



# *International Journal of Law, Justice and Jurisprudence*

E-ISSN: 2790-0681  
P-ISSN: 2790-0673  
IJLJJ 2023; 3(2): 01-08  
Received: 02-04-2023  
Accepted: 08-05-2023

**Dr. Ehab Al-Rousan**  
Associate Professor,  
Department of Criminal Law,  
American University, Dubai.  
Academic City, Emirates,  
United Arab Emirates

## **Evidence power before the international criminal court**

**Dr. Ehab Al-Rousan**

**DOI:** <https://doi.org/10.22271/2790-0673.2023.v3.i2a.75>

### **Abstract**

This study examines one of the main hottest legal topics concerning the proof before the International Criminal Court (ICC), by which it is reached the power of proof before the ICC is limited to the Prosecutor, and this authority is not absolute but is restricted by the authorization of the Pre-Trial Chamber.

This study has divided into two parts, the first one analyzes the burden of proof as an absolute power of the Prosecutor, and the second is Prosecutor's powers of indictment.

While the second part deals with the Pre-Trial Chamber's control of the Prosecutor's powers of proof by examining the need for the Prosecutor to obtain prior authorization when undertaking certain powers of investigation and evidence, and the Pre-Trial Chamber control of the work of the Prosecutor during the indictment phase.

**Keywords:** International Criminal Court, Prosecutor, Burden of Proof, Pre-Trial Chamber. Indictment, investigative powers

### **Introduction**

Evidence plays a big role in detecting the crime through which it is possible <sup>[1]</sup>, to investigate the validity of the reports, and to reveal the unknown in it, through facts based on evidence and indications that would drop suspicion of the innocent and hold the criminal's profile and strengthen the charge in confronting him. Proof before the ICC does not differ from proving ordinary criminal cases at national levels, through which an indictment is brought to reach the truth, whether by conviction or by acquittal. The ICC has become a permanent international judicial institution specialized in tracking down and punishing perpetrators of crimes that disturb international peace and security <sup>[2]</sup>, contained exclusively at the heart of Article 5 of the Rome statute. In addition to its criminal function, this Court has a deterrent function as a permanent one, the ICC is an international judicial institution specializing in prosecuting the most serious crimes of international concern" <sup>[3]</sup>, and here the burden of proof rests with the prosecutor who is responsible for seeking evidence and prospecting the truth, both innocent and guilty.

The main aim of the proof before the ICC, as one of the criminal matters, is to uncover the truth and achieve the justice. It also has some characteristics that relate to the competent authorities. Based on the above, it is generally a prominent feature of international law <sup>[4]</sup>. The criminal evidence focuses on the availability of the elements of the crime <sup>[5]</sup> and its different circumstances and attribution to the perpetrator, so that the theory of proof in criminal law is of great importance <sup>[6]</sup>. The Prosecutor examines the doubt of the evidence by investigating the facts of the act until it reaches certainty, and its judgment is based on either innocence or conviction <sup>[7]</sup>.

Therefore, what concerns the Prosecutor before the International Criminal Court is the possibility of obtaining conclusive evidence that builds his conviction on the certainty and clarity of the innocence or conviction of the accused. The prosecutor, when he does so, in terms of his duty imposed on him from one side, and satisfying his conscience in the humanitarian aspect of it, and satisfying the international community, which has placed his trust in him from another side, The research issue is how are the evidentiary powers before the ICC manifested itself?

**Correspondence Author:**  
**Dr. Ehab Al-Rousan**  
Associate Professor,  
Department of Criminal Law,  
American University, Dubai.  
Academic City, Emirates,  
United Arab Emirates

## **The burden of proof is absolute authority for the Prosecutor**

### **A. The prosecutor's authority to prove**

**First:** The burden of proof is borne by the prosecutor

The scholars of criminal law the proof as providing the evidence before the competent authorities of criminal procedure sought on a reality of legal importance in the ways determined by the law in accordance with the rules that subject it to <sup>[8]</sup>. It is noticeable from the above definitions that the scholars have not limit the scope of proof to the establishment of evidence before the judiciary, but made it broader where the evidence is held before the competent authorities, including the judiciary and the investigative authorities <sup>[9]</sup>, that the burden of proof, which means that it costs one of the litigants in the case to submit the legal evidence of the validity of his claims, governed by established legal principles and circulated before the judiciary such as presumption of innocence, and therefore the burden of proof is now on the authorities of the indictment, which is enshrined in the Basic Law of the International Criminal Court, where the prosecutor bore the burden of proof, and exempted the accused from the burden of proof pursuant to the general principle on which the criminal evidence procedures are based on the norm says that that the origin of the human person is "presumption of innocence". This is stipulated by the Statute under article 66, which provides "1- A person is innocent until proven guilty in court in accordance with applicable law, 2- The prosecutor has the burden of proving that the accused is guilty," and article 67, paragraph 1/i of the Basic Law, affirms that "the accused shall not impose the burden of proof or disproved in any way", and accordingly it can be said that the international legislator in the statute has resolved the controversial matter regarding the burden of proof that it falls on the prosecutor.

