

Public Annex B11: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Triffterer, O. and Ambos, K., eds., *The Rome Statute of the International Criminal Court:*

A Commentary, 3rd ed., Beck et al. 2016

Article 61: pp. 1484-1489, 1496-1502, 1535-1546

Article 61

Confirmation of the charges before trial¹

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

¹ The views expressed herein are those of the authors alone and do not reflect the views of the International Criminal Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Other relevant provisions: Rules 121 to 130, see Annex I. Regulations 31, 52 and 53 of the Regulations of the Court.

Literature: Ambos, K., 'International Criminal Procedure: "Adversarial", "inquisitorial" or mixed?' (2003) 3 *ICLRev* 1; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL* 715; *id.*, 'The first confirmation decision of the International Criminal Court: Prosecutor v Thomas Lubanga Dyilo', in: Kotsalis L., Courakis N. and Mylonopoulos C. (eds.), *Essays in honour of Argyrios Karras* (Ant. N. Sakkoulas 2010) 979; *id.*, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs Disclosure Obligations: The Lubanga Case and National Law', (2009) 12 *NethCLRev* 543; Ambos, K. and Miller, D., 'Structure and Function of the confirmation procedure before the ICC from a comparative perspective', (2007) 7 *ICLRev* 335; Bekou, O. and Bergsmo, M., 'The In-depth Evidence Analysis Charts at the International Criminal Court', in: M. Bergsmo (ed), *Active Complementarity: Legal Information Transfer*, (Torkael Opsahl Academic EPublisher 2011), 313; Bourguiba, L., 'Article 61', in: J. Fernandez, J. and X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone 2012) 1385; Büngener, L., *Disclosure of Evidence in International Criminal Trials - An Historical Overview* (Philipps-Universität Marburg, 2014), 260-400; Caianiello, M., 'Disclosure Before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?', (2010) 10 *ICLRev* 23; Cotte, B. and Saracco, M., 'Article 64', in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone 2012) 1443-1471; de Beco, G., 'The Confirmation of Charges before the International Criminal Court: Evaluation and First Application', (2007) 7 *ICLRev* 469; de Hemptinne J., 'The creation of investigating chambers at the International Criminal Court: an option worth pursuing?', (2007) 5 *JICJ* 402; de Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 405; Fourmy O., 'Powers of the Pre-Trial Chamber', in: Cassese A. et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (OUP 2002) 1207; Friman H., Brady H., Costi M., Guariglia F. and Stuckenberg C.-F., 'Charges', in: G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappalà (eds), *International Criminal Procedure* (OUP 2013), 381; Guhr A., 'Victim Participation During the Pre-Trial Stage at the International Criminal Court', (2008) 8 *ICLRev* 109; Marchesiello M., 'Proceedings before the Pre-Trial Chambers', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (OUP 2002) 1231; Happold M., 'Prosecutor v Thomas Lubanga Dyilo, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', (2007) 56 *ICLQ* 713; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker & Humblot 2014) 408-421; Higgins G., 'Fair and expeditious pre-trial proceedings: the future of international criminal trials', (2007) 5 *JICJ* 394; Jackson J., 'Finding the best epistemic fit for international criminal tribunals: beyond the adversarial-inquisitorial dichotomy', (2009) 7 *JICJ* 17; Kreß C., 'The Procedural Law of the International Criminal Court in Outline. The Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603; López Velásquez, 'M.P., 'Situación en la República de Costa de Marfil, caso de Fiscalía c. Laurent Gbagbo, decisión de la Sala De Cuestiones Preliminares I sobre la audiencia de confirmación de cargos en relación con artículo 61(7)(i) Del Estatuto de Roma, de 3 de junio de 2013', (2014) 2 *Anuario Iberoamericano de Derecho Internacional Penal* 153; Mariniello T. and Pons N., 'The confirmation of charges at the International Criminal Court: A Tale of Two Models', in: T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2015) 217; Miraglia M., 'The first decision of the ICC Pre-Trial Chamber: international criminal procedure under construction', (2006) 4 *JICJ* 188; Miraglia M., 'Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga', (2008) 6 *JICJ* 489; Narantsetseg O. and Sevgili U., 'Role of the Victims in the Hearing Leading to the Confirmation of Charges in the Lubanga Case Before the International Criminal Court', (2006) 14 *African Yearbook of International Law* 171; Nerlich V., 'The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?', (2012) 10 *JICJ*

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1339; Safferling Ch., 'The Rights of and Interests of the Defence in the Pre-Trial Phase', (2011) 9, *JICJ* 651; Safferling Ch., *International Criminal Procedure* (OUP 2012), 316; Scheffer D., 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence', (2008) 21 *LeidenJIL* 151; Stahn C., Olasolo H. and Gibson K., 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *JICJ* 219; Stegmiller I., 'Confirmation of Charges', in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015) 891; Trendafilova E., 'Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings', in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 441.

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A. Introduction/General remarks

I. Historical development

1 The confirmation process provided for in article 61 is the mechanism by which the PTC determines whether the case should be sent to trial. The closest equivalent before the *ad hoc* tribunals is the so-called Rule 61 Procedure, introduced by the judges early in the work of the ICTY as a mechanism to appease those who felt there should be the capacity of *in absentia* trials.¹ Despite persistent denials,² it had many similarities with an *in absentia* procedure and was, in many respects, an honourable compromise between the different views of jurists from the Romano-Germanic and common law systems with respect to such proceedings.³ Rule 61

¹ On the rule 61 Procedure, see: King (1997) 29 *NYLSchLRev&P* 523; Quintal (1998) 36 *ColJTransnatL* 723; Thieroff and Amley Jr. (1998) 23 *YaleJIL* 231.

² *Prosecutor v. Rajić*, IT-95-12-R61, Review of the Indictment Pursuant to rule 61 of the Rules of Procedure and Evidence, 13 Sep. 1996: 'A Rule 61 proceeding is not a trial in absentia. There is no finding of guilt in this proceeding'. *Prosecutor v. Nikolić*, IT-95-2-R61, Review of Indictment Pursuant to rule 61, 20 Oct. 1995: 'The Rule 61 procedure ... cannot be considered a trial in absentia: it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal'.

³ The UN itself proposed, in November 2006, the creation of an international tribunal with the power to hold *in absentia* trials. See: Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, paras 32-33.

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Confirmation of the charges before trial

hearings to confirm indictments were held in 1995 and 1996 by the Yugoslavia Tribunal, but later abandoned, and they were never used at the sister tribunal for Rwanda. This may be because the Prosecutor became too busy with defendants who were actually in custody, and for whom no such confirmation was required. Indeed, the Prosecutor may also have believed that such hearings could only benefit the accused while offering little or no assistance in obtaining a conviction. The *ad hoc* tribunals also provide for judicial authorisation of the issuance of an indictment, but this is really no different in principle from the earlier stage in the proceedings under the Rome Statute by which a warrant of arrest or summons is approved by the PTC.

Establishment of the confirmation procedure within the procedural architecture of the Rome Statute is an important example of the increased judicial control by the judiciary over the Prosecutor that sets the ICC apart from other international criminal justice institutions. The confirmation of charges provision did not exist in the so-called Zutphen text. At the Preparatory Committee meetings held in March-April 1998, a group of delegations submitted a proposal containing an alternative text for procedural matters. The confirmation hearing was comprised in a document entitled 'Further option for articles 58 to 61',⁴ which it was decided would be used as a basis for discussions at the Rome Conference. Article 61 of this text was entitled 'Confirmation of the charges before trial'. The substantial parts of this draft provision were approved by the Rome Conference and became article 61 of the ICC Statute, with the exception of paragraphs 8 and 11, which were added during the Conference.

At the February session of the Preparatory Commission in 1999, article 61 was discussed extensively within the context of the drafting of the Rules of Procedure and Evidence, based upon proposals submitted by Australia and France.⁵ In the course of the debate, discussion papers proposed by the Coordinator of the Working Group on Rules of Procedure and Evidence, entitled 'Part 5 of the Rome Statute: Investigation and Prosecution',⁶ covering confirmation procedure and disclosure of evidence were introduced (hereafter referred to as the 'proposed Rules').

In national legislation, a procedure similar to that of article 61 is found, for example, in the German Criminal Procedure Code (§§ 199-211, 'Das Zwischenverfahren').⁷

II. Purpose of the confirmation procedure

The purpose of the confirmation procedure under article 61 is nowhere defined in the Court's statutory documents. In the first set of article 61 decisions, PTCs have repeatedly explicated their understanding of the purpose of the confirmation of charges process.

The PTC has been ascribed, first and foremost, a 'gatekeeper function' or 'filter function' according to which only those cases for which the Prosecutor has presented 'sufficiently compelling charges going beyond the mere theory of suspicion',⁸ shall proceed to trial. By implication, the article 61 mechanism 'is designed to protect the rights of the Defence against wrongful and wholly unfounded charges'.⁹ Distinguishing the cases that should go to trial

⁴ UN Doc. A/CONF.183/2/Add.1.
⁵ Proposals submitted by Australia - Draft Rules of Procedure and Evidence of the International Criminal Court (UN Doc. PCNICC/1999/DP.1) and Proposals by France concerning the Rules of Procedure and Evidence (UN Doc. PCNICC/1999/DP.7, and DP.8, Add.1 and Add.2).
⁶ UN Doc. PCNICC/1999/WGRPE/RT3 and RT4.
⁷ See, for example, Roxin and Schünemann, *Strafverfahrensrecht* (27th ed. 2012), 333; Rieß, P., *Das Zwischen- oder Eröffnungsverfahren im Strafprozess*, (2002) *JURA* 735.
⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, PTC I, 30 September 2008, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.
⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tENG, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 37; reaffirmed in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-

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Part 5. Investigation and Prosecution

from those that should not also ensures judicial economy insofar as it saves the Court's limited resources for those cases which deserve to be discussed at trial.¹⁰ The PTC's commitment to weed out the 'good cases' from the 'bad cases' is supported by the fact that to date proceedings against four suspects, namely *Abu Garda*, *Mbarushimana*, *Kosgey* and *Ali*, did not pass the article 61 stage. Moreover, confirmation of charges hearings have been adjourned twice (*Bemba* and *Laurent Gbagbo*) while the Prosecutor was requested to consider providing either further evidence or proposing a different legal characterization of the facts. This level of judicial scrutiny is in conformity with the intention of the drafters of the Rome Statute.

