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The International Criminal Court: Our Differences in Jurisprudence

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On July 1, 2002, the International Criminal Court (ICC) became operational following establishment by the Rome Statute.[1] The Court is made up of the Presidency, an Appeals Division, a Trial Division, Pre-Trial Division, the Office of the Prosecutor, and the Registry.[2] The purpose of the Court is to provide a means to bring to justice the perpetrators of "the most serious crimes of concern to the international community . . . ."[3] The crimes within the jurisdiction of the court are the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[4] To date, no crime of aggression has been charged.

One case is pending before the Pre-Trial Division[5] and six cases are being tried before a Trial Chamber,[6] leaving eleven cases where the defendants are at large and warrants have been issued for their arrests[7] and two cases where a Pre-Trial Chamber refused to confirm charges.[8] The jurisprudence of the ICC results from the decisions in these cases by the Pre-Trial, Trial, and Appeals Divisions interpreting the Statute of Rome, the Elements of Crimes, and the Court's Rules of Procedure and Evidence. Following that, the Court may look to applicable treaties and the principles and rules of international law. Lastly, the Court may under certain circumstances review the national law of states.[9]

PRE-TRIAL CHAMBER

The major role of the Pre-Trial Chamber once a defendant has been brought before it is to conduct a hearing to determine whether the prosecutor has brought forth "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[10] If the prosecutor has met that burden, the Pre-Trial Chamber sends the defendant to the Trial Chamber for trial.[11] This process is similar to any probable-cause hearing in the United States. However, the confirmation decisions issued by the Pre-Trial Chamber are substantially different than those in the U.S. The confirmation decisions are quite long, ranging, for example, from 157 pages in *Lubanga* to 226 pages in *Katanga and Ngudjolo*.[12] These decisions may contain a discussion of the factual background, preliminary evidentiary matters, material elements of the crimes, and modes of liability. Each discussion is footnoted at great length to the prosecution and defense briefs.[13]

The Pre-Trial Chamber in its confirmation decision in *Katanga and Ngudjolo* in effect usurps the authority of the Trial Chamber by setting forth the mode of criminal responsibility that the prosecutor is bound to follow. The Statute of Rome was carefully constructed to include virtually all methods of criminal responsibility, and it states:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of

Footnotes

1. ROME STATUTE OF THE I.C.C., 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90.
2. *Id.* at art. 34.
3. *Id.* at Preamble.
4. *Id.* at art. 5 (1).
5. The Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11.
6. The Prosecutor v. Bemba, ICC-01/05-01/08; The Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07; The Prosecutor v. Lubanga, ICC-01/04-01/06; The Prosecutor v. Banda & Jerbo, ICC-02/05-03/09; The Prosecutor v. Ruto and Sang, ICC-01/09-01/11; The Prosecutor v. Muthaura and Kenyatta, ICC-01/09-02/11.
7. The Prosecutor v. Bashir, ICC-02/05-01/09; The Prosecutor v. Harun & Kushay, ICC-02/05-01/07; The Prosecutor v. Ntaganda, ICC-01/04-02/06; The Prosecutor v. Kony, Otti, Odhiambo & Ongwen, ICC-02/04-01/05; The Prosecutor v. Hussein, ICC-02/05-01/12; The Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11.
8. The Prosecutor v. Garda, ICC-02/05-02/09; The Prosecutor v. Mbarushimana, ICC-01/04-01/10.
9. ROME STAT. art. 21 (1) (a)-(c).
10. *Id.* at art. 61 (7).
11. *Id.* at art. 61 (7) (a).
12. Decision on Confirmation of Charges, The Prosecutor v. Lubanga, ICC-01/04-01/06-803, Pre-Trial Chamber I (Jan. 29, 2007), *available at* http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf; Decision on Confirmation of Charges, The Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07-717, Pre-Trial Chamber I (Sept. 30 2008), *available at* http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf.
13. *See Id.*

the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[14]

A close review of this language indicates that criminal responsibility exists for one's own acts, acts done jointly with or through another person, complicity, aiding or abetting, or acting through a group of persons. Also, criminal responsibility exists based on actions or inactions as a commander.[15] Furthermore, no indication shows one mode is more or less serious than another because all modes are subject to the same level of punishment.[16] However, the Pre-Trial Chamber in *Katanga and Ngudjolo* must have believed that actions contained in subsections (b), (c), and (d) were less serious than those contained in subsection (a). In a tortured interpretation of this subsection, the Pre-Trial Chamber devised a scheme whereby an individual can be criminally liable for the acts of another's subordinates. This interpretation was clearly unnecessary because such acts are criminally liable under subsections (b), (c), or (d). The only reason for this interpretation is that conviction under subsection (b), (c), or (d) was believed to be less serious as an accessory rather than under subsection (a) as a principal.

