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## Building the International Criminal Court

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*International Criminal Court*

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## **Building the International Criminal Court**

*Judge Anita Ušacka\**

I would like to thank you for inviting me to speak with all of you today. Even though I stand before you today as a judge of the International Criminal Court, it is exciting for me to be here and to know that we will have a new generation of lawyers who will be trained in this complex but dynamic field.

I will start with a brief discussion on the short history of the International Criminal Court (ICC); however, my primary focus will be on some of the challenges facing the ICC. I will begin with a brief description of some of the diverse legal traditions that we have inherited in the Rome Statute of the International Criminal Court.<sup>1</sup> I will then discuss disclosure and victim participation as examples of how some of the compromises made in the Rome Statute and Rules of Procedure and Evidence<sup>2</sup> have significantly affected the proceedings. I will conclude with an update on a new and important development in the Court's legal framework: the June 2010 agreement by the States Parties on a definition of the crime of aggression.<sup>3</sup>

I hope that through this lecture, I can provide some information that you may not be able to glean as simply a follower of the ICC, and that I will provide some perspective on a few of the real issues that we continue to face as we build the ICC from a vision of international justice to a fully functioning judicial institution.

As a starting point, I should mention that the ICC is a young institution when compared with other courts. While the ICC was established when the Rome Statute entered into force on July 1, 2002,<sup>4</sup> it was quite some time before the

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\* This lecture was given by Judge Anita Ušacka in Salzburg, Austria on July 19, 2010.

1. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court).

2. See generally Rules of Procedure and Evidence, ICC-ASP/1/3 (Sept. 9, 2002), available at [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf) [hereinafter Rules] (adopted by the Assembly of States Parties on September 3-10, 2002).

3. See Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, ICC-RC/Res.6, (June 11, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) [hereinafter Aggression].

4. *Chronology of the International Criminal Court*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm> (last visited Nov. 23, 2010).

institution was really fully operational. For example, the judges were not elected until February of 2003,<sup>5</sup> and the Prosecutor was not elected until April of that same year.<sup>6</sup> The first warrant of arrest was not issued until July 8, 2005 (in the case of the *Prosecutor v. Joseph Kony*),<sup>7</sup> and opening statements in the first case commenced on January 26, 2009.<sup>8</sup> To date, the ICC has issued a total of fourteen warrants of arrest<sup>9</sup> and three summonses to appear.<sup>10</sup> It has confirmed charges in three cases<sup>11</sup> and declined to confirm the charges in one case.<sup>12</sup>

The starting point for the establishment of the International Criminal Court is usually described as the Nuremburg and Tokyo Trials following World War II.<sup>13</sup> Even though efforts were made to prosecute alleged war criminals at the end of World War II, the notion of bringing perpetrators of international crimes to justice lost momentum during the Cold War. However, the end of the Cold War ushered in a new era of international criminal justice. In 1993, the UN Security Council established the International Criminal Tribunal for the former

5. *Id.*

6. *Id.*

7. Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders, ICC Press Release ICC-CPI-20051014-110 (Oct. 14, 2005), available at <http://www2.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2005/Warrant+of+Arrest+unsealed+against+five+LRA+Commanders.htm>; see also *Prosecutor v. Joseph Kony*, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, (Sept. 27, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>.

8. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-107-ENG, Hearing, ¶¶ 1, 4 (Jan. 26, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc623638.pdf>.

9. See *Cases*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/> (last visited Nov. 23, 2010) (indicating that warrants have been issued against the following individuals: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Raska Lukwiya, Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana, Jean-Pierre Bemba Gombo, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, and Omar Hassan Ahmad Al Bashir) [hereinafter *ICC Cases*]; see also *Prosecutor v. Omar Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 3 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (indicating that a second arrest warrant was issued for Bashir, thereby adding a charge of genocide that was not included in the first arrest warrant of March 4, 2009).

10. *Id.* (showing that the following individuals have received summonses to appear: Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus).

11. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 154-57 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> [hereinafter *Lubanga Confirmation Decision*]; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 207-13 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> [hereinafter *Katanga Confirmation Decision*]; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 184-86 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>.

12. See *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09-243-Red, Public Redacted Version: Decision on the Confirmation of Charges, 97 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>; see also *ICC Cases*, *supra* note 9 (showing that of those cases that have reached a confirmation hearing, only the Abu Garda hearing resulted in a denial of the charges).

13. See, e.g., Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998).

Yugoslavia (ICTY),<sup>14</sup> and established a similar tribunal for Rwanda in 1994.<sup>15</sup> In addition, hybrid criminal courts, which have both domestic and international characteristics,<sup>16</sup> have been created in East Timor,<sup>17</sup> Kosovo,<sup>18</sup> Sierra Leone,<sup>19</sup> Cambodia<sup>20</sup> and Lebanon.<sup>21</sup>

The entry into force of the Rome Statute in 1998, establishing the International Criminal Court, marked a new direction in the adjudication of international crimes.<sup>22</sup> Unlike the tribunals previously mentioned, the ICC is a permanent court that will address crimes committed within its jurisdiction since July 1, 2002 and into the future.<sup>23</sup> The ICC, unlike other international tribunals, operates independently from the United Nations and is not subject to the authority of any single state.<sup>24</sup> It is also important to remember that the ICC is a court of last resort. A case is only admissible at the ICC if the case is being investigated by a state that has jurisdiction over the crime, “unless the [s]tate is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>25</sup> This principle is called “complementarity,” and is one of the cornerstones of the

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14. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

15. Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

16. E.g., David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 38 (2006) (describing “hybrid” courts as those established within a country, yet “composed of international judges and prosecutors working together with their domestic counterparts.”).

