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# The International Criminal Court's Chambers Practice Manual: Towards a Return to Judicial Law Making in International Criminal Procedure?

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## Abstract

*This article discusses the nature of the International Criminal Court's Chambers Practice Manual as an interpretative source, in the context of a wider debate on judges as procedural lawmakers in international criminal law. As is clear from the ICC Statute, the Practice Manual should not be seen as a source of law on a par with the Statute or Rules of Procedure and Evidence, nor even does it represent a secondary source of law. However, this article argues that the Practice Manual oversteps the mark of what could be expected from a guidance document containing merely non-binding recommendations in two important respects. First, as expressly acknowledged by the ICC's President, the judges have perceived the amendment of the Practice Manual as an alternative to proposing amendments to the Court's Rules of Procedure and Evidence to the Assembly of States Parties, a practice which has been fraught with difficulty in recent years. Second, the Practice Manual contains explicit instructions to Chambers, including text to be included in Chambers' decisions, which appears to cross the boundaries of what should be expected from a guidance document. This article further argues that some early decisions of the Court following its adoption give the Practice Manual a normative force that ought not to attach to it. This raises issues of fairness, legal certainty, predictability and coherence, and overall, it is argued that the Practice Manual marks an unforeseen return to judicial law making in international criminal procedure.*

## 1. Introduction

In May 2017, the International Criminal Court published the latest edition of its Chambers Practice Manual.<sup>1</sup> This was the Court's second update to its Pre-Trial Practice Manual, which was first published in September 2015.<sup>2</sup> The Chambers Practice Manual is designed to reflect best practices as identified by the Judges of the

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<sup>1</sup> ICC Chambers Practice Manual, May 2017, [https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual\\_May\\_2017\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf) ('Manual').<sup>[1]</sup><sup>[SEP]</sup>

<sup>2</sup> ICC Pre-Trial Practice Manual, September 2015, [https://www.icc-cpi.int/iccdocs/other/Pre-Trial\\_practice\\_manual\\_\(September\\_2015\).pdf](https://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf). A first update was published in February 2016: ICC Chambers Practice Manual, February 2016, [https://www.icc-cpi.int/iccdocs/other/Chambers\\_practice\\_manual--FEBRUARY\\_2016.pdf](https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf).

Court in relation to specific procedural issues, and to ensure consistency amongst differently constituted Chambers.<sup>3</sup> The development of the Manual was a clear facet of the Court's drive towards greater efficiency in its practices, given that the unwieldiness of procedures was one of the main criticisms levelled against the court in its first decade.<sup>4</sup>

This article undertakes the first thorough analysis of the Chambers Practice Manual as a judicial source.<sup>5</sup> In particular, it examines the impact and character of the Manual as a source of guidance to judges, and the extent to which Chambers are afforded the ability to deviate from the Manual. It situates this analysis within the context of a wider debate in international criminal law on the judicial development of international criminal procedure. Part 2 provides an overview of the history of judges as procedural lawmakers in international criminal law. It shows that, unlike its predecessors, the International Criminal Court's legal framework significantly curtailed the ability of judges to act in the 'quasi-legislative'<sup>6</sup> role of drafting and amending procedural rules. However, as will be shown, recent difficulties have emerged with the ICC's model of Rule amendments by States Parties to the Statute, and this, it is posited, will lead to a greater emphasis on less formal ways to enact procedural changes. The Chambers Practice Manual is therefore likely to grow in significance as a means through which judges can shape the ICC's procedure. It is thus imperative that a systematic assessment of the normative force that attaches to

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<sup>3</sup> Pre-Trial Practice Manual (*ibid.*), Introduction ('[I]t was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings').

<sup>4</sup> S. Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy', in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), 44, 45; ICC Assembly of States Parties, Establishment of a Study Group on Governance, ICC-ASP/9/Res.2, 10 December 2010; S. Ford, 'How Much Money does the ICC Need?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 84.

<sup>5</sup> Parts of the Manual are referred to in some literature, particularly K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (Oxford University Press, 2016) at 114; 142; 344–365; 523–531; 661–662, as well as in X.-J. Keita, 'Disclosure of Evidence in the Law and Practice of the ICC', 16 *International Criminal Law Review* (2016) 1048; F. Gaynor, K.I. Kappos and P. Hayden, 'Current Developments at the International Criminal Court', 14 *Journal of International Criminal Justice* (2016) 689, and P. Ambach, 'The "Lessons Learnt" process at the International Criminal Court – a suitable vehicle for procedural improvements?' 12/2016 *Zeitschrift für Internationale Strafrechtsdogmatik* (2016) 854, but the Manual as a whole, including its character and use by the Court, is not subjected to in-depth analysis in any of these works.

<sup>6</sup> International Criminal Tribunal for the former Yugoslavia, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, UN Doc A/49/342 (29 August 1994), § 27.

the Manual as a document to be used by parties before, and by Chambers of, the Court, be undertaken.

Part 3 provides this assessment of the Chambers Practice Manual's character as a judicial source, together with an analysis of its main content. It argues that the Manual appears to cross the boundaries of what should be expected from a guidance document in two important respects. First, as explicitly acknowledged by the ICC's President, the judges have perceived the amendment of the Practice Manual as an alternative to the Court's statutory framework on amendments to its Rules of Procedure and Evidence. Second, the Manual contains explicit instructions to Chambers, including text to be included in Chambers' decisions, which appears to cross the boundaries of what should be expected from a guidance document. It also argues that the source of the 'best practice' that the Manual is supposed to reflect is often uncertain.

Moreover, as shall be outlined in Part 4, some early decisions of the Court following the adoption of the Practice Manual appear to give the Manual a normative force that ought not to attach to it. Part 4 analyses the difference in opinion that has arisen between some Pre-Trial Chamber judges, who believe that their colleagues have shown undue deference to the Manual by treating it as though it were a source of law, and other judges, who have deemed it necessary to follow the Manual's guidance closely. In the light of this important debate, this article examines what the return to judicial law making in international criminal procedure through the Chambers Practice Manual means for principles of fairness, legal certainty and consistency in international criminal law.

## **2. Judicial Law Making in International Criminal Procedure**

Procedural frameworks have been likened to railway tracks that are needed for the train of any legal process to run on.<sup>7</sup> The judicial creation of rules of procedure is relatively common in international tribunals, including the International Court of Justice,<sup>8</sup> various human rights courts,<sup>9</sup> and the International Tribunal on the Law of

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<sup>7</sup> O.-G. Kwon, 'Procedural Challenges Faced by International Criminal Tribunals and the Value of Codification', in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), 1415.

<sup>8</sup> Art 30 Statute of the International Court of Justice (18 April 1946), 33 UNTS 993.

<sup>9</sup> Art 25(d) European Convention on Human Rights (4 November 1950), 213 UNTS 221; Art 60

the Sea.<sup>10</sup> These Courts and Tribunals are mandated to create rules of procedure for carrying out their functions. In domestic criminal trials, by contrast, procedure is generally codified in advance, by statute or criminal procedure code passed by the legislature in the same manner as any other piece of legislation.<sup>11</sup> International criminal tribunals, being both international tribunals and criminal courts, are therefore left with a choice between conferring procedural rule-making power to judges, or depending on some external body to establish rules of procedure and evidence. Traditionally, the international tribunals' preference has been to leave this role to the judges, with some important exceptions and nuances.

There was some debate at Nuremberg over whether a 'liberal rule-making power'<sup>12</sup> should be left to the Tribunals, or whether detailed procedural rules should be outlined in advance.<sup>13</sup> Ultimately, the Charters of both the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo stated that the Tribunals would draft (and, in the case of the IMTFE, amend<sup>14</sup>) their own rules of procedure, and that those procedural rules would not be inconsistent with the Tribunals' Charters.<sup>15</sup> One might expect from this wording that the judges would constitute the 'Tribunal' for these purposes, but interestingly, it fell to the Chief Prosecutors to prepare a draft of the Rules of Procedure and Evidence, which was later adopted by the President of each of the Tribunals.<sup>16</sup> The Rules of Procedure of both Tribunals were scant by the standards of contemporary international criminal tribunals; the IMTFE Rules of Procedure

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American Convention on Human Rights (22 November 1969), 1144 UNTS 143.

<sup>10</sup> Art 16 Statute of the International Tribunal for Law of the Sea, Annex VI, United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3.

<sup>11</sup> E.g. Codice di Procedura Penale (Italy); Código de Processo Penal (Brazil); Code de procédure pénale (France). Some common law countries have traditionally eschewed a codified instrument on criminal procedure, but that is changing; England and Wales now has 'Criminal Procedure Rules', with the aim of ensuring 'that criminal cases be dealt with justly' (§ 1.1). National judiciaries do have a role in the formulation of legislative codes of procedure in many domestic systems. In the United States of America, for example, federal judges play a major part in the formulation of amendments to the Federal Rules of Criminal Procedure.

<sup>12</sup> 'Report of Robert H Jackson, United States Representative to the International Conference on Military Trials', Department of State (1949), online at [https://www.loc.gov/r/rfd/Military\\_Law/pdf/jackson-rpt-military-trials.pdf](https://www.loc.gov/r/rfd/Military_Law/pdf/jackson-rpt-military-trials.pdf), 75.

<sup>13</sup> This was the preference of the Soviet delegation: *ibid.*, 71.

<sup>14</sup> The power to amend the IMT Rules of Procedure was conferred via the Rules themselves, specifically Rule 11.

<sup>15</sup> Art 13 IMT Charter; Art. 7 IMTFE Charter.

<sup>16</sup> V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence', in K. Khan *et al* (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010), 157, 159.

contained just nine Rules, whilst the IMT Rules of Procedure was comprised of just eleven.

At the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), explicit statutory authority was granted to the judges of the Tribunal to adopt ‘rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters’.<sup>17</sup> The Security Council, having completed the Tribunal’s Statute, seemed content to confer responsibility on the judges of the Tribunal to enunciate a full procedural framework for the Tribunal’s operation.<sup>18</sup> As the Appeals Chamber noted in *Tadić*, ‘the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for Trials and Appeals’.<sup>19</sup>

While the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone expressly mandated the judges to adopt the Rules of Procedure and Evidence of their predecessors, judges were also given the power to amend those Rules as they saw fit.<sup>20</sup> The Statute of the Special Tribunal for Lebanon grants judges the power to adopt and amend Rules of Procedure and Evidence, taking both Lebanese criminal procedure and other relevant international procedural standards into account.<sup>21</sup> Even in those hybrid tribunals where the expectation is that domestic criminal procedure will apply, such as the Extraordinary Chambers in the Courts of Cambodia, judges are permitted to adopt or amend Rules to ensure their compliance with international standards.<sup>22</sup>

Although some authors believed that it would have been inappropriate for the Security Council, as a political body, to draft the Rules of Procedure and Evidence as well as the *ad hoc* Tribunals’ Statutes<sup>23</sup> and others argued that granting procedural lawmaking powers to judges ensures greater coherence,<sup>24</sup> this aspect of international

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<sup>17</sup> Art 15 ICTYSt.

<sup>18</sup> T. Meron, ‘Procedural Evolution in the ICTY’, 2 *Journal of International Criminal Justice* (2004) 520, 521.

<sup>19</sup> Decision on Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-T), 2 October 1995, § 4.

<sup>20</sup> Art 14 ICTRSt.; Art 14 SCSLSt.

<sup>21</sup> Art 28 STLSt.

<sup>22</sup> Art 20 ECCC St.

<sup>23</sup> L.D. Johnson, ‘Ten Years Later: Reflections on the Drafting’, 2 *Journal of International Criminal Justice* (2004) 368, 375-376.