The practical effect of this determination is that the Trial Chamber is now bound by the Pre-Trial Chamber's confirmation of charges, which includes this mode of liability. Furthermore, this mode of liability was not the method of proof that was desired by the prosecutor, which in effect also binds the prosecutor's hands.[17] In summary, the Pre-Trial Chamber exceeded its authority while limiting the options of both the prosecutor and the judges who would try the case. While a Trial Chamber has the authority to act as a Pre-Trial Chamber,[18] it has not done so. It appears the Trial Chamber has ceded its authority to the Pre-Trial Chamber to determine which mode of criminal responsibility is appropriate. It is interesting to note that in *Katanga and Ngudjolo* the court requested briefs from the parties regarding the mode of responsibility.[19] No decision was made on that issue, and the case proceeded to trial. Closing arguments have been completed and still this issue hangs over the case. Apparently the court will resolve this issue when it renders a verdict.

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TRIAL

Trials are held before three-judge panels at the ICC.[20] Because judges elected to the ICC bench are not required to have judicial experience,[21] two of the eight judges assigned to the Trial Division have no judicial experience and little if any trial experience.[22] The drafters of the Rome Statute desired that 2/3 of the judges have experience as a judge, prosecutor, or advocate. The remaining judges should have expertise in international law, which results in many of those judges being academics. Obviously, the skill sets necessary to be an academic and a judge are significantly different.

Trials at the ICC contain factors that simply to do not exist in most American courtrooms. Because the official languages of the court are both French and English, participants in the trial may speak one language but not the other. As a result, the court must have significant electronic facilities such that each counsel, judge, and other participant has available headphones to hear the statements of those at trial as those statements are translated by a group of interpreters. In *Katanga and Ngudjolo*, the Congolese witnesses also need interpreters. This obviously slows down the trial process.

Another interesting aspect of the ICC is the prominent role of victims. The court is required to take appropriate measures to assure the physical and mental well-being of victims.[23] The court may allow victims not only to be present at trial but also to participate as a party. Witnesses are entitled to be represented by counsel, who may question witnesses during trial and call their own witnesses.[24] This substantial difference between trials in American courts and the ICC carries the danger of a victim's counsel acting in effect as a second prosecutor. Their participation increases the length of the trial to the detriment of the defendant who is in custody.

14. Rome Stat. art. 25 (3).
15. *Id.* at art. 28.
16. *Id.* at art. 77.
17. *See Katanga*, *supra* note 12, at para. 469.
18. Rome Stat. art. 64 (6) (a).
19. *See* Prosecution's Pre-Trial Brief on the Interpretation of Art. 25 (3) (a), *Katanga*, ICC-01/04-01/07-1541 (Oct. 19, 2009), *available at* http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/1541?lan=fr-FR.
20. Rome Stat. art. 39 (2) (b) (ii) & art. 61 (11).
21. *Id.* at art. 36 (3) (b).
22. *See Structure of the Court: Trial Division,* International Criminal Court, http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB (last visited Feb. 27, 2012) (supplying biographical information of the trial division judges).
23. Rome Stat. art. 68 (1).
24. *Id.* at art. 68 (3).

The ICC's approach to the admission of hearsay . . . leaves the Rome Statute's guarantee of confrontation tenuous.

Like in the U.S., defendants are entitled to be represented by counsel. These attorneys are paid by the court.[25] The defense's costs, which include multiple attorneys, investigators, and support staff, are staggering. In *Katanga and Ngudjolo*, the 2008 budget for each defendant was 472,459 and 442,309 euros, respectively.[26] The conversion rate to U.S. dollars is approximately $614,196 and $575,001.