17. U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf>.

18. U.N. Mission in Kosovo, On Assignment of International Judges/Prosecutors and/or Change of Venue, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000).

19. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 57th Sess., Annex, U.N. Doc. S/2002/246 (Jan. 16, 2002).

20. *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, ECCC, [http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf) (June 6, 2003).

21. *Statute of the Special Tribunal for Lebanon*, STL, <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf> (May 30, 2007).

22. Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/ROM/22 (July 17, 1998), available at <http://www.un.org/icc/pressrel/lrom22.htm> [hereinafter Conference Decision].

23. See Rome Statute, *supra* note 1, art. 11, 126.

24. See ICTY Statute, *supra* note 14; see also ICTR Statute, *supra* note 15; see also Tolbert & Solomon, *supra* note 16.

25. Rome Statute, *supra* note 1, art. 17, pmbl. (emphasizing that the ICC “shall be complementary to national criminal jurisdictions”).

Rome Statute.<sup>26</sup> This concept means that the ICC is complementary to national jurisdictions and does not replace them.

During the Rome Conference, which took place from June 15-July 17, 1998, more than 160 countries participated in the drafting of the Rome Statute.<sup>27</sup> By the end of the year 2010, only eight years after the Rome Statute's entry into force, 114 countries have become States Parties.<sup>28</sup> All of the continents of the world are represented;<sup>29</sup> however, some powerful countries are not parties, including the United States, China, and Russia.<sup>30</sup>

There are currently five situations (geographic areas) under investigation.<sup>31</sup> Under the Rome Statute, a situation arises when it is referred to the Court by either a State Party or the Security Council, or when the Prosecutor receives authorization from the Pre-Trial Chamber to investigate on his own initiative (*proprio motu*).<sup>32</sup> So far, the Prosecutor has initiated only one investigation *proprio motu*:<sup>33</sup> on March 31, 2010, Pre-Trial Chamber II, by majority, granted the Prosecutor's request to commence an investigation on crimes against humanity allegedly committed in the Republic of Kenya.<sup>34</sup>

As recently as June 17, 2010, two more individuals voluntarily responded to a summons of the Pre-Trial Chamber to appear before the Court, pursuant to Article 58 of the Statute.<sup>35</sup> In addition, three trials against four defendants have already begun.<sup>36</sup> The most advanced trial is the *Prosecutor v. Thomas Lubanga Dyilo*, a case arising out of the Democratic Republic of Congo.<sup>37</sup> In the next

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26. *Id.* pmbl.

27. Conference Decision, *supra* note 22.

28. *Ratification of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=romeratification> (last visited Nov. 24, 2010).

29. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Nov. 24, 2010).

30. *Id.*

31. The situations are Uganda, the Democratic Republic of Congo, Darfur, Sudan, the Central African Republic, and the Republic of Kenya. *See Situations*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> (last visited Nov. 24, 2010).

32. Rome Statute, *supra* note 1, art. 13, 15.

33. *See Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 211 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

34. *Id.*

35. Press Release, International Criminal Court, As Darfur Rebel Commanders Surrender to the Court, ICC Prosecutor "welcomes compliance with the Court's decisions and with Resolution 1593 (2005) of the Security Council, ICC Press Release ICC-OTP-20100616-PR548 (June 16, 2010), available at <http://www.icc-cpi.int/NR/exeres/8880041B-E951-4860-B058-CE5BE7F9CC23.htm>.

36. *See ICC Cases*, *supra* note 9 (showing that trials have commenced for Thomas Lubanga Dyilo, Germain Katanga, and Mathieu Ngudjolo Chui); *Trial Begins for Former Vice-President of the Democratic Republic of Congo*, FOREIGN & COMMONWEALTH OFFICE, <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=154524682> (last visited Nov. 22, 2010).

37. *See ICC Cases*, *supra* note 9 (noting that Thomas Lubanga's trial, the first before the ICC, commenced on January 26, 2009).

section, I will discuss some specific procedural issues which have arisen in this particular case.

Having completed this brief introduction into the current proceedings before the Court, and before starting with the main portion of my lecture, I would like to provide a few statistics to consider.

Between 2007 and 2009, the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy undertook a historical survey of world conflicts which occurred between 1945 and 2008. The experts, who reviewed data compiled from multiple sources, concluded that:

- Between 1945 and 2008, approximately 313 conflicts took place throughout the world.<sup>38</sup>
- These conflicts resulted in an estimated 92 to 101 million deaths, twice the number of deaths from both World Wars combined.<sup>39</sup>
- Less than 1% of the perpetrators of international crimes have been brought to justice,<sup>40</sup> and amnesty laws in 125 of 313 conflicts identified by the study were enacted to shield the perpetrators from justice.<sup>41</sup>
- Some form of victim reparation was only undertaken in 16 of the 313 conflicts, involving less than 1% of the victims.<sup>42</sup>

With this background in mind, I will begin with the main portion of my presentation, which is a discussion of some of the main challenges of the International Criminal Court. I will start with the diversity of legal traditions that, to some extent, complicate the application of the ICC's legal instruments, but are inherent in the creation of a truly international court.

The Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence provide the Court's legal framework,<sup>43</sup> and are a testament to diversity and compromise. This is not necessarily a new concept in terms of international tribunals. The Nuremberg Tribunal, the *ad hoc* tribunals, and the hybrid international courts all incorporate elements of many different countries' legal

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38. M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 6 (M. Cherif Bassiouni ed., 2010) [hereinafter Bassiouni].

