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A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence

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Abstract

Negotiators of the Rome Statute of the International Criminal Court (ICC) did not intend the Pre-Trial Chamber (PTC) to act as a de facto investigating judge; rather, their intent was that the PTC ensure that the Prosecutor act responsibly and within well-defined limits. Several opportunities have arisen in the *Lubanga* case before the ICC's PTC and the Appeals Chamber to examine the Prosecutor's duty and performance in disclosing documentary evidence and the identities of witnesses at the pre-trial stage. International criminal tribunals necessarily must bridge the evidentiary magnitude of atrocity crimes with a pragmatic focus on one person's role. The PTC judge should aggressively narrow the charges and focus the Prosecutor on the requirement of minimal evidence to meet the sufficiency standard for the remaining charges, direct the Prosecutor to share existing and emerging evidence with the accused in a timely manner and not wait until 30 days prior to confirmation hearing, and use statutory power to ensure timely non-disclosure requests and determinations.

Key words

atrocity crimes; evidence; International Criminal Court; international criminal law; pre-trial chamber; pre-trial procedures

One of the more reliable constants of criminal procedure – domestic or international – is the discord between prosecutor, defence counsel, and judges over the timing and manner of disclosure of evidence to each of them. This is, and will be, no less true for the International Criminal Court (ICC). In this paper I examine some of the issues that have arisen in the Pre-Trial Chamber (PTC) and Appeals Chamber of the ICC on disclosure of evidence and offer some ideas on how to improve the overall procedure.

First, however, in order to emphasize the universality of the problem, I point to a very recent proceeding in the United States. On 29 June 2007, Federal District Court Chief Judge Mark L. Wolf in Boston filed an unusual disciplinary complaint against Assistant US Attorney Jeffrey Auerhahn for misconduct that 'required the release

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from prison of a capo [Vincent Ferrara] in the Patriarca family of La Cosa Nostra'.[1] That misconduct was Auerhahn's failure to turn over to defence counsel for Ferrara a police detective's handwritten memo recording a hit man's testimony that he fled Boston after he and another man killed a Mafia figure *without* Ferrara's permission. Ferrara was convicted after the same individual's testimony that Ferrara had ordered the murder and after Ferrara had pleaded guilty. He was serving a 22-year sentence, but Chief Judge Wolf ruled that he be released from prison in April 2005.

The Justice Department's Office of Professional Responsibility had concluded in a secret report that the memorandum included exculpatory information and should have been turned over. The Justice Department's public position, however, when it appealed Chief Judge Wolf's release order, has been that its lawyers had no duty to disclose the detective's memorandum because it contained no material information. The conflicting positions did not amuse Chief Judge Wolf, particularly after Auerhahn received only a secret mild reprimand from the US Attorney in Boston. Chief Judge Wolf wrote on 29 June, 'A mere secret, written reprimand would not ordinarily be a sufficient sanction for the serious, intentional, repeated and consequential misconduct by Mr. Auerhahn.'[2]

Nothing so serious appears to have arisen between the judges of the International Criminal Court and Prosecutor Louis Moreno Ocampo over the disclosure or non-disclosure of evidence. But the regular eruption of such miscarriages of justice in national courts, including in the United States, suggests that it is an issue that should remain in the forefront of serious examination by the ICC judges, particularly in the Court's early years of litigation. The front line of defence is the Pre-Trial Chamber.

1. Origins of the Pre-Trial Chamber

Among the origins of the Pre-Trial Chamber in the negotiations leading to the Rome Statute of the ICC was the US delegation's strong opposition to legislating *proprio motu* powers for the Prosecutor. The primary position of the United States at the start of the Rome Conference in June 1998 was to oppose a *proprio motu* prosecutor.[3] Despite gaining some support among governments for that position, the US delegation knew by the second week in Rome that it probably would not gain the necessary support for that position. Knowing that the *proprio motu* prosecutor had become a fait accompli in the negotiations, we knew that we needed to create an oversight mechanism to ensure that the Prosecutor would have to act responsibly and within well-defined limits. The US position morphed into strong support for a Pre-Trial Chamber that would regulate the Prosecutor's efforts – be they under *proprio motu* authority or in response to a state party or UN Security Council referral

