Chicago Journal of International Law

Volume 15 | Number 2 Article 5

2-1-2015

Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers

Jocelyn Courtney

Christodoulos Kaoutzanis

Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers

Jocelyn Courtney and Christodoulos Kaoutzanis*

Abstract

The Pre-Trial Chambers of the International Criminal Court have become critically important to its functioning. This Article identifies the trends that cut across the decisions of the ICC's Pre-Trial Chambers. It argues that they have taken a proactive approach to judicial decision-making, analyzing each legal and factual question raised rather than deferring or punting issues to the Trial Chambers. It then explains how the expression of this proactive approach varies depending on whether the Chambers are maintaining, clarifying, or expanding the field of international criminal law.

Table of Contents

---

* Jocelyn Courtney: Federal Law Clerk, New York; Christodoulos Kaoutzanis: Columbia University Department of Political Science, PhD Candidate in International Relations. The authors thank Professors Harmen van der Wilt (University of Amsterdam) and Michael Doyle (Columbia University) for detailed comments to prior versions of this Article.

I. INTRODUCTION

While much international attention has been paid to the attempted prosecution of the current president and vice-president of Kenya by the International Criminal Court (ICC),[1] not as many commentators realize that the ICC is also in the process of trying the former president of the Ivory Coast, Laurent Gbagbo.[2] Aside from the fact that the recent history of the Ivory Coast is generally less well known than that of Kenya, few people are familiar with the proceedings because the case has not yet moved beyond the pre-trial phase. In June 2013, the ICC's Pre-Trial Chamber adjourned the proceedings against Gbagbo, ordering the Office of the Prosecutor (OTP or the Prosecutor) to submit additional evidence on a host of issues.[3] After additional submissions, the Pre-Trial Chambers finally confirmed the charges against Gbagbo and committed him to trial a year later, in June 2014.[4] As this Article argues, the decision to adjourn the proceedings is chief among many examples of the proactive, substantive role the ICC's Pre-Trial Chambers have recently assumed.

Previously untested at the international level, the creation of the Pre-Trial Chambers (composed of two separate chambers, one of which hears each case) was one of the ICC's most innovative structural developments.[5] Their institutional mandate encompasses authorizing investigations brought sua sponte by the Prosecutor; issuing arrest warrants upon application by the Prosecutor; and most importantly, for every case, holding a confirmation hearing to determine whether the case should proceed to trial and, if so, in what form.[6]

---

1 *See generally* Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges (Pre-Trial Chamber II, Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf.

2 *See generally* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges (Pre-Trial Chamber I, June 12, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf. This is the fourth trial against a head of state in the modern era and the second such trial at the ICC. The prior two trials against heads of state include those against Slobodan Milošević at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Charles Taylor at the Special Court for Sierra Leone (SCSL).

3 *See generally* Prosectutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c) (Pre-Trial Chamber I, June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf.

4 *See generally* Gbagbo, *supra* note 2.

5 *See* Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 J. MARSHALL L. REV. 515, 519 (2010) (describing the Pre-Trial Chamber as "entirely new").

6 *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court art. 61, July 17, 1998, UN Doc. A/CONF. 183/9, 2187 UNTS 90, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter Rome Statute].

Through these functions—and as illustrated by examples like the *Ghagbo* case—the Pre-Trial Chambers exercise significant gatekeeping powers.

This Article inquires into the scope of this gatekeeping, examining all of the decisions issued thus far in the hearings on the confirmation of charges. After examining these decisions,[7] the Article concludes that the Pre-Trial

---

Article 61 of the Rome Statute establishes that, within a reasonable time after an accused has surrendered or voluntarily appeared, "the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial," *id.* art. 61(1), and 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." *Id.* art 61(7). Once the accused appears in front of a judge at the Pre-Trial Chamber, the Prosecutor presents its charges. While the standard of proof required for the Chamber to confirm the charges is lower than the standard required at trial ("beyond reasonable doubt," *id.* art. 66(3)), it is higher than the standard of "reasonable grounds to believe," which is used for the issuance of the arrest warrant or the summons to appear. The requirements for this mid-level burden of proof have been defined by various Pre-Trial Chamber decisions as including "concrete and tangible proof demonstrating a clear line of reasoning underpinning [the Prosecutor's] specific allegations." *See, for example*, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Pre-Trial Chamber I, Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf [hereinafter Mbarushimana]; *see also* Volker Nerlich, *The Confirmation of Charges Procedure at the International Criminal Court, Advance or Failure?*, 10 J. INT'L CRIM. JUST. 1339, 1343 (2012).

The hearing on confirmation of charges is an adversarial proceeding, in which the Prosecutor has the burden of proof of establishing a *prima facie* case, and the defense has the opportunity to counter the facts, law, and evidence presented against the accused. The accused can also present his or her own case. The Pre-Trial Chamber must consider testimony and evidence presented by the victims, who are allowed to take part in the confirmation of charges hearings. According to the ICC, during these proceedings, the Pre-Trial Chamber should "act as a check on the powers of the Prosecutor as regards his investigation and prosecution activities; . . . guarantee the rights of suspects, victims and witnesses . . .; and . . . ensure the integrity of the proceedings." *The Role of the Pre-Trial Chamber*, ICC Newsletter, (International Criminal Court, The Hague, The Netherlands) Oct. 2004, at 4, *available at* http://www.icc-cpi.int/NR/rdonlyres/4E898258-B75B-4757-9AFD-47A3674ADBA5/278481/ ICCNL2200410_En.pdf. After the Pre-Trial Chamber has concluded the hearing, it must render its decision as to whether to confirm the charges within 60 days. The Rome Statute provides that the Pre-Trial Chamber can confirm the charges, decline to confirm them, or adjourn the proceeding and invite the Prosecutor to produce more evidence or seek to amend the charges. *See* Rome Statute, *supra*, arts. 19, 53, 61.

7 The cases that have reached the Proceedings on the Confirmation of Charges at the Pre-Trial Chamber thus far are: Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I, Jan. 29, 2007) [hereinafter Lubanga]; Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber I, Sept. 30, 2008) [hereinafter Katanga]; Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Confirmation of Charges (Pre-Trial Chamber II, June 15, 2009) [hereinafter Bemba]; Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, Decision on the Confirmation of Charges (Pre-Trial Chamber I, March 7, 2011) [hereinafter Nourain]; Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision Adjourning the Hearing on Confirmation of Charges Pursuant to Article 61(7)(c) (Pre-Trial Chamber I, Feb. 8, 2010) [hereinafter Garda]; Mbarushimana, *supra* note 6; Prosecutor v.

Chambers (alternatively, "the Chambers") have exercised their gatekeeping functions by adopting a proactive approach to decision-making, engaging with the legal and factual issues presented by the parties, setting guidelines, and answering as many questions or open issues as possible before a case proceeds to trial. With this approach, the Pre-Trial Chambers have consistently shaped the course of all the cases that have come before the ICC. As a result of their eagerness to address proactively all issues and the strategic manner of their engagement, the Pre-Trial Chambers have elevated the importance of the pre-trial phase at the ICC far beyond its equivalent at other international criminal tribunals and in most domestic criminal systems.

The Article is developed in three sections. Section II sets the stage by defining the term "proactive" as it is used in the context of this Article. Section III examines the scope of the Pre-Trial Chambers' decision-making, arguing that the Chambers have proactively engaged with all issues across the spectrum of international criminal law. The analysis focuses on their decisions in the four main legal categories of actus reus, modes of liability, mens rea, and evidence. Through the use of three examples, Section IV explores how the Chambers express their proactive decision-making differently with respect to each legal issue by responding to the clarity, or lack thereof, of international criminal law. The Article concludes by illustrating how their proactive stance has elevated the importance of the pre-trial phase in the case against Gbagbo.

II. PROACTIVE PRE-TRIAL CHAMBERS

The ICC's legal documents specify that a Pre-Trial Chambers can only send an accused to trial on a specific charge after it is satisfied that there is "sufficient evidence to establish substantial grounds to believe" that the accused committed the alleged crime.[8] However, the legal documents offer no guidance as to how the Chambers should make this determination. Neither the Rome Statute, the ICC's Rules of Procedure and Evidence, nor the precedent of past international criminal tribunals details *how,* or *to what extent,* the Pre-Trial Chambers are to determine whether there is "substantial evidence" to confirm a

---

Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges (Pre-Trial Chamber II, Jan. 23, 2012) [hereinafter Muthaura]; Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges (Pre-Trial Chamber II, Jan. 23, 2012) [hereinafter Ruto]. All ICC cases, including pre-trial rulings, are available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.

8 Rome Statute, *supra* note 6, arts. 5, 7.

charge, check the powers of the Prosecutor, or ensure the integrity of the proceedings.[9]

Despite this uncertainty or perhaps because of it, the Chambers have consistently taken a *proactive* approach to decision-making. The confirmation hearings have demonstrated that they will not simply decide whether the charges sought by the Prosecutor are legally sufficient, but will actively engage with each issue raised by the parties. In many cases, the Chambers' decisions have significantly altered the Prosecutor's theory of the case and the charges brought against an accused.[10]

The term "proactive" is not commonly used to describe the judiciary, but it captures the forward-looking, engaged role that the Pre-Trial Chambers have been playing.[11] Merriam-Webster defines "proactive" as "controlling a system by making things happen or by preparing for possible future problems" or "acting in anticipation of future problems, needs, or changes."[12] The term should not be confused with the "activist" label, which is often used pejoratively to describe a type of judge who tends to rule based on personal or political considerations rather than on existing law.[13] Nor is proactive judging the same as "managerial" judging. The latter denotes the situation where the "court takes over significant substantive aspects of the litigation ordinarily left to the parties to manage" and performs administrative functions to keep the litigation on track.[14]

A proactive judge does not cursorily decide issues but puts great effort into establishing appropriate standards, laying out rules for the future, and seeking to

---

9 *See* Rome Statute, *supra* note 6, art. 61; Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A), 121–29, http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf; Regulations of the Court, Doc. No. ICC-BD/01-01-04, at 53 (May 26, 2004) *available at* http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf [hereinafter ICC Rules].

10 *See, for example*, Katanga, *supra* note 7, ¶¶ 469–71 (holding that, because the defendants were tried together as principals, there was no value in an accessory charge).

11 *See* Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice*, 25 CONN. J. INT'L L. 243, 276–78 (2010) (arguing that "proactive"—as opposed to "reactive"—refers to "the enhanced engagement of the judge with the evidentiary process and trial management [in the Pre-Trial Chamber] . . . . [T]he judge engages more frequently and directly with the witness. . . . [Before trial], a high level of intervention and engagement from the bench often redresses some of the obstacles to the smooth progression of proceedings and the development of an effective trial record").

12 Proactive, *Merriam Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/proactive (last visited Sept. 24, 2011).

13 *See* BLACK'S LAW DICTIONARY 922 (9th ed. 2009) (defining "judicial activism" as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions").