39. *Id.* at 6, 11.

40. Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945-2008*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 80 tbl.2 (M. Cherif Bassiouni ed., 2010) (showing that of 331 conflicts, there were international prosecutions in a total of 19 conflicts, and mixed model prosecutions in 13 conflicts).

41. *Id.* at 82 tbl.6.

42. *Id.*

43. Rome Statute, *supra* note 21, art. 21(1)(a).

systems in their practice and procedure.<sup>44</sup> As was explained by the first President of the International Criminal Court on the sixtieth anniversary of the judgment of the International Military Tribunal at Nuremberg:

[Compromise] is an inevitable part of establishing an international tribunal that can be agreed to by several states. In evaluating a court like the ICC or the Nuremberg tribunal, we cannot expect it to exactly mirror our national experience. What we should expect is that it guarantees due process and a fair trial, which can be and is done in different ways in different countries.<sup>45</sup>

In this context, President Kirsch recalled a statement made by Justice Robert Jackson, a United States Supreme Court Justice and the Chief Prosecutor at the Nuremberg Trials. Justice Jackson surmised that, “[m]embers of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right.”<sup>46</sup> Justice Jackson’s statement indeed provides insight into the atmosphere surrounding the development of the Nuremberg Tribunal’s procedure. The Nuremberg Trials were conducted by the Allies—U.S., Russia, UK and France—with four legal systems contributing to the procedure of the Tribunal.<sup>47</sup> In contrast, the Rome Statute was negotiated by 160 countries<sup>48</sup> and is interpreted by eighteen judges from numerous legal systems.<sup>49</sup>

Although the Rome Statute was negotiated by 160 countries, it may be said that the greatest influence in the drafting of the Statute came from either the “common law” or “civil law” (Romano-Germanic) systems, in part, because these legal traditions are the basis for many of domestic legal systems around the world.<sup>50</sup> In fact, many provisions in the Rome Statute mirror fundamental aspects of the law of the United States, as well as other legal systems. These include the presumption of innocence;<sup>51</sup> the right to an expeditious trial;<sup>52</sup> the right to remain

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44. See Phillippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOB. STUD. L. REV. 501, 501, 505 (2007) (noting that the Nuremberg Tribunal and ICC incorporated legal procedures from different countries and that the “new system of international criminal justice . . . [including] national courts, ad hoc international and mixed tribunals, and now the International Criminal Court . . . are rooted in Nuremberg.”).

45. *Id.* at 505.

46. ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON 1945 preface (1949), available at [http://avalon.law.yale.edu/imt/jack\\_preface.asp](http://avalon.law.yale.edu/imt/jack_preface.asp).

47. *Id.*

48. Kirsch, *supra* note 44, at 504.

49. Rome Statute, *supra* note 1, art. 36(8)(a)(i)-(ii).

50. E.g., *The World Factbook: Legal System*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Nov. 24, 2010).

51. Rome Statute, *supra* note 1, art. 66(1).

silent;<sup>53</sup> and, the right “[t]o examine, or have examined,” witnesses against the accused.<sup>54</sup>

In addition, aspects of the Court’s legal framework combine elements from different domestic legal systems. For example, while the ICC Prosecutor is responsible for investigations under Article 53 of the Rome Statute,<sup>55</sup> he also has a duty to “investigate *incriminating and exonerating circumstances equally*” under Article 54(1)(a) of the Rome Statute.<sup>56</sup> In addition, while the parties are permitted to present their evidence at trial, Article 69(3) of the Rome Statute also grants the Trial Chamber the authority “to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>57</sup> Thus, at the ICC, unlike some legal systems, the parties do not completely control the presentation of the evidence; the Trial Chamber has the power to itself call evidence, in addition to that which is presented during the trial by the parties, for example on particular conduct, if the Chamber considers the evidence necessary for the determination of the truth.<sup>58</sup>

At the ICC, the defendants are tried by professional judges, as opposed to a jury.<sup>59</sup> In my view, one practical benefit of using professional judges instead of a jury is that many of the rules relating to the admissibility of evidence, such as hearsay, which may be intended to shield a lay-person juror from bias, may not be necessary when the finder of fact is a professional judge who is presumed to have the sophistication, impartiality, and capacity to determine the weight and probative value of evidence.<sup>60</sup> In practice, the Pre-Trial or Trial Chambers may accord a lower probative value to hearsay testimony or evidence, but it may still be admissible.<sup>61</sup> The Chamber’s ruling on the admissibility of evidence will take into account, “*inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.”<sup>62</sup> As a result, evidence generally may be admissible as long as the

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52. *Id.* art. 67(1)(c).

53. *Id.* art. 67(1)(g).

54. *Id.* art. 67(1)(e).

55. *Id.* art. 53.

56. *Id.* art. 54(1)(a) (emphasis added).

57. *Id.* art. 69(3).

58. *Id.* art. 64(6)(d), 69(3); See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-2288, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial,” (July 16, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc909021.pdf> (holding that “in principle, evidence pertaining to the role of the accused may fall within the scope of evidence that the Trial Chamber considers necessary for the determination of the truth” within the meaning of articles 64(6)(d) and 69(3) of the Rome Statute).

59. Rome Statute, *supra* note 1, art. 36(3).

60. *Id.* art. 36(3)(a).

61. See, e.g., Lubanga Confirmation Decision, *supra* note 11, ¶¶ 101-03; Katanga Confirmation Decision, *supra* note 11, ¶¶ 117-20.