<sup>24</sup> Zappala, *supra* note 4, at 51.

criminal law practice has not been without critique. At the time of the ICTY's establishment, the NGO Helsinki Watch criticized 'the Security Council's near-complete abdication of responsibility' in this regard.<sup>25</sup> Sluiter argued that the formulation of Rules of Procedure and Evidence by the same judges who may well be asked to assess the validity and legality of those Rules at a later stage could raise issues of judicial impartiality and independence.<sup>26</sup> Authors have noted the reactive nature of rule making in the *ad hoc* tribunals, where many Rules of Procedure and Evidence could be directly traced back to issues that arose in practice; this was particularly true for Rules on the admissibility of evidence.<sup>27</sup>

In the drafting of the ICC Statute, considerable debate arose on the extent to which judges should be given the power to draft and amend procedural rules.<sup>28</sup> Article 51 of the Statute greatly curtails the role of the judges in this regard, stating that the Rules of Procedure and Evidence, and any amendments thereto, must be adopted by a two-thirds majority of States Parties to enter into force.<sup>29</sup> Rule amendments can be proposed by State Parties, by a majority of judges, or by the Prosecutor,<sup>30</sup> and these proposals are to be considered by the Assembly of States Parties (ASP).<sup>31</sup> There is, however, an emergency provision, whereby a two-thirds majority of judges can agree upon provisional rules to be applied until the next session of the ASP.<sup>32</sup> At that session, States Parties can decide whether to adopt that provisional rule into the permanent Rules of Procedure and Evidence, or whether to amend or reject it.<sup>33</sup>

Despite the curtailing of the judges' procedure-making role in favour of the ASP in the ICC's legal framework, judges are not completely bereft of agency in this

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<sup>25</sup> Helsinki Watch, *Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal*, August 1993, <https://www.hrw.org/sites/default/files/reports/YUGO938.PDF>, 6.

<sup>26</sup> G. Sluiter, 'Procedural Lawmaking at the International Criminal Tribunals', in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010), 315, 325.

<sup>27</sup> *Ibid.*; G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', 12 *Criminal Law Forum* (2001) 41. The jurisprudential origins of Rules 92*bis*, *ter*, *quater*, and *quinquies* of the ICTY RPE are outlined in Y. McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law', 26 *Leiden Journal of International Law* (2013) 971, 971-974.

<sup>28</sup> W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), 643-644.

<sup>29</sup> Arts 51(1) & 51(3) ICCSt.

<sup>30</sup> Art 51(2) ICCSt.

<sup>31</sup> Art 51(3) ICCSt.

<sup>32</sup> Art 51(4) ICCSt.

<sup>33</sup> *Ibid.*

regard. Judges do, for example, have the power, pursuant to Article 52 of the ICC Statute, to adopt Regulations of the Court ‘necessary for its routine functioning’,<sup>34</sup> and the exercise of this power has not been without controversy.<sup>35</sup> Nevertheless, the fact that the Regulations are limited in their scope to matters necessary for the routine functioning of the Court limits the ability of judges to use them as a proxy for amendments to the Rules of Procedure and Evidence. Further, the ASP retains a supervisory role over the Regulations of the Court; once amendments to the Regulations are adopted, they are circulated to the States Parties and they only remain in force if there are no objections from a majority of States Parties within six months of their adoption.<sup>36</sup> In addition, the Trial Chamber has the power, under Article 64(3)(a) of the Statute, to ‘confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’, a power that has been seen as granting a measure of influence in shaping ‘the overall architecture’ of proceedings.<sup>37</sup> The operation of this statutory function cannot, however, be likened to a procedural rule-making authority. One practical example of Article 64(3)(a) in use was the limiting of the trial in *Banda and Jerbo* to three specific contested issues as agreed by the prosecution and defence,<sup>38</sup> but this is hardly equivalent to the establishment of a new procedural framework. Another example was the decision to appoint a single judge for the preparation of trial in *Gbagbo*;<sup>39</sup> however, this procedure had already been established by Rule 132*bis*, which was adopted by the ASP in 2012.<sup>40</sup> Further, ICC judges, acting by majority, can adopt provisional Rules, pursuant to Article 51(3), in urgent situations where there is a lacuna in the Rules; these provisional Rules are to be adopted until they are adopted, amended, or rejected by the ASP.

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<sup>34</sup> Art 52(1) ICCSt.

<sup>35</sup> Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons (*Katanga and Chui*), ICC-01/04-01/07-3319, 21 November 2012. For an analysis, see S. Rigney, ‘“The Words Don't Fit You”: Recharacterisation of the Charges, Trial Fairness, and Katanga’, 15 *Melbourne Journal of International Law* (2015) 1.

<sup>36</sup> Art 52(3) ICCSt.

<sup>37</sup> C. Kress, ‘The Procedural Law of the International Criminal Court: Anatomy of a Unique Compromise’, 1 *Journal of International Criminal Justice* (2003) 603, 605-606.

<sup>38</sup> Decision on the Joint Submission regarding the contested issues and the agreed facts, *Banda and Jerbo* (ICC-02/05-03/09-227), Trial Chamber IV, 28 September 2011; see further, G. Bitti, ‘Article 64’, in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn: Hart/Beck, 2016) 1588, 1598-1600.

<sup>39</sup> Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence, *Gbagbo* (ICC-02/11-01/11-700), Trial Chamber I, 23 October 2014.

<sup>40</sup> ASP, *Amendment of the Rules of Procedure and Evidence*, ICC-ASP/11/Res.2, 21 November 2012.



Thus, the framing and remoulding of the ICC's Rules of Procedure and Evidence remains very much centered on the ASP, which holds the ultimate power in this regard. By 2010, it became very clear that both the ASP and the Court were concerned with the efficiency of proceedings,<sup>41</sup> and that some procedural amendments might be needed to expedite processes. As a result, the ASP created the Study Group on Governance, a subsidiary body of the ASP comprised of representatives from State Parties, with the aim of enabling a 'structured dialogue between States Parties and the Court'.<sup>42</sup> In 2012, following the issuance of the *Lubanga* judgment, the Bureau of the Study Group on Governance issued its 'Lessons Learnt' first report to the ASP, identifying nine 'clusters' of practice where procedure could be made more efficient.<sup>43</sup> The ASP endorsed the 'Roadmap' proposed by the Study Group on Governance, which was designed to facilitate dialogue between the Court and the ASP to consider amendments to the Rules that would expedite trials before the Court.<sup>44</sup> Under the Roadmap, a number of steps for amending Rules of Procedure and Evidence were established.<sup>45</sup> First, the Working Group on Lessons Learned, comprised of judges of the Court, would examine whether potential amendments to the Rules of Procedure and Evidence could be identified; any identified proposed amendments would be communicated to the Advisory Committee on Legal Texts for further consultation.<sup>46</sup> The Advisory Committee, if in agreement with the Working Group, would submit those proposed Rule amendments to the Study Group on Governance. If the members of the Study Group on Governance agreed with the proposals put forward by the judges,<sup>47</sup> it would in turn convey them to the ASP's Working Group on Amendments, which would decide whether to invite the ASP to vote on adopting the proposed amendments at its next regular session.

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<sup>41</sup> For a detailed overview, see P. Ambach, 'A Look towards the Future – The ICC and "Lessons Learnt"', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 1277, at 1285-1287.

<sup>42</sup> ASP, Establishment of a Study Group on Governance, ICC-ASP/9/Res.2, 10 December 2010.

<sup>43</sup> Study Group on Governance, *Lessons Learnt: First Report of the Court to the Assembly of States Parties*, ICC-ASP/11/31/Add.1, 23 October 2012 ("First Report").

<sup>44</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/11/Res.8, 21 November 2012, § 41.

<sup>45</sup> *Report of the Bureau on Study Group on Governance*, ICC-ASP/12/37, 15 October 2013, § 11.

<sup>46</sup> This Committee was established by Regulation 4 of the Regulations of the Court (ICC-BD/01-01-04, 26 May 2004), and is comprised of three judges (one from each Division), and one representative each from the Office of the Prosecutor, Registry, and list of counsel.

<sup>47</sup> The Study Group may, in the interim, revert to the Working Group with views and recommendations, which will in turn report back before the Study Group transmits its recommendations on proposed Rule amendments to the Working Group on Amendments: *supra* note 45, § 11.

In October 2013, the Working Group on Amendments recommended two proposed amendments that had come through the Roadmap process to the ASP,<sup>48</sup> both of which were adopted by consensus in November 2013.<sup>49</sup> The first concerned Rule 100, on proceedings outside the seat of the Court. The amendment provides for a more expeditious process for sitting in a State other than The Netherlands, by allowing the Chamber to make a recommendation (acting by majority) to the President, taking into account the views of the parties, victims, and the Registry's assessment.<sup>50</sup> The second recommended amendment was to Rule 68 (on prior recorded testimony), and the amendment incorporates almost wholesale Rules 92*bis*, *ter*, *quater* and *quinquies* of the ICTY RPE, thus allowing prior recorded testimony to be admitted to the evidential record where the witness was dead, had been subject to intimidation, or where the evidence did not go to the acts and conduct of the accused.<sup>51</sup> At the ASP, the Kenyan delegation raised concerns that this Rule amendment could infringe the rights of the accused. In order to address these concerns, a reference to Article 51(4) of the Statute was introduced to the amendment, thus clarifying that the amended rule would not be applied retroactively to the detriment of accused persons who were under investigation, on trial, or convicted at the time of the new Rule's passage.<sup>52</sup>

These amendments appeared to herald a new era of cooperation between the Court and the ASP, and the success of the collaborative process as set out in the Roadmap on reviewing the procedures of the Court.<sup>53</sup> However, in the same Resolution adopting the amendments to Rules 68 and 100, the ASP also adopted some amendments to Rule 134, which had not come through the Roadmap process. The new Rule 134*bis* provides for participation via video-link, while the new Rule 134*ter* sets out a framework for excusing an accused person from presence at trial. The new Rule 134*quater* relates specifically to those persons mandated 'to fulfill extraordinary public duties' who wish to be excused from attending their trial.<sup>54</sup> This amendment is notable, because it was proposed by States Parties and thus did not follow the new

<sup>48</sup> *Report of the Working Group on Amendments*, ICC-ASP/12/44, 24 October 2013.

<sup>49</sup> ASP, *Amendments to the Rules of Procedure and Evidence*, ICC-ASP/11/Res.7, 27 November 2013.

<sup>50</sup> *Ibid.*, §§ 5-7.

<sup>51</sup> See further, M. Fairlie, 'The Abiding Problem of Witness Statements in International Criminal Trials', 50 *NYU Journal of International Law and Politics* (2017, forthcoming); Y. McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016) 90-92.

<sup>52</sup> ASP, *Amendments to the Rules of Procedure and Evidence*, *supra* note 49, § 2.

<sup>53</sup> Set out in Annex I to the 2013 *Report of the Bureau on Study Group on Governance*, *supra* note 45.