Reading the articles 66 and 67 of the Basic Law which bear the burden of proof by the prosecutor, and article 79/1 of the procedural rules and the rules of proof of the ICC indicates that the burden of proof has returned to be distributed between the prosecution and the accused, but such an interpretation would be contradicted with article 51/5, which states that "in the event of a conflict between the statute, procedural rules and rules of evidence, the statute is considered.

Article (54/1) requires the Prosecutor to extend the scope of the analysis to include all facts and evidence relating to the assessment of whether there is liability under this statute, particularly since the subject of proof is that the prosecution must establish both elements *Mens Rea* and *actus reus* by the international crime and demonstrates that the accused is responsible for it.

The criminal evidence before the ICC is quite different since that the Statute has exempted the court from proving the known facts, as provided by article 69 of the Basic Law, the meaning of the known facts can be defined as those to be known to all members of the Court, and article 69 of the procedural rules and rules of evidence has been excluded from the subject of proof of the facts agreed upon by the prosecutor and the defense. Therefore, the Prosecutor must investigate all the circumstances associated with the case, whether leading to the criminalization of the accused or the acquittal of him, in accordance with the principle of each innocent accused until proven guilty, which corresponds to the sake of justice in conducting effective investigations of

crimes and achieving justice to avoid judicial errors <sup>[10]</sup>,

In evidence of the truth, the Prosecutor extends the scope of the investigation to include all documents and evidence relating to the assessment of whether there is criminal liability under this statute and, in detail, to investigate both the circumstances of criminalization and acquittal <sup>[11]</sup>, the passage of the public prosecution from the investigation to the accusation stage requires the prosecutor's conviction that there is a reasonable basis of evidence to trace and prosecute the suspect.

At this procedural stage, the prosecutor charges and demands that the accused to be prosecuted on the basis of the suspected acts of article 5 of Rome Statute, in which, the burden of proving these charges stays solely with the prosecutor <sup>[12]</sup>, so he is required to consolidate the charges on which he intends to seek trial and the issue of the adoption of the charges remains entrusted to the discretion of the judges of the pre-trial chamber.

On the other hand, the Prosecutor has discretionary power to adapt the material facts and give them a definitive description, especially with the availability of a detailed database of crimes, and by defining them with the determination of the full acts of their constituents <sup>[3]</sup>, since the burden of proof is borne by the alleged, the Prosecutor is required, according to paragraph 5 of article 61 of the Rome Statute, to consolidate his accusation.

The Prosecutor has also the power to raise objections or make remarks on a matter of the validity of the measures prior to the confirmation hearing and allow the prosecutor to make final observations on the charges <sup>[14]</sup>.

The charges against them do not become the basis for the prosecutor's during the trial until they have been approved in the pre-trial chamber, while the remaining charges are not supported by insufficient evidence <sup>[15]</sup>.

The Prosecutor has also the right to request of the Pre-Chamber to provide further evidence or conduct further investigations in relation to a particular charge that has been refused accreditation for lack of evidence <sup>[16]</sup>, such matter indicates the seriousness of his accusation to be based on strong and consistent evidence, to avoid the prosecutor's abuse of the power of indictment.

In relation to the role of the Prosecutor in the proof, it is noted that this role is his only jurisdiction, it determines the charges based on the evidence available to him and the factual evidence, and the prosecutor is adapting the material facts legally and factually proof, and giving each act its legal description in accordance with the rules of criminalization contained in the core of the statute of the Court,

However, the prosecutor may sometimes be unable to carry out the duty of the burden of proof, perhaps article 69/3 of the Statute tried to fill this void that the court will exercise its positive role in assessing all the evidence obtained by the parties to the prosecution, because we must not lose sight that, despite the basic law, the burden of the proof is essentially a duty of the prosecutor,

However, this does not mean that the accused is prohibited from contributing to the presentation of the evidence of the negation, which is enshrined in the same article 69/3 of the Basic Law, where the parties were allowed to provide any evidence related to the case, especially since this article specified this evidence in accordance with article 64 of the Basic Law, and by linking both articles to us that the accused has the right to present evidence that denies the

prosecutor's claim and returns to the provisions of Article 64/D, and article 64, paragraph 9 stipulates that the trial chamber has the power to decide whether or not to accept the evidence or its relevance, and given the burden of proof on the prosecutor, he is obliged to search and collect evidence that exonerates or convicts the suspect.

### **Second: The prosecutor authorities during the stage of search for evidence**

The procedures for collecting and examining evidence are one of the main tasks assigned to the Prosecutor, which is the procedure of investigation in the narrow sense of the word, because it is a set of procedures aimed at exploring the truth, whether the evidence is on behalf of the accused or against his interest <sup>[17]</sup>.

In fact, the Public Prosecutor conducts investigations in the territory of the state. As "authorized by the Pre-Chamber under paragraph 3 (d) of article (58)" <sup>[18]</sup>, the Prosecutor, on the basis of this article, conducts investigations in the territory of the State in accordance with the cooperation of states parties provided for in article (86) of the Rome Statute. As well as legal aid or doing so with the permission of the preliminary chamber as the legislator obliged the prosecutor in addition to collecting, examining and checking the evidence, to abide by confidentiality so that he does not disclose at any stage of the proceedings any documents or information obtained in order to complete the new evidence. The provider of information has not agreed to disclose it, to take or request the necessary measures to ensure the confidentiality of the information, to protect any person or to preserve the evidence <sup>[19]</sup>. He is legally responsible for keeping the material information and evidence obtained during the investigations conducted by his office, for storing and securing it <sup>[20]</sup>, the international legislator authorized the prosecutor to collect and examine the evidence of the case.