7 But, as formulated by PTC I in the *Banda/Jerbo* case, 'the relationship between the pre-trial phase and the trial phase of the proceedings goes beyond the filtering of cases by the Pre-Trial Chamber for the benefit of the Trial Chamber.'¹¹ When discussing the purpose of the confirmation process, it is also of much significance to point out that the article 61(7)(a) decision confirming the charges delineates the factual scope of the case to be discussed at trial. Indeed, the PTC's enquiry extends to ascertaining whether there is sufficient evidence supporting the facts as alleged by the Prosecutor. Hence, if there is no evidence or the evidence is too weak or irrelevant to support a particular factual allegation, the PTC will simply disregard it and as a result it will 'cut' the factual scope of the case. This rejection may concern a whole set of facts underlying a particular count (e.g. all facts allegedly supporting the crime of murder) but also discrete facts underlying a particular count (e.g. murder in villages X and Z but not in village Y). The facts relied upon and confirmed by the PTC may not be exceeded before the TC. This conclusion is deduced from a combined reading of articles 61(7)(a) and 74(2) as well as regulation 55 of the Regulations of the Court ('Regulations').

Article 74(2) provides that 'the decision at trial shall not exceed the facts and circumstances described in the charges and any amendments to the charges' (emphasis added), thus referring back to the confirmation process under article 61. By the same token, regulation 55 of the Regulations vests the TC with the authority to modify the legal characterisation of facts also 'without exceeding the facts and circumstances described in the charges and any amendments to the charges' (emphasis added). Again this provision draws the link with the confirmation process.

On the one hand, these provisions specify that it is the 'facts and circumstances' appearing in the confirmed charges, and in the confirmed charges alone, that determine the actual

01/04-01/07-717. PTC I, 30 September 2008, para. 63; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 40; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 52; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.

¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, para. 28; *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 40; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 52; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.

¹¹ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 32.

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ambit of the case for the purposes of the trial. They circumscribe it, thus preventing the TC
from exceeding that factual ambit. On the other hand, the specific reference in these same
provisions to 'the facts and circumstances' makes it clear that it is only the factual, as
opposed to the legal elements of the confirmed charges that have a delimiting function *vis-à-*
vis the TC. As regulation 55 of the Regulations explicitly states, the TC is vested with
unrestricted powers to retain, modify or otherwise amend the legal characterisation of the
facts and circumstances appearing in the charges.¹² Finally, in delineating the factual scope of
the case, the accused is also informed 'in detail of the nature, cause and content of the
charges', as guaranteed under article 67(1)(a).

There is also a third dimension to the confirmation process relating to the proper
preparation for trial proceedings. Most decisions taken at the pre-trial stage have an impact
beyond the article 61 stage. A most prominent example is the confirmation decision filtering
the charges. The article 61 procedure is not an end in itself; while it is a separate stage in the
overall case proceedings, it forms a unity with the trial stage, should the charges be
confirmed. The identity of the case (not necessarily its scope) remains the same in the pre-
trial and trial stages. It is a matter of proper case management to solve as many preliminary
questions as possible at the pre-trial stage so as to relieve the TC and the parties from
addressing time-consuming issues prior and during the trial. While this function is nowhere
expressly stipulated in the Statute, some chambers have alluded to or simply discharged their
responsibilities in light of such a function.¹³

III. Confirmation proceedings held to date

To date, 12 confirmation proceedings emanating from five situations have been con-
cluded.¹⁴ The cases listed below concern all suspects in relation to whom an article 61(7)
decision was rendered at the time. The length of the confirmation proceedings, starting from
the initial appearance until the issuance of the article 61(7) decision, varied, depending on the
circumstances of each case. Save for the *Laurent Gbagbo* case, the confirmation proceedings
lasted approximately between 8 and 14 months. Compared to the length of trial proceedings,
it may be said that the time needed to conclude the confirmation proceedings has been kept

¹² *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-
Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, paras 32-35.

¹³ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-307, Decision on the Joinder of the
Cases against German Katanga and Mathieu Ngudjolo Chui, PTC I, 10 March 2008, 9; *id.*, ICC-01/04-01/07-
2259, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009
Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention
and Stay of Proceedings', AC, 12 July 2010, para. 3; *Prosecutor v. Abdallah Abakaer Nourain/Saleh Jerbo Jamus*
Banda, ICC-02/05-03/09-169, Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the
Statute for an order for the preparation and transmission of a cooperation request to the Government of the
Republic of the Sudan', TC IV, 1 July 2011, footnote 23; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/
08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties,
PTC III, 31 July 2008, para. 25; PTC II in the *Ntaganda* case entertained two redaction requests after having
issued the decision confirming the charges, see, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-
334-Red2, Redacted Decision on the Prosecutor's Eleventh and Twelfth Applications for Redactions, PTC II,
17 July 2014. PTC II also requested the Prosecutor to submit progress reports on the status of evidence affected
by confidentiality agreements and the consultation process with the information providers as a precautionary
measure to anticipate and prevent any disclosure problems to continue past the confirmation stage, see
Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-229, Decision Regarding the Non-Disclosure of 116 Documents
Collected Pursuant to Article 54(3)(e) of the Rome Statute, PTC II, 27 January 2014; *Prosecutor v. Dominic*
Ongwen, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters,
PTC II, 27 February 2015, para. 44.

¹⁴ The proceedings involving *Abdullah Al-Senussi* were declared as inadmissible by PTC I. This decision was
confirmed by the AC. As a result, no confirmation proceedings will take place before the ICC, unless the
Prosecutor requests the decision to be reviewed in light of new facts (article 19(10)). Proceedings against
Muammar Mohammed Abu Minyar Gaddafi, Okot Odhimabo and *Raska Lukwiya*, were terminated by the
competent PTCs as the suspects had died. Confirmation proceedings are in preparation against *Dominic*
Ongwen, and *Ahmad Al Fagi Al Mahdi*.

proceedings against the other three co-suspects could also be held in parallel to the case against *Dominic Ongwen* and in their absence. Yet, the Prosecutor expressed reservations.⁴⁸ In its decision severing the case against *Dominic Ongwen* from that against *Kony et al.*, PTC II decided that there was no cause to hold a confirmation hearing *in absentia* against *Kony et al.* It added, alongside the reservations of the Prosecutor, that the Court 'currently [lacked] the necessary resources to proceed against the other co-suspects *in absentia*' as well as the 'significant, but unjustified budgetary implications'. The Chamber also made reference to the impact of such course of action on victims participating in the case as only those victims would continue to participate at trial who are linked to the charges against *Dominic Ongwen* causing disappointment to those who would not continue participating in trial proceedings, if charges were to be confirmed.⁴⁹

- 23 If, after holding consultations under rule 123(2) or rule 124(1), the PTC intends to proceed with confirmation proceedings in the absence of the suspect, it shall so decide;⁵⁰ it must also rule on whether the suspect may be represented by counsel. Article 61(2), second sentence, provides that the suspect be represented by counsel where the PTC determines that this is in the 'interests of justice'. The PTC shall, when appropriate, set a date for the hearing and make the date public (rule 125(1)). The decision must be notified to the Prosecutor and, if possible, to the suspect and his or her counsel (rule 125(2)).
- 24 If the PTC decides not to hold a confirmation hearing in the absence of the suspect, and the suspect is not available to the Court, the confirmation of charges may not take place until the suspect is available to the Court;⁵¹ the PTC may review its decision at any time, at the request of the Prosecutor or on its own initiative (rule 125(3)). If the PTC decides not to hold a confirmation hearing in the absence of the suspect, and the suspect is available to the Court, it shall order him or her to appear (rule 125(4)).

III. Paragraph 3: Rights guaranteed to the suspect and obligations of the Prosecutor

- 25 The Rome Statute carefully avoids using the term 'accused' throughout its provisions in Part V ('Investigation and Prosecution'). Until the charges are confirmed, the person is generally referred to as 'person' or 'suspect'.⁵² At trial, the person is referred to as the 'accused'.⁵³ Once the person is convicted, he or she is referred to as the 'convicted person'.⁵⁴
- 26 Rule 121(1), second sentence, clarifies that subject to the provisions of articles 60 and 61, the person shall enjoy the rights of an accused person set forth in article 67. Article 67(1)(a) stipulates that the accused 'be informed promptly and in detail of the nature, cause and content of the charge'. Having been served with the summons to appear or the warrant of arrest, the suspect is not yet fully apprised of the facts of the case and their legal characterization on the basis of which the Prosecutor seeks to bring the suspect to trial. In

⁴⁸ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-424, Decision Severing the Case Against Dominic Ongwen, PTC II, 6 February 2015, para. 5.

⁴⁹ *Ibid.*, para. 7.

⁵⁰ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-T-46-ENG, Transcript of Hearing, PTC I, 11 July 2008, 24; *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-103, Decision on issues related to the hearing on the confirmation of charges, PTC I, 17 November 2010.

⁵¹ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-424, Decision Severing the Case Against Dominic Ongwen, PTC II, 6 February 2015.

⁵² The term 'person' is referred to, for example, in articles 57(3)(b), 58 or 61. The term 'suspect' is a term introduced by and used in the Court's case-law. During the confirmation hearing in the *Lubanga* case, PTC I admonished the Registry for referring to *Lubanga* as 'accused' in a newsletter and ordered that an explanatory note be drafted so as to inform the public about the status of *Lubanga* as a suspect in the proceedings at the time, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-32-ENG, Transcript of Hearing, PTC I, 10 November 2006, 36.

