

The Presumption of Innocence before the International Criminal Court

Theodore Ngoy Ilunga Wa Nsenga

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Abstract

Historically, persons suspected or accused of the gravest crimes against the whole of humanity have a high profile. They are held to be already guilty by public officials, and systematically detained pending trial. For instance, the accused that appeared before the Nuremberg and Tokyo Military Tribunals were not presumed innocent; neither were suspects who came before the ICTY and ICTR, inasmuch as the presumption of innocence was confined to trial as an evidentiary rule.

Article 66 of the ICC's Statute, however, highlights the presumption of innocence as a right, and, as a corollary, a rule of proof.

It is therefore argued that the presumption of innocence means the right of persons to be treated as innocent until proven guilty by the Prosecutor, who solely bears the burden of proof. Consequently, unless it is applied and interpreted as such, it is most unlikely that the ICC will secure a fair trial for the accused. As a result, this work examines whether the presumption of innocence as the right of everyone to be treated as innocent has been applied, interpreted and protected by the Court, and if so, to what extent, so as to give full effect to the reach of this doctrine.

In order to consider this in depth, the work first discusses the meaning and effects of the presumption of innocence, and subsequently considers its interpretation and application by the Court, in four key respects:

1. Standards of proof;
2. Statements of public officials and media reports;

3. Pre-conviction detention;
4. Rights of Victims.

The work constitutes a doctrinal legal study, which is the most appropriate means of research for the presumption of innocence. In effect, under article 21 (3) of the Statute, the application and interpretation of statutory provisions must be assessed consistent with internationally recognized human rights.

Acknowledgements

In order to protect and maintain international public order, security and peace, the perpetrators of crimes that threaten the international community's well-being must be brought to justice and punished. Before, however, a person has been found guilty of a crime; when a person is suspected or accused; they have an absolute right to the guarantee of a fair trial. They should, therefore, not be deemed to be guilty, until the conviction has been made and all appeal proceedings exhausted.

The right to a fair trial does not, however, only protect and benefit the individual accused; it is in the interest of the whole of society that the true perpetrator is punished and the innocent protected. For that very reason, a person must be presumed innocent until proven otherwise.

Originally, the right to be presumed innocent was not an evidentiary rule but was seen as a safeguard of a persons' innocence up until the end of a trial. This view, however, is not shared by all legal systems and was not present in the Statutes of both the Nuremberg and Tokyo international military tribunals.

It appears *a priori*, however, that article 66 of the Rome Statute of the International Criminal Court has established the presumption of innocence as both a right of persons to be treated as innocent before and during the trial (article 66 (1)) and a rule of proof (article 66 (2) and (3)).

This work deals with the presumption of innocence in its fundamental role as a right of persons to be treated as innocent before conviction and, consequently as a rule of proof, and determines how it should be applied and interpreted by the International Criminal Court so as to present it as a template of human rights in international criminal proceedings.

The right to a fair trial, founded on the right to be presumed innocent, has always been an interest of mine in my work as both a professional and academic lawyer in the Democratic Republic of the Congo, my motherland.

I never thought that I would be living so far from the Country and people I love and cherish. God, however, has made this so. I glorify and honour His great Name in the Name of His Son Jesus-Christ our Saviour. He has been with me through all the times in which I have experienced suffering and humiliation since I was forced to remain in England (Romans 8:28).

In 2007, I came to the UK for a short visit in my capacity as an MP, and had not returned since. Before the end of my planned stay, I discovered that once again the Congolese government wanted to unlawfully arrest me because of my views. Eventually, my house, my lawyer's office and the church of which I am the pastor, 'l'Eglise de la Gombe', were all burnt down. Unable to leave England and return home, I became a political refugee and begun to rebuild my life in an unfamiliar country. The first struggle was and still is the learning of language, of which this thesis has been the ultimate test.

This work would not have been possible without the help of so many people. I would like to thank:

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List of Abbreviations

ACHPR: African Charter on Human and People's Rights.

ACHR: American Convention on Human Rights

AJCL: American Journal of Comparative law

AJIL: American Journal of International Law

ALR: Albany Law Review

AC: Appeal Chamber

AMLR: Ave Maria Law Review

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CAR: Central African Republic

CLF: Criminal Law Forum

CLM: The Criminal Law Magazine

CLMR: Criminal Law Magazine and Reporter

CMR: Criminal Magazine and Reporter

Crim, L.Q: Criminal Law Quarterly

CSLR: Cleveland State Law Review

BLR: Baylor Law Review

DRC: Democratic Republic of the Congo

Duke J. Comp & Int'l L: Duke Journal of Comparative and International law

ECHRFF: European Convention on Human Rights and Fundamental Freedoms Shortly known as the ECHR

ECHR: European Convention on Human Rights

ECtHR: European Court on Human Rights

HLR : The Harvard Law Review

HRC: UN Human Rights Committee

IACtHR: Inter-American Court on Human rights

ICC: International Criminal Court also referred to as the Court

ICCPR: International Covenant on Civil and Political Rights

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

IMTFE: International Military Tribunal for the Far East commonly known as the Tokyo Tribunal

IMT: International Military Tribunal at Nuremberg commonly known as Nuremberg Tribunal.

ILC: International Law Commission

JCLC: Journal of Criminal law and Criminology

JCLIL: Journal of Comparative legislation and International law

LHR: Law and History Review

LJIL: Leiden Journal of International Law

MLJ: Macquarie Law Journal

MLR: Manitoba Law Review

NILQ: Northern Ireland Legal Quarterly

NGO: Non Governmental Organization

NILQ: Northern Ireland Legal Quarterly

OTP: office of the Prosecutor or the Prosecutor

OSLJ: Ohio State Law Journal

PTC: Pre-Trial Chamber

Regulation: A regulation of the Regulations of the Court

Rule: A rule of the Rules of Procedures and Evidence

SAJC: South African Journal of Criminal Justice

SAJHR: South African Journal on Human Rights

SCLR: South Carolina Law Review

SPTL: Society of Public Teachers of Law

SLULJ: Saint Louis University Law Journal

SPTL: Society of Public Teachers of Law

TALJ: The American Journal of International Law

TC: Trial Chamber

TCLR: Trinity College Law Review

TMLR: The Modern Law Review

The Statute: The Rome Statute of the International Criminal Court

The Regulations: The Regulations of the Court

The Rules: The Rules of Procedures and Evidence

TIER: The Irish Ecclesiastical Record

UDHR: Universal Declaration of Human Rights

VLR: Virginia Law Review

W and Lee LR: Washington and Lee Law Review

Wis. Int'l L. J.: Wisconsin International Law Journal

WLLR: Washington and Lee Law Review

Wis. L. Rev.: Wisconsin Law Review

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INTRODUCTION

1. The Problem and the Question of Research

The persons accused before the IMT were supposed to be judged fairly 'in accordance with the sacred principles of law and justice'¹. Nonetheless, according to one of the authoritative scholars,

'only few years later, one of the Nuremberg tribunals held that prosecutors and judges involved in a trial lacking fundamental guarantees of fairness could be held responsible for crimes against humanity'².

It is axiomatic that the presumption of innocence constitutes one of the fundamental guarantees of a fair trial that prosecutors and judges may violate. It is, indeed, regarded in national laws as the principle that governs criminal proceedings³ despite its being 'expressed in very ambiguous terms or entails conditions which render it ineffective'⁴.

¹ In fact, on the very first day of the IMT proceedings, sitting at Nuremberg, in Germany, on 20th November 1945, the Presiding judge stated the following: 'The trial which is now about to begin is unique in the history of the jurisprudence of the world and it is of supreme importance to million people all over the globe. For these reasons, there is laid upon everybody who takes any part in this trial a solemn responsibility to discharge his duties without fear or favour, in accordance with the sacred principles of law and justice'. See *The Trial Of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany Part I*, 20th November, 1945 to 1st December, 1945, Taken from the Official Transcript (Published Under the Authority of H.M Attorney-General by His Majesty's Stationery Office, London 1946) 1.

² William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP, New York 2006) 501.

³ Indeed, the presumption of innocence has been held to be 'a basic component of a fair trial' *Delo v Lashley*, 507 U.S. 272 (1993) (Per Curiam at 278 and Stevens, J., dissenting, 284, 'the governing principle' Lord Bingham of Cornhill's opinion in *Sheldrake v DPP* [2005] 1 AC 264, [2004] UKHL 43, [2005] 1 All ER 237, [2004] 3 WLR 976, [3]), the 'cardinal' Christoph JM Safferling, *Towards an International Criminal Procedure* (OPU, Oxford 2001) 68, 'the first of all principles in criminal proceedings' Déclaration de Louis XVI faite à Versailles le 1^{er} mai 1788 available on http://ledroitcriminel.free.fr/la_sciences_criminelle/penalistes/introduction/declaration_louis16.htm accessed on 1 August 2011, and 'the undoubted law, axiomatic and elementary' *Coffin v. United States*, 156 U.S. 432, 453 (1895) [60].

⁴ *HRC General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art. 14) (13/04/1984) [7].

In international recognized human rights⁵, however, the presumption of innocence is unambiguously held to be a fundamental fair trial principle, 'one of the ultimate bench-marks of a right to a fair trial, set out in Article 14 of the ICCPR'⁶. Indeed, under article 66 of the Rome Statute of the International Criminal Court founded in Article 14 of the ICCPR, suspects as well as accused are presumed innocent and shall be treated as such until proven guilty by OTP beyond reasonable doubt according to the law of the Court⁷.

Historically, suspects or accused of the most serious crimes cognate to those modern international crimes within the jurisdiction of the ICC appear to have been political or military leaders, heads of states and warlords⁸. Such type of suspects

⁵ As held by the Court, '[a]rticle 66, setting out the presumption of innocence, as any other provision of the Statute, must be interpreted and applied consistently with internationally recognized human rights, as required by article 21(3) of the Statute'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (Public Document Decision of the Defence Request for an Order to preserve the impartiality of the Proceedings) PTCI ICC-01/04-01/10 (31 January 2011) [9]. In this respect, the Court has chiefly referred to the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) European Convention on Human Rights (ECHR), American Convention of Human Rights (ACHR), African Charter on Human and People's Rights (ACHPR) as internationally recognized human rights. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga* (Public Document Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006) The Appeals Chamber ICC-01/04-01/06 (OA4) (14 December 2006) [36]-[39].

⁶ See Dominic McGoldrick, Peter Rowe and Eric Donnelly, 'The Permanent International Criminal Court: Legal Policy Issues (Hart Publishing, Oxford and Portland Oregon 2004) 300 (footnote 80 included) The presumption of innocence is indeed regarded as 'one of the elements of fair criminal trial' See *Daktaras v Lithuania* (Judgment) ECtHR, Application No. 42095/98 (10 October 2000) [41], 'fundamental to the protection of human rights' HRC General Comment No. 13 (n 4) and regarded by scholars as 'an essential principle of a fair trial' Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N.P. Engel Publisher, Germany 2005) 329, 'inextricably linked to fairness', M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', [1993] 3 Duke J. Comp & Int'l L. 235, 'fundamental and necessitating all the procedural guarantees[and] therefore the cardinal principle of criminal proceedings' Christoph J.M. Safferling (n3) an undisputable law laid down as being 'one of the cornerstones of modern criminal procedure' Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford; New York 2009) 457. Such a law is said to have been traced by Greenleaf to the biblical book of Deuteronomy *Coffin v. U.S.* 156 U.S. 432, 453 (1895) [62] so that it is regarded as '[t]he most important concept in today's criminal justice system' Andrew Scott Hanen 'Wearing Jail Cothes and Handcuffs in a Criminal Trial: Changes in the Presumption of Innocence' (1977) Baylor Law Review 29 (2) 410, 422.

⁷ Article 66 of the Statute reads as follows: '[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'. See The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) art 66.

⁸ Examples include those who led the Franco-Prussian war (1870-1871), William II (in German Kaiser Wilhelm II) Hohenzollern, formerly German Emperor, accused of 'a supreme offence against international morality and the

and accused are generally portrayed⁹ within the media by public officials and journalists as already guilty and systematically kept into pre-trial detention pending their trial. For instance, the guilt of Nazi leaders was taken for granted¹⁰. They were actually seen as 'so black so that they [fell] outside and [went] beyond the scope of any judicial process'¹¹. As a result, the agreement¹² that led to the establishment of the IMT¹³ referred to suspects as '[w]ar Criminals'¹⁴.

Consequently, if the ICTY and ICTR have statutorily and practically recognized a presumption of innocence to the accused but not to the suspect, the Nuremberg and Tokyo Tribunals did not even mention it¹⁵. Furthermore, defendants were referred to as '[t]he persons accused as guilty of these crimes'¹⁶. Equally, the Tokyo trial denied a

sanctity of treaties' See The Peace Treaty of Versailles (28 June, 1919) art 227, after the First World War, the Nazi leaders after the Second World War. In the modern era, key suspects and accused have included Slobodan Milosevic in the territory of the former Yugoslavia, suspects and accused of the Rwandan Genocide or persons prosecuted by the ICC, amongst them an accused such Jean Pierre Bemba, former Vice President of the DRC, suspects such Omar Hassan Ahmad Al Bashir, the President of Sudan, Muammar Gaddafi, the Libyan President or a probable suspect such Laurent Gbagbo, the former President of Ivory Coast Republic.

⁹ Milosevic, for instance, was '[d]erided by the West as the "Butcher of the Balkans"; see Michael P. Scharf and William A. Schabas, *Slobodan Milosevic on Trial: A Companion* (Continuum, New York; London 2002) 1.

¹⁰ According to Geoffrey Robertson QC, Winston Churchill, for instance, believed that Nazi leaders were not worthy of being given a trial; 'Truman wanted an international tribunal to try the Nazi leaders, but Churchill insisted in summary execution'. In fact, 'punishment for war crimes was declared by Churchill to be a principal aim'. He, actually 'simply wanted a political decision made as to whom to kill-a list of fifty prominent Nazis was proffered, to be executed without trial as and when they were captured'. Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn Penguin Books, London 2006) 244, 246. Churchill thought that a trial for Nazi could be a platform for Nazi's 'propaganda'. He thought that they needed just to 'be given a summary proceeding and then taken out in the yard and shot'. For Stalin, they 'had already been found guilty'. See Norbert Ehrenfreund, 'Reflections on Nuremberg Trial' (Robert H. Jackson Center June 13, 2005) <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/reflections-on-nuremberg-trial/> accessed on 25 March 2011.

¹¹ Geoffrey Robertson QC (n10) 244.

¹² It has been noted that 'The statement reflected the disagreement amongst the allies (and within them) as to whether the major Nazis ought to be dealt with judicially, or by extra-judicial execution. By late in the war, the US had decided that the option would be for there to be a trial. The UK was opposed to a trial, primarily on the basis that it would grant the Nazi leaders a platform from which to propagate propaganda. The Soviet Union broke the deadlock, coming out in favour of a trial, although not one in which the guilt of the defendants was actually at issue. As a result, the UK relented and a trial was agreed upon'. See Antonio Cassese (n6) 441.

¹³ Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials* (Palgrave Macmillan, New York 2004)94.

¹⁴ See London Agreement of August 8th 1945, [2] and arts 1,3,4 available on <http://avalon.law.yale.edu/imt/imtchart.asp> accessed on 12 April 2011.

¹⁵ The U.S.S.R. Negotiator to the London Charter for the establishment of the IMT, General Nikitchenko was the view that Nazi criminals were already convicted by the heads of governments. Therefore the IMT has to carry out only a trial for punishment of crimes already committed. So he pleaded for a presumption of guilt. See Henry T. King, Jr, 'Robert Jackson Transcendent Influence over Today's World' (2006) ALR 68 23, 25.

¹⁶ This was the case of Justice Beals who presided the trial in the case known as '*Medical Case*' in which persons were prosecuted for war crimes and crimes against humanity. See *Medical Case (USA V Karl Brandt et al. 1946-*

number of rights to persons, including the presumption of innocence. It is actually reported to have adopted the synoptic procedure of the IMT denying a number of rights appropriate to the 'Anglo-American evidential and procedural rules'¹⁷. If the Charter mentioned the right to a fair trial for the accused, it was not actually

'granted to them. Essential principles, violation of which would result in most civilized nations in the nullity of the entire procedure, and the right of the tribunal to dismiss the case against the accused were not respected'¹⁸.

Arguably, therefore, the presumption of innocence within the Rome Statute, particularly its wording, has significant meaning and effects which fall to be examined as to establish a clear understanding of this principle in international criminal proceedings. Moreover, the presumption of innocence, as worded under article 66 of the Statute, appears to have been foreseen by its drafters as a human right safeguarding persons against being treated as guilty beforehand and against 'wrongful conviction'¹⁹. Therefore, it is imperative that the presumption of innocence is correctly interpreted and applied by the ICC, bearing in mind –and worthy recalling– that its application and interpretation as that of any other provision of the Statute must be carried out in accordance with internationally recognized human rights under article 21(3) of the Statute²⁰, which appear to be binding on the ICC²¹.

47) Official Transcript (Nuremberg, Germany on 21 November 1946) 1 [8]. For an account on '*Medical Case*', see Paul Julian Weindling (n13).

¹⁷ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal* (OUP, Oxford; New York 2008) 75.

¹⁸ Opinion relative to the proceedings of the Tribunal. See Boister and Robert Cryer (n17) 675.

¹⁹ Mike McConville & G. Wilson, *The hand book of the Criminal Justice Process* (OUP, Oxford 2002) 5, 6.

²⁰ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5).

²¹ Ibid.

Also, the presumption of innocence appears to be under internationally recognized human rights²² a bulwark against the treatment of persons as guilty beforehand by public officials, OTP, in particular, and media²³ and thus acts in a favour of protecting persons' reputation and dignity²⁴. As such and in an international democratic society the presumption of innocence plays such a preeminent role in international criminal process so that its violation in the pre-trial stage may affect and compromise the fairness of the actual trial. Nevertheless, in national law, the presumption of innocence has been mainly discussed by academics in its second facet but regarded as the first one²⁵ and therefore defined as a rule that entails the onus of proof being placed on OTP to prove the guilty of the accused beyond all reasonable doubt²⁶.

However, the wording of the presumption of innocence under article 66 of the Rome Statute appears to have gone beyond the ambiguous way of the understanding of the presumption of innocence in national laws. The principle also has set forth as a fundamental right for suspects and accused. Therefore the aim of this work is to establish that the presumption of innocence should be primarily understood in international criminal proceedings as a right of every person at any stage of the proceedings to be treated as innocent until proven otherwise. From this

²² Such as the UDHR, UDHR (G.A. Res. 217A (III) U.N. Doc. A/810 (1948) adopted and proclaimed 10 December 1948) art 11(1) and the ICPR, ICCPR 1966 (G.A. res. 2200A (XXI) 21 U.N.GAOR Supp. (No. 16) at 52 U.N. Doc. A/6316 (1966) entered into force 23 March 1976, 999 U.N.T.S. 171) art 14(2). Art 14 of the ICCPR is perceived to be one of the two 'most known and influential 'fair trial' codifications' with article 6 of the ECHR. Cf Christoph JM Safferling (n3) 24.

²³ *Munguwambuto Kabwe Peter Mwamba v Zambia*, HRC Communication No. 1520/2006 (Ninety-eighth session 8 to 26 March 2010) [6.5] (references omitted).

²⁴ Cherif Bassiouni notes that the presumption of innocence is 'intrinsically related to the protection of human dignity' see Cherif Bassiouni (n6).

²⁵ See, for instance, Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishin, Oxford and Portlamd, Oregon 2010) xxxviii.

²⁶ The US Supreme Court has considered the presumption of innocence to be 'an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created'. See *Coffin v. U.S.*, 156 U.S. 432, 453 (1895).

standing point, as a corollary, persons subjected to trial have an absolute right to remain silent, the onus of proving their guilt being exclusively placed on OTP. The latter must prove all the facts and elements of crimes within the jurisdiction of the Court as to establish the guilt of the accused beyond reasonable doubt. Interpreted in this sense, the right would therefore entail that the Court takes all the necessary measures to protect it against its being whatsoever attacked since a person is mentioned in connection with a crime within the jurisdiction of the ICC. Applied in such a view, the presumption of innocence will undoubtedly advance the international criminal law in the age of human rights.

Hence, the work focuses on the following question: how - and to what extent- has the ICC applied, interpreted and protected the presumption of innocence as worded under article 66 of the Rome Statute in light of internationally recognized human rights?

2. Existing Work

Given the importance of both the presumption of innocence, and the ICC, it may be questioned whether the topic of this thesis is one which advances the state of knowledge.

Undoubtedly, the issue of the presumption of innocence has been the focus of a range of academic researchers. Most of them have identified the presumption of innocence as primarily-if not essentially- a rule of proof placing the onus on OTP to prove the guilt of the defendant beyond all reasonable doubt and thus applying to the

accused²⁷. Viewed as such the principle of the presumption of innocence is strongly embedded in the Anglo-American law, particularly in England²⁸ and USA²⁹ and it is generally considered to be a mere tenet of evidence acting in favour of the accused. To that effect, it is generally argued that the presumption of innocence belongs to the trial and, accordingly, relates to the accused and, thus, not to the suspect so as not to destroy the 'efficiency of investigation'³⁰. Consequently the pre-trial stage allows 'no room at all for the presumption of innocence'³¹.

As a result its significance and extent have been 'greatly diminished'³². For instance, the pre-trial detention of suspects or accused persons 'solely on the grounds of potential danger to society'³³ is believed to be not in violation of the presumption of innocence whatever the duration of the detention may be. This idea, as noted by LeRoy Pernell, is the effect of 'a growing belief that the safety of society depends on massive deprivation of liberty and property without predetermination of guilty'³⁴, the presumption of innocence being considered not to be 'a presumption in the strict sense of the term [but] simply a rule of evidence which allows the defendant to stand mute at trial

²⁷ Andrew C. Stumer (n25) xxxvii-xxxix.

²⁸ See *Woolmington v DPP* [1935] AC 462 (HL) Viscount Sankey, the Lord Chancellor, stated: 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'.

²⁹ Justice Edwards Douglas White stated that the 'principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law'. See *Coffin v. U.S.* 156 U.S. 432, 453 (1895) para 60.

³⁰ Christoph JM Safferling, (n3) 68.

³¹ Ibid.

³² Marsha L. W. Reingen 'The current Role of the Presumption of Innocence in the Criminal Justice System' (1980) SCLR 31 (2) 357,376.

³³ Shari Lewis, 'Unites States v. Salerno: Destruction of the Presumption of innocence?' (1987) SLULJ 32 (2) 573.

³⁴ LeRoy Pernell, 'The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence. A Brief Commentary' (1989) CSLR 37 (3) 393, 416.

[and which has not] any application to proceedings prior to trial'³⁵. It has been thus noted that doubts have been cast over the meaning of the presumption of innocence³⁶.

Likewise, despite its wording under the HRA, which incorporates Article 6(2) of the ECHR and so has strengthened the presumption in England and Wales, the presumption of innocence has been, nevertheless, the subject of various legislative and case laws 'inroads'³⁷. For instance, The CJPOA has been seen as having significantly undermined the presumption of innocence³⁸ or even caused its 'demise'³⁹ by instituting the drawing of adverse inference from the suspect's failure to mention any facts during interrogation but that are relied on at trial and the refusal or failure of the accused to mention his presence somewhere at the time of the alleged crime, or to account for 'substance and marks'⁴⁰. The provision is therefore believed to have 'not only shift[ed] the burden of proof towards the accused, but also[...] lower[ed] the standard of proof necessary to obtain a conviction'⁴¹.

It appears thus that the presumption of innocence has been in general confined to a rule of proof. As a result, according to one scholar, it could 'legitimately be asked whether there is any value in continuing to pay lip service to what has essentially become an extinct notion'⁴². In fact, the presumption of innocence seems to be definitely regarded as not being a part of the criminal procedure in general, its extent being reduced to a rule of proof. Therefore J.C. Smith, for instance, has been of the view that, it would

³⁵ John N. Mitchell, 'Bail Reform and the Constitutionality of Pretrial Detention' (1969) VLR 55 (7) 1223, 1242.

³⁶ LeRoy Pernell (n34).

³⁷ Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67(3) MLR 402, 434.

³⁸ See for instance, Frances Gibb and Jack Malvern, 'Legal Reform Damages Presumption of Innocence' (The Times, The Sunday Times, November 7, 2007) available on <http://www.timesonline.co.uk/tol/news/uk/crime/article2823996.ece> accessed on 1 August 2011.

³⁹ Sybil Sharpe, 'Criminal Justice and Public Order Bill: The Demise of the Presumption of Innocence' (1994) 58 (2) 179, 182 (References omitted).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² LeRoy Pernell (n34).

be crucial that 'the effect and scope of the presumption of innocence'⁴³ be set forth within the code of the criminal law in England and Wales, should the latter be set up.

Against the reduction of the significance and extent of the presumption of innocence, commentators such as Ashworth consider that 'the standing of the presumption of innocence may be thought to be higher than ever'⁴⁴ and above all should be applied according to a wide interpretation as derived from the principles of European human rights law

'that pre-trial procedures should be conducted, so far as possible, as *if* the defendant were innocent. This sense of the presumption acts as a restraint on the various compulsory measures that may properly be taken against suspects in the period before trial'⁴⁵.

Ashworth also thinks that the broader interpretation of the presumption of innocence should prevail so as to 'recognise the defendant's legal status of innocence at all stages prior to conviction'⁴⁶. Such a view has been described by Trechsel as 'the 'reputation-related' aspect of the presumption of innocence'⁴⁷, which, concerns any public statements given by public authorities about the suspect or accused.

Almost in the same view, this work considers that the presumption of innocence as worded under article 66 of the Rome Statute has a wider meaning and effects that have not been yet dealt with neither by the ICC nor by researchers. If the ICC has recently been 'of the view that allegations of prejudice to suspects on account of public statements suggesting their guilty before a conviction by a court

⁴³ J.C. Smith, 'The Presumption of Innocence' (1987) NILQ 38 (3).

⁴⁴ Andrew Ashworth, 'Four threats to the presumption of innocence' (2006) E&P 10(4) E&P 241, 279.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press: Oxford, 2005) 178.

[...] are primarily of relevance to the issue of the presumption of innocence'⁴⁸, it nevertheless failed to hold the presumption of innocence as a general right not to be treated as guilty before conviction and take necessary measures as to protect such a right⁴⁹. Furthermore, researchers and academics interpret the presumption of innocence under article 66 of the Statute mainly as a rule of proof. William A. Schabas, for instance, has stated that '[i]ts effects are possibly less significant at the pre-trial than at the trial because issues such as burden of proof do not arise in the same way'⁵⁰ although he paradoxically recognized that under international human rights law, the presumption of innocence 'provides a cornerstone for the fairness of the trial in substantive as well as procedural sense'⁵¹ and thus entails 'other manifestations' such as rights to 'interim release pending trial' or 'to remain silent during the investigation and during trial'⁵². In the same way Roza Pati, in spite of recognizing that consistently with article 11 of the UDHR, the presumption of innocence 'applies to treatment before and during trial'⁵³, nevertheless restricted its meaning to a rule of proof putting the onus on OTP⁵⁴. Therefore, the presumption of innocence appears to be 'one of the most narrowly applied'⁵⁵ even in international criminal proceedings despite the wording of article 66 of the Rome Statute.

⁴⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [6].

⁴⁹ Although it upheld the words of Judge Jorda underlining the presumption of innocence as one of the principles that govern trials and all the participants and thus protects a suspect from being treated as an accused before the confirmation of his charges. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [7] footnote 14..

⁵⁰ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, Oxford; New York 2010) 785. See also William A. Schabas, 'Article 66: Presumption of Innocence' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Bade, Germany 1999) 837.

⁵¹ William A. Schabas, (n50) 786.

⁵² William A. Schabas, (n 50) 782. See also William A. Schabas, (n 50) 833, 834.

⁵³ Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (Martinus Nijhoff Publishers (Leiden; Boston 2009) 116.

⁵⁴ *Ibid* 36, 116.

⁵⁵ Richard Wilson 'Procedural Safeguards for the Defense in International Human Rights Law' in Michale Bohlander, Roman Boed, Richard Wilson (eds), *Defense in International Criminal Proceedings, Cases, Materials and Commentary* (Transnational Publishers, New York 2006) 15.

Salvatore Zappalà, on the other hand, although having discussed the issue of the presumption of innocence as one of the rights of the accused in trial proceedings⁵⁶, has, nevertheless, pleaded for the recognition of the presumption of innocence to the suspect. Moreover, he has considered the presumption of innocence as holding three consequences respectively relating to the treatment of the accused as 'a general rule', the rule 'imposing the burden of proof on the prosecutor' and the 'standard of proof'⁵⁷ –an important analysis that will be returned to in the chapters to follow but in rather different views. Furthermore, the presumption of innocence under article 66 of the Rome Statute has been the subject of a not less significant discussion by 'The Oxford Companion To International Criminal Justice', which pointed out its 'main corollaries' such as the onus being placed on OTP and the standard of proof⁵⁸.

Actually, the presumption of innocence under article 66 has been held by the ICC to be 'a general principle in criminal procedure'⁵⁹ applying 'to different stages of the proceedings before the Court, including the investigation stage'⁶⁰.

Therefore, this work aims at dealing with the issue of the presumption of innocence beyond its being viewed in international criminal proceedings as a trial right. This appears to be the case, for instance, as mentioned above, from the work of Salvatore Zappalà⁶¹, Roza Pati⁶² or 'The Oxford Companion'⁶³.

⁵⁶ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP, Oxford; New York 2005) 83.

⁵⁷ Salvatore Zappalà (n56) 85-100.

⁵⁸ Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford; New York 2009) 457.

⁵⁹ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) Pre-Trial Chamber II ICC-01/05-01/08 (15 June 2009) 31.

⁶⁰ *Situation in the Republic Democratic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) Pre-Trial chamber I ICC-01/04 (17 January 2006) [42]-[44] (references omitted).

⁶¹ As already mentioned, the presumption of Innocence has been thoroughly discussed but as one of the rights of the accused in trial proceedings. See Salvatore Zappalà (n56) 85-100.

This work intends, indeed, to demonstrate that the wording of the presumption of innocence under article 66 of the Statute could be understood as defining the presumption of innocence as primarily and essentially a right for both the suspect and accused to be treated as innocent before a conviction has been made. Interpreted and applied as such in the first place, the presumption of innocence would imply that the Court takes necessary measures to protect such a right at all the stages of the proceedings against any ill-treatments of persons by anyone by, any means, by media, in public, in pre-trial detention or during the trial itself. Moreover, as a corollary, the presumption should play a key role in determining the reasons for issuing a warrant or a summon to appear before the Court at the investigation stage, for detaining suspects pending their trials, for formally and strictly protecting suspects and accused rights against being treated as guilty by public officials, for confirming charges at the hearing of confirmation of charges and, of course, for conviction at the appropriate stage. In addition, the rights of victims should be dealt with by the ICC in so far as opposed to suspects or accused's right to a presumption of innocence as to secure the equality of arms between parties to the proceedings. The particularity of this work consists in thoroughly dealing with those issues.

⁶² The presumption is categorized as one of the trial rights which 'requires that the burden of proof rests with the prosecutor'. See Roza Pati (n 53) 36.

⁶³ The presumption of innocence under article 66 of the Statute is considered as implying that 'the individual has right to be treated as an innocent person until the proceedings come to an end by virtue of a final judgement' but as one of its consequences with the rule of proof putting the onus on the prosecutor and the standard of proof. See Antonio Cassese (ed) (n58) 457.

3. The Research Method

This thesis is a piece of doctrinal international legal research. This approach seeks to provide an accurate understanding of the law in the area of study, emphasising legal doctrine over say law in practice or public perception of the law, and to evaluate the law against specifically legal criteria. In this case, the law being considered is the applicable law before the ICC of which the Statute is the primary law⁶⁴. Using this methodology, the work explores and explains the wording of the presumption of innocence under the Statute to establish its meaning and effects using preparatory work in the light of internationally recognized human rights and , where appropriate, principles and rules of international law⁶⁵ in comparison, where necessary, with the conception of the presumption of innocence by previous

⁶⁴ Article 21 (1) and (2) of the Statute strictly and hierarchically establishes the applicable law before the ICC. Under the first paragraph, the Statute appears to be the primary law to be mandatory applied in the first place by the Court above all followed by Elements of Crimes and Rules of Procedure and Evidence, which are subordinate to the Statute. In the second place and where appropriate the Court may apply applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. In case of failure only, then the Court would apply general principles of law derived by the Court from national laws, provided that those principles are not inconsistent with the Statute and with internationally recognized norms and standards. Under article 21 (2), the Court appears to have the discretion to apply its previous decisions without any binding effect as it *may* but not have to apply its previous decisions. Nevertheless, the validity of the application and interpretation of any provision of the Statute, including article 66 relating to the presumption of innocence, depends on the consistency with such application and interpretation with internationally recognized human rights under article 21(3). See The Statute (n 7) art 21. The latter far from being another source of the applicable law before the Court constitute the winnowing that validates the interpretation and application of the applicable law before the Court. The Rome Statute appears therefore to be a 'veritable criminal code' without precedent whilst being at the same time a treaty. Allain Pellet, 'Applicable law' in Antonio Cassese, Paola Gaeta, John R.W.D.Jones (eds), *The Rome Statute of The International Criminal Court A Commentary Volume II* (OUP, Oxford; New York 2002)1053. As such it is regarded as 'the core document of international criminal law today' and 'the main source of international criminal law' as 'it set out the legal bases of the International Criminal Court and develops its new brand of procedure' Gerhard Werle, *Principles of International Criminal Law* (2nd edn T.M.C. Asser Press, The Hague, The Netherlands 2009) 25, 50 .Nevertheless, as it has been held by the Court, the 1969 Vienna Convention on the Law of Treaties remains 'the principal' and 'authentic guide to the interpretation of the Statute' *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (Public Document Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "D cision sur la confirmation des charges" of 29 January 2007") The Appeals Chamber ICC-01/04-01/06 OA8 (13 July 2006) [8]. In fact, under article 21 of the Statute, it has been set forth not only a genuine code of international criminal law and procedure but also its particular method of interpretation.

⁶⁵ Bearing in mind that these principles and rules remain 'subsidiary sources of law' before the ICC. See e.g. *Situation in the Republic of Kenya* (Public Document Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya))Pre-Trial Chamber II ICC-01/09 (31 March 2010) Judge Hans-Peter Kaul's dissenting opinion [29] footnote27.

international criminal tribunals and national laws⁶⁶ and critically analyses its application and interpretation by the ICC to date in situations and cases. In effect, it first considers how the provision of the presumption of innocence is legally set forth within the Rome Statute, Elements of Crime, Rules of Procedure and Evidence, in the first place. In the second place and where appropriate the work examines the understanding of the presumption of innocence as it emerges from applicable treaties, principles and rules of international law, including the established principles of international law of armed conflicts. Where neither the Statute, nor international law, resolves an issue then – following the methodology laid out in the Statute itself, the work explores general principles of national laws⁶⁷ of legal systems of the world, particularly the French⁶⁸ and English⁶⁹ systems, which are viewed as ‘the two classic models of criminal procedure’⁷⁰, including, as appropriate, the national law of States that would normally exercise jurisdiction over the crime, provided that those principles are consistent with the Rome Statute and with internationally recognized norms and standards⁷¹.

⁶⁶ As highlighted by Judge Kaul, the law and jurisprudence of other national or international courts are not ‘binding on the ICC as such. Insofar as the Rome Statute provides the applicable law, there is no room for the jurisprudence of other courts and Tribunals’. See *Situation in the Republic of Kenya* (Public Document Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya))Pre-Trial Chamber II ICC-01/09 (31 March 2010) Judge Hans-Peter Kaul’s dissenting opinion [29] including footnote 26. The Court has already held that ‘the rules and practice of other jurisdictions, whether national or international, are not as such “ applicable law” before the court beyond the scope of article 21 of the Statute’. See *Situation in Uganda* (Public Document Decision on the Prosecutor’s position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification) Pre-Trial Chamber II ICC-02/04-01/05 (28 October 2005) [19].

⁶⁷ The same approach has been applied by Cherif Bassioun (n6). Cf. Christoph J.M. Safferling,(n3)3; Salvatore Zappalà (n56)1 (italic emphasis and reference omitted); Roza Pati (n53)2.

⁶⁸ John Smith (tr) A Esmein, *A History of Continental Procedure with special reference to France* (John Murray, Albemarle Street, W, USA 1914) 288. Cf. A Esmein, *Histoire de la Procédure Pénale en France et spécialement de la Procédure Inquisitoriale depuis le XIIe siècle jusqu’à nos jours* (L.Larose et Forcel, Paris 1882)284.

⁶⁹ Taken as that of England and Wales.

⁷⁰ Stephen Thaman, *Comparative Criminal Procedure: A Case Book Approach* (2nd edn Carolina Academic Press, Durham, North Carolina, USA 2008)3.

⁷¹ The Statute (n7) art 21.

However, given that the application and interpretation of the applicable law before the International Criminal Court must be consistent with internationally recognized human rights according to article 21(3) of the Rome Statute⁷², the work will further consider the consistency of the interpretation of the presumption of innocence by the ICC in situations and cases with its understanding under internationally recognized human rights⁷³.

It should be borne in mind, therefore, that international recognized human rights is being used in two modes in this work. On the one hand, international recognized human rights form a source which can be used in determining the meaning and effects of the presumption of innocence. On the other, they figure a free-standing legal basis for critique of the Statute, and jurisprudence created by its organs.

4. The Structure of the Work

The structure of the work is determined by its aim, which is the analysis of the application and interpretation of article 66 of the Statute in order to ascertain its meaning and effects in international criminal proceedings. Therefore, the first chapter

⁷² The Court has referred to a number of international instruments and regional conventions and treaties such as the UDHR, ICCPR, ECPHRRF, ACHR and the ACHPR, chiefly cited in situations and cases as internationally recognized human rights. So, as held by the Court, 'article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga* (Public Document Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006) The Appeals Chamber ICC-01/04-01/06 (OA4) (14 December 2006) [36]-[39]; *Situation in the Democratic Republic of the Congo* (Public Document Judgement on the Prosecution's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying leave to appeal) The Appeals Chamber ICC-01/04 (13 July 2006) [38]; *Situation in Darfur, Sudan in the Case of the Prosecutor v Omar Hassan Ahmad Al Bashir* ("Omar Al bashir") (Public Redacted Version Decision on the Prosecution's Application for a Warrant of arrest against Omar Hassan Ahmad Al Bashir) Pre-Trial Chamber I ICC-02/05-01/09 (4 March 2009) [28]-[33].

