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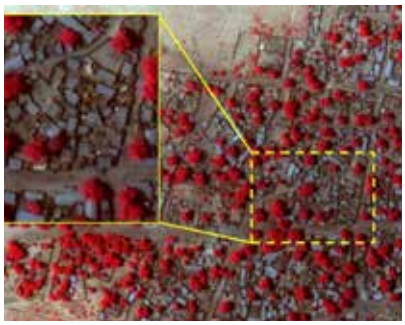

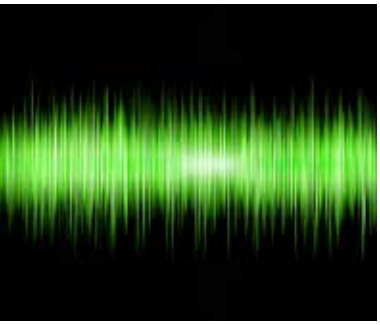


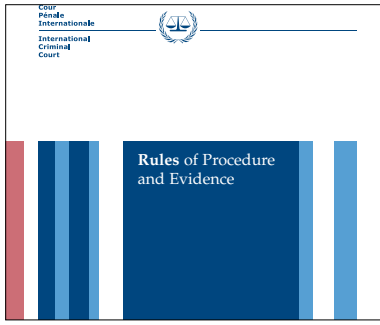

Evidence Matters in ICC Trials

An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice

August 2016

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About the programme

The International Bar Association (IBA) commenced the IBA International Criminal Court (ICC) Programme in 2005.

The programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals, and encourages the legal community to engage with the work of these courts. The IBA's work includes the thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the rights of defendants, impartiality of proceedings and development of international justice.

Based at the Peace Palace in The Hague, the IBA's International Criminal Court & International Criminal Law (ICC & ICL) Programme acts as an interface between the courts and the global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers, and collaborating with key partners on specific activities to increase the engagement of the legal community on ICC and ICL issues.

Programme information is disseminated through regular reports, expert discussions, workshops and expert legal analysis on issues relevant to our mandate.

Methodology

The IBA's monitoring work and research is complemented by consultations with key legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel and diplomatic representatives.

This report forms part of the programme's thematic publication series *IBA ICL Perspectives*, and presents the programme's views on key developments in ICL that have a particular impact on fair trial standards. It reflects the IBA's monitoring and analysis of developments and jurisprudence to 20 June 2016.

The report was researched, written and reviewed by the legal staff of the IBA's ICC & ICL Programme, Kate Orlovsky, Programme Researcher, and Aurélie Roche-Mair, Programme Director. Invaluable research assistance was provided by IBA interns Marine Corhay, Daniel Eck, Lindsay Freeman and Vivien Szalai-Krausz. The report was further reviewed by senior-level IBA officials, including Dr Mark Ellis, IBA Executive Director, and senior lawyers with relevant expertise.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this report.

Executive summary

In this report, the IBA examines the maturing trial practice of the ICC, as it is situated within a lineage of institutions that deliver international criminal justice. The number of trials and legal issues before the ICC continues to increase. By considering evidence matters, the IBA builds on its previous report on *Witnesses before the International Criminal Court* to focus on existing issues and future considerations for fair trials before the ICC. In *Evidence Matters in ICC Trials*, the IBA takes into account the existence and relevance of new types of evidence, and the development of ICC procedural law for hearing and ruling on evidence.

Digital and technologically derived evidence

The IBA has previously recommended that the ICC diversify its sources of evidence, in part, to ensure that witness testimony is not the sole source of evidence in its trials. Indeed, the nature of the evidence relevant to cases before the ICC is rapidly evolving, and will call for new skills, technology and resources from the ICC as a whole. The introduction of digital and technologically derived evidence as a significant portion of the evidence at trial, in particular, calls for a unified approach in consultation with all organs and with counsel working before the ICC.

To date, the Office of the Prosecutor, as the ICC organ responsible for investigations and prosecutions, has played a leading role in seeking to develop its own capacity to obtain, process and introduce digital and technologically derived evidence in ICC proceedings. The IBA urges increased coordination and planning for the impact such evidence will have on the ICC as a whole, including on the Registry and chambers. Of particular importance is the involvement of counsel and representatives of the defence. The experience of other international criminal tribunals in using such evidence highlights the need for adequate legal aid, access to the services of experts and, above all, an inclusive planning process to incorporate digital and technologically derived evidence efficiently, and with full protection of the rights of the accused.

Admission of prior recorded testimony in ICC trials

The ICC is seeking ways to streamline trials, a goal that corresponds to a number of important rights, including the accused's right to be tried without delay and the victims' right to justice, as well as the desire of all stakeholders, including States Parties that fund the ICC, to see its limited resources used efficiently. Some efficiency gains can be made regarding how evidence is introduced, for example, by admitting statements in place of hearing all or part of a witness's testimony in the courtroom. However, witness testimony will remain the primary form of evidence before the ICC.

The IBA encourages the ICC to proceed on both fronts: to continue to strengthen its practices with respect to witnesses to ensure that they are adequately protected and able to testify, as well as to standardise and systematise its recording of statements during investigations and in proceedings, to ensure that statements meet evidentiary requirements. Since the amendment of Rule 68 of the ICC Rules of Procedure and Evidence, which expanded the possibilities of admitting prior recorded testimony, the IBA has cautioned against relying on those provisions in place of a strong regime of witness protection, in particular, for witnesses who may face intimidation or interference.

In particular, the use of witness statements in place of courtroom testimony for unavailable and interfered-with witnesses is an exceptional measure that should be used only as a last resort. However, the ICC can and should develop a regular practice of admitting written statements that provide background and corroborated information, consistent with the requirements of Rule 68(2)(b) and practices of other tribunals. In doing so, the ICC should balance the potential efficiency gains with other considerations, including the rights of the accused and possible benefits for witnesses from affected communities of participating directly in the trial, as well as public interest in the fuller historical record created through witness testimony.

Assessing evidence within trial proceedings

'No case to answer'

Fair trials, as well as efficiency, can be supported by the Trial Chambers evaluating the evidence at the close of the prosecution's case and entering a judgment of acquittal for any charges for which adequate evidence has not been presented, such that a reasonable Trial Chamber could convict. The ICC has, for the first time, articulated procedures for 'no case to answer', or motion for judgment of acquittal, and so has begun to implement a process that has been adopted and standardised as a regular stage of proceedings in other international criminal tribunals. The IBA recommends that these procedures be adopted across cases and considered for potential inclusion as an amendment to the ICC's Rules of Procedure and Evidence.

In further developing the procedures for motion for judgment of acquittal, the ICC should take into account the consistency with precedents at other courts and the potential for increasing the efficiency of trial proceedings by clarifying the scope of the charges for the defence presentation of its case. In the first ICC case to apply these procedures, the majority of judges found that the prosecution had presented insufficient evidence. Because the majority considered this to be the direct result of witness interference, they chose to vacate the charges instead of acquitting. This outcome preserves the right of the prosecution to present new evidence, and results in a lack of finality for the accused. It also risks a lack of clarity about the purpose and established practices of motions for judgment of acquittal, while emphasising the ongoing challenge of witness protection.

Regulation 55

The IBA observes that, whereas the ICC's evolving procedures reflect some of the practices of other international criminal tribunals, the ICC's legal framework remains unique. Particularly relevant is the existence of a distinct pre-trial stage of proceedings, which includes an evaluation of the evidence for the purpose of confirming charges for trial. The pre-trial phase has the potential to enhance the fairness of proceedings, but it must perform a clearly defined and delimited function, namely to arrive at a clear statement of the charges for trial.

However, for the majority of cases that have reached the trial stage of proceedings, the 'recharacterisation' of the charges or mode of liability has been under consideration in response to a request from the parties or on the initiative of the Trial Chamber. This frequent recourse to Regulation 55 of the Regulations of the Court – which allows legal recharacterisation – highlights the need for a well-structured and comprehensive pre-trial process, including better investigations and

evidence presented by the prosecution at the pre-trial phase. Moving forward, the ICC should use Regulation 55 as a last resort and the chambers should give due regard to the full scope of the rights of the accused guaranteed under Article 67 of the Rome Statute when considering any modification of the legal characterisation of the facts.

Overall, evidence matters in ICC trials, as addressed in this report, present many intertwined issues with the ICC's use of witnesses in its trials. As the ICC's trial procedures with respect to evidence from witnesses and in other forms continue to develop, the IBA underscores the importance of continued attention to the rights of the accused, consistency between the chambers, and standardisation of best practices derived both from the ICC and other relevant courts to ensure that ICC trials remain fair.

List of acronyms used throughout this report

ASP	Assembly of States Parties
CDR	call data records
Court	International Criminal Court
CST	call sequence table
DRC	Democratic Republic of the Congo
EPE	electronic presentation of evidence
IBA	International Bar Association
ICC	International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICL	international criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
NGO	non-governmental organisation
OPCD	Office of Public Counsel for the Defence
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SGG	Study Group on Governance
STL	Special Tribunal for Lebanon
STL RPE	Rules of Procedure and Evidence of the Special Tribunal for Lebanon
UN	United Nations
UNICRI	UN Interregional Crime and Justice Research Institute
WGLL	Working Group on Lessons Learnt

Chapter 1: The context of evidence in ICC trials

Evidence, from witnesses and other sources, is at the centre of International Criminal Court (ICC or the 'Court') investigations and trials. Evidence is a key factor in the decision-making process of the Prosecutor in respect of selecting cases and charges,[1] and in determining the trial strategy for cases. The evidence presented during the confirmation of charges proceedings provides the basis for the Pre-Trial Chamber's determination of whether a case may proceed to trial, and at trial, provides the basis for the factual and legal findings of the Trial Chamber and its eventual judgment on the guilt or innocence of the accused.[2]

The International Bar Association's (IBA's) approach to the topic of evidence derives from its mandate to monitor the ICC's work through the lens of fairness and equality of arms. This report follows on from the IBA's 2013 report *Witnesses before the International Criminal Court*, which analyses the role of witnesses before the Court. In the present report, *Evidence matters in ICC Trials*, the IBA looks more closely at ICC practices relating to the use of evidence in trial proceedings, and analyses some evolving issues in a vital area of the Court's work. At this stage of the Court's development, although the institution has now completed a number of trials and produced judgments at trial and appeals levels, new practical and legal issues continue to arise that require discussion and analysis, as well as resolution and the establishment of procedures for the Court going forward.[3]

In this report, the IBA addresses selected evidence matters of current and critical importance in ICC trials that have a particular resonance in terms of fair trial considerations, specifically, the use of digital and technologically derived evidence in ICC trials, the application of the Court's amended rules for the use of prior recorded testimony, and the Trial Chamber's role in assessing evidence during trial proceedings in the form of 'no case to answer' proceedings and the application of Regulation 55.

The legal framework

The Rome Statute and the Rules of Procedure and Evidence of the ICC (ICC RPE) set out a framework that provides standards and rules for evidence in the form of witness testimony, as well as other forms.[4] As a whole, the legal framework addresses the collection, management, presentation, admission and evaluation of evidence. As discussed further below, it also provides Trial Chambers with the discretion to organise proceedings in order to achieve a trial that is fair, expeditious and

1 ICC, Office of the Prosecutor, *Draft Policy Paper on Case Selection and Prioritisation*, 29 February 2016, paras 18–19, see www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf accessed 16 June 2016.

2 Rome Statute, Art 74(2) states: 'The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial'.

3 The IBA notes that 'evidence' is a broad topic, and one that touches on many areas of the Court's structure and legal framework. Much has been written about the legal theories behind, parameters of and challenges inherent in presenting and ruling on evidence in ICC trials. Significant scholarship has also been focused on comparative analysis of the ICC's framework and practices with other international courts and tribunals, as well as domestic courts, including the hybrid nature of the ICC's legal and procedural framework, which combines aspects of both common and civil law traditions. See, eg, Karim A A Khan et al, *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010); Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff Publishers, 2013); Fergal Gaynor et al, 'Law of Evidence', in Göran Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 1015–1150; Judge Richard May and Marieke Wierda, International Criminal Evidence (Brill, 2002).

4 Rome Statute, Art 69 and ICC RPE, Chapter 4(I).

conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[5] The Rome Statute and ICC RPE also reflect some of the advancements and lessons learned in the international legal regime with respect to the presentation of evidence, such as specific measures that apply to evidence regarding sexual violence.[6] There is, additionally, a growing body of jurisprudence from the ICC regarding topics including disclosure, presentation and admissibility of evidence, as well as the relevant standards of proof.

A comparative perspective

The IBA has taken a comparative approach regarding evidence matters in ICC trials, considering experiences and jurisprudence from other international criminal tribunals, in particular, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Tribunal for Lebanon (STL). The ICC's legal framework on evidence is similar to those in place at the ICTY and ICTR with respect to many key provisions, as discussed below. To the extent that the issues arising in ICC trials have similarities with proceedings in other courts, their jurisprudence and procedures may provide instructive points of comparison.

As noted in this report, each of these institutions developed legal and procedural mechanisms for dealing with evidence that evolved as the courts' trial practices developed. In particular, the high volume of trials conducted by the ICTY, as well as its role in adjudicating cases against high-level accused and addressing issues of witness interference and political cooperation, has resulted in jurisprudence relevant to current issues being litigated at the ICC. The jurisprudence of the ICTY is discussed in detail in Chapter 3, in respect of the admission of prior recorded testimony as evidence at trial, and in Chapter 4, in relation to motions for judgment of acquittal. While the STL, as a court primarily mandated to address a single incident, differs from the other ad hoc tribunals, it is of particular interest because the central role played by digital evidence in its main trial is breaking new ground for international criminal trials, as is discussed at length in Chapter 2.

Evidence and States Parties

The ICC's structure, as a permanent, treaty-based court, includes a role for States Parties through both the Assembly of States Parties (ASP) and broader diplomatic processes. With respect to evidence, the central role of state cooperation at the ICC impacts investigations because cooperation is necessary for the Court to have access to evidence. Cooperation may also play a role in the Court's ability to present evidence at trial, for example, by providing assistance to facilitate or compel witnesses to appear or by implementing out-of-court protective measures.[7] The ICTY and ICTR operated in a different context, due to their creation by the United Nations (UN) Security Council, which carried an obligation on all UN member states to comply with its orders.[8] The STL, based on its specific territorial jurisdiction, has established various channels of cooperation with the Government

5 Rome Statute, Art 64(2).

6 ICC RPE, Rules 70, 71, 72.

7 States Parties are obliged to cooperate with the Court's investigations and prosecutions under Art 86 of the Rome Statute. Procedures for requests for cooperation and States Parties' obligations to include procedures for cooperation in domestic law are set out in Rome Statute, Arts 87 and 88, respectively. See also IBA, Witnesses before the International Criminal Court (IBA, 2013) 15–17 and 34–41.

8 ICTY Statute, Art 29.

of Lebanon.[9] Outside the specific context of evidence matters in ICC trials, the IBA notes that the Court's inability to enforce judicial orders against states presents ongoing challenges.[10]

The ICC's States Parties are also involved in amending the ICC RPE, as set out in Article 51 of the Rome Statute and Rule 3 of the ICC RPE.[11] Amendments may be proposed by any State Party, an absolute majority of the judges or the Prosecutor, and must be approved by a two-thirds majority of the ASP, although it is worth noting that States Parties to the ICC have developed a practice of amending the RPE only upon consensus.[12] In the other courts included in this report, amending the RPE is an internal process. At the ICTY and ICTR, amendments are proposed and approved by judges.[13] The STL process for amending rules allows proposals to be made by 'a Judge, the Prosecutor, the Head of Defence Office or the Registrar', with the proposals then forwarded to a Rules Committee of similar composition for examination, followed by a vote by the judges.[14]

While, overall, the approach to amendments at the ICC has reflected consultations and collaborations between States Parties and the Court, in particular the chambers, the IBA notes that state involvement in the amendment process creates the possibility that political considerations, or the appearance of political considerations, may enter the Court's operational regime. On the other hand, the ICC's amendment process allows a relatively greater measure of transparency, which allows civil society, including the IBA, to comment and raise concerns regarding draft amendments.[15] In respect of evidence matters in ICC trials, the amendment of Rule 68 of the ICC in 2013 to expand the situations in which the Court can admit prior recorded testimony, is significant and is discussed in detail in Chapter 3 of this report.[16]

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9 See, in particular, STL RPE, Rules 13–22 and the various Memoranda of Understanding between the Organs of the STL and the Government of Lebanon, see www.stl-tsl.org/en/documents/stl-documents/defence-office-documents/tag/Memorandum%20of%20understanding accessed 16 June 2016.

10 For example, the Court has issued a number of orders relating to cooperation for the execution of the arrest warrants against President Al-Bashir of Sudan and Saif Al-Islam Gaddafi, without success. See, eg, ICC, *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-261, Decision requesting the Republic of Djibouti to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, 17 May 2016; ICC, *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-262, Decision requesting the Republic of Uganda to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, 17 May 2016 and ICC, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-563, Decision on matters related to Libya's duties to cooperate with the Court, 11 July 2014; ICC, *Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11-587, Registrar's Report on the referral to the UN Security Council and the notification of the Decision on the non-compliance by Libya with requests for cooperation, 18 March 2015 and see also ICC, ASP, ICC-ASP/9/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, 10 December 2010, see https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf accessed 16 June 2016.

11 The ICC judges and ASP have taken a number of steps to ensure a considered approach to amendments of the RPE. Within the ASP, a Working Group on Amendments (WGA) was set up in 2009, to follow up on possible amendments of the Rome Statute and ICC RPE following on from the Review Conference in 2008. ICC, ASP, ICC-ASP/8/Res.6, Review Conference, 26 November 2009, see https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-RC-Establishing-WGA-ENG.pdf accessed 16 June 2016; ICC-ASP/11/Res.8, annex II, Terms of Reference of the WGA see https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx accessed 05 July 2016. A Study Group on Governance was set up in 2010 to consider, among other issues, the efficiency of the criminal process, including possible amendments to the ICC RPE. See ICC, Assembly of the States Parties, ICC-ASP/9/Res.2, Establishment of a Study Group on Governance, 10 December 2010, see https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf accessed 16 June 2016. Within the Court, a Working Group on Lessons Learnt was set up to consider possible amendments to the ICC RPE and take forward amendments that have the support of at least five judges. ICC, ASP, ICC-ASP/11/31/Add.1, Annotated list of items included in the provisional agenda, 14–22 November 2012, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-1-Add1-ENG.pdf accessed 16 June 2016. The Court also has an Advisory Committee on Legal Texts, established under Regulation 4 of the Regulations of the Court, composed of a representative from each division of the chambers, the OTP, Registry and list of counsel. For more on the amendments process, see Jonathan O'Donohue, 'The ICC and the ASP' in Carsten Stahn (ed), The Law and Practice of the International Criminal Court (Oxford University Press, 2015) 118–119.

12 Rome Statute, Art 51(2). The ASP's practice of seeking to reach consensus follows Art 112(7), which states the following: 'Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau' and further stipulates that, except as otherwise provided in the Rome Statute, decisions must be approved by a two-thirds majority if consensus cannot be reached.

13 ICTY and ICTR RPE, Rule 6.

14 STL RPE, Rule 5.

15 See, eg, IBA, IBA ICC Programme Legal Opinion, *Rule 68 Amendment Proposal, Assembly of States Parties*, 12 November 2013.

16 ICC, ASP, ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, 27 November 2013, see https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf accessed 16 June 2016.

Evidence and efficiency at the ICC

International criminal justice is criticised for its relatively slow pace. The ICC, ICTY and ICTR generally take multiple years to try single and multi-accused cases. The length of international criminal proceedings can be attributed to a number of factors, including the need to establish and develop legal procedures through the initial years of operation of international criminal tribunals, such as the ICC.[17]

The length of the ICC's first trials has varied, with the period of time between the opening statements and final trial judgment lasting approximately three years and two months in the *Lubanga* case, four years and three months in the *Katanga* case and three years and one month in the *Ngudjolo* cases, and five years and four months in the *Bemba* case.[18] Some of the issues addressed in the first trials were specific to those cases, such as the delays in the *Lubanga* case due to disclosure and intermediaries issues.[19] Delays have also derived from the application of novel legal concepts, such as Regulation 55 of the ICC Regulations of the Court, discussed in detail in Chapter 4 of this report.

The IBA notes that the volume of evidence itself is a factor in the length of trial proceedings, but cannot definitively be identified as a major influence in the length of trials. Other factors, such as the number of co-accused, and the number and complexity of charges, may have a greater impact on the length of trial proceedings. In this regard, the IBA supports the ongoing analysis being undertaken by the ICC, ASP and external partners regarding factors that may contribute to the duration of cases, in the context of developing 'performance indicators' for the Court.[20]

With respect to charges, 70 charges were recently confirmed against Dominic Ongwen in the Uganda situation. The charges in the *Ongwen* case indicate that the Office of the Prosecutor (OTP) may be

17 For example, international criminal courts and tribunals have frequently operated in ongoing conflicts or post-conflict situations, where insecurity and lack of infrastructure may complicate the gathering of evidence, including finding witnesses. Challenges to the jurisdiction of the court, the admissibility of the case and the form of indictment or the charges are important components of international criminal pre-trial procedure, which may add time to proceedings. At the ICC, the legal procedure is lengthened by the confirmation of charges stage of proceedings, prior to the trial, as well as the reparations phase following a conviction. As noted above, the level of cooperation that the Court is accorded from states and other bodies, such as regional and international organisations, also has a great influence on the pace of proceedings. In addition, as the IBA has noted in previous reports, a number of specific issues arose during the ICC's first trials that gave rise to significant delays. See n 19 below.

18 The dates between the opening of trial and the delivery of the trial judgment for the respective cases are: 26 January 2009 – 14 March 2012 (*Lubanga*), 24 November 2009 – 7 March 2014 (*Katanga*), 24 November 2009 – 18 December 2012 (*Ngudjolo*) and 22 November 2010 – 21 March 2016 (*Bemba*).

19 See, eg, IBA/ICC Monitoring and Outreach Programme, The ICC's trials: an examination of key judicial developments at the International Criminal Court between November 2009 and April 2010, May 2010; *Sustaining the International Criminal Court: Issues for consideration at the 2010 Review Conference and beyond*, November 2009; First Challenges: *An examination of recent landmark developments at the International Criminal Court,* June 2009; Balancing Rights: *The International Criminal Court at a Procedural Crossroads*, May 2008.

20 The ICC has noted eight principal factors that affect the likely duration of a case, of which the volume of evidence is one. The factors identified by the Court are '(a) the number of accused persons (b) their position(s) within a political or military hierarchy (c) the number and nature of the charges (d) the volume of evidence and likely number of witnesses (e) the complexity of the legal and factual arguments involved (f) whether the case raises significant novel legal or evidential issues (g) the geographical scope of the case (localised or extensive) (h) the scale of the victim communities affected'. See ICC, *Report of the Court on the development of performance indicators for the International Criminal Court* (ICC, November 2015) www.icc-cpi.int/Pages/item.aspx?name=report-icc-12-11-2015 accessed 23 June 2016.

moving towards a strategy of broader and more numerous charges.[21] It remains to be seen whether the selection and confirmation of a broader set of charges and modes of liability prior to trial save time that might otherwise be spent on hearing litigation and additional evidence under Regulation 55. In this regard, and particularly in light of the right of the accused to be informed of the charges under Article 67(1)(a), the IBA emphasises the importance of clarity and certainty regarding charges as fundamental components of a fair trial.

