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THE INTERNATIONAL CRIMINAL COURT IN ACTION: CHALLENGES IN FIGHTING IMPUNITY

I. Introduction

The Rome Statute of the International Criminal Court (ICC), which came into force on 1 July 2002,¹ represents today the ultimate example of the evolution of international criminal law, envisaging an enhanced international public order in which perpetrators of the “most serious crimes of international concern” are brought to justice. In 2008, Professor Otto Triffterer stated “so far we have more achievements than ever before; and this is the highest peak of the mountain we have climbed within the last hundred years.”²

Now, more than ten years since the entry into force of the Rome Statute, we cannot rest atop this mountain, but must work hard to reach new heights in order to continue building this fully functioning judicial institution on the basis of a realistic vision of a system of international justice. In 2015, the last five of the judges who were appointed to the ICC at its initiation in 2003 will complete their terms of appointment. By this time, the first appeals judgment will have been handed down in the case of *Prosecutor v. Lubanga*. Now, more than ever, we must begin thinking about the ICC’s continuity and must look forward to addressing past and present challenges faced by the ICC.

After an overview of the history of the ICC, the first section will provide a brief introduction to the ICC’s legal framework, and the position of this

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¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 United Nations Treaty Series 38544 (Rome Statute).

² O. Triffterer, *The Court in Danger? Future Perspectives for International Criminal Law and its Enforcement Mechanisms*, [in:] C. Burchard, O. Triffterer and J. Vogel (eds), *The Review Conference and the Future of the International Criminal Court: Proceedings of the First AIDP Symposium for Young Penalists in Tübingen, Germany, co-organised by the AIDP YP Committee*, Dordrecht, Kluwer Law International, 2010, p. 9, at p. 42.

framework as a testament to diversity and compromise by States Parties. The second section of this paper will outline the jurisdiction of the ICC and the conditions under which it can exercise this jurisdiction, specifically noting issues that have arisen regarding the practice of self-referrals and the involvement of the United Nations Security Council. In the third section, I will discuss the ICC's judicial process of determining cases, from the pre-trial stage to the trial and appeals stages. Within this section, the current situations and cases before the ICC will be referred to and specific challenges with regard to this judicial process, including the role of the Pre-Trial Chamber, the length of proceedings, and the rules of disclosure, will be discussed. As the issue of victim participation at the ICC traverses all of the judicial stages, this will be discussed in a separate sub-section within this section. In the fourth section, I focus on the development of specific essential aspects of the Rome Statute, specifically; the principle of complementarity and the application of article 21 of the Rome Statute. Finally, I will emphasise the absolute need for the cooperation of States Parties in order for the ICC to fulfil its role in ending impunity for individuals who commit the most serious crimes of international concern.

The purpose of this article is to outline the history and context of these challenges, not to provide solutions – this will be the task of the Court and of the States Parties to the Rome Statute in the coming years, assisted by an interested public, including contributing academics and national practitioners.

II. The Establishment of the ICC

The concept of a global criminal court is often traced back to the 19th century when Gustav Moynier, a founding member of the International Committee of the Red Cross, called for the creation of an international court in response to the atrocities committed during the Franco-Prussian War in 1870.³ However, the legal bedrock for the establishment of the ICC can be traced back in earnest to the end of World War II when, through the Nuremberg⁴ and Tokyo⁵ trials, the notion of individual responsibility for perpetrators of grave crimes in times of war first became a reality. While this concept of bringing perpetrators of international crimes to justice lost momentum during the Cold War, its end ushered in a new era of international criminal justice. The United Nations Security

³ M. Glasius, *The International Criminal Court: A global civil society achievement*, Routledge, Abingdon, Oxon 2006, at p. 6.

⁴ *Charter of the International Military Tribunal*, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 United Nations Treaty Series 251.

⁵ *Charter of the International Military Tribunal for the Trial of the Major War Criminals in the Far East*, 19 January 1946, special proclamation issued by Douglas MacArthur.

Council established in 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY)⁶ and in 1994 a similar tribunal for Rwanda (ICTR).⁷

The Rome Statute found the favour of the plenipotentiaries of 120 States on 17 July 1998 after a conference that lasted three weeks and a preparatory period of four years. The Rome Statute is the most comprehensive basis of any international court and consists of 128 articles that regulate in detail not only the scope of the ICC's jurisdiction, but also matters relevant to the ICC's procedure, its cooperation with States and related matters. Within only four years, 60 States had ratified the Rome Statute so that it could enter into force on 1 July 2002. Poland was one of these States that, by its early ratification,⁸ actively promoted the entry into force of the Rome Statute and thereby its goals.

The entry into force of the Rome Statute ushered in a new direction in the adjudication of international crimes.⁹ Unlike the ICTY and ICTR, the ICC is a permanent court that operates independently from the United Nations and is not subject to the authority of a single state.¹⁰ The ICC investigates and prosecutes the alleged perpetrators of the most serious crimes of international concern, but only where the State Parties to the Rome Statute themselves do not investigate or, if they investigate or prosecute, are unwilling or unable to do so.¹¹ This principle of complementarity is one of the cornerstones of the Rome Statute,¹² and ensures that the ICC is a court of last resort. The very existence of the ICC is a signpost in the international landscape that marks the fact that the international community is there if States do not take action.

Having started in 2002 in a former Dutch Telecom building, the ICC currently has more than 700 staff members from approximately 90 countries, has field offices

⁶ *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993, Security Council Resolution 827 (1993) (ICTY Statute).

⁷ *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Security Council Resolution 955 (1994) (ICTR Statute).

⁸ Poland ratified the Rome Statute on 12 November 2001. See United Nations Treaty Collection, "Status as at 07-11-2013 05:09:46 EDT: Rome Statute of the International Criminal Court", 7 November 2013, accessed at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en. For an official translation of the Rome Statute into Polish, see Rzeczypospolitej Polskiej: Internetowy System Aktów Prawnych, "Rzymski Statut Międzynarodowego Trybunału Karnego sporządzony w Rzymie dnia 17 lipca 1998 r.", 9 May 2003, accessed at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20030780708>.

⁹ Press Release, *United Nations Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, 17 July 1998, U.N. Press Release UJROM122, accessed at: <http://www.un.org/icc/pressrelrom22.htm>.

¹⁰ Rome Statute. See also ICTY Statute; ICTR Statute; David Tolbert and Andrew Solomon, "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies" (2006) 19 *Harvard Human Rights Journal* 29, 38.

¹¹ Rome Statute, art. 17.

¹² Rome Statute, preamble (emphasizing that the ICC "shall be complementary to national criminal jurisdictions"), arts 1, 17.

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in five countries, and has built two fully operative E-courtrooms.¹³ By the middle of 2013, only 11 years after the Rome Statute's entry into force, 122 countries have become States Parties.¹⁴ All of the continents of the world are represented; however, some powerful countries are not parties, including three of the Security Council's veto powers, the United States, China, and the Russian Federation.

The adoption of the Rome Statute triggered the creation of numerous hybrid criminal courts which were tasked to deal with crimes over which the ICC has jurisdiction. These courts have both domestic and international characteristics¹⁵ and were created in East Timor,¹⁶ Kosovo,¹⁷ Sierra Leone,¹⁸ and Cambodia.¹⁹ Another hybrid tribunal, the Special Court for Lebanon,²⁰ only has jurisdiction over the crime of terrorism. More recently, domestic jurisdictions have started to adjudicate such crimes in a more concrete manner, be it in the countries where the crimes were committed²¹ or in other countries where the alleged perpetrators reside.²²

¹³ International Criminal Court, "The Court Today", 1 November 2013, accessed at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>.

¹⁴ International Criminal Court, "The States Parties to the Rome Statute", accessed at: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

¹⁵ Tolbert and Solomon, above n 10, p. 38 (describing "hybrid" courts as those established within a country, yet "composed of international judges and prosecutors working together with their domestic counterparts").

¹⁶ United Nations Transitional Administration in East Timor, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, 6 June 2000, UNTAET/REG/2000/15.

¹⁷ United Nations Mission in Kosovo, *On Assignment of International Judges/Prosecutors and/or Change of Venue*, 15 December 2000, UNMIK/REG/2000/64.

¹⁸ *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, 2178 United Nations Treaty Series 38342.

¹⁹ United Nations, *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003.

²⁰ *Statute of the Special Tribunal for Lebanon*, 30 May 2007, Security Council Resolution 1757 (2007).

²¹ For example, in July 2008 Uganda established the International Crimes Division of the High Court of Uganda in order to try perpetrators of war crimes and crimes against humanity: see The Judiciary: The Republic of Uganda, "International Crimes Division", accessed at:

http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html. In 2009, Bangladesh set up the International Crimes Tribunal to investigate and prosecute the perpetrators of the 1971 genocide committed by the Pakistan Army and its local collaborators during the Bangladesh liberation war: see Bangladesh, *International Crimes (Tribunals) (Amendment) Act 2009*.

²² For example: in The Netherlands, five persons were convicted of international crimes from 2001 to 2009; in Belgium, seven persons were convicted in relation to the Rwandan genocide from 2001 to 2009; in Germany, four individuals were convicted in relation to crimes committed in the former Yugoslavia; and in Switzerland, one person was convicted in relation to crimes committed during the Rwandan genocide. See Joseph Rikhof, "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity", 20(1) *Criminal Law Forum* (2009), p. 1, at pp. 20–28.

III. The legal framework

In 2002, at the first Assembly of States Parties after the entry into force of the Rome Statute, the States adopted the Elements of Crimes²³ and the Rules of Procedure and Evidence²⁴. They are part of the ICC's legal framework,²⁵ and, in the same way as the Rome Statute, are a testament to diversity and compromise. As was explained by Professor Otto Triffterer:

A Court at any price was not desirable. However, a Court based on [sic] universally tolerable compromises with which everybody can live, because it is equipped to promote theoretical development and endowed with a capacity for practical enforcement aimed at avoiding impunity without derogation, represents a significant step forward.²⁶

The Rome Statute was negotiated by 160 countries²⁷ and is interpreted by judges from numerous legal systems.²⁸ In order to reach consensus, the provisions of the Rome Statute were deliberately drafted in an open and ambiguous manner, with the drafters refraining from determining whether proceedings need to follow 'common law' or 'civil law' (Romano-Germanic) systems. Thus, resolving legal issues inbuilt in the Rome Statute has presented many challenges as the judges and States Parties each have different perceptions of how the legal framework should be applied in the context of international criminal proceedings.

Ultimately, the Rome Statute includes elements of both common law and civil law traditions with many aspects of the ICC's legal framework combining elements from different domestic systems. For example, while the ICC Prosecutor is responsible for investigations, he or she also has a duty to "investigate incriminating and exonerating circumstances equally" under article 54(1)(a) of the Rome Statute. In addition, while the parties are permitted to present their evidence at trial, article 69(3) of the Rome Statute also grants the Trial Chamber the authority "to request the submission of all evidence that it considers necessary for the determination of the truth." Thus, at the ICC, unlike many common law legal systems, the parties do not completely control the

²³ *The Elements of Crimes*, adopted by the Assembly of States Parties, 9 September 2002, ICC-ASP/1/3.

²⁴ *Rules of Procedure and Evidence of the International Criminal Court*, 9 September 2002, ICC-ASP/1/3. For an unofficial translation of the Rules of Procedure and Evidence into Polish, see Ministerstwo Sprawiedliwości: Biuletyn informacji publicznej, accessed at: http://www.bip.ms.gov.pl/Data/Files/_public/bip/prawa_czl_onz/rules_of_procedure.doc.

