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What is the purpose of the pre-trial chamber's confirmation hearing?

Kevin Hussey

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
INTERNATIONAL CRIMINAL COURT

ISSUE:

WHAT IS THE PURPOSE OF THE PRE-TRIAL CHAMBER'S CONFIRMATION
HEARING?

Prepared by Kevin Hussey
Fall 2006

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

The Pre-Trial Chamber's confirmation hearing is a mystery to many. This memorandum seeks to address the following questions: What is the confirmation hearing? When must it take place? What are the relevant time concerns? How long should the confirmation hearing last? Is the confirmation hearing meant to be a simple hearing, or a mini-trial? What is the burden of proof and how does it differ from the burden required by the Pre-Trial Chamber in order to issue an arrest warrant? What are the repercussions if a person charged is not confirmed by the International Criminal Court ("ICC") and is set free after months in prison?

B. Summary of Conclusions

1. The confirmation hearing is held by the Pre-Trial Chamber in order to confirm the charges on which the Prosecutor intends to go to trial.

Article 61 of the ICC requires that "within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."¹ The basic

* The confirmation hearing is a big mystery to many people in the Chambers. What is it? When must it take place? What are the relevant time concerns? How long does it last? Is it a simple hearing, or is it more of a mini-trial? What is the burden of proof and how does it differ from the burden required by the Pre-Trial Chamber in order to issue and arrest warrant? What are the repercussions if a person charged is not confirmed by the ICC to be tried and is set free after months in prison?

¹ UN Doc. A/CONF.183/9 (17 July 1998), *Rome Statute of the International Criminal Court*, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 61(1). [hereinafter Rome Statute] Article 61(1) states: "Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel." [Reproduced in the accompanying notebook at Tab 1].

purpose of the confirmation hearing is for the Pre-Trial Chamber to confirm that the Prosecutor has demonstrated sufficient evidence to proceed to trial.²

2. The confirmation hearing must be held within a reasonable time after the surrender or voluntary appearance of the person charged.

Article 61 provides no specific guidance as to how long the confirmation hearing can take, but it does specify when it must take place.³ The confirmation hearing must take place within a “reasonable time” between the surrender or voluntary appearance of the person charged and the trial itself. The term “reasonable time” is not defined in the Rome Statute.⁴

3. The confirmation hearing is not a mini-trial, the determination of the Pre-Trial Chamber only establishes whether there are reasonable grounds to proceed to the trial phase. No inference is made as to the responsibility of the person charged.

The sole import of the Pre-Trial Chamber’s rulings concern whether or not the Prosecutor’s charges are supported by sufficient evidence in order to justify going to trial. The Pre-Trial Chamber’s ruling has no bearing on whether the person charged is found guilty or innocent. If the Pre-Trial Chamber rules that the Prosecutor’s charges are supported by sufficient evidence, the case goes to trial.⁵ If the Pre-Trial Chamber rules

² William A. Schabas, *An Introduction to the International Criminal Court* 138 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

³ Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

⁴ Rome Statute, *supra* note 1, art. 61. [Reproduced in the accompanying notebook at Tab 1].

⁵ William A. Schabas, *An Introduction to the International Criminal Court* 140 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

that the Prosecutor's charges are not supported by sufficient evidence, the case does not go to trial unless the Prosecutor later amends the charge or obtains additional evidence.⁶

4. At the confirmation hearing, the burden of proof for the Prosecutor is to support each specific charge with sufficient evidence to establish substantial grounds to believe that the person accused committed the crime charged.

The Prosecutor can support each charge by means of documentary evidence or summary evidence.⁷ The person charged may object to the Prosecutor's charges, challenge the Prosecutor's evidence, and present evidence of his own.⁸ Because of security concerns the Prosecutor is not required to call witnesses that are expected to testify at the trial.⁹

⁶ Rome Statute, *supra* note 1, art. 61(8). Article 61(8) states: "Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence." [Reproduced in the accompanying notebook at Tab 1].

⁷ Rome Statute, *supra* note 1, art. 61(5). Article 61(5) states: "At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.." [Reproduced in the accompanying notebook at Tab 1].

⁸ Rome Statute, *supra* note 1, art. 61(6). Article 61(6) states: "At the hearing, the person may: (a) Object to the charges; (b) Challenge the evidence presented by the Prosecutor; and (c) Present evidence." [Reproduced in the accompanying notebook at Tab 1].

⁹ William A. Schabas, *An Introduction to the International Criminal Court* 140 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

5. The burden of proof that the Prosecutor must satisfy before the Pre-Trial Chamber issues an arrest warrant is reasonable grounds to believe the individual sought has committed a crime within the Court’s jurisdiction.

In order to obtain an arrest warrant, the Prosecutor must submit a concise statement that demonstrates the existence of reasonable grounds.¹⁰ Along with the statement, the Prosecutor should submit any materials supporting the relevant facts demonstrating the existence of reasonable grounds.¹¹

6. When a person charged is not confirmed by the Pre-Trial Chamber, the Prosecutor may seek to amend the charge or obtain additional evidence.

Non-confirmation of charges does not necessarily end the confirmation hearing or incarceration of the person charged. The Prosecutor may conduct further investigations in order to obtain additional evidence to support the charges.¹² The Prosecutor may also amend the charges, add new charges, or substitute more serious charges.¹³

¹⁰ Rome Statute, *supra* note 1, art. 58(5). Article 58(1). states: “At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor.” [Reproduced in the accompanying notebook at Tab 1].

¹¹ *Id.*

¹² Rome Statute, *supra* note 1, art. 61(8). [Reproduced in the accompanying notebook at Tab 1].

¹³ *Id.*

7. There is no provision setting out the repercussions if a person charged is not confirmed by the Pre-Trial Chamber and is set free after months in prison.

The Rome Statute does not describe what happens to a person charged when all charges are dismissed and the Prosecutor fails to submit additional evidence, amend the charges, add new charges, or substitute more serious charges.

II. FACTUAL BACKGROUND

A. Civil law and common law pre-trial proceedings.

From the start, the creation of international tribunals has been a complex affair requiring intense negotiation.¹⁴ In particular, it has been difficult to find balance between the civil law system's major inquisitorial role for the judge and the common law system's emphasis on the adversarial process.¹⁵ The Pre-Trial Chamber is a hybrid institution representing a blending of civil law and common law pre-trial procedures, but it is primarily based on civil law proposals.¹⁶ Precedent for the confirmation hearing procedure can be found in Italian, French, and German civil law procedure as well as common law procedure and is further discussed below.

¹⁴ James Crawford. *Current Development: The ILC Adopts a Statute for an International Criminal Court*. 89 A.J.I.L. 404 (April, 1995). [Reproduced in the accompanying notebook at Tab 19].

¹⁵ Howard Ball, *Prosecuting War Crimes and Genocide* 50 University Press of Kansas 1999). [Reproduced in the accompanying notebook at Tab 23].

¹⁶ The International Criminal Court *The Making of the Rome Statute Issues, Negotiations, Results* 223 (Roy S. Lee ed., Kluwer Law International 1999). [Reproduced in the accompanying notebook at Tab 24].