INDIVIDUAL RIGHTS

SPEEDY TRIAL

As a result of the confirmation practices of the Pre-Trial Chamber, the length of time existing between arrest and trial is certainly a concern. For example, Thomas Lubanga was taken into custody on March 17, 2006, charges were confirmed on January 29, 2007, and his trial began on January 26, 2009. He was found guilty on March 14, 2012, but has yet to be sentenced. Germain Katanga was placed in custody on October 17, 2007. Matthieu Ngudjolo was taken into custody February 6, 2008. The charges were confirmed on September 30, 2008, and trial began on November 24, 2009. Jean-Pierre Bemba was taken into custody on May 24, 2008, the confirmation of charges was issued on June 15, 2009, and trial commenced on November 22, 2010.[27] None of these trials have concluded. The ICC is required to bring defendants to trial without undue delay;[28] however, these time frames, ranging from 21 months to nearly 3 years, do not square with U.S. concepts of a speedy trial.

As discussed above, the participation of witnesses creates delay. How the court schedules its calendar also affects this delay. For example, the *Katanga and Ngudjolo* trial is held in either morning or afternoon sessions. The remaining time is left for other court business. Much of that business is another interesting facet of the ICC that adds to the delay in reaching a final determination. While some decisions on motions before the Trial Chamber are issued from the bench, many are written. Each decision is written in the same format as confirmation decisions in that it is completely footnoted as to facts, prosecution and defense positions, and the court's decision. Each one of these proposed decisions must be drafted and circulated among the judges for review, changes, and agreement. These decisions can be lengthy from a U.S. perspective.[29] The process is more akin to an appellate court proceeding. Delay can also be attributed to the lack of trial or judicial experience among the judges.

The jurisprudence of the ICC has interesting differences from the U.S. system. For example, the Rome Statute lists a series of defendant's rights that are similar to rights guaranteed by the U.S. Constitution; however, when one delves into the decisions of the court, it becomes obvious that stark differences exist. Clearly the right to a speedy trial discussed above is one of those.

CONFRONTATION/HEARSAY

One of the strongest protections provided to a criminal defendant and embodied in the Sixth Amendment is the right to confront the witnesses upon whose testimony the state relies for conviction. This provision assures a defendant that he or she may test through cross-examination a witness's truthfulness. Furthermore, the confrontation clause allows a defendant to examine the accuracy of a witness, the witness's memory, and the meaning and sincerity of the witness's testimony. Without this protection, there lies a real and ever-present danger that an individual could be wrongfully convicted.

Within the ICC's founding document rests an apparently similar provision to the Sixth Amendment.[30] This provision indicates a defendant shall have minimum guarantees, including "[t]o examine, or have examined, the witnesses against him or her . . . ." While this subsection appears to be relatively straightforward, when one examines the decisions of the ICC, it is apparent that this protection is illusory at best.

The ICC's approach to the admission of hearsay and its reliance on judges determining the probative value of hearsay evidence leaves the Rome Statute's guarantee of confrontation tenuous. The ICC has found first that the exclusion of hearsay evidence is not expressly provided by the Statute.[31] Furthermore, in *Katanga and Ngudjolo*, the Pre-Trial Chamber determined that "any challenges to hearsay evidence may affect its probative value, but not its admissibility."[32] The chamber did address confrontation and the determination of