The investigation made by the prosecutor must cover all facts and evidence, as the investigation must include both evidence and denial <sup>[21]</sup>, which are carried out by the Investigations Division.

It is clearly noted that the authorities assigned to the Prosecutor in the investigation enable him to carry out several tasks to facilitate the investigation process collect and retain evidence, where there is a section of information and evidence of the Prosecutor office responsible for keeping the information and material evidence obtained during the investigations and for storing and securing it <sup>[22]</sup>.

In addition, it is the prosecutor's job to expand the powers of the search for evidence, as he can collect evidence outside the court's location if he is given the task of conducting the necessary research for the investigation process outside the ICC <sup>[23]</sup>, specifically over the territory of the state in which he committed the crimes under article 5. The first paragraph of article 93 acknowledged that the Prosecutor could "examine places or sites, including exhumation scans and grave sites."

Note that the (Dayton) Agreement gave the prosecutor the authority to conduct some scientific and medical research on mass graves that had spread during the armed conflicts in the former Yugoslavia <sup>[24]</sup>. After conducting research and gathering of evidence in order to establish the truth and ensure the effectiveness of the investigation, the prosecutor must move to the indictment stage in order to confirm the charge or to acquit the accused if there is sufficient evidence to do so.

## **1B: The prosecutor Authorities in the indictment**

### **First: The Prosecutor Authorities in making an accusation**

The first paragraph of Article 14 lays down that the prosecutor can direct charges. This means that the authority of indictment is the prerogative of the prosecutor, which requires him to have sufficient evidence of forensic proof so that the charge is correct, and therefore convincing to the court.

At the stage of indictment, the prosecutor must begin to ascertain that the acts committed by the accused constitute a crime as mentioned in Article 5 of the Rome Statute, and then the burden of proving these charges alone is transferred to him <sup>[25]</sup>. It is therefore a burden of proof to support these charges, on the basis of which he intends to seek trial in order to convince the Court of its validity and legitimacy. The issue of the adoption of these charges remains up to the discretion of the judges of the pre-trial chamber, and the Prosecutor has the discretion to adapt the material facts and give them a legal description, especially with a detailed database of crimes and their definition with a full definition of the acts that constitute them <sup>[26]</sup>.

It is noted with regard to the exercise of the authority of charge is that, this competence is limited to the prosecutor who determines the charges based on the evidence he has and the factual evidence that enables him to prove the crime against the suspect. The prosecutor legally adapts the material facts and gives each act its legal description in accordance with the criminalization rules contained in the statute of the Court <sup>[27]</sup>. In order to reach a fair truth and not prejudice the rights of the charged person.

Note that the legal adaptation of the prosecutor is not considered final, as it could be amended by the judiciary it in three cases determined by the legislator in the Rome Statute: the first stage: the pre-confirmation hearing: pursuant to article 61, paragraph 4 of the Rome Statute <sup>[28]</sup>. Phase II: The stage between the confirmation hearing and the start of the trial: paragraph 9 of the article 61 allows the charges to be amended by the prosecutor with the permission of the preliminary chamber and after the charges are brought <sup>[29]</sup>, as he may add new charges or compensate for another charge more severe and here must be a hearing to approve the new or aggravated charges. Phase 3: Post-trial: At this stage, the prosecutor may only withdraw the charges and, under the permission of the Court's Primary Chamber.

The confirmation hearing is of great importance since it represents the final procedure before the start of the trial, during which the charges to be adopted during the trial are determined, because once the charges are adopted in accordance with article 61, "the presidency constitutes a trial chamber" dealing with the trial of the accused. Since the burden of proof is borne by the alleged, the prosecutor is required, as stated in article 61, paragraph 5 of the Rome Statute to uphold his accusation. The Prosecutor may also raise objections or make remarks on a matter relating to the validity of the measures prior to the confirmation hearing <sup>[30]</sup>, and may also allow final remarks on the charges filed.

Note that this authority, as will be explained later, given to the Prosecutor is not absolute, as it must be approved by the Pre-Trial Chamber while the remaining charges are not approved due to lack of evidence, so the Prosecutor may later according to Article 61, paragraph 7 (c) of the Rome Statute "Request approval if this request is supported by

sufficient evidence <sup>[31]</sup>." This focus on supporting evidence is only for one purpose, which is to uncover the truth. At the request of the Pre-Chamber, the Prosecutor must "provide further evidence or conduct further investigations in relation to a particular charge", which has been denied for lack of evidence, which confirms the desire for his accusation to be based on strong and consistent evidence to establish the truth as it is.

Since the Public Prosecutor's Office in general is considered an impartial adversary in a criminal dispute, the Public Prosecutor is a neutral and independent opponent at the same time, since he is required in addition to presenting the evidence of the conviction, as he also provides evidence of innocence if any.

