Partly Dissenting Opinion of Judge Eboe-Osuji

1. I fully concur in the decision inviting the Prosecutor to file what in international criminal procedure has come to be known as a 'pre-trial brief'. I also concur in the decision declining to require the Prosecutor to file an 'evidence-based chart.' As I understand the matter, the two types of documents serve the same essential purpose. The filing of a 'pre-trial brief' is a more familiar practice—and its utility has been tried and tested—in international criminal procedure. The 'evidence-based chart', on the other hand, is a more unusual idea, the added utility of which is not so clear, especially when measured against the investment of time and effort likely to go into creating and reading it.

2. But, I regret my inability to concur with my highly esteemed colleagues in their decision to deny the Prosecutor authorisation to file an updated document containing the charges (UDCC)—something the Prosecutor is willing and ready to do.

3. My concerns go beyond the difficulty I have in understanding a decision that invites the Prosecutor to file a pre-trial brief, while denying her the authorisation to file a UDCC because of the Majority's concern that the UDCC is, among other things, intended to make the charges clearer. I particularly dissent from the reasoning of my colleagues the orientation of which *may* now or in the future be assumed as bearing towards a judicial view that the basic documents of this Court have left Trial Chambers without any discretion to order or authorise the filing of a UDCC. The danger that such an assumption carries for the jurisprudential import of this Chamber's decision (especially on account of the Majority reasoning) may not have been sufficiently avoided by the Majority merely saying that 'in this case' the filing of a UDCC is '[not] compatible with the procedural regime set out in the Statute.'[1] That qualifier sheds no light upon the obvious question whether the 'procedural regime set out in the Statute' is *ever* 'compatible with' the idea of a Trial Chamber having the discretion to direct or authorise the Prosecutor to file a UDCC. It would have been helpful—and much judicial debate might now have been avoided—if the decision of this Chamber clarified the view(s) of the Chamber as to: (i) whether there is (or there is not) a discretion in the Trial Chamber to order or authorise the filing of a UDCC; or, (b) if it is accepted that the discretion exists, whether the exercise of it is inappropriate 'in this case'.

4. In the circumstances, I feel compelled to address—in Part I of this opinion—the question of a Trial Chamber's discretion to order or authorise the filing of a UDCC. In Part II, I shall address the question of who, in my view, bears the responsibility to formulate the charges for purposes of the trial—an issue said to underlie the related question of legal cognisability of a UDCC filed for purposes of a trial. And, in Part III, I shall examine the question of the propriety of exercising the discretion to authorise or direct the filing of a UDCC 'in this case'.

[1] Majority reasoning, as expressed in para 8.

PART I—DISCRETION OF A TRIAL CHAMBER TO ORDER A UDCC

An Established Practice of the Trial Chamber based on Ample Statutory Discretion

Consistency with the Statutory Framework

5. It is now an established practice in this Court that a Trial Chamber may exercise its discretion to require the Prosecutor to file a UDCC, before the commencement of a trial. The practice is perfectly consistent and compatible with the statutory framework of not only the Rome Statute, but also of both customary international procedural law and general principles of criminal procedural law identifiable in the national sphere.

6. The filing of a UDCC is perfectly consistent with the Rome Statute both (a) as a matter of *necessary* logic flowing from the express language of the Statute aimed at ensuring fairness of the trial; and, (b) as a matter of a composite reading of the Rome Statute in the light of its express language in requiring that notice of the charges must *actually* be given to the accused.

7. First, the Rome Statute *itself* may be examined, for *any actual* provision which ensures that notice of the charges is *indeed* given to the person charged. It is noted that the concept of 'charges' against the accused makes myriad appearances in the Statute in various ways. To begin with, article 67(1)(a) crucially receives into the Rome Statute the customary international law requirement that a person charged with a crime *must* be given notice of the charge—and within a reasonable time. It provides as follows: 'In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge …'. This requirement no doubt compelled the drafters of the Rome Statute to specify where the charges are to be found and when the accused must be informed about them. Notably, the *only* document that the Rome Statute itself mentions as the place where the charges are to be found is the Prosecutor's DCC, as indicated in article 61(3). Similarly, the *only* time that the Rome Statute makes a provision as to when the notice of the charges is to be given to the accused person is at a reasonable time before the confirmation hearing—when the DCC must be served upon the suspect (as he or she then was). This appears also in article 61(3).

8. It may be observed, in contrast, that the Rome Statute *itself* never mentions that the confirmation decision is the place where the charges are to be found. That is a revealing omission indeed. It is also revealing that the Rome Statute *itself* is entirely silent as to any requirement that the confirmation decision must be notified to the accused. The fact that the confirmation decision, as a matter of practice, does get notified to the accused in a prompt fashion does not alter the juristic reality that the Rome Statute does not contain any requirement in that regard.

9. The necessary implication of these omissions regarding the confirmation decision is that the Rome Statute contemplates the DCC as *the* primary instrument through which notice is given to the accused. This is a principle of international criminal law well settled before the ICC opened its doors to judicial business.[2] And, it is one juristic reason to update the DCC, whenever the confirmation decision alters the original content of the DCC. This, of course, does not exclude the reality that at the end of the day, the system will consider every other means (including the controlling pronouncements of the Pre-Trial Chamber in the confirmation decision) by virtue of which improved notice of the charges had actually been communicated to the accused.

10. Turning now to the Rules: it is no less revealing that the requirement to notify the accused of the confirmation decision appears only in the Rules of Procedure and Evidence—but in a considerably weaker form, in the terms of 'if possible'. This is to be compared with the peremptory provisions of the Rules as regards notification of the charges that the Prosecutor framed. That is to say, r 121(3) of the Rules requires the Prosecutor to serve on the accused 'a detailed description of the charges' no later than 30 days before the date of the confirmation hearing. In light of reg 52, which requires that a detailed description of the charges shall be provided in the DCC, it is obvious that r 121(3) is, to all intents and purposes, referring to what has now acquired the status of a term of art in ICC parlance as 'the document containing the charges' (pursuant to that description of the document in article 61(3)).

11. Three significant observations may be made here. First, r 121(3) ensures that notice of the charges, as framed by the Prosecutor, is *actually* given to the accused—in order to comply with the requirements of article 67(1)(a) requiring notice of charges to be given to the accused. Second, the requirement of r 121(3) that the notice of the DCC is to be given within a specified timeframe is a measure that obviously addresses the requirements of article 67(1)(a) that the notice of the charges is to be given in a *time-sensitive* manner. And, third, no excuse is indicated as admissible for either a failure to give the notice or to give it within the indicated timeframe.

12. In a contrasting provision concerning notifying the confirmation decision to the accused, r 129 only requires notification of the decision to accused 'if possible'. And, as if to drive the point home, there is no indication of any sort for a timeframe within which this notification is to be made or within which to exhaust the *possibility* of giving the notification; nor is there any indication as to what may constitute legally cognisable impossibility to notify the decision. In the resulting impression, the Rules' drafters—as with the Statute's drafters—do not appear to have considered notification of the confirmation decision to the accused as a matter of inescapable importance and urgency, in the same way that they obviously considered the notification of the Prosecutor's charging document.

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[2] See *Prosecutor v Kupreškić (Appeal Judgment)* dated 23 October 2001 [ICTY Appeals Chamber] paras 88 and 114.

13. Once more, it is observed that the silence of the Rome Statute and the qualified aptitude of the Rules in relation to the confirmation decision—as either the place to look for the charges or as a document that must be served upon the accused for the purpose of communicating the notice of the charge that article 67(1)(a) requires to be given to the accused—is silence that highlights the need to serve a UDCC, whenever the confirmation decision results in a variation of the charges that the Prosecutor had communicated to the accused. The UDCC thus simply serves, even if out of an abundance of caution, the purpose of *updating* the charges an earlier notice of which had formally been communicated to the accused (when only a suspect); but which charges had undergone significant changes by the operation of the controlling authority of the Pre-Trial Chamber to require variation of the charges and its parameters. This is one sense in which a UDCC is seen as perfectly consistent with the Rome Statute.

14. Another sense in which a UDCC is wholly consistent with the Rome Statute is readily apparent from the clear language of the Rome Statute—concerning fairness of trial as a legal norm. Here, it must immediately be observed that a minimum of the discretion to order or authorise a UDCC is amply founded on the provisions of article 64(2), article 67(1)(a) and article 64(6)(f) of the Rome Statute—all of which come under Part 6 of the Statute dealing with 'THE TRIAL'.

15. Article 64(2) provides: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.' Notably regarding the rights of the accused—a basic concern of the idea of fair trial—article 67(1)(a) requires, as seen earlier, that a person charged with a crime must promptly be given notice of the charge.

16. And, regarding the residual power of a Trial Chamber to do justice in the trial that it is conducting, article 64(6)(f) provides: 'In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary … (f) Rule on any other relevant matters', in addition to those explicitly nominated in clauses (a) to (e).

17. The foregoing provisions of the Statute amply anchor the discretion of the Trial Chamber to do justice in the trial of which it is seised. In light of these provisions, any argument that aims to limit the Trial Chamber's discretion must be seen to have been founded upon a very explicit provision of the Rome Statute. It is unsustainable to assert a limitation to the discretion of the Trial Chamber merely upon an inconclusive theory supposedly distilled from an assemblage of disparate provisions that serve their own obvious purposes (without necessarily limiting the Trial Chamber's discretion in their own explicit terms)—and in relation to which reasonable people may disagree as to the objective potential of those provisions on the question of limitation of the Trial Chamber's discretion.

A Practical Question of Lack of Remedy in the Face of an Unfair Trial

18. But, it should be fairly obvious that a Trial Chamber should order a procedural remedy where the Trial Chamber takes the view—as some Trial Chambers have found in the past—that the charges may not have been clear; possibly engaging questions of violation of the norms indicated in article 64(2) and article 67(1)(a). As noted above, the remedial power is reasonably implicit in both article 64(2) itself and article 64(6)(f). Perhaps, it bears stressing, once more, that there is a complete absence of any text in the Statute that clearly forbids the UDCC as a procedure to remedy any perceived defect in the provision of proper notice of the charge to the accused.

19. If it were to be accepted that there is no discretion in a Trial Chamber to require or authorise the Prosecution to submit a UDCC, merely because the Pre-Trial Chamber has delivered a confirmation decision on the charges which overtakes the Prosecutor's charging document, the following dilemmas will then engage: (1) since a Trial Chamber is not in a position to require a Pre-Trial Chamber by an order to provide better notice of the charges to the accused, there is a potential that nothing can be done to improve notice of the charges; (2) the Trial Chamber will thus have to decide either to stay the proceedings or to proceed with the trial of an accused who may not have had proper notice of the charges against him; and, (3) the conviction of the accused may be set aside on appeal, as the ICTY Appeals Chamber held in *Kupreškić*, if the trial is conducted on the basis of a charge that was not properly notified to the accused.[3]

The Established Practice

20. In view of the foregoing considerations, it is thus not surprising that the discretion to order a UDCC has been exercised whenever the Trial Chamber considered that the UDCC would assist in improving notice of the charges to the accused. As a factual matter, this discretion has been exercised in the vast majority of cases that have gone to the Trial Chambers of this Court. Specifically, that was the course followed in the *Lubanga* case,[4] the *Bemba (No 1)* case,[5] the *Katanga & Ngudjolo* case,[6] the *Ruto & Sang* case,[7] the *Kenyatta* case,[8] and the *Ntaganda* case.[9]

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[3] See *Prosecutor v Kupreškić*, *supra*, para 114.

[4] *Prosecutor v Lubanga (Order for the prosecution to file an amended document containing the charges)*, dated 9 December 2008 [Trial Chamber I], ICC-01/04-01/06-1548.

