

# TEN YEARS OF TRIAL PROCEEDINGS AT THE INTERNATIONAL CRIMINAL COURT

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## I. INTRODUCTION: STEPS INVOLVED IN PREPARING AND CONDUCTING A TRIAL AT THE ICC

My remarks will address trial proceedings before the International Criminal Court (“ICC”) and the early jurisprudence of the ICC’s Trial Chambers. As an introduction, this part will outline the steps involved in preparing and conducting a trial at the ICC and describe some of the more notable procedural developments in the Institution’s first trials. The article will then discuss some of the biggest achievements and challenges in the ICC’s first ten years of existence, giving particular attention to issues related to the fairness and expeditiousness of the proceedings and the recently completed case of *The Prosecutor v. Thomas Lubanga Dyilo*.<sup>1</sup>

### A. From Constitution of the Trial Chamber to Opening Statements

Once an ICC Pre-Trial Chamber confirms the charges, the Presidency constitutes a Trial Chamber, which shall be responsible for the conduct of subsequent proceedings.<sup>2</sup> This step starts the trial phase of the proceedings, but many steps need to be taken before the opening statements and evidence presentation actually begin.

The Trial Chamber needs to hold status conferences with the parties and adopt necessary procedures to facilitate the fair and expeditious conduct of the proceedings.<sup>3</sup> Trial Chambers have held status conferences to a varying extent thus far: Trial Chamber I in *Lubanga* held a total of 54 status conferences prior to the start of the trial; Trial Chamber II in *Katanga and Ngudjolo* held 27 status conferences; and Trial Chamber III in *Bemba* held 16 status conferences.

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1. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶¶ 566–67 (Mar. 14, 2012).

2. Rome Statute of the International Criminal Court art. 61(11), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

3. *Id.* art. 64(3)(a).

Many issues need to be resolved in status conferences, and written decisions from the Chamber must be provided before the opening statements are made. These issues include: determining which languages are to be used during the trial,<sup>4</sup> managing any disclosure issues which still exist following the proceedings before the Pre-Trial Chamber,<sup>5</sup> providing for the protection of confidential information,<sup>6</sup> obtaining the cooperation from states in securing the presence of witnesses and evidence,<sup>7</sup> etc. While many procedures are explicitly mentioned for the Trial Chamber to consider in the Court's statutory instruments, Trial Chambers are also entitled to rule on "any other relevant matters"<sup>8</sup> and are generally empowered to exercise the functions of the Pre-Trial Chamber that are relevant and capable of application before the Trial Chamber.<sup>9</sup>

To give some perspective as to how much litigation is generated during this pre-trial portion of the trial phase, approximately 148 written decisions and orders were issued in the *Lubanga* case prior to the trial, 200 in the Katanga case, and 93 in the Bemba case.

### *B. From Opening Statements to the Conclusion of the Trial Proceedings*

After addressing these preliminary matters, the trial proceedings reach the stage where the opening statements are made and the evidence presentation begins. At the commencement of the trial, the Trial Chamber shall read to the accused the confirmed charges.<sup>10</sup> The Trial Chamber must satisfy itself that the accused understands the nature of the charges and must give the accused the opportunity to admit guilt or plead not guilty.<sup>11</sup>

The Presiding Judge of the Trial Chamber gives directions for the conduct of the proceedings.<sup>12</sup> To date, trials have generally followed a procedure where the prosecution presents its case, followed by the victim's case through legal representatives, and concluding with the

4. *Id.* art. 67(1)(f) (trial proceedings must also be available in a language which the accused fully understands and speaks).

5. International Criminal Court (ICC) Rules of Procedure and Evidence §§ 76–84, ICC-ASP/1/3 (2013) [hereinafter Rules], available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf) (setting out the Court's disclosure regime).

6. Rome Statute, *supra* note 2, art. 64(6)(c).

7. *Id.* art. 64(6)(b).

8. *Id.* art. 64(6)(f).

9. *Id.* art. 61(11).

10. *Id.* art. 64(8)(a).

11. *Id.*; see also Rome Statute, *supra* note 2, art. 65.

