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Report of the Working Group on Lessons Learnt to the Study Group on Governance
Cluster I: Expediting the Criminal Process

Progress Report on Clusters A, B, C and E

I. Introduction

1. The Working Group on Lessons Learnt ("WGLL") hereby submits the present report to the Study Group on Governance ("Study Group"). The WGLL was established in October 2012 pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court ("Roadmap"), which was drafted by the Study Group and subsequently endorsed by the ASP in November 2012 and as amended in November 2013. The WGLL and the Roadmap were developed in response to a request by States Parties for a mechanism to identify areas for improving the efficiency of judicial proceedings and propose amendments to the legal framework. The Court identified nine clusters in its "First report of the Court to the Assembly of States Parties" as the most useful areas for discussion. The present report updates the Study Group on recent initiatives taken at the Court with a view to expediting judicial proceedings with regard to clusters A ("Pre-trial"), B ("Pre-trial and trial relationship and common issues"), C ("Trial") and E ("Appeals").

2. The Appeals Division, the Trial Division and the Pre-Trial Division have each been intensively involved in efforts to enhance the Court's efficiency and effectiveness. To this end, the judges of the Court participated in a retreat at Nuremberg in June 2015 (see section III below) which focussed on practice-based approaches to enhancing efficiency, as well as exploring certain proposals for amendments to the Court's legal texts. Many agreements were facilitated by the extensive discussions at Nuremberg, which focussed on trial and pre-trial proceedings. Subsequently, the achievements of Nuremberg have been consolidated through ongoing efforts in The Hague. For example, several judges are acting as focal points to co-ordinate the harmonisation of practices in relation to specific issues such as victims' applications for participation and procedures for admission, drafting style and the use of protocols or practice directions for non-contentious technical aspects of proceedings (see paras. 12, 47 and 49 below). In addition, efforts are ongoing in all three divisions to continue to pursue enhanced efficiency through the Court's jurisprudence, further identification of expeditious practice changes and improved working methods.

II. Changes to the composition, methodology and approach of the WGLL

3. The WGLL, in 2015, has undertaken reform of both the process and the output of the lessons learnt project.[1]

4. Process-wise, the composition and methodology of the WGLL have been reformed in 2015 to maximise judicial involvement in the lessons learnt process and optimise the interaction between the WGLL and the Advisory Committee on Legal Texts ("ACLT"). The WGLL is now chaired by President Fernández de Gurmendi and has a variable composition. This composition consists of the members of the Presidency, those judges who are members of the ACLT and those judges who volunteer to act as focal points in relation to specific issues currently under considerations.

5. Further clarification has been achieved regarding the interaction between the WGLL and the ACLT in respect of proposals for amendments. It has been re-iterated that, as had previously occurred, proposals for reform to the legal framework originating from the judiciary shall continue to be submitted first to the WGLL which will serve to prioritise and ensure sufficient support (of at least 5 judges) to proposals that are to be sent to the ACLT. It has now been clarified that the WGLL will act as a co-ordinating body for such proposals but will not discuss their substance. Such substance will be addressed by the ACLT. The judges who are members of the ACLT have confirmed their commitment to ensuring appropriate consultations with all the judges in their respective divisions concerning the proposals before the ACLT.

6. Turning to the output of the lessons learnt project, past experience has demonstrated that amending the Rules of Procedure and Evidence is highly complex and cumbersome. It is a time-consuming approach to enhancing efficiency and one which carries no guarantees of success.[2] Even when adopted, scattered amendments to certain rules have a limited capacity to have a real impact on proceedings. In view of this reality, the WGLL, in 2015, has pursued a holistic approach to enhancing and expediting proceedings which considers a range of options, including addressing entire clusters of issues together, considering whether enhanced efficiency can be achieved mainly through the internal adoption of best practices and amendments to the Regulations of the Court. Still, some amendments to the Rules of Procedure may be necessary in certain cases. As developed below, a proposed amendment to the Rules has been presented, following the Nuremberg retreat, and is now being considered by the ACLT.

III. The Nuremberg Retreat

7. The successful pursuit of enhancing the efficiency of the Court's proceedings requires the participation of all judges. Accordingly, as indicated at para. 2 above, the judges of the Court held a retreat in Nuremberg, Germany from 18 to 21 June 2015 ("Nuremberg

[1] As highlighted by President Fernández de Gurmendi, in her remarks to the New York Working Group of the Bureau of the ASP on 10 April 2015.

[2] At the thirteenth session of the ASP in December 2014, recommendations of the WGLL on proposals to introduce rule 140 *bis* and to amend rules 76(3), 101(3) and 144(2)(b) of the Rules of Procedure and Evidence were not adopted.

Retreat") in order to collectively and extensively reflect upon how to enhance the efficiency and effectiveness of pre-trial and trial proceedings and to identify both best practices and potential amendments to the Court's legal framework in this regard and to reflect on how to increase external awareness of the Court's work. The focus on trial and pre-trial proceedings reflected the previous identification by both the WGLL and the Study Group of Cluster B as integral to achieving overall enhancements to the system.[3] Given the limited time available for the retreat, it was considered best to leave out discussions concerning appeals proceedings. The Nuremberg Retreat also considered potential enhancements to the structure and working methods of chambers in order to pursue increased cohesion and efficiency. The programme of the Nuremberg Retreat is annexed to this report.

8. The judges prepared extensively in order to optimise what could be achieved at the Nuremberg Retreat. The retreat took place on the basis of discussion papers circulated by the Presidency in consultation with the judges of each of the Pre-Trial and Trial Divisions, various written contributions made by individual judges and the "Pre-Trial Practice Manual" prepared by the judges of the Pre-Trial Division, which is further developed below.

A. The Pre-Trial Practice Manual

9. The Pre-Trial Practice Manual ("Practice Manual") resulted from discussions held among the judges of the Pre-Trial Division in May and June 2015 with a view to expediting agreement on certain matters at the Nuremberg Retreat. The approach of the Practice Manual reflects the approach outlined in paras. 2 and 6 above in which priority is given to pursuing internal best practices considering, as a whole, the inter-related and complex issues facing the Pre-Trial Division. In order to facilitate the discussion at Nuremberg, the Practice Manual was usefully originally prepared to follow the structure of the relevant discussion paper circulated by the Presidency.

10. At the Nuremberg Retreat, the judges welcomed the preparation of the Practice Manual by the Pre-Trial Division. They endorsed the Practice Manual and agreed that it would be published on the website of the Court, following its restructuring. Accordingly, the Practice Manual was made available on the Court's website on 4 September 2015. The judges agreed that the Pre-Trial Manual itself achieved a sort of codification of a range of practice-based matters, particularly those discussion in section IV, part A below. A copy of the Practice Manual is annexed to this present report.

11. The Practice Manual is intended to be a dynamic and living document to be updated and expanded to other issues and phases of proceedings as agreement is achieved on further best practices. The judges of the Pre-Trial Division will meet on a regular basis to assess the need for any modifications.

B. The Inter-Divisional Committee on Drafting Style

12. In parallel to the above efforts, the importance of internal practice-based changes was similarly reflected in the establishment, in March 2015, of an Inter-Divisional Committee

[3] ICC-ASP/13/28, para. 26.

on Drafting Style to explore, *inter alia*, greater standardisation in matters of drafting and style across chambers and divisions.

13. At the Nuremberg Retreat, the focal point of the Committee presented two provisional documents: (i) a number of recommendations on drafting style, in both English and French, together with template decisions for a number of basic procedural matters (*i.e.* time limits, the classification of documents, arrangements for status conferences) and (ii) a provisional English language citation guide ("ICC Chambers' Style Guide").

14. Subsequent to the Nuremberg Retreat, work continued on the above draft documents. Recommendations on drafting style have been finalised by the Committee and will constitute an internal working document for the judges. The English-language ICC Chambers' Style Guide is being finalised and will be imminently available for application on a provisional basis. The French-language version of the Guide will then be prepared. Following its finalisation in both languages, the ICC Chambers' Style Guide will be made publicly available.

IV. Harmonisation of practice related to confirmation of charges proceedings

A. The Charges

15. At the Nuremberg Retreat, there was broad agreement among the judges with respect to several issues related to the charges and the basis of the trial.

