

THE CONFIRMATION OF CHARGES PROCESS AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
October 2008

ACKNOWLEDGMENTS

Susana SáCouto, WCRO Director, and Katherine Cleary, WCRO Assistant Director prepared this report, with contributions from Washington College of Law (WCL) J.D. student Jennifer Norako and additional assistance from WCRO Staff Assistant Nathalie Marechal. We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute, the Oak Foundation and the WCL, without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including WCL Professor Robert Goldman and the members of the WCRO's ICC Advisory Committee: Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); Judge Florence Mumba, Justice of the Supreme Court of Zambia and former Judge of the ICTY; Diane Orentlicher, WCL Professor; and Judge Patricia Wald, former Judge of the ICTY.

ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

THE CONFIRMATION OF CHARGES PROCESS AT THE INTERNATIONAL CRIMINAL COURT

WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
October 2008

Copyright © October 2008 by the War Crimes Research Office
American University Washington College of Law
All rights reserved
Printed in the United States of America

CONTENTS

| | |
|---|-----------|
| EXECUTIVE SUMMARY | 1 |
| I. INTRODUCTION | 13 |
| II. PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER IN THE LUBANGA AND KATANGA & NGUDJOLO CASES | 14 |
| A. THE LUBANGA CASE | 14 |
| 1. <i>Delays</i> | 14 |
| 2. <i>Issues Raised by Pre-Trial Chamber I's Decision Confirming the Charges Against Mr. Lubanga</i> | 25 |
| B. THE KATANGA & NGUDJOLO CASE | 30 |
| 1. <i>Delays Continue</i> | 30 |
| 2. <i>Disclosure Scaled Back</i> | 34 |
| 3. <i>The Single Judge Grants Non-Anonymous Victims Extensive Participation Rights in the Context of the Confirmation Hearing</i> | 37 |
| 4. <i>The Defense Seeks Stay of Proceedings Due to the Prosecution's Inability to Disclose Potentially Exculpatory Material</i> | 39 |
| 5. <i>Pre-Trial Chamber I Confirms the Charges Against Both Mr. Katanga and Mr. Ngudjolo</i> | 43 |
| III. THE EVOLUTION OF THE CONFIRMATION OF CHARGES PROCESS IN THE DRAFTING OF THE ROME STATUTE AND ICC RULES..... | 44 |
| A. INTERNATIONAL LAW COMMISSION DRAFT STATUTE | 44 |
| B. COMMENTS TO THE 1994 DRAFT STATUTE | 46 |
| 1. <i>Balance of Authority</i> | 48 |
| 2. <i>Standard of Review</i> | 49 |
| 3. <i>Rights of the Accused</i> | 50 |

| | |
|--|-----------|
| C. PROPOSALS FOR THE CREATION OF AN “INVESTIGATING CHAMBER” | 51 |
| D. FINALIZING THE ROME STATUTE PROVISIONS ON THE CONFIRMATION OF CHARGES..... | 53 |
| E. ARTICLE 61 OF THE ROME STATUTE | 55 |
| F. RULES OF PROCEDURE AND EVIDENCE RELATING TO CONFIRMATION OF CHARGES PROCESS..... | 58 |
| G. THEMES EMERGING FROM THE DRAFTING HISTORY OF THE PROVISIONS GOVERNING THE CONFIRMATION PROCESS | 60 |
| IV. ANALYSIS AND RECOMMENDATIONS | 62 |
| A. RECOMMENDATIONS RELATING TO PROCEDURES APPLIED AT CONFIRMATION STAGE..... | 62 |
| 1. <i>The Disclosure Process Prior to the Confirmation of Charges Hearing Must Be Significantly Accelerated</i> | 62 |
| 2. <i>Clarification as to What Constitutes the “Bulk” of Exculpatory Evidence Would Benefit Parties</i> | 70 |
| 3. <i>Careful Consideration Should Be Given as to What Procedural Rights Should Be Given to Victims at the Confirmation Hearing.....</i> | 71 |
| B. RECOMMENDATIONS RELATING TO DECISIONS OF THE PRE-TRIAL CHAMBER DURING AND AT THE CONCLUSION OF THE CONFIRMATION PROCESS..... | 73 |
| 1. <i>Where the Pre-Trial Chamber Seeks to Amend a Charge, the Appropriate Remedy is to Suspend the Confirmation Hearing and Request that the Prosecutor Consider Amending the Charges</i> | 73 |
| 2. <i>The Pre-Trial Chamber Should Consider Allowing the Full Chamber to Review Requests for Leave to Obtain Interlocutory Appeal of Decisions Made by a Single Judge</i> | 76 |

EXECUTIVE SUMMARY

According to the Rome Statute of the International Criminal Court (ICC), the Pre-Trial Chamber must hold a hearing to confirm the charges against an accused person within a reasonable time after that person has been taken into the custody of the Court. At the close of the hearing, the Pre-Trial Chamber must determine whether there is sufficient evidence to establish substantial grounds to believe that the accused committed the crimes charged by the Prosecutor. The Chamber may then confirm the charges and commit the accused to trial; decline to confirm the charges; or adjourn the hearing and request the Prosecutor to consider providing further evidence or amending a charge.

At the time of this writing, the ICC has confirmed the charges in two cases – namely, in the case against Thomas Lubanga Dyilo and in the joint case against Germain Katanga and Mathieu Ngudjolo Chui. Focusing on these two cases, the aim of this report is to analyze the confirmation process as carried out by the Court thus far – both in terms of the manner in which the drafters of the Rome Statute seemed to have envisioned the process, as well as with respect to issues not necessarily anticipated by the drafters – and to make recommendations as to how the process might be improved for future accused.

The Confirmation Process in the *Lubanga* and *Katanga & Ngudjolo* Cases

Both cases that have been confirmed by the ICC to date have been marked by serious delays in the confirmation process, which has implications regarding not only the right of the accused to a speedy trial, but also on each accused's ability to prepare its defense. As the Prosecution has been permitted to disclose evidence in a heavily redacted or summary form for purposes of the confirmation stage of

proceedings, it has been difficult for each accused to begin his own investigations and preparations for trial during the confirmation process. Other issues arising in the confirmation process include the decision by Pre-Trial Chamber I to unilaterally alter the charges against Mr. Lubanga, questions regarding the appropriate scope of victim participation at the confirmation stage, and the fact that a number of key decisions have been taken by a Single Judge, who also determines whether those decisions should be allowed up on interlocutory appeal.

Lubanga Case

a) Delays

In the case against Mr. Lubanga – who was the first accused taken into custody by the ICC – the Pre-Trial Chamber (PTC) initially scheduled the confirmation of charges hearing to take place a little over three months after the accused’s transfer to the Court. The Chamber then appointed Judge Sylvia Steiner to serve as Single Judge of the PTC in the intervening months. Judge Steiner quickly issued a disclosure calendar according to which all relevant evidence would be turned over to the Defense well in advance of the scheduled hearing date. Judge Steiner also made clear in her early decisions that: (i) as a general matter, all relevant evidence should be disclosed to the Defense in full, including the identities of the witnesses upon whom the Prosecution would rely at the hearing and the statements, interview transcripts, and interview notes relating to those witnesses; (ii) any restrictions on disclosure must be approved by the Single Judge; and (iii) the Single Judge would not approve any redactions to exculpatory excerpts of statements made by witnesses upon whom the Prosecution intended to rely at the hearing.

Unfortunately, it quickly became evident that the Prosecution would be unable to comply with the disclosure calendar set forth by Judge Steiner, and the confirmation of charges hearing was postponed on two separate occasions as a result of disclosure delays. The delays arose, in part, from the amount of time required to evaluate and implement protective measures requested on behalf of the Prosecution's witnesses – such as relocating the witness or seeking the Single Judge's approval to redact the names and other information about persons that may be at risk from the evidence being disclosed. Notably, although Judge Steiner had originally suggested that she would authorize requests from the Prosecutor to withhold witness's identities from the Defense only in exceptional circumstances, security concerns ultimately led the judge to a different approach, and she was required to analyze hundreds of pages of requests for redactions under a detailed review process. Finally, with respect to those witness statements, interview transcripts, and interview notes that could not be sufficiently redacted so as to protect the identity of the relevant witness, the Single Judge granted the Prosecution's request to disclose summaries, written by the Prosecution, of that evidence.

The confirmation hearing in the *Lubanga* case finally commenced on 9 November 2006, nearly nine months after the accused was first taken into the custody of the ICC; the hearing lasted approximately two weeks. Two months later, the Pre-Trial Chamber issued its decision regarding the sufficiency of the evidence against Mr. Lubanga, allowing the case to proceed.

The *Lubanga* case was transferred to the Trial Chamber on 6 March 2007, nearly one year after the accused was first taken into custody by the ICC. Notably, despite the lengthy proceedings conducted prior to the confirmation of charges hearing, a vast array of issues remained to be resolved before the trial could commence, and the disclosure

process was nowhere near complete. Thus, it took the Pre-Trial Chamber just short of one year to finally determine that the charges against Mr. Lubanga were not wholly unfounded, and the parties were only marginally closer to being prepared for trial than they had been the day Mr. Lubanga was taken into custody.

b) Confirmation Decision Inconsistent with Charges Presented

Notably, although the PTC confirmed the charges against Mr. Lubanga, the decision of the Pre-Trial Chamber was inconsistent with the charges presented by the Prosecution. As an initial matter, the PTC stressed that the purpose of the confirmation process was merely to ensure that the case was not based on “wrongful and wholly unfounded charges.” The Chamber then went on to find that the Prosecutor had met this burden with respect to Mr. Lubanga. However, the Chamber did not confirm the charge as presented by the Prosecutor, which alleged that Mr. Lubanga had committed the war crime of conscripting, enlisting, and using children to participate actively in non-international armed conflict. Instead, the Pre-Trial Chamber held that Mr. Lubanga should be tried, in part, for committing the war crime of conscripting, enlisting, and using children to participate actively in international armed conflict. Significantly, the Prosecution had expressly noted – both in the Document Containing the Charges presented prior to the confirmation hearing and at the hearing itself – that it lacked evidence to establish that the relevant crime had occurred in the context of an international armed conflict. Moreover, the Defense did not challenge the charge in the context of an international armed conflict during the confirmation hearing, as that charge was never brought by the Prosecutor. Nevertheless, requests from both the Prosecution and the Defense for leave to obtain interlocutory appeal of the decision confirming the charges were denied by the Pre-Trial Chamber.

Katanga & Ngudjolo Case

a) Delays Continue

Despite efforts by Judge Steiner – again appointed to act as Single Judge of the Pre-Trial Chamber – to ensure a quicker pre-trial process in the Katanga & Ngudjolo case, similar disclosure-related problems meant that the second confirmation of charges hearing did not take place until eight months after Mr. Katanga was transferred to the ICC.

b) Disclosure Scaled Back

At the same time, Judge Steiner continued to make decisions scaling back her initial position in the Lubanga case that full disclosure of all material the Prosecution intended to rely on at the hearing must be turned over to the Defense prior to the hearing. For example, although the judge had previously authorized the disclosure of evidence in summary form only where redactions could not adequately protect the identity of the witness, she determined in April 2008 that, in order to avoid months of delay, the Prosecution should generally disclose evidence in summary form rather than requesting that the Single Judge approve redactions. The judge reasoned that this would save considerable time, as the Single Judge was not required to approve the summaries, and also noted that the difference in probative value between redacted evidence and summaries was minimal. Furthermore, the judge authorized the Prosecution to unilaterally redact material from exculpatory documents prior to disclosing those documents to the Defense, while giving the Defense the right to challenge any of the redactions.

Finally, the judge held that, although the Prosecution was unable to turn over some 231 exculpatory documents to the Defense due to confidentiality restrictions, the confirmation of charges hearing could

nevertheless proceed because the Prosecution had disclosed the “bulk” of exculpatory material in its possession.

c) Expansive Participation Rights Given to Non-Anonymous Victims

Another significant decision issued in the context of the Katanga & Ngudjolo case was the decision by Judge Steiner granting victims that were willing to reveal their identity to the Defense the right not only to be present at the confirmation hearing and to make written submissions, but also the right to cross-examine witnesses presented by the parties at the hearing.

d) Majority of Charges Brought by Prosecution Confirmed by Pre-Trial Chamber I

The confirmation hearing in the Katanga & Ngudjolo case took place in June and July 2008 and, on 1 October 2008, Pre-Trial Chamber I issued a decision confirming the majority of the charges against each of the two accused. In its decision, the Chamber reiterated that the purpose of the confirmation process is to protect the Defense against “wrongful and wholly unfounded charges.” The Chamber also affirmed that the confirmation hearing is limited in scope and not intended to serve as a “mini-trial.”

The Evolution of the Confirmation of Charges Process in the Drafting of the Rome Statute and ICC Rules

The drafting history of the Rome Statute’s provisions governing the “confirmation of charges” process suggests that the drafters sought to achieve two primary goals through the confirmation process. First, the drafters sought to impose a check on the Prosecutor’s authority to determine the appropriate charges in any given case, in particular, where the charges were brought in the context of an investigation that the Prosecutor had initiated under his proprio motu powers. Second,

the drafters wanted to provide the accused with a chance to challenge the charges prior to confirmation.

At the same time, however, the drafters agreed that the confirmation of charges hearing was not intended to be a mini-trial that could be seen as a pre-judgment of the accused. Furthermore, the drafters were aware that the confirmation process must not interfere with the accused's right to a speedy trial. Hence, the standard for confirmation was set low, and it was agreed that the Prosecutor could rely on documentary or summary evidence, rather than calling the witnesses expected to testify at the trial. In addition, although the Pre-Trial Chamber was given authority to order disclosure prior to the confirmation hearing, the drafters of the Rules of Procedure and Evidence determined that disclosure did not need to be completed before the charges could be confirmed. Rather, the Prosecution need only disclose the evidence upon which it intends to rely at the hearing, including the names of relevant witnesses and any prior statements made by those witnesses. In addition, the Prosecution is under an ongoing obligation under the Rome Statute to disclose potentially exculpatory evidence to the Defense "as soon as practicable."

Analysis & Recommendations

Recommendations Relating to Procedures Applied at Confirmation Stage

In light of the problems discussed in the cases above – particularly delay and the absence of full disclosure during the confirmation process – and of the drafting history of the provisions governing the confirmation process – which suggests that the standard for confirmation was intended to be fairly low and that the confirmation hearing was not intended to be a "mini-trial" – we recommend the following:

- *Significantly accelerating the disclosure process prior to the confirmation of charges, which will achieve the goals of the confirmation process while expediting the Defense's ability to prepare its case in the event the charges are confirmed.*

The initial approach to pre-trial disclosure, set out by Judge Steiner in her 15 and 19 May 2006 decisions in Lubanga, was developed with the expectation that all evidence being relied on by the Prosecutor at the confirmation of charges hearing, in addition to most exculpatory evidence, could be readily turned over to the accused well in advance of the hearing. In practice, however, security concerns meant that full disclosure of evidence would be impossible, while the provision of protective measures proved incompatible with the requirement that the confirmation hearing take place within a “reasonable time” after the accused is taken into the custody of the Court. At the same time, the evidence ultimately disclosed to the Defense for purposes of the confirmation hearing – whether in redacted or in summary form – possesses limited probative value, particularly in terms of the Defense’s ability to start building its own case through the identification of potential witnesses and other evidentiary sources. Finally, even in the Lubanga case, which took nearly an entire year to move to the Trial Chamber, the parties were only marginally better prepared for trial than at the time of Mr. Lubanga’s transfer to the Court.