B. The Nuremburg Tribunal.

The most significant difference between the procedure at the Nuremburg Trial and the confirmation hearing is that at Nuremburg, persons charged could be tried and found guilty *in absentia*.¹⁷ The ICC has no similar authority. The confirmation hearing can only be held in the absence of the person charged when that person has waived his right to be present or fled.¹⁸

C. The International Criminal Tribunal for the Former Yugoslavia.

Like the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the ICC is an international institution in that its Rules attempt to combine the procedural traditions of both the civil law and common law systems.¹⁹ For example, in both the ICTY and ICC the initiation of prosecutions is analogous to the adversarial system in that an independent prosecutor has the authority and responsibility for initiating investigations but, the role of the judges in both the ICTY and ICC is more extensive than in common law

¹⁷ Tonya J. Boiler, *The International Criminal Court: Better Than Nuremburg?*, 14 Ind. Int’l & Comp. L. Rev. 279, (2003). [Reproduced in the accompanying notebook at Tab 11].

¹⁸ Rome Statute, *supra* note 1, art. 61(2). Article 61(2) states: “The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.” [Reproduced in the accompanying notebook at Tab 1].

¹⁹ Faiza Patel King and Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996* International Criminal Tribunal for the Former Yugoslavia: Current Survey <http://www.ejil.org/journal/Vol8/No1/sr1.html> accessed October 3, 2006. [Reproduced in the accompanying notebook at Tab 35].

countries and resembles the practice of civil law systems.²⁰ However, there are differences between ICTY and ICC procedure.

The most significant difference between procedure at ICTY and the confirmation hearing is that the ICTY can hold its Article 61 hearings, which bear some resemblance to the Pre-Trial Chamber's confirmation hearing, in the absence of the person charged.²¹ In fact the ICTY can hold Article 61 hearings before the person charged had even surrendered or been apprehended.²²

The ICC represents the latest step in the development of international criminal jurisprudence. Both the Nuremburg Tribunal and the ICTY provided lessons for the drafters of the Rome Treaty. This memo will analyze the processes of the confirmation hearing. The memo will then examine how the confirmation hearing represents a blending of civil law and common law procedures along with safeguards that were not present at the Nuremburg Tribunal or before the ICTY. Finally, the memo will explain the purposes of the confirmation hearing. At base, the confirmation hearing exists to safeguard the legitimacy of the ICC's prosecutorial process and the dignity of the Trial Chamber itself.

²⁰ *Id.*

²¹ William A. Schabas, *An Introduction to the International Criminal Court* 139 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

²² *Id.*

III. LEGAL DISCUSSION

A. Analysis of the text of Article 61

Article 61 enumerates the specific duties of the Pre-Trial Chamber, the Prosecutor and rights of the person charged.

1. Duties of the Pre-Trial Chamber

According to Article 61, the Pre-Trial Chamber must hold a hearing to confirm the charges against a person charged.²³ The Pre-Trial Chamber shall hold this confirmation hearing within a reasonable time after the surrender or voluntary appearance of the accused.²⁴

The confirmation hearing shall be held in the presence of the person charged, unless that person has waived the right to be present or has fled and cannot be located.²⁵ Reasonable steps must be taken to secure the appearance of the person charged before the Pre-Trial Chamber for the confirmation hearing.²⁶ Reasonable steps must be taken to inform the person charged of the charges against him.²⁷ If the person charged cannot be located and reasonable steps have been taken to do so, then the Pre-Trial Chamber may hold the confirmation hearing in his absence.²⁸ In the interests of justice, the Pre-Trial

²³ Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

²⁴ Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

²⁵ Rome Statute, *supra* note 1, art. 61(2). [Reproduced in the accompanying notebook at Tab 1].

²⁶ Rome Statute, *supra* note 1, art. 61(2). [Reproduced in the accompanying notebook at Tab 1].

²⁷ Rome Statute, *supra* note 1, art. 61(2). [Reproduced in the accompanying notebook at Tab 1].

²⁸ Rome Statute, *supra* note 1, art. 61(2). [Reproduced in the accompanying notebook at Tab 1].

Chamber may appoint a counsel to represent the person accused if they are not present at the confirmation hearing.²⁹ The Pre-Trial Chamber may instruct the Prosecutor to provide further evidence or conduct further investigation.³⁰

2. Duties of the Prosecutor.

The Prosecutor must support each charge with sufficient evidence to establish substantial grounds to believe that the person charged committed the crime charged.³¹ The Prosecutor may rely on documentary or summary evidence to establish each charge and is not required to call witnesses that are expected to testify at the trial, however the Prosecutor may call witnesses if he so chooses and it is possible that witnesses have a right of their own to appear.³²

Should the Pre-Trial Chamber decline to confirm the Prosecutor's charges, the Prosecutor is not barred from seeking to confirm the same charges on the basis of additional evidence.³³ With the permission of the Pre-Trial Chamber, after the charges

²⁹ Rome Statute, *supra* note 1, art. 61(2). [Reproduced in the accompanying notebook at Tab 1].

³⁰ Rome Statute, *supra* note 1, art. 61(7). Article 61(7) states: "The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court." [Reproduced in the accompanying notebook at Tab 1].

³¹ Rome Statute, *supra* note 1, art. 61(5). [Reproduced in the accompanying notebook at Tab 1].

³² Carsten Stahn. *Participation of Victims in Pre-Trial Proceedings of the ICC*. ICJ 4 2 (219) (April, 2006). [Reproduced in the accompanying notebook at Tab 20].

³³ Rome Statute, *supra* note 1, art. 61(8). [Reproduced in the accompanying notebook at Tab 1].

have been confirmed but before the trial has begun, the Prosecutor may amend the charges after giving notice to the accused.³⁴ If the Prosecutor seeks to add additional charges or more serious charges, a new confirmation hearing must be held.³⁵

The Prosecutor need not call witnesses expected to testify at the main trial. The main justification for the Prosecutor not having to call witnesses at the confirmation hearing is security. Early identification could put potential witnesses in danger and the ICC does not have the resources to provide protection for great numbers of potential witnesses.³⁶

3. Rights of the accused.

Under Article 67, the accused has the right to counsel.³⁷ The right to counsel is implied to have attached by the time of the confirmation hearing.³⁸ In addition the accused is entitled to a copy of the document containing the charges on which the Prosecutor intends to go to trial and to be informed of the evidence the Prosecutor intends to rely on at

³⁴ Rome Statute, *supra* note 1, art. 61(9). [Reproduced in the accompanying notebook at Tab 1].

³⁵ Rome Statute, *supra* note 1, art. 61(9). [Reproduced in the accompanying notebook at Tab 1].

³⁶ The International Criminal Court Recommendations on Policy and Practice 17-18 (Thordis Ingadottir ed., Transnational Publishers, Inc. 2003). [Reproduced in the accompanying notebook at Tab 25].

³⁷ Rome Statute, *supra* note 1, art. 67(1)(d). Article 67(1)(d) states: “Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.” [Reproduced in the accompanying notebook at Tab 1].

³⁸ Kenneth S. Gallant. The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court. 34 Int'l Law. 21 (Spring, 2000). [Reproduced in the accompanying notebook at Tab 12].

the hearing.³⁹ At the confirmation hearing itself, the person charged may object to the Prosecutor's charges, challenge the evidence presented by the Prosecutor and, present evidence.⁴⁰

B. What is the purpose of the Pre-Trial Chamber's confirmation hearing?

The Pre-Trial Chamber has been described as being a “filter, safeguard and impulse.”⁴¹ The confirmation hearing itself is best understood as the filter and safeguard used by the Pre-Trial Chamber to protect against abuse of power by the Prosecutor. The purpose of the Pre-Trial Chamber's confirmation hearing can best be understood in the context of the Pre-Trial Chamber's authority over the actions of the Prosecutor.