<sup>54</sup> Rules 134*bis*, *ter*, and *quater*.

collaborative model set out in the Roadmap; therefore, little or no consultation with the Court was carried out prior to its adoption.<sup>55</sup> Moreover, the new amendment was a clear reaction to case law in the *Ruto and Sang* case, where the accused Ruto had asked to be excused from trial to enable him to carry out his duties as Deputy President of Kenya.<sup>56</sup> The Appeals Chamber had rejected the suggestion put forward by a number of states, acting as *amici curiae*, he should be entitled to a blanket excusal from presence at trial as a result of his senior political role.<sup>57</sup> This amendment of the Court's legal framework to fit the rather unique circumstances of a particular case highlights that the Roadmap process of close collaboration between the Court and the ASP, whilst strongly encouraged, cannot exclude the future amendment of Rules through other means set out in the ICC Statute. It has also been argued, from a more theoretical standpoint, that this type of amendment can lead to incoherence and 'a loss of the abstract-general character constitutive of a law that is meant to apply to any situation'.<sup>58</sup>

The politicisation of Rule amendments was not to end with the amended Rules 134*bis-quater*. Shortly after the amendments to Rule 68 were passed, the Prosecutor sought to introduce material under the revised Rule in the *Ruto and Sang* case.<sup>59</sup> The Trial Chamber held that, notwithstanding the reference to Article 51(4) in the newly adopted Rule, it could be applied retroactively to admit witness statements to the evidentiary record.<sup>60</sup> It found that the reference to Article 51(4) could not be read as implying that the ASP did not want the amended Rule to apply retroactively to any case that was ongoing at the time of its adoption; the Rule could only not apply if it would apply retroactively 'to the detriment of the person who is being [...] prosecuted.'<sup>61</sup> The African Union intervened as an *amicus curiae* in the appeal of this decision, arguing that the Trial Chamber had misconstrued the intentions of the

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<sup>55</sup> Ambach, *supra* note 5, 864-865.

<sup>56</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, *Ruto and Sang* (ICC-01/09-01/11-777), Trial Chamber V(a), 18 June 2013; Judgment on the appeal of the Prosecutor against the decision of the Trial Chamber V (a) of 18.6.2013 entitled 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang* (ICC-01/09-01/11-1066), Appeals Chamber, 25 October 2013.

<sup>57</sup> Appeals Chamber, *ibid.*, § 13.

<sup>58</sup> Ambach, *supra* note 41, 1291.

<sup>59</sup> Decision on the Prosecution Request for Admission of Prior Recorded Testimony, *Ruto and Sang* (ICC-01/09-01/11-1938), Trial Chamber V(a), 19 August 2015, § 1.

<sup>60</sup> *Ibid.*, § 19.

<sup>61</sup> *Ibid.*

ASP.<sup>62</sup> Ultimately, the Appeals Chamber held that to apply the amended Rule retroactively would give rise to unfairness.<sup>63</sup> However, the experience was to mark a turning point for the increased politicisation of Rule amendments by the ASP. While the matter was pending before the Appeals Chamber, Kenya sought to use the ASP's 2015 session to further clarify the scope of the amended Rule's application,<sup>64</sup> a move that was criticised as attempting to interfere with the Court's independence.<sup>65</sup>

Nevertheless, attempts persisted to keep the Roadmap process on track.<sup>66</sup> In 2014, the Working Group on Lessons Learned put forward two sets of proposals for Rule amendments.<sup>67</sup> Under the 'language cluster' set were proposed amendments to Rules 76(3) and 144(2)(b) (allowing for partial translations of prosecution witness statements and certain decisions, where not inconsistent with the rights of the accused) and Rule 101 (allowing the commencement of deadlines and time limits to be delayed until translations have been received). These proposals were influenced by the *Banda and Jerbo* case, where the process of translating all prosecution witness statements into Zaghawa, a language spoken by fewer than 200,000 people in Sudan,<sup>68</sup> had taken over two years, at a not insignificant cost to the Court.<sup>69</sup> The Working Group on Amendments noted support for these proposed amendments,<sup>70</sup> but declined to submit a recommendation that the ASP adopt these proposals, on the grounds that some delegations had reservations on their compatibility with the right to

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<sup>62</sup> Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", *Ruto and Sang* (ICC-01/09-01/11-2024), Appeals Chamber, 12 February 2016, §11.

<sup>63</sup> *Ibid.*, § 94.

<sup>64</sup> *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the President of the Assembly of States Parties, 13 October 2015, online at <http://www.jfjustice.net/userfiles/Kenya-Formal-request.pdf>.

<sup>65</sup> Letter from President, Prosecutor and Registrar of the ICC to ASP President Sidiki Kaba, 13 November 2015, online at [http://www.jfjustice.net/userfiles/file/ICC%20Documents/Letter%20from%20the%20Court%27s%20Principals%20to%20President%20of%20the%20ASP%20in%20ant%20\(1\).pdf](http://www.jfjustice.net/userfiles/file/ICC%20Documents/Letter%20from%20the%20Court%27s%20Principals%20to%20President%20of%20the%20ASP%20in%20ant%20(1).pdf).

<sup>66</sup> Notwithstanding the adoption of Rules 134*bis-ter* in 2013, the Bureau of the ASP noted its commitment to the process, 'so as to avoid a disparate and unstructured approach to any proposals on amending the criminal procedures'.

<sup>67</sup> *Report of the Bureau on Study Group on Governance*, ICC-ASP/13/28, 28 November 2014, Annex I, Appendixes II and III.

<sup>68</sup> 'Zaghawa', *Ethnologue*, online at <http://www.ethnologue.com/18/language/zag/>.

<sup>69</sup> *Report of the Bureau on Study Group on Governance*, *supra* note 66, Annex I, Appendix III. In 2016, the WGA noted some further 'arguments put forward by the Court in support of the proposals, including the absence of a written form of some languages and the considerable time required to train translators in the *Lubanga* case': *Report of the Working Group on Amendments*, ICC-ASP/15/24, 8 November 2016, § 22.

<sup>70</sup> *Report of the Working Group on Amendments*, ICC-ASP/14/34, 16 November 2015, § 22.

a fair trial.<sup>71</sup> Those concerns have persisted (arguably rightly so<sup>72</sup>) with regard to the proposed amendment of Rule 76(3) on the translation of prosecution witness statements.<sup>73</sup> However, the Working Group on Amendments found sufficient support across delegations for the proposed amendments to Rules 101 and 144(2)(b),<sup>74</sup> and following its recommendation, the ASP adopted these amendments on 24 November 2016,<sup>75</sup> two years after the amendments were first proposed by the judges' Working Group. The proposals on Rule 76(3) remain under consideration.<sup>76</sup> These examples highlight the unwieldiness of the Roadmap process in practice, and perhaps illustrate 'that the Roadmap process did not provide an opportune means to achieve tangible efficiency gains in the ICC's criminal process'.<sup>77</sup>

This experience was confirmed by the ASP's response to proposed Rule 140*bis*, which had been put forward by the judges' Working Group on Lessons Learned at the same time as the 'language cluster' of amendments.<sup>78</sup> The proposed new 140*bis* would allow a particular stage of the trial to continue in the temporary absence of one judge, where there were unforeseen and unavoidable reasons for the judge's absence, and provided that the continuation had the consent of the parties and was in the interests of justice.<sup>79</sup> The Study Group on Governance noted some delegations' concerns about the compatibility of this proposal with the spirit and letter of the Statute.<sup>80</sup> Following some amendments to the Court's proposed Rule 140*bis*, the Study Group on Governance conveyed it, together with the Court's proposed text and the views expressed by the various delegations, to the ASP's Working Group on Amendments for its consideration.<sup>81</sup> The Working Group on Amendments, in considering both proposed Rule 140*bis* and the language amendments in 2015, noted that it would focus on the language amendments instead of the amendment on absence of a judge, as 'there was less divergence of views' on these proposals, compared to

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<sup>71</sup> *Ibid.*, §§ 28-30.

<sup>72</sup> McDermott, *Fairness*, *supra* note 51, 66-67, noting the higher standard included in the ICC's statutory framework.

<sup>73</sup> *Report of the Working Group on Amendments*, *supra* note 69, § 23.

<sup>74</sup> *Ibid.*, §§ 27-28.

<sup>75</sup> ASP, Resolution on amendments to rule 101 and rule 144, paragraph 2(b), of the Rules of Procedure and Evidence, ICC-ASP/15/Res.4, 24 November 2016.

<sup>76</sup> *Report of the Working Group on Amendments*, *supra* note 69, § 28.

<sup>77</sup> Ambach, *supra* note 5, 864.

<sup>78</sup> *Report of the Bureau on Study Group on Governance*, *supra* note 66, Annex I, Appendixes II and III.

<sup>79</sup> *Report of the Bureau on Study Group on Governance*, *supra* note 66, Annex I, Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court, § 13.

<sup>80</sup> *Ibid.*, § 15.

<sup>81</sup> *Ibid.*, §§ 19-21.

the range of views on the proposed Rule 140bis.<sup>82</sup> The proposed Rule 140bis was not mentioned in the 2016 Report of the Working Group on Amendments;<sup>83</sup> we can therefore assume that the decision has been taken to shelve these proposals indefinitely.

The judges' relative lack of success as regards their proposed amendments, and the hurdles faced even for those amendments that were ultimately passed, may well have a chilling effect on the future operation of the Roadmap. Indeed, the Court informed the ASP in 2015 that normative changes to the Court's legal framework 'would only be proposed if an issue could not be resolved *via* changes of practice.'<sup>84</sup> It is notable that the last proposed amendment put forward by the Working Group on Lessons Learned was to Rule 165, in July 2015.<sup>85</sup> While awaiting the proposals on Rule 165 to go through the amendment process, the judges of the Court unanimously adopted a provisional amendment to Rule 165 in February 2016,<sup>86</sup> using their authority to adopt provisional rules under Article 51(3). The provisionally amended Rule allows a single judge to exercise functions that would normally be carried out by a full Chamber, in proceedings under Article 70 of the Statute (i.e. for offences against the administration of justice).<sup>87</sup> Appeal functions are carried out by a panel of three judges instead of the full Appeals Chamber under the amended Rule.<sup>88</sup> The decision to proceed in this manner met with a mixed response from States Parties in the Working Group on Amendments.<sup>89</sup> Whilst some delegations supported the substance of the amendment and the judges' actions in attempting to make Article 70 proceedings more efficient, others raised concerns that the criteria of Article 51 had not been met, and that the judges' actions went against the intention for a structured dialogue between the Court and the ASP on Rule amendments, as set out in the Roadmap.<sup>90</sup> One delegation went so far as to argue 'that the legislative process had been hijacked.'<sup>91</sup> Ultimately, owing to differences of opinions amongst delegations,

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<sup>82</sup> *Report of the Working Group on Amendments*, *supra* note 70, § 24.

<sup>83</sup> *Report of the Working Group on Amendments*, *supra* note 69.

<sup>84</sup> *Report of the Bureau on Study Group on Governance*, ICC-ASP/14/30, 16 November 2015, § 14.

<sup>85</sup> *Ibid.*, Annex II, Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E, § 71.

<sup>86</sup> Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016.

<sup>87</sup> *Ibid.*, § 3.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Report of the Working Group on Amendments*, *supra* note 69.

<sup>90</sup> *Ibid.*, §§ 35-36.