²⁵ Rome Statute, art. 21(1)(a).

²⁶ O. Triffterer, *Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, C. H. Beck, 2nd ed, München 2008, p. 15, at p. 43.

²⁷ Ph. Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, "Washington University Global Studies Law Review" 2007, 6, 501, 504.

²⁸ Rome Statute, art. 36(8)(a)(i)-(ii).

presentation of the evidence; the Trial Chamber itself has the power to request the submission of evidence.²⁹

Evidence of the compromise that was reached by States Parties can be found in all aspects of the Rome Statute. For example, the provisions of the Rome Statute dealing with complementarity and the hierarchy of laws to be applied by the Chambers (Articles 17 and 21 of the Rome Statute) emerged out of heated debates surrounding different conceptions of the role of the ICC. These provisions will be discussed in greater detail in the fifth section of this paper.

Different conceptions of the role of the ICC, and whether it should be a court with ‘teeth’ to try perpetrators of the most serious crimes of international concern, are also subsumed within the provisions that dictate when the ICC can actually act; in other words, when the ICC has ‘jurisdiction’ over a crime. This will be discussed in the next section of the paper.

IV. Jurisdiction of the ICC

The ICC’s ‘subject-matter jurisdiction’, namely, the crimes within the jurisdiction of the Court, is dealt with in article 5 of the Rome Statute which lists the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. These crimes are defined in articles 6 to 8*bis*. Its temporal jurisdiction is delimited by article 11.³⁰ This provision states that the ICC’s temporal jurisdiction can only commence on the day the Rome Statute entered into force, i.e. on 1 July 2002. However, for States that ratified the Rome Statute subsequently, the jurisdiction is limited to the date on which the ratification took effect, except if that State extended by declaration the temporal applicability of the Rome Statute in relation to its territory and nationals. Its jurisdiction is further limited by articles 12 and 26 that clarify that only persons above the age of 18 years, who are either nationals of States Parties or who allegedly committed crimes on the territory of States Parties, may be subject to the jurisdiction of the ICC.³¹

²⁹ Rome Statute, art. 64(6)(d), 69(3); *see also* Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’”, 16 July 2010, ICC-01/04-01/07-2288 (OA 11) (holding that “in principle, evidence pertaining to the role of the accused may fall within the scope of evidence that the Trial Chamber considers necessary for the determination of the truth” within the meaning of articles 64(6)(d) and 69(3) of the Rome Statute).

³⁰ *See* Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772 (OA4), paras 21–23.

³¹ *See also* Appeals Chamber, *Prosecutor v. Laurent Koudou Gbagbo*, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings”, 12 December 2012, ICC-02/11-01/11-321 (OA2) (the Appeals Chamber determined that,

Under the Rome Statute, the ICC may exercise its jurisdiction if a situation is referred to the ICC by either a State Party or the United Nations Security Council, or when the Prosecutor receives authorisation from the Pre-Trial Chamber to investigate on his/her own initiative (*proprio motu*).³² The United Nations Security Council can also refer a situation to the ICC and this includes situations where the crimes were not allegedly committed by a national of a State Party or on the territory of a State Party. Soon after taking office, the Prosecutor adopted a policy of “inviting and welcoming voluntary referrals by territorial states” who were involved in internal conflicts.³³ Indeed, the first two investigations formally initiated by the Prosecutor in 2004 – Northern Uganda and the Democratic Republic of Congo (DRC) – were triggered by state referrals under article 14 of the Rome Statute.³⁴ Thereafter, the Central African Republic (CAR) in December 2004 and Mali in July 2012 referred situations in their own countries, and the Union of the Comoros in May 2013 referred the situation in relation to vessels shared with other states.³⁵ The Prosecutor initiated investigations in relation to all of these situations, except with respect to the referral by the Union of the Comoros.

The question that arises in relation to these self-referrals is whether the practice falls within the meaning of article 14 of the Rome Statute and, if so, what are the limits of such a referral. Article 14 of the Rome Statute grants States Parties the authorisation to refer situations to the ICC. While this authorisation appears to be unrestricted, the sixth paragraph of the preamble to the Rome Statute speaks of “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” While commentators have noted that reference to ‘its jurisdiction’ is ambiguous³⁶, there is an issue with reconciling this duty with the triggering of an international investigation through

although Côte D’Ivoire was not a party to the Rome Statute, its declaration in 2003 to accept the jurisdiction of the court covered crimes committed over the post-2010 election period).

³² Rome Statute, arts. 13, 15.

³³ International Criminal Court, Office of the Prosecutor, “Report on the Activities Performed During the First Three Years (June 2003 – June 2006)”, 12 September 2006, accessed at: http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf, p. 7.

³⁴ *Ibid.*; ICC Press Release, “The Office of the Prosecutor of the International Criminal Court opens its first investigation”, 23 June 2004, ICC-OTP-20040623-59; ICC Press Release, “Prosecutor of the International Criminal Court opens an investigation into Northern Uganda”, 27 July 2004, ICC-OTP-20040729-65; see also Presidency, *Situation in the Democratic Republic of Congo*, “Decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I”, 5 July 2004, ICC-01/04-1; Presidency, *Situation in Uganda*, “Decision assigning the situation in Uganda to Pre-Trial Chamber II”, 5 July 2004, ICC-02/04-1.

³⁵ International Criminal Court, above n 13, pp. 2–4.

³⁶ T.N. Slade and R.S. Clark, *Preamble and Final Clauses*, [in:] R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Transnational Publishers, The Hague–London–Boston 1999, p. 427.

a self-referral under article 14.³⁷ Despite these concerns and despite the fact that it may not have been contemplated by the participants in the drafting process or by the various commentators at the time of the drafting of the Rome Statute³⁸, it has since been held by Pre-Trial Chamber I in *Prosecutor v. Lubanga*, that the practice of a State referring a case *against itself* “appears consistent with the ultimate purpose of the complementarity regime.”³⁹

A supplementary concern is that the practice of self-referral may become a political tool that is used by governments who wish to undermine their opposition. In the situation in northern Uganda, the Prosecutor, aware of this concern, interpreted the reference to “the situation concerning the Lord’s Resistance Army” as covering “crimes within the situation of northern Uganda by whomever committed”.⁴⁰

Article 13(b) of the Rome Statute grants the Security Council the power to refer a situation to the ICC where there is evidence that crimes have been committed within the ICC’s jurisdiction. This power has been met with on-going reservations regarding the loss of independence of the ICC, the capacity for referrals that are based on political rather than legal factors, and questions about whether the Security Council has competence in matters of international criminal law under the United Nations Charter.⁴¹ Furthermore, article 16 of the Rome Statute grants the Security Council the power to suspend any investigation or proceedings in progress before the ICC for a renewable period of twelve months. This article has been met with criticism from commentators who tout it as a serious example of political interference.⁴² However, thus far, the Security Council has not resorted to using this measure with respect to a specific situation under investigation or a specific case under prosecution before the Court.⁴³

The Security Council has referred two situations to the Court – the situation in Darfur, Sudan in March 2005 and the situation in Libya in February 2011.⁴⁴

³⁷ C. Kress, ‘Self-Referrals’ and ‘Waivers of Complementarity’: *Some Considerations in Law and Policy*, “Journal of International Criminal Justice” 2004, 2, 944, 945.

³⁸ *Ibid.*, p. 946.

³⁹ Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, ICC-01/04-01/06-8, para. 35.

⁴⁰ Letter from the Chief Prosecutor, 17 June 2004, Annex 1 to “Decision Assigning the Situation in Uganda to Pre-Trial Chamber II”, 5 July 2004, ICC-02/04-1-Anx1; *see also* Kress, above n 37, pp. 946, 947.

⁴¹ *See, for e.g.*, L. Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, [in:] R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague 1999, p. 143.

⁴² N. Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, “European Journal of International Law” 2005, 16(2), 239.

⁴³ On 15 November 2013, the United Nations Security Council rejected a resolution from the African Union to suspend the trial of Kenyan President Uhuru Kenyatta and Deputy President William Ruto: *see* United Nations News Centre, ‘Security Council: bid to defer International Criminal Court cases of Kenyan leaders fails’, 15 November 2013, accessed at: <http://www.un.org/apps/news/story.asp?www.wmo.int/www.iaea.org/html/www.sealthedeal2009.org/petition/realfile/html/story.asp?NewsID=46499&Cr=criminal+court&Cr1=>.

⁴⁴ International Criminal Court, above n 13, pp. 2–4.

Neither Sudan nor Libya are State Parties to the Rome Statute and therefore, it appears that Part 9 of the Rome Statute regulating the cooperation by States is not directly applicable to them. Accordingly, the Security Council, acting under Chapter VII of the United Nations Charter, obliges them to cooperate with the Court in its resolutions.⁴⁵

One criticism that has been directed towards the ICC is based on the fact that all of the situations that have been referred to the ICC pertain exclusively to African States. However, the Prosecutor, on authorisation of the Pre-Trial Chamber, has only twice opened investigations *proprio motu*; in Kenya in relation to the 2007/2008 post-election violence in that country, and in Côte d'Ivoire in relation to alleged crimes within the ICC's jurisdiction committed since 19 September 2002.⁴⁶ All other situations have been triggered by self-referrals of African States or Security Council resolutions.

Thus, the Court can currently exercise its jurisdiction in relation to nine situations, five referred by States Parties through the process of self-referrals, two referred by the Security Council and two initiated by the Prosecutor. The next section will discuss the cases that have arisen out of each of these situations and their progress throughout the different stages of the ICC's judicial process, from the pre-trial stage to the appeals stage.

V. The Judicial Process at the ICC

To date,⁴⁷ 21 cases have been brought before the ICC in relation to the nine situations within the ICC's jurisdiction. Five cases are currently at the trial stage and two at the appeals stage. The ICC has issued a total of 27 warrants of arrest and nine summonses to appear.⁴⁸ There are currently five persons in the custody of the Court.⁴⁹ These situations and cases will be discussed throughout the following sections, in line with the stage of proceeding relevant to each case – be it at the pre-trial, trial or appeals stage.

Article 34 (b) of the Rome Statute provides that the ICC shall be comprised of an Appeals Division, a Trial Division and a Pre-Trial Division. The Appeals Division is composed of the President and four other judges, and the Trial and Pre-Trial Divisions are each composed of no less than six judges.⁵⁰ Judges are assigned to the divisions in accordance with their expertise in criminal law and

⁴⁵ United Nations, Security Council, *Resolution 1593*, 31 March 2005, S/RES/1593 (2005); United Nations, Security Council, *Resolution 1970*, 26 February 2011, S/RES/1970 (2011).

⁴⁶ International Criminal Court, above n 13, pp. 2–4.

⁴⁷ The statistics in this article reflect the position of the ICC as of 20 December 2013.

⁴⁸ All nine appeared voluntarily before the ICC: International Criminal Court, above n 13, pp. 2–4.

⁴⁹ DRC: Thomas Lubanga Dyilo, Germain Katanga and Bosco Ntaganda; CAR: Jean-Pierre Bemba Gombo; Cote d'Ivoire: Laurent Gbagbo: *Ibid.*

⁵⁰ Rome Statute, article 39(1).

procedure or international law, with the judges of the Trial and Pre-Trial Divisions coming from a predominantly criminal law background.⁵¹ The judicial functions of the Chambers within these divisions will be discussed in the following subsections.

