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## Review of ICC Jurisprudence 2008

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# Review of ICC Jurisprudence 2008

Rod Rastan\*

## I. INTRODUCTION

¶1 The year 2008 marked the sixtieth anniversary of the Genocide Convention and the tenth anniversary of the adoption of the Rome Statute for the International Criminal Court (ICC): the former was the groundbreaking international instrument aimed at criminalizing the most serious of crimes in response to the terrible atrocities of the Second World War; the latter, adopted after a half-century hiatus, established the very mechanism for enforcement of the norm recalled in Article 6 of the Genocide Convention in its reference to an “international penal tribunal” with jurisdiction.<sup>1</sup> While the Court has only been functioning for a little over six years and has yet to deliver a final judgment, the year witnessed a range of significant decisions from the Pre-Trial, Trial and Appeals Divisions of the Court. These decisions are helping to shape the contours of the emerging jurisprudence of the ICC and are starting to reveal the form the institution will take. A number of the most significant developments of 2008 are treated below in summary form to provide an overview of a number of jurisprudential foundations upon which the Court will likely build in the immediate years ahead. This includes an examination of further developments before the Court in its approach towards modes of liability, which diverges from theory of joint criminal enterprise developed at the *ad hoc* Tribunals. Also reviewed are a number of

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. vi, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

decisions on procedural issues that have clarified in greater detail such areas as the requirements of confidentiality and those of disclosure; the application of the gravity criteria under the Statute's admissibility provisions; and the role of victims in pre-trial and trial proceedings. The final section looks at the way the Court has resorted to secondary sources of law to regulate aspects of its own proceedings, as reflected in its rulings on witness proofing.

## II. MODES OF LIABILITY

¶2 On September 30, 2008, Pre-Trial Chamber (PTC) I rendered its decision on the confirmation of charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, arising from the situation in the Democratic Republic of the Congo (DRC).<sup>2</sup> In this decision, the PTC recalled that the purpose of the confirmation hearing is to ensure that there is sufficient evidence for a case to proceed to trial. As the Chamber observed, “[t]his mechanism is designed to protect the rights of the defence against wrongful and wholly unfounded charges . . . the confirmation hearing has a limited scope and purpose and should not be seen as a ‘mini-trial’ or a ‘trial before the trial.’”<sup>3</sup> The decision entered a number of important findings, particularly in relation to the admissibility and probative value of evidence admitted for the purpose of meeting the confirmation threshold of substantial grounds to believe.<sup>4</sup> However, focus is given below to the

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<sup>2</sup> Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07-717 (Pre-Trial Chamber I), Decision on the Confirmation of Charges (Sept. 30, 2008). Germain Katanga, alleged commander of the Force de résistance patriotique en Ituri (FRPI), and Mathieu Ngudjolo Chui, alleged former leader of the Front des nationalistes et intégrationnistes (FNI), are charged with criminal responsibility for two charges of crimes against humanity: murder under article 7(1)(a) and rape and sexual slavery under article 7(1)(g). *Id.* ¶¶ 420, 428 (citing Rome Statute of the International Criminal Court, *opened for signatures* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Statute or Rome Statute]). They are also charged with the following war crimes: willful killings under article 8(2)(a)(i) of the Statute; directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i); destruction of property under article 8(2)(b)(xiii), pillaging under article 8(2)(b)(xvi); sexual slavery and rape under article 8(2)(b)(xxii); and using children under the age of fifteen to take active part in the hostilities under article 8(2)(b)(xxvi). *Id.* ¶¶ 565-69.

<sup>3</sup> *Id.* ¶¶ 63-64.

<sup>4</sup> *See id.* ¶¶ 72-78.

Chambers' approach to modes of liability, given its potential role in shaping the way future cases will be heard before the Court.

¶3 Following the interpretation developed by the same Chamber in the *Lubanga* case, the PTC further elaborated its approach to modes of liability based on the theory of "control over the crime." In the *Lubanga* case the PTC observed that when a crime is committed by a plurality of persons, the Rome Statute separates out the commission *strictu sensu* of a crime by a person, i.e. principal liability, committed as "an individual, jointly with another or through another person" pursuant to Article 25(3)(a), from the responsibility of accessories to a crime under Article 25(3)(b)-(d).<sup>5</sup> The PTC went on to identify three main approaches to distinguishing between principal and accessory forms of participation for this purpose: (i) an objective approach, whereby only those who physically carry out one or more of the objective elements of the offense can be considered principals; (ii) a subjective approach, which focuses principal liability on the intent in which a contribution to the commission of crimes is made, rather than the level thereof; and (iii) the concept of control over the crime, by which the liability of principals is established not only by reference to those who physically carry out the objective elements of the crime, but also to those who, though removed from the crime scene, control or mastermind its commission, because they decide whether and how the offense will be committed.<sup>6</sup>

¶4 In its decision on the confirmation of charges in the *Katanga and Ngudjolo* case, the PTC reiterated its finding that the Statute excludes the objective approach as a basis for principal liability given the inclusion within Article 25(3)(a) of commission "through another person." In other words, the Statute foresees the possibility of a person who does not physically carry out the objective elements of the offense being considered as a principal. Turning to the subjective approach, which it characterized as the theory adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the doctrine of joint criminal enterprise, the PTC observed that a reading of principal liability based on the intent of a group of persons to commit a crime would be

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<sup>5</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803 (Pre-Trial Chamber I), Decision on the Confirmation of Charges, ¶ 320 (Jan. 29, 2007) [hereinafter *Lubanga Decision on Confirmation of Charges*].

<sup>6</sup> *Katanga & Ngudjolo*, Case No. ICC-01/04-01/07-717, ¶¶ 328-30, 482-84.

inconsistent with the placement of the common purpose doctrine under Article 25(3)(d), which it identified as an accessory mode of liability.

¶5 By contrast, the PTC held that the notion of control over the crime synthesizes both objective and subjective components.<sup>7</sup> As such, the PTC maintained that under Article 25(3)(a) of the Statute, a principal is a person who:

- a. physically carries out all elements of the offence (commission of the crime as an individual, i.e. *perpetration*);
- b. has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others, i.e. *co-perpetration*); or
- c. has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person, i.e. *indirect perpetration*).<sup>8</sup>

¶6 Applying this framework to the facts at hand in the *Katanga and Ngudjolo* case, the PTC further expanded on the control over the crime theory in its decision on the confirmation of charges. It did so by combining two forms of commission under 25(3)(a) which may independently give rise to criminal responsibility under 25(3)(a), namely co-perpetration and indirect perpetration, in order to more fully capture the modes of participation that incur principal liability under the Statute. As the PTC observed, “through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises

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<sup>7</sup> *Id.* ¶ 484.

<sup>8</sup> *Id.* ¶ 488. The PTC characterized indirect perpetration by reference to the notion of the “perpetrator behind the perpetrator” (Täter hinter dem Täter), the former controlling the will of the latter. *Id.* ¶ 496 (citing with approval CLAUD ROXIN, STRAFTATEN IM RAHMEN ORGANISATORISCHER MACHTAPPARATE, GOLDHAMMER’S ARCHIV FÜR STRAFRECHT 193-207 (1963)). The notion applies irrespective of whether the physical perpetrator is also criminally responsible. *Id.* ¶ 496.

which allows the Court to assess the blameworthiness of 'senior leaders' adequately."<sup>9</sup> The PTC went on to explain:

An individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual — one who controls the person used as an instrument — these crimes can be attributed to him on the basis of mutual attribution.<sup>10</sup>

In this respect, the Chamber emphasized that “the leaders’ *horizontal* sharing of responsibility is critical because the distinction between the Ngitis and the Lendus made it unlikely for combatants to comply with the orders of a leader who was not of the same ethnicity” (emphasis added).<sup>11</sup> As such, the PTC rejected the defense’s contention that it was improper to hold a co-perpetrator criminally liable for the crimes committed by the fully responsible subordinates of his co-perpetrator. Instead, co-perpetration based on joint control over the crime was held to involve “the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime.” The fulfillment of such essential tasks can be carried out by each co-perpetrator in person or through another person.<sup>12</sup>

¶7

The PTC recalled that the objective elements for joint commission are: (a) the existence of an agreement or common plan, which must include the commission of a crime, between the

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<sup>9</sup> Drawing on principles of interpretation, the Chamber observed that the Statute leaves open the possibility to lend the connective “or” in the formulation “jointly with another *or* through another person” under article 25(3)(a) a reading that is either inclusive (either one or the other, and possibly both) or exclusive (either one or the other, but not both). As such, it found that “there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it.” *Id.* ¶¶ 491-92.

<sup>10</sup> *Id.* ¶ 493.