Given these realities, and in light of the fact that security concerns are likely to be high in most, if not all, of the cases tried by the ICC, we recommend that the Court take steps to accelerate the disclosure process prior to the confirmation hearing. Specifically, we recommend that the Pre-Trial Chamber continue to encourage the disclosure of evidence in summary form over evidence in redacted form, as the former is far less time-consuming and the difference in probative value

appears to be minimal. Again, while it would be ideal to grant the Defense full disclosure even prior to the confirmation hearing, the Rome Statute clearly allows for the use of summaries, and an expedited confirmation process is consistent not only with the Defense's right to a speedy trial, but also with the drafters' desire to avoid a "mini-trial" at the confirmation stage. Most importantly, in the event that the Prosecution is able to establish a prima facie case against the accused, the Defense will be in a position to demand full disclosure as required for the trial much more quickly than were the accused in the Lubanga and the Katanga & Ngudjolo cases. Thus, rather than waiting in custody for eight to ten months before being able to thoroughly prepare for trial, an accused who is committed for trial would ideally have the right to fully access the Prosecution's evidence much more quickly.

Toward the same end of encouraging an expedited confirmation process, we recommend that the Prosecution take steps aimed at being in a position to comply with a limited disclosure calendar at the time the accused is transferred to the custody of the ICC, in particular, by judiciously selecting the evidence to be relied upon at the confirmation hearing and ensuring timely submission of any necessary requests for protective measures.

- *Clarifying what constitutes the "bulk" of exculpatory evidence*

In both the Lubanga and Katanga & Ngudjolo cases, the Pre-Trial Chamber has repeatedly held that the Prosecution's duty under the Rome Statute to disclose potentially exculpatory evidence to the Defense is ongoing, and thus must be observed in the lead up to the confirmation hearing. At the same time, the Chamber has held that the Prosecution need only disclose the "bulk" of the exculpatory evidence. While this determination seems generally consistent with both the Rome Statute and the Rules of Procedure and Evidence, the Chamber

has yet to explain what is required to comply with the “bulk” rule, including whether it is a strictly quantitative measure or whether it could also include analysis of the types of exculpatory material disclosed at a given point. Such clarification would significantly benefit the parties in terms of knowing what is required of the Prosecution regarding disclosure of exculpatory evidence prior to the confirmation hearing.

- *Careful consideration as to what procedural rights should be given to victims at the confirmation hearing.*

While Judge Steiner’s decision in the Katanga & Ngudjolo case regarding the participation rights of non-anonymous victims at the confirmation stage is to be welcomed, it is important to stress that in that case, there were only four victims willing to reveal their identities to the Defense, all of whom had agreed to use the same legal representative, and that Judge Steiner based her decision in part on these factors. Thus, as the Single Judge acknowledged in her decision, the procedural rights granted to non-anonymous victims in Katanga & Ngudjolo should not necessarily apply automatically in future cases, as Article 68(3) of the Rome Statute requires that victim participation take place “in a manner which is not prejudicial to or inconsistent with the rights of the accused,” which includes the right to a trial without undue delay. Thus, for example, it may not be feasible to grant victims the right to cross-examine witnesses in a case where a large number of victims were willing to disclose their identities, particularly if these victims did not have common legal representation.

Recommendations Relating to Decisions of the Pre-Trial Chamber During and at the Conclusion of the Confirmation Process

In addition to the foregoing procedural recommendations, we recommend the following in relation to decisions taken by the PTC:

- *Where the Pre-Trial Chamber seeks to amend a charge, the appropriate remedy is to suspend the confirmation hearing and request that the Prosecutor consider amending the charge.*

As noted earlier, the Rome Statute grants the Pre-Trial Chamber the power to confirm those charges for which it finds sufficient evidence and to dismiss those for which there is insufficient evidence. If the Pre-Trial Chamber is not persuaded of the sufficiency of evidence, or considers that the charge does not appropriately reflect the evidence presented, the Rome Statute is clear that the PTC must adjourn the hearing and request the Prosecutor to present more evidence or to amend the charges. Furthermore, as described in detail below, the drafters of the Rome Statute expressly considered proposals suggesting that the Pre-Trial Chamber itself be given the authority to amend the charges brought by the Prosecutor, and ultimately rejected those proposals. Thus, the Pre-Trial Chamber seems to have clearly exceeded its authority in the Lubanga case when it altered the charges to include allegations that the accused committed a war crime in the context of an international armed conflict. Notably, the new charge includes elements not required under the charge brought by the Prosecution, meaning the Prosecution must prepare to try Mr. Lubanga on a charge for which it may lack sufficient evidence to convict. At the same time, Mr. Lubanga has been committed to trial on a charge that the Defense was never able to challenge at the confirmation hearing. Such results should be avoided in future cases.

- *The Pre-Trial Chamber should consider allowing the full Chamber to review requests for leave to obtain interlocutory appeal of decisions made by a Single Judge.*

In both the Lubanga and Katanga & Ngudjolo cases, a Single Judge was appointed to carry out the functions of the Pre-Trial Chamber during the lead up to the confirmation hearing. Thus, a large number of

decisions in both cases – including those that dealt with disclosure, evidentiary issues, and victim participation – were taken by Single Judge Steiner. Notably, many of these decisions resulted in requests by the parties for leave to obtain interlocutory appeal under Article 82(1)(d), and the Single Judge has been responsible for deciding whether to grant such requests. While this process is certainly permitted under the relevant provisions of the Rome Statute and Rules of Procedure, the Pre-Trial Chamber is equally authorized to decide that the functions of the Single Judge be exercised by the full Chamber at a given time. Thus, given the impact that decisions taken by the Single Judge – such as the manner in which requests for redactions are evaluated or the scope of victim participation at the confirmation hearing – may have on the ultimate outcome of a case, the Chamber should consider constituting the full PTC for purposes of reviewing requests for leave to appeal decisions taken by a Single Judge.

I. INTRODUCTION

This report addresses the unique process developed under the Rome Statute requiring that, within a “reasonable time” after an accused person has been taken into the custody of the Court, the Pre-Trial Chamber must hold “a hearing to confirm the charges on which the Prosecutor intends to seek trial.”¹ To date, the International Criminal Court (ICC) has confirmed the charges in two cases – namely, in the case against Thomas Lubanga Dyilo and in the joint case against Germain Katanga and Mathieu Ngudjolo Chui.² Focusing on these two cases, the aim of this report is to analyze the confirmation process as carried out by the Court thus far – both in terms of the manner in which the drafters of the Rome Statute seemed to have envisioned the process, as well as with respect to issues not necessarily anticipated by the drafters – and to make recommendations as to how the process might be improved for future accused.

¹ Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, Art. 61(1), U.N. Doc. A/CONF.183/9 (1998).

² At the time of this writing, confirmation proceedings have commenced against a fourth accused, Jean-Pierre Bemba Gombo. However, the confirmation proceedings in the case against Mr. Bemba will not be addressed in this report due to the ongoing nature of the process.

II. PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER IN THE LUBANGA AND KATANGA & NGUDJOLO CASES

A. THE LUBANGA CASE

Thomas Lubanga Dyilo, the first suspect to be taken into the custody of the International Criminal Court, was surrendered to the ICC on 17 March 2006.³ Mr. Lubanga, whose case arose from the situation in the Democratic Republic of Congo (DRC), was arrested pursuant to a finding by Pre-Trial Chamber I that there are reasonable grounds to believe he is criminally responsible for the war crime of conscripting, enlisting, and using children to participate actively in the course of armed conflict.⁴

1. Delays

a) Single Judge Sets Forth General Principles Governing Disclosure Required Prior to Confirmation Hearing

Shortly after Mr. Lubanga's transfer to the ICC, the Pre-Trial Chamber scheduled the confirmation of charges hearing for 27 June 2006, leaving the parties more than three months to prepare.⁵ The Chamber then appointed Judge Sylvia Steiner to serve as a Single Judge of Pre-Trial Chamber I for purposes of overseeing preparations for the confirmation of charges hearing, including taking the necessary

³ See *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06-2, at 4 (Pre-Trial Chamber I, 10 February 2006).

⁵ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, ICC-01/04-01/06-54, at 2 (Pre-Trial Chamber I, 23 March 2006).

decisions regarding disclosure between the Prosecution and the Defense.⁶

Because the *Lubanga* case was the first case before the ICC, Judge Steiner began by issuing a decision setting forth a “system of disclosure” for the parties, which included the following principles:⁷

- The Prosecution is required, under Rule 76, to provide the Defense with the names and statements of *all* witnesses on which it intends to rely at the confirmation hearing, “regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements.”⁸
- As a “general rule,” witness statements, transcripts of interviews with witnesses, and notes from witness interviews must be disclosed to the Defense “in full;” any restriction on such disclosure “must be authorised by the single judge.”⁹

⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Designating a Single Judge in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-51 (Pre-Trial Chamber I, 22 March 2006). Article 39(2)(b)(iii) provides that the “functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.” Rome Statute, *supra* n. 1, Art. 39(2)(b)(iii). For further discussion about the role of the Single Judge, *see infra* Part 14.

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, at 2-4 (Pre-Trial Chamber I, 15 May 2006).

⁸ *Id.* Annex 1, ¶¶ 93-100. Rule 76(1) provides: “The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.” International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 76(1).

⁹ *Lubanga*, Decision on the Final System of Disclosure and the Establishing

- The scope of exculpatory material¹⁰ to be disclosed by the Prosecution in the Pre-Trial stage does not depend on the evidence on which the Prosecution plans to rely at the confirmation hearing; rather, the scope is defined by the charges against the Defense and the factual allegations that support them. Thus, exculpatory material must be disclosed “as soon as practicable,” regardless of the stage of proceedings at which such evidence is identified.¹¹ Indeed, according to the Single Judge, the fact that the confirmation hearing had been scheduled to commence a full three months after Mr. Lubanga’s first appearance in Court made it “fully practicable to disclose most of the potentially exculpatory materials in the Prosecution’s possession or control before the confirmation hearing.”¹²

of a Timetable, *supra* n. 7, Annex 1, ¶ 101.

¹⁰ Two provisions govern the disclosure of exculpatory material. The first is Article 67(2) of the Rome Statute, which states that, “[i]n addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” Rome Statute, *supra* n. 1, Art. 67(2). The second is Rule 77, which provides that the Prosecutor “shall, subject to the restrictions on disclosure as provided for in the Statute and in [R]ules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.” ICC Rules, *supra* n. 8, R. 77.

¹¹ *Lubanga*, Decision on the Final System of Disclosure and the Establishing of a Timetable, *supra* n. 7, Annex 1, ¶¶ 121-25.

¹² *Id.* Annex 1, ¶ 126.

Judge Steiner's first decision also set forth a timetable according to which the parties would make all required disclosures well in advance of the scheduled 27 June 2006 confirmation hearing.¹³

A few days after setting forth the general system of disclosure for the *Lubanga* pre-trial proceedings, Judge Steiner issued a second decision, this time detailing some of the principles governing applications to restrict disclosure – for example, because the full disclosure of evidence would endanger a witness or because the evidence is confidential – pursuant to Rule 81 of the ICC Rules.¹⁴ First, Judge Steiner noted that, in ascertaining the relevant principles, particular attention must be paid to “the limited scope of the confirmation hearing” and to “the fact that protection of sensitive evidence, materials, and information must be consistent with the rights of the Defence.”¹⁵ With respect to the latter of these factors, the judge held that “non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised only exceptionally.”¹⁶ Furthermore, in view of the Article

¹³ *Id.* at 8-13.

¹⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr (Pre-Trial Chamber I, 19 May 2006). Rule 81(4) authorizes the Chamber to, “on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information,” whether such measures be required to protect information provided to the Prosecutor under conditions of confidentiality or to protect the safety of witnesses and victims and members of their families, “including by authorizing the non-disclosure of their identity prior to the commencement of the trial.” ICC Rules, *supra* n. 8, R. 81(4).

¹⁵ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, *supra* n. 14, ¶ 6.

¹⁶ *Id.* ¶ 31.

67(2) requirement that all potentially exculpatory evidence in the possession of the Prosecution be disclosed to the Defense “as soon as practicable,” the judge held that she would not authorize any redactions to “potentially exculpatory excerpts” of statements made by witnesses upon whom the Prosecution intended to rely.¹⁷

b) Confirmation Hearing Postponed Until 9 November 2006 due to Disclosure-Related Delays

Despite Judge Steiner’s disclosure timeline, it quickly became apparent that the Prosecution would be unable to comply with the disclosure deadlines necessary to commence the confirmation hearing on 27 June 2006. Specifically, the delays arose due to the fact that the Prosecution was seeking protective measures for “a number” of the witnesses upon which it intended to rely at the confirmation hearing, and the process under which such protective measures could be granted by the Victims and Witnesses Unit (VWU) was taking approximately three months from the time the Prosecution submitted the relevant request.¹⁸ Thus, on 24 May 2006, the Single Judge postponed the confirmation hearing from 27 June to 28 September 2006 and adjusted the timeline for disclosures accordingly.¹⁹

In line with the new timetable, Judge Steiner ordered the Prosecution to file any requests for redactions to the evidence by 29 August, suggesting the confirmation hearing would go forward as planned on

¹⁷ *Id.* ¶¶ 36-38.

¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, ICC-01/04-01/06-126, at 4-5 (Pre-Trial Chamber I, 24 May 2006).

¹⁹ *Id.*

28 September 2006.²⁰ However, on 20 September, Judge Steiner once again postponed the hearing, noting that the Prosecution had submitted applications as late as 19 September 2006, and therefore “part of the evidence on which the Prosecutor intends to rely at the confirmation hearing is not yet accessible to the [D]efence.”²¹

Eventually, the hearing was rescheduled for 9 November 2006²² – more than four months after the initial date of the hearing, and nearly nine months after Mr. Lubanga was transferred to the custody of the ICC.

c) Single Judge Issues Numerous Decisions on Prosecution’s Applications for Redactions and Use of Summaries

Throughout September and October 2006, Judge Steiner issued a series of decisions concerning applications from the Prosecution for redactions and other exceptions to disclosure pursuant to Rule 81.²³ In

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution Practice to Provide to the Defence Redacted Versions of Evidence and Materials Without Authorisation by the Chamber, ICC-01/04-01/06-355, at 4-5 (Pre-Trial Chamber I, 25 August 2006).

²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/04-01/06-454, at 2-3 (Pre-Trial Chamber I, 20 September 2006).

²² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Date of the Confirmation Hearing, ICC-01/04-01/06-521, at 4 (Pre-Trial Chamber I, 5 October 2006).

²³ See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution Amended Application Pursuant to Rule 81(2), ICC-01/04-01/06-235 (Pre-Trial Chamber I, 2 August 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning the Prosecution’s Requests for Redactions, ICC-01/04-01/06-378 (Pre-Trial Chamber I, 1 September 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning the Compliance by the Prosecution with the Pre-Requisites to File Rule 81(4)

her first decision responding to the Prosecution's applications for redactions, the Single Judge began by noting the "considerable amount of material" at issue and the fact that "the filings were made by the Prosecution in the last seven days of the three-month period" permitted under the judge's latest timeline for disclosure.²⁴ The judge then went on to describe the "recent deterioration of the security system in some parts" of the DRC and the impact of these changes on the "range of protective measures currently available to and feasible for witnesses" on whom the parties intended to rely at the confirmation hearing.²⁵

Thus, despite her initial position that the non-disclosure of the identity of witnesses to be relied upon at the confirmation hearing was to be granted only in exceptional circumstances, the Single Judge determined in September 2006 that non-disclosure was the only measure "available and feasible" for the protection of "many" prosecution witnesses.²⁶ A few days later, the Single Judge issued a second decision, this time authorizing a number of redactions requested by the Prosecutor for a number of documents, including witness statements and notes of the Prosecutor's interviews with witnesses.²⁷

Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-437, (Pre-Trial Chamber I, 15 September 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-455 (Pre-Trial Chamber I, 20 September 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517 (Pre-Trial Chamber I, 4 October 2006).