12. *Id.* art. 64(8)(b); Rules, *supra* note 5, Rule 140.

defense. The Chamber also has the authority to request the submission of all evidence that it considers necessary for the determination of the truth.<sup>13</sup>

During proceedings, Trial Chambers may rule on the admissibility of any evidence.<sup>14</sup> A test has been developed in the jurisprudence for the admissibility of evidence. Under this test, the Trial Chamber examines, on a preliminary basis, whether the submitted materials (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission.<sup>15</sup> As to witnesses presenting evidence before the Trial Chambers, 67 witnesses were heard in *Lubanga* over 204 days of hearings, 54 witnesses in *Katanga & Ngudjolo* over 265 days of hearings, and 40 prosecution witnesses, with an anticipated number of 63 defense witnesses, in *Bemba*.

At the conclusion of the presentation of the evidence, the Trial Chamber goes into deliberations in preparation for issuing its judgment. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings, and this decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.<sup>16</sup>

In the event of a conviction, an appropriate sentence is imposed.<sup>17</sup> This conviction makes victims eligible to receive reparations in ICC proceedings. For this purpose, the Trial Chamber must establish the principles relating to reparations<sup>18</sup> and may make orders for reparations to be paid by the convicted person or through the ICC Trust Fund.<sup>19</sup>

## II. NOTABLE PROCEDURAL DEVELOPMENTS IN THE ICC'S FIRST TRIALS: ACHIEVEMENTS AND CHALLENGES

Now that the basic outline of an ICC trial has been established, it is time to explore some of the biggest developments in the first ten years of the ICC's trial proceedings. The ICC's first trials have already generated a rich and interesting jurisprudence, and I will focus in particular on Trial

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13. Rome Statute, *supra* note 2, art. 69(3).

14. *Id.* art. 69(4). *But see* Rules, *supra* note 5, Rule 63(3) (an admissibility ruling is required when evidence falls within the scope of Article 69(7) of the Statute).

15. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, ¶ 13 (Feb. 9, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1329139.pdf>.

16. Rome Statute, *supra* note 2, art. 74(2).

17. *Id.* art. 78(1).

18. *Id.* art. 75(1).

19. *Id.* art. 75(2).

Chamber rulings that affected the fairness and expeditiousness of the proceedings.

*A. Fairness and Expeditiousness of the Proceedings*

*1. Fairness to the Accused*

The essential provisions for protecting the rights of the accused are explicitly set out in the Rome Statute of the International Criminal Court (“Rome Statute”).<sup>20</sup> Every trial is conducted with these rights in mind. However, the contours of these rights and the logistical challenges they present have played a large role in ICC trial proceedings to date.

Consider the *Banda and Jerbo* proceedings in Trial Chamber IV, where I serve as Presiding Judge, and the right to have trial proceedings unfold in a language the accused fully understands. The accused, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, each only fully understand one language: Zaghawa. These were the concerns that the prosecution presented to the Chamber about conducting a trial in Zaghawa:

- i. Zaghawa is not a written language;
- ii. The Zaghawa vocabulary is limited to no more than 5,000 words, rendering it difficult to translate certain words and concepts from languages of the Court such as English, French and Arabic into Zaghawa;
- iii. Consequently, the relevant material would first have to be transliterated and then read on to audio tapes in Zaghawa;
- ...
- v. The current page-count of material that needs to be disclosed pursuant to Rule 76 is approximately 3700 pages . . . .

Needless to say, the Trial Chamber needed some creativity to resolve these concerns.

With the input of the parties as to how to proceed, several measures were adopted. First, the prosecution was ordered to disclose its signed witness statements in narrative form and in both their original language

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20. See, e.g., Rome Statute, *supra* note 1, art. 67.

and a Zaghawa audio format.<sup>21</sup> Second, in the course of preparing Zaghawa audio versions of witness statements, the prosecution was required to arrange to have the corresponding witness statement page numbers read into the recording.<sup>22</sup> Third, the registry was ordered to prepare a complete audio translation of the Decision Confirming the Charges.<sup>23</sup>

The Trial Chamber's approach is currently being implemented in the *Banda and Jerbo* cases, but it stands as an example of the kinds of challenges the ICC faces and how these challenges are met. It is important to make sure that the logistical challenges presented by the language rights to which the accused are entitled do not affect the fair and effective functioning of the ICC. It is not always possible to predict which languages will be required in ICC proceedings, but quality interpretation and creative problem solving will go a long way to ensure that trials unfold in the manner prescribed in the Rome Statute.