1. Powers of the Prosecutor.

The Prosecutor is vested with great authority under the Rome Statute. For instance, under Article 15 of the Rome Statute, the Prosecutor may initiate investigations and under Article 58 the Prosecutor may issue arrest warrants.⁴² However, the Diplomatic Conference perceived the need to ensure that the Prosecutor's independent authority to initiate investigations would not be abused. Initially, France, China, and the United States

³⁹ Rome Statute, *supra* note 1, art. 61(3). Article 61(3) states: “Within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.” [Reproduced in the accompanying notebook at Tab 1].

⁴⁰ Rome Statute, *supra* note 1, art. 61(5). [Reproduced in the accompanying notebook at Tab 1].

⁴¹ The Rome Statute of the International Criminal Court: A Commentary Volume II 1215 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

⁴² Rome Statute, *supra* note 1, art. 15(1). Article 15(1) states: “The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.” and Rome Statute, *supra* note 1, art. 58. [Reproduced in the accompanying notebook at Tab 1].

wanted the United Nations Security Council to have veto power over any investigation initiated by the Prosecutor.⁴³ Their position was rejected on the basis of the fact that it would undermine the independence of the Court and politicize decision-making.⁴⁴ Common law states at the Diplomatic Conference had a particularly difficult time accepting the idea of a Pre-Trial Chamber supervising any of the Prosecutor's pre-trial activities, whereas civil law countries strongly supported the idea of a Pre-Trial Chamber to supervise the activities of the Prosecutor.⁴⁵ In the end, a compromise was struck wherein the Prosecutor would retain sole authority to initiate investigations and arrests and the Pre-Trial Chamber would only review and authorize these decisions, but not have the power to initiate investigations or arrests on its own.

2. Pre-Trial Chamber procedures to limit the power of the Prosecutor.

The limitations on the Prosecutor's independence are rooted in civil law tradition, but political considerations provided the impetus for their adoption. Two factors gave the Diplomatic Conference particular pause.

⁴³ Joe Stork, *International Criminal Court*, Foreign Policy in Focus, <http://www.fpif.org/briefs/vol3/v3n4icc.html> April 1998 accessed September 26, 2006. [Reproduced in the accompanying notebook at Tab 36].

⁴⁴ *Id.*

⁴⁵ Fanny Benedetti, Report on the Negotiations for the Creation of an International Criminal Court. <http://www.wcl.american.edu/hrbrief/v5i1/html/icc2.html> accessed September 20, 2006 [Reproduced in the accompanying notebook at Tab 37].

First, the ICC has broad jurisdiction. Unlike the ad hoc Tribunals, the ICC's jurisdiction is not limited by territory or situation.⁴⁶ Consequently, there is the potential for the Prosecutor's activities to have an extremely strong political impact that affects international peace and security.⁴⁷

Second, the Prosecutor is a judicial, non-political organ with no political legitimization or liability.⁴⁸ There was acute concern at the Diplomatic Conference that either through intentional misconduct or simple overzealousness, a completely unfettered Prosecutor could run roughshod over the political considerations of the states parties.

In order to address the concerns of the states parties over the dangers inherent in a completely independent Prosecutor, the Diplomatic Conference adopted three procedures: The Article 15 procedure at the commencement of an investigation by the Prosecutor, the Article 58 procedure before the issuance of an arrest warrant, and finally, the Article 61 procedure at the end of an investigation, but before the commencement of a trial.

i. Article 15 limits on the power of the Prosecutor.

The first procedure of the Pre-Trial Chamber that assists in its filtering and safeguarding role is its authority under Article 15 over the Prosecutor's decision to

⁴⁶ The Rome Statute of the International Criminal Court: A Commentary Volume II 1143 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

⁴⁷ *Id.*

⁴⁸ The Rome Statute of the International Criminal Court: A Commentary Volume II 1142 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

undertake an investigation.⁴⁹ It should be noted that not only does the Pre-Trial Chamber have authority over the Prosecutor's decision to undertake an investigation, but it also has the authority to review the Prosecutor's decision not to initiate an investigation.⁵⁰ Once the Prosecutor concludes there is a reasonable basis to proceed with an investigation, he must submit a request for authorization of the investigation to the Pre-Trial Chamber.⁵¹ This is the Pre-Trial Chamber's first opportunity to review the Prosecutor's actions.

The burden of proof that the Prosecutor must demonstrate in order to proceed with an investigation is: first the establishment of a reasonable basis to believe that a crime has occurred, and second that it falls under the jurisdiction of the ICC.⁵² If the Pre-Trial Chamber finds that there are reasonable grounds to proceed with an investigation, it will authorize the Prosecutor to commence one. However, if the Pre-Trial Chamber does not find that the Prosecutor has provided a reasonable basis to proceed with an investigation, it will deny authorization.⁵³ A denial of authorization by the Pre-Trial Chamber does not

⁴⁹ Rome Statute, *supra* note 1, art. 15(4). Article 15(4) states: "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case." [Reproduced in the accompanying notebook at Tab 1].

⁵⁰ Michela Miraglia. *The First Decision of the ICC Pre-Trial Chamber*. ICJ 4 1 (188) (March, 2006). [Reproduced in the accompanying notebook at Tab 13].

⁵¹ Rome Statute, *supra* note 1, art. 15(4). [Reproduced in the accompanying notebook at Tab 1].

⁵² Rome Statute, *supra* note 1, art. 15(4). [Reproduced in the accompanying notebook at Tab 1].

⁵³ Rome Statute, *supra* note 1, art. 15(4). [Reproduced in the accompanying notebook at Tab 1].

foreclose the possibility that Prosecutor may make a subsequent request for an investigation based on new facts or evidence regarding the same situation.⁵⁴

The Pre-Trial Chamber's role in authorizing investigations serves as a major check on potential misconduct by the Prosecutor. If a Prosecutor were inclined to pursue a politically motivated investigation the Pre-Trial Chamber's role as gatekeeper would in theory preclude him from doing so, as long as the Pre-Trial Chamber was not complicit in the Prosecutor's misconduct.

ii. Article 58 limits on the power of the Prosecutor.

The second procedure of the Pre-Trial Chamber that assists in its filtering and safeguarding role is its authority under Article 58 over the Prosecutor's issuance of arrest warrants.⁵⁵ The burden of proof that the Prosecutor must demonstrate in order to issue an arrest warrant is the same that he must demonstrate in order to begin an investigation: reasonable grounds.⁵⁶ Alternatively, the Prosecutor can request a summons for a person to appear. Like an arrest warrant, the Pre-Trial Chamber must agree to a summons and the Prosecutor must demonstrate reasonable grounds.⁵⁷

⁵⁴ Rome Statute, *supra* note 1, art. 15(5). Article 15(5) states: "The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation." [Reproduced in the accompanying notebook at Tab 1].

⁵⁵ Rome Statute, *supra* note 1, art. 58(1). [Reproduced in the accompanying notebook at Tab 1].

⁵⁶ Rome Statute, *supra* note 1, art. 58(1)(a). Article 58(1)(a). states: "There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." [Reproduced in the accompanying notebook at Tab 1].

⁵⁷ Rome Statute, *supra* note 1, art. 58(1)(a). [Reproduced in the accompanying notebook at Tab 1].

iii. Article 61 limits on the power of the Prosecutor.