<sup>11</sup> *Id.* ¶ 519. Ituri district in the Orientale Province of the DRC includes at least 18 different ethnic groups, the largest being the Alur, the Bira, the Hema, and the Lendu, as well as the Ngiti (a sub-group of the Lendu). *Id.* ¶¶ 1-4. During 2002, ongoing tensions in Ituri flared up into renewed acts of violence, bringing armed conflict, *inter alia*, among the Hema, the Lendu, and the Ngiti. *See id.*

<sup>12</sup> *Id.* ¶ 521.

persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual, and (b) the coordinated essential contribution made by each co-perpetrator resulting in the realization of the objective elements of the crime. In relation to the latter, the Chamber noted that only those to whom essential tasks have been assigned—and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks—can be said to have joint control over the crime.<sup>13</sup>

¶18 In establishing the elements that allow for the criminal actions of subordinates to be attributed to their leaders, moreover, the Chamber held that three factors must apply: (i) the leader must control the organization that is used as an instrument of the crime; (ii) the organization must be based on hierarchical relations between superiors and subordinates, while composed of a sufficient number of subordinates to guarantee that the superiors' orders will be carried out, if not by one subordinate, then by another;<sup>14</sup> and (iii) authority within the organization must be such that the leader's orders will be complied with automatically, in an almost mechanical manner, since the actual executioner of the order is a replaceable “gear in a giant machine” or is otherwise so brutalized by intensive, strict, and violent training regimens that the leader can ensure automatic compliance with his orders.<sup>15</sup>

### *Comment*

¶19 The approach of PTC I to the modes of liability displays an effort to forge a distinct path for identifying the responsibility of principals among a plurality of perpetrators. In particular, the elaboration of a coherent exposition by the Chamber of the legal and theoretical framework governing the applicability of modes of participation in the first decisions of the ICC represents an important milestone in the development of the Court's early

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<sup>13</sup> *Id.* ¶¶ 522-25.

<sup>14</sup> This may be evidenced by his capacity to hire, train, impose discipline, and provide resources to his subordinates. *Id.* ¶¶ 513-14.

<sup>15</sup> *See id.* ¶¶ 500-18. As the PTC notes, “The leader's ability to secure this automatic compliance with his orders is the basis for his principal—rather than accessorial—liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed.” *Id.* ¶ 518.

jurisprudence. The regime negotiated in Rome for individual criminal responsibility under Article 25(3) of the Statute is clearly far more detailed than the basic parameters set out in the Statutes of the *ad hoc* Tribunals. As the PTC has found, the mechanical transfer of the jurisprudence developed by the ICTY and International Criminal Tribunal for Rwanda (ICTR) on joint criminal enterprise will therefore not be appropriate without a careful consideration of the specific legal regime established by the ICC Statute.<sup>16</sup>

¶10

At the same time it might be considered, similarly, that the Court should not rely exclusively on theories of participation derived from particular national legal systems without careful consideration of the entire statutory framework.<sup>17</sup> Thus, while the control of the crime theory represents an important doctrinal guide to the distinction between principal and secondary forms of liability, particularly in the context of bureaucratically structured hierarchical organizations, such as the Nazi organizational apparatus during WWII, it may encounter limitations in addressing all the forms of principal liability presented to the Court. To remain adaptable to the different types of organized criminality that will be litigated in the ICC, the formal requirements of control of the crime theory as originally conceived may need to be applied in ways that will enable it to evolve in one of two ways: (i) the concept of the organizational apparatus through which control is exercised may need to be conceived in more flexible terms than those for which the theory was initially developed, or (ii) the parameters of Article 25(3)(a) may need to be broadened so as to capture other forms of principal liability not expressly regulated therein. Both tendencies, however, could strain the utility of strict adherence to the doctrine without significant adaptation to take into account the Court's *sui generis* legal regime and the context of its application.

¶11

For example, if the starting point for the distinction between principal and accessory forms of participation under the Statute is the structure of Article 25(3), it is not clear why subparagraphs (b)-(d) of Article 25(3) must of necessity be posited as secondary.

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<sup>16</sup> See *id.* ¶ 508.

<sup>17</sup> There is little indication, for example, that the doctrinal concepts particular to any national legal system served as the unique lens through which the drafters negotiated and adopted Article 25.



Why should a superior who orders the commission of a crime by his subordinates not be held to be liable as a principal of the crime?<sup>18</sup> In the *Katanga and Ngudjolo* confirmation decision, the PTC observed that ordering as a principal can be distinguished from that as an accessory on the basis that:

An authority who issues an order within such an organisation [in which the highest authorities can ensure automatic compliance with their orders] ... assumes a different kind of responsibility than in ordinary cases of criminal ordering. In the latter cases, Article 25(3)(b) of the Statute provides that a leader or commander who orders the commission of a crime may be regarded as an accessory.<sup>19</sup>

Such a reading effectively creates two separate headings of ordering under the Statute: one evident from the plain reading of Article 25(3)(b) and one that can be subsumed into Article 25(3)(a) as an underlying form of commission. This suggests also that other forms of responsibility can only be relied upon to identify principal liability to the extent that they could be subsumed into Article 25(3)(a). This would, however, create an uneven balance between the provisions of Article 25(3), placing disproportionate reliance on the opening subparagraph while effectively rendering redundant (b)-(d) for the majority of the types of cases that will come before the ICC.<sup>20</sup>

¶12 The positing by the Chamber of common purpose doctrine under Article 25(3)(d) as a secondary form of liability, similarly, renders the entire sub-provision inutile to address leadership

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<sup>18</sup> As the International Law Commission has noted, “[t]he superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative. The superior contributes significantly to the commission of the crime by using his position of authority to compel the subordinate to commit a crime.” Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 20, U.N. Doc. A/51/10 (1996).

<sup>19</sup> *Katanga & Ngudjolo*, Case No. ICC-01/04-01/07-717, ¶ 517.

<sup>20</sup> This would result from the stated prosecutorial policy of focusing on persons bearing the greatest responsibility for crimes within the jurisdiction of the Court. See Paper on Some Policy Issues before the Office of the Prosecutor, ICC-OTP, at 3 (2003).

crimes. The Chamber's reading appears to be based, in large part, on an examination of the opening phrase of the paragraph "in any other way contributes" to the commission of crimes, suggesting that once the Statute has established that actual "commission" of crimes *strictu sensu* is captured by Article 25(3)(a), all other forms must of necessity be read as secondary. Nonetheless, it appears open to suggest that the phrase "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" could relate to a contribution to the commission of a crime *strictu sensu* that is other than that committed "as an individual, jointly with another or through another person."<sup>21</sup>

¶13 One answer to this seeming tension would be to posit a unitary approach whereby the distinction between the liability of a principal and that of an accessory does not automatically result in the apportioning of a lower degree of blameworthiness for the latter – that, rather, the two forms describe the nature of participation in the conduct alleged and not necessarily the gravity of applicable penalties.<sup>22</sup> So long as the principal to a crime bears more serious responsibility, prosecutorial charging policy will be steered towards that form of characterization.

¶14 The more general response, however, is to acknowledge that Article 25(3) of the Statute was drafted to provide the Court with a range of modes of participation for its consideration without strict adherence to doctrinal models particular to any national legal system. While this may undercut the merits of developing at an early stage a theoretically appealing self-contained system, it appears inevitable that the Court, as its case-law develops, will need to elaborate an approach to modes of liability that takes into account the unique features of the Rome Statute, including the general principles of criminal law and the applicable law established therein.

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<sup>21</sup> Such a reading could, for example, borrow from the principles of interpretation applied by the Chamber in the same decision to suggest that the Statute does not necessarily limit the interpretation of "in any other way contributes" to a reading that is either exclusive or inclusive, see *supra* note 9. See generally *Lubanga* Decision on Confirmation of Charges, Case No. ICC-01/04-01/06-803.

<sup>22</sup> This, however, would appear to be effectively ruled out under the control of the crime theory by PTC I; See *Katanga & Ngudjolo*, Case No. ICC-01/04-01/07-717, ¶ 499 (where the PTC correlates principal liability to assignment of "the highest degree of responsibility for commission of a crime").

## III. CONFIDENTIALITY &amp; DISCLOSURE

¶15 Perhaps among the most publicized decisions of the ICC during 2008 were those of Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ordering a stay in the proceedings and the release of the accused before the trial had actually begun.<sup>23</sup> At issue was the apparent tension between two binding provisions of the Statute regulating the obligations of the prosecution: one related to non-disclosure and the other to disclosure, and the ability of the Chamber to resolve the matter. Under one duty, pursuant to Article 54(3)(e), the prosecution must ensure the non-disclosure of documents that it has agreed to obtain under the conditions of confidentiality stipulated therein.<sup>24</sup> The provision is designed to enable cooperation from an information provider that may be unwilling to make material available for disclosure, but may agree to providing documents or information to the prosecution on a confidential basis for the sole purpose of generating new evidence and thereby not subject to disclosure unless it grants its consent.<sup>25</sup> Under a second statutory duty, Article 67(2) stipulates that the prosecution must disclose to the defense potentially exculpatory evidence in its possession or control.<sup>26</sup>

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<sup>23</sup> Thomas Lubanga Dyilo, alleged former Commander-in-Chief of the Forces Patriotiques pour la Libération du Congo (FPLC) and alleged president of the Union des Patriotes Congolais (UPC), is charged with criminal responsibility for war crimes consisting of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an international armed conflict under article 8(2)(b)(xxvi); he is also charged with enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character under article 8(2)(e)(vii). *See Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Indictment (Aug. 29, 2006).

