

# DEFINING THE CASE AGAINST AN ACCUSED BEFORE THE INTERNATIONAL CRIMINAL COURT: WHOSE RESPONSIBILITY IS IT?



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
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### 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*

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COURT: WHOSE RESPONSIBILITY  
IS IT?**

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## **EXECUTIVE SUMMARY**

Since the first case began at the International Criminal Court (ICC) in March 2006, a series of decisions have been issued raising questions about the respective authority of the Prosecutor and the judges to determine the appropriate charges in cases tried before the ICC. This report examines the key question underlying these decisions, namely, whether the judges at the ICC maintain a supervisory role over the Prosecution in the latter's selection of charges.

### **Relevant Jurisprudence**

As described in detail below, there are three decisions that raise questions about the authority of judges to alter the charges against an accused as presented by the Prosecutor. The first two relate to the authority of the Pre-Trial Chambers, whose main function is to oversee the process of confirming the charges against the accused prior to trial. The third decision relates to the authority of the Trial Chamber to change the "legal characterization" of the charges against an accused after the trial has commenced.

### **Pre-Trial Chamber Decisions**

Pursuant to Article 61(1) of the Rome Statute, the Pre-Trial Chamber assigned to each case must, within a reasonable amount of time after the initial appearance of an accused before the ICC, hold a hearing in the presence of the accused to confirm the charges on which the Prosecutor intends to seek trial. Article 61(7)(c) of the Rome Statute limits the Pre-Trial Chamber to taking one of three actions upon the close of the confirmation of charges hearing. First, the Pre-Trial Chamber must confirm those charges in relation to which it has determined that there is sufficient evidence to establish substantial grounds to believe the accused is responsible, and commit the person to a Trial Chamber for trial on those charges. Second, the Chamber must decline to confirm those charges in relation to which it has determined that there is insufficient evidence. Finally, if the Pre-Trial Chamber is not persuaded of the sufficiency of evidence, or considers that the charges as presented by the Prosecutor do not appropriately reflect the evidence presented, Article 61(7)(c) allows the Pre-Trial Chamber to adjourn the hearing and *request that the Prosecutor* present more evidence or amend the charges.

Despite the language of Article 61(7), the Pre-Trial Chamber in the case against Thomas Lubanga Dyilo *sua sponte* amended the charges against the accused at the close of the confirmation hearing, without adjourning the hearing and requesting the Prosecutor to consider amending the charges. The Pre-Trial Chamber in the case against Jean-Pierre Bemba Gombo also acted contrary to the language of Article 61(7), declining to confirm certain charges presented by the Prosecutor, *despite* finding that there was sufficient evidence to support those charges, because it determined that the charges were not warranted as a matter of fairness and expeditiousness. Subsequently, in refusing a request from the Prosecutor for interlocutory appeal of the decision declining to confirm certain charges, the *Bemba* Pre-Trial Chamber recognized that the express language of Article 61(7) mandates the Chamber to confirm those charges for which there is a sufficiency of evidence, but held that it could not be bound to a “literal” reading of the Statute. Indeed, the Chamber suggested that its decision to decline the charges was based on its “inherent powers” to conduct fair and expeditious proceedings. At the same time, the Chamber explained, without citing to any authority, that the duty of the Prosecutor is to present the facts that he has investigated and to provide his view on their legal characterization, but it is for the Pre-Trial Chamber to ultimately give the legal characterization of the facts put forward by the Prosecutor. Finally, the Chamber rejected the notion that its decision declining to confirm certain charges may be harmful to the victims of those crimes, in part, on the ground that the Trial Chamber could itself reinstate those charges at a later stage in the proceedings by applying a different “characterization” to the facts.

### Trial Chamber Decision

Issues relating to the respective authority of the Prosecution and the Chambers over the charges have also arisen at the trial stage, specifically in the case against Mr. Lubanga. In that case, the majority of the Trial Chamber issued a decision holding that it has the authority to “change the legal characterization” of the charges against the accused, in the midst of an ongoing trial, even if the “re-characterized” charges exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber. The majority reached this conclusion by relying on Regulation 55 of the Regulations of the Court, which provides as follows:



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1. In its decision under article 74 [relating to the final judgment of the Trial Chamber], the [Trial] Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

Interestingly, the majority read this regulation as creating two distinct stages at which the Trial Chamber may change the legal characterization of the facts. During one stage, described in Regulation 55(1), the Trial Chamber determined that it may change the legal characterization of the facts in its final judgment on the guilt or innocence of the accused, so long as the new charges do not exceed the facts and circumstances described in the charges and any amendment to the charges. During the second stage, according to the majority, the Chamber may change the legal characterization of the charges against

the accused “at any time during the trial” *without being limited to the facts or circumstances described in the charges*, so long as the Trial Chamber provides the parties with the procedural protections contained in Regulations 55(2) and (3), such as notice to the parties. Notably, the majority provided no support for its unique interpretation of Regulation 55.

In a subsequent “clarification” of its decision, the majority of the Trial Chamber seemed to step back somewhat from its finding that it is not bound by the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber as long as it acts pursuant to Regulations 55(2) and (3). Specifically, in its clarification, the majority held that any additional facts incorporated into the case by the Trial Chamber must “build a unity” with the “course of events” described in the confirmed charges. Nevertheless, it is unclear what the majority meant by this standard or how it will be applied in the future.

Following the issuance of the *Lubanga* Trial Chamber majority’s initial opinion, Presiding Judge Adrian Fulford issued a strong dissent, primarily challenging the majority’s interpretation of Regulation 55 as creating two distinct stages at which the Chamber could re-characterize the charges. Specifically, Judge Fulford noted the majority’s interpretation would put Regulation 55 in direct conflict with provisions of the Rome Statute, including Article 74(2), which provides that the Trial Chamber’s final judgment “shall not exceed the facts and circumstances described in the charges and any amendments to the charges,” and Article 67(1)(a), which provides the defense with a right to be informed promptly and in detail of the nature, cause and context of the charges against the accused. Judge Fulford also noted that the judges who wrote the majority opinion had previously endorsed an interpretation of Regulation 55 contrary to their current reading of the provision, without providing any reasoning for the change in interpretation.

Both the Prosecution and the Defense in the *Lubanga* case sought request for leave to appeal the majority’s decision, which was granted by the Trial Chamber on 3 September 2009. The appeal is pending before the Appeals Chamber as of this writing.

## **Analysis and Conclusions**

### **The Rome Statute Vests Authority in the Prosecutor to Frame the Charges against the Accused**

The underlying issue raised by each of the three decisions discussed above – the *Lubanga* Pre-Trial Chamber’s *sua sponte* amendment of the confirmed charges, the *Bemba* Pre-Trial Chamber’s holding that it has inherent powers to characterize the facts as presented by the Prosecutor, and the *Lubanga* Trial Chamber majority’s interpretation of Regulation 55 – is whether the judges at the ICC maintain a supervisory role over the Prosecution in the latter’s selection of charges. To answer this question, the report below examines not only the final text of the Rome Statute, but also the drafting history of the relevant provisions.

#### *Travaux Préparatoires*

As has been generally recognized, the 1994 Draft Statute created by the International Law Commission, which formed the basis of the negotiations on the final Rome Statute, was heavily influenced by the common law tradition. This had significant consequences for the division of authority between the Prosecution and the Chambers under the draft. Generally speaking, in common law systems, the Prosecution is responsible for the investigation of crimes and selection of the charges, whereas the judiciary principally arbitrates between two opposing sides – the Prosecution and the Defense – with regard to the charges selected by the Prosecution. In contrast, the role of the Prosecution in Romano-Germanic systems is to deliver and prove the facts underlying the crime or crimes at issue, whereas the judiciary is responsible for the legal characterizations of the facts.

Given that it relied more heavily on the common law tradition, the 1994 Draft Statute gave the ICC Prosecutor of the Court sole responsibility for determining when to commence a prosecution and what charges to bring. In addition, while the Presidency was responsible for confirming an indictment based on the evidence presented by the Prosecutor, only the latter was authorized to seek amendments to the indictment. Finally, no provision of the Draft Statute afforded the Trial Chamber any authority to amend the charges against the accused.

Over the course of the next three years, certain delegates participating in the drafting of the Rome Statute recommended that a “reviewing body” be established to replace the role of the Presidency with respect to indictments under the 1994 Draft Statute. For some, the primary difference between this new body and the Presidency would be that the former would be authorized to hold a preliminary hearing on the charges in the presence of the accused before committing a case to trial. Another view, put forward by France, was that the new body would be an “investigating chamber” with the power to amend the charges and/or change the legal characterization of the charges *sua sponte*. While there seems to have been broad support for the notion that the accused should have an opportunity to challenge the charges prior to trial, many delegates were concerned that the French proposal would result in excessive judicial interference in investigations and prosecutions, which in turn would undermine the independence of the Prosecutor.

With respect to the powers of the Trial Chamber, the view was expressed during the drafting of the Rome Statute that the Chamber should have power to convict the accused of a crime different from that included in the indictment, so long as the accused had an opportunity to prepare a defense and would not be subject to a more severe punishment under the new crime. However, it does not appear as though any specific proposals were put forward to reflect this view, nor was this view incorporated into any future version of the draft.

### *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 with respect to indictments. 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. For the purposes of this report, it is particularly noteworthy that the French proposal allowing the Pre-Trial Chamber to amend the charges as prepared by the Prosecutor, or even to “change the legal characterization” of the charges, was dropped from the final version of the Statute. Instead, as discussed above, Article 61(7) limits the Pre-Trial Chamber’s authority over the charges to: confirming, denying, or requesting that the Prosecution consider amending them.