## **Second: The duties of the prosecution regarding the defence in the case of examining the circumstances of acquittal**

When the prosecutor exercises his authority to indict the accusation, he has a duty to declare and support each charge with convincing forensic evidence to eliminate the conviction of the accused, and he must enable the accused to exercise his right to defend, by enabling him to access these charges, it is the duty of the prosecutor to disclose to the defence as soon as possible the evidence in his possession or under his control, which he believes appears or tends to show the innocence of the accused or mitigate his guilt, which may affect the credibility of the prosecution <sup>[32]</sup>.

The prosecutor also has duties during interrogation as defined by article 55 of the second paragraph of the statute to prove before the International Criminal Court, the Public Prosecutor's Office must seek the truth and allow the accused to make his defence in consideration of the proper functioning of the judiciary <sup>[33]</sup> in order to facilitate the accused to defend himself. When the prosecutor's office or under his command has protected material or information, it may then provide such material or information as evidence without prior consent from the provider of information and without proper disclosure to the accused <sup>[34]</sup>.

The Rules of Procedure and Evidence of the International Criminal Court, article 77 states that "the prosecutor allows the defence subject to limitations to disclose as provided in the Statute and rules 81 and 82 by examining any books, documents, photographs or other tangible objects in the prosecutor's possession or under his command that are material necessary to prepare for the defence or the prosecutor intends to use them as evidence for the purposes of the plea hearing or at trial as a matter of fact or may have been obtained from the person or belong to him".

The prosecutor is therefore required to disclose to defend the evidence in his possession or under his control that could help to show the truth, in addition to the law created by the legislator in the Rome system that was not present in previous international trials. For example, article 68 of the Statute of the International Criminal Court (ICC) stipulates that the prosecutor must "inform" the defence the existence of "evidence contacted by his knowledge concerning the acquittal of the accused".

According to the above, it could be said that the Rome Statute obliges the Prosecutor to disclose all the information and documents he has to the accused so that the latter can defend him, and this is the purpose of proof before the International Criminal Court that the truth should be brought to light, whether by criminalization or acquittal.

Balancing the achievement of international criminal justice with respect for the basic principles of a fair trial has justified the prosecutor's authority to prove and burden him with the burden of proof, but giving the public prosecutor absolute authority to prove may not be without arbitrariness in the use of this authority, so the international legislator considered that this authority should be under the control of an independent judicial body, the Pre-Trial Chamber.

## **2. Pre-Trial Chamber Control of the Prosecutor's Authority of Evidence**

### **1B: Request permission from the preliminary chamber at the investigation stage**

First: Oversight of the pre-trial chamber when there is a unique opportunity for proof: it is certain that the prosecutor to reach the truth makes a great effort to achieve this task of the investigations, which is to bring justice, and therefore he uses all the legal means available to him by the Statute to achieve it <sup>[35]</sup>. Once the Office of the Prosecutor (OTP) has sufficient evidence against an individual, it submits a request to the Pre-Trial judges to issue a warrant of arrest or summons to appear.

The judges of the Pre-Trial Chamber will issue a warrant of arrest if there are reasonable grounds to believe that the person has committed a crime within the Court's jurisdiction and that the person will not appear voluntarily before the Court, will endanger the proceedings or investigation, or will continue committing crimes if not arrested. If the judges believe that the person will cooperate and come to the Court voluntarily, they can issue a summons to appear. Once either an arrest warrant or a summons to appear is issued, a case enters the Pre-Trial stage, during which the Pre-Trial Chamber judges determine whether or not there is sufficient evidence for the case to proceed to trial. The legislator to achieve this, but sometimes the evidence is vulnerable to damage and extinction, which the legislator called the unique opportunity from one aspect, on the other hand, obtaining this evidence, requires the prosecutor to obtain prior permission from the Department. Preliminary as a control authority over the prosecutor's investigative work, this creates a major challenge for the prosecutor to preserve this evidence, because by the loss of this evidence the truth is lost, and justice is served.

For this, the legislator authorized the prosecutor to provide a unique opportunity to prove that "when the prosecutor considers that the investigation provides a unique opportunity that is not available later to take testimony or to testify, to examine, collect or test the evidence, the prosecutor shall notify the preliminary chamber <sup>[36]</sup> of this matter" and the "unique opportunity" provided by the investigation to uncover the truth refers to a concept in public law relating to "one-time and separate conduct or the activation of evidence collection <sup>[37]</sup>".

Through this, it is clear that the role of the pre-trial chamber is the control in case of the unique opportunity, which is a special case, if it relates only to evidence that cannot be obtained later in the court period because of its special nature where it is prone to loss or damage, such as the extraction and autopsy of bodies, it requires a codification of the means that help to obtain evidence and take special measures to preserve them <sup>[38]</sup>.

Once the preliminary chamber has been notified by the public in accordance with article 56, paragraph 1 "a" of the Statute, it shall directly, without delay, consult with the



Prosecutor and without prejudice to the provisions of paragraph 1 (c) of article 56 of the Rome Statute and with the arrested person or brought before the court by a summons to attend and with his lawyer to determine the measures to be taken and the manner in which they are implemented in accordance with rule 114 of the Rules of Procedure and Evidence of the International Criminal Court. Therefore, the truth may be lost, but obtaining such evidence is preceded by permission from the pre-trial chamber that monitors the work of the Prosecutor, where the oversight of the Chamber at this stage is manifested by a special case and is transmitted to evidence that can be obtained later during the trial due to its particular nature and when the pre-trial chamber receives notification from the Prosecutor in accordance with this paragraph, it conducts consultations without delay with the Prosecutor.