1. Letter from Chief Judge Mark L. Wolf to Attorney General Alberto Gonzales, 29 June 2007, available at www.masslawyersweekly.com/archives/pdf/ma/07/letter2.pdf; letter by Chief Judge Mark L. Wolf to Constance Vecchione, Board of Bar Overseers, 29 June 2007, available at www.masslawyersweekly.com/archives/pdf/ma/07/letter.pdf.
2. A. Liptak, 'Federal Judge Files Complaint against Prosecutor in Boston', *New York Times*, 3 July 2007, A11.
3. See D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93 AJIL 12, at 15; D. J. Scheffer, 'Staying the Course with the International Criminal Court', (November 2001–February 2002) 35 *Cornell International Law Journal* 47, at 76, 81–2.

of a situation – to indict alleged perpetrators. In Rome, US negotiators seized every opportunity to strengthen the PTC's oversight powers of the Prosecutor. The PTC essentially would be the brake on Prosecutor's accelerator.

But negotiators (including in the US delegation) in Rome *did not seek* a PTC that itself would become the investigatory engine of the Court. That would have defeated the purpose underpinning the PTC and substituted activist judges for an activist Prosecutor. It also would have tilted the ICC too far in the direction of the type of civil law court that relies heavily on the role of an investigating judge and minimizes the prosecutor's functions. The balance was critical; the Prosecutor has to meet evidentiary standards and thresholds for warrants of arrest and indictments while the PTC stands as the reasoned gatekeeper, ensuring that the Prosecutor is not a zealot, that he or she proves reasonable or substantial grounds based on the evidence (depending on what is being sought), and that he or she stands on solid legal reasoning before the gate is opened by the PTC judges.

The PTC was never intended to be the trial chamber, where all relevant evidence is examined. The PTC has a limited but *vital* purpose that demands professional due diligence by the Prosecutor. The PTC stands primarily as a defendant-friendly chamber and a watchdog for compliance with due process requirements. The best-case scenario would have the Prosecutor using his or her discretion cautiously and responsibly and within the parameters set by the PTC, which itself acts within its statutory boundaries.

2. The context of atrocity crimes

Evidence of atrocity crimes (genocide, crimes against humanity, and war crimes)[4] collected by the Prosecutor with respect to a referred situation or in his capacity of a *proprio motu* prosecutor necessarily will far exceed the individual role of the accused. But the context of such atrocity crimes is vital to meeting the subject-matter jurisdiction of the ICC for a single prosecution. A significant magnitude of criminality must have occurred before the situation or *proprio motu* initiative merits ICC scrutiny. At this early stage of the investigative process, it is far too early for the relative convenience of 'stipulated facts' to smooth the way for individual prosecutions. The Prosecutor is compelled to compile a substantial quantity of evidence relating to the totality of crimes within the situation and then to present to the PTC the slice of evidence attributable to the accused along with enough of the larger body of evidence to satisfy jurisdictional requirements of the Rome Statute.

4. For an explanation of the term 'atrocity crimes', see D. J. Scheffer, 'Genocide and Atrocity Crimes', (2006) 1 *Genocide Studies and Prevention*, 229–50; D. J. Scheffer, 'The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law"', (2007) 2 *Genocide Studies and Prevention* 91. The purpose in using such terminology is to simplify the description of relevant crimes falling within the jurisdiction of the international and hybrid criminal tribunals and to avoid the errors that often occur when referring to only one category of crimes (e.g. genocide) when in fact the broader range of atrocity crimes (including crimes against humanity and war crimes) is the intended area of inquiry. This need for terminological accuracy and comprehensive application is particularly true for the International Criminal Court. The above-referenced articles explore this in depth, and critiques of my proposed terminology are published in the Spring 2007 issue of *Genocide Studies and Prevention* cited above.