²⁴ *Lubanga*, First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, *supra* n. 23, at 6.

²⁵ *Id.* at 7.

²⁶ *Id.* at 7-8.

²⁷ *Lubanga*, Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, *supra* n. 23, at 11-15.

Notably, the Defense was granted leave to obtain interlocutory appeal of these decisions, and these appeals were still pending before the Appeals Chamber on 9 November 2006, the scheduled date of the confirmation hearing.²⁸ Although Mr. Lubanga moved to postpone the confirmation hearing until after the Appeals Chamber had reviewed the Single Judge’s decisions, Pre-Trial Chamber I refused to grant the request.²⁹ The Appeals Chamber ultimately issued the relevant judgments on 14 December 2006 – approximately two weeks *after* the close of the confirmation hearing – reversing both decisions by the Single Judge in which a number of exceptions to disclosure had been granted for purposes of the confirmation hearing itself.³⁰ Specifically, the Appeals Chamber held that the PTC erred in not providing “sufficient reasoning” for its findings that the identities of certain witnesses should not be disclosed and that certain redactions were warranted under Rule 81(4).³¹

²⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Oral Hearing Held 10 November 2006, ICC-01/04-01/06-T-32-EN, at 28-29 (Transcript, 10 November 2006).

²⁹ *Id.*

³⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (Appeals Chamber, 14 December 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-774 (Appeals Chamber, 14 December 2006).

³¹ *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” *supra* n. 30, ¶ 18; *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” *supra* n. 30, ¶ 28.

On 4 October 2006, Judge Steiner issued another decision representing a significant departure from her earlier decisions regarding disclosure.³² Specifically, although the Single Judge held in May 2006 that the statements, interview transcripts, and interview notes of all witnesses upon whom the Prosecution would rely at the confirmation hearing had to be disclosed in full,³³ in October, she approved the Prosecutor's request to disclose information in summary form where redactions could not adequately protect the identity of the relevant witness.³⁴ In her decision, Judge Steiner again stressed the deteriorating security situation in the DRC,³⁵ as well as the "limited scope of the confirmation hearing."³⁶

d) Pre-Trial Chamber I Finds Sufficient Evidence to Establish Substantial Grounds for the Trial of Mr. Lubanga

Although debates over disclosure continued through early November, the confirmation of charges in the case against Mr. Lubanga did finally commence on 9 November 2006.³⁷ The hearing lasted approximately two weeks, closing on 28 November 2006.³⁸ Two months later, on 29 January 2007, Pre-Trial Chamber I issued its decision regarding

³² See generally *Lubanga*, Decision Concerning the Prosecution Proposed Summary Evidence, *supra* n. 23.

³³ See *supra* n. 8 *et seq.* and accompanying text.

³⁴ See generally *Lubanga*, Decision Concerning the Prosecution Proposed Summary Evidence, *supra* n. 23.

³⁵ *Id.* at 3.

³⁶ *Id.* at 6.

³⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, ¶ 30 (Pre-Trial Chamber I, 29 January 2007).

³⁸ *Id.*

whether there were substantial grounds to believe that Mr. Lubanga had committed the crimes charged.³⁹

The case against Mr. Lubanga was referred to Trial Chamber I on 6 March 2007, nearly one year after the accused was first taken into custody by the ICC.⁴⁰ Notably, despite the lengthy pre-trial proceedings conducted prior to the confirmation of charges hearing, a vast array of issues remained to be resolved before the trial could commence. Indeed, one year after the confirmation hearing had begun, on 9 November 2007, the Trial Chamber issued a decision noting that the Prosecution had only disclosed a fraction of the exculpatory documents in its possession to the Defense and had only identified 11 of 37 witnesses it was planning to call at trial.⁴¹ Moreover, the Trial Chamber held that evidence admitted before the Pre-Trial Chamber at

³⁹ See generally *id.*

⁴⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

⁴¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, ¶¶ 2-7 (Trial Chamber I, 9 November 2007); see also *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07-621, ¶ 45 (Pre-Trial Chamber I, 20 June 2008) ("The Single Judge [Steiner] recalls that, at the time of completion of her duties as Single Judge in the *Lubanga* Case on 5 October 2006, the Prosecution had only identified twenty-nine [A]rticle 54(3)(e) documents as potentially exculpatory or otherwise material to the Defence. As consent had already been secured in relation to sixteen of such documents, and hundreds of documents falling under [A]rticle 67(2) and [R]ule 77 had already been disclosed to the Defence by that time, Judge Claude Jorda, acting as Single Judge of the Chamber, found that the applicable standard at the confirmation hearing encapsulated in the so-called 'bulk rule' had been met. As a result, the Single Judge is surprised to learn that after the confirmation hearing in the *Lubanga* Case, the number of [A]rticle 54(3)(e) documents identified as potentially exculpatory or material to the Defence rose, in fact, into the hundreds.").

the confirmation of charges hearing would not be automatically entered into the trial process, but must be introduced *de novo*, meaning any evidentiary disputes would have to be re-litigated.⁴²

The Trial Chamber has also determined that it possesses no authority to review the Pre-Trial Chamber's decision to amend the legal characterization of the charges against Mr. Lubanga.⁴³ While the Trial Chamber may grant or reject an application by the Prosecutor to *withdraw* the charges, it found that such an application cannot be made until after the trial has begun.⁴⁴ Similarly, although the Trial Chamber may itself modify the legal characterization of the facts under Regulation 55 of the Court's Regulations, the Chamber held it could not exercise that authority until the trial had begun and evidence had been presented.⁴⁵ Thus, the Trial Chamber concluded that the Prosecutor should be prepared to present, and the Defense should be in a position to address, all available evidence on the issue of whether the relevant conduct took place in the context of international or non-international armed conflict.⁴⁶

In sum, it took the Pre-Trial Chamber just short of one year to finally determine that the charges against Mr. Lubanga go "beyond mere

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06-1084, ¶¶ 4-8 (Trial Chamber I, 13 December 2007).

⁴³ *Id.* ¶¶ 39-50.

⁴⁴ *Id.* ¶¶ 43-46.

⁴⁵ *Lubanga*, 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, *supra* n. 42, ¶¶ 47-48.

⁴⁶ *Id.* ¶ 50.

theory or suspicion,”⁴⁷ and the parties were only marginally closer to being prepared for trial than they had been the day Mr. Lubanga was transferred to the Court.

2. *Issues Raised by Pre-Trial Chamber I’s Decision Confirming the Charges Against Mr. Lubanga*

a) Pre-Trial Chamber Clarifies Purpose of the Confirmation Hearing

Among the issues addressed by the Chamber in its 29 January decision was the “purpose” of the confirmation hearing.⁴⁸ Specifically, the Chamber held that the confirmation of charges process is “limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.”⁴⁹ In other words, the Chamber observed, the confirmation of charges hearing is “designed to protect the rights of the Defence against wrongful and wholly unfounded charges.”⁵⁰

b) Pre-Trial Chamber Confirms Charges Despite Exclusion of Considerable Amount of Evidence

The Pre-Trial Chamber also addressed the fact, mentioned above,⁵¹ that the confirmation of charges hearing took place before the Appeals Chamber had issued its decisions reversing Judge Steiner’s decisions regarding redactions requested by the Prosecution.⁵² Importantly, the

⁴⁷ See *infra* n. 49 (citing the standard set forth for confirming the charges by Pre-Trial Chamber I).

⁴⁸ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶¶ 33-39.

⁴⁹ *Id.* ¶ 37.

⁵⁰ *Id.*

⁵¹ See *supra* n. 28, *et seq.* and accompanying text.

⁵² *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶¶ 42-55.

decisions reversed by the Appeals Chamber had authorized the Prosecution to withhold the identity of 24 witnesses relied upon at the confirmation hearing and to redact or summarize a huge range of documents relating to those witnesses, including statements, transcripts, investigators' notes, and reports of the interviews with such witnesses.⁵³ Despite this considerable amount of evidence – and indeed in part because there were so many documents – the Pre-Trial Chamber determined that it would simply exclude the affected evidence from its determination whether to confirm the charges, rather than re-evaluate the Prosecutor's applications as the Appeals Chamber had directed it to do.⁵⁴ The Pre-Trial Chamber justified its decision by noting the requirement that the confirmation hearing be conducted "expeditiously" and explaining that a re-evaluation of the Prosecutor's Rule 81 applications affected by the Appeals Chamber's decisions would take "several months to complete."⁵⁵

c) Pre-Trial Chamber Finds Disclosure of "Bulk" of Exculpatory Evidence Sufficient for Purposes of Confirmation of Charges Process

Yet another issue addressed in the Chamber's 29 January decision was the Defense's claim that the Prosecution had not fulfilled its duty under Article 67(2) of the Rome Statute to disclose exculpatory evidence to the accused prior to the hearing.⁵⁶ For example, on the opening day of the confirmation of charges hearing, counsel for the Defense argued that the disclosure of exculpatory material in the form of summaries was prejudicial because the Defense "could not rely on

⁵³ *Id.* ¶¶ 42-47.

⁵⁴ *Id.* ¶¶ 53-54.

⁵⁵ *Id.* ¶ 54.

⁵⁶ *Id.* ¶ 154.

[the summaries] as evidence, nor could [the Defense] use [the summaries] to conduct further investigations.”⁵⁷ The Defense also pointed out that the Prosecution had identified some 33 documents that were potentially exculpatory, but not disclosed, because the Prosecutor had obtained the documents on the condition of confidentiality.⁵⁸ However, the Chamber dismissed the Defense’s claim in its 29 January 2007 decision, noting that the Prosecutor need only disclose the “bulk” of potentially exculpatory evidence prior to the confirmation hearing, and that the Prosecution had repeatedly stated that it had fulfilled this duty.⁵⁹

d) Confirmation Decision Inconsistent with Charges Presented

Finally, the Chamber determined that substantial grounds existed to commit Mr. Lubanga to trial.⁶⁰ However, rather than confirming the charges as set forth in the Document Containing the Charges, which alleged that Mr. Lubanga had committed the war crime of conscripting, enlisting, and using children to participate actively in non-international armed conflict,⁶¹ PTC I held that Mr. Lubanga

⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Open Session, ICC-01/04-01/06-T-30-EN, at 177:24 – 178:1 (Transcript, 9 November 2006).

⁵⁸ *Id.* at 186:17 – 189:1. The issue of potentially exculpatory documents obtained under an obligation of confidentiality pursuant to Article 54(3)(e) of the Rome Statute is addressed in further detail below with respect to the *Katanga & Ngudjolo* case. *See infra* Part II.B.4. Note that, although the substantial issues currently facing the ICC with respect to the conflict between the Prosecution’s authority to conclude confidentiality agreements and its duties to search for and disclose exculpatory evidence are beyond the scope of this report, the War Crimes Research Office will be issuing a report specifically addressing these issues in late 2008.

⁵⁹ *Lubanga*, Decision Confirming the Charges, *supra* n. 37, ¶ 154.

⁶⁰ *Id.* at 156.

⁶¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of

should be tried, in part, for committing the war crime of conscripting, enlisting, and using children to participate actively in *international* armed conflict.⁶² Notably, the Prosecution had expressly addressed its decision to limit the charges to the context of non-international armed conflict in its Document Containing the Charges, saying that although there was some evidence that the countries of Rwanda and Uganda were involved in supporting militias within the DRC, that evidence did “not suffice to enable the Prosecution to meet its burden of establishing an international armed conflict as the term is defined by international criminal jurisprudence.”⁶³ The Prosecution reiterated this point during the actual confirmation hearing,⁶⁴ and it presented no evidence during the hearing in support of a charge against Mr. Lubanga for committing war crimes in the context of an international – as opposed to non-international – armed conflict. Similarly, the Defense made no submissions at the confirmation of charges hearing on the subject of whether there was sufficient evidence to commit Mr. Lubanga to trial on the basis of allegations that he had committed a war crime in the context of an *international* armed conflict.

Both the Prosecution and the Defense filed applications with the Pre-Trial Chamber seeking leave to obtain interlocutory appellate review of the 29 January 2007 decision, and in particular of the portion of the

Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), ICC-01/04-01/06 (Office of the Prosecutor, 28 August 2006).

⁶² *Lubanga*, Decision Confirming the Charges, *supra* n. 37, at 156-57.

⁶³ *The Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), *supra* n. 61, ¶ 12(1) (citing *The Prosecutor v. Dusko Tadić*, Judgment, ¶¶ 68-171 (International Criminal Tribunal for the former Yugoslavia Appeals Chamber, 15 July 1999)).

⁶⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Open Session, ICC-01/04-01/06-T-33-EN, at 96: 12-23 (Transcript, 13 November 2006).

decision laying out the nature of the charges confirmed by the Chamber.⁶⁵ However, several months after the applications for leave to appeal were filed, PTC I issued a decision rejecting all of the grounds raised by the Prosecution and Defense.⁶⁶ With respect to the request of both parties for leave to obtain interlocutory appellate review of the Pre-Trial Chamber's authority to amend the charges prior to confirmation, the Chamber declared that the issue had been adequately "raised" elsewhere in the case against Mr. Lubanga so as to provide the parties with sufficient notice and an opportunity to be heard.⁶⁷ The Pre-Trial Chamber further explained its action by reasoning that "there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts."⁶⁸ In other words, PTC I seemed satisfied that, even if its decision to amend the charges on its own initiative was improper, the Trial Chamber might choose to correct the error before issuing a final

⁶⁵ See *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 «*Décision Sur la Confirmation des Charges*», ICC-01/04-01/06-806, ¶ 2 (Office of the Prosecutor, 5 February 2007); *The Prosecutor v. Thomas Lubanga Dyilo*, Version Publique Expurgée de la Requête de la Défense en Autorisation d'Interjeter Appel de la Décision de la Chambre Préliminaire I du 29 Janvier 2007 sur la Confirmation des Charges en Conformité avec les Décisions de la Chambre Préliminaire du 7 et 16 Février 2007, ICC-01/04-01/06-836, ¶ 16 (Defence, 22 February 2007).

⁶⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/04-01/06-915, at 21 (Pre-Trial Chamber I, 24 May 2007).

⁶⁷ *Id.* ¶ 43 (citing the confirmation of charges hearing transcript as follows: ICC-01-04-01-06-T-33-EN, at 96, lines 12-23; ICC-01-04-01-06-T-44-EN, at 73, lines 1-4; ICC-01-04-01-06-T-47-EN, at 16, lines 12-20; and ICC-01-04-01-06-T-47-EN, at 49-51).