In this case, the Pre-Trial Chamber may, at the request of the Prosecutor, "take the necessary measures to ensure the effectiveness and integrity of the measures and in particular to protect the rights of the defense" <sup>[39]</sup> by making recommendations or an order on the measures to be followed, ordering the preparation of a register of measures, appointing an expert to provide assistance or authorizing the assistance of a lawyer, appointing a lawyer to attend, representing or maintaining the necessary evidentiary actions in accordance with article 56, paragraph 2 of the Rome Statute.

Pre-trial oversight is not limited to the prosecutor's obligation to notify it of the existence of a "unique opportunity" to prove and uncover the truth and to take necessary measures to protect and preserve evidence, but to rise to an advanced form of oversight "in cases where the Prosecutor does not request measures, but the Preliminary Chamber considers that these measures are required to preserve the evidence it considers essential

For the defense during the trial, where it must consult with the Prosecutor as to whether there is a good reason why he has not requested such measures, and if it concludes that there is no justification for not doing so, it may take such measures on its own initiative" <sup>[40]</sup>.

According to what has been said, it could be noted that the Prosecutor is free even when he decides not to take a decision, and that the Pre-Chamber follows up on the procedures of his work. When he is not required to take the necessary measures to preserve the evidence, the file does not close "silently" and may conceal behind him ambiguity, confusion or illegal backgrounds, and also does not automatically take such measures on its own in cases where the Prosecutor does not request it, rather, it must consult with him first and consider whether there is a good reason for his decision, and if it then concludes that there is no justification for doing so, then it may take such measures itself.

The chamber's replacement of the Prosecutor is the final solution and after consultation between the parties, therefore the role of oversight by the pre-trial chamber on the prosecutor even in its advanced forms is not based on a vertical relationship but is based on consultation. It should be noted that the authorities of the pre-trial chamber are broader and stronger when the investigation leads to the initiation of a criminal case, the prosecutor cannot automatically initiate the case in accordance with the international criminal courts of the former Yugoslavia and Rwanda, when he considers that the evidence established

against a sufficient person to follow him asks the preliminary chamber to issue an arrest order or a summons to present before it <sup>[41]</sup>.

## **Second: Request permission from the preliminary chamber to issue an arrest order or attendance**

The process of proof before the ICC requires the arrest or presence of the accused in order to facilitate the disclosure of the truth, but this process cannot be carried out by the prosecutor without control, so he makes a request to the pre-trial chamber to issue the order for the accused to attend before the court. To prove and advance the stages of criminal proceedings before the ICC, the Prosecutor must apply to the Pre-Trial Chamber to issue a summons to the court or an arrest order for any person who is a complete person in a pending case if the sake of the investigation requires it <sup>[42]</sup>.

This request must be provided with all the evidences and information on which the preliminary chamber can be persuaded, and the Prosecutor shall provide the relevant information to the person who has been arrested, or who has presented in court, on the basis of an investigative attendance order so that his opinion on the matter can be heard, unless the preliminary chamber orders otherwise <sup>[43]</sup>. The pre-trial service will issue an arrest order at any time after the investigation has been initiated, and at the request of the public prosecutor, an arrest order will be issued if it is satisfied after examining the request, evidence or other information provided by the prosecutor <sup>[44]</sup>.

Regarding the attendance order, it is subjected to the article 58 paragraph 7 so that the prosecutor could convince the preliminary chamber of the need to issue an arrest order or attend, <sup>[45]</sup> which must respect the obligatory, obligation-bound provisions, should be provided in the request, on the other hand, highlighting the practical importance of the arrest order or the summons through the provisions of article 58, paragraph 6 of the arrest order or the summons, which states that, the prosecutor may request the pre-trial chamber to amend the arrest order by modifying or adding to the description of the crimes mentioned in it).

In this regard, the issuance of the arrest order or the subpoena does not prevent the possibility of amending the charges on which the prosecutor intends to request a trial, thus enabling the prosecutor to review the charges brought on the basis of new data that represent "reasonable grounds" that the pre-trial chamber is convinced of its existence "to believe that the person has committed the crimes that are amended or added" <sup>[46]</sup>.

In response to the above, it could be said that the issuance of the order for the arrest or attendance is subject to the discretion of the pre-trial judges and not the prosecutor-in-law, so the prosecutor's request and respect for the obligatory and evidentiary provisions contained in it is not sufficient to ensure the authenticity of the pre-trial chamber, and for this reason the holder of the authority to prove and seek the truth is required to convince the preliminary chamber of sufficient evidence that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court", with the obligation of the Prosecutor to state the reason. That prompted him to request such an order.

The issuance of an arrest order or the presence of the accused after his or her approval from the pre-trial chamber helps to bring him before the court and thus facilitate the

process of proof, since the suspect can be confronted with the charges against him, at which point the latter can deny these charges and exonerate him, but when he cannot refute them, the crime will be proved on him.

When the accused present before the ICC, the pre-trial chamber will hold a hearing to approve the charges on which the prosecutor intends to request a trial, and therefore monitor the prosecutor's actions during the indictment phase.