Other provisions included in the final Rome Statute support the notion that the Prosecutor enjoys exclusive authority to frame the charges against an accused. For instance, Article 58(6) makes clear that an arrest warrant may only be amended at the request of the Prosecution. Similarly, Article 61(9) provides that, after the charges are confirmed and before the trial has begun, the charges may only be amended on the initiative of the Prosecutor and with the permission of the Pre-Trial Chamber. Once the trial has begun, the Prosecutor alone may withdraw the charges, after receiving permission from the Trial Chamber.

Finally, Article 74(2) of the Rome Statute makes clear that the Trial Chamber may not *sua sponte* amend the charges, as it provides that the final judgment shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

Pre-Trial Chamber Has Three Options at Confirmation Stage: Confirm the Charges, Deny the Charges, or Adjourn the Hearing to Request the Prosecutor Consider Amending the Charges

Given the plain language of Article 61(7), as well as the relevant drafting history behind the creation of the Pre-Trial Chamber, it is difficult to understand the *Bemba* Pre-Trial Chamber's finding that it is for *the Chamber* to characterize the facts put forward by the Prosecutor. While the Pre-Trial Chamber justified its actions based on its inherent powers to ensure the efficiency and fairness of proceedings, it is questionable whether the invocation of such powers should result in substantial deviation from the plain language of the Statute. Moreover, the *Bemba* Chamber's own rationale for its decision to deny confirmation of certain charges on the basis of "efficiency and fairness" would not appear to be consistent with the interests of efficiency or to protect the rights of the Defense, as the Chamber justified its decision in part by stating that there was nothing preventing the Trial Chamber from later reinstating these charges. In terms of the interests of the Defense, the Rome Statute guarantees not only the accused's right to be informed promptly and in detail of the nature, cause and content of the charges, but also the right to have adequate time and facilities for the preparation of the defense. Surely these rights would be more meaningful if the accused was given some certainty over the charges on which he or she will be tried. As for the efficiency argument, the Pre-Trial Chamber's rationale calls into

question the very purpose of having a confirmation of charges process, if it is not to finalize the charges prior to trial.

Hence, as stated in Article 61(7) of the Rome Statute, the role of the Pre-Trial Chamber at the conclusion of the confirmation process is to confirm each of the charges for which the Prosecution has presented sufficient evidence to establish substantial grounds to believe the accused is responsible for the crime, and deny those for which insufficient evidence exists. In the event that the Pre-Trial Chamber believes an amendment to the charges is in order, its sole recourse is to request that the Prosecutor consider amending the charges accordingly.

#### Regulation 55 Cannot Be Interpreted to Authorize the Trial Chamber to Amend the Charges against the Accused

Article 52(1) of the Rome Statute requires the Regulations of the ICC to be in accordance with the Statute and the Rules of Procedure. Yet, as Judge Fulford persuasively explained in his dissent in the *Lubanga* case, Trial Chamber I's majority interpretation of Regulation 55 inevitably conflicts with a number of provisions of the Statute. By utilizing a bifurcated reading of Regulation 55 that views the Trial Chamber as possessing authority to modify the charges at two different stages (during the course of the trial under sub-regulations 55(2) and (3) and in its final judgment under sub-regulation 55(1)), the majority concludes that the limitations in sub-regulation 55(1) do not apply when modifying the charges under sub-regulations 55(2) and (3) and vice versa. This refusal to apply the restrictions appears inconsistent with the Rome Statute, as discussed in detail in the report.

As Judge Fulford suggested in his dissent, a possibility exists that Regulation 55 simply cannot be read consistently with the Rome Statute, even if the regulation is interpreted as creating a single process for re-characterizing the facts. Indeed, while such an interpretation of Regulation 55 would avoid conflicts with Article 74(2) and the safeguards granted to the accused in the Statute, *any* use of Regulation 55 might still violate Article 61(9), which grants exclusive authority to the *Prosecutor* to amend the charges after the confirmation of charges hearing with permission of the *Pre-Trial Chamber* and notice to the accused. As Judge Fulford explained, this issue turns on whether it is possible to modify the legal characterization of the facts *without* amending the charges. Although it is not clear from any of the documents governing the Rome Statute what constitutes an

“amendment” to the charges, as opposed to a change in the legal characterization of the facts, it seems that the addition of new crimes that would require the Prosecution to establish – and the accused to defend against – elements not present in the confirmed charges cannot be regarded as a mere “re-characterization” of the facts. It is also questionable whether Regulation 55 is valid under the language of Article 52(1) of the Rome Statute, which authorizes the judges to pass regulations only for the “routine functioning” of the Court. Presumably, a regulation that significantly alters the respective authority of the Prosecution and the Chambers regarding the case against the accused, and which allows the Trial Chamber to substantially change the number and character of crimes against which an accused must defend, amounts to more than a provision regarding “routine functioning.”

It may be that, at most, Regulation 55 permits the Trial Chamber to convict an accused of a lesser included offense if that offense contains the same essential elements as the original offense and will not result in punishment more severe than the confirmed charge. At the same time, by contrast to *adding* new charges with different elements, *substituting* the confirmed charge with a lesser included charge will not significantly affect the burden on the Prosecution or the work of the Defense, nor will it alter the authority of the Prosecution relative to the Chambers. As such, this interpretation of Regulation 55 seems much more consistent with the notion that the Regulations of the Court are merely for the “routine functioning” of the Court.

## I. INTRODUCTION

Since the first case began at the International Criminal Court (ICC) in March 2006, a series of decisions have been issued raising questions about the respective authority of the Prosecutor and the judges to determine the appropriate charges in cases tried before the ICC. This report examines the key question underlying these decisions, namely, whether the judges at the ICC maintain a supervisory role over the Prosecution in the latter's selection of charges.

## II. RELEVANT JURISPRUDENCE

### A. *LUBANGA* CASE: PRE-TRIAL CHAMBER *SUA SPONTE* AMENDS THE CHARGES IN ITS DECISION CONFIRMING CASE FOR TRIAL

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.<sup>1</sup> Mr. Lubanga, whose case arises in the situation in the Democratic Republic of Congo (DRC), was arrested pursuant to a finding by Pre-Trial Chamber I that there were reasonable grounds to believe he is criminally responsible for the war crimes of conscripting, enlisting, and using children to participate actively in the course of an armed conflict.<sup>2</sup>

Several months later, in anticipation of the confirmation hearing in the *Lubanga* case,<sup>3</sup> the Prosecution submitted the Document Containing

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<sup>1</sup> 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).

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

<sup>3</sup> The confirmation of charges is a process unique to the International Criminal Court under which the Pre-Trial Chamber holds a hearing, within a reasonable time after an accused is transferred to or surrenders to the Court, to confirm that there is sufficient evidence to establish substantial grounds to believe that the accused committed the crimes charged by the Prosecutor. See Rome Statute of the International Criminal Court, *adopted on 17 July 1998 by the U.N. Diplomatic Conference of*



the Charges against Mr. Lubanga as required by Article 61(3)(a) of the Rome Statute.<sup>4</sup> According to this document, the Prosecution was alleging that Mr. Lubanga had committed the war crime of conscripting, enlisting, and using children to participate actively in non-international armed conflict.<sup>5</sup> In November 2006,<sup>6</sup> as required by Article 61(1) of the Rome Statute, Pre-Trial Chamber I held “a hearing to confirm the charges on which the Prosecutor intends to seek trial.”<sup>7</sup>

Two months after the close of the confirmation hearing, on 29 January 2007, the Chamber issued a decision holding that substantial grounds existed to commit Mr. Lubanga to trial.<sup>8</sup> 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 under Article 8(2)(e)(vii) of the Rome Statute,<sup>9</sup> the 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

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

<sup>4</sup> *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), ICC-01/04-01/06-356 (Office of the Prosecutor, 28 August 2006). Article 61(3) of the Rome Statute provides as follows: “Within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.” Rome Statute, *supra* n. 3, Art. 61(3).

<sup>5</sup> *Lubanga*, 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. 4.

<sup>6</sup> *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).

<sup>7</sup> Rome Statute, *supra* n. 3, Art. 61(1).

<sup>8</sup> *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 6, at 156-57.

<sup>9</sup> *Lubanga*, 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. 4, ¶ 12(i).

conflict under Article 8(2)(b)(xxvi).<sup>10</sup> 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 of foreign state support of 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.”<sup>11</sup> The Prosecution reiterated this point during the actual confirmation hearing,<sup>12</sup> 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.

Interestingly, the Chamber recognized in its 29 January 2007 decision that, pursuant to Article 61(7)(c)(ii) of the Rome Statute, the “Chamber is required to adjourn the hearing and request the Prosecutor to consider amending the charges if it finds that the evidence before it appears to establish that a crime other than those detailed in the Document Containing the Charges has been committed.”<sup>13</sup> Nevertheless, it determined that the “purpose” of the Article 61(7)(c)(ii) requirement is “to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.”<sup>14</sup> The Chamber then went

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<sup>10</sup> *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 6, at 156.

<sup>11</sup> *Lubanga*, 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. 4, ¶ 12(i) (citing *The Prosecutor v. Dusko Tadić*, Judgment, ¶¶ 68-171 (International Criminal Tribunal for the former Yugoslavia Appeals Chamber, 15 July 1999)).

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

<sup>13</sup> *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 202.

<sup>14</sup> *Id.* ¶ 203.

on to conclude that Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute “criminalise the same conduct,” and therefore, it was “not necessary” for the Chamber to adjourn the hearing and request that the Prosecutor amend the charges.<sup>15</sup>

Following the 29 January 2007 decision by Pre-Trial Chamber I, both the Defense and the Prosecution filed applications with the Pre-Trial Chamber seeking leave to obtain interlocutory appellate review of the decision.<sup>16</sup> First, the Defense argued that, by “changing the charges and subsequently confirming the new charges without adjourning the proceedings and giving the Defense the right to be heard,”<sup>17</sup> the Chamber acted beyond the scope of its statutory authority<sup>18</sup> and violated the accused’s right to a fair trial.<sup>19</sup> According to the Defense’s request for leave to appeal:

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<sup>15</sup> *Id.* ¶ 204.