A. The Pre-Trial Chamber

The Pre-Trial Division plays a unique role at the ICC. In accordance with regulation 46 (2) of the Regulations of the Court,⁵² the Pre-Trial Chambers are assigned with specific situations and in charge of any ‘matter, request or information’ arising out of the situations assigned to it. The functions of the Pre-Trial Chamber are either carried out by three judges or a single judge of that Chamber.⁵³ The Pre-Trial Chamber is not an investigative chamber as in the French or Spanish legal systems; rather, its role is to preside over all processes and proceedings assigned to a judicial authority during the investigations and prosecutions that occur before a person charged is committed to the Trial Chamber for trial.

The more general role of the Pre-Trial Chamber is laid down in article 57 (3) of the Rome Statute. It includes issuing summonses and warrants on the request of the Prosecutor, safeguarding the interests of victims and witnesses, particularly their safety, physical and psychological well-being, as well as their dignity and privacy,⁵⁴ protecting confidential information, and seeking the cooperation of States, where necessary.

The precise scope of the role and responsibilities of the Pre-Trial Chamber during the investigative stage of proceedings is something that will need to be further refined by the ICC in its jurisprudence. In particular, a number of issues need to be addressed with respect to the division of powers between the Prosecutor and the Pre-Trial Chamber. While it is clear that the responsibility for the investigation lies with the Prosecutor, there are many outstanding questions that the ICC will need to resolve regarding the powers of the Pre-Trial Chamber in confirming charges, or allowing amendments to charges, as well regarding when an investigation needs to conclude.⁵⁵

Another area of concern with regard to the Pre-Trial Chamber is the duration of pre-trial proceedings. On average, out of the nine completed confirmation

⁵¹ Rome Statute, article 39(1).

⁵² *Regulations of the Court*, 26 May 2004, ICC-BD/01-01-04, last amended on 14 November 2007, ICC-BD/01-02-07 (Regulations of the Court).

⁵³ Rome Statute, article 39(2)(b)(iii).

⁵⁴ For this purpose, the Pre-Trial Chamber may issue such orders as are necessary and take any other measure as may be required, taking into account the rights of the defence.

⁵⁵ See e.g. Trial Chamber V, “Decision on defence application pursuant to Article 64(4) and related requests”, 26 April 2013, ICC-01/09-02/11-728, paras 91, 117–123, but see Concurring Separate Opinions (ICC-01/09-02/11-728-Anx1, ICC-01/09-02/11-728-Anx2, ICC-01/09-02/11-728-Anx 4-Corr2-Red).

processes,⁵⁶ it took just under ten months from the suspect's initial appearance to the decision on the confirmation of charges. In the case of *Prosecutor v. Laurent Gbagbo*, based on the schedule outlined by Pre-Trial Chamber I in its decision adjourning the confirmation of charges,⁵⁷ the Pre-Trial Chamber will only issue a decision on the confirmation of the charges well over two years after Mr. Gbagbo's transfer into ICC custody on 30 November 2011. This is particularly concerning in light of the right of the accused to be tried without undue delay.⁵⁸ Furthermore, the length of these proceedings is concerning as lengthy pre-trial proceedings can lead to loss of evidence, unavailability of witnesses, and loss of public confidence in the ICC's procedures.

1. Functions of the Pre-Trial Chamber until a person's first appearance

(a) Overview

Upon referral of a situation to the Pre-Trial Chamber, the Prosecutor must decide whether to open an investigation pursuant to article 53 (1) of the Rome Statute. For that purpose, she must make an initial examination of the evidence provided to her. Similarly, when acting on her own motion, she must carry out a preliminary examination before she can request the Pre-Trial Chamber to authorise an investigation pursuant to article 15 (4) of the Rome Statute. When an investigation has commenced, the Prosecutor should investigate incriminating and exonerating circumstances and decide whether to request the Pre-Trial Chamber to issue a warrant of arrest or a summons to appear in relation to specific persons suspected of having committed crimes falling within the ICC's jurisdiction. During the investigations, especially if there is a risk that certain evidence may not be available later for the purposes of the trial, the Pre-Trial

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11; *Prosecutor v. Uhuru Kenyatta*, ICC-01/09-01/11.

⁵⁷ Pre-Trial Chamber I, *Prosecutor v. Laurent Koudou Gbagbo*, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432. See also Appeals Chamber, *Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute"", 16 December 2013, ICC-02/11-01/11-572 (OA 5).

⁵⁸ Rome Statute, article 67(1)(c). See also Appeals Chamber, *Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled "Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute"", Dissenting Opinion of Judge Anita Ušacka, 29 October 2013, ICC-02/11-01/11-548-Anx2, paras 10–16.

Chamber may, upon request of the Prosecutor, take certain measures laid out in article 56 of the Rome Statute.⁵⁹

Under article 58(1) of the Rome Statute, the Pre-Trial Chamber issues a warrant of arrest if it is satisfied that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”⁶⁰ and if the person’s arrest appears necessary for reasons enumerated in subparagraph b: risk of flight; risk of obstruction or endangerment of the investigation or proceedings; risk of continued commission of crimes. Upon issuance of a warrant of arrest, it is a question of state cooperation as to whether an accused person is arrested and surrendered to the ICC. When the accused arrives at the Court, the Pre-Trial Chamber schedules a first appearance.

(b) Current cases at this stage and cases that concluded at this stage

In the situation in Uganda, five warrants of arrest have been issued against the five top members of the Lord’s Resistance Army (LRA). While the proceedings against Mr Lukwiya were terminated following confirmation of his death, the four remaining suspects are still at large.⁶¹

In the situation in Darfur, Sudan, warrants of arrests were issued against high-ranking members of the Sudanese government. On 4 March 2009, Pre-Trial Chamber I issued the first warrant of arrest for Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan, for war crimes and crimes against humanity,⁶² but ruled that there was insufficient evidence to prosecute Al Bashir for genocide.⁶³ Upon concluded appeal proceedings,⁶⁴ Pre-Trial Chamber I issued a second warrant of arrest for three separate counts of genocide, crimes against humanity and war crimes on 12 July 2010.⁶⁵ Al Bashir was the first sitting head of state to receive an arrest warrant by the ICC.

In the situation in Libya, on 27 June 2011, Pre-Trial Chamber I issued three warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif

⁵⁹ These measures may include, *inter alia*, appointing an expert or authorising a counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence.

⁶⁰ Rome Statute, art. 58(1)(a).

⁶¹ International Criminal Court, “Situations: Uganda”, accessed at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%201015/Pages/uganda.aspx.

⁶² Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09.

⁶³ Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” with Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, ICC-02/05-01/09.

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⁶⁵ Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09.

Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity (murder and persecution through the State apparatus and Security Forces) allegedly committed from 15 to 28 February 2011 across Libya.⁶⁶ None of the suspects are in the custody of the court. The case against Muammar Gaddafi was formally terminated on 22 November 2011 due to his death.⁶⁷ On 31 May 2013, Pre-Trial Chamber I rejected Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi.⁶⁸ This decision has been appealed by Libya. On 11 October 2013, Pre-Trial Chamber I decided that the case against Abdullah Al-Senussi was inadmissible as it is currently the subject of domestic proceedings in Libya.⁶⁹ This decision has been appealed by the Defence.

In the situation in Côte d'Ivoire, on 29 February 2012, Pre-Trial Chamber III issued a warrant of arrest for Simone Gbagbo for four counts of crimes against humanity allegedly committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011.⁷⁰ On 21 December 2011, Pre-Trial Chamber III issued a warrant of arrest against Charles Blé Goudé for four counts of crimes against humanity allegedly committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011.⁷¹

2. The confirmation of charges procedure

(a) Overview

The confirmation of charges procedure at the ICC, which includes the holding of a hearing, is unique amongst international criminal tribunals. The aim of the proceedings, as stressed by the Pre-Trial Chambers, is to filter out cases that lack merit in order to promote expeditious and fair trials.⁷²

⁶⁶ Pre-Trial Chamber I, *Situation in the Libyan Arab Jamahiriya*, "Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi", 27 June 2011, ICC-01/11-13; Pre-Trial Chamber I, *Situation in the Libyan Arab Jamahiriya*, "Warrant of Arrest for Saif Al-Islam Gaddafi", 27 June 2011, ICC-01/11-14; Pre-Trial Chamber I, *Situation in the Libyan Arab Jamahiriya*, "Warrant of Arrest for Abdullah Al-Senussi", 27 June 2011, ICC-01/11-15.

⁶⁷ Pre-Trial Chamber I, *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi", 22 November 2011, ICC-01/11-01/11-28.

⁶⁸ Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 31 May 2011, ICC-01/11-01/11-344-Red.

⁶⁹ Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the admissibility of the case against Abdullah Al-Senussi", 11 October 2013, ICC-01/11-01/11-466-Red.

⁷⁰ Pre-Trial Chamber III, *Prosecutor v. Simone Gbagbo*, "Warrant of Arrest for Simone Gbagbo", 29 February 2012, ICC-02/11-01/12-1-US-Exp.

⁷¹ Pre-Trial Chamber III, *Prosecutor v. Charles Blé Goudé*, "Warrant of Arrest for Charles Blé Goudé", 21 December 2011, ICC-02/11-02/11-1-US-Exp.

⁷² Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06-803-tEN, para. 37; Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo Chui*, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber I, *Prosecutor v. Abu Garda*, "Decision on the Confirmation of Charges", 8 February

The Prosecutor is obliged to file a document containing the charges with the Pre-Trial Chamber. This document must set out the alleged facts, as well as their legal classification.⁷³ Under article 61(7) of the Rome Statute, the Pre-Trial Chamber must determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. If the threshold is satisfied, it may confirm the charges and commit the accused to trial. If the evidentiary threshold is not met, the Pre-Trial Chamber may either decline to confirm the charges, or adjourn the hearing to request the Prosecutor to provide further evidence or conduct further investigation in relation to a particular charge, or ask the Prosecutor to amend a charge where the evidence submitted appears to establish a different crime within the jurisdiction of the Court.⁷⁴

Out of nine confirmation hearings, the Court has confirmed charges in four cases⁷⁵, declined to confirm charges in four cases⁷⁶, adjourned the hearing to

2010, ICC-02/05-02/09-243-Red, para. 39; Pre-Trial Chamber II, *Prosecutor v. Bemba*, “Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, para. 28; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, “Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121, para. 31; Pre-Trial Chamber I, “Decision on the confirmation of charges”, *Prosecutor v. Mbarushimana*, 16 December 2011, ICC-01/04-01/10-465-Red, para. 41; Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-02/11-382-Red, para. 52; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, para. 40; see also V. Nerlich, *The Confirmation of Charges Procedure at the International Criminal Court*, “Journal of International Criminal Justice” 2012, 10, 1339, 1347.

⁷³ Rules of Procedure and Evidence, rule 121(3), (4); Regulations of the Court, regulation 52.

⁷⁴ Rome Statute, art. 61 (7). See also Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute””, Dissenting Opinion of Judge Anita Ušacka, 29 October 2013, ICC-02/11-01/11-548-Anx2, para. 3.

⁷⁵ Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo Chui*, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07-717; Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, “Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373 (the Chamber confirmed the charges against Ruto and Sang and declined to confirm the charges against Kosgey); Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-02/11-382-Red (the Chamber confirmed the charges against Muthaura and Kenyatta and declined to confirm the charges against Ali).