⁵³ Provisions of Part VI ('The Trial').

⁵⁴ For example, articles 78(1), 81(1)(b) or 84(1).

Confirmation of the charges before trial

fact, prior to the submission of the copy of the document containing the charges (DCC) pursuant to article 61(3) the suspect is not yet officially 'charged'. In explaining the relationship between the warrant of arrest and the DCC, PTC I in the *Mbarushimana* case stated:

'There should be no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing' (footnote omitted).⁵⁵

Article 61(3) instructs the Prosecutor to provide the suspect, within a reasonable time before the confirmation hearing, with two documents: (i) the DCC; and (ii) the list of evidence on which the Prosecutor intends to rely at the confirmation hearing.

Article 61(3) must be read in context with other provisions, in particular articles 67(2) and 101, rules 76, 77, and 121(2), (3), (5), (8) and (9) and regulation 52 of the Regulations. As a whole, they provide the legal framework under which the Prosecutor must perform his or her functions prior to the commencement of the confirmation hearing.

1. Document containing the charges

Sub-paragraph (3)(a) states that within a reasonable time before the hearing, the suspect shall be provided with a 'copy of the document containing the charges on which the Prosecutor intends to bring the person charged to trial'. This provision is further supplemented by rule 121(3) which provides that the 'detailed description of the charges (together with a list of the evidence which the Prosecutor intends to present at the hearing) shall be submitted 'no later than 30 days before the date of the confirmation hearing'.

The DCC has been described by the AC as 'an assertion by the Prosecutor that he [or she] intends to bring a person to trial for the specific crimes set out in the document' (emphasis added).⁵⁶ The contents of the DCC are set out in the Regulations:

Regulation 52: Document containing the charges

The document containing the charges referred to in article 61 shall include:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

According to regulation 52(a) of the Regulations, the Prosecutor is to provide the full name of the suspect (including aliases or different spelling of the suspect's name) and other identifying information, such as date of birth, place of birth, marital status, nationality, or ethnicity.

Regulation 52(b) of the Regulations instructs the Prosecutor to provide a precise statement of the facts in relation to two elements: (i) the crimes and (ii) the Court's exercise of jurisdiction. The provision of jurisdiction-related facts will allow the PTC to ascertain its competence over the case, in particular with respect to the jurisdiction *ratione temporis* and

⁵⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red. Decision on the confirmation of charges, PTC I, 16 December 2011, para. 88. See also *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-567, Decision on 'Narcisse Arido's Request for an Order Rejecting the Prosecution's Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to File an Amended and Corrected Document Containing the Charges', PTC II, 15 July 2014, 4-5. As the summons to appear is an alternative to the warrant of arrest, the same would apply for the description of facts in the summons.

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', AC, 13 October 2006, para. 51.

ratione loci.⁵⁷ The provision of crime-related facts sets out the foundation of the accusation: the alleged crimes, including their time and place (what happened, when and where and by whom). The notion of 'crime' within the meaning of regulation 52(b) of the Regulations must be understood broadly, encompassing not only the constitutive elements of the crimes in articles 6, 7, 8 (and 8bis), *i. e.* the contextual elements and individual underlying acts, but also the form of participation as set out in articles 25 and 28. This interpretation is supported by the consideration that (i) the suspect is entitled to be informed promptly and in detail about the cause of the accusation (article 67(1)(a)) and to prepare his or her defence accordingly; and (ii) the crime and form of participation correlate to and shape each other.⁵⁸ In short, all facts that are necessary to fulfil the legal elements of the crimes and forms of participation, as proposed by the Prosecutor, must be set out in the DCC.⁵⁹ Those are the facts which the Prosecutor must prove against the requisite evidentiary threshold (here: article 61(7)). The inclusion in the DCC of background information or other information not directly supporting one of the legal elements of the crimes or forms of participation may be useful, in the sense that they 'complete the picture';⁶⁰ but they will regularly not constitute the 'facts and circumstances' of the case and, by implication, must not be proven against the requisite evidentiary threshold.⁶¹ Equally, any analysis of facts or evidence in the DCC is not part of the 'facts and circumstances' of the case.

- 33 The preparation of the statement of the facts in the DCC is the responsibility of the Prosecutor. In the selection of the 'facts', the Prosecutor is guided by the legal elements of the crimes and forms of participation. He or she will regularly select all those facts which are relevant and apt to prove these legal elements. The description must be as precise and detailed as possible; the mere allegation that a crime took place will not suffice. Lacking a precise description of the facts in the DCC, the suspect will not have been informed properly within the meaning of article 67(1)(a) and the PTC will not be in a position to exercise its functions under article 61(7). Hence, for example, if the Prosecutor purports that the crimes took place in the context of a 'widespread or systematic attack' conducted by a particular armed group, an account of all those compound or individual incidents conducted by that particular armed group must be set out in the DCC which will support the existence of a widespread or systematic attack within the meaning of article 7(1). If the Prosecutor alleges the suspect's criminal responsibility of murder and attempted murder, then incidents of murder *and* attempted murder, where the act was not completed, must be set out in the DCC. In case the Prosecutor alleges that the suspect ordered the commission of crimes within the meaning of article 25(3)(b), such 'order' (the suspect said what, when, and where to whom?) must be described in the DCC.
- 34 Whereas the statement of the facts must be precise and with sufficient clarity, it may not be always possible, depending on the nature of the alleged proximity of the suspect to the events in question, to provide all the particulars. In quoting from the ICTY AC judgment in the *Blaškić* case, the ICC AC in its *Lubanga* judgment accepted different levels of specificity, depending on the proximity of the suspect to the events in question.

⁵⁷ It is to be noted, however, that the PTC will regularly have ascertained its jurisdiction already at the article 58 stage (and in case the Prosecutor activated his or her *proprio motu* powers, already at the article 15 stage).

⁵⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 26.

⁵⁹ In this regard, the specification of 'material facts' and 'subsidiary facts', as referred to in some PTC decisions and recently reiterated in the *Ongwen* case, is not helpful, as its precise content, when considered in light of regulation 52 of the Regulations, remains unclear. Moreover, such an additional qualification, not foreseen in the Court's legal texts, is likely to provoke litigation between the parties with the potential to delay the start of the confirmation hearing. See *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-6-ENG ET, Transcript of Hearing, PTC II, 19 May 2015, 20-21. This interpretation was also rejected by the AC, see mn 130.

⁶⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 152.

⁶¹ See the explication of the AC, mn 40.

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"The jurisprudence of the *ad hoc* tribunals establishes different levels of specificity required of the charges depending on the form of individual criminal responsibility charged. This is addressed in the *Blaškić* Appeal Judgment in the following terms:

[...]

When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision." However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question. [Footnotes omitted.]

In light of the foregoing, the Appeals Chamber finds that, in order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances. In the view of the Appeals Chamber, the underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him- or herself against them.⁶²

While the degree of specificity may vary, as seen above, in the circumstances of the case, 35 this does not mean that the Prosecutor can frame the factual allegations openly by using text elements like 'including but not limited to' [as if] reserving the right to add factual allegations post-confirmation with a view to providing the missing elements of the case. In several cases, PTCs have rejected such an attempt on the part of the Prosecutor in their decisions under article 61(7) which is instructive in this respect for the preparation of the DCC. PTC I in the *Mbarushimana* case held:

"The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.

For these reasons, the Chamber finds that the words "include but are not limited to" are meaningless in the circumstances of this case. Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC.⁶³

On the other hand, the reference to 'Busurungi and surrounding villages'⁶⁴ has been 36 accepted as sufficiently precise given 'the relatively narrow geographic area involved'.⁶⁵ In the

⁶² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, AC, 1 December 2014, paras 122-123.

⁶³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, paras 82-83. This was further confirmed by PTC II in both Kenya cases, see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 99, 101 and 103; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 106.

⁶⁴ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 84.

⁶⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 84.

same vein, temporal references of 'on or about' a particular date have also been accepted as sufficiently precise.⁶⁶

- 37 As a result, the 'facts' as described in the DCC constitute the factual scope of the case. These are the factual allegations which the Prosecutor asks the PTC to confirm; these are the factual allegations against which the suspect will defend him- or herself in the confirmation hearing, and, in case and to the extent the charges are confirmed, at trial. By the same token, the Chamber's task under article 61(7) is to assess only the facts set out in the DCC against the applicable law and on the basis of the evidence presented. The PTC is not entitled to go beyond the factual scope of the case set out in the DCC and add new facts it identified in the evidence with a view to supplementing an, in its view, otherwise incomplete narration of the events or closing the gap of an otherwise deficient DCC. The confirmation process is a review process and not a clarification process. Indeed, the PTC is not an investigative chamber, establishing the case for the Prosecutor. As PTC II pointed out in the *Katanga/Ngudjolo* case: '[It] is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case' (see mn 33).⁶⁷
- 38 A carefully drafted and comprehensive statement of facts in the DCC is of crucial importance to the success of the confirmation proceedings. It is incumbent upon the Prosecutor to specify those factual allegations that he or she wishes the PTC to confirm. Imprecisions in the DCC occasionally have translated into imprecision in the PTC decisions confirming the charges under article 61(7)(a); this notwithstanding the fact that the Judges, as judicial guarantors of the proceedings, can address any possible deficiencies in the DCC by either requesting the submission of a new DCC or rejecting the charges which are factually unsupported or imprecise.⁶⁸ In this context, it is worth noting that past attempts on the part of the defence to move the PTC to reject the DCC (or request the submission of an amended DCC) for an apparent lack of precision have regularly been rejected by the PTCs.⁶⁹ Addressing the concerns of the defence, the PTCs advised to read the DCC together with the Prosecutor's list of evidence.⁷⁰ The same approach was followed in cases where the DCC failed to comply with formatting requirements.⁷¹
- 39 The DCC as such does not limit, however, the Prosecutor's flexibility to withdraw or amend the charges, possibly in light of new evidence, as the existence of articles 61(4) and (9)

⁶⁶ For example, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, paras 67-68.