⁷³ Such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention of Human Rights (ACHR), African Charter on Human and People's Rights (ACHPR).

ponders on the meaning and effects of the presumption of innocence as provided by article 66 of the Rome Statute in light of its understanding under internationally recognized human rights and national laws. The second discusses the presumption of innocence as rule of proof as to establish the evidentiary threshold with regard to the right of persons to be treated as innocent until a conviction has been made. The remainder of the work looks at whether the court has interpreted the presumption of innocence as a right to liberty pending trial in its third chapter whilst the fourth chapter examines the right to be presumed innocent and the statements of public officials and media reports. The fifth and last chapter questions the relation between the presumption of innocence and the rights of victims, particularly, their participation in the ICC's proceedings before the ICC, their right to reparation and to protective measures such as the anonymity of victims/witnesses.

By way of conclusion, the work will highlight the extent of the understanding of the presumption of innocence as provided by article 66 of the Statute and its application, interpretation and protection as such by the ICC. It will argue that the application, interpretation and protection of article 66 should be made by the Court in so far as to meet international standards which view the presumption of innocence, under the UDHR, ECHR, ICCPR, ACHR, ACHPR read together, first of all, as a right of persons to be treated as innocent not only by the Court but also by all the public authorities, media and the public in general, prior to and during the trial, until proven guilty according to the applicable law and in the second place only as a rule of proof.

This study will set up a theory and practice that will correspond to the prospects of international recognized human rights instruments. The International Criminal court acts as a complementary jurisdiction for all criminal systems of the world and it

should, therefore, stand firmly as an example and an expression of the most democratic criminal proceedings, implementing the full understanding of the presumption of innocence, which is regarded, by both international and national instruments on Human Rights, as a basic component of a fair trial. This work will contribute to achieving a fuller understanding of the meaning and effects the presumption of innocence and its protection as a human right, in the context of the International Criminal proceedings, by ascertaining its complete synthesis.

CHAPTER 1: The Meaning and Effects of the Presumption of Innocence under Article 66 of the Rome Statute.

Article 66 of the Rome Statute ⁷⁴ undeniably constitutes an original legal formulation of the presumption of innocence in international criminal procedure: First, the presumption of innocence was absent from the IMT and IMTFE Statutes despite the statement of the Chief Counsel for the United States that the accused ‘must be given a presumption of innocence’⁷⁵ and the statutory provision relating to the right to a fair trial⁷⁶. Second, whilst both UN ad hoc Tribunals Statutes word the presumption of innocence as one of the specific rights of the accused⁷⁷, denying the right to the suspect⁷⁸, article 66 of the Statute recognises a presumption of innocence in relation to ‘everyone’⁷⁹. Furthermore, article 66 (2) and (3) which deal

⁷⁴ The Statute (n7) art 66.

⁷⁵ Opening Statement before the International Military Tribunal in Case No. 1, Robert H. Jackson, Chief of Counsel for the United States (Nuremberg, Germany November 21, 1945) <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/> accessed on 18 November 2010 para 12.

⁷⁶ Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, art 16; Charter of the International Military Tribunal for the Far East (19 January 1945, as amended on 25 April 1946) art 9.

⁷⁷ See ICTY Statute (Adopted 25 MAY 1993 by Resolution 827)(As Amended 13 MAY 1998 by Resolution 1166) (As Amended 30 November 2000 by Resolution 1329) art 21 (3); Under art 20 (3) of the ICTR, ‘The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute’. See ICTR Statute (as adopted and amended, as applicable (Resolution 955 (1994) (8 November 1994) and by other security council resolutions) art 20(3).

⁷⁸ See ICTY Rules of Procedure and Evidence (adopted on 11 February 1994) rule 42; ICTR Rules of Procedure and Evidence (entered into force 29 June 1995) rule 42.

⁷⁹ In the same token, the Court held that ‘the right to be presumed innocent until proven guilty, set forth in article 66(1) of the Statute, is guaranteed to everyone’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [8]. In fact, except the ICL Draft and the 1996 Preparatory Committee draft of article 66 of the Statute recognising the right solely to the accused, the Zutphen Draft and many others recognised the right to everyone. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court Volume 2: An Article-by-Article Evolution of the Statute from 1994-1998* (Transnational Publishers, Ardsley, New York 2005) 479-481.

with the burden and standard of proof appear to be a corollary to the right of every person to be presumed innocent before the Court until proven otherwise. It is, therefore, axiomatic that the Statute has provided the presumption of innocence before the ICC with a formulation that is much more forthright than its equivocal and inadequate conception in national laws⁸⁰.

This chapter examines the legislative history, jurisprudence, commentary on the presumption of innocence and preparatory work relating to it under article 66 of the Statute in order to ascertain its actual meaning and effects in international criminal proceedings. The chapter comprises two sections. Section 1 ponders on what should be the meaning of the presumption of innocence; section 2 underlines its effects.

It is argued that the presumption of innocence under article 66 of the Statute interpreted and applied consistently with internationally recognized human rights means a right of suspects and accused to be treated as innocent as long as their guilt has not yet been established in a final instance by the Prosecutor before the Court in accordance with the applicable law. It is further argued that, understood as such, the presumption of innocence applies at all the stages of the proceedings including at the investigation stage and should be protected against its being infringed by anyone. It is also argued that the presumption of innocence is a rule of proof throwing the onus of proof solely on OTP as a corollary to the right of suspects and accused to be treated as innocent until proven otherwise. Therefore, unless, it is interpreted, applied and protected as such, it is likely that the fairness of trials at

⁸⁰ HRC General Comment No. 13 (n4) [7].

the ICC would be jeopardised, the presumption of innocence being an essential component of a fair trial⁸¹.

Section 1: The Meaning of the Presumption of Innocence under Article 66 of the Rome Statute.

There can be little doubt that the presumption of innocence under article 66 of the Statute constitutes ‘a seminal provision’⁸², in spite of having been to date the subject matter of only one decision of the ICC⁸³. The decision relates to a press release issued by OTP following the arrest of Mr *Callixte Mbarushimana* and that the Defence considered to be defamatory of the suspect and thus infringed the presumption of innocence⁸⁴. The Defence therefore requested that OTP be ordered ‘to publish an immediate and public retraction of the Press release’⁸⁵.

In response, the Court held, *inter alia*, that:

‘allegations of prejudice to suspects on account of public statements suggesting their guilty before a conviction by a court, such as the allegations made by the Defence in the Request, are primarily of relevance to the issue of the presumption of innocence. [...] the right to be presumed innocent until

⁸¹ *Delo v Lashley*, 507 U.S. 272 (1993) (Per Curiam at 278 and Stevens, J., dissenting, 284).

⁸² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, Oxford; New York 2010) 784.

⁸³ See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5).

⁸⁴ In fact OTP presented Mr Mbarushimana as the leader of the group of people who participated in the 1994 Rwandan genocide and who were involved in the commission of more than 300 rapes in the DRC. OTP underlined that Mr Mbarushimana ‘blatantly continued to refute any allegations against his movement’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [12].

⁸⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [1]-[4].

proved guilty, set forth in article 66(1) of the Statute, is guaranteed to everyone [...]⁸⁶.

This important finding carries the advantage of having laid down one the main effects of the presumption of innocence underscored in section 2 below and discussed in Chapter 4 namely the right of suspects and accused not to be treated by public officials as guilty until proven otherwise and the grounds for interpreting correctly the provision of article 66 relating to the presumption of innocence⁸⁷ as to shed light on its actual meaning. This characteristic appears also when the Court, citing the European Commission of Human Rights, considered the presumption of innocence as protecting everyone against 'being treated by public officials as being guilty of an offence before this is established according to law by a competent court'⁸⁸. Moreover, the Court upheld the words of Judge Jorda in *Lubanga* whereby he held the presumption of innocence to be one of

'the principles governing this hearing, which governs us all-the Prosecutor, the Defence, the Legal representatives of victims, and of course, the judges

⁸⁶ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [8]-[9].

⁸⁷ Indeed the Court held that [a]rticle 66, setting out the presumption of innocence, as any other provision of the Statute, must be interpreted and applied consistently with internationally recognized human rights as required article 21(3) of the Statute. The right to be presumed innocent until proved guilty is enshrined in many international human rights instruments'. The Court then added a footnote citing arts 11(1) of the UDHR, 14 (2) of the ICCPR, 6(2) of the ECHR, 8(2) of the ACHR, all of them relating to the presumption of innocence and then concluded as follows: [c]onsequently, the respective case-law of the judicial and other authorities dealing with alleged violations of international treaties can be an important source for the interpretation of the scope of article 66 of the Statute'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [9]

⁸⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [10] (reference omitted).

as well[...] [and which means that] first of all, everybody is presumed innocent until their guilt has been established before the Court'⁸⁹.

However, the problem with the discussion found in *Mbarushima* lies in the deficiency in dealing with a portentous question relating to the real meaning of the presumption of innocence, its effects and protection⁹⁰ as to secure its complete understanding in international proceedings. It is indeed worth recalling that the formulation of the presumption of innocence under article 66 of the Statute has the advantage on its national counterparts of identifying the presumption of innocence in its two facets: first, a principle that a person shall be presumed innocent until proven otherwise and second, as a corollary, a rule throwing the onus of proof on OTP and determining the standard of proof that he shall meet to convict the accused of his guilty. This distinction between the principle and its effects facilitates a reflexion as to the meaning of the presumption of innocence in international criminal proceedings whilst in national legal systems the question generally remains the subject of uncertainty as to what exactly the presumption of innocence is⁹¹ and what its actual

⁸⁹ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5)[7] footnote14. Cf *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) Pre-Trial Chamber I ICC-01/04-01/06 (9 November 2006) lines 18-25, p 10; line1, p11.

⁹⁰ One may argue that from Judge Jorda's words, the presumption of innocence means that 'everybody is presumed innocent until their guilt has been established before the Court'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [7] footnote14. Cf *Situation in the Democratic Republic of the Congo* (n89) lines 18-25, p 10; line1, p11. Arguably, however, such a definition still needs to be elaborated.

⁹¹ As pointed out by Kenneth Pennington, the meaning of the presumption of innocence 'in the context of the judicial process [...] has been the subject of much debate' which should no longer take place in light of article 66 of the Statute as demonstrated in this chapter. See Kenneth Pennington, 'Innocent Until Proven Guilty: The Origins of a Legal Maxim' in Patricia M. Dugan, (ed), *The Penal Process and the Protection of Rights in Canon Law* (Wilson & Lafleur, Montréal 2005). See also Bruce P. Smith, 'The Presumption of Guilt and the English Law of Theft, 1750-1850' (2005) LHR 23 (1) 133, 171, note 2. Cf P. J. Schwikkard, 'The Presumption of innocence: What is it?' (1998) 11 SACJ 397, 408.

implications are⁹² so that the actual meaning of the presumption of innocence remains the subject of vagueness and ambiguity narrowing its scope⁹³.

As a result, when the time came to set up the first international criminal trial in the world, the American negotiator to the London agreement, Justice Robert H. Jackson intended to introduce this narrow meaning within the IMT Statute. Whilst the U.S.S.R. representative General Nikitchenko 'pushed hard for a presumption of guilt, mainly concerned with the degree of punishment to be meted out'⁹⁴, Justice Robert 'favored a presumption of innocence, which meant that the Nazi were to be freed if there were insufficient evidence to rebut this presumption'⁹⁵. Eventually neither of the two opposite views triumphed and as a result the presumption of innocence was absent from both the IMT and IMTF Statutes. It appeared later in the Statutes of both the ICTY and ICTR but lessened to a right of an accused hence meaning a rule of proof. Indeed the ICTY and ICTR Statutes provide that the accused shall be

⁹² It has been, for instance argued, in the Anglo-American criminal system, that the presumption has 'no settled meaning' Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (2nd edn OUP, Oxford, New York 2010) 223. Instead academics and professional lawyers generally confine the presumption of innocence to a rule and standard of proof. For instance, referring to the 'Golden Thread' in *Woolmington*, Glanville Williams define the presumption of innocence as follows: 'When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution'. See Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (2nd edn Stevens & Sons, London 1958) 152. In the words of A.R.N. Cross, the presumption of innocence means 'the effect of the rule that the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt'. See A.R.N. Cross 'The Right to Silence and The Presumption of Innocence: Sacred Cows or Safeguards of Liberty?' (1970) 11 SPTL 66, 75. See also Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (n92) 223). The misconception may be the result of the focus by most of the academics, in the Anglo-American world, on Lord Viscount Sankey's view of the presumption of innocence in *Woolmington v DPP* ([1935] AC 462, 481-2, HL) as 'extolling the merits of the presumption of innocence' so that it has become 'one of the most famous and frequently quoted passages in English Criminal jurisprudence' (n92) 222 (reference omitted)). For instance, Andrew Stumer considers Lord Sankey's view as 'the more familiar aspect of the presumption of innocence, at least to common law lawyers, and it is sometimes treated as exhaustive of its content' see Andrew Stumer (n25) xxxviii; see also note 6). A.R.N. Cross acknowledged his being 'a stalwart supporter of *Woolmington* principle' see A.R.N. Cross (n92). In his work entitled 'A Bill of Rights and the Presumption of Innocence', Andrew Skeen starts his reflexion by referring to the words of Lord Sankey in *Woolmington* as the leading case from which the presumption of innocence is reported to have received its recognition in American criminal law as a heritage from the English common law. See Andrew Skeen, 'A Bill of Rights and the Presumption of Innocence' (1993) SAJHR 9 525, 538. In actual fact, far from having started a new principle, Lord Viscount Sankey, mentioned the presumption only once recalling an established principle in English law that it 'is always[...] the duty of the prosecution to prove the prisoner's guilt'. In starting so he reversed a decision made by a judge at a lower court at Bristol Assizes which instructed the jury that 'this had always been the law of England' to impose on the defendant who alleged as a defence that the murder for which he was prosecuted was an accident, to satisfactorily prove his defence to the jury. See J.C. Smith (n91).

⁹³ Bruce P. Smith (n91).

⁹⁴ Henry T. King, Jr, 'Robert Jackson Transcendent Influence over Today's World' (2006) ALR 68 23, 25.

⁹⁵ Ibid.

presumed innocent until proved (proven for the ICTR Statute) guilty according to the provisions of the Statute⁹⁶ whilst the presumption of innocence under the Rome Statute is recognised to everyone. Moreover, part 4 of the Rules of Procedures of both the ICTY and ICTR specifically dedicated to the rights of suspects during investigation-as opposed to the rights of the accused-do not mention the presumption of innocence⁹⁷.

Inversely, the drafters of the Rome Statute of the ICC had a broader view of the presumption of innocence. Indeed, if the Statute gives no explicit meaning of the presumption of innocence under article 66 (1), although a number of rights pertaining to the principle are disseminated within the Statute⁹⁸, what the drafters meant by the presumption of innocence under article 66 comes to light from the examination of 'the preparatory work'⁹⁹ of article 66. Undoubtedly, indeed, an analysis of the *travaux préparatoires* relating to the drafting of article 66 may 'shed light on the intention'¹⁰⁰ of its drafters so that no shadow will be cast on its interpretation¹⁰¹. The ICC used the same technique to find out, for instance, the intent of the drafters of article 19 of

⁹⁶ See ICTY Statute (Adopted 25 MAY 1993 by Resolution 827)(As Amended 13 May 1998 by Resolution 1166) (As Amended 30 November 2000 by Resolution 1329) art 21 (3); Under art 20 (3) of the ICTR; ICTR Statute (as adopted and amended, as applicable (Resolution 955 (1994) (8 November 1994) and by other security council resolutions) art 20(3).

⁹⁷ See ICTY Rules of Procedure and Evidence (adopted on 11 February 1994) rule 42; ICTR Rules of Procedure and Evidence (entered into force 29 June 1995) rule 42.

⁹⁸ See The Statute (n7) specifically arts 55, 61 and 67.

⁹⁹ 1969 Vienna Convention on the Law of Treaties (signed on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331 art 32.

¹⁰⁰ *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) ICC-01/04-01/07 Trial Chamber II (16 June 2011) [46] (references omitted).

¹⁰¹ *Situation in the Republic Democratic of the Congo* (Public Document Judgement on the application of the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04 (13 July 2006) [40]-[41].

the Rome Statute as to determine the stage at which a challenge of admissibility might be made¹⁰².

So from the preparatory work, what was intended to be the meaning of the presumption of innocence under article 66 of the Statute?

It appears from the ILC Draft Statute¹⁰³ that the provision of article 14 (2) of the ICCPR¹⁰⁴ constitutes the foundation of article 66 of the Rome Statute. Article 40 of the ILC Draft Statute, the forerunner of article 66 of the Rome Statute, has actually provided that '[a]n accused shall be presumed innocent until proved guilty in accordance with the law'¹⁰⁵. Nevertheless, the final version that became article 66 of the Statute provides that '[e]veryone shall be presumed innocent until proven guilty according to the applicable law'¹⁰⁶, a lifelike wording of its founder, which is article 14(2) of the ICCPR¹⁰⁷.

Hence article 14 (2) of the ICCPR as interpreted by the HCR is arguably the provision that sheds most light on the meaning of the presumption of innocence under article 66 of the Rome Statute. Article 14 (2) of the ICCPR reads, indeed, as follows: '[e]veryone charged with a criminal offense shall have the right to be

¹⁰² *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain katanga and Mathieu Ngudjolo Chui* (n100) [46].

¹⁰³ Draft Statute for an International Criminal Court with commentaries 1994 (Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session) art 40.

¹⁰⁴ Considered as 'the most authoritative of the contemporary and universally accepted minimum standard of human rights' See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edn N.P. Engel, Publisher, Germany 2005) XI.

¹⁰⁵ Draft Statute for an International Criminal Court with commentaries 1994 (n103).

¹⁰⁶ The Statute (n7) art 66.

¹⁰⁷ Draft Statute for an International Criminal Court with commentaries 1994 (n103).

presumed innocent until proved guilty according to law'¹⁰⁸. Commenting on this article, the HRC stated that 'the presumption of innocence implies a right to be treated in accordance with this principle'¹⁰⁹. Therefore, it is because a person has the right to be treated as presumed innocent that the onus of proof falls on the prosecution. This is evidenced by the words of the HRC on their comment of article 14 of the ICCPR as follows: 'By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt'¹¹⁰.

Such is the meaning of the presumption of innocence as expressed by the drafters of the Statute under their commentary on article 40, the forerunner of article 66 in spite of having referred at that time to the presumption of innocence as a right of the accused¹¹¹. Noticeably the drafters distinguished the principle from its effects: the presumption of innocence, defined as a right of everyone, and the burden of proof as a corollary to such a right. In effect, the reference to 'everyone' and the use of the imperative expression 'shall' under article 66(1) of the Statute, which provides that '[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law'¹¹², show that the drafters of the Statute did not depart from such a view.

¹⁰⁸ ICCPR 1966 (G.A. res. 2200A (XXI) 21 U.N.GAOR Supp. (No. 16) at 52 U.N. Doc. A/6316 (1966) entered into force 23 March 1976, 999 U.N.T.S. 171) art 14 (2).

¹⁰⁹ *HRC General Comment No. 13* (n4) [7].

¹¹⁰ *Ibid.*

¹¹¹ 'Article 40 recognizes that in criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14, paragraph 2, of the International Covenant on Civil and Political Rights [...]' See Draft Statute for an International Criminal Court with commentaries 1994 (n103).

¹¹² The Statute (n7) art 66.

Furthermore, it is noteworthy recalling that article 66 should not only be interpreted in the light of internal rules of the Rome Statute, but is also one of a constellation of presumption of innocence rules to be found across internationally recognized human rights as provided by article 21 (3) of the Statute¹¹³. Accordingly, the UDHR, ECHR, ACHR and the ACHPR, including the ICCPR, have been chiefly and so far referred to by the ICC as being internationally recognized human rights instruments¹¹⁴. The examination of all of them with regard to their understanding of the presumption of innocence confirms and even enhances the meaning of the presumption of innocence as underlined above. Effectively, all those instruments picture the presumption of innocence as a right of a person to be treated as innocent by everybody, including the Court, until a conviction is made. The burden of proof is shown as a consequence of a person's right to be treated as innocent¹¹⁵.

¹¹³ In this respect, it noteworthy recalling that the court held that '[a]rticle 66, setting out the presumption of innocence, as any other provision of the Statute, must be interpreted and applied consistently with internationally recognized human rights, as required by article 23(3) of the Statute. The right to be presumed innocent until proved guilty is enshrined in many international human rights instruments. Consequently, the respective case-law of the judicial and others authorities dealing with alleged violations of international treaties can be an important source for interpretation of the scope of article 66 of the Statute'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5)[9].

¹¹⁴ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public Document Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on June 2008) Trial Chamber I ICC-01704-01/0 (13 June 2008) [58]. Cf *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [9] footnote 16.

¹¹⁵ Indeed, as emphasised by Walter Ullmann, quoting Johannes Monachus, 'the innocence of the accused was always taken for granted, so long as the prosecutor did not bring forth convicting proof of the Defendant's guilt'. See Walter Ullmann, 'The Defence of the Accused in the Medieval Inquisition' (1950) 63 *The Irish Ecclesiastical Record* 481, 489. In fact, Johannes de Monachus, a French Canonist, considered that if God needed to summons Adam in order to hear his defence before passing judgement on Adam and Eve, a fortiori, the Pope who is not above natural law should summon persons who are presumed innocent until proven guilty. Johannes just referred to a decretal of Pope Innocent III who ordered that should a cleric carries 'a papal mandate providing him with a benefit' he had to be 'presumed worth unless the contrary is shown'. See Kenneth Pennington, *The Prince and the Law 1200-1600 Sovereignty and Rights in the Western Legal Tradition* (University of California Press, California; Oxford 1993) 156,157). Johannes changed the papal words and transformed the order into the contemporary wording of the presumption of innocence with the same meaning that entails the presumption of innocence under article 66 of the Statute, meaning that a person suspected or accused has the right to be treated 'with humanity'. See François Quintard- Morénas, 'The Presumption of Innocence in the French and Anglo-American legal Traditions' [2010] 58 *AJIL* 107. Likely in the 13th Century Henry de Bracton laid down the meaning of the presumption stating that 'it is presumed that every man is good until the contrary is proved'. See Samuel E. Thorne (tr), *Bracton on the Laws and Customs of England* Volume Three (Harvard University Press Cambridge, Massachusetts and London 1977) 91, even if his assertion is not believed to have been 'made in the context of criminal procedure, and it is not clear whether it had any impact in criminal trials'. See Andrew Stumer (n25) 2; see note 8.

Indeed, the UDHR provides that '[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'¹¹⁶. Close and attentive reading of articles 7 to 11 of the UDHR which deal with general principles and rights of a person facing criminal charges, reveal that those articles institute general principles of fair administration of justice. All of them (no arbitrary arrest or detention, public and impartial hearing) rely on a basic principle: the person suspected or charged in criminal matter shall be presumed innocent. in other words, the presumption of innocence means that a person has the right to be treated as innocent' before trial and during trial'¹¹⁷. In the same way, article 6(2) of the ECHR provides that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'¹¹⁸. The European Commission of Human Rights has considered that the presumption of innocence under article 6 (2) of the ECHR 'protects everybody against being treated by public officials as being guilty of an offence before this is established according to law of a competent Court'¹¹⁹. Similarly, the ACHR provides that '[e]very person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law'¹²⁰. Under this provision, all the other minimum guarantees of a fair trial happen to be deriving from the right to be presumed innocent as these are all listed under the provision of the presumption of innocence. In almost a similar way, as Judge Sergio stated in light of Article 8(2) of the ACHR that the presumption of innocence is

¹¹⁶ UDHR (Adopted by U.N. Assembly Resolution 217 A (III), December 10, 1948) art 11(1).

¹¹⁷ Roza Pati (n53) 116.

¹¹⁸ CPRFFP (signed in Rome on 04 November 1950, entered into force on 3 September 1953) European Treaty Series, no.5.-43 p. (official original text) art 6 (2).

¹¹⁹ *Krause v Switzerland* (App. No. 7986/77) (1978) 13 DR 73.

¹²⁰ ACHR (Signed at the Inter-American Specialized Conference on Human Rights San José, Costa Rica, 22 November 1969) art 8.

‘the foundation for the right to fair trial. The latter is, in fact, built around the idea of innocence, which does not block criminal prosecution, but rationalizes and channels it. Historical experience supports this approach’¹²¹

Such an understanding matches the meaning of the presumption of innocence under article 66 of the Statute as meant by its drafters which founded the concept on article 14(2) of the ICCPR, perceived to be one of the two ‘most known and influential ‘fair trial’ codifications’¹²² with article 6 of the ECHR. According to Christoph JM Safferling, ‘it seems as if the drafters [of article 14 (2) of the ICCPR] saw the presumption of innocence as fundamental and necessitating all the procedural guarantees. The presumption itself is therefore the cardinal principle of criminal proceedings’¹²³.

Likewise, the provision of the presumption of innocence under article 7 (1) (b) of the ACHPR has been laid down as a component of the right of persons to have their ‘cause heard’¹²⁴. Despite its being regarded by Roza Pati as having dealt ‘rather inadequately with the right to a fair trial’¹²⁵ a fact also underlined by Malcolm D Evans and Rachel Murray¹²⁶, Article 7 of the ACHPR actually expresses the meaning of the presumption of innocence in a better way as one of the rights to be

¹²¹ Separate Concurring Opinion of Judge Sergio García-Ramírez in the Judgement of the Inter-American Court of Human Rights in the Case of *Tibi v Ecuador* (7 September 2004) [32].

¹²² Christoph JM Safferling, (n3) 24.

¹²³ Ibid 68.

¹²⁴ Indeed Article 7 (1) (a) to (d) of the ACHPR reads as follows: ‘1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal’. See ACHPR (Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986).

¹²⁵ Roza Pati (n53) 104 (references omitted),

¹²⁶ Malcolm D. Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (CUP, Cambridge 2002) 155.

heard as long as a person presumed innocent has not been proven guilty by a competent jurisdiction¹²⁷. Indeed, according to Christoph Safferling,

‘[t]his seems to be the best approach to an understanding of the presumption of innocence. The presumption ends with conviction by a competent court. Before such conviction, everybody is to be presumed innocent by all state authorities’¹²⁸.

It was in such a view that the African Commission on Human and People’s Rights considered a government’s comments ‘prior to and during the trial’ pronouncing ‘the accused guilty of the crimes at various press conferences and before the United Nations’ to be ‘a violation of the right to be presumed innocent’ as provided by the ACHPR under article 7(1) (b)¹²⁹.

Indeed, as highlighted by Herbert L. Packer some years ago, the presumption of innocence ‘means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question’¹³⁰.

¹²⁷ In actual facts, since the thirteenth century Paucapalea linked the right of defendants to be heard and thus to be presumed innocent to the prerequisite of two or three witnesses in criminal cases to secure the conviction of a man for an alleged crime under Deuteronomy 19:15 and the pleading (‘Ordo Iudiciarius’) See Ken Pennington, ‘Innocent Until Proven Guilty: The Origins of a Legal Maxim’ in Patricia M. Dugan (ed) (n91). So the presumption of innocence appears to be have been originally a right of a defendant to be heard as an innocent person and thus treated as such until proven otherwise. In this view, Moses ordered not only the truth of a case to be established by two or three witness, but further instructed Israelite judges to hear obligatory the disputes between their brothers in order to fairly judge them. See The NIV Study Bible, Deuteronomy 1:16 (Hodder & Stoughton, Great Britain 1987) 242. Nicodemus recalled the principle as follows: ‘Does our law condemn a man without first hearing him to find out what he is doing?’ See Ibid John 7:51, p 1579.

¹²⁸ Christoph J.M. Safferling (n3) 68.

¹²⁹ *International Pen and Others v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998) [96].

¹³⁰ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, California 1968) 161.

Concluding Remarks

The presumption of innocence under article 66 of the Statute appears to be both a substantive right and a procedural guarantee in criminal proceedings in the light of article 14(2) of the ICCPR¹³¹ and all the relevant instruments regarded by the Court to be international recognized human rights under article 21(3) of the Statute¹³².

Substantively, the presumption of innocence is a right of a suspect and an accused to be treated as innocent until proven guilty by the Court.¹³³ The Court quoting the ECHR held that such a right ‘protects everybody against being treated by public officials as being guilty of an offence before this is established according to

¹³¹ See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edn N.P. Engel, Publisher, Germany 2005) VII.

¹³² Indeed Note 1 and Note 2 under Article T relating to the presumption of innocence of the 1996 Preparatory Committee, the presumption of innocence was thought to be ‘a procedure matter’ and ‘a substantive right’ See M. Cherif Bassiouni (n79) 481.

¹³³ According to Antonio Cassese ‘[i]t is generally agreed that the presumption of innocence entails that: (i) the person charged with a crime must be treated as being innocent until proven guilty’. See Antonio Cassese, *International Criminal Law* (2nd edn OUP, Oxford; New York) 380. Indeed, the ICC regards the presumption of innocence under article 66(1) of the statute as ‘the right to be presumed innocent [and that] is guaranteed to everyone [...] [i.e.] to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [8]. It is, however, submitted that a person against who is interrogated by OTP on the basis that there are grounds to believe that he or she have committed a crime within the jurisdiction of the Court is presumed to be innocent and should be treated as such by OTP or by national authorities concerned involved in the proceedings under article 55(2)). In this sense the Court has held that ‘allegations of prejudice to suspects on account of public statements suggesting their guilty before a conviction by a court [...] are primarily of relevance to the issue of the presumption of innocence’. See *Ibid.* Accordingly, the presumption of innocence as a right of the suspect and the accused to be treated governs all the proceedings of the Court, the Court itself, the Prosecutor, Judges, Registry, Victims, and Representatives of victims, Defence’s Counsels, all the public officials and media. In this sense, the Court held that the presumption of innocence is one of ‘the principles governing this hearing, which governs us all-the Prosecutor, the Defence, the Legal representatives of victims, and of course, the judges as well [...] [and which means that] first of all, everybody is presumed innocent until their guilt has been established before the Court’. See *Situation in the Democratic Republic of the Congo* (Transcription) (n 89). In this sense the Court considered ‘itself responsible for the protection of the right of a suspect to presumption of innocence when it found that it was unacceptable that a publication of the Court referred to *Thomas Lubanga Djilo* as an accused person while at the time was still a suspect’. (See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [6] footnote 13).

law by a competent court¹³⁴. Therefore, under article 66 of the Statute, as a subjective right, the presumption of innocence imposes on the entire Court, public officials, and the media a duty to treat a person as presumed innocent at all the stages of the proceedings until such time a conviction is made beyond all reasonable doubt in the last instance of the Proceedings¹³⁵.

Procedurally, as a corollary to the right of the suspect and accused to be treated as innocent before a conviction has been made, the onus of proof falls on OTP. Consequently, persons have the right to remain silent before and during trial and the right not to incriminate themselves in any other ways¹³⁶. In this sense, the

¹³⁴ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n5) [10] footnote 18 quoting *Krause v. Switzerland*, Decision, 3 October 1978, application no. 7986/77.

¹³⁵ Actually, in light of the 1789 French Declaration of the Rights of Man and Citizen, '[w]hat the presumption of innocence referred to [...] and what it still refers to primarily, thought not exclusively [...] was (and is) the treatment of a suspected or accused person before trial'. (See Harold J. Berman 'The Presumption of Innocence: Another Reply' (1980) A J C L 28).

¹³⁶ The right to silence and the privilege not to incriminate oneself, both two components of the presumption of innocence, have their roots in the 16th century, in the time of religious persecutions in England. John Lambert, for instance, chose to perish on flame rather than testify against himself. He was expected to confess his heresy to the inquisition for having converted to Protestantism. John Lambert 'asserted his right to remain silent'. See Michael Mears, 'The Right To Remain Silent: From the Stars Chambers to Guantanamo Bay' available on http://www.gpdsc.org/docs/resources-publications-articles_right_to_remain_silent.pdf accessed on 6 May 2011. Refusing to take the oath 'ex officio' that avoided the adversarial procedure of common law, he empathically resisted against being asked to accuse himself by crying 'No man is bound to accuse himself'. See Leonard W. Levy, *The Origins of the Fifth Amendment* (OUP, New York 1968) 283). He, indeed, 'claimed that it was illegal to force a man to accuse himself'. See Carl Watner, 'Silence: The Ultimate Protector of Individual Rights' (1994) The Zon Association Las Vegas, Nevada, available on <http://www.neo-techsociety.com/myaccount/library/silence/index.html> and <http://www.neo-techsociety.com/myaccount/library/silence/main1.html> Accessed on 3 May 2011. Leonard W. Levy (n136) 282, 283. Nevertheless, '[t]he presumption of innocence in common law proceedings had no real existence at that time. It was one of Lilburne's great feats to establish this presumption of innocence even while remaining silent' (Michael Mears (n136); Leonard W. Levy (n136), 283) (to be précised). Effectively, in the 17th century John Lilburne, accused of having introduced seditious books in England 'refused [...] to take oath ex officio in Star Chamber proceedings against him'. See Diane Parkin-Speer, 'John Lilburne: A Revolutionary Interprets Statutes and Common Law Due Process' (1983) 1 LHR 276, 296). Found guilty, condemned to pillory, he was sent to Fleet Prison and in addition whipped on streets along the way from the prison to pillory. For history background see Leonard W. Levy (n136) 283; Diane Parkin-Speer (n136). Bravely, Lilburne 'told the assembled crowd 'the Law [of God] requires no man to accuse himself' (Michael Mears (n136). Eventually, he was released as the parliament considered his imprisonment and punishment to have been illegal and ordered for reparations in his favour but without making any law establishing the right to silence and against self-incrimination based on the presumption of innocence. Nevertheless, John Lilburne's claims for a right to due process, right to defence, right to know the charges and right to human treatment of prisoners revealed his correct understand of the presumption of innocence. As a defendant before the Stars Chamber, he 'vigorously protest[ed] being called a traitor from the bench since he [was] presumed innocent until proven guilty (Diane Parkin-Speer (n132). So not only John Lilburne told Stars Chamber's judges that 'the law [of God] requires no man to accuse himself see Leonard W. Levy (n136) 282, 283, but he also claimed the right to human treatment of prisoners. See Diane Parkin-Speer (n136). The interpretation of the 'Statutes and Common Law Due Process' achieved publically in trial by a revolutionary had an incontestable impact of the perception of the right of people to be presumed innocent before and during trial. Therefore, despite the assumption that the presumption of innocence was

presumption of innocence has been held by the court, as a general principle in criminal procedure applying, *mutatis mutandis*, at all the stages of the proceedings of the ICC and having as one of its components, the principle ‘in dubio proreo’¹³⁷. In this respect, it has been held that the presumption of innocence ‘requires *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused’¹³⁸.

The presumption of innocence understood as such, it deems necessary that it be strictly and specifically protected against any breach by anyone, particularly OTP. In effect a violation of the presumption of innocence as ‘an integral component of the fair trial rights contained in international human rights treaties’¹³⁹, by the Prosecutor would immediately undermine the impartiality and fairness of the proceedings.

The presumption of innocence under the Rome Statute is thus best understood as being a substantive right, imposing duties upon all actors under the Statute and held by ‘everyone’. As a result, the respect of this substantive right has immediate and detailed effect upon ‘criminal procedure generally’¹⁴⁰. It appears therefore indispensable to consider the main effects upon the general proceedings of the ICC of the presumption of innocence as a right of a suspect and an accused to be treated as innocent before a conviction has been made by the Court.

‘shown to be far from characteristic of English Criminal Law until the nineteenth century[.] [i]ts establishment as a principle of law was due partly to the changes in social organization, so that society, having less to fear from criminals, could treat persons more fairly, partly to the development of law of evidence’. See A. E. W. H. ‘Review: [untitled]’ [1932] JCLIL14 <http://www.jstor.org/stable/754206> accessed on 15 September 2010. Therefore, until a person is heard and his guilt established by the competent Court of law, a person shall be treated as innocent.

¹³⁷ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n59) 31.

¹³⁸ *Barberà, Messegue and Jabardo v Spain*, Series A, No. 146, 6 December 1988 [77].

¹³⁹ Paul Roberts & Adrian Zuckerman (n92) 221.

¹⁴⁰ *Ibid* 223.

Section 2: The Effects of the Presumption of Innocence under Article 66 of the Statute

This section outlines the effects of the presumption of innocence to be discussed in depth in chapters to follow. In light of the HRC views¹⁴¹, the presumption of innocence has the effects of determining the burden of proof, the treatment of persons by public authorities, the question of the detention of persons pending trial and media coverage of proceedings.

Under article 66 of the Statute, the burden of proof means that the onus to prove any charge against persons lies on OTP. Therefore, any individual under investigation has an absolute right to remain silence and not to be compelled to incriminate himself and thus the right not to confess guilt. Coercion, duress, torture or any other form of cruel, inhuman or degrading treatment or punishment in order 'to extract a confession' are forbidden and thus 'evidence obtained by such a means or other of the same kind in no way admissible'¹⁴². Moreover, where 'there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned by the prosecutor or national authorities'¹⁴³, the person has the right to remain silent during interrogation¹⁴⁴ 'without such silence being a consideration in the determination of guilt or innocence'¹⁴⁵. Such a right is linked to the right not to be compelled to incriminate oneself or to confess guilt. The accused has an absolute right to remain silent in trial as no adverse inferences shall be drawn from anyone's silence to establish his guilt

¹⁴¹ *HRC General Comment* UN CCPR/C/GC/32 (23 August 2007) [30].

¹⁴² *HRC General Comment No. 13* (n4) [14].

¹⁴³ The Statute (n7) art 55 (2).

¹⁴⁴ Draft Statute for an International Criminal Court with commentaries 1994 (103) Commentary on Article 26 [5].

¹⁴⁵ The Statute (n7) art 55 (2) (b))

or innocence. Moreover, the accused has the right to make an unsworn oral or written statement in his or her defence¹⁴⁶. In fact, the accused unlike a witness, is unlikely to commit an intentional offence against the administration of justice as set forth by article 70 (1) (a) pursuant to article 69 (1) of the Statute if he uses his right to make an unsworn oral or written statement in his or her own defence. This provision, as noticed by William A. Schabas, has no equivalent in internationally recognized human rights¹⁴⁷. The Court has held such a statement to be a statutory right of a suspect or an accused and cannot by any means be regarded as evidence as persons are not under an obligation of telling the truth to the Court or being questioned on it by any party to the proceedings nor even by judges¹⁴⁸.