The final procedure of the Pre-Trial Chamber that assists in its filtering and safeguarding role is its authority under Article 61 to hold a confirmation hearing in order to determine whether the Prosecutor has demonstrated sufficient evidence to establish substantial grounds that the person charged committed the crime for which he is held.⁵⁸ Even after the Pre-Trial Chamber has authorized the Prosecutor to conduct an investigation, it still waits as the final gatekeeper between the Prosecutor and a trial before the Chamber.

3. Differences between the burden of proof requirements for the commencement of investigation, issuance of arrest warrants, and confirmation of charges.

The burden of proof required for the Pre-Trial Chamber to confirm charges is sufficient evidence to establish substantial grounds. This is a very high burden of proof. The burden is akin to that required for an investigation under Article 32 of the United States Uniform Code of Military Justice.⁵⁹ The burden of sufficient evidence to establish substantial grounds that the Prosecutor must demonstrate before at the confirmation hearing is higher than that required of prosecutors at either the ICTY or International Criminal Tribunal for Rwanda (“ICTR”).⁶⁰ The statutes for the ICTY and ICTR require

⁵⁸ Rome Statute, *supra* note 1, art. 61(5). [Reproduced in the accompanying notebook at Tab 1].

⁵⁹ Lieutenant Colonel Michael A. Newton. *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*. 167 Mil. L. Rev. 20 (March, 2001). [Reproduced in the accompanying notebook at Tab 14].

⁶⁰ International Criminal Tribunal for the former Yugoslavia Article 19 <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf> accessed on November 20, 2006 and International Criminal Tribunal for Rwanda Statute of the Tribunal Article 18 <http://www.un.org/ictt/statute.html> accessed on November 20, 2006.). [Reproduced in the accompanying notebook at Tabs 4 and 5].

only that the prosecutors establish a *prima facie* case against the accused in order to proceed to trial.⁶¹ The likely reason for this difference in burden is that the ICC Prosecutor has potential for far greater reach than either of the prosecutors at the ICTY or the ICTR and the Diplomatic Conference perceived the need to rein in this power.

Sufficient evidence to establish substantial grounds is a higher burden than the reasonable grounds standard for both the commencement of investigations and issuance of arrest warrants under the Rome Statute.⁶² The difference between the burdens required for the commencement of investigations, the issuance of arrest warrants and the confirmation of charges before the Pre-Trial Chamber serve two purposes. First, the lower threshold for investigations and arrest warrants allows the Prosecutor greater latitude into looking into potential crimes. Second, the higher threshold for confirmation of charges protects the integrity of the Trial Chamber and the likelihood that cases brought before it will be of the most serious nature as required by Article 5 of the Rome Statute.⁶³

Through the procedures established in Article 15, Article 58, and Article 61 of the Rome Statute, the Diplomatic Conference put practical constraints on the Prosecutor's

⁶¹ *Id.*

⁶² Rome Statute, *supra* note 1, art. 15. [Reproduced in the accompanying notebook at Tab 1]. And Rome Statute, *supra* note 1, art. 58. [Reproduced in the accompanying notebook at Tab 1].

⁶³ Rome Statute, *supra* note 1, art. 5. Article 5 states: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." [Reproduced in the accompanying notebook at Tab 1].

independent authority, in effect creating a sort of Prosecutor under guardianship.⁶⁴

Together, these procedures help to filter out the possibility of politically motivated or otherwise inappropriate conduct on the part of the Prosecutor, safeguard the ICC's reputation, and serve to focus the scope of proceedings before the Trial Chamber thereby shortening the time needed for trial.⁶⁵

4. Analysis of Pre-Trial Chamber procedures to limit the power of the Prosecutor.

Assuming that the Pre-Trial Chamber executes its duties responsibly and has no inappropriate intentions, these three procedures taken together help ensure that once a case makes it to the Chamber, it has been well considered and is in no way an inappropriate matter for the ICC to rule on. This kind of vetting is of particular importance for the ICC.

Because the ICC has no independent police power, it is in effect, dependent on the goodwill of the parties to the Rome Treaty to carry out its judgments. If the ICC were perceived as politically motivated or otherwise compromised, the goodwill of the parties to the Rome Treaty would drop off and the ICC's authority would evaporate. To gain acceptance, the ICC must not only rule well, but also ensure that its reputation is ironclad against accusations of misconduct. The Prosecutor with his wide-ranging authority is the facet of the ICC that would be most prone to accusations of misconduct both real and imagined. The confirmation hearing is in effect the last check on the Prosecutor before a

⁶⁴ The Rome Statute of the International Criminal Court: A Commentary Volume II 1142 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

⁶⁵ Hans-Peter Kaul. *Developments at the International Criminal Court: Construction Site For More Justice: The International Criminal Court After Two Years*. 99 A.J.I.L. 370 (April, 2005). [Reproduced in the accompanying notebook at Tab 15].

case comes before the Chamber. The confirmation hearing not only ensures the legitimacy of any case brought before the Chamber, but also serves to protect the perceived legitimacy of the ICC itself.

C. What are the differences between the ICTY Rule 61 procedure and the Pre-Trial Chamber's confirmation hearing?

The ICTY's Rule 61 procedure and the Pre-Trial Chamber's confirmation hearing are similar in that they both are intended to confirm the charges upon which the prosecution intends to go to trial. Neither the ICTY Rule 61 procedure nor the confirmation hearing make a ruling on the guilt of the accused, instead their purpose is to confirm or deny that there is sufficient evidence such that the accused could be found guilty at trial.

1. *In absentia* proceedings before the ICTY and the Pre-Trial Chamber.

The primary difference between the ICTY Rule 61 procedure and the Pre-Trial Chamber's confirmation hearing is the presence of the person charged. Under the ICTY Rule 61 procedure, the prosecution may present its evidence during an *ex parte* hearing and the Tribunal may rule on the sufficiency of the evidence.⁶⁶ The ICTY found it necessary to develop this procedure because in the early days of the Tribunal, their attempts to arrest defendants were frustrated.⁶⁷ According to the judge in Prosecutor v. Rajic:

A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is

⁶⁶ William A. Schabas, *An Introduction to the International Criminal Court* 139 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

⁶⁷ *Id*

whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. As part of this determination, the Chamber considers whether the acts with which the accused is charged, if proven beyond a reasonable doubt at trial, are crimes falling within its subject-matter jurisdiction and ensures that the charges against the accused are well founded in fact. No penalty is imposed on the accused in a Rule 61 proceeding. The only consequences of the proceeding are the public airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of the arrest of the accused and enabling the International Tribunal to discharge its mandate instead of being rendered ineffective by the non-compliance of States. Thus the procedure furthers the purposes for which the International Tribunal was established.⁶⁸

The ICTY Article 61 procedure raises the specter of *in absentia* rulings because though it does not rule on the guilt or innocence of the accused, it can occur before they have been apprehended. On the other hand, the Pre-Trial Chamber confirmation hearing only takes place after the person charged has been apprehended or has voluntarily appeared before the Court.⁶⁹ However, a confirmation hearing can occur without the accused for two reasons. First, the accused can waive their right to be present. Second, Pre-Trial Chamber may hold a confirmation hearing if the person charged has fled or cannot be found, but only so long as all reasonable steps have been taken to secure his appearance before the court and to inform him that charges and a hearing to confirm those charges will be held.⁷⁰

Regarding *in absentia* proceedings, the principle reason for the difference between the ICTY Article 61 procedure and the Pre-Trial Chamber confirmation hearing are the respective scopes of their authority. The ICC's potential reach is far greater than that of the

⁶⁸ Prosecutor v. Rajic, Case No. IT-95-13 Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ II(B)(3) (Sept. 13, 1996). [Reproduced in the accompanying notebook at Tab 6].