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If evidence is viewed in isolation from the larger atrocity crimes – the situation – then the ICC will have no jurisdiction. The act would be a common crime suited to national court prosecution. For a warrant of arrest, there must be submitted to the PTC 'evidence and any other information which establish *reasonable* grounds to believe that the person committed those crimes'.[5] For confirmation of the charges, the Prosecutor must show that an atrocity crime was committed in which there is 'sufficient evidence to establish *substantial* grounds to believe that the person committed the crime charged'.[6] Depending on the atrocity crime and the situation that has been referred (or examined under *proprio motu* authority), the amount of evidence filed with the PTC could be overwhelming. In contrast to national prosecutions, it is, in no small measure, a different judicial landscape. Hence there is no perfect symmetry between the national and international procedures. One has to presume that the full extent of the accused's criminal conduct may not be discoverable, given the magnitude of the atrocity crimes framing the situation. The Court thus defers to the Prosecutor's discretion regarding which slice of the accused's conduct will be prosecuted, and how the larger purpose (leadership accountability for atrocity crimes and, indirectly, state responsibility for such crimes) will be achieved through such a prosecution.

3. A NEW METHODOLOGY?

Do atrocity crimes demand a modern methodology of evidence submission and evaluation in pre-trial stages? Probably. International criminal tribunals necessarily must bridge the evidentiary magnitude of atrocity crimes with a pragmatic focus on one person's role, including individual or command responsibility. The ICC Prosecutor should not need to conquer the world with each warrant of arrest or confirmation hearing.

A new methodology for the ICC, in particular its PTC, could arise from at least one of two options. The first option would be to amend the Rome Statute, perhaps as early as the anticipated 2009 Review Conference. The amendment could provide for the creation of an investigatory commission that would investigate any referred situation or *proprio motu* application with neutrality, objectivity, and unmatched expertise. Proponents of this option might argue that just because a state party, the UN Security Council, or *proprio motu* Prosecutor thinks a situation exists, this should not dictate whether it actually does as a matter of fact or law. In the former Yugoslavia, Rwanda, Cambodia, and Lebanon, investigatory expert commissions preceded the establishment or authorization of a criminal tribunal. But once the atrocity crime situation is confirmed through the work of such an investigatory commission, the ICC Prosecutor would narrow the search for evidence to individual suspects. The task would be immensely simplified if the Prosecutor could submit some form of stipulated facts drawn from the commission's report in order to establish the context

5. Rome Statute, Art. 58(2)(d) (emphasis added).
6. Ibid., Art. 61(5) (emphasis added).

for the indictments of individual alleged perpetrators. The PTC would examine a far smaller body of evidence with greater speed.

This first option, however, is highly unlikely to attract sufficient support among states parties and could become the wrecking ball of the Review Conference if it were to be introduced. If implemented through amendment to the Rome Statute and the Rules of Procedure and Evidence, the ICC would be transformed into a largely civil law mechanism rather than a more balanced integration of common law and civil law principles and procedures. Yet some scholars of the ICC are attracted to the notion.[7]

The second option, which could supplement the first option or, more likely, stand on its own, would operate from the existing statutory premise that the PTC requires a minimum amount of evidence showing 'reasonable grounds to believe that the person has committed' an atrocity crime before an arrest warrant would be issued or 'sufficient evidence to establish substantial grounds to believe that the person committed the crime charged' in order to confirm the charges. The accused is entitled, solely for confirmation hearings, to the same evidence, including any exculpatory evidence held by the Prosecutor,[8] 'as soon as practicable'.[9] The PTC judge would make full use of status conferences and the requirement that such conferences 'ensure that disclosure takes place under satisfactory conditions'.[10] The PTC judge would (i) aggressively narrow the charges and focus the Prosecutor on the requirement of minimal evidence to meet the sufficiency standard for the remaining charges; (ii) direct the Prosecutor to share existing and emerging evidence with the accused in a timely manner and not wait until 30 days prior to confirmation hearing;[11] and (iii) use his or her statutory power to ensure timely non-disclosure requests and determinations.[12]

The second option can become operational through an interpretation of Rule 121(3) as an invitation for the PTC judge, in status conferences, to press for the Prosecutor's earlier delivery of the description of charges and lists of evidence so that the defence counsel has a reasonable period of time in which to review charges and the evidence list. The same would be true regarding the defence obligation to submit lists of evidence under Rule 121(6). PTC judges who thus act aggressively, but within the limits of their authority, can help to ensure far greater efficiency and, indeed, accuracy in the presentation of the evidence.