⁶⁸ *Id.* ¶ 44.

judgment against the accused, and therefore interlocutory review of the decision was unnecessary.⁶⁹

B. THE KATANGA & NGUDJOLO CASE

Approximately four months after the Lubanga case was referred to the Trial Chamber, in July 2007, Pre-Trial Chamber I authorized the issuance of an arrest warrant for a second suspect identified in the context of the situation in the DRC, Germain Katanga.⁷⁰ The Chamber found reasonable grounds to believe that Mr. Katanga is criminally responsible for a range of war crimes and crimes against humanity, including crimes involving sexual slavery and murder.⁷¹ As discussed further below,⁷² the case against Mr. Katanga was eventually joined with the one against Mathieu Ngudjolo Chui, who has been accused of bearing criminal responsibility for the same crimes that are alleged against Mr. Katanga.⁷³

I. Delays Continue

a) Disclosure Issues Again Prove to Be an Obstacle to the Expeditious Conduct of Proceedings

Although Mr. Katanga was not transferred to the custody of the ICC until October 2007,⁷⁴ Judge Sylvia Steiner – once again appointed to

⁶⁹ *See id.*

⁷⁰ *The Prosecutor v. Germain Katanga*, Warrant of Arrest for Germain Katanga, ICC-01/04-01/07 (Pre-Trial Chamber I, 2 July 2007).

⁷¹ *Id.*

⁷² *See infra* n. 85 *et seq.* and accompanying text.

⁷³ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257 (Pre-Trial Chamber I, 10 March 2008).

⁷⁴ *See* Int'l Criminal Court Press Release, *Second arrest: Germain Katanga*

act as Single Judge⁷⁵ – began to address issues of disclosure as soon as PTC I had authorized the arrest warrant.⁷⁶ For instance, on 6 July 2007, Judge Steiner issued a decision “establishing from the outset” a disclosure calendar, expressing hope that such action would lead to more expeditious pre-trial proceedings as compared with the *Lubanga* case.⁷⁷ Nevertheless, a number of disclosure issues remained outstanding at the time of Mr. Katanga’s transfer to the Court on 18 October 2007,⁷⁸ thus the date of the confirmation hearing was initially set for 28 February 2008.⁷⁹

transferred into the custody of the ICC, ICC-20071018-250-En, 18 October 2007.

⁷⁵ *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, ICC-01/04-328 (Pre-Trial Chamber I, 11 May 2007) (designating Judge Steiner as Single Judge for the DRC situation “and any related case”).

⁷⁶ See, e.g., *The Prosecutor v. Germain Katanga*, Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials for the Prosecution Application for a Warrant of Arrest Against Germain Katanga, ICC-01/04-01/07-5 (Pre-Trial Chamber I, 6 July 2007); *The Prosecutor v. Germain Katanga*, Decision Altering the Calendar for the Submission of Formatted Version of the Arrest Warrant Application and Redacted Witness Statements, ICC-01/04-01/07-9 (Pre-Trial Chamber I, 10 July 2007); *The Prosecutor v. Germain Katanga*, Decision on the Prosecution’s Application Pursuant to Rules 81(2) and 81(4), ICC-01/04-01/07-16 (Pre-Trial Chamber I, 29 August 2007).

⁷⁷ *Katanga*, Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials for the Prosecution Application for a Warrant of Arrest Against Germain Katanga, *supra* n. 76, at 5.

⁷⁸ *The Prosecutor v. Germain Katanga*, Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest Against Germain Katanga, ICC-01/04-01/07-60, Public Redacted Version of ICC-01/04-01/07-28-US-Exp (Pre-Trial Chamber I, 18 October 2007).

⁷⁹ See *The Prosecutor v. Germain Katanga*, Transcript of First Appearance, ICC-01/04-01/07-T-5, at 29: 12-13 (22 October 2007).

In accordance with the initial date of the confirmation hearing, Judge Steiner issued a set of deadlines to ensure that the Defense would have access to all of the evidence on which the Prosecutor intended to rely, as well as the bulk of exculpatory evidence, within thirty days of the start of the hearing.⁸⁰ However, as of 30 January 2008, requests relating to “more than half of the witnesses on which the Prosecution intend[ed] to rely at the confirmation hearing” remained pending before the Victims and Witnesses Unit.⁸¹ At the same time, the Prosecutor had instituted a new practice, not used in the context of the *Lubanga* proceedings, which involved requesting redactions to witness statements and related material to protect the names or identifying information of so-called “innocent third parties” – *i.e.*, persons who were neither Prosecution sources themselves nor related in any way to a Prosecution source, but who are nevertheless mentioned in a witness statement.⁸² Thus, even if a witness was accepted into the Court’s protection program, meaning that the Prosecution would be required to reveal the identity of the witness, the Prosecution would still be submitting a high number of redaction requests for the material related to that protected witness.⁸³ In other words, the Single Judge would

⁸⁰ *The Prosecutor v. Germain Katanga*, Corrigendum to the Decision Establishing Time Limits for Decisions on Protective Measures and Requests for Redactions, ICC-01/04-01/07-103 (Pre-Trial Chamber I, 13 December 2007).

⁸¹ *The Prosecutor v. Germain Katanga*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, ICC-01/04-01/07-172, at 6 (Pre-Trial Chamber I, 30 January 2008).

⁸² *See, e.g., The Prosecutor v. Germain Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-90, ¶¶ 44-56 (Pre-Trial Chamber I, 7 December 2007); *The Prosecutor v. Germain Katanga*, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-160, ¶ 5 (Pre-Trial Chamber I, 23 January 2008).

⁸³ *See, e.g., Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, *supra* n. 82, ¶ 10, in which the

have considerable work to do once the VWU reached a decision for each of the witnesses seeking protection, regardless of whether protective measures were granted. Accordingly, on 30 January 2008, the Pre-Trial Chamber indefinitely postponed the confirmation hearing scheduled for 28 February.⁸⁴

b) Katanga and Ngudjolo Cases are Joined

A further delay arose in the confirmation of Mr. Katanga when, in March 2008, the Pre-Trial Chamber determined that the case against the third suspect detained by the ICC – Mathieu Ngudjolo Chui – would be joined with that of Mr. Katanga.⁸⁵ Mr. Ngudjolo initially appeared before the ICC on 11 February 2008,⁸⁶ at which point the Pre-Trial Chamber designated 21 May 2008 as the first day of the confirmation of charges hearing.⁸⁷ The following month, when PTC I joined the two cases, the Chamber maintained the 21 May date for the start of the joint confirmation of charges hearing.⁸⁸ In view of this date, Judge Steiner once again set forth a timetable designed to ensure that the necessary disclosure between the parties would be complete as required for a 21 May 2008 confirmation hearing.⁸⁹

Single Judge notes that her decision deals only with the “redactions requested by the Prosecution in relation to the statements and interviews of seven witnesses who have already been accepted in the protection program of the Victims and Witnesses Unit,” but that the confidential portion of the decision analyzing those requests was nevertheless “particularly lengthy.”

⁸⁴ *Katanga*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, *supra* n. 81.

⁸⁵ *Katanga & Ngudjolo*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, *supra* n. 73.

⁸⁶ *See id.* at 3.

⁸⁷ *Id.*

⁸⁸ *Id.* at 12.

⁸⁹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision

2. Disclosure Scaled Back

In late April, the Pre-Trial Chamber again postponed the confirmation of charges hearing, pushing the date back to 27 June 2008.⁹⁰ Around the same time, on 25 April 2008, Judge Steiner issued yet another decision relating to the level of disclosure required prior to the start of the confirmation of charges hearing.⁹¹ As a general matter, the judge reiterated that the confirmation hearing has a “limited scope” and must be seen only as a “means to distinguish those cases that should go to trial from those that should not go to trial.”⁹² The judge also stressed the requirement that the confirmation hearing take place within a “reasonable time” after a person’s surrender or voluntary appearance before the Court, and noted that Mr. Katanga had been in the ICC’s custody since October 2007.⁹³

Judge Steiner then made a number of observations regarding the Prosecution’s practices regarding witness protection during the pre-trial stage of proceedings.⁹⁴ For example, the judge highlighted the “Prosecution’s practice of referring the great majority of the witnesses on whom it intends to rely at the confirmation hearing” to the witness

Establishing a Calendar in the Case Against Germain Katanga and Mathieu

⁹⁰ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision Establishing a Calendar According to the Date of the Confirmation Hearing: 27 June 2008, 01/04-01/07-459 (Pre-Trial Chamber I, 29 April 2008).

⁹¹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr (Pre-Trial Chamber I, 25 April 2008).

⁹² *Id.* ¶ 6.

⁹³ *Id.* ¶¶ 8-9.

⁹⁴ *Id.* ¶ 55.

protection program.⁹⁵ She also observed that the Prosecution has demonstrated a tendency to rely on a “high number of witnesses” at the confirmation hearing.⁹⁶ For instance, the judge noted that the Prosecution had relied on evidence from “around thirty-five witnesses” in the *Lubanga* confirmation hearing, a case “confined to the enlistment, conscription and active use in hostilities of children under the age of 15 in a handful of training camps and military operations.”⁹⁷ These factors, according to the judge, have “led to a situation that is not sustainable in relation to every confirmation hearing held before this Court,”⁹⁸ particularly as the witness protection programs for each case do not come to an end at the close of the confirmation hearings, and indeed are likely to grow as the Prosecutor prepares for trial.

Importantly, as Judge Steiner pointed out, the problem is not only one of exceeding the capacity of the Court’s witness protection program, but also one of defense rights. She stressed that, in relation to the case against Mr. Katanga, the Prosecution has submitted requests for relocation to the VWU up to three months *after* the transfer of the suspect to the custody of the ICC.⁹⁹ Given that it takes the VWU “at least five to six months... to decide upon and implement the decisions on the Prosecution’s requests for relocation,”¹⁰⁰ this has a serious impact on the timing of the confirmation hearing. Furthermore, it is only *after* the Prosecution’s requests for relocation have been

⁹⁵ *Id.* ¶ 56. Indeed, as of the judge’s April 2008 decision, the Prosecution had made applications for relocation in relation to all but three witnesses on whom it intended to rely at the confirmation hearing. *Id.* ¶ 57.

⁹⁶ *Id.* ¶ 58.

⁹⁷ *Id.* ¶ 58.

⁹⁸ *Id.* ¶¶ 60-61.

⁹⁹ *Id.* ¶ 62.

¹⁰⁰ *Id.*

addressed by the VWU that the Prosecution is able to apply to the Pre-Trial Chamber for redactions.¹⁰¹ These applications are themselves very time consuming, as the requests for redactions in regard to those witnesses *not* seeking anonymity alone extended to “hundreds of names and locations.”¹⁰² Lastly, it is only after the Chamber decides upon all the requests for redactions that the 30-day period given to the Defense for final preparation prior to the confirmation hearing begins to run.¹⁰³ Thus, the manner in which the pre-trial proceedings are being conducted, the Single Judge concluded, is not only unsustainable, but has created a situation that is “not consistent with the fact that the confirmation hearing has a limited scope, must be carried out within a reasonable time after the surrender or voluntary appearance of the suspect before the Court, and must also aim at facilitating the preparation for trial in the event that the charges are confirmed.”¹⁰⁴

In light of these observations, and the large number of requests for redactions still pending, Judge Steiner decided that, as a general rule, she would reject the Prosecution’s requests for redactions in documents relating to witnesses on whom it intended to rely at the hearing, thereby leaving it to the Prosecution to disclose summaries of the evidence rather than the statements of the witnesses themselves.¹⁰⁵ The judge justified her decision, in part, by noting that summaries – unlike redactions – did not have to be reviewed by the Chamber.¹⁰⁶ Furthermore, she explained that “the difference in probative value

¹⁰¹ *Id.* ¶ 63.

¹⁰² *Id.* ¶ 64.

¹⁰³ *Id.* ¶ 69.

¹⁰⁴ *Id.* ¶ 71.

¹⁰⁵ *Id.* ¶ 90.

¹⁰⁶ *Id.* ¶ 112.

between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal.”¹⁰⁷ Judge Steiner also approved the Prosecution’s request that, in the event witness statements in the possession of the Prosecution contained certain exculpatory material, the Prosecution be permitted to fulfill its obligations to disclose exculpatory evidence by way of summaries that omitted information that may identify the source of the exculpatory evidence.¹⁰⁸ The judge again explained that “the benefit for Defence’s investigation of having access to a heavily redacted version of the relevant statements, interview notes and interview transcripts will be, at best, very limited,” and that the “difference in probative value between a summary, and a heavily redacted version, of the relevant [material] is negligible.”¹⁰⁹ Finally, the judge held that, with respect to some 47 additional potentially exculpatory documents upon which the Prosecution did not intend to rely at the hearing, the Prosecution could itself make whatever redactions it considered necessary prior to disclosure without the prior approval of the Single Judge, and the Defense would be given the opportunity to request that the redactions be lifted.¹¹⁰

3. The Single Judge Grants Non-Anonymous Victims Extensive Participation Rights in the Context of the Confirmation Hearing

In addition to her many decisions dealing with disclosure in the Katanga & Ngudjolo case, Single Judge Steiner issued a significant decision regarding the scope of victims’ participation rights during the

¹⁰⁷ *Id.* ¶ 89.

¹⁰⁸ *Id.* ¶¶ 98-110.

¹⁰⁹ *Id.* ¶ 130.

¹¹⁰ *Id.* ¶ 140.

confirmation hearing.¹¹¹ Specifically, in May 2008, Judge Steiner set forth the procedural rights of four victims who, unlike the victims who participated in the *Lubanga* confirmation hearing, were willing to reveal their identities to the Defense.¹¹² As Judge Steiner reiterated in her decision, Article 68(3) of the Rome Statute, the provision governing victim participation in proceedings before the ICC,¹¹³ does not “pre-establish the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case, but rather leaves its determination to the discretion of the Chamber.”¹¹⁴ The judge also noted that, as PTC I held in the *Lubanga* case,¹¹⁵ the procedural rights of victims requiring anonymity must necessarily be limited to comply with the fundamental principle of “prohibiting anonymous accusations.”¹¹⁶ Thus, as in *Lubanga*, Judge Steiner held

¹¹¹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474 (Pre-Trial Chamber I, 13 May 2008).

¹¹² *Id.*

¹¹³ Rome Statute, *supra* n. 1, Art. 68(3) (“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”).

¹¹⁴ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 111, ¶ 53.

¹¹⁵ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01-06/462, at 8 (Pre-Trial Chamber I, 22 September 2006).

¹¹⁶ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 111, ¶ 181.

that any victim not wishing to reveal his or her identity would be prevented from adding “any point of fact or any evidence” at the confirmation of charges hearing, and would be prohibited from questioning any witnesses presented at the hearing.¹¹⁷ At the same time, however, the judge held that non-anonymous victims could enjoy all of the rights of anonymous victims – including the rights to give opening and closing arguments and to file written submissions of “evidentiary and legal issues to be discussed at the confirmation hearing”¹¹⁸ – and would also be permitted to examine witnesses presented at the hearing.¹¹⁹

4. The Defense Seeks Stay of Proceedings Due to the Prosecution’s Inability to Disclose Potentially Exculpatory Material

Throughout the pre-trial proceedings in the Katanga & Ngudjolo cases, the Prosecutor had, at the request of the Single Judge, periodically been submitting reports on the status of the Prosecution’s ability to disclose to the Defense potentially exculpatory documents that were subject to confidentiality restrictions under Article 54(3)(e) of the Rome Statute.¹²⁰ Article 54(3)(e) provides that the Prosecutor may

¹¹⁷ *Id.* ¶ 182.

¹¹⁸ *Id.* ¶ 143.

¹¹⁹ *Id.* ¶¶ 137-38.