62. Rome Statute, *supra* note 1, art. 69(4).



Trial Chamber determines that it is relevant,<sup>63</sup> with certain exceptions. For example, if the evidence is obtained by means that violate the Rome Statute or internationally recognized human rights, the evidence is inadmissible, if “[t]he violation casts substantial doubt on the reliability of the evidence” or “[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”<sup>64</sup>

Another important element of the Court’s procedure is that the Rome Statute and Rules of Procedure and Evidence allow the alleged victims of crimes to participate in the proceedings, to be represented by counsel, and to request monetary, or other forms of reparation, if it is established that they were harmed by a crime allegedly committed by the accused.<sup>65</sup> Some practitioners may consider this to be an innovative approach to criminal proceedings; however, in many countries that have a civil law origin, including Germany, France, and Spain, the participation of victims, beyond the role of a witness, is well established. In these systems, victim participation is permitted not only to preserve the victims’ rights and allow them to have an active role in attaining justice, but also to serve as a check on the prosecutor’s actions, ensuring that he or she has adequately addressed the harm suffered.<sup>66</sup>

Finally, the ICC also allows the parties to appeal acquittals in addition to convictions.<sup>67</sup> Appealing an acquittal is allowed in some national systems, but not in others, including the United States.<sup>68</sup> In addition to appeals on a judgment, the

63. *Id.* art. 69(3)-(4).

64. *Id.* art. 69(7).

65. *See id.* art. 68(3), 75; Rules, *supra* note 2, § 89(2).

66. ICC Trial Chamber I did a comparative analysis of the extent to which different legal systems incorporate victim participation, noting that:

In Spain the victim may appear as a civil claimant or as a private prosecutor in criminal proceedings (article 108, 101 and 270 Code of Criminal Procedure—*Ley de Enjuiciamiento Criminal*); the German legal system allows the victim to participate as an auxiliary prosecutor or *Nebenklager* and also as a civil claimant in some cases (s. 395, 396 and 403-406b StPO) and the French criminal system allows the victim to participate as a civil claimant or *partie civile* (article 4 Code of Criminal Procedure—*Code de Procédure Penale*). Within the Latin-American jurisdictions several criminal justice systems allow the victim to participate, usually as a private prosecutor and/or as a civil claimant: Argentina (articles 82-96 Code of Criminal Procedure—*Código Procesal Penal*); Bolivia (articles 11, 36 and 37 Code of Criminal Procedure - *Código de Procedimiento Penal*); Peru (articles 54 and 302 Code of Criminal Procedure); Chile (article 12 Code of Criminal Procedure - *Código Procesal Penal*) and also in articles 78-99 of the Model Code of Criminal Procedure for Iberoamerica—*Código Procesal Penal Modela para Iberoamérica*. In Ireland victims may act as private prosecutors of summary offences, commonly known as ‘common informers’ (*State (Cronin) v Circuit Judge of the Western Circuit [1937] IR 34,49*); and in Canada a victim may participate in some stages of the proceedings, for example providing victim impact statements (section 722 Canadian Criminal Code).

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation, ¶ 26 n. 13 (Jan. 18, 2008) (Blattmann, J., dissenting), <http://www.icc-cpi.int/iccdocs/doc/doc409168.pdf>.

67. Rome Statute, *supra* note 1, art. 81(3)(c)(i).

68. Vikramaditya S. Khanna, *Double Jeopardy’s Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 350-53 (2002) (stating that the United States does not allow acquittals to be appealed and England’s “treatment of government appeals of acquittals is generally quite similar to the United

ICC also has a regular regime for interlocutory appeals, which are appeals against interim decisions of the Pre-Trial and Trial Chambers before the final judgment.<sup>69</sup> In reviewing the jurisprudence of the Appeals Chamber, it may appear that interlocutory appeals occur more often at the ICC than in a domestic trial. One reason for this is that, as a new judicial institution, there are many aspects of the interpretation and application of the Court's core legal instruments which are "issues of first impression" and still need to be definitively answered.<sup>70</sup> Thus, one purpose of interlocutory appeals is to ensure that the proceedings continue smoothly and follow the right course.<sup>71</sup>

I have just outlined some of the aspects of the ICC's legal framework that are the result of compromise and of combining elements from different legal traditions. In the next section, I will discuss in detail one particular example of the Court's procedure that is not as familiar to practitioners in the civil law systems. This is *inter partes* (between parties) disclosure of material evidence.<sup>72</sup>

At the ICC, the first general rule of disclosure is that the Prosecutor shall disclose to the accused, as soon as practicable, all evidence which is potentially exculpatory or would tend to mitigate the guilt of the accused.<sup>73</sup> Secondly, the Prosecutor shall disclose, under Rule 76 of the Rules of Procedure and Evidence, the names and statements of witnesses to the defense.<sup>74</sup> Under Rule 77, the Prosecutor shall permit the defense to inspect any evidence that is "material to the preparation of the defen[s]e or [is] intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial . . . or [was] obtained from or belonged to the [accused]."<sup>75</sup>

As a minor digression, there is currently a split between the Pre-Trial Chambers on whether disclosure of exculpatory evidence occurs *only* between the parties, or whether Articles 67(1) and 69(3) of the Rome Statute also give the

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States.").

69. See Rome Statute, *supra* note 1, art. 82.

70. *Courting History: The Landmark International Criminal Court's First Years*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/node/62135/section/5> (last visited Nov. 24, 2010) (from the drop-down menu, select "Chambers").