⁶⁷ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, PTC II, 21 October 2009, para. 23.

⁶⁸ Merely expressing 'regret' that the Prosecutor did not 'plead with greater specificity the context in which the crimes (...) occurred' is not sufficient, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 153. A positive development in this regard is the proactive approach of PTC I in the *Laurent Gbagbo* case to provide some directions to the Prosecutor as to the structure of the DCC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012.

⁶⁹ See, for example, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-648, Decision on the Three Defence's Requests Regarding the Prosecution's Amended Charging Document, PTC I, 25 June 2008, paras 23 et seq; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-567, Decision on 'Narcisse Arido's Request for an Order Rejecting the Prosecution's Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to file an Amended and Corrected Document Containing the Charges', PTC II, 15 July 2014; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-315, Decision on the 'Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE' and the 'Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute', PTC II, 12 September 2011.

⁷⁰ See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 150; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-648, Decision on the Three Defence's Requests Regarding the Prosecution's Amended Charging Document, PTC I, 25 June 2008, para. 21.

⁷¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-306, Decision on the 'Defence request to exclude the Prosecution's amended document containing the charges and amended list of evidence', PTC I, 22 July 2011.

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demonstrates. However, changes (also) to the factual basis of the case will require gradually increasing judicial intervention as proceedings progress so as to ensure the overall fairness and expeditiousness of the proceedings.

The 'statement of the facts' must be distinguished from the 'evidence' (article 69) which the Prosecutor adduces to prove the facts against the applicable law. The evidence is the means to prove the existence or non-existence of a particular fact. Likewise, the 'statement of the facts' [shall not] be conflated with the legal characterization of the (proven) facts. These notions, while triangularly interrelated, must be differentiated at all times. As the AC explained, albeit in a footnote:

'In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.'

The 'statement of the facts' in the DCC must be presented together with a legal characterization of the facts, pursuant to regulation 52(c) of the Regulations. As stated above, the DCC must not follow the legal characterization of facts as contained in the (request for the issuance of a) warrant of arrest or summons to appear (see mn 26).⁷³ The Prosecutor is free to re-consider the legal characterization of facts anew in light of additional facts surfaced during the ongoing investigation and evidence collected. Considering that the construction of many statutory provisions is not yet fully settled in the Court's case-law, the legal characterization of facts may be viewed as a proposal by the Prosecutor with which the PTC (and later the TC) may agree or disagree. The legal characterization set out in the DCC is thus preliminary in nature and may change, pursuant to article 61(7)(c)(ii) (or regulation 55 of the Regulations of the Court at trial). What cannot change, however, in the course of the confirmation hearing, is the 'statement of the facts' as set out in the DCC.⁷⁴

Finally, the facts and their legal characterization together form the 'charge'.⁷⁵ What the PTC assesses during the confirmation hearing are the facts and circumstances together with

⁷² Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2205 (OA15 & OA16), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', AC, 8 December 2009, footnote 163.

⁷³ In the Lubanga case, for example, the Prosecutor had requested and obtained a warrant of arrest for the crimes related to child soldiers committed in both international and non-international armed conflict. But subsequently, in the DCC the Prosecutor maintained that the crimes occurred in the context of a non-international armed conflict, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, PTC I, 10 February 2006, para. 85; *ibid.*, ICC-01/04-01/06-356-Anx2, Document Containing the Charges, Article 61(3)(a), Office of the Prosecutor, 28 August 2006, para. 7.

⁷⁴ The distinction between 'facts' and their 'legal characterization' has implications also for the use of regulation 55 of the Regulations of the Court, see Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulations 55(2) of the Regulations of the Court', AC, 8 December 2009, para. 97.

⁷⁵ Prosecutor v. William Samoci Ruto et al., ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 44; Prosecutor v. Francis Kirimi Muthaura et al., ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 56; Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012, para. 25; see also Prosecutor v. Germain Katanga/Mathieu Ngudjolo Chui, ICC-01/04-01/07-1547-ENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, PTC II, 21 October 2009, para. 19.

their legal characterisation proposed by the Prosecutor. The PTC's assessment and confirmation or rejection of the charges affects both elements.⁷⁶

- 43 The specificity of the DCC will also depend on the comprehensiveness and depth of the investigation. On several occasions it has been commented that the investigation be concluded at the stage of the confirmation hearing.⁷⁷ This approach will greatly assist in presenting a precise and comprehensive statement of facts in the DCC. This does not entail, however, that the Prosecutor is barred from continuing the investigation post-confirmation in certain circumstances as the ability to amend the charges after the confirmation stage pursuant to article 61(9). However, these investigative activities cannot be the rule but must remain of limited and exceptional nature, considering that, in case the charges are confirmed, the trial is supposed to commence soon thereafter. In other words, the (re-launching) of the investigation after the confirmation of charges may be a delaying factor with detrimental effects on the overall fair and expeditious conduct of the proceedings and the rights of the accused.⁷⁸ Thus adopting a rule stipulating that the investigation should be completed at the stage of the confirmation hearing would assist in expediting and streamlining the proceedings.
- 44 The DCC is notified to the suspect by way of personal service, pursuant to regulation 31(3)(c) and (4) of the Regulations of the Court.

2. Information of the evidence and disclosure procedure

- 45 In order to afford to the person charged a sufficient opportunity to prepare for the hearing, in addition to the notice of the charges in the DCC, he or she shall be 'informed of the evidence on which the Prosecutor intends to rely at the hearing'. This information is contained in a list of evidence which, together with the DCC, must be provided 'within a reasonable time' before the confirmation hearing (article 61(3)). At the Rome Conference, the Working Group considered that the concept of 'reasonable time' should be addressed in the Rules.⁷⁹ For the Prosecutor, such time-limits are provided in rules 121(3), (4) and (5). Accordingly, pursuant to article 61(3)(b) and rule 121(3) the Prosecutor must provide the suspect the DCC and the list of evidence no later than 30 days prior to the commencement of the confirmation hearing.
- 46 The list of evidence is preceded by the evidence disclosure process between the parties which is a crucial aspect in the preparations for the confirmation hearing. Disclosure of evidence is an *inter partes* process between the Prosecutor and the suspect for whom a warrant of arrest or summons to appear has been issued (rule 121(2)). It is facilitated and implemented through the channel of the Registry. The evidence is then communicated to the Chamber (rule 121(2)(c), see mn 71 *et seq.*)⁸⁰ The disclosing party must indicate the level of

⁷⁶ See mn 128.

⁷⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rule of Procedure and Evidence', AC, 13 October 2006, para. 54; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012 (OA4), para. 44; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Dissenting Opinion by Judge Hans-Peter Kaul, PTC II, 23 January 2012, paras 44-52; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Dissenting Opinion by Judge Hans-Peter Kaul, PTC II, 23 January 2012, paras 49-57. Also arguing against 'two different investigation stages', *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-166, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, PTC I, 23 June 2006, paras 38-39; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, paras 25 and 35.

⁷⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to 'Decision on the Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', PTCII, 21 March 2013, paras 33-37.

⁷⁹ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2.

⁸⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, paras 34 and 42; *Prosecutor v.*

Rather, the PTCs have confined their analysis to individual challenges related to specific pieces of evidence.²⁵⁷

The article 61(7) decision is rendered within 60 days from the date the confirmation hearing ends or from the date the final written submission of the defence is received (see *Ruto et al.* case, PTC II varied the 60-day deadline and decided to issue the article 61(7) decision later, namely simultaneously with that in the *Muthaura et al.* case, for fears that the issuance of the confirmation decision in only one case could spark violence in the country.²⁵⁸

Decisions under article 61(7) are not directly appealable but may be appealed if leave is granted by the PTC pursuant to article 82(1)(d).²⁵⁹ Considerations that the interlocutory appeal would address fundamental questions or would be beneficial for the entire Court do not *per se* warrant granting the appeal. PTCs have adopted a restrictive approach when deciding whether to grant leave to appeal the decision under any of the sub-paragraphs in article 61(7). To date, only two article 61(7) decisions have been reviewed on appeal: the decision rejecting all charges against *Mbarushimana*²⁶⁰ and the adjournment decision in the *Laurent Gbagbo*²⁶¹ case.

A decision under article 61(7) may be based on either sub-paragraphs (a) to (c) or on a combination thereof. In case the PTC confirms some of the charges but adjourns the hearing on other charges pursuant to article, 61(7), 'it may decide that the committal of the person concerned to the Trial Chamber on the charges that it is ready to confirm shall be deferred pending the continuation of the hearing' (rule 127, first sentence).

3. The decision confirming the charges

The decision confirming the charges paves the way for proceedings to take place before a TC. The decision of the PTC has a **binding effect** on the TC; the latter cannot review or simply alter without more the charges as contained in the decision confirming the charges. TC I in the *Lubanga* case held:

'[I]n the judgment of the Bench, the Trial Chamber has no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber. The power to frame the charges lies at the heart of the Pre-Trial Chamber's functions, as set out in Article 61 of the Statute. (...)

It follows that the Trial Chamber would be acting *ultra vires* if it (...) attempted to interfere with, or strike down, the decision of the Pre-Trial Chamber on an issue over which it has exclusive control. The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (...), and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-

et al., ICC-01/05-01/13-749, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 11 November 2014, para. 14.

²⁵⁷ See, for example, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-749, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 11 November 2014, para. 14.

²⁵⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-357, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, PCT II, 26 October 2011.

²⁵⁹ The ground in relation to the confirmation or denial of an indictment was deleted at one stage from Draft Article 81 as it was considered to lead to delays in the proceedings, see Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, 126-127; see also Brady and Jennings, in: Lee (ed.), *The Making of the Rome Statute* (1999), 300.

²⁶⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2012 entitled 'Decision on the confirmation of charges', AC, 30 May 2012.

²⁶¹ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', AC, 16 December 2013.

Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges. Contrary to the submissions of the prosecution, the Trial Chamber has severely limited authority as regards the content of the charges.²⁶²

128 The decision under article 61(7)(a) confirming the 'charges' comprises both the facts together with their (preliminary) legal characterization (see mn 42); it informs authoritatively the accused of the subject-matter of the upcoming trial. The legal characterization of the facts as confirmed is not binding on the TC²⁶³ and may be subject to change, pursuant to regulation 55 of the Regulations. The facts of the case, on the other hand, are 'frozen' with the decision of the PTC.²⁶⁴ It follows that the Prosecutor may not add new facts or substitute facts at trial which have not been discussed at the confirmation process (in contrast, the Prosecutor is entitled to present new evidence which was not presented at the confirmation stage). Hence, of crucial importance is that the PTC indicates in its decision exhaustively and with sufficient clarity all the facts upon which it confirmed the charges. Equally, facts in relation to which the evidence was considered insufficient should be clearly set out as such; they will not form part of the charges as confirmed. In case the PTC remains silent as to certain facts, it cannot be assumed that the PTC either rejected or confirmed them. In this case, those factual allegations also do not form part of the charges as confirmed. In the past, TCs have expressed their concern that the factual basis upon which the charges had been confirmed was not always clearly set out in the decision and have made concrete proposals as to a possible structure of the article 61(7)(a) decision.²⁶⁵ Consequently, PTCs in recent proceedings, such as the *Ntaganda*, *Laurent Gbagbo*, *Jean-Pierre Bemba Gombo et al.* and *Blé Goudé* case, explored different ways to make the decisions clearer in this respect. Leaving aside for the moment the appropriateness of the different structures chosen for the article 61(7)(a) decisions, it is clear that the Chambers in these decisions took pains to provide only the essence of their assessment and to describe, as precise as possible, the 'facts and circumstances' that the TC may not exceed (article 74(2), second sentence). Thus facts which

²⁶² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, paras 39 and 43.

²⁶³ '[I]t is only the factual, as opposed to the legal elements of the confirmed charges that have a delimiting function vis-à-vis the Trial Chamber', *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges, PTC I, 7 March 2011, para. 35.

²⁶⁴ '[A]t the beginning of the trial, its parameters must be clear. The only modification possible under the Court's legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court', see recently *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-1123 (OA6), Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', AC, 13 December 2013, para. 29.

²⁶⁵ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, paras 29-31; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, TC III, 20 July 2010, paras. 29-31. To overcome the 'information deficit' of the confirmation decision, the Prosecutor has been requested in some cases to submit an 'updated DCC'. While the 'updated DCC' may serve as an auxiliary document assisting to have additional clarity on the facts, its submission can by no means be viewed as a statutorily prescribed procedural act. This was confirmed by the AC lately in the *Lubanga* case which held: 'As to where and how the detailed information about the charges is to be provided to the accused, the Appeals Chamber underlines at the outset that, given the Court's statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial. If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined. However, this does not necessarily exclude that further details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents', see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, AC, 1 December 2014, para. 124; *Prosecutor v. Jean-Pierre Bemba et al.*, ICC-01/05-01/13-992, Decision on the Submission of Auxiliary Documents, TC VII, 10 June 2015: dissenting opinion of Judge Eboe-Osuji registered under No. ICC-01/05-01/13-992-Anx.

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are not expressly mentioned in the recent article 61(7)(a) decisions do not form part of the charges as confirmed. The Prosecutor frames the charges in the DCC for the purpose of the confirmation hearing; the PTC frames the charges in its decision for the purpose of trial. The authority to define the parameters of the case shifts at the confirmation stage from the Prosecutor to the PTC. As a result, any queries as to the precise scope of the charges should be addressed to the PTC pursuant to article 64(4).

The term 'facts and circumstances' is not defined in the Statute. The Appeals Chamber in the context of the appeal on regulation 55 in the *Lubanga* case coined the distinction between 'facts', 'evidence' and 'background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged' (see mn 40). In the aftermath of this judgment, both PTC I and II occasionally introduced the notions of 'material facts' and 'subsidiary' facts' by way of which they asserted to better single out the 'facts and circumstances' from within the different facts presented in the DCC: 'material facts' are those which underpin a specific charge (and which, accordingly, must be proven against the evidentiary threshold of article 61(7)); a 'subsidiary fact' is background information or evidence from which the existence of the 'material fact' may be inferred.²⁶⁶ It has been discussed in the context of the DCC, such a distinction does not provide more clarity and is not grounded in the law (see mn 32). Moreover, it is not clear from the PTC decisions concerned which of the facts the PTC considered as 'material' or 'subsidiary' and how this impacted the confirmed charges. Actually, it seems that such distinction was not necessary for the application of article 61(7). This is so because what matters for confirming one or more charges is to rely on all those facts essential for proving the legal elements of the crime(s) namely, what is proposed as the 'material facts'.

In the *Laurent Gbagbo* case, the Prosecutor had alleged a number of incidents (45) to constitute an 'attack directed against any civilian population' within the meaning of article 7(1), amongst them four so-called 'charged incidents'. When adjourning the hearing, the Majority Judges and the dissenting Judge were divided over the question whether those 45 incidents were part of the 'facts and circumstances' and to what extent they must be proven. While the dissenting Judge opined in essence that such incidents are 'subsidiary facts' which merely serve to prove, together with other evidence, the 'attack',²⁶⁷ the Majority Judges rejected such qualification and held that the incidents are part and parcel of the 'facts and circumstances' supporting the contextual legal elements of the crimes charged and must be proved to the requisite threshold.²⁶⁸ In the following, the AC was given the opportunity to enquire into this issue. Recalling, *inter alia*, articles 61(3), 67(1)(a) and regulation 52 of the Regulations, the AC rejected the proposed distinction between 'material' and 'subsidiary'

²⁶⁶ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, paras 36-37; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 47-48; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 59-60; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012, para. 27. See recently, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-6-ENG, Transcript of Hearing, PTC II, 19 May 2015, 21. When providing directions to the Prosecutor as to the expected content of the DCC, the Single Judge remained unclear what he meant by the term 'subsidiary facts' ('In the charges the Prosecutor must include only the material facts as the subsidiary facts, like more generally the evidence, are brought to the attention of the Chamber only as part of the Prosecutor's argumentation but do not belong to the charges' [emphasis added]). Indeed, as confirmed by the AC, evidentiary information does not constitute 'facts and circumstances' underpinning the charges.

²⁶⁷ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432-Anx-Corr, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, 6 June 2013, para. 41.

²⁶⁸ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, paras 21-23.

the Decision on the confirmation of Trial Chamber has severely limited

arges' comprises both the facts in 42); it informs authoritatively equal characterization of the facts subject to change, pursuant to the other hand, are 'frozen' with not add new facts or substitute ation process (in contrast, the t presented at the confirmation t in its decision exhaustively and l the charges. Equally, facts in ould be clearly set out as such; e the PTC remains silent as to ted or confirmed them. In this arges as confirmed. In the past, n which the charges had been ave made concrete proposals as Consequently, PTCs in recent re Bemba Gombo et al. and Blé clearer in this respect. Leaving chosen for the article ons took pains to provide only e as possible, the 'facts and nd sentence). Thus facts which

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-1547, Decision on the Filing of a as 29-31; *Prosecutor v. Jean-Pierre* for corrections to the Document Document Containing the Charges, of the confirmation decision, the hile the 'updated DCC' may serve as mission n by no means be viewed ly in *Lubanga* case which held: ovided to the accused, the Appeals ork and the respective roles of the be no doubt that the decision on the were otherwise, a person could be in relation to which confirmation ails about the charges, as confirmed ined in other auxiliary documents', tent on the appeal of Mr Thomas ector v. Jean-Pierre Bemba et al., TC VII, 10 June 2015: dissenting

facts since the Statute does not provide for such distinction.²⁶⁹ Rather, its yardstick remained whether the facts in question support any of the legal elements of the crimes charged. Hence, in response to the Majority's approach requiring a 'sufficient number' of incidents relevant for the establishment of an alleged 'attack', the AC stated

'that it is for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack. The question of how many of the incidents pleaded by the Prosecutor would suffice to prove an 'attack' in the present case is a matter for the Pre-Trial Chamber to determine. It is not a question that can be determined in the abstract' (emphasis added).²⁷⁰

131 Similarly, past attempts of the Prosecutor to draw a distinction between 'facts of the case' and 'facts constituting the charges' were not accepted by the Court on the grounds that such distinction does not exist under the Statute and would 'constitute a source of ambiguity, confusion and contention at trial'.²⁷¹

132 The allegations of the Prosecutor are verified on the basis of the evidence submitted. Where the Chamber does not find any evidentiary support for a particular factual allegation, it will not confirm it. Thus, the factual allegations for which not sufficient evidence has been presented will not form part of the charges and remain outside the ambit of the trial. In several cases, the factual scope of the case has been significantly reduced, including its temporal²⁷² or territorial²⁷³ scope thereby substantially modifying or 'downsizing' the case, as initially presented by the Prosecutor. One may argue that the control exercised by the PTCs has allowed not only barring totally unmeritorious cases from proceeding to trial but, more importantly, to reduce the (factual) scope of cases where the Prosecutor did not have any or sufficient evidence. In case the Prosecutor decides to re-introduce those facts on the basis of new evidence, he or she may make use of the procedure under article 61(9) (see mn 146 *et seq.*).

²⁶⁹ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', AC, 16 December 2013, para. 37.

²⁷⁰ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', AC, 16 December 2013, para. 47.

²⁷¹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, para. 19.

²⁷² For example, in the case of the *Muthaura et al.* case, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 to 31 January 2008 (one month). In the decision on the confirmation of charges, the PTC reduced this period to events which took place overall between 24 and 28 January 2008 (four days), see *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 21 and 428. In the *Ruto et al.* case, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 until the end of January 2008 (one month). In the decision on the confirmation of charges, the PTC reduced this period to events which took place in Turbo town only to 31 December 2007 (one day); in the greater Eldoret area to the period between 1-4 January 2008 (four days); in Kapsabet town to the period between 30 December 2007 to 16 January 2008 (2 weeks); and in Nandi Hills town between 30 December 2007 to 2 January 2008 (four days). The temporal scope was reduced therefore from one month to selected periods ranging from two weeks to one day(!), see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 22 and 367.