⁶⁹ Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

⁷⁰ Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

ICTY. Common law countries, tend to avoid trials *in absentia*. The United States in particular avoids the use of trials *in absentia* because the concept of presence at trial is rooted in the Confrontation Clause of the Constitution and has a due process component.⁷¹

The codes of criminal procedure in France, Italy, and the Netherlands make clear, that trial and sentencing may proceed if the accused is unlawfully absent.⁷² However even in civil law countries trial *in absentia* is available only in exceptional circumstances.⁷³

According to Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) a person accused has the right to be present at his trial.⁷⁴ This right was mitigated by *Mbenge v. Zaire*.⁷⁵ *Mbenge* was a case before the Human Rights Committee concerning a Zairean national who sentenced to death *in absentia* by the government of Zaire.⁷⁶ The Human Rights Committee did not have enough information to find that

⁷¹ Robert Christensen. *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*. 6 UCLA J. Int'l L. & For. Aff. 391 (Fall, 2001 / Winter, 2002). [Reproduced in the accompanying notebook at Tab 16].

⁷² *Id.*

⁷³ Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977 (8 September 1977), U.N. Doc. Supp. No. 40 (A/38/40) at 134 (1983). <http://wwwserver.law.wits.ac.za/humanrts/undocs/session38/16-1977.htm> accessed on November 18, 2006. [Reproduced in the accompanying notebook at Tab 10].

⁷⁴ U.N. Doc. A/6316 (1966), *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art. 14. Article 14(3)(d) states: “To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” [Reproduced in the accompanying notebook at Tab 3].

⁷⁵ Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977 (8 September 1977), U.N. Doc. Supp. No. 40 (A/38/40) at 134 (1983). <http://wwwserver.law.wits.ac.za/humanrts/undocs/session38/16-1977.htm> accessed on November 18, 2006. [Reproduced in the accompanying notebook at Tab 10].

⁷⁶ *Id.*

Mbenge's death penalties were contrary to the ICCPR, but they did find that trials *in absentia* are not necessarily inadmissible if steps are taken to protect the rights of the accused.⁷⁷ For instance, reasonable steps must have been taken to make the accused aware of the charges against him and the timing of proceedings against him.⁷⁸

In principle no common law country would want a court conducting anything resembling *in absentia* proceedings. However, common law states have been far more willing to tolerate such proceedings in the case of the former Yugoslavia because there is little chance that the ICTY would be bringing cases against their own citizens. With its greater reach, the ICC is far more likely to prosecute individuals from common law countries. Given the greater chance that ICC proceedings could reach their citizens, it makes sense that if common law countries would seek not to completely oppose the ICC's civil law procedures, they would at least seek to ameliorate the elements, which are considered to be particularly alien to their legal traditions. As a result, the Rome Statute goes farther in providing protections for an absent accused than even those called for in *Mbenge*. No trials *in absentia* are permitted before the ICC and the confirmation hearing can only take place *in absentia* after the accused has been apprehended or surrendered and subsequently fled or cannot be found.

⁷⁷ *Id.*

⁷⁸ *Id.*

2. The ICTY, the Pre-Trial Chamber and shaming.

Another reason for the difference between the ICTY Article 61 procedure and the Pre-Trial Chamber confirmation hearing is legitimacy. A court that has to resort to shaming in order to give effect to its pronouncements is not being afforded the respect due to a legitimate judicial body.

In the early days of the ICTY, the tribunal began conducting the Article 61 procedures in part to shame states into the surrendering of persons charged. While there is little question that this process was necessary, one can question its effect on the perceived legitimacy of the ICTY. A court that has to shame states into complying with its orders can be said to lack legitimacy. A national court is obeyed not only because it has the power of the state behind it, but also because the parties to cases before it believe that they are legally bound by the court's mandate.

In the case of the ICTY, the states that were ignoring the tribunal's calls to surrender fugitives were essentially challenging the legitimacy of the court. Like the ICC, the ICTY has no police force to apprehend fugitives and is dependent on either the cooperation of states harboring fugitives or the assistance of the Security Council.⁷⁹ The Security Council could be of little help considering Russia's veto and the states of the former Yugoslavia were no help at all. If the ICTY were a real judicial body to which the states harboring fugitives felt they owed a duty, and not just a tribunal forced upon them by the Security Council, there would have been no question as to whether or not they would turn over the fugitives they harbored.

⁷⁹ Michael Scharf. *The Indictment of Slobodan Milosevic*. <http://www.asil.org/insights/insigh35.htm> June 1999 accessed October 3, 2006. [Reproduced in the accompanying notebook at Tab 38].

The ICC cannot afford similar questioning of its legitimacy. The ICC depends on the cooperation of its state parties to give force to its pronouncements. If the ICC were to conduct confirmation hearings before the person charged was apprehended in order to shame its state parties into surrendering the person charged, much of the ICC's legitimacy would already be sapped. The state parties are bound to cooperate with the ICC.⁸⁰ Article 88 states that the state parties are bound to ensure that national laws provide support for the ICC.⁸¹ The state parties must believe that they owe a real legal obligation to the ICC. Resorting to shaming would damage this belief and is a step far below legal obligation.

3. Imposition of the ICTY and ratification of the ICC.

An important difference between the ICTY and the ICC is the manner in which they were adopted. The United Nations Security Council imposed the ICTY upon the states of the former Yugoslavia.⁸² The Rome Statute was negotiated by over 148 states.⁸³ To date the Rome Treaty has been ratified by over 104 states.⁸⁴

⁸⁰ Rome Statute, *supra* note 1, art. 86. Article 86 states: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." [Reproduced in the accompanying notebook at Tab 1].

⁸¹ The International Criminal Court 302 (Olympia Bekou & Robert Cryer eds., Dartmouth Publishing Company 2004). [Reproduced in the accompanying notebook at Tab 26].

⁸² United Nations Security Council Resolution 827 [Hereinafter Resolution 827] <http://www.ohr.int/other-doc/un-res-bih/pdf/827e.pdf> accessed on November 24, 2006. [Reproduced in the accompanying notebook at Tab 27].

⁸³ Press Release UN Diplomatic Conference concludes in Rome with Decision to establish permanent International Criminal Court <http://www.un.org/icc/index.htm> accessed November 24, 2006. [Reproduced in the accompanying notebook at Tab 28].

⁸⁴ International Criminal Court Assembly of States Parties <http://www.icc-cpi.int/statesparties.html> accessed November 24, 2006. [Reproduced in the accompanying notebook at Tab 29].

The states of the former Yugoslavia are to obey the ICTY not because they freely choose to do so, but instead because their membership in the United Nations mandates that they obey Security Council's directives.⁸⁵ On the other hand, the state parties to the ICC are bound because they have freely chosen to be bound. Article 87 of the Rome Statute provides for consequences to states parties that do not cooperate with the Court.⁸⁶

However, history has taught us that states do not always comply with treaty obligations. The most troubling example of this is the fate of another institution that aspired to spread justice across the globe, but in the end had its legitimacy destroyed: the League of Nations. Part of the League's fall was caused by the flouting of its authority. Germany's rejection of the League and the lack of consequences that followed precipitated a cascade of nations first rejecting the League's authority, and then withdrawing from the League itself. The effect of this cascade was that by the outbreak of the Second World War, the League was effectively a dead institution.⁸⁷

Despite the mandate placed upon them by the Security Council, the states of the former Yugoslavia openly flouted the ICTY's authority until it became evident that their participation in organizations such as the European Union could be blocked by their

⁸⁵ Resolution 827, *supra* note 64. [Reproduced in the accompanying notebook at Tab 27].