<sup>91</sup> *Ibid.*, § 35.

the Working Group on Amendments felt unable to put forward a final recommendation to the ASP on the adoption or otherwise of the amended Rule 165.<sup>92</sup> An interesting question then arose as to whether the provisionally amended Rule could continue to apply; as will be recalled, provisional Rules are to be applied ‘until adopted, amended or rejected’<sup>93</sup> by the ASP, but of course the ASP’s non-action is neither a formal rejection nor an adoption or amendment. Kenya issued a strong statement urging the Court to continue not to apply the Rule, in order ‘to avoid legal absurdities’.<sup>94</sup> Conversely, Belgium argued that the Rule remained applicable, noting ‘that it is not up to the Assembly to dictate to the Court the way in which the latter should accomplish this task.’<sup>95</sup>

On the one hand, the above impasses and difficulties could be seen as a positive reflection of the Court’s legal framework, insofar as they reflect the ASP’s acting as guardian of the Statute and the rights of accused persons before the Court. It might be argued that the Rome Statute’s drafters intended to ensure that judges did not have an untrammelled right to adopt and amend the Court’s procedure, and that these recent experiences give credence to that intention. On the other hand, some may argue that they illustrate the undesirability of leaving procedural rule amendments in the hands of a political body, where extraneous considerations might play into delegations’ support or otherwise of rules intended by the judges to enhance efficiency. While the ability of judges of other international criminal tribunals to change the framework of Rules of Procedure and Evidence to deal with situations as they arose was critiqued for their lack of oversight,<sup>96</sup> at least those amendments were processed efficiently and in a collegiate manner. It is notable that many of the issues that have resulted in a stalemate at the ASP – including judicial absences and translation issues – were dealt with expeditiously at the ICTY.<sup>97</sup> Moreover, given that the judges of the International Criminal Court have agreed that they ‘would try to

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<sup>92</sup> *Ibid.*, § 38.

<sup>93</sup> Art 51(3) ICCSt.

<sup>94</sup> ASP, Official Records, 15<sup>th</sup> Session, 16-24 November 2016, Annex V, Statement by Kenya concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016.

<sup>95</sup> *Ibid.*, Annex VI, Statement by Belgium concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016.

<sup>96</sup> P. Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials’ 8 *Journal of International Criminal Justice* (2010) 539; E. O’Sullivan and D. Montgomery, ‘The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY’ 8 *Journal of International Criminal Justice* (2010) 511.

<sup>97</sup> Rule 15*bis*, ICTY RPE, adopted 17 November 1999; Rule 3(F), ICTY RPE, amended 25 July 1997;

avoid proposing amendments to the Rules of Procedure and Evidence and rather take measures to expedite proceedings through practice changes’,<sup>98</sup> these extensive discussions may conversely lead to an increased power of judges in amending procedure, and in forums that are less transparent than the ASP, in future. It is in this context that the Chambers Practice Manual was developed.

### **3. The Character, Scope and Context of the Chambers Practice Manual**

#### *A. The Development of the Manual*

The Manual’s introduction, written by the President of the Pre-Trial Division, Judge Cuno Tarfusser, tells us that it was the product of discussions since April 2015 between the five Pre-Trial Judges, attempting to resolve issues that had arisen in the Court’s first years of operation and reflect on lessons learned thus far.<sup>99</sup> Whether the five Pre-Trial judges were completely in agreement as to the content and effect of the Manual is open to some debate – as shall be seen in Part 4 below, two of these five judges have since issued strong dissents to date on issues relating to the Manual.<sup>100</sup> At a judicial retreat in Nuremberg in June 2015, the Manual was endorsed by all of the Judges of the Court, who recommended that it be made public.<sup>101</sup>

In 2016, an amended version of the Manual – now called the ‘Chambers Practice Manual’, as opposed to the ‘Pre-Trial Practice Manual’ – was released.<sup>102</sup> The change in nomenclature was to reflect the fact that the guidance therein no longer solely related to the pre-trial stage of proceedings.<sup>103</sup> However, the focus of the Manual remains predominantly on pre-trial procedure. A second amended version was released in 2017.<sup>104</sup>

As outlined in Part 2 above, the Roadmap process for Rule amendments has perhaps not been as successful as was originally hoped in affecting procedural changes in an efficient and collaborative manner. Thus, the judges of the Court have determined that they will attempt to bring about efficiencies in a manner that falls short of full amendment to the RPE, and the Manual is a clear facet of that strategy.

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<sup>98</sup> Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, Remarks to the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, 3 March 2016.

<sup>99</sup> Pre-Trial Practice Manual, *supra* note 2, 4.

<sup>100</sup> See below, section 4.A.

<sup>101</sup> *Ibid.*

<sup>102</sup> Chambers Practice Manual, *supra* note 1.

<sup>103</sup> *Ibid.*, 4.

<sup>104</sup> Chambers Practice Manual, *supra* note 1.



The President of the Court, speaking in 2016, noted that the intention to steer clear of formal Rule amendments:

[I]s now reflected in a Chambers' Practice Manual, which initially started as a Pre-Trial Practice Manual, reflecting the agreements we reached during and following the retreat on pre-trial proceedings and issues that arise between pre-trial and trial... [W]e are trying to avoid amendments to the Rules of Procedure and Evidence because practice changes provide more flexibility and the amendment procedure is cumbersome. Therefore, where possible, we try instead to address issues through agreements to be reflected in the Manual or amendments to the Regulations of the Court.<sup>105</sup>

Thus, the intention to use the Manual as an alternative to the Court's formal processes for the amendment of Rules of Procedure and Evidence could hardly be more explicit. Early scholarship on the Manual has praised the use of the Manual in this way, insofar as it avoids cumbersome processes and obstructionist state practices.<sup>106</sup> However, it does give rise to some serious questions about the weight to be given to the Manual as a non-binding guidance document. When a conflict between a provision in the Manual and the Rules of Procedure and Evidence arises, it is of course clear that the latter, as a formally binding source of law before the ICC, should prevail. How, then, can formal Rule amendment through the ASP be avoided through practice changes enshrined in the Manual? The judges' intentions here may be laudable, but may well lead to further incoherence and difficulties as the Manual and related practice progresses.

### *B. The Content of the Manual*

The Chambers Practice Manual is divided into three parts: Part A on pre-trial proceedings, Part B on issues related to trial proceedings before they begin, and Part

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<sup>105</sup> Judge Fernández de Gurmendi, *supra* note 98, 4. While it falls outside the scope of this article, it is worthy of note that Regulations have been amended since this speech, highlighting another way that Rule amendments have been avoided. In December 2016, amendments to Regulations 20, 24, 33, 34, 36, 38, and 44, described as 'technical in nature, concerning page limits, time limits and other procedural issues', were adopted. The distinction between procedural issues requiring amendments to the Rules and Procedure and Evidence, those requiring revised Regulations, and those requiring merely 'practice changes' later codified in the Practice Manual is unclear. Some of the issues covered in the latest tranche of Regulation amendments have the potential for significant implications for the parties, in particular the changes to Regulations 24 and 34 on the permitted scope for replies. Other issues addressed in the amendments, such as time limits, are also discussed in the Practice Manual, particularly in relation to pre-trial time limits.

<sup>106</sup> Ambos, *supra* note 5, 661; Ambach, *supra* note 5; Ambach, *supra* note 40; J. Powderly, *The Role of the Judge in the Development of International Criminal Law* (PhD thesis, 2017, on file with author), 224.

C on ‘issues related to various stages of proceedings’. An Annex, newly introduced in 2016, contains a ‘Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant’. The latter protocol was clearly influenced by the *Bemba et al.* case, where all five defendants were found guilty of having corruptly influenced witnesses, an offence under Article 70 of the Court’s Statute.<sup>107</sup> Part A spans pages 6-19 of the Manual, and remains broadly unchanged from the first iteration of the Pre-Trial Practice Manual. Part A covers such issues as: the issuance of an arrest warrant, disclosure of evidence at pre-trial, and the confirmation of the charges hearing and decision. Part B, newly introduced in 2017, governs issues surrounding the first status conference, trial preparation matters, and review of detention prior to the start of trial. Part C, on ‘various stages of proceedings’ comprises six pages and the annexed Protocol, and outlines the procedure for victims to be admitted to participate in proceedings and exceptions to the redaction of information for the purposes of disclosure. The Manual can be distinguished from Practice Directions before other international criminal tribunals, which are issued by the President after appropriate consultation to address ‘detailed aspects of the conduct of proceedings before the Tribunal’.<sup>108</sup>

The Manual is designed to be a reflection of the Court’s ‘best practices’. In his introduction to the original Pre-Trial Practice Manual, Judge Tarfusser noted that: ‘[A]fter more than 10 years of activity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings.’<sup>109</sup> This touches on an important point – that what can be seen as ‘best’ practices are not necessarily consistent practices of the Court. The judges’ methodology for identifying best practices, where previous Court practice was divided on a matter, is unclear and is not given a great deal of elucidation in the Manual. The introduction to the third edition notes that the best practices identified ‘are based on the experience and expertise of judges across trials at the Court’,<sup>110</sup> but the source of some parts of the Manual is far from clear. As the International Bar Association noted in 2016, it may

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<sup>107</sup> Public Redacted Version of Judgment pursuant to Article 74 of the Statute, *Bemba et al.* (ICC-01/05-01/13-1989), Trial Chamber VII, 19 October 2016.

<sup>108</sup> ICTY RPE, Rule 19(B); ICTR RPE, Rule 19(B); SCSL RPE, Rule 19(B); RSCSL RPE, Rule 19(C); MICT RPE, Rule 23(B); STL RPE, Rule 32(E).

<sup>109</sup> Pre-Trial Practice Manual, *supra* note 2, Introduction.

<sup>110</sup> Chambers Practice Manual, *supra* note 1, Introduction.

have been helpful for the Manual to be annotated with relevant ICC jurisprudence, illustrating how prior practice adopted by the majority of Chambers does support particular provisions in the Manual.<sup>111</sup> Alternatively, a Briefing Note or similar document to accompany subsequent amendments to the Manual could note the source of practice for amended provisions. If the Manual is intended to serve as a compendium of best practice developed in the case law of the Court, some reference to the source of that practice would be helpful for practitioners, should they seek to challenge the applicability of a particular section of the Manual, or differentiate the case at hand from the original case(s) where the practice was developed.

Interestingly, some aspects of the Manual do appear to depart from previous practice at the Court, in particular as regards issues surrounding the confirmation proceedings. To give an example, the Manual states on two separate occasions that no submission of any ‘in-depth analysis chart’ shall be required of either party.<sup>112</sup> These charts, which link the evidence relied upon or disclosed to each constituent element of the charges,<sup>113</sup> were ordered to be submitted by the Prosecutor in *Ruto et al.*,<sup>114</sup> *Ongwen*,<sup>115</sup> and *Bemba*,<sup>116</sup> amongst others.<sup>117</sup> Indeed, in *Ongwen*, the Pre-Trial Chamber determined that the in-depth analysis chart was ‘embedded in the statutory documents of the Court.’<sup>118</sup> In addressing the ASP in 2010, the then-President of the Court, Judge Song, hailed the introduction of the in-depth analysis chart as one of the Court’s achievements in ensuring the fairness and expediency of proceedings.<sup>119</sup> In

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<sup>111</sup> International Bar Association, *Evidence Matters in ICC Trials*, August 2016.

<sup>112</sup> Chambers Practice Manual, *supra* note 1, 10, 14.

<sup>113</sup> Decision on the Defence Requests in Relation to the Submission of a Comprehensive In-Depth Analysis Chart, *Ruto et al.* (ICC-01/09-01/11-191), Pre-Trial Chamber II, 13 July 2011, 5.

<sup>114</sup> *Ibid.*

<sup>115</sup> Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *Ongwen* (ICC-02/04-01/15-203), Pre-Trial Chamber II, 27 February 2015.

<sup>116</sup> Decision on the ‘Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth Analysis Chart’, *Bemba* (ICC-01/05-01/08-682), Trial Chamber III, 29 January 2010.

<sup>117</sup> e.g. Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *Ntaganda* (ICC-01/04-02/06-47), Pre-Trial Chamber II, 12 April 2013.