In the context of international criminal tribunals, the discourse on efficiency is two-fold. Efficiency is, first, a goal of the criminal process as an aspect of the right of the accused to be tried without undue delay, guaranteed by Rome Statute Article 67(1)(c), and as a consideration for victims' right to prompt access to justice and reparation before the ICC.[22] The Rome Statute specifically charges the Trial Chamber with conducting trial proceedings that are fair and expeditious, and conducted with full respect for the rights of the accused.[23] Beyond the criminal process, efficiency is also an issue of institutional management. The Court has limited resources to respond to the varying needs and demands it faces, and the number of cases and situations that it will be able to address will, in part, depend on how efficiently it conducts legal proceedings. From the perspective of States Parties, efficiency relates not only to the Court's ability to deliver fair trials, but also to the resources needed for the functioning of the institution.[24]

Both facets of efficiency, as it relates to the criminal process and to institutional management, are being addressed within the context of the ASP's Study Group on Governance (SGG),[25] in the context of the work being carried forward by ICC President Judge Silvia Fernández de Gurmendi and

21 The OTP has indicated that its charging strategy aims to 'represent as much as possible the true extent of the criminality which has occurred within a given situation' as well as to 'take into particular consideration crimes that have been traditionally under-prosecuted'. See n1 above, paras 44-45.
The IBA notes that, taken together with specific policies adopted by the OTP, this approach may yield a greater number of more complex charges. For example, the OTP in implementing its Policy on Sexual and Gender-Based Crimes has indicated its commitment to charge sexual and gender-based crimes whenever there is sufficient evidence to support these charges. ICC, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (ICC, 2014) para 7 www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf accessed 16 June 2016; ICC, OTP, Strategic Plan 2016–2018, 21 August 2015, ICC-ASP/14/22, para 49, ('OTP Strategic Plan 2016–2018') www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf accessed 16 June 2016. In this regard, the IBA notes that 18 out of the 70 charges against Dominic Ongwen relate to sexual and gender-based crimes, showing a greater number and range of charges relating to those types of crimes as compared with previous cases. ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, 23 March 2016, paras 117, 124.

22 See, eg, UN, General Assembly, A/RES/60/147, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Cross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, paras 2(b),(c); 3(b); 11(b); 14; 15, see https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement accessed 16 June 2016. However, while acknowledging the important stake of victims in the proceedings, the IBA considers that there is a need to ensure that the fair trial rights of the defendant are not subordinated to those rights of the victims or the prosecution. See IBA, *Fairness at the International Criminal Court* (IBA, 2011) 20. In this regard, the IBA notes that the jurisprudence of the ICC confirms that the rights of victims with respect to presenting evidence, calling witnesses and cross-examination are more limited than those granted to the defence. For an overview of the modalities of victim participation and victims' rights at trial, see ICC, Office of Public Counsel for Victims, ICC-OPCV-MLR-004/15_Eng, Representing Victims Before the International Criminal Court: A Manual for Legal Representatives, 2014, see www.icc-cpi.int/iccdocs/opcv/OPCVManual-4-Eng.pdf accessed 16 June 2016.

23 Rome Statute, Art 64(2), (3)(a).

24 The budget of the Court is provided by contributions from States Parties, and the ASP annually reviews the Court's use of funds and the requested budget through its specialist body, the Committee of Budget and Finance.

25 See n 11 above. See also, ICC, ASP, ICC-ASP/12/37, *Report of the Bureau on Study Group on Governance*, Annex 1, 10–11, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf#page=10 accessed 16 June 2016.

the Court's Working Group on Lessons Learnt (WGLL),[26] and through the process of developing performance indicators for the Court.[27]

With respect to efficiency and the presentation of evidence at trial, certain procedural devices have the potential to shorten the duration of trials. For example, the use of prior recorded testimony to admit evidence regarding background and context information under amended ICC RPE Rule 68 may decrease the courtroom time needed to hear *viva voce* testimony.[28] In this regard, the adoption of practice directions and other tools to ensure completeness of written statements, and conformity with the requirements for admissibility, will facilitate Trial Chambers' rulings on such evidence. The admission of documentary and other evidence from 'bar table' motions, without hearing a witness to present the evidence, is permitted at the ICC and may increase efficiency in some cases.[29] On the other hand, the use of other types of evidence, such as digitally and technologically derived evidence, may increase courtroom time, with additional time needed to hear expert witnesses, as discussed in Chapter 2. As the use of these newer forms of evidence increases in ICC trials, the IBA encourages careful observation and evaluation of the impact of such evidence in the trial process.

Overall, efforts to improve the ICC's efficiency should be a dynamic process that benefits from continued attention and collective input, including from all organs of the Court, counsel acting before the Court, the ASP and civil society. At the same time, efficiency should be measured against the aims and standards of the Court, taking into account the Court's primary role as a judicial institution and its fundamental obligation to ensure fair trials. Noting that efficiency is also a component of the Court's management, the IBA urges the ASP and ICC to maintain the standards of the criminal process above all, in particular, the rights of the accused, in any process seeking to increase the efficiency of the Court.

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26 ICC, ASP, ICC-ASP/12/37/Add.1, WGLL: Second report of the Court to the Assembly of States Parties (ICC ASP, November 2013) www.legal-tools.org/uploads/tx_ltpdb/ICC-ASP-12-37-Add1-ENG.pdf and https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add.1-Corr.1-ENG.pdf accessed 16 June 2016. *Remarks by Silvia Fernández de Gurmendi, ICC President, to the Assembly of States Parties in relation to Cluster I: Increasing the efficiency of the criminal process* (ICC, 2015) [on file with the IBA]. See also, ICC, ASP, SGG Cluster I: Increasing the efficiency of the criminal process (ICC ASP, November 2015) paras 5–8, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ASP14-PD-EFEC-Summary-ENG.pdf accessed 16 June 2016.

27 See n 20 above and see also Open Society Justice Initiative, *Establishing Performance Indicators for the International Criminal Court* (Open Society Foundations, 2015) www.opensocietyfoundations.org/sites/default/files/briefing-icc-perforamnce-indicators-20151208.pdf accessed 16 June 2016.

28 ICC RPE, Rule 68(2)(b).

29 See, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2589, Decision on the 'Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64', 21 October 2010. See also, Fergal Gaynor et al, 'Law of Evidence', in Göran Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 1054–1055.

Evidence and judicial discretion

ICC Trial Chambers have broad latitude and flexibility to rule on evidentiary issues during the trial.[30] This flexible approach is consistent with that of ad hoc tribunals and in line with the approach to evidence generally in international criminal law (ICL), based on, among other things, the specialised structure and functions of international criminal tribunals, considerations of expedience and the desire to maximise use of the limited evidence that can be available post-conflict.[31] Jurisprudence from the ICC has also confirmed that Trial Chambers are not bound by the rulings of other Trial Chambers or the Pre-Trial Chamber with respect to evidence.[32] Flexibility in rules of evidence also allows Trial Chambers to take into account the differences between cases and situations that come before the Court, which give rise to varying amounts and types of evidence.

In light of their clear discretion set out in the Rome Statute and ICC RPE, judges have varied in their approach to ruling on evidence, but have also indicated the importance of some consistency between the chambers and with existing jurisprudence.[33] Resources, such as the *Chambers Practice Manual*, which seek to identify and set out best practices, are not binding on the chambers,[34] but nonetheless have the potential to support consistent rulings between the chambers. At the same time, the IBA notes that consensus has not yet been reached with respect to important issues, and as such,

30 See Rome Statute, Arts 64(9) and 69(4), and ICC RPE, Rule 63(4). As articulated by Trial Chamber I, 'the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorized by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence'. ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para 24.

31 See Klamberg, n 3 above, 337–338.

32 *Ibid*, 340–342.

33 See, eg, ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405, Decision on the submission and admission of evidence, 29 January 2015, and see ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405-Anx, Dissenting Opinion of Judge Henderson, 1 February 2016, paras 12–13. Judge Henderson dissents on the majority's decision to defer decisions on admissibility of evidence until the end of the trial, stating: 'I also consider that, in relation to procedural matters in international criminal cases of great scope and size, a Chamber should have due regard for the lessons learned from the ample experience and jurisprudence of the Court, as well as the ad hoc tribunals. With the exception of the *Bemba et al* case (a case of limited scope and anticipated duration), issuing admissibility decisions before the closure of evidence has been the settled and uncontroversial practice in international criminal proceedings, both at the Court and the ad hoc tribunals. This includes both those international and hybrid courts founded on the common law tradition, as well as those applying a primarily inquisitorial system. Nowhere in the Majority Decision is there any assessment as to why the *Gbagbo and Blé Goudé* case is unique from the dozens of other international cases where admissibility decisions have been issued before the closure of evidence. Nor is there any discussion as to how such practice is misguided, let alone an assessment of the impact on the respective parties' ability to efficiently and adequately prepare (issues specifically raised in the parties' submissions).'

34 As noted by the Appeals Chamber in the *Gbagbo and Blé Goudé case*, the *Chambers Practice Manual* is an explanatory document that contains general recommendations and guidelines regarding best practices at the Court, based on the experience and expertise of the pre-trial judges. It is not a binding instrument designed to have the same force and effect as the Rome Statute, ICC RPE or the Regulations of the Court. See ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-369, Judgment on the appeal of Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court', 18 December 2015 ('Gbagbo and Blé Goudé Appeals Judgment on Regulation 55(2)'), para 54.

the *Chambers Practice Manual*, as a 'living document', should continue to evolve.[35] As the *Chambers Practice Manual* is meant to be a model reflecting lessons learned, the IBA would also encourage a broader consultation process in the development of best practices, which could, for example, draw on external resources, such as former ICC judges and judges from other international criminal tribunals, who could introduce a comparative perspective. Annotation of the *Chambers Practice Manual* with relevant ICC jurisprudence may also support the development of a document that accurately reflects the best practice adopted by the majority of chambers.

Finally, with due regard to the chambers' discretion, the IBA reiterates that any best practice should be in line with the rights of the accused.[36] In this regard, the IBA notes the importance of consistency for the fairness of proceedings, in light of the right of the accused to know with certainty the applicable law and charges against them. The need for notice of the procedural law by which the trial will be conducted is emphasised in Article 51(4) of the Rome Statute, which requires that the ICC RPE be interpreted consistently with the Rome Statute, including the rights of the accused set out in Article 67. This is reinforced in Article 51(4)'s provision that amendments to the ICC RPE shall not be applied retroactively to the detriment of a suspect, accused or convicted person. As discussed in Chapter 3, the ICC Appeals Chamber ruled in the *Ruto and Sang* case that the concept of the detriment of the accused should be interpreted broadly.[37]

Evidence matters in ICC trials

The IBA's 2013 report, *Witnesses before the International Criminal Court*, addressed the role of witnesses as the main source of evidence for ICC trials. In light of the growing number of witness-related issues facing the Court at that time, the IBA recommended that the organs of the Court and the ASP focus on strengthening the Court's practices with respect to witnesses on a number of fronts, including pursuing and using additional forms of evidence; amending the Rome Statute to strengthen the Court's legal framework for enforcing the appearance of witnesses; strengthening the Court's witness protection regime; and addressing issues within investigations, prosecutions and cooperation.

In addressing evidence matters in ICC trials, the IBA reiterates many of the recommendations from the previous report. Witness testimony is, and is likely to remain, the chief form of evidence in ICC trials.

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35 The *Chambers Practice Manual* states that it 'will be updated, integrated, amended as warranted by any relevant development and therefore the judges of the Pre-Trial Division will meet on a regular basis in order to discuss the need for any such update'. ICC, *Pre-Trial Practice Manual* (ICC, September 2015) p 5, see www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf accessed 16 June 2016. The *Pre-Trial Practice Manual* was updated and renamed the *Chambers Practice Manual* in February 2016. See ICC, *Chambers Practice Manual* (ICC, February 2016) www.icc-cpi.int/iccdocs/other/Chambers_practice_manual–FEBRUARY_2016.pdf accessed 17 June 2016. For example, the IBA notes that the chambers have diverse practices with respect to important procedural issues, such as witness proofing, see ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-355 Decision on witness preparation and familiarisation, 2 December 2015, and ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* , ICC-02/11-01/15-355-Anx1, Partially Dissenting Opinion of Judge Henderson to Decision on witness preparation and familiarisation, 3 December 2015, as well as the timing of considering admissibility determinations, see ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution's list of evidence, 23 November 2010 and ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405-Anx, Dissenting Opinion of Judge Henderson, 1 February 2016.

36 In this regard, the IBA would caution against adopting provisions that seek to shorten statutory timeframes, as this may impact the ability of the accused to have adequate time and facilities to prepare their defence as guaranteed under Art 67(1)(b). For example, the *Chambers Practice Manual* recommends that Pre-Trial Chambers order that the time limit for responses set out in Reg 34(b) of the Court should be uniformly shortened from 21 days to 5 days or another appropriately short time limit, for the period leading up to the confirmation hearing. The IBA recommends that any such modifications should instead be considered on a case-by-case basis.

37 The Appeals Chamber defined detriment as 'disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person'. ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2024, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior recorded Testimony', 12 February 2016 ('Ruto and Sang Appeals Judgment on Prior recorded Testimony'), para 78.

As such, having a strong framework and established practices with respect to handling witnesses and witness testimony should appropriately remain one of the main focuses of the Court's efforts. At the same time, the Court should seek to make the most of the significant efforts and amount of resources that are required to bring witnesses to testify, including by improving the efficiency of the trial process, without sacrificing any of the fundamental aspects of a fair trial.

In this context, the various aspects of evidence covered in the present report – introducing digital and technologically derived evidence, the introduction of prior recorded testimony as evidence and evaluating evidence during the trial procedure – represent both continuity with the work of other international criminal tribunals, and the evolution and expansion of the ICC's trial practice.

Selected recommendations related to witness issues before the ICC

In light of the interconnected nature of witness issues and evidence matters before the ICC, the IBA wishes to reiterate selected recommendations made in the 2013 report *Witnesses before the International Criminal Court*. The IBA's full recommendations relating to witness issues are available at: **www.ibanet.org/Document/Default.aspx?DocumentUid=9c4f533d-1927-421b-8c12-d41768ffc11f**.

Recommendations to facilitate evidence in the form of witness testimony

1. The IBA recommends that the ASP consider amendments to the Rome Statute and ICC RPE providing judges with a citation or subpoena power to require testimony by witnesses.[38] The IBA also proposes an amendment to Article 93(1)(e) of the Rome Statute clearly mandating States Parties to transfer witnesses to The Hague if ordered by the chambers. The word 'voluntary' should be removed and the word 'facilitating' should be replaced with 'ensuring'.

2. The IBA calls upon the Registry to assess its video link technological capacity to ensure such testimony is a viable option in cases where it is found that the transfer of the witness to The Hague raises serious security risks.

Recommendation regarding additional forms of evidence

3. The IBA encourages the prosecution and defence to source and utilise additional forms of evidence in place of an exclusive reliance on witness testimony. These may include forensic materials, official government records, physical exhibits, medical reports, video footage and other forms of electronic evidence.

Full recommendations regarding the use of digital and technologically-derived evidence may be found in Chapter 2 of this report.

38 In respect of the power of the ICC to issue subpoenas, the IBA notes the October 2014 Appeals Chamber ruling in the *Ruto and Sang* case. The Appeals Chamber found the following: (1) 'Article 64 (6) (b) of the Statute gives Trial Chambers the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned'; and (2) 'Under article 93 (1) (b) of the Statute the Court may request a State Party to compel witnesses to appear before the Court sitting in situ in the State Party's territory or by way of video-link'. ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1598, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 9 October 2014.

Recommendations regarding witness protection

4. The Registry is urged to ensure that the victims and witnesses unit has the human, technical and financial resources necessary to carry out its functions.

5. The Registry is encouraged to establish a mechanism to assist defence teams with assessing the protection needs of witnesses and making referrals to the victims and witnesses unit when appropriate. The Registry is also urged to hold adequate consultation with defence teams to determine their needs, prior to adopting policies or procedures that impact defence witnesses.

Recommendations regarding cooperation

6. The IBA encourages States Parties to meet their cooperation obligations related to the transfer, protection and support of witnesses in accordance with the Rome Statute.

7. The ASP is urged to continue to encourage states to sign agreements; follow through by accepting witnesses; and where there are resource challenges, to take advantage of the Special Fund for Relocations, which was established to support states in such situations.

8. The IBA encourages the ICC to continue to pursue avenues to engage with non-States Parties with functional witness protection programmes that are willing to cooperate with the Court and receive relocated witnesses. This could be done through ad hoc agreements as provided in the Rome Statute's cooperation provisions.

Recommendations regarding witness interference

9. The IBA urges the ICC and OTP to ensure timely investigations of all allegations of false testimony and witness interference, especially those involving threats and intimidation. Furthermore, results of such investigations should be published as quickly as possible.

10. In lieu of amending the Rome Statute or ICC RPE, the IBA recommends that ICC judges consider appointing *amicus curiae* to make recommendations on whether investigations should be launched – and whether they should be conducted internally or externally – when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is.

11. The IBA encourages the Court to standardise various procedural protocols across all cases, as opposed to the current case-by-case approach.

Chapter 2: Digital and technologically derived evidence

International criminal cases rely on a range of types of evidence. The ICC's legal texts, as well as its jurisprudence to date, place evidence in the form of witness testimony at the centre of trial proceedings.[39] At the same time, as previously noted by the IBA, additional forms of evidence form essential components of ICC cases, and there are multiple rationales for the Court to continue to develop its practices around working with evidence beyond *viva voce* witness testimony.[40] Such evidence can include documents and records; photographs; aerial and satellite images; audio and video recordings; phone records; and forensic evidence, such as DNA, ballistics and blood tests; as well as a growing universe of digital information from devices such as phones, computers and other digital devices. This section of the report focuses on digital and technologically derived evidence, which means evidence taken from and created by digital devices and via technology, such as cameras, satellites and other 'remote sensing technologies'.

We distinguish digital evidence, created by digital technology and itself the record or trace of an action or event used for the purpose of proceedings, from the digitisation of documents and records for the purpose of storing, organising and presenting evidence, as for example, with the ICC's E-Court protocol.[41]

The value of additional forms of evidence

The ICC's recent challenges relating to witness testimony illustrate one rationale for pursuing the collection and introduction of additional forms of evidence to support and as a partial alternative to witness testimony. The amended ICC RPE Rule 68 may further establish prior recorded testimony as an alternative to *viva voce* testimony, as discussed in Chapter 3 of this report. However, the circumstances in which such recorded testimony is allowed will remain limited. Moreover, digital and technologically derived evidence allows for information to be introduced in court that captures dimensions of a situation, event or location that may be beyond (contemporaneous) human

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39 See, notably, Rome Statute, Art 69(2): 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused'; and ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC- 01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, para 76: 'The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber'.

40 IBA, *Witnesses before the International Criminal Court* (IBA, 2013), 18–20. The IBA 'encourages the Prosecution and Defence to source and utilise additional forms of evidence in place of exclusive reliance on witness testimony. These may include forensic materials, official government records, physical exhibits, medical reports, video footage and other forms of electronic evidence'. .

41 Each international criminal court and tribunal has increasingly digitised its evidence storage, disclosure and presentation systems. At the ICC, the 'E-Court' Protocol has been in place since 28 August 2006 and refers to 'an information system which manages and provides access to judicial records and material'. See ICC Regulations of the Registry, Regulation 10 and see also ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1127 Decision on the E-Court Protocol, 24 January 2008. The ICTY also uses an Electronic Document Management System (E-court). See the ICTY in conjunction with the UN Interregional Crime and Justice Research Institute (UNICRI), ICTY Manual on Developed Practices (UNICRI, 2009) 95–98 www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf accessed 16 June 2016. At the STL, the Legal Workflow system manages the court records of the tribunal, as well as the evidence presented during the proceedings. See www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/practice-directions/2317-protocol-for-the-upload-of-electronically-stored-information-as-evidence accessed 16 June 2016. In addition, as will be further discussed below, a number of specialised databases were created to facilitate the storage and disclosure of evidence in the form of digital records.

perception or may provide a counterpoint to a witness's recollection. While an eyewitness account provides that witness's perception and recollection of an event, a video may capture elements that were outside a person's range of vision or that the individual has forgotten; a satellite or aerial image may show an overview of a larger area or an inaccessible location; and data such as phone records or computer records may show communications and patterns of communications relevant to an individual's activities and knowledge of events. This information, when presented as evidence, has the potential to better enable judges to discharge one of their key functions: to ascertain the truth about crimes charged within the jurisdiction of the ICC. In addition, the increasing prevalence of digital technology, in particular, mobile phones, mobile phone cameras and computers, even in remote locations, makes such technologically derived evidence an inevitable component of the ICC's investigations.

Presenting and assessing digital and technologically derived evidence

Importantly, as with witness testimony, none of these additional forms of evidence can be considered infallible. A key component of using such evidence in international legal contexts has always been an assessment of its reliability by judges, often assisted by experts who explain the science or technology behind the evidence and the conditions under which it was created. Parties to the proceedings must also have the opportunity to probe the process of its creation, chain of custody and content. Experts may also be required to explain what information the evidence provides and does not provide, especially with unfamiliar and complex technologies, such as call data records (CDR) or satellite images. Presenting, challenging and weighing digital and other 'newer' forms of evidence requires all parties, as well as the bench, to have access to specialist knowledge and additional resources, including time, to complete any necessary investigations and legal arguments related to presenting or challenging this type of evidence.

To date, ICC cases that have gone to trial have remained focused on witness testimony, and in that regard, it is worth noting that the context of the conflict and crimes under investigation may largely dictate the types of evidence available. The first cases to complete trials have addressed crimes allegedly committed by armed groups operating in the eastern Democratic Republic of the Congo (DRC) and the Central African Republic in 2002–2003, when access to technology was more limited. More recent investigations in Kenya, the Ivory Coast and Libya have involved conflicts in contexts where the use of mobile phones, email and social media is widespread.[42] For future investigations and trials, digital and technologically derived evidence creates enormous potential to enhance the truth-telling function of the ICC by providing new sources of relevant information and evidence, but also creates a host of new challenges, including security, verification and authentication. It also has implications for the equality of arms, as further discussed below.

42 Human Rights Center, UC Berkeley School of Law, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* (Human Rights Center, UC Berkeley School of Law, 2014) 8, www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf accessed 16 June 2016. See also OTP Strategic Plan 2016–2018, para 58, which states the following: 'The use of computers, internet, mobile phones, and social media, etc., has exponentially expanded worldwide, including in the countries in which investigations are undertaken by the Office' accessed 16 June 2016.

The ICC's approach to digital and technologically derived evidence

The IBA notes that the state-of-the-art for investigating, processing and presenting digital and technologically derived evidence is evolving rapidly and becoming ever more central to prosecutions of serious crimes.[43] The ICC OTP is taking steps to incorporate expertise and facility with such evidence. In its 2012–2015 Strategic Plan, the OTP identified a need for more diversified evidence, in part, due to problems with witness testimony, including witness intimidation and protection.[44] The OTP also noted the 'explosive growth in its access to digital data', prompting it to commit to expanding its capacity and expertise to collect and work with these types of evidence.[45] The OTP further emphasised these trends in its 2016–2018 Strategic Plan, noting that it had invested in internal expertise in the form of 'cyber-investigators and analysts experienced in online investigations and phone communications', which had improved its ability to 'identify, forensically collect and process this new evidence'.[46] However, the OTP also noted that strategic partnerships with the law enforcement community, non-governmental organisations (NGOs) and academic institutions were crucial for keeping up with the developments in the field. Going forward, the OTP outlined a strategy that combines internal capacity-building through recruiting experts and investing in specialised equipment, staff training and partnerships, in addition to increasing the use of technology for presenting its cases in court.[47]

The OTP is continuing to focus on building relationships with NGOs and other potential 'first responders' working on the ground in conflict situations, who may be in a position to gather evidence of crimes within the ICC's jurisdiction at the earliest possible stage, and thus preserve evidence of crimes that may lead to prosecutions. To this end, the OTP has participated in a series of workshops on its investigation and evidence strategies, facilitated by the Human Rights Center of the University of California (UC) Berkeley School of Law and other partners.[48] The second of these workshops, in 2014, focused on the use of electronic evidence to advance prosecutions at the ICC. A major issue identified was the need to upgrade the Court's technology systems and work practices, noting that the Court lacked dedicated internet lines, offline storage capacity, online anonymity for investigators and comprehensive, standard operating procedures for digital evidence.[49] The report further noted that 'a lack of resources is the greatest constraint' for the OTP to produce digital evidence, due to the

43 See, eg, the litigation in United States Federal Courts between the FBI and Apple over access to the contents of the iPhone of one of the actors in the December 2015 attacks in San Bernardino, California. Tim Bradshaw, Lindsay Fortado and Geoff Dyer, 'Apple privacy battle with Washington looms as watershed moment' *Financial Times* (London, 26 February 2016) www.ft.com/intl/cms/s/0/76034380-dc68-11e5-a72f-1e7744c66818.html#axzz49Tq1MlJd accessed 16 June 2016. On the importance of social media and digital devices to criminal networks, see also Brendan I Koerner, 'Why Isis is Winning the Social Media War' *WIRED* (Boone, April 2016) www.wired.com/2016/03/isis-winning-social-media-war-heres-beat accessed 16 June 2016.