16. It was reaffirmed that the confirmation decision is binding with respect to the scope and extent of the charges confirmed, *i.e.* the facts and circumstances described in the charges.[4] The binding nature of the confirmation decision requires that such decision be unambiguous as to the charges confirmed. The binding effect of the confirmation decision attaches only to the charges, and not to the reasoning of the Pre-Trial Chamber in support of its findings, including references to evidence and evidentiary/subsidiary facts. In order to ensure such clarity, the Practice Manual establishes an outline for the structure of a decision on the confirmation of charges. This structure includes an operative part, the

[4] See articles 61(7)(a) and 74(2) of the Rome Statute; Regulation 55(1) of the Regulations of the Court. See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé ("Gbagbo and Blé Goudé")*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-01/15-1, para. 57; *The Prosecutor v. Laurent Gbagbo ("Laurent Gbagbo")*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-01/11-810, para. 57; *The Prosecutor v. Charles Blé Goudé ("Blé Goudé")*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-02/11-222, para. 57. The binding nature of the charges (or any amendment thereto) has been confirmed by the Appeals Chamber: *The Prosecutor v. Thomas Lubanga Dyilo ("Lubanga")*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", 8 December 2009, ICC-01/04-01/06-2205, para. 88. See also the finding of the Appeals Chamber that "there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial", *Lubanga*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

only section binding on the Trial Chamber, in which the Pre-Trial Chamber shall reproduce *verbatim* those charges presented by the Prosecutor which are confirmed. The inclusion of the charges confirmed in an operative part has the advantage of precisely delineating the parameters of the trial. At the Nuremberg Retreat, the judges endorsed this proposed structure.

17. At the Nuremberg Retreat, the judges underlined that the responsibility to formulate the charges rests with the Prosecutor. These charges should be clearly identified in either a separate filing or a separate section of the Document Containing the Charges ("DCC") in order to distinguish them from other submissions included in the same document (evidentiary/subsidiary facts, description of surrounding circumstances, analysis of evidence etc.). These requirements have been codified in the Practice Manual.

18. The Practice Manual reflects, in this regard, recent practice in *The Prosecutor v. Laurent Gbagbo* (*"Laurent Gbagbo"*) and *The Prosecutor v. Charles Blé Goudé* (*"Blé Goudé")*, in which the Pre-Trial Chamber requested that the DCC clearly and comprehensively identify and set out the material facts and circumstances underlying the charges, with these being distinguished from facts of a subsidiary nature (factual allegations which aim to demonstrate or support the existence of material facts).[5]

19. At the Nuremberg Retreat, the judges took the view that, before the commencement of the confirmation hearing, the Pre-Trial Chamber is obliged to ensure that the formulation of the charges by the Prosecutor is consistent with the right of an accused person, pursuant to article 67(1)(a) of the Rome Statute, to "be informed promptly and in detail of the nature, cause and content of the charges". Accordingly, in the event that the Pre-Trial Chamber considers the charges to be defective, the Pre-Trial Chamber must send the charges back to the Prosecutor with instructions to remedy such defects. This should occur prior to the commencement of the hearing on the confirmation of charges and should occur even if such referral would result in the postponement of such commencement.

20. For example, Pre-Trial Chamber II, in *The Prosecutor v. Dominic Ongwen ("Ongwen")*, clarified that, in order to ensure the proper conduct of proceedings and to safeguard the rights of a suspect, questions concerning the form, completeness and clarity of the charges should be settled before the commencement of the confirmation hearing.[6]

21. At the Nuremberg Retreat, the judges agreed that the defence may bring challenges to the charges which do not touch upon the merits, nor require consideration of the evidence, at the latest, as procedural objections pursuant to rule 122(3). Such challenge must be made prior to the opening of the confirmation hearing.

22. The judges agreed that the confirmation decision may not expand the factual scope of the charges presented by the Prosecutor, although minor adjustments to the charges may be

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[5] Pre-Trial Chamber I, *Blé Goudé*, "Decision establishing a system for disclosure of evidence", 14 April 2014, ICC-02/11-02/11-57, paras. 11-12; Pre-Trial Chamber I, *Laurent Gbagbo*, "Decision on the date of the confirmation of charges hearing and proceedings leading thereto", 17 December 2012, ICC-02/11-01/11-325, paras. 27-28.

[6] *The Prosecutor v. Dominic Ongwen ("Ongwen")*, Transcript of the status conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, p. 20, lines 21-24.

made to ensure conformity with findings in the confirmation decision.[7] This is consistent with recent practice in the *Laurent Gbagbo* and *Blé Goudé* cases which replicated the Prosecutor's charges *verbatim* with only minor adjustments to ensure conformity with its findings.[8]

23. The judges agreed that the fact that the charges are confirmed by the Pre-Trial Chamber, does not preclude a Trial Chamber from requesting or allowing the presentation of supplementary documents by the Prosecutor explaining her case in which the evidence and arguments may be revised, adapted or updated so long as the description of the material facts and circumstances of the charges does not differ from that contained in the operative part of the confirmation decision.

24. The judges agreed that while the facts and circumstances described in the charges cannot be modified without formal amendment to the charges, the legal characterisation should be more flexible in order to avoid delays to the proceedings that may result from the use of regulation 55 of the Regulations of the Court at the trial level.

25. The judges agreed that, upon request by the Prosecutor, Pre-Trial Chambers will confirm alternative charges (including alternative modes of liability) where the evidence is sufficient. Such alternative charging may render resort to regulation 55 exceptional. In the practice of the Court, more recent confirmation decisions have adopted a flexible approach by confirming alternative legal characterisations of modes of liability and/or alternative legal characterisations for certain crimes.[9] In the event of the confirmation of alternative charges, it is for the Trial Chamber, on the basis of the trial proceedings, to determine which, if any, of the confirmed alternatives is applicable.

B. Evidence in pre-trial proceedings

1. Live evidence

26. In practice, the confirmation hearing has proceeded primarily on the basis of written evidence. At the Nuremberg Retreat, the judges agreed that the use of live evidence at the confirmation hearing should be exceptional and allowed only if such testimony cannot be replaced by a written statement or other documentary evidence. This reflects recent decisions of the Pre-Trial Chambers.[10]

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[7] The judges agreed that this is predicated on the DCC clearly distinguishing between the charges (material facts and circumstances and their legal characterisation) and the Prosecutor's submissions in support of the charges, as indicated at paras. 16-17 above.

[8] Pre-Trial Chamber I, *Blé Goudé*, "Decision on the confirmation of charges against Charles Blé Goudé", 11 December 2014, ICC-02/11-02/11-186; Pre-Trial Chamber I, *Laurent Gbagbo*, "Decision on the confirmation of charges against Laurent Gbagbo", 12 June 2014, ICC-02/11-01/11-656-Red.

[9] See a summary of developing practice in ICC-ASP/13/28, Annex II, paras. 21-23; See also Pre-Trial Chamber I, *Blé Goudé*, "Decision on the confirmation of charges against Charles Blé Goudé", 11 December 2014, ICC-02/11-02/11-186, para. 182

[10] See the finding in *Laurent Gbagbo* that "the Single Judge expects that oral testimony at the hearing, if any, will be narrowly relied on and only to the extent that it cannot be properly substituted by documentary evidence or a written statement", Pre-Trial Chamber I, *Laurent Gbagbo*, "Decision requesting observations from the parties on the schedule of the confirmation of charges hearing", 4 May 2012, ICC-02/11-01/11-107, para. 11; *Blé Goudé*, Transcript of 1 May 2014, ICC-02/11-02/11-T-4-Red-ENG, p. 10, lines 13-16; Pre-Trial Chamber I,

2. Format for the presentation of evidence

27. Rule 121(3) and (6) refer to the provision of a "list of evidence". To date, two different models for the presentation of such lists have emerged: a simple list presenting the items of evidence consecutively or a chart linking factual or legal claims with their supporting evidence.

28. Noting that there is no express basis by which a Pre-Trial Chamber could impose a particular modality for the presentation of evidence upon the parties, the Practice Manual, as endorsed by the judges at the Nuremberg Retreat, indicates that it is sufficient for the parties to provide a simple list with the items of evidence set out consecutively in any clear order, for example, by categories of evidence.

29. The judges agreed that no charts or tables (including "in-depth analysis charts") of the evidence disclosed and/or relied upon should be requested from either party.

30. The judges have also taken note of recent practice of the Prosecutor by which factual allegations have been accompanied by footnotes which include hyperlinks to the evidence in support.[11] The Practice Manual considers that such practice is potentially useful and should be encouraged.

