ICCBA Commentary to the third edition of the "CHAMBERS PRACTICE MANUAL"

Introduction:

In September 2015, the Pre-Trial Division of the International Criminal Court produced a "Pre-Trial Practice manual" which was "first and foremost directed at the Pre-Trial Judges themselves". According to the introduction to the first edition, "the final goal of the manual is therefore to contribute to the overall effectiveness and efficiency of the proceedings before the Court"[1].

It was approved by all Judges of the Court and subsequently amended twice (February 2016 and May 2017) to cover broader issues, also relating to the Trial phase.

While this Manual is obviously not intended by the Judges to be a binding legal document, there is no doubt that it was adopted not only in order to reflect certain past practices of Judges but also in order that it should have some impact on future practice.

This is why it is particularly important that these Best Practices be 1) in conformity with the binding legal framework (Rome Statute, Rules of procedure and Evidence and, subsidiarily, the Regulations of the Court) and 2) in line with the interests of the Parties, notably the Defence and representatives of Victims.

It is therefore in its continuing spirit of dialogue with the various organs of the Court (here the Chambers) that the ICCBA proposes the following commentaries, in order to participate to the ongoing collective process of making sure ensuring that the ICC conducts fair and equitable trials.

[1] Practice manual, p. 5.

Section A.II.2 (*Language that the person fully understands and speaks*)

The Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine what other language the person fully understands and speaks.

Commentary:

Given the fact that there is an obligation to notify the person of certain documents, such as the Arrest Warrant, before his or her transfer to the seat of the Court, one would expect that arrangements have been made prior to the first appearance to ascertain what language the person speaks, in order to notify the relevant documents in that language.

Section A.II.4 (*The date of the confirmation hearing*)

However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

Commentary:

This section should explicitly recall the right for the Defence to benefit from adequate time and facilities to prepare for the hearing. This is an inherent right of the Accused, which is independent from any considerations of expeditiousness, being recalled that, by definition, the exercise of his rights by the Accused can never be considered as affecting the expeditiousness of the proceedings.

Section A.III.1 (*Proceedings leading to the confirmation of charges hearing*)

At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor's application under article 58 of the Statute and any accompanying documents

Commentary :

- *It is inaccurate to claim that the Defence acquires all procedural rights and becomes a Party after the first appearance. The Accused formally becomes a Party to the proceedings as soon as an arrest warrant or summons to appear has been issued and already benefits from the protection of Article 55 of the Rome Statute even during the investigation phase.*
- *The Manual should reflect the principle that the warrant, OTP application and accompanying documents should be notified as soon as practicable upon arrest, not after the initial appearance. This principle has been recognized consistently in the case law of the Court and there is no reason it should not appear in the Manual.*

Section A.III.2 (*Time limit for responses under regulation 24 of the Regulations of the Court*)

Commentary:

The default time limit for responses under regulation 24 should be a minimum of 8 days, not 5 days as provided for by the Manual. 5 days is an unrealistic figure, given the volume of work that needs to be done by the Defence during the confirmation phase and given the limited human resources available to Defence teams (especially compared to the OTP).

Section A.III.3 (*informal contact with the parties and the Registry*)

In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

Commentary:

The Manual should be explicit about the fact that the Chamber shall take the appropriate steps for all email communication to be put in the record of the case, and made public when appropriate.

Section A.IV.1 (*disclosure of evidence between the parties*)

The Prosecutor has the duty to disclose to the Defence "as soon as practicable" and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. article 67(2) of the Statute), or is material to the preparation of the defence (cf. rule 77 of the Rules).

