

# EXPEDITING PROCEEDINGS AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
June 2011

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## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. Thus, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Court of Bosnia and Herzegovina. It has also provided legal research assistance to Argentina's Assistance Unit for Cases of Human Rights Violations Committed under State Terrorism and the Office of War Crimes Issues at the U.S. Department of State.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in recognition of the urgent need for analytical critique at early stages of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO has taken on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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## COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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## **EXECUTIVE SUMMARY**

In its less than one decade of existence, the International Criminal Court (ICC) has achieved a great deal, opening formal investigations into six situations involving some of the most serious atrocities that have occurred since the birth of the Court in 2002 and commencing cases against a number of the individuals believed to bear the greatest responsibility for those atrocities. However, nearly ten years after coming into being, the ICC has yet to complete a single trial, raising concerns among States Parties to the Rome Statute and others regarding the effective functioning of the Court. Hence, while recognizing that the ICC is still a very young institution faced with a variety of novel substantive and procedural challenges, the aim of this report is to identify areas of unnecessary delays in proceedings currently before the Court that are likely to arise again, and to suggest ways in which such delays may be avoided in the future.

The structure of the report is as follows: first, we address delays arising at the pre-trial stage of proceedings, referring to proceedings conducted before the Court's Pre-Trial Chambers; second, we address delays arising after a case has been transferred to the Trial Chamber; finally, we address issues that are relevant both at the pre-trial and trial level.

### **Delays Arising at Pre-Trial Stage**

#### *Issuance of Arrest Warrants/Summonses to Appear*

The Pre-Trial Chambers have in several cases taken more than two months to respond to applications for a warrant of arrest or summons to appear under Article 58 of the Rome Statute, and in only two cases did the Pre-Trial Chamber respond to an Article 58 application in less than one month. By contrast, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have regularly issued arrest warrants in a matter of days, rather than weeks or months, even in cases against senior leaders.

One solution to the delays in the issuance of arrest warrants and summonses to appear would be to consider imposing a deadline on the Pre-Trial Chambers' Article 58 decisions. Notably, such a deadline already exists regarding when a decision must be taken by the Pre-Trial Chamber as to whether the charges against the suspect can be confirmed. Thus, it seems reasonable to impose a similar limit on Article 58 decisions, particularly since the Prosecution's burden under Article 58 is lower and the Defense is not given a chance to contest the evidence. Another possible solution would be to permit decisions under Article 58 to be decided by a single judge, which is the practice of other international criminal bodies.

### *Length of the Confirmation of Charges Process*

Before a suspect is committed to trial, a Pre-Trial Chamber of the ICC must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. As of the writing of this report, the ICC has concluded confirmation proceedings in five cases and, in each case, the confirmation process has taken several months, even though the Chamber need only establish *substantial grounds to believe* the suspect is responsible for the crimes charged. Furthermore, cases are nowhere near "trial ready" when they move from the Pre-Trial Chamber to the Trial Chamber.

Several of the proposals addressed in other sections of this report – such as those relating to disclosure and the pace of interlocutory appellate review – should contribute to expediting the confirmation process. In addition, confirmation proceedings could be significantly accelerated if the Prosecution were to rely on fewer witnesses at this stage. The Prosecution should also take advantage of the fact that the Rome Statute permits it to rely on "documentary or summary evidence" at the confirmation stage. Yet another way to expedite the confirmation process would be to amend Regulation 53 of the Regulations of the Court to shorten the amount of time given to the Pre-Trial Chamber to issue its decision whether to confirm the charges, which is currently set at sixty days from the close of the confirmation hearing. Alternatively, future Pre-Trial Chambers could interpret Regulation 53 as requiring the decision within sixty days of the last day of the actual confirmation hearing, rather than sixty days from the last submission received following the close of the hearing, as the Chambers have done in the past.



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## **Delays Arising at Trial Stage**

### *Number and Assignment of Trial Judges*

There are currently eight judges assigned to the Trial Division of the ICC. Because each Trial Chamber is composed of three judges, this means that, in order to run three trials simultaneously, judges either need to be assigned to more than one active case at once or a judge from the Pre-Trial Division needs to be temporarily assigned to the Trial Division. Each of these options has its drawbacks, as discussed in detail below.

The most practical solution to the problem of insufficient judges in the Trial Division appears to be the addition of *ad litem* judges at the ICC. Notably, *ad litem* judges have been used at the ICTY and the ICTR for several years, and it has been observed that the availability of such judges has been crucial to improving the efficiency of the tribunals. Moreover, the Assembly of States Parties could consider, where appropriate, electing *ad litem* judges from the regions in which the Court is active at the time of the election, which could be beneficial from the standpoint of the Court's perceived legitimacy in the region, in addition to potentially reducing delays that may otherwise occur during witness testimony due to problems of interpretation or cultural misunderstandings.

### *Requirement that Trial Chamber Functions Be Carried Out By Three Judges*

Article 39 of the Rome Statute requires that "the functions of the trial chamber shall be carried out by 3 judges," and Article 74 states "[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations." Obviously, these provisions have the potential to cause delays where one or more judges are assigned to more than one active case. However, the requirement that all Trial Chamber functions be carried out by three judges may also be a source of delay where there is no overlap in the composition of various Trial Chambers. First, requiring that all three judges be involved in each status conference and every order and decision issued by the Chamber seems both unnecessary and inefficient, particularly given the volume of work in the lead-up to trial. Second, the requirement that all Trial Chamber functions be carried out by three judges raises problems when one judge is unexpectedly unavailable, for instance, due to sickness or a family emergency.

In terms of resolving the inefficiency that results from requiring that all Trial Chamber functions be carried out by three judges, one solution would be to carve out exceptions to the relevant provisions of the Rome Statute to allow certain Trial Chamber functions to be carried out by a single judge, as seen both at the ICTY and ICTR, and at the confirmation stage of ICC proceedings. With regard to the delays that are likely to arise in the event that a Trial Chamber judge is unexpectedly unavailable for a brief period of time, two solutions present themselves. First, at a minimum, it makes sense to interpret the term “present” as used in Article 74 as encompassing not just physical presence, but also presence through participation *via* teleconferencing or videoconferencing. Second, the rules of the ICC could be amended to include a provision similar to the ICTY’s Rule 15*bis*, which provides, *inter alia*, that if a judge is absent for a short duration and the remaining judges are satisfied that it is in the interests of justice to do so, the remaining judges may conduct all or part of the Chamber’s business in the absence of the missing judge.

#### *Amount of Time Taken By Live Testimony*

As a general rule, the Rome Statute expresses a presumption that evidence will be presented through a process of in-court direct- and cross-examination of witnesses, which is often the most desirable way for a court to receive evidence, particularly where the testimony is relevant to a critical issue in the case. However, it is not necessarily true that all evidence needs to be presented *via* in-court examination. Indeed, in the context of atrocity trials, a significant amount of the evidence relates to matters other than the conduct of the accused in relation to the crime charged, such as background events, jurisdictional prerequisites, impact on victims, and factors relevant to sentencing. Furthermore, the length of time taken by live witness testimony at the ICC may be exacerbated by a number of factors. For instance, the Trial Chambers’ prohibition on witness proofing has arguably prolonged witness testimony, as witnesses have had to be recalled after recanting testimony or take a break from giving testimony after suffering an emotional breakdown. Another potentially problematic practice is that seen in the *Bemba* case with regard to Trial Chamber III’s ban on leading questions, as leading questions are often useful in ensuring a direct and succinct answer from a witness, particularly on cross-examination or with respect to non-contentious issues.

Importantly, the ICC's governing documents already carve out exceptions to the general presumption in favor of in-court witness testimony. In particular, the Rome Statute expressly contemplates "the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts," and the Rules of Procedure and Evidence state that a Trial Chamber may allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) both parties had the opportunity to examine the witness during the recording; or (b) the witness is available to be examined in court if either party or the Chamber wants to question the witness. However, to date, the ICC Trial Chambers have not made extensive use of these provisions. We suggest that the Court consider increasing use of prior-recorded testimony going forward, particularly in the form of deposition testimony. It might also be useful if the ICC had a rule equivalent to Rule 92*bis* of the ICTY Rules of Procedure and Evidence, which allows a Chamber to admit the written testimony of a witness, even if that witness is not available to be examined in court and has not been previously examined by both parties, so long as the testimony in question "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Yet another way to expedite testimony on issues not central to the conduct of the accused in a case is to make greater use of reports from court-appointed experts.

For those witnesses who do testify in court, the expeditious presentation of testimony would likely be encouraged if the Chambers permitted the parties to proof their witnesses prior to taking the stand, as witness proofing promotes the orderly presentation of evidence and ensures that both parties are aware of any new information known to the witness before the witness takes the stand. Efficiency would also be encouraged if all Trial Chambers were to follow the approach of the Chambers in the first two cases and permit leading questions with respect to non-contentious issues on direct, and without limit on cross-examination. A final way to reduce the amount of time taken by live testimony is to narrow the issues contested at trial, for instance through the increased use of stipulations by the parties and the taking of judicial notice.

## **Delays Arising Both at Pre-Trial and Trial Stage**

### *Interlocutory Appellate Process*

One area of substantial delay at both the pre-trial and trial stages of ICC cases has been the process by which parties secure judgments on interlocutory appeals. First, the Pre-Trial or Trial Chamber responsible for the initial impugned decision sometimes causes delays by waiting a substantial period of time before issuing rulings on whether to grant a party's request to obtain interlocutory appeal. Second, the Appeals Chamber has regularly taken several months to render judgments on those issues that reach it, even though in many cases the proceedings below have been formally or effectively stayed pending the judgment. One source of delay in the rendering of interlocutory judgments appears to be the fact that the Appeals Chamber often takes weeks to rule on a request from victims to participate in the appeal, which delays the proceedings because, once granted a right to participate, victims are given the opportunity to submit observations, and the parties are permitted to respond to the victims' observations. Finally, although the Appeals Chamber regularly takes multiple months to rule on an interlocutory appeal, the resulting judgment is often brief and provides little guidance to the parties and lower chambers of the Court.

One obvious solution to the delays caused by the interlocutory appellate process would be to limit the availability of interlocutory appeal. However, there are a number of circumstances under which it would be *more* efficient to have a decision reviewed immediately, particularly if a reversal will either make a costly and lengthy trial unnecessary or significantly alter the substance of that trial. An additional benefit of permitting interlocutory appeal is the ability of the parties to receive authoritative rulings on unsettled issues of law, which, particularly in the early years of a court's operation, assists the litigants in preparing their cases and could reduce unnecessary litigation during trial. Hence, rather than limiting the number of decisions for which interlocutory appeals are permitted, it seems the better solution is to reduce the amount of time consumed by the process of securing interlocutory judgments from the Appeals Chamber. One way to accomplish this would be to consider imposing time limits with respect to both decisions on requests for leave to appeal and the resulting appeals judgments. The process on appeal would also be expedited if the Appeals Chamber were to automatically

grant participatory rights to any victims who have already been granted the right to participate before the Pre-Trial or Trial Chamber that issued the impugned decision. Finally, the Appeals Chamber should be encouraged to provide as much guidance as possible to the lower chambers and the parties, while limiting itself to the issues in contention, such that any delays caused by the appeal will ideally contribute to expeditious proceedings in the long run.

### *Issues Relating to Payment of Defense Counsel*

To date, there have been two instances of delay in cases before the ICC stemming from disputes between the Registrar and defense counsel over payment. The first was brought about when Thomas Lubanga's lead defense counsel withdrew from the case and his replacement, Catherine Mabilie, conditioned her formal acceptance of the appointment on an agreement from the Registrar to increase the resources available to the defense team. In response, the Registrar declined to consider Ms. Mabilie's request until she had formally accepted her appointment, as the Regulations of the Court state that a person "receiving legal assistance from the Court" may apply for additional resources, and Ms. Mabilie was not yet providing legal assistance to the accused. Ultimately, the matter was resolved when Mr. Lubanga himself filed an application with the Registry seeking additional resources, but the holdup meant that proceedings before the Trial Chamber were postponed several months. The second delay brought about by a dispute between the Registry and defense counsel over payment occurred in the *Bemba* case and involved a refusal by the Registry to provide Mr. Bemba with legal aid because the Court had determined that he has substantial assets, even though those assets for the most part have been unavailable to the accused. As a result of the Registrar's decision, Mr. Bemba's defense team was significantly scaled down for a number of months, hindering his effective trial preparation, and the Trial Chamber was unable to set a date for the start of trial. Eventually, the Trial Chamber ordered the Registrar to provide the accused with legal aid, while taking steps to ensure that if and when Mr. Bemba is able to access his funds, he will reimburse the Court.

Avoiding similar delays in the future will require a more flexible approach on the part of the Registrar. First, to avoid a recurrence of the substantial delay in proceedings brought about by the withdrawal of lead counsel in the *Lubanga* case, it is recommended that the

Registrar effectively treat an attorney selected by the accused as representing that accused for purposes of negotiating defense resources, even if the negotiations occur prior to the attorney's formal appointment. At the very least, the Registrar should in the future advise an attorney in Ms. Mabile's position that his or her client must submit the formal application for additional resources, but permit the attorney to participate in negotiations on that application. Second, even where there is a belief on the part of the Registry that an accused has assets, if those assets are not immediately available, the Registrar should promptly allocate resources to the accused in accordance with the Court's legal assistance framework, while making arrangements to ensure the Court will be reimbursed if and when the accused's assets become available.

#### *Issues Relating to Translation and Interpretation*

A lack of timely translations and inaccurate interpretations has occasionally resulted in delays at the ICC, as detailed below. Furthermore, translation issues were the source of significant delays at the *ad hoc* tribunals, suggesting they will present ongoing challenges for the ICC, which has to contend with translations into many more languages than required at the ICTY or ICTR.

Ensuring the timely translation both of material required to be disclosed by the Prosecution and of decisions by the Chambers will obviously require that the ICC's translation budget keeps pace with growing activity of the Court. In terms of interpretation errors during trial, the issues likely stem from factors such as the use of voice distortion, poor microphone use, and the tone and speed with which the person speaks. One recommendation is for the judges to exercise greater judicial control by reminding participants to pay attention to their tone and speed, to properly use microphones, *etc.*

#### *Issues Relating to Disclosure*

Late disclosure of material by the Prosecution to the Defense, which has been one of the principal causes of delay at the ICC, has primarily arisen from two sources. First, the Prosecution has had to postpone the disclosure of evidence containing sensitive information – such as the identities of vulnerable witnesses and victims and information that may “prejudice further or ongoing investigations” – until any at-risk witnesses have been accepted into the ICC's Protection Programme (ICCPP) and the Chamber has approved an application from the

Prosecution to redact confidential information from the evidence. Second, significant delays have resulted from the Prosecution's refusal to disclose evidence obtained pursuant to Article 54(3)(e) of the Rome Statute, which authorizes the Prosecutor to "(a)gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information actually consents..."

On the subject of disclosure that is delayed due to the need to protect vulnerable witnesses and other sensitive information, one solution would be for the Prosecution to rely on fewer witnesses requiring relocation through the ICCPP. Of course, the ICC is investigating crimes committed in countries engaged in ongoing conflict, or recently recovering from conflict or other mass atrocity, and it is therefore reasonable to anticipate that a large number of witnesses will require the assistance of the Court's ICCPP. For these witnesses, it is recommended that the Prosecution submit applications for admission into the Programme to the Victims and Witnesses Unit (VWU) as soon as possible after the suspect is taken into the custody of the Court. At the same time, it is essential that the VWU be provided with the staff and resources necessary to rapidly evaluate and implement requests for relocation. With regard to applications to the Chambers to redact sensitive information relating to individuals not accepted into the Court's ICCPP or that may prejudice further or ongoing investigations, we recommend, as discussed above, that at the confirmation stage, the Prosecution rely on summaries of evidence that would otherwise require extensive redactions. For purposes of trial, the Prosecution should work to ensure that it will be in a position to submit any requests for redactions to the Trial Chamber as soon as charges are confirmed against a suspect. Furthermore, the speed with which the Chambers are able to respond to requests for redactions may be improved if the Prosecution were to adopt a more systematic and careful approach to its applications for redactions.

Turning to the issue of evidence collected pursuant to confidentiality agreements, our primary recommendation is that the Prosecution strictly limit its use of Article 54(3)(e) agreements in its investigations. One way to ensure compliance with this recommendation would be for the Prosecution to adopt guidelines as to when it will make use of such agreements. Furthermore, to the extent that the Prosecution does rely on Article 54(3)(e) to collect certain evidence, it should set in motion

the process by which it will secure the permission of the relevant information providers to disclose potentially exculpatory material as soon as the suspect is taken into the custody of the Court.



## I. INTRODUCTION

In its less than one decade of existence, the International Criminal Court (ICC) has achieved a great deal, opening formal investigations into six situations involving some of the most serious atrocities that have occurred since the birth of the Court in 2002, and commencing cases against a number of the individuals believed to bear the greatest responsibility for those atrocities. However, nearly ten years after coming into being, the ICC has yet to complete a single trial, raising concerns among States Parties to the Rome Statute and others regarding the effective functioning of the Court.<sup>1</sup> On the one hand, international criminal trials are understandably more lengthy on average than domestic criminal trials due to factors such as the difficulty of collecting evidence in a country still experiencing or recently emerging from conflict; the fact that witnesses are often located far from the seat of the court; the need for translation of documents and testimony into multiple languages; the challenges of linking senior leaders to crimes physically perpetrated by lower-level actors; the large scale of the crimes at issue; and the need to establish the contextual elements of international crimes. On the other hand, unduly lengthy proceedings are problematic for a number of reasons. First, significant delays in the processing of a case raise questions about the ICC's ability to respect the fundamental right of an accused person to be tried without undue delay.<sup>2</sup> Second, lengthy trials are

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<sup>1</sup> See, e.g., Assembly of States Parties Resolution, *Establishment of a Study Group on Governance*, ICC-ASP/9/Res.2 (2010) (“Stress[ing] the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court...”); International Law Association, The Hague Conference (2010), *International Criminal Court: Fourth Report*, prepared by Professor Göran Sluiter and Professor William Schabas, Co-Rapporteurs, at 14 (2010) (noting a “consensus” among members of the International Law Association’s Committee on the International Criminal Court that “the ICC should operate more effectively than it has done until this date”); International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress*, IBA/ICC MONITORING & OUTREACH PROGRAMME 8 (January 2011) (explaining that “the issue of the efficiency and effectiveness of the International Criminal Court... has been a matter of much interest and often concern” since the Court’s inception, and that such concerns have intensified in light of the protracted nature of the *Lubanga* case).

<sup>2</sup> See Rome Statute of the International Criminal Court, *adopted on 17 July 1998 by*

costly and threaten to create such a backlog that the Court will be unable to respond effectively to new situations and cases as they arise. Finally, the efficiency of the ICC is directly linked to its credibility among the victims of the crimes being prosecuted by the Court, as well as the wider public. Hence, while recognizing that the ICC is still a very young institution faced with a variety of novel substantive and procedural challenges, the aim of this report is to identify areas of unnecessary delays in proceedings currently before the Court that are likely to arise again, and to suggest ways in which such delays may be avoided in the future.