3. Extent of disclosure at the pre-trial stage and extent of the communication of evidence to the Pre-Trial Chamber

31. Rule 121(2)(c) provides that "[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber". Differing interpretations have emerged as to the scope of evidence which must be communicated to the Pre-Trial Chamber: everything disclosed between the parties during pre-trial proceedings[12] or only that which the parties intend to rely on during the hearing on the confirmation of charges.[13]

Laurent Gbagbo, "Decision on the 'Requête de la Défense du Président Gbagbo en vue d'une prorogation de délais pour la soumission d'informations relatives à la présentation de témoignages viva voce lors de l'audience de confirmation des charges'", 15 May 2012, ICC-02/11-01/11-115, para. 11.

[11] *Ongwen*, Transcript of the status conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, p. 21, lines 22-23; Pre-Trial Chamber I, *Blé Goudé*, "Decision establishing a system for disclosure of evidence", 14 April 2014, ICC-02/11-02/11-57, para. 13.

[12] See e.g. Pre-Trial Chamber II, *Ongwen*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 27 February 2015, ICC-02/04-01/15-203, para. 11; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda ("Ntaganda")*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, paras. 9-10; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ("Muthaura, Kenyatta and Ali")*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 7 April 2011, ICC-01/09-01/11-44, paras. 5-6; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 7 April 2011, ICC-01/09-02/11-48, paras. 6-7; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", 31 July 2008, ICC-01/05-01/08-55, paras. 42-44.

[13] See e.g. Pre-Trial Chamber III, *Laurent Gbagbo*, "Decision establishing a disclosure system and a calendar for disclosure", 24 January 2012, ICC-02/11-01/11-30, para. 15; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana ("Mbarushimana")*, "Decision on issues relating to disclosure", 30 March 2011, ICC-

32. In order to provide clarity on the interpretation of rule 121(2)(c), the Practice Manual specifies that this provision requires the disclosure of all evidence disclosed between the parties during all pre-trial proceedings, *i.e.* from the person's initial appearance before the Court (or earlier, in certain instances) to the issuance of the decision on the confirmation of charges. This clarification was supported by the judges at the Nuremberg Retreat, who noted the need to both harmonise previously divergent practice and ensure simplicity.

33. At the Nuremberg Retreat, the judges discussed the requisite extent of the disclosure of incriminating evidence for the purpose of the confirmation of charges. The judges agreed, as stated in the Pre-Trial Manual endorsed by the judges, that the Court's statutory regime leaves the ultimate determination of such extent to the Prosecutor, although she must take into account the scope and purpose of the confirmation proceedings and the applicable standard of proof.

V. Streamlining practices related to the relationship between trial and pre-trial and common issues

A. The Prosecutor's trial-readiness

34. In the practice of the Court, investigations by the Prosecutor have often continued even after the decision confirming the charges, with such lack of trial-readiness delaying the commencement of trial.

35. The Appeals Chamber has held that:

> "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing … However, … this is not a requirement of the Statute. The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing".[14]

36. In *The Prosecutor v. Kenyatta*, a majority of Trial Chamber V has determined that the Prosecutor's capacity to continue investigations after charges have been confirmed is not unlimited, noting the expectation that the Prosecutor present a reliable narrative of events at the confirmation hearing and emphasising that any post-confirmation investigations should not involve the collection of evidence which should reasonably have been

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01/04-01/10-87, paras. 9-10; Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on issues relating to disclosure", 29 June 2010, ICC-02/05-03/09-49, paras. 5-6; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, "Second Decision on issues relating to Disclosure", 17 July 2009, ICC-02/05-02/09-35, paras. 9-10; Pre-Trial Chamber I, *Lubanga*, "Decision on the Final System of Disclosure and the Establishment of a Timetable", 16 May 2006, ICC-01/04-01/06-102, paras. 54-58.

[14] *Lubanga*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, para. 54. The desirability of the investigation being largely complete by the time of the hearing on the confirmation of charges has been later confirmed by the Appeals Chamber in *Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44.

obtained prior to the confirmation of charges.[15] Trial Chamber VI has also recently emphasised, in *The Prosecutor v. Bosco Ntaganda ("Ntaganda")*, that investigations should be largely completed prior to the confirmation hearing.[16]

37. A majority of Pre-Trial Chamber I, in the *Laurent Gbagbo* case, has indicated that it "must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation".[17]

38. More generally, Pre-Trial Chamber II, in the *Ongwen* case, emphasised, in the context of addressing the timing for review, disclosure and redactions, that the right of an accused to be tried without undue delay, pursuant to article 67(1)(c) of the Rome Statute, demands that "no efforts must be spared to render this right effective by reducing to a minimum the time between the end of the pre-trial phase and the commencement of the trial".[18] In this case, the Pre-Trial Chamber postponed the date of the confirmation hearing in order to allow further investigations, in the form of re-interviewing witnesses, so as to enable the Prosecutor to collect the best evidence for the purposes of the confirmation hearing.[19]

39. As a matter of policy, the judges at the Nuremberg Retreat considered that it would be highly desirable for cases to be as trial-ready as possible and for the Prosecutor to complete the necessary investigations to the extent possible, by the time of the confirmation hearing. This would enable the case to proceed to trial within a short period after any confirmation of the charges.

40. In this regard, the judges welcomed the commitment of the Prosecutor, evident in both the OTP Strategic Plan for 2012-2015 and draft Strategic Plan for 2016-2018, to be as trial-ready as possible from the earliest phases of proceedings, such as at the stage of seeking a warrant of arrest and no later than the confirmation of charges hearing.

41. At the Nuremberg Retreat, the judges further discussed methods for implementing the policy that the Prosecutor should be ready to proceed to trial as early as possible following the confirmation of the charges. There was broad agreement that Trial Chambers should seek to establish a clear final deadline for the disclosure of incriminating evidence in advance of the commencement of the trial. It was also recognised that, in practice, the setting of the trial date creates natural time limits for disclosure. It was also understood by the judges that any deadlines – codified or otherwise – would be without prejudice to the possibility of admitting new relevant evidence.

B. Unified systems

42. A key element of the harmonisation of practices involves the need to encourage more unified practices concerning certain technical aspects of proceedings. This would enable

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[15] *The Prosecutor v. Uhuru Muigai Kenyatta*, "Decision on defence application pursuant to Article 64(4) and related requests", 26 April 2013, ICC-01/09-02/11-728, paras. 119-121.
[16] *Ntaganda*, "Decision on Prosecution requests to vary the time limit for disclosure", 22 July 2015, ICC-01/04-02/06-740-Red, para. 12.
[17] *Laurent Gbagbo*, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, para. 25.
[18] *Ongwen*, "Decision Postponing the Date of the Confirmation of Charges Hearing", 6 March 2015, ICC-02/04-01/15-206, para. 30.
[19] ICC-02/04-01/15-206, para. 31.

less repetition of judicial work and greater unification: (1) across different stages of the proceedings (*i.e.* from pre-trial to trial) and (2) across different cases at the same level (e.g. amongst Trial Chambers acting in different cases).[20]

43. At the Nuremberg Retreat, the judges broadly agreed on the need to maximise the degree of effective continuity between pre-trial and trial levels in relation to case management, mindful of the need to avoid any appearance on the part of the Trial Chamber of prejudgment on a substantive question that is material to the Trial Chamber's ultimate responsibility to make the determination as guilt or innocence.

44. An example of the need for continuity can be seen in the Court's seeking increased efficiency in respect of redactions regimes. There has been considerable diversity in the practice of Pre-Trial Chambers in relation to the system for authorising redactions to evidence disclosed to the defence pursuant to rule 81(2) and (4).[21] A number of models have emerged, including:

    (i) review of specific redactions proposals of the Prosecutor by the Pre-Trial Chamber;[22]

    (ii) the Chamber only making determinations on individual redactions where a dispute thereon arises between the parties;[23] and/or

    (iii) redactions implemented by the Prosecutor without the need for prior authorisation for certain standard categories of information.[24]

45. This latter approach was implemented by Pre-Trial Chamber II in the *Ongwen* case, with the Single Judge noting such system to be "efficient as well as equitable".[25] This approach was modelled on that adopted in recent trials.[26] The Practice Manual, endorsed by the judges at the Nuremberg Retreat, adopts the approach used in *Ongwen*. For certain standard categories of information, redactions can be implemented by the Prosecutor without the need for prior authorisation by the Pre-Trial Chamber, the latter becoming seized of the question only in the event of a challenge by the defence which cannot be resolved *inter partes*. The burden of justifying such redaction remains with the