44 ICC, OTP, Strategic Plan June 2012–2015 ('OTP Strategic Plan 2012-2015'), para 44 www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf accessed 16 June 2016.

45 *Ibid*, para 44.

46 OTP Strategic Plan 2016–2018, para 59. The OTP has established both a cyber unit and a technology advisory board. See Annex 1, para 20.

47 *Ibid*, paras 60–61.

48 Human Rights Center, UC Berkeley School of Law, *Beyond Reasonable Doubt, Using Scientific Evidence to advance Prosecutions at the International Criminal Court* (Human Rights Center, UC Berkeley School of Law, 2012) www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf accessed 16 June 2016; Human Rights Center, UC Berkeley School of Law, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* (Human Rights Center, UC Berkeley School of Law, 2014) www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf accessed 16 June 2016; and Human Rights Center, UC Berkeley School of Law, First Responders, *An International Workshop on Collecting and Analyzing of International Crimes* (Human Rights Center, UC Berkeley School of Law, 2014) www.law.berkeley.edu/files/HRC/First_Responders_final_with_cover4.pdf accessed 16 June 2016.

49 Human Rights Center, UC Berkeley School of Law, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* (Human Rights Center, UC Berkeley School of Law, 2014) 8, www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf accessed 16 June 2016. As of May 2016, the OTP has drafted Standard Operating Procedures addressing a range of issues relating to digital evidence. IBA Consultation with ICC OTP, 18 May 2016.

expensive equipment, software licences and need for dedicated staff and regular training. External partnerships were again emphasised, including with technology companies.[50] To this end, the OTP is participating in events, including RightsCon, that focus on progressive applications of technology for social justice.[51]

Key considerations for digital and technologically derived evidence in ICC trials

In this section of the report, the IBA highlights some of the key considerations for the use of digital and technologically derived evidence, including the volume, format and complexity of the evidence, and sources of the evidence. Through analysis of some of the more established forms of evidence, such as aerial and satellite images and video, as well as through newer types of evidence, such as mobile phone records, the IBA examines examples of how such evidence has been presented and assessed to date in international criminal trials. The IBA also makes observations regarding future considerations for the ICC's use of digital and technologically derived evidence, in particular, considerations pertaining to the equality of arms.

The volume, format and complexity of digital and technologically derived evidence

The IBA notes that specific challenges are presented by the volume, format and complexity of digital and technologically derived evidence. The *Ayyash et al* case at the STL presents the most extensive use of digital evidence in an international criminal trial to date. In presenting its case, the STL prosecution is relying heavily on mobile telephone communications data (more specifically, CDR)[52] in 'raw data' format,[53] to establish that telephone networks, involving at least 49 phones,[54] were created and used by five co-accused. The prosecution argues that the telephone networks provided the means by which the co-accused covertly prepared the attack on 14 February 2005, which killed 22 people including former Lebanese Prime Minister Rafik Hariri. It alleges that the networks were used to carry out surveillance on Hariri, carry out the attack and facilitate the broadcast of a false claim of responsibility for the attack. The prosecution also relies on CDR to attribute the phones to the co-accused through linking their activities and locations to specific phones.

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50 The Human Rights Centre noted that 'Relationships with private technology companies may also help the Office of the Prosecutor keep abreast of technological advancements and defray the costs of necessary software and hardware. Technology engineers often have philanthropic interests, and may be willing to assist with the Court's mission of promoting global justice. Meeting with independent programmers may be a way to galvanize support for the Court and build a network of innovative assistance without incurring prohibitive costs. Workshop participants also discussed the extraordinary benefits that could come with collaboration between the Court and large technology companies such as Yahoo!, Microsoft, Google, Facebook, YouTube and others. These companies hold much of the world's digital data and as private entities may not face the same restrictions on ICC cooperation as government agencies'. Human Rights Center, UC Berkeley School of Law, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court*, 2014) 9–10, www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf accessed 16 June 2016.

51 Alexa Koenig, 'The International Criminal Court at RightsCon: Upping its Cyber Game' *The Huffington Post* (New York, 11 March 2014) www.huffingtonpost.com/alexa-koenig-/the-international-crimina_1_b_4936346.html accessed 16 June 2016. See also, *ibid, 13*.

52 'CDRs refer to information in the Prosecution's possession and related to communication via either a fixed or mobile phone, and include Short Message Service or "SMS" records'. See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-0 1/PT /PTJ, Public Redacted Version of 'Decision on issues related to the inspection room and call data records' dated 18 June 2013, 19 September 2013, para 4.

53 Raw data (also called 'original data') is the data received by the OTP from the Lebanese authorities, which is 'unstructured' and 'contains records for one or more phone numbers and/or cell towers, as well as other technical information. Original data, especially when considering the volume of information in this case, is not intelligible without further processing'. See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-0 1/PT /PTJ, Public Redacted Version of 'Annex A to Defence Office Internal Memorandum Regarding Call Data Records' Filed 31 January 2013 – Corrected Version, 19 September 2013, para 8.

54 See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11/01/T/TC, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution, 6 May 2015, paras 6, 16, 23, 33, 39 ('*Ayyash et al* Decision on Five Prosecution Motions'); and STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11/01/T/TC, Prosecution Motion for the Admission of Blue Network-Related Call Sequence Tables and Related Statements, 2 February 2015, para 2.

In preparing and presenting its case, the STL prosecution has amassed a significant volume of information, which includes CDR from 'every mobile phone call made and text message sent in Lebanon between 2003 and 2010', obtained from the three telecom companies that operate in Lebanon or via requests for assistance from the Lebanese Government.[55] Because this information is of a specialised nature, both the prosecution and defence teams have hired experts in CDR to process the raw data, create and work with CDR databases, and verify and analyse the data. The data has been disclosed in multiple formats, including as raw data. The IBA notes that the *Ayyash et al* case, built on circumstantial rather than direct evidence,[56] presents particular challenges due to the importance of the information contained in the CDR. CDR serve as the basis for the linkage evidence that the prosecution intends to present to link the crimes to the accused. As such, while each defence team may take a different strategy in rebutting the charges presented by the prosecution, it is necessary for each team to be able to understand, process and challenge the CDR.

With complex digital evidence, such as CDR, disclosure and the format of disclosure become particularly important. In this regard, the IBA notes that the STL's structure includes a dedicated Defence Office, which is an independent organ of the tribunal and, among other functions, may assist defence teams in addressing common problems, such as technological and resource requirements.[57] At the pre-trial stage, in January 2013, the STL Defence Office, together with the individual teams, raised a number of issues regarding the defence teams' ability to access and work with the CDR. A memorandum from the Defence Office concluded that, at that time, the 'combined state of disclosure and technology' did not allow the defence teams to undertake the necessary activities to provide an effective defence.[58] In order to address the disclosure issues, the Pre-Trial Chamber held a series of meetings and status conferences, convened a working group and received submissions from the parties.[59] The Pre-Trial Chamber then ordered the prosecution and Registry to undertake a number of actions, including providing additional CDR to the defence in various formats, working with the Registry to facilitate the defence's data retrieval, and verifying and attesting to the validity of the raw data it was providing.[60]

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55 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/AC/AR126.9, Decision on Appeal by Counsel for Mr Oneissi against the Trial Chamber's Decision on the Legality of the Transfer of Call Data, 28 July 2015, paras 3–4. According to the prosecution, '[t]he original raw data encompasses individual records of billions of calls and text messages'. STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-0 1/PT /PTJ, 20140116_STL-11-01_T_T29_OFF_PUB_EN, Transcript, 16 January 2014, p 48, lines 12–13. Requests for assistance are a mechanism by which the prosecution and the defence – via the Defence Office – request investigative measures. See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-0 1/PT /PTJ, Public Redacted Version of 'Decision on Issues Related to the Inspection Room and Call Data Records', 19 September 2013, para 41.

56 For example, in its opening statement, the prosecution described the case as 'built on a number of different strands of evidence understood in their relationship to each other and in their totality. Each reinforces the other. It is the numerous pieces of reinforcing evidence, including the indelible traces which the accused could not erase, when taken together lead, in the Prosecution's submission, beyond reasonable doubt to the conclusion that each of the four accused carried out the acts attributed to them and are guilty of the crimes charged'. STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-0 1/PT /PTJ, 20140116_STL-11-01_T_T29_OFF_PUB_EN, Transcript, 16 January 2014, p 19, lines 10–17.

57 See www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence accessed 17 June 2016.

58 'In the efforts of the Defence counsel to provide an effective defence the following needs have been identified in relation to the collection of CDR. The Defence needs to be able: a. to validate and verify that the raw files received by the OTP from the Lebanese authorities are the same as the raw files disclosed to the Defence; b. to validate and verify the original raw files against the results produced by the SQL databases. This involves cross-checking raw data against SQL data; c. to compare individual CDR against overlapping other CDR encompassing greater time periods; d. to search, query and analyse, within one database, all relevant CDR provided by [redacted in original], as well as [redacted in original] data; e. to access, search and analyse [redacted in original] data, including the [redacted in original], in the same database; and f. to do the above without the assistance or oversight of the Prosecution in order to safeguard the confidentiality of its own work. Currently, the combined state of disclosure and technology does not allow the Defence to undertake these activities.' See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/PT-PTJ, Public Redacted Version of 'Annex A to Defence Office Internal Memorandum Regarding Call Data Records' Filed 31 January 2013 – Corrected Version, 19 September 2013, paras 27–28.

59 The working group, which met periodically during the pre-trial phase, was chaired by a legal officer in the Pre-Trial Chamber and included representatives from the prosecution, defence, Defence Office and Registry. See STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-/01/PT/PTJ, Public Redacted Version of 'Decision on Issues Related to the Inspection Room and Call Data Records', 19 September 2013, para 14.

60 *Ibid*, pp 26–27.

The IBA further notes that the complexity of digital evidence presented as part of an international criminal trial has implications for the efficiency of the proceedings. Significant amounts of expert witness testimony may be needed because each type of digital evidence may require specific expertise and therefore, a witness to present it to the judges, and to allow the defence to probe the source and content of the data. In *Ayyash et al*, as of the end of February 2016, the prosecution had called 19 OTP staff members to testify about the data and their analysis of the data.[61] The pre-trial judge had additionally recommended that the Trial Chamber retain an internal expert to provide advice to the Chamber.[62] The IBA observes that the complexity of the information makes the order in which evidence is presented more important, in order to build the proper foundation and understanding for judges. In *Ayyash et al*, as discussed below, the Trial Chamber delayed the admission of spreadsheets based on CDR because the underlying data first had to be explained and challenged. Counsel may also need additional time for preparation to present and respond to evidence based on complex digital technology.

Sources of digital and technologically-derived evidence

The value of any information as evidence, including digital and technologically derived information, is, in part, dependent on its source. The probative value that a chamber will be able to assign to any piece of evidence relates to its reliability, and judges may consider aspects of the form, content and origin of the information in making this assessment.[63] However, the use of digital and technologically derived evidence presents particular challenges relating to the source. Information providers may impose restrictions that make information about the origin and technology behind such information inaccessible. Indeed, the legal frameworks of these tribunals allow for 'lead' evidence to be provided confidentially, which recognises that the courts will be working on conflicts where evidence may come from state, military and UN sources.[64] Information may also come from sources that seek confidentiality for other reasons, for example, documentation including images and video footage filmed by civil society. In this instance, the need to protect sources who are living in a conflict situation may preclude providing full information to the ICC.

As discussed in Chapter 1, judges in international criminal trials have rather flexible rules of evidence and admissibility. However, the IBA notes that evidence coming from restricted sources also presents particular challenges for the parties in a case, and their ability to present and challenge the evidence. For example, at the ICTY, in the *Krstić*, *Blagojević*, *Popović et al* and *Tolimir* cases, the Trial Chambers admitted aerial images offered by the prosecution, which most significantly went to show areas of earth that the prosecution alleged were disturbed in the digging of mass burial sites in the vicinity of Srebrenica.[65] Aerial images were also admitted that showed buildings, vehicles, large groups of

61 STL, *Seventh Annual Report* (2015-2016) (STL, 2016) 10 www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/4833-seventh-annual-report-2015-2016 accessed 16 June 2016.

62 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/PT/TC, Redacted Version Of The Corrected Version Of The Pre-Trial Judge's Report Prepared pursuant to Rule 95(A) of the Rules Of Procedure And Evidence, 11 December 2013, para 71.

63 Christopher Gosnell, 'Admissibility of Evidence', in Karim A A Khan et al (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010) 386.

64 Rome Statute, Art 54(3)(e) and ICTY RPE, Rule 70(B).

65 ICTY, *Prosecutor v Zdravko Tolimir*, Case No IT-05-88/2-T, Trial Judgment, 12 December 2012 ('Tolimir Trial Judgment'), paras 65, 67–68, 70, 435, 454, 457, 459, 478, 561, 564; ICTY, *Prosecutor v Radislav Krstić*, Case No IT-98-33-T, Trial Judgment, 2 August 2001, paras 114, 223, 229, 230, 238, 250, 253, 258; ICTY, *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Case No IT-02-60-T, Trial Judgment, 17 January, 2005, fn 1397, 1398; and ICTY, *Prosecutor v Vujadin Popović et al*, Case No IT-05-88-T, Public Redacted Judgment, Volume I, 10 June 2010, paras 73–75.

prisoners and bodies.[66] The aerial images were provided to the prosecution by the US Government, pursuant to Rule 70 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY RPE), which allows the Prosecutor to receive confidential information on a limited basis and under certain conditions. In the *Tolimir* trial judgment, the Trial Chamber noted the US Government's stipulations that the prosecution 'is not authorized to discuss in courtroom proceedings any information relating to the technical or analytical sources, methods, or capabilities of the systems, organizations, or personnel used to collect, analyse, or produce these imagery-derived products'.[67] In the trial judgment, the Trial Chamber responded to the accused's objections to the reliability of these images 'on the grounds that no evidence was presented on their origin, the method of their creation, the manner of their editing, how to interpret them or whether they were delivered to the Prosecution in their original form or previously modified'.[68] While acknowledging that 'evidence is lacking on the method of creation of these images', the Trial Chamber nonetheless found that 'this does not impair the credibility of aerial images in general'.[69] The IBA notes that the high level of corroboration of this evidence was a key factor in the Trial Chamber's determination.[70]

Unlike satellite imagery, which is highly resource-intensive to produce, video footage of many conflicts is widely available from news and media sources, and from humanitarian organisations and NGOs. Video, and in particular, mobile phone video, has become an extremely accessible technology, which has led to dedicated civil society programmes seeking to harness the potential of citizens documenting crimes, which may be used as evidence in international criminal trials.[71] At the same time, treating this footage as evidence in a criminal trial raises a number of considerations relating to its probative value.

At the ICC, video played a key role in the *Lubanga* case, and the case highlights challenges regarding how the content of video may be interpreted and relied on.[72] To the extent that the video was introduced in public session, it was accompanied by the testimony of a protected witness whose identity was not revealed. Over the course of the trial, the prosecution introduced ten video clips as evidence to prove that children under the age of 15 were included within Mr Lubanga's armed group, and to show that he was aware of this fact.[73] In the judgment, the Trial Chamber found that

66 *Ibid*, *Tolimir* Trial Judgment, para 67.

67 *Ibid*, *Tolimir* Trial Judgment, para 68.

68 *Ibid*, para 69. In his final brief, Z Tolimir stated the following: 'In order to understand these photographs, it is necessary to "understand their nature and methods of their creation" in order to establish what they really contain. No evidence or explanations were presented to the Trial Chamber as to whether these are satellite photographs, photographs taken by unmanned aircraft or photographs taken in another way, for example, by freezing the frames of a video recording. Namely, at least two questions arise: the first is the question of the method of their creation, and the second is their interpretation. Without further information it is not possible to interpret these photographs, and therefore the Trial Chamber cannot rely on them when rendering the final judgment'. See ICTY, *Prosecutor v Zdravko Tolimir,* Case No IT-05-88/2-T, Defence Final Trial Brief (with corrigendum), 1 October 2012, para 158.

69 *Ibid*, Defence Final Trial Brief, paras 69–70.

70 The Trial Chamber cited the extensive testimony of two former OTP investigators about the use of aerial images; complementary forensic and anthropological reports; and corroborating witness testimony, including testimony indicating the aerial images led to discovery of burial sites. See n 65 above, *Tolimir* Trial Judgment, para 70.

71 See the IBA project 'eyeWitness to atrocities' www.eyewitnessproject.org and see WITNESS https://witness.org/about accessed 16 June 2016.

72 Extensive testimony was heard about video evidence in the *Lubanga* trial from 16–20 February 2009. See ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-127-Red-ENG, Transcript, 16 February 2009; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-129-Red3-FRA, Transcript, 17 February 2009; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-130-Red2-ENG, Transcript, 18 February 2009; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-132-ENG, Transcript, 20 February 2009.

73 The IBA notes the majority of the video clips relied on by the prosecution are not publicly available. See ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Anx2, Dissenting Opinion of Judge Anita Ušacka to the Appeals Judgment, 1 December 2014, fn 70, stating that 'it should be noted that the public cannot access the video excerpts at hand, which I find deeply regrettable'. Those that were screened publicly showed activities of the FPLC troops, including individuals who the prosecution alleged, based on their appearance, were children under the age of 15. See, eg, www.youtube.com/watch?v=3ySF8ojE6n4 accessed 16 June 2016.

these videos showed children under the age of 15 and considered that, together with other evidence, including witness testimony, the evidence was sufficient to convict Thomas Lubanga for the crime of enlistment, conscription and use of child soldiers. On appeal, the *Lubanga* defence raised a number of challenges to the manner in which the Trial Chamber relied on the videos.[74] However, the majority of the Appeals Chamber rejected the defence's argument that the Trial Chamber erred in relying on video excerpts to assess the age of soldiers in the Forces Patriotiques pour la Libération du Congo (FPLC) based on their appearance.[75] It found that the Trial Chamber's factual finding was reasonable because it 'appropriately exercised caution when assessing the age of an individual based on video images'.[76] Judge Anita Ušacka dissented and would have overturned Mr Lubanga's conviction. With respect to the crucial evidence of age, Judge Ušacka saw 'a series of major problems in relation to reliance on indirect evidence only and a lack of reasoning on the part of the Trial Chamber as to how it reached its conclusion based on the evidence at hand without any explanation of these major issues'.[77] While the use of video in the *Lubanga* case has been lauded as a positive development with respect to the further establishment of video as a credible source of evidence in international trials, the IBA notes that the issues raised in the dissenting opinion in the *Lubanga* appeal bear further examination with respect to the extent of analysis applied to video evidence.

In respect of authenticating the footage itself, by showing that it has not been altered or modified in any way and that there is a reliable chain of custody from the source of the evidence to the ICC, the IBA notes that progress is being made through advances in technology and the provision of training and resources. Organisations, including the IBA's eyeWitness Project, are seeking to address the authentication problem by embedding technology within devices that will assist with authentication.[78] Manuals and guidelines are also being created that provide information for civil society and non-professional investigators about the requirements that information must meet to pass as evidence in a courtroom setting.[79]

With the proliferation of technologies for capturing digital video and images, and for sharing them widely on social media, additional challenges arise with authenticating and verifying sources. For example 'metadata' about the time and place in which an image was created can be manipulated

74 The Lubanga defence also sought leave to introduce additional evidence pertaining to video footage of two former bodyguards of Thomas Lubanga who the Trial Chamber had accepted were under 15, challenging this determination. While the Appeals Chamber did not allow this evidence to be introduced, the *Lubanga* defence was seeking to bring these individuals to testify that they were over 15 at the time that the footage was filmed. ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Appeals Judgment, 1 December 2014 ('Lubanga Appeals Judgment'), para 216 and see also ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2948-Red-tENG, Public Redacted Version of Mr Thomas Lubanga's appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute, 3 December 2012, paras 295–296.

75 *Ibid*, *Lubanga* Appeals Judgment, para 223.

76 *Ibid*, para 222.

77 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Anx2, Dissenting Opinion of Judge Anita Ušacka to the Appeals Judgment, 1 December 2014, para 79.

78 The eyeWitness to Atrocities project 'offers an easy-to-use camera app that captures the metadata needed to ensure the images can be used in investigations or trials and safely stores the information in a storage facility maintained by the eyeWitness organisation'. The eyeWitness app functions by (1) expanding the metadata collected and embedded in the image when the images are taken, to include GPS coordinates, date and time, device movement data and location of surrounding objects such as cell towers and Wi-Fi networks; this information verifies the date/time/location of the footage; and (2) embedding a unique identifying code (known as a hash value) calculated based on the pixel count that is used to verify the footage has not been edited or altered in any way. The user then sends the footage from the app directly to a secure storage facility maintained by eyeWitness. Only footage captured with and sent from the app is stored, ensuring that the stored footage is the original version. This original, encrypted footage is stored offline until it is needed for investigations or trials www.eyewitnessproject.org accessed 16 June 2016.

79 See, eg, Witness.org, Video as Evidence Field Guide, pp 21–28; pp 39–56 https://vae.witness.org/video-as-evidence-field-guide accessed 16 June 2016.

and is removed by some social media platforms.[80] At the ICC, in the *Bemba et al* case, the prosecution has sought to introduce into evidence screenshots of photographs taken from a Facebook account to show linkage between two individuals, which were challenged by the *Bemba* defence on the basis that the ownership of the Facebook account could not be forensically verified and there was no metadata attached to the screenshots.[81] The Trial Chamber has yet to rule on this issue at the time of writing this report.

Security considerations are also a major factor in both the creation of digital evidence and its use in a criminal trial. The act of documenting in a conflict zone or situation of unrest may put both the documenter and subject at risk at the time of capturing the images or information, and later, if the information is discovered. In addition, disclosure rules that apply before and during a trial proceeding may require that both documenters and subjects be named and made available for questioning by the other party in the case. The protection regime of an international criminal court or tribunal has provisions to address this, both with respect to prosecution and defence witnesses; however, the ICC's resources for providing protection may be limited. For this reason, many resources that encourage the documentation of crimes rightly emphasise informed consent at each stage of creating and sharing such information to ensure that participants are fully informed about the potential risks of their involvement.[82]

Related to the issue of informed consent are wider concerns about privacy of individuals when a court is given widespread access to digital evidence. In the *Ayyash et al* case at the STL, the Trial Chamber ruled that the collection and transfer of large tracts of CDR from the major Lebanese telephone providers to the tribunal did not violate the right to privacy according to international human rights law. The Trial Chamber found that the transfer was legally authorised by UN Security Council Resolutions, access to the records was strictly limited and the transfer was proportionate to the legitimate aim of investigating the attack of 14 February 2005.[83] This decision was upheld on appeal.[84] The IBA notes that privacy concerns will continue to arise with the increasing availability of digital evidence, whether from government, corporate, civilian or other sources.

In the future, it is also anticipated that the ICC will conduct trial proceedings where aerial and satellite images – or more broadly, 'remote sensing technologies' – may play a more prominent role. For example, in Darfur, the security and political situation makes it impossible for the ICC to investigate on the ground.[85] Images may provide context and background information, for example,

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80 See, eg, instructions from Google on changing metadata for online video at 'Change video information & settings', see https://support.google.com/youtube/answer/57404?hl=en accessed 16 June 2016. On the removal of metadata by some social media platforms, see Olivier Laurent, 'Study exposes social media sites that delete photographs' metadata' *British Journal of Photography* (London, 13 March 2013) www.bjp-online.com/2013/03/study-exposes-social-media-sites-that-delete-photographs-metadata accessed 16 June 2016.

81 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1170-Conf, Decision on the 'Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre de la décision de la Chambre de première instance VII du 17 novembre 2015', 23 December 2015, paras 49–53, 83–86.

82 See, eg, www.eyewitnessproject.org and https://vae.witness.org/video-as-evidence-field-guide accessed 16 June 2016; and Public International Law & Policy Group, Section 19 ('Informed Consent'), see http://publicinternationallawandpolicygroup.org/wp-content/uploads/2015/11/PROTOCOLS-ON-INVESTIGATION-AND-DOCUMENATION-Field-Guide-Couch-20.11.15.pdf accessed 16 June 2016.

