

Public Annex B12: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant
to the Appeals Chamber's order ICC-01/05-01/08-3579

Triffterer, O. and Ambos, K., eds., *The Rome Statute of the International Criminal Court:
A Commentary*, 3rd ed., Beck et al. 2016

Article 74 : pp. 1841-1846

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Requirements for

delegations from common law legal systems.⁹¹ Neither the Statute nor the Rules of Procedure and Evidence have addressed this particular issue. Instead, a Regulation was adopted in 2004, concerning the 'Authority of the Chamber to modify the legal characterization of facts', under Regulation 55 of the Regulations of the Court.⁹²

- 43 b) Is a 'factual allegation' part of the facts and circumstances described in the charges? As set out above, the ICTY, ICTR, SCSL and STL provide for the defence right to be informed promptly and in detail of the 'nature' and 'cause' of the charges.⁹³ The Prosecutor is under an obligation to prepare an indictment containing 'a concise statement of the facts' and the crime or crimes with which the accused is charged.⁹⁴ The pleadings of an indictment will be sufficiently particular when the 'material facts' are concisely set out with enough detail to inform the accused clearly of the nature and cause of the charges against him, such that he is in a position to prepare a defence.⁹⁵
- 44 In the Rome Statute framework, the right to be informed of the charges is regulated in Article 67(1)(a) in a manner virtually identical to the Statutes spelled out above, save for the explicit reference to the 'Content' of the Charge. The facts and circumstances (cause) and their legal characterization (nature) compose the charges (content).⁹⁶ Reference to the 'statement of facts' can be found in Regulation 52(b) of the Regulations, which describes what shall be included in the Document Containing the Charges to be presented before the Pre-Trial Chamber. This Regulation requires *inter alia* 'a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court'. Regulation 52(c) makes reference to the 'legal element'. It describes this element as the 'legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28'.
- 45 Given this legal framework, it is useful to analyze the case law of the Tribunals to explore the principles which have emerged in discussions as to the sufficiency of the statement of facts and the 'material facts' to be reflected therein. Bearing in mind that providing an exhaustive overview of such principles is not possible, it follows from the jurisprudence that: the Prosecution must plead the material facts underpinning the charges with enough detail to inform an accused person clearly of the nature and cause of the charges to allow them to prepare a defence;⁹⁷ there is a clear difference between the material facts, which must be

⁹¹ Friman, Bradym Costi, Guariglia and Stuckenberg, *Charges*, in: Sluiter, Friman, Linton, Vasiliev, Zappala, *International Criminal Procedures, Principles and Rules*, (Oxford 2003), p. 381, 431, 467 *et seq.*

⁹² In the jurisprudence of the ICC Appeals Chamber, there are two important decisions setting out the parameters for the use of Regulation 55. These are: *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', Appeals Chamber, 16 December 2009 and *Prosecution v. Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, 27 March 2013. See also Carsten Stahn, *CLF* (2005), 2 *et seq.*

⁹³ See above footnote 85.

⁹⁴ See for instance Article 18(4) of the ICTY Statute.

⁹⁵ *Prosecutor v. Kupreskić*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 88.

⁹⁶ In relation to the notion of 'charge', see *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 30 March 2012, ICC-01/04-01/06-2842, para. 2; *Prosecutor v. Katanga*, Trial Chamber II, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, 18 March 2014, paras 1485 'From article 74(2) of the Statute and regulation 52 of the Regulations of the Court taken together, a 'charge' must be understood as: a statement of the facts and circumstances including the time and place of the alleged crimes, given that the term 'fact' denotes, as aforementioned, factual allegations underpinning each of the legal elements of the crime charged; and a legal characterisation of the facts, which must accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation therein under articles 25 and 28 of the Statute'.

⁹⁷ ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, paras 61, 147; *Prosecutor v. Kupreskić*, IT-95-16-A, Judgment, 23 October 2001, para. 88; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment,

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⁹⁹ *Prosecutor v. v. Ntagerura*, IC

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¹⁰⁰ *Prosecutor*

¹⁰¹ *Prosecutor*

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12 March 2008,

¹⁰² *Prosecutor*

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¹⁰³ *Ibid.*

¹⁰⁴ *Prosecutor*

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2001, p. 88. rial Chamber I, Judgment pursuant to ; *Prosecutor v. Katanga*, Trial Chamber 01/07-3436, 18 March 2014, paras 1485 of the Court taken together, a 'charge' iding the time and place of the alleged gations underpinning each of the legal hich must accord both with the crimes therein under articles 25 and 28 of the