14 Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 164 (2012). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

achieve internal consistency and a cohesive jurisprudence. This Article demonstrates how, in each of their decisions thus far on whether to confirm the charges brought by the Prosecutor, the Pre-Trial Chambers have carefully evaluated and weighed the evidence presented and actively applied the relevant law sua sponte, thereby reshaping aspects of the Prosecutor's case. The use of the term "proactive" aims to precisely capture this deliberate and consistent involvement with all aspects of the case. The fact that the Chambers have engaged with the law in the cases presented may not be surprising, but the extent of their proactivity is unprecedented.

As of April 2014, the Pre-Trial Chambers have completed eight hearings against fourteen individuals charged with a total of eighty-two counts. The charges against four individuals were dismissed in their entirety.[15] The remaining ten individuals were originally presented with forty-eight charges, which the Chambers whittled down to thirty-eight.[16] While it is difficult to establish a causal connection between the Chambers' proactive approach and the Prosecutor's forty-six percent success rate, it is easy to see that the former has shaped, if not determined, the issues within and the scope of the remaining charges that proceed to trial. As the next section illustrates, the proactive stance of the Chambers largely determines the contours of ICC cases before the trial phase begins.[17]

---

15 Charges were not confirmed against: Bahar Idriss Abu Garda, see Garda, *supra* note 7, ¶ 236 (Chamber I); Callixte Mbarushimana, see Mbarushimana, *supra* note 6, at 149 (Chamber I); Henry Kiprono Kosgey, see Ruto, *supra* note 7, at 138 (Chamber II); and Mohammed Hussein Ali, see Muthaura, *supra* note 7, at 154 (Chamber II). Pre-Trial Chamber I initially adjourned Laurent Gbagbo's confirmation proceedings, see generally Decision Adjourning the Hearing, *supra* note 3, but then confirmed the charges a year later, see generally Decision on the Confirmation of Charges, *supra* note 2, at 131.

16 All charges were confirmed against: Thomas Lubanga Dyilo, *see* Lubanga, *supra* note 7, at 156–58 (Chamber I); Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, *see* Nourain, *supra* note 7, ¶¶ 163–64 (Chamber I); and William Samoei Ruto and Joshua Arap Sang, *see* Ruto, *supra* note 7, at 138 (Chamber II) (confirming all six total charges against Ruto and Sang but declining to confirm any charges against the third named defendant, Kosgey). Certain charges were confirmed and others declined against: Germain Katanga and Mathieu Ngudjolo Chui, *see* Katanga, *supra* note 7, ¶¶ 573–81 (Chamber I) (confirming charges of murder, willful killing, using child soldiers, targeting civilians, pillaging, and destruction of property as war crimes and crimes against humanity, but declining to confirm the charges of inhuman treatment and outrages upon personal dignity); Jean-Pierre Bemba Gombo, *see* Bemba, *supra* note 7, at 184–85 (Chamber II) (confirming five counts—including murder, rape, and pillaging—as war crimes and crimes against humanity, but declining to confirm the charges of torture and outrages upon personal dignity); and Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, *see* Muthaura, *supra* note 7, ¶¶ 428–30 (Chamber II) (confirming five charges—including murder, deportation or forcible transfer, inhumane acts, and persecution—but declining to confirm six other charges—including sexual violence; also declining to confirm any charges against the third named defendant, Ali).

17 *See, for example*, Katanga, *supra* note 7, ¶¶ 527–31 (asserting the unavailability of *dolus eventualis*); Bemba, *supra* note 7, ¶¶ 402–43 (describing the requirements of command responsibility).

In presenting the Pre-Trial Chambers' proactive approach, this Article does not hypothesize why the Chambers have adopted such an approach,[18] nor does it attempt to determine whether this is a positive development.[19] Instead, it seeks to describe the scope of, and identify patterns in, its expression, recognizing that the emergence of the proactive character of the Chambers is critical to understanding recent legal developments at the ICC, such as the stay of the Gbagbo proceedings.

III. THE SCOPE OF THE PRE-TRIAL CHAMBERS' PROACTIVE STANCE

This section presents examples of the Pre-Trial Chambers' proactivity in four main legal areas: actus reus, modes of liability, means rea, and the rules of evidence. These examples are only a sampling chosen to highlight the proactive manner of the Chambers' behavior, which spans across many cases and areas of the law. In an effort to achieve transparency in the classification employed, the dataset that accompanies this Article in Appendix 1 identifies the instances of proactive behavior in all of the decisions on confirmation of charges. In the spirit of the "Data Access Research Transparency" initiative in the social sciences, this list allows other scholars to examine the argument contained herein.[20]

A. Actus Reus

The records of the *travaux préparatoires* for the Rome Conference show that the drafters of the Rome Statute spent a considerable amount of time refining the elements of each individually charged criminal act or actus reus.[21] The Rome Statute provides a list of the required elements for each of the numerous offenses chargeable under it. With this guidance in mind, and in light of the fact that the ICC Pre-Trial Chambers were mandated to conduct only a pre-trial

---

18 *But see generally* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); BOB WOODWARD & SCOTT ARMOSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) (both providing an insider's story into the decisions of the US Supreme Court).

19 For a previous attempt to do so, see Nerlich, *supra* note 6, at 1354 (arguing that "[t]he track record of the ICC's confirmation process is . . . a mixed one").

20 See generally Arthur Lupia & Colin Elman, Openness in Political Science: Data Access and Research Transparency, 47 POL. SCI. & POLITICS 19 (2014).

21 *See* William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute 141–42 (2010).

review, few had any expectation that they would engage further with the law.[22] Yet, as this section illustrates, the Chambers' proactive approach has affected the determination of actus reus in ICC cases, at both the pre-trial and trial phases, and the emerging jurisprudence has definitively shaped the larger body of international criminal law.

The Chambers' proactivity is first exhibited in the "hands-on approach" that the judges have taken when defining each element of the actus reus charged. For example, one of the *chapeau* elements of a crime against humanity is that the actus reus targets "a civilian population."[23] In previous international criminal cases, this requirement incited long and complex arguments between the parties and the judges (echoed by international law academics and other commentators),[24] particularly when it came to its application to situations in which soldiers were present within a targeted civilian population.[25] Before the inception of the ICC, no decision had been conditioned on the per se nature of a targeted population.[26] By explicitly identifying particular victim groups, the Pre-Trial Chambers broke with this long history of using an indeterminate term. In the *Katanga* case, for example, the Pre-Trial Chamber specified that the victim group was the "civilian population of Bogoro."[27] In *Ruto* and *Muthaura*, the Pre-Trial Chamber went so far as to define the targeted group subject to crimes against humanity "by its (perceived) political affiliation."[28] There was no need for the pre-trial judges to change the requirements for crimes against humanity in such a drastic and specific manner, nor was there any expectation that they would do so.

Beyond adding nuance to each actus reus element, the Pre-Trial Chambers, in perhaps their most famous example of proactive decision-making, refused to permit the practice of cumulative charging, which had been used extensively at prior international tribunals.[29] Cumulative charging occurs when an accused is charged simultaneously with more than one crime on the basis of the same set

---

22 *See, for example, id.* at 734 (noting how the "'[t]he confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial").

23 Rome Statute, *supra* note 6, art. 7.

24 *See, for example*, Alexander Zahar & Göran Sluiter, International Criminal Law 205–09 (2007); Gerhard Werle, Principles of International Criminal Law 221–24 (2005).

25 *See, for example*, Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, ¶¶ 635–44 (Int'l Crim. Trib. for the Former Yugoslavia (ICTY) May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf [hereinafter Tadić Trial Judgment].

26 *See* discussion and sources cited *infra* notes 138–52.

27 Katanga, *supra* note 7, ¶ 404.

28 Ruto, *supra* note 7, ¶ 164; Muthaura, *supra* note 7, ¶ 110.

29 *See* Bemba, *supra* note 7, ¶¶ 199–205.

of factual allegations. Affirmatively breaking with the jurisprudence of other international criminal tribunals, the ICC's Pre-Trial Chambers have only permitted cumulative charging when the charges include different material elements. In *Ruto,* for example, Pre-Trial Chamber II held that murder, deportation, and forcible transfer were distinct charges from that of persecution.[30] Although murder, deportation, and forcible transfer stemmed from the same events as the persecution charge, they include different material elements and thus could be cumulatively charged. In contrast, that same Chamber determined in *Bemba* that the Prosecutor had acted inappropriately by bringing "cumulative charges" based on the act of rape. In that case, the torture charge—based on rape as a crime against humanity—was considered cumulative with the charge of rape as a crime against humanity. Additionally, the charge of outrages upon personal dignity as a war crime—based on rape—was considered cumulative with the charge of rape as a war crime.[31]

The significance of the departure that the ICC's Pre-Trial Chambers made in rejecting cumulative charging can only be appreciated when viewed against the holding of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Čelebići* trial.[32] In *Čelebići,* the ICTY Appeals Chamber—not during the pre-trial phase, but after a full trial—allowed multiple charges against an accused. However, "multiple criminal convictions entered under different statutory provisions but based on the same conduct [we]re permissible only if each statutory provision involved has a materially distinct element not contained in the other."[33] If this test was not met, then the ICTY had to decide "in relation to which offence it w[ould] enter a conviction,"[34] with priority given to the more specific crime. Perhaps most importantly for this discussion, according to the ICTY, "cumulative charging [wa]s to be allowed in light of the fact that, *prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven.*"[35] Taking a proactive approach and prohibiting cumulative charging before trial signaled the Chambers' intention to provide definitive guidance for future cases, as well as a shift in understanding what should be proven at the pre-trial stage. As a result, the Chambers have not

---

30 *See* Ruto, *supra* note 7, ¶¶ 280–81.

31 For a critique of this ruling, see generally Fiona O'Regan, Prosecutor vs. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism, 43 GEO. J. INT'L L. 1323 (2012).

32 Prosecutor v. Delalic, Mucic, Delic and Landžo, Case No. IT-96-21-A, Appeals Judgment (ICTY Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf [hereinafter *Čelebići* Appeals Judgment].

33 *Id.* ¶¶ 412–13.

34 *Id.* ¶ 413.

35 *Id.* ¶ 400 (emphasis added).

only abruptly ended the practice of cumulative charging but also established that, for similar underlying acts, important distinctions exist from the pre-trial phase onwards. The best illustration of these distinctions comes from the Chambers' rulings on the different material elements required to confirm a charge of rape as a war crime,[36] rape as a crime against humanity,[37] rape as a form of torture,[38] sexual slavery,[39] and other forms of sexual violence,[40] all of which often stem from similar facts.

Finally, the Chambers' proactive stance on actus reus takes the form of sua sponte decisions to amend the charges themselves when the pre-trial judges find the charges lacking at the confirmation hearing, which differs markedly from the Rome Statute's instruction to adjourn the hearing under such circumstances.[41] In *Lubanga*, the Pre-Trial Chamber found that the relevant conflict was initially of a non-international character but that it had become international in its later months.[42] It thus amended the charges sua sponte to add a charge under Article 8(2)(b)(xxvi) of the Rome Statute, which criminalizes the conscription of children in wars of an international character.[43] Perhaps evincing some caution

---

36 *See* Mbarushimana, *supra* note 6, ¶ 164 (classifying rape as a war crime when committed by soldiers and militant rebels).