It must be stressed finally that the Statute prohibits any imposition of reversal of the burden of proof or any onus of rebuttal¹⁴⁹. This provision places the entire onus of the guilt of the accused on OTP, exclusively. In that respect, it has been viewed as 'really a corollary of the presumption of innocence'¹⁵⁰. In effect, it reinforces the right to be presumed innocent before the ICC as persons have an absolute right to remain silent at any stage given that no adverse inference may be drawn from their silence to determine their guilt or innocence¹⁵¹.

¹⁴⁶ The Statute (n7) art 67 (1) (h).

¹⁴⁷ William A. Schabas (n50) 815.

¹⁴⁸ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Confirmation of Charges) PTCl ICC-02/05-02/09 (8 February 2008) [54]-[55].

¹⁴⁹ The Statute (n7) art 67 (1) (i).

¹⁵⁰ William A. Schabas (n50) 815.

¹⁵¹ Such a right has been held not to be absolute under the ECHR. See *John Murray v United Kingdom* (1996) 22 E.H.R.R. 29; [1996] E.C.H.R. 18731/91). In national laws, for instance, in England and Wales, if persons have no obligation to answer Police's questions and thus may remain silent, their silence may, impair their defence later on in Court if they rely on evidence they did not mention before the Police (Terms of the Caution: 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence'). See PACE Code C Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Entered into force after midnight on 31 January 2008) s10.5(b). Cf. John Sprack, *Emmins on Criminal Procedure* (8th edn Blackstone Press Limited, London 2000) 30, 31; Michael Zander, *The Police and Criminal Act Evidence* 1984 (Sweet & Maxwell, London 1990) 159, 160). In other words, what the suspect says may be used as evidence against him; what he does not say, may be used, under the CJPOA 1994, to draw adverse inference in Court against him (CJPOA (3rd November 1994) s 34). An adverse inference may be understood as 'a negative

The burden as explained above prevents a person to be suspected of crimes within the jurisdiction of the Court unless OTP demonstrates before the Court that there are 'reasonable grounds to believe' the contrary. Afterwards, in order to transform a suspect into an accused OTP must meet the 'substantial grounds' standard and then convince the Court to establish the guilt of the accused by meeting the 'beyond reasonable doubt' standard¹⁵².

Also, the right of persons to be presumed innocent has the effect of imposing upon public authorities 'the duty to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused'¹⁵³. Moreover, persons should not be presented by judicial authorities to the public by whatever means, 'in a manner indicating that they may be dangerous criminals'¹⁵⁴. It follows that as a substantive right of both a suspect and an accused to be treated as innocent, the presumption of innocence concerns the treatment that a person should expect before and outside the Court¹⁵⁵. In that respect, media coverage must be prevented from 'undermining the presumption of innocence'¹⁵⁶ as discussed in chapter 4 below. On the other hand, the presumption of innocence has the effect of preventing the Court from detaining persons in a manner indicating their 'guilt and its

conclusion from the defendant's silence when interviewed at the police station'. See Gary Atkinson and Deborah Sharpley, *Criminal Litigation: Practice and Procedure 2009/10* (CLP, UK 2009) 339-350. However, as pointed out by Michael Zander, '[t]he right of silence' is the ancient principle that neither the prosecution nor the judge can suggest to the jury that silence in response to police questioning is evidence of guilt. It is based on the presumption of innocence, and reflects the burden thrown on the prosecution to prove the defendant guilty, without any assistance from the defendant if he so chooses'. See Michael Zander, 'Abandoning an Ancient Right to Please the Police, *The Independent*' (London), Oct. 6, 1993) 25. Cf. Dr Barbara Ann Hocking and Laura Leigh Manville, 'what of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?' (2001) 1 MLJ 63, 92). In that view, it appears that by imposing an absolute silence, the Statute carries the best understanding of the right to be presumed innocent.

¹⁵² See Chapter 2 below.

¹⁵³ *HRC General Comment 32* (n141) [30].

¹⁵⁴ *Ibid.*

¹⁵⁵ Salvatore Zappalà (n 56) 87-90.

¹⁵⁶ *HRC General Comment 32* (n 141) 30.

degree'¹⁵⁷ whatever may the gravity of charges be. For instance he should not be shown wearing prison clothes or hand-cuffed whatsoever. Moreover, the question of the pre-trial detention and the treatment of a person arrested and remanded in custody pending trial appear to be at issue. In fact, the arrest and detention of persons must be in accordance with statutory grounds and procedures¹⁵⁸ pursuant to the ICCPR which prohibits arbitrary arrest and detention¹⁵⁹ so that, as held by the Court, the Statute, under 'article 21(3) assures to every individual the right to effectively contest the deprivation of liberty'¹⁶⁰.

¹⁵⁷ *HRC General Comment 32* (n 141) 30.

¹⁵⁸ The Statute (n7) art 55 (1) (d)

¹⁵⁹ Human Rights Committee, General Comment 24 (52), reservations to the ICCPR U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [8].

¹⁶⁰ *Situation in the Central African Republic The Prosecutor v Jean-Pierre Bemba Gombo* (Public document Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release") AC (16 December 2008) [31].

Chapter 2: The Standards of Proof as Corollaries to the Right of a Person to be Treated as Innocent at all the Stages of the Proceedings until Proven Guilty.

One of the effects of the presumption of innocence under Article 66 of the Statute concerns the burden of proof. Unlike ambiguous national conceptions of the presumption of innocence as meaning a rule of proof, the Statute as interpreted by the Court makes it clear that the presumption of innocence applies to everyone at all the stages of the ICC's proceedings. And as a corollary, the onus of proof falls exclusively on OTP without any reversal of the burden of proof or onus of rebuttal contrary to national courts findings. The burden of proof means 'the duty which lies on one or other of the parties, either to establish a case or establish the facts upon a particular issue'¹⁶¹. With this burden lying totally and exclusively on it, OTP has to meet standards required at different stages of the proceedings namely 'reasonable grounds to believe' under Article 58 (1 (a) and 7 of the Statute¹⁶², 'substantial grounds to believe' at the stage of the confirmation of charges under Article 61 (7) and 'beyond reasonable doubt' standard in order to convict the Court of the guilt of the accused under Article 66(3) of the Statute¹⁶³. It must be underscored that the standard of proof concerns 'the degree to which the proof must be established'¹⁶⁴.

¹⁶¹ *Phipson on Evidence* (16th edn Sweet & Maxwell, London 2005) 125.

¹⁶² To be distinguished from 'reasonable basis to proceed with an investigation' in order to convince the PTC to authorize an investigation under article 15(3) of the Statute.

¹⁶³ As also held by PTCII: '[t]he drafters of the Statute established three different, progressively higher evidentiary thresholds for each stage of the proceedings under articles 58(1), 61(7) and 66(3) of the Statute.' See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) PTC II ICC-01/05-01/08 (15 June 2009) [27]. Nonetheless, under art 55(2) (a) of the Statute, OTP is required to inform a person 'prior to being questioned, that there are grounds to believe that he or she committed a crime within the jurisdiction of the Court'.

¹⁶⁴ *Phipson on Evidence* (n161) 125.

This chapter assesses the application and interpretation of the presumption of innocence by the ICC through those three evidentiary thresholds in three sections in order to find out whether- and if so-to what extent- the presumption of innocence has been interpreted and applied as the guiding principle as held by the Court¹⁶⁵. It is argued that the presumption of innocence, particularly one of its components, *in dubio proreo*, shall be the guiding principle in making decisions on warrants of arrest or summons to appear, at the confirmation of charges and at the stage of conviction. Any doubt shall be interpreted in favour of a suspect or an accused. It is argued, in addition, that the less strong the required standard of proof is, the more strong should the strictness of the respect of the presumption of innocence by OTP and all the parties to the proceedings and its protection by the Court be.

¹⁶⁵ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n 163) [31].

Section 1: The Presumption of Innocence and the Reasonable Grounds to Believe Standard

This stage is the most important as it constitutes the ground for the rest of the proceedings. A person being presumed innocent, OTP must convince PTC, in the course of an investigation¹⁶⁶, to issue a warrant for arrest or a summons for a person to appear before the Court by demonstrating the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court under article 58 of the Statute¹⁶⁷.

It is noteworthy that the presumption of innocence applies at the investigation stage¹⁶⁸. Therefore, a person under investigation has the right to be treated as innocent and thus to remain silent and not to be compelled to incriminate himself. Hence there must be 'grounds to believe' that the person has committed alleged crimes within the jurisdiction of the Court as to have the person questioned¹⁶⁹. However those grounds must be proved to be 'reasonable' under article 58 of the

¹⁶⁶ An investigation takes place at any time on the ground of 'reasonable basis' found by OTP under art 54 of the Statute following a referral of a situation whether by a State Party or the UNSC to OTP under articles 13 (a) and (b) and 14 and rule 45 of The Rules. Also, an investigation proprio motu may be initiated by OTP with the authorization of the Pre-Trial Chamber under art 15 of the Statute.

¹⁶⁷ Article 58 (1) (a) and (7) of the Statute reads as follows: 'At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court [...] As an alternative to seeking a warrant for arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention)'.

¹⁶⁸ See *Situation in the Republic Democratic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) Pre-Trial chamber I ICC-01/04 (17 January 2006) [42]-[44] (references omitted). Cf *Situation in the Democratic Republic of the Congo* (Public Document Judgement on the Prosecution's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying leave to appeal) The Appeals Chamber ICC-01/04 (13 July 2006) [11].

¹⁶⁹ The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) art 55 (2).

Statute so as to justify a warrant of arrest or a summons for the person to appear before the Court.

This section scrutinizes the meaning of ‘reasonable grounds to believe’ and how OTP meets such a standard in respect of the right of a person to a presumption of innocence. In other words, the section discusses the following questions: Does the right to be presumed innocent protect the person suspected-and if so- to what extent? How does OTP meet the standard of proof so as to believe that the person presumed innocent has committed the alleged crimes and not another person even if the latter happens to be under the authority of the former? What actually is the meaning of ‘reasonable grounds to believe’ that a person who is presumed to be innocent, can, nevertheless, be arrested or summoned to appear before the Court with or without conditions restricting his liberty? The Statute makes no provision on these issues. Therefore, an analysis of the reasoning of the Court in a number of decisions may shed light on them.

In the case of *Bashir*,¹⁷⁰ PTCI considered that there was a lack of reasonable grounds to believe in terms of a specific genocidal intent that PTCI considered being the standard to be applied under article 58 of the Statute for the crime of genocide¹⁷¹. However, APC unanimously considered the ground PTCI’s decision to have been a wrong standard of proof as it required ‘a level of proof that would be

¹⁷⁰ Upon considering OTP’ application for a warrant of arrest for Al Bashir, the Sudan President, for alleged crime of genocide, crimes against humanity and war crimes. In its decision PTCI found reasonable grounds to believe that crimes against humanity and war crimes were possibly committed but it found no reasonable grounds for the crime of genocide. See *Situation in Darfur, Sudan, in the Case of The Prosecutor v Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)* (Public Redacted Version Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Ahmad Al Bashir) PTCI ICC-02/05-01/09 (4 March 2009) [158].

¹⁷¹ Ibid.

required for the confirmation of charges or conviction¹⁷². Nevertheless, APC did not precisely specify the accurate understanding of reasonable grounds to believe.

Yet, PTCI considered reasonable grounds as referring to the contextual and specific elements of a crime within the jurisdiction of the Court. Thus 'reasonable grounds to believe' exist where, on the one hand, 'the contextual elements of at least one crime within the jurisdiction of the Court are present' and on the other hand 'the specific elements of any such crime also have taken place'¹⁷³. In this view, 'reasonable grounds to believe' have been thought by the Court in the light of internationally recognized human rights specifically article 5 (1) (c) of the ECHR, to be the same as 'reasonable suspicion standard' which, according to the ECtHR's interpretation 'requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence'¹⁷⁴. Those facts and information generally described in *Abu Garda* as evidence and information provided by OTP¹⁷⁵ refer in fact to various sources such as information provided by NGOs, their statements, communiqués, witness statements, videos, media news or reportages, photographs, States governments and UN reports, statements or discourses and interviews of persons suspected, related to the contextual circumstances of the crime concerned or to an element of

¹⁷² *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir* (Public Document Judgement of the Appeal of the Prosecutor against the " Decision of the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) AC ICC-02/05-01/09-OA (3 February 2010) [30], [34], [39].

¹⁷³ *Situation in the Democratic Republic of the Congo* (Under Seal Ex Parte, Prosecution Only Decision on the Prosecutor's Application Warrants of Arrest, Article 58) PTCI ICC-01/04-01/07 (10 February 2006) 94. See also *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Prosecutor's Application under article 58) PTCI ICC-02/05-02/09 (7 May 2009) [6].

¹⁷⁴ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) PTCI II ICC-01/05-01/08 (10 June 2008) [24] (references omitted).

¹⁷⁵ See *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Prosecutor's Application under article 58) Pre-Trial Chamber I ICC-02/05-02/09 (7 May 2009) [12].

such a crime¹⁷⁶. If OTP is required at the confirmation of charges stage to 'offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations'¹⁷⁷, it is not clear how article 58 standard is actually gauged to ascertain that the person alleged responsible is more than likely to be indeed the one who effectively committed the crime prosecuted considering the ex parte nature of article 58 stage. This question is essential as it has been found that 'international trials are beset by numerous and sever fact-finding impediments that substantially impair the tribunals' ability to determine who did what to whom'¹⁷⁸. It has been, particularly, pointed out that 'the testimony of international witnesses often is vague, unclear and lacking in the information necessary for fact finders to make reasoned factual assessments. Moreover, what clear information witnesses do provide in court often conflicts with the information that witnesses previously provided in their pre-statements'¹⁷⁹. It must be stressed indeed, that the submissions of OTP are generally if not essentially grounded on OTP witnesses or victims/witnesses.

In the very first decision on article 58 in the *Situation in Uganda*, PTCII considered 'the application, the evidence and other information submitted by the Prosecutor to be the basis to discuss and ascertain the existence of 'reasonable grounds to believe that Joseph Kony [and other] committed crimes within the

¹⁷⁶ Materials generally classified. See Andrew J. Burrow 'The Standard of Proof in Pre-Trial Proceedings' in Karim A.A. Khan, Caroline Buisman, Christopher Gosnell, *Principles of Evidence in International Criminal Justice*, (OUP, Oxford; New York 2010) 679 footnote 24 Cf *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (n173).

¹⁷⁷ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Confirmation of Charges) Pre-Trial Chamber I ICC-02/05-02/09 (8 February 2008) [37] (footnote included).

¹⁷⁸ Nancy Armoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP, New York 2010) see Fact-Finding Without Facts page (without number).

¹⁷⁹ Ibid 5.

jurisdiction of the Court' upon which it issued warrants of arrests.¹⁸⁰ Did such a view imply that the rationale of article 58 as an ex parte stage requires the PTC to merely consider the OTP's chosen submission to be sufficient as a ground of consideration whether reasonable grounds to believe existed?

Such has been OTP's view in *Lubanga*¹⁸¹. Indeed PCTII agreed with such a view¹⁸². Nonetheless, OTP's claim that the rationale of article 58 required the PTC to 'trust' his 'summary'¹⁸³ was rejected. Instead PTCII buttressed the rationale of article 58 (1) requiring it to review both the OTP's Application and supported evidence and other information 'in order to satisfy itself that there are reasonable grounds to believe'¹⁸⁴. And in order to carry out such a test, PTCIII held that 'the Chamber will be specifically guided by the "reasonable suspicion" standard'¹⁸⁵.

It must be underscored that the provisions referred to as a guidance to assess whether OTP meets his burden under article 58 deals rather with the question of

¹⁸⁰ *Situation in Uganda* (Under Seal Ex Parte, Prosecutor Only Decision on the Prosecutor's Application for a Warrants of Arrest under Article 58) PTCII ICC-02/04 (8 July 2005) [6]-[7].

¹⁸¹ *Situation in the Democratic Republic of the Congo* (n173) [7].

¹⁸² Moreover, it contended that article 58 stage imposed no 'procedural obligation' compelling OTP to submit precise material to the PCT in order to convince it of the existence of reasonable grounds to believe. It affirmed the OTP's 'discretion [...] to decide what to present to the Chamber' for the purpose of article 58(1) see *Situation in the Democratic Republic of the Congo* (n173) [9], provided that 'the Prosecutor's Application itself [...] [obligatory] contain[s], *inter alia* "[a] summary of the evidence and any other information which establish reasonable grounds to believe that the person committed [the alleged] crimes' Ibid [8].

¹⁸³ *Situation in the Democratic Republic of the Congo* (n173) [10].

¹⁸⁴ Ibid.

¹⁸⁵ Which, under article 5(1) (c) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as interpreted by the European Court of Human Rights ("ECHR"), "requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offense. In addition, the Chamber will also be guided by the jurisprudence of the Inter-American Court of Human Rights ("IACHR") of the fundamental right to liberty as enshrined in article 7 of the *American Convention on Human Rights*'. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n174) [24] (references omitted).

liberty¹⁸⁶ than that of the existence of reasonable grounds to challenge a person's presumption of innocence so as to hold them as a suspect irrespective of whether such a person should be arrested or summoned to appear before the Court¹⁸⁷. It appears, therefore, that the test does not actually deal with the degree of evidence necessary to incontrovertibly establish reasonable grounds to question impartially and fairly a person's right to be presumed innocent as to make such a person be a suspect, the question of issuing a warrant or summons coming in the second instance.

Nevertheless, one may argue that the stage of the confirmation of charges may correct any wrong view taken at article 58 stage. In *Ngudjolu*, for instance, PCT, after reaching a conclusion on the existence of 'reasonable grounds to believe', stressed that the decision was made 'without prejudice to any subsequent interpretation by the Chamber at the confirmation hearing stage'¹⁸⁸. Indeed PTC has once found facts previously held as constitutive of 'reasonable grounds to believe' to not be matching the 'substantial grounds to believe' required for the confirmation of charges.¹⁸⁹

Nevertheless, article 58 stage as the starting point of officially transforming a person regarded so far as an innocent, respectable and trustworthy individual, into a suspect, needs not only accurate fact-finding to establish the merit of the prosecution

¹⁸⁶ See AC's view on this point in *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir* (Public Document Judgement of the Appeal of the Prosecutor against the " Decision of the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) The Appeals Chamber ICC-02/05-01/09-OA (3 February 2010) [31].

¹⁸⁷ See Statute art 58 (1) (a) and (b) Cf art 58 (7).

¹⁸⁸ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Mathieu Ngudjolo Chui* (Under Seal Urgent Decision on the Evidence and Information provided by the Prosecution for the issuance of a Warrant of Arrest of Mathieu Ngudjolo Chu) PTCI ICC-01/04-02/07 (6 July 2007) [53].

¹⁸⁹ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Confirmation of Charges) Pre-Trial Chamber I ICC-02/05-02/09 (8 February 2008). Cf *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (n173).

against the person, but also to some extent certain measures preventing OTP from presenting those against whom he has identified grounds to believe as already guilty as discussed in chapter 4.

Concerning measures that would prevent OTP from treating persons at the stage of article 58 as already guilty, it must be underlined at this point how a warrant or a summons to appear affects the suspect's life: media coverage depicts him as the one who committed the most heinous crime of concern to the whole of humanity. In one instant the person-generally of high profile such as a head of a State- loses respect, dignity, honour, social consideration or wealth for unproven charges considered being just 'reasonable grounds to believe'. In fact those grounds as seen above are information and facts brought to OTP by the UNSC, heads of States, NGOs who may have political interests to distort the truth. It is submitted that in order to protect the innocent against wrongful conviction the truth must be carefully determined so as to ascertain the factual circumstances of the crime and the responsibility of the suspect. As stressed by Roberts and Zuckerman

'[i]n order to do justice in individual cases and to protect the community from crime, the right people-offenders, and only them-have to be caught, tried, and punished. The principle of accurate fact-finding is the ultimate golden thread tying criminal proceedings to the public interest. [...] for criminal process unconcerned with the truth is the instrument, not of justice, but of despotism'¹⁹⁰.

Therefore, in addition to using an accurate test of reasonable reasons as regard to the presumption of innocence instead of that relating to whether a person shall be

¹⁹⁰ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn OUP, Oxford; New York 2010) 19.

remanded on bail or not, considering the ex parte feature of the proceedings under article 58, the Court should impose the respect of the right of a person to be presumed innocent not only by OTP, but also by the UNSC, head of States Parties who all have the power to trigger the proceedings of the Court by referring a situation to OTP. Any distortion of the truth or attempt to do so by any means may render the entire process questionable, considering such alteration of truth may be seen as 'the effects of realpolitik (powers politics)'¹⁹¹ which, regrettably, as observed by a number of specialists, 'will continue to challenge the capacity of the ICC to prosecute and punish the worst perpetrators of gross human rights abuses'¹⁹² as it appears to have been the case in the first 'self referral'¹⁹³ of the situation in the DRC, in the ongoing investigation in Ivory Coast¹⁹⁴, in the situation in Kenya¹⁹⁵ or in the Situation in

¹⁹¹ Steven C. Roach, 'Introduction: Global Governance in Context' in Steven C. Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP, Oxford; New York 2009) 1.

¹⁹² Ibid.

¹⁹³ The self referral of the situation in the DRC to OTP in March 2004 by the current Head of State Joseph Kabila has been seen as 'surprising considering that Kabila himself may have been responsible for some of [the] crimes [concerned] and could be subject to investigation'. See Eric K. Leonard and Steven C. Roach, 'From Realism to Legalization: A rationalist Assessment of the International Criminal Court in the Democratic Republic of Congo' in Steven C. Roach (ed) (n191) 65. However Mr Kabila knew that crimes that he may be held to have been involved in occurred before the coming into force of the Rome Statute. In actual fact the self-referral far from being a genuine search of justice aimed at, on the one hand, getting rid of political opponents and on the other hand cementing his international legitimacy by pleasing the International Community.

¹⁹⁴ In the situation in Ivory Coast, since the then President accepted the jurisdiction of the Court under article 12 (3) of the Statute in 2003 and demanded an investigation into crimes within the jurisdiction of the Court allegedly committed since 2002 following the failed Coup d'état, no investigation took place. See Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court (Done at Abidjan 18 April 2003). Moreover, French troupes based within the country have been seen firing on civilian protesters allegedly committing crimes against humanity, no declaration has been made to date by OTP. Paradoxically, OTP only acknowledged 'monitoring the situation in Libya ahead of the presidential run-off of 28 November', ignoring all the facts that occurred before then. See ICC-OTP, Statement by the Deputy Prosecutor of the ICC on the situation in Côte d'Ivoire (2 December 2010). Furthermore, on April 2011, OTP expressed concerns about 'Widespread or systematic killings in Cote d'Ivoire [which] may trigger OTP investigation' and made known its eagerness to 'prepare a request for an arrest warrant for those most responsible for crimes in Ivory Coast'. See ICC-OTP, Widespread or systematic killings in Cote d'Ivoire may trigger OPT investigation (Statement 6 April 2011). And in its letter to the presidency informing the Court of its intention to start an investigation OTP underlined that it found reasonable basis to believe that crimes within the jurisdiction of the Court have been committed only since 28 November 2010. The position taken by OTP cannot be justified by the question of jurisdiction since the then President made a declaration in accordance with articles 11(2) and 12 (3) of the Statute for an investigation to focus on facts occurred since 2002. On the other hand, whilst OTP pointed the event of 28 November 2008, which may involve the former President Laurent Gbagbo, his wife and a number of collaborators, OTP made no comments on the accusations made against Mr Ouattara, the current President and his troupes, for the crime of genocide, crimes against humanity and war crimes that may have been committed in the region of Doukoue. See, for instance, David Batty '880 Dead in Ivory Coast Violence around Doukoue City, says Red Cross' The Guardian (2 April 2011) available on <http://www.guardian.co.uk/world/2011/apr/02/800-dead-ivory-coast-doukoue> accessed on 5 August 2011.. Apparently, Laurent Gbagbo may be prosecuted by the Court, considering the last interview of the Current President. See France24 'Ouattara Insists Gbagbo Must Face War

Libya¹⁹⁶. It must be highlighted that when considering whether to grant OTP authorisation to initiate an investigation *proprio motu* in the situation in Kenya, the Court underscored its awareness of the 'risk of politicizing the Court and thereby undermining its credibility'¹⁹⁷. Indeed, such a fear could be expressed in regard to the situation in Libya. Arguably, all the parties involved in the Libya war, the rebels, the international coalition and the Libyan government could be suspected of crimes within the jurisdiction of the Court¹⁹⁸. Moreover, heavy casualties occurring as the

Crimes Trial' (23 May 2011) available on <http://www.france24.com/en/20110522-france-24-exclusive-interview-ivorian-president-ouattara-gbagbo-trial#>. Cf BBC News, 'All Sides in Ivory Coast to Face Justice, Ouattara Says' (13 April 2011). <http://www.bbc.co.uk/news/world-africa-13067609> accessed on 5 August 2011. The latter, however, seems to hold himself as not accountable of crimes that his troupes are suspected of (*Amnesty International, Côte d'Ivoire: Both Sides Responsible for War Crimes and Crimes against humanity*' (25 May 2011) available on <http://www.amnesty.org/en/news-and-updates/report/c%C3%B4te-divoire-both-sides-responsible-war-crimes-and-crimes-against-humanity-2>), accessed on 5 August 2011. He actually tends to throw responsibility exclusively on his troupes. However, under article 28 (a) of the Statute, Ouattara is the first suspect as Commander in chief of the crimes that are alleged committed by his troupes in Douekoue. Cf *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n174) [19]; *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [501] see reasons for the decision d).

¹⁹⁵ Rejecting the decision of the majority to authorise an investigation in Kenya, Judge Hans-Peter Kaul in his dissenting opinion as he found no 'reasonable basis to believe' that alleged crimes within the jurisdiction of the Court were committed. See *Situation in the Republic of Kenya* (Public Document Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya) Pre-Trial Chamber II ICC-01/09 (31 March 2010) Judge Hans-Peter Kaul's dissenting opinion [5]-[10]. It also pointed out that the necessity for the Prosecutor under article 15 (1) and (2) to 'properly and thoroughly analyze[...] the material received or gathered' as to assess 'in a conclusive manner whether there is a reasonable basis to proceed with an investigation' *Situation in the Republic of Kenya* (Public Document Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya) PTC II ICC-01/09 (31 March 2010) Judge Hans-Peter Kaul's dissenting opinion [5]-[10]. Furthermore, OTP eventually chose not to request a warrant of arrest or a summons to appear for the Head of State and the Prime Minister of Kenya. The latter should indeed have been held responsible of post-electoral acts of violence of their respective collaborators as to the Situation in the CAR.

¹⁹⁶ In the situation in Libya, it must be pointed out that it took just less than three months to OTP to establish 'reasonable grounds to believe that 'Ghadaffi used his absolute authority to commit crimes in Libya'. See Statement ICC Prosecutor Press Conference on Libya 16 May 2011. A fact criticized within the ICC. See *Situation in the Libyan Arab Jamahiriya* (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) OPCD PTCI ICC-01/11 (25 May 2011) Annex A.

¹⁹⁷ The Court referred to the debate concerning the power of OTP on art 15 of the Statute though the drafting process of the Statute. See *Situation in the Republic of Kenya* (Public Document Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya) Pre-Trial Chamber II ICC-01/09 (31 March 2010) [17]-[18].

¹⁹⁸ Paradoxically, the UNSC resolution referring the situation in Libya to OTP ignored the fact that rebels could commit crimes within the jurisdiction of the Court and focussed solely on Gaddafi his relatives and collaborators. In fact the UNS resolution already held Gaddafi responsible 'for ordering repression of demonstrations, human rights abuses' or as '[i]nvolvement in or complicit [...] in ordering the commission of serious human rights abuses against persons in Libya [...]'. See UNSC Resolution S/Res 1970 (2011) (Adopted by the Security Council at its 6491st meeting on 26 February 2011 [22] and Annexe 1 (11). These statements were made eleven days only after the conflict took place in Libya. How could have accurate information been gathered so quickly as to declare Mr Gaddafi already guilty in a UNSC resolution whilst nothing has been said against almost the same kind of conflicts with terrible casualties going on at the same time in Bahrain, Yemen, Syria and other places in the world? Furthermore, it is noticeable that since the OTP made its examination public in Afghanistan in 2007 for alleged crimes that all the actors involved in the war in there may have committed or in Columbia in 2006 and Georgia in 2008, for instance, no other declaration public has been made taken in those countries. See ICC-OTP

result of the coalition attacks cannot be held as falling within the UNSC mandate given to all Members States to implement Arms embargo on Libya by taking ‘the necessary measures’¹⁹⁹. Paradoxically, OTP focuses essentially on Gaddafi. And, in his statement opening investigation on Libya, OTP already identified Gaddafi as one of the people who ordered the commission of crimes in Libya without mentioning any leader of neither the Libyan opposing parties nor the coalition and without acknowledging the right of persons to be presumed innocent²⁰⁰.

Such a statement further to its failure to respect impartiality²⁰¹, appears to be in contradiction with the necessary search of the truth which requires OTP to ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute, and in doing so, investigate incriminating and exonerating circumstances equally’ under article 54(1) (a) of the Statute. Also under article 54(1)(c) OTP has an obligation to carry on the investigation in full respect of ‘the rights of persons arising under [the] Statute’ of which the presumption of innocence constitutes an essential component in regard a

‘OTP Weekly Briefing (5-11 April 2011). On the contrary, in Libya, as in Ivory Coast, statements and allegations have been made in a very quick way arising numerous questions as to the accuracy of fact-finding and impartiality of the proceedings. Regarding the question of selective investigation, the way the OTP has dealt with situation in Libya and in other countries such as Iraq, Afghanistan, Kenya, Ivory Coast, etc can be considered illustratively as a starting point. Firstly, OTP carried investigation for less than three month and then applied for Warrants of arrest of Gaddafi and al. Paradoxically, OTP took almost 3 years since the first communication on Iraq on 16 July 2003 (See Letter of the Prosecutor, OTP, The Hague (9 February 2006) to examine over 240 communications on alleged crimes in Iraq and then state, *inter alia*, that a reasonable basis to proceed with an investigation could not be found (See Letter of the Prosecutor, OTP, The Hague (9 February 2006). In actual facts, as underlined by William A. Schabas [t]here can be little doubt[...], that both the crime of aggression and serious violations of international humanitarian law have been committed by armed forces of the United States, the United Kingdom and other states who have participated in the 2003 invasion for Iraq and is subsequent occupation’ See William A. Schabas, ‘Complicity before the International Criminal Tribunals and Jurisdiction over Iraq’ in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing, US; Canada 2008). To justify the length of time taken reach his conclusion, OTP argued that to consider the information gathered in a situation in order to determine whether there is a reasonable basis ‘can take a time’ given the ‘limited powers’ of OTP. See Letter of the Prosecutor, OTP, The Hague (9 February 2006).

¹⁹⁹ UNSC Resolution S/Res 1970 (2011) (Adopted by the Security Council at its 6491st meeting on 26 February 2011) para 9.

²⁰⁰ Statement of the Prosecutor on the opening of the investigation into the situation in Libya, ICC, The Office of the Prosecutor, The Hague (3 March 2011).

²⁰¹ See *Situation in the Libyan Arab Jamahiriya* (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) OPCD PTCI ICC-01/11 (25 May 2011) Annex A.

fair trial²⁰². In fact in light of article 54 of the Statute, as emphasised by Antonio Cassese, OTP cannot act only as a party to the ICC proceedings but also as ‘an impartial truth-seeker or organ of justice’²⁰³. Furthermore, if OTP is indisputably a party to a trial, he should by no means act as a ‘partisan’²⁰⁴. In this view the Court held that ‘as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of the accused persons to a fair trial’²⁰⁵. In this sense, during the first hearing of confirmation of charges that took place before the Court, the latter deemed it necessary to remind all the participants of their obligations within the legal framework of the ICC. To OTP and his team the Court reminded the solemn undertaking that they took ‘in application of Rule 6 of the Rules of Procedure and Evidence and that [they] will exercise [their] powers honourably, faithfully, impartially and conscientiously’²⁰⁶. Impartiality has been described in its ‘ordinary meaning as the absence of prejudice and or bias’²⁰⁷.

²⁰² It is important to underscore that where article 14 (1) and (3) of the ICCPR respectively relating to the fairness of a trial and the minimum guarantees of a fair trial have been violated because persons were brought to trial in violation of the requisite safeguards of a fair trial out of a reasonable time and without access to legal assistance, there has been ipso facto a violation of article 14(2) relative to the presumption of innocence according to the views of the HRC in two decisions: *Massera et al v Uruguay*, *Communication* No R.1/5 (15 August) 1979) para 10 (ii); and *Beatriz Weismann Lanza and Alcides Lanza Perdomo v Uruguay*, *Communication* No R. 2/8 U.N. Doc. Supp. No. 40 (A/35/40) at 11 (1980) para 16. See also Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (OUP, Oxford; New York 1994) 419. For American views on the presumption of innocence as a basic component of a fair trial, see Marsha L. W. Reingen, ‘The Current Role of the Presumption of Innocence in the Criminal Justice’ (1980) 31 SCLR 357, 376.

²⁰³ Antonio Cassese, ‘he Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 EJIL 168.

²⁰⁴ Separate opinion of Judge Shahabuddeen in *Barayagwiza* (ICTR-97-19-AR72) Decision (Prosecution’s Request for Review of Reconsideration) 31 March 2000 [68].

²⁰⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolu Chui* ((Public Document Urgent Decision on Article 54 (3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing) PCTI ICC-01/04-01/07(20 June 2008) [39].

²⁰⁶ See *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) Pre-Trial Chamber I ICC-01/04-01/06 (9 November 2006) lines 1-3, p12 and 3-8, p13.

²⁰⁷ *Affaire Piersack c Belgique*, CEHD (Requête no 8692/79) Arrêt, Strasbourg (1 octobre 1982) [30].

Therefore, in order to secure downstream a fair trial for the accused who is a suspect or likely to be so at the investigation stage, it is essential that the Court ensures that OTP acts towards a potential suspect in accordance with the imperatives duties imposed upon him by the provision of article 54 (1) and thus strictly respect the right of persons to be treated as innocent before conviction. In this sense, the Court held that

‘within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54’²⁰⁸.

Undeniably, the violation by OTP of his duty to ‘investigate incriminating and exonerating circumstances equally’ under article 54(1) (a) of the Statute has the effects of worsening the imbalance between the accusation and the defence²⁰⁹. In reality, ‘[t]he investigator should not act as though engaged in a personal battle against a particular suspect but should, instead attempt to discover the whole truth of the crime and establish where guilt lies’²¹⁰. The search of the truth implies not only that the criminal process is grounded on an ‘[a]ccurate fact-finding’²¹¹ but also on the principle of ‘protecting the innocent from wrongful conviction [...] even at the risk of allowing significant numbers of the probably guilty to escape their just deserts’²¹². In

²⁰⁸ *Situation in the Democratic Republic of the Congo* (Decision on the Prosecutor’s Application for Leave to appeal the Chamber’s Decision of 17 January 2006 on the Application for Participations in the Proceedings of VPRS1 VPRS2 VPRS3 VPRS4 VPRS5 VPRS6) Pre-Trial Chamber I ICC-01/04 (31 March 2006) [39].

²⁰⁹ See in particular the concerns raised in this respect by OPCD. *Situation in the Libyan Arab Jamahiriya* (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) OPCD PTCI ICC-01/11 (25 May 2011) Annex A.

²¹⁰ Christoph JM Safferling, *Towards an International Criminal Procedure* (OPU, Oxford 2001) 69.

²¹¹ Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (2nd edn OUP, Oxford, New York 2010) 19.

²¹² *Ibid* 19, 223.

this respect, academics view the protection of the innocent from wrongful conviction as ‘a key constitutional right’²¹³. As mentioned in the introduction, the presumption of innocence with the privilege against self-incrimination had been correctly identified as being the ‘[c]riminal procedure’s most celebrated corrective mechanisms’²¹⁴ of the ‘more pronounced and potentially deleterious effects of the adversarial deficit’²¹⁵. The deficit may be found huge at the ICC where an individual suspected or accused faces an intense pressure on his innocence from OTP with huge means at his disposal including international cooperation. Unfortunately, in the view of the Court, it is not the evidentiary threshold under article 58 that protects ‘the suspect against wrongful prosecution’²¹⁶ given its being not high as the threshold under article 60(7) applied at the confirmation charges hearing, ‘namely "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"'²¹⁷. In this view, it is essential that the application of reasonable grounds standard be strictly guided by a high degree in respect for the presumption of innocence by OTP, all the public officials of the UNSC and State Parties, all the information providers amongst others, Amnesty International, Human Rights Watch, etc., in order to make sure that only the actual suspect is brought to Court on the ground of genuine and incontestable evidence that he may have committed a crime within the jurisdiction of the ICC.

²¹³Paul Roberts & Adrian Zuckerman (n 221) 223.

²¹⁴ Ibid 15.

²¹⁵ Ibid.

²¹⁶ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [27] (reference omitted).

²¹⁷ Ibid.

Section 2: The Presumption of Innocence and the Substantial Grounds to Believe Standard

This section discusses the meaning of ‘substantial grounds to believe’ as the threshold applied at the hearing of confirmation of charges stage and how OTP has to meet the standard so required as to commit to trial a person still presumed innocent. As held by the Court in *Lubanga*,

‘the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges’²¹⁸.

In *Katanga*, the Court held that

‘[t]he evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of "substantial grounds to believe", as provided for in article 61(7) of the Statute. The purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged’²¹⁹.

Therefore, unless OTP’s evidence appears in the sight of the Court to be ‘as "significant", "solid", "material", "well built", "real" and rather than "imaginary"’²²⁰ as to determine the confirmation charges against a person by the Court in accordance

²¹⁸ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public Redacted Version with Annex I Decision on the confirmation of charges) PTCL ICC-01/04-01/06 (29 January 2007) [37].

²¹⁹ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Public Redacted Version Decision on the confirmation of charges) Pre-Trial Chamber I ICC-01/04-01/07 (30 September 2008) [63]-[63] (references omitted).