<sup>16</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, 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 (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 (Defense, 22 February 2007). Pursuant to Article 82(1) of the Rome Statute, parties have an automatic right to obtain interlocutory review of a decision by the Appeals Chamber only with regard to decisions respecting jurisdiction or admissibility, granting or denying release of the person being investigated or prosecuted, or involving the Pre-Trial Chamber’s right to act on its own initiative with respect to a “unique investigative opportunity” under Article 56(3) of the Statute. Rome Statute, *supra* n. 3, Art. 82(1)(a) – (c). For all other decisions, the parties must secure leave to file an interlocutory appeal from the Chamber issuing the impugned decision, which will be granted only where the decision “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.” *Id.* Art. 82(1)(d).

<sup>17</sup> *Lubanga*, 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, *supra* n. 16, ¶ 16.

<sup>18</sup> *Id.* ¶¶ 21-22.

<sup>19</sup> *Id.* ¶¶ 61-62, 71.

the clear text of the [Rome] Statute contains an additional element for crimes committed in international armed conflicts, namely the conscription or enlistment into a national armed force. At no point in time did the charging document or the Prosecution evidence refer to the [Union of Congolese Patriots] as a national armed force. The question as to whether a national armed force could be constituted by non-State actors was a legal issue which had not been put to the parties before or during the confirmation hearing. The Defence submits that the conclusion of the Chamber was therefore predicated on a legally debateable issue, which would have transformed the nature of the submissions of the parties.<sup>20</sup>

For its part, the Prosecution stressed that the Rome Statute “only allows the Chamber to adjourn the proceedings and request the Prosecution to consider amending a charge, if the Chamber is of the view that the evidence submitted appears to establish a different crime.”<sup>21</sup> As a result of the Chamber’s “substitution of the crime charged by the Prosecution,” the Prosecution argued that it would be “forced to proceed with a crime that it had already determined, after careful examination of the evidence in its possession, should not be charged, and to devote time and resources to supplement that evidence, if possible, in order to adequately substantiate that crime at trial.”<sup>22</sup> The Prosecution concluded that the decision affected the “fairness of the proceedings” which, it noted, includes “respect for the procedural rights of the Prosecutor.”<sup>23</sup>

Despite these requests from both the Defense and the Prosecution, the Chamber refused to grant leave to appeal, saying that the issue of the proper legal characterization of the charges had been adequately “raised” elsewhere in the case against Mr. Lubanga so as to provide

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<sup>20</sup> *Id.* ¶ 14.

<sup>21</sup> *Lubanga*, Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 “*Décision sur la Confirmation des Charges*,” *supra* n. 16, ¶ 15.

<sup>22</sup> *Id.* ¶¶ 1-2.

<sup>23</sup> *Id.* ¶ 10.

the parties with notice and an opportunity to be heard.<sup>24</sup> The Chamber further reasoned that “there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts.”<sup>25</sup> In other words, the Pre-Trial Chamber 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 judgment against the accused, and therefore interlocutory review of the decision was unnecessary.

Following the Pre-Trial Chamber’s decision rejecting leave to appeal the decision confirming the charges, the *Lubanga* case was transferred to Trial Chamber I for trial. One of the first issues taken up by Trial Chamber I was a request by the Prosecution that the Trial Chamber restore the charges to the form initially alleged by the Prosecution, *i.e.*, to include charges only of war crimes occurring in the context of a non-international armed conflict.<sup>26</sup> Specifically, the Prosecution asked the Trial Chamber to adopt one of two measures in relation to the charges against Mr. Lubanga. First, the Prosecution argued that “the Trial Chamber has the statutory authority to remedy the legal and procedural defects resulting from the Confirmation Decision and to place the ongoing proceedings on a certain and solid foundation.”<sup>27</sup> The Trial Chamber rejected this route on the ground that it “has no

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<sup>24</sup> *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, ¶ 43 (Pre-Trial Chamber I, 24 May 2007) (citing the confirmation of charges hearing transcript as follows: ICC-01-04-01-06-T-33-EN, p. 96, lines 12-23; ICC-01-04-01-06-T-44-EN, p. 73, lines 1-4; ICC-01-04-01-06-T-47-EN, p. 16, lines 12-20; and ICC-01-04-01-06-T-47-EN, p.49-51).

<sup>25</sup> *Id.* ¶ 44. The authority of the Trial Chamber to “reconsider the legal characterisation of the facts” is discussed in detail below. See *infra* n. 30 *et seq.* and accompanying text, and n. 89 *et seq.* and accompanying text.

<sup>26</sup> See *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 (Trial Chamber I, 13 December 2007).

<sup>27</sup> *Id.* ¶ 29. In support of this argument, the Prosecution cited, *inter alia*, Article 64(2) of the Rome Statute, which requires the Trial Chamber to ensure that the trial is fair and expeditious, as well as Article 64(6)(f), which provides that, “[i]n performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary... rule on any... relevant matters.” *Id.*

authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber.”<sup>28</sup>

The second route recommended by the Prosecutor was that the Trial Chamber utilize Regulation 55 of the Regulations of the Court to “modify the characterisation of the facts.”<sup>29</sup> Regulation 55, which was adopted by the judges of the ICC pursuant to Article 52(1) of the Rome Statute,<sup>30</sup> provides as follows:

1. In its decision under article 74 [relating to the final judgment of the Trial Chamber], the [Trial] Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

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<sup>28</sup> *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. 26, ¶ 39.

<sup>29</sup> *Id.* ¶ 29.

<sup>30</sup> Article 52(1) of the Rome Statute provides: “The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.” Rome Statute, *supra* n. 3, Art. 52(1).

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).<sup>31</sup>

The Trial Chamber also rejected this route, holding that Regulation 55 “indicates that a decision to modify the legal characterisation of facts will only occur at a late rather than an early stage in the trial, because it is provided that notice shall be given to the parties of this possibility once it emerges, and the Court shall hear submissions ‘after having heard the evidence.’”<sup>32</sup> 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.<sup>33</sup>

**B. *BEMBA* CASE: PRE-TRIAL CHAMBER DECLINES TO CONFIRM CERTAIN CHARGES ON THE GROUND THAT THE CHARGES WERE “CUMULATIVE”**

On 9 May 2008, the Prosecution submitted to Pre-Trial Chamber III<sup>34</sup> an application for a warrant of arrest against Jean-Pierre Bemba

<sup>31</sup> Regulations of the Court, ICC-BD/01-01-04, R. 55(1), *adopted* 26 May 2004.

<sup>32</sup> *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. 26, ¶ 48.

<sup>33</sup> *Id.* ¶ 50.

<sup>34</sup> Note that on 19 March 2009, the Presidency of the ICC decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the Central African Republic, including the *Bemba* case, to Pre-Trial Chamber II. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and

Gombo, a national of the Democratic Republic of Congo alleged to be responsible for crimes committed on the territory of the Central African Republic.<sup>35</sup> According to Article 58(1) of the Rome Statute, the Pre-Trial Chamber “shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) [t]he arrest of the person appears necessary” to securing the person’s appearance at trial, preventing interference with the administration of justice, or preventing the ongoing commission of the suspected crime.<sup>36</sup> After examining the Prosecutor’s application,<sup>37</sup> the Chamber found reasonable grounds to believe that Mr. Bemba is responsible for a series of crimes – including the crimes against humanity of rape and torture and the war crimes of rape, torture, and outrages upon personal dignity – and therefore issued the requested warrant.<sup>38</sup> Notably, however, the Chamber included the following language in its decision:

The Chamber... recalls that in his Application the Prosecutor appears on occasion to have presented the same facts under different legal characterizations. It wishes to make it clear that the Prosecutor should choose the most appropriate characterization. The Chamber considers that the Prosecutor is risking

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(b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 16 (Pre-Trial Chamber II, 15 June 2009).

<sup>35</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, ¶¶ 4, 26 (Pre-Trial Chamber III, 10 June 2008).

<sup>36</sup> Rome Statute, *supra* n. 3, Art. 58(1)(a) – (c).

<sup>37</sup> While the application for the arrest warrant was pending, the Prosecution received information regarding a likely attempt by Mr. Bemba to flee the Kingdom of Belgium, where he was residing, and therefore the Chamber issued a request for the provisional arrest of Mr. Bemba pursuant to Article 95 of the Rome Statute on 23 May 2008. See *Bemba*, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, *supra* n. 35, ¶¶ 6-8.

<sup>38</sup> *Id.* ¶ 90(a)(i) – (vii).



subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. *It is for the Chamber to characterize the facts put forward by the Prosecutor.* The Chamber will revisit this issue in light of the evidence submitted to it by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure the fair and expeditious conduct of the proceedings.<sup>39</sup>

The Chamber cited to no authority to support its finding that the Chamber is responsible for characterizing the facts put forward by the Prosecutor.

Mr. Bemba was transferred to the Hague in July 2008.<sup>40</sup> On 19 November 2008, the Prosecution filed its Document Containing the Charges, indicating that it sought to commit Mr. Bemba to trial on the basis of the charges contained in the Pre-Trial Chamber's 10 June 2008 arrest warrant, namely: the crimes against humanity of murder, rape, and torture, and the war crimes of murder, rape, torture, outrages upon personal dignity, and pillaging.<sup>41</sup> In January 2009, the Pre-Trial Chamber held a hearing to determine whether sufficient evidence exists to establish there are substantial grounds to believe that Mr. Bemba is responsible for the alleged crimes.<sup>42</sup>

Approximately two months after the close of the confirmation hearing, the Pre-Trial Chamber issued a decision adjourning the confirmation process pursuant to Article 61(7)(c)(ii), the provision of the Rome Statute authorizing the Pre-Trial Chamber to "request the Prosecutor to consider... [a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the

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<sup>39</sup> *Id.* ¶ 25 (emphasis added).