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[20] See Trial Chamber I, *Laurent Gbagbo*, "Decision on the Protocol establishing a redaction regime", 15 December 2014, ICC-02/11-01/11-737, paras. 3, 15.
[21] See further discussion of developing practice in this regard in ICC-ASP/13/28, Annex II, paras. 26-29.
[22] Pre-Trial Chamber I, *Lubanga*, "Decision on the Final System of Disclosure and the Establishment of a Timetable", 16 May 2006, ICC-01/04-01/06-102.
[23] Pre-Trial Chamber I, *Blé Goudé*, "Second decision on issues related to disclosure of evidence", 6 May 2014, ICC-02/11-02/11-67, paras. 12-13; Pre-Trial Chamber III, *Laurent Gbagbo*, "Decision establishing a disclosure system and a calendar for disclosure", 24 January 2012, ICC-02/11-01/11-30, paras. 48-51; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ("Katanga and Ngudjolo")*, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", 25 April 2008, ICC-01/04-01/07-428-Corr, paras. 139-146.
[24] Pre-Trial Chamber II, *Ongwen*, "Decision on issues related to disclosure and exceptions thereto", 23 April 2015, ICC-02/04-01/15-224.
[25] ICC-02/04-01/15-224, para. 3.
[26] Trial Chamber I, *Laurent Gbagbo*, Annex A to "Decision on the Protocol establishing a redaction regime", 15 December 2014, ICC-02/11-01/11-737-AnxA; Trial Chamber VI, *Ntaganda*, Annex A to "Decision on the Protocol establishing a redaction regime", 12 December 2014, ICC-01/04-02/06-411-AnxA.

Prosecutor. The non-disclosure of the identity of a witness during pre-trial proceedings, pursuant to rule 81(4), must be specifically authorised by the Chamber upon receipt of a motivated request by the Prosecutor. This requirement applies similarly to the non-disclosure of any entire item of evidence by the Prosecutor (*i.e.* the defence is not informed of the very existence of this evidence).

46. More generally, the judges agreed that efficiency could be maximised by ensuring that certain technical aspects of case management are governed by systems established during pre-trial proceedings which remain applicable in any subsequent trial. This might take the form of protocols or standard directions to be included in the decisions of Pre-Trial Chambers. The types of technical aspects potentially amenable to such regulation include, *inter alia*, the modalities of disclosure between the parties; the authorisation of exceptions to disclosure requirements; the modalities of victims' applications for disclosure and the procedure for their admission; the modalities for the handling of confidential information; and the modalities for contact with the witnesses of the opposing party.

47. To pursue the potential efficiency gains to be made from such continuity of technical systems, the judges, at the Nuremberg Retreat, decided to create a working group, to be chaired by a judge who volunteered to act as a focal point, tasked with identifying to what extent protocols and/or directions on non-contentious and technical aspects could be adopted across proceedings. This group is currently producing draft documents related to a number of the topics identified by the judges as appropriate for a unified approach, including exploring the possibility of taking further steps to consolidate the procedures for "standard" and "non-standard" justifications for redactions. The working group has produced a draft Standard Directions on Redactions and a draft "Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant", which will be added to the Pre-Trial Practice Manual pending their approval by all judges.

48. The judges also noted that the e-Court protocol should be uniformly and consistently applied in all cases.

C. Harmonisation of practice concerning victim applications

49. At the Nuremberg Retreat, the judges decided to create a working group, to be chaired by a judge who volunteered to act as a focal point, to pursue the harmonisation of practice with respect to victims' applications for participation in the proceedings and the procedure for their admission. Such working group has before it the Report on Cluster D(1): Applications for Victim Participation dated 25 August 2015. The work of this group is currently ongoing and the WGLL will report to the Study Group thereon in subsequent reports.

VI. Streamlining practices related to trial proceedings

A. Single Judge at trial level

50. The WGLL has taken note of the desire of the Study Group to receive information on the implementation, in practice, of amendments to the Rules of Procedure and Evidence which have been previously adopted in the context of the lessons learnt process.

51. Rule 132 *bis*, concerning the designation of a Single Judge for the preparation of the trial, was adopted by the ASP in November 2012.[27]

52. A Single Judge for the preparation of trial has been appointed by Trial Chamber I in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (as well as in the individual cases prior to their joinder).[28] By way of example, the types of procedural decisions which have been taken by the Single Judge are on issues such as: access to confidential materials,[29] time limits,[30] word limits,[31] the scheduling of and arrangements for status conferences,[32] the establishment of a protocol for redactions,[33] the request of submissions from parties and participants,[34] the reclassification of documents[35] and the seeking of leave to appeal in respect of largely procedural decisions.[36] Issues which, pursuant to the limitations

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[27] ICC-ASP/11/Res.2.

[28] *Gbagbo and Blé Goudé*, "Decision notifying the election of the Presiding Judge and designating a Single Judge", 25 March 2015, ICC-02/11-01/15-13; *Blé Goudé*, "Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence", 12 February 2015, ICC-02/11-02/11-199-Anx; *Laurent Gbagbo*, "Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence", 23 October 2014, ICC-02/11-01/11-700.

[29] *Gbagbo and Blé Goudé*, "Second decision on objections concerning access to confidential material on the case record", 21 July 2015, ICC-02/11-01/15-150; *Gbagbo and Blé Goudé*, "Decision on objections concerning access to confidential material on the case record", 24 June 2015, ICC-02/11-01/15-101; *Laurent Gbagbo*, "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record", 19 January 2015, ICC-02/11-01/11-749; *Laurent Gbagbo*, "Order on the notification of confidential filings to the Legal Representative of victims", 20 November 2014, ICC-02/11-01/11-724.

[30] *Blé Goudé*, "Order reducing the time limit to file responses to ICC-02/11-02/11-201", 28 January 2015, ICC-02/11-02/11-202; *Laurent Gbagbo*, "Decision granting extension of time", 24 November 2014, ICC-02/11-01/11-727-Red; cf. *Gbagbo and Blé Goudé*, "Decision on requests for clarification concerning review of the case record and extension of time", 13 April 2015, ICC-02/11-01/15-30.

[31] *Gbagbo and Blé Goudé*, "Decision on urgent Prosecution request for an extension of the word count limit for the Pre-Trial brief", 15 July 2015, ICC-02/11-01/15-138.

[32] *Laurent Gbagbo*, "Scheduling order and agenda for the status conference on 4 December 2014", 27 November 2014, ICC-02/11-01/11-730; cf. *Gbagbo and Blé Goudé*, "Order setting the final agenda for the status conference of 21 April 2015", 17 April 2015, ICC-02/11-01/15-40.

[33] *Laurent Gbagbo*, "Decision on the Protocol establishing a redaction regime", 15 December 2014, ICC-02/11-01/11-737.

[34] *Gbagbo and Blé Goudé*, "Order for submissions by the defence for Mr Blé Goudé concerning potentially privileged material", 26 June 2015, ICC-02/11-01/15-104; *Gbagbo and Blé Goudé*, "Order requesting the parties' and participants' observations under Article 60(3) of the Statute", 11 May 2015, ICC-02/11-01/15-61; *Laurent Gbagbo*, "Order requesting the parties and participants' observations under Article 60(3) of the Statute", 20 January 2015, ICC-02/11-01/11-750.

[35] *Laurent Gbagbo*, "Order reclassifying documents", 10 March 2015, ICC-02/11-01/11-806.

[36] *Gbagbo and Blé Goudé*, "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'", 10 July 2015, ICC-02/11-01/15-132; *Laurent Gbagbo*, "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims'

contained in rule 132 *bis*, have been decided by all three judges of the Chamber include: joinder,[37] the review of detention pursuant to article 60(3) of the Rome Statute[38] and the trial date.[39] The application of rule 132 *bis* has enabled the majority of decisions, which concern the preparation of the case for trial, to be taken by the Single Judge.

53. A Single Judge has also recently been elected by Trial Chamber VII in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido ("Bemba et. al.")*.[40]

54. At the Nuremberg Retreat, the judges discussed a number of matters related to the operation of rule 132 *bis*. There was agreement that the project of standardising systems and protocols, as discussed above at paras. 46-47, which has been referred to a working group, could encourage and simplify further use of rule 132 *bis* by providing a more uniform approach to the issues which a Single Judge may address under rule 132 *bis* (5). The judges agreed that the determination of whether a Single Judge procedure is useful is to be made by each Trial Chamber on a case-by-case basis.