It should be noted from the outset that this report does not purport to address every source of delay seen in the proceedings before the ICC. As an initial matter, we recognize that a number of delays were caused by unsettled areas of law that inevitably took time to resolve, but which appear to have been settled in a satisfactory manner and are unlikely to cause delay in the future. For example, the first case to come to trial before the ICC, the *Lubanga* case, has been stayed on two separate occasions, considerably delaying the progress of the trial, but in each instance, the ultimate resolution of the underlying issue makes it unlikely that a similar stay of proceedings would be required in the future.<sup>3</sup> Second, certain areas of the Court's operation, such as

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the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9, Art. 67(1)(c) (1998).

<sup>3</sup> In the first instance, discussed in more detail below, Trial Chamber I ordered a stay of proceedings due to the refusal of the Prosecution to disclose – either to the Defense or to the judges – certain exculpatory material on the grounds that the evidence was collected on condition of confidentiality. *See infra* n. 231 *et seq.* and accompanying text. While the Prosecution does have authority to agree not to disclose information collected solely for the purpose of generating new evidence, the Appeals Chamber subsequently made clear that the Prosecution may only enter into such agreements in such a manner that will allow *the Court*, rather than the Prosecution, to resolve the potential tension between confidentiality and the demands of a fair trial. *See The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues raised at the Status Conference on 10 June 2008,” ICC-01/04-01/06-1486, ¶ 6 (Appeals Chamber, 21 October 2008). In the second instance, Trial Chamber I ordered a stay of proceedings after the Prosecution refused to implement repeated orders from the Trial Chamber to disclose to the Defense the identity of an intermediary used by the Prosecution. *See The*

the victim participation and reparations schemes, are still under development and are therefore difficult to judge from the perspective of their impact on the expeditious conduct of proceedings at this stage. Finally, it is important to acknowledge that some areas of delay, such as the requirement that the Chambers periodically review a ruling denying provisional release to an accused pending trial,<sup>4</sup> are necessary to protect the rights of the accused. Again, for purposes of this report, we have attempted to identify clear areas of *unwarranted* delay that are likely to arise again in the future, and for which we see one or more potential solutions.

The structure of the report is as follows: first, we will address delays arising at the pre-trial stage of proceedings, referring to proceedings conducted before the Court's Pre-Trial Chambers; second, we will address delays arising after a case has been transferred to the Trial Chamber; finally, we will address issues that are relevant both at the pre-trial and trial level.

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*Prosecution v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-RED (Trial Chamber I, 8 July 2010). Although it is conceivable that such a situation could arise again in the future, the Appeals Chamber made clear in the context of the *Lubanga* case that, before resorting to a stay of proceedings, a Trial Chamber "faced with a deliberate refusal of a party to comply with its orders which threatens the fairness of the trial should seek to bring about that party's compliance through the imposition of sanctions" in accordance with Article 71 of the Rome Statute. *The 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," ICC-01/04-01/06-2582, ¶ 60 (Appeals Chamber, 8 October 2010).

<sup>4</sup> See Rome Statute, *supra* n. 2, Art. 60(3).

## II. DELAYS ARISING AT PRE-TRIAL STAGE

### A. ISSUANCE OF ARREST WARRANTS/SUMMONSES TO APPEAR

#### 1. *Problem*

In several of the first cases brought at the ICC, there have been delays from the very inception of the case.<sup>5</sup> Indeed, as the statistics in Figure One below demonstrate, the Pre-Trial Chambers have in several cases taken more than two months to respond to applications under Article 58 of the Rome Statute.<sup>6</sup> Furthermore, in only two cases did the Pre-

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<sup>5</sup> See, e.g., PhD Studies in Human Rights, *Big Improvement at ICC as Prosecutor Moves Fast on Libya*, 4 March 2011, <http://humanrightsdoctorate.blogspot.com/2011/03/big-improvement-at-icc-as-prosecutor.html> (noting that the ICC judges “have not exactly been speedy in issuing arrest warrants once the applications are made”).

<sup>6</sup> Article 58 of the Rome Statute provides, in relevant part:

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

...

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear...

Rome Statute, *supra* n. 2, Art. 58.

Trial Chamber issue the final arrest warrant<sup>7</sup> within one month of the Prosecution's application. While in two instances, the ultimate issuance of the arrest warrant was preceded by a lengthy interlocutory appellate process,<sup>8</sup> there is no explanation for the delay in the majority of cases, particularly given that the Prosecution's burden – establishing that there are “reasonable grounds” to believe the person is responsible for the crime<sup>9</sup> – is very low.

By contrast to the ICC, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have regularly issued arrest warrants in a matter of days, rather than weeks or months.<sup>10</sup> Notably, this has been true even in cases against senior leaders, such as the ICTY case against Slobodan Milošević<sup>11</sup> and the SCSL case against Charles Taylor.<sup>12</sup>

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<sup>7</sup> As seen in Annex One to this document, in the context of the case against Jean-Pierre Bemba Gombo, the Pre-Trial Chamber issued a provisional arrest warrant more than two weeks before issuing its final arrest warrant.

<sup>8</sup> See *infra* n. 148 *et seq.* and accompanying text; see also Annex One.

<sup>9</sup> Rome Statute, *supra* n. 2, Art. 58.

<sup>10</sup> See, e.g., *The Prosecutor v. Zlatko Aleksovski*, Warrant for Arrest, Order for Surrender, D1706-D1703, IT-95-14/I (ICTY, 10 November 1995) (issued eight days after the indictment was submitted by the Prosecutor); *The Prosecutor v. Momir Talić*, Warrant for Arrest, Order for Surrender, D709-D708, IT-99-36-I (ICTY, 14 March 1999) (issued two days after the indictment was submitted by the Prosecutor); *The Prosecutor v. Miroslav Deronjić*, Warrant for Arrest, Order for Surrender, D90-D91, IT-02-61-I (4 July 2002) (issued one day after the indictment was submitted by the Prosecutor); *The Prosecutor v. Jean Paul Akayesu*, Trial Judgement, ICTR-96-24-T, ¶ 11 (ICTR, 2 September 1998) (explaining that the arrest warrant was issued on 16 February 1996, three days after the Prosecutor submitted the indictment); *The Prosecutor v. Alfred Musema*, Trial Judgement, ICTR-96-13-A, ¶ 18 (ICTR, 27 January 2000) (explaining that the arrest warrant was issued on 15 July 1996, four days after the Prosecutor submitted the indictment); *The Prosecutor v. Sylvestre Gacumbitsi*, Trial Judgement, ICTR-01-64-T, ¶ 8 (ICTR, 17 June 2004) (explaining that the arrest warrant was issued on 20 June 2001, the same day that the Prosecutor submitted the indictment); *The Prosecutor v. Issa Hassan Sesay, et al.*, Warrant of Arrest and Order for Transfer and Detention, SCSL-03-05-I (SCSL, 7 March 2003) (issued four days after the indictment was submitted by the Prosecutor); *The Prosecutor v. Brima Bazzy Kamara, et al.*, Trial Judgement, SCSL-04-16-T, at 596 (SCSL, 20 June 2007) (explaining that the arrest warrant was issued on 28 May 2003, four days after the Prosecutor submitted the indictment).

<sup>11</sup> *The Prosecutor v. Slobodan Milošević, et al.*, Decision on Review of Indictment and Application for Consequential Orders, IT-02-54 (ICTY, 24 May 1999) (issued

**FIGURE ONE: Issuance of Arrest Warrants/Summons to Appear<sup>13</sup>**

Case	Time Between Article 58 Application and Pre-Trial Chamber Decision
<i>Kony, et al.</i>	> 1 month from amended application
<i>Lubanga</i>	< 1 month
<i>Ntaganda*</i>	> 6 months
<i>Harun &amp; Al-Rahman</i>	2 months
<i>Katanga &amp; Ngudjolo</i>	< 1 month
<i>Al Bashir*</i>	> 11 months for both arrest warrants
<i>Bemba</i>	> 1 month
<i>Abu Garda</i>	> 2 months from amended application
<i>Banda &amp; Jerbo</i>	> 3 months from amended application
<i>Mbarushimana</i>	> 1 month
<i>Ruto, et al.</i>	> 2 months
<i>Muthaura, et al.</i>	> 2 months

two days after the Prosecution submitted the initial indictment).

<sup>12</sup> *The Prosecutor v. Charles Taylor*, Warrant of Arrest and Order for Transfer and Detention, SCSL-03-01-I (SCSL, 7 March 2003) (issued four days after the indictment was submitted by the Prosecutor).

<sup>13</sup> For the dates of the Prosecution's application for an arrest warrant or summons to appear and the Pre-Trial Chamber's decision on the application, together with relevant citations, see Annex One. Note that in those cases marked by an asterisk, the issuance of the arrest warrant was preceded by an Appeals Chamber judgment. These judgments, and their effect on the timing of the arrest warrant, are discussed below. See *infra* n. 148 *et seq.* and accompanying text.

## 2. Proposed Solutions

The easiest solution to the long delay in the issuance of arrest warrants and summonses to appear would be to consider imposing a deadline on the Pre-Trial Chambers requiring that a Chamber respond to applications from the Prosecution under Article 58 of the Rome Statute within a certain number of days. Notably, such a deadline exists in the Regulations of the Court regarding the confirmation of charges decision,<sup>14</sup> but none exists for Article 58 decisions. Given that the Prosecution's burden at the confirmation stage is higher than its burden under Article 58, and the fact that, unlike a confirmation of charges decision, an Article 58 decision is based on an application by the Prosecution that cannot be contested by the Defense, the deadline for the issuance of an arrest warrant or summons could be at least as short, if not shorter, than the sixty day deadline imposed on the Chambers regarding the confirmation decision.<sup>15</sup>

Another possible solution would be to permit decisions under Article 58 to be decided by a single judge. In other international criminal bodies – including the ICTY, ICTR, SCSL, and Special Tribunal for Lebanon – a single judge is responsible for both issuing a warrant of arrest and reviewing the indictment.<sup>16</sup> Importantly, unlike at each of

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<sup>14</sup> See International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, Reg. 53, *adopted* 26 May 2004 (“The written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends.”). For further discussion of Regulation 53, *see infra* n. 40 *et seq.* and accompanying text.

<sup>15</sup> As explained above, *see supra* n. 8 and accompanying text, the issuance of an arrest warrant is sometimes preceded by a lengthy interlocutory appellate process. To account for such instances, any new rule or regulation imposing a time limit on Article 58 decisions should specify that the clock initially runs from the time that the Prosecution submits its amended application under Article 58, and, where there is a successful appeal of the Pre-Trial Chamber's first decision, begins again on the date that the Appeals Chamber judgment is released.

<sup>16</sup> See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.45, R. 11(6) *bis* (2010) (“[A] Judge may ... issue a warrant for the arrest of the accused.”); *id.* R. 47 (stating that “an indictment... shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose” and that “the Judge may issue an arrest warrant”); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 11(G)*bis*, U.N. Doc. ITR/3/Rev.1 (1995), *as amended* 1 October 2009 (“[A] Judge may ... issue a warrant for the arrest of the accused.”); *id.* R. 47 (stating that “an indictment... shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose” and

these other bodies, at the ICC, a suspect would not immediately be sent to trial upon the decision of a single judge to grant an application under Article 58, but rather would have the intermediate step of a confirmation of charges hearing before a full panel of three Pre-Trial judges.<sup>17</sup>

## B. LENGTH OF THE CONFIRMATION OF CHARGES PROCESS

### 1. Problem

Before a suspect is committed to trial at the ICC, a Pre-Trial Chamber must hold “a hearing to confirm the charges on which the Prosecutor intends to seek trial.”<sup>18</sup> As of the writing of this report, the ICC has concluded confirmation proceedings in five cases and, in each case, the confirmation process has taken several months, even though the purpose of the confirmation process is simply to weed out “wrongful and wholly unfounded charges.”<sup>19</sup> Looking at the cases that have been through the confirmation process to date, Figure Two demonstrates the amount of time between an accused’s first appearance before the ICC and the Pre-Trial Chamber’s final decision on the confirmation of charges. Note that in all of the cases but the *Banda & Jerbo* case, one or both parties filed a request with the Chamber seeking leave to

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that “the Judge may issue an arrest warrant”); Special Court for Sierra Leone Rules of Procedure and Evidence, R. 47 (2010) (providing that an indictment “shall be approved by the Designated Judge” and that, following approval of an indictment, “[t]he Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender, or transfer of persons...”); Special Tribunal for Lebanon, Rules of Procedure and Evidence, U.N. Doc. STL/BD/2009/01/Rev.3, R. 68 (2010) (stating that an indictment “shall be reviewed by the Pre-Trial Judge” and that, upon confirmation of the indictment, “the Pre-Trial Judge may issue a summons to appear or an arrest warrant”); *id.* R. 77 (providing that “a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary”).

<sup>17</sup> For further discussion of the confirmation of charges process, see *infra* n. 18 *et seq.* and accompanying text.

<sup>18</sup> Rome Statute, *supra* n. 2, Art. 61(1).

<sup>19</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, ¶ 37 (Pre-Trial Chamber I, 29 January 2007); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ICC-01/04-01/07-611, ¶ 63 (Pre-Trial Chamber I, 1 October 2008).



appeal the confirmation of charges decision.<sup>20</sup> Hence, for all of the cases except the *Banda & Jerbo* case, the relevant time frame in Figure Two runs from the suspect's first appearance to the Pre-Trial Chamber's decision on any requests to appeal the confirmation decision; the *Banda & Jerbo* time frame is measured from the suspects' first appearance to the date of the confirmation of charges decision.

**FIGURE TWO: Length of Confirmation Process<sup>21</sup>**

Case	Time Between First Appearance and Final Confirmation Decision
<i>Lubanga</i>	> 14 months
<i>Katanga &amp; Ngudjolo</i>	> 12 months from Katanga's first appearance; > 8 months from Ngudjolo's first appearance
<i>Bemba</i>	> 14 months
<i>Abu Garda</i>	> 11 months
<i>Banda &amp; Jerbo</i>	> 8 months

Thus, while the process seems to be speeding up, the only case to pass completely through the confirmation stage in fewer than eleven months is the *Banda & Jerbo* case, a case in which the Defence "[did] not contest any of the material facts alleged in the [Document Containing the Charges] for the purposes of confirmation" and in which neither party called witnesses at the confirmation hearing.<sup>22</sup>

<sup>20</sup> As explained below, a party may obtain interlocutory appellate review of a confirmation decision only with leave of the Pre-Trial Chamber that issued the decision. See *infra* n. 129 *et seq.* and accompanying text.

<sup>21</sup> For the dates of an accused's first appearance before the ICC, the Pre-Trial Chamber's decision on whether to confirm the charges, and, where applicable, the Pre-Trial Chamber's decision on whether to grant leave to appeal the confirmation decision, together with relevant citations, see Annex Two.

<sup>22</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Joint Submission by the Office of the Prosecutor and the Defence as to Agree Facts and Submissions regarding Modalities for the Conduct of the Confirmation

Furthermore, as detailed in an earlier report by the War Crimes Research Office entitled *The Confirmation of Charges Process at the International Criminal Court*, cases are nowhere near “trial ready” when they move from the Pre-Trial Chamber to the Trial Chamber.<sup>23</sup> This fact is evidenced by the amount of time taken between the transfer of a case to the Trial Chamber and the start of trial, summarized in Figure Three. Indeed, in the first case to reach trial at the ICC, nearly two years passed between the transfer of the case to the Trial Chamber and the first day of the trial.<sup>24</sup>

**FIGURE THREE: Time Between Transfer of a Case to the Trial Chamber and First Day of Trial<sup>25</sup>**

Case	Time Between Transfer of Case and First Day of Trial
<i>Lubanga</i>	> 22 months
<i>Katanga &amp; Ngudjolo</i>	13 months
<i>Bemba</i>	> 14 months

Hearing, ICC-02/05-03/09-80, ¶¶ 5, 7 (Office of the Prosecutor & Defense, 19 October 2010).

<sup>23</sup> War Crimes Research Office, *The Confirmation of Charges Process at the International Criminal Court*, at 23-25 (October 2008), <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonConfirmationofCharges.pdf?rd=1> (explaining that, despite the lengthy pre-trial proceedings conducted prior to the confirmation of charges hearing in the *Lubanga* case, a vast array of issues remained to be resolved before the trial could commence, including issues relating to disclosure of both incriminating and exculpatory material and the admissibility of evidence for purposes of trial).

<sup>24</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007); See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-107-ENG (26 January 2009).

<sup>25</sup> For the dates regarding when a case was transferred to a Trial Chamber and the first day of trial, together with relevant citations, see Annex Three.

## 2. Proposed Solutions

A significant portion of the delays at the confirmation stage have stemmed from problems with disclosure, which is addressed separately below.<sup>26</sup> Delays have also been brought about at the confirmation stage due to untimely translations<sup>27</sup> and the slow pace of interlocutory appeals,<sup>28</sup> also addressed below. However, there are certain solutions unique to the confirmation of charges stage of proceedings that deserve to be discussed here.

First, the confirmation process could be significantly expedited if the Prosecution were to rely on fewer witnesses at this stage. As stated above, the Prosecution's burden at the confirmation stage is low; it need only put forward "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."<sup>29</sup> Furthermore, Article 61 of the Rome Statute expressly provides that, for purposes of the confirmation of charges, the Prosecutor "need not call the witnesses expected to testify at the trial."<sup>30</sup> Notably, in *Lubanga*, although the Prosecution put forward evidence from some thirty-five witnesses at the confirmation hearing, the Pre-Trial Chamber ended up excluding a significant portion of this evidence from consideration when it determined whether to confirm the charges,<sup>31</sup> yet was nevertheless satisfied that the Prosecution had

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<sup>26</sup> See *infra* n. 204 *et seq.* and accompanying text.

<sup>27</sup> See *infra* n. 192 *et seq.* and accompanying text.

<sup>28</sup> See *infra* n. 128 *et seq.* and accompanying text.

<sup>29</sup> Rome Statute, *supra* n. 2, Art. 61(7).

<sup>30</sup> *Id.* Art. 61(5).