²²⁰ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [29].

with article 61 (7) (a), the latter will 'decline to confirm them pursuant to article 61(7)(b) of the Statute'²²¹. Relying on internationally recognized human rights, the Court regarded 'substantial grounds to believe', as "strong grounds to believe"²²². In light of this threshold so defined the Court assessed, in *Bemba*, whether there were 'sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba committed each of the crimes alleged'²²³. Importantly, the Court underscored that in its assessment it was 'guided by the principle *in dubio pro reo* as a component of the presumption of innocence'²²⁴. Concretely, the Court used as measures the 'relevance and probative value of evidence disclosed'. [R]elevance is the relationship between a piece of evidence and a fact that is sought to be proven'²²⁵. PTCII after reviewing the evidence disclosed²²⁶ as a whole found sufficient evidence to establish substantial grounds to believe that Mr Bemba was criminally responsible not as a co-perpetrator under article 25 (3) (a) of the Statute²²⁷ but as a military commander or person effectively acting as a military commander under article 28 (a) of the Statute

²²¹ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [30].

²²² It hence held that 'for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore the "substantial grounds to believe" standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole. After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecutor's allegations are sufficiently strong to commit Thomas Lubanga Dyilo for trial. In this regards, the Court will consider the various witness statements in the context of the remaining evidence admitted for the purpose of the confirmation hearing, without however referencing all of them in this decision'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (n218) [39].

²²³ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) 30.

²²⁴ *Ibid* 31.

²²⁵ Therefore 'evidence is relevant only if it has probative value. Probative value is the weigh to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence. Each piece of evidence has to provide a certain degree of probative value in order to be constructive and decisive for the Chamber in making its determination pursuant to article 67 (7) of the Statute'

Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo (n163) [41]-[42] (reference omitted).

²²⁶ Naturally evidence considered to be either 'direct' or 'indirect' have to pass the test of admissibility under article 69 (4) or (7) of the Statute and rule 64, if challenged by a party to the proceedings or on the Court's own motion where appropriate. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [45]-[46]). Books, photographs, documents, tangible objects such as video and audio recorded evidences amongst other, written and oral witnesses' statements are considered to be direct evidence (See Rules 76, 77 and *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [47]- [48]) whilst indirect evidence encompasses 'hearsay evidence, reports of the United Nations (the "UN"), Non-Governmental Organisations (the "NGO" "NGOs") and media reports' (*Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [47]).

²²⁷ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [341] [344].

for crimes against humanity of murder and rape, war crimes of murder, rape and pillaging committed by his troupes in the CAR²²⁸.

The same standard and approach were applied in *Katanga* and *Ngudjolo* to confirm their respective charges²²⁹. Nevertheless, while agreeing with the conclusion of the majority that there were sufficient evidence to establish substantial grounds to believe that alleged crimes were committed, Judge Anita Usacka, in her partly dissenting opinion, stated that she was not “‘thoroughly satisfied ” that the Prosecution’s allegations [were] sufficiently strong to establish grounds to believe that the suspects were criminally responsible for the commission of those crimes’²³⁰. In *Abu Garda*, applying the ‘substantial grounds to believe’ as required for the confirmation of charges as defined above, found that OTP did not meet his evidentiary burden. The Court concluded that ‘the evidence brought by the Prosecutor is not sufficient to establish substantial grounds to believe’ that Mr Abu Garda could be held responsible of crimes charged of. Accordingly the Court declined to confirm charges against him without precluding the Prosecutor for making a subsequent request for the confirmation of charges, should ‘such a request be supported by additional evidence, in accordance with article 61(8) of the Statute’.²³¹

²²⁸ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [402]-[444].

²²⁹ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n219) [567] Cf reasons of the decision under [582].

²³⁰ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n219) Partly Dissenting Opinion of Judge Anita Usacka [13], [14].

²³¹ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (n189) [37]-[40] and [231]-[236] (references omitted).

Paradoxically, whilst stating that it was 'guided by the principle in *dubio pro reo* as a component of the presumption of Innocence'²³² in making its determination whether there were 'sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba committed each of crimes alleged'²³³, the Court contradicted itself in *Abu Garda*. In reply to the Defence's argument that on the ground of the principle in *dubio pro reo* applying at all stage, any doubt in reviewing the standard applied at the confirmation of charges had to 'come down on the side of the Defence'²³⁴, the Court expressed a rather different view stating that

'[...]inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm charges. Such a conclusion would not, however, be based on the application of the principle in *dubio pro reo* to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings. A conclusion such as this would rather be based on a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged and thus that threshold required by article 61 (7) has not been met'²³⁵, and therefore allowing only people against whom strong evidences are shown that they may have committed the crimes charged²³⁶.

Such a contradiction suggests that the understanding of the meaning of the presumption of innocence and its effects under article 66 of the Statute still has a

²³² *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [31].

²³³ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [30].

²³⁴ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (n189) [42].

²³⁵ *Ibid* [43].

²³⁶ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [31].

long journey ahead before being buttressed as the fundamental safeguard of persons' dignity. It shall then be the guiding principle of any test of the degree of proof to reach the standard of proof required to hold a person as an accused of crimes charged of and thus commit him to trial.

Section 3: The Presumption of Innocence and the Beyond Reasonable Doubt Standard

Under article 66 (2) and (3), as a corollary to the right of persons to be presumed innocent, OTP bears the burden to convince the Court of the guilt of the accused beyond reasonable doubt in order to have the accused convicted. This section outlines the meaning of beyond reasonable doubt ground standard without dealing of how it shall be met by OTP given the fact that there has not been yet a decision at a stage of conviction at the Court.

The Statute has not defined the reasonable doubt standard nor has international recognized human rights. For instance, article 14 (2) of the ICCPR relating to the presumption of innocence does not mention the standard of proof to be met by OTP. Nevertheless, the HRC considered that

‘[t]he presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilty can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle’²³⁷.

Although a decision has not yet been made on this standard, APC has given a hint which seems to match the above view: reasonable standard is met where reasonable doubts have been eliminated and the only conclusion left beyond them is that a person must be guilty²³⁸. Such an idea emerges, for instance, from the

²³⁷ HCR General Comment No 32 ‘Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’, CCPR/GC/32 (23 August 2007) [30].

²³⁸ See *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir* (n186) [33].

discussion carried out in the case of *Aleksovski* before the ICTY²³⁹. Convicted of a violation of laws or customs of war but acquitted on other counts, *Aleksovski* lodged an appeal on the ground that OTP relied essentially on ‘mere witness testimony in the absence of medical or other scientifically objective evidence at trial’²⁴⁰ and therefore did not prove him guilty beyond a reasonable doubt. APC, however, argued that TC correctly applied the legal framework by considering that ‘medical reports or other scientific evidence’ were not ‘proof of a material fact. Similarly, the testimony of a single witness on material fact does not require, as a matter of law, any corroboration’²⁴¹. Moreover, APC considered that TC has the discretion to evaluate evidence. For APC ‘the evidence relied on [by the APC was correct as it] could have been accepted by any reasonable tribunal’²⁴².

In the case of *Coffin v US*, as it appeared from a reported instruction to a jury, the beyond reasonable basis is gauged on the grounds of evidences adduced by OTP with regard to the crimes charged²⁴³. In this respect, as suggested by Zappalà, OTP meets his burden of proof beyond reasonable doubt standard when from the evidence he has adduced, the Court could ‘reach a finding based on the highest probability that a certain sequence of acts led to the commission of the crime by the

²³⁹ *Prosecutor v Zlatko Aleksovski*, Judgement, APC ICTY IT-95-14/1-T (24 March 2011).

²⁴⁰ *Prosecutor v Zlatko Aleksovski* (n239) [58].

²⁴¹ *Ibid* [62].

²⁴² *Ibid* [63] (reference omitted).

²⁴³ The Jury must be satisfied on the basis of such evidence of the guilty of the accused beyond reasonable doubt. This means that ‘the evidence must be of such a character as to satisfy [the jury’s] judgment to the exclusion of every reasonable doubt’. In that case they could find the accused not guilty. However, ‘after weighing all the proofs, and looking only to the proofs, [they] impartially and honestly entertain the belief that the defendants may be innocent of the offenses charged against them, they are entitled to the benefit of that doubt, and [the jury] should acquit them. It is not meant by this that the proof should establish their guilt to an absolute certainty, but merely [the jury] should not convict unless, from all the evidence, [they] believe the defendants are guilty beyond a reasonable doubt’. Consequently, ‘reasonable doubt,’[...] is an honest, substantial misgiving, generated by the proof[...] ‘If the whole evidence, when carefully examined, weighed, compared, and considered, produces in [the jury’s] minds a settled conviction or belief of the defendants’ guilt’ then they may consider themselves to have reached a state of having no reasonable doubt as to find the accused guilty (see *Coffin v. U.S.* 156 U.S. 432, 453 (1895)) [58].

accused'²⁴⁴. Such a conclusion will be reconsidered in light of the first expected final decision that will have applied beyond reasonable doubt standard²⁴⁵.

²⁴⁴ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP, Oxford; New York 2003) 99.

²⁴⁵ Closing oral statements are scheduled to take place on 25 and 26 August 2011. See *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (Public Order on the Timetable for Closing Submissions) TCI ICC-01/04-01/06 (12 April 2011). Concluding 'Prosecution's Closing Brief' in the case OTP stated that 'The evidence establishes beyond a reasonable doubt that the Accused is criminally responsible for the crimes of conscription, enlistment and use of children under the age of 15 years to participate actively in hostilities'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public Redacted Version prosecution's closing brief) PTCI ICC-01/04-01/06 (01 June 2011)

Concluding Remarks

The three evidentiary thresholds appear to be progressively higher as held by the Court, depending on each stage. Their nature has been held 'consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged'²⁴⁶. Indeed, it is noteworthy that the presumption of innocence under article 66 of the Statute as a right of persons to be treated as innocent applies at all stages of the proceedings before the Court. As a corollary, it determines the standard of the evidentiary burden to be met at each stage by OTP.

At the investigation stage, at any time, the latter must convince the Court of the existence of reasonable grounds to believe that a person has committed a crime within the jurisdiction of the court so that the latter would issue whether a warrant for arrest or a summons for the person to appear before the Court. If so, then a person becomes a suspect before the Court and should not be treated as an accused. It has appeared that the test applied to verify whether OTP met his burden of proof to reach the standard required is that dealing with the question of liberty and thus lacks the level of accuracy needed to incontrovertibly challenge the presumption of innocence. Moreover it has come to light that at this stage person's right to presumption of innocence is not protected against the statements of OTP and other authorities participating somehow and other in the proceedings. Furthermore, whilst held as applying at the investigating stage, the presumption of innocence has not yet been applied to concrete situation such as in Libya, Ivory Coast, etc.

²⁴⁶ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [27].

At the stage of confirmation of charges, OTP must adduce 'substantial grounds to believe' to convince the Court to commit a person to trial. If the Court was the view that its being higher than that 'reasonable grounds to believe' under article 58, 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'²⁴⁷ at the confirmation stage protects 'the suspect against wrongful prosecution'²⁴⁸, it paradoxically, contradict its being 'guided by the principle in dubio pro reo as a component of the presumption of Innocence'²⁴⁹ in making its determination whether there is sufficient evidence to establish substantial grounds to believe.

It considered that it could reach its determination not on such a principle but rather 'on a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged and thus that threshold required by article 61 (7) has not been met'²⁵⁰.

Although, the Court held that 'for the Prosecut[or] to meet [the] evidentiary burden, [he], must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations'²⁵¹, by rejecting the test on the basis of the presumption of innocence, the Court has distorted the ground of testing the validity of both the reasonable grounds and substantial grounds to believe that a person have committed the alleged crimes.

²⁴⁷ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n163) [27] (reference omitted).

²⁴⁸ Ibid.

²⁴⁹ Ibid [31].

²⁵⁰ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (n189) [43].

²⁵¹ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n 163) [29] (reference omitted).

It remains however to the Court to make know how it applies the beyond reasonable standard when the first decision at the stage of conviction will eventually be reached in the first case before the Court, namely the case of *Lubanga*.

Chapter 3: The Pre-conviction Detention and the Presumption of Innocence

Under the Rome Statute²⁵², a suspect may be detained pending trial unless PTC eventually declines to confirm his charges²⁵³. A suspect is an individual against whom OTP has proved before PTC that there are reasonable grounds to believe that he has committed a crime within the jurisdiction of the Court and, as a result, a warrant of his arrest or a summons for him to appear before the Court has been issued²⁵⁴. A warrant is issued on a basis of the standard appearance or in order to prevent the person from causing impediment to the ICC process or putting it in jeopardy, or from continuing the commission of the alleged 'or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances'²⁵⁵.

Nevertheless, it is to be pointed out that in light of article 21(3), the application and interpretation of the applicable law on pre-conviction detention are subjected to their being consistent with, *inter alia*, the right of persons concerned to a presumption of innocence as one of the internationally recognized human rights. This chapter aims at examining how and to what extent the Court has considered the presumption of innocence in issuing warrants of arrest (section 1) and in deciding to keep persons in pre-conviction detention (section2).

²⁵² As highlighted by PTCl, '[p]re-conviction detention at the Court is governed by article 60 and 58(1) of the Statute'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision of the Release of Thomas Lubanga Dyilo") AC ICC-01/04-01/06 OA 12 (21 October 2008) Judgement [34]-[36].

²⁵³ Indeed PTCII declined to confirm charges against Garda. See *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Confirmation of Charges) Pre-Trial Chamber I ICC-02/05-02/09 (8 February 2008) [235].

²⁵⁴ The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) art 58.

²⁵⁵ Ibid art 58 (1) (b).

It is argued that in light of article 66 and in accordance with internationally recognized human rights, the presumption of innocence as a right of persons to be treated as innocent until proven guilty should be 'given priority as the starting-point'²⁵⁶ in deciding whether to issue a warrant of arrest of persons or a summons to appear and in deciding to keep a suspect or an accused in detention or to release them²⁵⁷. Moreover, it is submitted that summons to appear and interim release should be preferred to arrest with subsequent lengthy detention which may be seen as a prejudgement of the guilt of persons²⁵⁸. It is also argued that unconvicted detainees, given their being presumed innocent, should be treated differently from convicted prisoners²⁵⁹.

²⁵⁶ United Nations Centre for Human Rights, *Human Right and Pre-Trial Detention: a Handbook of International Standards relating to Pre-Trial Detention* (United Nations, New York; Geneva 1994)8.

²⁵⁷ In that respect the Court should be 'guided by the principle in *dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings, including the pre-trial stage' as to order the interim release of persons rather than keeping them into detention until the outcome of their trial. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) PTCII ICC-01/05-01/08 (15 June 2009) 31). It is argued further that release should be held as the principle and detention as an exception in accordance with international standards related to pre-trial detention as to comply with the requirement of article 21(3) relating to the interpretation and application of the presumption of innocence as that of any other statutory provision of the Statute.

²⁵⁸ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, 27 August- 7 September 1990: Pre-Trial Detention, p158 [2(e)].

²⁵⁹ United Nations Centre for Human Rights (n256).

Section 1: Warrants of Arrest or Summons to appear and the Presumption of Innocence

Once OTP has established reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court, PTC may issue a warrant of arrest of the person provided that OTP meets the standard of appearance by proving that the person may abscond from his trial if not arrested. Otherwise, OTP must have demonstrated that the person may interfere with the course of an investigation or with the proceedings of the Court or continue the commission of the same crime or a related one within the jurisdiction of the Court, if left at liberty²⁶⁰.

This section analyses how OTP meets one of these standards as to convince PTC to issue a warrant of arrest. It intends to find out the extent to which the presumption of innocence as an internationally recognized human right has been taken into account in dealing with those issues.

In issuing the first warrant, PTCII contended itself with being satisfied that the arrest of Kony and others appeared necessary²⁶¹. However, the following decision was said to have been consistent with 'reasonable suspicion standard'²⁶², as it was founded on OPT's material discretionarily submitted to PTC to support 'factual allegations'²⁶³. Through that reasoning, PTCL considered that Lubanga could use his

²⁶⁰ The Statute (n254) art 58 (1) (a) and (b). Cf *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga* (Public Redacted Version Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga) PTCL ICC-01/04-01/07 (5 November 2007) [63].

²⁶¹ *Situation in Uganda (Under Seal, Ex Parte Prosecutor Only Decision on the Prosecutor's Application for Warrants of Arrest under Article 58)* Pre-Trial Chamber II ICC-02/04 (8 July 2005).

²⁶² *Situation in the Democratic Republic of the Congo (Under Seal Ex Parte, Prosecution Only Decision on the Prosecutor's Application Warrants of Arrest, Article 58)* PTCL ICC-01/04-01/07 (10 February 2006) [12] (footnotes included).

²⁶³ In PCTI's view, 'the fundamental right of the relevant person to his liberty is at stake' [therefore] it will not take any decision limiting such a right on the basis of applications where key factual allegations are fully unsupported'. PTCL considered such a view 'the only interpretation to be consistent with 'reasonable suspicion standard', in accordance with internationally recognized human such as article 5 (1) (c) of the ECHR or article 7 of the ACHR. See *Situation in the Democratic Republic of the Congo* (n262) [10]-[12] including footnotes.

national and international connection to escape the ICC's proceedings if left at liberty²⁶⁴. In *Katanga*, PCT held that his detention in DRC prevented him from 'willingly and voluntarily appearing before the Court'²⁶⁵. So his arrest was rendered necessary 'to ensure his appearance at trial'²⁶⁶. The arrest was also needed in order to prevent him from obstructing or endangering the investigation or the proceedings of the Court²⁶⁷. These were also grounds for the arrest of *Ngudjolo*²⁶⁸ although it appears here that evidence in support of the allegations were stronger than in *Katanga*²⁶⁹.

Thus, a warrant is issued on PCT's 'intimate conviction' upon considering OTP's application, evidence, information provided, submissions and further submissions²⁷⁰.

It appears, however, that the presumption of innocence has not been treated as the 'starting-point'²⁷¹ contrary to international standards requirement in dealing with the arrest and pre-trial detention of suspects and accused²⁷². Moreover it is not clear

²⁶⁴ Prior to the issuance of the warrant of his arrest, Mr *Lubanga* publically expressed concern regarding his likely being prosecuted by the ICC. Moreover, following the killing of some witnesses and 'high-ranking' members of his party in relation of proceedings before a Congolese tribunal, *Lubanga*, despite his being detained, was thought to be able to 'obstruct or endanger the investigation or the Court proceedings because of his unmonitored contacts with persons outside'. So *Lubanga* was arrested in order to 'ensure his appearance at trial and to ensure that he does not obstruct the investigation of the Court proceedings'. See *Situation in the Democratic Republic of the Congo* (n262) [112]-[116].

²⁶⁵ *Situation in the Democratic republic of the Congo in the case of the prosecutor v Germain Katanga* (n260)[62].

²⁶⁶ *Ibid.*

²⁶⁷ *Situation in the Democratic republic of the Congo in the case of the prosecutor v Germain Katanga* (n260) [63]-[64].

²⁶⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Mathieu Ngudjolo Chui* (Under seal Urgent Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for *Mathieu Ngudjolo Chui*) PTCl ICC-01/04-02/07 (6 July 2007) [68].

²⁶⁹ In fact, it appeared that *Ngudjolo* could flee if informed of the IIC prosecution against him, using his means and influence as a superior officer well connected. He also had authority on people who threatened witnesses in respect of both ICC and Congolese proceedings. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Mathieu Ngudjolo Chui* (n268) [64]-[67].

²⁷⁰ Provided of course that OTP reaches the standard appearance, or demonstrates the probable obstruction or endangering of the investigation of the court proceedings or, if pertinent, the possible continuation of 'the commission of [the same] crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances'. See *Situation in the Democratic Republic of the Congo* (n262) [111] (footnotes included).

²⁷¹ United Nations Centre for Human Rights (n256) 8.

²⁷² *Ibid.*

how PTC establishes 'reasonable grounds to believe that a summons is sufficient to ensure the person's appearance'²⁷³ or prevent the person from influencing or threatening witnesses and thus obstructing the course of justice²⁷⁴. For, instance, persons summonsed in the situation in Kenya are prominent and held or still hold high political and social position. They undeniably have financial and political means which might enable them to impede the proceedings of the Court. Moreover, since OTP disclosed their names, the Kenyan government started campaigning against the ICC proceedings with the effect of 'intimidating potential witnesses and ultimately undermining national and international investigations'²⁷⁵. Nevertheless, OTP maintained its application for warrants and contented itself with sending a team in Kenya to discuss with the Kenyan government the issue of the protection of witnesses²⁷⁶.

Paradoxically, it was on such grounds that the arrest of Bemba was required as being necessary to ensure his appearance at trial and 'prevent him from obstructing and endangering the investigation'²⁷⁷. Indeed, PTCIII took such a view, considering,

²⁷³ *Situation in Darfur, Sudan in the Case of the Prosecutor v Bahr Idrissa Abu Garda* (Public Redacted Version Decision on the Prosecutor's Application under Article 58) PCTI ICC-02/05-02/09 (7 May 2009) [29].

²⁷⁴ In *Garda and others*, for instance, the decision to issue a summons was taken solely upon considering OPT's request for a summons. OTP relied on an expression of 'willingness' of persons concerned to appear before the Court and hence requested a summons for Garda and others to appear before the Court. See *Situation in Darfur, Sudan in the Case of the Prosecutor v Bahr Idrissa Abu Garda* (n273) [30]-[32]). In *Ruto and others*, PTCI, in agreement with OTP's submissions, found 'no indication that Ruto, Kosgey and Sang, are either perceived as flight risks or likely to evade personal service of the summonses or refrain from cooperating if summoned to appear'. See *Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Public Document Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) PTCII ICC-01/09-01/11 (8 March 2011) [54]-[59]). On the other hand PTCI contended itself with ordering them *inter alia* to avoid any form of contacts with witnesses, to not 'corruptly' influence them or to 'refrain from committing crime(s) set forth in the Statute'. See *Ibid.* The same views were expressed in *Muthaura and others*. See *Situation in the Republic of Kenya in the Case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Public Document Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) PTCII ICC-01/09-02/11 (8 March 2011) [55]-[58]).

²⁷⁵ OTP, Statement of the Prosecutor on the *Situation in Kenya*, The Office of the Prosecutor.

²⁷⁶ *Ibid.*

²⁷⁷ *Situation in the Central African Republic in the case of the Prosecutor v Jean - Pierre Bemba Gombo* (Public Document Decision on the Prosecutor's Application for a Warrant of Arrest against Jean - Pierre Bemba Gombo) PTCIII ICC - 01/05 - 01/08 (10 June 2008) [86].

first of all, that 'Mr Jean-Pierre Bemba's past and present political position, his international contacts, his financial and professional background, and the fact that he has the necessary network and financial resources, he may abscond and avoid the execution of the arrest warrant'²⁷⁸. The same, the arrest of Mbarushima has been primarily determined by his political leadership with international networks enabling him to continually 'contribute to the commission of the crimes alleged in the Prosecutor's application'²⁷⁹. Therefore, grounds for issuing summons for suspects in the situation in Kenya, illustratively compared to those in *Bemba* or *Mbarushima*, for instance, seem not to establish an objective basis for PTC in deciding to issue a warrant of arrest instead of a summons to appear. This basis should have been the presumption of innocence of a person and one of its components, the principle in *dubio proreo*²⁸⁰ as it might be balanced by the heaviness of personal responsibility of a suspect in the commission of the alleged crimes and evidence²⁸¹ proving that the person would certainly not appear before the Court or will continue to commit the same crime or pervert the course of justice²⁸².

²⁷⁸ *Situation in the Central African Republic in the case of the Prosecutor v Jean - Pierre Bemba Gombo* (Public Document Decision on the Prosecutor's Application for a Warrant of Arrest against Jean - Pierre Bemba Gombo) PTCIII ICC - 01/05 - 01/08 (10 June 2008) [87].

²⁷⁹ *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Callixte Mbarushimana* (Decision on the Prosecutor's Under Seal Application for a Warrant of Arrest Mbarushimana against Callixte) PCTI ICC-01/04-01/10 (28 September 2010) [49].

²⁸⁰ The Court has recognized being so guided at all stage of the Proceedings in making its determination at confirmation hearing. It also held the presumption of innocence as one of the governing principles of the ICC proceedings taken as a whole. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) Pre-Trial Chamber II ICC-01/05-01/08 (15 June 2009) [31]. Cf *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) PCT I ICC-01/04-01/06 (9 November 2006) lines 18-25, p 10; line1, p11.

²⁸¹ Indeed, 'the nature and seriousness of the offence, the strength of the evidence' are amongst international standards to be taken into account '[i]n considering whether pre-trial detention should be ordered'. See Eighth United Nations Congress (n258) p158 [2(c)].

²⁸² See Eighth United Nations Congress (n158) p158 [2(b)].

Indeed, the magnitude of the presumption of innocence has been at issue at the issuance of warrants in *Gaddafi* and others on almost similar considerations as in *Bemba* or *Mbarushima*²⁸³ although in the former case, persons concerned had beforehand rejected the ICC's process, thus prospectively justifying the necessity for PTC to forcibly chose the way of a warrant rather than a summons. Nevertheless, the expeditiousness of OTP's application for warrants against Gaddafi and others on 16 May 2011, only a bit more than two months after opening the investigation on 3 March 2011, has raised questions within the Court itself as to whether the investigation was 'properly' conducted taking into account rights of persons concerned to the presumption of innocence and thus investigating 'incriminating and exonerating circumstances'²⁸⁴. In the same respect, the eventual expeditious issuance of warrants by PTC in less than one month following OTP's application could be questioned. Illustratively, indeed, the investigation in the Darfur was opened more than two months after the referral of the situation to OTP in March 2005²⁸⁵. OTP applied for warrants only more than 3 years later on 14 July 2005 and PTC issued the first warrant only on March 2009²⁸⁶. Unsurprisingly, therefore, doubts

²⁸³ *Situation in the Libyan Arab Jamahiriya* (Public Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI") PTCI ICC-01/11 (27 June 2011) [91]-102].

²⁸⁴ As underlined by the Office of Public Counsel for the Defence of the ICC (OCPD), '[t]he presumption of innocence, a cornerstone of fair trial rights, is particularly important in the early stages of the proceedings before the ICC, when the Prosecution is charged with investigating both incriminating and exonerating circumstances. Given the very recent referral of matter to the ICC as well as the tumultuous and shifting nature of events on the ground in Libya, it is questionable as to whether the Prosecution could have properly investigated incriminating and exonerating circumstances'. See OCPD Letter of 02 March 2011 to 'Mr. Moreno-Ocampo Prosecutor' ICC-01/11-1-5-AnxA 25-05-2011.

²⁸⁵ UN Resolution 1593 (2005) S/RES/1593 (Adopted by the Security Council at its 5158th meeting, on 31 March 2005).

²⁸⁶ *Situation in Darfur, Sudan in the Case of the Prosecutor v Omar Hassan Ahmad al Bashir ("Omar Al Bashir")* (Public Document Warrant of Arrest for Omar Hassan Ahmad Al Bashir) PTCI ICC-02/05-01/09 (4 March 2009)

have been cast over evidence as to some of the crimes charged on *Gaddafi and al*²⁸⁷.

Nonetheless, the right to a presumption of innocence for *Gaddafi and al* was underlined by the ICC²⁸⁸ but without having dealt with its role in the determination of PTC in deciding to issue warrants and not the alternative way of summons. The next section intends to assess whether the issue has been dealt with in ordering remand in custody or release, even if none of the persons in pre-conviction detention has been eventually released to date following a decision of release or interim release pending trial. It also considers the question of the treatment of persons detainee in regard the right to be treated as innocent until proven otherwise.

²⁸⁷ For instance, OTP made public statements that it had evidence of massive rape committed in Libya by rapists soldiers, sexual vigour enhanced by usage of Viagra ordered by Gaddafi. See BBC 'Libya: Gaddafi investigated over use of rape as weapon' (8 June 2011) Available on <http://www.bbc.co.uk/news/world-africa-13705854> accessed on 2 July 2011. In actual facts, an Amnesty International's senior Adviser in charge of investigation over Africa and Middle East stated during an interview that no evidence nor victims or witnesses of such massive rape had been found in Libya, underscoring crimes committed by rebels as well. See Liberation 'Il y a eu des dizaines de Cas de Soldats Assassinsés» Interview : Donatella Rovera, d'Amnesty International, Revient sur les Exactions Commises par les Rebelles' (22 June 2011). Available on <http://www.liberation.fr/monde/01012344751-il-y-a-eu-des-dizaines-de-cas-de-soldats-assassines> accessed on 2 July 2011. It must be highlighted that African Union Members States have decided not to cooperate with the ICC to implement ICC's warrants of arrest of *Gaddafi and al*. See, for instance, Antoinette Louw 'Perspectives on Africa's Response to the ICC's Arrest Warrants in the Libya Situation' Institute for Security Studies, Situation Report (22 July 2011) available on <http://www.iss.co.za/uploads/22July11Libya.pdf> accessed on 19 August 2011.

²⁸⁸ Indeed, the presiding Judge Sanji Mmasenono Monageng at the hearing on delivery of warrants of arrest of *Gaddafi and al* stated the following: '[b]efore concluding the hearing, I would further note for the public and for the sake of clarity, that the decision I have just read out is not a finding on the guilt of any of the three individuals and does not establish any fact beyond reasonable doubt, which is a standard of proof to be applied by a Trial Chamber. Rather, it concerns the issue of whether the requirements for the issuance of Warrants of Arrest have been met in accordance with Article 58 of the Statute and only in light of the allegations made by the Prosecutor in his application and in light of the supporting materials thereon'. See Situation in the Libyan Arab Jamahiriya (Public Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI") PCTI ICC-01/11-T-1-ENG Transcript (27 June 2011) p 10, lines 9 to 17.

Section 2: Detention or Release and the Presumption of Innocence

The issue of release or detention at the siege of the Court after the arrest of a person on an ICC's warrant is dealt with by the Court, in light of article 60 of the Statute. A person surrendered to the Court following an arrest on warrant has the right to 'an initial request for interim release'²⁸⁹. Decisions are made on a request for interim release by considering whether grounds that rendered the arrest necessary under article 58 (1) (a) (b) no longer exist. The person will remain detained if the Court is satisfied that those grounds remain intact. Otherwise a release of the person 'with or without conditions' shall be ordered²⁹⁰. Moreover, once the detention of the person is confirmed, the said detention must be assessed after 120 days by PTC to find out whether the circumstances that determined the Court to maintain the person in detention at the seat of the Court have changed or not. PTC 'may do so at any time on the request of the person or the Prosecution'²⁹¹. Notwithstanding the lawfulness a detention²⁹², the person detained has the right to be released 'with or without conditions' if the Court considers that his detention has been unreasonably delayed 'prior to trial due to inexcusable delay by the Prosecutor'²⁹³. Though the provision compels the Court alone to imperatively 'ensure' that a person is not unreasonably detained, the practice of the Court shows that the door remains opened to the person to request that the Court examines his application for a release if he can demonstrate that the unreasonableness of his detention is due to an inexcusable delay by OTP²⁹⁴.

²⁸⁹ The Statute (n254) art 60 (1); Rule 118.

²⁹⁰ The Statute (n254) art 60 (2); Rule 118 (1) and (3).

²⁹¹ Rule 118 (2)).

²⁹² In light of grounds set forth in the Statute (n 254) art 58 (1) (a) and (b).

²⁹³ The Statute (n254) art 60(4).

²⁹⁴ *Situation en République centrafricaine Affaire le Procureur c Jean-Pierre Bemba Gombo*

If it is undisputable that PTC must grant OTP's request²⁹⁵, the question arises with regards to the rule applying to the systematic arrest and detention of persons supposed to be presumed innocent until proven guilty. Indeed, to date the ICC has systematically rejected claims for interim release or release of suspects and accused persons. Detained persons have repeatedly challenged their being kept in custody pending trial. Mr Lubanga, for instance, has been detained since his surrender to the Court and transfer to the detention centre in The Hague on 17 March 2006²⁹⁶. TC

(Public requête de la défense sur la révision de la détention de M Jean - Pierre Bemba Gombo) La Chambre de Première Instance III ICC - 01/05 - 01/08 (22 juillet 2010) [37], [39],[42]-[43], [58], [66], [67] ; *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence) Pre-Trial Chamber III ICC-01/05-01/08 (28 July 2010) [18], [36], [37].

²⁹⁵ Indeed, PTC 'is bound to grant the Prosecution's request, if, after the examination of the supporting materials presented by the Prosecution, it is satisfied that there are reasonable grounds to believe that the relevant person is criminally liable under the Statute'. See *Situation in Darfur, Sudan* (Public Decision on Application under Rule 103) PTCI ICC-02/05 (4 February 2009) [24].

²⁹⁶ *Lubanga's Defence*, for instance, challenged the legality of his detention considering that the Court did not review his detention as to release him or change the conditions of his detention within at least 120 days since the decision on his detention was taken in light of both article 60(3) of the Statute and Rule 118 (2). See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Decision on the Application for the Interim Release of *Thomas Lubanga Dyilo*) PTCI ICC-01/04-01/06 (18 October 2006) 4th considering). The Court, nevertheless, considered that the provisions referred to by *Lubanga's Defence* constituted a rule applying to a subsequent ruling on an application for an interim release after the surrender of a person to the Court and his initial appearance under article 60 (1) of the Court and not to the initial detention as the result of an arrest under article 58 of the Statute. See *Ibid* (See *Ibid* 5th to 8th consideration). Indeed, Mr *Lubanga* had not used before then his 'right to apply for interim release pending trial'. See art 60(1) Cf art 60 (2) of the Statute. Moreover, as the Defence requested Mr *Lubanga's* release on the ground of 'an unreasonable period [of detention] prior to trial due to inexcusable delay by the Prosecutor' under article 60 (4) of the Statute, the Court considered that the complexity of the case due to the fact that all the evidence under article 58 (1) were abroad and the reasons pointed out above justifying his detention still remained made his detention to be not unreasonable and therefore rejected the application for his interim release. See *Ibid* 9th to 20th consideration). AC confirmed PTCI's above decision. Firstly, it found no failure on PTCI obligation to review detention of a suspect periodically pursuant to article 60 (3) of the Statute as the Defence had not made a request for interim release following surrender to the Court under article 60(1) of the Statute and therefore PTCI had not yet ruled on this matter in the absence of the Defence's request. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial chamber I entitled "Décision sur la Demande de Mise ne Liberté Provisoire de Thomas Lubanga Dyilo") AC ICC 01/04-01/06 (OA7) (13 February 2007) [87-102]). Secondly AC confirmed PCTI decision rejecting the Defence application which appears to be an application to challenge jurisdiction. On the other hand article 60 (2) of the Statute relied on by the Defence concerns interim release rather than release. See *Ibid* [103]-[107]). Thirdly AC rejected the Defence's claim for an immediate release as a result of the unreasonableness of a long period of *Lubanga's* detention prior to the confirmation of charges in which he included the period of his detention in the DRC before he was surrendered to the Court. See *Ibid* [109]-[124]). Finally AC confirmed the reject of an interim release for the fact that article 58 conditions were still met. See *Ibid* [125]-[140]).

rejected his application for interim release even after subsequent reviews²⁹⁷. It also rejected the request for release.²⁹⁸ Nonetheless, due to OTP's non compliance with TCI's order to disclose exculpatory materials to the accused²⁹⁹, the latter applied for a stay to be imposed on the proceedings and for his consequent release³⁰⁰. TCI considered the disclosure of exculpatory materials to be 'a fundamental aspect of the accused's right to a fair trial'³⁰¹ and, consequently, decided to impose a stay on the proceedings³⁰² and, on the grounds that the legal requirement for his being detained was no longer met and in the absence of a prospective trial³⁰³, order the unconditional release of the accused³⁰⁴. However, upon considering OTP's request for suspensive effect of his appeal against the release of Lubanga, AC granted it³⁰⁵.

²⁹⁷ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo") PTCI ICC-01/04-01/06 (14 February 2007) Cf *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Decision Reviewing the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo") PTCI ICC-01/04-01/06 (9 October 2007); *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Decision Reviewing the Trial Chamber's Ruling on the Detention of Thomas Lubanga Dyilo in accordance with Rule 118 (2) PTCI ICC-01/04-01/06 (1 February 2008); *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Urgent Decision Reviewing the Trial Chamber's Ruling on the Detention of Thomas Lubanga Dyilo in accordance with Rule 118 (2) PTCI ICC-01/04-01/06 (29 May 2008).

²⁹⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Second Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo") PTCI ICC-01/04-01/06 (11 June 2007).

²⁹⁹ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Urgent Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with Other Issues raised at the Status Conference on 10 June 2008) TCI ICC-01/04-01/06 (13 June 2008) [1(a)].

³⁰⁰ *Ibid* [1(b)(1)].

³⁰¹ *Ibid* [57] [58] [92(i)].

³⁰² *Ibid* [94].

³⁰³ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Decision on the Release of Thomas Lubanga Dyilo) TC1 ICC-01/04-01/06 (2 July 2008) [29].

³⁰⁴ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Decision on the Release of Thomas Lubanga Dyilo) TCI ICC-01/04-01/06 (2 July 2008) [30]-[36].

³⁰⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Decision of the Request of the Prosecutor for Suspensive effect of his Appeal against the

Afterwards, following OTP's non compliance with TCI's order on disclosure regarding intermediary 143, a stay was imposed³⁰⁶ and orally ordered the unconditional release of Mr *Lubanga*³⁰⁷, which, was eventually reversed³⁰⁸ as a result of TCI's decision ordering a stay having been reversed³⁰⁹ by AC³¹⁰.

"Decision of the Release of Thomas Lubanga Dyilo") AC ICC-01/04-01/06 OA 12 (7 July 2008). In fact, AC recalled that, as repeatedly acknowledged by TCI in its different reviews on Lubanga's detention, pursuant to grave charges faces by the latter, he would return to the DRC if released and would not appear at his trial considering that a leave to appeal a stay was granted. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Reasons for the Decision on the Request of the Prosecutor for Suspensive effect of his Appeal against the "Decision of the Release of Thomas Lubanga Dyilo") AC ICC-01/04-01/06 OA 12 (22 July 2008) [9]-[10]). Afterwards, indeed, TCI's decision on *Lubanga*'s release as a result of a stay was reversed by AC which 'directed [TCI] to decide anew whether Mr. *Lubanga Dyilo* should remain in detention or whether he should be released with or without conditions'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision of the Release of Thomas Lubanga Dyilo") AC ICC-01/04-01/06 OA 12 (21 October 2008) Judgement [1][2] Cf [34]-[37]). In fact AC considered the unconditional release of *Lubanga* as a result of a stay to have been erroneous on the grounds that, TCI, 'when ordering the unconditional release of Mr. Lubanga Dyilo, failed to take the conditional character of the stay it had imposed properly into account. This led the Trial Chamber to fail to consider all the options that were at its disposal and to assume erroneously that the unconditional release of Mr. Lubanga Dyilo was "inevitable"'. See *Ibid* [1][2]). Furthermore, AC was the view that considering the conditional character of the stay, which cannot be seen as 'neither an acquittal nor a final termination of the proceedings, but may be lifted in appropriate circumstances[with the consequence that] the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned [...] the unconditional release of the person concerned is not the inevitable consequence' *Ibid* [37] Cf Reasons [1]).