ly 2000, paras 61, 147; *Prosecutor v. or v. Blaškić*, IT-95-14-A, Judgment,

pleaded, and the evidence proffered to prove them;⁹⁸ the Prosecution is not required to plead the evidence intended to prove the pleaded material facts;⁹⁹ it would be unworkable for an indictment to contain all the evidence the Prosecutor proposes to introduce at the trial;¹⁰⁰ an indictment must be considered as a whole, and select paragraphs should be read in context with the entire document;¹⁰¹ the materiality of a particular fact cannot be decided in the abstract and depends on the nature of the Prosecution's case;¹⁰² the alleged criminal conduct is decisive in determining the degree of specificity required in the indictment;¹⁰³ regarding the identity of perpetrators for whose acts an accused is charged, but without being charged with personally committing the crimes, it is sufficient to identify such perpetrators by category or group in relation to a particular crime site;¹⁰⁴ a date may be considered to be a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence;¹⁰⁵ a reasonable range of dates may be pleaded where precise dates cannot be specified as to when the alleged criminal conduct occurred.¹⁰⁶

The ICC jurisprudence has reflected some of these principles. According to the jurispru- 46 dence of the Appeals Chamber, it is for the prosecution to plead the facts relevant to establishing the legal elements.¹⁰⁷ The facts must be identified with sufficient clarity and detail in the confirmation process, meeting the standard in article 67(1)(a) of the Statute. The term 'facts' refers to the 'factual allegations' which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence presented in support a charge as well as from background or other information that does not support the legal elements of the crime charged.¹⁰⁸

29 July 2004, para. 209; *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, para. 116; *Prosecutor v. Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 20; see also, *Ntabakuze v. The Prosecutor*, ICTR-98-41A-A, Judgment, 8 May 2012, para. 30; STL, *Prosecutor v. Ayyas et al*, Decision on alleged defects in the form of the amended indictment of 21 June 2013, 13 September 2013, STL-11-01/PT/TC, para. 17.

⁹⁸ *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 210; *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, para. 116.

⁹⁹ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, paras 61, 147, 153; ICTR, *The Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgment, 7 July 2006, para. 21; *Prosecutor v. Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 20; *The Prosecutor v. Uwinkindi*, ICTR-01-75-AR72 (c), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 4.

¹⁰⁰ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 153.

¹⁰¹ *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para. 304; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgment, 7 July 2006, para. 123; *Prosecutor v. Seromba*, ICTR-2001-66-A, Judgment, 12 March 2008, para. 27.

¹⁰² *Prosecutor v. Kupreškić*, IT-95-16-A, Judgment, 23 October 2001, para. 89; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 210.

¹⁰³ *Ibid.*

¹⁰⁴ *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 218; *Prosecutor v. Simba*, ICTR-01-76-A, Judgment, 27 November 2007, paras 71–72; *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgment, 1 April 2011, para. 64.

¹⁰⁵ *Prosecutor v. Nindabahizi*, ICTR-01-71-A, Judgment, 16 January 2007, para. 19.

¹⁰⁶ *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Objection by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Prosecutor v. Nindabahizi*, ICTR-01-71-A, Judgment, 16 January 2007, para. 19–20.

¹⁰⁷ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-572, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', 16 December 2013, para. 47.

¹⁰⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', Appeals Chamber, 16 December 2009, fn. 163. There was a suggestion by the Appeals Chamber that the notion of 'facts and circumstances described in the charges' as a whole may be 'narrowly or broadly understood', *Prosecution v. Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, 27 March 2013, para. 50; The Appeals Chamber also indicated that the Prosecutor's investigation may be continued beyond the confirmation hearing; *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision

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- 47 By reference to the jurisprudence of the *ad hoc* tribunals, it has been accepted that different levels of specificity are required of the charges, depending on the form of individual criminal responsibility charged and the nature of the alleged criminal conduct charged.¹⁰⁹ If the accused is proximate to the events, as in cases of direct perpetration, the identity of the victim, the place, date and description of the events may be material facts and the Prosecution must to set out this detail 'with the greatest precision'.¹¹⁰ In cases of accessorial liability, the Prosecution is required to identify the 'particular acts' or 'the particular course of conduct'. In cases of co-perpetration, the accused must be provided with detailed information regarding: (i) the alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. The underlying criminal acts form an integral part of the charges, and sufficiently detailed information must be provided in this respect. The Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.¹¹¹
- 48 c) Where are the facts and circumstances described in the charges to be found? The facts and circumstances are to be found in the decision on the confirmation of the charges. This decision defines the factual parameters of the charges at trial.¹¹² 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.¹¹³
- 49 Where the Prosecution requested and obtained from the Pre-Trial Chamber permission to amend a charge, pursuant to article 61(9), it may amend the charges after notice to the accused 'before the trial has begun'.¹¹⁴ In this situation the scope of the charges, including the amended

of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', Appeals Chamber, 13 October 2006, para. 56 and *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', Appeals Chamber, 30 May 2012, footnote 89. Naturally, the resulting evidence can properly be submitted at trial and evaluated for the purposes of the judgment and it can generate additional detail as the facts.