²⁷³ For example, in the *Muthaura et al.* case, the Prosecutor charged the suspects for the commission of crimes in the locations 'in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province)'. In the decision on the confirmation of charges, the PTC rejected the notion 'in or around locations including Nakuru and Naivasha' but accepted only 'in or around Nakuru' and 'in or around Naivasha' and extended its analysis of the facts only to those two locations for which evidence had been submitted, see *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 21 and 106. Likewise, in the *Ruto et al.* case, the PTC rejected the word 'including' and confined its analysis to those locations which were explicitly referred to in the DCC. It ruled 'the use of the expression 'in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town' shall be understood as encompassing exclusively these locations', see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 22 and 99.

With a view to the informed PTC I noted that, whenever appropriate, it grounded its decision, it agreed on the charges 'to be or the interests of the parties fair is 'a complex

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With a view to expediting the confirmation process, the defence in the *Banda/Jerbo* case informed PTC I that it did not contest any of the facts alleged in the Prosecutor's DCC. Importantly, such agreement was limited for the purposes of the confirmation process only. PTC I noted the parties' agreement on the facts set out in the DCC, but when taking its decision, it declared to adopt nonetheless a 'cautious approach' to refer to the evidence whenever appropriate to determine that the requisite evidentiary standard has been met. It grounded its approach on three grounds: (i) the Chamber's independent obligation in article 61(7) to ascertain whether there is sufficient evidence, 'irrespective of whether the parties agreed on the facts of the case';²⁷⁴ (ii) the aim of the procedural framework which allows the charges 'to be presented in full whenever either the interests of justice, which are paramount, or the interests of the victims, which are also critical, so require' (rule 69); and (iii) the fact that the parties failed to specify exactly the uncontested facts they agreed upon, given that the DCC is 'a complex narrative in which issues of fact and issues of law are often intertwined'.²⁷⁵

4. The decision declining to confirm the charges

PTC I and II have declined to confirm all charges against four suspects (*Abu Garda*, *Mbarushimana*, *Kosgey* and *Ali*) based on the insufficiency of evidence. Accordingly, proceedings were terminated against them. This was done without prejudice to the powers of the Prosecutor to approach the relevant PTC under article 61(8).²⁷⁶

Challenges as to the Prosecutor's purported failure to investigate in accordance with article 54(1)(a) do not lead to the rejection of the charges. PTC I determined that investigative failures 'may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole' met the requisite threshold of article 61(7).²⁷⁷ On the basis of which criteria this assessment can be achieved is not further explained. PTC II in the *Kenya* cases reacted in the same way and highlighted that 'the scope of the determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted the investigations'.²⁷⁸

5. The decision adjourning the confirmation hearing

The decisions taken under article 61(7)(c) differ markedly from those taken under articles 61(7)(a) and (b). While in the latter, the PTC takes a final decision on the merits, either in the affirmative or in the negative,²⁷⁹ in the former case, the PTC is not yet in a position to take such a decision and returns to the Prosecutor with certain queries.²⁸⁰ In other words, the

²⁷⁴ See also, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 10.

²⁷⁵ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, paras 44-47.

²⁷⁶ Notably in a number of cases, such as in the *Bemba*, *Katanga/Ngudjolo* and *Ruto et al.* case, a combination of article 61(7)(a) and (b) led to the partial confirmation of charges, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, 184-185; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-10/07-717, Decision on the confirmation of charges, PTC I, 30 September 2008, 211-212; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, p. 138.

²⁷⁷ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 48.

²⁷⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 49-53; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 61-65.

²⁷⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 13.

²⁸⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 14.

n.²⁶⁹ Rather, its yardstick remained the number of incidents relevant to the crimes charged. Hence, 'incident number' of incidents relevant

r those facts, if proven to the requisite standard of how many of the incidents pleaded in the present case is a matter for the Pre-Trial Chamber in the abstract' (emphasis added).²⁷⁰

distinction between 'facts of the case' and 'evidence' on the grounds that such facts 'constitute a source of ambiguity,

is of the evidence submitted. Where a particular factual allegation, it will not be sufficient evidence has been presented in support of the trial. In several cases, the Chamber, including its temporal²⁷² or territorial²⁷³ aspects of the case, as initially presented by the PTCs has allowed not only a finding of fact but, more importantly, to reduce the standard of proof to a level below the standard of proof required by article 61(7)(a) of the Statute. In the *Kenya* cases, the Chamber has found that the evidence is insufficient to establish the crime (see *Kenya*, PTC II, paras 146 et seq.).

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Article 61 137-140

PTC renders an intermediate decision before deciding finally whether or not to confirm the charges.²⁸¹ In fact, article 61(7)(c) is a procedural avenue to overcome certain shortcomings in the presentation of the case without rejecting outright the charges; the Prosecutor is given the opportunity to re-consider certain aspects of his or her file and, as the case may be, to present additional arguments and/or material, to the Chamber. This means that the article 61(7)(c) does not conclude the confirmation process.

137 As is the case for articles 61(7)(a) and (b), before rendering a decision the PTC must have evaluated the sufficiency of the evidence to reach the requisite threshold (see mn 87). This is a prerequisite dictated by the chapeau wording of article 61(7). Whether the Chamber is ready to render a final decision on the merits under article 61(7) or wishes to adjourn the hearing is therefore dependent on the PTC's prior assessment of the evidence as a whole.

138 Such analysis, one may assume, has already been conducted in the course of the preparation of the article 61 proceedings so that the PTC ideally invoke article 61(7)(c) before the closure of the hearing. However, both PTC III in the *Bemba* case and PTC I in the *Laurent Gbagbo* case 'adjourned' the hearing after it was actually declared to be closed and within the 60-day time limit within which the written decision of the PTC must be delivered in accordance with regulation 53 of the Regulations. This means that the 'hearing' within the meaning of article 61(7)(c) is understood to include also the period subsequent to the hearing until the delivery of the written decision. Adopting an effective interpretation, PTC III in the *Bemba* case explained:

'Thus, according to a wider interpretation, an adjournment of the Hearing may take place subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges. This interpretation finds support also in the language of rule 127 of the Rules which states that 'if the Pre-Trial Chamber is ready to confirm some of the charges but adjourns the hearing on other charges under article 61, paragraph 7(c), it may decide that the committal of the person concerned to the Trial Chamber (...) shall be deferred pending the continuation of the hearing (...)' (emphasis added). The reference to the phrase 'continuation of the hearing' indicates that the notion of 'hearing' may extend beyond the oral sessions of the Hearing.'²⁸²

139 Despite the first impression, the adjournment of the 'hearing' in today's practice did not lead to resume the 'hearing' at a later point. While this option is not excluded, as the Chamber can always hold hearings at it deems necessary, the practice hitherto has been to proceed in writing and to conclude the confirmation stage with the written decision. In this case, it must be assumed that the 'hearing' within the meaning of article 61(7)(c) is definitively closed with the delivery of the article 61(7)(a) or (b) decision.

140 Article 61(7)(c) provides two different grounds for which the hearing is adjourned. (1) Under option (i), the PTC considers that the evidence submitted, viewed as a whole, does not meet the required threshold for confirming the charges but, at the same time, does not consider the evidence to be 'irrelevant and insufficient to a degree that merits declining to confirm the charges'. As a result, the PTC may request the Prosecutor to consider to provide further evidence or to conduct further investigation.²⁸³ The formulation 'with respect to a particular charge' in the context of article 61(7)(c)(i) has been interpreted to encompass one or more charges, including any element within the charge(s) in question.²⁸⁴

²⁸¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 20.

²⁸² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 37; see also *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 13.

²⁸³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 16; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 15.

²⁸⁴ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 14.

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Any suspect has the right to be tried 'without undue delay', as guaranteed in article 67(1)(c). When requesting the Prosecutor to consider conducting further investigation, the Chamber must bear in mind the inevitable prolongation of the confirmation process which may unduly infringe upon the rights of the suspect in detention. 'Whether or not the activation of article 61(7)(c)(i) (...) unduly infringes the right of the suspect to be tried without undue delay must be determined on a case-by-case basis, taking into account the particularities of the case and in accordance with internationally recognized human rights'.²⁸⁵

In the *Laurent Gbagbo* case, the PTC I Majority was not satisfied that the 45 incidents described by the Prosecutor in the DCC constituted an 'attack directed against any civilian population'. The Judges therefore requested the Prosecutor to consider providing further evidence in relation to those incidents. With a view to guiding the Prosecutor in remedying the deficiencies detected by the Chamber, a set of issues was provided; however, such list is not binding upon the Prosecutor as the Chamber has no powers to give 'directives' to the Prosecutor; this would contravene the request nature of article 61(7)(c) (see mn 141).

(2) Under option (ii), the PTC considers that the evidence submitted 'appears to establish a different crime within the jurisdiction of the Court' and, consequently, there may be a need for amending the charge(s) as originally contained in the Prosecutor's DCC.²⁸⁶ A 'different crime' has been interpreted by PTC III to encompass both the crimes as listed in article 5 as well as the form of participation. The reason for considering the mode of criminal liability part of the 'crime' within the meaning of article 61(7)(c)(ii) was seen in their correlation: 'Depending on the mode of participation as set out in articles 25 and 28 of the Statute, the material (objective) elements of the crime are shaped differently. It does have a bearing on the structure of the crime whether the person held liable for committing the crime acted as a principal, as an accomplice or as a superior'.²⁸⁷ In addition, reasons of fairness and the suspect's entitlement to be informed and in detail about the nature, content and cause of the charges (article 67(1)(a)) also militate in adopting a broader interpretation.²⁸⁸

PTC III also pointed to a specificity of article 61(7)(c)(ii) which stems from the mention of 'appearance'. In the view of that Chamber, this implies that the (provisional) determination of the PTC under article 61(7)(c)(ii) is reached against a lower standard than 'substantial grounds to believe'.²⁸⁹ The standard of 'appearance' in this context does not require the Chamber to demonstrate that the legal requirements of a 'different crime' are 'definitively satisfied'; rather, it is deemed sufficient that the Chamber makes a *prima facie* finding setting out its doubts as to the legal characterization of facts as proposed by the Prosecutor in the DCC.²⁹⁰

In the *Bemba* case, the suspect was prosecuted as principal perpetrator under article 25(3)(a) but PTC III opined at the time that the evidence regarding Bemba's criminal

²⁸⁵ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 39.