⁷⁶ Pre-Trial Chamber I, *Prosecutor v. Abu Garda*, “Decision on the Confirmation of Charges”, 8 February 2010, ICC-02/05-02/09-243-Red; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373 (the Chamber confirmed the charges against Ruto and Sang and declined to confirm the charges against Kosgey); Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-02/11-382-Red (the Chamber confirmed the charges against Muthaura and Kenyatta and declined to confirm the charges against Ali); Pre-Trial Chamber I, “Decision on the confirmation of charges”, *Prosecutor v. Mbarushimana*, 16 December 2011, ICC-01/04-01/10-465-Red.

request further evidence or investigation in one case⁷⁷, and has requested the Prosecutor to amend the charges where the evidence appeared to establish a different crime in one case.⁷⁸ In addition, in *Prosecutor v. Lubanga*, the Pre-Trial Chamber confirmed the charges, not only in respect of recruitment and use of child soldiers in a non-international armed conflict⁷⁹, as pleaded in the document containing the charges, but also in respect of this war crime committed in an international armed conflict⁸⁰, without first inviting the Prosecutor to amend the charges.⁸¹

(a) *Current cases at this stage and cases that concluded at this stage*

In the situation in Darfur/Sudan, on 18 May 2009, Bahar Idriss Abu Garda voluntarily appeared before the Pre-Trial Chamber; however, Pre-Trial Chamber I declined to confirm the charges against him.⁸²

In the situation in the Democratic Republic of the Congo, Callixte Mbarushimana was arrested by French authorities on 11 October 2010. However, on 16 December 2011, Pre-Trial Chamber I declined to confirm the charges against him⁸³ and he was released from ICC custody on 23 December 2011.⁸⁴ On 22 March 2013, Bosco Ntaganda surrendered himself and is currently in

⁷⁷ Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 3 June 2013, ICC-02/11-01/11-432; see also Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute””, Dissenting Opinion of Judge Anita Ušacka, 29 October 2013, ICC-02/11-01/11-548-Anx2, para. 9.

⁷⁸ Pre-Trial Chamber II, *Prosecutor v. Bemba*, “Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424 (the Pre-Trial Chamber confirmed at the end of the confirmation proceedings the majority of the charges based on superior responsibility under article 28 as a mode of liability and not based on commission-liability under article 25(3)(a), as pleaded by the Prosecutor).

⁷⁹ Rome Statute, art. 8(2)(e)(vii).

⁸⁰ Rome Statute, art. 8(2)(b)(xxvi). It did this by virtue of Uganda’s presence in Ituri from July 2002 to 2 June 2003.

⁸¹ Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06-803-tEN. However, the Trial Chamber reclassified the conflict as a non-international armed conflict and determined that article 8(2)(b)(xxvi), dealing with international armed conflicts, did not apply: Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2842.

⁸² Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the Confirmation of Charges”, 8 February 2010, ICC-02/05-02/09-243-Red.

⁸³ Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465-Red.

⁸⁴ International Criminal Court, “Democratic Republic of the Congo: ICC-01/04-01/10 The Prosecutor v. Callixte Mbarushimana”, accessed at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx.

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ICC custody.⁸⁵ His confirmation of charges hearing is scheduled to commence on 10 February 2014.⁸⁶

In the situation in the Republic of Kenya, on 7 and 8 April 2011, responding to summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before the Court. On 23 January 2012, the charges against William Samoei Ruto and Joshua Arap Sang on the one hand, and Uhuru Muigai Kenyatta and Francis Kirimi Muthaura on the other, for crimes against humanity, were confirmed in two different decisions.⁸⁷ Charges against the two other suspects were not confirmed. The charges against Francis Kirimi Muthaura were withdrawn on 18 March 2013.⁸⁸

In the situation in Côte d'Ivoire, following the issuance of a warrant of arrest on 23 November 2011⁸⁹, Laurent Gbagbo was transferred to the ICC detention centre by Ivorian authorities on 30 November 2011. On 3 June 2013, Pre-Trial Chamber I adjourned the hearing on the confirmation of charges of Laurent Gbagbo and requested the Prosecutor to provide further evidence or conduct further investigation with respect to the charges.⁹⁰

3. *The issue of inter-partes disclosure of evidence*

One recurring issue for the ICC has been the requisite scope for disclosure of evidence between the parties, which becomes a particularly delicate legal issue when it conflicts with provisions of the Rome Statute related to the protection of sensitive information provided by States (or inter-governmental organisations) or the protection of victims and witnesses, who are often located in remote areas thousands of kilometres from the seat of the Court.

The first general rule of disclosure is that the Prosecutor shall disclose to the accused, as soon as practicable, all evidence which is potentially exculpatory or would tend to mitigate the guilt of the accused.⁹¹ Secondly, the Prosecutor shall disclose, under rule 76 of the Rules of Procedure and Evidence, the names and

⁸⁵ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, "Decision on Setting the Date for the Initial Appearance and Related Issues", 22 March 2013, ICC-01/04-02/06-41, para. 7.

⁸⁶ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, "Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties", 17 June 2013, ICC-01/04-02/06-73.

⁸⁷ Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373; Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 23 January 2012, ICC-01/09-02/11-382-Red.

⁸⁸ Trial Chamber V, *Prosecution v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, "Decision on the withdrawal of charges against Mr Muthaura", 18 March 2013, ICC-01/09-02/11-696.

⁸⁹ Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, "Warrant of Arrest for Laurent Koudou Gbagbo", 23 November 2011, ICC-02/11-26-US-Exp.

⁹⁰ Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432.

⁹¹ Rome Statute, art. 67(2).

statements of witnesses she intends to rely on. Under rule 77, the Prosecutor shall permit the defence to inspect any evidence that is “material to the preparation of the defence or [is] intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial ... or [was] obtained from or belonged to the [accused].”⁹² A number of articles also qualify the scope of this disclosure and provide further disclosure obligations.⁹³

There is a split between the approaches taken by different Pre-Trial Chambers on whether disclosure of exculpatory evidence occurs *only* between the parties, or whether articles 67(1) and 69(3) of the Rome Statute also give the Pre-Trial Chamber the authority to request that all exculpatory evidence be disclosed *to the Chamber* during the pre-trial proceedings.⁹⁴ While rule 121(2)(c) states that all evidence disclosed between the parties for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber, the words “all evidence” may be interpreted in a broad sense as all evidence disclosed, or in a narrow sense as all evidence on which the prosecution intends to rely at the confirmation hearing. In the case of *Prosecutor v. Lubanga*, the Pre-Trial Chamber upheld the latter interpretation and determined that exculpatory evidence and evidence in the possession of the Prosecutor that is material to the Defence’s preparation for the confirmation hearing only needs to be disclosed *inter partes* to the Defence and need not be communicated to the Pre-Trial Chamber.⁹⁵

⁹² *Rules of Procedure and Evidence of the International Criminal Court*, 9 September 2002, ICC-ASP/1/3 (Rules of Procedure and Evidence), rule 77.

⁹³ Article 61(3) regulates disclosure in the lead-up to the confirmation hearing; article 64(3)(c) and article 64(6)(d) concern disclosure prior to trial and production of additional evidence; article 68(5) regulates protection of information as to witnesses prior to the commencement of the trial; article 54(3)(e) regulates protection of information obtained on condition of confidentiality and solely for the purpose of generating new evidence; article 72 regulates protection of national security information and documents; article 93(8)(b) and (c) regulate protection of information provided by a State on a confidential basis solely for the purpose of generating new evidence. The disclosure regime is further elaborated in the Rules of Procedure and Evidence, rules 76–84, 121, (rules 129, 130 and 131 regulate that the record of the proceedings be transmitted to the Trial Chamber).

⁹⁴ Compare Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, “Second Decision on Issues Relating to Disclosure”, 15 July 2009, ICC-02/05-02/09-35, para. 9 (noting that parties are not required to communicate to the Chamber materials on which they do not intend to rely, including potentially exculpatory materials), and Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on Issues Relating to Disclosure”, 29 June 2010, ICC-02/05-03/09-49, para. 5 (confirming that materials subject to disclosure, on which the parties do not intend to rely, including those of a potentially exculpatory nature, need not be communicated to the Chamber), with Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties”, 31 July 2009, ICC-01/05-01/08-55, paras 16–19 (explaining that under articles 61(7) and 69(3) of the Rome Statute, the Chamber “cannot fulfill [its] function at the pre-trial stage without having access to the evidence exchanged between the Prosecutor and the defence, in particular to exculpatory evidence”).

⁹⁵ Pre-Trial Chamber I, *Prosecutor v. Lubanga*, “Decision on the Final System of Disclosure and the Establishment of a Timetable”, 15 May 2006, ICC-01/04-01/06-102, annex 1, paras 41, 50–51. This practice was also followed in Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, 14 December 2007, ICC-01/04-01/07-T, p. 4 lines 14–22; Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, “Second Decision on Issues Relating to Disclosure”, 15 July 2009, ICC-02/05-02/09-35, paras 9, 11; Pre-Trial Chamber I,

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However, in *Prosecutor v. Bemba*, the Pre-Trial Chamber concluded that “the Chamber should not be confined to the evidence which the parties intend to rely on for the purposes of the confirmation hearing [...] [T]he Chamber’s role is to distinguish those cases that should go to trial from those that should not. The Chamber considers that it cannot fulfil this filtering function at the pre-trial stage without having access to the evidence exchanged between the prosecutor and the defence, in particular to exculpatory evidence.”⁹⁶

The dissenting judge in the *Prosecutor v. Abu Garda* decision described the divergence of opinions as follows:

[T]he provisions relevant to the disclosure process at the pre-trial stage in preparation of the confirmation hearing have been construed in different manners by different Pre-Trial Chambers of the Court. This difference in approach stems not only from a different reading of the relevant provisions but also, more broadly, from different conceptions of the role of the Pre-Trial Chamber [...] within the context of both the disclosure process and the pre-trial procedure as a whole.⁹⁷

This issue in regard to the interpretation of the disclosure obligation is one example of the challenges faced by an international court operating in a global context. The issue reflects the aforementioned different conceptions of the role of the ICC and specifically, the role of the Pre-Trial Chamber within the legal framework of the ICC.

B. The Trial and Appeals Chambers

1. Overview and Current Issues

If the Pre-Trial Chamber confirms the charges against an accused, the case is remitted to the Trial Chamber. The Trial Chamber controls the trial preparation phase, including the disclosure process between the parties, and conducts the trial hearing.⁹⁸

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, “Decision on Issues Relating to Disclosure”, 29 June 2010, ICC-02/05-03/09-49, paras 5, 6; Pre-Trial Chamber I, *Prosecutor v. Mbarushimana*, “Decision on issues relating to disclosure”, 30 March 2011, ICC-01/04-01/10-87, para. 9; see also Pre-Trial Chamber III, *Prosecutor v. Gbagbo*, “Decision establishing a disclosure system and a calendar for disclosure”, 24 January 2012, ICC-02/11-01/11-30, paras. 12–13.

⁹⁶ Pre-Trial Chamber III, *Prosecutor v. Bemba*, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, 31 July 2008, ICC-01/05-01/08-55, para. 11. This approach was also followed in Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 6 April 2011, ICC-01/09-01/11-44, paras 4, 6; Pre-Trial Chamber III, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision Setting the Regime for Evidence Disclosure and Other related Matters”, 6 April 2011, ICC-01/09-02/11-48, paras 5, 7.

⁹⁷ Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, “Second Decision on Issues Relating to Disclosure”, Dissenting Opinion of Judge Tarfusser, 15 July 2009, ICC-02/05-02/09-35, para 1.

⁹⁸ See Rome Statute, art. 64.