¹²⁰ *See, e.g., The Prosecutor v. Germain Katanga*, Prosecution’s Report on the Status of the Procedures Initiated Under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature Under Article 67(2) of the Statute, ICC-01/04-01/07-77 (Office of the Prosecutor, 14 November 2007); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Fifth Prosecution’s Report on the Status of the Procedures Initiated Under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature Under Article 67(2) of the Statute, ICC-01/04-01/07-502 (Office of the Prosecutor, 23 May 2008).

documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.”¹²¹ Thus, for example, in November 2007, the Prosecution informed the judge that it had “so far reviewed 1000 documents that were collected under the condition of confidentiality as set forth in Article 54(3)(e)” that were considered relevant to the *Katanga* case and, of these 1000 documents, identified 164 documents as being potentially exculpatory under Article 67(2).¹²² Although the Prosecutor had submitted requests to the so-called “information providers” to lift the confidentiality restrictions with regard to the exculpatory documents, by late May, the Prosecution had received permission to disclose a total of just 7 documents, while the information providers had rejected a total of 28 requests for disclosure.¹²³ In addition, the Prosecutor informed the Chamber in late May that an additional 94 documents had been identified as material to the Defence pursuant to Rule 77.¹²⁴

¹²¹ Rome Statute, *supra* n. 1, Art. 54(3)(e).

¹²² *Katanga*, Prosecution’s Report on the Status of the Procedures Initiated Under Articles 54(3)(e), *supra* n. 120, ¶¶ 1-2. As explained above, Article 67(2) provides that, “[i]n addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” See Rome Statute, *supra* n. 1, Art. 67(2).

¹²³ *Katanga*, Prosecution’s Report on the Status of the Procedures Initiated Under Articles 54(3)(e), *supra* n. 120, ¶¶ 2-3.

¹²⁴ *Id.* ¶ 4. Rule 77 provides that the Prosecutor “shall, subject to the restrictions on disclosure as provided for in the Statute and in [R]ules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.” ICC Rules, *supra* n. 8, R. 77.

On 19 June 2008, following a decision by the Trial Chamber in the *Lubanga* case to stay the proceedings in light of the volume of potentially exculpatory documents that the Prosecution could not disclose to the Defense due to Article 54(3)(e) restrictions,¹²⁵ the Defense in the *Katanga & Ngudjolo* case filed a motion seeking the same relief.¹²⁶ In addition to arguing that the Prosecution's approach to Article 54(3)(e) constituted a "wholesale and serious abuse" of the Rome Statute,¹²⁷ the Defense claimed that a fair trial was not possible under the circumstances, and therefore asked the Pre-Trial Chamber to "stay proceedings in the case" and to "convene a hearing discussing further steps to be taken."¹²⁸

Judge Steiner responded the following day.¹²⁹ As an initial matter, she reiterated that Article 67(2) and Rule 77 are applicable for the purposes of the confirmation hearing, and that the Prosecution's duty to disclose materials governed by those provisions is "a core component of the accused's right to a fair trial."¹³⁰ At the same time,

¹²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01-06/1401 (Trial Chamber I, 13 June 2008).

¹²⁶ See generally *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Observations on Behalf of Mr. Germain Katanga on the Prosecutor's Disclosure Obligations, Together with a Related Application for a Stay of Proceedings, ICC-01/04-01/07-611 (Defense, 19 June 2008).

¹²⁷ *Id.* ¶ 8.

¹²⁸ *Id.* ¶¶ 19, 27.

¹²⁹ *Katanga & Ngudjolo*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *supra* n. 41.

¹³⁰ *Id.* ¶ 3 (citing *Lubanga*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain

however, Judge Steiner recalled that “the specific features and limited scope and purpose of the confirmation hearing” allow the Prosecution to fulfill its duty with regard to the disclosure of exculpatory material by turning over the “bulk” of the relevant material prior to the hearing.¹³¹ The judge also held that, although the *Lubanga* Trial Chamber had rejected the Prosecution’s proposal that it fulfill its disclosure obligations by providing material “analogous” to the exculpatory documents protected by confidentiality agreements in that case, use of analogous material would be permitted for the purposes of fulfilling the Prosecution’s duty at the confirmation of charges stage.¹³² According to the Prosecution, it had already disclosed documents containing information “analogous” to the information appearing in 142 of the 231 outstanding exculpatory documents protected by Article 54(3)(e).¹³³ Adding this figure to the approximately 388 exculpatory items *not* protected by a confidentiality agreement that had already been disclosed to the Defense, Judge Steiner determined that the Prosecution had adequately fulfilled its disclosure duties for purposes of the confirmation hearing, and therefore denied the Defense’s request for a stay of proceedings.¹³⁴

Other Issues Raised at the Status Conference on 10 June 2008, *supra* n. 125, ¶ 77).

¹³¹ *Id.* ¶ 8.

¹³² *Id.* ¶¶ 92-93.

¹³³ *Id.* ¶ 112.

¹³⁴ *Id.* ¶¶ 110-25.

5. *Pre-Trial Chamber I Confirms the Majority of the Charges Against Both Mr. Katanga and Mr. Ngudjolo*

The confirmation hearing in the Katanga & Ngudjolo case commenced on 27 June 2008 and ended on 16 July 2008. Just over two months after the conclusion of the hearing, on 1 October 2008, Pre-Trial Chamber I issued a decision confirming the majority of the charges against each of the two accused.¹³⁵ In its decision, the Chamber reiterated that the purpose of the confirmation process was to “protect the rights of the Defence against wrongful and wholly unfounded charges.”¹³⁶ The Chamber also affirmed that the “confirmation hearing has a limited scope and purpose and should not be seen as a ‘mini-trial’ or a ‘trial before the trial.’”¹³⁷

¹³⁵ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ICC-01/04-01/07-611 (Pre-Trial Chamber I, 1 October 2008) (note that although the charges were confirmed on 26 September 2008, the decision was not publicly released until 1 October 2008).

¹³⁶ *Id.* ¶ 63.

¹³⁷ *Id.* ¶ 64.

III. THE EVOLUTION OF THE CONFIRMATION OF CHARGES PROCESS IN THE DRAFTING OF THE ROME STATUTE AND ICC RULES

Given the various problems that have arisen during the process of confirming the charges in the first two cases being tried by the International Criminal Court, it is useful to examine the drafting history of the provisions governing that process to ascertain both the goals and the concerns of the drafters.

A. INTERNATIONAL LAW COMMISSION DRAFT STATUTE

The process of developing a Statute for the ICC began in earnest in 1994 with the creation of the International Law Commission (ILC) Draft Statute, which formed the basis of the negotiations going forward.¹³⁸ The Draft Statute, which was heavily influenced by the common law tradition,¹³⁹ gave the Prosecutor of the Court sole responsibility for determining when to commence an investigation or prosecution.¹⁴⁰ However, once the Prosecutor determined that there was sufficient basis to proceed with a prosecution, he or she was required to submit an indictment, together with the necessary supporting documents, to the Presidency of the Court, which would

¹³⁸ Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group*, International Law Commission, A/CN.4/L.491/Rev.1, 8 July 1994. See also M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 1, 1-35 (Bassiouni ed., 1998) (discussing the development of the International Criminal Court).

¹³⁹ See, e.g., Silvia A. Fernández de Gurmendi, *International Criminal Law Procedures: The Process of Negotiations*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 217, 221 (Lee ed., 1999).

¹⁴⁰ Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session (2 May-22 July 1994), vol. II, 2 May - 22 July 1994, A/CN.4/SER.A/1994/Add.1 (Part 2), Art. 26 and 27.

then determine whether or not a *prima facie* case existed under the terms of the Statute.¹⁴¹

The ILC Draft Statute contained commentary clarifying a number of the provisions set forth by the Commission. For example, the commentary made clear that a “*prima facie*” case was “understood to be a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge.”¹⁴² The commentary also noted that, although the review of the indictment was considered “necessary in the interests of accountability and in order to ensure that the court only exercises jurisdiction in circumstances provided by the statute, it must be emphasized that confirmation of the indictment is in no way to be seen as a pre-judgment by the court as to the actual guilt or innocence of the accused.”¹⁴³ In this context, the draft stressed that the “confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at trial.”¹⁴⁴

In the event that the Presidency determined that a *prima facie* case existed, it would confirm the indictment and establish a Trial Chamber.¹⁴⁵ Notably, the Presidency could only amend the indictment as prepared by the Prosecutor upon the request of the Prosecutor. The Presidency could, however, “ask the Prosecutor to provide further information, and [could] suspend consideration of whether to confirm an indictment while it is being sought, provided that, having regard to

¹⁴¹ *Id.*

¹⁴² *Id.* Art. 27 Commentary, ¶ 1.

¹⁴³ *Id.* ¶ 4.

¹⁴⁴ *Id.* Art. 27(1).

¹⁴⁵ *Id.* Art. 27(2).

[Article 9(3)] of the International Covenant on Civil and Political Rights, the procedure is not unnecessarily delayed.”¹⁴⁶

Finally, under the Draft Statute, the Presidency was authorized to make, at its discretion, “any further orders required for the conduct of the trial,”¹⁴⁷ including orders requiring disclosure of evidence within a “sufficient time before the trial to enable the preparation” of the defense and orders providing for the “protection of the accused, victims and witnesses and of confidential information.”¹⁴⁸

Nevertheless, the commentary also made clear that the Trial Chamber “should assume responsibility for subsequent pre-trial procedures once it is convened.”¹⁴⁹

B. COMMENTS TO THE 1994 DRAFT STATUTE

Following the submission of the ILC’s Draft Statute to the United Nations General Assembly, the latter created an *Ad hoc* Committee on the Establishment of an International Criminal Court to discuss and

¹⁴⁶ *Id.* Art. 27 Commentary, ¶ 3. Article 9(3) of the International Covenant on Civil and Political Rights states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.” International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49, Art. 9(3).

¹⁴⁷ 1994 Draft Statute, *supra* n. 140, Art. 27(5).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Art. 27 Commentary, ¶ 7.

comment on the draft.¹⁵⁰ Comments to the Draft Statute were also submitted by member states of the United Nations, as well as international organizations such as the International Commission of Jurists.¹⁵¹ Interestingly, although the 1994 Draft Statute's provisions regarding the initiation of a prosecution largely reflected the process put in place for both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – created by the United Nations Security Council in 1993 and 1994, respectively¹⁵² – the fact that the provisions of the ICC

¹⁵⁰ *Ad Hoc* Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/50/22, ¶ 1, 6 September 1995.

¹⁵¹ *See, e.g., Ad Hoc* Committee on the Establishment of an International Criminal Court, Comments Received Pursuant to Paragraph 4 of the General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, U.N. Doc. A/AC.244.1, at 2, 20 March 1995; International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper*, August 1995.

¹⁵² *See* Report of the Secretary-General Containing the Statute of the International Tribunal, S/25704, 3 May 1993, Art. 18(4) (“Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.”); *id.* Art. 19(1) (“The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”); Statute of the International Tribunal for Rwanda, *annexed to* United Nations Security Council Res. 955, S/RES/955, 8 November 1994, Art. 17(4) (“Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.”); *id.* Art. 18(1) (“The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”).

were subject to negotiations among future member states resulted in a number of suggested changes to the process, as discussed immediately below. Note, however, that there is no evidence that the process of initiating prosecutions in either the ad hoc criminal tribunal for the former Yugoslavia or the tribunal for Rwanda was seen as problematic by the drafters of the Rome Statute. In fact, those tribunals were still in their early stages of operation when comments were made to the 1994 Draft Statute for the International Criminal Court.

Generally speaking, the comments to the 1994 Draft Statute's provisions on the initiation of prosecutions largely dealt with the following three categories: the balance of authority between the Prosecutor and the Presidency, the appropriate standard of review, and the rights of the accused.

1. Balance of Authority

Various comments on the 1994 Draft Statute expressed concern about the balance of power between the Prosecutor and the Presidency with respect to the indictment.¹⁵³ However, these concerns were not necessarily aligned, as some worried that the "broad powers" of the Presidency "undermined the independence of the Prosecutor,"¹⁵⁴ while

¹⁵³ See, e.g., 1995 Report of the *Ad hoc* Committee, *supra* n. 150, ¶ 143; *Third ICJ Position Paper*, *supra* n. 151, Ch. VI.A.1(c); Preparatory Committee on the Establishment of an International Criminal Court, *Draft Report of the Preparatory Committee*, U.N. Doc. A/AC.249/L.15, Art. 27, 23 August 1996.

¹⁵⁴ 1995 Report of the *Ad hoc* Committee, *supra* n. 150, ¶ 143; see also 1996 Draft Report of the Preparatory Committee, *supra* n. 153, Art. 27 ("As regards the reviewing body [for indictments], concerns were expressed over the concentration of authority vested with the Presidency as envisaged in the draft statute, and it was suggested that it would be more appropriate to give certain pre-trial responsibilities to another body, independent of the Prosecutor and the trial and appellate chambers.").

others felt that the process for commencing prosecutions gave too much power to the Prosecutor.¹⁵⁵ At least one group thought the balance between the Prosecutor and the Presidency was just right, especially if the Prosecutor were given the power to initiate investigations on his or her own initiative, in which case the Presidency could provide a “reasonable check on self-initiated investigations and indictments,” thereby ensuring “fairness as well as prosecutorial effectiveness.”¹⁵⁶

2. *Standard of Review*

Another theme common to many of the comments on the Draft Statute was the appropriate standard of review. For example, at least one commentator criticized the use of the term “prima facie” as the relevant legal standard; saying it was “imprecise and even subjective.”¹⁵⁷ It was suggested that the term “substantiated” be employed instead, as this would be “in keeping with the terminology used by most legal systems.”¹⁵⁸ Another expressed the view that “whatever standard was ultimately employed should be sufficiently high to justify trial proceedings.”¹⁵⁹ A related issue was how much information the Prosecutor would be required to present to have the indictment confirmed.¹⁶⁰ Thus, for example, in 1996, the Preparatory Committee on the Establishment of an International Criminal Court –

¹⁵⁵ 1995 Report of the *Ad hoc* Committee, *supra* n. 150, ¶ 132 (noting the view that the draft provisions on investigations and prosecutions “should be carefully reviewed to ensure, *inter alia*, a proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused.”).

¹⁵⁶ *Third ICJ Position Paper*, *supra* n. 151, Ch. VI.A.1(c).

¹⁵⁷ Comments Received by the *Ad hoc* Committee, *supra* n. 151, at 23.

¹⁵⁸ *Id.*

¹⁵⁹ 1996 Draft Report of the Preparatory Committee, *supra* n. 153, Art. 27.

¹⁶⁰ *Id.*

the successor to the Ad hoc Committee set up in 1995 – noted that suggestions had been made that the indictment filed by the Prosecutor should “contain more detailed information” than was called for in the 1994 Draft Statute.¹⁶¹ However, the proposal also stipulated that “if the evidence collected in the case was excessive, then a summary could be provided to the reviewing body, which would have the right to request further information as needed.”¹⁶²

3. *Rights of the Accused*

Finally, a number of the comments to the Draft Statute touched on the rights of the accused to challenge the charges prior to confirmation, and the related topic of whether the accused was entitled to disclosure from the Prosecutor before the indictment was confirmed. On the one hand, it was seen as desirable by many to have public confirmation “hearings;”¹⁶³ on the other, there was the ongoing concern, first noted in the commentary to the 1994 Draft Statute, that the “confirmation of the indictment is in no way to be seen as a pre-judgment by the court as to the actual guilt or innocence of the accused.”¹⁶⁴

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (noting that some supported the idea of holding “confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes.”).

¹⁶⁴ 1994 Draft Statute, *supra* n. 140, Art. 27 Commentary, ¶ 4.