## 2. Regulation 55

Another critical component of ensuring that a trial is fair is that the accused must have a clear understanding of the accusations he or she faces. The Rome Statute has laid an important groundwork for giving clarity in this regard by adopting the Elements of Crimes, which are intended to assist the Court in the interpretation and application of the Court's provisions regarding genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>24</sup> The Elements of Crimes<sup>25</sup> exhaustively present every element for every crime in the Rome Statute. They have proven an invaluable resource.

The ICC cases are framed around charges, and a "charge" consists of both facts and a legal characterization of those facts.<sup>26</sup> It is the prosecution's responsibility to create a "document containing the charges" which is submitted before the Pre-Trial Chamber.<sup>27</sup> It is then for the Pre-

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21. Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-214, Judgment on the appeal of the prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation," ¶ 37 (Feb. 17, 2012).

22. *Id.* ¶ 38.

23. *Id.* ¶ 39.

24. Rome Statute, *supra* note 2, art. 9.

25. Elements of Crimes, Part II-B, ICC-ASP/1/3 (Sept. 9, 2002).

26. See Regulations of the Court of the ICC, Regulation 52, ICC-BD/01-01-04 (2004) [hereinafter Regulations].

27. Rome Statute, *supra* note 2, art. 61(3).

Trial Chamber to determine whether there is sufficient evidence to establish “substantial grounds to believe” that the person committed each of the crimes charged.<sup>28</sup> In its confirmation decision, the Chamber confirms those charges in relation to which it has determined that there is sufficient evidence, if any, and commits the person to a Trial Chamber for trial on the charges as confirmed.<sup>29</sup>

Once the charges are transmitted to the Trial Chamber, the Trial Chamber cannot, strictly speaking, amend them. The prosecution is entitled to seek amendment of charges before the trial has begun, but this must be done with the permission of the *Pre-Trial* Chamber and after giving notice to the accused.<sup>30</sup>

The Trial Chamber, however, is given the power to modify the legal characterization of the facts under Regulation 55 of the Regulations of the Court (“Regulations”). Regulation 55 allows the Chamber to change the legal characterization of the facts, so long as this change does not exceed the facts and circumstances described in the charges and any amendments to the charges.<sup>31</sup> If, at any time during the trial, it appears to the Chamber that the legal characterization of the facts may be subject to change, the Chamber must give notice of this possibility and ensure that the rights of the accused are respected.<sup>32</sup>

This provision has created a lot of litigation in ICC trial proceedings to date. In *Lubanga*, Trial Chamber I gave notice under Regulation 55 before the formal commencement of the trial that it “may delete the international armed conflict ingredient” from the charges which were confirmed as having been committed in an international armed conflict.<sup>33</sup> Trial Chamber I ultimately applied Regulation 55(1) of the Regulations to modify this legal characterization in the *Lubanga* Trial Judgment.<sup>34</sup>

Notice under Regulation 55 was also given in the *Katanga and Ngudjolo* case on the characterization of the armed conflict after the

28. *Id.* art. 61(7).

29. *Id.* art. 61(7)(a).

30. *Id.* art. 61(9).

31. Regulations, *supra* note 26, Regulation 55(1).

32. *Id.* Regulation 55(2)–(3).

33. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ¶ 48 (Dec. 13, 2007).

34. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶¶ 566–67 (Mar. 14, 2012).

conclusion of the Defense case.<sup>35</sup> On 18 December 2012, Trial Chamber II did not rule upon this proposed re-characterization in the *Ngudjolo* Trial Judgment.

More recently, Trial Chamber II, by majority, severed Katanga's case from Ngudjolo's after nearly six months of deliberations and gave notice under Regulation 55(2) that re-characterizing the facts under Article 25(3)(d) of the Rome Statute was under consideration.<sup>36</sup> Judge Christine Van den Wyngaert dissented from this decision, arguing that the proposed re-characterization exceeded the facts and circumstances described in the charges and was unfair to the accused.<sup>37</sup>

In *Bemba*, notice under Regulation 55 was given during the defense case that Trial Chamber III "may modify the legal characterization of the facts so as to consider in the same mode of responsibility the alternate form of knowledge [i.e. 'should have known'] contained in Article 28(a)(i) [which is the Rome Statute's provision regarding the responsibility of commanders and other superiors]."<sup>38</sup>

As the *Katanga* and *Bemba* final judgments have not been issued as of now, it is yet to be determined whether those re-characterizations will actually be made.