³⁰⁶ 'because of the Prosecution's abuse of the process', see *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Transcript) TC1 ICC-01/04-01/06-T-314-ENG ET WT (15 July 2010) p 17 line 9), resulting in the impossibility to ensure a fair trial to the accused, see *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Redacted Decision of the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU) TC1 ICC-01/04-01/06 (8 July 2010) [31] [32]). Specifically, TCI considered that '[t]he trial has been halted because it is no longer fair, and the accused cannot be held in preventative custody on a speculative basis'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Transcript) (n 306) p21, lines 1-9).

³⁰⁷ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Transcript) (n306) p 17, line 8 to p22, line 8.

³⁰⁸ *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo* (Public Document Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo) AC ICC-01/04-01/06 OA 17 (8 October 2010) [1].

³⁰⁹ *Ibid*.

³¹⁰ Indeed, AC, after recalling that 'the Trial Chamber ordered the release of Mr *Lubanga Dyilo* on the grounds of (1) the unconditional stay of proceedings, (2) the uncertainty of the trial resuming at a future date and (3) the length of Mr Lubanga Dyilo's detention'. See *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo* (n306) (08 October 2010) (n308) [22], it reversed the decision to release the latter since the decision to stay the proceedings was reversed. Furthermore, AC considered unnecessary to discuss the question of the length of Mr *Lubanga*'s detention since 'the Trial Chamber made no finding either that the continued detention of Mr *Lubanga Dyilo* was no longer necessary for trial under articles 58 and 60 (2) and (3) of the Statute or that Mr Lubanga Dyilo was detained for an unreasonable period due to the inexcusable delay of the Prosecutor under article 60(4) of the Statute'. See *Ibid* [23]-[25] (reference omitted)).

Noticeably, in this case and in all the cases before the Court such as in *Katanga*³¹¹ or *Bemba*³¹², for instance, the presumption of innocence played no role in the making of all the decisions to maintain them in detention pending trial. In actual fact, as held by the IACtHR 'detention must 'truly be the exception rather than the rule'³¹³. In that respect, it is submitted that the Court should rule on the basis of article 21 (3) that article 66 (1) must be considered in dealing with the question of

³¹¹ Mr Katanga filed a Motion asking the Court to declare unlawful his arrest and detention in the DRC, prior to his surrender to the Court, and therefore order that his prosecution be terminated. The Trial Chamber denied his Motion. Mr Katanga lodged an appeal. AC held that there was no statutory provision 'stipulating time limits for the filing of motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings' but 'the Trial Chamber has discretion under article 64 (2) of the Statute to determine the timeliness of such motions' and on this basis, found that the "Defence motion for a declaration on unlawful detention and stay of proceedings" [...] was filed to late'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Public Document Judgement of the Appeal of Mr Katanga Against the Decision of the Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings") AC ICC-01/04-01/07 OA 10 (12 July 2010) [1]-[2]. Therefore, AC considered [m]otions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings must, as a general rule, be brought before the Pre-Trial Chamber'. See *Ibid* [3]-[5].

³¹² According to OTP the detention of Mr Bemba held in pre-trial detention since his surrender to the Court and transfer to the Detention Centre in the Hague on 3 July 2008, was 'neither unusual nor unreasonable in the context of a complex international criminal trial'. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (28 July 2010) (n294) [13]. And despite Mr Bemba's submission to have his detention regime modified in case the Court found no grounds for his release, the Court held as follows: 'none of the submissions of the defence 'undermine[d] the critical conclusion that detention remains necessary to ensure the accused's appearance at this trial'. In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime. Similarly, the defence request concerning guarantees by States Parties is irrelevant, given the Chamber's finding that there has been no material change since 1 April 2010'. See *Ibid* [38]. Therefore, the Court considered that 'there has been neither a material change of circumstances since the last review of detention nor inexcusable delay attributable to the prosecution, and it is satisfied that the requirements of Article 58(l)(b)(i) of the Statute apply. Accordingly, the accused will remain in custody' (*Ibid* [39]). However, AC reversed the Trial Chamber III's decision. Moreover, it directed the latter 'to carry out a new review under article 60 (3) of the Statute as to whether Mr Jean-Pierre Bemba Gombo should remain in detention or whether he should be released, with or without conditions, in light of paragraphs 40 to 56 of [...] [its] judgment. Until, and subject to that review, Mr Jean-Pierre Bemba Gombo shall remain in detention'. See *Ibid* [1] [2] under 'Judgement'. AC held further that '[a] Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must revert to that ruling and determine whether there has been any changes in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute. However, the Chamber should not restrict itself to only considering the arguments raised by the detained person'. See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (28 July 2010) (n294) [1] under 'Reasons'. The Court held, in addition, that '[f]or each periodic review of detention under article 60 (3) of the Statute, the Prosecutor must make submissions as to whether there has been any change in the circumstances that justified detention previously and must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release' (*Ibid* [2] under 'Reasons'). Having considered the case anew, the Trial Chamber III decided that Mr Bemba 'will remain in custody' given that 'the Chamber is satisfied, firstly, that there has not been a change of circumstances sufficient to justify a modification of its ruling as to detention pursuant to Article 60(3) of the Statute and that the requirements of Article 58(l)(b)(i) of the Statute continue to apply at this stage and that secondly, pursuant to Article 60(4) of the Statute, there has been no inexcusable delay by the prosecution causing the detention of the accused for an unreasonable period prior to the commencement of trial on 22 November 2010 upheld its previous decision (See *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010) PTCIII ICC-01/05-01/08 (17 December 2010) [46],[48]).

³¹³ *Tibi v Ecuador* Judgment of September 07 2004 (*Preliminary Objections, Merits, Reparations and Costs*) Inter American Court on Human Rights [61].

pre-trial detention, and interim release with or without conditions. Otherwise, the ICC's trial would seem to be unfair on the grounds that persons are punished before conviction by being detained for a long time pending trial in violation of the presumption of innocence as provided by article 66 (1) and thus in violation of internationally recognized human rights in the light of article 21 (3) of the Statute.

On the other hand, it appears that the Court has not yet basically considered the presumption of innocence in its essence as a right of unconvicted detainees to be treated differently from convicted prisoners, for instance in the light of the Minimum Rules for the Treatment of Prisoners³¹⁴. Primarily, a person suspected or accused should not be detained in prison which suits convicted persons. Indeed, the manner in which a suspect or an accused is publically treated, for instance if seen handcuffed or wearing prison clothes, will picture him in the public eye as already guilty of alleged crimes. Thus, his image, reputation and good name may be spoiled while the question of their guilt still remains an issue to be dealt with by the Court.³¹⁵. It is noteworthy that on the ground of its discretionary power under article 64, the Chamber decided to approve with conditions the Defence request for Mr Bemba's

³¹⁴ Indeed, in light of Minimum Rules for the Treatment of Prisoners: 'Unconvicted prisoners are presumed to be innocent and shall be treated as such' See Standard Minimum Rules for the Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977) Rule 84.2. As per Judge Sergio dissent in light of Principle 36 of the Body of Provisions for the Protection of All Persons under any Form of Detention or Imprisonment '[a] detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence' *Tibi v Ecuador* Judgment of September 07 2004 (n313) [33].

³¹⁵ In this respect, according to the advert on the IICC website relating to the Detention Centre, '[d]etained persons are presumed innocent until proven guilty. If convicted of crimes under the jurisdiction of the ICC, they do not serve their sentences at the ICC Detention Centre as it is not a facility made for the purposes of managing a regime of convicted prisoners; they are transferred to a prison outside of The Netherlands to serve their time, subject to an agreement between the ICC and the State of enforcement' (ICC, Structure of the Court, 'The ICC Detention Centre' available on <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Detention/> Accessed on 12 June 2011).

interim release and transfer to Belgium in order to attend his stepmother's funeral³¹⁶.

In actual fact, the authorisation of Mr Bemba to attend the funeral appears to be in accordance with the right to be presumed innocent viewed 'as a general rule for the treatment of individuals'³¹⁷. Therefore, the Court could have ruled on the grounds of article 64 (6) (f) and 66(1) that an accused being presumed innocent has the right to an interim release to visit his family or participate to a funeral following the example of the treatment of suspects and accused in the Middle-Ages where, for instance 'a priest accused of adultery, but not yet convicted, could continue to give sacraments'³¹⁸. That was and is still the original meaning of the presumption of innocence³¹⁹. In this respect, it is noteworthy that Mr Bemba requested that he 'be permitted to leave detention for approximately 17 hours to travel to the Democratic Republic of the Congo ("DRC") to register for the upcoming elections'³²⁰ in order to participate in the presidential election as a presidential candidate. Despite the finding of the Court rejecting the request³²¹, the latter could nevertheless have held that the only reasons for rejecting Mr Bemba's request were the flight risk or the risk of interfering with witnesses. Therefore, in the absence of such causes, the accused being presumed innocent, has the right to participate in the elections as he still fully

³¹⁶ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Redacted Version of ICC-01/05-01/08-1099-Conf Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral) Pre-Trial Chamber III ICC-01/05-01/08 (12 January 2011) [16]-[20].

³¹⁷ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP, Oxford; New York 2003) 88.

³¹⁸ François Quintard- Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 AJCL 107.

³¹⁹ As noted by Harold, that '[w]hat the presumption of innocence referred to in the French Declaration of Rights, and what it still refers to primarily, though not exclusively, in the legal traditions of most European countries, was (and is) the treatment of a suspected or accused person before trial. It still has this meaning in the European Covenant on Human Rights'. See Harold J. Berman 'The Presumption of Innocence: Another Reply' (1980) 28 A J C L 615, 623.

³²⁰ See *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011) PTCIII ICC-01/05-01/08 (16 August 2011) [12].

³²¹ Due to the 'risk witnesses interference' and 'flight risk'. See Ibid [63]-[65]-[71].

enjoys his political and civil rights³²². Hence, stating that the unfeasibility of the participation of Mr Bemba in the 2011 presidential elections as a result of the Court's finding not to permit him to go to the DRC is 'an unavoidable consequence of his status as an individual against whom serious charges have been confirmed'³²³ is implicitly tantamount to a denial of his right to be presumed innocent- despite the seriousness of the charges- and thus to be treated as such. Indeed, the non participation of Mr Bemba in the election can only be the consequence of the persistence of conditions set forth under article 58 1 (b) of the Statute and not the gravity of charges. Indeed, as pointed out by Herbert L. Packer when concluding his anecdotal account of a murder publically committed and gladly confessed, the presumption of innocence 'means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question'³²⁴. In this respect , the IACtHR considered that

'the principle of the presumption of innocence-inasmuch as it lays down that a person is innocent until proven guilty- is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of

³²² In this respect, see for, instance ICCPR 1966 (G.A. res. 2200A (XXI) 21 U.N.GAOR Supp. (No. 16) at 52 U.N. Doc. A/6316 (1966) entered into force 23 March 1976, 999 U.N.T.S. 171) art 25 (b) which establishes the right of everyone '[t]o vote and to be elected', 'without unreasonable restrictions'. Cf *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (n320) [70].

³²³ See *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (n320) [72].

³²⁴ 'A murderer, for reasons best known to himself, chooses to shoot his victim in plain view of a large number of people. When the police arrive, he hands them his gun and says, "I did it and I'm glad". His account of what happened is corroborated by several eyewitnesses. He is placed under arrest and led off to jail. Under these circumstances, which may seem extreme but which in fact characterize with rough accuracy the evidentiary situation in a large proportion of criminal cases, it would be plainly absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what the presumption of innocence means'. See Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, California 1968) 161.

the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention, should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)). This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law³²⁵.

³²⁵ *Suárez-Rosero v. Ecuador* Judgment of November 12, 1997 (*Merits*) In the Inter American Court on Human Rights, Judge Sergio García-Ramírez's Dissenting Opinion [77].

Concluding Remarks

It appears that the grounds for issuing a warrant of arrest of certain persons and summons for others seem not to stand as impartial. The Court has preferably, on OTP's application, issued warrants of arrest than summons for persons to appear. The principle of liberty of suspects and accused pending the issue of a trial on the grounds of the presumption of innocence has not been taken into account in dealing with the appearance standard. In fact, originally, the provision relating to the warrant of arrest and detention was supposed to be in compliance with articles 9 of the ICCPR³²⁶, which protects the right of persons arrested or detained to be released pending trial and to challenge an unlawful detention. This right is based on the rule that

'[i]t shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings'³²⁷.

In its concluding observations regarding regulations related to detention matters, its length and the reasons of keeping persons in detention before and after trial, HRC underlined significant links existing between the presumption of innocence and the right to a fair trial within reasonable time or release as provided by articles 14(2) and 9(3) of the ICCPR³²⁸.

³²⁶ Draft Statute for an International Criminal Court with commentaries 1994 (Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session) articles 28 and 29.

³²⁷ ICCPR (n322) art 9 (3).

³²⁸ HRC, Consideration of Reports submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee Italy, CCPR/C/79/Add.94 (18 August 1998) [15]. Cf Ibid [13]; HRC, Consideration of Reports submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee Argentina, CCPR/CO/70/ARG.94 (15 November 2000) [10].

It is suggested therefore that the Court should interpret the legal framework relating to pre-conviction detention in light of right of persons to be presumed innocent as an internationally recognized human right despite the wording of article 58 which regards a summons as an alternative to a warrant of arrest. Instead, it is submitted that the ICC would be consistent with the requirement of article 21(3) in privileging the right to liberty by issuing summons to appear as a matter of a principle and a warrant as an exception³²⁹. The same rule should favour the release of persons pending trial³³⁰. In this respect, it is recommended that pre-trial detention be used 'as a last resort in criminal proceedings' and 'only if circumstances make it strictly necessary'³³¹.

Therefore, '[w]henver possible, the use of pre-trial detention should be avoided by imposing alternative measures'³³² such as the summons to appear with or without restrictive conditions in respect of the presumption of innocence. Indeed, the rule based on the right to be presumed innocent that defendants must be remanded on bail or at liberty pending their trial, is enshrined in national laws and constitutes an international standard³³³. Therefore, the ICC, by considering only grounds under

³²⁹ See *Ilijkov v Bulgaria*, ECtHR, No. 33977/96 (26 July 2001) [85].

³³⁰ As noticed by Hassmer, quoted by Safferlings, '[s]een in terms of the presumption of innocence, the legitimacy of pre-trial detention called in question, as it can be defined as the detention of an innocent' (Christoph JM Safferling, *Towards an International Criminal Procedure* (OPU, Oxford 2001) 134). It would be indeed [d]esirable, for humanitarian, social and economic reasons, to reduce the applications of pre-trial detention to the minimum compatible with the interests of justice'' (See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, 27 August- 7 September 1990: Pre-Trial Detention, p158 [1]).

³³¹ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, 27 August- 7 September 1990: Pre-Trial Detention, p157 See 'Considering'. Specifically, '[p]re-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offenses and there is a danger of their absconding or committing further serious offenses, or a danger that the course of justice will be seriously interfered with if they are left free'. See *Ibid* p158 [2(b)]).

³³² See Eighth United Nations Congress (n258) p158 [2(e)].

³³³ Karin N. Galvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Martinus Nijhoff Publishers, Leiden; Boston 2006) 54). Paradoxically, under Sub-rule 65 (B) of the Rule of Evidence and Procedure of the ICTY (ICTY, Rules of procedures and Evidence (Adopted on 11 February 1994)) and ICTR (ICTR, Rules of Procedure and Evidence, entered into force 29 June 1995), the release was said to be ordered 'only in exceptions circumstances'. And as noted by Karin N. Galvo-Goller, '[e]ven after its amendment by the ICTY, pre-trial detention remained the principle, provisional release the exception' (Karin N. Galvo-Goller (n240) 54, 55 see also footnote 208). In that respect, the Trial Chamber of ICTY held that 'Sub-rule 65 (B) establishes the criteria which must be satisfied before a Trial Chamber can grant the release of an accused

articles 58 (a) and (b) and 60(1) and (2) and 60 (4) as a basis of its being satisfied that persons detained shall remain in detention pending the outcome of the trial, seems to ignore the provision of article 66(1) of the Statute. The latter indisputably constitutes the first ground for persons to be treated as innocent until proven otherwise and thus to be released pending the trial at least with conditions given that remaining in the pre-trial detention 'does not seem to accord with the presumption of innocence'³³⁴.

In effect, when detention becomes long, unnecessary, and thus arbitrary, it constitutes 'the great flaw at the outset of the proceeding, or at least the one that most often and overwhelmingly victimizes the defendant –the one presumed innocent'³³⁵. In that respect, it is submitted that the Court should rule on the basis of article 21 (3) that article 66 (1) must be considered in dealing with the question of pre-trial detention, and interim release with or without conditions³³⁶. Otherwise, the

pending trial. These criteria are fourfold, three of which are substantive and one procedural. They are conjunctive in nature and the burden of proof rests on the Defence. Thus, the Defence must establish that there are exceptional circumstances, that the accused will appear for trial, and that if released the accused will not pose a danger to any victim, witness or other person. Additionally, the host country must be heard. If any of these requirements are not met, the Trial Chamber is not authorised to grant provisional release and the accused must remain detained' (*Prosecutor V Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic and Esad Landzo also known as "Zenga"* (Decision on Motion for Provisional Release filed by the Accused Zednil Delalic) Trial Chamber ICTY IT-96-21-T (24 October 1996) [2]). The Principle was shortly recalled by the Pre-trial Chamber of the ICTY (Ibid [2]). It is an undeniable fact the arrest of any person 'is a dramatic moment, pregnant with legal consequences' (Geoffrey Robertson QC, *'Freedom, the Individual and the Law'* (7th edn Penguin Books, London 1993)1), particularly for former heads of States. As pointed out by the UNHC 'pre-trial detention may cause physical and psychological damage to persons subjected to it' (See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, 27 August- 7 September 1990: Pre-Trial Detention, p157 Preamble).

³³⁴ Salvatore Zappalà, (n317) 88).

³³⁵ *Tibi v Ecuador* Judgment of September 07 2004 (n313) [36].

³³⁶ In that respect, the practice in national law in accordance with international standard despite a number of violations pointed out at Havana Congress may be considered and improved by the ICC. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana, 27 August- 7 September 1990. In national law, for instance, in the French criminal proceedings, an individual, 'under judicial examination, presumed innocent, remains at liberty. However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he may, in exceptional cases, be remanded in custody'. See FCCP (Act no. 2005-1550 of 12 December 2005. Official Journal of 13 December 2005) art 137. So the detention and its extension constitute an exception as provided by article 144 of the FCCP and accordingly held by the Court of Cassation. See Cour de cassation - Chambre criminelle, Arrêt n° 1238 du 26 février 2008, 1st 'Attendu'. Similarly, in the English law, the general right to bail under section 4 of the Bail Act 1976 carries a presumption in favour of any defendant, prior to conviction, to be granted a bail despite a limitation under section 25 of the CJPOA 1994 and the exceptions set forth under the Bail Act schedule 1(2) to (7). See Gary Atkinson and Deborah Sharpley, *Criminal Litigation: Practice and Procedure* (CLP, Guildford 2009) 131-133. In the opinion of Justice Vinson '[u]nless this right to bail before trial is

ICC's trial would seem to be unfair on the grounds that persons are punished before conviction by being detained for a long time pending trial in violation of the presumption of innocence as provided by article 66 (1) and thus in violation of internationally recognized human rights in the light of article 21 (3) of the Statute.

preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning'. See *Stack v Boyle*, 342 U.S. 1 (1951) [2]. . In that respect, Gregory W. O'Reilly notes that '[t]he right to bail pending trial corresponds to the presumption that the suspect is innocent until proven guilty in court'. See Gregory W. O'Reilly 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85 JCLC 402 footnote 289.

Chapter 4: The Statements of Public Officials, Media reports and the Presumption of Innocence

As highlighted by Herbert L. Packer,

[t]he presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome [...], a direction to the authorities to ignore the presumption of guilty in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities³³⁷.

Indeed, in light of the HRC's comment, '[i]t is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused'³³⁸. On the other hand, the HRC emphasised that '[t]he media should avoid news coverage undermining the presumption of innocence'³³⁹.

In this regard, bearing in mind the two rationales of the presumption of innocence in international law³⁴⁰, it follows that statements of public officials and media

³³⁷ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, California 1968) 161. Indeed, the right of persons to be treated as innocent concerns acts and statements of public authorities as well those of all the parties to the proceedings of the Court. In this sense, a reference by the ICC' Registry to a suspect as an accused in the ICC Newsletter before the confirmation of his charges has been held by the Court as a breach of the right of a suspect to be treated as such on the ground of the presumption of innocence. See Situation in the Democratic Republic of the Congo (Transcription No ICC-01/04-01/06-T-30-EN) PTCI ICC-01/04-01/06 (9 November 2006) lines 19-25, p 15; lines 1-3, p16; lines 7-14, p19). In this view, as strictly asserted by Judge Jorda, the presumption of innocence as a right to be treated and consequently a rule of proof, shall govern all the stages of the ICC Proceedings, each of the hearings, all the parties, the Prosecutor as well as the victims and their legal representatives and the Defence, all the Court including all the Judges until the person being prosecuted is proven guilty. Judge Jorda underscored that the treatment of a person shall so prevail bearing in mind that 'first of all, everybody is presumed innocent until their guilt has been established before the Court'. See Ibid (Transcriptions) lines 18-25, p 10; line1, p11).

³³⁸ HRC, *General Comment No. 32* Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32 (23 August 2007) [30].

³³⁹ Ibid.

³⁴⁰ The first rationale, under article 14(2) of the ICCPR' for instance, regarded as 'the gold standard in terms of codification of the right to a fair trial in international human rights law', See William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, New York 2006) 503) is that the presumption of innocence imposes that persons be treated according to the principle that they are presumed innocent, in order to prevent any risk of encouraging the public to believe that a suspect is already

coverage should not undermine a suspect's good name³⁴¹ before a conviction has been made³⁴².

This chapter, therefore, examines whether and how the Court has dealt with the issue of the statements of public officials, especially OTP, and their consequences on the presumption of innocence as a right to be treated, particularly through media coverage. Section 1 discusses the notion of public officials and considers their statements in relation to the right of persons to be treated as innocent and how the Court has dealt with; section 2 considers media coverage of those statements and the stance of the Court on them.

It is argued that unless the presumption of innocence, as a right to be treated by public officials and thus by media and the general public, is upheld as such and strictly protected by the Court with relevant remedies in case it is breached, the

'guilty of the alleged crimes and that it prejudged the assessment of the facts by the Court' see HRC, General Comment No. 32 (n338) [30]. This first rationale therefore deals with the protection of the suspect reputation within a society and the same time prevents any prejudice to be caused to the fact-finding process of the truth before the Court, which actually acts on behalf of a society. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Callixte Mbarushimana* (Public Document Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings) PTCI ICC-01/04-01/10 (31 January 2011) [17]. The second rationale, which is a corollary to the first one, is that the presumption of innocence, as a component of a fair trial under art 6(1) and (2), is 'intended to enshrine the fundamental principle of the rule of law'. See *Salabiaku v France* (Judgement) Application No 10519/83 (7 October 1988) [28]. As such it throws the burden on OTP to establish the standard required in order to reduce at each stage the strength of the protection of the law of the presumption of innocence. In fact, OTP bears the onus to convince the Court of the existence of reasonable grounds to believe against a suspect as to have him indicted, substantial grounds to believe as to have charges confirmed and commit persons to trial and ultimately convince the Court beyond reasonable doubt that a person is guilty of having committed alleged crimes.

³⁴¹ In the words of Stephan Trechsel, the presumption of innocence as a right to be treated 'aims to protect the image of the person concerned as 'innocent, i.e. not guilty of a specific offence. In other word, it protects the good reputation of the suspect. This means, for example, that a person who has not been convicted in criminal proceedings must not be treated or referred to by persons acting for the state as guilty of an offence'. See Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford; New York 2005) 164. In this respect, it is axiomatic that the presumption of innocence, under internationally recognized human rights, constitutes 'one of the elements of a fair criminal trial required [...]. It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty'. See *Daktaras v Lithuania* (Judgment) ECtHR , Application No. 42095/98 (10 October 2000) [41].

³⁴² In this view, a violation of the presumption of innocence as a right to be treated was found as a result of statements made at a press conference referring to a person under judicial investigation as 'one of the instigators of a murder and thus an accomplice in that murder'. by senior police officers in charge of the matters with the support of the Minister of the Interior and by the latter. The statements were held as having 'firstly, encouraged the public to believe [that the person referred to was] guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority'. See *Allenet De Ribemont v France* (Judgement) ECtHR Application no 15175/89 (10 February 1995) [36]- [41].

fairness of the ICC trials would be jeopardised and hence the credibility³⁴³ of the Court in its duty of guaranteeing 'lasting respect for and the enforcement of international justice'³⁴⁴.

³⁴³ As noticed by Lyne 'War crimes involve unimaginable atrocities, and therefore provoke an extreme sense of moral outrage. However, it is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society's collective need for condemnation and punishment of war criminals and simultaneously to assiduously protect the rights of those accused of war crimes. In order for a war crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness'. Therefore, for the Court 'to pursue justice that accords with basic notions of human dignity, it must uphold the highest standards of due process and fundamental fairness'. Indeed, the presumption of innocence is regarded as one of the due process rights granted by the Statute. See Lynne Miriam Baum, 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court' [2001] 19 Wis, Int'l L. J. 197, 229.

³⁴⁴ The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) Preamble [11].

Section 1: Statements of Public Officials and the Presumption of innocence

Under International law, ‘public officials’ generally refer to anyone who holds a public office and therefore has ‘a duty to act in the public interest’³⁴⁵. It follows that ‘[p]ublic officials shall ensure they perform their duties and functions efficiently, effectively and with integrity in accordance with laws or administrative policies’³⁴⁶. Specifically, within judicial proceedings, the ICC has considered, in light of internationally recognized human rights as ‘public officials’ the Prosecutor and/or ‘other persons in charge of the relevant investigations’³⁴⁷. Actually, in the case of *Allemont v France*, public officials were not only senior police officers in charge of the inquiries regarded as the ‘highest ranking officers in the French police’, but also the Minister of Interior- though not being part of the judicial process as such-who supported them and made public statements as to the guilt of a person concerned by the investigation³⁴⁸. It follows that, as regards the proceedings of the Court, public officials are those involved in the proceedings, holding a public office or acting on the behalf of such public authorities.

In this respect, heads and public officials of States Parties and members of the UNSC by virtue of their respective power to refer a situation to OTP and thus trigger the proceedings³⁴⁹ of the Court³⁵⁰, appear to be an essential part of the ICC

³⁴⁵ International Code of Conduct for Public Officials, UNGA Res 51/59 (12 December 1996) Annex [1].

³⁴⁶ Ibid [2].

³⁴⁷ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [10] see footnote 18.

³⁴⁸ Judgement, 10 February 1995, Application no 15175/89 [37], [41].

³⁴⁹ As noticed by Hector Olasolo, art 13(b) of the Statute has granted ‘the international political organ in charge of the maintenance and the restoration of the international peace and security the right to access to an ICC which has been entrusted with the investigation and prosecution of the most serious crimes of concern of the international community as a whole. [...] The broad content of the right of access to the Court granted to the Security Council reflects its procedural status as petitioner or requesting party in the triggering procedure’. The same, ‘there can be no doubt of the procedural position as petitioner or requesting party in triggering procedure that the State Party making the referral enjoys’ (arts 13(a) and 14). See Hector Olasolo, *The Triggering*

proceedings. Therefore, they may arguably be regarded as public officials and thus may, in the same way as OTP, infringe the presumption of innocence if they do not refrain from presenting a person to the public as guilty before a judgement establishing the guilt of the person has been passed.

OTP, in particular, has, under article 54(1) (a) and (c) of the Statutes, the duty to 'investigate incriminating and exonerating circumstances equally' and [f]ully respect the rights of persons arising under [the] Statute'. In this view article 54 (1) (a) makes OTP to be not simply a party to the proceedings but an 'organ of justice'³⁵¹ and 'an officer of justice rather than a partisan advocate'³⁵².

It is stressed that the presumption of innocence as a right of persons to be treated as innocent until proven otherwise applies outside and inside the courtroom, at the investigation stage³⁵³ and at all the stages of the ICC's proceedings³⁵⁴.

Procedure of the International Criminal Court (Martinus Nijhoff Publishers, Leiden, The Netherlands ; Boston 2005) 91, 104.

³⁵⁰ In accordance with art 13 of the Statute which reads as follows: The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

³⁵¹ Antonio Cassese, *International Criminal Law*, (2nd edn OUP, Oxford 2008) 440.

³⁵² Claus Kress, 'The Procedural law of the International Criminal court in Outline: Anatomy of a Unique Compromise' (2003) 1 (3) JICJ 603.

³⁵³ *Situation in the Republic Democratic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) PTCI ICC-01/04 (17 January 2006) [42]-[44] (references omitted).

³⁵⁴ Although it has been held that a potential suspect 'does not enjoy locus standi' at the pre-trial stage of the issuance of a warrant of arrest or a summons to appear under article 58 of the Statute. See *Situation in the Republic of Kenya* (Public Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58 (7)") PTCII ICC-01/09 (11 February 2011) [6]), one can nevertheless argue that the placement of the presumption of innocence in part 6 of the Statute relating to trial implies that it applies also at such a stage. According to M. Cherif Bassiouni, 'there is no valid methodological explanation for the separation and placement of the provision of the presumption of innocence (Article 66) in Part 6'. It 'properly belong[s] in Part 3 of the Statute, which deals with general principles of criminal responsibility'. [...] [T]he location of article 66 in Part 6 reflects an insufficient appreciation of traditional legal methods of criminal law'. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers, New York 2005) 85. M. Cherif Bassiouni 'chaired the Drafting Committee at the Rome Conference'. See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, Oxford; New York 2010) 785. The Court held indeed that, despite its being placed in Part 6 of the Statute relating to trial, the presumption of innocence, under article 66 of the Statute, 'as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings, including the pre-trial stage'. See *Situation in the Central African Republic in the case of the*

In this respect, the Court held that the presumption of innocence is 'guaranteed by the Statute not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court'³⁵⁵. Actually, the presumption of innocence is also guaranteed to persons against whom grounds to believe that they have committed a crime within the jurisdiction of the Court and are about to be interrogated by OTP or national authorities under article 55(2) of the Statute³⁵⁶.

It follows that any statement made at any stage of the proceedings showing the guilty prior to a conviction of a person breaches the presumption of innocence as a right to be treated as innocent³⁵⁷. It is axiomatic that the presumption of innocence 'protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court'³⁵⁸. More importantly, the Court held that it 'has a specific responsibility to protect the rights of a suspect. In order to fulfil its duties relating to this responsibility and to its role of the

Prosecutor v Jean-Pierre Bemba Gombo (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) Pre-Trial Chamber II ICC-01/05-01/08 (15 June 2009) 31). In fact the Court emphatically observed that 'Part 6 of the Statute, entitled "The Trial", contains both articles concerning the conduct of the proceedings before the Trial Chamber and articles establishing general principles applicable to different stages of the proceedings before the Court. [...] these articles are generally applicable to different stages of the proceedings before the Court, including the investigation stage'. See *Situation in the Republic Democratic of the Congo* (n353) (January 2006) [42]-[44] (references omitted)). In the same view, the Court held that '[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime'. See *Situation in the Democratic Republic of the Congo* (Public Document Judgement on the Prosecution's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying leave to appeal) AC (13 July 2006) [11]. In *Minelli v Switzerland*, the ECtHR considered that the presumption of innocence under article 6(2) 'governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge' (A.62 (1983) 5 EHRR 554 [30]).

³⁵⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [8].

³⁵⁶ In such a case persons have the right to be informed by OTP of the grounds prior to being interrogated, the right to remain silence, a right that derives and is linked to the presumption of innocence. It must be recalled that in the words of the Court the presumption of innocence applies even at the investigation stage.

³⁵⁷ In this regard, the Court, quoting the ECtHR, held that 'public authorities, in particular those involved in criminal investigations and proceedings, should be careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the 'person's innocence being called into question even before being tried'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [10] footnote 19 X. V. the Netherlands, "Decision", 17 December 1981, application no. 8361/78).

³⁵⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [10] footnote 18 quoting *Krause v. Switzerland*, "Decision", 3 October 1978, application no. 7986/77.

guarantor of the suspect's rights, the Chamber has the necessary powers to take appropriate measures to protect these rights'³⁵⁹. Nevertheless, despite this important finding, OTP, as before the finding was made, appears to be 'willfully (sic) oblivious to his assigned role of an impartial functionary tasked with assisting the Court in determining the truth'³⁶⁰ and thus continues making public statements presenting suspects as having committed alleged crimes. Regrettably, the Court has not taken any appropriate measure to protect the presumption of innocence of suspects against OTP's nor UNSC members' public statements³⁶¹ which are

³⁵⁹ Ibid [6] see also footnote 13.

³⁶⁰ *Situation in the Democratic Republic of the Congo, in the case of The Prosecutor v Callixte Mbarashimana* (Public Document Urgent Defence Request for an Order to Preserve the Impartiality of the Proceedings) Pre-Trial Chamber I ICC-01/04-01/10 (18 October 2010) [5].

³⁶¹ In this respect public statements in the case of Mr *Gaddafi et al* may be illustrative. The case of *Gaddafi et al* arose from the situation in Libya referred to OTP by the UNSC on 26 February 2011 (UNSC Resolution S/Res 1970 (2011) Adopted by the Security Council at its 6491st meeting) 26 February 2011). Subsequently, on 23 June 2011, warrants of arrest of Mr *Gaddafi and al* were issued by PTCL. See *Situation in the Libyan Arab Jamahiriya* (Public Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI) PTCL ICC-01/11 (27 June 2011). However, since the referral and afterwards and even before the referral, various statements on the guilt of Gaddafi were made by both UNSC members and OTP, which infringed the presumption of innocence. Observably, the UNSC resolution itself contained affirmation of undisputed facts rather than allegations as the circumstances required under internationally recognized human rights. Indeed, as underlined above, the members of the UNSC, as an organ taking part in the ICC proceedings, are definitely public officials. Therefore, when making their allegations, 'it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [10] footnote 17 quoting *Alenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89 [38]). However, in the UNSC resolution referring the situation in Libya to OTP, members of the UNSC referred to Gaddafi et al as 'the individuals [...] involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law'. See UNSC Resolution S/Res 1970 (2011) (Adopted by the Security Council at its 6491st meeting (26 February 2011) [22 (a)] and Annexe 1.

Such a statement is indisputably not circumspect as per internationally recognized human rights requirement under article 21(3) of the Statute. In fact, Mr Gaddafi was already held by UNSC members as having committed crimes within the jurisdiction of the Court and thus no longer the legitimate representative of Libya, yet he was not a suspect before the ICC (Despite the fact that NATO and Rebels forces cause civil casualties and the destruction of civil facilities likely to be qualified as crimes within the jurisdiction of the Court, rebels are regarded as trustworthy. They are therefore treated as legitimate representative of Libya. For the US, Gaddafi lost his legitimacy. See organ Strong, 'Summary on the American and International Press on the Libyan Revolution' The Tripoli Post (5 May 2011) available <http://tripolipost.com/articledetail.asp?c=1&i=5965> on accessed on 15 May 2011. See also BBC, 'Cameron invites Libya Rebels to open office in the UK' available on <http://www.bbc.co.uk/news/uk-politics-13371152> accessed on 15 May 2011.). Indeed, the status of a suspect is conferred by a warrant of arrest or a summons to appear issued by the Pre-Trial Chamber under article 58 (1) and (7) of the Statute. Not only was Mr Gaddafi before the issuance of a warrant of his arrest treated as a potential suspect presumably guilty of crimes within the jurisdiction of the Court, but he has been publically pointed as a 'legitimate target' of NATO's forces. See Kunto Wibison (ed), 'Kadhafi a 'legitimate target' of NATO: Libyan Rebels' available on <http://www.antaranews.com/en/news/71345/kadhafi-a-legitimate-target-for-nato-libyan-rebels> accessed on 15 May 2011). For the Italian foreign minister, Franco Frattini, the eventual issuance of a warrant for arrest against Gaddafi, 'would be a 'key moment' in the battle against' him even if the office the Prosecutor has been reported to have been surprised by the Italian minister's statement. See Al Jazeera and Agences, 'Gaddafi arrest warrant to be issued soon' available on <http://english.aljazeera.net/news/africa/2011/05/20115123318113711.html> accessed on 15 May 2011).

generally conveyed by media which portray suspects as already guilty of alleged crimes³⁶². We need then to consider particularly the status of media reports of statements of OTP in relation to the presumption of innocence.

³⁶²This has been the case after OTP's conference at the ICC on 16 May, stating that Gaddafi committed crimes against humanity. OTP incautiously asserted that Gaddafi ordered in person attacks on unarmed civilians. See ICC Prosecutor Statement Press Conference on Libya 16 May 2011, Questions and Answers, ICC. OTP affirmed further that 'Muammar Gaddafi committed the crimes with the goal of preserving his authority, his absolute authority'. See Libya Situation: Press Conference, ICC Prosecutor-16 May 2011 <http://www.youtube.com/watch?v=Q5XOorxeFUg> accessed on 22 July 2011. Such a statement as it does not indicate that all the facts referred to by OTP constitute allegations until proven to be true before the Court and thus indisputably violates the right of *Gaddafi et al* potential suspects in the case to be presumed innocent. See *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) Pre-Trial Chamber I ICC-01/04-01/06 (9 November 2006) lines 18-25, p 10; line1, p11). In the views of OCPD (Office of Public Counsel for the Defence established by the ICC Registrar pursuant to Regulations 77 of the Regulations of the Court with, *inter alia*, the tasks of representing and protecting the right of the defence during the initial stage of the investigation), '[t]he Statement ICC Prosecutor Press Conference on Libya 16 May 2011', which can be found on the Court's website, contains the following sentence which is a particularly serious contravention of the presumption of innocence: Muammar Gaddafi committed the crimes with the goal of preserving his absolute authority' (Situation in the Libyan Arab Jamahiriya (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) PTCI ICC-01/11 (25 May 2011) [10]. The violation is noticeably regrettable as especially, it has been, already recalled by the Court to OTP and to all the participants in the proceedings that the right of persons to be presumed innocent is one of the principles that govern Judges, the Prosecutor, the Registrar, the legal representatives of victims and everybody before the Court. See *Situation in the Democratic Republic of the Congo* (Transcription) (n362) (9 November 2006) lines 18-25, p 10; line1, p11). Moreover, the Court has already dealt with the issue of publically naming persons about which an application for a warrant for or a summons to appear have been submitted by OTP. The Court actually considered that such actions could 'have the potential to affect the administration of justice and the integrity of the [...] proceedings'. It therefore expressed 'its deprecation regarding the Prosecutor's course of actions [...] as it [...] unduly exposes [...] [persons] to prejudicial publicity before a determination of the Chamber pursuant to article 58 of the Statute has even been made'. See *Situation in the Republic of Kenya* (n354) (11 February 2011) [22]).