83 See n 54 above, Decision on Five Prosecution Motions, paras 108–110.

84 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/AC/AR126.9, Decision on Appeal by Counsel for Oneissi against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015.

85 While the ICC has not made the majority of documents from its Darfur investigations publicly available, it was reported that the OTP used images generated by the Satellite Sentinel Project in its investigation into Abdel Raheem Muhammad Hussein in the Darfur situation. See Mark Benjamin, 'George Clooney's Satellites Build a Case Against an Alleged War Criminal', *TIME* (Washington, DC, 3 December 2011) www.time.com/time/world/article/0,8599,2101425,00.html accessed 16 June 2016. The Satellite Sentinel Project is a joint project of the actor George Clooney and John Prendergast, Founding Director of the Enough Project www.enoughproject.org/category/our-campaigns-initiatives/satellite-sentinel-project accessed 16 June 2016.

establishing patterns and usage of a location. In the *Abu Garda* confirmation of charges hearing, images were used to show civilian use and reliance on the peacekeeping outpost at Haskanita and, together with other evidence, were referenced by the Pre-Trial Chamber in making its determination that the charges met the gravity threshold.[86] Beyond providing background information, proponents of using satellite images in investigations and judicial proceedings also note the potential for remote sensing technologies to provide evidence of crimes within the jurisdiction of the ICC, for example, by documenting troop movements, and the destruction of villages and infrastructure.[87] It is worth noting that in Darfur, satellite imagery is also being collected by a civil society initiative, marking a development in respect of possible sources for more advanced technology.[88]

Compiled and formatted evidence

The final point relates to the extent to which compilations of images and data are presented as evidence. In the *Katanga and Ngudjolo* trial at the ICC, which dealt with an attack on a village in the eastern DRC, the prosecution introduced a number of satellite images, aerial photographs taken by drone and photographs taken on the ground, which were arranged into a 360-degree 'virtual reality' presentation of the village of Bogoro and its immediate surroundings.[89] The Trial Chamber had admitted the visual representation of the 'Institut de Bogoro' – a key location in the case – into evidence together with the accompanying report and photographs, noting that it had 'very limited evidentiary value' and was 'simply a tool for orientation, just like a diagram or drawing'.[90] In the *Ayyash et al* case at the STL, the prosecution presented two 3D models that depicted the relevant area of Beirut, Lebanon, before and after the explosion on 14 February 2005. The models, along with other visual evidence including photographs, videos and maps, were tendered from the bar table, meaning without a witness to produce or identify them.[91] The Trial Chamber accepted them into evidence as 'demonstrative exhibits', with the weight assigned to the models to be assessed later, and noted that it would 'exercise appropriate caution with regard to objects whose position is not fixed, such as cars and debris'.[92]

The IBA observes that the exact evidentiary status of visual aids can be unclear, even for the party that seeks to introduce them. However, important fair trial rights, including the right to adequate time and facilities to prepare a defence, hinge on the status of visualisations and whether or not they are evidence. For example, in a filing in the *Ongwen* case at the ICC, the prosecution indicated that it intends to rely on, and have available to all parties and the Trial Chamber, 'electronic visual representations of the four attack locations derived from the use of drone photography/video and

86 ICC, *Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, fn 62.

87 Ben YWang et al, 'Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities' (2013) 2 Stability: International Journal of Security & Development 53, 1–18 www.stabilityjournal.org/articles/10.5334/sta.cn accessed 16 June 2016.

88 The Satellite Sentinel Project. See n 85 above.

89 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-90-ENG ET WT 26-01-2010, Transcript, 26 January 2010, pp 24–25. Many of these images were taken during a site visit conducted by the OTP together with forensic and other experts in March 2009 (*Ibid* 21–22).

90 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1515, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), 7 October 2009, para 39.

91 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 12 January 2014.

92 *Ibid*, para 10.

three dimensional laser scanning'.[93] In this instance, the prosecution had requested late disclosure of the visualisations due to the technical complications of creating them, and justified this on the basis of their being 'not of primary evidentiary value'.[94] In a status conference, the prosecution later stated that it would seek to admit the representations as evidence, and it also planned to show the material to victims during their testimony at trial, with markings and references to the visual aids becoming part of the evidence.[95] In this respect, the IBA notes that the lack of clarity about whether the visual aids themselves are evidence may have an impact on the defence's strategy and whether it expends resources investigating and challenging them. As these examples illustrate, the complex technology behind such visual aids has the potential to require significant resources or expertise. The IBA additionally notes that visualisations, including 3D computer-generated or physical models of a location, can be resource-intensive to create and present, while in the end having limited value for judges. Such models may also duplicate information that judges may obtain by other means, including by judicial site visits, which in the end may have a greater utility and immediacy as an opportunity for first-hand observation.[96] In addition, visualisations may also subtly influence judges' perception of events because they provide a selective representation of facts in what is ostensibly an 'objective' format. As such, the IBA urges that such visual tools be approached with the appropriate caution.

The IBA further notes that the line between compiled and raw data may be hard to discern. As noted above, the prosecution's case at the STL is heavily reliant on CDR, which consist of long strings of numbers and are 'without further analysis largely unintelligible'.[97] The prosecution is presenting the raw data in various formats that are intended to illustrate the connections and conclusions on which the charges against the accused are based. One such format is the call sequence table (CST), which prosecution analysts produce using Microsoft Excel software by, according to the prosecution, 'copying and pasting raw data' into 'chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time, comprising relevant call data records and cell site information'.[98]

The prosecution sought to have a large number of CSTs admitted, presenting them as a product created through a 'standardised' and 'mechanised' method, and arguing that the tables represent merely the reformatting of CDR data.[99] Among their objections, defence teams called for the Trial Chamber to hear evidence on and assess the validity and admissibility of the underlying CDR first, including the creation, storage and retrieval of the CDR, as well as the need for witnesses to be heard

93 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-438, Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016, 18 May 2016, para 8.

94 *Ibid*.

95 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-T-25-ENG ET WT 23-05-2016, Transcript, 23 May 2016, pp 19–20. The images 'will be shown to 25 witnesses so that they can describe to the Bench where the attackers came from, where a particular event occurred. And their comments on it, markings on it if it be, if that be done, will then become part of their evidence'.

96 For example, in the *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the Trial Chamber travelled to Bogoro and environs on 18–19 January 2012, together with representatives of the prosecution, *Katanga* and *Ngudjolo* defence teams. This visit resulted in a detailed report that covered all the locations visited by the judges and included images, as well as summaries of comments made by judges and participants connecting locations to various pieces of testimony from specific witnesses. In the final judgment, the Trial Chamber appeared to rely on the site visit on a very limited and non-specific basis, noting that 'the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications in situ of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the Accused persons' and that it had 'drawn on such findings in the present judgment'. See ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3234-Anx-Red, Version publique expurgée de l'annexe à l'Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo, 3 February 2012.

97 See n 54 above, Decision on Five Prosecution Motions, para 2.

98 *Ibid*.

99 *Ibid*, para 9.

who can explain the CSTs and be cross-examined.[100] In a decision on 6 May 2015, the Trial Chamber deferred a decision on the admissibility of CSTs until it had heard witness testimony about the provenance of the CDR, including on the gathering, retrieval and storage of data, and the production of the CSTs.[101] The Trial Chamber noted that in the absence of such testimony, it had 'insufficient information to effectively assess the reliability and probative value of these call sequence tables, which amalgamate and organize underlying data from different sources of raw data. To properly evaluate the integrity, value, and authenticity of these call sequence tables, the Prosecution must provide contextual evidence on these tables and, in particular, on how they were produced.'[102]

The Electronic Presentation of Evidence (EPE) programme is another format used by the STL prosecution to present evidence. The EPE is a computer program designed by the prosecution to display evidence in varying combinations and record what it has displayed.[103] While similar systems have been used in domestic proceedings, this represents the first time that such a system has been used in an international criminal court or tribunal.[104] The system was presented in court by two prosecution analysts,[105] and the program as a 'vessel' was submitted into evidence with the understanding that any information that would be displayed in the program would have to be admitted separately.[106] While at the time of writing this report, the STL Trial Chamber had not ruled further on the probative value of the EPE or how it may be used during the trial, the IBA notes both the potential of, and the challenges raised by, the use of sophisticated technology to present evidence in the courtroom. While such technology may allow the prosecution to narrate a sequence of events and illustrate alleged connections between and among individuals and criminal acts, such technology attempts to unify and simplify disparate pieces of evidence, including data and digital evidence. Judges, whose role is to rule on the underlying data and evidence, as well as the unified theory presented by the prosecution, are faced with the task of dismantling the technology underlying these databases and systems; technology that is both complex and opaque.[107]

Although the ICC has, to date, not conducted a trial that is heavily reliant on digital or technologically derived evidence,[108] in light of the rapidly evolving field, the IBA recommends that the Court continue to update and assess its approaches to such evidence. The variation between

100 *Ibid*, Decision on Five Prosecution Motions, paras 46–60.

101 *Ibid*, Decision on Five Prosecution Motions, p 36.

102 *Ibid*, Decision on Five Prosecution Motions, para 115.

103 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, 20150916_STL-11-01_T_T196_OFF_PUB_EN, Transcript, 16 September 2015, p 23, lines 1–9. The prosecution describes the EPE as 'a demonstrative tool, through which to organize and display extensive amounts of data related to the Accused's alleged telephone use during the preparation and perpetration of the assassination'. See STL, *Seventh Annual Report* (2015–2016), March 2016, p 19 www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/4833-seventh-annual-report-2015-2016 accessed 16 June 2016.

104 *Ibid* STL, *Seventh Annual Report*.

105 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, 20150916_STL-11-01_T_T196_OFF_PUB_EN, Transcript, 16 September 2015, p 24, lines 4–13; STL, *Prosecutor v Salim Jamil Ayyash et al*, 20151109_STL-11-01_T_T212_OFF_PRV_EN 41/88, Transcript, 9 November 2015; and STL, *Prosecutor v Salim Jamil Ayyash et al*, 20151110_STL-11-01_T_T213_OFF_PRV_EN 28/92, Transcript, 10 November 2015.

106 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, 20150917_STL-11-01_T_T197_OFF_PUB_EN, Transcript, 17 September 2015, pp 13–17.

107 See, eg, Ned Whalley, 'Technical evidence a hurdle for STL judges', The Daily Star (Lebanon) (Beirut, 10 May 2016), which states that the evidence being presented in the *Ayyash et al* case 'is so technical that it is unclear how judges – or anyone else lacking significant experience in telecommunications – could be expected to appropriately evaluate its implications' www.dailystar.com.lb/News/Lebanon-News/2016/May-10/351372-technical-evidence-a-hurdle-for-stl-judges.ashx accessed 17 June 2016.

108 The IBA notes that, increasingly, digital and technologically derived evidence may be part of the evidence included in ICC cases, even if it does not yet form a substantial component of the case. For example, the prosecution has relied on CDR in the *Bemba et al* case dealing with offences against the administration of justice. In this context, CDRs were one type of evidence put forward together with witness testimony, intercepts and documentary evidence, and were intended to demonstrate that the accused 'remained in frequent, lengthy, and unsanctioned contact to coach witnesses'. The CDRs were introduced in Court through the prosecution's telecommunications expert. See, ICC, *Prosecutor v Bemba et al,* ICC-01/05-01/13-1905-Red, Public Redacted Version of 'Prosecution's Closing Brief', 10 June 2016, paras 21, 43.

relatively verifiable sources, such as governments and the UN, and more informal information providers will continue to grow, and it will be important for the ICC to be prepared to protect fair trial concerns while dealing with such evidence, as well as any attendant privacy issues. Especially as such information may become more central to cases, as discussed in the examples of *Lubanga*, Darfur and the STL in this report, it will be important for the defence, and to a lesser extent, legal representatives of victims, to be able to fully explore the sources and challenge the evidence as they would any other type of evidence.

Future considerations for digital and technologically derived evidence

The IBA emphasises that digital and technologically derived evidence will require resources and changes for the ICC as a whole, so that all organs build capacity to process and manage such evidence. In this regard, the IBA encourages the Court to take a common approach. For example, representatives of the Registry and chambers would benefit from workshops, such as those convened with the OTP, and would enrich the discussion by raising operational and legal concerns from the perspective of their respective organs. Likewise, as the experience of the STL has demonstrated, some degree of centralisation will conserve resources, reinforce equality of arms and increase efficiency in assisting defence teams to manage such evidence. The IBA notes that in the absence of a Defence Office as an independent organ at the ICC, the Office of Public Counsel for the Defence (OPCD), as the only independent section mandated to support the rights of the defence, is well-positioned to provide assistance to teams, act as a clearing house for defence issues and preserve practices that develop across cases and over time.

In addition, the IBA notes that the ICC Prosecutor has a unique obligation among prosecutors of international criminal tribunals to 'investigate incriminating and exonerating circumstances equally' according to Article 54 of the Rome Statute. The IBA encourages the Prosecutor to take this into account when developing the OTP's practices around digital evidence. In this regard, the OTP should not only plan for its disclosure obligations in the event of receiving a high volume of digital evidence, but also, together with the Registry, be prepared to address questions including the format and searchability of the data and the extent to which the defence would be able to undertake their own investigations into the digital evidence. Taking into account the experience of other courts, the IBA notes that the introduction of digital and technologically derived evidence may make trials longer and more complex, in part, due to the need for a sufficient pre-trial period for the defence to process and investigate such evidence, and the need during the trial to hear witnesses and experts to authenticate and explain evidence. In light of the accused's right to be tried without undue delay under Article 67(1)(c), the IBA recommends a selective approach regarding relying on digital and technologically derived evidence, and notes that the prosecution will need to balance its obligations to disclose potentially exculpatory evidence with avoiding high volumes of irrelevant information that may prolong the disclosure and pre-trial period. A selective approach is also in line with the move towards a more efficient trial process.

Furthermore, the IBA urges the ICC to plan for the resource implications of incorporating evidence from digital sources. Within the legal aid framework, the Court should ensure that the defence, and to a lesser extent, legal representatives of victims, have the means to access experts and technology as needed for sufficient periods of time. In this regard, the IBA notes that the right guaranteed to the

accused under Article 67(1)(b) to have adequate time and facilities to prepare the defence will be implicated, as additional time may be needed to process digital and technologically derived evidence, including time to obtain the advice of relevant experts.[109] If experts are also required to interpret evidence put on by the prosecution during their presentation of the evidence, expert assistance may also be required throughout the trial to give full meaning to the accused's right to examine witnesses under Article 67(1)(e). For the chambers, the appointment of experts may also be appropriate to assist judges with analysing information, so that judges can assess the probative value and weight of the evidence. Beyond the need for parties to access additional resources, the Registry itself will need resources to facilitate processing and presenting digital evidence in the courtroom, and to ensure the IT systems of the Court can securely store and manage the evidence.

Recommendations

1. The IBA recommends that the ICC take a common approach to preparing for and working with digital and technologically derived evidence, with participation and input from all organs and parties affected by the use of such evidence. In this regard, focal points within the Registry and OTP for coordination with all relevant stakeholders, in keeping with a 'one-court approach', would be highly beneficial.

2. The IBA strongly urges the Court and States Parties to ensure that adequate resources for the defence are available as part of the regular legal aid policy, but also in response to specific needs and requests that may arise. Relevant resources may include funding for experts, opportunities for training, opportunities to investigate and access to information about available sources of digital evidence. In this regard, the IBA notes that the resources made available to the defence should take into account the possibility for the defence to select their own analytical tools for data, rather than having to use the analytical tools developed by the OTP.

3. The IBA encourages the OTP to take into account the particular challenges posed by digital and technologically derived evidence, and to plan for the impact this type of evidence may have on its obligation to investigate exculpatory evidence under Article 54(1)(a) of the Rome Statute, as well as on the OTP's broader disclosure obligations.

4. The IBA recommends that the OPCD be involved as a focal point for defence-related issues within the ICC, in the absence of an independent defence organ at the Court and in light of the effectiveness of the STL Defence Office in dealing with such matters.

5. In cases involving large amounts of digital and technologically derived evidence, the IBA

109 In this regard, the IBA notes that the ICC Legal Aid scheme currently in force does not contain specific provision for experts. The current structure of defence teams before the ICC includes a counsel, associate counsel, legal assistant, case manager, professional investigator and resource person. See ICC, ASP, ICC-ASP/11/2/Add.1, *First Report of the Bureau on legal aid* (ICC ASP, 2012) https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-2-Add1-ENG.pdf accessed 20 June 2016. In practice, ICC defence teams have been directed to cover costs for expert fees from the budget that each team has for expenses (€3,000 monthly). The ICC Counsel Support Section also notes that 'the ICC legal aid system has flexibility as one of its basic principles, allowing counsel to 'use available savings to further remunerate experts', with the further possibility of requesting additional resources from the Court for this purpose. (IBA Consultation with ICC defence Counsel, 29 February 2016; and IBA email correspondence with ICC Counsel Support Section, 24 May 2016). By contrast, while it also does not include experts within the structure of the core defence team, the STL Legal Aid policy includes provisions for counsel to hire experts, with €75,000 allocated for the pre-trial phase and an additional €75,000 allocated for the trial phase. STL, STL/PL/2011/01/Rev.1, Legal aid policy for the Defence, 19 October 2015, Sections 4.9, 5.6, 13, see www.stl-tsl.org/en/documents/stl-documents/defence-office-documents/1190-legal-aid-policy-for-defence accessed 20 June 2016.

recommends the setting up of working groups involving all parties at an early stage of the proceedings to assist with resolving any issues with disclosure and any associated technological issues that may arise.

6. The IBA urges the chambers and all parties to proceed with caution in introducing and evaluating compiled and formatted evidence, and to maintain distinctions between 'original' and manipulated products.

Chapter 3: Admission of prior recorded testimony in ICC trials

Prior recorded testimony as evidence at trial

The ICC's legal texts qualify the primacy of oral witness testimony in Article 69(2) with the ability, under certain conditions, to admit prior recorded testimony as evidence. The ICC RPE initially included a limited provision for admitting prior recorded testimony.[110] In November 2013, following an extended process, the ICC ASP adopted an amendment to Rule 68 of the ICC RPE, which gave the Court greater latitude in admitting prior recorded testimony.[111] An expanded practice of admitting prior recorded testimony may, over time, alleviate some of the ICC's heavy reliance on in-person witness testimony and may allow for a more efficient use of court time during trial.

The IBA supported the amendments to Rule 68 at the time of their adoption.[112] In particular, the IBA welcomed the language in ICC RPE Rule 68(1), which provides that the admission of prior recorded testimony should not be 'prejudicial to or inconsistent with the rights of the accused'. This phrase was added to Rule 68 with the express purpose of making explicit the applicable fair trial protections.[113] The right of the accused to examine or have the witnesses examined against him or her is a fundamental component of a fair trial enshrined in Rome Statute Article 67(1)(e).[114] As discussed below, the provisions of Rule 68 and the analogous rules at the ICTY, ICTR and STL seek to protect this right in a number of ways, for example, by limiting the subject of the prior recorded testimony to evidence that goes to prove matters other than the acts and conduct of the accused, such as evidence on the background or impact of crimes. The various rules also provide that, in principle, if the prior recorded testimony does concern evidence that goes to prove the acts and conduct of the accused, the witness must be available for cross-examination and questioning by judges, or the defence must have had an opportunity for cross-examination at the time the statement was given.

In accepting prior recorded testimony as evidence, courts are balancing a number of considerations for a fair trial, including the accused's right to confront witnesses, with their right to be tried without undue delay. The amended ICC RPE Rule 68 was adopted primarily on the grounds of increasing the efficiency of the criminal process, and closely followed the RPE in place at the ICTY, and, to

110 Prior to its amendment, ICC RPE, Rule 68 read as follows: 'When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the Defence had the opportunity to examine the witness during the recording; or (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings'.

111 See n 16 above.

112 See n 15 above.

113 ICC, ASP, ICC-ASP/12/37/Add.1 Annex II.A, WGLL, *Second report of the Court to the Assembly of States Parties,* (ICC ASP, 2013) para 11 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf accessed 16 June 2016 ('WGLL Second Report to the ASP').

114 On the importance of cross-examination, Eugene O'Sullivan and Deirdre Montgomery state the following: 'Cross-examination is the ultimate means of demonstrating truth and of testing veracity and credibility, for the cross-examination with the most honest witness also can provide the means to explore the frailties of the testimony. It is one of the ways an accused may provide full answer and defence to the charges and allegations against him or to elicit information concerning facts in issue, or relevant to an issue that is favourable to him. It permits the accused to confront a witness while the trier of fact observes the witness during his or her testimony.' Eugene O'Sullivan and Deirdre Montgomery, 'The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY (2010) 8 J Intl Crim Justice 511, 513.

some extent, similar provisions in place at the ICTR and STL.[115] Indeed, through amendments of its RPE, the ICTY, in particular, also went through a process of broadening its rules for admitting prior recorded testimony, sometimes significantly departing from the principle of the primacy of oral evidence given in court.[116] Compared to the ICTY, the ICTR retained a more restrictive legal framework and its Trial Chambers less frequently admitted prior recorded testimony.[117] Following the ICTY, the ICC's current legal framework allows the admission of prior recorded testimony in a number of situations. Although, to date, the amended Rule 68 has been used on a limited basis, it is anticipated that the use of prior recorded testimony will become an established practice at the ICC and a tool for reducing the time needed for witness testimony to be heard during trial proceedings. The admission of written statements in lieu of or in addition to oral testimony requires careful attention to fair trial considerations and a standardised and consistent practice in regard to taking witness statements. This practice can be supported by clear and detailed guidelines from the chambers, including in the form of practice directions.

This Chapter provides a brief overview of the situations in which prior recorded testimony is now admissible in ICC trials, and notes some points of comparison with practices of other international criminal tribunals. It then considers the most recent litigation over the use of Rules 68(c) and (d) in the *Ruto and Sang* case, and makes recommendations for continuing to incorporate prior recorded testimony into the ICC's trial procedures.

Written evidence to prove a matter other than the acts and conduct of the accused

Defining 'acts and conduct'

The RPE of the respective above-mentioned courts allow prior recorded testimony as evidence to prove a matter other than the acts and conduct of the accused.[118] In other words, for prior recorded testimony to be admissible without the witness being present for cross-examination, the testimony must not go towards linking the accused to the crimes. International criminal proceedings focus on those most responsible, and employ theories of liability that, for example, allow individuals to be convicted for acting jointly with another, making a contribution to the commission of a crime or having responsibility as a military commander. Cases may also be built on circumstantial rather than direct evidence. The IBA notes the challenges inherent in discerning which acts and conduct of the accused are relevant and, therefore, where the limits should be for admission of a witness account or statement relating to the 'acts and conducts' of the accused. At the same time, linkage evidence – the evidence establishing a relationship between the crimes and the criminal responsibility of an accused

115 The WGLL notes that 'the proposed amendment is intended to reduce the length of ICC proceedings and streamline evidence presentation. The new sub-rules reflect practice in international criminal tribunals and are based on three ICTY rules'. See n 13 above; see also paras 3, 4 in Annex 1.

116 ICTY RPE, Rule 92*bis* was added in 2000; Rule 92*ter* and Rule 92*quater* were added in 2006; and Rule 92*quinquies* was added in 2009.

117 As outlined below, the ICTR adopted the same provision as the ICTY RPE, Rule 92*bis*, to allow admission of prior recorded testimony that does not go to prove the acts and conduct of the accused. The ICTR RPE also included Rule 92*bis*(C) for admitting statements of unavailable witnesses, provided that they do not go to the acts and conduct of the accused, while omitting equivalents to ICTY RPE, Rules 92*ter* and Rule 92*quinquies*. As such, the ICTR generally had a more restrictive regime with respect to prior recorded testimony. The IBA further notes that the cases adjudicated by the ICTR presented a number of issues in relation to witness testimony that distinguish it from the ICC and ICTY, but which are beyond the scope of the current Report. See, eg, Yvonne McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis' (2013) 26 LJIL 971–989. See also Nancy Amoury Combs, 'A New Look at Fact-Finding at the ICTR: Advances in Judicial Acknowledgement' (2015) 26 Crim L Forum 387–401.