25. *Id.* at art. 67 (1) (b).
26. *Report on Different Legal Aid Mechanisms Before International Criminal Jurisdictions*, ICC-ASP/7/23 (Oct. 31, 2008), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-23%20English.pdf.
27. *See Situations and Cases*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/ (last visited 27 Feb. 2012) (supplying dates of apprehension).
28. ROME STAT. art. 67 (1) (c).
29. *See* Corrigendum to Decision on Prosecution Motion for Admission of Prior Recorded Testimony of Witness P-02 and Accompanying Video Excerpts, *Katanga*, ICC-01/04-01/07-2289-Corr-Red, Trial Chamber II, (Aug. 27, 2010), *available at* http://www.icc-cpi.int/NR/exeres/F7695FFB-40B0-4231-A3B7-40C915B556CA.htm; Order in Relation to Disclosure of Identity of P-143, *Katanga*, ICC-01/04-01/07-1817, Trial Chamber II, (Feb. 1, 2010), *available at* http://www.icc-cpi.int/NR/exeres/AA43436E-8447-42DA-8942-AF1C6E716A5B.htm; Decision of the Communication of P-316's Statement, *Katanga*, ICC-01/04-01/00-1728-Red, Trial Chamber II, (Dec. 17, 2009), *available at* http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/chambers/trial%20chamber%20ii/1728?lan=en-GB.
30. ROME STAT. art. 67(1) (e).
31. Decision Regarding Protocol on Practices to be Used to Prepare Witnesses for Trial, *Lubanga*, ICC-01/04-01/06 at para. 41, Trial Chamber I (May 23, 2008), *available at* http://www.icc-cpi.int/icc-docs/doc/doc494990.pdf.
32. Decision on Confirmation of Charges, *Katanga*, *supra* note 12, at para. 137.

probative value when it stated "the parties' inability to cross-examine a Prosecution source is simply one factor in the Chamber's determination of the probative value accorded to the evidence in question."[33] The ICC also looks to the text of the Rome Statute and its own rules of evidence for its position that the Chamber can consider this type of evidence.[34] If one examines Article 69 (3), the second sentence states: "The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."[35] The ICC and other national jurisdictions have a strong reliance on appropriate judicial determination of probative value to obtain the truth, while in U.S. courts, the hearsay rule makes this determination unnecessary because trustworthiness of an out-of-court statement is found to be inherently lacking unless it falls within an exception to the rule. In the U.S., every law student has drilled into him or her the importance of the confrontation clause and underlying reason for the hearsay rule. Instead, the ICC views this as a hindrance to the determination of the truth.

A recent decision by Trial Chamber III in *Bemba* once again provides insight into the immense differences in jurisprudence between the U.S. and the ICC. In a 17-page decision, the court admitted as prima facie evidence all documents submitted by the prosecutor before the start of the presentation of evidence.[36] The Court distinguished admission of evidence and the probative value to be given it at the end of the trial. The Court justified its action as ensuring the proper conduct of the trial. Furthermore, the court believed that the drafters of the Statute wanted to avoid the "technical formalities of the *common law* system of admissibility of evidence in favour of the flexibility of the *civil law* system . . . ."[37] Fortunately, this decision was reversed on appeal.[38] Twelve of the eighteen judges at the ICC come from civil-law systems.[39] This mixture of civil-law and common-law judges creates its own set of problems as the court attempts to provide a coherent approach to trial and criminal procedure.

The result of these conflicting views is apparent. In the U.S., a defendant has protection under our Constitution and the rules of evidence. At the ICC, in contrast, a defendant is at the mercy of a judge's determination of probative value without the safeguards of cross-examination and rules limiting the admission of evidence.

REASONABLE DOUBT/DOUBLE JEOPARDY

Another interesting difference in jurisprudence is our concept of reasonable doubt. Without considering the definition of this term, most jurisdictions in the U.S. require that a verdict be unanimous. Every prosecutor and defense attorney understands that a single juror voting not guilty constitutes a win for the defense.

It is interesting to compare the ICC's view of double jeopardy with that of U.S. jurisdictions.

The decisions of a Trial Chamber at the ICC are made not by a jury, but rather by a three-judge panel.[40] Like in the U.S., those subject to the jurisdiction of the ICC are presumed innocent.[41] The burden of proof at the ICC is also beyond a reasonable doubt.[42] However, the two jurisdictions split on how sufficient proof is counted. The Rome Statute urges the judges to seek unanimity, but if it is lacking, a simple majority is sufficient to establish guilt.[43] Therefore, a judge with strong doubts as to the veracity of important witnesses or the probative value of evidence presented has no ability to affect the finding unless that individual can sway an additional judge to his or her point of view.

It is interesting to compare the ICC's view of double jeopardy with that of U.S. jurisdictions. The Double Jeopardy clause of the Fifth Amendment has protected citizens from the government's attempt to obtain a conviction once a jury has rendered a not-guilty verdict. Absent extreme circumstances, a finding of not guilty by a jury simply prevents the retrial of a criminal defendant for the same charge.