<sup>24</sup> “The Prosecutor may: . . . (e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.” Rome Statute, *supra* note 2, at art. 54(3)(e).

<sup>25</sup> *See also* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, Rule 70, U.N. Doc. IT/32/REV. 42 (2008).

<sup>26</sup> Rome Statute, *supra* note 2, at art. 67(2) (“In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”).

¶16 In its decision of June 13, 2008, the Trial Chamber ruled that if the prosecution was unable to provide for disclosure of exculpatory evidence in its possession or control due to a significant body of such material being subject to non-disclosure restrictions under Article 54(3)(e), nor allow the Chamber to review such materials in order to assess the appropriateness of counter-balancing measures proposed by the prosecution, the proceedings must be indefinitely stayed. The Chamber held that a stay was apposite due to the manner in which the prosecution had entered into agreements with information providers on a routine (as opposed to exceptional) basis and to apparently obtain evidence that could potentially be used at trial, instead of using the material solely to generate new evidence. At the same time, the agreements appeared to preclude the Chamber from exercising its review functions over the non-disclosure of confidential materials.<sup>27</sup> Although the Trial Chamber held that it had not been divested of jurisdiction, it went on to hold that the inevitable consequence of its decision with respect to an indefinite stay of proceedings was an order for the unconditional release of the accused.<sup>28</sup>

¶17 In the *Lubanga* case, the sources concerned were the United Nations<sup>29</sup> and several non-governmental organizations, both local and international, working in eastern DRC in areas still volatile and in conflict. These organizations had observed that the prospect of unredacted disclosure without their consent, or even the fact of their cooperation becoming known, posed risks to the personal safety of their staff and of other individuals. The organizations feared that disclosure could compromise their organizational neutrality and security as well as the proper conduct of their operations and activities on the ground, and might violate the principle of originator consent with regards to documents obtained

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<sup>27</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1401 (Trial Chamber I), Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered By Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶ 88 (June 13, 2008) [hereinafter *Lubanga* Decision on Application to Stay Prosecution].

<sup>28</sup> Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-1418 (Trial Chamber I), Decision on the Release of Thomas Lubanga Dyilo, ¶¶ 32-34 (July 2, 2008).

<sup>29</sup> The information related in particular to the UN's peacekeeping operation on the ground dealing with security, demobilization, humanitarian and human rights related activities, known by its French acronym MONUC.

from third parties.<sup>30</sup> In the absence of applicable guiding provisions in the Statute, they asked, *inter alia*, that the Chambers provide explicit guarantees that any *ex parte* review of their documents would be conducted under conditions of confidentiality that would ensure non-disclosure of the material absent their consent. The Chamber could then determine, having access to the unredacted versions of the said materials, the adequacy of the method of disclosure proposed for each item by the relevant information provider.<sup>31</sup>

¶18

Getting an undertaking of non-disclosure from both the Trial and Appeals Chambers proved difficult. The Trial Chamber, in the context of subsequent applications for the lifting of the stay, recalled that it was indeed able to provide its undertaking not to disclose the material without the consent of the information providers. The Appeals Chamber, however, evidently could not communicate such an undertaking by way of a ruling to that effect as it was not seized of the matter.<sup>32</sup> In the alternative, therefore, the Trial Chamber was asked by the information providers to return the materials after its review; with the items to be made available afterwards, if required, to the Appeals Chamber on the same basis and subject to the same conditions. However, this left the possibility, as the Trial Chamber saw it, that the Appeals Chamber might not get to conduct its review unless it agreed to the same conditions.<sup>33</sup> Instead, the Trial Chamber ruled that it would refuse to begin its review unless the Appeals Chamber could also be guaranteed to be able to review the said materials under the same conditions; meaning that the orders on stay and release would remain in effect.<sup>34</sup>

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<sup>30</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1434, (Appeals Chamber), Prosecution's Document in Support of Appeal Against Decision to Stay Proceedings, ¶ 14 (July 14, 2008).

<sup>31</sup> See Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-1467 (Trial Chamber I), Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings," ¶¶ 5-17 (Sept. 3, 2008) [hereinafter *Lubanga* Decision on Application to Lift Stay of Proceedings].

<sup>32</sup> See *Lubanga* Decision on Application to Stay Prosecution, Case No. ICC-01704-01/06-1401, ¶ 45, for the Trial Chamber's earlier indication of its willingness to give such an undertaking.

<sup>33</sup> *Lubanga* Decision on Application to Lift Stay of Proceedings, Case No. ICC-01/04-01/06-1467, ¶¶ 31-33.

<sup>34</sup> *Id.* ¶¶ 29-40.

¶19 In its judgments of October 21, 2008, rejecting the prosecution's first appeal, the Appeals Chamber clarified the entire regime that should guide all such situations in the future:

In situations such as the present, where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under Article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see Article 64(6)(c) of the Statute and Rule 81(3), first sentence, of the Rules of Procedure and Evidence). Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under Article 54(3)(e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.<sup>35</sup>

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<sup>35</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 13 (Appeals Chamber), Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008," ¶ 48 (October 21, 2008) [hereinafter *Lubanga* Judgment on Appeal Against Decision on Application to Stay Prosecution].

¶20 The Appeals Chamber, however, reversed the Trial Chamber’s ruling on release. In particular, it held that a “conditional” stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed.<sup>36</sup> Such a trial, nonetheless, might become possible at a later stage due to the resolution of the issue; assuming this would not violate the accused’ rights for other reasons such as the right to be tried without undue delay. Therefore, the unconditional release of the accused person was not the “inevitable” consequence and “the only correct course” to take in such circumstances, as had been held by the Trial Chamber. Instead, the Chamber would have to consider all relevant circumstances, including foreseeable prospects for a resolution to the matter, and base its decision on release or detention on the governing criteria set out in Articles 60 and 58(1) of the Statute.<sup>37</sup>

### *Comment*

¶21 The two judgments of the Appeals Chamber have several important ramifications for the future work of the Court. In the first place, the Appeals Chamber made it clear that potential tensions between the requirements of confidentiality and those of a fair trial should be avoided preemptively by the Office of the Prosecutor. In particular, Article 54(3)(e) should be applied in strict adherence to the conditions stipulated in the provision so as to avoid routine resort to its application. Also, confidentiality agreements should be concluded in a manner that will allow the Court to resolve any potential tensions that may arise. However, where tension does arise, it affirmed that disclosure obligations under Article 67(2) do not override the confidentiality of information under Article 54(3)(e). If disclosure cannot be effected, the Chambers must provide for an appropriate remedy to ensure that fairness results.<sup>38</sup>

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<sup>36</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 12 (Appeals Chamber), Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled “Decision on the Release of Thomas Lubanga Dyilo,” (Oct. 21, 2008).

<sup>37</sup> *Id.* ¶¶ 37-42.

<sup>38</sup> *Lubanga* Judgment on Appeal Against Decision on Application to Stay Prosecution, Case No. ICC-01/04-01/06 OA 13, ¶ 48. The Appeals Chamber, as the Trial Chamber before it, appears to have treated in equal terms disclosure obligations with respect to potentially exculpatory materials pursuant to article 67(2) and materials subject to inspection under Rule 77.

The Appeals Chamber indicated that determination of appropriate remedies or “counter-balancing measures” may include such measures as the identification of similar exculpatory material, the provision of materials in summarized form, the stipulation of relevant facts, or the amendment or withdrawal of charges.<sup>39</sup> This means that the defense does not enjoy an absolute right to the disclosure of every item of potentially exculpatory material under Article 67(2) or the inspection of material under Rule 77 in its entirety – it may be restricted on the basis of Article 54(3)(e). Nevertheless, this can only be decided by way of judicial control.<sup>40</sup> This means that, pursuant to the last sentence of Article 67(2), where required, the Court must be able to review potentially exculpatory documents in the prosecution’s possession or control that were obtained pursuant to Article 54(3)(e) in order to determine the extent of the prosecution’s disclosure obligations.

¶22 At the same time, the judgment provides procedural certainty by confirming that no chambers of the Court can order the disclosure of 54(3)(e) materials to the defense without the prior consent of the information provider. This is because a chamber will itself be required to respect the conditions of confidentiality provided for by the Article 54(3)(e) agreement, pursuant to its statutory obligation to provide for the confidentiality of information.<sup>41</sup> This particular aspect of the ruling may, nonetheless, have implications for future cooperation from some providers who might prove reticent to share information that could potentially go beyond the strict control of the Prosecutor.