<sup>118</sup> *Supra* note 115, § 39. This decision was overturned in part by the Appeals Chamber, which nevertheless held that the Single Judge had ‘the discretion to issue orders to ensure that disclosure takes place under satisfactory conditions. Such orders may address various aspects of the disclosure process, including the production and submission of aids or tools such as in-depth analysis charts’: Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, *Ongwen* (ICC-02/04-01/15-251), Appeals Chamber, 17 June 2015, § 33. The Appeals Chamber found that the Single Judge had not properly exercised her discretion by ordering the production of in-depth analysis charts without first consulting with the parties: *ibid.*, §§ 36-43.

<sup>119</sup> Judge Sang-Hyun Song, President of the International Criminal Court, Remarks to the Assembly of States Parties, 9<sup>th</sup> Session, New York, 6 December 2010, 3.

*Bemba*, the Appeals Chamber rejected the accused's contention that he was not properly informed of the charges against him with explicit reference to the fact that the Prosecution had submitted an updated in-depth analysis chart, setting out how the evidence related to the allegations.<sup>120</sup> The only legal authority stating that an in-depth analysis chart is *not* required is a decision of Single Judge Tarfusser in the *Bemba et al.* case from January 2014.<sup>121</sup> Thus, it is difficult to conclude that this change in approach is reflective of consistent practice from across the Court, let alone best practice.

### *C. The Nature of the Manual as a Source of Law*

The sources of law applicable before the Court are clearly set out in Article 21 of the ICC Statute. The Court's primary sources of law are its Statute, Elements of Crimes, and Rules of Procedure and Evidence.<sup>122</sup> Where appropriate, the Court can also have recourse to the rules and principles of international law, including treaties and customary international law,<sup>123</sup> and should neither the Court's own legal framework or international law provide guidance, the Court can apply general principles of law derived from national legal systems.<sup>124</sup> While judges can apply rules and principles from earlier decisions of the Court,<sup>125</sup> there is no formally binding doctrine of precedent. The term 'may apply' in Article 21(2) makes it clear that judges are by no means obliged to follow previous practice.<sup>126</sup> It therefore goes without saying that the Chambers Practice Manual can neither be seen as a source of law in itself, nor can the fact that it draws inspiration from previous decisions of the Court mean that the judges are in any way bound to follow 'best practices' as set out in the Manual. This was recognised by the Appeals Chamber in *Gbagbo*, when it referred to the Pre-Trial

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<sup>120</sup> Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", *Bemba* (ICC-01/05-01/08-1386), Appeals Chamber, 3 May 2011, § 63.

<sup>121</sup> Decision on the 'Defence request for an in-depth analysis chart' submitted by the Defence for Mr Jean-Pierre Bemba Gombo, *Bemba et al.* (ICC-01/05-01/13-134), Pre-Trial Chamber II, 28 January 2014.

<sup>122</sup> Art 21(1)(a) ICCSt.

<sup>123</sup> Art 21(1)(b) ICCSt.

<sup>124</sup> Art 21(1)(a) ICCSt.

<sup>125</sup> Art 21(2) ICCSt.

<sup>126</sup> Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in DRC* (ICC-01/04-135), Pre-Trial Chamber I, 31 March 2006. See further, G. Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 411, 422-425.

Practice Manual as ‘an explanatory document’, providing only ‘recommendations’ for the Court.<sup>127</sup> An introduction to the third edition of the Manual in May 2017 confirms, for the first time in the Manual’s history, that the Manual is not intended as a binding instrument; rather, ‘it contains general recommendations and guidelines reflecting best practices.’<sup>128</sup>

However, it is clear that there is a perception within the Court that the Practice Manual represents a more efficient means to enact procedural reforms without having recourse to formal means such as amending the Rules of Procedure and Evidence. As mentioned above, the Report of the Bureau on the Study Group on Governance presented to the Assembly of States Parties in November 2015 noted that a representative of the Presidency of the Court had advised the Group that the judges were focusing on changes in practice and harmonisation across Chambers.<sup>129</sup> To this end, it was reported, changes through formal means, such as amendment of the Rules of Procedure and Evidence, ‘would only be proposed if an issue could not be resolved *via* changes of practice’, and that therefore the Court would not be proposing any Rule amendments in 2015.<sup>130</sup> This intention is reflected in the 2016 statements of the President of the Court, noted above.<sup>131</sup> While some might see this less formal approach as being preferable to the cumbersome procedure of normative reforms, including formally amending the Rules of Procedure and Evidence,<sup>132</sup> this does raise concerns insofar as it clearly disregards the intention of the Rome Statute’s drafters to take procedural law-making out of the hands of the Court’s judges. Moreover, as shall be discussed in detail in Part 4, some Chambers have showed an unwillingness to act contrary to the Manual’s guidance.

Even if the Manual were to be seen as merely a guidance document, we might ask whether it oversteps that role in the wording of certain provisions. While guidance to the parties is often provided in the form of encouragement in the Manual,<sup>133</sup>

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<sup>127</sup> Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, *Gbagbo and Blé Goudé* (ICC- 02/11-01/15-369), Appeals Chamber, 18 December 2015, § 54.

<sup>128</sup> Chambers Practice Manual, *supra* note 1, Introduction.

<sup>129</sup> Report of the Bureau on Study Group on Governance, *supra* note 66, § 14.

<sup>130</sup> *Ibid.*

<sup>131</sup> Judge Fernández de Gurmendi, *supra* note 98.

<sup>132</sup> K. Ambos, ‘Fairness and Expediency in International Criminal Procedure’, in J. Jackson and S. Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Procedural Forms* (Hart, 2017) (forthcoming; on file with author).

<sup>133</sup> E.g. Chambers Practice Manual, *supra* note 1, 13 ‘The inclusion, in the Prosecutor’s submissions for the purpose of the confirmation hearing ... of footnotes itemising the evidence supporting a factual

instruction to Chambers is much more explicit. For example, Pre-Trial Chambers are instructed that '[n]o footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges',<sup>134</sup> and a 924-word text to be inserted into a decision on exceptions to prosecutorial disclosure is explicitly provided.<sup>135</sup> This text sets out thirteen different categories of information that can be redacted by the Prosecutor without authorization from the Pre-Trial Chamber, and the categorizations are taken directly from a decision of Single Judge Tarfusser of April 2015,<sup>136</sup> five months before the publication of the first edition of the Manual. The explicit inclusion of text to be used by Chambers does appear to go beyond the boundaries of what might be expected of a merely advisory document. The text in question states that 'The following procedure *shall* apply for exceptions to disclosure by the Prosecutor which are subject to judicial control, *i.e.* under Rule 81(2) and (4) of the Rules of Procedure and Evidence.'<sup>137</sup> The use of the word 'shall' does not suggest that Chambers are granted leeway in deciding what procedure applies in such circumstances. Moreover, we might ask whether the setting out of what effectively constitute exceptions to Rules 81(2) and 81(4) oversteps the role that might be expected of the Manual,<sup>138</sup> or whether the establishment of such a procedure is the kind of change that requires a formal amendment of the Rule. The wording and style of the Practice Manual stands in contrast to comparable documents, such as the International Court of Justice's Practice Directions, which uses more nuanced phrases, such as 'the Court will find it very helpful if...'<sup>139</sup> and '[t]he Court wishes to discourage...'.<sup>140</sup>

#### 4. The Impact of the Chambers Practice Manual in Practice

It is beyond question from the above that the Chambers Practice Manual represents, in principle, nothing more than a guidance document that Chambers should not feel

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allegation – preferably with hyperlinks to Ringtail – *is encouraged.*' (emphasis added)

<sup>134</sup> *Ibid.*, 14.

<sup>135</sup> *Ibid.*, 24-25.

<sup>136</sup> Decision on issues related to disclosure and exceptions thereto, *Ongwen* (ICC-02/04-01/15-224), Pre-Trial Chamber II, 23 April 2015.

<sup>137</sup> Chambers Practice Manual, *supra* note 1, 24 (emphasis added).

<sup>138</sup> J. Lindenmann, 'Stärkung der Effizienz der Verfahren vor dem Internationalen Strafgerichtshof' 10/2015 *Zeitschrift für Internationale Strafrechtsdogmatik* (2015), 529, at 529-530 (illustrating some potential examples that would constitute practice changes ('*Praxisänderungen*')).

<sup>139</sup> International Court of Justice, Practice Directions, October 2001 (as amended on 20 January 2009 and 21 March 2013), Practice Direction VI.

<sup>140</sup> *Ibid.*, Practice Direction I.

obliged to consistently follow, but that in practice, it has been broadly perceived as an alternative to normative amendments (to the Rules of Procedure and Evidence, Regulations of the Court, and Statute). Beyond that widespread perception, it is important to examine the actual influence of the Manual in practice. As shall be shown through a case study of a distinct issue – the quality and quantity of evidence required for a Confirmation of the Charges decision – the majority of judges of the Pre-Trial Chamber have perhaps shown an undue deference to the Manual, and this has led to disagreements in practice between the majority and two of the five Pre-Trial judges. The treatment of the Manual as though it were formally binding on the Chambers of the Court, in turn, raises issues surrounding legal certainty and predictability, fairness, and coherence.

#### *A. Evidentiary Thresholds for Confirmation of Charges Decisions*

The ICC's statutory framework introduced a procedural hurdle for the prosecution to overcome before a case could proceed to trial, through its confirmation of the charges procedure. Pursuant to Article 61(7) of the Statute, the Pre-Trial Chamber must establish 'whether there is sufficient evidence to establish substantial grounds to believe' that the accused committed the crimes charged.<sup>141</sup> In its first ten years of operation, four of 14 cases before the Court had fallen at this procedural stage, with the Pre-Trial Chamber refusing to confirm the charges on the basis that the evidence before it did not meet the standard of proof ('substantial grounds to believe') for that stage of proceedings.<sup>142</sup> Thus, a key issue before the Court has been the amount and quality of the evidence that the Prosecutor should place before the Pre-Trial Chamber in order to cross this evidentiary threshold. On the one hand, the Court is adamant that

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<sup>141</sup> Art 61(7) ICCSt. See further, I. Stegmiller, 'Confirmation of Charges', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 891; T. Mariniello and N. Pons, 'The Confirmation of Charges at the International Criminal Court: a Tale of Two Models', in T. Mariniello (ed.), *The International Criminal Court: In Search of its Purpose and Identity* (Routledge, 2015), 217.

<sup>142</sup> These are: Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/05-02/09-243), Pre-Trial Chamber I, 8 February 2010; Decision on the Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10-465), Pre-Trial Chamber I, 16 December 2011; the case of Kosgey in Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Ruto et al.* (ICC-01/09-01/11-373), Pre-Trial Chamber II, 5 February 2012, and the case of Hussein Ali in Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura et al.* (ICC-01/09-02/11-382), Pre-Trial Chamber II, 29 January 2012. See further W.A. Schabas, 'Thoughts on the Kenya Confirmation Decisions', *PhD Studies in Human Rights*, 30 January 2012, depicting this as a 'failure rate of 29%'.

the Confirmation of Charges procedure should not become a ‘mini-trial’,<sup>143</sup> and previous confirmation decisions had been critiqued for their length and detail.<sup>144</sup> On the other hand, the presumption of innocence necessitates that a person should not be put on a trial for a crime where there is a lack of sufficiently compelling charges going beyond mere theory or suspicion.<sup>145</sup> The fact that four cases had failed to reach the evidentiary threshold shows the value of the process for protecting both the right to liberty of suspects and the resources of the Court, by ensuring that prosecutions where there is no realistic prospect of success are not pursued. While other legal systems subject charges to less searching scrutiny before cases can proceed to trial, the Confirmation of Charges hearing is an important part of the ICC’s legal framework.<sup>146</sup>

The Chambers Practice Manual attempts to relieve some of the uncertainty surrounding the evidentiary threshold by establishing clear guidelines on the scope and quality of evidence required for the confirmation stage of proceedings. The Manual establishes that live witnesses are not required at this stage of proceedings,<sup>147</sup> that there is no need for parties to prepare an ‘in-depth analysis chart’ or similar, linking the evidence to the charges,<sup>148</sup> and that Pre-Trial Chambers should not provide footnotes in the ‘charges’ section of their confirmation of the charges decisions, linking the charges to the evidence presented to the Chamber.<sup>149</sup> This latter point stands in contrast to recent academic analysis, which has argued for factual findings to be more explicitly linked to the evidence received by the Chamber, not less.<sup>150</sup> Indeed, it could be argued that the Manual effectively lowers the evidentiary threshold for confirmation hearings – previous practice had explicitly required that cases be as

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<sup>143</sup> Decision on the confirmation of charges, *Katanga and Chui* (ICC-01/04-01/07-717), Pre-Trial Chamber I, 13 October 2008, § 64.