The Rome Statute provides defendants with an apparently similar protection as that contained in the Fifth Amendment. It reads: "Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."[44] The term "except as provided in this Statute" leads to the procedure for appeals within the statute. After conviction, the prosecutor has the right to appeal a procedural error, a factual error, or an error of law.[45] While it is procedurally possible in the U.S. for a prosecutor to obtain appellate review for errors in procedure and law, it is nearly impossible to obtain review of the factual determination made by the jury.

During the process of deliberation, a Trial Chamber must, like juries in the U.S., weigh the evidence and issue a verdict. It is required to issue a written decision, which contains a "full and reasoned statement of the Trial Chamber's findings on the

33. *Id.* at para.109.
34. ROME STAT. art. 64 (9) (a); ICC Rules of Proc. & Evidence, Rule 63 (2).
35. *Id.* at 69 (3).
36. Decision on Admission into Evidence of Material Contained in Prosecution's List of Evidence, *Bemba*, ICC-01/05-01/08-1022, Trial Chamber III, (Nov. 19, 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc969801.pdf.
37. *Id.* at para. 17.
38. Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence," *Bemba*, ICC-01/05-01/08 OA 5 OA 6, Appeals Chamber (May 3, 2011), available at http://www.icc-cpi.int/iccdocs/doc/doc1066048.pdf
39. Judges Blattmann, Cotte, Diarra, Gurmendi, Kaul, Kourula, Odio Benito, Steiner, Tarfusser, Trendafilova, Usacka, and Van den Wyngaert.
40. ROME STAT. art. 39 (2) (b) (ii).
41. *Id.* at art. 66 (1).
42. *Id.* at art. 66 (3).
43. *Id.* at art. 74 (3).
44. *Id.* at art. 20 (1).
45. *Id.* at art. 81 (1) (a).

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evidence and conclusions."[46] It is from this decision that a prosecutor may appeal a factual determination. The options available to the Appeals Division upon review of the Trial Chamber's decision include ordering a new trial before a different Trial Chamber or reversing or amending the decision.[47] It appears from this statutory framework that the Appeals Division of the ICC can reverse a finding of not guilty and enter a finding of guilty based on its determination that the Trial Chamber made a mistake of fact. In other words, judges who have not heard the live testimony of the witnesses or had the opportunity to judge their credibility can enter a finding of guilty. While this apparent authority vested in the Appeals Division is disconcerting, no indication as yet shows whether it will be exercised.

EXCLUSIONARY RULE

In the U.S., the exclusionary rule is a well-founded doctrine designed to deter police violations of citizens' constitutional rights. During the drafting of the Rome Statute, a division between common-law and civil-law advocates on the rules of evidence existed. The final result was a "delicate combination" of the two.[48] The ICC's founding document recognizes that evidence may be obtained in violation of accepted rules. It reads:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> - The violation casts substantial doubt on the reliability of the evidence; or
> - The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[49]

If determined that evidence was illegally obtained, the court must then engage in a two-pronged test to determine if it will admit the contested evidence. The first prong relates to the reliability of evidence. If it is reliable, the violation has no bearing on admissibility. The second prong suggests that serious damage to the integrity of the proceedings is the lynchpin upon which a decision will be made. In *Mapp v. Ohio,*[50] the United States Supreme Court found that "the imperative of judicial integrity" was one of the justifications for the application of the exclusionary rule. More recently, the Court relied on the deterrence of police misconduct as the prime justification.[51]

The Pre-Trial Chamber in *Lubanga* addressed the issue of evidence it found to have been obtained in violation of recognized human rights.[52] The Chamber, in discussing the issue of "integrity of the proceedings," stated: ". . . in the fight against impunity, it must ensure an appropriate balance between the rights of the accused and the need to respond to victims' and the international community's expectations."[53] The Chamber continued, indicating that exclusion would result only from "serious human rights violation[s]."[54] Like in the U.S., the Chamber understood the difficulty in balancing the "contradictory and complex matters of principle."[55] The Trial Chamber upheld the Pre-Trial Chamber's decision on the application of the exclusionary rule.[56] Furthermore, the Trial Chamber went on to question whether deterrence of illegal police activity was a concern of the court.[57] Clearly, the jurisprudence of the ICC reflects the desire to leave in the hands of the judges what evidence should be heard and what weight is to be given such evidence.