Commentary:
Practice in virtually all cases has revealed considerable problems in how the Prosecutor implemented her duty to disclose Article 67(2) and Rule 77, either disclosing in a tardy way material in her possession for a long time or not disclosing at all evidence material to the preparation of the Defence. The heart of the problem here is that there is today virtually no control over the elements in the Prosecutor's possession. The current practice it puts the evaluation of the usefulness of the evidence entirely in the hands of the OTP. This needs to be changed. Indeed, 1) a party should not be the sole judge of its own obligations, with no external oversight and 2) very concretely, the OTP does not know what will be useful for the Defence, because it depends on the Defence strategy, which the Defence should of course not be asked to reveal to the Prosecution. More thought should therefore be put in devising a system by which the OTP is either asked to disclose all documents obtained during the investigation or either submitted to some form of judicial oversight. It is not possible for the OTP to disclose just before or sometimes after the testimony of a witness elements that he had in his possession for years. Such oversight mechanism could very well be put in place without any change to the current legal framework. Indeed, Rule 77 does not indicate who decides what is "material to the preparation of the Defence".

No submission of any "in-depth analysis chart", or *similia,* of the evidence disclosed can be imposed on either party.

Commentary:

Especially in such complex cases, the Pre-trial Chamber should remind the Prosecutor of her obligation to specifically explain how each piece of evidence is related to the charges. If not the work of the Defence is made impossible because it is drowned in disclosures without any indication, very often, of how the Prosecutor plans to use a particular document.

The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

Commentary:

- *The first sentence of this paragraph seems problematic. What does it mean to "take full advantage"? the expression seems to suggest that the Defence is expected to have analysed the evidence once and for all during the confirmation hearing. In other words, what seems to be said here implicitly is that the Defence, because it will be considered to have had time to analyse the evidence during the confirmation phase, will be given less time during the pre-trial and trial phase. If that is what is meant, it is extremely problematic for a number of reasons. 1) The analysis of the evidence at the confirmation phase does not have the same finality as during a trial, given the more limited scope of the confirmation of charges phase. It cannot be*

expected for the Defence to conduct an exhaustive analysis of the evidence, as if it were preparing for a Trial that might or might not happen ; 2) In a number of cases, this would be a waste of time, because experience has shown that the Prosecutor considerably changes his evidentiary basis from the confirmation to the Trial, often changing not only the documentary evidence but even the witnesses relied upon ; 3) relatedly, the analysis of the Prosecution evidence is a complex operation which requires not just analysing the documents in an isolated manner, but analysing all the evidence in an holistic way. If the Prosecutor discloses new evidence, this might require revisiting all or part of the evidence that was previously disclosed, to understand how it relates to the new evidence. In this sense, until the Prosecutor has disclosed its final list of evidence and witnesses, there can be no definitive analysis of the Prosecution evidence.

- *The second sentence seems equally problematic. Indeed, the expression "subject to consideration of the rights" is inappropriate: Defence rights are not issues to be "considered" they are simply to be respected. If the Accused is allowed to change counsel, he should not be punished for that and his right to adequately prepare should be respected.*

Section A.V.1 (*the factual basis of the charges*)

The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing.

Commentary:

It should be made clear that the Chamber should, once the DCC is notified, consider, either proprio motu or on request from the Defense, how much time is needed for the Defense to prepare for the hearing. Indeed, especially in the absence of an IDAC or an EBC, the accused only becomes aware of the Prosecutor's case theory when he is notified of the DCC. In practice, it should be noted that 30 days, as the minimum time granted to the Defence under Rule 121, will often be inadequate, especially in more complex cases.

Section A.V.2 (*Distinction between the charges and the Prosecutor's submissions in support of the charges*)

There shall be no confusion between the material facts described in the charges and the "subsidiary facts" (*i.e.* those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally "evidence"). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a "[pre-]confirmation brief"). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – "charges" and "submissions" – must be kept clearly separate, and no footnotes containing cross- references or reference to evidence must be included in the charges.