<sup>144</sup> See further, V. Nerlich, ‘The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?’, 10 *Journal of International Criminal Justice* (2012) 1339.

<sup>145</sup> Decision on the confirmation of charges, *Lubanga* (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber I, 14 May 2007, § 37.

<sup>146</sup> Nerlich, *supra* note 144; W.A. Schabas, E. Chaitidou, and M. El-Zeid, ‘Article 61’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> edn: Hart/Beck, 2016) 1484.

<sup>147</sup> Chambers Practice Manual, *supra* note 1, 14.

<sup>148</sup> *Ibid.*, 10, 13; see *supra*, text to notes 106-114, for further analysis.

<sup>149</sup> *Ibid.*, 12.

<sup>150</sup> E.g. M. Cupido, ‘Facing Facts in International Criminal Law: A Casuistic Model of Judicial Reasoning’, 14 *Journal of International Criminal Justice* (2016) 1; Y. McDermott, ‘Inferential Reasoning and Proof in International Criminal Trials’, 13 *Journal of International Criminal Justice* (2015) 507.



‘trial-ready’ as possible at this stage of proceedings,<sup>151</sup> and had noted that it was important that cases did not proceed to trial where the evidence was ‘riddled with ambiguities’.<sup>152</sup> Thus, the previous practice does seem, on its face, to have required a level of evaluation of the evidence that appears to be minimised by the Manual.

This issue came to a head in relation to the first two Confirmation of the Charges decisions issued after the publication of the Pre-Trial Practice Manual – in the cases against Ahmad al-Faqi Al-Mahdi<sup>153</sup> and Dominic Ongwen.<sup>154</sup> Both cases illustrate a deep division between judges of the Pre-Trial Chamber on the extent to which evidence should be thoroughly evaluated for the purposes of establishing whether there are substantial grounds to believe that a crime within the jurisdiction of the Court has been committed. They also highlight a difference of opinion on the extent to which Chambers are bound to follow the guidance set out in the Manual.

In *Ongwen*, the defence sought leave to appeal the Confirmation of Charges decision on the basis that it was insufficiently reasoned.<sup>155</sup> It is notable that the Manual sets out strict limits on the extent of Pre-Trial Chambers’ reasoning, noting that it should be confined ‘to what is necessary and sufficient for the Chamber’s findings on the charges’,<sup>156</sup> on the basis that the Pre-Trial Chamber should not pre-adjudicate matters that are to be considered at trial.<sup>157</sup> The Manual also sets out a detailed structure for Confirmation decisions – each decision should distinguish between the ‘factual findings’, the ‘legal findings’, and the ‘operative part’ of the decision, reproducing *verbatim* the charges put forward by the Prosecutor that have been confirmed by the Pre-Trial Chamber.<sup>158</sup> The intention appears to be, because ICC proceedings do not have indictments *per se*,<sup>159</sup> the ‘operative part’ of the

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<sup>151</sup> E.g. Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, *Mbarushimana* (ICC-01/04-01/10-514), Appeals Chamber, 30 May 2012, § 44. Trial-readiness is noted as desirable in Chambers Practice Manual, *supra* note 1, 8.

<sup>152</sup> *Ibid.*, § 46.

<sup>153</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, *Al Mahdi* (ICC-01/12-01/15-84), Pre-Trial Chamber I, 24 March 2016.

<sup>154</sup> Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422), Pre-Trial Chamber II, 23 March 2016.

<sup>155</sup> Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, *Ongwen* (ICC-02/04-01/15-423), Defence, 29 March 2016, §§ 25-35.

<sup>156</sup> Chambers Practice Manual, *supra* note 1, 13.

<sup>157</sup> Mariniello and Pons, *supra* note 141, 234; M. Miraglia, ‘Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga’ 6 *Journal of International Criminal Justice* (2008), 496, 497.

<sup>158</sup> Chambers Practice Manual, *supra* note 1, 16-18.

<sup>159</sup> For further discussion, see V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Nijhoff, 2008), 3.

confirmation decision would become the conclusive statement of the charges faced by the accused as confirmed by the Pre-Trial Chamber.<sup>160</sup> The Manual states that only the operative part of the decision will be binding, and ‘after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content.’<sup>161</sup>

The defence argument in *Ongwen* was that the Confirmation decision was ‘riddled with findings whose basis and reasoning is not clear.’<sup>162</sup> Some examples given included the factual finding at paragraph 56 of the decision, stating that ‘the evidence overwhelmingly shows’ an effective hierarchical structure within the LRA, but without reference to any evidence,<sup>163</sup> and the findings on communications between Ongwen and Joseph Kony, again unreferenced to the evidence presented.<sup>164</sup> Indeed, the length of the Confirmation decision and the degree to which the factual findings are linked to particular pieces of evidence represents a notable departure from previous practice. The ‘findings’ part of the decision spans fewer than 50 pages with a total of 37 footnotes,<sup>165</sup> which is remarkable, in light of the fact that 70 counts of crimes against humanity and war crimes were confirmed.<sup>166</sup> The ‘charges’ part of the decision, which, as required by the Manual, does not cross-reference any evidence,<sup>167</sup> is almost as long as the first part of the Decision, at 33 pages long. By contrast, the confirmation decision issued in the case of Charles Blé Goudé in December 2014, confirming four counts of crimes against humanity, contains a section dedicated to ‘analysis of the evidence’ (roughly equivalent to the ‘findings’ section in the new format for confirmation decisions) that spans 72 pages with no

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<sup>160</sup> This is probably preferable to the approach taken in the *Katanga and Chui* confirmation decision, *supra* note 143, where the decision concludes with a number of paragraphs of narrative; the new approach makes it more clear as to precisely which aspects of the charges have been confirmed.

<sup>161</sup> Chambers Practice Manual, *supra* note 1, 16. This guidance in the Manual has not been followed by the Chamber in *Gbagbo*, as discussed *infra*, text to note 201.

<sup>162</sup> Defence request, *supra* note 155, § 27. There were four other issues included in this Request to Appeal the Confirmation decision, but only the issue of judicial reasoning (or lack thereof) is relevant for this piece.

<sup>163</sup> *Ibid.*, § 27

<sup>164</sup> *Ibid.*, § 28; see e.g. *Ongwen* Confirmation Decision, *supra* note 154, § 78 (‘The evidence demonstrates that Dominic Ongwen devised the plan to attack Lukodi, and sought and obtained permission from Joseph Kony for the attack – this particular radio communication was intercepted on 17 May 2004.’), which includes no footnote to the relevant evidence that supports this finding.

<sup>165</sup> *Ongwen* Confirmation Decision, *ibid.*, 23-70. In addition, on 19 separate pages, the testimony or written statements of witnesses are referred to in brackets, whereas differently-constituted Pre-Trial Chambers in the past would have used footnotes for such references.

<sup>166</sup> *Ibid.*, 71-104.

<sup>167</sup> Chambers Practice Manual, *supra* note 1, 18.

fewer than 421 footnotes referencing the evidence.<sup>168</sup> The operative part<sup>169</sup> of the Blé Goudé Confirmation decision spans seven pages.<sup>170</sup>

Despite there being a readily apparent difference in the level of detail between its decision and previous confirmation decisions, the Pre-Trial Chamber was less than impressed by the defence's argument on the allegedly insufficient reasoning in the Confirmation decision; it found that any party engaged in judicial proceedings could potentially argue that a decision it disagreed with was not reasoned enough.<sup>171</sup> It went on to hold that 'that the decision is, in the view of the Chamber which rendered it, sufficiently reasoned.'<sup>172</sup> This is a rather unusual response to the allegations of insufficient reasoning. The right to a reasoned judgment requires that a court indicates 'with sufficient clarity the grounds on which they based their decision',<sup>173</sup> so as to make it possible for an accused to exercise their right of appeal if there is an error in those grounds.<sup>174</sup> It would surely have been preferable for the Chamber to indicate precisely how the grounds on which its earlier decision was based were clearly stated in the Confirmation decision, rather than entering into the circular argument that the decision was sufficiently reasoned because the Chamber that issued it thought it to be sufficiently reasoned.

The Chamber further concluded that the Defence had misunderstood 'the nature, purpose and structure of the Confirmation Decision' and that its argument 'is predicated on a failure to appreciate the distinction between the Chamber's reasoning in the Confirmation Decision, on the one hand, and the disposition in such decision (i.e. the confirmed charges), on the other hand.'<sup>175</sup> In other words, the majority noted,

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<sup>168</sup> Decision on the confirmation of charges against Charles Blé Goudé, *Blé Goudé* (ICC-02/11-02/11-186), Pre-Trial Chamber I, 11 December 2014, 10-82; fns 20-441.

<sup>169</sup> The operative part is entitled, 'Facts and Circumstances and their Legal Characterisation Confirmed by the Chamber' in *Blé Goudé*, *ibid.*

<sup>170</sup> *Ibid.*, 82-89.

<sup>171</sup> Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *Ongwen* (ICC-02/04-01/15-428), Pre-Trial Chamber II, 29 April 2016, § 21.

<sup>172</sup> *Ibid.*

<sup>173</sup> Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', *Lubanga* (ICC-01/04-01/06-773), Appeals Chamber, 14 December 2006, § 20, citing *Hadjianastassiou v. Greece* (App. No. 12945/87), ECtHR, 16 December 1992. See further, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, *Milutinović* (IT-05-87-AR65.1), Appeals Chamber, 1 November 2005, § 11.

<sup>174</sup> *Lubanga*, *ibid.*; *Karyagin, Matveyev and Korolev v. Russia* (App. Nos. 72839/01, 74124/01 and 15625/02), ECtHR, 28 May 2009, § 25; Judgement on Sentencing Appeal, *Nikolić* (IT-02-60/1-A), Appeals Chamber, 8 March 2006, § 96; Judgment, *Kunarac* (IT-96-23 & 23/1-A), Appeals Chamber, 12 June 2002, § 41.

<sup>175</sup> *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of

the fact that the Chamber did not explicitly link the charges confirmed to the evidence or findings of fact (and in so doing, followed the instruction set out in the Manual), did not mean that it had not provided sufficient reasoning on why those charges were confirmed. However, the defence request for appeal cited the factual findings, and not the operative part of the decision, and thus the defence did not appear to be labouring under a misapprehension of the nature and structure of the Confirmation Decision.