71. See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶¶ 14-16 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183558.PDF>.

72. *Inter partes* disclosure is less familiar to practitioners in civil law systems because after an investigating judge or prosecutor has collected the evidence and prepared the dossier (case file), the defense is usually given access to the entire dossier prior to trial. Since the Court provides the entire dossier to the accused, a system of disclosure between the parties is not necessary. See VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND EVIDENCE 95-96 (2008); and Vladimir Tochilovsky, *Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience*, 10 Eur. J. Crime Crim. L. & Crim. Just. 268, 272 (2002).

73. Rome Statute, *supra* note 1, art. 67(2).

74. Rules, *supra* note 2, § 76.

75. *Id.* § 77.

Pre-Trial Chamber the authority to request that all exculpatory evidence also be disclosed *to the Chamber* during the pre-trial proceedings.<sup>76</sup> In essence, one Pre-Trial Chamber has interpreted the rules to leave the presentation and disclosure of evidence primarily to the parties; however, another Pre-Trial Chamber has asserted more judicial control over the disclosure and presentation of evidence.<sup>77</sup> A recent dissenting opinion from a disclosure decision in Pre-Trial Chamber I explained the divergence as follows:

[T]he provisions relevant to the disclosure process at the pre-trial stage in preparation of the confirmation hearing have been construed in different manners by different Pre-Trial Chambers of the Court. This difference in approach stems not only from a different reading of the relevant provisions but also, more broadly, from different conceptions of the role of the Pre-Trial Chamber . . . within the context of both the disclosure process and the pre-trial procedure as a whole.<sup>78</sup>

The two most important exceptions to the general policy of *inter partes* disclosure at the ICC are contained in Rules 81 and 82.<sup>79</sup> Rule 81 governs “Restrictions on Disclosure” and protects three areas of evidence from disclosure obligations: internal work product of the parties;<sup>80</sup> evidence that may prejudice further or ongoing investigations;<sup>81</sup> and information about witnesses and victims when their safety needs protection.<sup>82</sup> Another important exception, considering the court’s unique role as an international tribunal, is allowing for restrictions on the disclosure of evidence obtained by the Prosecution during the course of the

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76. Compare Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-35, Second Decision on Issues Relating to Disclosure, ¶ 9 (July 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc711237.pdf> [hereinafter Abu Garda Disclosure Decision], (noting that parties are not required to communicate to the Chamber materials on which they do not intend to rely, including potentially exculpatory materials), and Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09-49, Decision on Issues Relating to Disclosure, ¶ 5 (June 29, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc902565.pdf> (confirming that materials subject to disclosure, on which the parties do not intend to rely, including those of a potentially exculpatory nature, need not be communicated to the Chamber), with Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, ¶¶ 16-19 (July 31, 2008) (explaining that under articles 61(7) and 69(3) of the Rome Statute, the Chamber “cannot fulfill [its] function at the pre-trial stage without having access to the evidence exchanged between the Prosecutor and the defen[s]e, in particular to exculpatory evidence”).

77. See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, ¶¶ 8-19 (July 31, 2008) (explaining that under articles 61(7) and 69(3) of the Rome Statute, the Chamber has authority to request submission of further evidence, including that of an exculpatory nature).

78. Abu Garda Disclosure Decision, *supra* note 76, ¶ 1 (Tarfusser, J., dissenting).

79. Rules, *supra* note 2, §§ 81-82.

80. *Id.* § 81(1).

81. *Id.* § 81(2).

82. *Id.* § 81(3)-(6); Rome Statute, *supra* note 1, art. 68(5).

investigation. Article 54(3)(e) of the Rome Statute provides that evidence the Prosecution obtained on the condition of confidentiality and solely for the purpose of generating new evidence may be withheld from the defense, unless the provider of the information consents.<sup>83</sup>

In 2008, an issue concerning this particular exception to disclosure arose during the *Lubanga* trial when “the Prosecutor was unable to disclose to the defen[s]e more than 200 documents that contain[ed] potentially exculpatory information or information that [was] potentially material to the preparation of the defen[s]e. . . .”<sup>84</sup> This exception applied because “the Prosecutor had obtained the documents on condition of confidentiality and the information providers had not subsequently given the consent to their disclosure to the defen[s]e and, in most cases, to the Trial Chamber.”<sup>85</sup>

According to the Trial Chamber, the Prosecutor incorrectly applied Article 54(3)(e) of the Rome Statute.<sup>86</sup> The Chamber concluded that the Prosecutor had given the provision “a broad and incorrect interpretation” because he had used the provision “routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances appl[ied],” such as solely to generate new evidence.<sup>87</sup> The Trial Chamber determined that under such circumstances it could not guarantee the accused’s right to a fair trial and issued a stay of the proceedings.<sup>88</sup> The main issue for the Trial Chamber was that it was unable to review the potentially exculpatory evidence *in camera* in order to determine whether or not the accused needed to have it to ensure a fair trial.<sup>89</sup>

The Appeals Chamber upheld the Trial Chamber’s decision and reasoned that the stay was an appropriate remedy since the Trial Chamber could not guarantee the minimum requirements of a fair trial because exculpatory information had been withheld from the defense.<sup>90</sup> The Appeals Chamber also held that the Prosecutor must only undertake confidentiality agreements having born in mind the rights of the accused to disclosure of potentially exculpatory material.<sup>91</sup> The Appeals Chamber confirmed that “the final assessment as to whether material in the possession or control of the Prosecutor has to be

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83. Rome Statute, *supra* note 1, art. 54(3)(e).

84. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I, ¶ 21 (Oct. 21, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf> (summarizing Trial Chamber decision on appeal) [hereinafter Appeals Chamber 54(3)(e) Stay Decision].

85. *Id.*

86. *Id.* ¶ 22.

87. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e), ¶ 72, (June 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc535163.pdf>.

88. *Id.* ¶¶ 92-94.

89. *See id.* ¶ 88.

90. Appeals Chamber 54(3)(e) Stay Decision, *supra* note 84, ¶¶ 76, 97.

91. *See id.* ¶ 44.

disclosed,” pursuant to Article 67(2) of the Rome Statute, is made by the Trial Chamber and therefore the Chamber *must* receive the material.<sup>92</sup>

Following the Appeals Chamber’s judgment, on October 14, 2008, the Prosecution submitted an application to the Trial Chamber to review all of the undisclosed evidence obtained from the information providers.<sup>93</sup> On November 18, 2008, the Trial Chamber announced that it was lifting the stay on the proceedings because the reasons for imposing the stay had “fallen away.”<sup>94</sup>

This is one example of the challenges faced by an international court operating in a global context. The ICC is an institution which has an organic capacity to combine legal traditions in order to apply the best mechanism for ensuring the accused’s right to a fair trial. In doing so, the ICC must operate in an international environment where political bodies, States, non-governmental organizations, and victims all simultaneously contribute to and complicate the proceedings.

This leads me to the next section of my lecture, which is one of the great innovations of the Rome Statute and the Rules of Procedure and Evidence: the rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility, under the Rome Statute, to present their views and concerns before the Court and to play a participatory role in the Court’s proceedings.<sup>95</sup>

Article 68(3) of the Rome Statute provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>96</sup>

Commentators have long discussed how providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions.<sup>97</sup> Generally, provisions for such remedies were “seen as a way to settle

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92. See *id.* ¶ 46.

93. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1478, Prosecution’s Application for Trial Chamber Review of All the Undisclosed Evidence Obtained from Information Providers, (Oct. 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc575370.pdf>.

94. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-98-ENG, Status Conference, 3-4 (Nov. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc586028.pdf>.

95. See Rome Statute, *supra* note 1, art. 68(3).

96. *Id.*

97. See M. Cherif Bassiouni, *Victim’s Rights*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 579 n.13 (2010) (explaining how different ancient civilizations provided remedies to victims of crimes).

disputes between the offender and the victim, thus preventing individualized vindication and further disturbances of the peace.”<sup>98</sup>

In this sense, the goal of bringing closure to victims and providing them with some form of redress may be considered a goal of international criminal *justice* that has been overlooked. However, the Rome Statute provides one of the most advanced schemes for victims’ rights in international criminal justice, by way of victims’ participation in proceedings and the forms of redress available to victims.<sup>99</sup>

Rule 85 defines “victims” either as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” or as “organizations or institutions that have sustained direct harm to any of their property” whose purpose is in compliance with section (b) of the rule.<sup>100</sup> I would like to point out that although the use of the word “victim” would seem to indicate that the person has in fact suffered harm within the jurisdiction of the court, determining whether a person can be characterized as a “victim” is something that is decided during the course of the proceedings.<sup>101</sup> Thus, “victim” is better understood as a designation for those persons who are claiming to have been harmed and who have been granted the right to participate in the proceedings.

The starting point is for the person claiming to be a victim to submit a written application to the Court’s Registrar, who will then redirect the application to the appropriate Chamber.<sup>102</sup> In the application, the person must describe the harms he or she has suffered and who he or she believes to be the perpetrator(s).<sup>103</sup> Rule 89(1) provides the parties with an opportunity to provide observations on the applications before the applications are accepted or denied.<sup>104</sup> The Chamber will then make its decision based on the information provided, and may reject the application if it determines that the person does not meet the criteria of a victim as defined by Rule 85.<sup>105</sup>

In practice, the application process is time-consuming work for the Court. To date, the Court has received hundreds of applications from victims who are often in remote villages, such as the eastern DRC and Northern Uganda.<sup>106</sup> These

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98. *Id.*

99. *See* Rome Statute, *supra* note 1, art. 75.

100. Rules, *supra* note 2, § 85(a)-(b).

101. *See id.* § 89.

102. *Id.* § 89(1).

103. Regulations of the Court, ICC-BD/01-01-4, § 86(2)(c) (May 26, 2004), [http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations\\_of\\_the\\_Court\\_170604EN.pdf](http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf).

104. *See* Rules, *supra* note 2, § 89(1).

105. *See id.* § 89(2).

106. *See, e.g.,* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-1017, Decision on 772 Applications by Victims to Participate in the Proceedings, 27 (Nov. 18, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc969148.pdf> (granting 624 victims the right to participate in the case); Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-1356, Decision on Victims’ Applications for Participation, (Nov. 21,

remote areas may also be entrenched in conflict, making it difficult, if not impossible, for applicants to travel to nearby cities to obtain proper identification cards or other documentation to append to their applications.<sup>107</sup> To ease this burden, Pre-Trial Chamber I announced, for example, that it would accept multiple forms of identification including passports, voting cards, student cards, or an affidavit from a witness.<sup>108</sup>

Once an application has been accepted, victims can “present their views and concerns” to the Court, at a time deemed appropriate by the Chamber, if they demonstrate to the Chamber that their “personal interests” are affected.<sup>109</sup> Victims also have the right to a legal representative,<sup>110</sup> and once their status as victims has been confirmed, they have the right to ask the Court to take all possible measures to respect their safety and well-being in the course of the proceedings.<sup>111</sup>

In practice, participation has meant that victims may, through their legal representatives: be permitted to attend and participate in hearings before the Court; make opening and closing statements; give observations to the judges while the Court is still deciding whether or not to proceed with an investigation or case; if the judges permit it, ask questions to a witness or an expert who is giving evidence before the Court, or the accused; and, if the judges permit it, allow the victim to testify or present evidence.<sup>112</sup> However, the extent to which a victim may be involved in a particular criminal trial is still developing in the Court’s jurisprudence.