The only time to date where Regulation 55 was applied in a manner that was reversed by the Appeals Chamber occurred in the *Lubanga* case. Trial Chamber I, by majority, gave notice after the close of the prosecution's presentation of evidence that it was considering re-characterizing the facts to accord with several additional crimes.<sup>39</sup> The

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35. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-3274, Ordonnance relative aux modalités de présentation des conclusions orales, ¶¶ 13–14 (Apr. 20, 2012); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-3285, Décision sur la mise en oeuvre de l'ordonnance relative présentation des conclusions orales aux modalités de présentation des conclusions orales (May 7, 2012).

36. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-3319, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés (Nov. 21, 2012). Article 25(3)(d) of the Statute provides that a person is criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person "[i]n any other way, contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." Rome Statute, *supra* note 2, art. 25(3)(d).

37. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-3319, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés (Nov. 21, 2012) (dissenting opinion of J. Van den Wyngaert).

38. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-2324, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ¶ 5 (Sept. 21, 2012).

39. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ¶ 35 (July 14, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc710538.pdf>.

Majority interpreted Regulation 55 in a manner that would allow it to exceed the facts and circumstances contained in the charges while giving notice for these possible re-characterizations.<sup>40</sup> The Appeals Chamber reversed, finding that Regulation 55 could not be used to exceed the facts and circumstances contained in the charges and any amendment to those charges.<sup>41</sup> Trial Chamber I decided to suspend the presentation of evidence during the pendency of the appeal.<sup>42</sup>

The litigation around Regulation 55 has highlighted several interesting issues in ICC trial proceedings. First, the existence of Regulation 55 is itself an innovation in international criminal law; there is no comparable provision in the ad hoc tribunals that could provide guidance for the application of the provision. Second, the provision has been described as a way to “close accountability gaps,”<sup>43</sup> but the Court’s practice has already shown that Trial Chambers do not have an unconditional power to re-characterize cases. Third, the provision highlights the shared responsibility of both Pre-Trial and Trial Chambers over a case, as the Trial Chamber can only re-characterize within the factual scope of the charges confirmed by the Pre-Trial Chamber.

How Regulation 55 is applied and its potential consequences on the fairness of the trial will undoubtedly remain an important challenge for ICC trial proceedings in years to come, and making these issues increasingly clear has been and will continue to be important.

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40. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2049, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ¶ 28 (July 14, 2009).

41. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the court,” ¶ 88 (Dec. 8, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf>.

42. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2143, Decision adjourning the evidence in the case and consideration of Regulation 55, ¶ 22 (Oct. 2, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc749476.pdf>.

43. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” ¶ 77 (Dec. 8, 2009).



### 3. *Disclosure Issues (Especially Two Orders of Stay of Proceedings in Lubanga)*

In the Trial Chamber jurisprudence to date, disclosure issues have been the subject of significant litigation. In particular, deficiencies in the prosecution's disclosure to the defense led to two stay orders in the *Lubanga* proceedings.

The first stay of proceedings in *Lubanga* related to material the prosecution obtained under Article 54(3)(e) of the Rome Statute. This provision allows the prosecution not to disclose information obtained by an agreement whereby the information provided would only be for the purposes of generating new evidence.<sup>44</sup> The prosecution had collected significant information pursuant to this provision in *Lubanga*, which it subsequently submitted that it was unable to disclose to the defense or even to the Chamber because the information provider had not consented to disclosure.<sup>45</sup> Trial Chamber I took the view that the trial could not proceed under these conditions, and therefore imposed a stay of proceedings<sup>46</sup> and ordered Mr. Lubanga's release.<sup>47</sup> The Appeals Chamber reversed this decision.<sup>48</sup> Since the information provider had, in the meantime, consented to the disclosure of the information following the stay order being imposed, the Appeals Chamber held that ordering an unconditional release was erroneous.<sup>49</sup>

The second stay of proceedings related to the prosecution's failure to disclose the identity of an intermediary despite repeated orders from Trial Chamber I to do so. Trial Chamber I imposed a stay of proceedings again and ordered Mr. Lubanga's release for a second time.<sup>50</sup> The Appeals Chamber reversed the Trial Chamber I decision, reasoning that the Trial

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44. Rome Statute, *supra* note 2, art. 54(3)(e).

45. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1401, 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, ¶¶ 63–69 (June 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf>.

46. *Id.* ¶¶ 94–95.

47. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1418, Decision on the release of Thomas Lubanga Dyilo, ¶ 35 (July 2, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc522804.pdf>.

48. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1487, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo," ¶ 44 (Oct. 21, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf>.

49. *Id.*

50. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2517-Red, Redacted Decision on 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, ¶ 31 (July 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>.

Chamber should have considered less radical measures (such as sanctioning the prosecution) short of imposing a stay of proceedings.<sup>51</sup> The case resumed in the weeks following the Appeals Chamber's ruling.

The Trial Chambers' measures to protect the accused's access to disclosure reflects an understanding of how important it is for the accused to be as fully informed as possible in order to present a defense.

Although both stays of proceedings in Trial Chamber I were ultimately reversed, the experience of Trial Chamber I reinforced the need to set tight disclosure deadlines and management over redaction procedure.

Since the last stay order in *Lubanga* was imposed, no stay of proceedings has been granted in ICC trial proceedings. This is not to say that such relief has not been requested. In a recent example, defense counsel in the *Banda and Jerbo* case requested a stay of proceedings on grounds that Sudanese authorities have not allowed them to sufficiently investigate their case in Darfur.<sup>52</sup>

Trial Chamber IV recently rejected this request on 26 October 2012.<sup>53</sup> The Chamber reasoned that: (i) "as a general principle, the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defense (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable,"<sup>54</sup> (ii) the *Banda and Jerbo* defense had not substantiated their claim that lines of defense and exculpatory evidence might have become available had they been allowed to enter the Sudan,<sup>55</sup> (iii) as of the time when the decision was rendered, the Chamber was of the view that the disclosure which had been made was not so deficient as to render a fair trial "prospectively impossible."<sup>56</sup>

51. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on 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," ¶¶ 55–61 (Oct. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf>.

52. The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, Defence Request for a Temporary Stay of Proceedings, ¶ 1 (Jan. 6, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1296602.pdf>.

53. Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, ¶¶ 159–160 (Oct. 26, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1498141.pdf>.

54. *Id.* ¶ 100.

55. *Id.* ¶ 108.

56. *Id.* ¶ 114; *see also id.* ¶¶ 121, 129, 135, 144, 150.

#### 4. *Intermediaries*

The issue surrounding intermediaries has had important consequences for the ICC's first trials. In *Lubanga*, the prosecution relied heavily on intermediaries to help it contact witnesses relevant to its investigations in the Ituri Province of the Democratic Republic of Congo.<sup>57</sup> In its Judgment, Trial Chamber I considered that these intermediaries acted without sufficient supervision, and many of the witnesses introduced to the prosecution by intermediaries were found to have given, at least in part, inaccurate or dishonest accounts of what happened to them.<sup>58</sup>

The intermediary issue in *Lubanga* reveals a great deal about the dynamics of the ICC's first cases. Intermediary issues are not contemplated in the Court's statutory instruments; in fact, the words "intermediary" or "intermediaries" are not mentioned in the Rome Statute, Rules, or Regulations of the Court.<sup>59</sup> However, and unlike the predominantly post-conflict investigations done in the former Yugoslavia and Rwanda, the ICC situation countries are often in the midst of ongoing conflicts when the prosecution commences its investigations. These investigative difficulties facing the prosecution create a need to resort to intermediaries for assistance. These issues are also not limited to *Lubanga*, as, in *Bemba*, concerns over improper influence by intermediaries led Trial Chamber III to order that the ICC's Victims Participation and Reparations Section re-interview a number of victims seeking to participate in the proceedings.<sup>60</sup>

However, the prosecution is required to prove the guilt of an accused beyond a reasonable doubt,<sup>61</sup> and the fact that evidence against the accused is difficult to obtain cannot allow for the application of a lesser standard.