C. PROPOSALS FOR THE CREATION OF AN “INVESTIGATING CHAMBER”

By 1996, the various comments to the Draft Statute culminated in proposals from numerous states calling for the creation of some form of “investigating chamber” to replace the Presidency, as well as other changes to the process for confirming the indictment.¹⁶⁵ The first of these proposals came from France, which advocated the creation of “Preliminary Investigations Chambers” to “perform pre-trial functions” similar to those given to the Presidency under the ILC Draft.¹⁶⁶ One significant difference between the 1994 Statute and the French proposal was that the latter would vest the Preliminary Investigations Chambers with the power to amend the indictment *sua sponte*.¹⁶⁷ Another proposal was that of Argentina, which

¹⁶⁵ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. II (Compilation of Proposals), U.N. Doc. A/51/22, at 8 (1996) (France calling for creation of preliminary investigations chambers and Netherlands called for creation of an investigative judge); *id.* at 21 (France proposing that a preliminary investigations chamber would “perform pre-trial functions”; *id.* at 23 (Japan suggesting that “[j]udges not members of the Appeals Chamber shall be available to serve on Trial Chamber and Pre-trial Chambers”); *id.* at 24 (Austria called for the President to establish Indictment Chamber); *id.* at 25 (delegations from Algeria, Egypt, Jordan, Kuwait, Libyan Arab Jamahiriya, and Qatar also calling for the creation of Chamber on indictments and preliminary matters); *id.* at 26 (Switzerland also calling for Indictment Chamber); *id.* at 120-21 (proposing to transfer responsibility of pre-trial functions to an Indictment Chamber/Preliminary Investigations Chamber and allow the Presidency/Indictment Chamber to require the Prosecutor to present additional material in support of any count).

¹⁶⁶ Draft Statute for the International Criminal Court: Working Paper Submitted by France to the Preparatory Committee on the Establishment of an ICC, A/AC.249/L.3, Art. 10, 6 August 1996.

¹⁶⁷ *Id.* Art. 48(5) (“Following the hearing and after deliberations, the Preliminary Investigations Chamber may: Confirm the indictment in its entirety; Confirm only part of the indictment and amend it, either by declaring the case inadmissible in part, for the reasons listed in article 35, if

recommended the creation of an “Indictment Chamber” with the power to review the indictment and request the Prosecutor to present additional evidence, but without authority to change the charges or the legal characterization of the facts.¹⁶⁸

Notably, both the French and the Argentine proposals would allow the accused – who would not be subject to arrest under the charges until after the indictment was confirmed – to be informed of the date and time of the review of the indictment so that he or she could attend voluntarily to defend against the charges.¹⁶⁹ The French proposal would ensure that the suspect would receive a copy of the proposed indictment and the supporting evidence prior to the preliminary chamber’s review,¹⁷⁰ and the Argentine proposal specified that the indictee would be entitled to “raise objections against the indictment, point out any defects it may contain, criticize the evidence supporting it and draw attention to any evidence relevant to a decision on the existence of a *prima facie* criminal case that was omitted by the Prosecutor.”¹⁷¹

An Informal Group Report published by the Preparatory Committee at the end of August 1996 included both the French and the Argentine

the Court has not already ruled on this issue, or by withdrawing certain charges deemed not sufficiently serious, or by giving some facts another characterization, in accordance with articles 27 to 32; Refuse to confirm the indictment.”).

¹⁶⁸ Working Paper Submitted by Argentina on the Rules of Procedure to the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/L.6, R. 61, 13 August 1996.

¹⁶⁹ Working Paper by France, *supra* n. 166, Art. 48; Working Paper Submitted by Argentina, *supra* n. 168, R. 61.

¹⁷⁰ Working Paper by France, *supra* n. 166, Art. 48.

¹⁷¹ Working Paper Submitted by Argentina, *supra* n. 168, R. 61.

proposals for consideration.¹⁷² However, such proposals “raised concerns among those delegations who feared the excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor.”¹⁷³ For instance, some participants in the 1996 meetings of the Preparatory Committee argued that the “authority of a judicial body should be limited” in order “to preserve prosecutorial discretion and independence.”¹⁷⁴ Similarly, “[m]any delegations” represented on the Working Group on Procedure, which met in 1997, flatly opposed the creation of a supervisory chamber, arguing that “a supervisory role for the court would tend to undermine the Prosecutor’s independence.”¹⁷⁵

D. FINALIZING THE ROME STATUTE PROVISIONS ON THE CONFIRMATION OF CHARGES

In early 1998, an intersessional meeting was held in Zutphen, the Netherlands for the purpose of facilitating the work of the final session of the Preparatory Committee later that year, in particular, by preparing a “practical working document” that encapsulated the various proposed amendments to the Draft Statute.¹⁷⁶ The article covering “commencement of prosecution” in the Zutphen Draft shows that there was still significant debate regarding the appropriate body

¹⁷² Report of the Informal Group on Procedural Questions, Fair Trial and the Rights of the Accused: Part 4, Investigation and Prosecution, U.N. Doc. A/AC.249/CRP.14, Art. 27(2), 27 August 1996.

¹⁷³ Fabricio Guariglia, *Article 56*, in COMMENTARY ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 736, 737 (Otto Triffterer ed. 1999).

¹⁷⁴ 1996 Draft Report of the Preparatory Committee, *supra* n. 153, at 5.

¹⁷⁵ *Non-Paper: Supervision Chamber*, United Kingdom, Non-Paper/WG.4/No. 3, ¶ 2(b), 5 August 1997.

¹⁷⁶ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13, at 8, 4 February 1998.

for reviewing indictments,¹⁷⁷ the standard to be applied by that body,¹⁷⁸ and the rights of the accused in relation to the review.¹⁷⁹ The Draft also reflected continued disagreement as to whether the indictment could be amended absent the request of the Prosecutor as the relevant provision, which was bracketed in its entirety – and which also contained several internal brackets, signifying substantial disagreement among the drafters – stated that, following the confirmation hearing, a “Pre-Trial Chamber”¹⁸⁰ may:

- (a) confirm the indictment in its entirety;
- (b) confirm only part of the indictment [and amend it], giving a different qualification to the facts;
- (c) order further investigation];
- (d) refuse to confirm the indictment.¹⁸¹

Nor did the final session of the Preparatory Committee – held in March and April 1998 – resolve any of the ongoing debates. Proposals submitted during the session included a suggestion submitted by a group of countries echoing an earlier criticism of the term “prima facie,” arguing it should be replaced with a “clearer expression” of the

¹⁷⁷ *Id.* at 95 (“The [Presidency] [Pre-Trial Chamber] shall examine the indictment...”).

¹⁷⁸ *Id.* (“The [Presidency] [Pre-Trial Chamber] shall examine the indictment... and determine whether (a) [a prima facie case exists] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence against the accused] with respect to a crime within the jurisdiction of the Court...”).

¹⁷⁹ *Id.* (“After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the accused...”).

¹⁸⁰ Note that it is not clear from the drafting history how the term “Pre-Trial Chamber” was chosen, as opposed to “Preliminary Investigations Chambers,” “Indictment Chamber,” or some other formulation.

¹⁸¹ Zutphen Draft, *supra* n. 176, at 96.

standard.¹⁸² This same group of countries also continued to push for the right of the accused to be heard prior to the confirmation of an indictment, arguing that “at a reasonable time prior to the hearing, the [accused] shall be provided with the proposed charges and informed of the evidence on which [the Prosecutor] intends to rely at the hearing.”¹⁸³ This proposal was later clarified to provide that the proposed Pre-Trial Chamber would have the power to issue disclosure orders for the purpose of the hearing.¹⁸⁴ At the same time, the proposals made clear that “full presentation of witnesses and evidence as at trial [was] not contemplated”¹⁸⁵ and authorized the Prosecutor to rely on “summary evidence.”¹⁸⁶

E. ARTICLE 61 OF THE ROME STATUTE

The final version of the Rome Statute brought about the creation of the Pre-Trial Chamber, which, *inter alia*, replaced the functions assigned to the Presidency in the 1994 Draft Statute. Furthermore, the right of

¹⁸² Paper put forward by the Delegations of Argentina, Australia, Austria, Canada, France, Germany, Japan, Korea, Malawi, the Netherlands, South Africa, Sweden, the United Kingdom, and the United States, proposing a framework for the fundamental stages of the criminal process of the Court to the Working Group on Procedural Matters, U.N. Doc. A/AC.249/1998/WG.4/DP.36, at 2, 27 March 1998.

¹⁸³ *Id.*

¹⁸⁴ Proposal submitted by the delegations of Argentina, Australia, Japan, Lesotho, Malawi, Mexico, the Netherlands, New Zealand, Norway, the Republic of Korea, Singapore, South Africa, Sweden to the Working Group on Procedural Matters, U.N. Doc. A/AC.249/1998/WG.4/DP.40, Art. 54, 1 April 1998.

¹⁸⁵ Proposal to Working Group on Procedural Matters dated 27 March 1998, *supra* n. 182, at 2.

¹⁸⁶ Proposal to Working Group on Procedural Matters dated 1 April 1998, *supra* n. 184, Art. 54(2).

an accused to challenge the charges against him or her prior to confirmation was fully embraced.

Thus, under Article 61 of the Rome Statute, the Pre-Trial Chamber shall hold “a hearing to confirm the charges on which the Prosecutor intends to seek trial” within a “reasonable time” after an accused’s surrender to or voluntary appearance before the Court.¹⁸⁷ Article 61 further states that, prior to the hearing, the suspect shall be: (i) “provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial;” and (ii) “informed of the evidence on which the Prosecutor intends to rely at the hearing.”¹⁸⁸ Towards achieving the latter, the Pre-Trial Chamber is empowered to “issue orders regarding the disclosure of information” prior to the hearing.¹⁸⁹ In the course of the hearing on the confirmation of charges, “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”¹⁹⁰ The “substantial grounds to believe” standard replaced the term “*prima facie*,” presumably in accordance with the desire expressed by several countries that the standard be “clearer.”¹⁹¹ Note, however, that there is no indication that the language “substantial grounds to believe” is intended to be a *higher* standard than “*prima facie*.” In putting on its case, the Prosecution may “rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”¹⁹² In response, the accused person may: (i) object to the charges; (ii) challenge the evidence

¹⁸⁷ Rome Statute, *supra* n. 1, Art. 61(1).

¹⁸⁸ *Id.* Art. 61(3).

¹⁸⁹ *Id.* Art. 61(2).

¹⁹⁰ *Id.* Art. 61(5).

¹⁹¹ *See supra* n. 182.

¹⁹² Rome Statute, *supra* n. 1, Art. 61(5).

presented by the Prosecutor; and (iii) present evidence of his or her own.¹⁹³

At the same time, however, the powers of the Pre-Trial Chamber as agreed to in the Rome Statute are not as extensive as some countries would have liked. Thus, as many commentators have noted, the drafting history makes clear that the PTC was not intended to act as “an investigating judge.”¹⁹⁴ For the purposes of this report, it is particularly noteworthy that the proposals allowing the Pre-Trial Chamber to amend the charges as prepared by the Prosecutor, or even to “change the legal characterization” of the charges, were dropped from the final version of the Statute. Instead, Article 61 states that 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,”¹⁹⁵ and, based on this determination, it “shall” do one of the following:

¹⁹³ *Id.* Art. 61(6).

¹⁹⁴ See, e.g., Michela Miraglia, *The First Decision of the ICC Pre-Trial Chamber*, 4 J. Int’l Crim. Just. 188, 190 (2006) (“The way in which the [ICC pre-trial] process is a compromise between different proposals brought into negotiations by the delegates represents a novel solution compared with the ones adopted in the traditional procedural models: Pre-trial Chambers are to act as an organ of judicial scrutiny and review, not as an investigating judge.”); Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. Int’l Crim. Just. 402, 404 (May 2007) (noting that the ICC Pre-Trial Chamber “is not an investigating chamber in the proper sense,” as it “has only limited power to conduct investigations and oversee the prosecutor’s activities.”); David Scheffer, *A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, 21 Leiden J. Int’l Law 151, 153 (2008) (explaining that the Pre-Trial Chamber was not designed to “become the investigatory engine of the Court,” in part because this “would have tilted the ICC too far in the direction of the type of civil law court that relies heavily on the role of an investigating judge and minimizes the prosecutor’s functions.”).

¹⁹⁵ Rome Statute, *supra* n. 1, Art. 61(7).

- (i) confirm the charges and commit the accused for trial on those charges;
- (ii) decline to confirm the charges; or
- (iii) adjourn the hearing and request the Prosecutor to consider providing further evidence on a particular charge or amending a charge.¹⁹⁶

Hence, while the Statute gives the Pre-Trial Chamber the power to review the charges and ask the Prosecutor to provide additional evidence or conduct further investigation, the PTC's powers are largely limited to monitoring the Prosecutor rather than becoming actively involved in the investigation and prosecution, like an investigating judge would be empowered to do in a traditional Romano-Germanic system.¹⁹⁷

F. RULES OF PROCEDURE AND EVIDENCE RELATING TO CONFIRMATION OF CHARGES PROCESS

The most significant issue discussed in relation to the confirmation of charges process during the drafting of the ICC Rules of Procedure and Evidence (ICC Rules) was the timing of disclosure. As mentioned above, the Rome Statute expressly authorizes the Pre-Trial Chamber to issue orders regarding the “disclosure of information” prior to the confirmation of charges hearing.¹⁹⁸ However, the Statute does not

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Olivier Fourmy, *Powers of the Pre-Trial Chambers in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1207, 1225 (Cassesse ed., 2002) (“As currently defined in the Statute, the role of the PTC is more that of a ‘judicial’ section of a ‘Bureau’ than that of an organ actively involved in conducting the preliminary phase of, and preparing, a trial. In other words, the PTC controls more than it elaborates, organizes, or streamlines.”).

¹⁹⁸ Rome Statute, *supra* n. 1, Art. 67(2).

mandate that *all* disclosure take place prior to the confirmation hearing. France sought to include such a requirement through the Rules, saying that “the Pre-Trial Chamber, during the pre-trial phase, should settle such matters, so that the trial itself is not disrupted by problems related to disclosure.”¹⁹⁹ As one of the French delegates to the Preparatory Commission explained: “it would be a waste of time to have just a partial disclosure at the pre-trial stage and then still disputes at the trial stage.”²⁰⁰ Yet others were of the opinion that “at this stage of the proceedings it is unnecessary for the Pre-Trial Chamber to undertake the more detailed disclosure exercise that will be necessary before the trial... such a process is likely to be time-consuming and may delay the straightforward task of determining whether there is sufficient evidence to support the prosecution charges.”²⁰¹

The latter view ultimately prevailed, as disclosure is discussed in general terms in the final version of the Rules,²⁰² implying that the drafters did not intend for disclosure to be handled exclusively at the pre-trial stage. Thus, for example, Rule 76, which requires that the Prosecution disclose “the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses,” is simply entitled “pre-trial disclosure relating to prosecution witnesses” and contains no requirement that the

¹⁹⁹ Proposal by France, *General Outline of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/1999/DP.2, ¶ 10, 1 February 1999.

²⁰⁰ Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 3 J. Int’l Crim. Just. 603, 610 (December 2003).

²⁰¹ *Id.* (quoting Peter Lewis, a British delegate to the Preparatory Commission).

²⁰² See generally ICC Rules, *supra* n. 8, R. 76 – R. 84 (rules governing disclosure).