Of essence to an effective trial preparation phase is the proper division of powers between the Pre-Trial Chamber and the Trial Chamber. Out of the five cases that have proceeded to the trial stage of proceedings,⁹⁹ the average time between the first appearance of a suspect before the Pre-Trial Chamber and the commencement of the trial is approximately two years and 3 months. While one of the purposes for creating the pre-trial processes at the ICC was to expedite proceedings,¹⁰⁰ this length of time appears to be commensurate with the time taken at other international tribunals. The lack of a streamlined division of powers between the Pre-Trial Chambers and the Trial Chamber provides one explanation for the length of this process. The Pre-Trial Chambers focus in their decisions on the purpose of the confirmation hearing and the standard for confirming the charges against an accused, and not on decisions regarding the preparation of the trial. However, the Trial Chambers do not often continue the processes relevant to disclosure of evidence that have been initiated by the Pre-Trial Chambers, rather, the Trial Chamber will often start new adjudication processes.¹⁰¹ While materials disclosed between the parties before the Pre-Trial Chambers will be included in the record that is transmitted to the Trial Chambers,¹⁰² most Trial Chambers allow disclosure between the parties without inclusion of such materials in the record. It will be the task of the jurisprudence, and perhaps the legislators¹⁰³ in the coming years to streamline these procedures in order to further expedite the commencement of the trial.

The first trials that have taken place before the ICC have brought to light many issues that are intimately connected with the fact that investigations for all of the situations before the ICC have occurred in the context of conflicts.¹⁰⁴ In the Lubanga proceedings, the Trial Chamber refrained from relying on all witnesses who were allegedly child soldiers of the UPC/FPLC in Ituri/DRC who Mr Lubanga allegedly enlisted, conscripted or used to participate actively in hostilities. The main reason for this decision appears to be that the intermediaries between the Prosecutor's staff and the witnesses were not trustworthy or

⁹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

¹⁰⁰ See *supra*, p. 14, fn. 72.

¹⁰¹ See e.g. Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "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 such evidence shall be submitted", 13 December 2007, ICC-01/04-01/06-1084, paras 4-6; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386 (OA 5, OA 6).

¹⁰² Rules of Procedure and Evidence, rules 121 (10), 130 (but see *supra*, under the heading "The issue of inter-partes disclosure of evidence").

¹⁰³ For the role and powers of the Assembly of States Parties, see Rome Statute, art. 112.

¹⁰⁴ See e.g. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on the defence request for a temporary stay of proceedings", 26 October 2012, ICC-02/05-03/09-410.

reliable.¹⁰⁵ The Trial Chamber, in reaching this decision, referred to the specific problems in investigating the alleged conduct due to the situation in Ituri/DRC. Due to the ongoing nature of many of the conflicts in the situations within the ICC's jurisdiction, the ICC has relied, in many instances, on materials of intergovernmental institutions that are provided to the ICC under the seal of confidentiality. This practice has generated many issues for the ICC with regard to the disclosure of such materials.¹⁰⁶

Another issue that has affected the progression of cases to the Trial Chamber is that the ICC has limited investigatory powers, particularly when compared to other domestic courts and the *ad hoc* tribunals. For example, the ICC cannot issue *subpoena* orders in order to coerce witnesses to give testimony at a trial.

The trial is concluded after the presentation of evidence, with the closing statements of the parties. Thereupon, the Trial Chamber may either acquit or convict the accused. In the case of a conviction, the Trial Chamber must issue a sentencing decision, and must hold an additional hearing if so requested by a party.¹⁰⁷ There is no minimum sentence; however, the Rome Statute provides for a maximum sentence of 30 years imprisonment or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".¹⁰⁸ Furthermore, the Trial Chamber is authorised to commence reparation proceedings and to issue a reparations order for the benefit of the victims.¹⁰⁹

The verdict, the sentencing and the reparations decisions may be appealed to the Appeals Chamber.¹¹⁰ The Appeals Chamber has the power to confirm, amend or reverse the decision on guilt and innocence.¹¹¹ The primary role of the Appeals Chamber is as a chamber of review as it largely focuses on errors alleged by the appellants.¹¹² Only if any such errors materially affect the impugned decision will the Appeals Chamber reverse the impugned decision and, where necessary, remit the case to a new Trial Chamber.¹¹³

¹⁰⁵ See Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842, paras 482-484; see also *Prosecutor v. Thomas Lubanga Dyilo* "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'", 8 October 2010, ICC-01/04-01/06-2582 (OA 18).

¹⁰⁶ See, for example, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Redacted Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents", 25 July 2011, ICC-01/04-01/06-2763-Red.

¹⁰⁷ Rome Statute, art. 76.

¹⁰⁸ Rome Statute, art. 77.

¹⁰⁹ Rome Statute, art. 75.

¹¹⁰ Rome Statute, art. 81.

¹¹¹ Rome Statute, art. 83(2).

¹¹² Rome Statute, art. 81(1), (2).

¹¹³ Rome Statute, art. 83(2).

2. Current cases at these stages and cases that concluded at these stages

In the situation in the DRC, two cases against three accused have proceeded to trial stage.¹¹⁴ The president of the ‘Union des Patriotes Congolais’, Thomas Lubanga Dyilo, was arrested on 17 March 2006 in Kinshasa and was convicted by Trial Chamber I on 14 March 2012 for the war crimes of conscripting and enlisting children under the age of fifteen years into armed forces or groups and using them to participate actively in hostilities.¹¹⁵ On 10 July 2012, he was sentenced to fourteen years of imprisonment.¹¹⁶ Both of these decisions have been appealed.¹¹⁷ The originally joint proceedings commencing on 24 November 2009 against the alleged leader of the “Force de résistance patriotique en Ituri”, Germain Katanga, and the “Front des nationalistes et intégrationnistes”, Mathieu Ngudjolo Chui, for crimes against humanity and war crimes arising out of the attack on the village Bogoro (Ituri) and its civilian population in March 2003,¹¹⁸ were severed by Trial Chamber II on 21 November 2012.¹¹⁹ On 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges and ordered his immediate release.¹²⁰ The Office of the Prosecutor appealed this decision. Trial Chamber II has announced that it will likely change the level of participation alleged against Germain Katanga, and has given the Defence time to prepare accordingly.¹²¹ The trial judgment is scheduled to be delivered on 7 February 2014.¹²²

On 17 June 2010, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus voluntarily appeared before the Court in a case arising from the

¹¹⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07; *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07.

¹¹⁵ Rome Statute, art. 8 (2)(e)(vii); Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment pursuant to article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2842.

¹¹⁶ Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01/06-2901.

¹¹⁷ See Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute”, 3 December 2012, ICC-01/04-01/06-2948-Conf-tENG; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Mr Thomas Lubanga’s appellate brief against Trial Chamber I’s 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute”, 3 December 2012, ICC-01/04-01/06-2949-tENG.

¹¹⁸ See International Criminal Court, “Situations: Democratic Republic of the Congo”, accessed at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx.

¹¹⁹ *Ibid.*

¹²⁰ Trial Chamber II, *Prosecutor v. Mathieu Ngudjolo Chui*, “Judgment pursuant to article 74 of the Statute”, 18 December 2012, ICC-01/04-01/12-3-tENG.

¹²¹ Trial Chamber II, *Prosecutor v. Germain Katanga*, “Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013”, 26 June 2013, ICC-01/04-01/07-3388-Teng; Trial Chamber II, *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons””, 27 March 2013, ICC-01/04-01/07-3363.

¹²² La Chambre de Première Instance II, *Le Procureur c. Germain Katanga*, “Ordonnance fixant la date de l’audience de prononance du jugement”, 19 Novembre 2013, ICC-01/04-01/07-3420.

situation in Darfur/Sudan. On 7 March 2011, Pre-Trial Chamber I confirmed the charges of war crimes, in particular for intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations.¹²³ Proceedings against Saleh Mohammed Jerbo Jamus were terminated on 4 October 2013 after Trial Chamber IV received evidence pointing towards his death.¹²⁴ The trial against Abdallah Banda Abakaer Nourain is scheduled to commence on 5 May 2014.¹²⁵

In the situation in the CAR, proceedings have been brought against the alleged leader of the “Mouvement de libération de Congo” (MLC), Jean-Pierre Bemba Gombo, who was arrested on 24 August 2008 in Belgium. On 15 June 2009, Pre-Trial Chamber II confirmed two charges of crimes against humanity (in particular, the crime of rape) and three charges of war crimes, allegedly committed in 2003 by members of the MLC in CAR under his command.¹²⁶ The trial is at the final stages before Trial Chamber III and commenced on 22 November 2010.¹²⁷

The main proceedings against Kenya’s current Vice President, William Samoei Ruto and Joshua Arap Sang commenced on 10 September 2013¹²⁸ and the trial against Uhuru Muigai Kenyatta is scheduled to commence on 5 February 2014.¹²⁹ An issue that arose at the beginning of the trial in *Prosecutor v. Ruto* is whether the accused needed to be present during the trial or whether he could be excused, upon his own request, from long periods of trial. Trial Chamber Va allowed Mr Ruto to be absent due to the important functions that he had to carry out as Deputy President of Kenya.¹³⁰ This decision was reversed on appeal by reference to articles 63 and 27 of the Rome Statute. Nevertheless, the majority of the Appeals Chamber held that short exceptions to the requirement

¹²³ Rome Statute, art. 8(2)(e)(iii); see also Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red.

¹²⁴ Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Public redacted Decision terminating the proceedings against Mr Jerbo”, 4 October 2013, ICC-02/05-03/09-512-Red.

¹²⁵ Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings”, 6 March 2013, ICC-02/05-03/09-455.

¹²⁶ Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424.

¹²⁷ Transcript of hearing, 21 October 2010, ICC-01/05-01/08-T-30-ENG ET, page 4, lines 18 to 20.

¹²⁸ Trial Chamber V(a), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date”, 3 June 2013, ICC-01/09-01/11-762.

¹²⁹ Trial Chamber V(b), *Prosecution v. Uhuru Muigai Kenyatta*, “Decision adjourning commencement of trial”, 31 October 2013, ICC-01/09-02/11.

¹³⁰ Trial Chamber V(a), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 18 June 2013, ICC-01/09-01/11-777.

that the accused be present at trial may be possible on a case-by-case basis.¹³¹ In response, the Assembly of States Parties introduced, upon motion of the African Union, the new rule 134*quater* allowing in specific instances, with the leave of the Trial Chamber, for the accused to be absent from the trial, including in order to carry out extraordinary public duties.¹³²

C. Other proceedings before the ICC

1. Revision and compensation

Revision proceedings are provided for in article 84 of the Rome Statute. Under this provision, a final judgment may be reviewed in circumstances where new evidence has been discovered, decisive evidence is found to have been forged or falsified, or judges on the bench have committed serious misconduct or a serious breach of duty. Furthermore, article 85 of the Rome Statute states that a victim of an unlawful arrest or detention by the ICC has the right to compensation. Neither of these provisions has been applied by the ICC to date.

2. Execution of sentence

The execution of a sentence that has been handed down by the Trial Chamber or Appeals Chamber is a matter assigned to the Presidency of the ICC.¹³³ A term of imprisonment is usually not served in the detention centre of the ICC, but in prisons of other countries. For this purpose, the ICC has concluded bilateral agreements with States that have agreed to host a convicted person to serve the term of his/her ICC sentence. Domestic procedures relevant to pardon or the review of sentence are not applicable to the persons convicted by the ICC.¹³⁴ A convicted person may only request early release from the Appeals Chamber after they have served two thirds of their sentence or 25 years if a sentence of life imprisonment was imposed.¹³⁵ In the case of *Prosecutor v. Lubanga*, while Mr Lubanga has been sentenced to a term of 14 years of imprisonment, his final appeal is currently pending before the Appeals Chamber.