Commentary:

- *The distinction between "material facts" and "subsidiary facts" is unclear, and has always been unclear. There should instead be a clear definition of what a charge is: 1) a factual claim 2) one or several legal qualifications and 3) one or several modes of liability.*
- *The Manual should not be making claims (even implicitly) about what should be proven to the adequate standard or not. Indeed, how do you prove something to the required standard without proving what the Judges call the "subsidiary facts" to the required standard? This needs to be clarified.*
- *In relation to this point, the Manual could take the opportunity to make it clear that there is no legal basis for the use of the word "count" either in the DCC or in the confirmation of charges decisions. This is vocabulary imported from the ad hoc tribunals which is not the same as a "charge". This vocabulary is confusing and has a potential impact on other stages of the proceedings, such as joinder of charges or NCTA motions.*

If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

Commentary :

- *This "practice" does not seem appropriate. 1) Rule 122(3) relates "an issue related to the proper conduct of the proceedings **prior** to the confirmation hearing". The issue of the sufficient specificity of the charges is not a procedural issue, it is a substantial right of the defense. 2) The Judges cannot preemptively preclude an Accused from claiming a violation of this right in a Practice Manual.*

- *It should be noted that the Prosecutor's case theory can evolve considerably between the Confirmation of charges and the Trial, as well as the underlying evidence, even if the "charges" remain formally the same. In this sense, the formal definition if a "charge" is one thing, what the Accused needs to know to prepare his defence is another. As a consequence, consideration should be given, at every stage of the proceedings, to the concrete needs of the Defence in terms of what information, and what specificity is needed to prepare their defence.*

SectionA.VI.1 (*presentation of evidence for the purposes of the confirmation hearing*)

The inclusion, in the Prosecutor's submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

Commentary :

In the absence of either an IDAC or an EBC, the inclusion of footnotes itemising the evidence supporting a factual allegation should be compulsory not encouraged.

Section A.VI.4 (*the conduct of the confirmation hearing*)

In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to rule 122(3) of the Rules before the commencement of the hearing on the merits.

Commentary :

This appears contrary to the plain language of Rule 122(3), which does not require the parties to inform either the Chamber or the other Parties in advance.

After the final oral observations at the hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

Commentary :

Such a strict rule is problematic. Written submissions can be extremely useful to summarize important points for the Chamber in a format that is better suited for precise legal argument than oral submissions. Specific references can be given, footnotes and references to specific items of evidence can be provided. Written submissions are also usually more readable than transcrits. This is all the more true if the Chamber is reading the transcripts in a language that was not used by one of the Parties, which means that they will be dependent on the quality of the interpretation and transcription, which has often been a problem.

It should also be noted that such a rule puts the Defence at a disadvantage, given the fact that the Prosecutor will have been able to present her case in writing (in the DCC) without the Defence being able to respond in kind.

Section A.VII.1 (*The distinction between the charges confirmed and the Pre - Trial Chamber's reasoning in support of its conclusions)*

In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre- Trial Chamber cannot expand the factual scope of the charges as presented by the Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, for example by presenting the charges as formulated

by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

Commentary :

This is arguably not in line with Article 61(7) of the Statute: indeed, while the Pre Trial Chamber is free to decline to confirm charges, it is not free to adjust anything. It is for the Prosecutor to amend the charges upon request from the Chamber (61(7)(c)).

Section A.VII.3 (*Alternative and cumulative charges*)

This course of action should limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

Commentary :

- *This "practice" should be phrased in stronger terms: there is no reason to use Regulation 55 before the start of the trial, especially not "immediately after the issuance of the confirmation decision", because there is at this point no new evidence before the Chamber. As a consequence, the early use of Regulation 55 becomes de facto a way to circumvent the Confirmation decision, which should simply not be allowed.*
- *In relation to this, due consideration should be given to the limitation of the use of regulation 55 after then end of the trial, during the deliberations phase. Not only is there strong arguments to be made that this is not in line with the language of Regulation 55 itself, it also puts the Defence in an impossible situation because it will often be too late to challenge effectively the recharacterization after is has constructed its whole Defence on the initial characterization. Ideally and logically, therefore, any notice of the possible use of Regulation 55, should take place as soon as possible after the start of the trial and at the latest after the Prosecution case and before the presentation of the Defence case, to allow the Defence to completely integrate such possible recharacterization into its Defence strategy.*

Section B.II.1 (*Trial Brief*)

A "Pre-trial brief", or its equivalent, has been filed in nearly all cases and is standard practice. Such briefs may be filed by any participant in advance of the commencement of trial, but it is particularly incumbent on the Prosecutor to provide such a brief – which should henceforth be termed a "Trial Brief".