[5] *Prosecutor v Bemba*, Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 13, lines 5—10; also *(Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges)*, dated 20 July 2010 [Trial Chamber III], ICC-01/05-01/08-836.

[6] *Prosecutor v Katanga & Ngudjolo, (Décision relative au dépôt d'un résumé des charges par le Procureur)*, dated 21 October 2009 [Trial Chamber II], ICC-01/04-01/07-1547.

[7] *Prosecutor v Ruto & Sang (Order for the prosecution to file an updated document containing the charges)*, dated 5 July 2012 [Trial Chamber V], ICC-01/09-01/11-439; see also *(Decision on the content of the updated document containing the charges)*, dated 28 December 2012 [Trial Chamber V], ICC-01/09-01/11-522.

[8] *Prosecutor v Kenyatta (Order for the prosecution to file an updated document containing the charges)*, dated 5 July 2012 [Trial Chamber V], ICC-01/09-02/11-450; see also *(Decision on the content of the updated document containing the charges)*, dated 28 December 2012 [Trial Chamber V], ICC-01/09-02/11-584.

21. It is important to note that the Appeals Chamber has clearly validated this generally accepted practice of the Trial Chambers, finding it a salutary procedure that aids the better notice to the accused of the charges against them.[10]

22. In the *Lubanga* case, the Appeals Chamber clearly adverted its mind to 'the Court's statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process'[11]—a consideration that predominates the reasoning of my colleagues in the Majority. The Appeals Chamber confirmed the undoubted controlling authority of the confirmation decision in 'defining the parameters' of the charges for purposes of the trial. And I unreservedly concur—to the extent that 'defining parameters' is accepted as connoting circumscription of boundaries and limits. 'However', held the Appeals Chamber, 'this does not necessarily exclude that further details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents.' [12] Indeed, as the pronouncements of the Appeals Chamber itself makes all too clear, the fact that the Appeals Chamber has correctly found that the Pre-Trial Chamber has authority to *define the parameters* of the charges, in light of the evidence presented at the confirmation hearing, does not necessarily yield a legal norm that displaces the need or value for an updated DCC. Markedly, the UDCC is one of the 'auxiliary documents' that the Appeals Chamber noted with approval as serving the purpose of providing 'further details about the charges, as confirmed by the Pre-Trial Chamber'.[13] And, ultimately, the Appeals Chamber held that 'all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges ...'[14]—as long as such information was provided prior to the commencement of trial.[15]

A Danger arising from the Majority Decision on the Trial Chamber's Discretion

23. Alas, a danger, as I see the matter, of my colleagues' position may be to give impetus to those who may insist that no Trial Chamber should ever have the discretion to order the Prosecution to provide such further information by way of a UDCC—notwithstanding the clear pronouncements of the Appeals Chamber (indicated above) and predominant practice that stand against any such contrary position. To be clear, the danger is the logical consequence of the failure to acknowledge clearly the existence of the discretion of a Trial Chamber to order or authorise a UDCC.

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[9] *Prosecutor v Ntaganda (Order instructing the Prosecution to prepare an updated document containing the charges)*, dated 30 October 2014 [Trial Chamber VI], ICC-01/04-02/06-390; see also Decision on the updated document containing the charges, dated 6 February 2015 [Trial Chamber VI], ICC-01/04-02/06-450.
[10] *Lubanga v Prosecutor (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction)*, dated 1 December 2014 [Appeals Chamber], ICC-01/04-01/06-3121, paras 124—130.
[11] *Ibid*, para 124.
[12] *Ibid.*
[13] See *ibid*, paras 125 and 126.
[14] *Ibid*, para 128.
[15] *Ibid*, paras 129 and 130.

24. I feel unable to join or encourage this potential expedition to a new jurisprudential awakening. I quarrel not with 'going boldly where no one had gone before', as the popular saying goes. The trouble, rather, is the high improbability, in my respectful view, of the seaworthiness of the chosen craft, on this occasion. In particular, any impugnment of the discretion in the Trial Chamber to order or authorise a UDCC is quite remarkable for the absence of a basis in any incontrovertible legal principle discernible from the words of the Rome State, the Rules of Procedure and Evidence, or the Court's Regulations. It merely supposes, in my view, subjective interpretation for juristic reality. But, that is insufficient to disturb the Trial Chamber's discretion to order a UDCC. Ultimately, the discretion remains validly grounded on solid considerations of law and practice that are fully consistent with the Court's own basic documents, as seen above.

Consistency with both National Law and Customary International Procedural Law

25. Beyond the immediate framework of the Court's basic documents, the discretion that has been exercised by the vast majority of this Court's Trial Chambers and noted with approval by the Appeals Chamber (as shown above) is also consistent with established practice and procedure in both the national and international spheres.

26. First, we may briefly look at the national sphere. In the Criminal Procedure Code of Germany, for instance, section 207(3) lays down a wholly sensible approach to criminal procedure—at the stage before the commencement of trial on the merit—*Das Zwischenverfahren*. It requires that 'the public prosecution office shall submit a new bill of indictment corresponding to the order' of the court confirming the charges if: (i) charges have been laid for more than one offence but the Court declined to confirm some of those charges; and, (ii) the prosecution is to be limited to individual severable parts of an offence, or such parts are to be reintroduced into the proceedings at a later stage. The point of this provision is that the prosecution office must update the German equivalent of the DCC, whenever the charges have been varied, notably, in particular, when the confirming court declines to confirm all the charges that the prosecutor presented for confirmation.

27. There is no indication, of course, that section 207(3) of the German Criminal Procedure Code has influenced the work of the Trial Chambers of this Court. But the current practice of the majority of the Trial Chambers of this Court in requiring a UDCC is consistent with that wholly sensible feature of a national law.

28. It may be noted that the approach of section 207(3) of the German Criminal Procedure Code is entirely consistent with the approach in some common law jurisdictions, where indictments are

generally produced by the prosecution following—and in accordance with—the decision of the court committing an accused to trial at the close of a preliminary hearing.[16]

29. And, at the international level, the overall consistency of the Trial Chamber's exercise of discretion to order a UDCC is strikingly evident by reference to the predominant practice in customary international procedural law. The consistent idea is that the Prosecutor's charging document continues to speak to the charges after their confirmation, but only within the defining parameters of the judicial decision confirming the charges. The practice is exemplified at the ICTY, the ICTR and the SCSL. There, as at the ICC, judicial decisions are needed to confirm the indictment.[17] And, there, as at the ICC, the compass of the trial following the confirmation of the charges is constrained by the charges as confirmed.[18] Nevertheless, the Prosecutor's indictment remains the primary accusatory instrument for purposes of the trial.[19]

The Absence of Explicit Language in the ICC Basic Documents

30. My colleagues argue in effect, if not explicitly, that the absence of explicit language requiring or authorising the filing of a UDCC is a factor that militates against that course of action 'in this case.' Notably, the implication of that argument goes beyond 'this case'. It is effectively an argument against any Trial Chamber's discretion to authorise or require a UDCC *in any case*. In its evident effect of constraining the exercise of discretion by a Trial Chamber of this Court, the argument is somewhat surprising. First, as noted earlier, article 64(2) and 64(6)(f) remain expressly authorised fountains of residual discretion in a Trial Chamber for the sake of fair trial. Thus, all that is reasonable and fair and not expressly forbidden by the Statute or the Rules may be done pursuant to those provisions, to ensure a fair trial. Nothing in the basic documents expressly forbids the discretion of the Trial Chamber to order a UDCC. Second, it is possible that there is much in the practice and procedure of criminal law that resulted from non-forbidden practice and procedure as from express statutory licence. Third, it is noted that the absence of express language requiring a UDCC is no less an impeding argument for my colleagues' proposition (discussed below) that the confirmation decision (not the Prosecutor's DCC) is the charging document for purposes of the trial. But, the proposition is deployed with enviable confidence; notwithstanding, as noted earlier, the complete absence of any language in the Rome Statute clearly nominating the confirmation decision as the Court's charging document; and, notwithstanding ample language in the Statute

[16] See, for instance, The Law Society of Upper Canada, Licensing Process, *Examination Study Materials - Barrister* (2012) p 326: 'Following the committal order, the accused will be remanded to the Superior Court of Justice, and prior to the first appearance, the prosecutor will prepare the indictment. The indictment may include not only those offences on which there was a committal, but also any other charge "founded on the facts disclosed by the evidence taken at the preliminary inquiry" (s 574(1)) without seeking the consent of the Attorney General.'

[17] See, for example, art 18(4) together with art 19(1) of the ICTY Statute. See also r 47 generally of the ICTY Rules of Procedure and Evidence.

[18] See art 19(2) of the ICTY Statute and r 47(G) of the ICTY Rules.

[19] See *Prosecutor v Kupreškić*, *supra*, paras 88 and 114.

clearly nominating the Prosecutor's DCC as the document through which accused persons are to be given actual notice of the charges against them for purposes of their trials on those charges. And, finally, as also noted earlier, the Appeals Chamber has clearly recognised the discretion of a Trial Chamber to order a UDCC, for purposes of making the parameters of charges very clear before the commencement of the trial.

31. In the circumstances, I am not persuaded by the argument that the failure of the basic documents to mention a UDCC stands in the way of the discretion of a Trial Chamber to authorise or require the Prosecutor to file one.

The Ordinary Meaning of Words: 'Confirm' and 'Confirmation'

32. Words in treaties should not be given contrived meaning. It is a cardinal rule of law of treaties that words must be given their ordinary meaning. The Vienna Convention on the Law of Treaties says so in article 31(1), according to which a treaty like the Rome Statute 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' This applies to the meaning of the verb 'confirm' and its derivative noun 'confirmation', as appearing in the Rome Statute in relation to charges.

33. In the contention of my distinguished colleagues, the confirmation decision, as an authoritative judicial decision from a Chamber of this Court, has the effect of removing any further value, effect or use for the Prosecutor's DCC. That being the case, there is no further legal point in a Trial Chamber authorising the Prosecutor to update the DCC; since, to do so would amount to a continued recognition of the Prosecutor's charging document.[20] I respectfully disagree. I have on a previous occasion provided reasons why I do not accept that view-point.[21] I fully adopt those reasons here, but need not repeat them.

34. But, I do suggest with respect that my colleagues' contention gives confirmation decisions an additional meaning that the Rome Statute does not give, in the very significant effect of displacing an important statutory and normative role that belongs to the Prosecutor (a matter discussed more fully elsewhere in this opinion). From the perspective of the foremost rule of treaty interpretation, according to which ordinary meaning must be given to words, the main difficulty with the contention, as I see it, is that such additional meaning to confirmation decision necessarily ignores the ordinary meaning of the word '**confirm**' and its derivative noun '**confirmation**'. There is seldom an ordinary meaning of the word 'confirm' that connotes the termination or displacement of continued value to a thing, as a consequence of its *confirmation*—even in the confirmed part.

[20] See reasoning of the Majority as expressed in paragraph 16 of the decision.
[21] *Prosecutor v Ruto & Sang (Decision on the Content of the Updated Document Containing the Charges)*, dated 28 December 2012 [Separate Opinion of Judge Eboe-Osuji].

This is evident from the meaning (in the most relevant context) that the *Oxford English Dictionary* gives to the words. In that context, **'confirm'** is defined as follows: **'To make valid by formal authoritative assent (a thing already instituted or ordained); to ratify, sanction.'** And among the contextual examples of usage of the word, are the following juristic ones:

- 'W. BLACKSTONE *Comm[entary on the] Laws [of] Eng[land]* I.i.127 The great charter .. obtained .. from king John, and afterwards .. confirmed in parliament by king Henry the third.'
- 'W. CRUISE [*A*] *Digest of [the] Laws [of] Eng[land respecting] Real Prop[erty]* VI. 132 Where a codicil ratifies and confirms a will.'
- '*Public Health Act* §184 Bye-laws made by a Local Authority … shall not take effect unless .. confirmed by the Local Government Board.'