¹³¹ Appeals Chamber, *Prosecutor v. William Samoei Ruto and Jushua Arap Sang*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 25 October 2013, ICC-01/09-01/11-1066 (OA 5). See also Appeals Chamber, *Prosecutor v. William Samoei Ruto and Jushua Arap Sang*, “Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka”, 25 October 2013, ICC-01/09-01/11-1066-Anx (OA 5).

¹³² Assembly of States Parties, *Amendments to the Rules of Procedure and Evidence*, 27 November 2013, 12th plenary meeting of the Assembly of States Parties, ICC-ASP/12/Res.7.

¹³³ Rules of Procedure and Evidence, rule 199.

¹³⁴ Rome Statute, art. 110.

¹³⁵ Rome Statute, art. 110 (3).

3. *Proceedings pursuant to article 70 of the Rome Statute*

Pursuant to article 70 of the Rome Statute, the ICC has jurisdiction over specifically enumerated offences against the administration of justice. These offences include corruptly influencing a witness and knowingly presenting false or forged evidence. The relevant proceedings follow, to a large degree, the same procedural stages as the main proceedings before the Court, i.e. there is a pre-trial, trial and appeals stage relevant to persons charged with such crimes.¹³⁶

In the situation in Kenya, on 2 October 2013, Pre-Trial Chamber II unsealed an arrest warrant against Walter Osapiri Barasa, initially issued on 2 August 2013, for several offences against the administration of justice, consisting in corruptly or attempting to corruptly influence ICC witnesses.¹³⁷ In the situation in the CAR, four arrest warrants were issued for such crimes and all of the persons made their first appearance before the ICC.¹³⁸

4. *Proceedings relevant to the elected officials of the ICC*

The legal texts comprehensively address matters relevant to the independence and impartiality of elected officials of the ICC as well as to their misconduct.

The 18 Judges, the Prosecutor and the Deputy Prosecutor of the ICC are elected for a non-renewable term of nine years by the Assembly of States Parties.¹³⁹ The plenary of judges elects the Registrar and Deputy Registrar for a five-year term.¹⁴⁰

The impartiality and independence of the elected officials is the basis for a credible ICC. With regard to this, article 40 of the Rome Statute provides that judges shall not engage in any activities which are “likely to interfere with their judicial functions or to affect confidence in their independence”. Furthermore, judges called to serve on a full-time basis may not engage in any other occupation. The plenary of judges is tasked with overseeing matters relevant to the independence of their fellow judges.

Article 41 of the Rome Statute provides an avenue for judges to recuse themselves from cases in relation to which their impartiality might reasonably be doubted. The Presidency has the final say in that matter. If the Prosecutor or the defence consider that a judge is impartial or appears to be impartial,

¹³⁶ Rule of Procedure and Evidence, rules 163, 165.

¹³⁷ Pre-Trial Chamber II, *Prosecutor v. Walter Osapiri Barasa*, “Warrant of arrest for Walter Osapiri Barasa”, 2 August 2013, ICC-01/09-01/13-1-Red2.

¹³⁸ See ICC Press Release, 24 November 2013, ICC-CPI-20131124-PR962, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx

¹³⁹ Rome Statute, arts. 36, 42.

¹⁴⁰ Rome Statute, art. 43 (4), (5).

they may request the plenary of judges to make a decision on that matter. The plenary of judges twice made decisions on such requests.¹⁴¹

The Prosecutor is required to exercise her functions independently and impartially. Article 42 of the Rome Statute provides that a “person being investigated or prosecuted” may request the Prosecutor’s or Deputy Prosecutor’s disqualification before the Appeals Chamber. Such requests have been filed twice before the ICC.¹⁴²

Finally, innovative in this point compared to any other statute of international tribunals, the legal texts comprehensively address matters relevant to misconduct. If elected officials commit serious misconduct or serious breaches of their duties, they can be removed from office.¹⁴³ If they commit misconduct of a less serious nature, they can be subject to disciplinary measures.¹⁴⁴

D. Victim Participation at the ICC

Providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions.¹⁴⁵ Generally, provisions for such remedies were “seen as a way to settle disputes between the offender and the victim, thus preventing individualized vindication and further disturbances of the peace.”¹⁴⁶

The Rome Statute provides one of the most advanced schemes for victims’ rights in international criminal justice, by way of victims’ participation in proceedings and the forms of redress available to victims.¹⁴⁷ Victims who wish to participate in proceedings must first submit a written application to the ICC’s Registrar, who will then redirect the application to the appropriate Chamber.¹⁴⁸

¹⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*” 11 June 2013, *Prosecutor v. Banda and Jerbo*, ICC-01/04-01/06-3040-Anx; “Decision of the plenary of the judges on the ‘Defence Request for the Disqualification of a Judge’ of 2 April 2012”, 5 June 2012, ICC-02/05-03/09-344-Anx.

¹⁴² Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the request to temporarily suspend the Prosecutor from conducting any prosecutorial activities related to the case pending the determination of the request for disqualification”, 11 May 2013, ICC-01/11-01/11-140 (OA 3); Appeals Chamber, *Situation in the Republic of Kenya*, “Decision on the request for reconsideration of the decision on the request for the disqualification of the Prosecutor in the investigation against Mr David Nyekorach-Matsanga”, 22 April 2013, ICC-01/09-111 (OA 2).

¹⁴³ See Rome Statute, art. 46; Rules of Procedure and Evidence, rules 24, 26, 27, 28, 29, 31; Regulations of the Court, chapter 8.

¹⁴⁴ See Rome Statute, art. 47; Rules of Procedure and Evidence, rules 25, 26, 27, 30; Regulations of the Court, Chapter 8.

¹⁴⁵ See M. Cherif Bassiouni, “Victim’s Rights”, in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia, Antwerp, 2010), p. 579, at n. 13 (explaining how different ancient civilizations provided remedies to victims of crimes).

¹⁴⁶ *Ibid.*

¹⁴⁷ Rome Statute, art. 75.

¹⁴⁸ Rules of Evidence and Procedure, rule 89(1).

In the application, the person must describe the harms he or she has suffered and who he or she believes to be the perpetrator(s).¹⁴⁹ For each application, the Chamber assesses whether the applicant qualifies as a victim under rule 85 of the Rules of Procedure and Evidence.¹⁵⁰ Article 68(3) of the Rome Statute provides victims the right to present their “views and concerns” to the Court when their “personal interests [...] are affected.”

Rule 85 of the Rules of Procedure and Evidence defines “victims” either as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” or as “organizations or institutions that have sustained direct harm to any of their property”. However, this relates only to organizations with a specific purpose, i.e. it excluded profit organizations.¹⁵¹ While the use of the word “victim” would seem to indicate that the person has in fact suffered harm within the jurisdiction of the ICC, determining whether a person indeed can be characterized as a “victim” for the purposes of participation or even reparations is a matter for the relevant Chamber.¹⁵² Once an application has been accepted, victims can ‘present their views and concerns’ in judicial proceedings, if deemed appropriate by the Chamber and if they demonstrate to the Chamber that their ‘personal interests’ are affected.¹⁵³ In practice, participation has meant that victims may, through their legal representatives, (1) be permitted to attend and participate in hearings before the Court; (2) make opening and closing statements; (3) if the judges permit it, ask questions to a witness or an expert who is giving evidence before the Court, or the accused; and, (4) if the judges permit it, allow the victim to testify or present evidence.¹⁵⁴ However, the extent to which a victim may be involved in a particular criminal trial is still under development in the ICC’s jurisprudence.¹⁵⁵

The ICC’s early jurisprudence in *Prosecutor v. Katanga and Ngudjolo* demonstrates the important role of victims in unravelling the truth of past crimes and assisting the ICC in its fact-finding mission.¹⁵⁶ However, the ICC, through its

¹⁴⁹ Regulations of the Court, reg. 86(2)(c), (d).

¹⁵⁰ Rules of Procedure and Evidence, rule 89(2).

¹⁵¹ Rules of Procedure and Evidence, rule 85(a)-(b).

¹⁵² Rules of Procedure and Evidence, rule 89(1).

¹⁵³ Rome Statute, art. 68(3).

¹⁵⁴ Rules of Procedure and Evidence, rule 91; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1432; Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial””, 16 July 2010, ICC-01/04-01/07-2288.

¹⁵⁵ See for a comprehensive overview: F. Eckelmans, *The ICC’s Practice on Victim Participation*, [in:] T. Bonacker, C. Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse*, Springer 2013, pp. 189–220.

¹⁵⁶ See Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, “Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of a Case”, 13 May 2008, ICC-01/04-01/07-474, paras 31–36.

jurisprudence and practice, has also endeavoured to put in place safeguards so that the rights of victims do not undermine the rights of the accused.¹⁵⁷

To date, the Appeals Chamber has issued a number of judgments on interlocutory appeals related to victim participation in the proceedings.¹⁵⁸ As of 30 April 2013, Registry figures indicate that over 12,000 applications for victim participation and over 9,000 applications for reparations have been received by the Court.¹⁵⁹ Over 5,000 victims have been permitted to participate in proceedings before the relevant Chambers: 204 in the situation in the DRC; 114 in the case of *Lubanga*; 366 in the case of *Katanga and Ngudjolo Chui*; 132 in the case of *Mbarushimana*; 3328 in the case of *Bemba*; 21 in the situation in Uganda; 41 in the case of *Kony et al.*; 11 in the situation in Darfur; 6 in the case of *Harun and Kushayb*; 12 in the case of *Al Bashir*; 89 in the case of *Banda and Jerbo*; 327 in the case of *Ruto et al.*; 233 in the case of *Muthaura et al.*; and 199 in the case of *Gbagbo*.¹⁶⁰ Most recently, on 27 August 2013, the Appeals Chamber granted 30 out of 32 applications for new victims to participate in *Lubanga's* Appeal against his conviction and sentence.¹⁶¹ On 25 October 2013, the Registry transmitted 107 new applications for reparations in the case of *Bemba*.¹⁶²

¹⁵⁷ For example, the ICC has rules that questions that the legal counsel of victims wish to put to witnesses must be submitted in advance to the Chamber and victims who wish to submit new evidence must apply to do so; see Appeals Chamber, *Prosecutor v. Lubanga*, “Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1432 (OA 9, OA 10), paras 4, 104; Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, “Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140”, 9 December 2009, ICC-01/04-01/07-1665-Corr, para. 20; Trial Chamber III, *Prosecutor v. Bemba*, “Decision on Directions for the Conduct of the Proceedings”, 19 November 2010, ICC-01/05-01/08-1023, para. 18.

¹⁵⁸ See Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1432 (OA 9, OA 10); Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’”, 16 July 2010, ICC-01/04-01/07-2288 (OA 11); see also Appeals Chamber, *Prosecutor v. Joseph Kony*, “Judgment on the Appeals”, 23 February 2009, ICC-02/04-179 (OA 2); Appeals Chamber, *Situation in Darfur*, “Judgment on Victim Participation”, 2 February 2009, ICC-02/05-177 (OA, OA2, OA 3); Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on Victim Participation”, 19 December 2008, ICC-01/04-556 (OA 4, OA 5, OA 6).

¹⁵⁹ International Criminal Court, “Figures from Registry as of 30 April 2013”, 2013, accessed at: <http://www.icc-cpi.int/iccdocs/db/Registry-Figures-30-April-2013.pdf>.