Prosecution disclose the identities of all witnesses it plans to use at *trial* prior to the confirmation hearing.²⁰³ Similarly, Rule 81(4), which sets forth the procedure by which the Prosecution may seek permission to withhold certain evidence – such as confidential information or information that may put a victim or witness at risk if disclosed – states that the Prosecution must obtain authorization from “the Chamber,” without specifying the Pre-Trial Chamber or the Trial Chamber.²⁰⁴ As explained by one commentator, it was ultimately “left up to the ICC judges to determine how disclosure should be timed in order to best serve the common goal of avoiding unnecessary delay.”²⁰⁵

G. THEMES EMERGING FROM THE DRAFTING HISTORY OF THE PROVISIONS GOVERNING THE CONFIRMATION PROCESS

The foregoing drafting history of the provisions governing the ICC “confirmation of charges” process suggests that the drafters sought to achieve two primary goals through the confirmation process. First, the drafters sought to impose a check on the Prosecutor’s authority to determine the appropriate charges in any given case, in particular, where the charges were brought in the context of an investigation that the Prosecutor had initiated under his *proprio motu* powers. Second, the drafters wanted to provide the accused with a chance to challenge the charges prior to confirmation.

At the same time, however, the drafters agreed that the confirmation of charges hearing was not intended to be a mini-trial that could be seen as a pre-judgment of the accused. Furthermore, the drafters were aware

²⁰³ *Id.* R. 76(1).

²⁰⁴ *Id.* R. 81(4).

²⁰⁵ Kress, *supra* n. 200, at 610.

that the confirmation process must not interfere with the accused's right to a speedy trial. Hence, the standard for confirmation was set low, and it was agreed that the Prosecutor could rely on documentary or summary evidence, rather than calling the witnesses expected to testify at the trial. In addition, although the Pre-Trial Chamber was given authority to order disclosure prior to the confirmation hearing, the drafters of the Rules of Procedure and Evidence determined that disclosure did not need to be completed before the charges could be confirmed. Rather, the Prosecution need only disclose the evidence upon which it intends to rely at the hearing, including the names of relevant witnesses and any prior statements made by those witnesses. In addition, the Prosecution is under an ongoing obligation under the Rome Statute to disclose potentially exculpatory evidence to the Defense "as soon as practicable."²⁰⁶

²⁰⁶ Rome Statute, *supra* n. 1, Art. 67(2).

IV. ANALYSIS & RECOMMENDATIONS

A. RECOMMENDATIONS RELATING TO PROCEDURES APPLIED AT CONFIRMATION STAGE

In light of the problems discussed in the cases above – particularly delay and the absence of full disclosure during the confirmation process – and of the drafting history of the provisions governing the confirmation process – which suggests that the standard for confirmation was intended to be fairly low and that the confirmation hearing was not intended to be a “mini-trial” – we make the following recommendations.

1. The Disclosure Process Prior to the Confirmation of Charges Hearing Must Be Significantly Accelerated

The initial approach to pre-trial disclosure, set out by Judge Steiner in her 15 and 19 May 2006 decisions in *Lubanga*,²⁰⁷ was developed with the expectation that all evidence being relied on by the Prosecutor at the confirmation of charges hearing, in addition to most exculpatory evidence, could be readily turned over to the accused well in advance of the hearing.²⁰⁸ In practice, however, security concerns have made full disclosure impossible. This reality, in turn, has meant that it is also impossible to achieve the degree of disclosure that was envisioned by Judge Steiner while complying with the requirement that the confirmation hearing take place within a “reasonable time” after the accused is taken into the custody of the Court. Thus, in both the *Lubanga* and *Katanga & Ngudjolo* cases, the scheduled date for the confirmation hearing was twice postponed due to delays in the

²⁰⁷ *Lubanga*, Decision on the Final System of Disclosure and the Establishing of a Timetable, *supra* n. 7; *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, *supra* n. 14, ¶ 31.

²⁰⁸ *Id.* at 8-13.

disclosure process.²⁰⁹ At the same time, the evidence ultimately disclosed to the Defense for purposes of the confirmation hearing – whether in redacted or in summary form – possesses limited probative value, particularly in terms of the Defense’s ability to start building its own case through the identification of potential witnesses and other sources.²¹⁰ Finally, even in the *Lubanga* case, which took nearly an entire year to move to the Trial Chamber, the parties were only marginally better prepared for trial than at the time of Mr. Lubanga’s transfer to the Court.²¹¹ Given these problems, and in light of the fact that security concerns are likely to be a significant factor in most, if not all, of the future cases tried by the ICC, we recommend the steps outlined directly below, which are aimed at expediting the disclosure process for purposes of the confirmation hearing, while still respecting the letter and spirit of the provisions governing the disclosure process.

²⁰⁹ See *Lubanga*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, *supra* n. 18, at 4-5 (postponing the hearing from 27 June to 28 September 2008); *Lubanga*, Decision on the Postponement of the Confirmation Hearing, *supra* n. 21 (indefinitely postponing the confirmation hearing, which was later rescheduled for 9 November 2006); *Katanga*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, *supra* n. 81 (indefinitely postponing the 28 February 2008 hearing, which was later scheduled for 21 May 2008 after the *Katanga* and *Ngudjolo* cases were joined); *Katanga & Ngudjolo*, Decision Establishing a Calendar According to the Date of the Confirmation Hearing: 27 June 2008, *supra* n. 90 (postponing the hearing to 27 June 2008).

²¹⁰ See *supra* n. 109 *et seq.* and accompanying text (quoting from Judge Steiner’s 25 April 2008 decision, in which she noted that redacted evidence has, at best, a “limited” benefit for the Defense’s investigation and that the difference in probative value between redacted evidence and summarized evidence is “negligible”).

²¹¹ See *supra* n. 40 *et seq.* and accompanying text (discussing the fact that, a full year after the confirmation hearing in the *Lubanga* case, the Trial Chamber was still dealing with numerous disclosure issues and evidentiary disputes).

- a) Significantly Accelerating the Disclosure Process Prior to the Confirmation of Charges Will Achieve the Goals of the Confirmation Process While Expediting the Defense's Ability to Prepare Its Case in the Event the Charges Are Confirmed

As discussed in Section III of this report, the drafters of the Rome Statute sought to achieve two primary goals through the confirmation process ultimately set forth in Article 61. First, the drafters sought to impose a check on the Prosecutor's authority to determine the appropriate charges in any given case, in particular where the charges were brought in the context of a *proprio motu* investigation.²¹² Second, the drafters wanted to provide the accused with the right to challenge the charges before a panel of three judges prior to confirmation, representing a departure from the process used at the ICTY and ICTR, which allowed a single judge to confirm an indictment without any opportunity for the accused to be heard.²¹³ At the same time, however, the drafters agreed that the confirmation of charges hearing was not intended to be a "mini-trial," as they wanted to avoid allowing the confirmation process to become a pre-judgment of the accused.²¹⁴ Hence, it was agreed that the Prosecution could rely on summary evidence at the confirmation stage, and the standard for confirmation was set low, ensuring that a decision by the Pre-Trial Chamber to confirm the charges represented no more than a finding that the Prosecution had set forth a *prima facie* case against the accused.²¹⁵ These choices were also consistent with the drafters' determination that the confirmation process not interfere with the accused's right to a

²¹² See *supra* n. 153 *et seq.* and accompanying text.

²¹³ See *supra* n. 152 *et seq.* and accompanying text.

²¹⁴ See *supra* n. 143 *et seq.* and accompanying text.

²¹⁵ See *supra* n. 192 *et seq.* and accompanying text.

speedy trial.²¹⁶ Finally, as confirmed by the drafting of the Rules of Procedure relating to disclosure, it was not envisioned that all disclosure would be complete by the time of the confirmation hearing.²¹⁷

Thus, although it might be ideal to ensure that the Defense receive full disclosure of all relevant material prior to the confirmation hearing, such disclosure is not required and, in practice, striving for that ideal has proved to frustrate other aspects of the confirmation process, most notably, that it not interfere with the accused's right to a speedy trial. In addition, there is nothing in the Rome Statute or the ICC Rules precluding the PTC or a Single Judge from tailoring the form of disclosure for purposes of the confirmation hearing alone. Moreover, the very low threshold applied at the confirmation of charges stage – namely, that the charges not be “wholly unfounded”²¹⁸ – supports the notion that the disclosure of summary evidence, in accordance with the guidelines set forth in Judge Steiner's 25 April 2008 decision,²¹⁹ will be sufficient to prepare the parties for the confirmation hearing. At the same time, assuming that the charges are confirmed, it is in the interest of the accused to have his or her case transferred to the Trial Chamber as soon as possible, as the Prosecution will then be under an obligation to *fully disclose* all relevant evidence,²²⁰ with the sole exception of

²¹⁶ See *supra* n. 146 and accompanying text. See also Rome Statute, *supra* n. 1, Art. 67(1)(c) (guaranteeing the accused's right to trial without “undue delay”).

²¹⁷ See *supra* n. 199 *et seq.* and accompanying text.

²¹⁸ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶ 37; *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 135, ¶ 63.

²¹⁹ See *supra* n. 91 *et seq.* and accompanying text (discussing Judge Steiner's 25 April 2008 decision relating to disclosure prior to the *Katanga & Ngudjolo* confirmation of charges hearing).

²²⁰ By “relevant evidence,” we refer to all evidence that the Prosecution is

redactions authorized by the Trial Chamber.²²¹ In other words, once the charges are confirmed, there generally should not be any questions of evidence being summarized, of unilateral redactions, or of the duty of the Prosecution with respect to exculpatory evidence being limited to the provision of the “bulk” of that evidence.²²²

Hence, the model of disclosure set forth by Judge Steiner in her 25 April 2008 decision in the *Katanga & Ngudjolo* case – which favors disclosure of evidence in summary, as opposed to heavily redacted, form and, where necessary, permits unilateral redactions by the Prosecution to evidence upon which it does not intend to rely at the confirmation hearing – presents a reasonable system for pre-trial disclosure that is consistent with the drafting history of the provisions governing the confirmation of charges process, and is likely to prove useful in expediting the confirmation of charges process in future cases coming before the Court. However, it is critical that, to the extent

required to disclose to the Defense pursuant to the Rome Statute and Rules of Procedure and Evidence, including all exculpatory evidence, the prior statements of any Prosecution witnesses, and any additional evidence that the Trial Chamber has ordered to be disclosed. *See* Rome Statute, *supra* n. 1, Art. 64(3), 64(6), and 67(2); ICC Rules, *supra* n. 8, R. 84.

²²¹ *See* *Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *supra* n. 41, ¶¶ 25-27 (setting a deadline for the full disclosure of the entirety of the Prosecution’s evidence, including exculpatory evidence, and noting that “[i]f the prosecution wishes to serve any of this material in a redacted form, each proposed redaction must be explained and justified to the bench.”).

²²² It should also be noted that Trial Chamber I has held that a trial cannot begin until at least three months *after* the Prosecution has fully disclosed all relevant evidence to the Defense, meaning that an accused will have a minimum of three months to prepare for trial after the charges are confirmed and all evidence has been disclosed. *See* *Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *supra* n. 41, ¶ 21 (“[I]n the Trial Chamber’s assessment a period of three months after the full disclosure of the prosecution case and before the commencement of trial, as requested by the defence, is reasonable.”).

unilateral redactions by the Prosecutor are contemplated in future cases, the Defense be given the opportunity, as seen in the *Katanga & Ngudjolo* case,²²³ to challenge the redactions, as Rule 81(4) gives the Chamber the authority to determine the appropriateness of redactions.²²⁴ In addition, it must be clear that, in the event the charges are confirmed, the presumption is that the Defense is entitled to full disclosure of all evidence – including evidence already turned over in redacted or summary form – absent permission from the Trial Chamber.²²⁵

b) Judicious Selection of Prosecution’s Core Evidence and the Submission of Timely Requests for Protective Measures Would Help Expedite the Confirmation Process

²²³ *Lubanga*, Decision on the Prosecution Practice to Provide to the Defence Redacted Versions of Evidence and Materials Without Authorisation by the Chamber, *supra* n. 20, at 4.

²²⁴ ICC Rules, *supra* n. 8, R. 81(4).

²²⁵ See Rome Statute, *supra* n. 1, Art. 64(3) (“Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: ... (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”); *id.* Art. 67(2) (“ In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”); ICC Rules, *supra* n. 8, R. 81(4) (“The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.”).

i. *The Low Standard of Proof Required for Confirmation of the Charges Suggests that the Prosecution Could Limit the Amount of Evidence Presented at the Hearing*

As discussed above, both the language of the statute and the drafting history support the notion that the confirmation of charges hearing has a much lower standard of proof than that required at trial. While the language of the standard changed throughout the drafting history from “*prima facie*” to “sufficient evidence to establish substantial grounds,” this change was most likely due to a desire to create a “clearer expression” of the standard.²²⁶ The lower standard of proof is also in accordance with the drafting history to the extent that the drafters made clear that the confirmation of charges should not turn into a “mini-trial.”²²⁷ This history was confirmed by the Pre-Trial Chamber in the *Lubanga* case when it held that the purpose of the confirmation hearing was “limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought,” thus avoiding trial on “wrongful and wholly unfounded charges.”²²⁸

The Single Judge has pointed out that the Prosecutor has presented a considerable amount of evidence at the confirmation of charges hearings in both the *Lubanga* and *Katanga & Ngudjolo* cases,²²⁹ particularly considering the limited nature of the charges at issue in

²²⁶ See *supra* n. 182 and accompanying text.

²²⁷ See *supra* n. 143 *et seq.* and accompanying text (noting the concern of the drafters that the confirmation of charges hearing not be seen as a pre-judgment of the accused).

²²⁸ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶ 37.

²²⁹ *Katanga & Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, *supra* n. 91, ¶ 58.

those cases.²³⁰ Indeed, in the *Lubanga* case, the Chamber was able to reach its decision confirming the charges despite ignoring all of the evidence affected by the Appeals Chamber's December 2006 decisions.²³¹ Thus, while the Prosecution is obviously concerned with presenting sufficient evidence to support its charges, the low standard required at the confirmation hearing suggests that the approach of the Prosecution at this stage may be scaled back in future cases.

- ii. *To the Extent the Prosecution Must Seek Protective Measures for Witnesses and/or Redactions from the Pre-Trial Chamber, the Confirmation Process Would Be Significantly Expedited If Those Requests Were Submitted As Soon As Possible After the Prosecution has Secured an Arrest Warrant*

Both the procedure to obtain protective services for witnesses from the Victims and Witnesses Unit and the process of obtaining authorization from the Single Judge to redact portions of evidence have taken a considerable amount of time in both the *Lubanga* and *Katanga & Ngudjolo* cases.²³² While Judge Steiner has explained that these delays are to some extent caused by the extensive review required in assessing these requests,²³³ she has also noted in both cases that the Prosecution had submitted at least some of the relevant requests very

²³⁰ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 111, ¶ 8 (noting that the “*Lubanga* case is confined to the enlistment and conscription into the *Forces Patriotiques pour la Libération du Congo* (‘FLPC’) and the active use in hostilities of children under the age of 15 in a handful of training camps and military operations, whereas [*Katanga*] is limited to crimes allegedly committed during one attack on one village on one day.”).

²³¹ See *supra* n. 51 *et seq.* and accompanying text (citing *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶¶ 53-54).

²³² See *supra* Part III.A.1 and Part III.B.1 (discussing the disclosure-related delays in both cases).