37 *See* Bemba, *supra* note 7, ¶ 164 (holding that rape as a crime against humanity must be committed in connection with a widespread or systematic attack against a civilian population).

38 *See id.* ¶ 204 (explaining that "the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration").

39 *See* Katanga, *supra* note 7, ¶¶ 342–53 (distinguishing the war crime of rape from the war crime of sexual slavery: for the former, the perpetrator must invade the victim's body by force, whereas for the latter, the perpetrator must exercise ownership over the victim and cause such victim to engage in any act of a sexual nature).

40 *See* Muthaura, *supra* note 7, ¶¶ 256–66 (finding that forcible circumcisions and penile amputations were not associated with sexuality, but with ethnic prejudices and cultural superiority, and thus do not constitute other forms of sexual violence).

41 *See* Rome Statute, *supra* note 6, art. 61.7(c).

42 *See* Lubanga, *supra* note 7, ¶¶ 235–37 (Chamber I). For a discussion of the events surrounding the Lubanga charging confirmation decision, see Nerlich, *supra* note 6, at 1344; *see also* Claire Knittel, *Reading between the Lines: Charging Instruments at the ICTR and the ICC*, 32 PACE L. REV. 513, 520 (2012). Additionally, note that the Pre-Trial Chamber in the Bemba case also sua sponte amended the charges. *See* Prosecutor v. Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing on Confirmation of Charges Pursuant to Article 61(7)(c) (Pre-Trial Chamber III, March 3, 2009); *see generally* Kai Ambos, *Critical Issues in the* Bemba *Confirmation Decision*, 22 LEIDEN J. INT'L L. 715 (2009).

43 The "facts and circumstances" are separate from the evidence and information used by the Prosecutor at confirmation hearings. New evidence and information can be presented at trial. *See, for example*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 15 OA 16, Judgment on Appeal from the Decision of the Trial Chamber I of 14 July 2009, ¶ 90 n.163 (Dec.

about adopting too active a role, the Pre-Trial Chamber in *Bemba* refrained from sua sponte including command responsibility under Article 28, but it adjourned the proceedings and directed the Prosecutor to make that specific change.[44] Deciding how the charges should be amended exceeds the bounds of the Rome Statute and demonstrates how the Pre-Trial Chambers seek to clarify what will and will not be permitted, preempting problems before they arise at the trial stage and setting important guidelines for the future.[45]

B. Mode-of-Liability Trends at the Confirmation of Charges Stage

The Pre-Trial Chambers' willingness to make formative jurisprudential decisions at confirmation hearings is also exhibited in their holdings on modes of liability. Instead of just confirming or rejecting the mode of liability chosen by the Prosecutor, the Chambers have established specific guidelines on this issue, which have determined the Prosecutor's more recent charging decisions and are likely to continue to have a significant influence in the future.

The first example of this innovative jurisprudence is the Chambers' development of the "control" theory of liability, which conditions criminal liability on an accused's control over the relevant crime that he or she is accused of committing.[46] Article 25 of the Rome Statue states that a person shall be criminally responsible within the ICC's jurisdiction if that person "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."[47] A direct perpetrator is thus someone who (i) commits a crime by himself ("as an individual"); (ii) commits the crime through the acts of a horizontal group ("jointly with another"); or (iii) commits the crime through the acts of vertical subordinates ("through another person").[48] This interpretation of Article 25(3)(a), however, was challenged in the *Katanga* confirmation hearing.[49] There, the Pre-Trial Chamber—agreeing with the Prosecutor—found that the Rome

---

8, 2009); Nerlich, *supra* note 6, at 1349; *see generally* Johan D. van der Vyver, *Time Is of the Essence: The In-Depth Analysis Chart in Proceedings Before the International Criminal Court*, 48 CRIM. L. BULLETIN 601 (2012).

44 *See* Bemba, Decision Adjourning the Hearing on Confirmation of Charges, *supra* note 42, ¶¶ 46–49.

45 *See* War Crimes Research Office, *Defining the Case Against an Accused Before the International Criminal Court: Whose Responsibility Is It?*, (Nov. 2009), http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_Defining_Case_Nov2009.pdf.

46 *See* cases discussed *supra* notes 7, 15–16.

47 Rome Statute, *supra* note 6, art. 25(3)(a).

48 Id.

49 *See generally* Katanga, *supra* note 7.

Statute allowed for an accused to be charged as a direct perpetrator of crimes committed through a person in control of the accused's criminal partner. By reading the conjunction "or" inclusively so as to allow commission of crimes both "jointly with another" *and* "through another person," the Pre-Trial Chamber attributed crimes to Katanga and Ngudjolo that were committed by each other's rival ethnic militias.[50] As a result, the Rome Statute is now understood to hold that a direct perpetrator is an individual who either (i) commits a crime by himself; (ii) commits the crime through the acts of a horizontal group; (iii) commits the crime through the acts of vertical subordinates; *or (iv) commits the crime through the act of vertical subordinates of the horizontal group.*[51] The latter category, created by the Pre-Trial Chamber in *Katanga*, has been used consistently by all ICC chambers ever since.

Adopting this additional mode of direct perpetration represents an important shift in international criminal law jurisprudence. The drafters of the Rome Statute did not contemplate that perpetration would include crimes committed jointly *and* through another.[52] The decision of the Pre-Trial Chambers in the aforementioned cases seems, therefore, to have increased the scope of direct perpetration.[53] Although this extension does not challenge widely accepted notions of moral liability,[54] as it imputes liability to the accused for criminal actions committed by subordinates of their co-perpetrators, it does seem to alter the designed hierarchy of the Rome Statute. Earlier commentaries on its provisions suggested that such actions would have been criminalized

---

50 Katanga, *supra* note 7, at 490–93. *See* Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 NW. J. INT'L HUM. RTS. 261, 266–67 (2009) (interpreting the decision to merge horizontal and vertical liability as "an effort to forge a distinct path for identifying the responsibility of principals among a plurality of perpetrators . . . [which] represents an important milestone in the development of the Court's early jurisprudence").

51 *See* Ambos, *supra* note 42, at 720 (explaining "a mixed horizontal-vertical relationship"); Rastan, *supra* note 50, at 264 (pointing out the "combin[ation of] two forms of commission under 25(3)(a)").

52 *See id.* at 428 ("[P]erpetration within the meaning of article 25(3)(a) covers three categories of offenders."); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 227 (4th ed. 2011) ("Article 25(3)(a) covers three categories of offenders."); Héctor Olásolo, *Developments in the Distinction Between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 339 (Carsten Stahn & Göran Sluiter, eds., 2009); *see generally* Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953 (2007).

53 Drafting history on this point is devoid of references to this mode of liability. *See* Jens D. Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 725 (2011) ("[I]t is unclear if the framers of the Rome Statute had this picture in mind when they crafted Article 25(3)(a) and its reference to 'jointly with another.'").

54 *See* Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 85–88 (2007) (discussing "the problem of equal culpability").

under aiding and abetting liability or under the catch-all provisions of accessorial liability.[55] The Chambers' innovation increases the Prosecutor's incentives to bring charges under this expanded notion of direct liability, as such charges are associated with longer prison sentences.[56]

The second innovation of the Pre-Trial Chambers that illustrates their proactive stance when it comes to modes of liability is their preference of confirming accessorial liability charges only pursuant to Article 25(3)(d) of the Rome Statute. This provision attributes liability to one who "in any other way contributes to the commission or attempted commission of such crime by a group of persons acting with a common purpose."[57] The contribution must be intentional and made either "(i) . . . with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court"; or "(ii) . . . in the knowledge of the intention of the group to commit the crime."[58] Article 25(3)(d) was drafted as a catch-all mode of accessorial liability, intended to serve as a fallback for those cases where one of the following was not a sufficient charging basis: direct perpetration; ordering, solicitation, or inducement; or aiding and abetting.[59]

The Chambers' preference for this mode of liability appears even more pronounced when one takes into consideration the gamut of cases at the ICC. Based on the evidence revealed in these cases, it is likely that the Chambers could have found sufficient evidence to sustain the two other types of accessorial liability (including ordering, solicitation, or inducement, as well as aiding and abetting).[60] However, even though all of the accused in these cases have been either politicians or warlords, the Chambers examined the mode of

---

55 *See* SCHABAS, *supra* note 21, at 436–37; SCHABAS, *supra* note 52, at 229–30; Werle, *supra* note 52, at 970–71.

56 *See* Rastan, *supra* note 50, at 269 ("So long as the principal to a crime bears more serious responsibility, prosecutorial charging policy will be steered towards that form of characterization.").

57 Rome Statute, *supra* note 6, art. 25(3)(d).

58 *Id.*

59 On the design of 25(3)(d) as a catch-all, see SCHABAS, *supra* note 21, 436–37; SCHABAS, *supra* note 52, at 229–30; Werle, *supra* note 52, 970–71.

60 For example, both *Ruto* and *Muthaura* resulted from the 2006 post-electoral violence in Kenya, and their facts appear to support a *prima facie* case of inducement to commit crimes against humanity. *See generally* Ruto, *supra* note 7; Muthaura, *supra* note 7. Similarly, *Garda* and *Nourain* both arose from attacks on AMIS peacekeepers in Darfur, Sudan and appear to support a *prima facie* case of ordering and aiding and abetting war crimes. *See generally* Garda, *supra* note 7; Nourain, *supra* note 7.

liability of ordering or directing the commission of crimes in only one case, indicating their strong preference for the catch-all category.[61]

A third mode-of-liability issue towards which the Pre-Trial Chambers have been proactive is the prohibition of alternative charges with regards to modes of liability. Similar to their refusal to allow cumulative charges to suffice for the actus reus, the Chambers have refused to confirm charges resting on alternative modes of liability yet concerning the same crimes. In *Bemba*, for the first time, an ICC Pre-Trial Chambers stated that it would confirm a charge against an accused under either a theory of direct perpetration, accessorial liability, or command responsibility.[62] Conceptually, this is a difficult distinction.[63] A military commander, for example, can himself kill, rape, and pillage, while also ordering his troops to do the same. According to the Chambers, however, the commander would only be prosecuted for his own actions or those of his troops. This distinction flies in the face of the *Aleksovksi* doctrine, endorsed by the ICTY, which would allow such a commander to be charged with two sets of crimes, one as a direct perpetrator for his actions and one as a commander for those of his subordinates.[64]

The Pre-Trial Chambers' activism with regards to the charged modes of liability has formatively shaped international criminal law in at least two regards. First, their expansive definition of direct liability and preference for the catch-all accessorial liability theory alters a theoretical basis of international criminal law. It is no longer possible to view all the provisions outlined in Article 25(3) as a

---

61 An exception to the above tendency, the only charge of accessorial liability falling outside the catch-all category appeared in the *Katanga* hearing, where the Prosecutor had charged the accused with ordering the crimes committed. We cannot draw any conclusions from this charge, however, because after the Pre-Trial Chamber found enough evidence to hold the accused persons liable as direct perpetrators, it did not examine the merits of accessorial liability. *See* Katanga, *supra* note 7, ¶ 471.