35. Notably, the *Oxford Thesaurus* similarly gives the synonyms of **'confirm'** (as applicable in the present context) as: **'ratify, sanction, authorise, endorse, support, sustain, approve, uphold, back up, validate, verify, recognise, authenticate, accredit: *By-laws shall not take effect unless confirmed by the local authority.*'**

36. And, as to the noun **'confirmation'**, the *Oxford English Dictionary* gives the following *relevant* meaning: **'The action of confirming or ratifying by some *additional legal form.*'** [Emphasis added.] And the following helpful illustration is given as to usage:

- 'W. STUBBS *Constit[utional] Hist[ory of England]* (1877) II. 147 The supplementary acts by which the Confirmation of the Charters was affirmed and recognised .. especially as the close of the long dispute about the limits and jurisdiction of the Forests.'

37. It is thus obvious that *one* additional, subsequent legal form that is designed to (authoritatively) 'ratify, sanction, authorise, endorse, support, sustain, approve, uphold, back up, validate, verify, recognise, authenticate [or] accredit' *another* legal form coming earlier in time does not terminate or displace continued value to the earlier legal form—beyond the extent of any inconsistency between the two. If that were so, it would mean that a codicil will terminate or displace the main will; a decision of any other body authorised to ratify a local bye-law will terminate or displace the bye-law; a decision of a body designated to confirm that a given act of another body is in compliance with a certain standard would then terminate or displace the act so ratified. And so on.

38. It is possible to consider that the act of confirmation of an earlier act means simply to issue or place a certificate of approval on the earlier act. So it is with the decision of the Pre-Trial Chamber in the decision confirming charges formulated by the Prosecutor.

Confusion resulting from Drafting History

39. In arguing that a charge that the Prosecutor submitted for confirmation is effectively terminated or displaced by a decision of the Pre-Trial Chamber *confirming* that charge, my colleagues have relied upon the provisions of article 64(8)(a) of the Rome Statute. And the anchor for that particular argument is the provision that '[a]t the commencement of the trial, the Trial Chamber *shall have read to the accused the charges previously confirmed* by the Pre-Trial Chamber.' It is argued that the idea of reading to the accused 'the charges previously confirmed by the Pre-Trial Chamber' is one that makes the confirmation decision the *only* document of reference at trial. The argument would make the UDCC an exercise in a void. In disagreeing with that argument, I must first note that the argument would not be made, had the provision of article 64(8)(a) been worded—as is the case with the statutes of the ICTR and the ICTY—to the effect that before the commencement of the trial the Trial Chamber shall have read to the accused '*the indictment* previously confirmed by the Pre-Trial Chamber.'

40. But, can an outcome as procedurally profound (as to deprive post-confirmation value to the Prosecutor's charging document) truly turn on whether the word 'charge' and not 'indictment' is used in article 64(8)(a)?

41. I must note here that *Oppenheim's*, a highly respected treatise in international law, cautions interpreters of treaties to keep in mind that treaty drafting is a human process, necessarily afflicted with human fallibility. Specifically, 'an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility'.[22] Professor Roger S Clark directly implicates the Court's basic documents in that phenomenon. In his words: 'Drafting by consensus, the norm in both exercises, the Statute and the Elements, leads sometimes to awkward compromises. An adamant minority can carry the day.'[23] I am of the view, respectfully, that the drafting of the parts of the Rome Statute concerning confirmation of charges is a classic illustration of the need for the wise caution sounded in *Oppenheim's*. And this is especially so by the systematic avoidance of the word 'indictment' in the ICC basic documents. The reasons suggested for that avoidance were, first, a certain view of the word as a process-determinant terminology peculiar to the confirmation process at the *ad hoc* tribunals, where indictments were confirmed according to an *ex parte* procedure that excluded defence participation.[24] According to this concern,

[22] See R Jennings and A Watts, *Oppenheim's International Law*, vol 1, 9th edn (1996) Parts 2 to 4, p 1273, fn 12, quoting *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, p 418.
[23] Roger S Clark, 'The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 *Criminal Law Forum* 291 at p 295.
[24] This legislative history is implicated in the following observations: '[T]he drafters of the Statute did not import the ICTY/ICTR procedures. The drafters of article 61 specifically rejected the idea of *an indictment procedure* which had appeared in earlier drafts of the Statute and replaced it with *a new confirmation of charges hearing*, which constituted part of a new "single, straightforward procedural approach, acceptable to delegations representing different national

the word 'indictment' would be synonymous with that kind of charges confirmation process. It has been suggested that a further reason for the avoidance of the word was that '[t]he term "indictment" was also strange to many delegations' to the meetings of the Rome Statute Preparatory Committee.[25] These would indeed be surprising reasons for avoiding the use of the word 'indictment' in the ICC basic documents—a terminology that has formed part of the accepted lexicon of customary international procedural law from the Nuremberg days to the modern era, even in the legal framework of international tribunals (for Cambodia and Lebanon) oriented towards the continental legal culture.[26] It may be observed in this regard that even in Romano-Germanic systems, the word 'indictment' is employed as the appropriate word for the document containing the charges. Notably, in the English translation of the German Code of Criminal Procedure—courtesy of the Federal Ministry of Justice and Consumer Protection—the word 'indictment' is used 28 times.[27] Similarly in the English translation of France's Code of Criminal Procedure, available at the website of France's Ministry of Justice, the word 'indictment' makes 21 appearances.[28] Indeed, there is evident good sense (in both the Romano-Germanic systems and customary international criminal procedural law) in using of the word 'indictment' to describe in the English language what at the ICC is described as 'the document containing the charges'. This is because in the English language an **'indictment'** is **'a document containing a charge'**, according to the *Concise Oxford English Dictionary.* It must particularly be observed that the word

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legal systems". The *confirmation of an indictment* at the ICTY/ICTR is an *ex parte* procedure, conducted in the absence of the defence by one judge. The *confirmation of charges hearing*, in comparison, was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right to be present and to contest the evidence and following which the Pre-Trial Chamber must assess the evidence' [emphasis added]: *Prosecutor v Mbarushimana (Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on confirmation of charges")* dated 30 May 2012 [ICC Appeals Chamber] para 43.

[25]See Fabricio Guariglia, 'Investigation and Prosecution' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (1999) p 235.

[26] See, for instance, article 24 of the Nuremberg Charter; article 15 of the International Military Tribunal for the Far East; articles III(a), IV(a) and XI(a) of Ordinance No 7 pursuant to the Control Council Law No 10; article 20(3) of the ICTY Statute; article 19(3) of the ICTR Statute; s 29.2 of UNTAET Reg 2000/30 (the rules of procedure and evidence of the Special Panels for Serious Crimes established by the United Nations Transitional Authority for East Timor); rr 61(ii) and (iii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone; article 20(1) of the Statute of the Special Tribunal for Lebanon; and r 89bis(1) of the Internal Rules of the Extraordinary Chamber in the Courts of Cambodia. For purposes of a larger issue here engaged, it may be tempting to point to the singular instance of the ECCC where the 'indictment' is drawn up by the investigative judges—and not the prosecutors—as supporting the idea that the DCC at the ICC is no longer a document of reference for the charges following their confirmation. The supposed parallel, in that case, would be that investigative judges are 'judges' and not prosecutors. But such an argument that would ignore the fact that investigative judges are still investigators--they are not Pre-Trial Judges at the ECCC. And the ICC PTC judges are not investigators. At the ICC, the investigator-in-chief is the Prosecutor. Hence, there is no true parallel between the investigative judge at the ECCC and the PTC judges at the ICC. We are then left with a situation in which the document of reference for the charges at the ECCC is the 'indictment' drawn up by the investigators and not by the PTC judges. At the ECCC, the PTC judges do get a chance to render decisions that affect notice of the charges. But such decisions, when they occur, never displace the indictment as a document of reference for the charges.

[27] See, for instance, ss 114d(2), 141(1), 151, etc of the German Criminal Procedure Code. Available at <www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf>.

[28] See, for instance, articles 175-1, 181, 183, 214, 215, etc of the Code of Criminal Procedure of France. Available at <www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>.

'indictment' is not a unique property of a charges confirmation process that is *ex parte*, in the manner of the procedures of the *ad hoc* tribunals. In common law jurisdictions the word is used to describe documents containing the charges, notwithstanding that the confirmation process may be an *inter partes* process in which the defence is entitled to appear and seek to prevent confirmation of the charges and committal for trial.

42. Be that as it may, there is no evidence that in shunning the word 'indictment' for 'charges' in the Rome Statute, the drafters intended any deeper significance for the doffing, beyond only the procedure for confirmation of charges. It may not always be necessary to invoke floral quotes from romantic plays of William Shakespeare,[29] for the proposition that an *indictment* by any other name will still remain a *document containing the charges* laid in a criminal case.

43. Nevertheless, the complaint remains that the origins of the confusion at the heart of the controversy (peculiar only to this Court)—concerning the relative values of the UDCC and the confirmation decision—results directly from the perceived need to avoid the use of the word 'indictment', but without anticipating and eliminating the difficulties that might result from that approach.

44. In the usual places in the text of cognate international criminal law instruments where the word 'indictment' appears—classically in the requirement that following confirmation of the charge but before the trial, the 'indictment' shall be read to the accused—the Rome Statute employs the word 'charge'.

45. Notably, in article 19(2) and (3) of the ICTR Statute—and article 20(2) and (3) of the ICTY Statute—the following appears:

> 2. A *person against whom an indictment has been confirmed* shall, pursuant to an order or an arrest warrant of [the Tribunal], be taken into custody, *immediately informed of the charges against him or her* and transferred to [the Tribunal].
>
> 3. The Trial Chamber shall *read the indictment*, satisfy itself that the rights of the accused are respected, *confirm that the accused understands the indictment*, and *instruct the accused to enter a plea.* The Trial Chamber shall then set the date for trial. [Emphasis added.]

46. The approximate dispensation at the ICC is provided for in article 64(8)(a) in the following words:

> At the commencement of the trial, the Trial Chamber *shall have read to the accused the charges previously confirmed* by the Pre-Trial Chamber. The Trial Chamber shall *satisfy itself that the accused understands the nature of the charges.* It shall *afford him or her the opportunity to make an admission of guilt ... or to plead not guilty.* [Emphasis added.]

[29] 'What's in a name? that which we call a rose/ By any other name would smell as sweet;/ So Romeo would, were he not Romeo call'd,/ Retain that dear perfection which he owes/ Without that title. Romeo, doff thy name ...'. William Shakespeare, *Romeo and Juliet.*

47. That the confirmation decision of the Pre-Trial Chamber must control the pleading on the charges for purposes of the trial is without a doubt. But the view that the Prosecutor's charging document no longer has value in the post-confirmation period of an ICC case is an entirely different proposition—and a highly unusual one at that. The correctness of such proposition cannot depend on what was not stated as such by the drafters of the Court's basic documents. In particular, the proposition does not turn on the unintended incident of using the expression 'charge' instead of 'indictment' as the preferred term for the act of making a formal accusation in a criminal case.