4. The Cambodian experience

The newly created Extraordinary Chambers in the Courts of Cambodia (ECCC), which became fully operational in June 2007 with the adoption of its Internal Rules

7. See, e.g., W. Pizzi, 'Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals', (2006) 4(1) *Fairness and Evidence in War Crimes Trials*, Berkeley Electronic Press, available at www.bepress.com/ice/vol4/iss1/art4.
8. Rome Statute, Art. 121(3).
9. Ibid., Art. 67(2).
10. ICC Rules of Procedure and Evidence, Rule 121(2)(b).
11. The same principle would hold true for the person under investigation and the 15-day condition for disclosure set forth in Rule 121(6).
12. Rome Statute, Art. 57(3)(c).

(i.e. rules of procedure and evidence), offers an interesting example of how judicial intervention at the investigative stage has been institutionalized without adopting a full-fledged civil law model for an international or hybrid criminal tribunal.[13] The ECCC has a unique structure of two Co-Prosecutors and two Co-Investigating Judges. While the Co-Prosecutors (one Cambodian and the other international) prepare files on suspects, it is the Co-Investigating Judges (one Cambodian and the other international) who undertake the bulk of investigative work to determine whether the evidence meets the requirements for an indictment. If the indictment is approved by the Co-Investigating Judges, then the Co-Prosecutors proceed with the prosecution of the suspect. The Pre-Trial Chamber of the ECCC resolves disputes between Co-Prosecutors and between Co-Investigating Judges and it considers certain appeals from the orders of the Co-Investigating Judges;[14] it does not oversee and discipline the investigative work of either the Co-Prosecutors or the Co-Investigating Judges beyond the arena of internal disputes – which are unique to the ECCC because of its mixed composition of Cambodian and international staff.

The ECCC requires that the Co-Prosecutors essentially work with the Co-Investigating Judges to fulfil the entire investigative mandate of the pre-indictment and pre-trial phases of the proceedings, and it leaves the bulk of the investigative work in the hands of the Co-Investigating Judges. In theory this should produce an objective and balanced investigation which examines inculpatory and exculpatory evidence with equal, or at least properly balanced, efforts on the part of the Co-Investigating Judges. Internal Rule 55(5) states, 'In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.' So while the ECCC Law and Internal Rules do not give a Pre-Trial Chamber judge the task of investigating the evidence, they do designate the Co-Investigating Judges as undertaking what, in a civil law courtroom, would normally be the responsibility of the investigating judge. The difference, in the case of the ECCC, is that the Co-Prosecutors play critical roles prior to, sometimes during, and immediately after the 'neutral' investigation by the Co-Investigating Judges.

The ECCC experience demonstrates that there is a way, at least in theory and very soon perhaps in practice as well, for a fusion of common law and civil law in the pre-indictment phase of atrocity crime investigations. The ICC judges should monitor the ECCC proceedings very closely because the dynamic relationship between the Co-Prosecutors and the Co-Investigating Judges, and how the ECCC Pre-Trial Chamber resolves disputes during the investigations, should prove instructive for at least some of what the ICC Pre-Trial Chamber considers when reviewing the investigative work and disclosure of evidence by the ICC Prosecutor and by defence counsel.

13. See D. J. Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', in C. Bassiouni (ed.), *International Criminal Law* (2008, forthcoming); the documents of the Extraordinary Chambers in the Courts of Cambodia are available at www.eccc.gov.kh/english/default.aspx and www.cambodiatribunal.org.
14. ECCC Internal Rules, Rules 71–74.

5. Pre-Trial Chamber I's performance so far – restraint or overreach?

PTC I and the Appeals Chamber have already had a number of opportunities, in *The Prosecutor v. Thomas Lubanga Dyilo*, to handle issues pertaining to the disclosure of evidence in that case which doubtless will resonate in the future practice of the Court.