B. Evidence in trial proceedings

55. At the Nuremberg Retreat, the judges exchanged ideas regarding potential tools at the disposal of Trial Chambers for reducing the future duration of the presentation of witness evidence at trial, in addition to discussing a number of other evidence-related issues.

1. Prior recorded testimony

56. Potential tools for reducing the duration of trial proceedings discussed by the judges at Nuremberg included prior recorded testimony under rule 68(2)(a) and (3). Rule 68(3) allows for the introduction of previously recorded testimony where: the witness is in agreement, is present before the Trial Chamber and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings. Rule 68(2)(a) allows for the introduction of previously recorded testimony even where the

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access to certain confidential filings and to the case record' and seeking suspensive effect of it", 11 March 2015, ICC-02/11-01/11-809.

[37] *Gbagbo and Blé Goudé*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-01/15-1; *Laurent Gbagbo*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-01/11-810; *Blé Goudé*, "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters", 11 March 2015, ICC-02/11-02/11-222; See also *Gbagbo and Blé Goudé*, "Decision on Defence requests for leave to appeal the 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters'", 22 April 2015, ICC-02/11-01/15-42.

[38] *Gbagbo and Blé Goudé*, "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", 8 July 2015, ICC-02/11-01/15-127-Red; *Laurent Gbagbo*, "Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", 11 March 2015, ICC-02/11-01/11-808.

[39] *Gbagbo and Blé Goudé*, "Order setting the commencement date for trial", 7 May 2015, ICC-02/11-01/15-58.

[40] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido ("Bemba et. al.")*, "Decision Notifying the Election of a Presiding Judge and Single Judge", 25 August 2015, ICC-01/05-01/13-1181-Corr.

witness is not present before the Trial Chamber if both the Prosecutor and the defence have had the opportunity to examine the witness during the recording.[41]

2. Focussed examination by the parties

57. At the Nuremberg Retreat, the judges broadly agreed that there is room to require sharper focus on the part of parties and participants during their examination of witnesses. For example, Chambers could more actively determine timelines for the parties.[42] The judges also exchanged ideas regarding the modes of questioning.

3. Active role for the Chamber in witness examination

58. At the Nuremberg Retreat, there was widespread agreement that judges could, where appropriate, take a more active role in relation to the conduct of proceedings, with suggestions including direct questioning of witnesses by a Chamber and curtailing ineffective questioning by the parties.

4. Agreed facts

59. At the Nuremberg Retreat, many judges agreed on the potential utility of agreed facts in trial proceedings, particularly in relation to background or contextual elements. Rule 69 provides that "[t]he Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims".

60. By way of recent example, in *Ntaganda*, at the prompting of Trial Chamber VI, a list of 82 agreed facts was jointly submitted by the parties, with the Chamber noting such facts and considering that rule 69 did not demand a more complete presentation of the evidence thereon.[43] Trial Chambers have further emphasised that the need for the parties to seek agreement on non-contested facts is ongoing.[44]

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[41] Rule 68 of the Rules of the Procedure and Evidence was amended by ICC-ASP/12/Res.7, although such amendments made no substantive changes to the provisions currently under discussion. What is now rule 68(2)(a) has been used on one occasion in the *Lubanga* case: ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16-18 November 2010. Although rule 68(2)(a) and (3) have not been extensively used, there is recent practice in relation to the use of prior recorded testimony pursuant to rule 68(2)(c) and (d) in: Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ("Ruto and Sang")*, "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 19 August 2015, ICC-01/09-01/11-1938-Red-Corr.

[42] See e.g. Trial Chamber V(A), *Ruto and Sang*, "Decision No. 2 on the Conduct of Trial Proceedings (General Directions)", 3 September 2013, ICC-01/09-01/11-900, paras. 25-27.

[43] *Ntaganda*, "Decision on Prosecution and Defence joint submission on agreed facts", 22 June 2015, ICC-01/04-02/06-662.

[44] Trial Chamber I, *Gbagbo and Blé Goudé*, "Order setting the commencement date for trial", 7 May 2015, ICC-02/11-01/15-58, para 27; Trial Chamber V(A), *Ruto and Sang*, "Decision on the Conduct of Trial Proceedings (General Directions)", 12 August 2013, ICC-01/09-01/11-847-Corr, para. 31.

5. Experts

61. At the Nuremberg Retreat, the judges discussed the application of regulation 44 of the Regulations of the Court empowers a Chamber, *inter alia*, to both direct the joint instruction of an expert by the participants and instruct an expert *proprio motu*. In this regard, it is to be noted that, in *Bemba et. al.*, Trial Chamber VII prompted the parties to explore the possibility of jointly instructing experts.[45]

6. Admissibility of evidence

62. At the Nuremberg Retreat, the judges generally agreed on the desirability of providing further guidance on the admissibility of evidence to the parties, with it being particularly important for the parties to have a clear understanding of admissibility requirements prior to the commencement of trial. The judges considered that the most efficient methodology and timing for addressing the admissibility of evidence must be determined by the Chamber on a case-by-case basis.[46]

C. Witness protection

63. The disclosure of the identity of a witness is often dependent on the completion of the assessment of the Victims and Witnesses Section (VWS)[47] and/or the implementation of any necessary protective measures. This has the potential to delay proceedings given that it takes an average of two to three months from referral of a witness to relocation in the context of the ICC Protection Programme, longer when multiple requests must be processed simultaneously.[48]

64. At the Nuremberg Retreat, the judges noted that the lack of effective witness protection may have serious implications for the materialisation of evidence at trial, for example, by witnesses becoming unwilling to testify. It was noted that Trial Chambers have a range of measures available to address witness protection issues, ranging from minimising delays in hearing oral testimony to the implementation of in-court protective measures.[49] For example, in *Ntaganda*, Trial Chamber VI ordered the Prosecutor to file a provisional list of trial witnesses six weeks prior to the filing of its final list, thus potentially assisting the work of the VWS.[50]

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[45] *Bemba et. al*, Transcript of 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG, p. 34.
[46] At the Pre-Trial level, Chambers have found that there is no obligation to undertake an assessment of the admissibility of each piece of evidence in accordance with article 69(4) of the Statute: Pre-Trial Chamber II, *Bemba et. al*., "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute", 11 November 2014, ICC-01/05-01/13-749, para. 14; *Ntaganda*, Pre-Trial Chamber II, "Decision on Admissibility of Evidence and Other Procedural Matters", 9 June 2014, ICC-01/04-02/06-308, para. 25.
[47] Formerly known as the Victims and Witnesses Unit.
[48] Pre-Trial Chamber I, *Katanga and Ngudjolo*, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", 25 April 2008, ICC-01/04-01/07-428-Corr, para. 61.
[49] For a recent example of the latter see, Trial Chamber VI, *Ntaganda*, "Decision on Prosecution request for in-court protective measures", 10 August 2015, ICC-01/04-02/06-774-Red.
[50] *Ntaganda*, "Corrigendum of 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial'", 28 November 2014, ICC-01/04-02/06-382-Corr, para. 9(a).

65. The judges generally agreed that these matters are an appropriate subject for further discussion among the judiciary, the Prosecutor, defence representatives and the Registrar. The judges noted that the time required to ensure witness protection is already a priority area for reform within the VWS, but noted that Trial Chambers could aid further expedition, for example by taking measures to prompt more timely referrals of witnesses to the VWS by the Prosecutor.

VII. Practice changes related to Appeals

66. As discussed at para. 2 above, as part of the follow-up to the Nuremberg Retreat, the Appeals Division employed concerted efforts to enhance the efficiency of proceedings, including though changes to its jurisprudence; this is notwithstanding that improvements in appeals proceedings did not form part of the discussions at the Nuremberg Retreat, due to time constraints..

67. On 31 July 2015, the Appeals Chamber issued a decision in which it took significant steps to minimise procedural delays and enhance the efficiency of its proceedings in respect of the participation of victims in interlocutory appeals.[51] The Appeals Chamber modified its previous practice, which had required victims to seek its authorisation to participate in an interlocutory appeal. The Appeals Chamber adopted an approach by which an interlocutory appeal is considered to be an extension of the proceedings before the Pre-Trial Chamber or Trial Chamber in question and thus victim participation for the purposes of an interlocutory appeal will be assumed for those victims authorised by the originating chamber in the proceedings underlying the appeal. If the personal interest of victims are not affected by issues arising in a specific interlocutory appeal or the participation of victims is otherwise inappropriate, the Appeals Chamber could render an order to such effect.[52]

68. This significantly reduces the procedural steps in such appeals and enables the Appeals Chamber to move more expeditiously towards its substantive determination thereof. For example, under the previous system, a victim wishing to participate in an appeal was required to make an application for participation, following which the Appeals Chamber would usually issue an order setting a deadline for responses to such application. The parties would then file such responses and the Appeals Chamber would issue a decision granting or denying the application to participate. Once a victim's participation had been authorised, such victim would then make his or her submissions on the interlocutory appeal. The replacement of this lengthy procedure by one in which victim participation is automatic for those victims authorised in respect of the underlying proceeding at trial or pre-trial level means that participating victims simply file their substantive response to the Document in Support of the Appeal within time limits pre-established by regulations 64 and 65 of the Regulations of the Court.