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57. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶ 181 (Mar. 14, 2012).

58. *Id.* ¶ 482.

59. As a response to this lack of statutory guidance, the Court is in the process of drafting guidelines governing the relations between the Court and intermediaries.

60. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-2247-Red, Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings," ¶ 28 (July 19, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1442557.pdf>.

61. Rome Statute, *supra* note 2, art. 66.

### 5. Cooperation

State cooperation is critical for the successful functioning of the ICC and, although also being an issue at the pre-trial stage, cooperation in trial proceedings is very important.

Part 9 of the Rome Statute covers State cooperation. States Parties have the general obligation to cooperate fully with the Trial Chamber during trial proceedings.<sup>62</sup> The Trial Chamber may make a request for cooperation, either to States Parties, to non-States Parties that have made arrangements and agreements of cooperation with the Court, or to any appropriate international or regional organization.<sup>63</sup> Cooperation requests can cover a wide variety of subject matter.<sup>64</sup>

In *Banda and Jerbo*, the defense requested the Chamber's assistance in acquiring several documents from the African Union.<sup>65</sup> As an international organization, the African Union itself is not a party to the Rome Statute. The Court, however, may ask any intergovernmental organization to provide information or documents under Article 87(6) of the Rome Statute, and the defense relied upon this provision as the basis for its request.<sup>66</sup>

Trial Chamber IV, which was faced with this request, developed a test for evaluating it. The Chamber considered that it might seek cooperation from intergovernmental organizations when the requirements of (i) specificity, (ii) relevance, and (iii) necessity have been met.<sup>67</sup> In applying this test, the Chamber found that: (i) sometimes the defense requested broad categories of documents which were not sufficiently specific to justify sending a cooperation request,<sup>68</sup> (ii) other documents requested were not material to the proper preparation of the defense,<sup>69</sup> and (iii) it was unnecessary to send a request to the African Union for the relevant, specifically identified documents because the defense had not made sufficient efforts to obtain this same information from the prosecution.<sup>70</sup>

62. *Id.* art. 86.

63. *Id.* art. 87; Regulations, *supra* note 26, Regulation 107.

64. *See* Rome Statute, *supra* note 2, art. 93.

65. Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-170, Decision on "Defense Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union," ¶ 1 (July 1, 2011).

66. *Id.* ¶ 7.

67. *Id.* ¶ 14.

68. *Id.* ¶ 20.

69. *Id.* ¶ 24; *see also* Rules, *supra* note 5, Rule 116(a).

70. Case No. ICC-02/05-03/09-170, ¶¶ 27–28.

As can be seen, the ICC Trial Chambers are aware of the amount of time and effort states and intergovernmental organizations require for complying with cooperation requests. Such requests will not be sent without careful consideration, and Trial Chambers have been very appreciative of the efforts made to comply with these requests when they are sent.

### 6. *Sentencing*

Even when a case progresses to judgment and leads to a conviction of the accused, the Chamber's duty to ensure the fairness of the proceedings does not end. When imposing a sentence on a convicted person, the Chamber needs to make a careful case-by-case assessment to ensure for an appropriate punishment. Chambers are given a multitude of factors to consider in the Court's statutory instruments, including the gravity of the crime and the individual circumstances of the convicted person.<sup>71</sup>

Trial Chamber I issued the first sentence in ICC trial proceedings in the *Lubanga* case. Mr. Lubanga was given a fourteen-year sentence for conscripting, enlisting, and using child soldiers in a non-international armed conflict.<sup>72</sup> The Chamber indicated that it was being very careful in not "double-counting" factors which were relevant for determining the gravity of the crime, such as the defenselessness of children, as aggravating circumstances for sentencing purposes.<sup>73</sup> Judge Elizabeth Odio Benito filed a dissenting opinion arguing for a higher sentence of 15 years.<sup>74</sup>

The Appeals Chamber is currently considering this decision, as both parties are appealing against the sentence imposed. As time goes by, further issues related to the fair imposition of a sentence are likely to arise whenever a conviction is imposed.

### 7. *Conclusion as to Fairness and Expeditionness*

After exploring all of the different areas of ICC trial proceedings which can affect the fairness of the trial for the accused, it is clear that the Court has taken the rights of the accused very seriously in the first ten years of

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71. Rome Statute, *supra* note 2, art. 78(1).

72. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 107 (July 10, 2012), <http://www.icc-epi.int/iccdocs/doc/doc438370.pdf>.

73. *Id.* ¶¶ 35, 78.

74. *Id.*

its existence. As seen with the two stay orders imposed by the Trial Chamber in *Lubanga*, trial chambers are prepared to end the trial and release defendants from detention if their rights are not being sufficiently respected.

A consequence of all of this careful management by the Chamber over the trial is that ICC proceedings have been criticized for taking too long. The decision issuing a warrant of arrest against Mr. Lubanga was issued on 24 February 2006 and his first appearance at the Court was on 20 March 2006. On 29 January 2007, the decision on the confirmation of charges was issued, sending the case to trial. The trial judgment itself came out on 14 March 2012, just about six years after Mr. Lubanga's first appearance before the Court.

Six years is a long time to complete the ICC's first trial, and improvement can certainly be made in increasing the speed of trial proceedings, but it is worth mentioning several points as to how long ICC trials take.

First, the longest delays in the *Lubanga* trial proceedings were caused by the two stay of proceedings orders and decisions regarding whether Regulation 55 of the Regulations should be triggered. All of these issues delayed Mr. Lubanga's trial, but they were also all critical issues which Trial Chamber I identified as needing to be resolved in order for the trial to be fair.

Second, *Lubanga* is the completion of the ICC's first trial, however, due to the role of the Pre-Trial Chamber in filtering cases for trial; four other suspects had their cases dismissed before trial.<sup>75</sup> Not every case needs to go to trial in order to be resolved, and the institution's track record improves upon considering that these cases have also been determined.<sup>76</sup>

Third, justice simply takes time, especially in international proceedings.

75. See Prosecutor v. William Samoei Ruto et al., Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012) (Henry Kiprono Kosgey's case dismissed); Prosecutor v. Francis Kirimi Muthaura et al., Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 26, 2012) (Mohammed Hussein Ali's case dismissed); Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-465-Red, Decision on the confirmation of charges (Dec. 16, 2011); Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-243-Red, Decision on the confirmation of charges (Feb. 8, 2010).

76. But see Rome Statute, *supra* note 2, art. 61(8) (subsequent confirmation may be requested if the request is supported by additional evidence).

And, fourth, the speed of the trials is improving. For instance, the *Bemba* trial, which is in the concluding stages of the defence case, is estimated to take less than five years to complete.

*B. Victim Participation and Reparations in the Trial Chamber Jurisprudence*

The last area related to ICC trial proceedings relates to the role victims play in the proceedings. The issue of victim participation clearly plays a role in the fairness and expeditiousness of the trial just like all of the other issues identified previously, but because victim participation is such an important innovation in the Rome Statute, it deserves some special attention.

*1. Victim Participation*

At any time during the trial, victims may seek to participate where their personal interests are affected.<sup>77</sup> The Trial Chamber shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>78</sup> As to how many victims are participating in ICC trials, 129 victims were granted the right to participate in *Lubanga*, 366 in *Katanga and Ngudjolo*, and 5,229 in *Bemba*.

The five Trial Chambers have managed how victims are approved to participate in different ways. Trial Chambers I, II, and III have received victim applications to participate in the proceedings and reviewed them on a case-by-case basis following the procedure set out in Rule 89 of the Rules.<sup>79</sup> In *Bemba*, for example, Trial Chamber III has reviewed over five thousand victim applications.<sup>80</sup> By contrast, Trial Chamber V recently decided that the applications described in Rule 89 would only need to be submitted for review for those who wish to participate individually by appearing directly before the Chamber.<sup>81</sup> All other victims who wish to participate without appearing before the Chamber (i) are permitted by Trial Chamber V to present their views and concerns through a common

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77. Rome Statute, *supra* note 2, art. 68(3).

78. *Id.*

79. Rules, *supra* note 5, Rule 89.

80. Prosecutor v. Ruto, Case No. ICC-01/09-01/11-460, Decision on victims' representation and participation, ¶ 30 n.21 (Oct. 3, 2012) (internal citations omitted).