With considerable boldness, PTC I issued its first decision on 17 February 2005, in which it applied a broad interpretation to Article 57(3)(c) of the Rome Statute[15] and convened a status conference in order 'to provide inter alia for the protection of victims and witnesses and the preservation of evidence'.[16] The aim of the status conference, as directed by PTC I, was to accelerate the Prosecutor's investigation of the situation in the Democratic Republic of the Congo and to offer more protection for the rights of the defence. Such an aim, however, is a delicate one to achieve within the four corners of the Rome Statute and the Rules of Procedure and Evidence. The Pre-Trial Chamber's functions and powers are explicitly provided for in Article 57 of the Rome Statute, and additional powers are set forth in Articles 15(3), 19(6), 53(3)(a) and (b), 56(1)(b) and (3)(a), 58, 60(2), and 62. One scholar, Michela Miraglia, a lecturer at the University of Genoa, has described this basket of powers as showing that

> the role of the Pre-Trial Chamber is akin to an 'umpire' that should intervene only to a very limited extent in the merits of investigations and prosecutions. Moreover . . . it appears that the Pre-Trial Chamber, leaving aside the mentioned occasions when it can act on its own initiative, has mainly a 'passive' role – one related to very specific moments of the pre-trial phase – that has to be stimulated by a request submitted, or act performed by the Prosecutor (or the defence). By the same token, Article 57(3)(c) ICCSt. envisions very general *proprio motu* powers that the Pre-Trial Chamber can exercise over the course of the pre-trial phase, paving the way for a more active and 'interventionist' attitude, beyond the minimum limits specified by the other provisions of the Statute.[17]

The extent of the PTC's 'more active and "interventionist" attitude', however, is open to serious scrutiny, particularly in the light of the negotiators' intent, as already described, to create a PTC that would properly limit an overly ambitious Prosecutor from overreaching with his powers and check any zealotry in his investigations. PTC I in the *Lubanga* case appears to have focused on an opposite priority – how to spur the Prosecutor on to new investigative leads and, in a sense, stage-manage the pace and delivery of his investigative work so as to accelerate towards the trial. This is accomplished by interpreting Article 57(3)(c) to enable the judge to probe in a manner similar to an investigating judge in the civil law tradition. If fully implemented by the Pre-Trial Chamber at the ICC, such an interpretation and initiative would

15. Art. 57(3)(c) of the Rome Statute reads, '3. In addition to its other functions under this Statute, the Pre-Trial Chamber may: . . . (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.'
16. Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo (ICC-01/04), Pre-Trial Chamber I, 17 February 2005.
17. M. Miraglia, 'The First Decision of the ICC Pre-Trial Chamber', (2006) 4 *Journal of International Criminal Justice* 188.

stand on its head the original intent of the negotiators by substituting an activist PTC single judge for the activist Prosecutor feared during the Rome negotiations and thereafter, when negotiators further strengthened the PTC's *oversight* (contra *investigative*) powers in the Rules of Procedure and Evidence. Nonetheless, the activism of the PTC I single judge may be directed more often towards the interests of the defence and the persons under investigation, thus introducing a useful cautionary signal to the Prosecutor's investigatory efforts. The line between prudent oversight and activist interventionism has yet to be fully drawn, but PTC I certainly started drawing it on 17 February 2005.

In the *Lubanga* case, the PTC I single judge used the status conference as an interventionist weapon, relying on Article 57(3)(c) of the Rome Statute.[18] One might conclude that in the event the Prosecutor was inspired to seek Article 56 measures to seize a unique investigative opportunity relating to a forensic examination.[19] But an equally significant development was described by Miraglia in these terms:

> In trying to control the Prosecutor's work and appointing the 'counsel of the defence', i.e. utilizing the most protective measure among those listed in Article 56, Pre-Trial Chamber I showed great concern about the 'inequality of arms' during the investigation phase and its willingness to take care of the protection of defence rights, especially when the Prosecutor is working only on a 'situation', i.e., when a 'suspect' is not yet formally identified such that his or her counsel has not entered into the proceedings and cannot act as a 'watchdog'.[20]

Despite the logic that might underpin such an evaluation, it remains a huge leap for PTC I to intervene in the Prosecutor's discretionary power as the investigator of a situation and determine, from the judge's relatively detached vantage point, that the investigation should be intensified or accelerated or broadened.