62 *See* Bemba, *supra* note 7, ¶¶ 342, 402. Command responsibility is understood as another mode of liability, not as a separate crime. *See* Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELB. J. INT'L L. 1, 3 (2012) ("Command responsibility in international criminal law [ ] is a mode of accessory liability and requires causal contribution.").

63 For similar conceptual difficulties surrounding command responsibility, see generally Nora Karsten, *Distinguishing Military and Non-military Superiors, Reflections on the Bemba Case at the ICC*, 7 J. INT'L CRIM. JUST. 983 (2009).

64 In the Aleksovski case, the ICTY Trial Chamber found Aleksovski guilty of the war crime of "violence inflicted on the Muslim detainees of Kaonik prison . . . [which] constitutes an outrage upon personal dignity . . . under Article 7(1) and 7(3) of the Tribunal's Statute" (that is, for both perpetration and command responsibility). *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, ¶ 228 (ICTY June 25, 1999), http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf.

systematic approach to the issue of liability.[65] Where confirmed charges vacillate between direct perpetration and indirect assistance (that is, between Article 25(3)(a) *or* Article 25(3)(d)), other modes of accessorial liability—which were designed to be structurally and conceptually prior to the catch-all provision of 25(3)(d)—are sidelined.[66]

The jurisprudence of the Pre-Trial Chambers has also impacted the international criminal law theory of Joint Criminal Enterprise (JCE),[67] foregrounding the oft-repeated question of whether JCE survived in the Rome Statute.[68] The first form of JCE liability (JCE I) requires that a group of people possess a shared intent to carry out a crime according to a common design, and the perpetrator must have made a significant and causal contribution to accomplishment of the common design.[69] Currently, certain instances of JCE I continue to be prosecuted at the ICC under provisions on direct perpetration jointly *and* through another (in other words, the *Katanga* approach). However, direct perpetration—under the control theory espoused at the ICC—requires an "essential contribution" to the crime,[70] which is a higher threshold than the "significant contribution" language of JCE I.[71] As a result, certain acts that

---

65 On systematic construction of Article 25(3), see Werle, *supra* note 52, at 974; Olásolo, *supra* note 52, at 351–58.

66 *See* Rastan, *supra* note 50, at 268 (arguing that the *Katanga* confirmation decision "create[s] an uneven balance between the provisions of Article 25(3), placing disproportionate reliance on the opening subparagraph while effectively rendering redundant (b)–(d) for the majority of the types of cases that will ever come before the ICC"); SCHABAS, *supra* note 21, at 436 ("Article 25(3)(d) seems destined to play a rather minor role in the work of the International Criminal Court, given the robust approach to article 25(3)(a).").

67 *See* Werle, *supra* note 52, 958–63 (concluding that "[c]ompared to the concept of joint criminal enterprise . . . the ambit of liability as a co-perpetrator is thus considerably narrowed, with regard to both the requisite *actus reus* and the requisite *mens rea*"); Olásolo, *supra* note 52, at 346–58 (explaining in detail how JCE is based on a subjective concept of liability, whereas joint control theory is predicated on an objective concept of liability).

68 Another important question concerns how the Rome Statute goes beyond JCE. In brief, perpetration under the Rome Statute requires a common plan with an element of criminality, but not necessarily aimed at the commission of the alleged crime. Under JCE, such a plan would not suffice for lack of common purpose to commit the crime. For a more complete discussion, see Olásolo, *supra* note 52, at 346–58; Werle, *supra* note 52, at 958–61; Ohlin, *Joint Intentions*, *supra* note 53, at 721–25.

69 *See* WERLE, *supra* note 24, at 122; Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 185–229 (ICTY July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf [hereinafter Tadić Appeals Judgment].

70 *See, for example*, Lubanga, *supra* note 7, ¶ 322; Rastan, *supra* note 50, at 265–66.

71 JCE is based on the common purpose doctrine, as opposed to the common control doctrine used at the ICC. *See, for example*, Olásolo, *supra* note 52, at 346–51.

would fall under JCE I will not meet the ICC criteria of perpetration and therefore require analysis under other modes of accessorial liability.[72]

It is even more difficult to imagine how the Pre-Trial Chambers will deal with facts supporting liability under JCE II—when an accused is aware of the criminal character of an action and acts with intent to further it (such as occurs in concentration camps, for example)—or JCE III—when an action by a group member is natural and foreseeable.[73] The "control" theory the Chambers use requires finding an essential contribution and seems to remove JCE II and JCE III from the available modes of liability at the ICC.[74] However, while facts that fall under JCE II and III are unlikely to satisfy the actus reus of ordering, soliciting, or inducing, or the mens rea of aiding and abetting,[75] they may still be criminalized under a theory of indirect assistance to a crime (under Article 25(3)(d)),[76] as its actus reus does not require an essential contribution.[77]

Therefore, although the Pre-Trial Chambers have taken important steps in JCE jurisprudence, there has not yet been a conclusive answer to the question of whether JCE can be used as a theory of liability at the ICC. The fact that the Chambers have taken up this issue, however, underscores how they conceive themselves not only as speaking to, and establishing, jurisprudence for the pre-trial phase of cases at the ICC, but also for the larger body of international criminal law.

C. Mens Rea Trends at the Confirmation of Charges Hearings

Similar to its provisions on the actus reus comprising each charge, the Rome Statute also strictly defines the possible mens rea of the accused, limiting the potential mental elements by which a crime can be committed: "unless

---

72 *See* Steffen Wirth, *Committing Liability in International Criminal Law*, *in* EMERGING PRACTICE, *supra* note 52, 329, 332–35.

73 *See* Ohlin, *Joint Intentions*, *supra* note 53, at 710–21.

74 *See id.* at 731–35 (analyzing the difficulty in prosecuting facts captured by JCE II and III, such as the concentration camp and deportation examples, under the control theory of perpetration in the Rome Statute).

75 *See* WERLE, *supra* note 24, at 127; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 162 (ICTY Mar. 24, 2000), http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf (holding that "it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal").

76 *See* Ohlin, *Joint Intentions*, *supra* note 53, at 721–25; Ohlin, *Three Conceptual Problems*, *supra* note 54, at 80, 85, 89–90; Werle, *supra* note 52, at 960; Olásolo, *supra* note 52, at 351 ("Article 25(3)(d) embraces a mode of liability that is closely akin to the doctrine of joint criminal enterprise.").

77 *But see* Ohlin, *Three Conceptual Problems*, *supra* note 54, at 89 (suggesting improvements to how the Rome Statute treats JCE by arguing that "Article 25(3)(d) should be rewritten so that it is clear that a substantial and indispensable contribution is required before criminal liability is invoked").

otherwise provided," a crime must be committed with both intent *and* knowledge.[78]

The Pre-Trial Chambers have emphasized when deciding whether to confirm charges that, pursuant to the Rome Statute, the combination of volitional and cognitive elements results in only two possible forms of mens rea. The first form, *dolus directus* of the first degree (or direct intent), attaches when the perpetrator "knows that the acts or omissions will bring about the objective elements of the crime, and undertakes such acts or omissions with concrete intent to bring about objective elements of the crime."[79] This is a high standard of liability that reflects clear intent to engage in the criminal conduct, and it is most often applied in cases where there is evidence of direct participation. In *Nourain*, for example, Pre-Trial Chamber I confirmed charges committed with the mens rea of *dolus directus* of the first degree for the crime of pillaging, when there was evidence that the two accused had personally participated in the looting of the African Union Mission in Sudan's (AMIS) material and equipment.[80]

Dolus directus of the second degree (or oblique intent) is the second form of mens rea that satisfies the cognitive and volitional element imposed by the Rome Statute. It "does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions."[81] In comparison to *dolus directus* of the first degree, the volitional element here is less pronounced than the cognitive element. The Chamber in *Nourain* found sufficient evidence under this standard to confirm charges against the two accused (Banda and Jerbo) for causing the death of AMIS peace observers, because the general evidence of the attack on the AMIS troops indicated that both accused were, at the very least, aware that killings would occur.[82] In all the

---

78 Gerhard Werle & Florian Jessberger, *"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law,* 3 J. INT'L CRIM. JUST. 35, 36 (2005) ("Article 30 codifies the mental element as a general requirement of individual criminal responsibility for the first time in international criminal law.").

79 Bemba, *supra* note 7, ¶ 358.

80 *See* Nourain, *supra* note 7, ¶ 137 (emphasizing the accused's culpability for "personally leading and participating in the attack").

81 Bemba, *supra* note 7, ¶ 359.

82 By way of background, note that Banda and Jerbo were rebel leaders of Zaghawa ethnicity accused of planning, preparing, and leading "a convoy of approximately 30 vehicles and armed with various types of weapons ('including 106 calibre weapons, dushkas, AK-47s, anti-aircraft weapons and rocket propelled grenades'), [which] launched 'a surprise attack' on the military observer group site established by the African Union [ ] Mission in Sudan." Nourain, *supra* note 7, ¶¶ 1–4 (internal quotation omitted). Ten AMIS peacekeepers "were shot and killed during the attack . . . two more died later from injuries sustained during the attack, and . . . at least other eight

cases so far, the Chambers have not confirmed any charge that did not include one of these two forms of mens rea.

Perhaps the most consequential of the Pre-Trial Chambers' decisions regarding mens rea, however, has been their decision to reject *dolus eventualis* (or subjective/advertent recklessness) as a potential mental state.[83] The Chambers have acknowledged that this form of mens rea—which arises when the perpetrator is "aware of the risk that the objective elements of the crime may result from acts or omissions, and accepts such outcome by reconciling with it or consenting to it"—was often used by the *ad hoc* tribunals.[84] In fact, the language initially used by the Chamber in the confirmation proceedings for the *Lubanga* case created the impression that *dolus eventualis* would also be applied at the ICC.[85] In a thorough and carefully reasoned opinion, once again indicating a desire to craft jurisprudence and guidelines for the future, the Pre-Trial Chamber in *Bemba* explained the limitations imposed by the Rome Statute on mens rea and definitively eliminated the possibility that *dolus eventualis* could be used as a permissible mental state. In subsequent cases, the Chambers have confirmed that reliance on *dolus eventualis* is "unfounded based on article 30" of the Rome Statute.[86]

The proactive nature of the Chambers' approach to mens rea questions also manifests in their treatment of the standard of knowledge. On the one hand, the *Bemba* decision corrected a textual mistake in the Rome Statute,[87] which had limited the definition of knowledge to "know" and "knowingly," seemingly excluding from the definition "knew" or "known."[88] On the other hand, the Pre-Trial Chamber—again in *Bemba*—interpreted the knowledge

---

AMIS peacekeepers personnel sustained severe injuries as a result of being shot at by the attackers." *Id.*

83 All international criminal courts and the majority of commentators equate *dolus eventualis* with recklessness. *See, for example,* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 168 (2003). In the literature on international criminal courts, there has been some disagreement regarding the equation of these two standards. *See, for example,* George P. Fletcher & Jens D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 553–55 (2005). The ICC, however, has stayed out of this theoretical debate and has continued to equate recklessness with *dolus eventualis*.