81. *Id.* ¶ 32.

legal representative and (ii) do not need to go through an application procedure.<sup>82</sup> A simplified registration procedure applies to this latter group of persons.<sup>83</sup>

Trial Chambers also exercise considerable discretion in managing how victims participate in proceedings once the Chamber permits them to do so. The Appeals Chamber has said that victims may lead evidence pertaining to the guilt and/or innocence of the accused.<sup>84</sup> Between the close of the prosecution's case and the start of the defense case, the legal representatives for victims were authorized to call three victims to testify in *Lubanga*,<sup>85</sup> two in *Katanga and Ngudjolo*,<sup>86</sup> and two in *Bemba*.<sup>87</sup> It is worth mentioning, however, that the victims testifying in *Lubanga* ultimately had their victim status revoked in the final judgment because their accounts contained internal inconsistencies, which undermined their credibility.<sup>88</sup> In addition to giving evidence, Trial Chamber III was the first to allow victims in trial proceedings to appear before the Chamber during trial solely to present their views and concerns, letting three such victims appear by video-link before the start of the defense case.<sup>89</sup> It has been emphasized that, regardless of how victims participate in proceedings, the right to lead evidence lies primarily with the parties, and it is the

82. *Id.* ¶ 25.

83. *Id.* ¶¶ 48–55.

84. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 94 (July 11, 2008).

85. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2032, Order issuing public redacted version of the "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial" (July 9, 2009).

86. See Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2517, Décision aux fins d'autorisation de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09 (Nov. 9, 2010); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2674-tENG, Decision on the notification of the removal of Victim a/0381/09 from the Legal Representative's list of witnesses (Aug. 8, 2011); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2699, Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant legal (Aug. 16, 2011).

87. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2138, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ¶ 55 (Feb. 23, 2012).

88. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶¶ 499–502 (Mar. 14, 2012).

89. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2138, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ¶ 55 (Feb. 23, 2012); see also *id.* ¶¶ 19–20 (distinction between "giving evidence" and "presenting views and concerns").



*prosecution's* duty to prove the guilt of the accused at trial beyond reasonable doubt.<sup>90</sup>

Balancing the victims' right to participate in ICC proceedings with the right of the accused to a fair and expeditious trial is still a work in progress at the ICC, but the Court's ability to achieve what it has in giving victims an opportunity to meaningfully participate in proceedings has been a highlight of the ICC's first ten years.

## 2. Reparations

Another significant feature of the Rome Statute is that it provides for reparations. Once the person concerned has been convicted, the Trial Chamber may make a reparations order against him or her or in respect to victims.<sup>91</sup> The first such decision regarding the principles relating to reparations was recently issued in the *Lubanga* case.<sup>92</sup>

In this decision, Trial Chamber I endorsed a five-step implementation plan for reparations:

- First, the Trust Fund for Victims (“TFV”), the Registry, the OPCV and a multidisciplinary team of experts should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed).
- Second, there should be a process of consultation in the localities that are identified.
- Third, an assessment of harm should be carried out during this consultation phase by the team of experts.
- Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations.

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90. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 93–95 (July 11, 2008).

91. Rome Statute, *supra* note 2, art. 75.

92. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations (Aug. 7, 2012).

- The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.<sup>93</sup>

Trial Chamber I also held that all victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings.<sup>94</sup>

This decision, which is currently under review by the Appeals Chamber, demonstrates some of the challenges to come in this important area. The Court has a limited number of resources to manage the reparations procedure and distribute reparations awards. The ICC cases tend to involve criminality on a mass scale, and there is inevitably no amount of money or reparation that could adequately compensate for the harm suffered. These issues will arise again and again in subsequent reparations decisions and remain one of the challenges the Court will face far into the future.

### III. CONCLUSION

To conclude, the ICC trial proceedings have covered an impressive amount of ground in ten years. As the Court's carefully negotiated statutory instruments have been applied, lessons have been learned, challenges have arisen, and some have been met.

Above everything else, it is an enormous achievement that this Court exists and has been functioning in the world for ten years. The presence of the Court has the potential to deter future international crimes and influence domestic proceedings for international crimes. The past ten years of the ICC have contributed a great deal to international criminal justice, and the lessons learned will reverberate for years to come.

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93. *Id.* ¶ 282.

94. *Id.* ¶ 187.