[51] *Gbagbo and Blé Goudé*, "Reasons for the 'Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)"'", 31 July 2015, ICC-02/11-01/15-172.
[52] ICC-02/11-01/15-172, paras. 15-19.

VIII. Amendments to the legal framework

69. As emphasised at paras. 2 and 6 above, the focus of the WGLL since its 2014 Reports has been on enhancements to efficiency through practice-based changes, harmonisation, developments in jurisprudence and improvements in working methods.

70. In addition, some amendments to the Court's legal framework, which were aimed at contributing to the sound management of proceedings, were discussed by the judges at the Nuremberg Retreat.

A. Rule 165 of the Rules of Procedure and Evidence

71. Article 70 of the Rome Statute concerns offences against the administration of justice. Rule 165 of the Rules of Procedure and Evidence concerns the investigation, prosecution and trial of such offences. Trial Chamber VII is currently seized with Article 70 offences in the *Bemba et. al.* case.

72. In view of the limited pool of judges, which creates potential difficulties in ensuring the availability of sufficient judges to conduct the current and pending trials before the Court, a proposal was sent to the ACLT in July 2015 concerning the amendment of rule 165 of the Rules of Procedure and Evidence. The proposal is for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases. As indicated above, this proposal is currently under consideration by the ACLT, pursuant to the procedure outlined in the Roadmap.[53]

B. Amendment to the Regulations of the Court

73. A further idea discussed at Nuremberg concerns the exploration of options to reduce the time required for the Trial Chamber's decision under Article 74 of the Rome Statute. At Nuremberg, a judge was appointed as a focal point to develop a proposal in this regard. Such draft proposal is currently before the WGLL.

IX. Conclusion and further steps

74. Although the original focus of the WGLL was on the outstanding issues within cluster B,[54] it became apparent that such issues were closely connected to those in clusters A and C. Accordingly, in 2015, the WGLL considered all outstanding issues in clusters A, B and C of the Roadmap. In addition, the WGLL has considered certain initiatives in the Appeals Chamber, which fall within the scope of cluster E. The WGLL has gone beyond the description of clusters C and E contained in the current Roadmap, incorporating additional issues derived from the inter-related and common issues in clusters B and D and the imperative of pursuing enhancements which could have a real impact on proceedings as a whole. The WGLL did not restrict itself to exploring proposals for the

[53] See ICC-ASP/12/37/Add.1, para. 5.
[54] ICC-ASP/13/28, para. 26.

amendment of the Rules of Procedure and Evidence, but rather focussed on practice-based solutions to problems impeding the efficiency of the Court.[55]

75. A number of concerted and concrete efforts have been introduced during the period covered by this report. The Nuremberg Retreat provided a unique opportunity for all the judges of the Court to comprehensively engage with the expedition of the criminal process, contributing their own experiences and expertise. As outlined throughout this report, the Nuremberg Retreat has resulted in the identification and adoption of certain best practices, especially at the pre-trial level, and has enabled the identification of possible areas for future efficiency gains, especially at the trial level. The establishment of working groups on unified systems, the harmonisation of practices in relation to victim applications, and drafting style is further intended to ensure an ongoing focus on key issues which may enhance efficiency across clusters A, B, C and E. The harmonisation of practice in the Pre-Trial Division in the form of a dynamic manual which has been made publicly available is particularly noted.

76. Further to the progress described in this Report, the WGLL has also been active in cluster D during 2015. As indicated in para 49 above, the working group pursuing harmonisation across the modalities of victims' applications for participation has before it the Report on Cluster D(1): Applications for Victim Participation dated 25 August 2015. Further, the Presidency will circulate an additional report on cluster D(2) concerning the legal representation of victims. This latter report, which describes the different systems that have been applied at the Court so far, is intended to assist in discussions to be undertaken by judges in the near future, with a view to harmonizing practices in this regard.

[55] ICC-ASP/13/28, paras. 7, 21-22.

LIST OF ANNEXES

Annex A: Programme of the Nuremberg Retreat (18-21 June 2015)

Annex B: Pre-Trial Practice Manual

Annex A

ICC Judges Retreat – Nuremberg – June 18 - 21

Programme

Goal: Enable all judges to reflect together on how to enhance the efficiency and effectiveness of Pre-Trial and Trial proceeding, to identify best practices and potential amendments to the legal framework on those issues, and to reflect as well on how to increase external awareness and support for the Court.

Thursday June 18

13.50	Arrival at the Nuremberg airport
14.00	Transportation to the hotel
14.30	Arrival at the hotel and check-in
14.45-15.30	Lunch at the hotel restaurant
16.00-18.00	Guided tours: Documentation Centre and Rally Grounds or Old Town
19.30	Mayor of Nuremberg's opening Reception and Dinner for all participants, members of the Academy and other distinguished visitors.

Friday June 19 *Revision of pre-trial and trial proceedings* (with interpretation)

9.00-10.30	Session I – *Common Issues to Pre-Trial andTrial Proceedings (on the basis of the discussion document circulated by the Presidency)*
10.30-11.00	Coffee break
11.00-13.00	Continuation of Session I on the Pre-Trial Stage
13.00-13.30	Tour of the Memorium Nuremberg Trials museum in the Courtroom 600 building
13.30-15.00	Lunch (including brief remarks by Ambassador Bernd Borchardt (Founding Director) on the objectives of the International Nuremberg Principles Academy)
15.00-16.30	Session II - *The Trial Stage (on the basis of the discussion document circulated by the Presidency)*
16.30-17.00	Coffee break
17.00-18.30	Continuation of Session II on the Trial Stage
19.30	Dinner (Judges only)

Saturday 20 June (without interpretation)

9.00-10.30	Session III - *Organization and Methods of Work of Legal Support Staff (on the basis of the discussion document circulated by the Presidency)*
10.30-11.00	Coffee break
11.00-1300	Continuation of Session III on Organization and Methods of Work of Legal Support Staff
13.00-14.30	Lunch
14.30-17.00	Session IV - *The Role of Judges in Creating a More Effective ICC: Looking Outward- (on the basis of the discussion document circulated by the Presidency)* *Presenter: Adama Dieng (Special Adviser to the UNSG on the Prevention of Genocide)*
17.00-17.30	Coffee Break

17.30-19.00 Session V - *Conclusions and recommendations*

-Proposals for remedy-for the short and longer terms-that will assist in ensuring that multiple trials can hold at once with immediate effect.

-Retreats and professional development of judges and staff

-Presentation of Report on sessions on legal proceedings prepared by legal team.

20.00 Dinner for all participants

Sunday 21 June

09.00 Departure of the participants

Annex B

Cour
Pénale
Internationale

International
Criminal
Court

PRE-TRIAL PRACTICE MANUAL

September 2015

Table of Contents

Why this Pre-Trial Practice Manual?

The present manual is the product of discussions held among the Judges of the Pre-Trial Division – Judges Marc Perrin de Brichambaut, Antoine Kesia-Mbe Mindua, Péter Kovács, Chang-ho Chung and myself – since April 2015 with a view to identifying solutions to challenges faced in the first years of the Court and build on the experience acquired so far. Indeed, after more than 10 years of axtivity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings.

The manual is first and foremost directed at the Pre-Trial Judges themselves, while certain issues are also of relevance to the trial stage of the case, and therefore of interest to the Judges of the Trial Division. It also states the expectations that pre-trial Judges have from the Prosecutor and Defence counsel. The final goal of the manual is therefore to contribute to the overall effectiveness and efficiency of the proceedings before the Court.

The manual was presented to and shared with all Judges of the Court in advance of the Judges' retreat that took place in Nuremberg, Germany, from 18 to 21 June 2015. At the retreat, after discussion, the Judges endorsed the manual and recommended that it be made public as soon as possible.