Notwithstanding this fact, it is difficult to reconcile the Chamber's interpretation that a clear link does not need to be drawn between the evidence and the charges with the wording of Article 61(7), which requires the Pre-Trial Chamber to 'determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed *each of the crimes charged*'<sup>176</sup> and to confirm the charges and commit the person for trial only for those charges where it has deemed that there is sufficient evidence to meet the evidentiary threshold of 'substantial grounds to believe'.<sup>177</sup> In addition, the Rules of Procedure and Evidence make it clear that Chambers, including Pre-Trial Chambers, have the authority to freely assess the evidence before them.<sup>178</sup> Previous Pre-Trial Chambers, while acknowledging that the confirmation hearing is not a 'mini-trial', have explicitly acknowledged the role of the hearing in ensuring that 'only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought' are committed for trial,<sup>179</sup> and that to that end, there must be 'concrete and tangible proof demonstrating a clear line of reasoning underpinning specific allegations.'<sup>180</sup> The majority in *Ongwen* appears to mark a clear departure from previous confirmation decisions, where factual findings were explicitly linked to pieces of evidence through footnotes.

Judge Marc Perrin de Brichambaut, in his partially dissenting opinion to the Decision on the Defence request for leave to appeal the decision on the confirmation

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charges, *supra* note 171, § 24.

<sup>176</sup> Art 61(7) ICCSt. (emphasis added).

<sup>177</sup> Art 61(7)(a) ICCSt. See further, Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo* (ICC-02/11-01/11-656), Pre-Trial Chamber I, 12 June 2014, Dissenting Opinion of Judge Christine Van den Wyngaert, § 4, stating that 'must be at least enough of an evidentiary basis to sustain a possible conviction on the assumption that these questions are resolved in favour of the Prosecutor at trial'; *Katanga* Confirmation Decision, *supra* note 143, Partly Dissenting Opinion of Judge Anita Usacka, § 2 ('it is the duty of the Chamber to determine whether it is thoroughly satisfied that the evidence presented on each element meets the requisite legal standard'.)

<sup>178</sup> Rule 63(2) ICC RPE. Rule 63(1) states that the Rules relating to evidence apply 'in proceedings before all Chambers.'

<sup>179</sup> *Lubanga* Confirmation Decision, *supra* note **Error! Bookmark not defined.**, § 37.

<sup>180</sup> Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Bemba et al.* (ICC-01/05-01/13-749), Pre-Trial Chamber II, 15 November 2014, § 25.

of charges noted that the list of charges in the operative part of a confirmation of charges hearing cannot overcome the Chamber's obligation to provide an account of the reasons why those charges were confirmed.<sup>181</sup> He noted that any confirmation of charges decision 'in which a Bench drastically curtails discussion of the reasons... calls into question whether there is any use in having a statement of reasons in a decision on the confirmation of charges; and it amounts to upholding that, in decisions on the confirmation of charges, it is no longer necessary to explain why there is sufficient evidence to commit a person for trial'.<sup>182</sup> In practice, as can be seen from the *Ongwen* confirmation of the charges decision, this approach leads to an inconsistency in the level of reasoning provided to support particular charges. We might compare, for example, the Confirmation decision's findings on persecution with its findings on forced pregnancy, both charges confirmed by the Pre-Trial Chamber. As regards persecution, the crime against humanity of denial of a fundamental right on discriminatory grounds,<sup>183</sup> neither the precise rights denied nor the discriminatory basis for their denial are fully elucidated until the operative part of decision (i.e. the list of confirmed charges).<sup>184</sup> There, we are told that the discriminatory basis was political, as the accused and his alleged co-perpetrators perceived the victims to be supporters of the Ugandan government. The evidential basis for this finding is not elucidated anywhere in the findings part of the decision – we are simply told that the elements of the crime are 'sufficiently established by the evidence'.<sup>185</sup> By contrast, for the factual findings on forced pregnancy, the elements of the crime are fully elucidated before the evidence of eight witnesses is set out in detail in establishing that there were substantial grounds to believe that Dominic Ongwen directly committed this crime as well as other sexual and gender based crimes – the in-depth analysis of this category of crimes spans 21 of the 46 pages of findings in the confirmation decision.

That is not, of course, to suggest that no evidence exists on any of the charges; it is merely to point out that if it does exist, the Pre-Trial Chamber gave no indication of where it could be found. As Judge Perrin de Brichambaut pointed out in his separate opinion to the confirmation decision, the Prosecutor had, at the Chamber's

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<sup>181</sup> *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *supra* note 171, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, § 14.

<sup>182</sup> *Ibid.*, § 15.

<sup>183</sup> Art 7(1)(h) ICCSt.

<sup>184</sup> *Ongwen* Confirmation Decision, *supra* note 154, §§ 81, 84, 88.

<sup>185</sup> e.g. *Ongwen* Confirmation Decision, *supra* note 154, § 79. See also, §§ 69, 74, 80, 84.

request, provided a ‘pre-confirmation brief’, which set out in detail the evidence that linked the accused to the charges across over 250 pages.<sup>186</sup> The Chamber’s confirmation decision, by contrast, is much less methodical, with uncertainty as to how, if at all, several charges are supported by the evidence presented. It is unsurprising, therefore, that Judge Perrin de Brichambaut found the majority’s treatment of the evidence on certain charges and modes of liability to be somewhat uneven.<sup>187</sup>

There is little doubt that the Chamber’s insufficiently detailed examination of the evidence was heavily influenced by the instructions laid out in the Manual. In its response to the defence application for leave to appeal, the Chamber, although it did not explicitly refer to the Manual, chided the defence for not fully appreciating what it saw as a clear delineation between the ‘reasoning’ part and the ‘charges’ part of the decision.<sup>188</sup> This delineation, as mentioned above, is the progeny of the Manual alone. Some might argue that this division between the charges and the factual findings leads to a less focused decision. On the other hand, some supporters of the formulation might argue that it prevents confirmation hearings unnecessarily morphing into ‘mini-trials’ where the evidence is examined to a standard of proof much higher than that established in Article 61, and further clarifies exactly which charges in the Prosecutor’s Document Containing the Charges have been confirmed by the Pre-Trial Chamber. However, the structural amendments as set out in the Manual cannot give judges *carte blanche* to abandon standards of proof and the thorough evaluation of evidence against that standard, as is clearly still required by the Statute.<sup>189</sup>

A similar tension on the level of reasoning required for the confirmation of charges arose in the *Al Mahdi* confirmation of charges decision.<sup>190</sup> Judge Kovacs, in his dissent, criticised the decision for its absence of ‘concrete references to the relevant pieces of evidence, which support the Prosecutor’s allegations.’<sup>191</sup> In a similar manner to Judge Perrin de Brichambaut’s separate opinion in *Ongwen*, Judge Kovacs noted that the Chamber was obliged to determine whether the evidence

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<sup>186</sup> *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *supra* note 171, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, § 9.

<sup>187</sup> *Ibid.*, § 14.

<sup>188</sup> *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *supra* note 171, §§ 26-27.

<sup>189</sup> *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *supra* note 171, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, § 11.

<sup>190</sup> *Al Mahdi* Confirmation Decision, *supra* note 153.

<sup>191</sup> *Ibid.*, Separate Opinion of Judge Peter Kovacs, § 4.

presented met the standard of proof set out in Article 61(7). In his opinion, the majority's decision had failed to 'provide a clear and well-reasoned decision, which presents a full account of the relevant facts and law in order to reveal transparency of the judicial process and guarantee a considerable degree of persuasiveness'.<sup>192</sup>

The key issue here is the amount of scrutiny that judges are expected to subject the evidential record to in confirmation decisions. It would appear that the majority opinion in both decisions felt that the evidential record as a whole supported the charges put forward by the prosecution, without feeling the need to rigorously link the evidence with the particular element(s) of the relevant charge. This is symptomatic of a broader debate between 'holism' and 'atomism' in international criminal fact-finding, which I have discussed at length elsewhere.<sup>193</sup>

Some might argue that a holistic overview of the evidence is all that is required at the confirmation of the charges stage, where the standard of proof is much lower than the trial standard of proof beyond reasonable doubt.<sup>194</sup> To subject each piece of evidence to a level of scrutiny that requires the Court to elaborate on precisely which element of the charges that evidence might support, the argument might go, would be to raise the standard of proof from 'substantial grounds to believe' to 'beyond reasonable doubt'. However, as Judge Kovacs pointed out in his dissent in *Al Mahdi*, an earlier stage of proceedings with a lower standard of proof 'does not justify a light assessment of facts or disregarding the proper presentation of evidence submitted',<sup>195</sup> it simply requires that a serious examination be carried out of the evidence in the light of the applicable (lower) standard of proof. To subject the evidence to a less searching scrutiny would have the effect of rendering the confirmation of the charges stage little more than a rubber-stamping exercise, where all that is required is for the prosecution to show that some crimes happened in the particular situation and that there are reasons to link the accused to some of those crimes, with the precise details to be worked out later. This would effectively render the confirmation hearing meaningless, and may well lead to inefficiencies later on, where the prosecution is still developing its theory of the case as the trial progresses.

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<sup>192</sup> *Ibid.*, § 6.

<sup>193</sup> Y. McDermott, 'Strengthening the Evaluation of Evidence in International Criminal Trials' 17 *International Criminal Law Review* (2017) 682.

<sup>194</sup> T. Mariniello, 'Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure' 13 *Journal of International Criminal Justice* (2015) 579.

<sup>195</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, Separate Opinion of Judge Peter Kovacs, § 7.

The majority decisions in *Ongwen* and *Al-Mahdi* apparently found some support for their approach in the Manual, insofar as it explicitly requires that the charges confirmed must not be cross-referenced to the evidence or factual findings. This stands to reason, insofar as it is the charges confirmed that are carried forward to trial.<sup>196</sup> However, the Manual does not, on its face, lower the level of evaluation of evidence required, although this may well be how these Chambers have read it. As Judge Kovacs noted in his dissent, ‘an assessment even against the backdrop of a relatively low evidentiary standard of proof should be carried out thoroughly and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber.’<sup>197</sup> The Majority in *Al Mahdi*, by contrast, believed that the Pre-Trial Chamber had no role in assessing apparent contradictions in the evidence or in adjudging the credibility of witnesses, preferring instead to leave such matters to the Trial Chamber.<sup>198</sup> This approach stands in contrast to previous jurisprudence. In *Mbarushimana*, the Pre-Trial Chamber held that the Chamber’s role was to consider elements of inconsistency, incoherence and ambiguity in the evidence and to treat such evidence with caution.<sup>199</sup>

Moreover, the legal framework of the Court draws no distinction on the standards of evidence depending on the stage of proceedings – Article 69 of the Statute on evidence refers to ‘the Court’, not to ‘the Trial Chamber’, while Rule 63(1) of the Rules of Procedure and Evidence states that ‘The rules of evidence set forth in this chapter, together with article 69, *shall apply in proceedings before all Chambers.*’<sup>200</sup> The remainder of Rule 63 refers to ‘a Chamber’, which can be taken to mean Pre-Trial, Trial, or Appeals Chamber. Pursuant to Rule 63(2), Chambers have the authority to assess freely the evidence before them to determine its relevance or admissibility. The Pre-Trial Chambers’ refusal to undertake such a free evaluation of the evidence in the *Al Mahdi* and *Ongwen* appears to abdicate this authority.<sup>201</sup>

There is a broader issue here as to the importance attached to the Chambers Practice Manual by the Majority in both *Ongwen* and *Al Mahdi*. Both dissenting

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<sup>196</sup> Chambers Practice Manual, *supra* note 1, 17.

<sup>197</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, Separate Opinion of Judge Peter Kovacs, § 7.

<sup>198</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, §§ 18-19.