¹⁰⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 122-123, quoting *Prosecutor v. Blaskić*, IT-95-14-A, Judgment, 29 July 2004, paras 210-213.

¹¹⁰ For instance, in the *Banda and Jerbo* case, the charges were confirmed *inter alia* in relation to the war crime of violence to life pursuant to article 8(2)(c)(i) of the Statute. Banda and Jerbo were charged the killing of twelve AMIS peacekeeping personnel and attempt to kill eight AMIS peacekeeping personnel in the 29 September 2007 attack at the MGS Haskanita, the Sudan. The attack was allegedly committed together with forces under their command and control, acting pursuant to a common plan and orders issued by them. Moreover, as confirmed by the Pre-Trial Chamber, the suspects personally participated and led the actual attack; see the Corrigendum of the 'Decision on the Confirmation of Charges', 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 146. This is good test situation to consider whether the identities of the victims may be material facts. If this was the case, the Trial Chamber would not be able to enter a conviction in relation to any additional instance of violence to life without the Prosecution requesting and obtaining permission from the Pre-Trial Chamber. It is useful to compare this circumstances with those described in the *Al Basir* warrant of arrest, where it was decided on reasonable grounds to believe that 'GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer' *Prosecutor v. Al Bashir*, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, page 6 [emphasis added].

¹¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, paras 122-123, quoting *Prosecutor v. Blaskić*, IT-95-14-A, Judgment, 29 July 2004, para. 210-213.

¹¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124; see also Nerlich, *JICJ* 10 (2012), 1339, 1348.

¹¹³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124. See also Fernandez and Pacreau (Dir.), *Statut de Rome de la Cour Pénale Internationale, Commentaire article par article*, ii (2012), p. 1646 indicating that if the facts charged are exceeded, the rights of the defence and the prosecution would be profoundly unbalanced.

¹¹⁴ Permission to amend the charges may be requested in circumstances 'which [...] does not entail the addition of new charges nor the substitution of more serious charges but rather an adjustment to the temporal

accepted that different of individual criminal ged.¹⁰⁹ If the accused the victim, the place, n must to set out this 'osecution is required es of co-perpetration, alleged conduct that mmon plan and its ital element; and (iii) form an integral part in this respect. The 'ing acts and identify stances.¹¹¹

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elements, will be clarified by the decision of the chamber or any ensuing document filed by the prosecution. If the Prosecution seeks to add additional charges or to substitute more serious charges, the additional or the substitute charges will be addressed in a Confirmation Decision.

In practice, Trial Chambers have experienced difficulties in identifying the facts and circumstances confirmed at the Pre-Trial stage as some Confirmation decisions did not provide a readily accessible statement of the facts underlying each charge.¹¹⁵ The facts and circumstances were reflected in the decision without separation from the narrative, the background information, the evidence put forward by the Prosecutor, or the reasoning which was developed in the consideration of each crime. In cases of ambiguity or silence as to whether certain facts and circumstances spelled out in the Document Containing the Charges were confirmed or not, there was a question on whether these are necessarily excluded from the facts and circumstances of the charges.¹¹⁶ As a reaction, it became common practice that Trial Chambers would request a post confirmation document from the Prosecution where they expect to have the factual parameters of the trial clearly set out; the so called 'Amended or Updated Document Containing the Charges'.¹¹⁷ This in turn triggers litigation as to the correct understanding of the documents involved.¹¹⁸

The Appeals Chamber has recently condoned that 'further details about the charges, as confirmed by the Pre-Trial Chamber', may also be contained in other 'auxiliary documents'.¹¹⁹ These auxiliary documents include a Pre-Trial brief,¹²⁰ an Updated or Amended DCC,¹²¹ submissions of the prosecution related to factual allegations providing additional detail,¹²² and the summary of evidence.¹²³ These additional details will assist in clarifying the facts and circumstances described in the charges and thus the scope of the trial, though they

scope of some of the alleged incidents underlying the charges by a matter of two days', see *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-912, Decision on the Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), Pre-Trial Chamber II, 6 September 2013, para. 26.

¹¹⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-836, 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, Trial Chamber III, 20 July 2010, paras 8 and 30.

¹¹⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-522, Decision on the content of the updated document containing the charges, Trial Chamber V, 28 December 2012, para. 19; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-584, Decision on the content of the updated document containing the charges, Trial Chamber V, 28 December 2012, para. 23. Trial Chamber V has taken the view that the confirmation decision is authoritative on those matters specifically addressed and/or those charges, including the facts, circumstances and their legal characterisation, expressly confirmed or rejected. Conversely, if the Pre-Trial Chamber was silent on certain facts and circumstances contained in the DCC, it does not mean that they were not confirmed. This interpretation was also adopted in *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015, although following a rather stricter approach.