118 ICC RPE, Rule 68(2)(b),(3); ICTY RPE, Rule 92*bis*; ICTR RPE, Rule 92bis(A),(B),(D); STL RPE, Rule 155.

– can be seen as more determinative of the outcome of a case, and therefore, should be approached with greater caution.[119] Because of the significance of linkage evidence, as well as the range of possible modes of liability applicable in ICL, the IBA supports clear principles and guidelines regarding the admission of prior recorded testimony, with due regard for the rights of the accused. The IBA further supports a broad interpretation of the notion of 'acts and conduct of the accused', corresponding to the broad categories of acts that may qualify as perpetration under ICL. In this regard, the IBA notes that the ICTY Appeals Chamber defined the 'acts and conduct of the accused' as 'any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish: (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or (b) that he planned, instigated or ordered the crimes charged, or (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or (d) that he was a superior to those who actually did commit the crimes or (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts'.[120]

Defining 'testimony'

According to ICC jurisprudence interpreting both the former and amended versions of Rule 68, 'testimony' is interpreted broadly to include audio or video taped testimony, transcripts of witness testimony and written statements taken under Rules 111 and 112 during investigations.[121] The STL Appeals Chamber adopted a broad interpretation of what constitutes a witness statement: 'an account of a person's knowledge of a crime recorded through due procedure in the course of an investigation'.[122] The ICTY and STL rules contain the additional restriction that such prior recorded testimony must be a written statement or transcript of evidence that was given by a witness before the respective tribunal, although the practice has, in exceptional circumstances, departed from that rule.[123] The IBA notes that quality and completeness of the recorded testimony is highly relevant, in particular, for statements taken outside the context of a courtroom, such as statements made during investigations. The IBA also urges caution in respect of admitting summaries of testimony in place of unedited verbatim statements or transcripts, in light of the important right of the accused to know and confront the full evidence against them.

Guidelines for statements

In this regard, the IBA emphasises the importance of best practice and standardisation in investigative practices with respect to taking and recording witness statements, and the importance of exercising

119 'While crime-base evidence may be subject to fewer disputes, linkage evidence could be more determinative for the outcome of a defendant's criminal responsibility. In such cases, it is reasonable that linkage evidence is subject to closer scrutiny, witness[es] should be heard live, and be subject to cross-examination pursuant to fair trial guarantees'. Klamberg, n 3 above, 118.

120 ICTY, *Prosecutor v Stanislav Galić*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92bis (C), 7 June 2002, para 10.

121 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1478-Red-Corr, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, paras 29–31.

122 *In the Matter of El Sayed*, STL-CH/AC/2011/01, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, para 89. The STL's Appeals Chamber endorsed the Special Court for Sierra Leone's broad definition of the concept of a witness statement, namely that 'transcribed trial testimony, radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given, constitute witness statements'.

123 See, eg, STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 30 January 2014, para 11.

caution in respect of statements drawn from sources outside the judicial proceedings, as further discussed below. The IBA therefore supports the development of explicit guidance and tools for the requirements for statements. In the *Bemba et al* case, the OTP submitted,[124] and the Registry commented on,[125] forms for the declaration of witnesses and attestation of the witnessing officer in accordance with the requirements of ICC RPE Rule 68(2)(b)(iii). Trial Chamber VII declined to comment on the forms in the abstract, ruling that the sufficiency of declarations will only be assessed at the time the request to submit prior recorded testimony is made.[126] Considering other international courts' practice in this situation, whereas the witness does not have to be present in court to admit this testimony, the ICTY, ICTR and STL rules provide that the Trial Chamber may still decide to call the witness for cross-examination.[127] Should the witness not appear for cross-examination, there are strict requirements in the respective RPE of the ICC, ICTY, ICTR and STL for a declaration to be appended to the statement attesting to the truthfulness of its contents.[128] To ensure that the declaration meets the requirements of the ICTY, the tribunal developed a practice direction early on, setting out the procedure for implementation of Rule 92*bis*(B), including templates for the declaration of the person making the statement and an attestation of the officer appointed by the Registry to witness the signature of the written statement.[129] The STL has also elaborated on the requirements of Rule 155 in a practice direction and has provided templates for the witness statement, witness acknowledgement and certification of the interpreter.[130] The IBA notes that having such forms and guidelines publicly available, as is the practice at the ICTY and STL, supports the transparency and accessibility of the tribunals' legal process.

While practice at the ICC shows that forms and guidelines have been developed, they are not publicly available. The IBA encourages the Court to make them public and encourages the further development of any standardised forms with input from all parties, and with periodic review and updating of the forms in light of relevant jurisprudence. For example, jurisprudence from ICC Trial Chamber VII has emphasised that, in order for a statement to qualify as prior recorded testimony, the person making the statement must understand that 'he or she is providing information that may be

124 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/03-1011, Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, 16 June 2015, with Annex A.

125 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/03-1150, Registry submission on the forms to be used for declarations made pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 14 August 2015, with Annexes A and B.

126 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/03-1158, Decision on Registry Submission on the Forms to be Used for Rule 68(2)(b) Declarations, 19 August 2015, para 3.

127 ICTY RPE, Rule 92*bis*(C) and 92*ter*; ICTR RPE, Rule 92*bis*(E); STL RPE, Rule 155(C).

128 ICC RPE, Rule 68(2)(b)(ii) and (iii); ICTY RPE, Rule 92*bis*(B); ICTR RPE, Rule 92*bis*(B); STL RPE, Rule 155(B).

129 ICTY, Practice Direction on the Implementation on Rule 92bis (B) of the Rules of Procedure and Evidence, IT/192, 20 July 2001, see www.icty.org/x/file/Legal%20Library/Practice_Directions/it192_rule92bis_procedure_en.pdf accessed 16 June 2016.

130 See STL, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court Under Rule 155, January 2010, see www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/practice-directions/320-practice-direction-on-depositions-and-rule-155-statements accessed 16 June 2016; see also the jurisprudence citing the STL Practice Direction, eg, STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 30 January 2014. ('*Ayyash et al* Second Decision under Rule 155').

relied upon in the context of legal proceedings',[131] a requirement on which ICC Rule 111 is silent.[132] A similar requirement has been made explicit and incorporated into the relevant ICTY and STL practice directions and templates for witness statements and acknowledgements.[133] Such templates provide a useful safeguard for prosecutors, defence counsel and investigators in ensuring that statements taken outside a courtroom context will meet the prima facie legal requirements for admissibility.

Factors for admissibility

When a witness is not available in court for cross-examination, even when the proposed testimony does not relate to the acts and conduct of the accused, the respective courts require the chambers to consider a number of additional factors. ICC RPE Rule 68(2)(b) provides general considerations, including whether 'the interests of justice are best served by its introduction' and whether the statement has 'sufficient indicia of reliability'. ICC RPE Rule 68(2)(i) states the following: 'In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, inter alia, whether the prior recorded testimony in question: relates to issues that are not materially in dispute; is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; relates to background information; is such that the interests of justice are best served by its introduction; and has sufficient indicia of reliability'.

The analogous rules at the ICTY, ICTR and STL provide 'factors in favour', which include evidence relating to the impact on victims, character and sentencing, and 'factors against', including whether there is an 'overriding public interest' in the evidence being presented orally.[134] For example, in the *Milošević* trial, the ICTY Trial Chamber allowed crime-base evidence from rape victims who had previously testified before the tribunal to be tendered in written form, taking into account, inter alia, that their evidence was 'not proximate to the accused' and they had been cross-examined by an accused 'with sufficiently common interest' to Slobodan Milošević.[135] In admitting the testimony in

131 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1478-Red-Corr, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, para 32.

132 ICC RPE, Rule 111 ('Record of questioning in general') provides: '1) A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor. 2) When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record'. Rome Statute Art 55 addresses the rights of persons during an investigation, including, inter alia, the right not to incriminate themselves, the right not to be subject to coercion or duress, the right to remain silent and the right to counsel.

133 For example, the template included as part of the STL Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements For Admission in Court Under Rule 155, includes language that states the following: 'I am aware that my statement may be used in legal proceedings before the Special Tribunal for Lebanon (STL) and that I may be called to give evidence in such legal proceedings', and further states that whether or not the statement is used in legal proceedings, the witness may be liable for prosecution for giving false statements. STL, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements For Admission in Court Under Rule 155, 15 January 2010, p 10, see www.legal-tools.org/uploads/tx_ltpdb/STL-PD-2010-02_20Practice_20Direction_20on_20Depositions_20and_20Rule_20155_20Statements_20EN_01.pdf accessed 16 June 2016. The ICTY Practice Direction includes a template declaration that specifies that the witness must have been informed that they may be subject to prosecution for giving false testimony, including being provided with a copy of the ICTY's Rule 91 in a language that they understand. ICTY, Practice Direction On Procedure for The Implementation of Rule 92bis(B) of The Rules of Procedure and Evidence, IT/192, 20 July 2001, see www.icty.org/x/file/Legal%20Library/Practice_Directions/it192_rule92bis_procedure_en.pdf accessed 16 June 2016. ICTY RPE, Rule 91 ('False Testimony under Solemn Declaration') sets out the Court's ability to investigate and prosecute false testimony, and to order penalties in the form of fines and imprisonment. In practice, ICTY written witness statements also included a standard acknowledgment that the statement was taken for the purposes of a legal proceeding before the ICTY.

134 ICTY RPE, Rule 92bis(A)(i) to (ii); ICTR RPE, Rule 92bis(A)(i) and (ii); STL RPE, Rule 155(A)(i),(ii).

135 Priya Gopalan, Daniela Kravetz and Aditya Menon, 'Proving Crimes of Sexual Violence' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford University Press, 2016) 127–128.

written form, this ICTY Trial Chamber sought to avoid further traumatisation of the witnesses, while balancing the rights of the accused.

Application of ICC Rule 68(2)(b) and equivalent provisions

At the time of writing this report, the amended ICC Rule 68(2)(b) has been used selectively. The prosecution has sought to introduce statements in the *Bemba et al* case charged under Article 70 of the Rome Statute, which deals with offences against the administration of justice.[136] In one instance in that case, Trial Chamber VII declined to admit a witness statement regarding a money transfer allegedly made by one of the accused, on the grounds that it was being submitted to prove the accused's acts and conduct.[137] The Trial Chamber did admit other witness statements, not relating to the acts and conduct of the accused, which related to limited incidents, were supported by other material, or did not go to matters that were materially in dispute.[138] The IBA notes that, in the *Ongwen* case, the prosecution has requested the admission of 45 of its 120 witnesses by means of prior recorded testimony. In its filing, the prosecution outlined the areas of testimony addressed by the statements it proposed to submit under Rule 68(2)(b).[139] It noted the subject of the testimony for each of the 45 witnesses and described how it did not go to the acts and conduct of the accused, as well as the extent to which it would be corroborated by proposed *viva voce* testimony from other witnesses. The prosecution also emphasised that admitting the statements would be in the interests of justice, in that it would save the ICC at least 114 hours of testimony, spare the witnesses additional trauma and inconvenience, and reduce financial costs to the ICC.[140] At the time of writing this report, the Trial Chamber had not ruled on the admissibility of the statements.

At the ICTY and ICTR, Rule 92*bis* was used extensively. In those courts, where multiple cases arose from the same set of events in a single conflict or interconnected conflicts, the ability to admit written witness statements under certain conditions obviated the need to have witnesses return to court after having testified in previous cases, and thereby saved the court both the time for hearing the testimony and the resources involved in bringing the witnesses physically to court.[141] The rationale of efficiency in respect of resources for witnesses and courtroom time was also a factor in the ICC's adoption of amended Rule 68(2)(b).[142] At the ICC, however, where cases relate to multiple conflicts and situations, the likelihood of witnesses being called for multiple cases is somewhat reduced.[143] Nonetheless, with the anticipation of the ICC continuing to increase its number and volume of cases,

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136 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1478-Red-Corr, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015; ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1430, Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015.

137 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1430, Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, paras 6–8. However, the Trial Chamber did allow the prosecution to add this witness to their witness list. See paras 16, 18.

138 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1478-Red-Corr, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, paras 100, 103.

139 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-465-Corr-Red, Public redacted version of 'Corrected version of Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules', 20 June 2016.

140 *Ibid*, 20 June 2016, para 14.

141 See ICTY, *ICTY Manual on Developed Practices* (UNICRI, 2009) 80 www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf accessed 17 June 2016.

142 See n 113 above, para 18. The WGLL stated the following: 'The addition of this provision is primarily intended to expedite proceedings by allowing the introduction of a limited class of evidence without the need to arrange for a witness to travel in order to appear in Court. Allowing such testimony to be admitted in the witness' absence, provided that certain procedural steps are met, would expedite proceedings and have additional budgetary benefits'.

143 See n 15 above

the IBA notes the practice of the OTP at the ICTY in keeping a database of prior witness testimony.[144] This database has allowed efficient access to prior testimony and assisted with determinations as to whether witnesses had previously testified before the tribunal and in which cases.[145] Such information may be particularly relevant in respect of expert testimony that may relate to multiple cases.[146]

At the STL, a number of written statements have been admitted under Rule 155 within the context of the main case dealing with the attack that took place in Beirut on 14 February 2005. The attack was the subject of multiple successive investigations, including by the Lebanese authorities. Many statements have derived from those investigations and concern 'crime-base' evidence, including statements regarding images and footage taken of the crime scene, statements from and about victims of the explosion, and statements about the investigations themselves.[147] After examining the statements on a case-by-case basis, the STL Trial Chamber admitted some written statements from the Lebanese case file provided that the statements were in compliance with the STL practice direction.[148] Other statements were admitted despite 'minor breaches' of the practice direction, such as the witness not having been provided with the relevant rules regarding the consequences of providing false information, but showing that the consequences were understood.[149] In the event of 'fundamental' breaches of the practice direction, such as the statement lacking a witness information sheet, declaration or any evidence that the witness was not informed of the consequences of providing false information, the STL Trial Chamber declined to admit the statements.[150]

The ability to admit statements from prior investigations is relevant to the ICC in light of both the permanent jurisdiction of the Court and the long period of time that may lapse between the initial investigations and initiation of proceedings against a suspect, and their arrest and trial. In this regard, the IBA underscores the importance of a case-by-case review of statements that may be admitted as prior recorded testimony against the standards included in the ICC RPE, as well as against the current jurisprudence of the Court. Not only do these standards protect the rights of the accused, but they also protect the interests of the witness and the individual's right to be informed of the implications of his or her statement being used in a judicial proceeding. The IBA also notes the utility of the practice direction for the STL in providing a clear, unified point of reference in respect of the applicable law and standards.

Evidence going to prove the acts and conduct of the accused

At the ICC, ICTY and STL, prior recorded testimony may be submitted as evidence when it relates to the acts and conduct of the accused, and the witness is available for cross-examination.[151] At the ICTY and STL, Trial Chambers may admit a written statement or transcript of evidence given by a witness

144 ICTY, *ICTY Manual on Developed Practices* (UNICRI, 2009) 25 para 77.

145 As of 2009, the index identified 6,483 individual testimonies. ICTY, *ICTY Manual on Developed Practices*, (UNICRI, 2009) 25 para 77.

146 For example, the prior recorded testimony of an expert on the conflict in the eastern DRC given in the *Lubanga* case has been admitted in the *Ntaganda* case under ICC RPE Rule 68(3), subject to the expert appearing to introduce the testimony and attest to its accuracy. ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-845, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015.

147 See, eg, STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01/T/TC, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, and *Ayyash et al* Second Decision under Rule 155.

148 *Ibid*, *Ayyash et al* Second Decision under Rule 155, para 14.

149 *Ibid*, para 15.

150 *Ibid*, paras 22, 28.

151 ICC RPE, Rule 68(2)(a),(c),(d); ICC RPE, Rule 68(3); ICTY RPE, Rule 92*ter*; and STL RPE, Rule 156.

in proceedings before the tribunal, provided the witness is present in court, is available for cross-examination by the parties and questioning by judges, and attests to the truth of the statement.[152]

At the ICC, the statement of a witness who is not present may be accepted if both the prosecution and defence had the opportunity to examine the witness during the recording of the statement.[153] If the witness is present before the chamber, the individual's previously recorded testimony may be admitted if he or she does not object and if he or she is available for cross-examination and questioning.[154] ICC RPE Rules 68(2)(a) and 68(3) do not restrict such evidence to testimony given in proceedings before the Court. In practice, the ICC prosecution has sought to introduce prior recorded testimony from other ICC trials under Rule 68(3), in cases deriving from the same conflict.[155] Addressing two such requests in the *Ntaganda* case, Trial Chamber VI considered, inter alia, that the prior recorded testimony directly concerned the acts and conduct of the accused and that proposed supplementary questioning would still require substantial court time, and found that it would not be in the interests of justice to admit the prior statements.[156] The Trial Chamber, however, emphasised that such decisions would continue to be made on a case-by-case basis, and encouraged the parties to 'continue exploring whether the use of this Rule is appropriate for future witnesses', noting 'that the introduction of evidence under Rule 68(3), in principle, has the potential to significantly enhance the expeditiousness of the proceedings'.[157] As discussed below, other limited situations permit the introduction of evidence relating to the acts and conduct of the accused, where witnesses are unavailable or have been subject to improper interference.

Evidence from an unavailable witness

If a witness has died, can no longer with reasonable diligence be traced or is otherwise unavailable, a written statement or transcript of his or her testimony may also be admissible under the RPE for the ICC, ICTY, ICTR and STL.[158] The obvious policy reason for such a rule is to ensure that the chambers are not denied access to relevant and probative evidence on account of unanticipated circumstances, such as the death or unavailability of a witness.[159] In this respect, ICTY chambers have noted that the right to cross-examination, while of fundamental importance to a fair trial, is not absolute, but subject to the chamber's duty to ensure a fair and expeditious trial.[160]

152 ICTY RPE, Rule 92*ter* provides that such evidence *may* go to prove the acts and conduct of the accused. [emphasis author's own]. STL RPE, Rule 158.

153 ICC RPE, Rule 68(2)(a).

154 ICC RPE, Rule 68(3).

155 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-845, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015; and ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-961, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, 29 October 2015.

156 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-961, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, 29 October 2015; and ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-988, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010, 6 November 2015.

157 *Ibid*, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-961, para 13; and *ibid*, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-988, para 15.

158 ICC RPE, Rule 68(2)(c); ICTY RPE, Rule 92*quater*; ICTR RPE, Rule 92*bis*(C); and STL RPE, Rule 158.

159 See n 113 above, para 28, which states the following: 'This amendment will enable the Court to introduce prior recorded testimony that would otherwise not be possible to consider'.

160 ICTY, *Prosecutor v Haradinaj et al*, Case No IT-04-84-T, Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 under Rule 89(D) and Deny its Testimony pursuant to Rule 92*quater*, 14 December 2007, para 8.

Evidence going to 'acts and conduct'

Before the ICC, ICTY and STL, the fact that such prior recorded testimony goes to prove acts and conduct of the accused may be a factor considered by the chamber against its introduction, but does not automatically exclude the evidence. In some instances, ICTY chambers have rejected the admission of entire statements because they relate to the acts and conduct of the accused or have admitted redacted statements taking out evidence related to acts and conduct of the accused; ICTY jurisprudence has also required that such evidence be corroborated. In the *Milutinović et al* and *Haradinaj et al* cases, ICTY Trial Chambers articulated a list of factors to be considered, including: '(a) the circumstances in which the statement was made and recorded, in particular, whether (i) the statement was given under oath; (ii) the statement was signed by the witness with an accompanying acknowledgment that the statement is true to the best of his or her recollection; and (iii) the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular, an unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statement'.[161]

In the *Haradinaj et al* case, the Trial Chamber admitted the statements of two deceased witnesses, taking into account that they were corroborated by other evidence and were internally consistent.[162] In relation to one of the witnesses, the Trial Chamber proceeded to redact portions related to the acts and conduct of the accused that were central to the case, to protect the rights of the accused because the witness was unavailable for cross-examination.[163]

Defining 'unavailability'

Witness unavailability for reasons other than death has also been addressed by both the ICTY and ICC. In addition, in the *Haradinaj et al* case, a prosecution witness was found to be unavailable to testify for reasons of ill health, which prevented him from completing his testimony before the ICTY Trial Chamber. However, the prosecution's motion to admit his prior recorded statements was denied because the statements spoke directly of the acts and conduct of the accused and were found to be uncorroborated and unreliable.[164]

At the ICC, in the *Ntaganda* case, Trial Chamber VI found that a witness was not unavailable within the meaning of ICC RPE Rule 68(2)(c), when the witness refused to appear before the Trial Chamber because he disagreed with its decision not to grant him the in-court protective measures of voice and face distortion.[165] However, in the *Bemba et al* case, Trial Chamber VII admitted the prior recorded testimony of a witness who had expressed fears of the repercussions of testifying. The Trial

161 ICTY, *Prosecutor v Milutinović et al*, Case No IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92*quater*, 16 February 2007, para 7; ICTY, *Prosecutor v Haradinaj et al*, Case No IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule 92*quater* and 13th Motion for Trial-related Protective Measures, 7 September 2007, para 8.

162 ICTY, *Prosecutor v Haradinaj et al*, Case No IT-04-84-T, Judgment, 3 April 2008, para 10.

163 ICTY, *Prosecutor v Haradinaj et al*, Case No IT-04-84-T, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence Pursuant to Rule 92quater, 28 November 2007, paras 20–21.

164 ICTY, *Prosecutor v Haradinaj et al*, Case No IT-04-84-T, Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 under Rule 89(D) and Deny its Testimony pursuant to Rule 92quater, 14 December 2007, paras 13, 17.

165 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1325, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, paras 8–10.

Chamber found that the 'reasonably foreseeable consequences of her testifying before the Court, whether in answer to a summons or otherwise, would place her under unnecessary hardship that is disproportionate to the purported significance of her evidence', and also took into account the Chamber's duty to protect 'the safety, physical and psychological well-being, dignity and privacy of witnesses' under Article 68(1) of the Rome Statute. The Trial Chamber found that this duty encompassed 'refraining from actions (in this case calling or summonsing witness P-263 to testify) that would in all likelihood entail negative consequences for the witness'.[166]

In this regard, the IBA notes the close relationship between protective measures and witnesses' willingness and ability to appear in court, which is also relevant to ICC RPE Rule 68(2)(d) discussed below, and the balancing exercise Trial Chambers need to undertake between the rights of the accused and the needs of victims and witnesses. While acknowledging the important stake of victims and witnesses in those criminal proceedings, the IBA considers that there is a need to ensure that the fair trial rights of the defendant are not subordinated to the interests of the witnesses or prosecution,[167] and that 'unavailability' be interpreted with caution. With respect to the protection of particularly vulnerable witnesses, Trial Chambers are able to order a range of protective measures that are intended to facilitate in-person testimony. Protective measures can include testimony in closed or private session, face and/or voice distortion, in-courtroom psychosocial support and testimony via video link. There is also a precedent, in particular at the ICTY, for admitting witness statements for particularly vulnerable witnesses in lieu of in-person witness testimony under the appropriate rule for instance Rule 92*bis*[168] at the ICTY or its equivalent at the ICC (Rule 68(2) (b)).[169]

As noted above, prior recorded testimony may be of particular relevance to the ICC context with investigations being conducted by other judicial authorities or the Court a long time before trial proceedings start. For example, the ICC began its initial investigations in Uganda in 2004, whereas the first suspect, Dominic Ongwen, only appeared before the Court over a decade later, in 2015. In Darfur, ICC investigations began in 2005, and arrest warrants issued against key suspects remain outstanding. ICC arrest warrants remain in force indefinitely unless otherwise ordered by the Court,[170] and therefore, witnesses with relevant testimony may be unlocatable or may have died by the time trial proceedings commence. Such circumstances are specifically addressed by ICC Rule 68(2)(c). At the same time, the IBA urges the Court to maintain a high standard of due diligence for efforts to locate witnesses prior to determining their unavailability.

The IBA also reiterates its concerns about the potentially broad category of material that may be admissible under amended Rule 68, including witness statements, audio and video recordings, and

166 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1481-Red, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 13 November 2015, para 18.