Section 2: Statements of Public officials and Media' Reports

Consistently with internationally recognized human rights, the Court upheld not merely the right but the duty of authorities, especially OTP, to inform the general public and the right of the latter to be made aware of the ongoing proceedings against a person³⁶³ in accordance with the principle of open justice³⁶⁴, which constitutes 'a guarantee against a sinister hole-in-the-corner justice, practised in

³⁶³ Indeed, quoting the ECtHR, the ICC held that 'the presumption of innocence cannot prevent the authorities from informing the public about criminal investigations in progress'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [10]. Nevertheless, the court rebuked OTP for causing prejudice to suspects by being cautious when making its public statements. See *Situation in the Republic of Kenya* (n354) (11 February 2011) [22].

³⁶⁴ It has been effectively argued that '[t]he most fundamental principle of justice is that it must be seen to be done'. See Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law* (5th edn Penguin Books, England 2008) 463, in order 'to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent urge to punish'. See *Richmond Newspapers v Virginia* (1980) 448 U.S. 555, [571] (reference omitted). In the same view, John Lilburne, when in trial before the Stars Chamber in 1649, claimed that 'all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place where the gates are shut and barred'. See Geoffrey Robertson (n364) 463. In response, judges sustained the idea of open justice so that 'all the world may know with what candour and justice the court does proceed'. See *Ibid.* Open justice became later 'a fundamental precondition of justice'. See *Ibid.* 463. In fact, Blackstone and Bentham considered '[p]ublicity'[to be] 'the very soul of justice'. See *Ibid.* Indeed, '[p]ress reporting of courts cases enhances public knowledge and appreciation of the working of the law, it assists the deterrent function of criminal trials and it permits the revelation of matters of genuine public interest'. See *Ibid.* 464. According to Blackstone and Bentham, '[t]rial derive their legitimacy from being conducted in public; the judge presides as a surrogate for the people, who are entitled to see and approve the power exercised on their behalf...[n]o matter how fair, justice must still be seen before it can be said to have been done'. *Ibid.* 464. This principle of open justice applies a fortiori to the proceedings of the ICC, which indeed prosecutes and judges persons for the most heinous crime that shocks the international community taken as a whole. However, media may make a crime to be a community's fascination for a time. See Helen Benedict 'She should be Punished: The 1983-1984 Nwe Bedford 'Big Dan's' Gang Rape (1992)' in Chris Greer (ed), *Crime and Media: A Reader* (Routledge, London; New York 2010). The case may be taken by international NGOs using international media to focus the community attention rather on the guilt of a suspect or accused and calling for compassion for the victim. Slobodan Mulosevic, for instance, was portrayed as 'the butcher of the Balkans' in 1992 (James L. Graff, 'Slobodan Mulosevic , the Butcher of the Balkans' *Time* (8 June 1992) available on <http://www.time.com/time/magazine/article/0,9171,975723,00.html> Accessed on 11 June 2011. Cf Michale P. Scharf and William A. Schabas, *Slobodan Milosevic on Trial: A Companion* (Continuum, New York; London 2002) 1) although, according to Michale P. Scharf and William A. Schabas, '[a] conviction in this case [would have been] more difficult to obtain than believed, in light of the unusual facts, governing rules, and guiding precedents. See *Ibid.* 2. In 2011, Ratko Muladic suspected of crimes within the jurisdiction of ICTY has been referred to as 'Butcher of Bosnia'. See Associated Press, 'Serbia Arrests 'Butcher of Bosnia' Ratko Muladic for Alleged War Crimes' *Fox News* (26 May 2011) Available on <http://www.foxnews.com/world/2011/05/26/serbia-arrests-man-believed-ratko-mladic/> Accessed on 11 June 2011. Further to nicknaming suspects as to highlight how guilty they already are, media depict suspects as horrible persons so that before the final decision of a Court they are expected to be convicted and sentenced. Consequently, due to regrettable public officials' statements and relating media coverage, acquittals are seen as 'injustice' by the general public. See International Justice reporting 'ICTR/IBUKA-IBUKA protests ICTR Acquittals' (21 November 2009) available on <http://www.hirondellenews.com/content/view/12995/1158/> Accessed on 11 June 2011. As Chief Justice's opinion joined by his two other pairs in the case of *Richmond Newspapers v Virginia* made it clear '[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows [...] Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," [...] "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish'. See *Richmond Newspapers v Virginia* (n364) [571] (reference omitted).

secret'³⁶⁵. In other words, 'the people are entitled to view the justice nominally administered on their behalf'³⁶⁶. A report that a crime within the jurisdiction of the ICC has been committed horrifies the community taken as a whole. The public then expects justice to be seen as to make sure that it is correctly done. In that respect, undoubtedly media coverage may serve the purpose of making justice be understood or, unfortunately, misunderstood by the general public³⁶⁷. In that view, it shall be pointed out that as a result of OTP's public statements, media have presented persons prosecuted by the ICC as already guilty of alleged crimes to the detriment of their right to be presumed innocent and treated accordingly³⁶⁸. For

³⁶⁵ Roderick Munday, 'Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence 2' [1991] 754, 762.

³⁶⁶ Ibid.

³⁶⁷ For instance, the case of *Portais Zigiranyirazo* before the ICTR may shed light on the effects of public officials' statements and related media coverage on the course of justice and its people's perception. See *Portais Zigiranyirazo v The Prosecutor* (Judgement) AC Case No. ICTR-01-73-A (16 November 2009) [2]. The accused, a brother-in-law of the late Rwandan's former President Habyarimana, was described within media as the mastermind of the 1994 genocide even after his acquittal and release. See David Smith and Agencies 'Rwanda genocide conviction quashed leaving Monsieur Z free' The Guardian (16 November 2009) Available on

<http://www.guardian.co.uk/world/2009/nov/16/rwanda-genocide-conviction-quashed> Accessed on 11 June 2011; Patrick Karurewa 'Release of Rwanda's Mastermind of Death Promotes Genocide Denial' Harvard Law Record (4 December 2009) Available on <http://www.hlrecord.org/opinion/release-of-rwanda-s-mastermind-of-death-promotes-genocide-denial-1.951557> Accessed on 11 June 2011). Indeed Mr Zigiranyirazo's conviction for inter alia genocide and crime against humanity by the Trial Chamber was overturned by AC on the ground of 'Trial Chamber's errors'. See *Portais Zigiranyirazo v The Prosecutor* (Judgement) Appeal Chamber Case No. ICTR-01-73-A (16 November 2009) [3]-[4]. In effect, AC was the view that 'the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. Zigiranyirazo's resulting convictions [...] violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse *Zigiranyirazo's* convictions. See *Portais Zigiranyirazo v The Prosecutor* (Judgement) Appeal Chamber Case No. ICTR-01-73-A (16 November 2009) [75]. Nevertheless, due to Mr *Zigiranyirazo's* conviction, there have been various reactions against his acquittal and immediate release so that for the general public, he remains the mastermind of the 1994 Rwandan genocide (David Smith and Agencies 'Rwanda genocide conviction quashed leaving Monsieur Z free' The Guardian (16 November 2009) Available on

<http://www.guardian.co.uk/world/2009/nov/16/rwanda-genocide-conviction-quashed> Accessed on 11 June 2011; Patrick Karurewa 'Release of Rwanda's Mastermind of Death Promotes Genocide Denial' Harvard Law Record (4 December 2009) Available on <http://www.hlrecord.org/opinion/release-of-rwanda-s-mastermind-of-death-promotes-genocide-denial-1.951557> Accessed on 11 June 2011) thus definitively presumed guilty for life to the detriment of good name, trustworthiness and dignity. However, the reaction of people would have been different if the presumption of innocence played its role of protecting suspects and accused reputation before conviction. Effectively, one of the aspects rationale of the presumption of innocence as a right not to be treated is to avoid making the public believe that a suspect or an accused is already guilty of alleged crimes before a final determination by the Court'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [17]). It follows that, where the presumption of innocence as a right to be treated is not protected the restoration, either by 'conviction or acquittal' of 'the imbalance that was created by the offense or public charge' would be prevented from being achieved due to media conviction. See *Richmond Newspapers v Virginia* (n364) [571] (reference omitted).

³⁶⁸ Indeed, under internationally recognized human rights, especially article 14(2) of the ICCPR, 'the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudicing the outcome of a trial'. See HRC General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)

instance, following an OTP's interview, Mr Lubanga was presented in media as someone who was going to be jailed 'for a very long time'³⁶⁹, eventually 'convicted' and to get 'a long sentence ("Mr Lubanga is going away for a long time")'³⁷⁰. Furthermore, OTP published comments on Bashir case stating that Bashir's forces committed genocide³⁷¹ and therefore infringing the presumption of innocence³⁷².

(13/04/1984) [7]. Paradoxically, repeatedly persons have been presented by public officials of the ICC, OTP in particular, as already guilty before a conviction has been made. The issue arose for the first time in the *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, following the reference made by the Registrar to Mr Lubanga in the ICC Newsletter as an accused before the confirmation of the crimes charged. See *Situation in the Democratic Republic of the Congo (Transcription)* (n337) (9 November 2006) lines 19-25, p 15; lines 1-3, p16; lines 7-14, p19. It must be indicated that the Court had already 'cautioned against inappropriate press reports generated by the parties', the Prosecutor, in particular. See *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo* (Public Document – Urgent Decision on the press interview with Ms Le Fraper du Hellen) Pre-Trial Chamber I ICC-01/04-01/06 (12 May 2010) [15]). Nevertheless, in the present case, the Prosecutor argued that the remarks made in the interview were not 'intended to prejudge the outcome of the trial or any sentence of the Court' nor 'to diminish the role of the Court. The prosecution suggests that a party may "assert in a public statement that it believes in the position it asserts in court". It is asserted that the Rome Statute framework does not prevent either party from making the kind of comments in issue'. See *Ibid* [20] (references omitted)).

³⁶⁹ *Ibid* [1] [] [8] [49].

³⁷⁰ See *Ibid*. Paradoxically, the defence argued only that 'the dignity of the accused had been unfairly called into account'. See *Ibid* [24]. Instead of raising the issue of the violation of the right of Mr *Lubanga* to be treated in accordance with the principle of the presumption of innocence. Even when OTP argued further, *inter alia*, that '[t]he media and various organisations have a right to information regarding the prosecution's performance of its responsibilities; It serves the public interest for the prosecution to clarify its methods of investigation, including how it overcomes the difficulties presented by an insecure environment and to confirm that its policy is to prosecute only those that it genuinely believes are guilty, without commenting on issues' (*Ibid*), the Defence contented herself with the Court's decision on the matter. See *Ibid* [30]). Whereupon, the latter, in lieu of invoking rights of persons, especially the right to be presumed innocent as provided by article 66(1) and interpreted under internationally recognized human rights in accordance with article 21(3), restricted itself just to observing that '[n]one of the provisions of the Rome Statute framework address the relationship between the parties and the press'. See *Ibid* [34], even if it stated that it was prepared, in the future, to take 'appropriate action against the party responsible' of 'objectionable public statements of [the same] kind'. See *Ibid* [53].

³⁷¹ OTP stated *inter alia* that 'Bashir's forces continue to use different weapons to commit genocide: bullets, rape and hunger. For example, the court found that Bashir's forces have raped on a mass scale in Darfur. They raped thousands of women and used these rapes to degrade family and community members. Parents were forced to watch as their daughters were raped. The court also found that Bashir is deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction. Millions of Darfuris are living in camps for displaced persons and, at the disposal of Bashir's forces, experiencing an ongoing genocide... Bashir used Ahmad Harun, as minister of state for the interior, to co-ordinate genocidal attacks on villages; he later used Harun, as minister of state for humanitarian affairs, to control genocidal conditions in the camps. Harun's current role as governor of South Kordofan could indicate an intention to continue using him as a future crimes co-ordinator. Bashir is attacking Sudanese citizens, the same people he has the duty to protect... As the prosecutor of the ICC, my mandate is to ensure justice for these Darfuris, the victims of genocide. Our evidence and our conclusions should be taken into consideration by the United Nations security council'. See Luis Moreno-Ocampo, 'Now End this Darfur Denial' (The Guardian, Thursday 15 July 2010).

³⁷² Bashir's ad hoc Counsel considered that OTP 'totally denied the presumption of innocence of the suspect Omar Al-Bashir as recognized under article 66 of the Statute' considering that he 'made the Public not only believe that A-Bashir was accused but it was already guilty of the crimes of genocide whilst he was first of all a suspect at the pre-trial stage of the proceedings'. See *Situation in Darfur, Sudan, the Prosecutor v Omar Hassan Ahmad Al Bashir* (Public Document Decision on the "Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010) PTC I ICC-02/05-01/09 (24 August 2009) [8 (c) (d)]. In response the Court simply rejected the request on the grounds that the ad hoc Counsel's request was 'inadmissible' given that it fell 'outside the scope and purpose of mandate vested with the ad hoc defence Counsel'. See *Ibid* see 'Considering' and 'For These Reasons'. Moreover, OPCD made a request 'for authorization to submit observations concerning Guardian Article dated 15 July 2010' on, *inter alia* 'the issue as

Afterwards, following the arrest of Mr Mbarushima, OTP issued a press release whereby Mr Mbarushima was referred to *inter alia* as “the most recent incarnation of Rwandan rebel groups established by former *génocidaires* who fled to DRC after the 1994 Rwandan genocide”³⁷³. The Defence Counsel considered that ‘an accused is entitled to the presumption of innocence’³⁷⁴ that had been violated via the ICC’s website. Therefore, the Defence Counsel requested the Court to order that OTP ‘publish an immediate and public retraction of the Press Release’³⁷⁵. In reply OTP requested that the Defence claim be dismissed³⁷⁶. However, the Court found that the request was relevant and thus held that it was ‘of the view that allegations of prejudice to suspects on account of public statements suggesting their guilty before a conviction by a court [...] are primarily of relevance to the issue of the presumption of innocence’³⁷⁷. It subsequently stated that ‘when making his future public statements, the Prosecutor should be mindful of the suspects’ right to be presumed innocent until proved guilty’³⁷⁸.

Nevertheless, the Court did not underscore the presumption of innocence as a right of persons to be treated as innocent before a conviction has been made and

to whether the article published by the Prosecutor, Luis Moreno Ocampo, in the Guardian on 15 July 2010 (the Guardian article) infringe[d] the presumption of innocence or affect[ed] the fairness and impartiality of the proceedings’ and ‘the impact of the Guardian article on the rights of the defendant, namely the presumption of innocence and the fairness and impartiality of the proceedings, as well as any appropriate remedies’. See *Situation in Darfur, Sudan, the Prosecutor v Omar Hassan Ahmad Al Bashir* (Public Document Decision on the “OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July 2010”) PTC ICC-02/05-01/09 (13 September 2010) [1]. The OPCD suggested that ‘if granted, its observations would elaborate on how “the contents of the Guardian article directly raise[d] issues concerning the presumption of innocence, the rights of the defendant, and the fairness and impartiality of the proceedings’. See Ibid [2]). The Court, however, rejected the request. See Ibid [6]-[10]).

³⁷³ *Situation in the Democratic Republic of the Congo, in the case of The Prosecutor v Callixte Mbarushimana* (n360) (18 October 2010) [5].

³⁷⁴ Ibid [6].

³⁷⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [2].

³⁷⁶ See Ibid [4].

³⁷⁷ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n340) (31 January 2011) [6].

³⁷⁸ Ibid [17].

take necessary measures as to protect such a right³⁷⁹. As a result OTP public statements still give rise to questioning the fairness of the ICC trials. For instance, its recent various statements on the case of *Gaddafi and al*³⁸⁰ determined the Office of Public Counsel for the Defence to request for an action to be taken by the Court as to protect suspects' right to a presumption of innocence³⁸¹. In response, OTP contended that he actually acknowledged the right of *Gaddafi et al* to a presumption of innocence³⁸². It therefore considered that 'the statements were appropriate and unobjectionable'³⁸³. Actually, as underlined by Judge Cremona

'when it comes to such a basic principle as that of the presumption of innocence, what really matters is not the possible intent with which certain words were uttered in judicial decisions concerning the accused, but the actual meaning of those words to the public at large'³⁸⁴.

In the same perspective, quoting the ECtHR, the Court recalled that '[t]he European Court held that while the presumption of innocence cannot prevent the authorities from informing the public about criminal investigations in progress, it requires that they do so with all the discretion and circumspection necessary if the

³⁷⁹ In fact the Court considered that 'in this instance, the risk that the Press Release might have encouraged the public to believe that Mr *Mbarushimana* is guilty of the alleged crimes and that it prejudged the assessment of the facts by the Court is not of such seriousness as to warrant the ordering of the measures sought by the Defence'. See Ibid [17].

³⁸⁰ Further to statements mentioned previously, it, for instance, stated the following: 'you believe it's not true what we're saying on the Libya crimes? Is it not true what we say about the crimes committed by *Lubanga*, *Joseph Kony* or *Jean-Pierre Bemba* or *president Bashir*? If you think the crimes are real, you should support the court, if not, you support the criminals'. See Ferry Biedermann 'Q&A with Luis Moreno-Ocampo, chief prosecutor of the International Criminal Court' The National (18 May 2011). Available on <http://www.thenational.ae/news/worldwide/asia-pacific/q-a-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court?pageCount=0> accessed on 22 July 2011).

³⁸¹ Situation in the Libyan Arab Jamahiriya (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) PTCI ICC-01/11 (25 May 2011).

³⁸² *Situation in the Libyan Arab Jamahiriya* (Public Document Prosecution's Response to OPCD's "Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d'innocence") PTCI ICC-01/11 (16 June 2011) [15] (footnote 19 included).

³⁸³ Ibid [18] (reference omitted).

³⁸⁴ *Nölkenbockhoff v Germany* ECHR (application no. 10300/83) judgment (25 august 1987) Dissenting Opinion of Judge Cremona p20-21.

presumption of innocence is to be respected'³⁸⁵. It follows that, statements by public officials to the media implying that a person is guilty breaches the right of a person to be presumed innocent³⁸⁶

It is therefore submitted that the Court needs to take appropriate measures to prevent OTP from continuing to make statements which suggest the guilt of persons before conviction as it has been pointed out regarding the situation in Libya or in the

³⁸⁵ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana (n340) (31 January 2011) [10] footnote 17 *Allenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89, [38]. In that respect, OPCD wrote a letter to OTP, prior to future submissions to the Court, following an OTP's press release regarding the opening of an investigation in the situation in Libya, whereby OTP announced that it will release 'preliminary information as to the entities and persons who could be prosecuted and put them on notice to avoid future crimes'. See Situation in the Libyan Arab Jamahiriya (n381) (25 May 2011) Annex A). OPCD rightly pointed out that 'the publication of names of potential suspects at this early stage will contravene the presumption of innocence inherent in Article 66(1) of the Statute. The presumption of innocence, a cornerstone of fair trial rights, is particularly important in the early stages of the proceedings before the ICC, when the Prosecution is charged with investigating both incriminating and exonerating circumstances. Given the very recent referral of matter to the ICC as well as the tumultuous and shifting nature of events on the ground in Libya, it is questionable as to whether the Prosecution could have properly investigated incriminating and exonerating circumstances to the extent that public disclosure of names of potential suspects would be either warranted or acceptable. The release of names of potential suspects into the public sphere – before substantive investigations can be properly undertaken- will create media speculation about guilt of those for whom no arrest warrant has yet been issued and for whom no arrest warrant may, in fact, be issued'. See *Ibid*. OPCD also recalled the finding whereby the Court rebuked OTP for having publically named persons about which it has submitted an application for a warrant of arrest or a summons to appear. See *Situation in the Republic of Kenya* (n354) (11 February 2011) [22]. Subsequently, OPCD requested PTCL 'to ensure respect for the right to a fair trial and the integrity of the proceedings by remedying the prejudice caused to the rights of the defence and by preventing any such prejudice from occurring in future'. See *Situation in the Libyan Arab Jamahiriya* (n381) (25 May 2011) [1]). This as to deal with the infringement of the presumption of innocence by OTP public statements which obviously pre-determined the guilty of *Gaddafi et al*. See Situation in the Libyan Arab Jamahiriya (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) PTCL ICC-01/11 (25 May 2011) [2]). Nevertheless, on 8 June 2011, during a press conference at the UNSC in New York, the Prosecutor stated that his office had evidence that containers of sex drugs such as Viagra was bought to enable soldiers to massively rape women in Libya in order to punish opponents. This mass rapes as a weapon according to OTP was personally ordered by Gaddafi. See for instance The Telegraph, 'Libya News :Gaddafi ordered mass rape as a weapon, International Criminal Court claims' (9 June 2011) available on <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8564999/Gaddafi-ordered-mass-rape-as-a-weapon-International-Criminal-Court-claims.html> accessed on 9 June 2011; BBC, 'Libya: Gaddafi forces accused of using rape as weapon' Available on <http://www.bbc.co.uk/news/world-africa-13707224> accessed on 9 June 2011. OTP intends therefore to request a warrant for this additional charges. Such statements from OTP are made despite the Court's view holding that 'allegations of prejudice to suspects on account of public statements suggesting their guilty before a conviction by a court [...] are primarily of relevance to the issue of the presumption of innocence'. See Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana (n340) 31 January 2011) [6]. It is observed, therefore, that unless, the Court takes subsequent measures as to impose on OTP the duty to refrain itself from making that kind of public statements, violation of the presumption by public officials, particularly OTP would increase giving way to dangerous media coverage to the detriment of the right of persons to be presumed innocent. This concern has been expressly made know by OCPD to PTCL and OTP requesting the former to take necessary measures as to fully protect the presumption of innocence and prevent in the future OTP to reproduce the same kind of public statements.

³⁸⁶ Given that 'the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle' see *Munguwambuto Kabwe Peter Mwamba v Zambia* Communication No. 1520/2006 (Ninety-eighth session, 8 to 26 March 2010) [6.5] (references omitted).

Ivory Coast so as to preserve the impartiality and the integrity of the proceedings before the Court. In this respect, the Court should positively consider the Office of Public Counsel for the Defence application regarding OTP statements on Libya whereby it, *inter alia*, requests that the court orders 'the publication of a press release clarifying the procedure before the Court at this stage and recalling the principle of the presumption of innocence'³⁸⁷. It also requests that OTP be directed as 'to refrain from making public statements which contravene the principle of the presumption of innocence'³⁸⁸ and in the alternative 'to make a public announcement as to the conduct of the proceedings before the Court and to state that everyone is presumed innocent until proved guilty'³⁸⁹. In this respect, the protection of the presumption of innocence in France against its infringement through media as it stands and the view of ICTY on media reports and the fairness of a trial may inspire the way the Court may deal with the effects of public officials' statements and media reports in order to protect the right of persons not to be treated as guilty beforehand, particularly by OTP within or through media.³⁹⁰ In this view, it is noteworthy recalling

³⁸⁷ *Situation in the Libyan Arab Jamahiriya* (n381) (25 May 2011) [42].

³⁸⁸ *Ibid.*

³⁸⁹ *Situation in the Libyan Arab Jamahiriya* (Public Document with Public Annex A Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle) PTCI ICC-01/11 (25 May 2011) [42].

³⁹⁰ Indeed, in the French system '[e]very person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute' (FCPP, Preliminary article [II]). Also under FCC '[e]veryone has the right to respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for injury suffered, may prescribe any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expenses of the natural or juridical person liable for that infringement'. Art. 9-1 of Civil Code (Act no 93-2 of 4 Jan. 1993) and (Act no 2000-516 of 15 June 2000) available on http://195.83.177.9/upl/pdf/code_22.pdf accessed on 11 August 2011)). It must be indicated that, the way of seeking compensation for injuries suffered as a result of attacks or infringements of the presumption of innocence was introduced in 1881 in the French civil proceedings. In effect, article 65-1 of the law of 29 July 1881 provides that an action may be made in instance where there is a violation of the presumption of innocence by one of the means referred to in article 23 of the same Act as modified to date: speeches, shouting uttered in public places or meetings, written or printed matters, drawings, engravings, paintings, emblems, pictures or any other form of writing, speech or image or sold publicity. See Act of 29 July 1881(n210) Arts 23, 65-1 ; see also *Cour de Cassation - Assemblée plénière* 00-20.493 Arrêt n° 547 du 21 décembre 2006). However, a written statement attacking the presumption of innocence does not suffice unless it contains 'conclusions showing bias taking for granted the guilt' of a person (See *Cour de Cassation Civ.* 1, 6 mars

that under article 7 of the ACHPR, the presumption of innocence means that until an individual is heard by the Court and subsequently proven guilty according to the applicable law before the Court, persons should be treated as innocent until proven

1996, Bull. n 123, p. 88) or describing such a person somehow and other as being guilty (Cour de Cassation Civ. 2, 29 avril 1998, Bull. n 141, p. 82), even if he is reported to have made a full confession during his police custody (garde à vue) (*Cour de Cassation Civ. 1*, 19 octobre 1999, Bull. n 286, p. 186) as a result of being suspected of having committed an offence (infraction). Nevertheless, an action founded on the breach of the presumption of innocence lapses after three months, from the date of the violation was made (*Cour de Cassation Civ. 2*, 4 décembre 1996, Bull. n 279, p. 169; *Cour de Cassation Civ.*, 31 janvier 2008, pourvoi n° 07-11.479, Bull. 2008, I, n° 34; *Cour de Cassation Civ.*, 30 avril 2009, pourvoi n° 07-19879, Bull. 2009, I, n° 84). The violation may also be prosecuted under the classification of defamation on a victim's complaint only. Moreover, Article 35ter of the law of 29 July 1881 provides that dissemination by any means will result in a fine of 15,000 Euros if done without consent. This is regardless of the type of medium used and would include, for example, an image of an identified or identifiable implicated person in the criminal proceedings showing the person wearing handcuffs or shackles or in custody or in remand before they had been convicted. Also anyone involved in performing, publishing or commenting on a poll, or any other consultation, and publishing information enabling access to surveys or consultations relating to a suspect or prosecuted person or predicting that the latter, before a conviction, is fined in the same way. In addition, it must be stressed that the right to be presumed innocent applies even after an accused has been convicted in the first instance as long as he has the right to appeal and until all ways of appeals have been exhausted and thus his conviction has become irrevocable. In this respect, the Court of Cassation has held that 'only a criminal conviction that has become irrevocable removes the right to the presumption of innocence as provided by article 9-1 of the Civil Code, in relation to facts to which it applies' See *Cour de Cassation Civ.1*, 12 novembre 1998, Bull. n 313, p. 216. It has been held, however, that only a living person concerned, the sole holder of rights, pursuant to article 9-1 had right to the respect for his presumption of innocence. See *Cour d'Appel de Paris* du 21 sept 1993, RTD civ. 1994, p 74). The principle behind the decision seems to have been, as stated by Planiol, that '[t]he personality is lost with life. The dead are no longer persons; they are nothing' (Planiol, *Traité élémentaire de droit civil*, (Tome Ier, 9ème édition, GDJ, Paris 1922) n° 371). Although such a view seems contentious, as noticed by Michael Bohlander, '[a] dead man is still a man' (Michael Bohlander 'Death of an Appellant: the Termination of the Appellate Proceedings in the Case of Rasim Delic at the ICTY' (2010) CLF 21) and therefore has right to be presumed innocent. He must therefore be referred to by the living as such if at the time of his death an irrevocable conviction hadn't taken place regardless of whether he died before the trial ended or during an appeal hearing. At international level, before the ICTY, in the case of the *Prosecutor v Milosevic*, the latter 'complained about publications in two news papers' as a result of interviews given by one of the amicus curiae in the case. The interviews presented the accused as a person that 'would certainly be convicted', who could be 'theoretically, but not practically be 'found innocent'. See *Prosecutor v Milošević* (Decision concerning an Amicus Curiae) Trial Chamber ICTY 41 ILM 1344 (2002) [1]-[2]. In that respect, the implicated amicus curiae were reported as having stated the following: 'If you went hunting and shot at game with an automatic rifle. You would stand a greater chance of hitting it than he stands of being found innocent. Milosevic is accused of offences in a great many places in Kosovo, Bosnia and Croatia. Even if he were acquitted of half the accusations, he would be found guilty of the rest. This is why the possibility of Milosevic being found completely innocent is insignificantly small'. See *Ibid* [4.]. The ICTY considered those views as being 'unfavourable to the accused' and giving 'rise to a reasonable perception of bias on the part of the amicus curiae' (*Ibid* [8]). The ICTY found that the amicus curiae could no longer act fairly and impartially and therefore instructed the registrar to revoke his appointment as amicus curiae. See *Ibid* [9, 10]. Though not mentioned, the presumption of innocence was in question in the above case. In that respect, the ICTY underlined 'the impact of pre-trial media reporting of events in [...] the indictment and arrest of the accused. In particular the Defence directed the attention of the Trial Chamber to media coverage in areas to which many refugees from the former Yugoslavia have fled since the events in question. To some extent, this issue related to the reliability of identification of witnesses who had not known the accused prior to the conflict. For example, of the 20 television programmes about th[e] case which were considered in a survey of which evidence was given, 15 carried the picture of the accused for at least a part of the report'. See *Prosecutor v Dusko Tadic a/k/a/ "Dule"* (Opinion and Judgement) Pre-Trial Chamber ICTY IT-94-1-T (7 May 1997) [542]. Beyond issues of identification, it was because of the submission of the Defence that this coverage potentiality affected the trustworthiness or reliability of testimony given by Prosecution witnesses generally'. See *Ibid* [543]. Even if 'a number of Prosecution witnesses denied having seen reports'. However, the Court concluded that '[i]n all trials, the potential impact of pre-trial media coverage is a factor that must be taken into account in considering the reliability of witnesses, and where this aspect was raised in cross-examination of witnesses, it has been taken into account in the evaluation of their testimony'. See *Ibid* [544].

otherwise³⁹¹. Indeed, picturing suspects as guilty before the Court by public officials through media have the effects of making the public to strongly believe them guilty despite their being eventually found not guilty³⁹².

³⁹¹ This has been the case regarding the situation in Libya, for instance. Various international media made reports relaying OTP's statements, BBC, amongst them. Whilst OTP's application for warrants of arrest has not been granted by PTC, the Gaddafi regime has been described as having 'committed war crimes against Libyan pro-democracy demonstrations opening fire "systematically" on peaceful protesters, according to report issued today by the prosecutor for the International Criminal court (ICC), who will seek arrest warrants against Muammar Gaddafi and two other senior members of his regime later this month' Julian Border 'Libyan Leaders Face Arrest on War Crimes Charges', The Guardian (4 May 2011) available on <http://www.guardian.co.uk/world/2011/may/04/libyan-leaders-face-arrest-war-crimes> accessed on 4 May 2011). Any sensible reader or watcher would conclude that Muammar Gaddafi is already guilty. In this respect, the Court has severely rebuked the Registrar for having referred to a suspect as an accused in the ICC Newsletter before the confirmation of his charges since he had the benefit of being presumed innocent (See Situation in the Democratic Republic of the Congo (Transcription No ICC-01/04-01/06-T-30-EN) Pre-Trial Chamber I ICC-01/04-01/06 (9 November 2006) lines 19-25, p 15; lines 1-3, p16; lines 7-14, p19). This understanding emerges from an individual opinion submitted by three members of the HRC in *Ruben Toribio Munoz Hermoza V Peru*, that the applicant 'appear[ed] to have all the time been treated as guilty while officially being temporally suspended. This amounted to a continued violation of his right to be presumed innocent (art 14, para.2) and to be treated accordingly until proceedings [...] were concluded against him' (HCR Communication No 203/1986 U.N. Doc.Supp. No 40 (A44/40) at 200 (1988) Appendix I [2]. Therefore it is 'the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The media should avoid news coverage undermining the presumption of innocence' (Ibid).

³⁹² As pointed out by Trechsel, '[m]edia publicity can have particularly dangerous consequence for the presumption of innocence'. See Stefan Trechsel, *Human Rights in Criminal Proceedings* OUP, Oxford; New York 2005) 177. In effect, media coverage can completely destroy somebody's dignity and life. See, for instance, New York Time 'The Strauss-Kahn Case: Free Press, Fair Trial?' (26 May 2011) available on <http://www.nytimes.com/roomfordebate/2011/05/26/can-strauss-kahn-get-a-fair-trial?emc=eta1> accessed on 4 June 2011. As underlined by an author, 'the utmost publicity is given to the affair, and the one-sided story is proclaimed throughout the community. In its eyes, the man is a criminal. He is treated as such-not, indeed, as a convicted criminal, but as one to be convicted. His character, his standing, is depressed. His business may be ruined, his health destroyed' (The Presumption of Innocence in Practice (1892) 14 CMR 185, 188). It is incontestable that publicity of a trial and media reports are founded on '[f]reedom of the press and openness of justice[as] being twin watchwords of the criminal justice system'. See Roderick Munday, 'Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence' [1991] 681, 688. However, when press report is not accurate or when they inaccurately report statements from the prosecution accusing a person, the publicity may make a person to be presented by media as guilty before a conviction. See Ibid see particularly note 28).

Concluding Remarks

Media as well as multimedia can play a crucial role in destroying the image and reputation of persons who are prosecuted. Their views influence the public and the Court's perception of persons accused to the extent that they compromise the fairness of the proceedings and the credibility of the Court. It is essential that the ICC uses its power under article 64 (6) (f) to rule on article 66 (1) pursuant to article 21(3) and establish the right of persons not to be presented by public officials in public and particularly through the media as guilty before conviction. In particular, the Court has a range of decisions that it may take against OTP's misconduct in case where it violates the right a person to a presumption of innocence. It should be made clear that a person cannot be presented by public officials as having actually committed crimes that they have been charged with, particularly on the ICC's website.

It must be made clear that there will be a violation of the right to be presumed innocent in case where OTP makes a statement portraying a person as criminal or having committed any crime. The Court may use its power to take 'disciplinary measures' against OTP under article 47 of the Statute and rule 25 (a) and (b) which deals *inter alia* with 'misconduct of a less serious nature' under article 47 of the Statute, in case it attacks a person's right to be treated as innocent until there is an irrevocable conviction, even if the violation of the presumption of innocence as a basic component of a fair trial seemingly falls in the category of 'serious misconduct or a serious breach' under article 46 of the Statute. This is so as to safeguard the credibility of the Court and the impartiality and fairness of the proceedings. In effect, '[e]xpression of opinions, through the communications media, in writing or in public

actions that, objectively, could adversely affect the required impartiality of the person concerned' are proscribed³⁹³.

In this respect the HRC, in the case of *Dimitry Gridin V Russian Federation*, considered with regard to 'public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage', referring to its General Comment No 13 on article 14, stated that: '[i]t is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial'. In the present case the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them and that the author's rights were thus violated³⁹⁴.

³⁹³ Rules of Procedure and Evidence (Adopted by the Assembly of States Parties, First Session New York, 3-10 September 2002 Official Records ICC-ASP/1/3) Rule 34(d).

³⁹⁴ *Dimitry Gridin V Russian Federation*, HRC, Communication No 770/ 1997 U.N. Doc. CCPR/C/69/D/770/1997 (20 July 2000) [8.3]. In this case, The applicant, Mr Dimitry, a student, arrested for 'attempted rape and murder' was in addition 'charged with six other assaults'. Found guilty, his sentence to death was eventually 'commuted to life imprisonment'. Amongst other claims, Mr Dimitry alleged the violation of his presumption of innocence as 'radio stations and newspapers announced that' [he] was 'the feared "lift-boy" murder who has raped several girls and murdered three of them' and 'the head of the police announced that he was sure that the author was the murder, and this was broadcasted on television. Furthermore, '[he] allege[d] that the investigator pronounced [him] guilty in public meeting before the court hearing and called upon the public to send prosecutors'. Consequently, claimed Mr Dimitry, 'the court room was crowded with people who were screaming that [he] should be sentenced to death'. Moreover, according to him, 'socials prosecutors and victims were threatening the witnesses and the defense and the judge did not do anything to stop this'. See Ibid [2]-[3.5]).

Chapter 5: Victims' Rights and the Presumption of Innocence

The aim of this chapter is to evaluate the extent to which the Court has applied and interpreted rights of victims and whether the interpretation and application of those rights have been made consistent with the right of suspects and accused to a presumption of innocence. It is noteworthy that the presumption of innocence, under article 66 of the Statute, interpreted consistently with internationally recognized human rights, remains, 'an essential principle of a fair trial'³⁹⁵. As such, the presumption of innocence applies at all the stages of the ICC's proceedings, including at the investigation stage³⁹⁶, namely at the issuance of a warrant, at the confirmation stage, at trial and after a conviction has been made, at the appeal stage. It therefore stands as the safeguard of the innocence of the suspect and the accused against being treated as guilty beforehand by anybody, including victims. As a corollary, OTP alone bears the burden to prove the contrary by meeting its burden of proof according to the standards required at each stage³⁹⁷. In this respect, in American trials, for instance, '[i]t has been settled for almost a century that the presumption of innocence, when uncontradicted, is an adequate substitute for

³⁹⁵ See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N.P. Engel, Publisher, Germany 2005)329. Cherif Bassiouni considers it to be 'inextricably linked to fairness', see Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', [1993] 3 Duke J. Comp & Int'l L. 235.

³⁹⁶ *Situation in the Republic Democratic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) Pre-Trial chamber I ICC-01/04 (17 January 2006) [42]-[44] (references omitted).