<sup>40</sup> *Id.* ¶ 4.

<sup>41</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 34, ¶¶ 71, 210.

<sup>42</sup> *Id.* ¶ 12.

Court.”<sup>43</sup> Specifically, the Chamber requested that the Prosecution consider amending the mode of responsibility under which it had charged Mr. Bemba to include allegations that the accused was responsible for the alleged crimes under a theory of superior responsibility.<sup>44</sup> In line with the Chamber’s request, the Prosecution filed an Amended Document Containing the Charges on 30 March 2009, including allegations involving Mr. Bemba’s liability as a superior pursuant to Article 28 of the Rome Statute as an alternative to his individual responsibility pursuant to Article 25 of the Rome Statute.<sup>45</sup>

On 15 June 2009, the Pre-Trial Chamber issued its decision regarding the charges against Mr. Bemba.<sup>46</sup> With regard to the crimes against humanity charged by the Prosecution, the Chamber found that there was “sufficient evidence to establish substantial grounds to believe that acts of murder and rape constituting crimes against humanity... were committed as part of a widespread attack directed against the civilian population” of the Central African Republic during the relevant time period.<sup>47</sup> However, the Chamber went on to say that it “reject[ed] the cumulative charging approach of the Prosecutor” and thus declined to confirm the charge of torture as a crime against humanity.<sup>48</sup>

Explaining its position, the Chamber stated that the Prosecutor “used a cumulative charging approach by characterizing count 3 [the crime against humanity of torture] of the Amended [Document Containing the Charges] as ‘[torture] through acts of rape or other forms of sexual

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<sup>43</sup> *Id.* ¶ 15.

<sup>44</sup> *Id.*

<sup>45</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, ICC-01/05-01/08-395 (Office of the Prosecutor, 30 March 2009).

<sup>46</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 34.

<sup>47</sup> *Id.* ¶ 72.

<sup>48</sup> *Id.*

violence” and that the Prosecutor “aver[red] that the same criminal conduct can be prosecuted under two different counts, namely the count of torture as well as the count of rape, the acts of rape being the instrument of torture.”<sup>49</sup> It then “acknowledge[d] that the cumulative charging approach is followed by national courts and international tribunals under certain conditions,”<sup>50</sup> citing, *inter alia*, a number of decisions by the International Criminal Tribunals for the former Yugoslavia and Rwanda in which those tribunals recognized that the Prosecutor may be justified in bringing cumulative charges where different crimes contain differing elements or where the laws in question protect “differing social interests.”<sup>51</sup> Nevertheless, the Chamber went on to “recall” the language cited above from its decision granting the Prosecutor’s request for an arrest warrant, in which the Pre-Trial Chamber had stated that it was for “the Chamber to characterize the facts put forward by the Prosecutor,”<sup>52</sup> and stated that it had “intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence.”<sup>53</sup> In light of this position, the Chamber held that, “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges,” and that this is “only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.”<sup>54</sup> The Chamber further supported its holding by adding:

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<sup>49</sup> *Id.* ¶ 199.

<sup>50</sup> *Id.* ¶ 200 (internal citations omitted).

<sup>51</sup> See, e.g., *Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95-I, Trial Judgment, ¶¶ 625-50 (21 May 1999); *Prosecutor v. Kupreskic et al*, Case No. IT-95-16-T, Decision on the Defence Challenges to Form of Indictment (15 May 1998).

<sup>52</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 34, ¶ 201.

<sup>53</sup> *Id.* ¶ 202.

<sup>54</sup> *Id.* ¶ 202, n. 277.

[T]he ICC legal framework differs from that of the *ad hoc* tribunals, since under [R]egulation 55 of the Regulations [of the Court<sup>55</sup>], the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.<sup>56</sup>

Applying its adopted framework to the Prosecutor's charges against Mr. Bemba, the Pre-Trial Chamber held that "the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape."<sup>57</sup> However, because the act of rape "requires the additional specific material element of penetration," the Chamber held that rape is "the most appropriate legal characterisation in this particular case."<sup>58</sup> The Chamber made similar findings with regard to the Prosecutor's charge of outrages upon personal dignity as a war crime.<sup>59</sup> Specifically, the Chamber held that, in its opinion, "most of the facts presented by the Prosecutor at the [Confirmation] Hearing reflect in essence the constitutive elements of force or coercion in the crime of rape, characterizing this conduct, in

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<sup>55</sup> See *supra* n. 31 and accompanying text.

<sup>56</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 34, ¶ 203.

<sup>57</sup> *Id.* ¶ 204.

<sup>58</sup> *Id.* With regard to evidence presented by the Prosecution during the Confirmation Hearing on alleged acts of torture other than acts of rape, the Chamber determined that the Prosecution had failed to adequately notify the Defense of such allegations in the Document Containing the Charges and therefore declined to confirm torture as a crime against humanity based on acts of torture other than rape. *Id.* ¶¶ 206-09.

<sup>59</sup> *Id.* ¶¶ 301-02. Note that the Chamber also declined to confirm the charge of torture as a war crime, although it based this decision on a finding that the Prosecutor failed to properly allege the perpetrator's specific intent to inflict pain or suffering for a prohibited purpose, as required for the war crime of torture under the Rome Statute. See *id.* ¶¶ 293-300.

the first place, as an act of rape.”<sup>60</sup> Hence, the Chamber held that the “essence of the violation of the law underlying [the relevant] facts is fully encompassed in the count of rape” and confirmed the charge of rape as a war crime, but not outrages upon personal dignity as a war crime.<sup>61</sup>

Following the issuance of the Pre-Trial Chamber’s decision, the Prosecution filed a request for leave to appeal the Chamber’s decision declining to confirm certain charges against Mr. Bemba.<sup>62</sup> Among the arguments that the Prosecution sought to advance on appeal was that the Pre-Trial Chamber has no authority to “deny confirmation of proven charges because [the Chamber] considers [the charges] are unnecessary, cumulative, or burdensome to the Defence.”<sup>63</sup> In support of this argument, the Prosecution relied on Article 61(7) of the Rome Statute, which governs the authority of the Pre-Trial Chamber in the context of the confirmation of charges process.<sup>64</sup> Specifically, Article 61(7) provides as follows:

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

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

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<sup>60</sup> *Id.* ¶ 310.

<sup>61</sup> *Id.* ¶¶ 310-11.

<sup>62</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-427 (Office of the Prosecutor, 22 June 2009).

<sup>63</sup> *Id.* ¶ 1.

<sup>64</sup> *Id.* ¶ 14.

- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.<sup>65</sup>

Thus, as the Prosecution pointed out in its request for leave to appeal, “[n]othing in the [Rome] Statute authorises the Chamber to decline to confirm [a charge] because it considers the charge is unnecessary or unduly burdensome to the Defence.”<sup>66</sup> The Prosecution also sought to appeal the manner in which the Chamber’s determination that cumulative *charging* – as opposed to cumulative *convictions* – are not permissible.<sup>67</sup> Finally, the Prosecution argued that the Appeals Chamber should review the manner in which the Pre-Trial Chamber applied its own standard for determining whether a charge was cumulative.<sup>68</sup>

Both the Office of Public Counsel for Victims (OPCV) and the Women’s Initiatives for Gender Justice submitted briefs in support of the Prosecution’s application, the latter in the form of an *amicus curiae* brief.<sup>69</sup> For its part, the OPCV agreed with the Prosecutor’s argument

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<sup>65</sup> Rome Statute, *supra* n. 3, Art. 61(7) (emphasis added).

<sup>66</sup> *Bemba*, Prosecution’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, *supra* n. 62, ¶ 15.

<sup>67</sup> *Id.* ¶ 16.

<sup>68</sup> *Id.* ¶¶ 17-18.

<sup>69</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba

that “it would be within the discretionary competence of the Prosecutor, and not the Pre-Trial Chamber, to choose the charges...”<sup>70</sup> Furthermore, the OPCV argued that, “considering that the victim status [before the ICC] is linked to the charges of the case, many victims would risk being denied participatory rights, and thus, would be deprived of presenting their views and concerns” if the Pre-Trial Chamber’s decision to cut out certain charges was not overturned on appeal.<sup>71</sup>

The Pre-Trial Chamber responded to the Prosecution’s request for leave to appeal on 18 September 2009, rejecting the application on the grounds that the issues sought to be appealed by the Prosecution would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>72</sup> In its decision, the Chamber seemed to step away from its finding that the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime were not sufficiently “distinct” from the charges of rape as a crime against humanity and rape as a war crime, respectively.<sup>73</sup>

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Gombo,” ICC-01/05-01/08-532, ¶¶ 6-8 (Pre-Trial Chamber II, 18 September 2009).

<sup>70</sup> *Id.* ¶ 42. The submission by the OPCV is available in French only.

<sup>71</sup> *Id.* ¶ 43.

<sup>72</sup> *See generally id.* As explained in note 16 above, Article 82(1) of the Rome Statute provides for an automatic right to obtain interlocutory review of a decision only in certain limited instances. *See Rome Statute, supra* n. 3, Art. 82(1)(a) – (c). For all other decisions, the parties must secure leave to file an interlocutory appeal from the Chamber issuing the impugned decision, which will be granted only where the decision “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.” *Id.* Art. 82(1)(d).

<sup>73</sup> *Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” *supra* n. 69, ¶ 51 (“The Chamber does not find merit in the Prosecutor’s argument pertaining to a lack of authority of the Pre-Trial Chamber to decline charges based on considerations of cumulative charges. In particular the Prosecutor’s understanding that the Chamber erred in assuming that the crimes of torture and outrages upon personal dignity were not ‘distinct’ crimes separate from the crime of rape, seems to rest on a misrepresentation of the Chamber’s findings in the 15 June 2009 decision.”).