The PTC I single judge examined and decided upon the final system of disclosure and the establishment of a timetable in an extraordinarily lengthy decision dated 15 May 2006.[21] In great detail the procedures for disclosure of evidence are set forth by the judge in a manner that almost serves as a supplement to the Rules of Procedure and Evidence. This particular decision doubtless will serve as a guide to all concerned in future proceedings. It does reflect, however, the instincts of an activist judge willing to dig deep into the investigative procedures and direct the parties as to how the evidence will be managed in the future rather than await their performance and judge accordingly.

On 4 October 2006 the PTC I single judge ruled against the Prosecutor, who had sought to prevent disclosure (by redaction) of certain information in a document of summary evidence to the defence in order to protect the identity of prosecution witnesses. PTC I held that to protect adequately the four prosecution witnesses

18. Decision to Hold Consultation under Rule 114, Situation in the Democratic Republic of Congo (ICC-01/04), Pre-Trial Chamber I, 21 April 2005.
19. Decision on the Prosecutor's Request for Measures Under Article 56, Situation in the Democratic Republic of Congo (ICC-01/04), Pre-Trial Chamber I, 26 April 2005.
20. See *supra* note 17.
21. Decision on the Final System of Disclosure and the Establishment of a Timetable, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06), Pre-Trial Chamber I, 15 May 2006.

whose safety would be threatened if identified (and who had not given consent to be identified), their statements and transcripts of their interviews and investigator's reports and notes had to be declared inadmissible for the purpose of the confirmation hearing, and in turn, the Prosecution could not rely on such evidence at the confirmation hearing. PTC I also held that other summary evidence would be admissible, except that summary evidence tied to the transcripts, interviews, and so on of the prosecution witnesses. Finally, PTC I ruled that the Prosecutor's duty to disclose exculpatory or even potentially exculpatory information remained enforceable.

The Appeals Chamber delivered a judgment on 13 October 2006 that in large part reversed some of the PTC I judge's bolder efforts to shrink the Prosecutor's discretionary powers in the investigative realm, particularly as to the duration of investigations.[22] At stake was the PTC I decision of 19 May 2006.[23] The Appeals Chamber confirmed PTC I's decision to require the Prosecutor to seek approval before restricting disclosure of names and/or portions of statements of witnesses on whom the prosecution intended to rely at the confirmation hearing. PTC I will need to evaluate the Prosecutor's request and the infeasibility or insufficiency of less restrictive means.

However, the Appeals Chamber reversed PTC I's decision of 19 May 2006, which had imposed the requirement that before the PTC considered the Prosecutor's request for non-disclosure of certain witnesses due to concerns for the witnesses' safety, the Prosecutor had (i) to seek protective measures from the Victims and Witnesses Unit, and (ii) to show that due to exceptional circumstances, non-disclosure remained necessary due to the infeasibility of protective measures. The Appeals Chamber found that such prior application by the Prosecutor to the Victims and Witnesses Unit for protection measures was not required by either the Rome Statute, the Rules of Procedure and Evidence (notably Rule 81(4)), or the Regulations of the Court as a prerequisite for an application for non-disclosure of the identity of a witness. The Appeals Chamber stressed that 'whether a request for non-disclosure will be successful will depend on the Pre-Trial Chamber's case-by-case evaluation'. The Appeals Chamber continued,

> [T]he Pre-Trial Chamber's decision that disclosure is the rule and non-disclosure is the exception cannot but be upheld because it can and should be read as allowing for a case-by-case evaluation of the merits of all future applications . . . [I]t is the duty of the Pre-Trial Chamber pursuant to rule 121(2)(b) of the Rules of Procedure and Evidence to hold status conferences 'to ensure that disclosure takes place under satisfactory conditions'. These provisions give the Pre-Trial Chamber important functions with respect to the regulation of the disclosure process prior to the confirmation hearing, which might involve, within the confines of the applicable law, the issuing of procedural directions to facilitate the disclosure process. These provisions, however, do not vest a Pre-Trial Chamber with the competence to pre-determine the merits of future applications for authorization of non-disclosure pursuant to rule 81(4) of the Rules of Procedure and

22. Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'. See *supra* note 21, Appeals Chamber, 13 October 2007.
23. *Supra* note 21.