¹⁶⁰ International Criminal Court, “Figures from Registry as of 30 April 2013”, 2013, accessed at: <http://www.icc-cpi.int/iccdocs/db/Registry-Figures-30-April-2013.pdf>; note that these numbers are subject to constant change; e.g. more than 4,000 victims participate in the *Bemba* case, 30 more victims were admitted to participate at the *Lubanga* appeal stage.

¹⁶¹ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on 32 applications to participate in the proceedings”, 27 August 2013, ICC-01/04-01/06-3045-Red2. On 3 October 2013, another victim was admitted in the proceedings: Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on a/2922/11’s application to participate in the appeals proceedings”, 3 October 2013, ICC-01/04-01/06-3052-Red.

¹⁶² Trial Chamber III, *Prosecutor v. Bemba Gombo*, “Notification to the Defence and the Legal Representatives of the Applicants of applications for reparations pursuant to rule 94(2) of the Rules of Procedure and Evidence”, 25 October 2013, ICC-01/05-01/08-2847.

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While the introduction of this right to participate represents a major shift away from the traditional view of victims as only able to participate in international criminal law cases as witnesses (and therefore a ‘means to an end’ for prosecutors), in practice, the application process is time-consuming and resource intensive. The large numbers of applications from victims have left the ICC struggling to keep pace, and has led to the inability of victims to present their views in many important proceedings.¹⁶³ To date, the ICC has received hundreds of applications from victims who are often in remote villages, such as the eastern DRC and Northern Uganda.¹⁶⁴ These remote areas may also be entrenched in conflict, making it difficult, if not impossible, for applicants to travel to nearby cities to obtain proper identification cards or other documentation to append to their applications.¹⁶⁵ In light of these issues, and other issues in regard to the participation of victims, the ICC, in cooperation with the Assembly of States Parties, has started to review and revise its practice and procedures in relation to victims.¹⁶⁶

¹⁶³ In *Mbarushimana*, victims were unable to present their views and concerns during the confirmation of charges procedure: see Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “Proposal on Victim Participation in the Confirmation Hearing”, 6 June 2011, ICC-01/04-01/10-213. In *Lubanga*, victims were unable to present their views and concerns in regard to the sentence and principles applicable to reparation: see Trial Chamber I, *Prosecutor v. Lubanga*, “Request for Instructions on Victims’ Applications for Participation and Reparations Received by the Registry”, 2 November 2011, ICC-01/04-01/06-2817. See also M. Pena and G. Carayon, *Is the ICC Making the Most of Victim Participation*, “The International Journal of Transitional Justice” 2013, 7, 518, 527–529.

¹⁶⁴ See, e.g., Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on 772 Applications by Victims to Participate in the Proceedings”, 18 November 2010, ICC-01/05-01/08-1017, para. 27 (granting 624 victims the right to participate in the case); Pre-Trial Chamber II, *Prosecutor v. Joseph Kony*, “Decision on victims’ applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07”, 21 November 2008, ICC-02/04-01/05-356 (granting 27 victims the right to participate in the case); Trial Chamber II, *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, “Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims”, 23 September 2009, ICC-01/04-01/07-1491-Red-t-ENG, para. 33 (granting 287 victims the right to participate in the case).

¹⁶⁵ See Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, “Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation”, 17 August 2007, ICC-01/04-374, paras 1, 13–14. To ease this burden, Pre-Trial Chamber I announced, for example, that it would accept multiple forms of identification including passports, voting cards, student cards, or an affidavit from a witness; see Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, “Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation”, 17 August 2007, ICC-01/04-374, para. 15 (indicating the different documents that are allowed to be submitted during the investigation stage of a situation).

¹⁶⁶ See International Criminal Court, Assembly of States Parties, *Court’s Revised Strategy in Relation to Victims*, 5 November 2012, ICC-ASP/11/38; International Criminal Court, Assembly of States Parties, *Report of the Court on the Revised strategy in relation to victims: Past, present and future*, 5 November 2012, ICC-ASP/11/40; International Criminal Court, Assembly of States Parties, *Resolution on Victims and Reparations*, 21 November 2012, ICC-ASP/11/Res.7; International Criminal Court, Assembly of States Parties, *Report of the Court on the implementation in 2013 of the revised strategy in relation to victims*, 11 October 2013, ICC-ASP/12/41.

VI. Important Features of the ICC Framework

The focus of this part lies on essential additional features of the ICC framework, focusing on the principle of complementarity, the role of article 21 of the Rome Statute and the need for cooperation.

A. The principle of complementarity

One of the early challenges that the States Parties were faced with during negotiations for the Rome Statute was the exact role that the ICC should play in relation to national criminal law jurisdictions. While many States Parties insisted that there should be a “strong presumption in favour of national jurisdiction”¹⁶⁷ and the ICC should only be able to intervene when “the national judicial system was unable to investigate or punish transgressors”¹⁶⁸, others were concerned to “avoid the jurisdiction of the court becoming merely residual to national jurisdiction.”¹⁶⁹

The resulting principle that emerged from a compromise between these divergent positions is the principle of complementarity. The preamble and article 1 of the Rome Statute set out that the ICC shall be complementary to national criminal jurisdictions. This principle of complementarity is, together with gravity considerations and the principle of *ne bis in idem*, at the essence of the admissibility proceedings before the ICC regulated in article 17 of the Rome Statute. The principle implies that the ICC only has jurisdiction to investigate and prosecute perpetrators of international crimes where the States Parties to the Rome Statute do not investigate or, if they investigate or prosecute, are unwilling or unable to do so.¹⁷⁰ The principle has often been pointed to as one of the cornerstones of the Rome Statute, permeating the entire structure of the Court.¹⁷¹

¹⁶⁷ United Nations General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 6 September 1995, A/50/22 (1995), para. 31; see also paras 29–51.

¹⁶⁸ J.T. Holmes, *The Principle of Complementarity*, [in:] R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague 1999, p. 41, at p. 42.

¹⁶⁹ United Nations General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 6 September 1995, A/50/22 (1995), para. 33; see also paras 29–51; see in addition J.T. Holmes, *The Principle of Complementarity...*, *op. cit.*, p. 41, at p. 42; S.A. Williams and W.A. Schabas, *Article 17*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, C. H. Beck, 2nd ed., München 2008, p. 605, at p. 607.

¹⁷⁰ Rome Statute, art. 17.

¹⁷¹ Rome Statute, preamble (emphasizing that the ICC “shall be complementary to national criminal jurisdictions”); arts 1, 17; see, e.g., O. Triffterer, M. Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, “Max Planck Yearbook of United Nations Law” 2003, 7, 591, 593; J. I Charney, *International Criminal Law and the Role of Domestic Courts*, “*American Journal of International Law*” 2001, 95, 120; E. La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction*, “*Netherlands International Law Review*” 1999, 46, 1; M. Bergsmo, *Occasional*

The Rome Statute dedicates most of its attention to negative complementarity, i.e. the decision regarding whether a case is or is not admissible before the Court. This notion is regulated by article 17(1)(a) of the Rome Statute, which provides that a case is inadmissible if it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” There has been considerable debate surrounding whether article 17 renders a case admissible only if the national state with jurisdiction over the crime is unwilling or unable to prosecute the crime¹⁷² and the criteria that should be used to determine whether a “case is being investigated or prosecuted.”¹⁷³ In response, the Appeals Chamber’s jurisprudence has established that the determination of admissibility under article 17 entails a two-fold test. First, the question must be asked whether there is or has been actual investigatory or prosecutorial activity in the state concerned. In regard to this, the Appeals Chamber stated in *Prosecutor v. Ruto* that “for such a case to be inadmissible under article 17 (1) (a) of the Rome Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”¹⁷⁴ It is only if this question is answered in the affirmative that the second question of whether the state in question is unwilling or unable to prosecute the crimes charges must be asked.¹⁷⁵

Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council, “Nordic Journal of International Law” 2000, 69, 28, 28–29.

¹⁷² See D. Robinson, *The Mysterious Mysteriousness of Complementarity*, “Criminal Law Forum” 2010, 21, 67, 72, quoting J.B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, “Loyola University Chicago International Law Review” 2006, 4, 107, 107.

¹⁷³ Rome Statute, art. 17(1)(a).

¹⁷⁴ Appeals Chamber, *Prosecutor v. Ruto*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, ICC-01/09-01/11-307 (OA), para. 40. See also Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, ICC-01/09/02/11-274 (OA), para. 39.

¹⁷⁵ Appeals Chamber, *Prosecutor v. Ruto*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, ICC-01/09-01/11-307 (OA), para. 41; Appeals Chamber, *Prosecutor v. Germain Katanga*, “Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 78; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, ICC-01/09/02/11-274 (OA), para. 40.

In the most recent admissibility proceedings in the situation in Libya, it is also at issue, for the first time in proceedings before the ICC, as to when a State is genuinely unable to investigate or prosecute a case.¹⁷⁶

The Rome Statute does not explicitly address so-called ‘positive complementarity’, i.e. the efforts relevant to strengthening domestic efforts to investigate and prosecute alleged crimes that fall within the ICC’s subject-matter jurisdiction. Article 93 (10) of the Rome Statute is the provision that allows the Prosecutor to cooperate, upon request, with a state that is investigating or prosecuting such crimes. The specific means of cooperation are left open; however, the focus appears to be on sharing evidence or materials collected in the course of the investigation. This, however, is only one limited aspect of positive complementarity. Not only does the ICC’s staff collect crucial knowledge about each situation that could be shared, but the overall functioning of the legal system, or at least of courts or chambers that are in charge of addressing crimes similar to those of the ICC, is immediately important to creating an effective remedy against impunity. States addressed this at the First Review Conference in Kampala in 2010 and cast the responsibility not on the ICC, but on States Parties and the international community as a whole.¹⁷⁷

B. The role of article 21 of the Rome Statute

Article 21 of the Rome Statute establishes a hierarchy of applicable law, including the sources of this law, for the Court to apply when adjudicating cases. This is the first ‘applicable law’ provision among the statutes of international criminal tribunals.¹⁷⁸ According to paragraph 1(a), first, priority is given to the Rome Statute, Elements of Crimes and the Rules of Procedure and Evidence.¹⁷⁹ Under paragraph 1(b), if “appropriate”, the ICC can then apply “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” Finally, if the sources listed in paragraphs (a) and (b) are unhelpful, the ICC can look to “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that

¹⁷⁶ Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 31 May 2013, ICC-01/11-01/11-344-Red; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Document in Support of the Government of Libya’s Appeal against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi””, 24 June 2013, ICC-01/11-01/11-370-Red3; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Prosecution Response to the “Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi””, 22 July 2013, ICC-01/11-01/11-384-Red.

¹⁷⁷ Review Conference, Resolution 1 (RC/Res.1), “Complementarity”, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf

¹⁷⁸ But see article 38 of the ICJ Statute.

¹⁷⁹ Rome Statute, article 21(1)(a).

those principles are not inconsistent with this Rome Statute and with international law and internationally recognized norms and standards.”