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2008), <http://www.icc-cpi.int/iccdocs/doc/doc595959.pdf> (granting 27 victims the right to participate in the case); Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 33 (Sept. 23, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc834746.pdf> (granting 287 victims the right to participate in the case).

107. See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-374, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, ¶¶ 13-14 (Aug. 17, 2007), [http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-374\\_English.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-374_English.pdf).

108. *Id.* ¶ 15 (indicating the different documents that are allowed to be submitted during the investigation stage of a situation).

109. Rome Statute, *supra* note 1, art. 68(3).

110. Rules, *supra* note 2, § 90.

111. *Id.* § 87(1).

112. See Rules, *supra* note 2, § 91; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defen[s]e Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF> [hereinafter Appeals Judgment on Victim Participation]; Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-2288, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial” (July 16, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc909021.pdf> [hereinafter Appeals Judgment on Modalities of Victim Participation].

To date, the Appeals Chamber has issued five judgments on interlocutory appeals related to victim participation in the proceedings.<sup>113</sup> For example, the Appeals Chamber has held that victims may, with authorization from the Chamber, submit incriminating evidence and testify before the Court on their own behalf.<sup>114</sup> The Appeals Chamber has also allowed victims to present their views and concerns in several other interlocutory appeals that were unrelated to victim participation.<sup>115</sup>

As discussed above, many legal challenges arise in the context of victim participation. For example, the Appeals Chamber recently considered two issues concerning the submission of evidence by the victims: *when* evidence presented during the trial by the victims must be disclosed to the defendant, and *whether* the victims have an obligation to disclose exculpatory evidence in their possession to the defendant.<sup>116</sup> In answering these questions, the Appeals Chamber confirmed the decision of the Trial Chamber that victims participating in the proceedings do not have an obligation to disclose evidence to the defendant prior to the start of trial and do not have a general obligation to disclose exculpatory evidence.<sup>117</sup>

The Appeals Chamber's judgment on these issues highlights the delicate balance between allowing victims the opportunity to meaningfully participate in the trial and limiting their involvement so that they do not become a *de facto* third-party. The judgment buttresses the Appeals Chamber's previous ruling that victims do not have the right to submit evidence during the trial, but may request the Trial Chamber to exercise its authority to call for evidence that is "necessary for the determination of the truth."<sup>118</sup> The Appeals Chamber reasoned that because the Trial Chamber can request the submission of all evidence it considers necessary for the determination of the truth, the victims may also request that the

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113. See Appeals Judgment on Victim Participation, *supra* note 112; see also Appeals Judgment on Modalities of Victim Participation, *supra* note 112; Prosecutor v. Joseph Kony, Case No. ICC-02/04-179, Judgment on the Appeals, (Feb. 23, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc635580.pdf>; Situation in Darfur, Case No. ICC-02/05-177, Judgment on Victim Participation (Feb. 2, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc625413.pdf>; Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-556, Judgment on Victim Participation (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

114. Appeals Judgment on Victim Participation, *supra* note 112, ¶¶ 97-98.

115. See, e.g., Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09-70, Decision on the Second Application by Victims (Jan. 28, 2010), <http://www.iclklamberg.com/Caselaw/Sudan/Bashir/AC/70.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1453, Decision on the Participation of Victims in the Appeal (Aug. 6, 2008), <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/1453.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1452, Decision on the Participation of Victims in the Appeal (Aug. 6, 2008), <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/1452.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-824, Judgment on the Appeal (Feb. 13, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc248155.PDF>.

116. Appeals Judgment on Modalities of Victim Participation, *supra* note 112, ¶¶ 16, 57.

117. *Id.* ¶¶ 37, 71.

118. *Id.* ¶ 111; Rome Statute, *supra* note 1, art. 69(3); Appeals Judgment on Victim Participation, *supra* note 112, ¶ 95.



Chamber do so on their behalf; however, the Trial Chamber has the discretion to decide whether to grant the victims' request.<sup>119</sup> In exercising its discretion, the Chamber must balance the victims' role in the proceedings with the rights of the accused, and in particular, the right as guaranteed under Article 67(1) of the Rome Statute, to confront the evidence and to have adequate time to prepare a defense.<sup>120</sup>

On the issue of potentially exculpatory evidence, the Appeals Chamber also struck a balance between the victims' role in the proceedings and the rights of the accused. The Appeals Chamber held that while the Trial Chamber was correct in *not* imposing a *general obligation* on the victims to disclose any exculpatory evidence in their possession, there may be specific instances in which the Trial Chamber may still order the victims to disclose such information,<sup>121</sup> for example, if a party had reason to believe that a victim participating in the proceedings had such information in his or her possession and the Trial Chamber determined that the information was necessary for the determination of the truth.<sup>122</sup>

As the final part of my lecture, I would like to highlight a recent development which constitutes, in essence, the final building block in the legal framework of the Rome Statute. This was the adoption on June 12, 2010 of a definition for the crime of aggression.<sup>123</sup>

As background, the Nuremberg Tribunal described "aggressive wars" as "[a] supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>124</sup> Sixty years later, history was made in Kampala, Uganda, where the first ever Review Conference of the International Criminal Court took place.<sup>125</sup> On June 12, 2010, the Review Conference agreed by consensus on a definition for the crime of aggression and the mechanisms for the ICC to exercise jurisdiction over persons who commit the crime.<sup>126</sup>

When the Review Conference ended on June 11, 2010, it was estimated that approximately 4,600 representatives of states, international organizations and non-governmental organizations had attended.<sup>127</sup> Many non-States Parties also attended the conference,<sup>128</sup> including Russia, India, and the United States, which

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119. Appeals Judgment on Modalities of Victim Participation, *supra* note 112, ¶ 112.