¹¹⁷ Prior to the commencement of the *Lubanga* trial, following disagreement between the parties as to the wording of the charges, Trial Chamber I found that an Amended DCC was 'necessary to ensure that there is complete understanding of the "statement of facts" underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute)'.; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, Trial Chamber I, 9 December 2008, paras 9-10 and 12-13; *Prosecution v. Katanga*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, Trial Chamber II, 21 October 2009, paras 14-19; *Prosecutor v. Bemba*, ICC-01/05-01/08-836, 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, Trial Chamber III, 20 July 2010, para. 30.

¹¹⁸ See for the most recent example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015.

¹¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124.

¹²⁰ *Ibid*, 131.

¹²¹ To clearly indicate the material facts and circumstances underlying the charges as confirmed or the provide, *inter alia*, sufficient detail, which was considered relevant, as to the identity of the victims of the attack; *Ibid*, para. 125 and 126.

¹²² *Ibid*, para. 130.

¹²³ *Ibid*, para. 132.

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need to stay within the parameters of the Confirmation decision.¹²⁴ To ensure notice, the Prosecution should be requested to point out that it is informing the defence of additional details as to the material facts charged. Adequate notice would not be provided if the Prosecution merely discloses evidence which reflect additional details, even if the evidence is summarized in the Prosecution's submission. Any such document providing additional details must be made available to the defence before the start of the trial hearings. A trial (meaning the evidentiary hearings) must commence based on a set of clearly defined charges. This results from the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's defence.¹²⁵ However, the prejudice caused by the lack of detail of the charges may be cured during the trial.¹²⁶

52 In order to tackle this same issue, helpful efforts have been made at the Pre-Trial level to identify more clearly the facts and circumstances confirmed.¹²⁷ These efforts include indicating particular sections or paragraphs of the Confirmation decision as reflecting the charges confirmed¹²⁸ and other paragraphs as reflecting the facts not confirmed.¹²⁹ They also include setting out, in a *distinct section* of the decision, the facts and circumstances confirmed which in turn is preceded by an instruction to the Prosecution to properly identify the factual allegations that underlie the charges.¹³⁰

3. The Court may base its decision only on evidence submitted and discussed before it at the trial

53 As a manifestation of the immediacy principle,¹³¹ the judgment can only be based on evidence submitted; discussed; assessed on relevance, probative value and prejudice; and evaluated by the Trial Chamber. The Trial Chamber shall not rely, for the purposes of the

¹²⁴ And the parameters of the confirmation decision will necessarily depend on the case brought by the prosecution and the facts and evidence underpinning the case – see the example situations set out above in footnote 107. Clearly, where a Trial Chamber would be unable to enter a conviction in relation to additional instances or details without the Prosecution requesting and obtaining permission from the Pre-Trial Chamber, or the latter confirming additional charges, these requirements cannot be circumvented by including the details or instances in auxiliary documents at Trial – thereby escaping the Pre-Trial filter/authorization. For instance, details specifically rejected in the confirmation decision could not be reintroduced by their reflection in the auxiliary document; such reintroduction would require the permission of the Pre-Trial judge; see *Prosecutor v. Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', Pre-Trial Chamber II, 21 March 2013, where the Chamber had rejected a factual allegation (namely that 'weapons were used in Naivasha') in the confirmation decision by reason of lack of evidence (para. 174) though post confirmation investigations produced evidence that, upon evaluation, did establish the relevant fact.

¹²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 129.

¹²⁶ *Ibid.*

¹²⁷ Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: 'Pre-Trial and Trial Relationship and Common Issues, ICC-ASP/13/28, 28 November 2014, page 43 paras 17 to 19.

¹²⁸ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, p. 63; see the interpretation of the Trial Chamber in the same case, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015, para. 36 *et seq.*

¹²⁹ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, paras 13, 32, 37, 75 and 98.

¹³⁰ *Prosecution v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras 266–277; *Prosecutor v. Blé Goudé*, ICC-02/11-01/11-325, Decision on the confirmation of charges against Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras 182–193.

¹³¹ See Roxin/Schünemann, *Strafverfahrensrecht* (2014) 395 *et seq.*; Beulke, *Strafprozessrecht* (2012), p. 26. For a discussion of the 'principle of immediacy' (both in its 'formal' and 'material' understandings), in connection with the 'orality' and the 'concentration principle' see Rieß, in: Löwe/Rosenberg, *Intro.* (1999) mn 60 *et seq.* Maier, J. B.J., *¿Es la inmediación una condición de la condena penal?: un aspecto parcial de la lucha entre inquisición y composición*, in: *Jueces para la democracia* (2004) 49 p. 13–20.