<sup>31</sup> Specifically, the Pre-Trial Chamber disregarded evidence from twenty-four witnesses after the Appeals Chamber held that the Chamber had improperly authorized redactions relating to information for some those witnesses. *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 19, ¶¶ 42-55. Because the Appeals Chamber's judgments relating to the redacted material came out after the conclusion of the confirmation hearing, the Pre-Trial Chamber simply held that it would exclude the affected evidence from its determination whether to confirm the charges, rather than re-evaluate the Prosecutor's applications as the Appeals Chamber had directed it to do. *Id.* ¶¶ 53-54. The Pre-Trial Chamber justified its decision by noting the requirement that the confirmation hearing be conducted "expeditiously" and explaining that a re-evaluation of the Prosecutor's applications affected by the Appeals Chamber's decisions would take "several months to complete." *Id.* ¶ 54.

put forth sufficient evidence to establish substantial grounds to believe Mr. Lubanga was responsible for the crimes charged.<sup>32</sup> In the *Bemba* case, the Prosecution scaled back its number of witnesses at the confirmation stage, but still put forward evidence from twenty-one witnesses, which is more than half the number of witnesses being relied upon by the Prosecution at the actual trial.<sup>33</sup> As Pre-Trial Chamber I stressed in its confirmation decision in the *Katanga & Ngudjolo* case, the “confirmation hearing has a limited scope and purpose and should not be seen as a ‘mini-trial’ or a ‘trial before the trial,’” further suggesting that the Prosecution could rely on fewer witnesses.<sup>34</sup> Along these same lines, the Prosecution should take advantage of the fact that the Rome Statute expressly permits it to rely on “documentary or summary evidence” at the confirmation stage.<sup>35</sup> Using summaries will significantly expedite proceedings at the confirmation stage because it will obviate the need for the Prosecution to secure permission from the Pre-Trial Chamber to redact confidential information from evidence disclosed in its original form.<sup>36</sup> As discussed below, the process of disclosure is significantly delayed at both the confirmation and trial stage by: (i) the amount of time taken by the Court’s Victims and Witnesses Unit (VWU) to process requests for relocation for the Prosecution’s witnesses, as the Prosecution cannot disclose unredacted versions of these witness’s statements and other evidence identifying the witnesses until they have been relocated; and (ii) the amount of time necessary for the Prosecution to obtain permission from the relevant Chamber to redact confidential information, such as the names of vulnerable victims and witnesses not relocated by the VWU and information that may jeopardize future or ongoing investigations if disclosed.<sup>37</sup> At the same time, as Judge

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<sup>32</sup> See generally *id.*

<sup>33</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Date of Trial, ICC-01/05-01/08-598, ¶ 4 (Trial Chamber III, 5 November 2009).

<sup>34</sup> *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 19, ¶ 64.

<sup>35</sup> Rome Statute, *supra* n. 2, Art. 61(5).

<sup>36</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, ¶ 112 (Pre-Trial Chamber I, 25 April 2008) (holding that summaries, unlike redacted evidence, do not need to be reviewed and approved by the Chamber).

<sup>37</sup> See *infra* n. 212 *et seq.* and accompanying text.

Sylvia Steiner has recognized, evidence turned over at the confirmation stage has been so extensively redacted that “the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal.”<sup>38</sup> Thus, relying on summaries of evidence would contribute substantially to a more expeditious confirmation process, without interfering with the rights of the accused at this stage of proceedings. The Pre-Trial Chambers could encourage the Prosecution’s use of summaries by adopting the approach taken by Judge Steiner in the *Katanga & Ngudjolo* case, in which the judge decided that, as a general rule, she would reject the Prosecution’s requests for redactions in documents relating to witnesses on whom it intended to rely at the confirmation hearing, thereby essentially compelling the Prosecution to disclose summaries of the evidence rather than the statements of the witnesses themselves.<sup>39</sup>

Yet another way to expedite the confirmation process would be to amend Regulation 53 of the Regulations of the Court to shorten the amount of time given to the Pre-Trial Chamber to issue its decision whether to confirm the charges, which is currently set at sixty days from the close of the confirmation hearing.<sup>40</sup> Although shortening the sixty-day period may result in shorter confirmation decisions, it seems appropriate at this stage to prioritize prompt delivery of the confirmation decision over detailed and lengthy discussions of the law and facts. Notably, the Pre-Trial Chamber’s decisions regarding whether to confirm the charges have run between 75 and 213 pages in length, with the majority being over 150 pages,<sup>41</sup> even though the

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<sup>38</sup> *Katanga & Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, *supra* n. 36, ¶ 89.

<sup>39</sup> *Id.* ¶ 90.

<sup>40</sup> See ICC Regulations of the Court, *supra* n. 14, Reg. 53 (“The written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends.”).

<sup>41</sup> See *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 19 (157 pages in length); *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 19 (213 pages for the majority decision, 13 pages for the dissent); See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-532, at ¶ 9 (Pre-Trial Chamber II, 18 September 2009) (196 pages in length); *The*

Chamber need only be satisfied that there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”<sup>42</sup> Indeed, in the one case to date in which the Chamber altogether declined to confirm the charges against the accused, the Chamber nevertheless issued a 98-page decision, prompting Judge Cuno Tarfusser to append a separate opinion lamenting the majority’s “detailed analysis of the legal issues pertaining to the merits of the case, in particular as to the existence of the material elements constituting any of the crimes charged.”<sup>43</sup> In the view of Judge Tarfusser, “the lacunae and shortcomings exposed by the mere factual assessment of the evidence [were] so basic and fundamental” that “the decision should have ended with the purely factual determination that, since the evidence brought before the Chamber is not adequate to establish any [link between the crime and the accused], there [were] no substantial grounds to believe that [the accused] committed the crimes as charged.”<sup>44</sup> Yet, even in those cases in which one or more charges are confirmed by the Chambers, it is questionable whether the detailed factual and legal analysis found in each of the confirmation decisions issued thus far are warranted. In fact, as one commentator has observed, the decisions inappropriately “appear to lend the weight of the Court’s authority to the view that the accused is guilty.”<sup>45</sup> Thus, while reducing the sixty-day deadline under Regulation 53 may limit the extent to which the Pre-Trial Chambers are able to engage in lengthy discussions of the law and facts, ensuring prompt delivery of the confirmation decision likely

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*Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red (Pre-Trial Chamber I, 8 February 2010) (103 pages for the majority decision, 5 pages for the dissent); *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the “Decision on the Confirmation of Charges,” ICC-02/05-03/09-121-CORR-RED (Pre-Trial Chamber I, 8 March 2011) (75 pages in length).

<sup>42</sup> Rome Statute, *supra* n. 2, Art. 61(7).

<sup>43</sup> See *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, Separate Opinion of Judge Cuno Tarfusser, ICC-02/05-02/09-243-Red, ¶¶ 3, 10 (Pre-Trial Chamber I, 8 February 2010).

<sup>44</sup> *Id.*

<sup>45</sup> Dapo Akande, *ICC Prosecutor’s Inaccurate Statements about the Bashir Arrest Warrant Decision*, European Journal of International Law Talk, 19 July 2010, <http://www.ejiltalk.org/icc-prosecutors-inaccurate-statements-about-the-bashir-arrest-warrant-decision/>.

outweighs the need for such discussions.<sup>46</sup> An alternative means of securing the confirmation decision more quickly would be for future Pre-Trial Chambers to interpret Regulation 53 as requiring the decision within sixty days of the last day of the actual confirmation hearing, rather than sixty days from the last submission received following the close of the hearing, as the Chambers have done in the past.<sup>47</sup> This approach is more consistent with the plain language of the regulation, which requires the decision “be delivered within 60 days from the date the *confirmation hearing* ends.”<sup>48</sup>

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<sup>46</sup> Cf. David Tolbert & Fergal Gaynor, *International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies*, 27 *Law in Context* 33, 59 (2009) (lamenting that one of the factors contributing to the overall length of trial proceedings at the ICTY and the ICTR has been “the practice of producing quite extensive written judgments” and observing that “[u]sing a disproportionate quantity of limited resources to produce an excessively long written judgment in a relatively simple case unnecessarily diverts resources away from the cases of other accused awaiting trial, and impacts negatively on the right to a speedy trial of all accused concerned”).

<sup>47</sup> See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing (Open Session), ICC-01/04-01/07-T-50-ENG, at 8-9 (Pre-Trial Chamber I, 16 July 2008) (“Following the precedents of this Chamber in the case versus Thomas Lubanga Dyilo, of giving the parties and participants time to file written statements, the Chamber considers the end of the confirmation hearing to be the submission of the last written observations, and therefore the 60 days will start running from the 29th of July.”).

<sup>48</sup> ICC Regulations of the Court, *supra* n. 14, Reg. 53 (emphasis added).

### III. DELAYS ARISING AT TRIAL STAGE

#### A. NUMBER AND ASSIGNMENT OF TRIAL JUDGES

##### 1. Problem

There are currently eight judges assigned to the Trial Division of the ICC. Because each Trial Chamber is composed of three judges,<sup>49</sup> this means that, in order to run three trials simultaneously, judges either need to be assigned to more than one active case at once or a judge from the Pre-Trial Division needs to be temporarily assigned to the Trial Division. Each of these options has its drawbacks, as illustrated by the *Bemba* case. First, when the *Bemba* Trial Chamber was initially constituted on 18 September 2009, two-thirds of the judges assigned to the *Bemba* Trial Chamber were already serving on the *Lubanga* Trial Chamber.<sup>50</sup> Presumably, the idea was that the *Lubanga* trial would conclude well in advance of the start of the *Bemba* trial, and thus the judges would be able to serve on both trials. However, because Article 39 of the Rome Statute requires that “the functions of the trial chamber shall be carried out by 3 judges,”<sup>51</sup> it stands to reason that both the ongoing trial proceedings in the *Lubanga* case and the pre-trial preparation in the *Bemba* case were adversely affected by the overlap in the makeup of the Chambers. As explained above, each of the cases that has gone to trial at the ICC to date has been transferred to a Trial Chamber well before the actual start of trial, and the Trial Chambers have been called upon to render an extensive number of decisions and participate in a number of status conferences in the lead-up to trial. Indeed, in the *Bemba* case, Trial Chamber III issued fifty-six decisions and orders between the date it was first constituted and the first day of trial,<sup>52</sup> and presided over eight status conferences during the same

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<sup>49</sup> See Rome Statute, *supra* n. 2, Art. 39(2)(b)(ii).

<sup>50</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Constituting Trial Chamber III and Referring to It the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-534 (Presidency, 18 September 2009).

<sup>51</sup> Rome Statute, *supra* n. 2, Art. 39(2)(b)(ii).

<sup>52</sup> This figure was derived from the court records available on the ICC’s website, which include each of the decisions and orders issued by the Trial Chamber in the *Bemba* case. See <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Court+Records/Ch>



period.<sup>53</sup> Furthermore, as it turned out, the *Lubanga* trial was nowhere near conclusion by the time the *Bemba* trial was due to commence, meaning that the two judges who were serving on the *Lubanga* Trial Chamber had to be replaced for purposes of the *Bemba* trial.<sup>54</sup> This change in the composition of the bench was one of the reasons that the start of the *Bemba* trial, scheduled to take place on 5 July 2010, was delayed indefinitely on 25 June 2010,<sup>55</sup> and only began on 22 November 2010.<sup>56</sup>

Second, because there were only two judges in the Trial Division not already sitting on an ongoing trial at the time that the *Bemba* Trial Chamber was reconstituted, the Presidency temporarily reassigned Judge Sylvia Steiner from the Pre-Trial Division to the Trial Division.<sup>57</sup> This reassignment apparently contributed to the delay of the confirmation hearing in the *Banda & Jerbo* case from 22 November 2010 to 8 December 2010, as Judge Steiner continued to sit on the Pre-Trial Chamber overseeing the confirmation proceedings in that case. Indeed, as the Pre-Trial Chamber's decision postponing the hearing states, the delay was attributed, in part, to "developments that have occurred in the composition of Chambers and of the Court schedule."<sup>58</sup> One can imagine that such delays will occur with more

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[ambers/Trial+Chamber+III/](#).

<sup>53</sup> This figure was derived from the court records available on the ICC's website, which include the transcripts of hearings held by the Trial Chamber in the *Bemba* case. See <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Transcripts/Trial+Chamber+III/>.

<sup>54</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Replacing Judges in Trial Chamber III, ICC-01/05-01/08-837 (Presidency, 20 July 2010).

<sup>55</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Order Postponing the Commencement of the Trial, ICC-01/05-01/08-803, ¶ 2 (Trial Chamber III, 25 June 2010) (noting that the change was "[d]ue to administrative reasons, in particular the likely change in the composition of the Bench, and to facilitate necessary preparation for the commencement of the trial").

<sup>56</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of Hearing (Open Session), ICC-01/05-01/08-T-32-ENG (22 November 2010).

<sup>57</sup> *Bemba*, Decision Replacing Judges in Trial Chamber III, *supra* n. 54.

<sup>58</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision Postponing the Confirmation Hearing and Setting a Deadline for the Submission of the Suspects' Written Request to Waive Their Right to Attend the Confirmation Hearing, ICC-02/05-03/09-81, ¶ 2 (Pre-Trial Chamber I, 22 October

frequency as the caseloads of both the Pre-Trial Chambers and the Trial Chambers grow in the foreseeable future.

## 2. *Proposed Solution*

The most practical solution to the problem of insufficient judges in the Trial Division would be the addition of *ad litem* judges at the ICC. As the International Bar Association (IBA) has explained, “[a]n *ad litem* judge is an ‘*ad hoc*’ judge appointed to participate only in a particular case or a limited set of cases and who may serve for a shorter period than a full term.”<sup>59</sup> The use of *ad litem* judges, as opposed to increasing the number of permanent judges at the ICC, makes sense because the Court’s docket is likely to ebb and flow depending not only on the number of situations in which it is active at any given time, but also on whether States are cooperating in enforcing warrants for arrest. Notably, *ad litem* judges have been used at the ICTY and the ICTR for several years,<sup>60</sup> and it has been observed that the availability of such judges has been crucial to improving the efficiency of the tribunals.<sup>61</sup> Moreover, the Assembly of States Parties could consider,

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2010) (noting also the lack of available courtrooms). The confirmation hearing was initially scheduled for 22 November 2010, before Judge Steiner was assigned to the Trial Division for purposes of the *Bemba* case. *See id.* ¶ 1 (explaining that the 22 November 2010 hearing date was set on 17 June 2010).

<sup>59</sup> International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress*, *supra* n. 1, at 25.

<sup>60</sup> *See* Security Council Res. 1329, U.N. Doc. 1329 (30 November 2000) (allowing for the election of *ad litem* judges to the ICTY); Security Council Res. 1431, U.N. Doc. S/RES/1431 (14 August 2002) (allowing for the election of *ad litem* judges to the ICTR).

<sup>61</sup> *See, e.g.*, Anna Petrig & Fausto Pocar, *Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy*, 45 No. 2 *Crim. Law Bulletin ART* 2, § B.1 (2009) (noting that the “creation of a pool of *ad litem* judges” helped improve the efficiency of the ICTY); *Statement by Judge Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia to the Security Council, 13 June 2005*, ICTY Press Release TM/MOW/976-e, at 2 (13 June 2005) (in which Judge Meron advocated for the re-election of *ad litem* judges on the grounds that, “[f]or new trials to be assigned to panels of Judges with no delay, it is absolutely imperative that the President have at his disposal a roster of distinguished jurists who are willing and able to serve the Tribunal, often on quite short notice.”); Judge Erik Møse, *The ICTR: Experiences and Challenges*, 12 *New Eng. J. Int’l & Comp. L.* 1, 10 (2005) (noting that the addition of *ad litem* judges at the ICTR in 2002 immediately permitted the tribunal to commence seven new trials).

where appropriate, electing *ad litem* judges from the regions in which the Court is active at the time of the election, which could be beneficial from the standpoint of the Court's perceived legitimacy in the region.<sup>62</sup> In addition, it could potentially reduce delays that may otherwise occur during witness testimony due to problems of interpretation or cultural misunderstandings.<sup>63</sup>

Of course, in the event that the number of trial judges increases, the ICC budget will need to be expanded not only to provide compensation and legal support for the new judges, but also to provide the technical support that will be required if the ICC is to conduct more than three trials simultaneously, including expanded resources for interpretation, translation, security, and audio-visual support. It is also critical that, in respects other than the terms of appointment, the *ad litem* judges would have the same conditions of employment as the permanent judges, including equivalent remuneration and privileges and immunities.<sup>64</sup> Other considerations that will have to be taken into account include when the elections of *ad litem* judges would take place, how *ad litem* judges would be assigned to particular cases, and whether *ad litem* judges would be eligible to serve on the Pre-Trial or Appeals Chambers, in addition to the Trial Chambers.

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<sup>62</sup> See, e.g., Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?*, 43 J. Marshall L. Rev. 715, 750 (2010) (arguing for the use of *ad litem* judges from the affected region serve on "local or regional chamber[s]," noting that "[h]aving judges... that come from the same region will improve the Court's perceived legitimacy amongst the affected communities").

<sup>63</sup> See, e.g., Leigh Swigart, *The "National Judge": Some Reflections on Diversity in International Courts and Tribunals*, 42 McGeorge L. Rev. 223, 230 (2010) (calling into question the decision to exclude nationals of the Balkans and Rwanda from the benches of the ICTY and ICTR, respectively, noting "[i]t is undeniable that their cultural and linguistic expertise could have been very helpful in the course of the trials").

<sup>64</sup> See *Current State of the International Tribunal for the Former Yugoslavia: Future Prospects and Reform Proposals*, ¶ 113, annexed to U.N. Doc A/55/382-S/2000/865 (14 September 2000) (expressing the ICTY judges' receptivity to the idea of adding *ad litem* judges on the ICTY, provided that the *ad litem* judges were subject to the "same qualifications and conditions of employment").

## B. REQUIREMENT THAT TRIAL CHAMBER FUNCTIONS BE CARRIED OUT BY THREE JUDGES

### 1. *Problem*

As mentioned above, Article 39 of the Rome Statute requires that “the functions of the trial chamber shall be carried out by 3 judges,”<sup>65</sup> and Article 74 states “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations.”<sup>66</sup> As seen in the context of the *Bemba* and *Lubanga* cases, these provisions have the potential to cause delays where one or more judges are assigned to more than one active case.<sup>67</sup> However, the requirement that all Trial Chamber functions be carried out by three judges may also be a source of delay where there is no overlap in the composition of various Trial Chambers.

First, requiring that the full Chamber be involved in each status conference and every order and decision regarding disclosure, victim participation, the admissibility of evidence, *etc.* seems both unnecessary and inefficient. Indeed, this is no small amount of work, as illustrated by the fact that in the *Lubanga* case the Trial Chamber issued more than one hundred orders and decisions<sup>68</sup> and held at least eighteen status conferences before the trial even commenced.<sup>69</sup> By contrast, as the judges of the ICTY observed in a 1999 report, “[d]ividing authority and responsibilities among the judges to hear

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<sup>65</sup> Rome Statute, *supra* n. 2, Art. 39(2)(b)(ii).

<sup>66</sup> *Id.* Art. 74(1).

<sup>67</sup> See *supra* n. 50 *et seq.* and accompanying text.

<sup>68</sup> This figure was derived from the court records available on the ICC’s website, which include each of the decisions and orders issued by the Trial Chamber in the *Lubanga* case. See <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Court+Records/Chambers/>.