Instead, the Chamber suggested that its decision to decline the charges was based on its “inherent powers” to “conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence.”<sup>74</sup> With regard to the Prosecution’s argument that Article 61(7) *requires* the Pre-Trial Chamber to confirm the charges where it finds sufficient evidence to support the charge, the Chamber held that it cannot be “restrict[ed]... to a literal understanding of [A]rticle 61(7) of the Statute.”<sup>75</sup> The Chamber also reiterated its view, first expressed in its decision granting the arrest warrant for Mr. Bemba, that “it is for the Chamber to characterise the facts put forward by the Prosecutor.”<sup>76</sup> Once again, the Chamber cited to no authority for this proposition, other than its own earlier decision.<sup>77</sup> Nor did the Chamber explain why, earlier, it found it necessary to comply with Article 61(7)(c)(ii) – by adjourning the proceedings and requesting that the Prosecutor consider amending the charges to include allegations that the accused is responsible for the alleged crimes under a theory of superior responsibility<sup>78</sup> – rather than amending the charges on its own initiative.

Interestingly, in response to the OPCV’s argument that the decision should be reviewed on appeal due to the potential impact of the decision on victims’ participatory rights, the Chamber took a decidedly different approach.<sup>79</sup> In that regard, the Chamber explained as follows:

By declining to confirm some of the charges based on cumulative charging, the Chamber did not reduce the factual scope of the case but decided to not qualify the

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<sup>74</sup> *Id.* ¶ 52.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶ 54.

<sup>77</sup> *Id.*

<sup>78</sup> *See supra* n. 43 *et seq.* and accompanying text.

<sup>79</sup> *Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” *supra* n. 69, ¶ 56.



facts as presented by the Prosecutor. All facts pertaining to acts of rape, which the Prosecutor presented under more than one legal characterisation, have been retained... The Trial Chamber will thus be able to decide on the facts and circumstances described in the 15 June 2009 Decision [on the confirmation of charges...]. In addition... the Trial Chamber may invoke [R]egulation 55 of the Regulations and re-characterise a crime to give it the most appropriate characterisation.<sup>80</sup>

In other words, the Pre-Trial Chamber appears to suggest that even if its characterization is incorrect, the Trial Chamber can later fix the error at trial pursuant to Regulation 55. Thus, the Pre-Trial Chamber justified its decision declining to confirm the charges as presented by the Prosecutor on grounds relating to efficiency and the rights of the Defense. However, in so doing, it rejected the victims' claims, in part, by using an argument that is *contrary* to efficiency and the rights of the Defense, since if the Trial Chamber can later re-characterize the charges, neither party can be absolutely certain what the relevant charges will be, even after the case moves to trial.

C. *LUBANGA CASE: TRIAL CHAMBER DETERMINES IT MAY ADD NEW CHARGES IN THE MIDST OF AN ONGOING TRIAL*

As described above, Thomas Lubanga Dyilo, the first suspect to be arrested by the International Criminal Court, was taken into custody on 17 March 2006.<sup>81</sup> Nearly one year later, on 6 March 2007, the case against Mr. Lubanga was referred to Trial Chamber I for trial on the charges confirmed by Pre-Trial Chamber I,<sup>82</sup> namely: enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003; and

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<sup>80</sup> *Id.* See also *supra* n. 31 and accompanying text (providing the full text of Regulation 55).

<sup>81</sup> See *supra* n. 1 and accompanying text.

<sup>82</sup> *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).

enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003.<sup>83</sup>

Despite a pre-trial process that lasted almost one year, the Trial Chamber took nearly two additional years to address preliminary issues before the trial, which did not commence until 26 January 2009.<sup>84</sup> Five months later, on 22 May 2009 – over three years after Mr. Lubanga was taken into the custody of the ICC – the Legal Representatives of the victims participating in the *Lubanga* case filed a joint application with the Trial Chamber “pertaining to the implementation of the procedure provided for by [R]egulation 55 of the Regulations of the Court.”<sup>85</sup> Specifically, the victims’ Legal Representatives requested that the Trial Chamber invoke Regulation 55 to apply “an additional legal characterization” to the facts and circumstances described in the charging document.<sup>86</sup> In particular, the victims’ application argued that the Trial Chamber should amend the charges to include the crime against humanity of sexual slavery and the war crimes of sexual slavery and cruel and/or inhuman treatment.<sup>87</sup> According to the victims, these charges could properly be added under the Trial Chamber’s authority to “change the legal characterisation of the facts” because, in the view of the victims, the proposed additional charges fell “within the context of the facts and circumstances described in the charges against [Mr. Lubanga]” as confirmed by the Pre-Trial Chamber.<sup>88</sup>

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<sup>83</sup> *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 6, at 156.

<sup>84</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-107-ENG, at 4 (Trial Chamber I, 26 January 2009).

<sup>85</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the *Regulations of the Court*, No. ICC-01/04-01/06-1891-tEng, ¶ 5 (Trial Chamber I, 22 May 2009).

<sup>86</sup> *Id.* ¶ 41.

<sup>87</sup> *Id.* ¶¶ 15, 41.

<sup>88</sup> *Id.* ¶ 41.

In a decision issued 14 July 2009, the same day that the Prosecution finished presenting its evidence in the case against Mr. Lubanga as confirmed by the Pre-Trial Chamber, the majority of Trial Chamber I notified the parties that it would consider adding the victims' Legal Representatives' proposed charges.<sup>89</sup> Significantly, while the victims had argued that the proposed charges fell within the facts and circumstances of the confirmed charges, the majority of the Trial Chamber held that it *was not bound* by the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber.<sup>90</sup> It reached this conclusion by finding that Regulation 55 creates "two distinct stages" at which the Trial Chamber could change the legal characterization of the facts.<sup>91</sup> During one stage, described in Regulation 55(1), the Trial Chamber determined that it may change the legal characterization of the facts in its final judgment on the guilt or lack of guilt of the accused, so long as the new charges do not exceed the "facts and circumstances described in the charges and any amendment to the charges."<sup>92</sup> During the second stage, according to the majority, the Chamber may change the legal characterization of the charges against the accused "at any time during the trial" *without being limited to the facts or circumstances described in the charges*, so long as the Trial Chamber provides the parties with the procedural protections contained in Regulations 55(2) and (3), such as notice to the parties.<sup>93</sup> Notably, the majority provided no support for its unique interpretation of Regulation 55.

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<sup>89</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049 (Trial Chamber I, 14 July 2009).

<sup>90</sup> *Id.* ¶¶ 27-32.

<sup>91</sup> *Id.* ¶ 27.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

The Chamber then went on to advise the parties that it was considering changing the legal characterization of facts pursuant to the second stage, *i.e.*, pursuant to Regulation 55(2), suggesting that the Chamber did not consider itself bound by the “facts and circumstances described in the charges and any amendments to the charges.”<sup>94</sup>

In a subsequent “clarification” to the 14 July 2009 decision, the majority of the Trial Chamber seemed to step back somewhat from its holding that it was in no way bound by the facts and circumstances contained in the Prosecution’s charges.<sup>95</sup> Specifically, the majority held that it would only consider adding the charges proposed by the victims – which ostensibly fell within the facts and circumstances of the confirmed charges because the allegations of sexual slavery and cruel and/or inhumane treatment were based on acts committed against child soldiers – as opposed to throwing the case wide open to, for example, charges of genocide.<sup>96</sup> Furthermore, while the majority continued to state that it was not bound by the “facts and circumstances described in the charges” so long as it provides notice to the parties of the new charges, it added that any additional facts incorporated into the case by the Trial Chamber “must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.”<sup>97</sup>

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<sup>94</sup> *Id.* ¶¶ 34-35.

<sup>95</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Clarification and Further Guidance to Parties and Participants in Relation to the “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” ICC-01/04-01/06-2093 (Trial Chamber I, 27 August 2009).

<sup>96</sup> *Id.* ¶ 7. Note that Mr. Lubanga was charged with genocide in the DRC before being surrendered to the ICC. See *The Prosecutor v. Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor’s Application for a Warrant of Arrest, Article 58, Annex 1, ICC-01/04-01/06-8, ¶ 33 (Pre-Trial Chamber I, 10 February 2006).

<sup>97</sup> *Lubanga*, Clarification and Further Guidance to Parties and Participants in Relation to the “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 95, ¶ 8.

The majority cited to no authority for this statement. Indeed, there is nothing in Regulation 55 or in the Rome Statute or Rules of Procedure and Evidence that authorizes adding new charges based on facts that “build a unity” with the facts underlying the charges confirmed at the pre-trial stage, and the majority provided no indication as to how the standard would or should be interpreted.

Following the issuance of the majority’s initial opinion on 14 July 2009, Presiding Judge Adrian Fulford issued a strong dissent, primarily challenging the majority’s interpretation of Regulation 55 as creating two distinct stages at which the Chamber could re-characterize the charges.<sup>98</sup> Judge Fulford began by pointing out that the Regulations of the Court must be read “subject to the [Rome] Statute and [ICC Rules of Procedure and Evidence],”<sup>99</sup> meaning that no regulation may contradict a provision of the Statute or Rules.<sup>100</sup> Yet, as Judge Fulford explained, the majority’s interpretation of Regulation 55 necessarily conflicts with the Rome Statute. First, reading Regulation 55(2) as permitting modifications to the charges without reference to the facts and circumstances described in the charges and any amendments to the charges contradicts Article 74(2) of the Rome Statute,<sup>101</sup> which provides that the Trial Chamber’s final judgment “shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”<sup>102</sup> Judge Fulford elaborated on this point as follows:

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<sup>98</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” ICC-01/04-01/06-2009, Annex 1 (Trial Chamber I, 31 July 2009).

<sup>99</sup> Regulations of the Court, *supra* n. 31, Reg. 1(1).