²³³ See *supra* n. 100, 102 *et seq.* and accompanying text.

late in the process.²³⁴ Consequently, although we recommend that the Prosecutor rely to the extent possible on summary evidence to avoid such delays altogether, if it is necessary for the Prosecution to rely on witnesses in need of protective measures or to seek redactions to evidence, the Prosecution could significantly benefit the confirmation process by submitting the relevant requests as soon as possible after it has secured an arrest warrant. While it is true that certain witnesses will not request protective measures until some time after the arrest warrant is issued, efforts to undertake the lengthy processes described by Judge Steiner in her 25 April 2008 decision²³⁵ as quickly as possible may have a substantial impact on the confirmation process.

2. Clarification as to What Constitutes the “Bulk” of Exculpatory Evidence Would Benefit Parties

As noted in the descriptions of both the Lubanga and Katanga & Ngudjolo cases, the Pre-Trial Chamber has repeatedly held that the Prosecution’s duty to disclose potentially exculpatory evidence to the Defense under Article 67(2) and the duty to allow the Defense access to evidence likely to be material to the preparation of the Defense’s case under Rule 77 are ongoing duties, and thus must be observed in the lead up to the confirmation hearing.²³⁶ At the same time, the

²³⁴ See, e.g. *Lubanga*, Decision on the Postponement of the Confirmation Hearing, *supra* n. 21 (explaining that, despite the 30 August 2006 deadline imposed by the Single Judge, the Prosecution submitted requests for redactions as late as 19 September 2006); *Katanga & Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, *supra* n. 91, ¶ 62 (in which the Single Judge stressed that, in relation to the case against Mr. Katanga, the Prosecution has submitted requests for relocation to the VWU up to three months *after* the transfer of the suspect to the custody of the ICC).

²³⁵ See *supra* n. 94 *et seq.* and accompanying text.

²³⁶ See *supra* n. 11 and n. 130 and accompanying text.

Chamber has held that the Prosecution need only disclose the “bulk” of the evidence covered by Article 67(2) and Rule 77 prior to the hearing.²³⁷ While this determination generally seems consistent with both the Rome Statute and the Rules of Procedure and Evidence,²³⁸ the Chamber has yet to explain what is required to comply with the “bulk” rule, including whether it is a strictly quantitative measure or whether it could also include analysis of the types of exculpatory material disclosed at a given point. Such clarification would benefit the Prosecution, particularly as it relates to exculpatory documents covered by confidentiality agreements under Article 54(3)(e). For instance, the Prosecution may choose to delay bringing future cases until permission to disclose such documents has been granted, depending on the level of additional exculpatory evidence readily available for disclosure. In addition, greater clarification of the requirements under the “bulk” rule would give the Defense a better idea of its rights prior to the confirmation of charges proceeding.

3. Careful Consideration Should Be Given as to What Procedural Rights Should Be Given to Victims at the Confirmation Hearing

While Judge Steiner’s decision in the Katanga & Ngudjolo case regarding the participation rights of non-anonymous victims at the

²³⁷ See, e.g., *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶ 30; *Katanga & Ngudjolo*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, *supra* n. 41, ¶ 8.

²³⁸ See Rome Statute, *supra* n. 1, Art. 61(3) (Pre-Trial Chamber may make orders relating to disclosure prior to confirmation of charges hearing); *id.* Art. 64(3)(c) (Trial Chamber may order disclosure of any material not previously turned over); ICC Rules, *supra* n. 8, Section II: Disclosure (Rules 76 through 84, which govern disclosure, may apply to either the Pre-Trial Chamber or the Trial Chamber).

confirmation stage²³⁹ is to be welcomed, it is important to stress that in that case, there were only four victims willing to reveal their identities to the Defense, all of whom had agreed to use the same legal representative,²⁴⁰ and that Judge Steiner based her decision in part on these factors.²⁴¹ Thus, as the Single Judge acknowledged in her decision, the procedural rights granted to non-anonymous victims in *Katanga & Ngudjolo* should not necessarily apply automatically,²⁴² as Article 68(3) of the Rome Statute requires that victim participation take place “in a manner which is not prejudicial to or inconsistent with the rights of the accused,”²⁴³ which includes the right to a trial without undue delay.²⁴⁴ Thus, for example, it may not be feasible to grant victims the right to cross-examine witnesses in a case where a large number of victims were willing to disclose their identities, particularly if these victims did not have common legal representation.

²³⁹ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 111.

²⁴⁰ *Id.* ¶ 165.

²⁴¹ *Id.* Note that Judge Steiner subsequently granted participation rights to an additional fourteen victims. *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-579 (Pre-Trial Chamber I, 10 June 2008).

²⁴² *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 111, ¶ 145.

²⁴³ Rome Statute, *supra* n. 1, Art. 68(3).

²⁴⁴ *Id.* Art. 67(1)(c).

B. RECOMMENDATIONS RELATING TO DECISIONS OF THE PRE-TRIAL CHAMBER DURING AND AT THE CONCLUSION OF THE CONFIRMATION PROCESS

In addition to the foregoing procedural recommendations, we recommend the following in relation to decisions taken by the PTC.

1. Where the Pre-Trial Chamber Seeks to Amend a Charge, the Appropriate Remedy Is to Suspend the Confirmation Hearing and Request that the Prosecutor Consider Amending the Charge

As described in Section II of this report, Article 61(7) grants the Pre-Trial Chamber the power to confirm those charges for which it finds sufficient evidence²⁴⁵ and to dismiss those for which there is insufficient evidence.²⁴⁶ If the Pre-Trial Chamber is not persuaded of the sufficiency of evidence, or considers that the charge does not appropriately reflect the evidence presented, Article 61(7)(c) allows the PTC to adjourn the hearing and request the Prosecutor to present more evidence or to amend the charges.²⁴⁷ Furthermore, although the plain language of Article 67(1) is unambiguous, it is worth recalling that the drafters of the Rome Statute expressly considered proposals suggesting that the Pre-Trial Chamber be given the authority to amend

²⁴⁵ *Id.* Art. 61(7)(a).

²⁴⁶ *Id.* Art. 61(7)(b).

²⁴⁷ *Id.* Art. 61(7)(c). By contrast, Article 74, which governs the decisions of the Trial Chamber, contains no express limit on that Chamber's ability to amend charges. *Id.* Art. 74. Thus, when drafting the Regulations of the Court, the ICC Judges were able to vest the Trial Chamber with limited authority to change the legal characterization of the facts during trial, as set forth by Regulation 55. Regulations of the Court, ICC-BD/01-01-04, R. 55(1), adopted 26 May 2004. While there is no evidence that a similar regulation was considered with respect to the Pre-Trial Chamber, the fact is that any attempt to vest the PTC with similar authority would be in direct contradiction to Article 61(7), and therefore invalid.

the charges brought by the Prosecutor, and ultimately rejected those proposals.²⁴⁸

Hence, the Pre-Trial Chamber seems to have clearly exceeded its authority in the *Lubanga* case when it altered the charges to include allegations that the accused committed war crimes in the context of an international armed conflict.²⁴⁹ Furthermore, although the Pre-Trial Chamber justified its decision to amend the charges on the grounds that the charges as confirmed were not “materially different” from those set out in the Prosecution’s Document Containing the Charges,²⁵⁰ the fact is that the war crime of recruiting, enlisting, and conscripting children in the context of international armed conflict contains an additional element not required to establish the crime in the context of non-international armed conflict. Specifically, in order to establish the war crime in an *international* armed conflict, the Prosecution must establish that the accused engaged in the act of “[c]onscripting or enlisting children under the age of fifteen years into *the national armed forces*.”²⁵¹ By contrast, the relevant war crime in a *non-international* armed conflict requires only that the accused engaged in the act of “[c]onscripting or enlisting children under the age of fifteen years into *armed forces or groups*.”²⁵² Moreover, the very existence of an international armed conflict is a material element of any war crime under Article 8(2)(b), and therefore must be proven at trial.²⁵³

²⁴⁸ See *supra* n. 166 and n. 194 *et seq.* and accompanying text.

²⁴⁹ See *supra* n. 61 *et seq.* and accompanying text.

²⁵⁰ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 37, ¶ 203.

²⁵¹ Rome Statute, *supra* n. 1, Art. 8(2)(b)(xxvi) (emphasis added).

²⁵² *Id.* Art. 8(2)(c)(vii) (emphasis added)

²⁵³ See, e.g., Int’l Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Art. 8(2)(b)(xxvi) (“4. The conduct took

Finally, as noted above, the Trial Chamber has held that it has no authority to review the Pre-Trial Chamber's action, and the Pre-Trial Chamber itself rejected the parties' requests to have the decision reviewed by the Appeals Chamber. Thus, the Prosecution must prepare for trial on charges for which it did not collect sufficient evidence, and the Defense has been committed to trial on charges that he was never able to challenge. To avoid such situations in future cases, we recommend that, in the event the Pre-Trial Chamber believes that the evidence presented at a confirmation hearing establishes the existence of a crime that has not been charged by the Prosecutor, the Pre-Trial Chamber act in accordance with Article 61(7) by adjourning the hearing and requesting the Prosecutor to consider amending the charges.²⁵⁴

place in the context of an was associated with an international armed conflict.”).

²⁵⁴ Rome Statute, *supra* n. 1, Art. 61(7). It is useful that the Rome Statute provides the Pre-Trial Chamber an express opportunity to adjourn the confirmation process and request that the Prosecution reconsider the charges because, as seen in the *Akayesu* case tried before the ICTR, judges may play a critical role in discerning the most appropriate charges in a given case. *See, e.g.,* Rebecca L. Haffajee, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 Harv. J. L. & Gender 201, 206-07 (Winter 2006) (explaining that Judge Navanethem Pillay, the only female judge at the ICTR at the time, was instrumental in the Prosecution's decision to amend its original indictment so as to include charges of rape and other inhumane acts as crimes against humanity and to reference rape in the genocide counts).

2. *The Pre-Trial Chamber Should Consider Allowing the Full Chamber to Review Requests for Leave to Obtain Interlocutory Appeal of Decisions Made By a Single Judge*

In both the *Lubanga*²⁵⁵ and *Katanga & Ngudjolo*²⁵⁶ cases, a Single Judge was appointed to carry out the functions of the Pre-Trial Chamber during the lead up to the confirmation hearing²⁵⁷ on the grounds that using a Single Judge would “ensure the proper and efficient functioning of the Court.”²⁵⁸ Thus, as explained in Section III of this report, a large number of decisions in both cases – including those that dealt with disclosure, evidentiary issues, and victim participation – were taken by Single Judge Steiner. Notably, many of these decisions resulted in requests by the parties for leave to obtain interlocutory appeal under Article 82(1)(d),²⁵⁹ and the Single Judge has been responsible for deciding whether to grant such requests.²⁶⁰

²⁵⁵ *Lubanga*, Decision Designating a Single Judge in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* n. 6.

²⁵⁶ *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, *supra* n. 75.

²⁵⁷ Article 57(2)(a) lists several situations where a Single Judge cannot act, including under Article 61(7), which requires the full PTC to participate in the actual confirmation of charges. *See Rome Statute*, *supra* n. 1, Art. 57(2)(a).

²⁵⁸ *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, *supra* n. 75.

²⁵⁹ Article 82(1)(d) provides that any party may obtain interlocutory appeal of a “decision that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” *Rome Statute*, *supra* n. 1, Art. 82(1)(d). For further reading on Article 82(1)(d) of the Rome Statute, *see War Crimes Research Office, Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, January 2008, available at <http://www.wcl.american.edu/warcrimes/documents/01-2008InterlocutoryAppeals.pdf?rd=1>.

²⁶⁰ *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the

While this process is certainly permitted under the relevant provisions of the Rome Statute and Rules of Procedure,²⁶¹ the Pre-Trial Chamber is equally authorized to “decide that the functions of the single judge be exercised by the full Chamber.”²⁶² Hence, although making extensive use of a Single Judge during the early stages of a case will in many circumstances encourage efficiency, given the impact that decisions taken by the Single Judge – such as the manner in which requests for redactions are evaluated or the scope of victim participation at the confirmation hearing – may have on the ultimate outcome of a case, the Chamber should consider constituting the full PTC for purposes of reviewing requests for leave to appeal decisions taken by a Single Judge.²⁶³

prosecution motion for reconsideration and, in the alternative, leave to appeal, ICC-01/04-01/06-, 166 (Pre-Trial Chamber I, 23 June 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, (Pre-Trial Chamber I, 28 September 2006); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on Request of Mathieu Ngudjolo Chui for Leave to Appeal the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,” 01/04-01/07-527 (Pre-Trial Chamber I, 29 May 2008); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Defence for Mathieu Ngudjolo Chui’s request for leave to appeal the Decision concerning translation of documents, 01/04-01/07-538 (Pre-Trial Chamber I, 2 June 2008).

²⁶¹ See Rome Statute, *supra* n. 1, Art. 39(2)(b)(iii); ICC Rules, *supra* n. 8, R. 7(2).

²⁶² ICC Rules, *supra* n. 8, R. 7(3).

²⁶³ Note that, absent permission from the Pre-Trial Chamber, there is no procedure by which the ICC Appeals Chamber may undertake an interlocutory review of a Pre-Trial Chamber decision, unless the decision involves: jurisdiction or admissibility, the release of the person being investigated or prosecuted, or Article 56(3) of the Rome Statute. See Rome Statute, *supra* n. 1, Art. 82(1) (providing that either party may immediately appeal any of the following: “(a) A decision with respect to jurisdiction or admissibility; (b) A decision granting or denying release of the person being investigated or prosecuted; (c) A decision of the Pre-Trial Chamber to act on

its own initiative under Article 56, paragraph 3; [or] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”). Indeed, early in the Court’s operations, the Prosecution applied directly to the Appeals Chamber seeking review of a Pre-Trial Chamber decision denying the Prosecution’s request to take an interlocutory appeal under Article 82(1)(d), but the Appeals Chamber rejected the Prosecution’s argument that the Appeals Chamber had inherent authority to exercise “extraordinary review” of decisions on an interlocutory basis without permission of the lower court. *See Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, ¶ 20 (Appeals Chamber, 13 July 2006).

ORDERING INFORMATION

Inquiries about obtaining print copies of reports may be sent to:

War Crimes Research Office
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016

Tel.: 202 274-4067

Fax: 202 274-4458

E-mail: warcimes@wcl.american.edu

Website: www.wcl.american.edu/warcimes

THE CONFIRMATION OF CHARGES PROCESS AT THE INTERNATIONAL CRIMINAL COURT

This report addresses the unique process developed under the Rome Statute requiring that, within a “reasonable time” after an accused person has been taken into the custody of the International Criminal Court (ICC), the Pre-Trial Chamber hold a hearing to determine whether there are substantial grounds to believe that the accused committed the crimes charged by the Prosecutor. At the close of this hearing, the Chamber may confirm the charges and commit the accused to trial; decline to confirm the charges; or adjourn the hearing and request the Prosecutor to consider providing further evidence or amending a charge. To date, the ICC has confirmed the charges in two cases - namely, in the case against Thomas Lubanga Dyilo and in the joint case against Germain Katanga and Mathieu Ngudjolo Chui. Focusing on these two cases, the aim of this report is to analyze the confirmation process as carried out by the Court thus far - both in terms of the manner in which the drafters of the Rome Statute seemed to have envisioned the process, as well as with respect to issues not necessarily anticipated by the drafters - and to make recommendations as to how the process might be improved for future accused.



AMERICAN UNIVERSITY

WASHINGTON, D.C.

WAR CRIMES RESEARCH OFFICE

Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016

www.wcl.american.edu/warcrimes