¶23 Upon obtaining the information providers’ consent, the prosecution was able, having met all the Chamber’s preconditions, to file all of the materials in question in fully unredacted form, before the Trial Chamber for its review in *ex parte* hearings open only to the prosecution.<sup>42</sup> This allowed the Chamber to assess the

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<sup>39</sup> *Id.* ¶¶ 28, 44. While these measures had been proposed by the Prosecution during earlier proceedings before the Trial Chamber, the bench had ruled that it would be unable to assess the adequacy of such measures absent review of the underlying materials in unredacted form.

<sup>40</sup> *Id.* ¶ 47.

<sup>41</sup> *Id.* ¶ 48.

<sup>42</sup> Ultimately, the prosecution was able to obtain this consent prior to the issuance of the Appeals Chamber’s decision; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1478 (Trial Chamber), Prosecution’s Application for Trial Chamber to Review all the Undisclosed Evidence Obtained from Information Providers (Oct. 14, 2009). This consent was obtained by



adequacy of the proposed method of disclosure for each document, whether by way of redactions, use of summaries, admissions of fact, or any combination thereof. On November 18, 2008, the Trial Chamber declared that it had completed its review of the materials to its satisfaction, ordered the prosecution to proceed in accordance with the approved method of disclosure for each document, and lifted the stay of proceedings.<sup>43</sup>

#### IV. GRAVITY

¶24 Another important decision made public in 2008 was an Appeals Chamber judgment that had been rendered in 2006, but kept under seal pending modification in its classification.<sup>44</sup> The decision concerned the case against Bosco Ntaganda, an alleged co-perpetrator with Thomas Lubanga, against whom a warrant had been simultaneously sought by the Prosecutor in the same warrant application.<sup>45</sup> The Pre-Trial Chamber (PTC) had initially declined

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combining the assurance already provided by the Trial Chamber on its confidential treatment of the documents during the proposed review with an undertaking by the prosecution towards the providers that it would seek to take all protective measures, including if necessary withdrawal of the charges, in the event the Appeals Chamber were to issue an order the disclosure of documents without the providers' consent; see *id.*, ICC-01/04-01/06-1478-Anx1.

<sup>43</sup> Press Release, Int'l Criminal Court, Stay of Proceedings in the Lubanga Case is Lifted - Trial Provisionally Scheduled for 26 January 2009, ICC-CPI-20081118-PR372 (Nov. 18, 2008); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1644 (Trial Chamber I), Reasons for Oral Decision Lifting the Stay of Proceedings (Jan. 23, 2009).

<sup>44</sup> Situation in Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal Against the Decision of the Pre-Trial Chamber Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Case No. ICC-01/04-169 (Appeals Chamber) (issued under seal July 13, 2006, reclassified as public on Sept. 23, 2008); Situation in Democratic Republic of the Congo, Decision on the Unsealing of the Judgment of the Appeals Chamber Issued on July 13, 2006, Case No. ICC-01/04-538 (Appeals Chamber) (Sept. 22, 2008). The proceedings had initially been conducted under seal in the interests of facilitating apprehension, but were later modified at the Prosecution's request.

<sup>45</sup> Bosco Ntaganda, alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC), is alleged to be criminally responsible for the war crime of enlisting and conscripting of children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an international armed conflict under article 8(2)(b)(xxvi); or, in the alternative, enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character under article 8(2)(e)(vii).

to issue a warrant of arrest based on its reading of the gravity criteria under the Court's admissibility provisions in Article 17(1)(d), which stipulates the Court shall determine that a case is inadmissible where "[t]he case is not of sufficient gravity to justify further action by the Court."<sup>46</sup> The PTC had held that for a case to be admissible the conduct must be either systematic or large-scale, with due regard paid to the social alarm caused to the international community and that the person charged must be among the most senior leaders accused of the most serious crimes.<sup>47</sup> The PTC opined that persons at the top of their organizations who play a major role in the systematic or large-scale commission of crimes are "the ones who can most effectively prevent or stop the commission of those crimes." As the Chamber explained:

... only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.<sup>48</sup>

¶25 Applying this test to the Prosecutor's application for an arrest warrant against Bosco Ntaganda led the Chamber to declare the case inadmissible based on the seniority and overall role Ntaganda played within the UPC/FPLC armed group.

¶26 The Appeals Chamber held that the test developed by the PTC was flawed. In relation to the requirement that the conduct must be either systematic or large scale, the Appeals Chamber

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<sup>46</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (Pre-Trial Chamber I), Decision on the Prosecutor's Application for Warrant of Arrest, Article 58, ¶¶ 77-89 (Feb. 10, 2006) [hereinafter *Lubanga* Arrest Warrant Decision].

<sup>47</sup> The three-pronged test set out by the Chamber specifically required that: (i) the alleged conduct was either systematic or large-scale, the due regard paid to the social alarm caused to the international community; (ii) the person fell within the category of most senior leaders of the situation under investigation; and (iii) the person fell within the category of most senior leaders suspected of being most responsible, considering their own role and the role played by group or entity to which they belong in the overall commission of crimes within the jurisdiction of the Court in the relevant situation; *Id.* ¶ 64.

<sup>48</sup> *Id.* ¶¶ 54-55.

declared that the PTC effectively blurred the distinction between the jurisdictional requirements for war crimes and crimes against humanity, contrary to the express terms of the Statute.<sup>49</sup> The Chamber also agreed with the prosecution that the criterion of “social alarm” was dependent on “subjective and contingent reactions to crimes rather than upon their objective gravity” and was therefore inappropriate for the determination of admissibility.<sup>50</sup> The rigid requirement that the person belong to the group of most senior leaders suspected of being most responsible, moreover, was held to be incompatible with the retributive and preventative impact of the ICC because it excluded entire categories of perpetrators from potentially being brought before the Court. In particular, the Appeals Chamber noted that the role of a person or an organization may vary considerably and thus “should not be exclusively assessed or predetermined on excessively formulistic grounds.”<sup>51</sup> In terms of the overall approach to interpreting gravity in the light of the drafting history of Article 17(1)(d), moreover, the Appeals Chamber observed that States explicitly rejected proposals to limit admissibility strictly to cases of “exceptional gravity,” thereby emphasizing that gravity should not be narrowly construed.<sup>52</sup>

¶27 On a separate, but related issue in the same judgment, the Appeals Chamber also rejected the PTC’s contention that an initial determination of the admissibility of a case is a prerequisite to the issuance of an arrest warrant. In particular, the Appeals Chamber observed that Article 58(1) lists exhaustively the substantive prerequisites for the issuance of an arrest warrant, namely: (i) that there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court, and (ii) the arrest of the person appears necessary.<sup>53</sup> Prior determination of admissibility at the arrest warrant application stage where the person sought is unable to participate in the proceedings could also severely impair

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<sup>49</sup> Situation in the Democratic Republic of Congo, Case No. ICC-01/04-186, Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ¶ 70 (July 13, 2006) [hereinafter Situation in the DRC, Judgment on Appeal Against Arrest Warrant Decision].

<sup>50</sup> *Id.* ¶ 72.

<sup>51</sup> *Id.* ¶ 76.

<sup>52</sup> *Id.* ¶ 81.

<sup>53</sup> *Id.* ¶¶ 42-44.

the rights of a suspect by predetermining a finding of admissibility that he or she might later seek to challenge before the same Chamber.<sup>54</sup> Accordingly, the Appeals Chamber held that when the Prosecution Application is made on a confidential and *ex parte* basis, the PTC should only exercise its discretion under Article 19(1) of the Statute in exceptional circumstances, bearing in mind the interests of the suspect. Such circumstances were identified as including instances where “uncontested facts” or “self-evident factors” render a case clearly inadmissible or an “ostensible cause” impels the exercise of review.<sup>55</sup>

### *Comment*

¶28 The Appeals Chamber’s overruling of the Pre-Trial Chamber’s social alarm and most-senior-leaders test represents one of the most significant rulings of the Court to date, given its impact on all future admissibility assessments. It impacts not only the scope of cases that will potentially be admissible before the Court, but the nature of the focus adopted by the Prosecutor in the formulation of his investigative strategies.<sup>56</sup> This is particularly relevant for in the type of complex and malleable group structures to which an ICC case may attach. The Appeals Chamber’s ruling that gravity should not be “exclusively assessed or predetermined on excessively formulistic grounds,”<sup>57</sup> for example, will probably help avoid litigation over the fulfillment of rigid organizational criteria. More generally, the judgment appears to distinguish between discretionary policy considerations, such as the adoption of a prosecutorial policy to focus as a general rule on persons bearing the greatest responsibility, and the setting of mandatory legal thresholds for admissibility. While the absence of a definition of gravity in the majority decision means that much is left undecided and remains subject to future litigation,<sup>58</sup> the judgment

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<sup>54</sup> *Id.* ¶ 50.

<sup>55</sup> *Id.* ¶¶ 52-53.

<sup>56</sup> E.g., The third application for arrest warrants in the Darfur Situation relies on the Appeals Chamber’s finding on gravity to support the *prima facie* admissibility of the case. *See also infra* note 76 and accompanying text.