48. This is because the two words are, to all intents and purposes, functional synonyms of one another. According to the *Oxford English Dictionary*, the verb '**indict**' means 'To bring a charge against; to accuse (a person) *for* (*of*) a crime, *as* (*for*) a culprit, esp. by legal process.' The noun 'indictment' as a process is defined in the relevant context as 'The action of indicting or accusing, a formal accusation; *spec.* in *Eng. Law*, the legal process in which a formal accusation is preferred to and presented by a Grand Jury. Hence the phrases ***to bring in or lay an indictment***, and (of the Grand Jury) ***to find an indictment***.' And, as concerns the document, the *OED* further defines an 'indictment' as 'The legal document containing the charge; "a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury" (Blackstone). Hence ***to draw (up) an indictment.***'

49. The effect of the foregoing is simply to say that the use of the word 'charge' in article 64(8)(a) instead of 'indictment' makes no difference at all in following the usual procedure of reading the Prosecutor's charging document to the accused prior to the commencement of trial and inviting the accused to enter his or her plea accordingly. That is to say, the Prosecutor's charging document continues to have procedural value throughout the trial, notwithstanding that it does so under the defining parameters marked by the authoritative decision of the Pre-Trial Chamber confirming the charges.

The Potential for Prolonged Litigation

50. A practical argument held out as demonstrating the potential that a UDCC authorisation or order has to generate inconvenience is the argument that it may prolong litigation. There are many reasons, in my view, that make this argument more speculative than real. First, it must be recalled that a UDCC was ordered in the majority of ICC trials so far. There is no evidence from those cases that the production of a UDCC had resulted in undue prolongation of litigation.

51. And, second, it is important to consider that the concern of this practical argument is, of course, that the Prosecutor may deliberately or inadvertently expand the elemental remit of the charge, using the UDCC; and, the resulting protest of the Defence would result in litigation that the Trial Chamber would need to resolve before the commencement of the trial. It is in that way that litigation is prolonged.

52. But, even at the intuitive level, a deeper reflection does not bear out the concern. This is because the incidence of the UDCC would not be the real reason that litigation is prolonged upon the submission of the UDCC. The real reason would be the existence of such deliberate or inadvertent inclination to expand the elemental remit of the charge. The existence of the inclination would not be the fault of the UDCC. What the UDCC does is assist in forcing into the open, at the threshold of the trial, the existence of the inclination to expand the charge. But, this would be advantageous to the litigation, rather than detrimental. And, that value is important indeed. For, left undetected at the threshold of trial, a latent prosecutorial inclination to expand the scope of the charge, even in slight degrees, without prior authorisation, may result in appreciable unfairness to the accused in the course of the trial or general inefficiency in the litigation or both. This is so, if evidence is called (or witnesses examined) amidst the dynamic flow of a trial, even along the vestigial axis of the non-apparent increase in the factual elements of the case on trial. It is thus better that this possibility is negated before the commencement of the trial, using the incidence of the UDCC to identify the potential problem. The ability to manage a trial in a manner that avoids such difficulties in a case is an essential matter for the discretion of a Trial Chamber.

PART II—THE LOCUS OF RESPONSIBILITY TO FORMULATE CHARGES

53. I now return more fully to the question of who, between the Prosecutor and the Pre-Trial Chamber, is responsible for formulating 'the charges on which the Prosecutor intends to seek trial'—a matter inevitably touched upon occasionally in the tangential strokes of the discussion in Part I concerning the discretion of the Trial Chamber to require or authorise the filing of a UDCC.

The Responsibility to Formulate the Charges at the ICC

54. As indicated earlier, implicit in the tendency of any normative opposition against the idea of a UDCC is a view of the confirmation decision as the charging document, not the DCC or UDCC (as applicable). That view comprises the related view—again implicit—that the Pre-Trial Chamber is the charging authority. Hence the argument: 'Why bother with a UDCC when there is a CD that lays out the charges that have been confirmed?' This argument is evident in the Majority's reasoning saying this: 'A UDCC is an updated version of a document given a specific purpose in the statutory scheme—and this purpose has been served when the confirmation decision is rendered.'[30]

55. But, the question arises whether *formulation* of the charges is the proper role of the Pre-Trial Chamber. My answer to that question is in the negative. And that answer begins, first, with recalling

[30] Majority reasoning appearing at para 16 of the present decision.

the review conducted above under the subsection dealing with the UDCC's 'Consistency with the Statutory Framework'. The review reveals the following facts: (a) the Rome Statute, by virtue of article 61(3), mentions only the Prosecutor's charging document as the instrument through which notice of the charges is to be given to the accused, for purposes of fulfilling the requirements of article 67(1)(a) that notice of the charges must be given to the person charged; (b) in mentioning only the Prosecutor's charging document as the instrument of notice of the charges, the Rome Statute, again by virtue of article 61(3), indicates that the notice of Prosecutor's charging document must be given to the person charged, within a reasonable time, again, for purposes of fulfilling the requirements of article 67(1)(a); (c) in contrast, nowhere does the Rome Statute ever mention the confirmation decision as an instrument through which notice of the charges is to be given to the accused, let alone indicate when it must be served on the person charged; (d) with a view to greater specificity, the Rules of Procedure and Evidence, by virtue of r 121(3), lay down a peremptory regime—admitting of no exceptions—that the Prosecutor's charging document must be served upon the accused, and served within a specified timeframe; (e) in contrast, r 129 only requires the confirmation to be served on the accused 'if possible'; and, (f) there is no indication of the timeframe within which the confirmation decision must be served on the accused, nor when efforts must be made to exhaust the *possibility* of serving the decision, nor what may be admissible as legitimate in considerations of *impossibility* to serve the confirmation decision.

56. As observed earlier, the foregoing considerations reasonably imply that the drafters of the Rome Statute had considered the DCC as *the* primary instrument through which notice is given to the accused, for purposes of the requirements of article 67(1)(a). And, as also observed earlier, that position is entirely consistent with a cardinal principle of international criminal law settled before the inception of the work of the ICC.[31] [It thus becomes prudent to serve a UDCC whenever the confirmation decision alters the original content of the DCC.]

57. Secondly, a deeper reflection on the text of regulation 53 of the Regulations of the Court should also yield a confident clue as to where the basic documents of the Court locate the responsibility to frame the charge. Notably, reg 53 describes what the confirmation decision of the Pre-Trial Chamber is supposed to do. It is instructively entitled 'Decision of the Pre-Trial Chamber following the confirmation hearing'; and, in its entirety, regulation 53 provides as follows: 'The written decision of the Pre-Trial Chamber *setting out its findings on* each of *the charges* shall be delivered within 60 days from the date the confirmation hearing ends.' [Emphases added.] The regulation does not expect or require the Pre-Trial Chamber to *formulate* the charges following the confirmation hearing—a notion appreciably different from the requirement of the Pre-Trial Chamber to set out *only* its *findings* on each of the charges. The charges on which the Pre-Trial Chamber must set out its *findings* are nowhere indicated as the charges that the Pre-Trial Chamber

[31] See *Prosecutor v Kupreškić*, *supra*, paras 88 and 114.

formulates; they are, rather, necessarily *the* charges that the Prosecutor had served and filed pursuant to article 61(3) and r 121(3). Had the understanding been to the effect that formulation of the charges is properly the function of the Pre-Trial Chamber, it would not have been too difficult for reg 53 to have been worded to the following effect: 'The written decision of the Pre-Trial Chamber *formulating each of the charges* shall be delivered within 60 days from the date the confirmation hearing ends.'

58. Once more, it is recalled that the charges that reg 53 contemplates are, of course, those that article 61(1) and article 61(3)(a) of the Rome Statute contemplate in turn, in their respective provisions that 'the Pre-Trial Chamber shall hold a hearing to *confirm the charges on which the Prosecution intends to seek trial*',[32] and that within a reasonable time before the confirmation hearing, the suspect shall be provided 'with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial' [article 61(3)(a)]. And, the charging authority naturally evident in these provisions is the Prosecutor—not the Pre-Trial Chamber.

59. A third consideration would be the imports of article 61(4) and article 61(9) of the Statute, concerning amendment or withdrawal of charges. In the relevant part, article 61(4) provides as follows:

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

60. Evidently, the Prosecutor enjoys free rein to amend or withdraw the charges before the commencement of the confirmation hearing.

61. According to article 61(9):

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

62. In the first place, it is obvious that these provisions as regards amendment of charges or their withdrawal treat the Prosecutor as the owner of the charges. For present purposes, it is of no moment that she is required to obtain judicial permission, after the indicated critical stages in the judicial process. In particular, that the Prosecutor is required to obtain permission from the Pre-Trial Chamber after confirmation of charges, but before the commencement of trial, does not suggest that the Pre-Trial Chamber bears the responsibility of formulating the charges. Quite the contrary: for, the Trial Chamber is never considered as bearing the responsibility of formulating charges merely

[32] Article 61(1) of the Rome Statute, emphases added.

because the Prosecutor is required to obtain the permission of the Trial Chamber in order to withdraw the charges after the commencement of trial. Indeed, in criminal practice, there is much that is mostly a matter for a party (such as list of witnesses, list of evidence, etc) but which a party is required to obtain the permission of a Trial Chamber before altering. Amendment or withdrawal of charges, with the leave of the Pre-Trial Chamber or the Trial Chamber (as the case may be), falls squarely within that order of correct procedures in criminal law.

63. Perhaps, more important, is the very striking similarities between the prescriptions of article 61(4) and article 61(9) and the equivalent processes at the *ad hoc* tribunals, down to the requirement (at the ICTR and not ICTY) to revert to the confirmation process where appropriate for purposes of amendment of charges. The relevant procedures are laid down in rr 50 and 51 of the Rules of Procedure common to the ICTR and the ICTY. Rule 50(a) of the ICTR Rules, notably, provides as follows:

> (i) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber ..., only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by that Trial Chamber ... .
>
> (ii) In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47(E) and (F) in addition to considering any other relevant factors.

64. ICTR r 50(a)(i) combines in one provision, an approximation of the same freedoms and restrictions that article 61(4) and 61(9) provide for regarding the Prosecutor's freedom to amend the charges before confirmation; thereafter, amendment requires leave of the confirmation judge (if the amendment is sought before initial appearance for purposes of the trial phase) or of the Trial Chamber (if the amendment is sought after the initial appearance for purposes of the trial phase). Also, as with article 61(9) of the Rome Statute, ICTR r 50(a)(ii) requires the judge or Trial Chamber seised with the amendment application to consider the standards set out in r 47(e) and (f) laid down for confirmations of indictment.[33] ICTY r 50 is substantively similar to the ICTR r 50, except in the notable detail that ICTY r 50 makes a markedly different provision in place of ICTR r 50(a)(ii) as concerns the requirement for further confirmation.[34]

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[33] Rules 47(e) and (f) concern confirmation of indictments before a reviewing judge. They provide as follows:
(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.
(F) The reviewing Judge may: (i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate; (ii) Confirm each count; (iii) Dismiss each count; or (iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

[34] Notably, ICTY r 50(a)(iii) provides as follows: 'Further confirmation is not required where an indictment is amended by leave.' However, whether or not this different provision in the ICTY Rules can be seen as marking a truly significant difference in the work of the ICTY in comparison to the respective work of the ICTR and the ICC (given the similarity of ICTR and ICC basic documents in this respect), will depend on the evidence in the practice of the relevant institutions tending to show that further confirmations (as a consequence of charges amendment applications) will be a

65. Also strikingly similar are the procedures of the ICC and the *ad hoc* tribunals for withdrawal of charges before and after confirmation of charges. Notably, in that regard, r 51 of the ICTR Rules provides as follows:

> (A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber ..., only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber... .
>
> (B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

66. ICTY r 51 is substantively similar to the ICTR r 51. Clearly, ICTR r 51 combines the withdrawal regimes provided for in article 61(4) and article 61(9) of the Rome Statute, to a similar effect, with necessary variations.

