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Length of the Proceedings at the International Criminal Court

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Cover picture: On 19 September 2019, the confirmation of charges hearing in the case *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* opened before Pre-Trial Chamber II of the International Criminal Court (ICC), composed of Judge Antoine Kesia-Mbe Mindua (Presiding Judge), Judge Tomoko Akane and Judge Rosario Salvatore Aitala.
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Length of the Proceedings
at the International Criminal Court

REPORT

Friedrich-Alexander-Universität Erlangen-Nürnberg

and

International Nuremberg Principles Academy

2022

Preface

The length of proceedings at international criminal courts and tribunals has been discussed for years, sometimes giving rise to controversy. This was also the case with proceedings at the most recent of the international criminal courts, the International Criminal Court (ICC) which was established with the Statute of Rome of 17 July 1998 and took up its work on 1 July 2002.

The project "Length of Proceedings at the ICC" is based on a resolution by the German Federal Parliament (BT-Drucksache 19/2983) and was carried out between October 2019 and September 2022. The Foreign Office of the Federal Republic of Germany had commissioned Professor Christoph Safferling, head of the International Criminal Law Research Unit at the Friedrich-Alexander-Universität Erlangen-Nuremberg, and Klaus Rackwitz, director of the International Nuremberg Principles Academy, to conduct a comprehensive study to examine whether or not the length of proceedings at the International Criminal Court is disproportionate and to formulate proposals for speeding up the proceedings.

The International Criminal Law Research Unit (ICLU) is a research institution founded in 2015 which deals in particular with current issues of international criminal law and international criminal procedural law, in addition to topics of contemporary legal history and cybercrime. The Foundation International Nuremberg Principles Academy (INPA), established in 2014 with headquarters at the historic site of the Nuremberg Trials, has the task of promoting international criminal law. Both institutions have been cooperating for many years, in particular in the organisation and implementation of the annual Nuremberg Moot Court. In the project presented here, the ICLU and the INPA have cooperated as research institutions.

This report was written under the academic supervision of Professor Christoph Safferling and Director Klaus Rackwitz as well as Deputy Director Dr Viviane Dittrich (until March 2021), by Dr Gurgen Petrossian, as well as Eduardo Toledo, Julia Klaus, Jane McCosker and Dr Marian Yankson-Mensah. The authors would like to thank Jennifer Schense and student assistants, Melanie Rosa, Deborah Weber, Johannes Lechler, Anna Pacurar, Martin Prokopek, Miriam Schäfer and Ramón Galvis for their support. The report, initially written in the project's working language, English, was translated into German by Ulrike Seeberger.

The project's intensive research activities were welcomed by the President of the ICC, by its Chief Prosecutor as well as by the Registrar of the Court itself and supported by the provision of data, for which we would like to express our gratitude. The Court's judges as well as numerous members of staff from all ICC organs provided valuable information and insights in interviews, for which we also express our sincere thanks.

Nevertheless research work faced considerable difficulties, in particular after the outbreak of the SARS-CoV-2 (Covid 19) pandemic and the associated travel restrictions and changes in working routines. In spite of the geographical proximity of ICLU and INPA, quite considerable adjustments were required in the cooperation resulting in a delay to the completion of the project. An initial workshop in The Hague with experts from the field could still be held in autumn 2019. However, the planned qualitative interviews then had to take place remotely via Zoom, as did a final workshop in November 2021.

In spite of these difficulties we are now able to present the final report on the question of the proportionality of the length of criminal proceedings at the ICC, hoping that on the one hand we succeed in raising understanding for the complexity of work in international criminal law, and on the other hand manage to provide one or two suggestions for improvements to the Hague Court.

Recent developments in Ukraine and Russia's attack on a sovereign State in violation of international law, as well as the possible violations of international criminal law reported in the media on a daily basis, demonstrate how important it is to have an independent and effective court to investigate and, if necessary, prosecute and punish genocide, war crimes and crimes against humanity. In this respect, we hope that the report presented here will also be a useful contribution for the States Parties of the ICC as well as for its bodies, both in the discussion of possible reforms and in demonstrating the necessity of providing this Court with the appropriate necessary resources.