## **2B: Oversight of the prosecutor's actions during the indictment phase<sup>[47]</sup>**

### **First: Prior Measures to the confirmation hearing**

The confirmation hearing represents an important detail of the proceedings before the ICC, so the preliminary chamber makes the necessary decisions concerning the disclosure of evidence between the prosecutor and the person in question who has been issued an arrest order or attendance. The person must also be provided with a photo from the document containing the charges that the prosecutor intends to rely on at the indictment hearing<sup>[48]</sup>.

In the meantime, the preliminary chamber may take the decisions contained in article procedural rules and proof 121. We therefore conclude that the Pre-Trial Chamber conducts these preparatory hearings in order to ensure respect for the procedures when the evidence is disclosed between the prosecutor and the accused person.

Therefore, the Pre-Trial Chamber has the authority to make appropriate decisions concerning the disclosure of evidence between the prosecutor and the person in question who has been issued an arrest order or attendance<sup>[49]</sup>, thus manifesting the control imposed on the prosecutor, as he is required to respect the procedures when the evidence is revealed and thus to respect the rights of the defence to access the accusation evidence and the proof supporting it.

The prosecutor must submit a detailed statement of charges to the Pre-Trial Chamber and the person concerned, as well as a list of evidence he intends to present at the indictment hearing, within 30 days before the confirmation hearing<sup>[50]</sup>, he must also inform the concerned person his decision in the event of amending or withdrawing the charges, and shall also inform the preliminary chamber a maximum of 15 days prior to the hearing<sup>[51]</sup>. If the Prosecutor intends to present new evidence at the hearing, he will provide the Pre-Trial Chamber and the person concerned with a list of such evidence within 20 days prior to the hearing<sup>[52]</sup>.

Therefore, if the concerned person intends to present evidence under article 61, paragraph 2 of the Rome Statute, he or she must submit a list of that evidence to the pre-trial chamber at least 15 days before the confirmation hearing, the Preliminary Chamber refers this list to the prosecutor without delay<sup>[53]</sup>.

The Prosecutor and the person concerned must submit written conclusions to the Pre-Trial Chamber on elements of the law, Including the reasons for the failure of criminal liability provided for in article 61, paragraph 1 of the Rome Statute, a maximum of 3 days before the hearing, and a copy of the conclusions shall be immediately forwarded to the prosecutor and to the person concerned as appropriate<sup>[54]</sup>.

It is noted that the Pre-Trial Chamber has the power to monitor and evaluate the evidence provided by both the prosecutor and the person in question to reveal the truth as it is. In accordance with the provisions of Article 61, paragraph 1 of the Rome Statute.

It could be concluded through the provisions of this paragraph that the charges on which the prosecutor intends to request a trial are not subject to his discretion only, these charges are subject to review by the pre-trial judges, this judicial review limits the prosecutor's authority to exercise proof as a fundamental and essential function of the representative of the public right, Thus reducing the risk of abuse by the prosecutor when making an accusation or mitigating it unjustifiably, according to article 61, paragraph 7 of the Rome Statute is also monitored during the confirmation hearing.

### **Second: Monitoring the procedures of the confirmation hearing**

The preliminary chamber considers the issue of the charges against the accused by the prosecutor before moving to the judicial stage, and these charges are decided by holding confirmation hearings in the presence of the accused or in his absence.

In accordance with article 61 of the ICC Statute, the pre-trial chamber will hold a hearing within a reasonable period before the accused submits to the court a hearing to approve the charges on which the Prosecutor intends to request a trial, the hearing is held in the presence of the prosecutor, the accused person, and his lawyer.

This is one of the procedures that characterize the ICC over the rest of the previous international courts. The Preliminary Chamber considers the issue of the charges against the accused by the prosecutor<sup>[55]</sup>, where the latter, in accordance with the requirements of article 61, third paragraph 61 and no later than 30 days before the confirmation hearing to the preliminary chamber and the person concerned shall submit a detailed statement of the charges, in addition to a list of evidence he intends to present at that hearing in order to enable the accused to prepare his defence, as the confirmation hearing is held in the presence of the prosecutor, the accused and his legal deputy. This trend may once again, confirm the proper conduct of the evidentiary procedures and the provision of numerous legal guarantees for a fair and impartial trial in accordance with the principles of international humanitarian law. Exceptionally, however, in some cases, confirmation hearings can be held in the absence of the accused, within the cases specified by the provisions of Article 61 of the Rome Statute, where it was approved. Exceptionally, an accusation can be made during a hearing in which the presence of the accused is not conditioned on the following reasons:

**First:** If the accused waives his right to attend during the hearing and this waiver is supposed to be voluntary and correct<sup>[56]</sup>, it is assumed that the reasons beyond the accused's will, which prevent him from attending this hearing, result in the nullity of its procedures and the attempt to reconvene this hearing in the presence of the accused. The confirmation hearing will be held in the absence of the accused only if the pre-trial chamber is satisfied that the person concerned understands the meaning of the right to attend the hearing and the consequences of waiving that right.