84 Bemba, *supra* note 7, ¶ 363 (defining *dolus eventualis* as "foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility," and clarifying that "had the drafters of the Statute intended to include dolus eventualis in the text of article 30, they could have used the words 'may occur' or 'might occur in the ordinary course of events' to convey mere eventuality or possibility, rather than near inevitability or virtual certainty").

85 *See* Ohlin, *Joint Intentions*, *supra* note 53, at 723, 732.

86 Ruto, *supra* note 7, ¶ 336.

87 *See* SCHABAS, *supra* note 21, at 473.

88 Bemba, *supra* note 7, ¶¶ 428–30.

requirements in Article 30 (general mental elements) and Article 28 (command responsibility) differently. It determined that, for the former, knowledge refers to an awareness of the occurrence of a result of the accused's own act.[89] For the latter (that is, Article 28 and command responsibility), because the accused is not a participant in the crime, knowledge means awareness that the actual perpetrator was committing the crime.[90] While this distinction has been the subject of academic criticism,[91] for the purposes of this Article, the key takeaway is the fact that the judicial bodies engaging in this detailed analysis are chambers that deal with *pre-trial* issues.

Despite these examples of proactive behavior, one might still argue that the Pre-Trial Chambers have not been as innovative or proactive when it comes to the mens rea of the accused as they have in other legal areas. When evaluating this argument, it is important to keep in mind that the ICC is the first international criminal tribunal to have published a list of the requisite mental elements of crimes.[92] Because the Rome Statute's express provisions are unique in this way, it is not unreasonable for the judges of the Pre-Trial Chambers to be more reticent to interpret their meaning in a divergent fashion. In their decisions, however, the Chambers have nonetheless demonstrated their proactive approach by carefully explaining their reasoning and describing how the Rome Statute ought to be applied, providing lessons for future cases.

D. Evidentiary Trends at the Confirmation of Charges Hearings

Article 61(7) of the Rome Statute establishes that the role of the Pre-Trial Chambers in confirming charges is to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged."[93] Under the ICC's Rules of Procedure and Evidence, the

---

89 Bemba, *supra* note 7, ¶ 356.

90 *See* Bemba, *supra* note 7, ¶ 429 ("[T]he Chamber considers that article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term 'knew,' requires the existence of actual knowledge. The second, which is covered by the term 'should have known,' is in fact a form of negligence."); *see id.* ¶¶ 87, 430–31.

91 *See, for example*, Ambos, *supra* note 42, at 720 (criticizing any such distinction as "plainly incorrect" and without "support in any (judicial or scholarly) authority"). Furthermore, the particular use of this distinction in the *Bemba* case introduced doubts as to its logic, as the accused was therein found to lack knowledge of the crimes as co-perpetrator but to possess knowledge of the same crimes as a commander. *See* Bemba, *supra* note 7, ¶¶ 430–31, 446.

92 *See* Werle & Jessberger, *supra* note 78, at 37 (noting that Article 30 "endeavors to give the mental element a uniform and consistent foundation").

93 Rome Statute, *supra* note 6, art. 61. The Prosecutor must file, at least 30 days before the hearing, a document containing the charges, which must set out the alleged facts as well as their legal

evidentiary rules applied are more relaxed than those applied at trial; the Prosecutor does not have to call witnesses and may rely on summaries of evidence; the suspect may object to the charges and challenge the Prosecutor; and victims are permitted to participate in the proceedings.[94] However, despite this relative laxity, the Chambers have carefully weighed and analyzed the evidence with a thoroughness not dictated by the Rules, again setting guidelines for future proceedings both at the pre-trial and trial stages.[95]

The ICC's Rules of Procedure and Evidence permit pre-trial judges, when deciding whether to confirm the charges against a suspect, to consider both direct evidence (such as testimony from an eyewitness to the charged crime) and indirect evidence (reports from national agencies, domestic intelligence services, newspapers and magazines, and video and/or audio recorded evidence).[96] Due to the enormous temporal and territorial scale of the crimes charged at the ICC and the amount of witnesses and documents involved, pre-trial judges often have to consider vast amounts of material that the parties claim is evidence. Nearly all of the decisions emphasize that "neither the Statute nor the Rules provide that a certain type of evidence is *per se* inadmissible," but neither is it *per se* admissible.[97] To be admitted, evidence must have some probative value and pass a threshold level of reliability.[98] Due to this lack of specificity in the Rules, the Chambers have not just ruled on admissibility of evidence when deciding whether to confirm charges but have sought to clarify what types of evidence will be admitted, for what reasons, and how that evidence will be weighed.

For example, there is no specific rule in the ICC's Rules of Procedure and Evidence as to how to determine whether evidence is authentic. The Pre-Trial Chambers have clarified, however, that both direct and indirect evidence will be presumed authentic and can be relied upon unless a party makes some

---

classification and may be amended up to 15 days before the hearing. Yet under Article 67(2), the Prosecutor must also disclose to the suspect before the hearing the "bulk" of all exonerating evidence in the Prosecutor's possession. *See, for example*, Nerlich, *supra* note 6, at 1342 (noting that the Prosecutor must show how each piece of evidence relates to the factual allegations).

94 *See* Nerlich, *supra* note 6, at 1343.

95 Both the Rome Statute and the Rules of Procedure and Evidence for the ICC are drafted in such a way as to leave room for the discretion of the judges. *See, for example*, Robert Heinsch, *How to Achieve Fair and Expeditious Trial Proceedings Before the ICC: Is It Time For a More Judge-Dominated Approach?*, *in* EMERGING PRACTICE, *supra* note 52, 479, 487 ("Since the Rome Statute and Rules of Procedure and Evidence are drafted in [sic] way that leaves room for the discretion of the judges, it will be in the hands of the first Trial Chambers and of course the Appeals Chamber to form the right amalgam between both systems.").

96 *See* Rome Statute, *supra* note 6, art. 69; Rules of Procedure and Evidence, *supra* note 9, at 21, 28.

97 Ruto, *supra* note 7, ¶ 62.

98 *See, for example*, *id.* ¶¶ 73–74; Mathaura, *supra* note 7, ¶¶ 85–86.

affirmative showing otherwise.[99] In *Lubanga*, for example, when it came to establishing the age of the alleged child soldiers (which is an element of the crime of using child soldiers), the Pre-Trial Chamber found that birth certificates, while the best means of proving age, are not the only means.[100] In that hearing, the Chamber allowed attestations corroborated by a child's testimony to substitute for birth certificates and carefully explained the reasons for doing so.[101] Similarly, the Chambers have frequently admitted reports published by non-governmental organizations (NGOs) over defense arguments that they contain unmitigated hearsay.[102] However, the Chambers have also noted that it is not sufficient for the Prosecutor to rely solely on a report published by an NGO to support the charge that a specific incident occurred.[103] In a similar vein, the Chambers have clarified for future litigants how to use anonymous evidence, which use is regulated under Articles 61(5) and 68(5) of the Rome Statute as well as under Rule of Evidence 81(4),[104] explaining that the ICC will permit anonymous evidence[105] and evidence derived from summaries of statements of people who testified before entities other than the ICC—even if those people did not consent to their use in ICC proceedings.[106] The Pre-Trial Chambers resolved to approach the use of anonymous hearsay evidence with caution and refrain from relying solely on it.[107]

If evidence is obtained in violation of the Rome Statute or in a manner contrary to internationally recognized human rights, it is inadmissible when the way it was obtained "casts substantial doubt on the reliability of the evidence" or

---

99 *See* Lubanga, *supra* note 7, ¶ 97.

100 *See id.* ¶ 114.

101 *See id.* ¶ 117.

102 *See, for example*, Muthaura, *supra* note 7, ¶¶ 137, 157 (using a report on gender-based violence during the post-election period in Kenya to corroborate the testimony of some of the Prosecution's witnesses and KNCHR and Human Rights Watch reports to corroborate other testimony); Mbarushimana, *supra* note 6, ¶¶ 77–78 (noting that documents from Human Rights Watch were relevant and had some probative value that was not outweighed by their prejudicial effect, and thus admitting them). Hearsay is "the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says." Chris Gosnell, *Admissibility of Evidence*, *in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 375, 389 (Karim A. A. Kahn et al. eds., 2010).

103 *See* Mbarushimana, *supra* note 6, ¶¶ 117–21.

104 *See* Muthaura, *supra* note 7, ¶ 90.

105 *See id.* ¶ 89.

106 *See* Ruto, *supra* note 7, ¶¶ 63–65.

107 *See* Katanga, *supra* note 7, ¶ 141; Lubanga, *supra* note 7, ¶¶ 101–103; Ruto, *supra* note 7, ¶ 293 (refusing to confirm the charges against Kosgey, as opposed to the other two accused, because all the Prosecutor could offer was uncorroborated anonymous witness statements).

the evidence's admission "would be antithetical to and would seriously damage the integrity of the proceedings."[108] Pre-trial judges have also sought to explain this directive, proclaiming that they will presume investigations carried out by national judicial and executive authorities to be in accordance with the legal provisions applicable in the relevant state. There is thus no burden on the Prosecutor to establish that impugned procedures were legal or that evidence was not obtained in violation of the Rome Statute or internationally recognized human rights.[109] In *Lubanga*, for example, the Pre-Trial Chamber noted that the mere fact of a Congolese court finding a search and seizure unlawful did not automatically preclude admission of that evidence, because the Pre-Trial Chambers are not bound by the decisions of national courts on evidentiary matters.[110] Absent an egregious human rights violation, such evidence will not be excluded.[111]

Similarly, after evidence has been deemed admissible, the Pre-Trial Chambers have proactively established guidelines on the weight to be accorded such evidence. Eyewitness testimony, for example, should be given the most weight when the witness is identified rather than anonymous.[112] Direct evidence, furthermore, has generally higher indicia of reliability and truthfulness than indirect evidence.[113] Consider the Chambers' wariness when it comes to weighing evidence proffered by interested witnesses. In *Mbarushimana*, for example, Pre-Trial Chamber I noted that a number of statements were given by former members of an armed group, some of whom had participated in the charged events. Mindful of the risks inherent in using such statements, it ultimately decided to weigh these statements as part of the totality of the evidence presented.[114] Similarly, in *Katanga*, it confronted witnesses who were originally suspects and had changed their testimony once no longer suspected, determining that it would consider this evidence but only with significant caution.[115] In both cases, the judges explained the factors that made them

---

108 Rome Statute, *supra* note 6, art. 69(1). *See* Mbarushimana, *supra* note 6, ¶¶ 61–63 (holding that breaking seals on the evidence bags does not constitute a violation of the Statute or internationally recognized human rights).