67. The foregoing similarities strongly recommend the wisdom of Professor MacCormick's observations (with which I fully agree) that '[f]aithfulness to the Rule of Law calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another.' According to him, 'consistency and coherence [are] systemic virtues of the law.'[35]

68. It thus becomes unsustainable to contend that the drafters of the Rome Statute had intended ICC judges to treat 'charges' differently from how 'indictments' are treated at the *ad hoc* tribunals. It is especially not clear that Rome Statute drafters intended to signal a substantive departure from the general understanding in international criminal procedural law,[36] and in many national jurisdictions including some Romano-Germanic[37] and all common law jurisdictions, that it is the Prosecutor that bears the responsibility to formulate the charges that must guide the trial; although the prosecutorial responsibility to formulate the charges remains under the judicial authority of either a single judge at the *ad hoc* tribunals or of three judges in an ICC Pre-Trial Chamber.

69. In my own view, the Prosecutor is the charging authority and remains so for all purposes. The Pre-Trial Chamber is not the charging authority. And the power to confirm or deny the Prosecutor's charges does not convert the Pre-Trial Chamber into the Court's charging authority. As a result, it is important that the Prosecutor's charging document must always be seen as constituting the terrain map of criminal responsibility against the accused.

70. It must be stressed, however, that the foregoing view does not diminish the role, the importance and the authority of the Pre-Trial Chamber's confirmation decision. The amplitude of

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defining feature of the work of the relevant institution. In the absence of such evidence, it may well be that ICTY r 50(a)(iii) is merely a detail in the law that makes no practical difference between the institutions under comparison.

[35] Neil MacCormick, *Rhetoric and the Rule of Law—a Theory of Legal Reasoning* (2005), p 143.

[36] See *Kupreškić*, *supra*, paras 88 and 114.

[37] See s 207(3) of the Criminal Procedure Code of Germany.

that role, importance and authority makes the confirmation decision the stamp of approval that validates the Prosecutor's map. Hence, the Pre-Trial Chamber is the approving authority for the map. Werle and Jessberger correctly captured the point when they observed that 'the Pre-Trial Chamber holds a confirmation hearing to satisfy itself of the validity of the charges.'[38] Schabas has also correctly explained the purpose of the confirmation process as allowing the Court to ensure that a prosecution is not frivolous.[39] These scholarly views are, of course, wholly consistent with the ordinary meaning of the term 'confirm' or 'confirmation' of the charges noted earlier under the philological authority of the *OED*.

71. But, there is no doubt in the mind of Professor Schabas that 'those who conceived of the confirmation hearing viewed it as a much more summary and brief process than what it has become in the hands of the judges of the Court.'[40] Alas, he regrets that the process 'has proven to be a rather significant, costly, and time-consuming process, resulting in decisions numbering into hundreds of pages.'[41] These observations may be considered interesting in light of the Appeals Chamber's observation that the drafters of the Rome Statute had replaced the ICTY and the ICTR model of indictment confirmation with 'a new confirmation of charges hearing, which constituted part of a new "single, *straightforward* procedural approach, acceptable to delegations representing national legal systems".'[42] [Emphasis added]. To be clear, my aim in mentioning Professor Schabas's criticism here is not to join myself to it; but merely to register my own befuddled observation, triggered by argument that the confirmation process at the *ad hoc* tribunals is to be eschewed for the new and improved system now in place at the ICC. It is unclear to me how less 'single' or less 'straightforward' the *ad hoc* tribunals' model truly was, as compared to the ICC model.

72. In order to keep the Prosecutor's map current for purposes of the trial, it should be updated to reflect the observations of the approving authority made in the process of approval. If it is accepted that (a) the Pre-Trial Chamber's role in the confirmation process is 'to satisfy itself of the validity of the charges' or to ensure that a prosecution is not frivolous, and, (b) the process should be 'a much more summary and brief process', the question then arises whether an efficient charges confirmation process should necessarily entail more than to say 'confirmed' or 'not confirmed' (for charges confirmed or not confirmed) with reasons briefly given at the end of the charges review process.

73. Such an approach will undoubtedly maintain the focus on the Prosecution's charging document throughout the trial process as the charging document of reference. And, the approach

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[38] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd end (2014) p102.
[39] William Schabas, *An Introduction to the International Criminal Court*, 2nd edn (2004) p 140.
[40] William Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (2010) p 735.
[41] *Ibid*, pp 734—735.
[42] *Prosecutor v Mbarushimana, supra*, para 43 [ICC Appeals Chamber.]

affords a further reason to update the DCC to reflect the findings made in the confirmation decision—as has been ordered in the majority of cases by ICC Trial Chambers.

74. In any event, the fact that the ICC confirmation process is *inter partes*, as opposed to the *ex parte* process at the *ad hoc* tribunals is insufficient to support the view that at the ICC, the Prosecutor's DCC should serve no value at trial because of the oversight of Pre-Trial Chamber in the *inter partes* process. In this connection, it is noted that in Canada, for instance, the committal proceedings[43] are also very much *inter partes*.[44] Nevertheless, following the committal proceedings, the prosecutor's charging document remains the document of reference for purposes of the trial and the verdict.[45]

The Evidential Threshold for Confirmation of Charges—at the ICC and the Ad Hoc *Tribunals*

75. The discussion in the foregoing section (about the different confirmation procedures at the ICC as compared to those of the *ad hoc* tribunals) naturally brings into focus the validity of the related suggestion made to the effect that the evidential threshold for committal of a person to trial is relatively higher at the ICC than at the *ad hoc* tribunals. This suggestion appears in the Majority reasoning.[46] I am unable to agree with it. This distinction is obviously inspired, yet again, by the different wordings of the basic documents of the Rome Statute, on the one hand, and those of the *ad hoc* tribunals, on the other. In that regard, article 61(7) of the Rome Statute states that the threshold for committal at the ICC is a determination that 'there is sufficient evidence to establish *substantial* grounds to believe'[47] that a person is criminally responsible for a crime. For their part, article 18(1) of the ICTR Statute and article 19(1) of the ICTY Statute require an indictment confirmation judge to consider whether 'a *prima facie* case' has been shown to warrant committal to trial. Notably in the Rules of Procedure and Evidence of the *ad hoc* tribunals concerning presentation of indictments for confirmation, the Prosecutor is required to satisfy himself or herself that the course of investigation has revealed 'sufficient evidence to provide *reasonable* grounds for believing that a suspect'[48] is criminally responsible for a crime within the jurisdiction of the tribunal. But, is there truly a material legal difference in evidential thresholds, separating the notions of 'substantial grounds to believe', '*prima facie* case' or, as the case may be, 'reasonable grounds for believing'? The answer is in the negative.

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[43] Committal proceeding, also known as preliminary inquiry, is held for purposes of committing an accused to trial. It is proceeding similar to ICC confirmation hearings.
[44] See Law Society of British Columbia, Professional Legal Training Course, *Criminal Procedure* (Practice Material), *supra*, p 45.
[45] See, The Law Society of Upper Canada, Licensing Process, *Examination Study Materials—Barrister*, *supra*, 326.
[46] See Majority reasoning at para 10 and footnote 17.
[47] Emphasis added.
[48] See r 47(b) common to the ICTR and the ICTY rules of procedure and evidence, emphasis added.

76. The word 'substantial' appearing in article 61(7) of the Rome Statute may resonate stupendous: but that is only when considered as a free agent. Tethered, as it must be, to its role in context as a modifier—to the term 'grounds to believe'—it quickly becomes clear that the purpose of the word 'substantial' is nothing more than the restraint of *belief* to the usual idea that judicial conclusions are to be founded upon *reasonable* grounds. And, relating that usual idea to confirmation decisions, the whole point to the word 'substantial' in the context of article 61(7) rises no higher than a reassurance that a confirmation decision of an ICC Pre-Trial Chamber is never an *acte de la foi*—or virtually so, as in when the decision is based only on a scintilla of evidence or less.

77. Indeed, authorities are readily available that support the view that 'substantial' evidence means evidence that supports reasonable grounds for a judicial conclusion. *Black's Law Dictionary* informs that 'substantial evidence' means '[e]vidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla.'[49]

78. And according to Professor Blume, '[t]he term "substantial" is used to distinguish evidence which is so slight that it must be disregarded under the doctrine of *de minimis non curat lex*, from evidence which is worthy of consideration by a court.'[50] And, as he further observed, the existence of such evidence 'shows a *prima facie* case.'[51] Hence, for purposes of committal proceedings at the ICC and at the *ad hoc* tribunals, there is no material difference among the notions of 'substantial grounds to believe', '*prima facie* case' or 'reasonable grounds for believing'. That being the case, an insistence upon such a distinction is an unconvincing basis to suggest that while the Prosecutor's charging document may endure as an accusatorial document of reference in the trial of accused at the *ad hoc* tribunals, no further use exists for the equivalent document at the ICC upon the delivery of the confirmation decision.

79. In the circumstances, the question arises as to whether the Appeals Chamber needs to look again at its *obiter dicta* in *Prosecutor v Mbarushimana*, in at least two respects. The first is as regards the observation that 'article 61 imposes a higher evidentiary threshold of "substantial grounds" in place of the ICTY/ICTR's lower "reasonable grounds" which is used in the context of the issuance of a warrant of arrest under article 58 of the Statute.'[52] The point of jurisprudence, as it concerns the ICC, is really that since article 58 requires the evidence to show 'reasonable grounds' for the issuance of an arrest warrant, while article 61 requires the evidence to show 'substantial grounds' for confirmation of the charges, there is a difference in the two thresholds. The need to give meaning to differing language in the two provisions makes it understandable—*ut res magis*

[49] *Black's Law Dictionary*, 7th edn (1999) p 580.
[50] William Wirt Blume, 'Origin and Development of the Directed Verdict' (1950) 48 *Michigan Law Review* 555 at p 576.
[51] *Loc cit.*
[52] *Prosecutor v Mbarushimana*, *supra*, [ICC Appeals Chamber] para 43.

valeat quam pereat—to want to consider 'substantial grounds' as something of a different, higher threshold than 'reasonable grounds.' Indeed, the Courts in some national jurisdictions have had to grapple with differences in thresholds between arrest warrants and confirmation of charges.[53] However, it is not generally accepted that there is a significant degree of difference in thresholds. In a renowned treatise on criminal procedure in the US, it is indicated that the 'difference in context [in light of the arrest warrants threshold] will necessarily lend a different *shading* to the [threshold for confirmation of charges] determination.'[54] This may be 'nothing more than the differences in the type of evidence required at each stage.'[55]

80. Therefore, the difference in the wordings of article 58 (for arrest warrants) and article 61 (for confirmation of charges) need not occasion an adjustment of the threshold for confirmation of charges at the ICC to a rung higher than the standard of reasonableness that is indicated in the basic documents of the *ad hoc* tribunals, in order to make room for the threshold for arrest warrants. What is required, rather, may only be to find for the arrest warrant threshold its own rung on the broad bandwidth of reasonableness, below the threshold for confirmation of charges generally recognised in international criminal procedural law outside the ICC. In this connection, it must be stressed that the bandwidth of reasonableness is never hair thin and mono-layered. It has ample room to accommodate the arrest warrant threshold appreciably below the charges confirmation threshold—at least by shades. That being the case, the use of the phrase 'substantial grounds' does not necessarily amount to a higher threshold for confirmation of charges at the ICC, as compared to 'reasonable grounds' phrase used at the *ad hoc* tribunals.

81. The second point of the *Mbarushimana obiter* that calls for a second look concerns the transliteration of '*prima facie*' (the evidential standard indicated for confirmation of charges at the ICTY and the ICTR) to the effect that at the *ad hoc* tribunals, the confirmation process does not 'go beyond looking at the Prosecutor's allegations "on their face"'.