<sup>57</sup> Situation in the DRC, Judgment on Appeal Against Arrest Warrant Decision, Case No. ICC-01/04-186, ¶ 76.

<sup>58</sup> Judge Pikis, in his separate and partly dissenting opinion, offered the following guidance: “[W]hich cases are unworthy of consideration by the International

notably dismissed the setting of an overly restrictive threshold that would hamper the preventative or deterrent role of the Court.

¶29 The finding that a determination on the admissibility of a case is not a prerequisite for the issuance of an arrest warrant and, moreover, the parameters set by the Appeals Chamber on the exercise of the Court's discretionary powers under Article 19(1) of the Statute, will also have important implications for the nature and scope of the assessment undertaken by chambers at the warrant application stage.<sup>59</sup>

## V. VICTIMS' PARTICIPATION

¶30 The Appeals Chamber also rendered a number of decisions during the year that provide further clarity on the scope of victims' participation before the ICC. In particular, in its judgment of July 11, 2008, the Appeals Chamber examined how the concept of "harm" should be defined for the purpose of Rule 85(a). The provision reads: "[v]ictims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." The Chamber observed that for the purpose of the definition of who is a victim, the harm suffered, whether material, physical or psychological, must necessarily have been suffered personally by the victim.<sup>60</sup> Such harm, however,

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Criminal Court? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases. A crime is insignificant in itself if, notwithstanding the fact that it satisfies the formalities of the law, i.e., the insignia of the crime, bound up with the mens rea and actus reus, the acts constituting the crime are wholly peripheral to the objects or the law in criminalising the conduct. Both the inception and the consequences of the crime must be negligible. In those circumstances, the Court need not concern itself with the crime nor will it assume jurisdiction for the trial of such an offence, when national courts fail to do so. Any other construction of article 17(1)(d) would neutralize its avowed objects and purposes and to a large extent empty it of content. The subject matter must be minimal, so much so that it can be ignored by the Court." Situation in the DRC, Judgment on Appeal Against Arrest Warrant Decision, Case No. ICC-01/04-186, Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, ¶ 40.

<sup>59</sup> See, e.g., Situation in the DRC, Judgment on Appeal Against Arrest Warrant Decision, Case No. ICC-01/04-186, ¶ 45 (finding that undertaking an admissibility at the article 58 stage "may substantially prolong the proceedings in respect of the application for a warrant of arrest").

<sup>60</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA9 OA10 (Appeals Chamber), Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 38 (July 11, 2008) [hereinafter *Lubanga* Judgment on Appeals Against

could be both direct and indirect. As the Chamber observed, the harm suffered by one victim can give rise to harm suffered by others, such as the recruitment of a child soldier which may result in personal suffering of both the child concerned and the parents of that child. So long as the harm suffered is personal to the individual, it can attach to both direct and indirect victims of a crime within the jurisdiction of the Court.<sup>61</sup>

¶31 In the context of a particular case, the next issue was for which crime exactly must the victim have suffered personal harm. The Trial Chamber had held that Rule 85 does not restrict the participation of victims to only those who were victims of the particular crimes contained in the charges. Accordingly, a victim of any crime falling within the jurisdiction of the Court could potentially participate in the *Lubanga* trial.<sup>62</sup> The Appeals Chamber reversed this finding. It held that for the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under Article 68 (3) of the Statute must be linked with the charges confirmed against the accused. As the judgment noted:

Given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged, and that the application under Rule 89 (1) of the Rules in this context is for participation in the trial, only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests. Therefore, only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to Article 68 (3) of the Statute read with Rule 85 and 89 (1) of the Rules. Once the

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Decision on Victims' Participation].

<sup>61</sup> *Id.* ¶ 32.

<sup>62</sup> In order to give effect to such participation in a manner that was meaningful and serve the interests of justice, the Trial Chamber held that the victim must nonetheless establish whether (i) there is a "real evidential link between the victim and the evidence which the Court will be considering during Mr. Thomas Lubanga Dyilo's trial . . . leading to the conclusion that the victim's personal interests are affected" or (ii) the victim was "affected by an issue arising during Mr. Thomas Lubanga Dyilo's trial because his or her personal interests are in a real sense engaged by it[.]" Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (Trial Chamber), Decision on Victims' Participation, ¶ 95 (Jan. 18, 2008).

charges in a case against an accused have been confirmed in accordance with Article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.<sup>63</sup>

The Appeals Chamber agreed, moreover, with the contention that it would exceed the Trial Chamber's competency to consider crimes that fell outside of the parameters set forth in the charges.<sup>64</sup>

¶32 Finally, in relation to the third ground of the appeal, raised by both the prosecution and the defense, the judgment confirmed the Trial Chamber's finding that victims participating at trial may in limited circumstances present evidence pertaining to the guilt or innocence of the accused and may challenge the admissibility or relevance of evidence. The Appeals Chamber held that while the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, there is nothing precluding a role for victims.<sup>65</sup>

¶33 In particular, the judgment concurred with the Trial Chamber's consideration of Article 69(3) of the Statute which provides "the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth."<sup>66</sup> Read together with Article 68(3) and Rule 91(3) of the Rules concerning the victims' participation in the proceedings, the Appeals Chamber agreed that the legislative framework left open the possibility for victims "to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth."<sup>67</sup> As had been observed by the Trial Chamber, such a possibility did not create an unfettered right for victims to lead or challenge evidence, but instead "victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation."<sup>68</sup> Similarly, in relation to the right to challenge the admissibility or

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<sup>63</sup> *Lubanga Judgment on Appeals Against Decision on Victims' Participation*, Case No. ICC-01/04-01/06, ¶ 62.

<sup>64</sup> *Id.* ¶ 63.

<sup>65</sup> *Id.* ¶¶ 93-94.

<sup>66</sup> *Id.* ¶ 95.

<sup>67</sup> *Id.* ¶ 98.

<sup>68</sup> *Id.* ¶ 99.

relevance of evidence, the Appeals Chamber affirmed the lower chamber's finding that nothing excludes a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims.<sup>69</sup> The system is thus predicated upon a discrete application by victims to the bench requesting it to invoke the Chamber's own powers: victims do not have the ability to lead or challenge evidence as of right.

¶34 As elaborated by the Appeals Chamber, the limits within which a Trial Chamber should exercise its powers to permit victims to tender and examine evidence require: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.<sup>70</sup>

¶35 The majority decision on this last ground of appeal elicited strong dissents from Judges Pikis and Kirsch, who held that the Statute does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused.<sup>71</sup> The participation of victims in the proceedings, by contrast, was strictly confined to the expression of their "views and concerns," as provided for under Article 68(3); they could not effectively be

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<sup>69</sup> *Id.* ¶ 101.

<sup>70</sup> *Id.* ¶ 104. As to the requirements for timely disclosure, the judgment held "[i]n deciding each application the Trial Chamber, being vigilant in safeguarding the rights of the accused could take into account, *inter alia*, whether the hearing of such evidence would be appropriate, timely or for other reasons should not be ordered. If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence." *Id.* ¶ 100.

<sup>71</sup> As Judge Pikis observed, "The proof or disproof of the charges is a matter affecting the adversaries. The victims have no say in the matter. Their interest is that justice should be done, coinciding with the interest of the world at large that the criminal process should run its course according to law, according to the norms of a fair trial. Both the submission of evidence and its reception affect the parties to the adversity. It is not the victims' concern, a matter directly related to the reception of evidence, to either prove or disprove the charges." *Lubanga Judgment on Appeals Against Decision on Victims' Participation*, Case No. ICC-01/04-01/06, Partly Dissenting Opinion of Judge Pikis, ¶ 19. Judge Pikis also partly dissented on the question of whether the personal harm suffered by victims can be anything other than direct harm. *Id.* ¶ 3.



made parties to the proceedings.<sup>72</sup> As set out in their separate partly dissenting opinions, such a reading was confirmed by the legislative choice made by the drafters of the Statute who placed no disclosure requirements on victims, since it was not envisaged that victims would either disclose or lead evidence relating to guilt or innocence.<sup>73</sup> Judge Kirsch noted, in particular, that the provisions dealing with evidence relating to guilt or innocence refer to submissions by the “parties,” while the Chambers’ own powers relate to requesting those same parties to submit all evidence that is necessary for the establishment of the truth.<sup>74</sup> As to challenges to the admissibility or relevance of evidence, Judge Kirsch opined that the Trial Chamber’s power to rule on the admissibility or relevance of evidence under Article 64(9) could only be invoked by the parties, as explicitly provided for in the provision, and not by the participants.<sup>75</sup>

¶36 In a separate decision of December 19, 2008, on the scope of victims’ participation, the Appeals Chamber reversed an earlier decision of the PTC on whether victims can be offered general participatory rights in the investigation of crimes committed in a situation referred to the Court.<sup>76</sup> In noting that Article 68(3) provides for the participation of victims at any stages of the proceedings, the Appeals Chamber held that such participation can take place only within the context of judicial proceedings. The Appeals Chamber defined “proceeding” as “a term denoting a

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<sup>72</sup> As Judge Kirsch observed, “On an ordinary understanding of those words, they do not equate to an ability to lead evidence on guilt. It would, in my view, be perfectly legitimate for victims to present their views and concerns in relation to the evidence submitted by the parties where it affects their personal interests. However, there is a sizeable difference between presenting views and concerns in relation to issues that arise at the trial that affect the personal interests of victims and presenting a prosecution case by leading additional evidence - independent of that led by the Prosecutor - on guilt.” *Lubanga Judgment on Appeals Against Decision on Victims’ Participation*, Case No. ICC-01/04-01/06, Partly Dissenting Opinion of Judge Philippe, ¶ 30.