120. *Id.* ¶ 114.

121. *Id.* ¶ 71.

122. *Id.*

123. Press Release, International Criminal Court, Review Conference of the Rome Statute Concludes in Kampala, ICC Press Release ICC-ASP-20100612-PR546 (June 12, 2010), available at <http://www.icc-cpi.int/NR/exeres/CF95BB41-B15A-45DA-B8CF-33E873E73829.htm> [hereinafter Kampala Conference].

124. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 186 (1947).

125. Kampala Conference, *supra* note 123.

126. *Id.*

127. *Id.*

128. *Id.*

sent a large delegation headed by the US Ambassador-at-Large for War Crimes, Stephen J. Rapp.<sup>129</sup> Although all of the participants were involved in providing their views on the proposed amendments, only the States Parties could decide on the proposals.<sup>130</sup>

A definition for the crime of aggression has been long awaited. During the 1998 Rome Conference, which led to the adoption of the Rome Statute, the participating states agreed that the ICC should have jurisdiction over the crime, but could not agree on a definition.<sup>131</sup> The adopted amendment defines an act of aggression as “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”<sup>132</sup> which by “its character, gravity and scale, constitute[s] a manifest violation of the Charter of the United Nations.”<sup>133</sup> Essentially, the amendment gives the Court the power to criminally charge a person responsible for planning, preparing, initiating or executing illegal wars.<sup>134</sup>

The adoption of an amendment for the crime of aggression was another example of negotiation, compromise and consensus. The major dividing line between the States Parties was the conditions under which the ICC would exercise its jurisdiction over the crime.<sup>135</sup> Under the amendment, the Security Council may refer the situation to the ICC, pursuant to Article 13(b) of the Rome Statute, with reference to Annex I, article 15 *ter* of the amendment.<sup>136</sup> This means that when the Security Council exercises its authority to determine whether particular conduct constitutes “aggression” in violation of the UN Charter and in contravention of international law, it may then decide to trigger the exercise of the ICC’s jurisdiction in relation to this conduct.<sup>137</sup>

There are two additional ways in which the Court may exercise jurisdiction over the crime of aggression.<sup>138</sup> The first is if the Prosecutor initiates an investigation *proprio motu*. However, in order for the Prosecutor to do so, the Prosecutor must first notify the Security Council, which will decide whether the conduct was an act of aggression.<sup>139</sup> If, after the notification, the Security Council

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129. *Delegations to the Review Conference of the Rome Statute of the International Criminal Court*, INTERNATIONAL CRIMINAL COURT, [http://www2.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf) (last visited Dec. 18, 2010).

130. Kampala Conference, *supra* note 123.

131. Rome Statute, *supra* note 1, art. 5(2).

132. Aggression, *supra* note 3, Annex II, art. 8 *bis* (Elements) (3).

133. *Id.* Annex II, art. 8 *bis* (Elements) (5).

134. *Id.* Annex II, art. 8 *bis* (Elements) (1).

135. *After Years of Debate, ICC Member States Agree on Definition of Aggression*, UN, <http://www.un.org/apps/news/story.asp?NewsID=35018&Cr=international+criminal+court&Cr1> (June 14, 2010).

136. Aggression, *supra* note 3, Annex I, art. 15 *ter*.

137. *Id.*

138. *Id.* Annex I, art. 15 *bis* (1).

139. *Id.* Annex I, art. 15 *bis* (6)-(7).

fails to act within six months, the Court may still exercise jurisdiction, but only once the Prosecutor's application to commence an investigation *proprio motu* has been authorized by the Pre-Trial Chamber.<sup>140</sup> Finally, the Court may also exercise jurisdiction through a referral by a State Party.<sup>141</sup>

While the adoption of a definition and the requirements for the crime of aggression were a compromise, nevertheless, the result of the Review Conference is a historic leap forward in the quest to end impunity for international crimes.

In this lecture, I have tried to highlight just a few of the challenges that the ICC, as an international tribunal, faces in its daily practice. While it may seem like a daunting task to build an international court from the ground up, it is also a tremendous opportunity to re-evaluate the inefficiencies and to hopefully simplify some of the complexities of the law. As a judge of the ICC, each day I am faced with new legal issues which allow me to view justice from a global perspective. Yet with all of the differences between existing legal systems, and a few of these were discussed in this lecture, shared themes among them remain: the search for truth and justice, the preservation of basic human rights, and the goal of ending impunity. It is for this reason that I continue to be hopeful that the realization of a nearly century-long goal of providing a mechanism for international criminal justice will be worthwhile.

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140. *Id.* Annex I, art. 15 *bis* (8).

141. *Id.* Annex I, art. 15 *bis* (1) (referring to the exercise of jurisdiction under article 13(a) of the Rome Statute).