⁸⁶ Rome Statute, *supra* note 1, art. 87. Article 87(7) states: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." [Reproduced in the accompanying notebook at Tab 1].

⁸⁷ Chronology of the League of Nations
[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/3DA94AAFEB9E8E76C1256F340047BB52/\\$file/sdn_chronology.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/3DA94AAFEB9E8E76C1256F340047BB52/$file/sdn_chronology.pdf) accessed November 24, 2006. [Reproduced in the accompanying notebook at Tab 30].

noncompliance.⁸⁸ It remains to be seen what affect the noncompliance of the states of the former Yugoslavia may have on the authority of the United Nations. The ICC is a much smaller and less universally recognized institution than the United Nations. Much like the fate of the League of Nations, the flouting by a state party of its obligations to the ICC, could deal a potentially crippling blow to perceptions of the ICC's legitimacy.⁸⁹

D. What are the similarities between the confirmation hearing and existing national court procedures?

1. The ICC as a product of compromise.

Like the ICTY, the ICC can be characterized as an "intermediate solution" between the civil law and common law systems.⁹⁰ The ICC is the product of compromises between the members of the Diplomatic Conference. The Rome Statute contains provisions similar to both civil law and common law traditions. Many of the procedures incorporated into the Rome Statute are taken directly either from civil law or common law tradition, others are hybrids of the two. The confirmation hearing, which bares similarity to trial procedures in both countries with civil law systems and countries with common law systems, is one such hybrid.

⁸⁸ EU Parliament: Compliance with Hague tribunal is key to accession, says Croatia's FM http://www.europa-eu-un.org/articles/en/article_4994_en.htm accessed November 24, 2006. [Reproduced in the accompanying notebook at Tab 31].

⁸⁹ The March Toward War Failure of the League <http://xroads.virginia.edu/~MA04/wood/mot/html/league.htm> accessed November 24, 2006. (This University of Virginia American Studies Program webpage examines the World War II era March of Time newsreel series. The newsreels presented catalog the collapse of the League of Nations and the perception of its impotence by the outbreak of World War II) [Reproduced in the accompanying notebook at Tab 32].

⁹⁰ Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C.J. Int'l L. & Com. Reg. 407 (Spring, 2001). [Reproduced in the accompanying notebook at Tab 17].

2. Similarities between civil law procedure and the confirmation hearing.

While elements of civil law procedure are evident in the confirmation hearing procedure, judicial procedure in civil law countries is not monolithic. There are broad similarities across the civil law tradition, but individual national systems showcase evidence of important differences. For instance in the Italian system:

the prosecution files a motion for trial which, together with the prosecution's elements of the case, is presented to a 'judge of the preliminary inquiry'. The judge holds a hearing within 30 days of the filing of the indictment and then decides whether to send the case for trial. The judge may request the parties to provide further explanation. He can hear witnesses. Upon the accused's request, the judge may also interrogate the accused. It should be emphasized that the judge can also hear a victim if, and only if, the victim has opted for the official status of plaintiff. In due course, the judge will decide whether to dismiss the case. The Prosecutor may be ordered to amend the indictment. Should the judge decide to dismiss the case, the Prosecutor may only file an appeal in the case where the decision not to proceed further is based on the determination that the accused did not commit the criminal action. The Italian judge is thus not only a judge who decides whether there is a prima facie case, he also verifies that there is a case to be presented before the finder of fact.⁹¹

Under the Italian procedure, the judge has more control over investigation than the Pre-Trial Chamber does during the confirmation hearing. For instance, the judge in the Italian procedure can hear the person charged and the victim, the judge can also interrogate the person charged, should that person request it. Article 61 provides the Pre-Trial Chamber with no similar authority to interrogate the person charged.⁹² Under Article 61,

⁹¹ The Rome Statute of the International Criminal Court: A Commentary Volume II 1212 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

⁹² Rome Statute, *supra* note 1, art. 61. [Reproduced in the accompanying notebook at Tab 1].

the Prosecutor can call witnesses, but is not required to do so.⁹³ Furthermore, Article 61 does not state that the Pre-Trial Chamber may interrogate witnesses called by the Prosecution.

Under the French system the “investigative judge” is invested with far more authority than the Pre-Trial Chamber.⁹⁴ All told, the French system displays far less resemblance to the Pre-Trial Chamber than the Italian system. However, the role of the Accusation Chamber should be noted:

He conducts all of the preliminary proceedings, decides whom to call as a witness, whether to ask for expert advice, and whether to use extraordinary measures. Further, the investigating judge will never ask the prosecution to conduct further investigations, since he is in charge of all of the investigations from the date he is seized by the prosecution. The judge decides when to send the case back to the Prosecutor, that is, when he is satisfied that he has covered all the elements for the case to be sent to trial, whether from the accused’s point of view (both in terms of charges brought against him and regarding his personality and sentencing elements) or from the victim’s point of view (assessment of the credibility of the victim and of materials to be used for the evaluation of the losses suffered). The Prosecutor then has to prepare a summary of the case, which is sent back to the investigative judge, who decides to transmit it to the ‘Accusation Chamber’, a chamber at the appeals level. This chamber reviews the file and decides whether to terminate proceedings or to send the case to the ‘Cour d’assises’, the specialized criminal Chamber of the Court of Appeal.⁹⁵

⁹³ Rome Statute, *supra* note 1, art. 61(5). [Reproduced in the accompanying notebook at Tab 1].

⁹⁴ The Rome Statute of the International Criminal Court: A Commentary Volume II 1212 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

⁹⁵ The Rome Statute of the International Criminal Court: A Commentary Volume II 1213 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

At the Rome Conference, the French delegation proposed the confirmation hearing.⁹⁶ They were inspired by the role of the French Accusation Chamber. Their idea was to concentrate all the disclosure at the pre-trial stage and to place it under the supervision of the Pre-Trial Chamber.⁹⁷ The French delegation's proposal for the confirmation chamber was a reaction to experiences in the ICTY and ICTR, where great delays have resulted from numerous pre-trial motions on disclosure.⁹⁸ Aside from the similarity of the Accusation Chamber to the confirmation hearing, the position of judges in the French system has little resemblance to the power of the Pre-Trial Chamber.

Of the states employing civil law judicial systems, the German system shows the most similarity to the Pre-Trial Chamber's role in the confirmation hearing:

Once the prosecution believes that its investigations are complete, it files a 'bill of indictment' with the court. The 'presiding judge of the court' communicates the indictment to the accused. The court examines the situation and may request the prosecution to conduct further investigation, particularly when there has been a motion to this effect by the accused. When the court finds that there are sufficient charges, it sends the case for trial. It nevertheless leaves the primary responsibility for the investigation of criminal cases with the prosecution.⁹⁹

The German system and the Pre-Trial Chamber confirmation hearing have many similarities. For instance, in both, the responsibility for the investigation is with the

⁹⁶ Claus Kress. *The Procedural Law Of The International Criminal Court In Outline: Anatomy Of A Unique Compromise*. ICJ 1.3(603) (December, 2003). [Reproduced in the accompanying notebook at Tab 18].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The Rome Statute of the International Criminal Court: A Commentary Volume II 1212 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., Oxford University Press 2002) (2002). [Reproduced in the accompanying notebook at Tab 21].

prosecutor. Another similarity is that the prosecutor, in both systems, submits his findings to a judge who makes the final determination as to whether there are sufficient charges to warrant a trial. This is the most important similarity, the decision to go forward with a trial does not rest with the prosecutor, it rests with a judge in the German system and the Pre-Trial Chamber in the ICC. From the perspective of the prosecutor, this arrangement can be seen both as a negative and a positive. The negative is that the power of the prosecutor to proceed to trial in both systems is curbed by the judiciary. The positive is that the prosecution in both systems knows this and must therefore pursue its investigation that much more zealously. In both the German procedure and the Pre-Trial Chamber confirmation hearing, the judiciary can request that the prosecution go back and conduct further investigation. It should be noted that in the ICC, the Prosecutor is also bound to investigate both incriminating and exonerating circumstances equally.¹⁰⁰ This arrangement indicates that the Prosecutor is supposed to balance aggressive investigation with neutral fact-finding. The confirmation hearing provides an extra layer of protection to ensure that the Prosecutor strikes this balance.