<sup>199</sup> *Mbarushimana* Confirmation Decision, *supra* note 142, § 47, confirmed by *Mbarushimana* Confirmation Appeals Decision, *supra* note 151, § 40.

<sup>200</sup> Rule 63(1) ICC RPE (emphasis added).

<sup>201</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, Separate Opinion of Judge Peter Kovacs, §§ 11-12.



judges noted that their colleagues' reasoning was heavily influenced by the standards set out in the Manual.<sup>202</sup> It stands to reason that if the purpose of the Manual was to streamline 'best practices', judges may be unwilling to depart from those established practices. However, there is no doctrine of *stare decisis* before the International Criminal Court, so even if the Manual were a reflection of clearly established practices before the Court (and that is questionable<sup>203</sup>), those prior decisions are not binding on future Chambers.<sup>204</sup> In addition, it must be borne in mind that the Manual has no legal status before the Court – being a creation of the judges themselves, it is not mentioned in the Statute as a source of law, or referred to in the Rules of Procedure and Evidence. Thus, if a conflict arises between the Rules or Statute and the Manual, there is no question that the latter must defer to the former. It does seem from this early practice that an undue deference has been shown to the Manual, without a full evaluation of whether its content is in tension with the Court's legal framework.

Before turning to an examination of the consequences of showing undue deference towards the Manual, it is important to note that the approach of the Majority in both *Ongwen* and *Al-Mahdi* has not been universal. In *Gbagbo*, the defence appealed against a decision that gave notice pursuant to Regulation 55 of the Regulations of the Court that the mode of liability may be subject to change,<sup>205</sup> submitting, amongst other arguments, that this decision was in contravention to the Manual, which aims to '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.'<sup>206</sup> The Appeals Chamber considered this argument to be 'misguided', noting that the Manual was not binding, and that a 'Trial Chamber cannot be constrained in its application of Regulation 55 by a recommendation contained in the Pre-Trial Practice Manual.'<sup>207</sup> While this interpretation has been criticised as leaving observers of the Court wondering what the point of having a practice manual is, if not

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<sup>202</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, Separate Opinion of Judge Peter Kovacs, § 13; *Ongwen* Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *supra* note 171, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, § 13.

<sup>203</sup> See *supra*, text to notes 106-114.

<sup>204</sup> See *supra*, text to notes 118-120.

<sup>205</sup> *Gbagbo* Judgment on Regulation 55 Appeal, *supra* note 127.

<sup>206</sup> Chambers Practice Manual, *supra* note 1, 19.

<sup>207</sup> Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", § 54.

to give some guidance as to how Chambers will act on a particular manner,<sup>208</sup> this undoubtedly is the correct interpretation of the Manual.

### *B. Consequences of Undue Deference to the Manual*

It may be argued that the possibility that some judges have treated the Chambers Practice Manual with more authority than should attach to a guidance document is of little practical concern. Indeed, some may argue that it is a positive development insofar as it ensures consistency across differently-constituted Chambers, although that argument may be unsupported, given the lack of consistency illustrated by the *Gbagbo* case as discussed above. However, the example set out above – on the level of evaluation of evidence required for confirmation decisions – illustrates that this can have very real consequences for the fairness of proceedings and, as a result, for the legitimacy of the Court. More broadly, this practice raises concerns for legal certainty and the determinacy of international criminal law. While the Manual has the potential for enormous utility, and to enhance certainty by setting down the consistent standards that have been developed in the case law of the Court that should be followed in later practice, this is diminished by the fact that it remains open to Chambers to disregard those practice directions, whereas Rule or Regulation amendments would result in more consistent practice across the Court. Furthermore, as illustrated above, resorting to the Manual rather than one of the traditional avenues for procedural change (*via* Rule or Regulation amendments) has the potential to sow discord amongst the judges instead of crystallizing consensus.

From a fair trial perspective, the less detailed treatment of the evidence in decisions relating to the confirmation of charges raises several concerns. The principle driving the need for a confirmation of charges stage in proceedings was the recognition that accused persons should not be put through lengthy international criminal proceedings if there was insufficient evidence from the outset to substantially support the charges against them. However, when a Chamber does not set out the precise reasons why the evidence gives rise to substantial grounds to believe that an accused person committed the crimes charged, this raises the potential that cases with a weaker evidential basis will proceed to trial only for the accused to be acquitted at

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<sup>208</sup> D. Jacobs, 'A Tale of Four Illusions: The Rights of the Defense before International Criminal Tribunals', in C. Rohan and G. Zyberi, *Defense Perspectives on International Criminal Justice* (Cambridge University Press, 2017), 559-560.

the end of a process. This is significant, not least because cases against four suspects before the Court failed to proceed past the confirmation stage, owing to a lack of evidence.<sup>209</sup> Moreover, the failure to set out a precise evidential basis for the confirmation of charges gives rise to a risk that the defendant will not be in a position to raise defences or introduce competing evidence to defend themselves against the charges, in violation of their rights under Article 67(1)(e) of the Statute. Furthermore, it could be argued that a less rigorous treatment of the evidence reflects a breach of the presumption of evidence, insofar as the prosecution's evidence is not subjected to the searching scrutiny that would be expected where the accused is genuinely presumed innocent.

Excessive deference to the Manual also gives rise to issues surrounding legal certainty, given that the parties will not only have to draft their arguments referencing the Rules of Procedure and Evidence, Statute, and established jurisprudence; they will also have to refer to an ever-changing catalogue of 'best practice' identified by the Judges. Given that the Manual can be changed by the Judges of the Court, with no legal record of the impetus for such changes and/or the discussions that led to that change, the process for procedural change at the ICC is likely to become much more opaque than what was envisioned by the drafters of the Statute, who saw the benefit in considering proposed amendments in the public forum of the Assembly of States Parties. While it may be argued that the identification of best practices gives rise to greater legal certainty, the fact that the source of such best practice in the case law is often less than clear perhaps detracts from that potential advantage.

Perhaps as an aside, the minimalist approach to the factual and legal assessment of the evidence and charges, as preferred by the Manual and followed by the Pre-Trial Chambers in *Ongwen* and *Al-Mahdi*, gives rise to a broader question as to the role of the function of Confirmation decisions in clarifying the definitions of crimes and illustrating the elements of crimes. This was particularly significant for those cases where the case did not proceed beyond the confirmation stage – for example, the *Abu Garda* Confirmation decision provides us with the ICC's definition of an 'attack' for the purposes of establishing the war crime of attacking peacekeeping missions,<sup>210</sup> even though no charges were confirmed against the accused,<sup>211</sup> while the

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<sup>209</sup> *Supra* note 142.

<sup>210</sup> *Abu Garda* Confirmation Decision, *supra* note 142, §§ 60-76.

<sup>211</sup> *Ibid.*, § 236.

*Katanga and Chui* Confirmation decision provides an extensive illustration of what might constitute outrages upon personal dignity,<sup>212</sup> even though no charges were confirmed on this count.<sup>213</sup> It may be argued that it was never the intention of the drafters for Confirmation decisions to provide a full elucidation of the elements of the crimes,<sup>214</sup> but in light of the Court's less than overwhelming rate of completed cases, confirmation decisions have, in the past, borne an important illustrative function that they no longer appear to play. To give an example, in *Al Mahdi*, the Pre-Trial Chamber did not enter into a discussion as to the meaning of an 'attack' for the purposes of Article 8(2)(e)(iv) of the Statute, but rather noted that the Structures had been targeted for their historical and religious character, and that full destruction of the targeted cultural property was not required under the Statute.<sup>215</sup> Had it entered into an assessment of the meaning of the word 'attack', the Pre-Trial Chamber would doubtless have recalled the *Abu Garda* Confirmation decision's definition of 'attack' as meaning 'acts of violence against the adversary, whether in offence or in defence';<sup>216</sup> this is difficult to square with the interpretation in *Al Mahdi* that the destruction of property by a rebel group in territory occupied by, and under the control of, that group constitutes a war crime in non-international armed conflicts.<sup>217</sup> By the same token, the decision by states to destroy a building dedicated to religion, education, art, history, science, or medicine that are not military objectives in times of armed conflicts, regardless of motive, could now constitute a war crime.<sup>218</sup> An absence of detailed reasoning on definitional issues can lead to such anomalies, which are not always solved by later Trial judgments.<sup>219</sup>

In addition, given that changes to the ICC's Rules of Procedure and Evidence are debated in public, via the ASP framework, the use of the Manual to avoid the process set out in the ICC's legal framework, as discussed above, may lead to the perception that a shroud of secrecy cloaks the operation of procedural amendments

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<sup>212</sup> *Katanga and Chui* Confirmation Decision, *supra* note 134, §§ 365-372.

<sup>213</sup> *Ibid.*, § 577.

<sup>214</sup> *Abu Garda* Confirmation Decision, *supra* note 142, Separate Opinion of Judge Cuno Tarfusser.

<sup>215</sup> *Al Mahdi* Confirmation Decision, *supra* note 153, §§ 42 and 43.

<sup>216</sup> *Abu Garda* Confirmation Decision, § 65.

<sup>217</sup> W. Schabas, 'Al Mahdi has been Convicted of a Crime he did not Commit' 49 *Case Western Reserve Journal of International Law* (2017) 75.

<sup>218</sup> *Ibid.*

<sup>219</sup> Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016, § 15 notes its interpretation that 'international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it' – the cited source for this assertion is the preceding paragraph of the judgment itself, which speaks of the special protection afforded to cultural property and fails to define an 'attack' for these purposes.

via the Manual. More generally, this may lead to the dilution of the impression that procedural rules act as a check on judges' untrammelled power, given that it is the judges themselves who are establishing and amending those procedural frameworks.<sup>220</sup>

### **Conclusion**

The International Criminal Court's Chambers Practice Manual, first introduced in 2015 as a guide to judges of 'best practices' to apply before the Court and amended every year since, has been hailed as a positive step towards consistency in practice, by giving clarity to parties as to best practices developed in the case law which are to be followed. It has also been celebrated as a means to ensure that judge-led amendments to procedural practices can be implemented without recourse to formal processes that can be both unwieldy and excessively politicised. This article provided the first rigorous assessment of the effect of the Manual in practice, and it showed that the Manual marks a return to procedural law-making by judges in international criminal law, despite it being the intention of the drafters of the ICC Statute that the power to draft and amend procedural rules should lie with states. Despite recent attempts to foment, and early success with establishing, a collegiate approach between the Court and the Assembly of States Parties in the amendment of procedural rules, the practice surrounding formal Rule amendments quickly became politicised and protracted, and this has led to an explicit acknowledgement by judges that they will seek to enact procedural changes through less formal means.

In light of that change in direction, the Chambers Practice Manual is likely to grow in significance as the Court moves away from formal amendment of its legal framework. However, this article has shown some difficulties in that approach, given that aspects of the Manual appear to extend beyond what might be expected from a mere guidance document. Furthermore, this article illustrates that some judges, in the early practice surrounding the Manual, have perhaps given it more deference than it deserves, given that it is neither a primary nor a secondary source of law before the Court. This has been illustrated by a recent debate arising on the standard of evidentiary assessment to be undertaken for the purposes of confirming the charges

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<sup>220</sup> F. Guariglia, 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility', in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002), 1116.

under Article 61 of the ICC Statute. This debate highlights the difficulties that can arise when the Manual is given a normative force that was not intended for it, as a non-binding document. Furthermore, the article illustrates that this recent practice gives rise to concerns about consistency, fairness, and legitimacy that ought to be addressed as the Manual itself, and practice thereto, continues to grow and develop.