109 *See* Mbarushimana, *supra* note 6, ¶ 60.

110 *See* Lubanga, *supra* note 7, ¶¶ 69, 72–78 (finding that what had occurred was only a breach of a procedural rule and not a human rights violation).

111 *See id.* ¶ 86.

112 *See* Ruto, *supra* note 7, ¶¶ 231, 293.

113 *See id.* ¶ 70.

114 *See* Mbarushimana, *supra* note 6, ¶ 50.

115 *See* Katanga, *supra* note 7, ¶¶ 183–85, 214–18.

hesitate and were transparent about weighing the evidence—thus setting clear guidelines for the future.

Pre-trial judges have also consistently demonstrated their proactivity in evidentiary decisions involving the Prosecutor. The Rome Statute provides the model of a non-judicial prosecutor with wide latitude to conduct investigations and limited judicial supervision over those investigations. The judicial supervision incorporated into the Rome Statute is intended not to protect the rights of suspects but chiefly to ensure that the Prosecutor does not exceed his or her authority over states.[116] However, despite not having direct authority over the Prosecutor, the Pre-Trial Chambers have used the confirmation hearings to determine the scope and shape of the Prosecutor's cases and have been generally unwilling to rubber-stamp evidence it presents—in sharp contrast to pre-trial proceedings in domestic common law systems and prior international criminal tribunals. The Chambers have also been careful to underscore that they are not merely appendages of the Prosecutor but look closely at the evidence presented: "the Prosecutor 'must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [its] specific allegations.'"[117] In some cases, the Pre-Trial Chambers' decisions have gone so far as to openly critique the prosecution, as in *Mbarushimana*, where Chamber I bemoaned that the Prosecutor was "so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations."[118] It also warned the Prosecutor that it was concerned about the broad parameters of the case and whether the Prosecutor could muster enough evidence at trial to support the charges.[119]

The critical stance that the Pre-Trial Chambers have adopted when it comes to addressing defects in the Prosecutor's case is in line with the professed purpose of the confirmation hearings, namely to "protect[ ] the suspect against wrongful prosecution and ensuring judicial economy by allowing to distinguish between cases that should go to trial from those that should not."[120] The significance of these decisions for this Article is not so much the end result, but rather the care the Chambers take to clarify exactly what the various provisions

---

116 *See* Gosnell, *supra* note 102, at 217 ("The Pre-Trial Chamber is accorded a limited role in supervising investigations, directed primarily towards ensuring that the prosecutor does not exceed his or her authority.")

117 Ruto, *supra* note 7, ¶ 40.

118 Mbarushimana, *supra* note 6, ¶ 51.

119 *See id.* ¶¶ 110–13.

120 SCHABAS, *supra* note 21, at 740 (citing Lubanga, *supra* note 7, ¶ 37).

of the Rome Statute or the Rules of Evidence mean and how they will be employed in practice. These decisions also have ramifications beyond the pre-trial stage, containing broad pronouncements on how the ICC should view different types of evidence. In contrast with domestic common law courts and other international pre-trial bodies, the Chambers have shown a willingness to engage rigorously and critically with the Prosecutor's theory of the case and treatment of witnesses.

IV. HOW THE PRE-TRIAL CHAMBERS EXPRESS THEIR PROACTIVE STANCE

As the previous sections have demonstrated, the ICC Pre-Trial Chambers have consistently taken a proactive stance at the confirmation hearings, deviating from the traditional role that one might expect of a pre-trial judicial body. The scope of issues with which the Chambers have engaged is expansive. Instead of cursorily examining the material and leaving for trial the more complex legal or evidentiary issues, the Pre-Trial Chambers have actively shaped the law and subsequent proceedings at the ICC. Their proactive tendencies, however, are not expressed across all legal issues in the same way. The current case law instead suggests that, depending on the legal issue, the Chambers express their proactivity in either an argumentative, cautious, or dispassionate tone. As the three examples in this section illustrate, one can find a direct correlation between the Chambers' expression of their proactive behavior and the persuasiveness and clarity of international criminal law on the relevant issue.

While the Rome Statute's explicit provisions determine how pre-trial judges approach certain issues, not all of its provisions are clearly defined. On the one hand, it has been obvious from the inception of the ICC that *dolus eventualis* has no place at the Court: the text of the Rome Statute calls for intention and knowledge.[121] Moreover, the *travaux préparatoires* of the Rome Statute and various legal commentators have clarified that *dolus eventualis* is not part of the ICC's legal framework.[122] On the other hand, the Rome Statute, the *travaux préparatoires* and the Elements of the Crimes do not clarify, for example, whether the conjunction

---

121 *See* Rome Statute, *supra* note 6, art. 30; SCHABAS, *supra* note 21, 473–79.

122 *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Official Records*, U.N. Doc. A/CONF.183/13 (Vol. III), 30, 102, 150, 251, and 258 (detailing the ways an individual can be held liable, but not including *dolus evantualis*). For a helpful summary of the *travaux préparatoires* of the Rome Statute on this topic, see Bemba, *supra* note 7, ¶ 366.

"or" in Article 25(3)(a) (concerning direct perpetration of a crime) should be read in an inclusive or disjunctive manner.[123]

In rendering decisions, the Chambers have had to consider the fact that previous international criminal tribunals, international human rights courts, and national courts have also contributed to and developed the field of international criminal law. Despite a certain fragmentation, there are common holdings across most of these courts that have a persuasive effect on the proceedings at the ICC.[124] In prosecuting mass crimes, for example, there is strong precedent in favor of criminalizing the actions of associates and accomplices to such crimes.[125] Yet there are other legal issues that are not clearly defined, if defined at all, by international legal precedent. For example, national courts, international human rights courts, previous international criminal tribunals, NGOs, and academics have all treated differently the issue of victim participation in an international criminal trial.[126]

As the examples below illustrate, variation in the *manner* of the Pre-Trial Chambers' proactive engagement vis-à-vis each legal issue reflects this distinction between applying settled, express provisions and those with linguistic indeterminacy or unsettled content. Notwithstanding their proactivity, the Chambers have sought to preserve the clarity and stability of the law when both the Rome Statute and international precedent are in agreement. To the contrary, when neither the Rome Statute nor international precedent provides an answer to a particular legal issue, the Chambers have expanded the law and set clear guidelines for future litigants in doing so. For those issues that fall in between these two extremes—about which some, at times conflicting, legal guidance exists, either in the Rome Statute or other international precedent—the Pre-Trial Chambers have sought to refine and clarify the law with an eye toward preempting future legal developments. As a result, they adopt a dispassionate tone of analysis when maintaining the law, an argumentative tone of analysis when refining the law, and a cautious tone of analysis when expanding the law. The following sections provide illustrations of this approach.

---

123 *Compare* Rome Statute, *supra* note 6, art. 25(3)(a), *with Official Records*, *supra* note 122, at 30, 102, 150, 251, and 258.

124 *See* SCHABAS, *supra* note 21, at 435 (noting that, on issues of individual criminal responsibility, "the case law of the *ad hoc* tribunals will undoubtedly be influential and even persuasive").

125 *See, for example,* Tadić Appeals Judgment, *supra* note 69, ¶¶ 185–229; SCHABAS, *supra* note 21, at 421–42.

126 See generally Brianne N. McGonigle, Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court, 21 FLA. J. INT'L L. 93 (2009).

	Law is Clear	Law is Ambiguous	Law is Not Clear
Position of the Pre-Trial Chambers	Dispassionately maintain the law	Persuasively argue in favor of their position	Cautiously innovate the law
Example	Anonymous evidence	Cumulative charges	CAH population

A. The Law Is Clear—Analysis Reaffirms Dispassionately

One example of the Chambers' dispassionate approach to legally settled issues is their treatment of anonymous evidence at the pre-trial phase. The Prosecutor's use of anonymous evidence prior to the commencement of trial is regulated under Articles 61(5) and 68(5) of the Rome Statute as well as under Rule 81(4) of the ICC's Rules of Procedure and Evidence.[127] Taking these three provisions together, the Pre-Trial Chambers are instructed to balance the defendant's right to mount a meaningful defense, the need for a fair trial, and the Prosecutor's concern over witness and victim safety. The Chambers are further explicitly authorized, when necessary, to order "the non-disclosure of [witnesses'] identity prior to the commencement of the trial."[128]

Moreover, the Chambers have guidance on these issues in the form of international legal precedent on using anonymous evidence.[129] The ICTY, from its very first case, created a balancing test with four criteria to weigh in determining whether to permit or reject the use of anonymous witness statements.[130] The test was later reapplied and refined in the *Blaškic* case, the *Čelebići* case, and the *Kordić and Čerkez* case.[131] The European Court of Human

---

127 *See* Muthaura, *supra* note 7, ¶ 90.

128 ICC Rules, *supra* note 9, ¶ 30.

129 *See* MARK KLAMBERG, EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS: CONFRONTING LEGAL GAPS AND THE RECONSTRUCTION OF DISPUTED EVENTS 445–58 (2013).

130 *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 71 (ICTY Aug. 10, 1995), http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm (defining a four-part test for anonymous witness evidence: (i) judges are to observe the demeanor of the witness in order to assess reliability; (ii) judges must factor a witness's identity into the reliability calculus; (iii) the defense must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information; and (iv) the identity of the witness must be released when there are no longer security concerns).

131 *See* Prosecutor v. Blaškic, Case No. IT-95-14-T, Trial Decision on the Defence Motion for Protective Measures for Defence Witnesses (ICTY Sept. 30, 1998), http://www.icty.org/x/cases/blaskic/tdec/en/80930PM15084.html; Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Trial Decision on the Motions by the Prosecution

Rights (ECHR) has also approved this type of balancing.[132] In addition to these tribunals, national courts often permit judges to use their discretion when deciding whether to allow such anonymous evidence.[133]

The Pre-Trial Chambers of the ICC have largely hewn to the Rome Statute and the jurisprudence of national and international courts. In the first case heard by a Pre-Trial Chamber at the ICC, that against Thomas Lubanga Dyilo, the Chamber used the discretionary test employed by the ICTY for an evidentiary submission by the defense and in so doing laid out clear guidelines for future use of anonymous evidence at the pre-trial phase. In support of its conclusion, it mentioned the permissive stance of the Rome Statute and the Rules of Procedure and Evidence, a prior related decision of the ICC's Appeals Chamber, and some of the available ECHR jurisprudence.[134] All subsequent ICC cases dealing with such anonymous evidence have comported with this approach of the *Lubanga* case.[135] Yet in its analysis in *Lubanga*, the Pre-Trial Chamber maintained a matter-of-fact approach, stating the law and its holdings in a detached manner without seeking to solidify or expand upon this precedent through a deeper legal analysis. This detached approach, however, remains proactive because, as opposed to just following international criminal law

---

for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M" (ICTY Apr. 28, 1997), http://www.icty.org/x/cases/mucic/tdec/en/70925PM2.htm; Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Order for Protective Measures Sought at Trial for Confidential Defence Witnesses (ICTY May 5, 2000), http://www.icty.org/x/cases/kordic_cerkez/tord/en/00505PM512870.htm.