³⁹⁷ In the same view, Johannes de Monachus, referring to a decretal of Pope Innocent III 'wrote that in criminal cases the legislation of law have decreed, in order to maintain the equity of a judgement and avoid the precipice of iniquity, that a man who has not been proven with absolute clarity to have committed a crime is presumed innocent'. The papal decretal in question (that Justice Edward Douglas White quoted in *Coffin v USA*, 156 U.S. 432 (1895)), provided that 'when a clerical carried a papal mandate providing him with a benefit he did not have to prove himself worthy. "He may be presumed worthy unless the contrary is shown"'. See Kenneth Pennington, *The Prince and the Law 1200-1600: Sovereignty and Rights in the Western Legal Traditions* (University of California Press, Oxford 1993) 157.

affirmative evidence'³⁹⁸ and 'an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created'³⁹⁹. It is submitted, therefore, that the interpretation and application of victims' rights have to be strictly seen as limited by the right of the defendants to a presumption of innocence.

In this regard, it is notable that the drafters of the Statute contemplated the imperative necessity for the Court of always balancing the rights of victims and rights of the accused when interpreting and applying relevant provision relating to rights of victims. In that respect, the Court has been mandated to allow victims the right to present their views and concerns at appropriate stages of the proceedings 'in manner which is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial'⁴⁰⁰.

In other words, while the Rome Statute innovates in providing, for the first time, for victims' participatory right in international proceedings⁴⁰¹, the drafters did not mean

³⁹⁸ *Delo v Lashley*, 507 U.S. 272 (1993) Stevens, J., dissenting.

³⁹⁹ *Delo v Lashley* (n398), quoting *Coffin v. United States*, 156 U. S. 432, 459). This view was corroborated by a quotation of Thayer as follows: 'A few years later, in his landmark treatise on evidence, Professor Thayer, while noting that a presumption is not itself evidence, concluded:

"What appears to be true may be stated thus:—

"1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.

"2. It serves therefore the purposes of a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence." J. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Appendix B, p. 575 (1898) (hereinafter Thayer).⁵

The presumption of innocence plays a unique role in criminal proceedings. As Chief Justice Burger explained in his opinion for the Court in *Estelle v. Williams*, 425 U. S. 501 (1976):

⁵ "A presumption may be called 'an instrument of proof,' in the sense that it determines from whom evidence shall come, and it may be called something 'in the nature of evidence,' for the same reason; or it may be called a substitute for evidence, and even 'evidence'—in the sense that it counts at the outset, for evidence enough to make a *prima facie* case." Thayer 576'.

⁴⁰⁰ The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) art 68(3).

⁴⁰¹ For details on this matter see, *inter alia*, Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Volume II* (OUP, Oxford 2002); J. Alex Little 'Balancing Accountability and Victim Autonomy at the International Criminal Court' (2007) *Georgetown Journal of International Law* 38 363, 397; Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) *Journal of International Justice* 8 137; Elizabeth Beaumgatner, *Aspects of Victims Participation in the Proceedings of the International Criminal Court* [2008] *International Review of the Red Cross* 90 870.

that the interpretation and application of victims' rights will undermine suspects and accused' rights to a presumption of innocence. It follows that the treatment of persons as guilty beforehand of a crime supposedly having caused harm to victims⁴⁰² is not in the purview of the Statute. On the contrary, as already underscored, in light of article 68(3)⁴⁰³ rights of victims were intended by the drafters of the Statute to be interpreted and applied consistently with the rights of the defendants.

Therefore, this chapter considers in section one the rights of victims within the proceedings of the Court as interpreted and applied by the ICC and in section 2 assesses whether such interpretation and application conflict with the right of persons to be presumed innocent.

It is argued that, the Court should not interpret and apply rights of victims in conflict or to the prejudice of the right of the suspect and the accused to a presumption of innocence, which 'as a basic component of a fair'⁴⁰⁴ trial plays an essential role in guaranteeing the fairness and impartiality of the proceedings.

⁴⁰²In accordance with art 66 of the Statute read in light of internationally recognized human rights under art 21 of the Statute, although, under international standards, '[a] person may be considered a victim [...], regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted[...]'. See The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UNGA A/Res/40/34 adopted on 29 November 1985) art 2.

⁴⁰³ Art 68(3) of the Statute reads as follows: '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedures and Evidence'.

⁴⁰⁴ *Delo v Lashley*, (n398) Per Curiam at 278 and Stevens, J., dissenting, 284.

Section 1: Victims' Rights

Victims, as defined by the Rules⁴⁰⁵ have the right- and the Court has obligation to allow them- to express their views and concerns where within the proceedings of the Court, a Chamber considers it appropriate⁴⁰⁶.

In effect, PTCI deemed appropriate for victims to participate in the proceedings at the investigation stage⁴⁰⁷ in order to express their views as to 'clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered'⁴⁰⁸. In fact, PTCI contemplated the participation of victims in three instances at the investigation stage, 'when specific proceedings are initiated' whether by PTCI

⁴⁰⁵ Indeed, 'victims', under the Rules in accordance with the Statute, not only 'means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court' (Rules (rule 85 (a)) but also 'include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, sciences or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'(Rules (rule 85 (b)). Nonetheless, PTCI considered that for persons, other than organizations or institutions, to be accorded the status of victims, they shall be natural persons understood as 'human being'. See who have suffered harm, the latter term being interpreted 'on a case-by-case basis in the light of article 21(3) of the Statute'. Moreover PTCI considered that at a stage of investigation, 'the determination of a single instance of harm suffered is sufficient [...] to establish the status of victim'. In addition, the alleged crimes that may have caused the harm must fall within the jurisdiction of the Court. Also, there must be a causal link between alleged crimes and harm suffered. See (*Situation in the Democratic Republic of the Congo* (n396) (17 January 2006) [78]-[80], [81].

⁴⁰⁶ The Statute (n400) art 68 (3); Rules of Procedure and Evidence (Adopted by the Assembly of States Parties, First Session, New York, 3-10 September 2002 Officials Records ICC-ASP/1/3) Rule 86.

⁴⁰⁷ However, on OTP's view, '[f]irstly, allowing for third party intervention at the investigation stage could jeopardize the appearance of integrity and objectivity of the investigation [...]. Secondly, participation in an investigation could be seen as necessarily entailing disclosure of the scope and nature of the investigation. The Prosecution submits that it is inconsistent with basic considerations of efficiency and security to disclose these details to third parties during an ongoing investigation'. See

Situation in the Republic Democratic of the Congo (n396) (17 January 2006) [25]-[56] (references omitted). Therefore OTP applied for a leave to appeal against that decision on the grounds, *inter alia*, that further to the fact that victims' participation at the investigation stage 'undermines the impartiality of the investigation and of any related proceedings', it 'creates a serious ambivalence between the victims and any future accused [...] and is therefore detrimental to the fairness of the proceedings'. See *Situation in the Republic Democratic of the Congo* (Decision on the Prosecution's for Leave to Appeal the Chamber's Decision on 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) PTCI ICC-01/04 (31 March 2006) [2], [11], [53] (references omitted). Nonetheless, PTCI rejected the OPT's application for a leave to appeal. Likewise, APC dismissed OTP's application for extraordinary review of PTCI's decision denying leave to appeal as 'ill-founded'. See *Situation in the Republic Democratic of the Congo* (Public Document Judgement on the Prosecution's Application for Extraordinary Review of Pre-trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) APC ICC-01/04 (13 July 2006) [42].

⁴⁰⁸ In that respect, the Court, distinguishing a situation from a case, held that 'during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case'. See *Situation in the Republic Democratic of the Congo* (n396) (17 January 2006) [63]-[65] (references omitted).

'*proprio motu*' or by OTP 'or by counsel representing the general interests of the Defence' or when specific proceedings are initiated by PTC on victims' request⁴⁰⁹.

AC, however, reversed the decision⁴¹⁰ and held that neither the Statute nor the Rules or Regulations⁴¹¹ establish 'status to victims' or right that entitles victims to 'participate generally in the investigation of a situation'⁴¹². In the meantime, PTCI rendered a decision 'on the criteria for permitting participation by victims [...] the role of victims in the proceedings leading up to, and during trial, victims' common legal representation and certain other related matters' in order to provide the parties and participants with general guidelines on all the matters related to the participation of victims throughout the proceedings⁴¹³. Under the terms of this decision, in order to participate in the proceedings, at any stage, persons shall be victims of a crime or crimes within the jurisdiction of the Court and their interests must be affected at such a stage of the proceedings⁴¹⁴.

Those interests are broad and thus, are not limited to reparations issues. Indeed, victims have the right to adduce evidence as to charge a suspect, the same right as an accused to inspect evidence materials in the hand of both OTP and the

⁴⁰⁹ *Situation in the Republic Democratic of the Congo* (n396) (17 January 2006) [73]-[75].

⁴¹⁰ Indeed, on 7 December 2007, PTCI rejected OPCD's requests relating to the production of relevant information on victims and the disclosure of exculpatory materials by OTP. See *Situation in Democratic Republic of the Congo* (Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor) PTCI ICC-01/04 (7 December 2007).

⁴¹¹ Regulations of the Court (As amended on 14 June and 14 November 2007; amendments entered into force on 18 December 2007) ICC-BD/01-02-07.

⁴¹² *Situation in the Republic Democratic of the Congo* (Public Document Judgement on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007) AC ICC-01/04 OA4 OA6 (19 December 2008) [56]-[59].

⁴¹³ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga* (Public Decision on Victims' Participation) PTCI ICC-01/04-01/06 (18 January 2008) [85].

⁴¹⁴ Ibid 86.

Defence⁴¹⁵. Victims may make opening and closing statements, written submissions, examine evidence, question or examine witnesses⁴¹⁶ and even the defendant, whenever their interests so require, but with the leave of a chamber⁴¹⁷. Also victims may 'challenge the admissibility or relevance of evidence when their interests are engaged'⁴¹⁸. Moreover, victims may be allowed, to participate in 'closed and ex parte hearings'⁴¹⁹. Furthermore, participation of anonymous victims may be allowed⁴²⁰. In addition victims appearing in person before the Court have a dual status of victims/witnesses and therefore cannot be cross-examined⁴²¹.

It is essential to distinguish, the participations of victims dealt with under article 68 (3) from, on the one hand that under article 15(3) which concerns victims' representations in relation to the authorization of an investigation and on the other that of under article 19(3) relating to victims' submissions as regard to the admissibility of a case or jurisdiction. Also, irrespective of any participation in the proceedings, 'views of victims may be solicited' whenever a chamber deems it necessary⁴²². Moreover, Victims are entitled to 'make a request for reparations against the convicted person' and, in the same way as witnesses, 'move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy'⁴²³.

⁴¹⁵ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga* (n413) (18 January 2008) [111].

⁴¹⁶ *Ibid* [12], [98].

⁴¹⁷ *Ibid* [108] Cf Rules (n406) Rules 91 (3) (a) and (b).

⁴¹⁸ *Ibid* (18 January 2008) [109].

⁴¹⁹ *Ibid* [113].

⁴²⁰ *Ibid* [11], [12], [130], [131].

⁴²¹ *Ibid* [132]-[134].

⁴²² *Situation in the Republic Democratic of the Congo* (n412) [47], [48].

⁴²³ *Ibid* [50].

Afterwards, taking into account AC's decision denying to victims a general right to participate in the proceedings at the investigation stage⁴²⁴, PTCI rendered 'a framework decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo ("DRC"), irrespective of and outside the context of any case which may arise from that situation'⁴²⁵. PTCI found 'it desirable to ensure consistency of the principles governing victims'⁴²⁶ and 'set out a new substantive and procedural framework for victims' participation in the situation in the DRC'⁴²⁷. Therefore, in the view of PTCI, victims may participate at the investigation stage where judicial proceedings take place⁴²⁸. In addition a chamber 'may seek the views of victims or their legal representatives on any issue. Victims may participate in judicial proceedings by presenting their views in this way also at the stage of the investigation of a situation'⁴²⁹.

In conclusion, victims as defined above enjoy a general statutory participatory right at any stage determined to be appropriate by the Court under article 68(3) and specific statutory rights such as rights to make representation at the stage of investigation under article 15(3), to participate in the proceedings relating to the challenge of jurisdiction of the Court or the admissibility of a case under article 19(3), to participate in respect of reparations under article 75 of the Statute. Furthermore, the Court and OTP have an imperative duty to take relevant protective measures in favour of victims⁴³⁰.

⁴²⁴ Situation in the Republic Democratic of the Congo (n412) [56]-[59].

⁴²⁵ *Situation in the Democratic Republic of the Congo* (Decision on victims' Public Document participation in proceedings relating Democratic Republic of the Congo) PTCI ICC-01/04 (11 April 2011).

⁴²⁶ Ibid [8].

⁴²⁷ Ibid..

⁴²⁸ Such as 'proceedings regarding an review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to article 53 of the Statute; proceedings concerning the preservation of evidence or the protection and privacy of victims and witnesses pursuant to article 57(3)(c) of the Statute; and proceedings concerning preservation of evidence in the context of a unique investigative opportunity pursuant to article 56(3) of the Statute'. See Ibid [9]-[10].

⁴²⁹ Ibid [9]-[10].

⁴³⁰ See, for instance, the Statute (n400) art 68.

The next section discusses whether- and to what extent- the Court has balanced victims' rights with the right of persons to be presumed innocent in order to ensure the fairness and impartiality of the proceedings.

Section 2: Victims' Rights and the Presumption of Innocence

Admittedly, victims as defined by the Rules and subsequently interpreted and applied by the Court appear to be in accordance with its meaning under the relating UN declaration⁴³¹. This section, however, is concerned with the assessment of whether victims' rights have been interpreted and applied by the Court consistently with the right of persons to a presumption of innocence. The discussion focuses on three main issues respectively relating to victims' general right to participate in the proceedings, right to participate for the purpose of reparations and right to participate as anonymous witnesses as opposed to rights of persons to a presumption of innocence⁴³².

Subsection 1. Victims' General Right to participate in the Proceedings and the Presumption of Innocence

Under article 15 of the Statute, OTP is required to submit a request for permission to PCT as to initiate investigations *proprio motu* if it finds 'a reasonable basis to proceed with an investigation'⁴³³. In that case, victims are statutorily allowed to 'make representations'⁴³⁴. Also victims are entitled to submit 'observations to the Court'⁴³⁵ in respect of 'a question of jurisdiction or admissibility'⁴³⁶. Moreover, under article 75 of the statute, persons having been granted the legal status of victims may participate in the proceedings for the purpose of the reparation of harm after the conviction of the perpetrator.

⁴³¹ Declaration of Basic Principles for Victims of Crime and Abuse of Power (n402).

⁴³² See also Salvatore Zappalà (n 401).

⁴³³ The Statute (n400) art 15(3).

⁴³⁴ Ibid art 15(3).

⁴³⁵ Ibid art 19(3).

⁴³⁶ Ibid.

Whilst articles 15(3), 19 (3) and 75 of the Statute are considered as related to 'particular instances where victims have the right to participate'⁴³⁷, article 68(3) has been held to be 'the normative framework'⁴³⁸ that governs the general participatory right of victims in the proceedings at stages that a Chamber determines to be appropriate for them to present their views and concerns. Article 68(3) is, in fact, regarded as 'the basic norm according to which victims' participation may take place before the Court'⁴³⁹ in the pre-trial as well as in trial stages. This makes it relevant to distinctively examine the interpretation and application of the rights of victims and the presumption of innocence in both of two parts of the proceedings.

1.1 Victims' Participatory Right in the Pre-trial Stage and the Presumption of Innocence

Victims are entitled to participate at the investigation stage⁴⁴⁰ where there are judicial proceedings⁴⁴¹. In fact, in the view of the court, the participation of victims under article 68(3) in the investigation stage is justified, by the fact that the interests

⁴³⁷ *Situation in the Republic of Kenya* (Public Document Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya) PTCII ICC-01/09 (3 November 2010) [7]. See also *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* ((Public Document Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007) Separate Opinion of Judge Georgios M. Pikis, AC ICC-01/04-01/06 OA 8 (13 June 2009) [8].

⁴³⁸ *Ibid* (3 November 2010) [7].

⁴³⁹ *Ibid*.

⁴⁴⁰ It seems, however, that the wording of article 68(3) would suggest that the investigation and pre-trial stages are not appropriate for the views and concerns of victims to be presented since the provision of article 68(3) relates to victims rights in trial as specifically opposed to the rights of the accused. Arguably, therefore, the interests of victims under article 68(3) were foreseen as to being applied and interpreted at appropriate stages of a trial consistently with the rights of the accused and not with rights of 'everyone' as under article 66 of the Statute which includes a suspect as well and thus applies in pre-trial stages. The Court, indeed, has strictly made it clear that a person becomes an accused only after charges have been confirmed on the ground of the presumption of innocence referred to as one of the principles that govern Judges, the Prosecutor, the Registrar, the legal representatives of victims and everybody before the Court. See *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) PTCI ICC-01/04-01/06 (9 November 2006) lines 18-25, p 10; line1, p11). So it seems that article 68(3) relates to the proceedings starting after the confirmation of charges, particularly, read in light of Rules 85 (a) which defines victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. The Court, however, has repeatedly rejected such a view as being casuistic as opposed to a the systematic reading of the provision adopted by the Court. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*, (Decision on the set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case) PTCI ICC-01/04-01/07 (13 May 2008) [45]-[79].

⁴⁴¹ *Situation in the Democratic Republic of the Congo* (n425) (11 April 2011) [9]-[10].

of victims are affected at such a stage⁴⁴². The Court assesses the way such interests are affected in case by case basis on facts related to OTP's 'summary of evidence'⁴⁴³.

Methodologically, the link between harm suffered and crimes committed is determined on the basis of the standard to be met by OTP as to interrogate a person at the investigation stage, under article 55(2) of the Statute, namely 'grounds to believe'⁴⁴⁴. Therefore, victims bear the burden to demonstrate not only that 'they have suffered harm as a result of a crime within the jurisdiction of the Court'⁴⁴⁵ but also 'whether and how their interests are affected'⁴⁴⁶. In this view, victims are actually allowed to participate, as noticed by Salvatore Zappala, in the 'fact-finding process [...] on the basis of a preliminary finding that a crime was committed against them'.⁴⁴⁷

Such an interpretation of the role of victims implies a presumption of guilt⁴⁴⁸ carried by victims with the support of the Court⁴⁴⁹ and thus according to Salvatore

⁴⁴² More importantly, the Court held that, '[t]he analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of proceedings. The pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted. The interests of victims are affected at this stage of the proceedings [pre-trial stage of a case] since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible of the crimes included in the Prosecution Charging Document'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui* (n440) (13 May 2008) [45] (references and enumeration omitted).

⁴⁴³ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga* (n413) (18 January 2008) [102].

⁴⁴⁴ *Situation in the Republic Democratic of the Congo* (n396) (17 January 2006) 100 (reference omitted).

⁴⁴⁵ *Ibid* [98] 100 (reference omitted).

⁴⁴⁶ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (n437) (13 June 2007) [23].

⁴⁴⁷ Salvatore Zappalà, '(n401) 137 (footnote 28 included). See also *Situation in Uganda* (Public Redacted Version Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 PTC II ICC-02/04 (10 August 2007) [13].

⁴⁴⁸ PTCII seemed to have taken cognizance of the conflict by without actually addressing the very issue in regard to the right of a person to the presumption of innocence. See *Situation in Uganda* (n447) (10 August 2007) [13].

⁴⁴⁹ As noticed by Salvatore Zappalà, '[b]y allowing victims to participate in the proceedings, judges may seem to have predetermined that there are certain persons who are victims of certain crimes, and that there is a strong presumption that the crimes took place in a given location at a certain moment in time'. See Salvatore Zappalà (n401) 137, footnote 28.

Zapalla, 'lessening the burden for the Prosecution to prove its case'⁴⁵⁰. OTP indeed pointed out that 'by using the "grounds to believe" test to arrive at the determination that the applicants qualify as Victims, Pre-Trial Chamber I prejudged the issue of whether the crimes in question had been committed'⁴⁵¹.

To sum up, the issue at the investigation stage concerns the determination by victims of their grounds to believe that they suffered harm⁴⁵² caused by a crime committed in a situation under investigation. Further to bringing evidence of facts to OTP against a possible perpetrator, undoubtedly, victims relieve OTP of his burden as also pointed out by Judge Pikis in his dissenting opinion⁴⁵³, infringing the presumption of innocence as a both the right of persons to be treated as innocent, particularly by victims and OTP and a rule of proof

Such a conclusion appears to be corroborated by the fact that, once the participatory right granted, victims are expected to play, at a later stage, a role giving effect to a 'substantial impact in the proceedings'⁴⁵⁴ and not act as 'second-class' participants, who have a sort of 'in-courtroom observer status'⁴⁵⁵. It follows that victims have to play their role distinctively and independently from OTP⁴⁵⁶ but

⁴⁵⁰ See Salvatore Zappalà (n401) 137, footnote 28.

⁴⁵¹ *Situation in the Republic Democratic of the Congo* (n407) (31 March 2006) [56].

⁴⁵² *Situation in the Democratic Republic of the Congo* (n396) (17 January 2006) [99]-[100].

⁴⁵³ Citing Judge Pikis' opinion Judge Kirsch stated that 'it is the Prosecutor who is responsible, prior to trial, for initiating an Investigation and investigating the crimes, submitting evidence for the purpose of applying for a warrant of arrest, formulating the charges on which it is intended to bring the person to trial, determining what evidence should be brought in relation to the charges at the hearing to confirm the charges, having specific disclosure obligations in relation to evidence and bearing the onus of proving the guilt of the accused'. See *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Judgement on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting Opinion of Judge Philippe Kirsch) AC ICC-01/04-01/06 OA 9 OA 10 (11 July 2011) [6].

⁴⁵⁴ See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n440) (13 May 2008) [157].

⁴⁵⁵ See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n440) (13 May 2008) [156].

⁴⁵⁶ *Situation in the Republic Democratic of the Congo* (n396) (17 January 2006) [51] (references omitted).

without being neither its ‘opponent’⁴⁵⁷ neither its ‘ally’⁴⁵⁸, in pursuit of their interests⁴⁵⁹.

In this regard, victims enjoy a various number of rights in respect of their right to participate under article 68(3). For instance, they may ‘make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing’⁴⁶⁰ and ‘examine such evidence’⁴⁶¹. They also have ‘the right to examine, at the confirmation hearing, any witness proposed by the Prosecution and the Defence’⁴⁶². Victims exercise this right after OTP and may, ‘after a question is posed and before it is answered by the witness, make an oral motion requesting the Chamber not to admit the relevant question or to request the examining party to reformulate it’⁴⁶³. The consequences of this manner of victims’ participation on the presumption of innocence are the same as in trial, as discussed below.

1.2 Victims’ Participation in Trial and the Presumption of Innocence

The Court views victims’ participation in trial as intended to find the truth in a form of ‘a declaration of the truth’⁴⁶⁴ by the ICC as to the facts that caused them harm. It

⁴⁵⁷ Ibid [51](references omitted).

⁴⁵⁸ Ibid.

⁴⁵⁹ In this regard, it has been held that ‘victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth. As a result, [...] the issue of the guilt or innocence of persons prosecuted before [the] Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth’. In this respect, ‘the victims’ central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui* (n440) (13 May 2008) [34]- [36].

⁴⁶⁰ Ibid [134].

⁴⁶¹ Ibid.

⁴⁶² Ibid [137].

⁴⁶³ Ibid [138].

⁴⁶⁴ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui* (n440) (13 May 2008) [31] (reference omitted). See also ICC-CPI, *Representing Victims*

has been held, indeed, that the ‘victims’ core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious of human rights⁴⁶⁵. Therefore, in the aim of establishing the truth, victims have right, during a trial, to question defendants, their witnesses and evidence⁴⁶⁶ including ‘evidence pertaining to the guilt or innocence of the accused’⁴⁶⁷. Moreover victims have the right to ‘challenge the admissibility or relevance of the evidence’⁴⁶⁸. Despite the view of the Court that, such a right ‘does not undermine the rights of the accused and his fair and impartial trial’⁴⁶⁹, it is observed that such rights make victims play OTP’s role and thus jeopardizing a process aimed at being dualist and adversarial. Moreover, in playing such a role, victims relieve OTP of his exclusive statutory burden to prove the guilt of the accused and thus violating the presumption of innocence as a rule of proof and the fairness of the trial. Indeed, as pointed out by Judge Philippe Kirsch, the question of evidence exclusively concerns the two parties namely OTP and Defendants⁴⁷⁰, the burden of proof at all the stages of the proceedings thrown exclusively on OTP⁴⁷¹. In the same way, Judge Pikis dissented

before the International Criminal Court: A Manual for Legal Representatives (The Office of Public Counsel for Victims, The Hague, The Netherlands 2010) 40.

⁴⁶⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n440) (13 May 2008) [32] (reference omitted). See also ICC-CPI, *Representing Victims before the International Criminal Court: A Manual for Legal Representatives* (n464) 40.

⁴⁶⁶ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (Public Document Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest-and-Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses) TCI ICC-01/04-01/06 (11 March 2010) [35].

⁴⁶⁷ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (n453) (11 July 2011) [109].

⁴⁶⁸ *Ibid* [109].

⁴⁶⁹ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (n466) (11 March 2010) [33] (footnotes included).

⁴⁷⁰ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo* (n453) Partly Dissenting opinion Judge Kirsch (11 July 2011) [5].

⁴⁷¹ Citing Judge Pikis’ opinion Judge Kirsch stated that ‘it is the Prosecutor who is responsible, prior to trial, for initiating an Investigation and investigating the crimes, submitting evidence for the purpose of applying for a warrant of arrest, formulating the charges on which it is intended to bring the person to trial, determining what evidence should be brought in relation to the charges at the hearing to confirm the charges, having specific disclosure obligations in relation to evidence and bearing the onus of proving the guilt of the accused’. See

and potentially contended, in light of the presumption of innocence under article 66(2) of the Statute, that

‘[t]he Prosecutor is the only authority the accused has to confront in relation to the charges. The two sides are locked into a conflict upon the denial of the charges by the accused. Neither the Trial Chamber nor the Pre-Trial Chamber is concerned with the collection of evidence’⁴⁷².

Consequently, [t]he presumption of innocence leaves no room for anyone other than the Prosecutor to assert the contrary and seek to prove it by the adduction of relevant evidence, admissible in the criminal proceedings before the Chamber’⁴⁷³. It is therefore submitted that the presumption of innocence as a rule of proof has been infringed by the manner in which victims participatory rights have been interpreted and applied at the trial stage by the Court.

It is also noteworthy that the Court has recognised a participatory right to deceased victims. It is therefore submitted that, by the same token, the deceased accused that passed away before a final judgement of conviction has been reached on appeal has the right to be held as presumed innocent and that his heirs may be granted a participatory right to continue the proceedings as to have his innocence established. Such an issue deemed to be examined as carried out below.

1.3 The deceased victims’ participation and the Presumption of Innocence

Victims, as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’⁴⁷⁴, may be granted the right to participate under the status of direct or indirect victims.

Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga Dyilo (n453) Partly Dissenting opinion Judge Kirsch (11 July 2011) [6] .

⁴⁷² See Ibid [12].

⁴⁷³ See Ibid [19].

⁴⁷⁴ The Rules (n406) Rules 85 (a)).

In the views of the Court, direct victims are persons who have suffered a direct personal harm including a child who had been as such 'conscripted or enlisted whilst under the age of fifteen, or used to participate actively in hostilities'⁴⁷⁵. Indirect victims comprise relatives of a deceased victim who have suffered mental and material harm as result of the death of the said person or relatives who have suffered psychological or material harm due to the crime that has caused harm to their relatives. It also includes parents affected by the harm caused to a child victim direct of a crime as defined above. Furthermore, with a demised direct victims' consent given when alive, their sibling have the right to participate in the proceedings of the Court on their behalf. Vulnerable persons such as minors and disabled may be represented as well⁴⁷⁶.

Nevertheless, TCII found no legal basis for a participatory right for the deceased victim as such. Indeed, TCII considered that the deceased victim may be represented if it can be proved that he made consent when still alive as to be represented by relatives in the process. The Court refrained from transposing the notion of successors of victims under the IACHR since the Statute distinguishes between participation on the ground of article 68(3) and the participation for the purpose of reparation under article 75 after the conviction of the accused⁴⁷⁷. Accordingly, in TCII's view, 'a relative of a deceased person can only submit an application for participation in his or her own name, by invoking any mental and/or

⁴⁷⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public Redacted version of "Decision on 'indirect victims'") TCI ICC-01/04-01/06 (8 April 2009) [40]-[52].

⁴⁷⁶ *Ibid* [40]-[52].

⁴⁷⁷ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (n475) (8 April 2009) [40]-[52]. See also *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Germain Katanga and Mathieu Ngudjolo chui* (Public redacted version With confidential *ex parte* Annex only available to the Registry and to the Legal Representatives of the Victims Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims) TCII ICC-01/04-01/07 (23 September 2009) [52]-[56].

material harm suffered personally as a result of the death of said person⁴⁷⁸. Yet, the question whether a sibling or any representative could act on a dead victim's behalf has not been dealt with in the same way by all the chambers of the ICC. Diverging, indeed, from TCII's view, TCIII held that [the deceased] is a victim under Rule 85(a) of the Rules⁴⁷⁹. TCII grounded this view on the IACHR's approach on the issue⁴⁸⁰. The latter, actually, 'accepts that the right to apply for compensation for the death of a person passes to the survivors affected by that death'⁴⁸¹, distinguishing 'between successors and injured third parties'⁴⁸². TCIII held that '[t]he death of a victim should not extinguish the opportunity for the Chamber to consider his or her views and concerns, in that it would be markedly unjust if an alleged perpetrator in these circumstances prevented the ICC from receiving relevant representations from the person fatally affected'⁴⁸³. Therefore, any person may act on the deceased's victim behalf and participate on the interest of the latter in the proceedings. In the view of TCIII, '[t]he most fundamental restriction is that this participation should not be prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial'.⁴⁸⁴

In this regard, one of the rights of the accused as well as the suspect, that deem to be balanced with the deceased victims' participatory right, is the presumption of innocence, as a fundamental constituent of a fair trial. It must be stressed, in this

⁴⁷⁸ See *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Germain Katanga and Mathieu Ngudjolo chui* (Public redacted version With confidential *ex parte* Annex only available to the Registry and to the Legal Representatives of the Victims Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims) TCII ICC-01/04-01/07 (23 September 2009) [56].

⁴⁷⁹ *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public with public Annex 1 Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings) TCIII ICC-01/05-01/08 (12 July 2010) [83] (reference included, parentheses omitted).

⁴⁸⁰ Ibid [81]-[82] (reference included).

⁴⁸¹ Ibid.

⁴⁸² *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public with public Annex 1 Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings) TCIII ICC-01/05-01/08 (12 July 2010) [82].

⁴⁸³ Ibid [83] (reference included).

⁴⁸⁴ *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (n 479) (12 July 2010) [83] (reference included).

respect, that the presumption of innocence as both a right of persons to be treated as innocent by a society and a rule putting the onus to prove the guilt of the accused on OTP, applies even after an accused has been convicted in trial as long as he has the right to appeal and until all ways of appeals have been exhausted and thus his conviction has become irrevocable⁴⁸⁵. In this respect, it has been held that 'only a criminal conviction that has become irrevocable removes the right to the presumption of innocence'⁴⁸⁶. Nevertheless only a living person is regarded as the sole holder of rights and thus has right to the respect for his presumption of innocence⁴⁸⁷. The principle behind the decision seems to have been, as stated by Planiol, that '[t]he personality is lost with life. The dead are no longer persons; they are nothing'⁴⁸⁸. Although such a view seems contentious, as noticed by Michael Bohlander, '[a] dead man is still a man'⁴⁸⁹. Indeed, in the ICC' view, a dead victim is still a person to whom it has recognized the participatory right in the proceedings through his successor. Similarly, contrary to the ICTY decision to terminate the proceedings in the case of *Rasim Delic* following his death, despite his son' motion to continue the process as to clearer his father' name⁴⁹⁰, the ECtHR, in the case of *Nölkenbockhoff v Germany*

⁴⁸⁵ As the French King Louis XVI underlined it, 'the first of all principles in criminal matters [...] is that a defendant, although having been convicted in trial and sentenced even to death, is still deemed to be presumed innocent in the eyes of the law until the sentence is confirmed on appeals trial' See Déclaration de Louis XVI faite à Versailles le 1^{er} mai 1788

http://ledroitcriminel.free.fr/la_sciences_criminelle/penalistes/introduction/declaration_louis16.htm accessed 21 August 2010. See also J Pradel, *Procédure pénale*, (12th edn Cujas, Paris 2004)322, 323.

⁴⁸⁶ *Cour de Cassation Civ.1*, 12 novembre 1998, Bull. n 313, p. 216. In the same token, the Federal Constitutional Court of Germany also recognised that '[t]he presumption of innocence, which is founded on the principle of the rule of law, precludes treating as guilty a person who has not been finally (rechtskräftig) convicted' and that '[a] finding of guilt will accordingly not be legitimate for this purpose unless it is pronounced at the close of a trial which has reached the stage at which a verdict can be given'. See *Nölkenbockhoff v Germany* ECHR (application no. 10300/83) judgment (25 august 1987) [22], [27].

⁴⁸⁷ *Cour d'Appel de Paris* du 21 sept 1993, *RTD Civ.* 1994, p 74.

⁴⁸⁸ Planiol, *Traité élémentaire de droit civil*, (Tome Ier, 9ème édition, GDJ, Paris 1922) n° 371.

⁴⁸⁹ Michael Bohlander 'Death of an Appellant: the Termination of the Appellate Proceedings in the Case of Rasim Delic at the ICTY' (2010) CLF 21.

⁴⁹⁰ *Rasim Delic*, a former commander of the Main Staff of the Army of Bosnia and Herzegovina, died while on provisional release pending the resolution of his appeal. *Delic* was initially sentenced by the Trial Chamber for 3 years imprisonment following his conviction for having fallen to deal, as a superior, with crimes committed by soldiers under his authorities against Bosnian Serb soldiers that they captured. Both the Prosecutor and the

agreed that a widow could be 'able to show both a legitimate material interest in her capacity as the deceased's heir and a moral interest, on behalf of herself and of the family, in having her late husband exonerated from any finding of guilt'⁴⁹¹. Indeed, the ECtHR, as to the issue of the continuation of a criminal process after the death of the defendant, held that

'[t]he principle of the presumption of innocence is intended to protect "everyone charged with a criminal offence" from having a verdict of guilty passed on him without his guilt having been proved according to law. It does not follow, however, that a decision whereby the innocence of a man "charged with a criminal offence" is put in issue after his death cannot be challenged by his widow under Article 25 (art. 25)'⁴⁹².

It follows that, under article 66 of the Statute, consistently interpreted with the requirement under article 21(3), suspects and accused should be held by the Court to be innocent in a decision terminating the proceedings as a result of their death before the final decision on appeal has been made. In this view, although the Court relied on article 24 (1) of the statute to claim his jurisdiction only over naturals

Defendant appealed the Trial Chamber decision. Following the demise of *Delic*, the Prosecutor withdrew his motion. However, *Delic's* counsel filled a motion for the continuation of the proceedings 'on behalf of *Delic's* son as his heir, and the appeal judgement be issued despite *Delic's* death'. In response, the Tribunal held that *Delic's* son 'is not and cannot qualify as a party to any existing proceedings before the Tribunal' and thus 'has no standing to submit a motion before the Tribunal and cannot be represented by counsel assigned to *Delic*'. Consequently, the motion was held not to have been 'validly filed before the Appeals Chamber and that the Appeals Chamber has no jurisdiction to consider its merits'⁴⁹⁰. See *Prosecutor v Rasim Delic* (Public Decision on Motion for Continuation of the Appellate Proceedings) ICTY AC IT-04-83-A (29 June 2010) pp 1, 2.

Subsequently, AC considered that his 'personal jurisdiction' was 'limited to natural persons' meaning 'the living' and 'neither the Statute nor the Rules allow for Tribunal's jurisdiction in relation to any procedures initiated by the convicted person's heirs or victims. The Appeals Chamber is of the view that this clearly demonstrates that the Tribunal's jurisdiction *ratione personae* is limited to living accused or convicted persons'. Then, having examined various court's decisions, AC come to the conclusion that 'as a matter of principle, the appellate proceedings before this Tribunal should be terminated following the death of the appellant for lack of jurisdiction'. It consequently terminated 'the appellate proceedings with respect to *Delic*' and held that '[t]he Trial Judgment shall be considered final'. See *Ibid* [6]- [16].

⁴⁹¹ *Nölkenbockhoff v Germany* (n486) [33].

⁴⁹² . *Nölkenbockhoff v Germany* (n486) [33].

persons⁴⁹³ as to justify the termination of the proceedings against a suspect who passed away⁴⁹⁴, nothing in the Statute precludes it from holding the deceased as being presumed innocent given that his death caused the termination of the proceedings before a conviction was made. Nor is there any preclusion to allowing an heir to participate in the proceedings on behalf of the suspect or accused who passed away before the trial ended or during an appeal hearing. Therefore, concluding, as the ICTY did, that the impugned trial chamber decision should be considered as a final finding of the Court against Rasim Delic⁴⁹⁵ cannot be reconciled with the meaning and effects of the presumption of innocence under internationally recognized human rights⁴⁹⁶.

Subsection 2: Victims' Right to participate in the Proceedings for the Purpose of Reparation and the Presumption of Innocence

Victims have a legal basis to participate in the proceedings in order to claim reparations for damage, loss or injury suffered as a result of crimes committed by a convicted person⁴⁹⁷. Reparations may be awarded individually or collectively or both by the Court according to the scale and degree of the harm or injury suffered. The

⁴⁹³ Although natural person, under article 24(3) of the Statute is not opposed to dead persons. It reads as follows: 'The Court shall have jurisdiction over natural person pursuant to this Statute'. It deals with individual criminal responsibility as opposed to 'abstract entities' or 'corporate bodies'. Preparatory work reveal that the drafters chose 'natural persons' or 'personnes physiques' (in the French version of the Statute equally authoritative) as opposed to 'legal' or 'juridical' persons. See Kai Ambos, 'Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft Baden Baden, Germany 1999).

⁴⁹⁴ See *Situation in Uganda in the Case of the Prosecutor against Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen* (Public Decision to Terminate the Proceedings against Raska Lukwiya) PTCII ICC-02/04-01/05 (11 July 2007).

⁴⁹⁵ See *Prosecutor v Rasim Delic* (n490) [6]-[16].