**Second:** If the accused escapes or is not found when an arrest order is issued or executed over the territory of a State party, if the pre-trial chamber decides not to hold a

confirmation hearing in the absence of the person concerned, and that person is at the disposal of the court, the confirmation of the charges cannot take place as long as that person is not at the disposal of the court. However, the Pre-Trial Chamber can review its decision at any time at the request or on the initiative of the prosecutor, in case the Chamber decides not to hold a hearing in the absence of the person concerned and the person is at its disposal, she is ordered to present before her<sup>[57]</sup>.

The adoption of this solution assumes that the pre-trial chamber will bear the burden of proving that the accused has obtained the knowledge by all legal means in relation to the charges against him and to take all necessary measures to ensure his attendance at the appointed hearing, on an earlier date, during which the accused is represented by a lawyer in the sake of justice.

It is noted that the Prosecutor exercises essential functions during the indictment hearing, presenting evidence in writing or oral to substantiate the charges against him in a separate and independent manner for each charge.

It should be noted that the waiver of the right to attend the confirmation hearing does not prevent the Pre-Trial Chamber from receiving written notes on the matters before it from the person concerned.

In particular, the Statute has assigned some of the basic rights that result from this hearing before the pre-trial chamber for the benefit of the accused, and these rights are the right to object the charges against him during the hearing, the necessary appeals to the evidence presented by the Prosecutor during the investigation process, in addition to the fact that the accused can provide evidence on his part in order to strengthen the means of his defense against the charges directed to him and works to deny them<sup>[58]</sup>. The preliminary chamber will issue the indictment during the hearing and after hearing the prosecutor, the suspect and his lawyer and examining the evidence, the indictments.

After the legal requirements for the confirmation hearing are held, the hearing will be held, after which the preliminary chamber can adopt the charges for which it has decided that there is sufficient evidence and refer the person to a trial chamber for the charges it has adopted<sup>[59]</sup>.

Its decision could also be to reject the adoption of charges for lack of evidence or to postpone the hearing and request the Prosecutor to consider new evidence or conduct further investigations into a particular charge or ask him to amend the description of a charge, as the evidence presented appears to establish a different offence within the jurisdiction of the court.

When the hearing of the adoption of the charges is postponed in accordance with article 61, the Preliminary Chamber may "decide to postpone the referral of the concerned person to the primary chamber" and "set a time limit within which the prosecutor is entitled to take what is necessary in accordance with paragraph 7 (c) 1 and 2 of Article 61<sup>[60]</sup>."

Since the decisions of the Pre-Trial Chamber following the confirmation hearing, it is noted that the prosecutor's powers, in adapting the facts and legal evidence, and giving them the legal description in accordance with the rules of criminalization are at the heart of the statute of the International Criminal Court, it is controlled by a court jurisdiction, which ensures that the public prosecutor respects the procedures and the law. The preliminary chamber represents a "filter for charges, so that they are not

approved because they lack sufficient evidence, which will support the court's work towards achieving the desired criminal justice, amending, adding or withdrawing a charge before the trial begins must be authorized by the pre-trial chamber, the latter may ask the Prosecutor to provide written observations on certain matters relating to the facts and the law<sup>[61]</sup>.

## Conclusion

It is found through this study that the proof is considered the confirmation of a disputed right, but in international criminal law it can be said that proof is a confirmation or denial of a crime against the accused, in which the burden of proof is borne by the prosecutor, who collects and seeks evidence that convicts or exonerates the suspect, all for one purpose of revealing the truth, but the prosecutor's authority to prove is not absolute, is restricted by the control imposed on her by the pre-trial chamber, this oversight, although limited by the prosecutor's authority, is a guarantee of the proper functioning of justice, an exclusion of the concentration of the power of proof in the hands of the prosecutor, and the injustice and arbitrariness that may result from this concentration on the right of the accused.

It is also reached that the prosecutor's authority in proving is a neutral authority, he is an impartial adversary who discloses evidence that may be in favor of any of the parties to the case, whether the accused or the victim, with all impartiality and independence, his only aim is to establish the truth. Therefore, it is believed that it is necessary to work on the allocation of a special section within the provisions of the Statute to clarify the rules of proof, strengthening the powers of the criminal court in proving at the trial stage.

## References

1. Mostafa Mohamed El-Deghidi: Criminal Investigations and Evidence, Dar Al-Kotob, Egypt, 2006,
2. Paragraph 3 of the Preamble to the Rome Statute,
3. Article 1 from the Rome Statute
4. Hassan Sadiq Al-Morsfawi: Al-Morsfawi in the Fundamentals of Criminal Procedure, Al-Ma'arif Foundation Edition, Alexandria 1978, Paragraph 285, pg 646,
5. Omar Al-Saeed Ramadan, Principles of Criminal Procedure, Dar Al-Nahda Al-Arabiya, Cairo, Second Edition, 1974, p. 85,
6. Mahmoud Naguib Hosni: Previous reference, paragraph 447, p. 417,
7. Mahmoud Naguib Hosni: Previous reference, paragraph 448, p. 418,
8. Mahmoud Naguib Hosni: Explanation of the Criminal Procedure Law, Dar Al-Nahda Al-Arabiya, Cairo, 1988, p. 417,
9. Abdel Hakim Thanoun Al-Ghazali: Forensic Evidence and Their Role in Criminal Evidence: A Comparative Study, University Press, Alexandria, 2009, p. 137,
10. Nasreddine Boussmaha: The International Criminal Court, Explanation of the Rome Agreement Article by Article, Part Two, Dar Huma for Printing, Publishing and Distribution, Algeria, 2008, p. 7,
11. Article 54, paragraph 1 (a) of the Rome Statute of the International Criminal Court,
12. Article 66, paragraph 2 of the Rome Statute of the International Criminal Court,