132 *See, for example*, Kostovski v. Netherlands, App. No. 11454/85, ¶¶ 31–32 (Eur. Ct. H.R. 1989), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57615 (considering how an anonymous witness affected the proceedings as a whole); Doorson v. Netherlands, App. No. 20524/92, ¶¶ 73, 76 (Eur. Ct. H.R. 1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57972 (finding that the questioning by counsel, who did not know the identity of the anonymous witness, and the questioning by the appellate judge, who knew the identity of the witness, sufficiently counter-balanced the threat of harm to the witness without jeopardizing the fairness of the trial as a whole; also holding that a conviction should not be based to a decisive extent on anonymous evidence); Van Mechelen and Others v. Netherlands, App. Nos. 21363/93, 21364/93, 21427/93, & 22056/93, ¶¶ 61–65 (Eur. Ct. H. R. 1997), *available at* http://hudoc.echr.coe.int/sites/ eng/pages/search.aspx?i=001-58030 (finding, on the whole, that a conviction on the basis of statements made by anonymous police officers was not fair).

133 *See, for example*, Waller v. Georgia, 467 U.S. 39, 50 (1984) (holding that a new trial would be required only if a new, public suppression hearing would result in suppression of material evidence not suppressed at the first trial); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 513 (1984) (holding that the trial judge should seal only parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected); Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others, (1994) 1 VR 84, 88 (Austl.); R. v. Watford Magistrates Court *Ex parte* Lenman, (1993) Crim LR 388.

134 *See* Lubanga, *supra* note 7, ¶¶ 100–102.

135 *See, for example*, Bemba, *supra* note 7, ¶ 50; Muthaura, *supra* note 7, ¶ 90.

precedent without explanation, the Chambers extensively describe what the law is and set clear guidelines for the future.

B. The Law Is Not Clear—The Chambers Innovate with Caution

On the other end of the legal spectrum, the Pre-Trial Chambers have had to deal with issues neither mentioned in the Rome Statute nor addressed by international or national criminal courts. In tackling such issues, they have consistently expanded the law, albeit incrementally and cautiously. A good example of this surfaces in their analysis of the term "any civilian population," one of the *chapeau* elements of crimes against humanity.[136] "The drafters in Rome . . . left the exact meaning of the term 'any civilian population' undefined."[137] Even though this term was "not novel" to the Rome Statute,[138] no decision had ever been issued in prior international criminal tribunals on the per se nature of a targeted population.[139] To the contrary, the ICTY found that any target civilian population had to be defined as an ethnic group;[140] at the International Criminal Tribunal for Rwanda (ICTR), further, the target civilian population was the Tutsi;[141] and at the Special Court for Sierra Leone as well as the Extraordinary Chambers in the Courts of Cambodia (ECCC), the target

---

136 *See* Rome Statute, *supra* note 6, art. 7.

137 Katanga, *supra* note 7, ¶ 399.

138 Bemba, *supra* note 7, ¶ 76.

139 *See* Tadić Trial Judgment, *supra* note 25, ¶ 635, 644 ("The inclusion of the word 'any' makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality. However, the remaining aspects, namely the definition of a 'civilian' population and the implications of the term 'population,' require further examination." In examining, however, the term 'population,' the ICTY held that "[t]he requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.").

140 *See, for example, id.* (discussing the required basis of ethnicity); Prosecutor v. Kvoćka et al., Case No. IT-98-30/1-T, Trial Judgment, ¶¶ 122, 790 (ICTY Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf (restricting the relevant target population to "Muslim[s] and Croat[s]").

141 *See, for example*, Prosecutor v. Ndindiliyimana, Bizimungu, Nzuwinemeye and Sagahutu, Case No. ICTR-00-56-T, Trial Judgment and Sentence, ¶ 140, 2133 (May 17, 2011), http://www.unictr.org/Portals/0/Case%5Cenglish%5Cndindiliyimana%5Cjudgement%5C110517_judgement.pdf.

population has remained undefined and has been referred to, respectively, as "the civilian population"[142] and "the entire Cambodian population."[143]

The ICC's Pre-Trial Chambers broke with this tradition of indeterminacy by identifying particular victim groups with respect to geography, nationality, and political affiliation.[144] In the *Katanga* case, the victim group was the "civilian population of Bogoro."[145] In the *Bemba* case, the group was defined as the "CAR [Central African Republic] civilians."[146] Finally, in both the *Ruto* and *Muthaura* cases, the Pre-Trial Chambers held that the protected group consisted of civilians supporting two rival political parties.[147] By clarifying this term, the Chambers expanded international criminal law in at least two ways. First, they moved towards ensuring that each term of the *chapeau* elements of crimes against humanity is properly defined. As part of this effort, they returned to considering an issue long buried in international criminal law, that of the nature of the protected group. This issue was first raised in a report filed by the UN Secretary General in the *Tadić* case[148] but had been sidelined in the subsequent years.[149] Second, by allowing crimes against humanity to cover the prosecution of supporters of political parties, the Chambers signaled that the law could cover other, specific civilian groups.

Nevertheless, the Chambers were somewhat cautious in expanding the law on this issue. This reluctance notably resulted in a lack of legal reasoning as to why the pre-trial judges decided to focus on the type of protected population.

---

142 Prosecutor v. Sesay, Kallon & Bao, Case No. SCSL-2004-15-PT, Corrected Amended and Consolidated Indictment, ¶ 17 (Trial Chamber, Aug. 2, 2006), http://www.rscsl.org/Documents/Decisions/RUF/617/SCSL-04-15-T-619.pdf [hereinafter Sesay].

143 Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶ 325 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf ("[T]he attack was directed at the entire Cambodian population and did not differentiate between military and civilian personnel. Crimes against humanity were therefore committed against a collectivity of persons.").

144 It is interesting to note that this indeterminacy was not always taken as given. The U.N. Secretary-General, in his report on the ICTY's Tadić case, noted that that the civilian population has to be targeted "on national, political, ethnic, racial, or religious grounds." While disagreeing with the discrimination requirement proposed by the Secretary-General, the Tadić Appeals Chamber also noted the presence of such discriminatory grounds in most attacks against civilian populations; it did not define the targeted population. *See* Tadić Appeals Judgment, *supra* note 69, ¶¶ 294–97.

145 Katanga, *supra* note 7, ¶ 129.

146 Bemba, *supra* note 7, ¶¶ 93–99.

147 *See* Ruto, *supra* note 7, ¶ 173; Muthaura, *supra* note 7, ¶ 144.

148 *See* Tadić Appeals Judgment, *supra* note 69, ¶ 294 (noting that the civilian population has to be targeted "on national, political, ethnic, racial, or religious grounds").

149 This issue was also part of the *Barbie* case in France, where the protected civilian population was found to include the French resistance. *See* Cour de cassation [Cass.][supreme court for judicial matters], Dec. 20, 1985, Bull. crim. 1985 No. 407, 85–95, 166.

Instead of explaining why they defined the nature of the protected group, the pre-trial judges seem to have taken for granted the need for this definition, despite the novelty of expanding the law in this area—especially of a pre-trial judicial body doing so. This is not to say that the Chambers have not carefully explained their new definition. In the Kenyan cases, for example, where the use of this definition has perhaps been the most innovative, they carefully analyzed why the protected groups are defined in terms of politics and not ethnicity.[150] However, by grounding their explanations in the facts and not delving into extensive legal analysis, the Chambers limited the novelty of their holding to an incremental innovation on, rather than a radical departure from, existing precedent.

C. The Law Is Ambiguous—Persuasive Analysis

In contrast with this cautionary expansion, the Pre-Trial Chambers have taken an argumentative approach to an issue when there is only partial legal guidance. In these situations, the Chambers' decisions often read more like legal briefs in which the judges seek to convince others of their analysis, once again underscoring the proactive character of their decision-making and the role that they see for themselves. The Chambers' position on the issue of cumulative charging demonstrates the persuasive tone of the judges' reasoning on issues about which they have only partial legal guidance.

The text of the Rome Statute alone does not indicate to the Prosecutor whether the ICC would permit cumulative charging.[151] Despite the Statute's silence, by the time the Prosecutor charged Jean-Pierre Bemba, the prior international criminal tribunals had long allowed cumulative charging.[152] For these tribunals, there was a practical necessity in allowing cumulative charges on the indictment, as a particular charge could only be determined after presentation of all the evidence at trial.[153] As a result, under Article 18 of each of

---

150 *See* Ruto, *supra* note 7, ¶¶ 161–221 (distinguishing between ethnic groups and political supporters while acknowledging strong overlap); *see also* Muthaura, *supra* note 7, ¶¶ 115–229.

151 *See* Attilla Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 MELB. J. INT'L L. 1, 30 (2002) (arguing that the ICTY Statute "does not address the issue of *concursus delictorium*" and that the Rome Statute "fail[s] to address the overlap between the elements of genocide, crimes against humanity, and war crimes").

152 See generally Nisha Valabhji, Cumulative Convictions Based on the Same Acts under the Statute of the ICTY, 10 TUL. J. INT'L & COMP. L. 185 (2002).

153 *See Čelebići* Appeals Judgment, *supra* note 32, ¶ 400 ("Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may

the ICTY and the ICTR Statutes, their Prosecutor felt free to bring cases with cumulative charges, a practice that was approved by their Appeals Chamber in, for example, the *Čelebići* case.[154] In addition, the indictments in Sierra Leone—such as the one against Sesay, Kallon, and Gbao—also included cumulative charges.[155]

However, the Pre-Trial Chamber in *Bemba* was aware of dissenting voices on cumulative charging. In one case, the ICTR Trial Chamber had found the practice of cumulative charges "improper and untenable" in law.[156] At the ICTY, the trial judges hearing the high profile case against General Krstić also had acknowledged that there were good reasons to limit the practice of cumulative charging: "[i]f the issues are clarified and narrowed at the outset, it may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient," and may "aid the defendant in the preparation of his case to know which charges will ultimately be considered."[157] Finally, academic commentaries had raised important concerns with the practice of cumulative charging.[158]

In its first decision on cumulative charging in *Bemba*, the Pre-Trial Chamber began by recognizing that the majority of international and national legal precedent permits cumulative charging.[159] It then, however, disagreed with that relative consensus and held that cumulative charging is allowed only when each of the offenses in question requires at least one additional material element not contained in the other offense. Borrowing the reasoning of the *Krstić* court, it justified this decision by pointing out that the "prosecutorial practice of cumulative charging is detrimental to the rights of the Defence because it places an undue burden on the Defence."[160] It also justified its position "as a matter of

---

be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.").

154 See id.

155 *See generally* Sesay, *supra* note 142.

156 Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Trial Judgment, ¶ 649 (May 21, 1999), http://www.unictr.org/Portals/0/Case%5CEnglish%5Ckayishema%5Cjudgement%5C990521_judgement.pdf.