⁴⁹⁶ Indeed as stated by Judge Cremona in his dissenting opinion in the case of *Nölkenbockhoff*, 'when it comes to such a basic principle as that of the presumption of innocence, what really matters is not the possible intent with which certain words were uttered in judicial decisions concerning the accused, but the actual meaning of those words to the public at large. What is decisive is that at the end of the day one is left with the impression that the courts did consider that Mr. *Nölkenbockhoff* was in fact guilty. The net result is in my view a surrogate conviction of the accused without the benefit of the protection afforded by Article 6 § 2 (art. 6-2)'. See *Nölkenbockhoff v Germany* (n486) Dissenting Opinion of Judge Cremona p20-21).

⁴⁹⁷ The Statute (n400) art 75.

proceedings may start on the application of the victim or in the Court motion⁴⁹⁸. Such a right is in accordance with internationally recognized human rights⁴⁹⁹ and does not per se violate the presumption of innocence.

Nevertheless, in regard to ‘protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims’⁵⁰⁰, the Statute allows the Court to ‘seek the Cooperation of States pursuant to article 92, paragraph 1 (k), to take protective measures for the purpose of forfeiture’ against a suspect under article 58. It is up to the Court to determine whether such measures should be taken. The Court may act *proprio motu* or on OTP’s application or at the request of a victim⁵⁰¹. In *Lubanga*, for instance, the Court acting on its own motion, after it found reasonable grounds to believe that Mr Lubanga was responsible of alleged crimes, decided to request all states ‘to identify, trace and freeze or seize the property and assets belonging to Mr Thomas Lubanga Dyilo at the earliest opportunity’⁵⁰². Moreover, as a result of the forfeiture of his properties and assets, Mr Bemba became unable to handle all the costs regarding his defence⁵⁰³.

The fundamental question regarding the forfeiture for the purpose of reparations concerns the possible infringement of the presumption of innocence when such measures are taken. Such measures are, indeed, taken, in the light of article 57(e) ‘having regard to the strength of the evidence and the rights of the parties concerned’. Undoubtedly, this statutory provision itself tends to favour a presumption of guilt of a person who is just a suspect and whose charges have not been yet

⁴⁹⁸ See The Statute (n400) art 75. See also The Rules (n406) Rules 94, 95(1) and 97(1).

⁴⁹⁹ For instance, Art 8 of the UDHR; Art 14() CAT; Art 2(3) (a), (b) and (c).

⁵⁰⁰ The Statute (n400) art57 (3) (e); The Rules (n406) Rule 99(1).

⁵⁰¹ The Rules (n406) Rule 99 (1).

⁵⁰² *Situation in the Democratic Republic of Congo* (Under Seal Ex Parte, Prosecution Only Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58) PTCI ICC-01/04-01/07 (10 February 2006) [152]-[153] and ‘For these Reasons’.

⁵⁰³ *Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo* (Public Redacted “Decision on Legal Assistance for the Accused) TCIII ICC-01/05-01/08 (26 November 2009) [10]-[11].

confirmed. Moreover, the notion of 'the strength of evidence' properly contradicts the standard established under article 58, namely 'reasonable grounds to believe' that the person targeted has committed crimes within the jurisdiction of the Court. Indeed, the Court has already pointed out that this standard was less strong than that required at the confirmation hearing. Therefore, it seems wrong considering the same less strong standard to bear 'strength evidence' gathered by the accuser with the help of victims to be of its own strong as to determine any forfeiture before conviction. This is the reason why, as pointed out by David Donat-Cattin, the position of some States who negotiated the ICC Statute was 'against protective measures on the strict interpretation of the presumption of innocence'⁵⁰⁴. He also indicated that there was a concern that seizure of properties may involve those not related to crimes prosecuted and thus conflict with relative national law⁵⁰⁵. This point was raised by the drafters of the 1993 draft although the question was envisaged for after the conviction stage⁵⁰⁶. Whilst recognising that the interpretation and extent of article 57 (3) (e) was not clear, the Court, considered that its 'first reading [...] might lead to the conclusion that cooperation requests for the taking of protective measures under such a provision can be aimed only at guaranteeing the enforcement of a future penalty of forfeiture under article 77 (2) of the Statute'⁵⁰⁷.

⁵⁰⁴ David Donat-Cattin, 'Article 75: Reparations to Victims' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Germany 1999).

⁵⁰⁵ David Donat-Cattin (n 504).

⁵⁰⁶ 'The 1993 draft statute provided for the court to order restitution or forfeiture of property used in conjunction with the crime. However, some members of the Commission questioned the ability of the court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the court to consider such matters would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes referred to in the statute. On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted'. See Draft Statute for an International Criminal Court with commentaries 1994 (Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session) Commentary on Article 47 (reference omitted).

⁵⁰⁷ *Situation in the Democratic Republic of Congo* (n502) (10 February 2006) [148].

Therefore, the Court should have considered the right of persons to a presumption of innocence in dealing with this matter considering that article 57 (e) calls for consideration for ‘rights of parties concerned’ in making the decision. Furthermore, this provision in the light of article 93 (1) (k) seems to actually be concerned only with ‘identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for purpose of eventual forfeiture’.

Moreover, pursuant to Rule 98 relating to Trust Fund for victims, which normally applies as regards a convicted person, the Board of Directors of the Trust Fund for Victims intended to hold a number of activities in relation with the situation in the Republic Democratic of the Congo⁵⁰⁸. The Office of Public Counsel for the Defence observed that ‘the proposed activities would predetermine issues to be determined by the Court, including jurisdiction, and could violate the presumption of innocence or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’⁵⁰⁹. In reply, one of the legal representatives for victims demanded that ‘the Chamber decide that the specific activities proposed by the Board of Directors do not pre-determine any issue to be determined by the Court, do not violate the presumption of innocence and or prejudice the rights of the accused, and the fairness and impartiality of the trial’⁵¹⁰. In response, the Court held that ‘the Notification do not appear per se to pre-determine any issue to be determined by the Court, including the determination of jurisdiction, admissibility, or to violate the

⁵⁰⁸ Under Regulations 50(a)(ii) of the Trust Fund for Victims specific activities of the Trust Fund for Victims are supposed to be carried out without violating the presumption of innocence.

⁵⁰⁹ Situation in the Republic Democratic Republic of the Congo (Public Document Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund) Pre-Trial Chamber I ICC-01/04 (11 April 2008) [7].

⁵¹⁰ Ibid [10].

presumption of innocence, and do not appear to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial⁵¹¹.

In actual facts, all the activity of the Trust Fund carry a presumption of the guilt of persons suspected or accused. In effect the rationale of the provision relating to Trust Fund under article 79 (2) is that once a person is convicted [t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund’.

Subsection 3: Victims’ Participation in the Proceedings as Anonymous Witnesses and the Presumption of Innocence

Under the Statute, the Court has the duty to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses⁵¹². On this basis, PTCI held, as an exceptional protective measure⁵¹³ to a general rule relating to disclosure⁵¹⁴, that the disclosure of the identity of OTP’s witnesses to the Defence will be subjected to restrictions⁵¹⁵. It subsequently appeared that the criteria for granting anonymity of witnesses as well

⁵¹¹ Situation in the Republic Democratic Republic of the Congo (Public Document Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund) Pre-Trial Chamber I ICC-01/04 (11 April 2008) [26].

⁵¹² The Statute (n400) art 68 (1).

⁵¹³ That ‘non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised only exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient’ and [a]s a result [...], applications for leave not to disclose the identity of Prosecution witnesses under rule 81 (4) of the Rules should be made on an exceptional basis’. Therefore ‘non-disclosure of identity of Prosecution witnesses for the purpose of the confirmation hearing shall not be granted under rule 81 (2) or (4) of the Rules except to ensure the safety of Prosecution witnesses and their families’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public Document Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute) PTCI ICC-01/04-01/06 (19 May 2006) [31],[35] and p23.

⁵¹⁴ ‘that, pursuant to rule 76 of the Rules, and unless the single judge authorises otherwise under rule 81 of the Rules, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements’. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Public document Decision on the Final System of Disclosure and the Establishment of a Timetable) PTCI ICC-01/04-01/06 (15 May 2006) p 6 (reference omitted)..

⁵¹⁵ Ibid [8] Cf *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* (n 513) (19 May 2006) [4]-[5].

as victims appearing as witnesses have been established⁵¹⁶. In the court's view, indeed, anonymity shall be granted since the disclosure of the identities of witnesses to the Defence 'would pose an unjustifiable risk to their safety and/or physical and psychological well-being'⁵¹⁷.

Nonetheless, the question of anonymity was left undecided by the drafters due to 'its controversial nature'⁵¹⁸. Thus it does not appear within the Statute. However, under Rule 8(4) the Court may order the non-disclosure of the identity of victims and witnesses⁵¹⁹. The question arises, nonetheless as to the issue of the non-disclosure of the victims' identities to the Defence, who, thus faces anonymous witnesses who accuse them of criminal facts within the jurisdiction of the Court whereas they are presumed innocent. Having considered the issue, in *Lubanga*, for instance, PTCI distinguished between the non-disclosure to the public and the non-disclosure to the defence⁵²⁰. It subsequently held that no disclosing victims' applicants' identities to the Defence does not violate the presumption of innocence⁵²¹.

⁵¹⁶ In terms of '(i) the existence of a danger caused by disclosure of their identity and, by the same token, the fact that non-disclosure could reduce that danger, (ii) the necessity of the nondisclosure, including whether it is the least intrusive measure necessary to protect the witnesses and their family members, and (in) the proportionality of non-disclosure in view of the prejudice caused to the rights of the suspect and a fair and impartial trial'. See *Situation in Darfur, Sudan in the Case of the Prosecutor v, Bahar Idrissa Abu Garda* (Urgent Public Documents Decision on the Prosecutor's Request for Authorization for Non-disclosure of Witnesses DAR-OTP-WWWW-0433 Identity) PTCI ICC-02/05-02/09 (31 August 2009) [1]. [5].

⁵¹⁷ *Situation in the Democratic Republic of the Congo in the Case of the prosecutor v Callixte Mbarushimana* (urgent Public With Confidential ex parte, Prosecutor and VWU only. Annexes I and II Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4)) PTCI .ICC-01/04-01/10 (20 May 2011) [14]. The Court also justifies such a view on the grounds that anonymity is sought prior to the confirmation hearing and not prior to trial, a stage at which such a measure 'could not be withheld'. Furthermore, according to the Court, 'there are no alternative measures short of anonymity which are available and feasible at this stage of the proceedings to protect these witnesses'. See *Ibid* [15].

⁵¹⁸ Anne Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence : The ICC and the Practice of the ICTY and ICTR* (Intersentia 2005) 252.

⁵¹⁹ Rule 81(4) reads as follows: 'The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial'.

⁵²⁰ 'Considering that the Chamber recalls that it is necessary to distinguish between (i) the non- disclosure of the identity of the Applicants during the application for participation procedure, in accordance with article 68 (1) of the Statute and rule 89 (1) of the Rules and (ii) the non- disclosure of the identity of the Applicants in accordance with rules 87 and 88 of the Rules, once a) they have been granted the status of victim in the case and b) that the

It is incontestable that, under article 64(2) of the Statute, TC is compellingly expected to conduct a fair and expeditious trial with 'due regard for the protection of victims and witnesses'⁵²² and the same time, with 'full respect for the rights of the accused'⁵²³. The fairness of the trial will be gauged according to the extent to which the accused's rights are taken into account as opposed to the rights of victims to be protected⁵²⁴. In this respect, protective measures are expected not to be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'⁵²⁵. It follows that in light of both article 64(2)⁵²⁶ and 68 (1), that the drafters of the Statute foresaw a real conflicts between rights of victims and rights of defendants to a fair trial. These rights, amongst them, the presumption of innocence, a basic component of a fair trial⁵²⁷, are held to be of 'crucial importance in that they underpin rights infrastructures'⁵²⁸.

It must be highlighted that under internationally recognized human rights, one of the minimum rights pertaining to the presumption of innocence is 'the right of the defence to examine witnesses present and to obtain the appearance, as witnesses, of experts or other persons who may throw lights on the facts'⁵²⁹. In this respect, as

manner in which they will participate has been defined'. See *Situation in the Republic Democratic of the Congo* in the Case of the Prosecutor v Thomas Lubanga Dyilo (Public document Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation) Pre-Trial Chamber I ICC-01/04-01/06 (06 November 2006) pp 5, 6.

⁵²¹ See Ibid thirteenth 'Considering'.

⁵²² The Statute (n400) art 64(2).

⁵²³ The Statute (n400) art 64(2).

⁵²⁴ Under article 64(6) (e) the Trial Chamber must '[p]rovide for the protection of the accused, witnesses and victims'. For instance, 'Chambers may, to protect victims and witnesses or an accused, conduct any part of the proceedings in *camera* or allow the presentation of evidence by electronic or special means'. Such a measure is expected to be 'an exception to the principle of public hearings provided for in article 67' of the Statute. See Ibid art 68(2).

⁵²⁵ The Statute (n400) art 68 (1).

⁵²⁶ Art 64(2) of the Statute reads as follows: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.

⁵²⁷ *Delo v Lashley* (n398) (Per Curiam at 278 and Stevens, J., dissenting, 284).

⁵²⁸ Kevin Kerrigan and Michael Stockdale, 'Can Fair Trial be Balanced against other Interests?' [2009] 1 Web JCLI.

⁵²⁹ Art 8 (2) (f) Cf art 6(2) and 3(d) of the ECHR; art 14(2) and 3(e).

underlined by Monroe Leigh 'effective cross-examination depends in major part on careful advance preparation. And this in turn depends on knowing the identity of accusing witnesses'⁵³⁰. That is why, David Donat-Cattin considers the anonymity of victims appearing as witnesses as 'unacceptable, in the light of the defence to cross-examine prosecution witnesses (in fact, it is not possible to respond to arguments presented by someone "without identity")'.⁵³¹

In conclusion, it must be underscored that, despite the provision of the Rules authorising the non-disclosure of the identity of OTP's witnesses⁵³², the Statute, as the primary applicable law of the Court to which the Rules are subordinate, has not contemplated the non-disclosure of victims/witnesses' identities to the Defence. Otherwise, such a right would have jeopardised the minimum guaranties of a fair trial such as the right of the Defence to cross-examine OTP's witnesses, a right deriving from the right to be presumed innocent⁵³³. It follows that, as pointed out by Monroe Leigh, 'international law has not yet accepted the position that the accused's right to a fair trial is subject to discount and "balancing" in order to provide anonymity to victims and witnesses'⁵³⁴. Therefore, as per Judge Stephen's dissent in *Tadic* case before the ICTY, the protection of 'the safety, physical and psychological well being and privacy of victims and witnesses'⁵³⁵, will be achieved 'by recourse to in camera proceedings or restrictions on media reporting without involving the ultimate step of concealing the identity of a witness from the accused and his counsel'⁵³⁶. In this respect, considering that decisions on non-disclosure of the victims/witnesses

⁵³⁰ Monroe Leigh 'Witness Anonymity Is Inconsistent with Due Process' (1997) 91 TALJ 80, 83.

⁵³¹ David Donat-Cattin (n504).

⁵³² The Rules (n406) Rules 81(4).

⁵³³ ACHR (Pact of San Jose, Costa Rico, 22 November 1969) art 8(2).

⁵³⁴ Monroe Leigh 'Witness Anonymity Is Inconsistent with Due Process' (1997) 91 TALJ 80, 83.

⁵³⁵ The Statute (n 400) art 68(1).

⁵³⁶ *Prosecutor v Dusko Tadic A/K "Dule"* (Separate Opinion of Judge Stephen on The Prosecutor's Motion Requesting Protective Measures) ICTY (10 August 1995).

identity have to be consistent and in no case prejudicial to the rights of the accused under article 68(1) of the Statute, Geoffrey Robertson has suggested that '[t]his formula should ensure that the correct dissenting opinion of Sir Ninian Stephen in the *Tadic* Case is adopted by the ICC, so that we will never have the spectacle of a defendant convicted of a monstrous crime on the word of an accuser whose identity he is not permitted to know'⁵³⁷.

⁵³⁷ Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn Peguins Books, London 2006) 456.

Concluding Remarks

It is axiomatic that statutory victims' rights do not per se conflict with the presumption of innocence⁵³⁸. In fact, in light of article 68(1) and (3) of the Statute, victims' rights were not intended to jeopardize the rights of the defendant⁵³⁹. Otherwise, as noticed by a scholar, the presumption of innocence as one of the 'fundamental principles of democratic justice' would have been regressively and retrogressively sacrificed 'under the guise of protecting the victim'⁵⁴⁰. The question basically concerns the interpretation and application of victims' general participatory right⁵⁴¹ since victims play various participatory roles independently from OTP and thus creating an imbalance in proceedings conceived as adversarial⁵⁴².

⁵³⁸ *Situation in the Republic Democratic of the Congo in the Case of the Prosecutor against Thomas Lubanga* (n 413) Separate and dissenting opinion, Judge René Blattmann [26].

⁵³⁹ As noticed by Ezzat, 'the noble cause the victims of crime [should not be] used [...] as an excuse to act out the inhibited aggression against the offender'. See Ezzat A. Fattah, 'Prologue: On Some Visible and Hidden Dangers of Victims Movements' in Ezzat A. Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (MacMillan, Basingstoke 1986) 1.

⁵⁴⁰ See Ibid 13.

⁵⁴¹ As noticed by Ezzat. See Ibid 1.

⁵⁴² As underlined by Claude Jorda and Jerome de Hemptinne, '[t]he ICC Statute does not explain how in concrete terms the participation of the victim can be reconciled with the essentially accusatorial procedure, whereby the trial is conceived as a duel between two adversaries-the prosecution and the defence-leaving little room for a third protagonist. In this respect, it does not indicate how the intervention of the victim in the proceedings can be accommodated with the right of the accused to be tried fairly, impartially and expeditiously'. See Claude Jorda and Jerome de Hemptinne (n401) 1388 although, AC eventually denied to victims a general right to participate in the proceedings at the investigation stage. See *Situation in the Republic Democratic of the Congo* (Public Document Judgement on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007) AC ICC-01/04 OA4 OA6 (19 December 2008) [56]-[59]), OTP rightly observed that the decision allowing victims to generally participate at the investigation stage 'undermine[d] the impartiality and integrity of the investigation and of any related proceedings' and 'create[d] a serious imbalance between the Victims and any future accused persons'. See *Situation in the Democratic Republic of the Congo* (Public Document 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) PTCI ICC-01/04 (31 March 2006) [11]). In actual fact, as highlighted in section 1 of this chapter, victims still have participatory rights within any judicial proceedings taking place at the investigation stage and on any issue. See *Situation in the Democratic Republic of the Congo* (n 425) (11 April 2011) [9]-[10] (reference omitted)) It must be indicated that the Court had already been of the view that victims' participation in the proceedings doesn't violate the rights of the Defence considering that the court deals with the matter in the way which is not 'prejudicial to or inconsistent with the rights of the Defence'. See *Situation on the Republic Democratic of the Congo* (n396) [70].

In any case, where appropriate, an ad hoc counsel is appointed by the Court in order to take care of such rights. See Ibid [81], [115-116]. In fact, the Court generally holds that the purpose of the appointment of an ad hoc Counsel is to 'represent' and 'protect the general interests of the defence'. See *Situation on the Republic Democratic of the Congo* (Public Document Decision on the Prosecutor's Request for Measures under Article 56) Pre-Trial Chamber I ICC-01/04 (26 April 2005) 4th Considering; Orders (b)) so that victims' participation is not 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial' under art 68 (3) of the Statute and Rule 86 of The Rules). Arguably, however, the presumption of innocence as a right to be treated as innocent and as a corollary to such a right, a rule of proof, cannot be confined to a suspect or an accused being

Moreover, as both a right of persons to be treated and a rule of proof, the presumption of innocence may be undermined by victims' rights at different stages.

In effect, when facts constituting grounds to believe that a person has committed crimes within the jurisdiction of the Court are established by victims, the latter, undoubtedly release OTP of his burden of proof and therefore violate the presumption of innocence⁵⁴³.

Furthermore, while provisions relating to the rights of victims have been given full interpretation to reach all the intent of the drafters of the Statute, the right to a presumption of innocence has not been fully considered by the Court. Indeed, although the presumption in its various components has been held as applying at all stages, including at a stage of investigation, the Court did not equate such a right with that of a victim at such a stage. A victim is given a status on the grounds of a crime that may have been committed by a presumed innocent against whom OTP has not yet established the fact-finding.

Therefore, participation of victims, forfeiture for the purpose of ultimate reparations, protective measures such the anonymity of victims heavily implies the guilt of persons before the Court. The imbalance is due to the absence of equivalent measures protecting suspects and accused against being treated as guilty

represented, since a person can defend himself or be assisted by his counsel. Moreover, under internationally recognized human rights, the presumption of innocence is clearly distinguished from the minimum guaranties of a fair trial such as a right to a counsel.

⁵⁴³ Effectively, 'it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence'. See *Situation in Uganda in the Case of the Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* (Public document Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II) APC ICC-02/04 O and ICC-02/04-01/05 O A2 (23 February 2006) [36].

beforehand, so that defendants' fair trial rights, regarded 'as an absolute minimum'⁵⁴⁴, are put at risk.

⁵⁴⁴ Monroe Leigh (n 534).

General Concluding Remarks

This work chiefly intended to assess the presumption of innocence under Article 66 of the Statute as a right of everyone to be treated as innocent until proven otherwise before the Court and consider to what extent it has been applied, interpreted and protected by the ICC. To that effect, the work first discussed what should the meaning and effects of the presumption of innocence be in international criminal proceedings in light of both its wording under article 66 and internationally recognized human rights under Article 21(3) of the Statute. It axiomatically appeared that the presumption of innocence is a right of both the suspect and the accused to be treated as innocent by the Court, OTP, all the parties in the proceedings, all the public officials and thus by media and the public in general. As a corollary to such a right, the presumption of innocence is a rule that throws the onus to prove the guilt of the accused solely on OTP. The latter has the obligation to meet the required standard at each of the stages of the ICC's proceedings. It also came to light that the presumption of innocence as a right to be treated applies at all the stages of the proceedings and should be protected by the Court as such in order to secure the fairness of trials before the ICC.

Therefore, at the investigation stage, in order to interrogate a person who is legally presumed innocent and thus has the right to be treated as such, OTP has to inform the person, prior to his being interrogated that it has found grounds to believe that the person committed a crime within the jurisdiction of the Court⁵⁴⁵. Then, in order to convince PTC to issue a warrant of arrest or a summons for the person to appear before the Court, OTP must meet the reasonable grounds to believe

⁵⁴⁵ The Statute (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002) U.N. Doc. A/CONF) art 55 (2) (a).

standard⁵⁴⁶. Subsequently, OTP must meet the substantial grounds to believe standard as to have the charges against a suspect confirmed by PTC and thus commit him to trial⁵⁴⁷. Finally, in order to convince the accused of being guilty of crimes charged, OTP must convince the Court beyond reasonable doubt of the guilt of the accused⁵⁴⁸. Consequently, a person under interrogation, a suspect as well as an accused before the ICC have an absolute right to remain silent. No adverse inference as to their being guilty may be drawn from their silence nor 'any reversal of the burden of proof or any onus of rebuttal'⁵⁴⁹ imposed on them⁵⁵⁰.

Second, the work scrutinised the extent to which the Court has applied, interpreted and protected the presumption of innocence so defined as regards the standards of proof to be met by OTP at all the stages, the question of pre-conviction detention of suspects and accused pending a trial, the statements of public officials and the rights of victims. The examination carried out therein revealed that the Court has held the presumption of innocence to be one of the governing principles of the ICC Proceedings. It therefore governs all the parties, OTP as well as the victims and their legal representatives, the Defence and all the Court including all the Judges until the person being prosecuted is proven guilty⁵⁵¹. Moreover, it 'considered itself responsible for the protection of the right of a suspect to the presumption of

⁵⁴⁶ The Statute (n545) art 58.

⁵⁴⁷ Ibid art 61.

⁵⁴⁸ Ibid art 66(3).

⁵⁴⁹ Ibid arts 55(2) (b) and 67(g).

⁵⁵⁰ In this way, according to Justice Marshall' dissent, 'our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal' *United States v Salerno*, 481 U.S. 739 (1987) (Justice Marshall, with whom Justice Brennan joins, dissenting).

⁵⁵¹ It has been underscored that the treatment of a person shall so prevail bearing in mind that 'first of all, everybody is presumed innocent until their guilt has been established before the Court'. See *Situation in the Democratic Republic of the Congo* (Transcription No ICC-01/04-01/06-T-30-EN) Pre-Trial Chamber I ICC-01/04-01/06 (9 November 2006) lines 18-25, p 10; line1, p11. This decision made orally during a hearing has been upheld by the Court in the *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (Public Document Decision of the Defence Request for an Order to preserve the impartiality of the Proceedings) Pre-Trial Chamber I ICC-01/04-01/10 (31 January 2011) [6] see footnote 13.

innocence⁵⁵². In practice, the Court has correctly seen the presumption of innocence as a right to be treated⁵⁵³ and consequently a rule of proof that guides, *mutatis mutandis* the Court in assessing whether a standard of proof required at a stage has been met by OTP against a person⁵⁵⁴.

Nonetheless, it appeared that the Court practically contradicted its finding on the role of the presumption of innocence at the hearing of the confirmation of charges. In effect, the standard of proof required at this stage, namely 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'⁵⁵⁵ protects 'the suspect against wrongful prosecution'⁵⁵⁶. In this regard, the Court previously held that it will be 'guided by the principle *in dubio pro reo* as a component of the presumption of Innocence'⁵⁵⁷ in making its determination whether there is sufficient evidence to establish substantial grounds to believe. However, it afterwards considered that it could reach its determination not on such a principle but rather 'on a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes of which he is charged and thus that the threshold required by article 61 (7) has not been met'⁵⁵⁸. Although, the Court held that 'for the Prosecut[or] to meet [the] evidentiary burden, [he], must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations'⁵⁵⁹, it nevertheless rejected the test based on the presumption of innocence. In doing so, the Court

⁵⁵² *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n 551) [6] see footnote 13.

⁵⁵³ See *Ibid.*

⁵⁵⁴ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Document Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) PTCII ICC-01/05-01/08 (15 June 2009) [31].

⁵⁵⁵ *Ibid* [27] (reference omitted).

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid* 31.

⁵⁵⁸ *Situation in Darfur, Sudan in the Case of the Prosecutor against Bahr Idriss Abu Garda* (Public Redacted Version Decision on the Confirmation of Charges) PTCI ICC-02/05-02/09 (8 February 2008) [43].

⁵⁵⁹ *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (n 554) [29] (reference omitted).

distorted the ground of testing the validity of both the reasonable grounds and substantial grounds to believe that a person have indeed committed the alleged crimes.

As regards the interpretation, application and protection of the presumption as a right to be treated, for instance, concerning the question of the detention or release of persons, it appeared that the Court has not interpreted the key role that the presumption of innocence should play in dealing with the question of prolonging a detention. Persons surrendered to the Court have been systematically kept in custody despite their rights to an interim release, a periodic review of their detention or a release following an unreasonable period of detention⁵⁶⁰. Furthermore, the Court seems to have ignored the rule that an accused as well as a suspect detained pending trial must be treated as innocent despite the seriousness of charges against him. For, instance Mr Bemba recently requested for permission to travel to his country for 17 hours in order to enrol and declare his candidacy for the post of the president of the DRC 'for the upcoming elections'⁵⁶¹. While rejecting the request on the grounds of flight risk or the risk of interfering with witnesses⁵⁶², the Court mistakenly added that the fact that its decision definitely made the accused unable to enrol and declare his candidacy was 'an unavoidable consequence of his status as an individual against whom serious charges have been confirmed'⁵⁶³. In actual fact, despite the confirmation of his charges, Mr Bemba remains presumed innocent and could be in his country if there were not any flight risk or a risk of interfering with

⁵⁶⁰ See concluding remarks on chapter 3 of this work.

⁵⁶¹ See *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011) PTCIII ICC-01/05-01/08 (16 August 2011) [12].

⁵⁶² See *Ibid* [63]-[65]-[71].

⁵⁶³ See *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (n 561) (16 August 2011) [72].

witnesses. Therefore the Court should instead have recognised Mr Bemba as a person enjoying the 'legal status of innocence at all stages prior to conviction',⁵⁶⁴.

On the other hand, it has come to light that, despite the assertion of the Court as regard the protection of the presumption of innocence⁵⁶⁵, person's right to a presumption of innocence has not yet been concretely protected against public statements of OTP and other public officials presenting a person as guilty before a conviction has been made.

Moreover, whilst provisions relating to the rights of victims have been given full interpretation as to reach the whole of the intents of the drafters of the Statute, the right to a presumption of innocence has not yet been fully considered by the Court. Indeed, whereas stating that the presumption in its various components applies at all stages, including at a stage of investigation, the Court has not yet equated such a right with that of a victim at each stage. A victim is given a status on the grounds of a crime that may have been committed by a presumed innocent against whom OTP has not yet established the fact-finding beyond reasonable doubt. Therefore participation of victims, forfeiture for the purpose of ultimate reparations, protective measures such as the anonymity of victims heavily imply the guilt of persons

⁵⁶⁴ As suggested by Andrew Ashworth. See Andrew Ashworth, 'Four threats to the presumption of innocence' (2006) E&P 10(4) E&P 241, 279. In fact, such a legal status would be in accordance with the presumption of innocence under article 66 of the Statute. In any case, the confirmation of charges despite their gravity did not, for instance, prevent former rebels in the situation in Sudan, Darfur to remain at liberty in their country. Indeed, summoned to appear, Mr *Banda* and Mr *Jerbo* voluntarily appeared at the initial proceedings before the Court and subsequently waived their right to appear at the confirmation of charges hearing. Eventually the Court confirmed the charges brought against them as direct co-perpetrators of all the alleged crimes which appear to be very serious: 'Count 1: Violence to Life and Attempted Violence to Life (article 8(2)(c)(i) and Article 25(3)(a) and Article 25(3)(f) of the Rome Statute'; 'Count 2: Intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission (Articles 8(2)(e)(iii) and 25(3)(a) of the Rome Statute'; 'Count 3: Pillaging (Article 8(2)(e)(v) and Article 25(3)(a) of the Rome Statute'. See *Situation in Darfur, Sudan in the Case of the Prosecutor v Abdallah Banda Abakaer Nourain and Saleh mohammed Jerbo Jamus* (Public Redacted Version Corrigendum of the "Decision on the Confirmation of Charges) PTCI ICC-02/05-03/09 (7 March 2011) [II]-[III] and [163]-[164].

⁵⁶⁵ It has been, indeed, held that 'one of the functions of the Chamber is to be the ultimate guarantor of the rights of the defence, including the right to presumption of innocence'. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Callixte Mbarushimana* (n 551) (31 January 2011).

beforehand. The imbalance is due to the absence of equivalent measures protecting suspects and accused against being treated as guilty before being actually convicted so that their fair trial rights regarded 'as an absolute minimum'⁵⁶⁶, are put at risk⁵⁶⁷, the presumption of innocence, according to a scholar, being 'perhaps the most fundamental principle governing a criminal trial and [which] has a long history [...] as the principal idea in terms of which the fairness of a trial is recognised'⁵⁶⁸.

It must be pointed out that the presumption of innocence, a 'cardinal principle of the modern criminal trial'⁵⁶⁹ regarded as the 'precious presumption'⁵⁷⁰, in the words of Monroe Leigh, 'has been a favorite target of authoritarian regimes throughout history'.⁵⁷¹ If it has been held to be 'axiomatic that there is a strong public interest in the prosecution and punishment of crime'⁵⁷²; it has been, however, and similarly, held as 'axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all'⁵⁷³.

⁵⁶⁶ Monroe Leigh 'Witness Anonymity Is Inconsistent with Due Process' (1997) 91 TALJ 80, 83.

⁵⁶⁷ As noticed by Frank Terrier, while discussing the rights of the accused before the international criminal court, the rights of the defendants are actually 'minimum guarantees, and the Rules of Procedure and Evidence, as well as, of course the judges in their practice and in their rulings, can amplify, extend, and develop them in the context of the system of balance [...] Obviously, the judges must not just themselves respect the rights of the accused but also ensure that these rights are respected by the other parties, fellow-accused, and the prosecutor'. See Frank Terrier, Chapter 31.1: Powers of the Trial Chamber' in Antonio Cassese, Pola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary Volume II* (OUP, New York; Oxford 2002)1265.

⁵⁶⁸ Howard Davis, *Human Rights Law: Directions* (OUP, Oxford; New York 2007) 258.

⁵⁶⁹ *Nölkenbockhoff v Germany* ECHR (application no. 10300/83) judgment (25 august 1987) Dissenting Opinion of Judge Cremona, p20.

⁵⁷⁰ Monroe Leigh (n 566).

⁵⁷¹ Ibid.

⁵⁷² *R v Horseferry Road Magistrates' Court Ex Parte Bennett* [1994]1 AC 42.

⁵⁷³ *R v Horseferry Road Magistrates' Court Ex Parte Bennett* [1994]1 AC 42.

Therefore, it seems crucial that article 66 in its full understanding and various components be applied and interpreted by the Court whenever the case arises as a right of suspects and accused that imposes on the Court in its entire composition and all the judiciary authorities the need to be cautious in the way they act towards persons not yet convicted⁵⁷⁴ and specifically prohibits their being presented to the public as guilty⁵⁷⁵. Furthermore, the Court must forbid ‘excessive ‘mediatization’⁵⁷⁶ considering that, as pointed out by Stephan Trechsel,

‘persons against whom criminal proceedings are brought are particularly vulnerable as far as this presumption goes; they need protection against the eagerness of prosecutors who will tend to anticipate their own success and treat or present the suspect as guilty’⁵⁷⁷.

In that respect, as noted by Salvatore Zappala, the presumption of innocence ‘should extend its effects beyond the actors of the trial and should be a principle also governing the perception of the media and public opinion’⁵⁷⁸. Therefore, as regards different statements of OTP within media, it is important that the latter be ordered to respect the presumption of innocence of persons given that the Statute imposes a duty on him under article 54 (1) (c) to ‘[f]ully respect the rights of persons arising under [the] Statute’. In fact, as noticed by Morten Bergsmo and Pieter Kruger, ‘[t]he use of the imperative “shall” indicates that no discretion exists for the Prosecutor with regard to what follows in subparagraphs (a), (b) and (c) of paragraph (1)’⁵⁷⁹. In that respect, for the credibility of the Court and its proceedings and in order that the court achieves its statutory role ‘as both a tribunal of individual criminal responsibility

⁵⁷⁴ Salvatore Zappala, *Human Rights in International Criminal Proceedings* (OUP, Oxford; New York 2003) 85.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford; New York 2005) 155.

⁵⁷⁸ Salvatore Zappala, (n 574) 4.

⁵⁷⁹ Morten Bergsmo and Pieter Kruger in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft Baden Baden, Germany 1999), article 54, 717.

and as a human rights institution⁵⁸⁰, it is imperative that the Court imposes measures to protect the presumption of innocence on the grounds of its power to sanction such a violation as a misconduct of the prosecution. Otherwise, as commented on by the ILC, 'the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation'⁵⁸¹. In that view and in respect of the right of persons not to be presented by OTP as guilty in media; should the ICC apply and interpret the presumption of innocence in its primary role as a safeguard of persons against their being treated as guilty before conviction as provided under article 66(1) of the Statute, it will unmistakably have assumed its overall responsibility under article 64 (2) of the Statute, which is 'to ensure the fairness of the proceedings and the obligations under article 21 (3) of the Statute to apply and interpret the Statute consistently with internationally recognized human rights'⁵⁸².

Furthermore, suspected and accused being presumed innocent, the Court should interpret the pre-trial detention as a provisional measure and hold it as a general rule that persons must remain at liberty pending trial even with conditions⁵⁸³ considering their right to be treated as innocent before conviction. Indeed, if the pre-trial detention does not at first impinge upon the right of persons to be presumed innocent, as held by the HRC, 'excessive period preventive detention' does have

⁵⁸⁰ Navi Pillay, 'The International Criminal Court as a Human Rights Institution' (Second Annual Distinguished Lecture on Criminal Justice and Human Rights, The Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork, Ireland, 21 February 2008) 4 (reference omitted).

⁵⁸¹ Draft Statute for an International Criminal Court with commentaries 1994 (Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session), art 26, [6].

⁵⁸² *Situation in the Democratic Republic of the Congo The Prosecutor v Thomas Lubanga Dyilo* (Public document Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008") AP ICC-01/04-01/06 OA 13 (21 October 2008) [76].

⁵⁸³ *Tibi v Ecuador* Judgment of September 07 2004 (*Preliminary Objections, Merits, Reparations and Costs*) Inter American Court on Human Rights, Judge Sergio García-Ramírez's Dissenting Opinion [49].

disastrous effect on it even if, as seen in the case dealt with by the HRC, the period exceeded 9 years⁵⁸⁴. It must be observed that the first accused before the ICC has been detained for more than 5 years and the trial has not yet reached the stage of conviction to date⁵⁸⁵.

It would therefore be in accordance with the legal framework of the Court in light of article 21(3), if the presumption of innocence were also applied and interpreted as a right of a person not to be detained unlawfully or unreasonably. This will mean that, at the ICC, which should stand as the template of human rights, pre-trial detention will no longer seem to be a rule but an exception⁵⁸⁶. In effect, it is incontestable that the right to be presumed innocent lays at the heart of a fair trial in internationally recognized human rights. And it was with this in view that the Statute was drafted aiming at 'the highest standards for the protection of persons suspected or accused of a crime'⁵⁸⁷. Nevertheless, it is indisputable that protecting the presumption of innocence applied and interpreted as primarily a right of suspects and accused to be treated as innocent before a conviction will not be an easy task⁵⁸⁸.

⁵⁸⁴ HRC Communication No CCPR/C/73/D/788/1997 (31 January 2002) [7.3].

⁵⁸⁵ Closing statements in the case took place on 25 and 26 August 2011 and PTCl is to deliberate and make its decision in a reasonable time. See 'Trial Chamber I to deliberate on the case against Thomas Lubanga Dyilo', Press Release ICC-CPI-20110826-PR714 (26 August 2011) available on accessed 28 August 2011.

⁵⁸⁶ *Tibi v Ecuador* (n 583) [61].

⁵⁸⁷ Hakan Friman, 'Rights of Persons Accused or suspected of a Crime' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute Issues Negotiations Results* (Kluwer Law International, The Hague, The Netherland 1999).

⁵⁸⁸ Indeed, according to Justice Marshal, '[h]onoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves'. See *United States v Salerno* (n 550).

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