<sup>100</sup> *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶ 6.

<sup>101</sup> *Id.* ¶ 9.

<sup>102</sup> Rome Statute, *supra* n. 3, Art. 74(2).

[T]he Statute, in explicit terms, left control over framing and effecting any changes to the charges (under Article 61(9) of the Statute) exclusively to the Pre-Trial Chamber. The scheme was clearly designed to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution. No opportunity is created for the Trial Chamber to send the case back to the Pre-Trial Chamber for a further hearing to amend or alter the charges, because ‘[a]fter the commencement of the trial’ the only available step is, following an application and with leave, to withdraw the charges. Critically, the statutory scheme has provided an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced.<sup>103</sup>

Second, the judge indicated that the majority’s reading of Regulation 55 as constituting two distinct stages means that, to the extent the Trial Chamber is acting under Regulation 55(1), the protections contained in Regulation 55(2) and (3) – including the requirement that the Chamber notify the parties that the legal characterization of facts may be subject to change and that the Chamber provide the parties with an opportunity to submit observations on the proposed changes<sup>104</sup> – do not apply.<sup>105</sup> However, as Judge Fulford observed, such a reading of Regulation 55 would “inevitably infringe certain central safeguards provided for the accused in the Rome Statute (as reflected in other international provisions), and it [would] run counter to the approach taken in key human rights jurisprudence.”<sup>106</sup> Specifically, Judge

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<sup>103</sup> *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶ 16.

<sup>104</sup> Regulations of the Court, *supra* n. 31, Reg. 55(2) and (3).

<sup>105</sup> *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶¶ 21-22.

<sup>106</sup> *Id.* ¶ 22.

Fulford noted that the Rome Statute “places an obligation on the Chamber to apply the law in accordance with internationally recognised human rights”<sup>107</sup> and provides the accused with the “fundamental right... to be informed promptly and in detail of the nature, cause and context of the charge[s]” against the accused.<sup>108</sup> Judge Fulford also cited a number of decisions by the European Court of Human Rights upholding the right of the accused to be notified of any change to the legal characterization of the facts in his or her case and an opportunity to prepare a defense to the new charge.<sup>109</sup>

Finally, Judge Fulford noted that the two judges who wrote the majority opinion had previously endorsed, in Trial Chamber I’s December 2007 decision in the early stages of the *Lubanga* case, an interpretation of Regulation 55 contrary to their current reading of the provision.<sup>110</sup> Notably, the majority of the Trial Chamber provided no explanation for its departure from this earlier interpretation in its 14 July 2009 decision.

Both the Prosecution and the Defense sought request for leave to appeal the majority’s 14 July 2009 decision, which was granted by the Trial Chamber on 3 September 2009.<sup>111</sup> The appeal is pending at the time of this writing.

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<sup>107</sup> *Id.* (citing Article 21(3) of the Rome Statute).

<sup>108</sup> *Id.* (quoting Article 67(1)(a) of the Rome Statute).

<sup>109</sup> *Id.* ¶¶ 23-25.

<sup>110</sup> *Id.* ¶ 30. See also *supra* n. 32 *et seq.* and accompanying text (describing Trial Chamber I’s initial interpretation of Regulation 55).

<sup>111</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision adjourning the evidence in the case and consideration of Regulation 55, ICC-01/04-01/06-2143, ¶ 10 (Trial Chamber I, 2 October 2009). The Trial Chamber’s decision granting leave to appeal has not been made publicly available as of this writing.

### III. ANALYSIS AND CONCLUSIONS

#### A. THE ROME STATUTE VESTS AUTHORITY IN THE PROSECUTOR TO FRAME THE CHARGES AGAINST THE ACCUSED

The underlying issue raised by each of the three decisions discussed above – the *Lubanga* Pre-Trial Chamber’s *sua sponte* amendment of the confirmed charges, the *Bemba* Pre-Trial Chamber’s holding that it has inherent powers to characterize the facts as presented by the Prosecutor, and the *Lubanga* Trial Chamber majority’s interpretation of Regulation 55 – is whether the judges at the ICC maintain a supervisory role over the Prosecution in the latter’s selection of charges. To answer this question, it is useful to examine not only the final text of the Rome Statute, but also the drafting history of the relevant provisions. We begin with the drafting history.

##### 1. *Travaux Préparatoires*

###### a) 1994 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.<sup>112</sup> As has been generally recognized, the Draft Statute was heavily influenced by the common law tradition,<sup>113</sup> which had significant consequences for the division of authority between the Prosecution and the Chambers under the draft. Generally speaking, in common law systems, prosecutors perform “both investigative functions as well as drawing up charges, while the judiciary remains, principally, a passive arbiter, awaiting the allegations to be brought before the Bench.”<sup>114</sup> In contrast, prosecutors in Romano-Germanic

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<sup>112</sup> See 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).

<sup>113</sup> See, e.g., *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, ¶ 130, 6 September 1995; 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).



systems are “only expected to deliver and prove the facts underlying the act committed.”<sup>115</sup> Thus, the judge is empowered in most Romano-Germanic jurisdictions to qualify the legal characterizations of the facts presented by the Prosecution in a “legally different format than the document containing the charges,” based on the understanding that the Prosecution has merely *recommended* a legal classification.<sup>116</sup>

Given its greater reliance on the common law tradition, the 1994 Draft Statute gave the ICC Prosecutor of the Court sole responsibility for “the investigation and the prosecution of the alleged crime.”<sup>117</sup> Once the Prosecutor determined that there was sufficient basis to proceed with a prosecution, he or she was required to “file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.”<sup>118</sup> The Presidency would then determine whether or not a *prima facie* case existed under the terms of the Statute.<sup>119</sup> In the event that the Presidency determined that a *prima facie* case existed and that the case should be heard by the Court, it would confirm the indictment and establish a Trial Chamber.<sup>120</sup> Under the 1994 Draft Statute, no Pre-Trial Chamber existed, nor was there provision for a confirmation of charges process beyond the Presidency’s decision regarding whether to

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<sup>114</sup> Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. Int’l Crim. Just. 71, 76 (2004).

<sup>115</sup> Carston Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 Crim. L. Forum 1, 5 (2005).

<sup>116</sup> *Id.*

<sup>117</sup> 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), Commentary to Art. 26, ¶ 1. No provision of the Draft Statute gave similar authority to any other organ of the Court.

<sup>118</sup> *Id.* Art. 27(1).

<sup>119</sup> *Id.* Art. 27(2).

<sup>120</sup> *Id.* Art. 27(2).

confirm the indictment, which took place without any input from the accused.<sup>121</sup>

Notably, the Draft Statute provided that the Presidency could amend the indictment *only* at the request of the Prosecution, even where the amendment involved changes that fell “within the scope of the original complaint.”<sup>122</sup> Moreover, where the Prosecution wanted to make changes that would “amount to a substantially different offence,” he or she was to file an entirely new indictment.<sup>123</sup> Importantly, even in the case of an amendment to the existing indictment – *i.e.*, where the Prosecution sought only changes that fell within the scope of the original complaint – the Draft Statute required that the accused be “notified of the amendment and ha[ve] adequate time to prepare a defence” based on the amendment.<sup>124</sup>

Finally, no provision of the Draft Statute afforded the Trial Chamber any authority to amend the charges against the accused. With respect to the final judgment of the Trial Chamber, the draft provided that the judgment “shall be in writing and shall contain a full and reasoned statement of the findings and conclusions.”<sup>125</sup>

b) 1995 *Ad hoc* Committee on the Establishment of an International Criminal Court

Upon receiving the ILC Draft Statute, the General Assembly established the *Ad hoc* Committee on the Establishment of an International Criminal Court, which met twice in 1995 to comment on the draft. Interestingly, despite the relatively limited powers of the Presidency as defined in the Draft Statute, “[a] substantial number of delegations expressed concern over the broad powers of the Presidency with respect to indictments.”<sup>126</sup> In particular, “[t]here was

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<sup>121</sup> *See generally id.*

<sup>122</sup> *Id.* Art. 27(4); *id.* Commentary to Art. 27, ¶ 6.

<sup>123</sup> *Id.* Commentary to Art. 27, ¶ 6.

<sup>124</sup> *Id.* Art. 27(4).

<sup>125</sup> *Id.* Art. 45(5).

<sup>126</sup> *Ad Hoc* Committee on the Establishment of an International Criminal Court,

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a view that these powers undermined the independence of the prosecutor.”<sup>127</sup> At the same time, “[e]mphasis was placed on the need to clarify the prosecutor’s discretion to file and possibly amend the indictment,” and it “was suggested that the suspect should be entitled to be heard, in order to ensure that the amendment of indictment did not infringe upon his or her rights.”<sup>128</sup>

c) 1996 Preparatory Committee for the Creation of an International Criminal Court

Discussion regarding the Draft Statute’s provisions on the filing, confirmation, and amendment of indictments continued into the 1996 Preparatory Committee for the Creation of an International Criminal Court. In particular, the Preparatory Committee discussed the confirmation process, as reflected in the following excerpt from the Committee’s report:

As regards the reviewing body, 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 appeals chambers. In this connection, it was proposed that a pre-trial, indictment or investigations chamber be established to examine the indictment and to hold confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes.<sup>129</sup>

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*Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, supra* n. 113, ¶ 143.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 144.

<sup>129</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. I, ¶ 233 (1996).

A number of specific proposals were made regarding the structure and functions of this proposed pre-trial body. For instance, France advocated the creation of “Preliminary Investigations Chambers” to “perform pre-trial functions” similar to those given to the Presidency under the ILC Draft Statute.<sup>130</sup> 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*.<sup>131</sup> Another proposal was that of Argentina, which 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.<sup>132</sup>

An Informal Group Report published by the Preparatory Committee at the end of August 1996 included both the French and the Argentine proposals for consideration.<sup>133</sup> 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.”<sup>134</sup> For instance, some participants in the 1996 meetings of the Preparatory Committee argued

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<sup>130</sup> 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.