13. Articles 7, 6, 5 and 8 of the Rome Statute,
14. Rule 122 of the Rules of Procedure and Evidence,
15. Article 61, paragraph 7 (c) of the Rome Statute,
16. Article 61, Paragraph 8 of the Rome Statute,
17. Dr. Abdel Qader Saber Jarada, International Criminal Court, Dar Al-Nahda Al-Arabiya, Egypt, 2005, p. 745
18. Article 54, paragraph 1 (a) of the Rome Statute of the International Criminal Court,
19. Article 54, paragraph 3 (a, e, and) of the Rome Statute,
20. Rule 10 of the Procedure and Evidence rules
21. Mahmoud Sherif Bassiouni: The International Criminal Court, its origins and its statute with a study of the history of international investigation committees and former international criminal courts, New Rose Al-Youssef Press, Cairo, 2002, p. 176, as well as Article 54, paragraph 1 (a) of the Rome Statute,
22. Hamed Sayed Muhammad Hamed: The Indictment and Investigation Agency of the Permanent International Criminal Court, The National Center for Legal Publications, First Edition, Cairo, 2010, p. 34,
23. Article 54 of the Rome Statute,
24. Mohamed Hadi Bayyoud: Litigation Procedures before the International Criminal Court, Memorandum for obtaining a master's degree in Criminal Sciences, Faculty of Law and Political Science of Tunis, 2005-2006, p. 39,
25. Article 66, paragraph 2 of the Rome Statute,
26. Articles 6-7-5- and 8 of the Rome Statute
27. Mostafa El-Jadidi: Terms of reference of the Prosecutor at the International Criminal Court, Memorandum for obtaining a master's degree in public international law, Faculty of Law and Political Science in Tunis, 2007, p. 40,
28. Article 61, paragraph 40, of the Rome Statute
29. Rule 128 of the Rules of Procedure and Evidence,
30. Rule 122 of the Rules of Evidence and Rules of Procedure,
31. Article 61, paragraph 8, of the Rome Statute,
32. Dr. Muhammad Fahad Al-Shallaza: International Humanitarian Law, Al Ma'arif Foundation, Alexandria, 2005, p. 389,
33. Rule (24/1/2) of the Rules of Procedure and Evidence,
34. Rule 82, Paragraph 1 of the Rules of Procedure and Evidence,
35. <https://www.icc-cpi.int/pages/pre-trial.aspx>
36. Article 56, paragraph 1 (a) of the Rome Statute,
37. Hamid Sayed Muhammad Hamed: Previous reference, pg. 27,
38. Mahmoud Sherif Bassiouni: The International Criminal Court, Introduction to a Study of the National Enforcement Cases and Mechanisms of the Basic Law, First Edition, Dar Al-Shorouk, Cairo, 2004, p. 76,
39. Article 56, paragraph 1 (b), of the Rome Statute,
40. Article 56, paragraph 3, of the Rome Statute
41. Article 58, paragraphs 1 and 7, of the Rome Statute
42. Muhammad Fahad Al-Shalaldeh: Previous reference, Page 386,
43. Article 56, paragraph 1, (c) of the Rome Statute,
44. Article 58, paragraph 1, of the Rome Statute,
45. Article 58 of the Rome Statute
46. Article 58, paragraph 6, of the Rome Statute,
47. See Karel De Meester, The Investigation Phase in International Criminal Procedure: In Search of Common Rules. Intersentia, 2015 and See Robert Cryer, Hakan Friman, Darryl Robinson, An Introduction to International Criminal Law and Procedure, University of Toronto, Chatham House 2010, and see Morten Bergsmo, Carsten Stahn, Quality Control in Preliminary Examination: Volume 2018 Morten Bergsmo, Carsten Stahn Publications, and see Héctor Olásolo, The Triggering Procedure of the International Criminal Court, 2005 Martinus Nijhoff Publishers
48. Article 61, paragraph 3, of the Rome Statute,
49. Rule 121 of the Rules of Procedure and Evidence,
50. Rule 121 paragraph 3 of the Rules of Procedure and Evidence,
51. Article 61, paragraph 4, of the Rome Statute,
52. Rule 121 paragraph 4 of the Rules of Procedure and Evidence,
53. Rule 121 Paragraph 2 of the Rules of Evidence and Rules of Procedure
54. Rule 121 Paragraph 9 of the Evidence and Procedural Rules,
55. Article 61 of the Rome Statute,
56. Rule 124 of the Draft Final Text of the Rules of Procedure and Evidence, pg. 78, November 2000,
57. Nasreddin Boussmaha: previous reference, p. 43,
58. Article 61 Paragraph 6 of the Rome Statute,
59. Article 61, paragraph 7, of the Rome Statute,
60. Rule 127 of the Rules of Evidence and Procedures of the International Criminal Court,
61. Rule 127 of the Rules of Evidence and Procedures of the International Criminal Court,