Needless to say, this manual is a living document. It will be updated, integrated, amended as warranted by any relevant development and therefore the Judges of the Pre-Trial Division will meet on a regular basis in order to discuss the need for any such update. The first update will concern issues with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission, on which the Judges of the Division are currently working together with the other Judges of the Court.

Thanks to the colleagues of Pre-Trial Division I have the honour to preside and to the staff members of the Division for their valuable contribution to the preparation of this manual.

Cuno Tarfusser
President of the Pre-Trial Division

I. Issuance of a warrant of arrest/summons to appear

1. The ex parte *nature of proceedings under article 58*

The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.

2. The warrant of arrest/summons to appear

A warrant of arrest/summons to appear should be issued as a single, concise document, by which the arrest of the person is ordered or the person is summoned to appear before the Court at a specified date and time, respectively. Its content is regulated by article 58(3) of the Statute, which states that it shall contain: (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (iii) a concise statement of the facts which are alleged to constitute those crimes. Any detailed discussion of the evidence or analysis of legal questions is premature at this stage and should be avoided.

If the person presumably speaks either of the working languages of the Court (English or French), and/or, if applicable, the language of the State on the territory of which the person might be found is either of these languages, the warrant of warrant of arrest/summons to appear should preferably be issued directly in such working language.

On the basis of the warrant of arrest, the Registrar, in consultation with the Prosecutor, transmits a request for arrest and surrender under articles 89 and 91 of the Statute to any State on the territory of which the person may be found. As recently instructed by the Judges of the Pre-Trial Division, every time that information of travel into the territory of a State Party, whether planned or ongoing, of a person at large who is the subject of a warrant of arrest is related to the Court or one of its organs, the Registrar shall transmit to the concerned State Party a request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court in the arrest and surrender of that person. In case the person at large is expected to travel into the territory of a non-State Party, the Registrar shall request the State's cooperation in the arrest and surrender of the person, informing or reminding it that it may decide to provide assistance to the Court in accordance with article 87(5)(a) of the Statute with regard to the arrest and surrender to that person, or reminding the State of any obligation arising from any Security Council resolution

referring the situation to the Prosecutor, in case any such obligation has been imposed.

II. The first appearance

1. Timing of the first appearance

The person's first appearance before the Chamber or the Single Judge, in accordance with article 60(1) of the Statute and rule 121(1) of the Rules, should normally take place within 48 to 96 hours after arrival at the seat of the Court upon surrender, or on the date specified in the summons to appear.

2. Language that the person fully understands and speaks

Under article 67(1)(a) of the Statute, the person proceeded against has the right to be informed of the nature, cause and content of the charge in a language which they fully understand and speak.

Even if not raised by the parties, the Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine what other language the person fully understands and speaks. In cases of controversy, a report of the Registrar can be ordered. The meaning of "fully understands and speaks" needs to be further refined in practice.

3. The right to apply for interim release

Article 60(1) of the Statute expressly mentions that, at the first appearance, the Pre-Trial Chamber must be satisfied that the person has been informed of the right to apply for interim release pending trial.

The Pre-Trial Chamber should specifically inform the person of this right. This is important because periodic review of detention does not start unless the Defence makes its first application for interim release (*i.e.* the 120-day time limit under rule 118(2) runs from the Chamber's ruling on any such application). Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.

4. The date of the confirmation hearing

According to rule 121(1) of the Rules, at the first appearance, the Pre-Trial Chamber shall set the date of the confirmation hearing. The typical target date for the confirmation hearing should be around 4-6 months from the first appearance. Efforts

should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.

However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct before the confirmation process the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court's legal instruments, held that the Prosecutor's investigation may be continued beyond the confirmation hearing, and determined that finding that, barring exceptional circumstances, the Prosecutor's investigations must be brought to an end before the confirmation hearing constitutes an error of law.

III. Proceedings leading to the confirmation of charges hearing

1. Review of the record of the case following the initial appearance

At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor's application under article 58 of the Statute and any accompanying documents.

2. *Time limit for responses under regulation 24 of the Regulations of the Court*

The general 21-day time limit for responses (see regulation 34(b) of the Regulations) is incompatible with the fast pace of pre-trial proceedings. In order to avoid delay and to pre-empt the need to issue numerous procedural orders shortening the general time limit, the Pre-Trial Chamber should order that, throughout the entire proceedings leading to the confirmation hearing, any responses shall be filed within five days, or within another appropriately short time limit. The power to make such order stems from the *chapeau* of regulation 34.

3. *Informal contact with the parties and the Registry*

In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

The Chamber should, however, make sure that no substantive litigation takes place by email, and should order the submission of formal filings in such cases.

4. *Victims' issues*

At the retreat in Nuremberg between 18 and 21 June 2015, the Judges agreed to create a working group to pursue harmonisation of practice across the proceedings with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission. The present manual will be updated on these matters in light of the outcome of the work of the working group.

5. *Status conferences*

Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences.

IV. Disclosure of evidence and communication to the Pre-Trial Chamber

1. Disclosure of evidence between the parties

Disclosure of evidence between the parties takes place through the Registry in accordance with the E-court protocol developed for this purpose. Until the E-court protocol is somehow codified, the current version of the E-court protocol should be put on the record of the case as soon as possible after the first appearance.

The Prosecutor has the duty to disclose to the Defence "as soon as practicable" and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. article 67(2) of the Statute), or is material to the preparation of the defence (cf. rule 77 of the Rules).

As far as the incriminating evidence is concerned, it is the Prosecutor's own choice to disclose to the Defence as much as he/she considers warranted. The disclosure of incriminating evidence by the Prosecutor is subject to the final time limit set out in rule 121(3) – *i.e.* 30 days before the confirmation hearing – and, in case of new evidence, in rule 121(5) – *i.e.* 15 days before the confirmation hearing.

Likewise, the Defence may disclose to the Prosecutor (and rely upon for the confirmation hearing) as much as it considers it necessary in light of its own strategy. The time limits for the Defence disclosure are set out in rule 121(6).

No submission of any "in-depth analysis chart", or *similia*, of the evidence disclosed can be imposed on either party.

The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

2. Exceptions to disclosure in the form of redaction of information

Under rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. In following with the practice developed by Trial Chambers, at least for certain standard categories of information (if not for all kinds of information) such redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only upon challenge by

the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

Redaction of the identity of a witness (*i.e.* anonymity) at the pre-trial stage of the proceedings under rule 81(4) of the Rules must be specifically authorised upon motivated request by the Prosecutor. This applies also to non-disclosure of an entire item of evidence by the Prosecutor with the Defence not being informed of its existence.

3. Extent of communication of disclosed evidence to the Pre-Trial Chamber

According to rule 121(2)(c) of the Rules, all evidence disclosed between the parties "for the purposes of the confirmation hearing" is communicated to the Pre-Trial Chamber. This should be understood as encompassing all evidence disclosed between the parties during the pre-trial proceedings, *i.e.* between the person's initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision.

Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is eventually included in the parties' lists of evidence under rules 121(3) and (6) of the Rules.

Nevertheless, for its decision on the confirmation of charges the Pre-Trial Chamber considers only the items of evidence that are included in the parties' lists of evidence for the purpose of the confirmation hearing. The determination of what and how much to include in their respective lists of evidence falls within the discretion of each party.

Other items of evidence that were communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could only be relied upon by the Pre-Trial Chamber for the confirmation decision provided that the parties are given the opportunity to make any relevant submission with respect to such other items of evidence.

V. The charges

1. The factual basis of the charges

The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued.

However, the Pre-Trial Chamber must ensure that the Defence be given adequate time to prepare (cf. article 67(1)(b) of the Statute providing that the person has the right "[t]o have adequate time and facilities for the preparation of the defence"). While rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the confirmation are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare. This advance notice – to be made by way of a short filing – would include only, and no more than, a concise statement of the relevant facts, *i.e.* the time, location and underlying conduct of the crimes with which the Prosecutor will charge the suspect. The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing. How much in advance before the confirmation hearing any advance notice of the charges would need to be provided will depend on the particular circumstances of each case, including the total amount of time foreseen between the person's initial appearance and the confirmation hearing and the extent of the proposed expansion of the factual basis of the case. Failure to provide such notice within the time frame set by the Pre-Trial Chamber would make impermissible the bringing of any charges going beyond the factual basis of the warrant of arrest or summons to appear in the particular confirmation proceedings, without prejudice to these other charges being brought as part of new or other proceedings conducted separately.