3. Similarities between common law procedure and the confirmation hearing.

The confirmation hearing bears some resemblance in purpose if not in form to the common law grand jury. The purpose of a grand jury is to determine if the prosecutor has

¹⁰⁰ Rome Statute, *supra* note 1, art. 18(6). Article 18(6) states: “Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.” [Reproduced in the accompanying notebook at Tab 1].

presented enough evidence in order to justify going to trial. The most glaring difference between the Pre-Trial Chamber's confirmation hearing and a grand jury is the ultimate decision. The ultimate decision maker in the confirmation hearing are the Pre-Trial Chamber's judges, whereas the ultimate decision maker in a grand jury are the jurors. However, aside from this difference of form, the fact stands that the confirmation hearing and grand jury serve essentially the same purpose. They both seek to confirm that the prosecutor has presented sufficient evidence to justify going to trial.

E. Bearing of the confirmation hearing on the verdict of the Trial Chamber.

The confirmation hearing has no bearing on the final verdict of the Trial Chamber other than it may prevent a case from coming before the Trial Chamber.¹⁰¹ The confirmation hearing's sole relation to the Trial Chamber is that it confirms that the Prosecutor has demonstrated sufficient evidence to establish substantial grounds that the person charged committed the crime for which they are held. The Pre-Trial Chamber only establishes through the confirmation hearing that there is sufficient evidence such that the person charged could be found guilty. If the Pre-Trial Chamber has ruled that a person could be found guilty, the ruling as to whether or not the person charged is found guilty is solely within the purview of the Trial Chamber.

F. Time Issues.

Article 61 of the Rome Statute states that within a "reasonable time" after the surrender or voluntary appearance of the person charged, the confirmation hearing must be

¹⁰¹ William A. Schabas, *An Introduction to the International Criminal Court* 140 (Cambridge University Press 2004) (2001). [Reproduced in the accompanying notebook at Tab 22].

held.¹⁰² The term “reasonable time” is used only twice in the Rome Statute. Both instances occur in Article 61. Yet nowhere in the Rome Statute is a definition of reasonable time provided.

1. Reasonable time in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The term reasonable time is used in several human rights documents in relation to the right of those detained for crimes to appear before a court.

For instance, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) states that:

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.¹⁰³

Article 6 of the European Convention goes on to guarantee the right of a public hearing within a reasonable time to anyone charged with a crime.¹⁰⁴ As is the case with the Rome Statute, reasonable time is only mentioned these two times in the European Convention and is not defined.

Case law of the European Court of Human Rights (“European Court”) provides some insight into the meaning of reasonable time. The case of *Deumeland v. Germany* cited three factors noted in the earlier case of *Buchholz v. Germany* that taken together can

¹⁰² Rome Statute, *supra* note 1, art. 61(1). [Reproduced in the accompanying notebook at Tab 1].

¹⁰³ Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention. Sept. 20, 1971, Rome, 4.XI.1950 art. 5. [Reproduced in the accompanying notebook at Tab 2].

¹⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention. Sept. 20, 1971, Rome, 4.XI.1950 art. 6. [Reproduced in the accompanying notebook at Tab 3].

be used to determine reasonable time.¹⁰⁵ *Deumeland* was a case determining whether or not a fall suffered by the original applicant was an industrial accident. All told, the case took almost eleven years. The three factors outlined in *Deumeland* are as follows:

The degree of complexity of the case is the first factor. An increased degree of legal complexity tends to lengthen the time that is considered reasonable in bringing a case to trial.¹⁰⁶

Behavior of the applicant is the second factor. If the applicant, or in the case of the Pre-Trial Chamber, the person charged intentionally takes steps to slow the trial, such steps will not count towards a judgment of reasonable time having been exceeded.¹⁰⁷

The conduct of the competent courts is the third factor. If the courts are slow to bring the case to trial, this will count against them in the reasonable time analysis.¹⁰⁸

The court in *Buchholz* also noted that the reasonableness of the length of proceedings coming within the scope of Article 6 must be assessed in each case according to the particular circumstances of the case.¹⁰⁹

In *Deumeland*, the European Court found that nearly eleven years adjudication through six separate courts constituted an unreasonable delay.¹¹⁰

¹⁰⁵ *Deumeland v. Germany*, 9384/81 Eur. Ct. H.R. (1986). [Reproduced in the accompanying notebook at Tab 7].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Buchholz v. Germany*, 7759/77 Eur. Ct. H.R. (1981). [Reproduced in the accompanying notebook at Tab 8].

The European Court's assessment of the reasonableness of the length of the proceedings in the *Deumeland* and *Buchholz* cases, based on the degree of complexity of the case, the behavior of the applicant, and the conduct of the competent courts, are the best formulation we have from the European Court on the question of reasonable time.

2. Reasonable time in the ICCPR.

Article 9 of the ICCPR uses the term reasonable time in much the same manner as Article 5 of the European Convention.¹¹¹ This is the only time the term reasonable time is used in the International Covenant. Like the European Convention, the ICCPR does not provide a definition of reasonable time.

3. Reasonable time in the ICTY.

The ICTY has addressed the question of reasonable time. Mile Mrkšić, former Commander in Chief of the Army of the Serbian Republic of Krajina, appeared before the tribunal in 2002 and attempted to obtain provisional release based in part on the probable

¹¹⁰ *Deumeland v. Germany*, 9384/81 Eur. Ct. H.R. (1986). [Reproduced in the accompanying notebook at Tab 7].

¹¹¹ U.N. Doc. A/6316 (1966), *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art. 9. Article 9 states: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." [Reproduced in the accompanying notebook at Tab 3].

time that he would spend in pre-trial detention.¹¹² Mrkšić surrendered to the ICTY on May 15th, 2002 and his trial started October 11th, 2005.¹¹³ Mrkšić's appeal to obtain provisional release was rejected on October 8th, 2002.¹¹⁴ Mrkšić's trial began three years later.¹¹⁵ While the tribunal rejected the part of Mrkšić's appeal based on reasonable time because it could not forecast how long he would be held before the start of his trial, it is worthy of note that Mrkšić did not raise the issue of reasonable time again in the interim between the rejection of his appeal on October 8th, 2002 and the beginning of his trial three years later.

4. Analysis of reasonable time and the confirmation hearing.

It seems that the European Court's formulation of reasonable time is the most precise. Regarding the first factor, degree of complexity, the Prosecutor should have some leeway. Cases before the ICC are complex. In order for the Prosecutor to have sufficient time to construct a case, it seems appropriate that the first factor should be relaxed.