82. It would be mistaken indeed to assume that the *ex parte* nature of the confirmation process at the *ad hoc* tribunals, in accordance with their statutory frameworks, had the effect of making their confirmation processes a perfunctory judicial exercise at the instance of the Prosecutors, thus leaving the Prosecutors rather than judges with the controlling role in defining the parameters of the indictment for purposes of the trial, in contrast with the dispensation at the ICC. In particular, it is not readily apparent that the *inter partes* nature of the confirmation process at the ICC has resulted in a higher incidence of rejection of charges or entire DCCs at the ICC than at all the *ad hoc* tribunals.

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[53] LaFave *et al*, *Criminal Procedure*, 5th edn (2009) §14.3.
[54] *Ibid*, p 755, emphasis added.
[55] *Ibid*, p 756.

83. Two cases from the ICTR may be noted here, in illustration of how judicial decisions made in the confirmation process could shape a case in a *defining* way—even in the manner of dismissing an entire indictment or most of the counts contained in one. In a decision entitled *Prosecutor v Bagosora and 28 Others (Dismissal of Indictment)*,[56] Judge Tafazzal Hossein Khan, as an indictment review judge, declined to confirm an indictment presented by the Prosecutor in 1998 for the purpose of conducting an omnibus trial involving 29 accused at the ICTR. Judge Khan's decision (reasoned with care and depth and with the rights of the defence at the heart of his concerns) indicated approaches that might have helped in removing some of the unfairness that he had identified as detrimental to the rights of some of the persons charged in the indictment. But, in view of the Prosecutor's refusal to pursue those solutions, the Judge declined to confirm the indictment, even in the part concerned with the suggested solutions. In the result, the omnibus trial was not conducted at the ICTR.

84. The second notable ICTR case is *Prosecutor v Ntuyahaga*. There, the Prosecutor had presented for confirmation an indictment, comprising five counts, against the Rwandan Army major who allegedly led a detachment of Rwandan soldiers implicated in the killing of 10 UN peacekeepers of Belgian nationality, during the Rwandan Genocide. But, in the confirmation decision, Judge Ostrovsky confirmed only one count, directed the Prosecutor to join a second count to the one confirmed count, and, dismissed the remaining three counts. Left thus with only one confirmed count out of the presented five, the Prosecutor sought to withdraw the much constrained indictment, in order to transfer the accused to Belgium where he was being sought for fuller prosecution. In the resulting application for withdrawal of the indictment and transfer of the accused to Belgium, the Trial Chamber granted the application to withdraw the indictment, declined to order the transfer of the accused to Belgium (as the ICTR at that time lacked the power to transfer an accused to a national jurisdiction[57]); and, ordered the immediate release of the accused.[58]

85. *Ntuyahaga*, in particular, demonstrably upsets the view that the notion of *prima facie* means nothing more than 'looking at the Prosecutor's allegations "on their face"' for purposes of confirmation of indictments at the *ad hoc* tribunals. It is thus a view that seriously begs a revision.

86. Beyond that, however, it may be noted that in the common law systems from where that expression '*prima facie*' was borrowed, the idea does not mean 'looking at the Prosecutor's allegations "on their face"' for purposes of confirmation of criminal charges. Notably, the expression is typically employed as the common test for both the decision to commit an accused to stand trial (i.e. confirmation of charges) and the decision on a defence motion for directed verdict of

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[56] *Prosecutor v Bagosora and 28 Others (Dismissal of Indictment)* 31 March 1998.
[57] The power to transfer accused to national jurisdictions was eventually provided for at the ICTR under r 11*bis* of the Rules added by a later amendment.
[58] See *Prosecutor v Ntuyahaga (Decision of the Prosecutor's Motion to Withdraw the Indictment)* dated 18 March 1999 [ICTR Trial Chamber I].

acquittal or of no case to answer (the procedure indicated in r 98*bis* common to the ICTR and the ICTY and the subject of a conduct of proceedings decision here at the ICC in the case of *Prosecutor v Ruto & Sang*[59]) at the end of the prosecution case. In both instances, the common question is *whether the accused has a case to answer*: such that (s)he must be committed to stand trial (in the first place at the instance of the case for the prosecution) or be required to commence his or her defence (at the close of the case for the prosecution). The test of the evidence required for the decision—in either case—is whether there is a *'prima facie* case', in the manner of presence of evidence upon which a trier of fact may reasonably convict. In *R v Arcuri*, the Chief Justice of Canada correctly, in my view, stated the matter in this way:

> The question to be asked by a preliminary inquiry judge ... is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty" ... . Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction".[60]

87. Indeed, in the earlier Canadian case of *United States of America v Shephard*,[61] the common test of *prima facie* case was noted as the test for both committals to stand trial[62] and motions of no case to answer made by the defence at the close of the case for the prosecution.[63]

88. Similarly, in the procedural law of the *ad hoc* tribunals, whether there is evidence upon which a trier of fact may reasonably convict is the proper test of what *prima facie* means both in the context of confirmation of charges and in the context of r 98*bis* motions of no case to answer that the defence make at the end of the case for the prosecution.[64] *Prima facie* case did not mean that all that the indictment confirmation judge did at the *ad hoc* tribunals was to confirm charges by 'looking at the Prosecutor's allegations "on their face"'. That view is thus inadequate a basis to consider that the evidential standards for confirmation of charges at the ICC are more exacting than at the *ad hoc* tribunals, as a function of the differing languages used in the basic documents.

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[59] See *Prosecutor v Ruto and Sang (Decision No 5 on the Conduct of Trial Proceedings—Principles and Procedures on 'No Case to Answer')* dated 3 June 2014 [Trial Chamber V(a)].
[60] *R v Arcuri* [2001] 2 SCR 828 para 21 [Supreme Court of Canada.]
[61] *United States of America v Shephard* [1977] 2 SCR 1068 [Supreme Court of Canada.]
[62] 'It thus appears to me clear that in that case it was held that there was not enough evidence to support *a prima facie* case against the accused and in fact that it was "inconceivable that a person should be put on trial on such flimsy evidence"': *ibid*, p 1088.
[63] 'I have always understood the rule to be that the Crown, in a criminal case, is not required to do more than produce evidence which, if unanswered, and believed, is sufficient to raise a *prima facie* case upon which the jury might be justified in finding a verdict': *ibid*, p 1083.
[64] See *Prosecutor v Ruto and Sang (Decision No 5 on the Conduct of Trial Proceedings—Principles and Procedures on 'No Case to Answer')*, *supra*, [Separate Further Opinion of Judge Eboe-Osuji, generally].

The Purpose of the Confirmation Decision viewed from the Meaning of 'Substantial' Grounds

89. The meaning of 'substantial grounds to believe' suggested above, as provided for in article 61(7) of the Rome Statute, also lends further assistance in the understanding of whether the Pre-Trial Chamber's confirmation decision was intended to terminate post-confirmation value to the Prosecutor's charging document. The picture becomes clearer when reg 53 is read in light of the provisions of article 61(7). It may recalled here, as noted earlier, that reg 53—entitled 'Decision of the Pre-Trial Chamber following the confirmation hearing'—indicates nothing more for the confirmation decision than the Pre-Trial Chamber '*setting out* its *findings* on each of the charges.' That provision when considered in the light of article 61(7), requiring the Pre-Trial Chamber to determine whether there are 'substantial grounds to believe', suggests that the remit of the confirmation decision need go no further than 'setting out [the] findings' that inform the Pre-Trial Chamber's substantial grounds to believe—thus communicating the intimate conviction of the Pre-Trial Chamber that the Prosecutor's charges are not laid on frivolous grounds.

90. It may then not be the case that having *set out* its *findings* on the charge, as to whether there are substantial grounds to believe, the decision setting out such findings would have the effect of displacing any further role for the Prosecutor as the charging authority, whose charging document must continue to be the document of reference at the trial. The leap is large indeed.

The Synchronicity of Appellate Pronouncements at the ICC and the ICTY

91. The judgment of the ICTY Appeals Chamber in 2001 in *Prosecutor v Kupreškić*[65] is a leading authority in international criminal law as to the role of an 'indictment'—defined in the *Oxford English Dictionary* as a 'document containing the charges'—and as to who bears the primary blame when it falls short of communicating notice of the charges properly to the accused. In that case, the ICTY Appeals Chamber identified the indictment as generally 'the primary accusatory instrument'; that it 'must plead with sufficient detail the essential aspect of the Prosecution case'; and that '[i]f it fails to do so, it suffers from a material defect.'[66] And quite importantly, for present purposes, the ICTY Appeals Chamber noted that it is the 'Prosecution's obligation to set out concisely the facts of its case in the indictment.'[67]

92. In my view (as generally expressed in this partly dissenting opinion), nothing in the basic documents of the ICC demonstrably compels a different legal position at the ICC, in relation to both the uses of the charging document and that it is the Prosecutor that bears the responsibility for formulating charges that must guide the trial of a case.

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[65] *Prosecutor v Kupreškić, supra.*
[66] *Ibid*, para 114.
[67] *Ibid*, para 88 (in particular) and following.

93. On a casual view, there may be a temptation to form an impression that the pronouncements of the ICC Appeals Chamber in *Lubanga* are at odds with those of the ICTY Appeals Chamber in *Kupreškić*. In my respectful view, such an impression may be mistaken. Nothing in the pronouncements of the one Appeals Chamber is really inconsistent with those of the other.

94. Notably, in *Lubanga*, the ICC Appeals Chamber observed as follows:

> As to where and how the detailed information about the charges is to be provided to the accused, the Appeals Chamber underlines at the outset that, *given the Court's statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process*, there can be no doubt that *the decision on the confirmation of the charges defines the parameters of the charges at trial. If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined.*[68] [Emphases added.]

95. The observations quoted above are not at all inconsistent with the pronouncements of the ICTY Appeals Chamber in *Kupreškić*. Nor are they at odds with the 'statutory framework' of the ICTY and 'the respective roles of the [ICTY] Prosecutor and the [ICTY judiciary] in the confirmation process'. This is for the simple reason that the ICTY Appeals Chamber was never called upon to make a similar pronouncement at the ICTY. For one thing, the ICTY (and ICTR) statutory frameworks also recognise the respective roles of the Prosecutor and the judiciary, such that the judicial decision on confirmation of charges would define the parameters of the charges at trial. Notably, similar to the ICC statutory framework, the statutory frameworks of the ICTY and the ICTR do not permit an unconfirmed charge to be brought to trial.[69] As will be recalled, two cases from the ICTR (*Ntuyahaga*[70] and *Bagosora and 28 Others*[71]) were reviewed earlier, to bring into full view the far-reaching power of the ICTR and the ICTY judiciary to 'define the parameters of the charges at trial' (to use the language of the ICC Appeals Chamber in *Lubanga*) as an incident of the 'confirmation process' within the 'statutory framework' of those *ad hoc* tribunals.

96. But, the ICC statutory framework does not compel a judicial view different from the *Kupreškić* view that it is the Prosecutor that bears the responsibility to formulate the charges that must guide the trial. Her responsibility to formulate the charges remains under the authority of the Pre-Trial Chamber to define the parameters of the charge.