167 See n 22 above, *Fairness at the International Criminal Court*, 20.

168 Priya Gopalan, Daniela Kravetz and Aditya Menon, 'Proving Crimes of Sexual Violence' in Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) 127–128, and references therein.

169 In addition to the possibility of admitting statements under Rule 68, the ICC legal framework also includes a provision for statements to be taken from witnesses who subsequently may not be available to testify at trial. Art 56 of the Rome Statute provides for the preservation of evidence in relation to a 'unique investigative opportunity', including the taking of testimony or statements, and Art 69(4) allows the Court to rule on the admissibility of such evidence. In allowing testimony to be admitted for unavailable witnesses, Rule 68(2)(c)(i) requires chambers to be satisfied that 'the necessity of measures under article 56 could not be anticipated'. In the *Ongwen* case at the ICC, the prosecution has sought to use Art 56 to admit testimony from victims of sexual violence taken via video link, and with the opportunity for cross-examination by the defence. The prosecution argued that the admission of the recorded testimonies in lieu of in-person testimonies would protect the psychological well-being, dignity and privacy of the witnesses, decrease the likelihood of further traumatisation and save time in the trial. ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-464, Prosecution's request to admit evidence preserved under Article 56 of the Statute, 13 June 2016.

170 Rome Statute, Art 58(4).

transcripts of proceedings from national jurisdictions and other fora,[171] and notes that other non-judicial statements, such as those gathered in the context of UN or NGO investigations, should also be approached with caution.[172] In this regard, the IBA emphasises that it is essential to have clear guidelines as to the format of statements and attestations necessary for the admission of any such material as prior recorded testimony, and that any exceptions should be evaluated on a case-by-case basis.

Evidence from a person who has been subjected to interference

Both the ICC and ICTY have an additional rule allowing the admission of prior recorded testimony from a person who is unavailable on account of having been 'subjected to interference'.[173] At the ICTY, the adoption of Rule 92*quinquies* in 2009 was prompted by incidents and allegations of witness bribery and intimidation.[174] Because of its late addition to the ICTY RPE, there is no significant jurisprudence regarding its interpretation and application. In proposing ICC RPE Rule 68(2)(d), the WGLL noted that '[w]itness interference is a live and ongoing issue in ICC cases, and may be more of an issue at the ICC than the ICTY because of the lack of a subpoena power and the differences in the nature of criminal investigations at each institution'.[175] The WGLL also envisioned the rule as having a potential deterrent effect. The rule can be used by both the prosecution and defence to introduce prior recorded testimony and is not limited to addressing interference with witnesses by parties to the proceedings, but also may apply to independent interference by a party's supporters. The WGLL wrote the following: 'Having a provision that is applicable to interference by supporters of a party (without the party's direct involvement) creates a broader disincentive for interested persons to interfere with ICC witnesses. In particular, this provision may have a deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence.'[176] In this regard, the IBA also observes that the notion of interference under Rule 68(2)(d) is drafted broadly, stating that 'an improper interference may relate, *inter alia*, to the physical, psychological, economic or other interests of the person'.[177]

The text of ICC RPE Rule 68(2)(d) largely follows the ICTY rule, with slight variations. Both rules provide a list of factors that chambers must take into account, including that the failure of the person to attend was 'materially influenced by improper interference' and reasonable efforts were made to secure the individual's attendance. Again, the 'interests of justice' must be taken into account, and the ICC Rule specifies that the prior recorded testimony must have sufficient indicia of reliability.[178] In admitting prior recorded testimony from witnesses subjected to interference, both courts allow

171 See n 15 above, 3–4.

172 The ICC's OTP has in some cases relied heavily on evidence drawn from non-judicial sources including the UN, NGOs and media, and judges have cautioned the OTP about the low probative value of information from these sources. See, eg, ICC, *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to Article 67(7)(c)(i) of the Rome Statute, 3 June 2013, para 36.

173 ICC RPE, Rule 68(2)(d); ICTY RPE, Rule 92*quinquies*.

174 Fergal Gaynor, 'Admissibility of Documentary Evidence' in Göran Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 1051–1052.

175 See n 113 above, para 34.

176 *Ibid.*

177 ICC RPE, Rule 68(2)(d)(ii).

178 Whereas ICC Rule 68(2)(d) does not define the interests of justice, ICTY Rule 92*quinquies*(B)(ii) states that they include 'a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded; (b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and (c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment'.

evidence that goes to prove the acts and conduct of the accused; however, the ICTY RPE states that the evidence may go to prove the acts and conduct of the accused,[179] whereas ICC Rule 68(2)(d) specifies that this may be a factor against its introduction, or part of it. The ICC prosecution has sought to introduce evidence under Rule 68(2)(d) in the Kenya situation, as discussed further below.

Application of the amended Rule 68 in *Prosecutor v Ruto and Sang*

The amended Rules 68 (2) (c) and (d) were first applied in August 2015 by Trial Chamber V(A) in the *Ruto and Sang* case in the Kenya situation. This Trial Chamber decision was subsequently overturned by the Appeals Chamber in February 2016.

Trial Chamber decision of 19 August 2015

The decision of Trial Chamber V(A) followed a request from the prosecution to admit six witness statements gathered during investigations under Rules 111 and 112 due to the subsequent recanting of five of those witnesses during the trial, and in one instance, due to the unavailability of the witness.[180] In making its request, the prosecution relied on Rule 68(2)(d) to admit prior recorded testimony of 'a person who has been subjected to interference', and Rule 68(2)(c) to admit prior recorded testimony for a person 'who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally'. The prosecution emphasised that these witnesses comprised 'a significant portion of the incriminating evidence it intended to present to the Trial Chamber', and evidence that was 'necessary to prove its case'.[181] Although the exact circumstances of the alleged witness interference and unavailability are redacted from the public filings in the case, it is clear that the prosecution alleges that, inter alia, evidence of communications and payments show that witnesses were put under pressure to change their testimony, and that at least one witness has 'disappeared' and is 'untraceable'.[182] In its decision, the Trial Chamber analysed on a case-by-case basis whether each witness's failure to give evidence had been materially influenced by improper interference, notably taking into account information presented by the parties, any alleged contacts or acts relevant to the interference, and any corroborating information. In this regard, the IBA notes the importance of applying an objective standard to the assessment of improper interference.

Under ICC RPE Rule 68(2)(d), chambers must be satisfied that the prior recorded testimony meets a number of factors, including having 'sufficient indicia of reliability'.[183] In *Ruto and Sang*, the prosecution argued, among other things, that voluntary, signed, formal witness statements given to the prosecution should satisfy this criterion, whereas the defence objected on the grounds that the

179 ICTY RPE, Rule 92*quinquies*(B)(iii).

180 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1866-Red, Public redacted version of 'Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses', 21 May 2015, paras 4–8.

181 *Ibid*, paras 2, 52.

182 *Ibid*, paras 63–137.

183 ICC RPE, Rule 68(2)(d)(i). The full set of factors to be considered are whether 'the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony; the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion; reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; the interests of justice are best served by the prior recorded testimony being introduced; and the prior recorded testimony has sufficient indicia of reliability'.

statements were not given under oath 'or in circumstances which would have given rise to liability for giving false statements', and on the grounds that there was no corroborating evidence.[184]

The Trial Chamber's reasoning on this point showed that it favours a flexible approach. After finding that the standard of proof for determining admissibility at this stage is lower than the 'beyond a reasonable doubt' threshold,[185] and noting that 'the assessment of reliability is preliminary at this stage', Trial Chamber V(A) considered a number of indicia of reliability.[186] Some of the indicia identified by the Trial Chamber relate to the circumstances in which the testimony arose and its content. While an oath may be a factor in favour of admission, it is not a requirement. A signed statement accompanied by a declaration that it is true to the best of the witness's knowledge is an indicator of reliability, as is the presence of a qualified interpreter. Other indicia of reliability may go beyond the circumstances in which the statement was made, including 'the absence of manifest inconsistencies', whether it was subject to cross-examination and whether it is corroborated. However, the Trial Chamber noted that 'these indicia of reliability are non-exhaustive, and no one indicator is definitive, even where one or more of the indicia are absent the Chamber may still admit the material, and can consider the absence of such indicia, together with other relevant factors, when ultimately weighing all of the evidence before it'.[187]

The statements at issue in the *Ruto and Sang* case arose from the prosecution's investigations. Rules 111 and 112 of the ICC RPE address the taking of statements during investigations and proceedings, and include requirements for recording statements.[188] However, statements taken during investigations may be taken under difficult circumstances, and the requirements for recording the statements and applying other measures to safeguard the testimony may not be consistently met. For example, the *Ruto* defence alleged discrepancies between the audio recording of OTP witness interviews with the signed versions later produced, that 'impact the reliability of all OTP statements and the processes by which they were taken'.[189] In addition, both defence teams stressed the difference between questioning and testimony under oath in their filings. In this regard, the IBA again notes the utility of standardisation for taking of witness statements, including the use of practice directions and templates, as well as the use of audio recordings, to ensure consistency and conformity with the legal requirements of Rule 68.

Along with analysing the indicia of reliability, Trial Chamber V(A) addressed the other relevant subsections of ICC RPE Rule 68(2)(d), including whether the witness failed to give evidence with respect to a material aspect included as their prior recorded testimony, whether reasonable efforts have been made to secure all material facts known to the witness, whether the witness's failure to give evidence has been materially influenced by improper interference and whether the interests of justice are served.

184 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior recorded Testimony, 28 August 2015, paras 61–62. ('Ruto and Sang Decision on Prior recorded Testimony')

185 *Ibid*, paras 34–37, 65.

186 *Ibid*, para 65.

187 *Ibid*, para 65.

188 See n 132 above for the text of ICC RPE, Rule 111.

189 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1981-Red, Public redacted version of the Ruto defence appeal against the 'Decision on Prosecution Request for Admission of Prior recorded Testimony', 6 October 2015, para 85.

At the time of the adoption of the amendments to Rule 68, the IBA further cautioned against the admission of untested evidence that goes to prove the acts and conduct of the accused.[190] Both Rules 68(2)(c) and (d) allow that 'the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it'.[191] However, the WGLL noted that the language of Rule 68(2)(d)(iv) was intended to 'discourage' the use of 'acts and conduct evidence', while not prohibiting it outright.[192] Trial Chamber(V)(A) included its consideration of this factor within the context of its analysis of the 'interests of justice'. In finding the prior recorded testimony of four witnesses to be admissible under Rule 68(2)(d), the Trial Chamber noted that, although the testimony went to prove the acts and conduct of the accused, the defence counsel were able to cross-examine the witnesses on the specific topics during in-court testimony. The Trial Chamber also stated that it would give the issue further consideration when weighing the probative value and reliability of the evidence in its decision under Article 74.[193]

The IBA notes that Rules 68(2)(c)(ii) and (d)(iv) place the consideration of whether the evidence in question goes to prove the acts and conduct of the accused as a separate factor in determining whether the prior recorded testimony may be introduced, apart from the consideration of the interests of justice. In addition, the language of Rules 68(2)(c)(ii) and (d)(iv), in addressing the 'introduction' of the evidence, denotes that factor as a threshold issue that would be taken into account in making an initial admissibility determination. Once resolved, the relationship between the testimony and the acts and conduct of the accused would not need to be revisited again during the final weighing and balancing of evidence for the Article 74 judgment. However, Trial Chambers may make a determination for the need of corroboration as a general consideration of evidence.

Appeals Chamber decision in Prosecutor v Ruto and Sang

Following requests for leave to appeal from both defence teams, the Trial Chamber granted leave to appeal on seven issues. The first issue related to whether the Trial Chamber's application of the amended Rule 68 contravened the Rome Statute's provisions prohibiting retroactive application of changes to the law, when the application is to the detriment of the accused (Articles 24(2) and 51(4)). The other six issues related to the Trial Chamber's interpretation of the provisions of the amended Rule 68.[194] In its decision, the Appeals Chamber restricted its analysis to the first ground of

190 See n 15 above.

191 ICC RPE, Rule 68(2)(c)(ii) and Rule 28(2)(d)(iv).

192 See n 113 above, para 38.

193 See n 184 above, paras 60, 81, 111, 128.

194 The other six grounds of appeal were as follows: whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as 'prior recorded testimony' for the purpose of Rule 68 (2)(c) and (d), to be admitted for the truth of their contents; whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d); whether the Impugned Decision erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules; whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference'; whether the Impugned Decision erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules; and whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules. ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1953-Red-Corr, Public Redacted Version of Decision on the Defence's Applications for Leave to Appeal the 'Decision on Prosecution Request for Admission of Prior recorded Testimony', 10 September 2015, para 20.

appeal, ruling that the Trial Chamber had erred in applying the amended rule, in contravention of Article 51(4), and reversed the Trial Chamber's decision to the extent that prior recorded testimony was admitted for the truth of its contents.[195] Article 51(4) of the Rome Statute provides that amendments to the ICC RPE 'shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted'.

The relevant point in time for the retroactivity analysis, according to the Appeals Chamber, is the date of the start of trial, at which time the amended Rule 68 was not yet adopted.[196] It also found that the Trial Chamber had erred in its interpretation of what was detrimental to the accused. According to the Appeals Chamber, detriment should be interpreted broadly. Within the meaning of Article 51(4), it should be understood as 'disadvantage, loss, damage or harm to the accused, including, but not limited to, the rights of that person', and it must meet the threshold that 'the overall position of the accused in the proceedings be negatively affected by the disadvantage'.[197] The Appeals Chamber found that the prior recorded testimony in question would not have been admissible under Rule 68 prior to its amendment.[198] The Appeals Chamber further found that incriminatory evidence was admitted 'without any proper opportunity for the accused to cross-examine the witnesses'.[199] Taking into account that the present situation involved the statements of witnesses who later recanted the contents of their previous statements, the Appeals Chamber opined that the defence could not reasonably be expected to elicit incriminating evidence from the witness in order to challenge it, and therefore, even though the witnesses appeared in court, such questioning did not amount to 'meaningful cross-examination'.[200]

Future considerations for the introduction of prior recorded testimony as evidence in ICC trials

The IBA continues to support the use of prior recorded testimony in ICC trials. As the IBA indicated in its 2013 Legal Opinion, there are two rationales to admit prior recorded testimony: the first is to increase the efficiency of proceedings by reducing the length of trials and the second is to overcome obstacles to witnesses appearing in person to give evidence. Overall, there are sound policy reasons and ample precedent for admitting prior recorded testimony as a regular part of ICC trials, and in particular, for evidence going to prove matters other than the acts and conduct of the accused, under ICC RPE Rule 68(2)(b).

Looking forward, it is clear that issues remain as to the interpretation of amended Rule 68 following the *Ruto and Sang* Appeals Chamber decision. Trial Chamber V(A)'s decision in the *Ruto and Sang* case interpreted the provisions of Rules 68(2)(c) and (d), relating to the testimony of unavailable and interfered-with witnesses, in a broad and flexible manner. While such an interpretation is consistent with the flexible approach to evidence allowed under the ICC

195 See n 37 above.
196 *Ibid*, para 81.
197 *Ibid*, para 78.
198 *Ibid*, para 91.
199 *Ibid*, para 93.
200 *Ibid*.

framework, it is not without its concerns, in particular, in relation to the fairness of trials. The IBA continues to urge a cautious approach to the introduction of prior recorded testimony where it relates to unavailable and interfered-with witnesses. Indeed the IBA notes that in considering the amendments, the WGLL assumed that if an interfered-with witness became available after their prior recorded testimony was admitted, the in-person testimony would govern and the prior recorded testimony would be disregarded.[201] Admitting prior recorded testimony when there is no obstacle to in-person testimony should be allowed only in the most exceptional circumstances. When prior recorded testimony is admitted, to minimise issues regarding its reliability, the IBA suggests that uniform high standards continue to be applied to the taking of witness statements, including through the recording of questioning.

In addition to preserving the fundamental right of the accused to confront the evidence against them, regard should be had for the other purposes served by *viva voce* witness testimony, including allowing those affected by the crimes charged to be heard in the courtroom, and creating a fuller historical record. In addition, as the IBA has noted before, the ability to introduce prior recorded testimony as evidence should not be a substitute for the continued development of strong witness protection practices at the ICC.[202]

Recommendations

1. The IBA recommends the continued development of guidelines and templates to ensure the standardisation of witness statements, declarations and attestations in accordance with the requirements of the provisions of ICC RPE Rule 68. Guidelines and templates should be developed with input from all parties, periodically reviewed and updated to reflect developments in jurisprudence and made publicly available.

2. The OTP should develop further tools to improve and standardise the quality of witness statements. In this regard, the IBA encourages the use of video recording, or at a minimum, audio recording witness statements during the investigative stage.

3. The IBA recommends that the OTP establishes a database of prior recorded testimony and statements to ensure that prior statements are available for future cases, following ICTY practice.

4. The IBA strongly recommends that the Court apply ICC RPE Rules 68(2)(c) to admit the prior recorded testimony of unavailable witnesses and 68(2)(d) to admit the prior recorded testimony of interfered-with witnesses, on an exceptional basis and only as a last resort. In making determinations that witnesses are unavailable under Rule 68(2)(c), the IBA recommends that the Court maintain a high level of due diligence regarding efforts to locate and produce witnesses, and that the Court does not interpret unavailability in

201 'For example, a situation may occur in which the improper interference comes to an end, and the witness is again willing to testify. It is therefore possible for there to be situations in which prior recorded testimony is introduced into evidence under rule 68(2)(d), but, due to changed circumstances, the formerly intimidated witness is now available to testify in full. If, in such a case, the prior recorded testimony was not independently admissible under any other part of rule 68, logic would dictate disregarding that testimony in evidence', see n 113 above, para 35.

202 See n 15 above, 1 and n 7 above, 32–33.

an overly broad manner, also making use of protective measures and, if necessary, other avenues for introducing statements, such as Article 56 of the Rome Statute and ICC RPE Rule 68(2)(b). The IBA further emphasises the importance of objective criteria in assessing whether witnesses have been materially influenced by improper interference under Rule 68(2)(d).

5. The IBA urges the Court to continue to strengthen its witness protection practices in line with the IBA's 2013 Recommendations, and to vigilantly monitor the use of Rule 68 to ensure that it is not used as a 'back door' substitution for victim and witness protection mechanisms that already exist at the ICC.

Chapter 4: Assessing evidence within the trial proceedings

The evidence submitted and discussed before the Trial Chamber forms the basis for its decision on the guilt or innocence of the accused in the trial judgment, according to Article 74 of the Rome Statute.[203] However, the ICC's legal framework and jurisprudence allow for the Trial Chamber to also assess the evidence at earlier stages of the proceedings in the form of 'no case to answer' proceedings, as well as under Regulation 55. In 'no case to answer' proceedings, the Trial Chamber assesses the evidence at the end of the presentation of the prosecution's case, with the possibility of partial or full acquittal on insufficiently substantiated charges. Under Regulation 55, at any time during the trial and on the basis of the evidence presented, the Trial Chamber may give notice to the parties that the legal characterisation of the facts may be subject to change, and may allow new evidence to be presented, if necessary, regarding the proposed changes.

The policy reasons behind these two procedures are distinct. As further discussed below, 'no case to answer' proceedings are based primarily on the rights of the accused and the prosecution's bearing of the burden of proof. The existence of such a procedure also takes into account increased efficiency and resources saved by the defence not having to address, and the Court not hearing further arguments on, charges for which the prosecution has not met its burden. On the other hand, Regulation 55 aims to prevent impunity by allowing the Trial Chamber to recharacterise the facts and circumstances described in the charges as other crimes and modes of liability included in the Rome Statute. Having recourse to Regulation 55, the Trial Chamber is not bound by the legal characterisations selected by the prosecution and confirmed by the Pre-Trial Chamber. Rather, based on its assessment of the evidence presented, the Trial Chamber has the possibility of finding different crimes and modes of liability than those originally identified, provided it does not exceed the facts and circumstances described in the charges. Within the ICC's particular structure, where the Pre-Trial Chamber also confirms charges based on a lower standard of proof, Regulation 55 is based on a presumption that the Trial Chamber will be presented with more evidence, and will be conducting a more thorough analysis to a higher standard of proof.

'No case to answer proceedings' are relatively new in the ICC's framework, with the first decision delivered in April 2016. Regulation 55 was first raised in the *Lubanga* case in 2009, and has since been raised or applied in numerous cases that have reached the trial phase. At the time of writing this report, both procedures still encompass unsettled areas of law, and have been the subject of much litigation, scholarly discussion and differences in interpretation between judges within Trial Chambers, giving rise to both dissenting opinions and jurisprudence from the Appeals Chamber.

In this Chapter, the IBA examines the emerging practices at the ICC for a Trial Chamber to assess evidence prior to the final trial judgment under Article 74 of the Rome Statute. The Chapter will focus on the proceedings initiated by Trial Chamber V(A) in the *Ruto and Sang* case, which in January 2016 held hearings as part of the ICC's first 'no case to answer' proceeding and, in April, delivered

203 See n 2 above.

the Court's first decision. It will examine the legal basis for this proceeding and compare it to the practices developed at the ad hoc tribunals. It will consider how an evaluation of admitted evidence at the end of the prosecution's case may support the efficiency of the Court, consider the fair trial implications and make recommendations.

The Chapter will also address the ICC's continued use of Regulation 55 to address situations when, during the trial, the evidence presented does not match the charges or mode of liability brought by the prosecution. Regulation 55 has been used at different stages of the proceedings in multiple cases. After the initial interpretation by the Trial and Appeals Chambers in the *Lubanga* case, it was subsequently applied in the *Katanga* case following the presentation of all the evidence, and in the *Bemba* case. This Chapter will focus on the more recent applications by Trial Chambers in the *Ruto and Sang* and *Gbagbo and Blé Goudé* cases, in which notice was requested by the prosecution and granted by the Trial Chamber regarding possible recharacterisation of the modes of liability for the accused in the respective cases. The Chapter will consider the implications of this practice on the right to a fair trial and make recommendations.

'No case to answer'

On 5 April 2016, Trial Chamber V(A) ruled that the charges against Mr Ruto and Mr Sang should be vacated 'without prejudice to their prosecution afresh in the future'.[204] The Trial Chamber's determination came as the result of the ICC's first 'no case to answer' proceeding, during which the Trial Chamber assessed, midway through the case and at the end of the presentation of the prosecution's evidence, whether there was sufficient evidence to continue the trial. 'No case to answer' or 'motion for judgment of acquittal' proceedings are an established practice at other international criminal tribunals, including the ICTY and ICTR, and are also provided for at the STL.[205] They are also a feature of many domestic proceedings. However, unlike the ICTY, ICTR and STL, the ICC's legal regime does not contain explicit provision for them.[206]

At the ICTY, motions for judgment of acquittal became an established practice, with the most frequent incidence of acquittal being with respect to specific counts of the indictment rather than a full acquittal on all counts.[207] The ICTR also developed a practice of motions of judgment of acquittal,

204 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para 1.

205 The terminology 'motion for judgment of acquittal', as the proceeding was designated at the ICTY, ICTR and STL, and 'no case to answer', as the proceeding was initially referred to at the ICC, are used interchangeably in this report, in line with the practice to date at the ICC. For example, while Trial Chamber V(A) initially referred to the proposed proceeding as 'no case to answer', see, eg, ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1334, Decision No 5 on the Conduct of Trial Proceedings (Principles and Procedures on 'No Case to Answer' Motions), 3 June 2014 ('Ruto and Sang Decision No 5'), on 5 April 2016, they delivered a 'Decision on Defence Applications for Judgments of Acquittal', see ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red, Decision on Defence Applications for Judgments of Acquittal.

206 The legal basis for motions for judgment of acquittal is explicitly set out in the RPE of the ICTY and ICTR in Rule 98*bis*, and in the STL RPE in Rule 167. ICTY RPE Rule 98*bis* reads as follows: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction'. ICTR RPE Rule 98*bis* reads as follows: 'If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts'. STL RPE Rule 167(A) reads as follows: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count'.