<sup>69</sup> This figure was derived from the court records available on the ICC’s website, which include the transcripts of hearings held by the Trial Chamber in the *Lubanga* case. See <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Transcripts/Trial+Chamber+I/>.

parties, coordinate communication, set deadlines, or handle other judicial functions reduces the burden on the Chamber as a whole.”<sup>70</sup>

Second, the requirement that all Trial Chamber functions be carried out by three judges raises problems when one judge is unexpectedly unavailable, for instance, due to sickness or a family emergency. As ICC Judge Adrian Fulford lamented in a December 2010 speech:

[Article 74 of the Rome Statute] is a highly inconvenient provision and can lead to considerable waste of time. Clearly, the judges should be present together for all of the main parts of the trial, and particularly for the witnesses who most directly affect the accused, but if a judge is ill when a witness is about to finish his or her evidence, or if a lengthy oral Decision, already agreed by the judges, needs to be read out, presently nothing can be done until the judge who has been unwell returns.<sup>71</sup>

Indeed, the requirement that three judges be present for all Trial Chamber functions has already caused delays. First, in the *Lubanga* case, Trial Chamber I had to postpone an “urgent hearing” on a matter affecting the timing of disclosure because one of the three Trial Chamber judges was out of town on the date of the scheduled hearing.<sup>72</sup> Notably, the hearing was “arranged as a simple fact-finding exercise” designed to allow the majority of the Chamber to “gain a better understanding” of issues already outlined in written submissions, and the Chamber did not plan on making a decision until the third judge had returned and participated in deliberations on the matter.<sup>73</sup> Nevertheless, citing Articles 39 and 74 of the Rome Statute,

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<sup>70</sup> *Contributions of the Chamber of the International Criminal Tribunal for the Former Yugoslavia*, submitted to the 26 July – 13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court, ¶ 29 (1999).

<sup>71</sup> “The Reflections of a Trial Judge,” speech delivered by Judge Adrian Fulford to the Assembly of States Parties, ¶ 17, 6 December 2010.

<sup>72</sup> See generally *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Whether Two Judges Alone May Hold a Hearing, ICC-01/04-01/06-1349 (Trial Chamber I, May 22, 2008).

<sup>73</sup> *Id.* ¶ 1.

the majority concluded that it could not hold the hearing in the absence of one judge.<sup>74</sup> Later, in the *Katanga & Ngudjolo* case, trial proceedings had to be halted on 2 December 2009 because one of the judges sitting on the Trial Chamber was involved in a traffic accident that, although minor, prevented her from attending proceedings.<sup>75</sup> Of course, unlike in the example of the oral decision being read aloud, it is preferable that the entire bench be present for the testimony of witnesses. Yet, the fact is that the testimony would have been transcribed, and presumably could have been videotaped, allowing for the absent judge to familiarize herself with the testimony at a later period. The delay would seem particularly unwarranted if the testimony delivered in the absence of one of the judges did not relate directly to the conduct of the accused in relation to the crimes charged.

## 2. *Proposed Solutions*

In terms of resolving the inefficiency that results from requiring that all Trial Chamber functions be carried out by three judges, one solution would be to carve out exceptions to the relevant provisions of the Rome Statute to allow certain Trial Chamber functions to be carried out by a single judge. Notably, at the ICTY and ICTR, the Trial Chambers designate a single judge as a pre-trial judge for the Chamber, who “exercise[es] oversight through meetings with counsel, efforts to reach agreement of facts, issues, witnesses, exhibits, scheduling, etc.”<sup>76</sup> According to the *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, such use of a single judge “appears to have been helpful in expediting proceedings,” although the Expert Group lamented the fact that the single judge was not “empowered to issue rulings on behalf of the Trial Chamber

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<sup>74</sup> See generally *id.*

<sup>75</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing (Open Session), ICC-01/04-01/07-T-89-ENG, at 1-2 (Trial Chamber II, 2 December 2009). Although the proceedings did not resume until 26 January 2010, part of this delay was due to the Court’s holiday recess.

<sup>76</sup> *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, ¶ 83, annexed to U.N. Doc A/54/634 (22 November 1999).

requiring action by the parties.”<sup>77</sup> Such authority is given to a single judge in proceedings before the Pre-Trial Chambers at the ICC. Indeed, in each case that has come before an ICC Pre-Trial Chamber to date, a single judge has been appointed for purposes of overseeing preparations for the confirmation of charges hearing, including taking the necessary decisions regarding disclosure between the Prosecution and the Defense, evidentiary issues, and victim participation.<sup>78</sup> Importantly, in determining whether to make use of a single judge at the confirmation stage of proceedings, the Pre-Trial Chamber is to consider, *inter alia*, “the proper management and efficiency in the handling of cases,”<sup>79</sup> and Pre-Trial Chamber I has expressly recognized that the use of a single judge “ensure[s] the proper and efficient functioning of the Court.”<sup>80</sup> The same would be true at the trial stage, and thus provision could be made for giving certain powers to a single judge of the ICC Trial Chambers.

With regard to the delays that are likely to arise in the event that a Trial Chamber judge is unexpectedly unavailable for a brief period of time, two solutions present themselves. First, at a minimum, it makes sense to interpret the term “present” as used in Article 74 of the Rome Statute as encompassing not just physical presence, but also presence through participation via teleconferencing or videoconferencing. In addition, it seems necessary that the rules or regulations of the ICC be amended to include a provision similar to the ICTY’s Rule 15*bis*. That rule provides, in part, as follows:

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<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Designating a Single Judge in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-51 (Pre-Trial Chamber I, 22 March 2006); *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, ICC-01/04-328 (Pre-Trial Chamber I, 10 May 2007). This use of a single judge at the confirmation stage of proceedings is authorized under Article 39(2)(b)(iii), which provides that the “functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.” Rome Statute, *supra* n. 2, Art. 39(2)(b)(iii).

<sup>79</sup> ICC Regulations of the Court, *supra* n. 14, Reg. 47(1).

<sup>80</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Designation of a Single Judge, ICC-01/04-167-tENG, at 2 (Pre-Trial Chamber I, 13 July 2006).

(A) If: (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

(B) If: (i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then: (a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and (b) the remaining Judges of the Chamber may adjourn the proceedings.

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(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.<sup>81</sup>

Notably, Article 15*bis* (A) has been invoked on a number of occasions at the ICTY to avoid delays in proceedings due to the temporary absence of one judge.<sup>82</sup>

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<sup>81</sup> ICTY Rules of Procedure and Evidence, *supra* n. 16, R. 15*bis*.

<sup>82</sup> See, e.g., *The Prosecutor v. Fatmir Limaj*, Order Under Rule 15 *bis* to Sit in the Absence if a Judge, IT-03-66-T (ICTY, 11 April 2005); *The Prosecutor v. Slobodan Milošević*, Order Under Rule 15 *bis* to Sit in the Absence if a Judge, IT-02-54-T



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## C. AMOUNT OF TIME TAKEN BY LIVE TESTIMONY

### 1. Problem

As a general rule, the Rome Statute provides that “the testimony of a witness at trial shall be given in person.”<sup>83</sup> Thus, the presumption is that evidence will be presented through a process of in-court direct- and cross-examination of witnesses. While obviously time consuming,<sup>84</sup> this general rule “reflects the desire that the primary source of evidence of a witness (*i.e.* his or her own testimony presented before the Court) should be available for purposes of the trial,” thereby permitting “the best opportunity for the parties to examine and cross-examine the witness and for the Court to ask questions and evaluate the demeanour and credibility of the witness.”<sup>85</sup> However, it is not necessarily the case that all background evidence or evidence on issues not relevant to the conduct of the accused needs in every instance to be presented *via* in-court direct- and cross-examination. Indeed, as former ICTY Judge Patricia Wald has observed, in the context of atrocity trials, “[a] substantial amount of testimony involves background events leading up to the indicted offenses, jurisdictional prerequisites to the charges, the impact of the alleged crimes on the victims, or factors that aggravate or mitigate the accused’s guilt.”<sup>86</sup>

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(ICTY, 16 March 2005); *The Prosecutor v. Milomir Stakic*, Scheduling Order, IT-97-24-T (ICTY, 26 September 2002).

<sup>83</sup> Rome Statute, *supra* n. 2, Art. 69(2). Exceptions to this general rule are discussed below. See *infra* n. 96 *et seq.* and accompanying text.

<sup>84</sup> See, e.g., Patricia M. Wald, *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 Harv. Int’l L.J. 535, 536 (2001) (noting that, although the ICTY has over time adopted various measures aimed at expediting proceedings, such as making extensive use of a pre-trial judge to decide preliminary motions and reduce the issues that need to be tried, “when all is said and done, it is primarily the live witnesses who take up trial time”).

<sup>85</sup> Donald K. Piragoff, *Article 69: Evidence*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 889, 898 (Otto Triffterer ed., 1999).

<sup>86</sup> Wald, *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, *supra* n. 84, at 549. See also Tolbert & Gaynor, *supra* n. 46, at 45 (noting that “[a] great proportion of court time at the [ICTY and ICTR] is taken up with direct examination, resulting

Furthermore, the length of time taken by live witness testimony at the ICC may be exacerbated by a number of factors. For instance, the Trial Chambers' prohibition on witness proofing has arguably prolonged witness testimony, as witnesses have had to be recalled after recanting testimony<sup>87</sup> or take a break from giving testimony after suffering an emotional outburst.<sup>88</sup> While there is no guarantee that these incidents could have been avoided if the witnesses had been proofed ahead of their testimony, it stands to reason that a witness who has not been proofed will be more likely to "blow up or break down on the stand," as they have not been adequately prepared for the experience of cross-examination.<sup>89</sup> Another potentially problematic practice is that seen in the *Bemba* case with regard to Trial Chamber III's ban on leading questions, including on cross-examination,<sup>90</sup> as leading questions are often useful in "bringing the witness to the

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in part from overreliance on classic common law trial procedure, which is often not suitable for presenting evidence in a major leadership trial").

<sup>87</sup> See, e.g., War Crimes Research Office, *Witness Proofing at the International Criminal Court*, at 1 (July 2009), [http://www.wcl.american.edu/warcrimes/icc/documents/WCRO\\_Report\\_on\\_Witness\\_Proofing\\_at\\_the\\_ICC\\_July2009.pdf?rd=1](http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_Witness_Proofing_at_the_ICC_July2009.pdf?rd=1) (noting that the first witness to testify in the *Lubanga* trial recanted portions of testimony on the stand during his first day of testifying, but was later recalled and reaffirmed his initial testimony, explaining that, the first time he took the stand, a lot of things went through his mind, he was angry, and he found himself unable to testify).

<sup>88</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-243-Red-ENG, at 29-30 (10 February 2010) (halting the proceedings in the *Lubanga* trial after a Defense witness becomes extremely upset while on the stand).

<sup>89</sup> Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale Hum. Rts. & Dev. L.J. 217, 233 (2002). Judge Wald stressed that, in the context of the ICTY, where witness proofing is permitted, "both sides of the aisle would do well to prepare their witnesses more carefully for what they will encounter by way of cross-examination," including by "try[ing] to build the witness's emotional stamina so that he will not blow up or break down on the stand."

<sup>90</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1023, ¶ 15 (Trial Chamber III, 19 November 2010) (instructing the parties and participants to "ask neutral questions to the witnesses"). See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of Hearing (Open Session), ICC-01/05-01/08-T-34-ENG, at 36-37 (24 November 2010) ("The Chamber is paying attention in order to remind the parties not to put leading questions.").

point,<sup>91</sup> particularly on cross-examination or with respect to non-contentious issues on direct.<sup>92</sup> Yet another source of delay with live testimony, discussed separately below, is problems that arise with incorrect interpretations.<sup>93</sup>

## 2. *Proposed Solutions*

As stated above, the direct- and cross-examination of witnesses is often the most desirable way for a court to receive evidence, particularly where the testimony is “important to a critical issue” in the case.<sup>94</sup> Nevertheless, as one commentary observes, “international criminal courts must be prepared to question the assumption that all evidence must be heard orally if there is to be any chance of trials being concluded expeditiously.”<sup>95</sup> In fact, although the Rome Statute states that, in general, the testimony of a witness “shall be given in person,” it expressly contemplates “the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts.”<sup>96</sup> Furthermore, Rule 68 of the ICC Rules of Procedure and Evidence states that a Trial Chamber may:

allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or (b) If the

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<sup>91</sup> Richard May & Marieke Weirida, *INTERNATIONAL CRIMINAL EVIDENCE* 147 (2002).

<sup>92</sup> See *infra* n. 117 *et seq.* and accompanying text (explaining that the Trial Chambers in both the *Lubanga* and *Katanga & Ngudjolo* cases have permitted leading questions on cross-examination and on direct examination for issues not in dispute).

<sup>93</sup> See *supra* n. 192 and accompanying text.

<sup>94</sup> Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 Wash. U. J. Law & Pol’y 87,112 (2001).

<sup>95</sup> Geoffrey Nice QC & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. Int’l Crim. Just. 354, 355 (2005).

<sup>96</sup> Rome Statute, *supra* n. 2, Art. 69(2).

witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.<sup>97</sup>

The Trial Chambers have already made use of Rule 68(b) to allow for the admission of written testimony on certain occasions,<sup>98</sup> noting in one instance that “there are likely to be some real ‘savings’ in court time by introducing these written statements in place of the initial examination of the witnesses by the prosecution,”<sup>99</sup> and should continue this practice where feasible.<sup>100</sup> However, Rule 68 still requires that the witness was either examined by both parties at the time of the recording or that both parties and the Chamber have the opportunity to examine the witness at trial. By contrast, the ICTY has a rule that allows a Chamber to “dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of

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<sup>97</sup> International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 68 (2000).

<sup>98</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution’s Application for the Admission of the Prior Recorded Statements of Two Witnesses, ICC-01/04-01/06-1603 (Trial Chamber I, 15 January 2009); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Request to Allow the Introduction into Evidence of the Prior Recorded Testimony of P-166 and P-219, ICC-01/04-01/07-2362 (Trial Chamber II, 3 September 2010). Another useful practice, permitted in the *Bemba* trial, is for the Prosecution, in conducting its direct examination, “to refer to paragraphs in a witness’s statement(s) that are clear and do not need further presentation, to avoid repetition of evidence.” *Bemba*, Decision on Directions for the Conduct of the Proceedings, *supra* n. 90, ¶ 12.

<sup>99</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution’s Application for the Admission of the Prior Recorded Statements of Two Witnesses, ICC-01/04-01/06-1603, ¶ 24 (Trial Chamber I, 15 January 2009).

<sup>100</sup> See Tolbert & Gaynor, *supra* n. 46, at 46 (“[F]or future large-scale trials at the ICC and elsewhere, international courts should dispense with oral direct examination, and instead swear in the witness and confirm his or her identity, and admit in evidence his or her signed statement... The witness could then, if necessary, be asked some simple introductory questions to put him or her at ease, and then immediately be cross-examined by counsel for each accused and subsequently questioned by the judges. This would result in a dramatic reduction of trial time.”).

evidence” where the testimony in question “goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.”<sup>101</sup> The ICTY rule further specifies that factors weighing in favor of admission of a written statement are that it: (a) is cumulative in that other witnesses will give similar oral testimony; (b) relates to historical, political, or military background; (c) consists of a statistical analysis of the ethnic composition of the population; (d) deals with the impact of crime upon victims; (e) relates to the character of the accused; or (f) relates to an issue of sentencing.<sup>102</sup> Factors weighing against the admission of written testimony include: (a) the presence of an overriding public interest in the evidence being presented orally; (b) demonstration by either party that its nature or source renders the statement unreliable or that its prejudicial effect outweighs its probative value; or (c) other factors suggesting cross-examination would be appropriate.<sup>103</sup> Finally, Rule 92*bis* (B) requires that the statement be accompanied by a sworn and witnessed declaration from the affiant stating that the content of the statement is true and correct to the best of his or her knowledge and belief.<sup>104</sup> Such a rule, together with its attendant safeguards, may prove useful for the ICC.

Rule 68 of the ICC Rules of Procedure and Evidence may also be used to allow for the use of depositions instead of in-court testimony, which again may be appropriate for “the less central areas of evidence.”<sup>105</sup> As Judge Fulford has recognized, this will expedite proceedings because “evidence can be gathered at different places at the same time, without every witness having to take his or her turn to give evidence before the judges,”<sup>106</sup> as a single judge or a legal officer may preside

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<sup>101</sup> ICTY Rules of Procedure and Evidence, *supra* n. 16, R. 92*bis*. See also Nice & Vallières-Roland, *supra* n. 95, at 365-66 (explaining that, in 2001, Rule 92*bis* was “introduced to facilitate the introduction of written evidence in order to expedite trials, at a time when the [ICTY] was beginning fully to realize the perils of even mid-level and low-level perpetrators’ trials, which were lasting in excess of one year, with the most complicated leadership cases still ahead”).

<sup>102</sup> ICTY Rules of Procedure and Evidence, *supra* n. 16, R. 92*bis*.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> “The Reflections of a Trial Judge,” *supra* n. 71, ¶ 13.

<sup>106</sup> *Id.*

over the deposition, rather than the full Trial Chamber.<sup>107</sup> Notably, only one witness appears to have testified *via* deposition, as opposed to providing in-court testimony, in the three trials that have come before the ICC to date.<sup>108</sup> According to the Trial Chamber's decision authorizing the taking of this one particular witness's testimony by way of deposition, "[i]t [was] agreed by the parties and participants that this [was] an appropriate way to take this witness's evidence."<sup>109</sup> However, nothing in Rule 68 requires the consent of the parties and the participants, meaning that future Trial Chambers may make more extensive use of deposition, as opposed to in-court, testimony.

Another way to expedite testimony on issues not central to the conduct of the accused is to make greater use of reports from court-appointed experts.<sup>110</sup> As Judge Fulford has observed, "the areas dealt with by expert witnesses have been somewhat limited" at the ICC to date.<sup>111</sup> In Judge Fulford's opinion, "the role of experts could be significantly expanded, thereby removing the need to call a substantial number of individual witnesses."<sup>112</sup>

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<sup>107</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-333-Red-ENG, at 18-21 (12 November 2010) (authorizing the taking of evidence from a witness by way of a deposition presided over by a Legal Officer of the Trial Chamber).

<sup>108</sup> The witness testified in deposition over the course of three days. See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Deposition (Closed Session), ICC-01/04-01/06-Rule68Deposition-Red-ENG WT (16 November 2010); *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Deposition (Closed Session), ICC-01/04-01/06-Rule68Deposition-Red-ENG WT (17 November 2010); *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Deposition (Closed Session), ICC-01/04-01/06-Rule68Deposition-Red-ENG WT (18 November 2010).

<sup>109</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-333-Red-ENG, at 19 (12 November 2010).

<sup>110</sup> "The Reflections of a Trial Judge," *supra* n. 71, ¶ 12 (recommending that the Chambers consider "whether some substantial areas of evidence (such as context, background, the general circumstances of the alleged offences and the less central, more peripheral facts) can be dealt with by submitting reports from court-appointed experts (rather than by a host of individual witnesses), with the parties contributing to the methodology and subject-matter to be covered in the reports, and with the authors giving evidence during the trial.").