<sup>131</sup> *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 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.”).

<sup>132</sup> 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.

<sup>133</sup> 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.

<sup>134</sup> 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).

that the “authority of a judicial body should be limited” in order “to preserve prosecutorial discretion and independence.”<sup>135</sup> 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.”<sup>136</sup>

With respect to the powers of the Trial Chamber, the view was expressed that the Chamber “should have power to convict the accused on the strength of evidence put forward of a crime different from that included in the indictment provided that the accused had an opportunity to defend himself or herself and that the punishment to be imposed would not be more severe than the punishment which may have been imposed under the original indictment.”<sup>137</sup> However, it does not appear as though any specific proposals were put forward to reflect this view, and the language was never incorporated into any future version of the draft. There was, by contrast, a proposal that the Statute expressly reflect a requirement that the “judgement shall not exceed the facts and circumstances described in the indictment or in its amendment, if any.”<sup>138</sup>

#### d) Zutphen Inter-Sessional Meeting

In early 1998, an inter-sessional 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, the delegates at Zutphen sought to create a “practical working document” that encapsulated the various proposed amendments to the Draft

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<sup>135</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Draft Report of the Preparatory Committee*, U.N. Doc. A/AC.249/L.15, at 5, 23 August 1996.

<sup>136</sup> *Non-Paper: Supervision Chamber*, United Kingdom, Non-Paper/WG.4/No. 3, ¶ 2(b), 5 August 1997.

<sup>137</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. I, *supra* n. 129, ¶ 291.

<sup>138</sup> 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, at 224 (1996).

Statute.<sup>139</sup> The article covering “commencement of prosecution” in the Zutphen Draft shows that there was still significant debate regarding the appropriate body for reviewing indictments and the powers afforded to that body with respect to the form of the indictment.<sup>140</sup> While the draft included a proposed provision for a “Pre-Trial Chamber,” the provision was bracketed in its entirety.<sup>141</sup> In addition, the provision contained internal brackets in regards to the proposed Chamber’s power following the confirmation hearing.<sup>142</sup> The relevant language stated that the Pre-Trial Chamber 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.<sup>143</sup>

On the subject of the Trial Chamber’s authority regarding the charges, the Zutphen Draft included the suggestion, first put forward in 1996, that the Statute expressly state that the “judgement shall not exceed the facts and circumstances described in the indictment or its amendment, if any.”<sup>144</sup>

## 2. *The Rome Statute*

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<sup>139</sup> 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.

<sup>140</sup> *Id.* at 95 (“The [Presidency] [Pre-Trial Chamber] shall examine the indictment...”).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, *supra* n. 139, at 96 (emphasis added).

<sup>144</sup> *Id.* at 120-21.

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. 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 Pre-Trial Chamber was not intended to act as “an investigating judge.”<sup>145</sup> 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,”<sup>146</sup> and, based on this determination, it “shall” do one of the following: (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.<sup>147</sup> Hence, while the Statute gives the Pre-Trial Chamber the power to review the charges for sufficiency of evidence and ask the Prosecutor to provide additional evidence, the

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<sup>145</sup> 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.”).

<sup>146</sup> Rome Statute, *supra* n. 3, Art. 61(7).

<sup>147</sup> *Id.*

Chamber is not authorized to become actively involved in the prosecution of the case, like an investigating judge would be empowered to do in a traditional Romano-Germanic system.<sup>148</sup>

Other provisions included in the final Rome Statute support the notion that the Prosecutor enjoys exclusive authority to frame the charges against an accused. For instance, Article 58(6), which relates to amendments of the arrest warrant, provides: “The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein.”<sup>149</sup> The Pre-Trial Chamber, in turn, is *required* to amend the warrant as requested by the Prosecutor “if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.”<sup>150</sup> Similarly, Article 61(9) provides as follows:

After the charges are confirmed and before the trial has begun, *the Prosecutor* may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If *the Prosecutor* seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, *the Prosecutor* may, with the permission of the Trial Chamber, withdraw the charges.<sup>151</sup>

It is not altogether clear if the Trial Chamber has any authority over changes to the charges *other than* a withdrawal of charges pursuant to Article 61(9).<sup>152</sup> One possibility is that Article 64(4), which provides

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<sup>148</sup> See, e.g., Olivier Fourmy, *Powers of the Pre-Trial Chambers, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1207, 1225 (Cassese 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.”).

<sup>149</sup> Rome Statute, *supra* n. 3, Art. 58(6).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* Art. 61(9) (emphasis added).

<sup>152</sup> *See id.*



that the Trial Chamber “may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber,”<sup>153</sup> authorizes the Chamber to “remand” a case to the Pre-Trial Chamber even after trial has begun if the Prosecution wishes to further amend the charges.<sup>154</sup> Of course, even if the Trial Chamber possesses such authority, it may only be exercised where “necessary for the [Trial Chamber’s] effective and fair functioning,” meaning that a motion by the Prosecutor seeking to amend the charges after trial has begun would be granted only in rare circumstances and taking into account the fair trial rights of the accused.

Finally, as discussed above, it is clear that the Trial Chamber may not *sua sponte* amend the charges, as Article 74(2) of the Rome Statute includes the language proposed in 1996 that the judgment “shall not

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<sup>153</sup> *Id.* Art. 64(4).

<sup>154</sup> See Otto Triffterer, *Article 74: Requirements for the Decision*, in COMMENTARY ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 953, 962 (Otto Triffterer ed. 1999) (arguing that Article 64(4) would authorize the Trial Chamber to refer an amendment to the charges to the Pre-Trial Chamber upon a motion by the Prosecutor requesting the amendment). Note that Triffterer also makes the argument that the Trial Chamber could itself amend the charges upon a motion by the Prosecutor, pursuant to Article 64(6)(a), which provides that the Trial Chamber may “[e]xercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11.” *Id.* However, Article 61(11) is itself “subject to” Article 61(9), which is the provision giving sole authority to the *Pre-Trial Chamber* to determine whether to confirm any amendments to the charges sought by the Prosecutor, suggesting that Article 64(6)(a) does not extend this authority to the Trial Chamber. See Rome Statute, *supra* n. 3, Art. 61(11). See also *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶ 15 (explaining that Article 64(6)(a) *does not* authorize the Trial Chamber to exercise the Pre-Trial Chamber’s powers under Article 61(9) because Article 64(6)(a) “operate[s] expressly **subject to** Article 61(9)”)” (emphasis in original). Triffterer interprets the language that makes Article 61(11) “subject to” Article 61(9) as meaning only that the Trial Chamber must give the accused notice and an opportunity to respond to the amended charges, but Judge Fulford’s reasoning seems more reasonable in light of the fact that Article 61(9) itself refers to the respective powers of the Pre-Trial Chamber and the Trial Chamber.

exceed the facts and circumstances described in the charges and any amendments to the charges.”<sup>155</sup>

B. PRE-TRIAL CHAMBER HAS ONLY THREE OPTIONS AT CONFIRMATION STAGE: CONFIRM THE CHARGES, DENY THE CHARGES, OR ADJOURN THE HEARING TO REQUEST THAT THE PROSECUTOR CONSIDER AMENDING THE CHARGES

As discussed above, two different Pre-Trial Chambers, acting in two different cases, have taken decisions in the context of the confirmation of charges process that would appear to exceed the authority of the Pre-Trial Chamber as set forth in Article 61(7) of the Rome Statute. To reiterate, Article 61(7) *requires* that the Pre-Trial Chamber take one of three actions upon the close of the confirmation of charges hearing.<sup>156</sup> First, the Pre-Trial Chamber is directed to “[c]onfirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed.”<sup>157</sup> Second, the Chamber is to “[d]ecline to confirm those charges in relation to which it has determined that there is insufficient evidence.”<sup>158</sup> Finally, if the Pre-Trial Chamber is not persuaded of the sufficiency of evidence, or considers that the charges do not appropriately reflect the evidence presented, Article 61(7)(c) allows the Pre-Trial Chamber to adjourn the hearing and *request that the Prosecutor* present more evidence or amend the charges.<sup>159</sup> Notably, this language differs from the rules of the International Criminal Tribunal for the former Yugoslavia, which expressly permit the Trial Chamber, “having heard the parties and in the interest of a fair and expeditious trial, [to] *direct the Prosecutor* to select the counts in the indictment on which to proceed.”<sup>160</sup>

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<sup>155</sup> *Id.* Art. 74(2).

<sup>156</sup> Rome Statute, *supra* n. 3, Art. 61(7).

<sup>157</sup> *Id.* Art. 61(7)(a).

<sup>158</sup> *Id.* Art. 61(7)(b).

<sup>159</sup> *Id.* Art. 61(7)(c).

<sup>160</sup> International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.43 (2009), entered into force 14 March 1994,

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 the charges *or to change the legal characterization of the facts* brought by the Prosecutor, and ultimately rejected those proposals.<sup>161</sup> More generally, the drafting history described above demonstrates a strong desire to protect the independence of the Prosecution.<sup>162</sup>

Given the plain language of Article 61(7), it is difficult to understand the *Bemba* Pre-Trial Chamber's finding that it is "for the Chamber to characterise the facts put forward by the Prosecutor."<sup>163</sup> It is also not clear why the same Chamber chose to comply with Article 61(7)(c)(ii) when it differed with the Prosecution's characterization of Mr. Bemba's alleged mode of responsibility with regard to the crimes.<sup>164</sup> While the Chamber followed the Statute in that instance, its own actions further call into question its approach with respect to the purportedly "cumulative" charges.