Such notice would also constitute the basis for the Pre-Trial Chamber to request in time, through the Registrar, that the surrendering State provides a waiver of the rule of speciality under article 101 of the Statute, if applicable (*i.e.* if the person was surrendered to the Court), as well as the basis for the admission of victims of the alleged crimes to participate in the proceedings.

2. *Distinction between the charges and the Prosecutor's submissions in support of the charges*

The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the "material facts and circumstances" (*i.e.* the facts and circumstances that must be described in the charges (cf. article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.

There shall be no confusion between the material facts described in the charges and the "subsidiary facts" (*i.e.* those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally "evidence"). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a "[pre-]confirmation brief"). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – "charges" and "submissions" – must be kept clearly separate, and no footnotes containing cross-references or reference to evidence must be included in the charges.

The Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments. The Defence may bring any formal challenge to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – at the latest as procedural objections under rule 122(3) of the Rules prior to the opening of the confirmation hearing on the merits.

In any case, the Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber's interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure that the suspect is informed in detail of the nature, cause and content of the charge (cf. article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case. In particular, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established *in abstracto*. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him- or herself.

At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

VI. The confirmation hearing

1. Presentation of evidence for the purposes of the confirmation hearing

The parties' respective lists of the evidence relied upon for the confirmation hearing (rule 121(3) and (6) of the Rules) shall indicate the items of evidence consecutively in any clear order, for instance by ERN or by categories of evidence (with, *e.g.*, statements/transcripts grouped by witness, official documents grouped by source, etc.). In order to serve its purpose, a list of evidence should not be presented in the form of a chart linking the factual allegations of the Prosecutor and the evidence submitted in support thereof.

The inclusion, in the Prosecutor's submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

No footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges, as they shall be fully self-contained and shall exhaustively set out all, and no more than, the material facts and their legal characterisation. As stated above, how the Prosecutor's evidence substantiates the charges belongs to the "submissions" part, not to the "charges" section. This applies regardless of whether the Prosecutor decides to include his/her submissions in the document containing the charges or in a separate filing.

It is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence. For example, no submission of any "in-depth analysis chart", or *similia,* of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties.

2. Live evidence at the confirmation hearing

Use of live evidence at the confirmation hearing should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.

3. Procedural objections to the pre-confirmation hearing proceedings

Under rule 122(3) of the Rules, the Prosecutor and the Defence, prior to the opening of the confirmation hearing on the merits, may "raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing".

As clarified above, formal challenges by the Defence to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – fall within the scope of the procedural objections under rule 122(3) of the Rules as they relate to the respect of the person's right to be properly notified of the charges. Procedural objections under rule 122(3) of the Rules may also include, for examples, challenges as to the proper time given for the parties' preparation for the confirmation hearing or to the exercise of disclosure obligations by the opposing party, including the propriety of redactions.

Decisions taken by the Pre-Trial Chamber on procedural objections under rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber's rulings under rule 122(3) which are joined, pursuant to rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

According to rule 122(4) of the Rules, "at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings". Arguably, the parties are precluded to raise at subsequent points (whether at confirmation or trial) procedural matters related to the proper conduct of the pre-trial proceedings prior to the confirmation hearing, also when they have chosen not to do it before the hearing on the merits is opened, while being in a position to do so.

4. The conduct of the confirmation hearing

The parties should be encouraged, as appropriate, to make use of the opportunity to lodge written submissions on points of fact and on law in accordance with rule 121(9) of the Rules in advance of the confirmation hearing. The filing of such written submissions presenting the full set of the parties' arguments on the merits of the charges would allow them to focus their oral presentations at the hearing to the issues that they consider most relevant. In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to rule 122(3) of the Rules before the commencement of the hearing on the merits.

In any case, at the opening of the confirmation hearing, after the reading out of the charges as presented by the Prosecutor, the Presiding Judge will request the parties whether they have any procedural observations or objections with respect to the proper conduct of the proceedings leading to the confirmation hearing that they wish to raise under rule 122(3) of the Rules. The parties will be informed that no such matter might be raised at any subsequent point – whether at confirmation or at trial – if they choose not to do it before the hearing on the merits is opened.

As part of the confirmation hearing on the merits, the parties (and the participating victims) shall be allocated a certain amount of time in order to make their respective presentations, without the need that each and every item of evidence be rehearsed at the hearing. In any case, the Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties' lists of evidence, and, as explained above, any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence.

As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the final observations under rule 122(8) of the Rules. In these final observations, the parties could only respond to each other's submissions: no new argument can be raised. After the final oral observations at the hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

The 60-day time limit for the issuance of the decision on the confirmation of charges in accordance with regulation 53 of the Regulations of the Court starts running from the moment the confirmation hearing ends with the last oral final observation under rule 122(8) of the Rules.

VII. The confirmation decision

1. The distinction between the charges confirmed and the Pre-Trial Chamber's reasoning in support of its conclusions

According to article 61(7)(a) of the Statute, the Pre-Trial Chamber, when it confirms those charges in relation to which it has determined that there is sufficient evidence, "commit[s] the person to a Trial Chamber for trial on the charges as confirmed". In terms of the factual parameters of the charges, article 74(2) provides that the article 74 decision "shall not exceed the facts and circumstances described in the charges".

The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial.

The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber. Any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope,

content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.

As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous, and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under rule 122(3) of the Rules.

Correspondingly to the distinction between the charges presented by the Prosecutor and the Prosecutor's submissions in support of the charges, in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings.

In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.

As already clarified, the charges presented by the Prosecutor, as confirmed by the Pre-Trial Chamber and reproduced in the operative part, set the parameters of the trial: after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content. The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief.

Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber's findings on the charges. Decisions declining to confirm the charges may require, depending on circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.

In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre-Trial Chamber cannot expand the factual scope of the charges as presented by the

Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, by presenting the charges as formulated by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

2. The structure of the confirmation decision

It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand.

Typically a decision on the confirmation of charges should be structured as follows:

(i) The identification of the person against whom the charges have been brought by the Prosecutor.

(ii) The charges as presented by the Prosecutor.

(iii) A brief reference to the relevant procedural history of the confirmation proceedings.

(iv) Preliminary/procedural matters, including consideration of any procedural objections or observations raised by the parties under rule 122(3) of the Rules that the Pre-Trial Chamber, pursuant to rule 122(6) of the Rules, decided to join to the examination of the charges and evidence.

(v) Factual findings ("the facts"), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor, both in terms of the alleged criminal acts and the suspect's conduct. Reference to evidence (including to subsidiary facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.

(vi) Legal findings ("the legal characterisation of the facts"), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is satisfied to the required threshold constitute one or more of the crimes charged giving rise to the suspect's criminal responsibility under one or more of the forms of responsibility envisaged in the Statute and pleaded by the Prosecutor in the charges.

(vii) The operative part, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber's decision on any procedural objections or observations addressed before the determination of the merits.

3. Alternative and cumulative charges

In the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability. In this case, the Pre-Trial Chamber will confirm alternative charges (including alternative modes of liability) when the evidence is sufficient to sustain each alternative. It would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case. This course of action should limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

The Prosecutor may also present cumulative charges, *i.e.* crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

VIII. Transfer of the case from pre-trial to trial

1. The continuation at trial of "systems" adopted at pre-trial

As concerns certain specific more technical aspects of proceedings (*e.g.* modalities of disclosure of evidence between the parties, including registration in the e-Court system; procedure for authorisation of exceptions to disclosure, including implementation of redactions under rules 81(2) and (4); modalities of victims' applications for participation in the proceedings and procedure for their admission; regime for the parties' handling of confidential information and contact with

witnesses of the opposing party) the Pre-Trial Chamber will set up regimes that are capable of being applied throughout the proceedings.

Considering that nothing in the procedural system of the Court precludes the continued validity of procedural orders of the Pre-Trial Chamber after the transfer of the case to a Trial Chamber, such procedural regimes should continue to apply, subject to necessary adjustments by the Trial Chamber. This will simplify proceedings and make them more efficient.

2. The record transmitted to the Trial Chamber

Following confirmation of charges and the assignment of the case to a Trial Chamber, the record is transmitted to the Trial Chamber pursuant to rule 130 of the Rules. This includes all evidence which has become part of the record by way of its communication to the Pre-Trial Chamber following *inter partes* disclosure (cf. also rule 121(10) of the Rules).

Considering that the evidence would then be individually considered for formal admission during trial, its inclusion in the record of proceedings before professional judges is not problematic. The transmission of the complete record with all its contents is also the preferred solution because of its simplicity.