97. A further point of unity between the pronouncements of the two Appeals Chambers is in the fact that *Kupreškić* admits the possibility that providing the accused with 'timely, clear and consistent information detailing the factual basis underpinning the charges' through other means

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[68] *Lubanga Appeals Judgment*, *supra*, para 124.
[69] See articles 17(4) and 18 of the ICTR Statute; articles 18(4) and 19 of the ICTY Statute; and, r 47 common to the Rules of both Tribunals.
[70] See *Prosecutor v Ntuyahaga (Decision of the Prosecutor's Motion to Withdraw the Indictment)* dated 18 March 1999 [ICTR Trial Chamber I].[71] *Prosecutor v Bagosora and 28 Others (Dismissal of Indictment)* 31 March 1998.[72] *Kupreškić*, *supra*, para 114.
[71] *Prosecutor v Bagosora and 28 Others (Dismissal of Indictment)* 31 March 1998.[72] *Kupreškić*, *supra*, para 114.

can cure a defective indictment.[72] That is to say, the Prosecutor's charging document is not the only document to be considered in determining whether adequate notice of the charges has been given to the accused. In a similar vein, the *Lubanga* appeals judgment has made clear that 'other auxiliary documents' can assist in providing the accused with better notice of the charges.[73] The implication of the ruling becomes this: any view of the Prosecutor's DCC (or UDCC) on the one hand or the confirmation decision, on the other, as the primary document giving notice of the charges does not exclude the other document as serving to provide better notice of the charges to the extent possible.

The Subjection of the Pre-Trial Chamber to Criticism for Lack of Clarity in the Charges

98. Perhaps, to be pointed out is the certain matter of awkwardness associated with the view of the Pre-Trial Chamber as the charging authority whose role it is to *formulate* the charges. This is in the nature of the temptation of some trial judges to criticise their colleagues of the Pre-Trial Chamber for issuing confirmation decisions that are considered to have been unclear.[74] In my view, these criticisms are entirely misplaced as a matter of law. The reason for that conclusion is not that judges of the Pre-Trial Chamber are incapable of writing unclear decisions. The reason rather is that the essential function of the confirmation decision is not, in my view, to provide clarity of the charges to the accused for purposes of the proper notice of the charges. The function of the confirmation decision is, rather, to communicate the *intimate* conviction of the judges of the Pre-Trial Chamber, for purposes of article 61(7), that there are substantial grounds to believe that the accused is criminally responsible for the crime as charged *by* the Prosecutor. In the resulting decision, it is the communication of that intimate conviction in a legally sound way (even if in a manner not readily understandable to the lay accused)[75] that is more important than the clarity with which the judges of the Pre-Trial Chamber have (within the limited time available to them) expressed themselves for all to understand. They may be brief or lengthy in their decision, and reasonable people may disagree with them: but all that is necessary, in my view, is that they do manage to justify in the essence of their decision the good faith reposed in them to ensure that they are satisfied that the Prosecutor's charges have not been frivolous.

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[72] *Kupreškić*, *supra*, para 114.
[73] *Lubanga* appeals judgment, para 124.
[74] See *Prosecutor v Ruto & Sang (Decision on the Content of the Updated Document Containing the Charges)*, dated 28 December 2012 [Separate Opinion of Judge Van Den Wyngaert, para 2.]
[75] By this, I mean that it is enough that there is narrative coherence in the confirmation decision in a manner that is discernible to trained and experienced legal minds. Such legal minds would be the Prosecutor and Defence Counsel (for purposes of appreciating the parameters of the charges as confirmed) and appellate judges (for the additional purposes of appreciating the correctness of the decision relative to the normative values laid down in article 61(7)). Beyond that, it should largely be technically immaterial that the decision remained obtuse to a lay person—including even an accused who is required to have clear notice of the charge. Notably, there is no unfairness to the accused resulting from lack of clarity of the confirmation decision. This is because the problem of clarity is a problem for the Prosecutor, who is required to clarify the charges within the parameters defined by the confirmation decision.

99. Indeed, the requirement of reg 53 that the confirmation decision must be rendered within 60 days is an important factor to be taken into account in the debate as to who is best situated to conceive, distil, frame and sharpen the charges in writing in a manner that achieves both the quality of conciseness and comprehensiveness that should be the ideal of a properly crafted document that is to give the correct notice of the charges to the accused. Is it truly to be accepted that the Pre-Trial Chamber is to be allowed only two months to review, consider, digest and deliberate upon all the documentary and viva-voce evidence (tendered by the Prosecution, the Defence and victim groups)? And having done that, they are then to draft, edit and revise their decision and render it—all still within the two months. A modest familiarity with the nature of the judicial process in the international criminal justice system suggests this as too inordinate an ambition even in the smaller cases, let alone the larger ones. It does not leave much time for the essential task of rendering a lengthy legal writing into its most concise and comprehensive form through the desirable process of extensive revising and editing.[76] The result would be to deliver what may be an understandable target of meeting the deadline for delivery of judgment, though it may be more voluminous than it should really be and not as ideally arranged in its presentation as the issuing judges might have wished if they had more time. Yet, the difficulty with such very lengthy decisions is not merely that they may make more work for the reader, but that they may not always convey the needed information (significantly to the accused) without generating some difficulties and possible confusion of their own.[77] This explains both the general tendency of ICC Trial Chambers to require the Prosecutor to clarify or update the charges following the delivery of the confirmation decision and the attendant observations of the various Trial Chambers (in those decisions) that the confirmation decisions at the ICC do 'not provide a readily accessible statement of the facts that underlie each charge'.[78]

100. These consequences of the time-limit on the Pre-Trial Chamber compared with the incidence of the longer time available to the Prosecutor to frame charges should leave little doubt that the onus to draft a concise and comprehensive charging document is properly upon the Prosecutor, as a practical matter. This is for the simple reason that there is no time limit—certainly not a 60 day time limit—placed upon the Prosecutor to complete the drafting of the DCC. This leaves the Prosecutor in a better position, compared to the Pre-Trial Chamber, to distil a concise and comprehensive document of a considerably shorter number of pages than the Pre-Trial Chamber could have written within a 60 day time-limit.

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[76] See Bryan A Garner, *The Elements of Legal Style* (1991) pp 178—179 and 208—209.

[77] See the observations of Trial Chamber II in *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009 para 13, indicating frustrations that are all too common at the ICC.

[78] See, for instance, *Prosecutor v Jean-Pierre Bemba Gombo (Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges)* dated 20 July 2010, para 30; *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009, *supra*, para 13; and *Prosecutor v Muthaura and Kenyatta (Order for the Prosecution to File an Updated Document Containing the Charges)* dated 5 July 2012, para 7.

101. Thus, any criticism as to lack of clarity of the charges becomes a criticism that the Prosecutor—and not the Pre-Trial Chamber—should bear. But the burden of the criticism of the Pre-Trial Chamber for lack of clarity in the charges remains for them, with the insistence that they are to be considered as the charging authority instead of the Prosecutor.

A Litmus Test as to the Proper Role of the Pre-Trial Chamber in Relation to the Charges

102. As part of their reasoning, the 'Majority ... recalls that the Statute entrusts the Pre-Trial Chamber with the responsibility to confirm or decline to confirm the charges, as presented by the Prosecution in the DCC.'[79] The observation as far as it goes is correct. But, it is incomplete in a significant respect that ought to be decisive as to the confusion at the ICC about the relative roles of the Prosecutor and the Pre-Trial Chamber as the charging authority.

103. What is absent from the Majority's recall is the message of article 61(7)(c)(ii) and what it signifies. That provision lays down in *mandatory* terms the third option for the Pre-Trial Chamber at the end of the confirmation hearing—in addition to the two options indicated by the Majority. According to article 61(7)(c)(ii),

> The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber ***shall***:
>
> ...
> *Adjourn the hearing and request the Prosecutor to consider:*
>
> ...
> *Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.* [Emphases added.]

104. It is thus clear that the Statute does not authorise the Pre-Trial Chamber to amend a charge on its own, following a confirmation hearing, 'because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.'

105. The effective minimum value of that provision thus underscores the enduring authority of the Prosecutor—not the Pre-Trial Chamber—as the Court's charging authority.[80] Had the

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[79] Majority reasoning, as expressed in para 10.

[80] It must be stressed that the value of even any statutory authority in the Pre-Trial Chamber to amend the indictment automatically (regardless of the Prosecutor) on the basis of the evidence seen at the confirmation hearing bears only a minimum value in the consideration as to who is the Court's charging authority as between the Prosecutor and the Pre-Trial Chamber for purposes of determining whether the Prosecutor's charging document continues to have value throughout the trial as a document of reference. This is because in some national jurisdictions, such as Canada and the UK, the judge who conducts a committal hearing (for purposes of committing an accused to trial, as the Pre-Trial Chamber does at the ICC) is authorised automatically to commit the suspect to trial for a different offence (than what the prosecution has charged) on the basis of evidence presented at the committal proceeding. See Law Society of British Columbia, Professional Legal Training Course, *Criminal Procedure* (Practice Material) (2015) p 48. See also *Blackstone's Criminal Practice* (2012) §D10.41. Even so, there is never a question whether the prosecutor's charging document is to remain a document of reference throughout the trial.

intendment of the Rome Statute been to make the Pre-Trial Chamber the charging authority of the Court, there would have been no need to require it to 'adjourn the [confirmation] hearing' (incurring delay), in order to 'request' the Prosecutor to 'consider' amending a charge because the evidence produced at the confirmation hearing supports a different crime; the Statute would have given the Pre-Trial Chamber the clear authority to proceed and amend the charge as it sees fit, according to the evidence submitted at the confirmation hearing.

A Simplified View of Article 61

106. It is unfortunate that article 61 of the Statute was not drafted in a simpler and more straightforward way. That notwithstanding, it is possible to follow the stream of its essential message as it flows, despite the cataracts and the eddies and the shoals along its course. That essential message may be stated simply as follows. The Pre-Trial Chamber shall determine, on the basis of the prescribed test, whether there is sufficient evidence to commit a person to trial on the charge brought by the Prosecutor. The prescribed test for the evidence being that it must establish substantial grounds to believe that the suspect is responsible for the crime charged. If the Pre-Trial Chamber finds that there is sufficient evidence to commit, it will confirm the charge; if it finds the evidence inadequate to commit, it will decline to confirm the charge; and, it finds that the evidence supports a crime different from that brought by the Prosecutor, it will adjourn and request the Prosecutor to consider amending the charge accordingly.

107. The arrangement does not compel a result in which the Pre-Trial Chamber, rather than the Prosecutor, becomes the body that formulates the charges on which the Prosecutor seeks a trial.

108. But, none of the above considerations perturbs the point that the Pre-Trial Chamber enjoys a controlling authority to define—in the sense of delimiting or varying as the evidence dictates—the parameters of the charges on which the Prosecutor intends to seek trial. There is no inconsistency between the two propositions. For, the suzerainty of one entity over another need not negate the continued existence of the servient entity or that of its act.

PART III —PROPRIETY OF PRESENT EXERCISE OF THE DISCRETION

The Value of a UDCC—'in this case'

109. I have explained above that the Trial Chamber's exercise of discretion to authorise or require a UDCC is entirely compatible with procedural regimes under general principles of national law, customary international criminal procedural law, as well as the procedural regime set out in the Statute. In this part, I shall now discuss why it is correct procedure to authorise or require the Prosecutor to file a UDCC 'in this case' in particular.

The Charges as Preferred and as Confirmed

110. There are five accused persons in this case: Mr Bemba, Mr Kilolo, Mr Magenda, Mr Balala and Mr Arido. The Prosecutor presented to the Pre-Trial Chamber for confirmation 43 charges against each of the Accused. As required by reg 52, the DCC had to set out the particulars as to the identity of the Accused; the particulars as to the facts, indicating both the criminal conducts and their consistency with the jurisdiction of the Court; and, the legal characterisation of the impugned conducts both as a matter of the crimes within the Rome Statute and as a matter of attribution of individual criminal responsibility.