207 See, eg, ICTY, *Prosecutor v Kordić and Čerkez*, Case No IT-95-14/2-T, Decision on Defence Motion for Judgment of Acquittal, 6 April 2000; ICTY, *Prosecutor v Blagojević and Jokić*, Case No IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98*bis*, 5 April 2004; ICTY, *Prosecutor v Brđjanin*, Case No IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 28 November 2003; and ICTY, *Prosecutor v Kunarac et al*, Case No IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000.

which resulted in the dismissal of some counts for some cases.[208] At the ICTR,[209] and the ICTY,[210] Trial Chambers also dismissed motions for judgment of acquittal in their entirety, finding that the accused had a case to answer on all counts. At the STL, at the time of writing this report, no practice has yet been established in light of the fact that the Trial Chamber is still hearing the prosecution's case in the main case before the tribunal, *Prosecutor v Ayyash et al.* However, the IBA observes that the inclusion of Rule 167 in the STL RPE reinforces the extent to which a mid-case review for judgment of acquittal has become established in ICL. Procedures for motions for judgment of acquittal were introduced at the ICTY in 1998, in an effort to increase the efficiency of proceedings and were later amended in 2004 to limit the motion to oral submissions and rulings as a response to the time that was being spent on voluminous filings and decisions.[211] Later practice at the ICTY incorporated judicial review at the end of the prosecution's case as a mandatory feature of the trial procedure, without requiring a motion on the part of the accused,[212] and the STL rule follows this practice.[213] ICC procedure, as established to date, on the other hand, reverts to a written procedure that requires initiation by the defence, as discussed below. In this regard, the IBA encourages the ICC to monitor the time and resources associated with 'no case to answer' proceedings, consider moving to an automatic, oral procedure and consider codifying this procedure in an amendment to the ICC RPE.

The IBA notes that, while the proceedings in the *Ruto and Sang* case established the legal basis and principles for future 'no case to answer' procedures at the ICC, in the end, Trial Chamber V(A)'s decision was atypical in that it resulted in vacating the charges, terminating proceedings without prejudice to charges being brought anew at a later stage, as opposed to acquittal, which would have terminated proceedings with finality, precluding the same charges being brought again.[214] The primary reason for the majority's decision vacating the charges instead of acquitting, as further discussed below and addressed in Chapter 3, was the long-standing problem of witness interference in the case. This specific situation in the *Ruto and Sang* case was addressed further by Judge Chile Eboe-Osuji in separate reasons, leading him to opine that, whereas he accepted the solution of vacating the charges, in his view, a mistrial would have been the correct result.[215] The outcome of the ICC's first 'no case to answer' proceedings was notable for the lack of agreement between the judges on both the interpretation of the law and assessment of the evidence, which resulted in a dissent on the part

208 See, eg, ICTR, *Prosecutor v Rukundo*, Case No ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, 22 May 2007; ICTR, *Prosecutor v Kamuhanda*, Case No ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 20 August 2002.

209 See, eg, ICTR, *Prosecutor v Rwamakuba*, Case No ICTR-98-44C-R98*bis*, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 28 October 2005; ICTR, *Prosecutor v Semanza*, Case No ICTR-97-20-T, Decision on the Defence Motion for a Judgment of Acquittal, 27 September 2001; ICTR, *Prosecutor v Muvunyi*, Case No ICTR-00-55A-T, Decision on Motion for Judgement of Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 18 August 2009; and ICTR, *Prosecutor v Karemera*, Case No ICTR-98-44-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 19 March 2008.

210 ICTY, *Prosecutor v Blaškić*, Case IT-95-14, Decision of Trial Chamber I on the Defence Motion to Dismiss, 3 September 1998; ICTY, *Prosecutor v Hadžić*, Case IT-04-75, Oral Decision on Defence Motion for Acquittal Pursuant to Rule 98*bis*, 20 February 2014; and ICTY, *Prosecutor v Mladić*, Case IT-09-92, Rule 98*bis* Judgment summary in the case of Ratko Mladić, 15 April 2014.

211 Vladimir Tochilovsky, *Jurisprudence of the international criminal courts and the European Court of Human Rights: procedure and evidence* (Brill, 2008) 536–537.

212 *Ibid* 537.

213 See n 206 above for text of STL RPE, Rule 167(A).

214 The IBA notes that the ICC created a public information resource to explain the complex particulars of this decision. See 'Questions and answers arising from the decision of no case to answer in the case of *Prosecutor v Ruto and Sang*', ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-PIDS-Q&A-KEN-01-01/16_Eng, see www.icc-cpi.int/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf accessed 17 June 2016.

215 Judge Eboe-Osuji appended separate reasons that addressed '(i) the proper approaches to no-case adjudication in this particular Court; (ii) questions of reparation for victims of the Kenyan post-election violence; (iii) the question of immunity of State officials; and (iv) the proper approach to the interpretation of 'organisational policy' for purposes of crimes against humanity under the Rome Statute'. See ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red, Reasons of Judge Eboe-Osuji, 5 April 2016, para 4.

of Judge Olga Herrera Carbuccia. Thus, it is anticipated that the law around these procedures will need to be further developed by future Trial and Appeals Chambers.

Legal basis for 'no case to answer' proceedings at the ICC

Trial Chamber V(A) first explored the topic of 'no case to answer' proceedings in 2013 and ordered submissions from the parties and participants on whether such proceedings should be allowed in the case.[216] In a decision on 3 June 2014 ('Decision No 5'), the Trial Chamber found that there was a legal basis for 'no case to answer' proceedings based on the provisions of the Rome Statute and RPE that provide the Trial Chamber with broad latitude to direct the proceedings and to rule on matters concerning the conduct of the proceedings, specifically Articles 64(3)(a) and 64(6)(f), and Rule 134.[217] The Trial Chamber also noted its obligation to ensure a fair and expeditious trial under Article 64(2) of the Rome Statute.[218]

In respect of the right to a fair trial, the Trial Chamber further noted that the 'primary rationale' for a 'no case to answer' proceeding lies in 'the principle that an accused should not be called upon to answer a charge when the evidence presented by the prosecution is substantively insufficient to engage the need for the defence to mount a defence case,' and that this principle flows from the general rights of the accused, including the presumption of innocence and right to a fair and speedy trial, reflected in Articles 66(1) and 67(1) of the Rome Statute.[219] The Trial Chamber noted that 'no case to answer' proceedings are consistent with the burden of proof lying with the prosecution.[220] Trial Chamber V(A) also emphasised that such proceedings have 'the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused'.[221]

Confirmation of charges proceedings and 'no case to answer'

Trial Chamber V(A) distinguished the evaluation of the evidence in 'no case to answer' proceedings from the Pre-Trial Chamber's evaluation of the evidence in the confirmation of charges proceedings. Noting that confirmation of charges proceedings entail a 'lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules', the Trial Chamber found that confirmation proceedings 'do not preclude a subsequent consideration of the evidence actually presented at trial by the prosecution in light of the requirements for the conviction of the accused.'[222]

To this end, the IBA notes that, initially, confirmation of charges proceedings were lengthier and entailed the presentation of more witnesses and evidence, and yielded long and detailed decisions. An October 2015 report on confirmation of charges proceedings showed that the period between the initial appearance and confirmation of charges decision ranged from seven months to two and

216 See n 205 above, *Ruto and Sang* Decision No 5, para 1. The prosecution, defence and legal representatives of victims all supported the proposal of holding 'no case to answer' proceedings, *Ruto and Sang* Decision No 5, paras 7–10.

217 *Ibid*, para 15.

218 *Ibid*, para 16.

219 *Ibid*, para 12.

220 *Ibid*, para 13.

221 *Ibid*, para 16.

222 *Ibid*, para 14.

a half years.[223] Confirmation of charges decisions have ranged between 157 pages in the *Lubanga* case for three charges, and 226 pages in the *Katanga and Ngudjolo* case for 13 charges.[224] The longest time between an initial appearance and confirmation of charges to date, in the *Gbagbo* case, was over 33 months for an indictment of four charges.[225] However, in recent cases, confirmation of charges proceedings have become more streamlined, and have also resulted in shorter decisions. In the *Ongwen* case, the time between the initial appearance and confirmation decision was one year and two months and resulted in a 104-page decision, for an indictment that contained 70 charges. In the *Al Madhi* case, the time period was six months and resulted in a 27-page decision for an indictment that contained one charge.[226]

The IBA urges the ICC to continue to seek a balanced and efficient approach to finalising the charges through confirmation proceedings in light of both the more detailed assessment of evidence that will take place at the trial phase and the mechanisms discussed in this Chapter by means of which the Trial Chamber can assess the evidence prior to the final trial judgment. A streamlined pre-trial phase is in line with the right of the accused to be tried without undue delay, and supports efficiency in that it minimises the possibility of a duplicative review of evidence, conserves the Court's limited judicial resources and avoids unnecessarily extending the overall timeline of a case.

In this regard, the IBA notes that, to date, cases against four suspects have not proceeded past the confirmation of charges stage. Charges against Henry Kiprono Kosgey, originally charged together with Mr Ruto and Mr Sang, were not sustained on the basis of insufficient evidence. In particular, the Pre-Trial Chamber found that the evidence presented by the prosecution, which consisted primarily of the statement of one anonymous witness, was insufficient to establish substantial grounds to believe that Mr Kosgey was criminally responsible for the crimes charged.[227] The decision not to confirm charges against Mr Kosgey resulted in a reduced case going forward to the Trial Chamber against two, rather than three, accused. In addition, in the Kenya situation, charges against Mohammed Hussein Ali were not confirmed by Pre-Trial Chamber II, which found that there was not sufficient evidence to establish substantial grounds to believe that Mr Ali committed the crimes charged.[228] In the *Abu Garda* case, Pre-Trial Chamber I declined to confirm any charges, having found, among other things, that there was insufficient evidence linking Mr Abu Garda

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223 War Crimes Research Office, *The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change* (War Crimes Research Office, 2015) 16.

224 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-356-Anx2, Public Redacted Version of the Document Containing the Charges, Article 61(3) (a), 28 August 2006, paras 25–40; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-584-Anx1A, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 12 June 2008, pp 31–35; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 14 May 2007; and ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 1 October 2008.

225 See n 223 above, 17; and ICC, *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-1, Warrant of Arrest for Laurent Koudou Gbagbo, 30 November 2011, p 7.

226 Dominic Ongwen made his initial appearance on 26 January 2015 and the confirmation of charges decision was delivered on 23 March 2016. See n 21 above. Ahmad Al Mahdi made his initial appearance on 30 September 2015 and the confirmation of charges decision was delivered on 24 March 2016. See ICC, *Prosecutor v Ahmad Al Faqi Al Mahdi,* ICC-01/12-01/15-84-Red, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016. The IBA notes, however, that judges do not appear to be of united opinion about the shape of confirmation proceedings and decisions going forward. Eg, Judge Kovács issued a separate opinion to the Al Mahdi confirmation of charges decision, noting that it was in his opinion insufficiently detailed and reasoned. See ICC, *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-84-Anx, Separate Opinion of Judge Péter Kovács, 9 May 2016. It is also worth noting that Mr Al Mahdi entered a guilty plea during his confirmation hearing, for the first time at the ICC. See ICC, *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-T-2-Red2-ENG WT, Transcript, 1 March 2016, pp 70–71 .

227 ICC, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para 293.

228 ICC, *Prosecutor v Kenyatta et al*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 420–427.

to the alleged planning meetings for the attack at issue in the case.[229] In the *Mbarushimana* case, Pre-Trial Chamber I declined to confirm any charges on the basis of insufficient evidence of the crimes charged, as well as insufficient evidence linking Mr Mbarushimana to the alleged crimes.[230] In declining to confirm charges against these suspects, the Pre-Trial Chambers indicated that the prosecution needed to strengthen its investigations, and the amount of evidence being presented at the confirmation stage should be stronger and more comprehensive. Following clear indications from chambers that cases should be more 'trial ready' at the confirmation stage, the Prosecutor specifically addressed investigations and the pre-trial phase in her strategic plans.[231] In this regard, the IBA notes that, whereas many valid criticisms can be made of the particular structure and conduct of pre-trial proceedings at the ICC,[232] even in its flawed format, the existence of the confirmation of charges process has functioned to save the Court resources that would have been expended at trial, and has usefully indicated areas for improvement in the Prosecutor's work of investigating and constructing cases.

Test for 'no case to answer'

In *Ruto and Sang*, Trial Chamber V(A) made specific reference in Decision No 5 to the text of ICTY Rule 98*bis*, which sets out the applicable standard for considering whether the analogous 'motion for judgment of acquittal' should be granted. ICTY Rule 98*bis* provides that the Trial Chamber should 'enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction'. Trial Chamber V(A) agreed with the test formulated by the ICTY Appeals Chamber, namely 'whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question'.[233] The ICC Trial Chamber made it clear that use of the word 'could' distinguished the prima facie assessment of the evidence in 'no case to answer' proceedings from the beyond reasonable doubt standard that applies to the 'ultimate decision on the guilt of the accused'.[234]

Thus, the test articulated by Trial Chamber V(A) was 'whether there is evidence on which a reasonable Trial Chamber *could* convict'.[235] The Trial Chamber further instructed the following:

> 'In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has been issued by the Chamber. The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber'.[236]

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229 ICC, *Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, paras 173, 177–179.

230 ICC, *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16 December 2011, Majority's findings, paras 291–340.

231 See OTP Strategic Plan 2012-2015, para 4(a) accessed 17 June 2016; OTP Strategic Plan 2016-2018, para 34 accessed 17 June 2016.

232 See, eg, War Crimes Research Office, *The confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change*, (War Crimes Research Office, 2015); see n 22 above, *Fairness at the International Criminal Court,* 22–24; and IBA, *Enhancing efficiency and effectiveness of ICC proceedings: a work in progress*, (IBA, 2011) 24.

233 See n 205 above, *Ruto and Sang* Decision No 5, para 30, [emphasis in original], citing ICTY jurisprudence.

234 *Ibid*, para 23. See further the Separate Further Opinion of Judge Eboe-Osuji elaborating on this point.

235 *Ibid*, para 32 [emphasis in original].

236 *Ibid.*

Review of the evidence in a 'no case to answer' proceeding would therefore be more limited than at the later stage of the Article 74 judgment, when questions of reliability and credibility are taken into account. However, the IBA notes that whether a credibility determination should be made became a point of contention in the later decision of Trial Chamber V(A) in this case, when the majority did consider credibility, a point on which Judge Herrera Carbuccia dissented. The assessment of credibility is discussed further below.

Decision No 5 also clarified a timeline and procedure for 'no case to answer' proceedings. The proceedings should be initiated by oral notification from the defence no later than the last day of the prosecution's case, followed within 14 days by written submissions and a subsequent hearing.[237] The use of written submissions and a written decision departs from the practice at the ICTY and STL. At the ICTY, as noted above, the relevant rule specifies that the arguments moving for judgment of acquittal should be given orally, and that the Trial Chamber will deliver its decision orally, a change made in 2004 for reasons of efficiency.[238] The STL also uses an oral procedure, whereas the ICTR did not. These precedents were considered by Trial Chamber V(A), which decided that 'being provided with concise and focused written submissions would be most conducive to the efficient consideration of any 'no case to answer' motion'.[239]

Application in the Ruto and Sang *case*

Following submissions from the parties and a hearing,[240] the Trial Chamber issued its 'Decision on Defence Applications for Judgments of Acquittal' on 5 April 2016. The two-page majority decision was accompanied by an evidential review by Judge Robert Fremr, which was fully adopted by Judge Eboe-Osuji, who also appended substantial separate reasons. The majority found that the prosecution had failed to meet its evidential burden, according to the standard of proof set out in Decision No 5, and accordingly vacated the charges against both accused persons. Judge Herrera Carbuccia dissented, and would have allowed the case to continue. Throughout the evidential review, separate reasons and dissent, the severe impact that witness intimidation and interference had on the evidence before the Trial Chamber was noted, although the judges differed in how they would have responded to it.

In reviewing the evidence, Judge Fremr noted at the outset that the Trial Chamber was bound by the Appeals Chamber judgment of 12 February 2016 to completely disregard the witness statements that had been admitted according to ICC RPE Rule 68.[241] Addressing the evidence relating to multiple alleged incidents, Judge Fremr noted that, without the prior recorded testimony of the five key prosecution witnesses, there was a paucity of witness testimony for the Trial Chamber to rely on. For example, the evidence of three preparatory meetings, presented as the factual basis for the existence of a common plan, was exclusively based on the inadmissible prior recorded testimony of

237 *Ibid*, para 37.

238 Andrew T Cayley and Alexis Orenstein, 'Motion for Judgment of Acquittal In the Ad Hoc and Hybrid Tribunals: What Purpose if Any Does It Serve?' (2010) 8 J Intl Crim Justice 575, 581.

239 See n 205 above, Ruto and Sang Decision No 5, para 36.

240 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1990-Corr-Red, Public Redacted Version of 'Corrigendum of Ruto Defence Request for Judgment of Acquittal' , 26 October 2015; ICC-01/09-01/11-1991-Red, Sang Defence 'No Case to Answer' Motion, 6 November 2015.

241 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Fremr, 5 April 2016, ('*Ruto and Sang* Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Fremr') para 21.

three witnesses.[242] The evidence of training of Kalenjin youths was based on three witnesses, two of whose statements were now inadmissible, and the evidence of the remaining witness was found to be unreliable.[243] The evidence of three implementation meetings was provided by a witness whose statement was inadmissible.[244]

The poor state of the evidence led Judge Fremr to take the unusual step of analysing the credibility of some of the witness testimony that was before the Trial Chamber, notwithstanding the Trial Chamber having found in Decision No 5 that determinations of reliability and credibility were not necessary at this stage.[245] The evidence that William Samoei Ruto and an associate purchased guns for use by the network was provided by a single witness (Witness 356), and was not corroborated, leading Judge Fremr to find that his evidence did not 'afford the necessary solid basis upon which a reasonable Trial Chamber could rely for proper conviction'.[246] Judge Fremr then moved to analyse the credibility of Witness 356, premised on his determination that the prosecution case had 'completely broken down'.[247] He stated that, 'if the entirety of the prosecution's case hinges on the testimony of one witness, where it initially intended to rely on a number of witnesses, it can certainly be argued that the case teeters on the brink of breaking down'. [248] In these circumstances, he found that the credibility of that key witness becomes the determinative question as to whether the proceedings should continue, and a credibility analysis is warranted.

Judge Fremr also opined that credibility assessments could form a part of 'no case to answer' proceedings, citing the interests of justice, efficiency and the Trial Chamber's obligations under Article 64(2) of the Rome Statute. [249] In her dissent, Judge Herrera Carbuccia disagreed with this analysis, and found that the Trial Chamber should have restricted its analysis to the legal standard set in Decision No 5. Judge Herrera Carbuccia found that introducing a credibility analysis at this stage would be 'contrary to the principle of legal certainty and overall fairness of proceedings' and emphasised that the Trial Chamber should not contradict its own findings in the previous decision. Also citing efficiency, Judge Herrera Carbuccia objected to the possibility that the Trial Chamber would assess witness credibility twice during the proceedings, as it was obligated to do so at the end

242 *Ibid*, para 36.

243 *Ibid*, paras 38–44.

244 *Ibid*, para 103.

245 *Ibid*, para 24.

246 *Ibid*, para 56. Judge Fremr went on to analyse the credibility of this witness and found that, based on discrepancies in his testimony that the witness was not able to convincingly explain, and based on apparent attempts by the witness to deceive the prosecution, 'a reasonable trier of fact would be well-advised to use this evidence with extreme caution'.

247 *Ibid*, paras 57–61. Judge Fremr's reasoning is consistent with the precedent at the ICTY and ICTR, which held that the prosecution's case has 'completely broken down' based on fundamental questions as to the reliability and credibility of witnesses such that the prosecution is left without a case. See ICTR, *Prosecutor v Rwamakuba*, Case No ICTR-98-44C-R98*bis*, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 28 October 2005, para 7; and ICTY, *Prosecutor v Kordić and Čerkez*, Case No IT-95-14/2-T, Decision on Defence Motion for Judgment of Acquittal, 6 April 2000, para 28. The ad hoc tribunals also formulated the concept as when 'the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution'. See ICTY, *Prosecutor v Strugar*, Case No IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, 21 June 2004, paras 10, 11, 18. See also ICTR, *Prosecutor v Nyiramasuhuko et al*, Case No ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98*bis*, 16 December 2004, para 71.

248 *Ibid Ruto and Sang*, para 57.

249 *Ibid*, paras 144–146. Judge Fremr stated the following in part: 'It would be against the interests of justice for a Trial Chamber to abstain from making a credibility assessment at the no case to answer stage where the evidence before it, at the close of the Prosecution case, is of an isolated nature and the falling away of any of the testimonies (if found that it could not be relied upon) would cause (significant) gaps in the Prosecution's theory of the case that would make it unlikely that a conviction in the case could ultimately follow. In such circumstances – and provided that the circumstances and the information available to the Trial Chamber allow for it – a Trial Chamber should make an evaluation of witness credibility, to avoid the trial continuing for another couple of years without any real prospect of a conviction'.

of trial.[250] The judges therefore both sought to increase the fairness and efficiency of proceedings, but would have used different means to reach this end.

Notably, Judge Herrera Carbuccia also addressed the prior recorded statements that were ruled inadmissible after the Appeals Chamber decision, and raised the Trial Chamber's authority under Article 69(3) of the Rome Statute, which allows the Trial Chamber to request the submission of all evidence that it considers necessary to determine the truth. Judge Herrera Carbuccia would have used the provision to admit the statements.[251] The Appeals Chamber, in its decision on the admissibility of the statements, had not ruled out the avenue of Article 69(3), which was raised by the prosecution. However, the Appeals Chamber found that the relevance of Article 69(3) to the current statements was wholly speculative, as it had not been addressed by the Trial Chamber in the impugned decision or specifically requested by the prosecution in her alternative request for admission.[252] Judge Fremr also noted the powers accorded to the Trial Chamber under Article 69(3), but stated that he did not believe that any evidence called by the Trial Chamber would change the outcome at this stage.[253]

As noted above, the IBA supports the further development of 'no case to answer' proceedings at the ICC. The IBA observes that the legal standards outlined in Decision No 5 are consistent with those established at ad hoc tribunals and the ICC may further benefit from moving to an automatic 'no case to answer' proceeding as a matter of course, without requiring motion from the defence, and relying on oral submissions and rulings. Such an approach would be consistent with the rights of the accused under Article 67 of the Rome Statute and would support the efficiency of the trial process. While the *Ruto and Sang* case has presented an atypical first instance of such proceedings for the Court in its outcome of vacated charges, the IBA notes that, going forward, a standardised approach would be beneficial to the Court, ensuring consistency between the chambers and preventing the procedure from being re-litigated and considered *de novo* in each trial. The IBA notes, for example, that in June 2015, a full year after Decision No 5 determined a procedure for 'no case to answer' in the *Ruto and Sang* case, Trial Chamber VI invited submissions on the same procedure in the *Ntaganda* trial.[254] For these reasons, the IBA also recommends that the ASP consider an amendment to the ICC RPE codifying the procedures for 'no case to answer' or motions for judgment of acquittal.

Standardisation of the procedures for 'no case to answer', including through an amendment to the ICC RPE, would also reinforce the fair trial and efficiency rationales that underlie the existence of such procedures. In the *Ruto and Sang* case, in addition to the disagreement regarding the credibility assessment, Judges Fremr and Eboe-Osuji differed on the outcome of finding that the prosecution had failed to meet its burden in this particular instance. While noting that, normally, such a finding would result in an acquittal,[255] Judge Fremr agreed that the proceedings should be terminated and

250 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Anx1, Decision on Defence Applications for Judgments of Acquittal, Dissenting Opinion of Judge Herrera Carbuccia, 5 April 2016, para 21.

251 *Ibid*, para 30.

252 See n 37 above, para 87.

253 See n 241 above, para 24.

254 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-619, Decision on the conduct of proceedings, 2 June 2015, para 17. Trial Chamber VI stated the following: 'The Chamber takes no position at this time on whether it will entertain a motion by the Defence asserting that there is no case for it to answer. Should the Defence wish to file such a motion, it should seek leave to do so including, inter alia, submissions on the applicable standard and procedure, no later than five days after the end of the Prosecution's presentation of evidence, or, if applicable, the presentation of evidence by the [legal representative of victims] LRVs'.