> Evidence. It is fundamental to the exercise of judicial power that applications are adjudicated on a case-by-case basis.[24]

The Appeals Chamber also reversed PTC I's decision that redactions of statements (due to concern for witness identification and safety) would be temporary and in any event not maintained beyond 15 days, and that all future applications would be *inter partes* so that the defence might know of the application and its legal basis. The new rule established by the Appeals Chamber stipulates that the limitation of time for sustaining redactions of statements will apply only if the ongoing investigation into a matter is finished at the time of the confirmation hearing. The Appeals Chamber held that the Prosecutor's investigation certainly could extend beyond this time frame, so the Prosecutor should not be required to cut short the investigation by reason of being forced to disclose redactions.

Significantly, the Appeals Chamber prevented the PTC from hijacking a key component of the investigative process through an unrealistic rule that essentially would mandate that the entire process be terminated by the time of the confirmation hearing before the PTC. As the judges concluded,

> The Appeals Chamber is not persuaded by the Pre-Trial Chamber's interpretation of article 61(4) of the Statute. The Pre-Trial Chamber is correct in stating that while article 61(4) of the Statute mentions investigations before the confirmation hearing, nowhere in the Statute are post-confirmation hearing investigations mentioned. To give this omission as much importance as the Pre-Trial Chamber does, is, however, not warranted . . . [T]he Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation . . . [T]he possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges . . . The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing.[25]

This ruling was a heavy brake on the PTC's perhaps inadvertent attempt to dictate the character and temporal nature of investigations in a manner that evoked images of a probing investigating judge rather than a pre-trial judge of limited authority.

The Appeals Chamber further held that there must be flexibility for the PTC to decide whether to make such an evidentiary hearing *ex parte* or *inter partes* and then make a decision based on the facts and circumstances of a particular case. It ruled,

> The decision of the Pre-Trial Chamber . . . does not provide for any flexibility. The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for ex parte proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and

24. *Supra* note 22, para. 39.
25. Ibid., paras. 53–54.

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consistently with internationally recognized human rights standards, as required by article 21(3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.[26]

Subsequent PTC I decisions on disclosure of evidence in the *Lubanga* case reflect considerable deference to the due process rights of the defence but also some concessions to the Prosecutor's and victims' requests during the investigatory stage. PTC I granted extra time for the defence to study exculpatory evidence,[27] an expansive defence request for exculpatory materials,[28] and the Prosecutor's request to redact some material, although certain transcripts and interviews were ordered to be disclosed.[29] PTC I ruled that video evidence must be in one of the Court's official languages[30] and that the defence must file formal requests with the PTC (hence creating a public record) for access to evidence and not rely solely on e-mail requests.[31] PTC I also granted a procedure for the legal representatives of victims to gain access to the defence application for leave to appeal so that victims could respond.[32] (But in the *Kony et al.* case (Uganda), PTC I denied the Office of the Public Counsel for Victims any access to non-public documents bearing on the security or safety of witnesses.[33])

All in all, these subsequent PTC I decisions reflect sound management of the pre-trial stages of the *Lubanga* case and of the types of decisions that necessarily must be made at the PTC level. The totality of PTC I and Appeals Chamber decisions and judgments in the *Lubanga* case demonstrates that the original intent of the negotiators of the Rome Statute has been honoured, but also challenged. The Appeals Chamber has confirmed that the Prosecutor remains the investigator of situations and cases, including after the confirmation hearing, which is the apex of PTC engagement in a case. The Pre-Trial Chamber has used its statutory authority to monitor closely and in various ways essentially supervise the investigation – results which can cut both ways. On the one hand, the PTC holds the Prosecutor 'in check' and guards against