Commentary :

- *The Trial Brief should explain in detail how each piece of evidence supports a particular legal element of the charges (crimes, modes of liability, etc.).*
- *This Trial Brief should be notified in the language of the Accused and, if the Defense team's chosen work language is not the language of the Prosecution team, in the language of the Defense team. This ensures that the Accused can participate in the effective preparation of his Defense and that the Defense team is not forced to work in a language it did not choose, thus being at a disadvantage in relation to the Prosecutor. It should be noted that there exists no requirements that a Defense team has to work in both working languages of the court.*
- *Also, in relation to the Accused, while it could be argued that it relates to the respect of his right to be informed of the charges, even if one doesn't agree, there is no denying that the basis for the preparation for the trial is not the confirmation of charges decision, but the Trial Brief and this is essential for the preparation of the Defense.*
- *More generally, a section of the Manual should be devoted to explaining that certain key documents and/or decisions should be notified in the language of the Accused and the language of the Defence team. More particularly, time limit to respond, or file requests to leave to appeal should only run after such notification in the adequate language.*

Section C.I (*Procedure for admission of victims to participate in the proceedings*)

Consistent with article 68(1) of the Statute, which is also explicitly referred to in rule 89(1) of the Rules, if there exist security concerns in case the applicant's identity and involvement with the Court were to be known to the Defence, the Registry transmits the application, and any supporting documentation, to the Defence in redacted form, expunging the person's identifying information.

Commentary :

It is unclear why the Defence is specifically singled out here. Why would giving names of victims to the Prosecution, which arguably cooperates closely with the political authorities of the situation country, not create a potential risk for the victms ? There is no reason for the Parties (who are bound by the same rules when it comes to confidentiality and more generally ethical behaviour) not to be treated equally when it comes to redactions. As a result, redactions to alleged victims applications should be specifically justified on a case by case basis upon proof of an actual and objective risk for the person and should not be such that the right of response of the Defence is made meaningless.

The Prosecutor and the Defence, in accordance with rule 89(1), are entitled to provide observations on the applications and request, as provided in rule 89(2), that one or more individual applications be rejected. The Single Judge/Chamber shall establish a time limit within which the parties may present specific objections to the admission as victims of any individual applicant. Evidently, neither party has a duty in this respect: it is entirely within their discretion to determine the extent of time and resources, if any, which they find worthy dedicating to the assessment of the applications.

Commentary :

The final sentence of this paragraph is problematic and should be deleted:

- *It seems to suggest implicitly that providing observations to victims applications is a mere discretionary choice for the Defence not a right, and that therefore the use of time and ressources to do so will not be considered as time necessary for the preparation of the Defence. In other words, it seems to suggest that if the Defence exercises this right, it will not be given more time to do other key aspects to prepare its Defence.*
- *This is also logically a problem, because it is only after having analysed the application forms that the Parties will be able to determine whether there is any problem which warrants further attention.*

Annex, par.10

If the witness is otherwise protected by the VWU, the party or participant shall inform the VWU of the disclosure of the witness' identity as soon as possible, but in any event prior to disclosure

Commentary :

This is unrealistic as a strict rule given the nature of on-site investigations: sometimes, you may not know in advance that you might need to mention a witness and a unique investigative opportunity might arise where it is materially not possible to inform VWU in advance. This should be reflected in the Protocol.

Annex, par. 29

The party or participant seeking to interview a witness of another party or participant shall notify the latter of its intent to do so. The calling party or participant shall ask the witness within five days whether he or she agrees to be contacted or interviewed. The calling party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by the other party or participant.

Commentary :

It should be provided that 1) the calling party keep a record of communications with the witness in case there is a challenge filed by the other Party relating to the way the witness was contacted and what was told to him or her 2) there should be a possibility for the party seeking to interview a witness to communicate a letter explaining why it wishes to interview the witness and possibly what issues it would intend to discuss.

Annex, par. 33

The calling party or participant shall inform the witness of this right but shall not attempt to influence the witness's decision.

Commentary :

Records of such communications should be kept.