157 Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Decision on Defence's Preliminary Motion on Form of the Amended Indictment Count, (ICTY Jan. 28, 2000), http://www.icty.org/x/cases/krstic/tdec/en/00128FI112421.htm.

158 See, for example, H.S. Wills, Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR, 17 EMORY INT'L L. REV. 341 (2003); Carl-Friedrich Stuckenberg, Multiplicity of Offences: Concursus Delictorum, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 559, 589 (Horst Fischer, Claus Kress & Sascha R. Lüder eds., 2001).

159 *See* Bemba, *supra* note 7, ¶ 200.

160 *Id.* ¶ 202.

fairness and expeditiousness of the proceedings."[161] This explanation would likely have been sufficient, but the Chamber did not stop there. It completed its argumentative analysis by distinguishing its holding from that of the other international criminal tribunals. Cognizant that the incompatible international precedent was based on the practical reasoning enunciated in the *Čelebići* trial, the Pre-Trial Chamber:

> recall[ed] that the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there [wa]s no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one w[ould] be retained by the Chamber.[162]

As the realities of the subsequent *Lubanga* trial demonstrated, this reasoning was speculative. Yet it allowed the Chamber to offer a coherent argument against the purported practical necessity of cumulative charging, thereby undermining the applicability of *Čelebići* and its progeny to ICC proceedings. By adopting such a ruling, the Chambers have also isolated the ICC from other international criminal courts on this topic. After the *Bemba* decision, other international tribunals continued to permit cumulative charges. For example, at the ECCC, the indictment against Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith included cumulative charges.[163] The Special Tribunal for Lebanon, on the basis of Lebanese criminal law, also allows for multiple charging in this manner.[164] Yet the persuasive argument of the ICC Pre-Trial Chambers has convinced some that the "restrictive approach to cumulative charging is to be welcomed."[165] Regardless of the validity of these opinions, the Pre-Trial Chambers' actions illustrate how—when faced with unsettled legal provisions—they will use their position as a pulpit, substantiating their analysis with persuasive arguments.

---

161 *Id.*

162 *Id.* ¶ 203.

163 Prosecutor v. Nuon, Ieng, Khieu & Ieng, Case No. 002/19-09-2001-ECCC-OCIJ, Closing Order and Indictment, ¶ 1613 (Office of the Co-Investigating Judges, Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/ documents/courtdoc/D427Eng.pdf.

164 Case No. STL-11-01/I, Interlocutory Decision on Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 272–301 (Appeals Chamber, Feb. 16, 2011), http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/f0936.

165 Ambos, *supra* note 42, 724.

V. CONCLUSION

The Pre-Trial Chambers' proactive approach once again emerged in Laurent Gbagbo's confirmation hearing. As Section I detailed, Gbagbo was initially neither acquitted nor confirmed for trial. Instead, the case against him was adjourned by Pre-Trial Chamber I. The proceedings lasted more than a year, until the pre-trial judges were finally convinced by the Prosecutor's supplemental evidentiary submissions to commit Gbagbo to trial.[166] The Chamber's decision to adjourn the proceedings, which delayed the trial for approximately one year, rested mainly on three holdings. These three holdings serve as an exemplar of both the consistently proactive approach that the Pre-Trial Chambers generally take and the three ways that they express this approach. The Prosecutor's case against Gbagbo centers on the perpetration of crimes against humanity in four instances. To strengthen its claim of a widespread and systematic attack, the Prosecutor at Gbagbo's confirmation hearing offered details of forty-one additional instances of attacks. As the Pre-Trial Chamber found, the "majority of them [we]re proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles."[167] Because these attacks were crucial to understanding the contextual elements of crimes against humanity, but were described with evidence that had "intrinsic shortcomings,"[168] the Pre-Trial Chamber could not make out the *chapeau* elements of the crimes against humanity with which Gbagbo was charged. Rather than dismissing the case without explanation based on the insufficiency of the evidence, the Chamber undertook proactively to summarize ICC case law and provide examples of what constitutes insufficient evidence. And, because international criminal law was clearly in its favor, the Chamber hewed to its consistent approach of dispassionately providing guidelines for classification and consideration of adequate evidence for the future.

The Chamber also criticized the Prosecutor's strategy of bringing cases before the conclusion of the investigation. The law on this issue is still not settled. Prior practice had favored such incremental approaches to prosecuting (with the Prosecutor gradually building its case on the road to the trial phase), but some recent dicta from the Appeals Chamber suggest that the Prosecutor ought to bring its strongest case from the beginning.[169] In the Gbago case, the

---

166 *See generally* Gbagbo, Decision on Confirmation, *supra* note 2.

167 Gbagbo, Decision Adjourning the Confirmation Hearing, *supra* note 3, ¶ 36.

168 *Id.* ¶ 31.

169 *See* Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04/-1/10 OA 3, Judgment on the Prosecutor's Appeal from Confirmation Decision, ¶ 44 (Appeals Chamber, May 30, 2012) ("[T]he investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this

Chamber, even though it had no obligation to comment on the quality of the Prosecutor's investigation, detailed its stance by stating that it "must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation."[170] Understanding that the law is not yet settled, it then argued in favor of its holding by pointing to the need for a speedy trial and for continuity in the presentation of the case (citing the Appeals Chamber decision).[171]

Finally, its decision to adjourn the confirmation hearing is the third example of the Pre-Trial Chamber's proactivity in *Gbagbo* alone. Even though the law and past practice were not clear on the requirements of adjourning the hearings, the Pre-Trial Chamber appeared eager to adjourn the proceedings so as to allow more evidence to be collected against the accused. Yet, in doing so, it exhibited caution by laying out specific requirements that have to be met for the hearings to proceed.[172] The Pre-Trial Chamber also explained why the case was being adjourned and imposed guidelines on the form the case should take if the Prosecutor wanted to proceed to trial.[173]

As a result of Pre-Trial Chamber I's proactive engagement with the *Gbagbo* case, the defendant was neither acquitted nor confirmed to trial, but awaited the Prosecutor's answers to the follow-up items identified by the Chamber relating to the contextual elements of crimes against humanity. A year later, in June 2014, and after the Prosecutor had satisfied the requests of proactive Pre-Trial Chamber I, the charges against Gbagbo were confirmed. Such proactive decision-making has influenced every case at the ICC and has elevated this pre-trial body to the forefront of international criminal justice. Because it is likely that this trend will continue, it is perhaps time for all parties to adjust their expectations regarding trials at the ICC by factoring the proactive "gatekeeper function of the Pre-Trial Chamber" into any trial preparation analysis.[174]

---

evidence to the Pre-Trial Chamber. Where the Prosecutor requires more time to complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits him to seek a postponement of the confirmation of charges hearing. If the evidence is found to be insufficient, article 61(8) of the Statute provides that the Prosecutor is not precluded from subsequently requesting the confirmation of charges on the basis of additional evidence.").

170 *See* Gbagbo, Decision Adjourning the Confirmation Hearing, *supra* note 3, ¶ 25.

171 For a critique of this argument, see Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c), ¶¶ 13–15 (Pre-Trial Chamber I, June 3, 2013) (Fernandez de Gurmedi, J. dissenting).

172 *See* Gbagbo, Decision Adjourning the Confirmation Hearing, *supra* note 3, ¶ 41.

173 *See id.* ¶ 44.

174 *See id.* ¶ 18.

APPENDIX I

Instances in which a Pre-Trial Chamber Was Proactive[175]

Case against	**Paragraphs**
Thomas Lubanga Dyilo	
Actus Reus	• 205–20 • 221–26 • 227–37 • 242–48 • 259–64 • 269–74 • 275–85 • 286–88 • 300–16 • 322–41
Mens Rea	• 349–60 • 361–65 • 366–67
Modes of Liability	• 151 • 320–21 • 343–48
Evidence	• 59 • 71 • 72–78 • 79–82 • 83–90 • 100–03 • 106 • 111–17 • 121-22 • 125 • 134–36 • 140–45

[175] For further discussion about the following cases and for their full citations, see *supra* sources cited in notes 6–7.

	• 157–63
Germain Katanga and Mathieu Ngudjolo Chui	
Actus Reus	• 238–41 • 248–52 • 266–70 • 287–94 • 310–14 • 329–30 • 342–44 • 357–60 • 366–71 • 380–83 • 394–400 • 430–32 • 439–40 • 449–54 • 461–64 • Dissent 27–29
Mens Rea	• 271–74 • 295–97 • 401–402 • 459–60 • 527–32 • Dissent 8–12 • Dissent 22
Modes of Liability	• 480–86 • 487–94 • 495–99 • 500–10 • 511–18 • 519–26
Evidence	• 71 • 75–78 • 89–99 • 104–06 • 112–13 • 118–20

	• 128–30 • 137–41 • 143–53 • 159–60 • 164–65 • 174–75 • 195 • 199 • 214–18
Jean-Pierre Bemba	
Actus Reus	• 75–81 • 82–83 • 84–86 • 87–88 • 131–34 • 151 • 162 • 171–72 • 197–203 • 211 • 217–19 • 220–23 • 224–37 • 246 • 266 • 307–12
Mens Rea	• 135–38 • 293–95 • 417–24
Modes of Liability	• 342 • 346–51 • 352–69 • 402–03 • 405–26 • 435–43
Evidence	• 29 • 37–39

	• 46 • 51 • 55–57 • 59–60 • 66 • 184 • 186
Bahar Idriss Abu Garda	
Actus Reus	• 27–34 • 64–84 • 85–89 • Dissent 3 • Dissent 7
Mens Rea	• 93-94
Modes of Liability	• 152–57 • 160–62
Evidence	• 36–43 • 53–54
Callixte Mbarushimana	
Actus Reus	• 35–38 • 82–85 • 88–92 • 148
Mens Rea	• N/A
Modes of Liability	• 270–87 • 288–89
Evidence	• 39–41 • 45–48 • 51 • 58–64 • 71–74 • 77–78 • 117
Abdallah Banda Abakaer Nourain and Saleh Mohammen Jerbo Jamus	
Actus Reus	• 27–28 • 31–38 • 58–61

	• 62–64 • 101–03
Mens Rea	• 65–67 • 105–06
Modes of Liability	• 95–99 • 124 • 128–29 • 136 • 138 • 140 • 150–53 • 159–60
Evidence	• 43–47
Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali	
Actus Reus	• 31–36 • 44–50 • 109–14 • 186–87 • 244 • 264–66 • 269–80 • 281–86 • 424–27 • Dissent 7–9 • Dissent 32–40
Mens Rea	• 411 • 415
Modes of Liability	• 296–97
Evidence	• 52–53 • 56–60 • 63–65 • 66–69 • 80–88 • 92 • 236

William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang	
Actus Reus	• 23–27 • 33–37 • 184–85 • 209–13 • 243–44 • 276–81
Mens Rea	• N/A
Modes of Liability	• 287–92
Evidence	• 40–43 • 44–48 • 49–53 • 59–61 • 73–76