<sup>73</sup> *See id.* ¶¶ 15-23.

<sup>74</sup> Judge Kirsch contrasted this with the provisions on reparations, where the Rules explicitly foresee the leading of evidence by victims. *Id.* ¶ 22.

<sup>75</sup> *Id.* ¶ 35.

<sup>76</sup> *Situation in Democratic Republic of the Congo*, Case No. ICC-01/04-556 (Appeals Chamber), Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007 (Dec. 19, 2008).

judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.”<sup>77</sup> As the Appeals Chamber went on to observe: “Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.”<sup>78</sup>

¶37 The Appeals Chamber also recalled that while participation pursuant to Article 68(3) of the Statute aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests, such a role “does not equate them ... to parties to the proceedings before a Chamber.” Their participation is restricted “to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.”<sup>79</sup>

#### *Comment*

¶38 The above judgments of the Appeals Chamber will have a significant impact in shaping the contours of victim’s participation in future trial proceedings. Of particular importance is the clarification that participation in trial proceedings must be linked to the charges confirmed against the accused. This will prevent the Court from being flooded with applications concerning matters that are extraneous to the case pending before it.

¶39 As to the role of victims in presenting and challenging evidence, the system foreseen by the majority envisages a tightly regulated scheme to avoid inconsistencies with the rights of the defense and the role of the prosecution. It can only be triggered by leave of the chamber, which must be convinced that a narrowly prescribed threshold has been satisfied to warrant the exercise of its own discretionary powers. The chamber will also need to closely regulate disclosure obligations, including the adequacy of prior notice, any delay in the timing thereof, and the application of

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<sup>77</sup> *Id.* ¶ 45. Victims are nonetheless not precluded from seeking participation in any judicial proceedings affecting investigations. *Id.* ¶ 56.

<sup>78</sup> *Id.* ¶¶ 45, 52.

<sup>79</sup> *Id.* ¶ 55.

such obligations to both incriminatory and exonerating materials. If so controlled, the system might well operate in a manner that does not impinge on the requirements of a fair and expeditious trial, limiting acceptance by a chamber of such motions to highly specific circumstances. Nonetheless, the Court will no doubt need to remain mindful of the observations of Judges Pikis and Kirsch that, in accordance with the scheme of the Statute, the accused should be faced by one prosecutor, who bears the onus of proving guilt at the trial, rather than, potentially, multiple accusers: “The different roles played by the Prosecutor and the victims must be kept distinct if the proceedings are to run in an orderly fashion which best protects the interests of all parties and participants involved.”<sup>80</sup>

¶40 Finally, the clarification by the Appeals Chamber as to the role of victims at the situation stage, i.e. during investigations, removes any lingering doubt as to the nature of the prosecution’s discretion at this stage and its independence from any mandatory duty to pursue complaints lodged with it by victims or others.<sup>81</sup>

## VI. WITNESS PROOFING

¶41 The issue of witness proofing first arose during a status conference in the *Lubanga* case prior to the confirmation hearing, where the prosecution informed the PTC of its intention to conduct “proofing sessions” with particular witnesses.<sup>82</sup> After instructing that such activity not be undertaken until hearing submissions from the parties and participants on the subject, the PTC issued a decision on November 8, 2006, in which it distinguished between “witness familiarisation” and “witness proofing.” The PTC characterized “witness familiarisation” essentially as “a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the

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<sup>80</sup> *Id.* ¶ 25.

<sup>81</sup> As the Chamber observed, the scope for victims within the statutory scheme during investigations as with anyone else with relevant information is to pass it on to the Prosecutor, or to otherwise make representations to the Prosecutor on any matter pertaining to the investigations and to their interests. *Id.* ¶ 53.

<sup>82</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (Pre-Trial Chamber I), Transcript of Hearing on October 26, 2006, ¶ 11: 1-6 (Oct. 26, 2006).

various participants at the hearing,”<sup>83</sup> for which it found legal authority under the Statute, and to be entrusted to the Registry’s Victims and Witnesses Unit. The PTC characterized the practice of “witness proofing” as the substantive preparation of a witness prior to testimony by the calling party which, by contrast, it deemed prohibited.<sup>84</sup>

¶42 As the PTC ruled, there were such wide discrepancies in approaches by national jurisdictions with regard to the practice of witness proofing that it was unable, pursuant to Article 21(1)(c) of the Statute, to discern authority from general principles of law from national laws of legal systems of the world.<sup>85</sup> It also noted the paucity of jurisprudence from the ICTY and ICTR to enable identification of relevant principles and rules of international law pursuant to Article 21(1)(b).<sup>86</sup> As summarized by the PTC, risks associated with witness proofing that support treatment of the practice as unethical or unlawful include: (i) a witness altering the emphasis of their evidence; (ii) a witness deliberately or inadvertently confusing information given during the proofing

<sup>83</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 15 (Nov. 8, 2006) [hereinafter *Lubanga* Decision on Witness Familiarization and Proofing].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ¶¶ 36-42. Article 21 of the ICC Statute provides:

1. The Court shall apply:
  - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Rome Statute, *supra* note 2, at art. 21.

<sup>86</sup> *Lubanga* Decision on Witness Familiarization and Proofing, Case No. ICC-01/04-01/06, ¶¶ 28-42 (2006).

sessions; (iii) a witness unconsciously trying to fill in their testimony with logical inferences from the proofing sessions; (iv) witness proofing inappropriately enhancing the credibility of witnesses because the more the witnesses practice, the more confident and detailed their recollection becomes; and (v) witness proofing, particularly through providing advance notice of the questions that would be asked, depriving court-room testimony of its spontaneity.<sup>87</sup> Among reasons put forward to justify witness proofing as good professional practice included the fact that witness proofing: (i) enables the identification of differences and deficiencies in recollection prior to the testimony of witnesses in the courtroom; (ii) enables the differences and deficiencies in recollection identified in the proofing sessions to be addressed prior to the testimony of the witnesses in the courtroom; and (iii) is likely to allow witnesses to present their evidence in a more accurate, structured and exhaustive manner.<sup>88</sup>

¶43

The issue was revisited before the Trial Chamber which heard further submissions from the parties and participants. The prosecution maintained the propriety of witness proofing as confirmed by the established practice and jurisprudence of the *ad hoc* Tribunals.<sup>89</sup> It noted that the fact that the ICC Statute and Rules do not refer to the term “witness proofing” does not preclude the Chamber from approving these practices; observing that the practice could advance the goal of establishing the truth and be utilized by both parties.<sup>90</sup> In support, the prosecution argued that

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<sup>87</sup> *Id.* ¶ 37 n.41.

<sup>88</sup> *Id.* ¶ 37 n.42.

<sup>89</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-T (Trial Chamber III), Decision on Defence Motions to Prohibit Witness Proofing, ¶ 10 (Dec. 15, 2006) [hereinafter *Karemera* Decision on Witness Proofing]; Prosecutor v. Milutinović, Case No. IT-05-87-T (Trial Chamber), Decision on Ojdanić Motion to Prohibit Witness Proofing, ¶ 10 (Dec. 12, 2006) [hereinafter *Milutinovic* Decision on Witness Proofing]; Prosecutor v. Limaj, Case No IT-03-66-T (Trial Chamber II), Decision on the Defence Motion on Prosecution Practice of Proofing Witnesses, ¶ 3 (Dec. 10, 2004).

<sup>90</sup> The prosecution argued that such witness proofing could encompass: (i) providing the witness with their statement a few days prior to the proofing session to allow the witness to refresh their memory; (ii) meeting with the witness a few days before they are to give evidence to remind the witness of their role and their duty to tell the truth; (iii) discussing issues that could lead to a request for protective measures for the witness; and (iv) addressing any areas within the witness statement that may be addressed in court. Witnesses could also be shown potential exhibits and asked to comment on them, and further enquiry be made about potentially incriminatory and exculpatory information,

witness proofing allows for a relevant, accurate, complete, orderly and efficient presentation of evidence, and enables the defense or other party to have notice of any different recollection of the witness, thereby preventing undue surprise.<sup>91</sup>

¶44 The defense suggested that once a witness had completed his or her statement, the prosecution should not be able to go over the substance of this testimony with the witness. While it accepted that the prosecution should be permitted to see the witness and remind him or her of certain critical points, the defense proposed that the Chamber should set a cut-off date after which the prosecution could no longer raise the substance of the testimony of the witness, suggesting that such activities should be prohibited from the moment one party notifies the other of its intention to call the witness to testify, e.g., by placing the name of the witness on the witness list.<sup>92</sup>

¶45 The Trial Chamber essentially upheld the ruling of the PTC in prohibiting the practice of witness proofing, while slightly expanding the range of activities that may be undertaken as part of witness familiarization.<sup>93</sup> It also affirmed the PTC's observation that witnesses are not attributable to parties but rather are witnesses of the Court.<sup>94</sup> As set out by the Trial Chamber, the process to be undertaken by the Registry's Victims and Witnesses Unit in consultation with the party introducing the witness included:

- a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
- b. Reassuring witnesses about their role in proceedings before the Court;

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which would be shared with the defense. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 12 (Nov. 30, 2007) [hereinafter *Lubanga* Decision on Witness Preparation for Testimony at Trial].