Article 21 represents a compromise between two schools of thought that emerged at the Preparatory Committee meetings.¹⁸⁰ A minority of States considered that the principle of legality required that the judges of the ICC have little to no discretion in the application of law and any doubt should be resolved by looking to domestic law.¹⁸¹ However, the majority of States took the position that, given the unique nature of international criminal law, judges should be able to apply general principles of international criminal law.¹⁸² Thus, article 21 of the Rome Statute only allows recourse to general principles of international law, derived from national laws, when all other sources fail.¹⁸³ In its judgment in the *Situation in the Democratic Republic of the Congo*, the Appeals Chamber held that recourse to sources of law other than those listed in article 21(1)(a) may only be had if the primary sources leave a gap – or lacuna – in the law that needs to be filled.¹⁸⁴

Paragraph 1(c) of article 21 of the Rome Statute is primarily based on the view, supported by the majority of States, that the Court should apply general principles of international law derived from the national laws of the legal systems of the world. However, the view that the Court should apply the national laws of concerned States Parties directly also influenced the shaping of this provision.¹⁸⁵ The compromise that was reached – although not without objections¹⁸⁶ – was that “the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options be combined.”¹⁸⁷

Paragraph 3 of article 21 of the Rome Statute reflects the virtually unanimous acceptance by the States Parties that the interpretation of law by the ICC “be

¹⁸⁰ See M. McAuliffe deGuzman, *Article 21*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, Germany 1999, p. 435, at p. 436.

¹⁸¹ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II*, 13 September 1996, A/51/22 (1996), p. 105. See also deGuzman, above n 180, p. 436.

¹⁸² McAuliffe deGuzman, above n 180, p. 436.

¹⁸³ See Rome Statute, art. 21(1)(c).

¹⁸⁴ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecution’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 (OA 3), para. 39.

¹⁸⁵ See United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute*, 14 April 1998, A/CONF.183/2/Add.1 (1998), article 20, at p. 54 (note that article 20 became article 21 in the Rome Statute); see, e.g., McAuliffe deGuzman, above n 180, p. 437 J. Verhoeven, ‘Article 21 of the Rome Statute and the ambiguities of applicable law’ (2002) 33 *Netherlands Yearbook of International Law* 2, at p. 9.

¹⁸⁶ See McAuliffe deGuzman, above n 180, p. 437.

¹⁸⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on article 20*, 8 July 1998, A/CONF.183/C.1/WGAL/L.1 (1998), at p. 2, n. 3; see also Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecution’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 (OA 3), para. 24.

consistent with internationally recognised human rights”.¹⁸⁸ As emphasised by the Appeals Chamber in *Prosecutor v. Lubanga*, “[h]uman rights underpin the Rome Statute; every aspect of it, including the exercise of the jurisdiction of the Court.”¹⁸⁹ For example, paragraph 3 has played an important role in the development of jurisprudence relevant to stays of proceedings and on the jurisprudence relevant to interim release.¹⁹⁰

C. The Need for Cooperation

The first President of the ICTY stated that the ICTY “remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of States is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force States to cooperate with it.”¹⁹¹ This statement is no less applicable to the ICC, which cannot fulfil its mandate of delivering justice without cooperation and assistance from relevant States. Indeed, the ICC cannot enforce such cooperation and “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of [the Rome Statute]”, the only recourse is for the Court to “make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”¹⁹² As stated by Triffterer: “Cooperation between States and the ICC is [...] a vertical support to protect legal values, inherent to the international community as a whole. States as members of this community have to help the Court which is lacking sufficient enforcement mechanism of its own or of the international community as a whole.”¹⁹³ The situation in Darfur, Sudan, has illuminated the difficulties of enforcing ICC rulings without cooperation, particularly when non-States Parties

¹⁸⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, 4 February 1998, A/AC.249/1998/L.13 (1998), at p. 64, n. 117; see also McAuliffe deGuzman, above n 180, p. 445.

¹⁸⁹ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, 14 December 2006, ICC-01/04-01/06 (OA4), para. 37.

¹⁹⁰ [...] See Dissenting Opinion of Judge Anita Ušacka in *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, 29 October 2013, ICC-02/11-01/11-548-Anx2, para. 11.

¹⁹¹ A. Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, “European Journal of International Law 1998, 9, 2, at p. 13.

¹⁹² Rome Statute, art. 87(7).

¹⁹³ O. Triffterer, *Concluding Remarks*, [in:] Austrian Federal Ministry of Foreign Affairs and Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights (eds.), *The Future of the International Criminal Court: Salzburg Retreat, 25–27 May 2006*, Office of External Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University, 2006, accessed at: http://data-space.princeton.edu/jspui/bitstream/88435/dsp01pv63g027t/1/ICC_2006.pdf, p. 19, at p. 25.

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such as Sudan are involved. While the United Nations has stated that non-States Parties must cooperate with the ICC in the case of Darfur,¹⁹⁴ Sudanese State officials have made statements reflecting an unwillingness to cooperate with the ICC.¹⁹⁵ The issues raised by this case in terms of enforcement bear serious implications for the ICC's effectiveness and legitimacy.

In the new strategy released by the Office of the Prosecutor (OTP) in October 2013,¹⁹⁶ the OTP stressed the absolute need for state cooperation in all aspects of its operations. For example, it is crucial for States to cooperate with the OTP by providing logistical support, providing access to information and evidence, providing access to local expertise, assisting in the protection of staff and other persons involved in the ICC's processes (such as witnesses and victims), and implementing Court orders and arrests.¹⁹⁷ Furthermore, the OTP noted that cooperation by States can encourage national States to genuinely investigate and prosecute crimes within the jurisdiction of the ICC, thus improving the complementarity regime of the ICC and reducing the necessity for ICC intervention.¹⁹⁸ In order to improve such cooperation, the OTP recommended the "further development of proper accountability mechanisms as envisaged within the framework of the Rome Statute".¹⁹⁹

VII. Conclusion

This article has sought to provide an outline of the structure of the ICC and its formation and procedure, and to shed light on some challenges that have faced, and continue to face the ICC in its first ten years of development. While it may seem like a daunting task to build an international court from the ground

¹⁹⁴ United Nations, Security Council, *Resolution 1593*, 31 March 2005, S/RES/1593 (2005).

¹⁹⁵ "[A] member of the parliament from the SPLM... Ahmad Isa criticized [in] a telephone call to Al-Ayyam [a Sudanese news agency] the proposals made by members of the [ruling] National Congress (NC) to persuade crime witnesses in Darfur not to collaborate with the ICC." Al-Ayam, "Sudan: SPLM Parliamentarians Call on Government to Hand over Darfur Suspects", 7 May 2007, accessed at: <http://www.sudantribune.com/spip.php?article21766>. "Our position is very, very clear-the ICC cannot assume any jurisdiction to judge any Sudanese outside the country," Justice Minister Mohamed Ali al-Mardi told the Associated Press... Asked whether Sudan would continue its past sporadic cooperation with the [C]ourt, al-Mardi answered, "What cooperation? It's over." M. Corder, *International Court Issues Arrest Warrants for Darfur War Crimes Suspects*, "The Associated Press", 2 May 2007, accessed at: <http://news.google.com/newspapers?nid=1665&dat=20070503&id=pWpPAAAAIIBAJ&sjid=yyUEAAAAIIBAJ&pg=2300,272281>.

¹⁹⁶ Office of the Prosecutor, "Strategic plan/June 2012–2015" 11 October 2013, accessed at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf.

¹⁹⁷ International Criminal Court: Office of the Prosecutor, "Strategic Plan: June 2012–2015", 11 October 2013, accessed at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf, para. 64.

¹⁹⁸ *Ibid.*, para. 66.

¹⁹⁹ *Ibid.*, para. 65.

up, it is also a tremendous opportunity to re-evaluate the inefficiencies and to hopefully simplify some of the complexities of the law. As a judge of the ICC, each day I am faced with new legal issues which allow me to view justice from a global perspective. Even with all of the differences between the legal systems of the States Parties to the Rome Statute, a few of which have been discussed in this article, shared themes among them remain: the search for truth and justice, the preservation of basic human rights, and the goal of ending impunity. It is for this reason that I continue to be hopeful that the realisation of a nearly century-long goal of providing a mechanism for international criminal justice will be worthwhile.

By the end of 2015, the ICC is set to move into new permanent premises in The Hague (the Netherlands). The construction of these premises marks an important step forward in strengthening the role of the ICC as a permanent institution in the international justice arena and in enabling the ICC to effectively discharge its role in fighting impunity. It is also symbolic of the commitment that the States Parties of the Rome Statute have shown to the establishment of the ICC and its continued development.

So long as there continue to be “unimaginable atrocities that deeply affect the conscience of mankind”,²⁰⁰ it is necessary, not only to have a permanent international criminal court, but to continually develop this court in order to improve its efficacy in bringing the perpetrators of these atrocities to justice. In the most recent meeting of the Assembly of States Parties, on 27 November 2013, the Assembly stressed many focus areas for the purpose of strengthening the ICC. These areas include, *inter alia*: working towards the universal full and effective implementation of the Rome Statute; the cooperation of State Parties and their compliance with obligations under the Rome Statute; the strengthening of the relationship of the ICC with international organisations and bodies such as the United Nations, the African Union, and the International Humanitarian Fact-finding Commission; learning from the best practices of other international and national tribunals and organisations that have investigated crimes falling within the ICC’s jurisdiction; the importance of electing highly qualified and competent judges; the continued implementation of legal aid; improving the institutional framework of the Rome Statute through continued dialogue with the States Parties; and the participation of individuals, international organisations, and corporations in the Assembly of States Parties.²⁰¹

The active involvement and support of States, human rights activists, academics and practitioners will be essential to ensure that the lofty goals of the Rome Statute’s preamble continue to become a reality: that the most serious crimes of the international community do not go unpublished and that we guarantee lasting respect for and the enforcement of international criminal justice.

²⁰⁰ Rome Statute, preamble.

²⁰¹ Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, 27 November 2013, 12th plenary meeting of the Assembly of States Parties, ICC-ASP/12/Res.8.

**MIĘDZYNARODOWY TRYBUNAŁ KARNY W DZIAŁANIU:
WYZWANIA W WALCE Z BEZKARNOŚCIĄ****Streszczenie**

Artykuł poświęcony jest działalności Międzynarodowego Trybunału Karnego w Hadze. Omówiono w nim jego genezę, podstawy prawne, zasady działania, zakres jurysdykcyjny, postępowanie przed trybunałem, udział ofiar w postępowaniu oraz przedstawiono sprawy rozpatrywane w poszczególnych wydziałach.

**THE INTERNATIONAL CRIMINAL COURT IN ACTION:
CHALLENGES IN FIGHTING IMPUNITY****Summary**

The article is devoted to the activities of the international Criminal Court in The Hague. It discusses its origin, legal bases, principles of operation, jurisdiction, court proceeding, victims' participation in the proceeding and issues dealt with in particular divisions.

**LA COUR PÉNALE INTERNATIONALE EN ACTION:
LES ENJEUX DANS LE DOMAINE DE LA LUTTE CONTRE NON-PUNITION****Résumé**

L'article est consacré aux activités de la Cour Pénale internationale à La Haye. On y parle de sa genèse, des bases juridiques, du champ d'activité juridique, de la procédure devant le tribunal, de la participation des victimes dans la procédure et on y présente aussi des affaires traitées par quelques départements particuliers.

**МЕЖДУНАРОДНЫЙ УГОЛОВНЫЙ СУД В ДЕЙСТВИИ:
ВЫЗОВ В БОРЬБЕ С БЕЗНАКАЗАННОСТЬЮ****Резюме**

Статья посвящена деятельности Международного уголовного суда в Гааге. В ней оговорены генезис, правовая база, принципы работы, сфера юрисдикции, процедура рассмотрения дел в трибунале, участие потерпевших в разбирательстве, а также представлены вопросы, рассматриваемые в отдельных подразделах.