²⁸⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 17. PTC III in the *Bemba* case added that a limited review of the evidence pertaining 'only to the issue at stake is sufficient' and that a 'complete and in-depth analysis of all the evidence is unwarranted' at this stage. This statement may not be transferrable to other cases where the 'issues at stake' involve more than one aspect of the case. In any event, it is advisable for any PTC to have thoroughly and comprehensively evaluated the evidence prior to rendering its decision under any of the options listed under article 61(7).

²⁸⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 26. For a different interpretation, albeit in a different context, see *Prosecutor v. Radoslav Brđjanin*, IT-99-36-A, Decision on Interlocutory Appeal, AC, 19 March 2004.

²⁸⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 28.

²⁸⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 18.

²⁹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 25.

responsibility pointed (also) towards the mode of liability under article 28. The Prosecutor agreed to submit an amended DCC adding this mode of liability; ultimately, the Chamber confirmed the charges under article 28 and rejected Bemba's role as a principal under article 25(3)(a), as initially argued by the Prosecutor.

141 Under article 61(7)(c), the PTC adjourns the hearing and *requests the Prosecutor to consider* whether to submit further evidence/conduct further investigation or amend a charge. The careful wording of article 61(7)(c) leaves no doubt that the Prosecutor enjoys, in principle, a wide margin of discretion whether and to what extent to react to an article 61(7)(c) decision. The request nature of article 61(7)(c) respects the division of responsibilities between the PTC and the Prosecutor and ensures that the Prosecutor's functions in the confirmation process are not encroached upon.

[T]he Chamber makes it clear that by way of adjourning the hearing it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the document containing the charges. The Chamber holds the view that it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to article 54(l)(a) of the Statute. The responsibilities of the Chamber lie in exerting judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute.²⁹¹

142 In case the Prosecutor does not decide to follow the Chamber's proposition, the Chamber will resort to rendering a final decision on the merits pursuant to either article 61(7)(a) or (b). In case the Prosecutor agrees to follow the PTC proposition, he or she must submit a new amended DCC, together with a list of evidence, as the case may be.

VIII. Paragraph 8: Subsequent request for confirmation

143 If the PTC declines to confirm one or more charge(s), the Prosecutor is not precluded from subsequently requesting its confirmation. The provision was added to article 61 at the Rome Conference on a proposal from Austria.²⁹² The Prosecutor can continue the investigation, and in case he/she obtains additional evidence to support the confirmation of the charge(s) concerned, he/she can request the PTC to confirm the charge(s) again.

144 In case all charges have been rejected against the suspect and the Prosecutor intends to request the confirmation of the charge(s) afresh based on additional evidence, he or she must first request the issuance of a new warrant of arrest or summons to appear pursuant to article 58 (see mn 154). This is necessary because according to article 61(10) the warrant of arrest ceases to have any effect, if one or more charges have not been confirmed. Upon surrender or appearance of the suspect, the procedure under article 61(1)-(7) will be rehearsed at the end of which the PTC will address the question whether or not to confirm the charges.

145 After the AC confirmed PTC I's decision in the *Mbarushimana* case rejecting the charges, the then Prosecutor Moreno Ocampo revealed his intention to explore whether it was possible to present a new case against *Mbarushimana*.²⁹³ Likewise, after PTCII declined to confirm the charges against *Kosgey* and *Ali* in the Kenya cases, Prosecutor Moreno Ocampo announced to continue his investigation in relation to those two suspects.²⁹⁴ Hitherto article 61(8) remains to be a dead letter.

²⁹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 39.

²⁹² Austria: proposal regarding article 61, UN Doc. A/CONF.183/C.1.AVGPM/L.19.

²⁹³ The [Office of the Prosecutor] takes note of today's decision by the Appeals Chamber. We are evaluating the decision to see whether it is possible to present a new case against Mr Mbarushimana presenting additional evidence, in accordance with the Judges' ruling', see 'OTP Statement following the Appeals Chamber decision', dated 30 May 2012 (available on the website of the Court).

²⁹⁴ 'We will keep investigating Kosgey and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu', see 'Statement by the Prosecutor of the International Criminal Court on Kenya ruling', dated 24 January 2012 (available on the website of the Court).

IX. Parag

It is apparent that an interplay between these article 61(4) governs the paragraph 9 regulates the trial. A distinguishat provided to the Prosecut pre-trial proceedings an enjoys a wide margin of the DCC, subject to pro mn 83). At this stage, However, the Chamber' the Prosecutor to provid situation as such, the rel application lodged by including the rights of t

The Prosecutor's disc have been confirmed. without notifying the a the *Kenyatta* case, PTC *sine qua non* for any According to the Chan certain aim namely, to supported and justified Prosecutor's request b necessary for the pur relevant chamber 'in a diverse factors affectin of the accused as well : in a different case five

²⁹⁵ 'Before the confirm permission of the Pre-Tria the charges with respect to Statute the Prosecutor ma Chamber [...]', *Prosecuto tor's appeal against the Governing Applications t Evidence*, AC, 13 Octobe

²⁹⁶ *Prosecutor v. Uhu* 'Prosecution's Request to of the Statute, PTC II, 21

²⁹⁷ *Prosecutor v. Uhu* 'Prosecution's Request to of the Statute, PTC II, 21

²⁹⁸ *Ibid.* See also rule 1 Chamber may request th law'. This rule makes it support in this provisor

²⁹⁹ *Prosecutor v. Uhu* 'Prosecution's Request to of the Statute, PTC II, 2

IX. Paragraph 9: Amendment or withdrawal of charges

It is apparent that article 61(9) should be read together with 61(4). There is a clear interplay between these two paragraphs as both of them complement one another. While article 61(4) governs amendment to the charges before their confirmation by the PTC, paragraph 9 regulates this procedure post-confirmation and prior to the commencement of the trial. A distinguishable feature between these provisions lies in the extent of discretion provided to the Prosecutor in carrying out an amendment to a charge. In the course of the pre-trial proceedings and before issuing a decision confirming the charges, the Prosecutor enjoys a wide margin of discretion to amend one or more of the charges initially presented in the DCC, subject to providing the Defence with 'reasonable notice before the hearing' (see *mn* 83). At this stage, the process of amendment does not require judicial authorization. However, the Chamber's intervention may take place in a situation of failure on the part of the Prosecutor to provide such notice sufficiently in advance or her failure to do so at all. In a situation as such, the relevant PTC should either intervene *proprio motu* or in response to an application lodged by the suspect in order to preserve the fairness of the proceedings, including the rights of the defence.

The Prosecutor's discretion regarding the amendment of charges is restricted after charges have been confirmed. In this case, the Prosecutor is not entitled to amend the charges without notifying the accused and being permitted to do so by the relevant chamber.²⁹⁵ In the *Kenyatta* case, PTC II considered that securing the Chamber's permission is a '*conditio sine qua non* for any amendment to the charges',²⁹⁶ in accordance with article 61(9). According to the Chamber, the insertion of the term 'permission' is not useless. It serves a certain aim namely, to ensure that any request for amendment of charges at this stage '[is] supported and justified'.²⁹⁷ This calls upon the respective chamber to examine not only the Prosecutor's request but also other 'relevant information' which [the] chamber could seek if necessary for the purpose of its final determination'.²⁹⁸ This holistic approach assists the relevant chamber 'in arriving at a proper and balanced decision, taking into consideration diverse factors affecting the [particular] case including its fairness, expeditiousness, the rights of the accused as well as those of the victims'.²⁹⁹ PTC II retained this approach and applied it in a different case five months later.

²⁹⁵ 'Before the confirmation hearing, the Prosecutor may [...], amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges; pursuant to article 61(9) of the Statute the Prosecutor may amend the charges after their confirmation only with the permission of the Pre-Trial Chamber [...]', *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence', AC, 13 October 2006, para. 53.

²⁹⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 19.

²⁹⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 21.

²⁹⁸ *Ibid.* See also rule 128(2) which reads: 'Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law'. This rule makes it clear that the power of the Chamber to rely on a holistic examination may find legal support in this provision.

²⁹⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 22.