<sup>91</sup> *Id.* ¶ 13.

<sup>92</sup> *Id.* ¶ 20.

<sup>93</sup> See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1351, Decision Regarding the Protocol on the Practices to be used to Prepare Witnesses for Trial (May 23, 2008) [hereinafter *Lubanga* Decision on Protocol to Prepare Witnesses for Trial].

<sup>94</sup> *Lubanga* Decision on Witness Preparation for Testimony at Trial, Case No. ICC-01/04-01/06-1049, ¶ 34 (2007).

- c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witnesses the process of examination;
- e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
- g. “Walking witnesses through” the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the court, and particularly where the various participants will be seated and the technology that will be used in order to minimise any confusion or intimidation.<sup>95</sup>

The Victims and Witness Unit was also tasked with making available to the witness a copy of any witness statement they may have made in order to refresh their memory, which was to be provided to the Victims and Witness Unit by the calling party. The Chamber explained that the purpose of allowing a witness to reread his or her statements to refresh their memory could not be equated with an “evidence-checking” procedure that aims at testing or correcting a witness’ original account; and that any such discrepancies should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence.<sup>96</sup> The Chamber affirmed that once the process of witness familiarization has been commenced, any further meeting between a party and its witness outside of Court is prohibited.<sup>97</sup>

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<sup>95</sup> *Id.* ¶ 53.

<sup>96</sup> *Lubanga* Decision on Protocol to Prepare Witnesses for Trial, Case No. ICC-01/04-01/06-1351, ¶¶ 38-40 (2008). The Chamber went on to hold without elaboration that “unless something exceptional occurs, the VWU is not under an obligation to provide a report on the statement-reading process to the parties and the Chamber.”

<sup>97</sup> *Lubanga* Decision on Witness Preparation for Testimony at Trial, Case No. ICC-01/04-01/06-1049, ¶ 56 (2007).

*Comment*

¶46 The issue of witness proofing has become notable for the divergent practice that has emerged at the international level and the extraordinary dialogue it has engendered between the different international courts and tribunals. Following the PTC's initial decision in 2006 prohibiting the practice before the ICC the ruling was immediately relied upon as authority by defense counsel before both the ICTY and ICTR.<sup>98</sup> However, both *ad hoc* Tribunals roundly rejected the approach taken by the ICC, particularly insofar as it misconstrued their own practice, noting in stark terms that "the process by which the *Dyilo* Chamber came to its decision is not based on a comprehensive knowledge of the established practice of the *ad hoc* Tribunals, which is justified by the particularities of these proceedings that differentiate them from national criminal proceedings."<sup>99</sup> Subsequent rulings by both *ad hoc* Tribunals, including on appeal, asserted the existence of consistent practice allowing pre-testimony interviews of witnesses for the purpose of the better administration of justice and to reduce any element of surprise to the defense.<sup>100</sup> As ICTR Trial Chamber III in the case of *Karemera* observed, "The practice of witness familiarization not only poses no undue prejudice, but is also a useful and permissible practice" and "this practice has been sanctioned by the Tribunal's jurisprudence."<sup>101</sup> In particular, the *Karemera* Trial Chamber held that witness preparation has been recognized in both *ad hoc* Tribunals in relation to how the content of an interview with a witness is to be disclosed, noting:

The prosecution has developed a practice of disclosing "will-say" or "reconfirmation statements" prior to the testimony of a witness ....

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<sup>98</sup> *Karemera* Decision on Witness Proofing, Case No. ICTR-98-44-T; *Milutinovic* Decision on Witness Proofing, Case No. IT-05-87-T.

<sup>99</sup> *Karemera* Decision on Witness Proofing, Case No. ICTR-98-44-T, ¶ 8.

<sup>100</sup> See *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73.8 (Appeal Chamber), Decision on Interlocutory Appeal Regarding Witness Proofing (May 11, 2007) [hereinafter *Karemera* Decision of Appeal on Witness Proofing].

<sup>101</sup> *Karemera* Decision on Witness Proofing, Case No. ICTR-98-44-T, ¶¶ 10-11. The Chamber also recalled a similar finding in the *Milutinović* case at the ICTY that "there is no reason for limiting witness familiarization to the Witnesses and Victims Support Section of the Tribunal." *Id.*



Trial Chambers have considered that will-say statements are in conformity with the prosecution's obligations under Rule 67(D) of the Rules of the Rules of Procedure and Evidence which require each party to promptly notify the opposing party and the Chamber of the discovery and existence of additional evidence, information and materials that should have been produced earlier pursuant to the Rules. The will-say statement generally supplements or elaborates on information previously disclosed to the Defence, but it may also bring new elements of which the Defence was not put on notice. Although it is not acceptable for the prosecution to mould its case against the Accused in the course of the trial, it must be admitted that a witness may recall and add details to his or her prior statements. As explained by Trial Chamber I in the *Bagosora et al.* case

[...] witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware.

While this practice cannot be considered as permission to train, coach or tamper a witness before he or she gives evidence, the content of these statements under Rule 67(D) encompasses much of the elements described in the second component of witness proofing in the *Dyilo* Decision.<sup>102</sup>

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<sup>102</sup> *Id.* ¶¶ 11-12. In the *Milutinović* case, the Trial Chamber similarly affirmed that “discussions between a party and a potential witness regarding his or her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness’ evidence,” *Milutinović* Decision on Witness Proofing, Case No. IT-05-87-T, ¶

¶47 In response, ICC Trial Chamber I, ruling on submissions tendered by the prosecution that sought reliance on the above pronouncements by the *ad hoc* Tribunals, revisited the earlier observation of the PTC by acknowledging “. . .as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.”<sup>103</sup> The Trial Chamber, nonetheless, went on to observe:

However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny under Article 21(l)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.<sup>104</sup>

¶48 In particular, the Chamber noted “the ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals. . .introducing additional and novel elements to aid the process of establishing the truth.”<sup>105</sup> Such differences were held to include the requirement on the prosecution to investigate exculpatory and incriminatory circumstances equally; the scope for greater intervention by the bench, and the unique element of victim participation.<sup>106</sup>

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<sup>103</sup> *Lubanga* Decision on Witness Preparation for Testimony at Trial, Case No. ICC-01/04-01/06-1049, ¶ 43 (2007).

<sup>104</sup> *Id.* ¶ 44.

<sup>105</sup> *Id.* ¶ 45.

<sup>106</sup> *Id.* The Chamber did not explain the relevance of such particular structural differences for rendering witness proofing impermissible *per se*. Arguably, the obligations of the prosecution pursuant to article 54(1) might actually render the

¶49 The repost and counter-repost by the different courts and tribunals on the issue of witness proofing provides a fascinating display of doctrinal interaction between the community of international judiciaries. At the same time, the debate indicates the strain of fragmentary tendencies in the discernment of international norms of criminal procedure.

¶50 Irrespective of the merits of the practice of witness proofing, which the Chamber in any event proceeded to examine on its own basis, the discussion raises the broader question of whether a chamber must find justification for every aspect of its procedure that is not expressly regulated in the Statute and Rules by resort to secondary sources of law. Several factors suggest that the ICC will often be called upon to regulate aspects of its criminal procedure in ways that cannot easily be patterned on general principles arising from national practice. This includes the particular context and challenges of holding trials at the international level, such as: the oft substantial lapse of time between the taking of a statement to the moment of testimony; the relative isolation engendered by witness protection programs; the in-court dislocation of cultural experience for witnesses from their natural environment; the large-scale and complex nature of the criminality which forms the basis of the cases; and, above all, the need in these specific contexts to continue to provide for fair and expeditious proceedings that are conducted with full respect for the rights of the accused and due regard to the protection of victims and witnesses. Establishing a rule that would require every determination on a previously unregulated aspect of its procedure to be based on secondary sources of law would hamper the functions and powers of a trial chamber to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceeding” and so determine its own procedure.<sup>107</sup> To date chambers of the Court have not found it necessary to do so in every instance and there is little suggestion that they consider themselves so bound.<sup>108</sup> Indeed, reference to

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permissibility of practice witness proofing more appropriate in the context of the ICC compared to that of the *ad hoc* Tribunals.