WITNESS PREPARATION/WITNESS PROOFING

Preparing one's witnesses for trial is a longstanding and well-accepted practice among American lawyers. Rarely are judges even involved in the process. It is not unusual for law firms to have courtroom facilities within their offices so that witness's testimony can be rehearsed. At the ICC, this practice is divided into two separate areas of witness familiarization and witness preparation.

The court has approved the process of witness familiarization as an important practice for witnesses. That process includes the following:

a. Assisting the witness to understand fully the Court proceedings, its participants and their respective roles;
b. Reassuring the witness about her role in proceedings before the Court;
c. Ensuring that the witness clearly understands she is under a strict legal obligation to tell the truth when testifying;
d. Explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
e. Discussing matters that are related to the security and safety of the witness in order to determine the necessity of applications for protective measures before the Court; and
f. Making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint

46. *Id.* at art. 74 (5).
47. *Id.* at art. 83 (2) (a)-(b).
48. William A. Schabas, An Introduction to the International Criminal Court 294 (3d ed. 2007).
49. Rome Stat. art. 69 (7).
50. Mapp v. Ohio, 367 U.S. 643 (1961).
51. *See* Davis v. United States, 131 S. Ct. 2419 (2011).
52. Decision on Confirmation of Charges, *Lubanga*, *supra* note 12, at para. 82.
53. *Id.* at para. 86.
54. *Id.*
55. *Id.*
56. Decision on Admission of Material from "Bar Table," *Lubanga*, ICC-01/04-01/06-1981 at para. 48, Trial Chamber I (June 24, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/ doc 702244.pdf.
57. *Id.* at. para. 45.

herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court.[58]

However, the court takes a very different view from American practices when it comes to witness preparation. While recognizing that many national jurisdictions and other international criminal tribunals allow witness preparation, the Trial Chamber in *Lubanga* charted a different course for the ICC. While the Chamber allowed a witness to review a previously written statement, it forbade counsel from discussing other topics or evidence. The court stated:

> . . . the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by [witness preparation]. Rather, it is the opinion of the Chamber that this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony. . . . A rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection. . . . Finally, the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.[59]

Obviously, that Chamber believes witness preparation is not conducive to finding the truth. Contrary to standard American legal thought, many questions will be asked without counsel knowing what the answer will be.

CONCLUSION

The jurisprudence of the ICC is a work in progress. It is a daunting task to establish a framework to try some of the most notorious crimes occurring throughout the world. The court works at a disadvantage because some judges lack judicial or trial experience. It is especially difficult given the differences existing between the civil-law and common-law systems in the approach to and conduct of trials. Clearly that court relies heavily on judges weighing the evidence—some of which would not be admitted in the U.S. It is also apparent that some of the constitutional rights afforded individuals in the U.S., which appear to be protected by the Statute of Rome, are in fact not protected.

The mission of the ICC is to assure that the most serious crimes are punished, to end the impunity for those who commit such crimes, and to give voice and protection to victims. The court's success in achieving these goals remains to be seen. Only time will tell whether the decisions made will obtain international acceptance and approval. Until the court has a proven history of acceptable court management and jurisprudence, one must expect that countries such as the U.S., China, and Russia will not submit to its jurisdiction.

Judge David Admire was elected to the King County District Court bench in Washington State at the age of 33. He served in that position for 22 years before he retired. He was a criminal justice professor at Bethany College for three years. He currently teaches at Southern Utah University. During the summer of 2010, Judge Admire was a visiting professional at the International Criminal Court in The Hague, Netherlands. He served as a legal advisor to Judge Christine Van Wyngaert on a case involving two defendants charged with multiple war crimes and crimes against humanity. Judge Admire can be reached via email at admire@suu.edu.

58. "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial," *Lubanga*, ICC-01/14-01/06-1049, Trial Chamber I (Nov. 30, 2007), para. 29.

59. *Id.,* paras. 51 and 52.