26. Ibid., para. 67.
27. Decision Convening a Hearing on the Defence Request for Order to Disclosure [sic] Exculpatory Materials, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–640), Pre-Trial Chamber I, 1 November 2006.
28. Decision Concerning Defence Request for Order to Disclose Exculpatory Materials, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–649), Pre-Trial Chamber I, 2 November 2006.
29. Decision on the Prosecution Application Pursuant to Rule 81(2) of 3 November 2006, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–658), Pre-Trial Chamber I, 3 November 2006.
30. Decision on the Defence 'Request to exclude video evidence which has not been disclosed in one of the working languages', Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–676), Pre-Trial Chamber I, 7 November 2006.
31. Decision on Defence Requests for Disclosure of Materials, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–718), Pre-Trial Chamber I, 17 November 2006.
32. Decision Ordering the Defence to File a Public Redacted Version of its 'Application for Leave to Appeal the Pre-Trial Chamber I's 29 January 2007 "Décision sur la confirmation des charges"', Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04–01/06–813), Pre-Trial Chamber I, 7 February 2007.
33. Decision on the Office of Public Counsel for Victims (OPCV) 'Request to access documents and materials', Situation in Uganda in the Case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen (ICC-01/04–01/05–222), Pre-Trial Chamber II, 16 March 2007.

any overzealous conduct he may be tempted to undertake, and the PTC does this by itself zealously protecting the due process rights of the defence. On the other hand, it remains essential that the PTC not substitute itself for the Prosecutor and strive to become the investigatory arm of the Court. That was never the intent of the negotiators. Indeed, the PTC enables achievement of another intent of the negotiators, namely that the Prosecutor has sufficient discretion and latitude to investigate effectively, and accurately, that which is referred to him for investigation under Article 13(a) or (b) of the Rome Statute or which he initiates with PTC approval under Articles 13(c) and 15 of the Rome Statute.

6. In conclusion, brief answers to brief questions

Set forth below are some brief, tentative answers to some of the questions that have arisen in this inquiry. I hope that these points might set the stage for further reflection in the months ahead as the ICC's docket grows and issues pertaining to pre-trial disclosure of evidence multiply. The questions and answers are admittedly short and are as follows.

- *How much access should the PTC have to prosecution documents to enforce and deter potential non-disclosures?*

  The PTC should have access only to those documents that are required to satisfy the threshold requirement of providing sufficient evidence to establish substantial grounds. The objective would be to have access only to what is required for the confirmation of charges.

- *What can and should the PTC do if there is a failure to disclose?*

  The PTC should
  immediately issue an order to disclose,
  take disciplinary action, or
  delay the approval of warrants of arrest and the confirmation of charges.

- *What is the best way to balance this oversight duty with the ICC's status as a court integrating civil and common law principles and yet designating no single judge as an investigating judge?*

  The PTC can take a more aggressive stance and yet remain within its statutory mandate.
  The PTC can narrow the charges through status conference consultations.
  The PTC can encourage the Prosecutor to develop an internal protocol on disclosure of evidence and question the Prosecutor about compliance with such protocol during PTC proceedings. The trial chamber also can question the Prosecutor about compliance with the internal protocol.

- *How much merit is there in the accusation that by invoking Article 57(3)(c) of the Rome Statute to convene a status conference at the pre-trial hearing, when that was not*

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necessarily the intent of such statutory provision, the PTC has broadened its role and transformed itself into an investigating judge?

It was never the negotiators' intent to expand the PTC role into investigatory functions and powers.
However, in a UN Security Council referral of a particular situation, there might be good reason to mandate a more expansive Article 57(3)(c) role for the PTC.

- *Before the confirmation hearing, does the Prosecutor have a duty to disclose all the evidence? Should the Prosecutor do so as a practical matter?*

  The Prosecutor has no statutory duty to disclose all the evidence prior to the confirmation hearing. The Prosecutor has the duty to disclose only the evidence that is relevant to the charges being considered for confirmation and exculpatory information.

- *Regarding evidentiary standards, what constitutes 'reasonable grounds to believe' in the context of arrest warrants?*

  The PTC in the Darfur arrest warrants (April 2007) decided that the appropriate interpretation and application of the expression 'reasonable grounds to believe' must be in accordance with internationally recognized human rights. The judges view as their guidance 'the 'reasonable suspicion' standard under Article 5(1)(c) of the European Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under Article 7 of the American Convention on Human Rights.[34]

34. See D. J. Scheffer, 'International Criminal Court: Introductory Note to Decision on the Prosecution Application under Article 58(7) of the Statute in the Case of The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Ali Kushayb') ICC Pre-Trial Chamber I', (2007) 46 ILM 532.

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