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

For those witnesses who do testify live, in court, *via* direct- and cross-examination, the expeditious presentation of testimony would likely be encouraged if, as mentioned earlier,<sup>113</sup> the Chambers permitted the parties to proof their witnesses prior to taking the stand. As explained in a previous report issued by the War Crimes Research Office, the practice of witness proofing is likely to contribute to the expeditious conduct of proceedings in a number of ways, including by promoting the orderly presentation of evidence and ensuring that both parties are aware of any new information known to the witness.<sup>114</sup> This view was recently seconded by one of the three judges on the *Bemba* Trial Chamber, Judge Kuniko Ozaki, who dissented from the Chamber's holding prohibiting the practice, noting:

It would undoubtedly be helpful to [the Chamber's] truth-finding function to improve the quality of the presentation of evidence by receiving clear, relevant, structured, focussed [*sic*] and efficient testimonies from proofed witnesses. Witnesses who will testify before this Chamber come from places far away from The Hague and are not necessarily familiar with the "Western" way of questioning or with court-systems in general. Also, they give evidence on events which occurred a number of years ago (witnesses will testify on events which occurred in 2002-2003, therefore over seven years ago), and their statements were also given months, or even a few years ago. Sometimes those statements were taken before the confirmation of charges, by investigators without legal training or without precise directions regarding specific crime-related evidence to be collected, resulting in statements which lack the degree of specificity required to prove that the crimes charged were committed. Without proofing, there is an increased likelihood that the evidence given by the witness will be incomplete, confused and ill-structured.<sup>115</sup>

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<sup>113</sup> See *supra* n. 87 *et seq.* and accompanying text.

<sup>114</sup> See generally War Crimes Research Office, *Witness Proofing at the International Criminal Court*, *supra* n. 87.

<sup>115</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of

Judge Ozaki went on to note that new information relevant to the charges against the accused (whether inculpatory or exculpatory) often comes out during proofing, and that “precious time might be wasted” if that information were to come out for the first time when the witness was on the stand, as opposed to ahead of the witness’s testimony, which would allow for the parties to disclose the information and prepare their examinations in light of the new material.<sup>116</sup>

Efficiency would also be encouraged if all Trial Chambers were to follow the approach of the Chambers in the first two cases tried at the ICC and permit leading questions without limit on cross-examination, and with respect to non-contentious issues on direct.<sup>117</sup> As the ICC Prosecution has observed: “Leading questions permit the parties to rapidly and efficiently identify and present the disputed issues and therefore save court time. In particular, the use of this mode of questioning has been proven to be an expeditious tool to elicit evidence from hostile witnesses disinclined to answer without hedging or elaboration when the response does not support their preferred

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Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/05-01/08-1039, ¶ 21 (Trial Chamber III, 24 November 2010).

<sup>116</sup> *Id.* ¶ 23.

<sup>117</sup> *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Status Conference, ICC-01/04-01/06-T-104-ENG, at 37 (16 January 2009) (banning the use of leading questions only with regard to issues in dispute on direct examination, and saying that leading questions should be “avoided” on any re-direct and re-cross examination); *The Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665, ¶¶ 66-67 (Trial Chamber II, 20 November 2009) (“As a general rule, during examination-in-chief only neutral questions are allowed. The party calling the witness is therefore not allowed to ask leading or closed questions, unless they pertain to an issue that is not in controversy. However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such a case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness’ previous statements.”). *See also The Prosecutor v. Jean Pierre Bemba Gombo*, Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1060, ¶ 10 (Office of the Prosecutor, 29 November 2010) (noting that, by “excluding leading questions on cross-examination or when a party’s own witness is declared hostile,” the *Bemba* Trial Chamber was acting “in conflict with procedures allowed by the Chambers of this Court in the *Lubanga* and *Katanga* trials”).



outcome.”<sup>118</sup> In addition, leading questions can significantly expedite the presentation of evidence not in dispute between the parties.<sup>119</sup>

A final way to reduce the amount of time taken by live testimony is to narrow the issues contested at trial, for instance through the use of stipulations by the parties and the taking of judicial notice. With regard to stipulations, Rule 69 of the Rules of Procedure and Evidence provides that “[t]he Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.”<sup>120</sup> Notably, the Trial Chambers in each of the cases to come to trial before the ICC to date have encouraged the parties to stipulate to uncontested facts, but the scope of the admissions has been very limited.<sup>121</sup> One potential way to increase the number of facts to which the parties will agree in advance of trial is to require the party refusing to stipulate to provide a reason for its refusal.<sup>122</sup> Notably, some judges have used this approach in the

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<sup>118</sup> *Bemba*, Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, *supra* n. 117, ¶ 21.

<sup>119</sup> See, e.g., Tolbert & Gaynor, *supra* n. 46, at n. 40 (noting the “widespread practice in common law jury trials, where uncontroversial evidence is expected to be elicited rapidly, using leading questions”).

<sup>120</sup> ICC Rules of Procedure and Evidence, *supra* n. 97, R. 69.

<sup>121</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dylo*, Decision on Disclosure Issues, Responsibilities for Protective Measures and Other Procedural Matters, No.: ICC-01/04-01/06-1311-Anx2, ¶ 71 (Trial Chamber I, 8 May 2008) (explaining that the parties were not able to agree to any facts); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Agreements as to Evidence, ICC-01/04-01/07-2681, ¶ 2 (Trial Chamber II, 3 February 2011) (“In total, the parties reached agreement about seven of the initial 149 proposals by the Prosecution.”); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Submission on Agreed Facts, ICC-01/05-01/08-922, ¶ 2 (Office of the Prosecutor, 4 October 2010) (noting that the parties were only able to agree to a “few facts”).

<sup>122</sup> See, e.g., Tolbert & Gaynor, *supra* n. 46, at 42 (recommending that judges in international criminal bodies should invite the Prosecutor to “suggest particular areas of the case which appear to be particularly unlikely to give rise to reasonable dispute” and, where the defense refuses to stipulate to these matters, require the defense to “articulate their reasons for objecting”).

context of the ICTY and ICTR, and it has proven helpful in “eliminating the need for the introduction of potentially massive amount of evidence, particularly by the Prosecutor, to establish facts that may not really be in dispute.”<sup>123</sup> In terms of judicial notice, the Rome Statute does provide that “[t]he Court shall not require proof of facts of common knowledge but may take judicial notice of them.”<sup>124</sup> However, unlike the *ad hoc* tribunals, the ICC does not have a rule permitting the Trial Chamber to take judicial notice of “adjudicated facts or . . . documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.”<sup>125</sup> This rule has proved useful at the *ad hoc* tribunals in “reducing the amount of trial time devoted to establishing background facts that have already been established in another trial.”<sup>126</sup> While such a rule may prove less relevant in the context of the ICC, which is dealing with cases arising out of several factually different situations, to the extent that the ICC tries several cases stemming from the same situation and establishes facts common to these cases, the Trial Chambers should be able to take judicial notice of those facts to decrease the amount of evidence that the Prosecution must produce in each subsequent trial. Of course, the defense should be given the opportunity to rebut a judicially noticed fact, and it would be useful for any new rule

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<sup>123</sup> *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, *supra* n. 76, ¶ 84.

<sup>124</sup> Rome Statute, *supra* n. 2, Art. 69(6).

<sup>125</sup> ICTY Rules of Procedure and Evidence, *supra* n. 16, R. 94; ICTR Rules of Procedure and Evidence, *supra* n. 16, R. 94.

<sup>126</sup> *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, *supra* n. 76, ¶ 75. See also Tolbert & Gaynor, *supra* n. 46, at 51 (noting that the ability of Trial Chambers at the ICTY and ICTR to take judicial notice of adjudicated facts “considerably reduces trial time, as it reduces or eliminates the need to call the same witness in different trials to give the same testimony about the horrors he or she has endured in a particular detention facility, for example”). Of course, as the Expert Group recognizes, the tribunals have made judicious use of their authority to take judicial notice of facts based on prior cases, as different judges from earlier proceedings may have differing views on evidence presented and because it could prejudice the accused to accept conclusions based on evidence presented at entirely different trials. *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, *supra* n. 76, ¶ 75.

allowing for judicial notice of adjudicated facts at the ICC to specify the standard of proof that must be satisfied by the defense when challenging the noticed fact.<sup>127</sup>

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<sup>127</sup> Tolbert & Gaynor, *supra* n. 46, at 51 (explaining that the standard developed at the *ad hocs* permits the defence to rebut a judicially noticed fact if it introduces “reliable and credible evidence to the contrary,” but that the meaning of the standard is not clear).

#### IV. DELAYS ARISING BOTH AT PRE-TRIAL AND TRIAL STAGE

##### A. INTERLOCUTORY APPELLATE PROCESS

###### 1. *Problem*

One area of substantial delay at both the Pre-Trial and Trial stages of ICC cases has been the process by which parties secure judgments on interlocutory appeals, that is, appeals taken of decisions other than a final judgment by the Trial Chamber. At the ICC, interlocutory appeals may be taken as a matter of right in a few specified situations, such as where the Pre-Trial or Trial Chamber issues a decision with respect to jurisdiction or admissibility, or a decision granting or denying the release of a suspect.<sup>128</sup> In addition, a party may be granted leave to obtain interlocutory appeal at the discretion of the Pre-Trial or Trial Chamber that issued the decision sought to be appealed. Specifically, under Article 82(1)(d), a party may appeal “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”<sup>129</sup> Thus, in the case of interlocutory appeals taken under Article 82(1)(d), delay can occur at two stages. First, the Pre-Trial or Trial Chamber that issued the initial impugned decision may cause delays by waiting a substantial period of time before issuing its ruling on whether to grant a party’s request to obtain interlocutory appeal. Second, the Appeals Chamber may cause delays by failing to issue timely judgments where leave to appeal is granted by a lower court. Both of these types of delay have occurred repeatedly at the ICC.

There are several examples of the Pre-Trial or Trial Chamber waiting a substantial period of time before rendering a decision on a party’s request to obtain leave to appeal the decision. For instance, in the *Bashir* case Pre-Trial Chamber I first issued its decision on the Prosecution’s application for an arrest warrant against the Sudanese

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<sup>128</sup> Rome Statute, *supra* n. 2, Art. 82(1)(a)-(c).

<sup>129</sup> *Id.* Art. 82(1)(d).

president, granting the request in respect of charges of war crimes and crimes against humanity, but denying the request in respect of the charges of genocide, on 4 March 2009.<sup>130</sup> The Prosecution filed an application for leave to appeal the decision on 13 March 2009,<sup>131</sup> but the Pre-Trial Chamber did not issue its decision granting the Prosecution's request until 24 June 2009.<sup>132</sup> While this did not in fact delay ongoing proceedings before the ICC in the *Bashir* case, as the suspect has yet to be apprehended by the Court, it did delay the issuance of a second arrest warrant for President Bashir, which includes charges of genocide, and could have caused substantial problems for the parties had the accused been taken into custody while the appeal was pending. Furthermore, as illustrated in Annex Two, Pre-Trial Chambers have regularly taken months to rule on requests for leave to appeal decisions on the confirmation of charges. While these requests have been denied each time, and thus have not resulted in concrete delays in any of the trial proceedings, it is difficult for the parties to prepare for trial absent certainty regarding the charges that will be tried. Moreover, in the event that a request for leave to appeal is granted and the Appeals Chamber ultimately reverses the Pre-Trial Chamber's decision regarding one or more of the charges, one can imagine significant delays in the trial proceedings, as each party would have to prepare for trial on new or different charges.

Delays have also occurred at the trial stage. For example, in the *Katanga & Ngudjolo* trial, Trial Chamber II issued a decision regarding the modalities of victim participation at trial on 22 January 2010,<sup>133</sup> but did not grant the Defense's request for leave to appeal the decision until 19 April 2010.<sup>134</sup> In another example, this time in the *Lubanga* case, Trial Chamber I issued a decision announcing that it

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<sup>130</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ICC-02/05-01/09-73, ¶ 3 (Appeals Chamber, 3 February 2010).

<sup>131</sup> *Id.* ¶ 4.

<sup>132</sup> *Id.* ¶ 5.

<sup>133</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Defence Application for Leave to Appeal the Trial Chamber's 'Décision relative aux modalités de participation des victimes au stade des débats sur le fond,'" ICC-01/04-01/07-2032, ¶ 2 (Trial Chamber II, 19 April 2010).

<sup>134</sup> See generally *id.*

would consider changing the legal characterization of the facts in the case on 14 July 2009.<sup>135</sup> Both the Defense and the Prosecutor sought leave to appeal this decision, filing their requests on 11 and 12 August 2009, respectively.<sup>136</sup> Yet it was not until 3 September 2009 that the Trial Chamber granted leave to appeal.<sup>137</sup>

As Judge Fulford observed in December 2010, the Appeals Chamber has also been very slow in rendering judgments on interlocutory appeal, regularly taking several months “to resolve issues of importance which require a ruling from the Appeals Division before active trials can re-commence.”<sup>138</sup> For instance, the Appeals Chamber took over three months to issue its judgment reversing the *Lubanga* Trial Chamber’s decision involving the re-characterization of the facts discussed above.<sup>139</sup> In the meantime, the Trial Chamber had to delay the commencement of the Defense’s case, initially scheduled for 6 October 2009,<sup>140</sup> until 27 January 2010.<sup>141</sup> Notably, part of the delay

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<sup>135</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” ICC-01/04-01/06-2205, ¶ 5 (Appeals Chamber, 8 December 2009).

<sup>136</sup> *Id.* ¶ 6.

<sup>137</sup> *Id.* ¶ 8.

<sup>138</sup> “The Reflections of a Trial Judge,” *supra* n. 71, ¶ 21. *See also* International Bar Association, *Sustaining the International Criminal Court: Issues for Consideration at the 2010 Review Conference and Beyond*, IBA/ICC MONITORING & OUTREACH PROGRAMME 43 (November 2009) (“At the appellate level, it is imperative that the Appeals Chamber... deliver timely and informed decisions which correctly interpret the law while providing guidance for the [other Chambers] and the parties and participants.”).

<sup>139</sup> *See generally Lubanga*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 135. As noted above, the Trial Chamber granted both parties’ requests for leave to appeal its decision on 3 September 2009. *Id.* ¶ 8.

<sup>140</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Adjourning the Evidence in the Case and Consideration of Regulation 55, ICC-01/04-01/06-2143 (Trial Chamber I, 2 October 2009).

<sup>141</sup> *See* Lubangatrial.org, *Defense Case Opens, Lubanga Lawyers Claim Testimony*

on the part of the Appeals Chamber seems to have resulted from the fact that the Chamber did not issue its decision on requests from victims to participate on the appeal until more than one month after receiving the requests, meaning that the victims' observations and the parties' responses thereto were not submitted until several weeks after the parties filed their initial briefs on appeal.<sup>142</sup> In another example, more than four months passed before the Appeals Chamber rendered its judgment affirming the Trial Chamber's decision to stay the proceedings in the *Lubanga* case as a result of the Prosecution's non-disclosure of certain evidentiary materials, even though proceedings had been completely halted since the issuance of the Trial Chamber's decision.<sup>143</sup> In the *Katanga & Ngudjolo* case, the Appeals Chamber took nearly five months to issue judgments on appeals from the Prosecution and Defense against a decision by Pre-Trial Chamber I regarding the scope of permissible redactions at the confirmation of charges stage.<sup>144</sup> Significantly, the confirmation hearing in the

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*Was Fabricated*, 27 January 2010, <http://www.lubangatrial.org/2010/01/27/defense-case-opens-lubanga-lawyers-claim-testimony-was-fabricated/>.

<sup>142</sup> See *Lubanga*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court," *supra* n. 135, ¶¶ 9-16. Specifically, the Defense and Prosecution filed their briefs in support of appeal on 10 and 14 September 2009, respectively. *Id.* ¶¶ 9-10. Twenty-seven victims then filed requests to participate on appeal via three separate applications, submitted on 14, 15 and 18 September 2009, but the Appeals Chamber did not issue a decision granting these requests until 20 October 2009. *Id.* ¶¶ 11, 15. The victims filed their observations on appeal on 23 October 2009 and the Prosecution and Defense submitted responses thereto on 28 October 2009. *Id.* ¶ 16.

<sup>143</sup> *Lubanga*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues raised at the Status Conference on 10 June 2008," *supra* n. 3, ¶ 6. Note that the stay of proceedings was subsequently lifted by the Trial Chamber, due to the Prosecution's ultimate compliance with its disclosure obligations. See *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for Oral Decision Lifting the Stay of Proceedings, ICC-01/04-01/06-1644 (Trial Chamber I, 23 January 2009).

<sup>144</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements," ICC-01/04-01/07-475 (Appeals Chamber, 13 May 2008); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the

*Katanga & Ngudjolo* case had to be postponed *twice*, due in part to the fact that the Appeals Chamber judgments remained outstanding and the Prosecution could not comply with its disclosure obligations until the Appeals Chamber had ruled.<sup>145</sup> More recently, nearly four months passed before the Appeals Chamber issued its judgment affirming the Trial Chamber's decision rejecting Mr. Bemba's challenge to the admissibility of his case,<sup>146</sup> thereby delaying the commencement of the trial in the *Bemba* case.<sup>147</sup>

Finally, the Appeals Chamber has been particularly slow in rendering judgments on interlocutory appeals of decisions relating to arrest warrants. For example, the Appeals Chamber took five months to issue its judgment reversing Pre-Trial Chamber I's decision rejecting the Prosecution's request for an arrest warrant for Bosco Ntaganda<sup>148</sup>

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Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements," ICC-01/04-01/07-476 (Appeals Chamber, 13 May 2008). The Pre-Trial Chamber's decision was issued 3 December 2007, and the requests for leave to appeal were granted 10 December 2007 and 19 December 2007, respectively. See *Katanga & Ngudjolo*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements," *supra* this note, ¶¶ 4, 7.

<sup>145</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, ICC-01/04-01/07-172, at 7-9 (Pre-Trial Chamber, 30 January 2008) (indefinitely postponing the confirmation hearing, which was scheduled to begin 28 February 2008); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence Request for Postponement of the Confirmation Hearing, ICC-01/04-01/07-446, at 7 (Pre-Trial Chamber, 25 April 2008) (postponing the confirmation hearing from 21 May 2008 until 27 June 2008).

<sup>146</sup> See generally *The Prosecutor v. Jean-Pierre Bemba Gombo*, *Corrigendum to Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges,"* ICC-01/05-01/08-962-Corr (Appeals Chamber, 19 October 2010). The Trial Chamber's decision on Mr. Bemba's admissibility challenge was issued 24 June 2010, and the Defense filed an automatic appeal pursuant to Article 82(1)(a) on 28 June 2010. *Id.* ¶¶ 8-9.