<sup>107</sup> Rome Statute, *supra* note 2, at art. 64(3)(a). ICC Rules of Procedure and Evidence, ICC Doc. ICC-ASP/1/3, Rule 134 (Sept 3-10, 2002).

<sup>108</sup> *See, e.g.*, Prosecutor v. Lubanga Dyilo, Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses, ICC-01/04-01/06-1603 (Jan. 15, 2009).

Article 21 in the litigation over witness proofing arose because the issue was initially framed in those terms by the prosecution.

¶51

Given the specific context and circumstances in which the ICC operates, it would appear that the appropriateness of the adoption of a particular unregulated aspect of its procedure should ordinarily be considered on a self-standing merits-based assessment. This should be done against the statutory requirements that proceedings are “fair and expeditious” and “conducted with full respect for the rights of the accused and due regard to the protection of victims and witnesses,”<sup>109</sup> rather than *a fortiori* whether it can be discerned from principles and rules of international law or general principles of law derived from national laws of legal systems of the world. While recognizing the utility of examining legal regimes and practices at the national and international level, the Court should not be definitively bound by them in matters of procedure. In particular, the diversity of national practice amongst legal systems on most evidentiary matters means that the Court will often be unable to discern general principles that support the adoption of a particular evidentiary rule. The Court cannot be left in procedural indeterminacy as a result and thus face the situation of a *non liquet*. This would arguably defeat the very purpose of Article 21. In this regard, ICC Rule 63 provides: “[T]he Chambers shall not apply national laws governing evidence, other than in accordance with Article 21[.]” Read together with its power to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceeding, this suggests that the ICC is not bound by national evidentiary laws and, rather than resorting to Article 21 to establish a permissible rule that is otherwise unregulated, it should only refer to secondary sources in order to discover a general principle or rule prohibiting the adoption of a particular procedure.<sup>110</sup> This is not to turn Article 21 on its head, but to distinguish where a chamber resorts to secondary sources of

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<sup>109</sup> Rome Statute, *supra* note 2, at art. 64 (2).

<sup>110</sup> See the similar reasoning applied by the ICTR Appeals Chamber: “[T]he submission that a number of national jurisdictions prohibit the practice of witness proofing to varying degrees does not, in the view of the Appeals Chamber, make such practice incompatible with the Tribunal’s Statute and Rules or with general principles of law. Indeed, Rule 89(A) of the Rules expressly provides that ‘Trial Chambers shall not be bound by national rules of evidence.’” *Karemera* Decision of Appeal on Witness Proofing, Case No. ICTR-98-44-AR73.8 ¶ 11.

law as a mandatory requirement to remedy a *lacuna* in the Court's legal instruments,<sup>111</sup> and where Article 21 serves to frame the parameters within which the Court exercises its discretionary power to regulate its proceedings, particularly in matters of evidentiary procedure.<sup>112</sup>

## VII. OTHER DEVELOPMENTS

¶52 In other significant developments before the ICC during 2008, on June 10, 2008, Jean-Pierre Bemba, alleged President and Commander-in-Chief of the Mouvement de Libération du Congo, was surrendered to the Court by the Belgium authorities following his arrest pursuant to a warrant issued under seal by Pre-Trial Chamber III.<sup>113</sup> Bemba is alleged to be criminally responsible for three counts of crimes against humanity: rape (Article 7(1)(g)), torture (Article 7(1)(f)), and murder (Article 7(1)(a)); and five counts of war crimes: rape (Article 8(2)(e)(vi)), torture (Article 8(2)(c)(i)), committing outrages upon personal dignity, in particular humiliating and degrading treatment (Article 8(2)(c)(ii)), pillaging a town or place (Article 8(2)(e)(v)), and murder (Article 8(2)(c)(i)).<sup>114</sup>

¶53 The Prosecutor lodged two further applications for arrest warrants during 2008, in relation to the Darfur situation, both of which were decided in 2009 and therefore not treated herein. The first was against Omar Al Bashir, President of the Sudan, for the alleged commission of ten counts of genocide, crimes against humanity and war crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Article 25 (3)(a) of the Statute (indirect perpetration or perpetration by means).<sup>115</sup> The second application focused on the alleged criminal

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<sup>111</sup> Situation in Democratic Republic of the Congo, Case No. ICC-01/04-168 (Appeals Chamber), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶¶ 33-42 (July 13, 2006).

<sup>112</sup> The author would like to thank Ben Batros for helping to formulate this conceptual distinction.

<sup>113</sup> See Press Release, ICC, Surrender of Jean-Pierre Bemba to the International Criminal Court, ICC-CPI-20080703-PR335 (July 3, 2008).

<sup>114</sup> See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-1, Warrant of Arrest (May 23, 2008).

<sup>115</sup> See Situation in Darfur, Sudan, Case No. ICC-02/05-157, Public Redacted Version of Prosecution's Application under Article 58 Filed on 14 July 2008

responsibility of rebel commanders for war crimes committed against African Union peacekeepers in Darfur on September 29, 2007, in the largest attack in a series of deadly attacks against peacekeeping personnel and objects. Relying on one of the few newly codified international crimes under the treaty establishing the Court, the application focused on the prohibition as a war crime of the intentional directing of attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.<sup>116</sup>

¶54 Also in 2008, Pre-Trial Chamber II, dealing with the situation in Uganda, in the case of *Kony et al* initiated, on its own initiative pursuant to Article 19(1) of the Statute, admissibility proceedings.<sup>117</sup> The Chamber held that such proceedings were necessary considering the peace negotiations between the Government of the Republic of Uganda and the Lord's Resistance Army and, in particular, the Annexure to the Agreement on Accountability and Reconciliation which provided for the establishment of a special division of the High Court of Uganda to try individuals for serious crimes during the conflict. In the light of these circumstances, the PTC held that it was appropriate to enter a determination on admissibility "in order to ensure the proper application of the relevant provisions concerning admissibility to current and future proceedings in the Situation." Accordingly, it invited the submission of observations by the Republic of Uganda, the Prosecutor, *ad hoc* counsel for the defense, which it appointed,

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(Sept. 12, 2008).

<sup>116</sup> See Situation in Darfur, Sudan, Case No. ICC-02/05-162, Summary of the Prosecutor's Application under Article 58 (Nov. 20, 2008).

<sup>117</sup> Joseph Kony, alleged Commander-in-Chief of the Lord's Resistance Army, is alleged to be criminally responsible for twelve counts of crimes against humanity: murder under article 7(1)(a), enslavement under article 7(1)(c), sexual enslavement under article 7(1)(g), rape under article 7(1)(g), and inhumane acts of inflicting serious bodily injury and suffering under article 7(1)(k). He is also alleged to be responsible for twenty-one counts of war crimes: murder under article 8(2)(c)(i), cruel treatment of civilians under article 8(2)(c)(i), intentionally directing an attack against a civilian population under article 8(2)(e)(i), pillaging under article 8(2)(e)(v), inducing rape under article 8(2)(e)(vi), and forced enlisting of children under article 8(2)(e)(vii). Kony is charged together with four other LRA commanders: Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.

and victims who had already communicated with the Court with respect to the case or their legal representatives.<sup>118</sup>

### VIII. CONCLUSION

¶55 As the ICC moves beyond the tenth anniversary of the adoption of its Statute and approaches the Review Conference to be held in 2010 it is gathering a body of jurisprudence that is starting to define the scope of its legislative framework in a number of important areas. The treatment of a number of these issues by the Appeals Chamber has been central in establishing clarity over the legal process, particularly on novel aspects unique to the Court's legal instrument. At the same time, the Court, as with its *ad hoc* predecessors, continues to grapple with the need to ensure that proceedings are both fair and expeditious.<sup>119</sup>

¶56 The commencement of the ICC's first trials will no doubt lead to a burgeoning of case-law on issues of both substantive and procedural law in the coming years. Moreover, many issues that, as of the end of the year, remained untested or only marginally treated have already begun to appear before the Court in the first half of 2009. These include foundational issues such as the Court's complementarity regime, command responsibility, modification of the charges once the trial has begun, and the evidentiary threshold for a warrant application for the crime of genocide.

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<sup>118</sup> See Prosecutor v. Kony, Case No. ICC-02/04-01/05-320, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence (Oct. 21, 2008).

<sup>119</sup> The duration of confirmation hearings, for example, has witnessed a downward trend from three weeks in the case of *Lubanga*, to two weeks in the larger case concerning *Katanga and Ngudjolo*, to five days scheduled for the *Bemba* case (only four of which were eventually utilized). Nonetheless, pre-trial proceedings remain time consuming, including at the warrant application stage, despite the adoption of such measures as, *inter alia*, demanding stricter adherence to disclosure timelines, focusing the approval of application for participation in circumstances more directly related to the proceedings, as well as efforts by Chambers to request the submission of in-depth analysis charts to better enable an overview of the evidence and so facilitate the effective management of proceedings.