255 See n 241 above, para 147.

the majority settled on vacating the charges and discharging the accused without prejudice for their prosecution in the future.[256] Both judges noted that the case presented special circumstances, which raised questions about the evidence that would have been available to the prosecution, had the case not been 'tainted' by 'witness interference and political intimidation of witnesses'.[257] For this reason, both judges supported leaving open the option for further prosecution.

The IBA emphasises that the outcome of an acquittal, with respect to any counts for which the prosecution has not presented evidence such that a reasonable Trial Chamber could convict, is integral to, and the object of, such proceedings in other international criminal jurisdictions. The outcome of an acquittal also supports a fair trial, in that it provides finality for the accused, and is in keeping with the principle of *ne bis in idem*, which is included in the ICC's legal regime in Article 20 of the Rome Statute.[258] The ICC's legal regime does not provide for a mistrial, and had this been the official result, it would have been the first mistrial declared in ICL.[259] In vacating the charges, and in the theoretical alternative of a mistrial, the prosecution is being invited to try again, and indeed this is made explicit in the decision. The IBA notes that the lack of clarity and finality of this outcome is antithetical to the purpose of 'no case to answer' proceedings, and to the precedents in ICL, and therefore recommends that this precedent not be carried further by other cases at the ICC.

As the IBA has recommended in the past and elsewhere in this report, there is a need to continue to strengthen the ICC's ability to address issues of witness intimidation and state cooperation, through a range of measures, including strengthening the Court's witness protection regime, issuing subpoenas, and enhancing support and cooperation from States Parties. The Court may also increase its use of specific legal tools, such as the amended ICC RPE Rule 68(2)(d), allowing the introduction of the prior recorded testimony of witnesses who have been interfered with, discussed in Chapter 3 of this report. At this stage of the Court's development of its jurisprudence and trial procedures, the IBA stresses that the Court's legal procedures should not become overly shaped by the particulars of the Kenya situation.

256 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para 1.

257 See n 241 above, para 148; ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red, Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, 5 April 2016, para 2.

258 Art 20(1) of the Rome Statute provides the following: 'Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'.

259 Professor William A Schabas, 'The Mistrial, An Innovation in International Criminal Law', (Studies in Human Rights Blog, 8 April 2016), see http://humanrightsdoctorate.blogspot.com/2016/04/the-mistrial-innovation-in.html accessed 17 June 2016.

Regulation 55

As outlined above, the ICC's Regulation 55[260] provides for Trial Chambers to change the legal characterisation of the facts, and has become a persistent feature of the ICC's trial procedure. A number of decisions have clarified how Regulation 55 is to be interpreted in respect of its scope and timing; however, judges have by no means been unified in their interpretation of its provisions. In addition, the types of changes that have been sought under Regulation 55 continue to evolve; first, from initially seeking to add specific new charges during the trial to changing the mode of liability charged after the trial evidence has been heard, and then to allowing the consideration of multiple modes of liability prior to the trial, without formally charging them in the alternative.

Regulation 55 and the pre-trial phase

The IBA notes that Regulation 55 is a legal device that interplays between the charging authority and responsibilities of the Prosecutor, and the role of the Trial Chamber as the ultimate arbiter of the accused's legal liability for the charges confirmed. The ICC's legal framework provides for an initial evaluation of evidence to a lower standard of proof by the Pre-Trial Chamber via the confirmation of charges process. The ICC's jurisprudence, along with the policies and guidelines of the OTP and chambers, has continued to develop regarding how 'trial-ready' the evidence should be at the pre-trial stage.[261] A related issue is whether charging in the alternative or cumulative charging is acceptable.

Whereas the powers stated in Regulation 55 accrue to the Trial Chamber, the provision has also been implicated at the pre-trial phase, in that the existence of Regulation 55 has been seen as a justification by at least one Pre-Trial Chamber for confirming minimal charges. In the June 2009 confirmation of charges decision in the *Bemba* case, Pre-Trial Chamber II cited the possibility of the Trial Chamber's recourse to Regulation 55 as partial justification to not confirm charges of torture based on the act of rape, in addition to the charge of rape itself. In the Pre-Trial Chamber's view, there was no need for the ICC Prosecutor to adopt a cumulative charging approach because, unlike at the ad hoc tribunals, Regulation 55 would allow the Trial Chamber

260 Regulation 55, 'Authority of the Chamber to modify the legal characterisation of facts', reads in full as follows:
' 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall: (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)'.

261 See OTP Strategic Plan 2012–2015, para 4(a); and OTP Strategic Plan 2016–2018, para 34. See also ICC, *Chambers Practice Manual*, (ICC, February 2016) 8, which states the following: 'In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct before the confirmation process the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court's legal instruments, held that the Prosecutor's investigation may be continued beyond the confirmation hearing, and determined that finding that, barring exceptional circumstances, the Prosecutor's investigations must be brought to an end before the confirmation hearing constitutes an error of law'.

at a later stage to choose the 'most appropriate legal characterisation'.[262]

However, more recent decisions have shown a preference for a more thorough and comprehensive confirmation of charges. For example, in the *Ongwen* case, a differently constituted Pre-Trial Chamber II confirmed 70 charges and multiple modes of liability in March 2016. The Pre-Trial Chamber explicitly rejected the existence of Regulation 55 as a justification not to confirm charges and found that cumulative charging was permitted when the relevant evidentiary standard was met.[263] In addition, the February 2016 *Chambers Practice Manual* indicates a preference on the part of the judges for alternative pleading, noting that this should 'limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted'.[264]

Regulation 55 and fair trials

Whether Regulation 55 is consistent with a fair trial depends in part on the stage of proceedings at which it is applied, and on the procedures adopted by the relevant Trial Chamber to give effect to paragraph 3 of Regulation 55. This provision obliges the Trial Chamber to ensure that the accused shall have 'adequate time and facilities for the effective preparation of his or her defence in accordance with Article 67, paragraph 1 (b)' and to 'be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Rome Statute in accordance with article 67, paragraph 1 (e)'.

In the first Appeals Chamber decision to interpret Regulation 55, in the *Lubanga* case, the Appeals Chamber found that the provision was not per se inimical to the right to a fair trial.[265] Citing precedents in international human rights jurisprudence, the Appeals Chamber found that changes to the legal characterisation of the facts, without a formal amendment of the charges, was not precluded by Article 67(1) of the Rome Statute, namely the right to 'be informed, promptly and in detail of the nature, cause and content of the charge'.[266] The Appeals Chamber noted that Regulation 55 itself contained 'stringent safeguards for the protection of the rights of the accused', but that '[h]ow these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented has not been fully considered in the context of the present appeals and will depend on the circumstances of the case.'[267]

The Appeals Chamber decision pertained to notice given by the majority of Trial Chamber I, in July

262 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para 203. The Prosecution sought leave to appeal this decision, including on the basis of its incorrect interpretation of the existing jurisprudence on cumulative charging from the ICTY. See ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-427, Prosecution's Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 22 June 2015, para 16. Commentators have also noted that, in addition to misapplying the ICTY test on cumulative charging in *Bemba*, the ICC Pre-Trial Chambers have gone on to permit cumulative charging in subsequent cases. See Carl-Friedrich Stuckenberg, 'Cumulative Charges and Cumulative Convictions', in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 856–857.

263 ICC, *Prosecutor v Dominic Ongwen*, see n 21 above, paras 31–33. It has also been noted that there may be a balancing in terms of efficiency, in the greater time expended to hear evidence on these charges against the time that might have otherwise been spent on litigating the use of Regulation 55. See Danya Chaikel, 'What Counts against Ongwen – Effectiveness at the Price of Efficiency?' (Justice in Conflict, 15 April 2016), see https://justiceinconflict.org/2016/04/15/what-counts-against-ongwen-effectiveness-at-the-price-of-efficiency/ accessed 17 June 2016.

264 ICC, *Chambers Practice Manual* (ICC, February 2016) 18–19.

265 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', 8 December 2009 ('*Lubanga* Appeals Judgment on Regulation 55'), para 87.

266 *Ibid*, paras 83–84.

267 *Ibid*, para 85.

2009 during the trial phase of the case, that it was considering changing the legal representation of the facts to include sexual slavery, and cruel and inhuman treatment. The Trial Chamber had acted following a request from the legal representatives of victims participating in the case.[268] In effect, as Mr Lubanga faced limited charges of enlistment, conscription and use of child soldiers, this would have amounted to adding additional charges based on evidence heard at trial, outside the Rome Statute's other provisions allowing the prosecution to amend charges.[269] The Appeals Chamber rejected the majority's interpretation of the provision and ruled that Regulation 55 may not be used to include additional facts and circumstances that are not described in the charges and any amendments to the charges.[270]

In the *Katanga* case, on the other hand, the majority of Trial Chamber II gave notice under Regulation 55 on 21 November 2012, nine months after the official closure of the presentation of all evidence.[271] Trial Chamber II indicated that the mode of liability under which Germain Katanga was charged was subject to change, a decision that was later upheld on appeal.[272] The Appeals Chamber found that notice under Regulation 55 may be given at the deliberations phase of the case, provided that the Trial Chamber ensures that the trial remains fair.[273] In their judgment under Article 74, the majority of Trial Chamber II convicted Mr Katanga on the basis of the recharacterised mode of liability.[274] In a strongly worded dissent, Judge Christine Van den Wyngaert disagreed with the recharacterisation on the grounds that it both exceeded the facts and circumstances of the case, and was in violation of Germain Katanga's right to a fair trial.[275]

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268 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2049, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, paras 1–6.

269 The ICC's legal regime provides for amending and withdrawing charges by the prosecutor prior to confirmation in Art 61(4), with reasonable notice to the accused. Charges may also be amended or withdrawn subsequent to confirmation per Art 61(9) of the Rome Statute, which provides the following: 'After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges'. For a discussion of the Pre-Trial Chamber's role in amending charges at the ICC, see Dov Jacobs, 'A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2013) 206–212.

270 See n 265 above, para 112.

271 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014, paras 20, 30. The official closure of the evidence in the *Katanga* case was on 7 February 2012. In the same decision giving notice under Regulation 55, Trial Chamber II severed the case of Germain Katanga from that of Mathieu Ngudjolo, whose judgment was then issued separately on 18 December 2013, acquitting Mr Ngudjolo on all charges.

272 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 March 2013.

273 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 March 2013, para 1. Judge Cuno Tarfusser concurred with the majority on the issue of the timing of the notice given on Regulation 55. However, he dissented on the use of Regulation 55 to shift between provisions within either Art 25 or 28, finding that instead it should properly be used only to shift from Art 25 to 28 or vice versa (ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3363, Dissenting opinion of Judge Cuno Tarfusser, 27 March 2010, para 10). Judge Tarfusser also dissented on the majority's finding that the proposed changes did not violate Germain Katanga's right to a fair trial, specifically in respect of the amount of information provided to the accused at the time of the notice of the proposed recharacterisation. Judge Tarfusser wrote the following: 'The right to be adequately informed of the nature and content of the charges requires that, in giving notice of their intention to consider a re-characterisation within the meaning of regulation 55 of the Regulations of the Court, the relevant Chamber provides *at the same time* adequate information as to the factual and legal scope of that change, with a view to allowing the accused to promptly take a meaningful stance and swiftly review his or her defence strategies accordingly, if need be'. ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3363, Dissenting opinion of Judge Cuno Tarfusser, 27 March 2010, para 27 [emphasis in original]. Judge Tarfusser would therefore have reversed the Trial Chamber and had it render a decision under Art 74 on the basis of the evidence heard, without recourse to Regulation 55. See ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3363, Dissenting opinion of Judge Cuno Tarfusser, 27 March 2010, para 28.

274 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014 ('Katanga Trial Judgment').

275 *Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, paras 1–3. Judge Van den Wyngaert further found that, even if the Regulation 55 recharacterisation would have been warranted, there was insufficient evidence to support a conviction under the new mode of liability.

Noteworthy in Judge Van den Wyngaert's dissent was her highlighting of the accused's right to remain silent, along with the other rights of the accused protected by Regulation 55(2) and (3).[276] In her view, Mr Katanga's decision to testify and waive his right to remain silent had been made based on the scope of the charges prior to notice of recharacterisation, and in fact the Trial Chamber had impermissibly used his testimony to convict him under the revised mode of liability, in violation of Article 67(1)(g) of the Rome Statute.[277] Judge Van den Wyngaert further found that the accused's rights to be informed of the charges, to have adequate time and facilities to prepare the defence, and to be tried without undue delay, were violated, and that his guilt was not established beyond a reasonable doubt, and he should have been acquitted.[278]

Judge Van den Wyngaert's dissent to the *Katanga* judgment raised important issues for the future use of Regulation 55, and in particular, for the timing and content of the notice given. The IBA agrees that notice should be given as promptly as possible, in sufficient detail, and that attention should also be paid to the accused's right not to incriminate themselves as well as the other rights enshrined in Article 67, in addition to the rights specifically enumerated in Regulation 55(3). Indeed, the IBA emphasises the broader scope of the rights guaranteed to the accused at the ICC and urges the Court to bring broader fair trial considerations to the foreground in the future development of Regulation 55.

Notice of Regulation 55 recharacterisation early in the trial phase

Since the *Katanga* case, the prosecution has requested notice to be given early in the trial proceedings in a number of cases, to allow for recharacterisation of the mode of liability to include multiple additional or alternative modes of liability.[279] While the prosecution requested Regulation 55 to be notified prior to the opening of the trial against both Mr Ruto and Mr Sang, as well as Mr Kenyatta, in the Kenya situation, notification was only given against William Ruto by Trial Chamber V(A) after the start of trial.[280] The prosecution also requested notice be given in the *Ntaganda* case, prior to the start of trial, with no response from the Trial Chamber prior to the start of trial or as of the writing of this report.[281]

In a December 2015 decision in the *Gbgabo and Blé Goudé* case, the Appeals Chamber confirmed Trial

276 *Ibid*, para 11. Judge Van den Wyngaert also found that the rights to be informed of the charges and to have adequate time and facilities to prepare the defence (Arts 67(1)(a) and (b) of the Rome Statute) were violated.

277 *Ibid*, paras 54, 59.

278 *Ibid*, paras 129–132, 309–320.

279 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1122, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013 and ICC, *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-455, Prosecution's application for notice to be given under Regulation 55(2) with respect to certain crimes charged, 24 July 2012.

280 See ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 3 July 2012 and ICC, *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-455, Prosecution's application for notice to be given under Regulation 55(2) with respect to certain crimes charged, 24 July 2012. Trial Chamber V(A) gave notice with respect to Mr Ruto on 12 December 2013 see ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1122, Public with Public Annex A Decision on Applications for Notice of Possibility of Variation of Legal Characterisation. While notice was never given with respect to Mr Sang, reference was made to possible notice in the 'no case to answer' proceedings and the Sang Defence team was advised to respond to all possible modes of liability including those mentioned in the Regulation 55 filing in their 'no case to answer' submission. See, ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1991-Red, Public Redacted Version of Sang Defence 'No Case to Answer' Motion, 6 November 2015, paras 3–13. With respect to Mr Kenyatta, charges were withdrawn on 13 March 2015, and there is no response on the public record with respect to the prosecution's proposed recharacterisation.

281 ICC, *Prosecutor v Bosco Ntaganda*, ICC/01-04/02-06/501, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), 9 March 2015.

Chamber I's decision to give notice under Regulation 55 prior to hearing opening statements or any evidence in the case, and including possible recharacterisation to a mode of liability that was rejected by the Pre-Trial Chamber.[282] The Trial Chamber based its decision on its review of the confirmation decision, the prosecution's request for notice, and the prosecution's pre-trial brief.[283] In particular, the Trial Chamber had regard to 'exceptional circumstances' consisting of the Pre-Trial Chamber's writing in the Confirmation Decision that it '[could] not rule out the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts'.[284]

Both the Trial and Appeals Chambers addressed Regulation 55 in the context of other available courses of action at that stage of the proceedings. The Trial Chamber noted that the prosecution had 'bypassed other statutory remedies' including seeking leave to appeal the confirmation decision, or seeking an amendment to the charges pursuant to Article 61(9), but did not find that the 'failure to exhaust other remedies' would impact on its decision.[285] The Appeals Chamber, however, rejected an argument that allowing Regulation 55 notice before opening statements was a subversion of the 'coherent procedure' set out in the Rome Statute. It found that 'the mere issuance of notice of a possible recharacterisation does not amount to an amendment of the charges', and that the two procedures are not inherently incompatible.[286] At the same time, whereas notice has been given at the prosecution's request in *Gbagbo and Blé Goudé*, and in a number of cases, as outlined above, Trial Chamber VII twice rejected the prosecution's request for notice in *Bemba et al*, and emphasised that the decision on whether to give notice is a prerogative of the Trial Chamber.[287]

The Appeals Chamber in *Gbagbo and Blé Goudé* has made clear that notice under Regulation 55 may be given 'at any time during the trial', including 'the stage after a Trial Chamber is seised of a case and before opening statements'.[288] The IBA notes that this practice creates additional complications in respect of the accused's right to know with certainty the charges against which they must defend themselves, which, according to the ICC's framework, should be set by the confirmation decision. Departing from this framework may encourage an overly broad charging practice on the part of the prosecution, in which they leave indeterminate or frequently revisit the theory of the case and mode of liability. Indistinct theories of cases in turn may lead to lengthier trials. Further, the IBA notes that following this practice, the role of the Pre-Trial Chamber becomes less distinct and the expectations for the pre-trial phase of proceedings lack clarity.

The IBA is mindful that the Appeals Chamber in *Gbagbo and Blé Goudé* addressed the status of the *Chambers Practice Manual*, clarifying that the general recommendations and guidelines therein, while based on the experience and expertise of the judges, do not constrain chambers in their application of Regulation 55.[289] However, the IBA notes that, particularly in light of the evolution of the confirmation of charges process becoming more focused and streamlined, for fair trial and efficiency

282 See n 34 above.

283 ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-185, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015 ('*Gbagbo and Blé Goudé* Decision on Regulation 55(2)'), para 13.

284 *Ibid* para 12, citing *Gbagbo* Confirmation of Charges Decision; see also ICC, *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para 263.

285 *Ibid*, para 8.

286 See n 34 above, para 53.

287 'The Chamber emphasizes that it is ultimately its prerogative to decide if and when to give Regulation 55 notice' ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-1553, Decision on Prosecution's Re-application for Regulation 55(2) Notice, 15 January 2016, para 8.

288 See n 34 above, para 1.

289 *Ibid*, para 54.

considerations, the confirmation process should result in fixed charges and the use of Regulation 55 at any time during the trial should remain a last resort used in exceptional circumstances.[290] This approach would be consistent with the recommendation in the *Chambers Practice Manual*.

Future considerations for 'no case to answer' proceedings and Regulation 55

The IBA observes that the introduction of 'no case to answer' proceedings is a new development at the ICC, and that Regulation 55 provides a new procedure in ICL. Therefore, it is to be expected that some time and consideration will be necessary to adapt these procedures to ICC trials. Indeed, there is a wide range of opinions about the propriety of both procedures.[291] However, based on the frequency to date with which recourse has been had to Regulation 55, and based on the consistent and standardised practice of ruling on judgment of acquittal at the ICTY and ICTR, it seems clear that both procedures, which together expand the conventional framework for the timing of the consideration of the content and disposition on charges, are well integrated into ICL. Moreover, the IBA observes that both procedures exist within a legal system that has a fundamentally flexible approach to evidence and accords considerable discretion to the Trial Chamber in respect of hearing and ruling on evidence. In addition, the policy reasons behind both procedures are consistent with the foundational principles of the ICC, including the rights of the accused as set out in Article 67 and the role of the Court in preventing impunity.[292]

It is unfortunate, though perhaps inevitable, that both Regulation 55 and 'no case to answer' procedures have been used in imprecise and expanded ways in the early years of the Court's jurisprudence. Regulation 55 has been called upon to cover for poor investigations or charging strategies in some cases, and has been used without sufficient regard for the Court's broad obligations under Article 67 in one instance. 'No case to answer' proceedings were first conducted in a case that faced significant issues with witnesses, which in turn led the judges to adapt the procedure, with the unconventional result of vacating the charges. The IBA is encouraged by the indications, in jurisprudence (including separate and dissenting opinions), prosecutorial strategies and the *Chambers Practice Manual*, that the Court is taking steps to address some of the underlying issues that affected these cases. Within the ongoing discussions, the IBA wishes to highlight the rights of the accused, and in particular, emphasise the importance of notice and certainty of the charges, adequate time and facilities to prepare the defence, and the rights to be tried without undue delay and not to incriminate him or herself. The IBA also reiterates its previous recommendations with respect to witnesses, as indicated in Chapter 1.

290 *Chambers Practice Manual*, see n 264 above, 18–19.

291 See, eg, Kevin Jon Heller, '"A Stick to Hit the Accused With": The Legal Recharacterization Of Facts Under Regulation 55' in Carsten Stahn et al (eds), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP, 2014) 981–1006. See also Elinor Fry's analysis on which recharacterisations are permissible. Elinor Fry, 'Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes are Permissible?' (2016) 29 LJIL 577–597. See also Andrew Cayley and Alexis Orenstein, who argue that motions for judgment of acquittal derive from the common law legal system and have no place in international criminal proceedings, including at the ICC. Andrew T Cayley and Alexis Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals: What Purpose If Any Does It Serve?', (2010) 8 J Intl Crim Justice 575–590.

292 See Rome Statute, Preamble, which states the following: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. See also *Lubanga* Appeals Judgment on Regulation 55, para 77, which states the following: 'The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.'

Recommendations

Generally

1. The IBA encourages the ICC to continue to seek a balanced and efficient approach in finalising the charges through confirmation proceedings in light of the more detailed assessment of evidence that will take place at the trial phase, and in light of the possible recourse to 'no case to answer' proceedings and Regulation 55.

2. The OTP should continue to improve charging practices so that charges are fixed and clear from the conclusion of the confirmation of charges proceedings.

3. The IBA emphasises the importance of consistency between the chambers at both the pre-trial and trial phases. In the development of resources intended to support consistency, such as the *Chambers Practice Manual*, the IBA recommends a consultation process on the identification of best practices, including external consultations with former ICC judges and judges from other international criminal tribunals. The IBA also recommends an annotation of the *Chambers Practice Manual* with relevant ICC jurisprudence to ensure that the document accurately reflects the best practices adopted by the majority of chambers. The IBA reiterates that any best practice should be in line with the rights of the accused.

No case to answer/motion for judgment of acquittal proceedings

4. The IBA recommends that the ICC continue to develop the practices for 'no case to answer' proceedings and that those proceedings be standardised according to the legal standards set out in Trial Chamber V(A)'s Decision No 5. Further, the IBA recommends that the ICC consider moving to a procedure that is also available to the Trial Chamber *proprio motu* without requiring motion from the defence, as well as consider moving to oral submissions and decisions.

5. The IBA recommends that the ASP consider codifying a procedure for 'no case to answer'/ motion for judgment of acquittal by an amendment to the ICC RPE. In drafting the amendment, the IBA would suggest that the ASP have reference to the principles set out in Trial Chamber V(A)'s Decision No 5, as well as ICTY RPE Rule 98*bis* and STL RPE Rule 167.

6. The IBA strongly urges Trial Chambers to rule on future motions for judgment of acquittal or 'no case to answer', keeping in mind the precedents for such proceedings in ICL, as well as the object and purpose of the proceedings. The IBA notes that the lack of clarity and finality of 'vacating the charges' are antithetical to the purpose of 'no case to answer' proceedings, and to the precedents in ICL, and therefore recommends that this precedent not be carried further by other cases at the ICC.

Regulation 55

7. The IBA recommends that legal recharacterisation under Regulation 55 be a procedure of last resort and used only under exceptional circumstances.

8. In order to protect the rights of the accused and to ensure a fair trial, the IBA recommends that

notice be given regarding the possibility of recharacterisation under Regulation 55 as promptly as possible, and in sufficient detail.

9. The IBA emphasises the obligation of Trial Chambers to strictly protect the rights specifically enumerated in Regulation 55(3), namely to have adequate time and facilities for the effective preparation of his or her defence, and to be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Rome Statute in accordance with Article 67, paragraph 1 (e).The IBA emphasises that the broader scope of the rights of the accused enshrined in Article 67, including the accused's right not to incriminate him or herself, should be protected in the application of Regulation 55.

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