111. The charges cardinally concerned the alleged dealings that the Accused had with witnesses and documents used in the prior case of the *Prosecutor v Bemba*. The resulting alleged offences involve the crimes proscribed under clauses (a), (b) and (c) of article 70(1) of the Rome Statute. Clause (a) concerns the offence of giving false testimony; clause (b) concerns the offence of knowingly presenting false or forged evidence; and, clause (c) concerns the offence of corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.

112. And along the ordinal axis, the Prosecutor sought to attribute individual criminal responsibility to the Accused according to the modes of criminal responsibility indicated in clauses (a), (b), (c) and (d) of article 25(3) of the Rome Statute. Clause (a) concerns attribution of individual criminal responsibility by way of committing the crime directly, in concert with others or through the agency of another person who may or may not be criminally responsible; clause (b) concerns ordering, soliciting or inducing the commission of a crime that is consummated or attempted; clause (c) concerns purposeful aiding, abetting or otherwise assisting in the commission of the crime or an attempt at it; and (d) concerns making a contribution in any other way to the commission or a attempted commission of the crime in question by a group of persons acting with a common purpose, provided (i) the contribution was intentional and was made either with the aim of furthering the criminal activity or criminal purpose of the group, where the activity or purpose involves commission of a crime within the Court's jurisdiction, or (ii) the contribution was made with knowledge of the intention of the group to commit the crime.

113. Careful study and serious concentration is required in order to understand the network of the Prosecutor's pleading of the charges, from the perspective of the cardinal crimes, modes of responsibility, the accused, and the concerned witnesses and documents. It is not all easily taken in in a hurry. And easy understanding is not aided by the Pre-Trial Chamber's decision that not only rejected some of the Prosecutor's charges and charging theories, but also interposed charging

theories that the Prosecution had not sought. I shall next summarise—as simply as I can—how the Prosecutor preferred the charges were laid and how the Pre-Trial Chamber decided.

Charges under Article 70(1)(a) concerning the Witnesses

114. Mr Bemba was charged, pursuant to article 70(1)(a) and article 25(3)(b), with soliciting the commission of the offence of giving false testimony in respect of each of the 14 relevant witnesses. The Pre-Trial Chamber confirmed each of these charges.

115. Mr Kilolo was charged with soliciting or inducing the commission of the same offence. The Pre-Trial Chamber confirmed each of these charges.

116. Mr Mangenda and Mr Babala were both charged, pursuant to article 25(3)(c), with aiding, abetting or otherwise assisting the commission of the same offence. The Pre-Trial Chamber confirmed each of these charges.

117. Mr Arido was charged with soliciting or inducing the commission of the same offence, and in the alternative, with aiding, abetting or otherwise assisting the commission of the offence, with respect to four of the relevant witnesses. As regards the other 10 witnesses, Mr Kilolo was charged with aiding, abetting or otherwise assisting the commission of the offence. The Pre-Trial Chamber confirmed, only with regard to four of the witnesses, the charges of aiding, abetting or otherwise assisting the commission of the offence. The Pre-Trial Chamber found that Mr Arido's involvement in the overall strategy was confined to those four witnesses, and declined to confirm the charges in relation to the other 10. The Pre-Trial Chamber further declined to confirm the charge of soliciting or inducing the commission of the offence.

Charges under Article 70(1)(b) concerning the Witnesses

118. Mr Bemba was charged, pursuant to article 70(1)(b) and article 25(3)(a), with indirectly co-perpetrating the offence of presenting false (testimonial) evidence, and in the alternative, pursuant to article 25(3)(b), with soliciting the commission of the offence of presenting false evidence, in respect of each of the 14 relevant witnesses.

119. Mr Kilolo was charged, with directly and/or indirectly co-perpetrating the same offence.

120. Mr Mangenda and Mr Babala were both charged with indirectly co-perpetrating the offence, and in the alternative, pursuant to article 25(3)(c), with aiding, abetting or otherwise assisting the commission of the offence.

121. Mr Arido was charged with directly and/or indirectly co-perpetrating the offence, and in the alternative with aiding, abetting or otherwise assisting the commission of the offence, with respect to all 14 relevant witnesses.

122. The Pre-Trial Chamber confirmed each of the above charges as concerns Mr Bemba, Mr Kilolo and Mr Mangenda. However, it rejected the Prosecutor's charging theory of indirect co-perpetration, changing each relevant mode of liability under article 25(3)(a) to that of direct co-perpetration. The Pre-Trial Chamber rejected, in particular, the Prosecutor's view of a common plan in which all suspects were indirect co-perpetrators, instead finding that the specific offences, which some suspects were directly involved in the commission of, were better captured by the mode of co-perpetration.

123. In their decision in relation to Mr Babala and Mr Arido, the Pre-Trial Chamber only confirmed the charges of aiding, abetting or otherwise assisting the commission of the offence, and declined to confirm those pursuant to article 25(3)(a) (and again limited Mr Arido's charges to four witnesses). The Chamber found that the reference to 'party' in article 70(1)(b) referred only to those who had a right to 'present evidence' to a Chamber during proceedings, which in the Main Case included the Defence team and Accused, while third parties (i.e. Mr Arido and Mr Babala) could only incur accessorial responsibility under article 25(3)(b)—(d), rather than perpetrator liability under article 25(3)(a).

Charges under Article 70(1)(c) concerning the Witnesses

124. Mr Bemba was charged, pursuant to article 70(1)(c) and article 25(3)(a), with indirectly co-perpetrating the offence of corruptly influencing witnesses, and in the alternative, pursuant to article 25(3)(b), with soliciting the commission of the offence of corruptly influencing witnesses, in respect of each of the 14 relevant witnesses.

125. Mr Kilolo was charged with directly and/or indirectly co-perpetrating the same offence. Mr Mangenda was charged with indirectly co-perpetrating the same offence, and in the alternative, pursuant to article 25(3)(c), with aiding, abetting or otherwise assisting the commission of the same offence.

126. Mr Babala and Mr Arido were both charged with directly and/or indirectly co-perpetrating the same offence, and in the alternative, with aiding, abetting or otherwise assisting the commission of the same offence.

127. In their decision, the Pre-Trial Chamber confirmed each of these charges as against Mr Bemba, Mr Kilolo and Mr Mangenda: but, again, changed each relevant mode of responsibility under article 25(3)(a) to that of direct co-perpetration. As regards Mr Babala and Mr Arido, the Pre-Trial Chamber only confirmed the charges of aiding, abetting or otherwise assisting the commission of the offence—again limiting Mr Arido's charges to four witnesses. It declined to confirm those charges against Mr Babala and Mr Arido as a matter of article 25(3)(a).

Charges under Article 70(1)(b) concerning the Documents

128. Mr Bemba was charged, pursuant to article 70(1)(b) and article 25(3)(a), with indirectly co-perpetrating the offence of presenting false (documentary) evidence, in respect of the 14 relevant documents. Mr Kilolo was charged with directly and/or indirectly co-perpetrating the same offence. Mr Mangenda was charged, pursuant to article 25(3)(c), with aiding, abetting or otherwise assisting the commission of the same offence. Mr Arido was charged with indirectly co-perpetrating the same offence, and in the alternative, with aiding, abetting or otherwise assisting the commission of the offence.

129. The Pre-Trial Chamber declined to confirm any of the charges relating to the 14 Documents. The Chamber concluded that the evidence provided failed to show the required *mens rea* on the part of Mr Bemba, Mr Kilolo or Mr Mangenda, and that that there was no evidence to demonstrate Mr Arido either provided the documents, or was aware of any doubt as to their authenticity.

Residual liability under article 25(3)(d) for all Charges

130. In respect of all of the above offences, all of the accused were charged in each instance, in the alternative or further alternative, pursuant to article 25(3)(d), with otherwise contributing to the commission of the offences. The Pre-Trial Chamber declined to confirm this mode of liability, finding that the relevant conduct was captured by modes of liability in Article 25(3)(b)—(c).

The Need for Updated DCC

131. It is possible—and indeed often the case—that the best efforts at a simplified description of a complex structure in a summary way may end up making things seem more complicated than they really are. That, I feel sure, is the fate of the effort that I have made above. Still, this admission of a shortcoming ought not belie the original complexity of the thing in question. For, it may indeed be an objective indicium of complexity that the thing defies a simplified narrative.

132. I fully accept that aspects of the confirmation decision of the Pre-Trial Chamber did go a long way in simplifying the indictment in a helpful manner in this case. One such aspect is the Pre-Trial Chamber's rejection of the catchall attempt of the Prosecutor to charge each of the Accused, pursuant to article 25(3)(d) of the Statute, with the alternative or further alternative criminal responsibility of 'otherwise contributing' to the commission of each of the offences already charged. Another salutary aspect of the confirmation decision is the fact that the Pre-Trial Chamber had provided at the end of their decision a compendium of the counts confirmed.

133. Nevertheless, the fact remains that not all the charges were confirmed against the Accused—and less so for some of the accused than others; not all the charging theories of the Prosecutor were accepted; and, the Pre-Trial Chamber superimposed onto the charges theories of criminal responsibility that the Prosecutor did not seek. All these are factors that necessitate a post-

confirmation clean up of the DCC, by way of a UDCC, in order to conform the DCC to the confirmation decision of the Pre-Trial Chamber.

134. In all the other cases of the Court where the Trial Chamber ordered the Prosecution to file a UDCC, the question arose because the Pre-Trial Chamber either did not confirm all the charges or did not accept some of the factual particulars of criminal conduct that the Prosecutor had alleged against the accused. In the present case, as well, the Pre-Trial Chamber declined to confirm some of the charges; and, declined to accept some of the factual particulars of the criminal conduct that the Prosecutor had alleged against the accused.

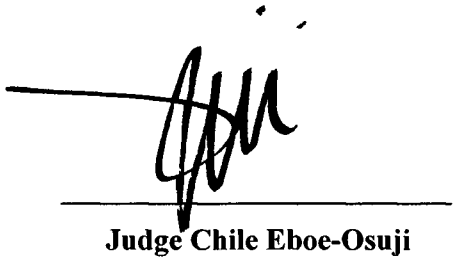
135. In my opinion, the Prosecution should file a UDCC. The forensic value of doing so in this case includes—but is not limited to—the following consideration. Updating the DCC holds out the prospect of avoiding confusion: it brings essential harmony between the DCC and the confirmation decision; it also refocuses everyone (the Prosecution, the Defence and the Trial Chamber) to the precise parameters of the charges that the Pre-Trial Chamber had confirmed. That it to say, it makes the Prosecutor's charging document a document of reference throughout the trial (whether as *the* primary or *an* auxiliary accusatorial document of reference), without prejudice to the value of the confirmation decision in also helping to give notice of the charges in its own way (either as *the* primary or *an* auxiliary accusatorial document of reference).

CONCLUSION

136. In conclusion, I would hold as follows. UDCC is not required by the Statute or Rules, as a matter of self-executing obligation on the Prosecutor. Whether or not to require or authorise the Prosecutor to file a UDCC is a matter entirely for the discretion of the Trial Chamber, pursuant to its obligation to guarantee a fair trial that respects the right of the accused. However, even when a UDCC is required or authorised to be filed, the confirmation decision is the overarching authoritative document that controls the UDCC. Any UDCC that is filed must not be used as an opportunity to introduce new facts and circumstances of the charges that the Pre-Trial Chamber had not accepted beforehand.

137. In the circumstances of the present case, I would authorise and direct the Prosecutor to submit a UDCC, in light of the Pre-Trial Chamber's revisions to the charges that the Prosecutor had presented for confirmation.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
Presiding Judge

Dated this 16 June 2015
At The Hague, the Netherlands