Finally, it would be difficult to justify the Pre-Trial Chamber's departure from the plain language of Article 61(7) on the grounds – asserted by the *Bemba* Chamber – that it has inherent powers to ensure the efficiency of proceedings and protect the rights of the Defense. As

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amendments adopted 24 July 2009, Rule 73*bis*(E) (emphasis added). It is worth noting that this language was adopted in the unique context of discussions relating to the "completion strategy" for the International Criminal Tribunal for the former Yugoslavia. See Letter dated 15 November 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/898, at 3-4, 16 November 2006 (discussing Rule 73*bis*(E) in the context of "Measures taken to implement the [ICTY's] completion strategy").

<sup>161</sup> See *supra* n. 143 *et seq.* and accompanying text.

<sup>162</sup> See *supra* n. 112 *et seq.* and accompanying text.

<sup>163</sup> See *supra* n. 76 *et seq.* and accompanying text.

<sup>164</sup> See *supra* n. 43 *et seq.* and accompanying text.

an initial matter, Article 21(1) of the Rome Statute provides that the Court “*shall apply*”<sup>165</sup> one of the following sources of law:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.<sup>166</sup>

Although the Court’s invocation of “inherent powers,” beyond the sources of law listed in Article 21(1), may at times be necessary to ensure the fairness and efficiency of proceedings, it is difficult to justify the use of such “inherent powers” to deviate from what the plain language of the Statute requires. Indeed, both Pre-Trial Chamber I and Trial Chamber I have read Article 21(1) so strictly in the past that they came to the conclusion that the parties to the *Lubanga* case were unable to meet with their witnesses prior to trial because nothing in the applicable sources of law *expressly authorizes* such meetings.<sup>167</sup> It is therefore surprising that the *Bemba* Pre-Trial Chamber would find authority to act in apparent contravention of the Rome Statute in relation to a process so fundamental as confirming the charges on which the accused will be sent to trial.

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<sup>165</sup> Rome Statute, *supra* n. 3, Art. 21(1) (emphasis added).

<sup>166</sup> *Id.* Art. 21.

<sup>167</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679 (Pre-Trial Chamber I, 8 November 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049 (Trial Chamber I, 30 November 2007).

Moreover, the *Bemba* Chamber's own rationale for its decision to deny confirmation of the charges it deemed to be "cumulative" shows that it is *not* acting in the interests of efficiency or to protect the rights of the Defense, as the Chamber justified its decision in part by stating that there was nothing preventing the Trial Chamber from later reinstating the so-called "cumulative" charges.<sup>168</sup> In terms of the interests of the Defense, the Rome Statute guarantees not only the accused's right to "be informed promptly and in detail of the nature, cause and content of the charge[s]," but also the right to "have adequate time and facilities for the preparation of the defense."<sup>169</sup> Surely these rights would be more meaningful if the accused was given some certainty over the charges on which he or she will be tried. As for the efficiency argument, the Pre-Trial Chamber's rationale calls into question the very purpose of having a confirmation of charges process, if it is not to finalize the charges prior to trial.

Hence, as stated in Article 61(7) of the Rome Statute, the role of the Pre-Trial Chamber at the conclusion of the confirmation process is to confirm each of the charges for which the Prosecution has presented sufficient evidence to establish substantial grounds to believe the accused is responsible for the crime, and deny those for which insufficient evidence exists. In the event that the Pre-Trial Chamber believes an amendment to the charges is in order, its sole recourse is to request that the Prosecutor consider amending the charges accordingly.

C. REGULATION 55 CANNOT BE INTERPRETED TO AUTHORIZE THE TRIAL CHAMBER TO AMEND THE CHARGES AGAINST THE ACCUSED

Article 52(1) of the Rome Statute requires the Regulations of the ICC to be "in accordance with th[e] Statute and the Rules of Procedure."<sup>170</sup> Yet, as Judge Fulford persuasively explained in his dissent from the 14 July 2009 decision, Trial Chamber I's majority interpretation of Regulation 55 inevitably conflicts with a number of provisions of the

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<sup>168</sup> See *supra* n. 80 *et seq.* and accompanying text.

<sup>169</sup> Rome Statute, *supra* n. 3, Art. 67(1)(a) and (b).

<sup>170</sup> *Id.* Art. 52(1).

Statute.<sup>171</sup> By utilizing a bifurcated reading of Regulation 55 that views the Trial Chamber as possessing authority to modify the charges at two different stages (during the course of the trial under sub-regulations 55(2) and (3) and in its final judgment under sub-regulation 55(1)), the majority concludes that the limitations in sub-regulation 55(1) do not apply when modifying the charges under sub-regulations 55(2) and (3) and vice versa.<sup>172</sup> This refusal to apply the restrictions cannot be seen as consistent with the Rome Statute.

As Judge Fulford suggested in his dissent, a possibility exists that Regulation 55 simply cannot be read consistently with the Rome Statute, even if the regulation is interpreted as creating a single process for re-characterizing the facts.<sup>173</sup> Indeed, while such an interpretation of Regulation 55 would avoid conflicts with Article 74(2) and the safeguards granted to the accused in the Statute, *any* use of Regulation 55 might still violate Article 61(9), which grants exclusive authority to the *Prosecutor* to amend the charges after the confirmation of charges hearing with permission of the *Pre-Trial Chamber* and notice to the accused.<sup>174</sup> As Judge Fulford explained, this issue turns on whether it is possible to modify the legal characterization of the facts *without* amending the charges.<sup>175</sup> Although it is not clear from any of the documents governing the Rome Statute what constitutes an “amendment” to the charges, as opposed to a change in the legal characterization of the facts, it seems that the addition of new crimes that would require the Prosecution to establish – and the accused to defend against – elements not present in the confirmed charges cannot be regarded as a mere “re-characterization” of the facts. For example,

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<sup>171</sup> See *supra* n. 101-108 *et seq.* and accompanying text.

<sup>172</sup> See *supra* n. 91 *et seq.* and accompanying text.

<sup>173</sup> *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶¶ 18-19.

<sup>174</sup> Rome Statute, *supra* n. 3, Art. 61(9).

<sup>175</sup> *Lubanga*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” Annex 1, *supra* n. 98, ¶ 18.

in the *Lubanga* case, the victims' Legal Representatives have requested that the Trial Chamber apply an "additional legal characterization" to the facts and circumstances described in the charges, namely by adding, *inter alia*, the *crime against humanity* of sexual slavery to the existing *war crimes* charges of recruiting, enlisting, and using child soldiers in armed conflict.<sup>176</sup> If the request

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<sup>176</sup> According to the ICC Elements of Crimes, the elements of Article 8 (2)(b)(xxvi) (War crime of using, conscripting or enlisting children) contains the following elements:

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

International Criminal Court, Elements of Crimes, ICC-ASP/1/3(part II-B) (2002), at 33. By contrast, Article 7(1)(g)-2 (Crime against humanity of sexual slavery) contains the following elements:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

*Id.* at 9.

were granted, the Prosecution would bear the burden of establishing crimes totally different in character from those confirmed over two years ago by the Pre-Trial Chamber, and Mr. Lubanga would be forced to defend against those new crimes. It is also questionable whether Regulation 55 is consistent with the language of Article 52(1) of the Rome Statute, which authorizes the judges to pass regulations only for the “routine functioning” of the Court.<sup>177</sup> Presumably, a regulation that significantly alters the respective authority of the Prosecution and the Chambers regarding the case against the accused, and which allows the Trial Chamber to substantially change the number and character of crimes against which an accused must defend, amounts to more than a provision regarding “routine functioning.”

It may be that, at most, Regulation 55 permits the Trial Chamber to exercise the power contemplated by the drafters during the 1996 Preparatory Commission,<sup>178</sup> namely: permitting the Trial Chamber to convict an accused of a lesser included offense if that offense contains the same essential elements as the original offense and will not result in punishment more severe than the confirmed charge. At the same time, by contrast to *adding* new charges with different elements, *substituting* the confirmed charge with a lesser included charge will not significantly affect the burden on the Prosecution or the work of the Defense, nor will it alter the authority of the Prosecution relative to the Chambers. As such, this interpretation of Regulation 55 is much more consistent with the notion that the Regulations of the Court are merely for the “routine functioning” of the Court than that applied by the majority of the Trial Chamber.

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<sup>177</sup> Rome Statute, *supra* n. 3, Art. 52(1).

<sup>178</sup> *See supra* n. 137 and accompanying text.



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## DEFINING THE CASE AGAINST AN ACCUSED BEFORE THE INTERNATIONAL CRIMINAL COURT: WHOSE RESPONSIBILITY IS IT?

Since the first case began at the International Criminal Court (ICC) in March 2006, a series of decisions have been issued raising questions about the respective authority of the Prosecutor and the judges to determine the appropriate charges in cases tried before the ICC. The first two decisions relate to the authority of the Pre-Trial Chambers, the main function of which is to oversee the process of confirming the charges against the accused prior to trial. Specifically, these decisions raise questions regarding whether a Pre-Trial Chamber may: (i) *sua sponte* amend the charges prior to confirmation; and/or (ii) decline to confirm charges for which sufficient evidence has been presented based on the inherent powers of the Chamber to ensure the fairness and efficiency of proceedings. The third decision relates to the authority of the Trial Chamber to change the “legal characterization” of the charges against an accused after the trial has commenced.

This report examines the key question underlying these decisions, namely, whether the judges at the ICC maintain a supervisory role over the Prosecution in the latter’s selection of charges. Based on a review of the drafting history of the Rome Statute governing the ICC and the treaty’s final provisions, we conclude that the Statute vests authority in the Prosecutor to frame the charges against the accused. Hence, the report finds that, as mandated by the language of the Rome Statute, the Pre-Trial Chamber has only three options at the close of the confirmation stage: confirm the charges, deny the charges, or adjourn the hearing to request that the Prosecutor consider amending the charges. At the same time, the report concludes that the Regulations of the Court cannot be interpreted to authorize the Trial Chamber to add new charges against the accused after the trial has commenced.



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

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