- 148 In the *Ruto et al.* case, the Prosecutor sought an amendment of the charges by way of extending their temporal scope.³⁰⁰ The Prosecutor requested the addition of the dates 30 and 31 December 2007 to all charges confirmed by the PTC.³⁰¹ However, the Prosecutor lodged this request only seven weeks before the actual start of the trial which was scheduled to take place on 10 September 2013 at the time.³⁰² Applying the same approach adopted in the *Kenyatta* case, the PTC considered that the statutory requirement of granting permission to the Prosecutor to amend a charge suggests that the 'Prosecutor should not benefit from an unfettered right to resort to article 61(9) [...] at her ease, particularly, if such permission will negatively affect other competing interests'.³⁰³ The Chamber engaged into consideration of the time factor, the fact that the Prosecutor had in her possession the necessary evidence several months before the date of filing the request and the potential prejudice to the rights of the accused.³⁰⁴ Upon balancing the competing interests at stake, the Chamber considered that the Prosecutor failed 'to provide [...] any justification or valid reasons for such procedural conduct and excessive delays'³⁰⁵ and that 'authorizing an amendment [...] in the absence of any justification as to the belated nature of the Prosecutor's Request on an issue that has been crucial since the confirmation of charges hearing would result in an unfair burden for the Defence [...] [and would] unduly compromise the rights of the accused [...] as provided in article 67(1)(a)-(c) of the Statute'.³⁰⁶ Having assessed these factors collectively, the Chamber rejected the Prosecutor's request.
- 149 The validity of this approach has not been considered on appeal. Although the Prosecutor appealed the decision in the *Ruto and Sang* case on 26 September 2013, the AC refrained from entering into the merits.³⁰⁷ Instead, the AC, by majority, dismissed the appeal as inadmissible due to the fact that the Prosecutor's appeal became moot since the trial in that case had actually commenced and an amendment could no longer take place before the PTC.³⁰⁸ Nevertheless, the AC made a significant pronouncement relating to the timing of lodging requests for amending the charges under article 61(9). It made it clear that even if the Prosecutor's request was filed before the commencement of the trial, the wording of article 61(9) 'indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment'.³⁰⁹ In the words of AC, '[t]he purpose of this [interpretation] is obvious: at the beginning of the trial, its parameters must be clear'.³¹⁰
- 150 Depending on the stage of the proceedings, the request of the Prosecutor may target an amendment or a withdrawal of charges.³¹¹ Prior to the start of the trial, the Prosecutor may request an amendment and, as noted above, it shall take place if permitted by the PTC as referred to in the cases cited above. After the commencement of the trial, the Prosecutor is only permitted to request withdrawal of one or more of the charges or institute new proceedings before the PTC. In the former case, this is the responsibility of the TC. The

³⁰⁰ *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-859, Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 16 August 2013, para. 13.

³⁰¹ *Ibid.*, para. 38.

³⁰² *Ibid.*, paras 8-9.

³⁰³ *Ibid.*, para. 31.

³⁰⁴ *Ibid.*, paras 35-42.

³⁰⁵ *Ibid.*, para. 38.

³⁰⁶ *Ibid.*, para. 42.

³⁰⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11-1123), Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', AC, 13 December 2013.

³⁰⁸ *Ibid.*, 3, 12-13.

³⁰⁹ *Ibid.*, para. 29.

³¹⁰ *Ibid.*

³¹¹ Article 61(9).

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amendment of the charges by way of adding the dates 30 and 31. However, the Prosecutor lodged the trial which was scheduled to take the same approach adopted in the requirement of granting permission to the Prosecutor should not benefit from an amendment, particularly, if such permission will number engaged into consideration of the possession the necessary evidence and the potential prejudice to the rights at stake, the Chamber considered the justification or valid reasons for such authorization an amendment [...] in the Prosecutor's Request on an amendment hearing would result in an undue compromise the rights of the Statute'.³⁰⁶ Having assessed these reasons, the Chamber refused the Prosecutor's request.

On appeal. Although the Prosecutor in September 2013, the AC refrained from dismissing the appeal as inadmissible and the trial in that case had actually commenced before the PTC.³⁰⁸ Nevertheless, the granting of lodging requests for amending the charges if the Prosecutor's request was filed under article 61(9) 'indicates that not only the commencement of the trial, but also the timing of that time, including the granting of the request, [the purpose of this [interpretation] must] be clear'.³¹⁰

The Prosecutor may target an amendment of the trial, the Prosecutor may place if permitted by the PTC as an amendment of the trial, the Prosecutor is allowed to amend the charges or institute new charges of the charges or institute new charges and the responsibility of the TC. The

³⁰⁶ ICC-01/09-01/11-859, Decision on the Prosecution's Request Pursuant to Article 61(9) of the Statute, 13 December 2013.

³⁰⁸ ICC-01/09-01/11-1123, Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, 13 December 2013.

decisive factor here is the timing for the start of the trial.³¹² Although the timing factor for the start of a trial was controversial until few years ago,³¹³ the recent language employed by the AC suggests that a trial does not begin before the opening statements. In *Ruto et al.*, the AC noted that 'opening statements in the present case were made on 10 September 2013 and the first witness was heard on 17 September 2013. Accordingly, irrespective of the precise moment at which the trial begins within the meaning of article 61 (9) (...), in the instant case, the trial has commenced' (emphasis added).³¹⁴ Thus, the fact that the AC focused only on the two respective dates concerning the opening statements and the hearing of the first witness, it is difficult to conclude that the AC meant that a trial begins prior to the opening statements (i.e., in the course of the pre-trial preparation for the actual trial). Rather logic dictates that the trial actually begins after the pre-trial preparations have been concluded and at least with the opening statements, as TC I suggested.³¹⁵

The request for amending the charges may take at least two different forms. It may be a request to make an amendment to an existing charge or to add one or more additional charge(s) or substitute one or more existing charge(s) with more serious charges. The current jurisprudence of the PTCs referred to above only dealt with the first form namely, requesting an amendment within the same set of charges. For this type of amendment, article 61(9) does not require a hearing before authorizing the amendment of the relevant charge.

In the *Kenyatta* case, the Prosecutor requested the addition of a limited factual allegation that 'victims were also killed by gunshot in Naivasha'.³¹⁶ The Chamber considered that 'the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather it is a re-insertion, on the basis of the new evidence presented, of an already known specific factual allegation for an existing charge of murder in Naivasha (...) [and accordingly] [there was no] need to hold a hearing for the purpose of deciding on the Prosecutor's Request'.³¹⁷ In the *Ruto et al.* case, although PCT II did not rule on the nature of the requested amendment it was clear that the nature of the request to add two days to the existing charges still falls within the first category which does not require a hearing.³¹⁸

Differently is the situation where the Prosecutor's request goes beyond the existing charges and aims at either adding new charges or replacing the existing ones with more serious charges. This may also take the form of adding new facts and circumstances and new legal

³¹² See also *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-696, Decision on the withdrawal of charges against Mr Muthaura, TC V, 18 March 2013, para. 11 where TC V was confronted with a situation where the Prosecutor requested withdrawal of the charges after the confirmation of charges but before the actual trial commenced. In this case, the Chamber still considered that permission should be granted as to the withdrawal of charges, but on the basis of article 64(2) of the Statute.

³¹³ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), TC II, 16 June 2009, paras 30, 36-42; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, para. 39.

³¹⁴ *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-1123, Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', AC, 13 December 2013, para. 27.

³¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, para. 39; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, TC III, 24 June 2010, para. 201.

³¹⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', PTC II, 21 March 2013, para. 26.

³¹⁷ *Ibid.*, para. 29.

³¹⁸ See also in the *Kenyatta* case, TC V considered, albeit in a different context based on a defence request, that a change in the evidence introduced before the TC does not justify a new confirmation hearing insofar as such a change does not lead to a change to the charges. *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to Article 64(4) and related requests, TC V, 26 April 2013, para. 111.

characterizations which were not confirmed by the PTC.³¹⁹ In this case a hearing to confirm these new charges will be required following the same procedural process envisaged under article 61(3), (5), (6)-(7) and the rules related thereto.

X. Paragraph 10: 'Warrant previously issued'

- 154 Paragraph 10 should be understood in the context of the other related paragraphs of article 61 namely, paragraphs 4, 7 (b), 8 and 9. The question of vacating a warrant of arrest is a corollary to a decision of a PTC to decline to confirm one or more charges pursuant to article 61(7)(b). In the *Mbarushimana case*, PTC I declined to confirm the charges against the suspect, and consequently, declared that the warrant of arrest against him 'cease[d] to have effect in its entirety'.³²⁰ On appeal, the AC recalling article 61(10), stated that 'the warrant of arrest cease[d] to have effect [was] therefore an automatic result of the decision declining to confirm the charges'.³²¹
- 155 A year later, PTC II also declined to confirm the charges against two suspects out of six in the *Kenya cases (Kosgey and Ali)*. But this time the PTC refrained from issuing warrants of arrest. Instead it issued summonses to appear. Article 61(10) speaks of '[a]ny warrant previously issued' as opposed to a summons to appear, which may indicate that this paragraph is confined to the former. Although it is true that both articles 58(4) and 61(10) only mention a warrant of arrest, these latter provisions should apply *mutatis mutandis* to summonses to appear. To say otherwise would lead to an absurd conclusion in the sense that the Court could never cease the effect of any conditions previously imposed on a suspect or vacate a summons to appear even if a PTC declined to confirm all charges against him or her.
- 156 Indeed, in the *Ruto et al. case*, PTC II, after declining to confirm the charges against *Kosgey*, decided that the 'conditions imposed on [him] in the Decision on Summons to Appear cease[d] to have effect'.³²² The Chamber followed the same path in the *Muthaura et al. case*.³²³ Nevertheless, although the Chamber declined to confirm the charge of other forms of sexual violence against the other two suspects (*Muthaura* and *Kenyatta*),³²⁴ the Chamber failed to note the effect of such finding on the validity of the summons to appear. In particular, the Chamber failed to acknowledge that the conditions imposed on the two suspects also cease to have effect in relation to the declined charge.
- 157 On the other hand, a warrant of arrest or a summons to appear may also cease to have effect if charges have been withdrawn by the Prosecutor. Thus a warrant of arrest which has been issued in the course of the confirmation proceedings will not stand any further if the Prosecutor decided *proprio motu* to withdraw the charges sufficiently in advance of the hearing.³²⁵ After the confirmation of charges and the commencement of the trial, a warrant of arrest shall still cease to have effect provided that the Prosecutor first secures permission from the TC to withdraw the charges.³²⁶

³¹⁹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, para. 27.

³²⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, 149.

³²¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-483, Reasons for 'Decision on the appeal of the Prosecutor of 19 December 2011 against the "Decision on the confirmation of the charges" and, in the alternative, against the "Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana" and on the victims' request for participation' of 20 December 2011, AC, 24 January 2012, paras 20-21.

³²² *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, 138.

³²³ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, 154.

³²⁴ *Ibid.*

³²⁵ Articles 61(4) and 61(10).

³²⁶ Article 61(9) and 61(10).