<sup>147</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Order Postponing the Commencement of the Trial, ICC-01/05-01/08-811, ¶ 5 (Trial Chamber III, 7 July 2010) (noting that "[i]t would be inappropriate to commence the trial when there is an outstanding issue for determination by the Appeals Chamber").

<sup>148</sup> See *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the



and more than seven months to issue its judgment reversing Pre-Trial Chamber I's decision to exclude genocide charges from its initial arrest warrant for President Bashir.<sup>149</sup> Notably, the majority's judgment in *Ntaganda* is only twenty-five pages in length and, while reversing the Pre-Trial Chamber's interpretation of the Rome Statute's Article 17(1)(d) gravity requirement, provides no guidance as to how that provision should be applied in the future.<sup>150</sup> Similarly, the *Bashir* judgment, which is a mere eighteen pages long, holds that the Pre-Trial Chamber applied an erroneous standard of proof in its analysis of the genocide charges, but fails to specify the correct standard of proof.<sup>151</sup>

Notably, these significantly delayed, and often terse, appellate judgments stand in stark contrast to interlocutory appellate decisions issued by other international criminal bodies in their first years of operation. For example, the first interlocutory decision issued by the ICTY Appeals Chamber, which was issued less than two months after the impugned Trial Chamber decision, was sixty-six pages in length and addressed such fundamental issues as the legality of the foundation of the ICTY, the propriety of the ICTY's primacy over national courts, and the subject matter jurisdiction of the ICTY.<sup>152</sup> More recently, the Appeals Chamber for the Special Tribunal for Lebanon issued a 153-page decision dealing with a number of

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Prosecutor's Application for Warrants of Arrest, Article 58," ICC-01/04-169, ¶¶ 8-9 (Appeals Chamber, 13 July 2006) (noting that the impugned decision was issued on 10 February 2006 and that the Prosecution filed an automatic appeal under Article 82(1)(a) on 14 February 2006).

<sup>149</sup> See generally *Bashir*, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," *supra* n. 130. As stated above, Pre-Trial Chamber I granted the Prosecution's request to appeal its decision to exclude genocide charges from the initial arrest warrant against President Bashir on 24 June 2009. See *id.* ¶ 5.

<sup>150</sup> See generally *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," *supra* n. 148.

<sup>151</sup> See generally *Bashir*, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," *supra* n. 130.

<sup>152</sup> *The Prosecutor v. Dusko Tadic, aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1 (ICTY Appeals Chamber, 2 October 1995).

questions certified to it by the Pre-Trial Judge less than one month after receiving the questions, which addressed a wide range of issues, including those relating to the elements of crimes under the Tribunal's Statute and modes of liability.<sup>153</sup>

## 2. *Proposed Solutions*

One obvious solution to the delays caused by the interlocutory appellate process would be to limit the availability of interlocutory appeal. Indeed, it is true that “[i]n many cases, interlocutory appeals may be considered disruptive of the proceedings, particularly if there are many issues on which parties are seeking such appeals, and particularly once trial has actually commenced.”<sup>154</sup> At the same time, however, absent interlocutory appeals, parties “may be required to defer any appellate proceedings until final judgment at first instance, by which time, depending on the course that the proceedings have taken, many issues may have become moot or irrelevant.”<sup>155</sup> As a result, interim appellate review may in some cases be warranted on the ground that, if an issue is not raised on interlocutory appeal and subsequently becomes moot, the court's appellate body may never review the issue, even if it is one that is likely to arise again in future proceedings and appellate review would prevent continuing uncertainty about the issue. Furthermore, interlocutory appellate review of a decision may, in fact, promote efficiency because “early resolution of a point of law may render unnecessary a lengthy and costly trial on certain allegations of fact.”<sup>156</sup>

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<sup>153</sup> See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis (STL Appeals Chamber, 16 February 2011). See also Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, STL-11-01/I/AC/R176bis (STL Pre-Trial Judge, 21 January 2011).

<sup>154</sup> Christopher Staker, *Article 82: Appeal against Other Decisions*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1029, 1031 (Otto Triffterer ed., 1999).

<sup>155</sup> *Id.* at 1032.

<sup>156</sup> *Id.* See also *Prosecutor v. Delalic, et al.*, Trial Judgement, IT-96-21-A, ¶ 122 (ICTY, 20 February 2001) (“The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.”).

Hence, rather than limiting the number of decisions for which interlocutory appeals are permitted, it seems the better solution is to reduce the amount of time consumed by the process of securing interlocutory judgments from the Appeals Chamber. One way to accomplish this would be to consider imposing time limits, similar to the regulation requiring the Pre-Trial Chamber to issue a confirmation of charges decision within sixty days of the close of the confirmation hearing.<sup>157</sup> First, time limits might be established requiring the Pre-Trial and Trial Chambers to render decisions on requests for leave to appeal within a certain number of days. Second, the Appeals Chamber might be required to issue interlocutory judgments within a certain number of days following parties' and participants' submissions. Another option is to do away with the practice of requiring victims who have already been granted the right to participate in proceedings at the Pre-Trial or Trial level to re-apply for the right to participate on appeal. According to Judge Fulford, the process by which victims apply and receive permission to participate on an interlocutory appeal can take up to forty days to resolve.<sup>158</sup> As seen above, this, in turn, delays the appellate proceedings because, once granted a right to participate, victims are given the opportunity to submit observations, and the parties are permitted to respond to the victims' observations.<sup>159</sup>

Finally, the Appeals Chamber should be encouraged to provide as much guidance as possible to the lower chambers and the parties, while limiting itself to the issues in contention, such that any delays caused by the appeal will ideally contribute to expeditious proceedings in the long run. As the International Bar Association has observed, "[t]imely decisions, guidance from the Appeals Chamber and consistent application of decisions by the Chambers will go a long way towards maximising efficiency and mitigating the effect of any delays" caused by the interlocutory appellate process.<sup>160</sup>

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<sup>157</sup> See *supra* n. 40 *et seq.* and accompanying text.

<sup>158</sup> "The Reflections of a Trial Judge," *supra* n. 71, ¶ 21.

<sup>159</sup> See *supra* n. 142 and accompanying text.

<sup>160</sup> International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress*, *supra* n. 1, at 20.

## B. ISSUES RELATING TO PAYMENT OF DEFENSE COUNSEL

### 1. Problem

To date, there have been two instances of delay in cases before the ICC stemming from disputes between the Registrar and defense counsel over payment. The first was brought about when Thomas Lubanga's lead defense counsel, Jean Flamme, withdrew from the case due to health concerns.<sup>161</sup> Mr. Flamme's request was filed with Pre-Trial Chamber I on 20 February 2007,<sup>162</sup> shortly after the Chamber had issued its decision confirming the charges against Mr. Lubanga and committing him to trial,<sup>163</sup> and the request was granted the following day.<sup>164</sup> On 6 March 2007, the Presidency of the Court issued a decision referring the case against Mr. Lubanga to Trial Chamber I, but simultaneously suspending "transmission of the record of proceedings of Pre-Trial Chamber I to Trial Chamber I, until such time as new Defence Counsel is assigned to Mr Lubanga Dyilo and it is determined that he/she has had adequate time to familiarise him/herself with the case."<sup>165</sup> On 20 March 2007, Mr. Lubanga informed the Registry that he had chosen Catherine Mabilille to fill the position of lead defense counsel, although Ms. Mabilille conditioned her formal acceptance of the appointment on an agreement from the Registrar to increase the resources available to Mr. Lubanga's defense team.<sup>166</sup> Specifically, Ms. Mabilille requested that the Registrar commit to providing her team with three counsel, four legal assistants, and one case manager.<sup>167</sup> In response, the Registrar insisted that he could not

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<sup>161</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Clarification, ICC-01/04-01/06-860-tEN, ¶ 1 (Defence, 3 April 2007) (referencing *The Prosecutor v. Thomas Lubanga Dyilo*, Request for the Withdrawal of Defence Council, ICC-01/04-01/06-829-Conf (Defence, 20 February 2007)).

<sup>162</sup> *Id.*

<sup>163</sup> See *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 19.

<sup>164</sup> *Lubanga*, Clarification, *supra* n. 161, ¶ 3.

<sup>165</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-842, at 3 (Presidency, 6 March 2007).

<sup>166</sup> *Lubanga*, Clarification, *supra* n. 161, ¶¶ 5-11.

<sup>167</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Registrar's Observations in Accordance with Rule 20(1)(d) of the Rules of Procedure and Evidence on the Document entitled "Clarification", Submitted to the Trial Chamber I of the Court on

consider any request for additional resources until *after* Ms. Mabile had formally accepted her appointment as counsel, citing Regulation 83(3) of the Regulations of the Court,<sup>168</sup> which states: “A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.”<sup>169</sup> Subsequently, on 2 May 2007, the Presidency confirmed that the Registrar was “well within his right to determine that Ms. Mabile’s request for additional means may not be entertained,” as there is “no legal basis for Counsel who is not representing a person before the Court to make such a request.”<sup>170</sup> Thus, more than two months after Mr. Flamme’s withdrawal, Mr. Lubanga remained without counsel and the case file had yet to be transferred from Pre-Trial Chamber I to Trial Chamber I. On 3 May 2007, Mr. Lubanga himself filed an application with the Registry, pursuant to Regulation 83(3), requesting additional resources for his defense.<sup>171</sup> Finally, on 14 June 2007, the Registrar granted Mr. Lubanga’s request in large part<sup>172</sup> and, on 5 July 2007, Ms. Mabile undertook the appointment as Mr. Lubanga’s lead defense counsel.<sup>173</sup> Of course, Ms. Mabile then required time to familiarize herself with the case,<sup>174</sup> meaning the first

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3 April 2007 by Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-864, ¶ 15 (Registrar, 5 April 2007).

<sup>168</sup> *Id.*

<sup>169</sup> ICC Regulations of the Court, *supra* n. 14, Reg. 83(3).

<sup>170</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Presidency upon the Document Entitled “Clarification” filed by Thomas Lubanga Dyilo on 3 April 2007, the Requests of the Registrar of 5 April 2007 and the Requests of Thomas Lubanga Dyilo of 17 April 2007, ICC-01/04-01/06-874, ¶ 18 (Presidency, 2 May 2007).

<sup>171</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Registration in the Record of the Case of the “Registrar’s Decision on the Additional Means for the Trial Phase Sought by Mr Thomas Lubanga in His ‘Application for Additional Means under Regulation 83(3) of the Regulations of the Court’ Filed on 3 May, ICC-01/04-01/06-927, at 4 (Registrar, 14 June 2007).

<sup>172</sup> *See generally id.*

<sup>173</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Registration of the Solemn Undertaking by Ms Catherine Mabile and of Her Undertaking under Article 22(3) of the Code of Professional Conduct for Counsel, ICC-01/04-01/06-932-tENG (Registry, 6 July 2007).

<sup>174</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Direction Suspending the Timetable on the Subjects that Require Early Determination, ICC-01/04-01/06-942, ¶¶ 1-2 (Trial Chamber I, 16 August 2007).

submissions before the Trial Chamber were not made until 5 September 2007,<sup>175</sup> almost six months to the day after the formal transfer of the case to the Trial Chamber.

The second delay brought about by a dispute between the Registry and defense counsel over payment occurred in the *Bemba* case. Following Mr. Bemba's arrest in May 2008, the Pre-Trial Chamber overseeing his case issued a series of decisions aimed at freezing and seizing his assets,<sup>176</sup> which are believed to be substantial.<sup>177</sup> Shortly thereafter, on 9 July 2008, Mr. Bemba requested legal assistance to be paid by the Court.<sup>178</sup> On 25 August 2008, the Registrar denied Mr. Bemba's request based on a determination that the accused was not indigent and thus was ineligible for assistance from the Court.<sup>179</sup> At the request of Mr. Bemba, the Pre-Trial Chamber thereafter unfroze certain of his assets, such that he had sufficient means to cover his legal expenses and care for his dependents for a number of months.<sup>180</sup> However, as of March 2009, the funds available to the accused had been exhausted, and the Court was unable to access any other of the accused's assets that had been traced and identified.<sup>181</sup> The situation had not been resolved as of October 2009,<sup>182</sup> by which time the charges against Mr. Bemba had been confirmed by the Pre-Trial Chamber and the case had

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<sup>175</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Order Setting Out Schedule for Submissions and Hearings regarding the Subjects that Require Early Determination, ICC-01/04-01/06-947 (Trial Chamber I, 5 September 2007).

<sup>176</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Redacted Version of "Decision on Legal Assistance for the Accused," ICC-01/05-01/08-567-Red, ¶ 10 (Trial Chamber III, 26 November 2009).

<sup>177</sup> *See, e.g., The Prosecutor v. Jean-Pierre Bemba Gombo*, Summary of the Decision on Legal Assistance for the Accused, ICC-01/05-01/08-568, ¶ 1 (Trial Chamber III, 20 October 2009) ("The accused is clearly a man of considerable means, in the sense that he appears to 'own', or to have a proprietary interest in, various kinds of property (e.g. buildings, cars, companies), and there are bank accounts held in his sole name, in a number of different countries.").

<sup>178</sup> *Bemba*, Redacted Version of "Decision on Legal Assistance for the Accused," *supra* n. 176, ¶ 12.

<sup>179</sup> *Id.* ¶¶ 14-15.

<sup>180</sup> *Id.* ¶¶ 17-38.

<sup>181</sup> *Bemba*, Summary of the Decision on Legal Assistance for the Accused, *supra* n. 177, ¶¶ 3-4.

<sup>182</sup> *See generally id.*

been transferred to Trial Chamber III.<sup>183</sup> Between March and October 2009, the accused had unsuccessfully requested the Pre-Trial Chamber to stay the proceedings on the grounds that his “defence team was reduced in number and in its effectiveness (*viz.* as regards discharging its duties), following the nonpayment of fees,”<sup>184</sup> and had unsuccessfully re-applied to the Registrar for legal assistance.<sup>185</sup> On 7 October 2009, the Trial Chamber held a status conference on the matter of the defense’s funding, during which it observed:

There is a clear impasse as regards the funding of this accused’s defence. Although funds and property which are said to belong to the accused or which he is said to have a proprietary interest in have been identified, there are not indications that he presently has the ability to pay his lawyers. [...] There needs to be an immediate solution to this problem which is now at least seven months old, going back to March of this year [...].<sup>186</sup>

Subsequently, on 20 October 2009, after receiving submissions from the parties and the Registry on the subject, the Chamber concluded that, “given the resources currently available to Mr Bemba, he is seriously at risk of being denied the opportunity properly to prepare for a timely trial before the ICC.”<sup>187</sup> Accordingly, it ordered the Registrar to immediately “provide funding in the sum of €30,150 a month (this sum is to be paid retrospectively to March 2009 and ongoing until there is a material change in circumstances).”<sup>188</sup> It was not until 5 November 2009, after the funding issue was finally resolved, that the Trial Chamber set a date regarding the commencement of trial in the *Bemba* case.<sup>189</sup>

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<sup>183</sup> *Bemba*, Redacted Version of “Decision on Legal Assistance for the Accused,” *supra* n. 176, ¶ 44.

<sup>184</sup> *Id.* ¶¶ 52, 67.

<sup>185</sup> *Id.* ¶¶ 59-60, 68.

<sup>186</sup> *Id.* ¶ 70.

<sup>187</sup> *Bemba*, Summary of the Decision on Legal Assistance for the Accused, *supra* n. 177, ¶ 4.

<sup>188</sup> *Id.* ¶ 8.

<sup>189</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Date of Trial,

## 2. Proposed Solutions

First, to avoid a recurrence of the substantial delay in proceedings brought about by the withdrawal of lead counsel in the *Lubanga* case, it is recommended that the Registrar adopt a flexible interpretation of Regulation 83(3), essentially treating an attorney selected by the accused as representing that accused for purposes of negotiating defense resources, even if the negotiations occur prior to the attorney's formal appointment. It is perfectly reasonable for counsel to condition his or her acceptance of an appointment on the level of available resources, and the Registrar should communicate what those resources will be as soon as practicable. At the very least, the Registrar should in the future advise an attorney in Ms. Mabilile's position that his or her client must submit the formal application for additional resources, but permit the attorney to participate in negotiations on that application. Finally, the Registrar should endeavor to respond to applications for additional resources in an expeditious manner.

Second, even where there is a belief on the part of the Registry that an accused has assets, if those assets are not immediately available, the Registrar should promptly allocate resources to the accused in accordance with the Court's legal assistance framework, while making arrangements to ensure the Court will be reimbursed if and when the accused's assets become available. As Trial Chamber III held in its 20 October 2009 decision in the *Bemba* case, adequate resources are essential to allow the defense to "prepare for a timely trial" at the ICC.<sup>190</sup> Furthermore, as eventually occurred in *Bemba*, the Registrar can require the accused to sign "an appropriately binding document that any assistance he receives from the Registry in advance of his funds becoming available is to be repaid by way of an enforceable first charge in the Registry's favour on any of the seized or other funds as and when they are released or otherwise become accessible."<sup>191</sup>

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ICC-01/05-01/08-598, ¶¶ 3-6 (Trial Chamber III, 5 November 2009).

<sup>190</sup> See *supra* n. 187 *et seq.* and accompanying text.

<sup>191</sup> *Bemba*, Redacted Version of "Decision on Legal Assistance for the Accused," *supra* n. 176, ¶ 71.



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## C. ISSUES RELATING TO TRANSLATION AND INTERPRETATION

### 1. *Problem*

A lack of timely translations and inaccurate interpretations has occasionally resulted in delays at the ICC. For instance, the confirmation of charges hearing in the *Abu Garda* case had to be postponed in order to allow the Prosecutor to provide the suspect with a list of evidence and the statements of witnesses in Arabic, the suspect's native language.<sup>192</sup> In a different case, a delay in the translation of the Pre-Trial Chamber II's decision confirming the charges against Mr. Bemba was issued on 15 June 2009,<sup>193</sup> but the French translation of the decision was not notified to the parties and participants until 28 August 2009,<sup>194</sup> delaying the Defense's determination as to whether to seek leave to appeal the decision.<sup>195</sup> In addition, the absence of a timely translation of the Prosecution's application for leave to appeal the *Bemba* confirmation decision delayed the Defense's response thereto, presumably thereby delaying the Pre-Trial Chamber's ruling on the Prosecution's application and the finality of the confirmation decision.<sup>196</sup> Meanwhile, inaccurate interpretations have caused delays during the *Lubanga* trial, with the Defense complaining early on that "the significant effort required to

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<sup>192</sup> *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Prosecutor's Requests for Extension of Time-Limit, ICC-02/05-02/09-98 (Pre-Trial Chamber I, 11 September 2009). See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRCOTP-1042-0006 Pursuant to Regulation 35 and Request for Redactions," ICC-01/04-01/07-1336, ¶ 5 (Trial Chamber II, 27 July 2009) (granting the Prosecution's request for an extension of the disclosure deadline to allow for the disclosure of certain video evidence, noting that the delay was due to the "the length of time required to produce the 25 transcripts and translations" of the video evidence).

<sup>193</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 41.