It is possible that if the Prosecutor does not take sufficient time during the initial investigation to construct a viable case, his investigation will be undermined. If the Pre-Trial Chamber determines at the confirmation hearing that the Prosecutor's case requires further investigation and therefore further time, the Prosecutor's investigation could begin to be unreasonably long.

¹¹² Prosecutor v. Mile Mrkšić, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, ¶ 20 (Oct. 8, 2002). [Reproduced in the accompanying notebook at Tab 9].

¹¹³ Trial Watch Mile Mrksic http://www.trial-ch.org/en/trial-watch/profile/db/facts/mile_mrksic_230.html accessed November 7, 2006. [Reproduced in the accompanying notebook at Tab 33].

¹¹⁴ Prosecutor v. Mile Mrkšić, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, ¶ 20 (Oct. 8, 2002). [Reproduced in the accompanying notebook at Tab 9].

¹¹⁵ Trial Watch Mile Mrksic http://www.trial-ch.org/en/trial-watch/profile/db/facts/mile_mrksic_230.html accessed November 7, 2006. [Reproduced in the accompanying notebook at Tab 33].

The behavior of the person charged should have little bearing on the timing of the confirmation hearing. If the accused intentionally attempts to slow proceedings by questioning the legitimacy of the ICC or otherwise obstructing the progress of the confirmation hearing, this will count against him if he later makes a motion claiming proceedings were unreasonably long. It is in the interest of the person charged to attend the confirmation hearing in order to evaluate what kind of case the Prosecutor has, however attendance is not mandatory.

There is potential for the Pre-Trial Chamber to impinge the reasonable timeliness of the confirmation hearing by requiring the Prosecutor to conduct further investigations if said investigations are not absolutely necessary. The Pre-Trial Chamber must make sure that any requests it makes for further investigation are absolutely necessary. By the time the Prosecutor gets to the confirmation hearing, his case should be as good as it possibly can be.

G. Effects of a non-confirmation of charges.

1. Effects of non-confirmation of charges under Article 61.

Article 61 does not provide any repercussions if charges are not confirmed by the Pre-Trial Chamber other than that the person charged is released. The Prosecutor is not precluded from subsequently requesting the confirmation of charges that the Pre-Trial Chamber has previously declined to confirm.¹¹⁶ In fact the Prosecutor can bring the same charge again against the same person if the request is supported by additional evidence.¹¹⁷

¹¹⁶ Rome Statute, *supra* note 1, art. 61(8). [Reproduced in the accompanying notebook at Tab 1].

¹¹⁷ Rome Statute, *supra* note 1, art. 61(8). [Reproduced in the accompanying notebook at Tab 1].

Article 61 does indicate that any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber.¹¹⁸ This means that a person charged would have to be released if the Pre-Trial Chamber declined to confirm all of the charges against that person. In order to bring the person before the Pre-Trial Chamber again on the basis of new evidence, it appears that the Prosecutor would have to first seek a new warrant for that person's arrest. During the negotiation of the Rome Statute, it was suggested that Article 61 contain a provision providing for the compensation of victims.¹¹⁹ Ultimately, this suggestion was not adopted. No similar provision providing for the compensation of the wrongly accused was suggested.

2. Effects of non-confirmation of charges under Article 85.

Under Article 85, anyone who has been the victim of unlawful arrest or detention has the right to compensation.¹²⁰ Article 85 goes on to state that in exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, the Court may in its discretion award compensation to a person who has been wrongly detained.¹²¹

¹¹⁸ Rome Statute, *supra* note 1, art. 61(10). Article 61(10) states: "Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor." [Reproduced in the accompanying notebook at Tab 1].

¹¹⁹ Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* 168 (Transnational Publishers 1998) (1998). [Reproduced in the accompanying notebook at Tab 34].

¹²⁰ Rome Statute, *supra* note 1, art. 85(10). Article 85(10) states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." [Reproduced in the accompanying notebook at Tab 1].

¹²¹ Rome Statute, *supra* note 1, art. 85(3). Article 85(3) states: "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and

It should be noted that it appears to be unlikely that the Court would find that a person charged had been improperly detained. The ICC's Pre-Trial Chamber already incorporates guards against unwarranted arrest. While the Prosecutor has the discretion to seek arrests, the Pre-Trial Chamber has the ultimate authority to issue arrest warrants. The threshold of a "grave and manifest miscarriage of justice" is a high one. Considering the fact that the authority to issue an arrest warrant is split between the Prosecutor and the Pre-Trial Chamber, the process would have to be severely compromised in order to rise to the level of a grave and manifest miscarriage of justice.

It seems that two scenarios would rise to the level required in order for the Court to award compensation. Either the Prosecutor would have to intentionally mislead the Pre-Trial Chamber in order to obtain the issuance of an arrest warrant and the Pre-Trial Chamber would have to fail to detect this, or the Pre-Trial Chamber itself would have to be complicit in the wrongdoing of the Prosecutor. Either of these scenarios could lead to the Court finding that a person accused had been wrongly detained, however, neither one is very likely. Both scenarios would require a significant failure of both the Prosecutor and the Pre-Trial Chamber to function normally. Given the scrutiny the ICC is under, it appears that any such failure would be detected either by the ICC itself, or by outside parties.

IV. CONCLUSION

At its most basic level, the confirmation hearing is a gatekeeper for the Trial Chamber. The confirmation hearing is the last hurdle a case must jump before the Trial

Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason." [Reproduced in the accompanying notebook at Tab 1].

Chamber can consider it. Assuming it functions properly, the Pre-Trial Chamber's confirmation hearing ensures that once a case reaches the Trial Chamber it will have been thoroughly reviewed and while no final determination of guilt or innocence will have been established, at least enough evidence will have been presented to demonstrate that the person charged could be found guilty. In this respect, the confirmation hearing is an essential guarantor of the dignity of the Trial Chamber.

On another level, the confirmation hearing can be understood as the final in a number of procedures that the Pre-Trial Chamber employs to oversee the conduct of the Prosecutor. The Pre-Trial Chamber's first control over the Prosecutor is its required authorization of investigations. The Pre-Trial Chamber's second control over the Prosecutor is its required authorization of arrest warrants. The Pre-Trial Chamber's final control over the conduct of the Prosecutor is the confirmation hearing.

The confirmation hearing is the most important control the Pre-Trial Chamber exercises over the Prosecutor. The evidentiary standards the Prosecutor must demonstrate before the Pre-Trial Chamber in order to begin an investigation or issue arrest warrants is lower than that required at the confirmation hearing. This illustrates the fact that the Pre-Trial Chamber is designed to oversee, but not unduly constrain the Prosecutor's independence during the initial stages of an investigation. In contrast, the higher burden upon the Prosecutor during the confirmation hearing is indicative of the fact that while the Prosecutor has some latitude in conducting investigations, the confirmation of charges and subsequent beginning of proceedings before the Trial Chamber, require the utmost level of

certainty that the accused is properly charged and the case is one which should be before the ICC.

The confirmation hearing, like the ICC itself, is not based solely on civil law or common law. Instead, they represent the ongoing evolution of law and procedure at the international tribunals. Though the confirmation hearing procedure is alien to common law countries they should recognize the hearing as an important safeguard against potential abuse of power by the independent prosecutor of the civil law tradition. The confirmation hearing is an important innovation, balancing both protecting the integrity of the ICC's Trial Chamber and acting as a check on the power of the Prosecutor, against, not unduly constraining the Prosecutor's independence or injecting judges into the investigative process.