<sup>194</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-532, ¶ 9 (Pre-Trial Chamber II, 18 September 2009).

<sup>195</sup> *Id.* ¶ 10.

<sup>196</sup> *Id.* ¶¶ 7, 10.

check the transcript was extremely time-consuming”<sup>197</sup> and the trial proceedings being halted on at least one occasion due to substantial discrepancies between the French and English versions of the transcripts.<sup>198</sup> Notably, translation was identified as a “bottleneck causing delay on a wide scale” at the ICTY and ICTR as of 1999,<sup>199</sup> suggesting it will be an ongoing challenge for the ICC, which has to contend with translations into many more languages than required at the *ad hoc* tribunals.

## 2. Proposed Solutions

Ensuring the timely translation both of material required to be disclosed by the Prosecution and of decisions by the Chambers will obviously require that the ICC’s translation budget keeps pace with the growing activity of the Court. In terms of interpretation errors during trial, the issues likely stem from factors such as the use of voice distortion, poor microphone use, and the tone and speed with which the person speaks.<sup>200</sup> One recommendation is that judges should exercise greater judicial control by reminding participants to pay attention to their tone and speed, to properly use microphones, *etc.* This was the approach taken by the Extraordinary Chambers in the Courts of Cambodia following various issues with interpretation that arose during its first trial.<sup>201</sup> Specifically, the Trial Chamber in the *Duch* case instructed the parties and witnesses to “speak slowly, clearly, and in short sentences to ensure the accuracy of language interpretation,” and also took measures “to control the speed of testimonies and statements by activating the microphones only after

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<sup>197</sup> International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, IBA/ICC MONITORING & OUTREACH PROGRAMME 35 (June 2009).

<sup>198</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-247-Red-ENG CT WT, at 28-29 (16 February 2010).

<sup>199</sup> *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, *supra* n. 76, ¶ 37.

<sup>200</sup> International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, *supra* n. 197, at 35.

<sup>201</sup> Michelle Staggs Kelsall, *et al.*, *Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia*, KRT Trial Monitoring Group, at 42 (December 2009).

the translation of the question was completed.”<sup>202</sup> While interpretation problems continued, they occurred on a smaller scale.<sup>203</sup>

## D. ISSUES RELATING TO DISCLOSURE

### 1. *Problem*

Late disclosure of material by the Prosecution to the Defense has been one of the principal causes of delay at the ICC. Under the Rome Statute, the Prosecution’s disclosure obligations commence at the time that the suspect is taken into custody.<sup>204</sup> Nevertheless, across both

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See, e.g., Rome Statute, *supra* n. 2, Art. 61(3) (“Within a reasonable time before the [confirmation] hearing, the person shall: ... (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.”); *id.* Art. 67(2) (“[T]he Prosecutor shall, *as soon as practicable*, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”) (emphasis added); ICC Rules of Procedure and Evidence, *supra* n. 97, R. 121(3) (“The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”). See also *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, at 8-9 (Pre-Trial Chamber I, 15 May 2006) (clarifying that, “*as soon as* the Prosecution has identified an item of potentially exculpatory material within the scope of article 67(2) of the Statute, the Prosecution shall... disclose it to the Defence” and “*as soon as* the Prosecution decides to rely on a given witness at the confirmation hearing, the Prosecution shall... transmit pursuant to rule 76 of the Rules, to the Defence the name of that witness and copies of his or her statement.”) (emphasis added). Of course, the Prosecution’s disclosure obligations continue at the trial stage of proceedings. See ICC Rules of Procedure and Evidence, *supra* n. 97, R. 76(1) (“The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. *This shall be done sufficiently in advance to enable the adequate preparation of the defence.*”) (emphasis added); *id.* R. 84 (“In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.”).

stages of proceedings, the Prosecution has repeatedly required extensions to the deadlines set by the Chambers regarding disclosure, negatively impacting the expeditious conduct of proceedings leading up to the confirmation hearing and trial. On occasion, the Prosecution has been forced to make untimely disclosures due to the late discovery of new evidence<sup>205</sup> or mere “oversight” on the part of the Prosecution.<sup>206</sup> For the most part, however, delays in the disclosure process have primarily arisen from two sources. First, the Prosecution has had to postpone the disclosure of evidence containing sensitive information – such as the identities of vulnerable witnesses and victims<sup>207</sup> and information that may “prejudice further or ongoing investigations”<sup>208</sup> – until any at-risk witnesses have been accepted into the ICC’s Protection Programme (ICCPP)<sup>209</sup> and the Chamber has approved an application from the Prosecution to redact confidential information.<sup>210</sup> Second, significant delays have resulted from the

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<sup>205</sup> See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Request for Late Disclosure of Exculpatory Evidence (Witness P-387) (ICC-01/04-01/07-1296), ICC-01/04-01/07-1423 (Trial Chamber II, 25 August 2009).

<sup>206</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Prosecution’s Requests to Add Items to the Evidence to be Relied on at Trial Filed on 21 April and 8 May 2008, ICC-01/04-01/06-1377, ¶¶ 4, 27 (Trial Chamber I, 4 June 2008).

<sup>207</sup> Pursuant to Rule 81(4) of the ICC’s Rules of Procedure and Evidence, a Chamber is required to “take the necessary steps to ensure the confidentiality of information... to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.” ICC Rules of Procedure and Evidence, *supra* n. 97, R. 81(4).

<sup>208</sup> *Id.* R. 81(2).

<sup>209</sup> The ICCPP allows for the relocation of witnesses, either within their home state’s territory or internationally, who face a risk of harm as a result of their interactions with the Court. See International Criminal Court, Regulations of the Registry, ICC-BD/03-01-06-Rev.1, Reg. 96 (2006); International Criminal Court Website, Description of Victims and Witnesses Unit, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm>.

<sup>210</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, Annex 1, ¶ 101 (Pre-Trial Chamber I, 15 May 2006) (“[A]s a general rule, statements must be disclosed to the Defence in full. Any restriction on disclosure to the Defence of the names or portions, or both, of the statements of the witnesses on which the Prosecution intends to rely at the confirmation hearing must be authorised... under the procedure provided for in rule 81 of the Rules.”); *The Prosecutor v. Germain*

Prosecution's refusal to disclose evidence obtained pursuant to Article 54(3)(e) of the Rome Statute, which authorizes the Prosecutor to "(a) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information actually consents..."<sup>211</sup>

Looking at delays caused by the need to protect sensitive information first, a large part of the problem has stemmed from the fact that the Prosecution cannot disclose unredacted evidence containing information about those witnesses potentially eligible for the ICCPP until after the Court's Victims and Witnesses Unit has accepted the witnesses into the program and implemented the appropriate measures.<sup>212</sup> This is a time-consuming process, as the Pre-Trial Chamber explained in the *Katanga & Ngudjolo* case:

[A]ccording to the VWU, it takes an average of two to three months from the moment the Prosecution makes a request for the inclusion of a witness in the ICCPP until the witness is relocated upon acceptance in the Programme. Logically, this amount of time increases when, as is presently the case, the VWU is processing dozens of requests in relation to the various cases

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*Katanga and Mathieu Ngudjolo Chui*, Decision on the Redaction Process, ICC-01/04-01/07-819-tENG, ¶ 1 (Trial Chamber II, 12 January 2009) (noting that "the redaction of material or information, as provided for in rule 81 of the Rules, must be the exception and subject to strict judicial supervision"). Note that, with regard to those witnesses who are accepted into the ICCPP, their identities will be disclosed to the Defense, but any information relating to their current whereabouts or the identities of their family members may be redacted. See, e.g., *The Prosecutor v. Germain Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-90, ¶¶ 23-38 (Pre-Trial Chamber I, 7 December 2007).

<sup>211</sup> Rome Statute, *supra* n. 2, Art. 54(3)(e).

<sup>212</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, ICC-01/04-01/06-126, at 4 (Pre-Trial Chamber I, 24 May 2006) (recognizing that several of the witnesses on whom the Prosecution intends to rely at the confirmation hearing "require that their identities and unredacted versions of their statements be only disclosed to the Defence after the protection measures sought by the Prosecution have been fully implemented" by the VWU).

before the Court. As a result when, as is presently the case, the Prosecution requests the relocation of approximately [REDACTED] witnesses for the purpose of a confirmation hearing, and some of those requests are made two to three months after the transfer of the suspect to the seat of the Court in The Hague, it takes at least five to six months for the Registrar to decide upon and implement the decisions on the Prosecution's requests for relocation.<sup>213</sup>

Furthermore, the Prosecution has applied for a significant number of its witnesses to be admitted into the ICCPP in each of the cases before the ICC,<sup>214</sup> meaning a large amount of evidence is affected by the need to wait for the VWU to rule on and implement requests for relocation.

Disclosure delays also result from the fact that the Prosecution may – and has – applied to the Chambers for permission to redact from evidence the names and other identifying information of vulnerable victims and witnesses not accepted into the ICCPP,<sup>215</sup> as well as a wide range of other information, including information relating to persons who were not Prosecution sources themselves, but who are nevertheless mentioned in a witness statement or other evidence;<sup>216</sup> intermediaries working on behalf of the Prosecution;<sup>217</sup> and

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<sup>213</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, *supra* n. 36, ¶¶ 61-62.

<sup>214</sup> *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Status Conference, ICC-01/04-01/06-T-104, at 1 (Trial Chamber I, 16 January 2009) (noting that twenty of the Prosecution's twenty-eight witnesses in the *Lubanga* case were admitted into the ICC's Protection Programme); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Status Conference, ICC-01/04-01/07-T-52-ENG, at 67-70 (Trial Chamber II, 27 November 2008) (noting that nineteen of the Prosecution's twenty-five fact witnesses have been admitted into the ICC Protection Programme).

<sup>215</sup> *See, e.g., Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, *supra* n. 210, ¶¶ 29-43.

<sup>216</sup> *See, e.g., id.* ¶¶ 44-56.

<sup>217</sup> *See, e.g., The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information Falling under Rule 77 of the Rules of Procedure and Evidence (Witnesses 007 and 294) of 17 June 2009, ICC-01/04-01/07-1240-tENG, ¶ 15 (Trial Chamber II, 23 June 2009).

information that may negatively affect further or ongoing investigations if disclosed.<sup>218</sup> Obviously, the evidence containing such information cannot be disclosed until after the relevant Chamber rules on the request for redactions, which can take weeks, if not months.<sup>219</sup>

Thus, absent timely applications both for the entry of witnesses into the ICCPP and for approval of redactions from the Chambers, the Prosecution is unable to meet its disclosure deadlines, thereby delaying the start of the confirmation hearing or trial. Unfortunately, this has occurred repeatedly. For instance, in the *Lubanga* case, the confirmation of charges hearing was initially scheduled for 27 June 2006, but on 12 May 2006, the Prosecution informed the Pre-Trial Chamber that it would not be in a position to disclose information related to witnesses who were awaiting acceptance into the ICCPP,<sup>220</sup> and as a result, the confirmation hearing was delayed until 28 September 2006.<sup>221</sup> Subsequently, the confirmation hearing had to once again be postponed, this time until 9 November 2006, due to the fact that the Prosecution had continued to submit requests for redactions of confidential information up to seven days before the deadline for disclosure.<sup>222</sup> Similarly, in the *Katanga & Ngudjolo* case,

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<sup>218</sup> *Id.* ¶ 8

<sup>219</sup> *See, e.g., See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Public Redacted Version), ICC-01/04-01/06-455 (Pre-Trial Chamber I, 20 September 2006) (ruling on applications from the Prosecution for redactions filed on 21 August 2006, 23 August 2006, and 29 August 2006); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-160, ¶¶ 41, 45 (Pre-Trial Chamber I, 23 January 2008) (ruling on applications for redactions submitted by the Prosecution on 21 November 2007 and 13 December 2007); *Katanga & Ngudjolo*, Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information Falling under Rule 77 of the Rules of Procedure and Evidence (Witnesses 007 and 294) of 17 June 2009, *supra* n. 217 (ruling on an application for redactions submitted by the Prosecution on 2 April 2009).

<sup>220</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision of the Final System of Disclosure, ICC-01/04-01/06-126, at 2 (Pre-Trial Chamber I, 24 May 2006).

<sup>221</sup> *Id.* at 6.

<sup>222</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-437, at 6 (15 September 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision

the confirmation of charges hearing, which was initially scheduled to begin 28 February 2008, had to be indefinitely postponed on 30 January 2008 due to the fact that the VWU still had not completed its assessment of the requests for relocation of more than half of the witnesses the Prosecution intended to rely on at hearing.<sup>223</sup> Several reasons were given to explain the delay in the VWU's processing of the protection requests, including the fact that the Prosecution had belatedly submitted the requests for relocation for some of the witnesses.<sup>224</sup> Indeed, the Prosecution continued to submit requests for relocation to the VWU up to three months after the transfer of the accused to the custody of the ICC.<sup>225</sup> Then, at the trial stage, the Prosecution's failure to comply with the Trial Chamber's deadline regarding requests for redactions was one of the reasons that the Chamber was unable to set a date for the trial until five months after the transfer of the *Katanga & Ngudjolo* case from the Pre-Trial Chamber to the Trial Chamber.<sup>226</sup> Finally, in the *Bemba* case, the confirmation of charges hearing had to be indefinitely delayed more than three months after the Chamber had initially set the date of the hearing,<sup>227</sup> due to "significant problems" that emerged "in the evidence disclosure system."<sup>228</sup> In particular, the *Bemba* Pre-Trial Chamber noted that, by filing untimely requests for redactions to the evidence

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on the Date of Confirmation Hearing, ICC-01/04-01/06-521-tEN, at 4 (Pre-Trial Chamber I, 4 October 2006).

<sup>223</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, ICC-01/04-01/07-172, at 6, 8 (Pre-Trial Chamber I, 30 January 2008).

<sup>224</sup> *Id* at 6. The precise number of witnesses for whom late requests were submitted is not identified in the decision.

<sup>225</sup> *Katanga & Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, *supra* n. 36, ¶ 62.

<sup>226</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), ICC-01/04-01/07-999 (Trial Chamber II, 27 March 2009).

<sup>227</sup> *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of Hearing (Open Session), ICC-01/05-01/08-T-3-ENG, at 9 (4 July 2008) (setting the confirmation hearing for 4 November 2008).

<sup>228</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/05-01/08-170-tENG, ¶ 23 (Pre-Trial Chamber III, 17 October 2008).



subject to disclosure, the Prosecution had put itself in a position that made it impossible to comply with the Chamber's disclosure deadlines.<sup>229</sup> The confirmation hearing was ultimately rescheduled to begin 8 December 2008.<sup>230</sup>

The second substantial source of unwarranted delay in relation to disclosure stems from the Prosecution's early practice of gathering large amounts of evidence pursuant to Article 54(3)(e) of the Rome Statute. As discussed in detail in a prior report by the War Crimes Research Office,<sup>231</sup> the Prosecution's extensive reliance on this provision when gathering evidence in the Democratic Republic of Congo<sup>232</sup> led to a complete halt of the proceedings in the *Lubanga* case from June 2008 to January 2009, as the Prosecution refused to disclose potentially exculpatory evidence to the Defense that it had collected pursuant to Article 54(3)(e), causing the Trial Chamber to conclude that the "trial process ha[d] been ruptured to such a degree that it [was] impossible to piece together the constituent elements of a fair trial."<sup>233</sup> While the impasse over the Article 54(3)(e) documents was ultimately resolved in the *Lubanga* case,<sup>234</sup> the delay caused was so significant that it is worth exploring explicit measures to avoid a recurrence of this problem in the future.

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<sup>229</sup> *Id.* ¶¶ 20-21.

<sup>230</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Setting the Date of the Confirmation Hearing, ICC-01/05-01/08-199 (Pre-Trial Chamber III, 31 October 2008).

<sup>231</sup> See War Crimes Research Office, *The Relationship Between the International Criminal Court and the United Nations*, at 43-57 (August 2009), [http://www.wcl.american.edu/warcrimes/icc/documents/WCRO\\_Report\\_on\\_ICC\\_and\\_UN\\_August2009.pdf?rd=1](http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_ICC_and_UN_August2009.pdf?rd=1).

<sup>232</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-0104-0106-T-52-ENG, at 13 (1 October 2007) (in which the Prosecution informs the Trial Chamber that fifty percent of the documents gathered in the course of the investigation in the Democratic Republic of Congo were obtained pursuant to Article 54(3)(e) agreements).

<sup>233</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01-06/1401, ¶¶ 91-93 (Trial Chamber I, 13 June 2008).

<sup>234</sup> See War Crimes Research Office, *The Relationship Between the International Criminal Court and the United Nations*, *supra* n. 231, at 56.

## 2. Proposed Solutions

On the subject of disclosure that is delayed due to the need to protect vulnerable witnesses and other sensitive information, one solution would be for the Prosecution to rely on fewer witnesses requiring relocation through the ICCPP. Indeed, as a former judge of the ICTY has stated, “[g]iven a choice between a witness who will testify openly and one who requires protection, the former should have an edge.”<sup>235</sup> For instance, the Prosecution could rely on expert witnesses, who are less likely to need protective measures, rather than lay witnesses, where possible. Of course, the ICC is investigating crimes committed in countries engaged in ongoing conflict, or recently recovering from conflict or other mass atrocity, and it is therefore reasonable to anticipate that a large number of witnesses will require the assistance of the Court’s ICCPP. For these witnesses, it is recommended that the

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<sup>235</sup> Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, *supra* n. 89, at 224. Of course, reducing the number of witnesses who testify without protective measures will benefit the International Criminal Court beyond reducing delays in the disclosure process. Not only does public witness testimony protect the accused from arbitrary and unfair convictions or procedures, it ensures the right of the accused to examine and have examined the evidence against him, as the public is in a position to come forward if any of the evidence presented during a witness’s testimony is false. *See, e.g., In re Oliver*, 333 U.S. 257, 270 (1948) (“Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”). *See also* International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, *supra* n. 197, at 28 (“[I]f a witness provides incorrect testimony in public session, there is a greater possibility that persons involved in the event in question will be in a position to identify the false testimony and offer to testify as a defence witness. This possibility will be eliminated if the public is unable to access key information pertaining to the testimony of the witness, for example the identity and physical appearance of the witness.”). At the same time, public trials may also discourage perjury. *See, e.g., Prosecutor v. Issa Hassan Sesay*, Response of Defence Office to “Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,” Case No. SCSL-2003-05-PT-022, ¶ 18 (Defence, 23 April 2003) (“It is also worth noting that anonymity in the *Tadić* trial was in the end only employed for one witness, whose credibility was thoroughly impeached at trial... It is submitted that the ICTY’s experience in this area is a salutary reminder of the dangers of anonymity, or partial anonymity, and the temptation it presents to witnesses to testify falsely.”). By contrast, a witness who testifies in the knowledge that the larger public will not be privy to his or her testimony may feel more secure in presenting false testimony.

Prosecution submit applications for admission into the Programme to the Victims and Witnesses Unit as soon as possible after the suspect is taken into the custody of the Court. At the same time, it is essential that the VWU be provided with the staff and resources necessary to rapidly evaluate and implement requests for relocation.

With regard to applications to the Chambers to redact sensitive information relating to individuals not accepted into the Court's ICCPP or that may prejudice further or ongoing investigations, we recommend, as discussed above, that at the confirmation stage, the Prosecution rely on summaries of evidence that would otherwise require extensive redactions.<sup>236</sup> For purposes of trial, the Prosecution should work to ensure that it will be in a position to submit any requests for redactions to the Trial Chamber as soon as charges are confirmed against a suspect. Furthermore, the speed with which the Chambers are able to respond to requests for redactions may be improved if the Prosecution were to adopt a more systematic and careful approach to its applications for redactions.<sup>237</sup> As the International Bar Association has observed:

Regrettably there appear to be two main problems with redactions which potentially affect the efficiency of the proceedings. First, the process of redacting documents does not appear to be carried out in a careful and thorough manner, resulting in significant duplication of effort. For example, the IBA understands that on some occasions the judges and the staff assigned to Chambers have had to invest considerable time and effort in cross-checking redacted documents submitted to the Chambers by the [Office of the Prosecutor], despite the latter's reportedly rigorous internal review procedure. Secondly, the IBA understands that the nature and scope of the redactions suggests the absence of a systematic approach to the process. The IBA is informed that in some instances identifying details, along with other relevant information, are completely

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<sup>236</sup> See *supra* n. 35 *et seq.* and accompanying text.

<sup>237</sup> International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress*, *supra* n. 1, at 22.

obliterated, making it impossible to fully comprehend the application or statement.<sup>238</sup>

The IBA concludes that “[a]ttention to these issues will certainly help in facilitating the efficient conduct of proceedings.”<sup>239</sup>

Turning to the issue of evidence collected pursuant to confidentiality agreements, our primary recommendation is that the Prosecution strictly limit its use of Article 54(3)(e) agreements in its investigations. One way to ensure compliance with this recommendation would be for the Prosecution to adopt guidelines as to when it will make use of such agreements.<sup>240</sup> Furthermore, to the extent that the Prosecution does rely on Article 54(3)(e) to collect certain evidence, it should set in motion the process by which it will secure the permission of the relevant information providers to disclose potentially exculpatory material as soon as the suspect is taken into the custody of the Court. As the Prosecution advised the Trial Chamber in the context of the *Lubanga* case, this can be a lengthy process,<sup>241</sup> and thus should be commenced at the very start of the proceedings.

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> See, e.g., Kai Ambos, *Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 12 *New Crim. L. Rev.* 543, 555-56 (2009) (suggesting that the Prosecutor “conclude confidentiality agreements only under three conditions: first, there is no other ‘normal’ way to obtain the respective information; second, the information is absolutely necessary to continue the investigation; and third, the information is only requested to generate new evidence.”).

<sup>241</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-0104-0106-T-52-ENG, at 17 (1 October 2007).

## V. SUMMARY OF RECOMMENDATIONS

Some of the solutions proposed above will require an amendment to the Rome Statute or the ICC Rules of Procedure and Evidence, both of which require adoption by a two-thirds majority of the Assembly of States Parties (ASP).<sup>242</sup> Solutions that call for additional resources will also require action by the ASP, which controls the budget of Court.<sup>243</sup> Other solutions may be accomplished by an amendment to the Regulations of the Court, which will require a favorable vote by a majority of the judges serving at the time of the amendment.<sup>244</sup> The judges may also enact certain of the recommendations simply by adopting a different interpretation of the Rome Statute, Rules, or Regulations, or by taking a different procedural approach. Finally, some of the proposed solutions call upon the Office of the Prosecutor or the Registry to adopt certain changes in their practices. These various recommendations may be summarized as follows:

### Recommendations Directed to the Assembly of States Parties

- Consider amending the Rome Statute to allow for the addition of *ad litem* judges at the ICC.
- Consider amending the Rome Statute or Rules of Procedure and Evidence to carve out exceptions to the Article 39 requirement that the functions of the Trial Chamber be carried out by three judges, thereby allowing certain Trial Chamber functions to be carried out by a single judge, as seen both at the ICTY and ICTR, and at the confirmation stage of ICC proceedings.
- Consider amending the ICC's Rules of Procedure and Evidence to include certain provisions similar to those found in the

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<sup>242</sup> Rome Statute, *supra* n. 2, Art. 121(3) (governing amendments to the Rome Statute); *id.* Art. 51(1) (governing amendments to the Rules of Procedure and Evidence).

<sup>243</sup> *Id.* Art. 112(2)(d).

<sup>244</sup> *Id.* Art. 52(1). A State Party may object to any amendments to the Regulations of the Court within six months of the amendment's adoption. *Id.* Art. 52(3).

ICTY's Rules, namely:

- ICTY Rule 15*bis*, which provides, *inter alia*, that if a judge is absent for a short duration and the remaining judges are satisfied that it is in the interests of justice to do so, the remaining judges may conduct all or part of the Chamber's business in the absence of the missing judge;
- ICTY Rule 92*bis*, which allows a Trial Chamber to admit the written testimony of a witness, even if that witness is not available to be examined in court and has not been previously examined by both parties, so long as the testimony in question goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment; and
- ICTY Rule 94, which permits a Trial Chamber to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.
- Ensure that the ICC's translation budget keeps apace with the growing activity of the Court.
- Ensure that the Court's Victims and Witnesses Unit is provided with the staff and resources necessary to rapidly evaluate and implement requests for relocation.

*Recommendations Directed to the Judges of the ICC*

- Consider amending the Regulations of the Court to impose deadlines on the Pre-Trial Chambers concerning the period of time within which the Chambers must issue decisions on Article 58 applications.
- Consider amending Regulation 53 of the Regulations of the Court to shorten the amount of time given to the Pre-Trial Chamber to issue its decision whether to confirm the charges, which is currently set at sixty days from the close of the confirmation hearing. Alternatively, consider interpreting Regulation 53 as requiring the decision within sixty days of the last day of the actual confirmation hearing, rather than sixty days from the last submission received following the close of

the hearing.

- Consider adopting an interpretation of the term “present” as used in Article 74 of the Rome Statute as encompassing not just physical presence, but also presence through participation *via* teleconferencing or videoconferencing.
- For purposes of trial, consider increasing the use of prior-recorded testimony, particularly in the form of deposition testimony, and reports from court-appointed experts. In addition, to the extent possible, encourage parties to agree to stipulations in advance of trial, and make use of judicial notice where appropriate. Finally, consider allowing the parties to proof their witnesses prior to taking the stand and, in all cases, allowing parties to ask leading questions with respect to non-contentious issues on direct, and without limit on cross-examination.
- Consider amending the Regulations of the Court to impose time limits with respect to decisions on requests for leave to appeal and the resulting appeals judgments.
- On appeal, consider automatically granting participatory rights to any victims who have already been granted the right to participate before the Pre-Trial or Trial Chamber that issued the impugned decision.

#### *Recommendations Directed to the Office of the Prosecutor*

- At the confirmation of charges stage of proceedings, consider relying on fewer witnesses and making more extensive use of summary evidence.
- In order to avoid the need to secure protective measures for a large number of witnesses, consider relying more on expert witnesses, who are less likely to need protective measures, rather than lay witnesses, where possible.
- Submit applications for admission into the Court’s Protection Programme to the Victims and Witnesses Unit as soon as possible after a suspect is taken into the custody of the Court. In addition, work to ensure that the Prosecution will be in a position to submit any requests for redactions to evidence to

the Trial Chamber as soon as charges are confirmed against a suspect, and ensure that the Office is consistently adopting a systematic and careful approach to its applications for redactions.

- Strictly limit the use of Article 54(3)(e) agreements in investigations, and consider adopting guidelines as to when to make use of such agreements. To the extent that the Prosecution does rely on Article 54(3)(e) to collect certain evidence, set in motion the process by which it will secure the permission of the relevant information providers to disclose potentially exculpatory material as soon as a suspect is taken into the custody of the Court.

*Recommendations Directed to the Registry*

- In the event that an accused seeks to appoint new counsel, consider treating an attorney selected by the accused as representing that accused for purposes of negotiating defense resources, even if the negotiations occur prior to the attorney's formal appointment.
- Even where there is a belief on the part of the Registry that an accused has assets sufficient to cover the costs of his or her defense, if those assets are not immediately available, consider promptly allocating resources to the accused in accordance with the Court's legal assistance framework, while making arrangements to ensure the Court will be reimbursed if and when the accused's assets become available.



**ANNEX ONE: Dates of the Prosecution’s Article 58 Applications and the Pre-Trial Chambers’ Issuance of Arrest Warrants/Summonses to Appear**

Case	Date of Application	Date Warrant/Summons Issued
<i>Kony, et al.</i>	6 May 2005 <sup>1</sup> 18 May 2005 (amended) <sup>2</sup>	8 July 2005 <sup>3</sup>
<i>Lubanga</i>	13 January 2006 <sup>4</sup>	10 February 2006 <sup>5</sup>
<i>Ntaganda</i>	13 January 2006 <sup>6</sup>	22 August 2006 <sup>7</sup>
<i>Harun &amp; Al-Rahman</i>	27 February 2007 <sup>8</sup>	27 April 2007 <sup>9</sup>
<i>Katanga &amp; Ngudjolo</i>	25 June 2007 <sup>10</sup>	2 July 2007 (Katanga) <sup>11</sup> 6 July 2007 (Ngudjolo) <sup>12</sup>
<i>Al Bashir</i>	14 July 2008 <sup>13</sup>	4 March 2009 <sup>14</sup> 12 July 2010 <sup>15</sup>
<i>Bemba</i>	9 May 2008 <sup>16</sup>	23 May 2008 (provisional) <sup>17</sup> 10 June 2008 <sup>18</sup>
<i>Abu Garda</i>	20 November 2008 <sup>19</sup> 23 February 2009 (amended) <sup>20</sup>	7 May 2009 <sup>21</sup>
<i>Banda &amp; Jerbo</i>	20 November 2008 <sup>22</sup> 23 February 2009 (amended) <sup>23</sup>	15 June 2010 <sup>24</sup>
<i>Mbarushimana</i>	20 August 2010 <sup>25</sup>	28 September 2010 <sup>26</sup>
<i>Ruto, et al.</i>	15 December 2010 <sup>27</sup>	8 March 2011 <sup>28</sup>
<i>Muthaura, et al.</i>	15 December 2010 <sup>29</sup>	8 March 2011 <sup>30</sup>

<sup>1</sup> *The Prosecutor v. Joseph Kony, et al.*, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-1, at 2 (Pre-Trial Chamber II, 8 July 2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor’s Application for a Warrant of Arrest, Article 58, Annex 1, ICC-01/04-01/06-8-US-Corr, at 2 (Pre-Trial Chamber I, 10 February 2006).

<sup>5</sup> See generally *id.*

<sup>6</sup> *The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, ICC-01/04-02/06-2, at 2 (Pre-Trial Chamber I, 22 August 2006).

<sup>7</sup> See generally *id.* Note, however, that the initial decision on the Prosecutor's application for a warrant of arrest for Mr. Ntaganda was initially issued on 10 February 2006, and it was only after the Appeals Chamber reversed the Pre-Trial Chamber's holding that it could not issue an arrest warrant in the case under Article 17(1)(d) that the Pre-Trial Chamber revisited its decision and issued the warrant. *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ICC-01/04-01/06-169 (Appeals Chamber, 13 July 2006). The fact that it took the Appeals Chamber five months to issue its decision reversing the Pre-Trial Chamber's decision on the Prosecutor's application is addressed above. See *supra* n. 148 *et seq.* and accompanying text.

<sup>8</sup> *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1, at 4 (Pre-Trial Chamber I, 27 April 2007).

<sup>9</sup> See generally *id.*

<sup>10</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07-4 (Pre-Trial Chamber I, 6 July 2007) (discussing the application of the Prosecutor's application for arrest warrants, which were submitted in two parts on 22 and 25 June 2007).

<sup>11</sup> See generally *id.*

<sup>12</sup> See generally *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC-01/04-01/07-262 (Pre-Trial Chamber I, 6 July 2007).

<sup>13</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, at 4 (Pre-Trial Chamber I, 4 March 2009).

<sup>14</sup> See generally *id.*

<sup>15</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94 (Pre-Trial Chamber I, 12 July 2010) (charging war crimes and crimes against humanity). The second warrant of arrest against President Bashir was issued following an Appeals Chamber judgment reversing the Pre-Trial Chamber's initial decision excluding genocide charges from the warrant of arrest. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ICC-02/05-01/09-73 (Appeals Chamber, 3 February 2010)

(charging genocide). The lengthy period of time taken by the Appeals Chamber to issue a judgment reversing the Pre-Trial Chamber is addressed above. *See supra* n. 149 *et seq.* and accompanying text.

<sup>16</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, at 4 (Pre-Trial Chamber III, 10 June 2008).

<sup>17</sup> *See id.* ¶ 7. On 23 May 2008, the Prosecutor filed an Application for Request for Provisional Arrest under Article 92 of the Statute, informing the Chamber that there "was a real likelihood that Mr Bemba would flee and attempt to avoid arrest and that it was therefore urgently necessary to send a request for his provisional arrest to the Kingdom of Belgium." *Id.* ¶ 6.

<sup>18</sup> *See generally id.*

<sup>19</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-15, at 3 (Pre-Trial Chamber I, 7 May 2009), *annexed to* Decision on Issues relating to the Publicity of Proceedings in the Case, ICC-02/05-02/09-15 (Pre-Trial Chamber I, 15 May 2009).

<sup>20</sup> *Id.*

<sup>21</sup> *See generally id.*

<sup>22</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Second Decision on the Prosecutor's Application under Article 58, ICC-02/05-03/09-1, at 3 (Pre-Trial Chamber I, 15 June 2010).

<sup>23</sup> *Id.*

<sup>24</sup> *See generally id.*

<sup>25</sup> *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, at 4 (Pre-Trial Chamber I, 11 October 2010).

<sup>26</sup> *See generally id.*

<sup>27</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-01, ¶ 2 (Pre-Trial Chamber II, 8 March 2011).

<sup>28</sup> *See generally id.*

<sup>29</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01, ¶ 2 (Pre-Trial Chamber II, 8 March 2011).

<sup>30</sup> *See generally id.*

## ANNEX TWO: Dates Relevant to the Confirmation of Charges Process

Case	First Appearance	Confirmation Decision	Decision on Leave to Appeal
<i>Lubanga</i>	20 March 2006 <sup>1</sup>	29 January 2007 <sup>2</sup>	24 May 2007 <sup>3</sup>
<i>Katanga &amp; Ngudjolo</i>	22 October 2007 <sup>4</sup> 11 February 2008 <sup>5</sup>	30 September 2008 <sup>6</sup>	24 October 2008 <sup>7</sup>
<i>Bemba</i>	4 July 2008 <sup>8</sup>	15 June 2009 <sup>9</sup>	18 September 2009 <sup>10</sup>
<i>Abu Garda</i>	18 May 2009 <sup>11</sup>	8 February 2010 <sup>12</sup>	23 April 2010 <sup>13</sup>
<i>Banda &amp; Jerbo</i>	17 June 2010 <sup>14</sup>	7 March 2011 <sup>15</sup>	N/A <sup>16</sup>

<sup>1</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

<sup>2</sup> See generally *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803 (Pre-Trial Chamber I, 29 January 2007).

<sup>3</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/04-01/06-915 (Pre-Trial Chamber I, 24 May 2007).

<sup>4</sup> *The Prosecutor v. Germain Katanga*, Decision Scheduling the First Appearance of Germain Katanga and Authorizing Photographs at Hearing of 22 October 2007, ICC-01/04-01/07-26, at 3 (Pre-Trial Chamber I, 18 October 2007).

<sup>5</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257, at 3 (Pre-Trial Chamber I, 10 March 2008) (discussing Ngudjolo's first appearance).

<sup>6</sup> See generally *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ICC-01/04-01/07-611 (Pre-Trial Chamber I, 1 October 2008).

<sup>7</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the

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Confirmation of Charges, ICC-01/04-01/07-727 (Pre-Trial Chamber I, 24 October 2008).

<sup>8</sup> *The 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, ICC-01/05-01/08-424, ¶ 4 (Pre-Trial Chamber II, 15 June 2009).

<sup>9</sup> *See generally id.*

<sup>10</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," ICC-01/05-01/08-532, ¶¶ 6-8 (Pre-Trial Chamber II, 18 September 2009).

<sup>11</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, ¶ 5 (Pre-Trial Chamber I, 8 February 2010).

<sup>12</sup> *See generally id.*

<sup>13</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges,'" ICC-02/05-02/09-267 (Pre-Trial Chamber I, 23 April 2010).

<sup>14</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the "Decision on the Confirmation of Charges," ICC-02/05-03/09-121-CORR-RED, ¶ 13 (Pre-Trial Chamber I, 8 March 2011).

<sup>15</sup> *See generally id.*

<sup>16</sup> Neither party sought leave to obtain interlocutory appeal of the confirmation decision in the *Banda & Jerbo* case.

### ANNEX THREE: Dates Relevant to the Time Between the Transfer of a Case to a Trial Chamber and the Start of Trial

Case	Date Case Referred to Trial Chamber	First Day of Trial
<i>Lubanga</i>	6 March 2007 <sup>1</sup>	26 January 2009 <sup>2</sup>
<i>Katanga &amp; Ngudjolo</i>	24 October 2008 <sup>3</sup>	24 November 2009 <sup>4</sup>
<i>Bemba</i>	18 September 2009 <sup>5</sup>	22 November 2010 <sup>6</sup>

<sup>1</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

<sup>2</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-107-ENG (26 January 2009).

<sup>3</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Constituting Trial Chamber II and Referring to It the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729 (Presidency, 24 October 2008).

<sup>4</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing (Open Session), ICC-01/04-01/07-T-80-ENG (24 November 2009).

<sup>5</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Constituting Trial Chamber III and Referring to It the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-534 (Presidency, 18 September 2009).

<sup>6</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of Hearing (Open Session), ICC-01/05-01/08-T-32-ENG (22 November 2010).

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## EXPEDITING PROCEEDINGS AT THE INTERNATIONAL CRIMINAL COURT

In its less than one decade of existence, the International Criminal Court (ICC) has achieved a great deal, opening formal investigations into six situations involving some of the most serious atrocities seen since the birth of the Court in 2002 and commencing cases against a number of the individuals believed to bear the greatest responsibility for those atrocities. However, nearly ten years after coming into being, the ICC has yet to complete a single trial, raising concerns among States Parties to the Rome Statute and others regarding the effective functioning of the Court. Hence, while recognizing that the ICC is still a very young institution faced with a variety of novel substantive and procedural challenges, the aim of this report is to identify areas of unnecessary delays in proceedings currently before the Court that are likely to arise again, and suggest ways in which such delays may be avoided in the future.



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