Nuremberg and Erlangen, September 2022

Klaus Rackwitz

Christoph Safferling

Length of Proceedings at the International Criminal Court

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Abbreviations

AC	Appeals Chamber
AfCtHPR	African Court on Human and Peoples' Rights
BGH	German Federal Court of Justice
BVerfG	German Federal Constitutional Court
CAR	Central African Republic
CEPEJ	European Commission for the Efficiency of Justice
CoC	Confirmation of Charges
CoE	Council of Europe
DCC	Document Containing Charges
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDS	Electronic Disclosure System
EU	European Union
FARDC	*Forces Armées de la République Démocratique du Congo*
GA	UN General Assembly
GG	Basic Law for the Federal Republic of Germany
HRC	UN Human Rights Committee
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IER	Independent Expert Review
LG	*Landgericht* (district court)
LRA	Lord's Resistance Army
LRV	Legal Representative of Victims
OTP	The Office of the Prosecutor
PTC	Pre-Trial Chamber
RoC	Regulations of the Court
ROTP	Regulations of the Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RReg	Regulations of the Registry
RS	Rome Statute
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UN	United Nations
UCP	Union of Congolese Patriots
W/S	Arrest Warrant or Summons to Appear

Definitions

Key term	Definition
Abwägung	Weighing up.
Anonymity measures	The anonymity of the accused and his attorney.
Anspruch auf Durchführung des Strafverfahrens in angemessener Zeit	The right to have criminal proceedings completed within a reasonable time.
Appeal Phase	From the date of the filing of the first appeal by either party until the date of the final decision on the appeal.
Appeals Hearing Stage	From the date of the opening of the appeals hearing until the date of closing of that hearing.
Applicant	The person who filed an application under Article 34 ECHR.
Arrest Warrant and Summons to Appear (W/S) Phase	From the date of the Prosecutor's first application for a W/S until the date of the suspect's completed transfer to the ICC.
Arrest/Surrender Stage	From the day after the issuance of the first W/S until the date of the arrest/surrender of the suspect.
Article 70 proceedings	Offences against the administration of justice.
Author	The person who submitted a complaint before the UN HRC.
Authority	The judge, registry, prosecutor, investigator and other national public authorities who are involved in the proceedings in whatever official manner.
Avowal measures	Measures to avoid retraumatisation or secondary victimisation, such as avoiding confrontation with the accused in person.
Closing Statements	From the date of the beginning of the closing statements until the closing of the confirmation hearing.
Complexity	The complexity of a case consists of all aspects that are contained in and relate to the individual case. The assessment of complexity is conducted with a general overview of all aspects of the case, including

Key term	Definition
	the facts, legal rules, court rulings and procedural issues.
Complexity of facts	Relates not only to the examination of the evidence, participating witnesses and expert opinions, but also to the nature of the charges as determined by the facts, which might be sensitive, relate to national security, or include a multiplicity of victims and defendants. Factual complexity arises from the individual case, including those dimensions that reflect and react to the factual situation.
Complexity of law	The complexity of law may arise from jurisdictional and constitutional issues, unclear and complex statutes, as well as the need to interpret potentially applicable international treaties. It is rooted in the Rome Statute framework. It pertains to material as well as procedural legal rules, the distinction between the two not always being sharp. Relevant rules relate to jurisdiction and admissibility, the disclosure system and the victims' participation system.
The complexity of the proceedings	The complexity of the proceedings is a sub-category that may include language barriers, the need for international cooperation in criminal matters, the number of interlocutory appeals, participation of victims and other organisational challenges. It results from the proceedings of the individual case, covering both legal and factual matters.
Confidentiality measures	Confidentiality from the press and public, such as pseudonyms for victims and witnesses, image or voice distortion and closed sessions.
Confirmation Hearing Stage	From the date of the opening of the confirmation hearing until the date of the closing of the confirmation hearing.
Confirmation Phase	From the day after the completed transfer of the suspect to the ICC until the date of the final decision on the confirmation of charges (CoC).
Contributory impact	The impact of the procedural activity on the length of proceedings which is small, but in continuous repetition contributes to the workload of the parties and the Chamber at the ICC.

Key term	Definition
Criminal proceedings according to The European Court of Human Rights (ECtHR)	Similar to the German provision in Section 198(6)(1) GVG, it measures the overall length of criminal proceedings from the point in time when a competent authority notifies the person concerned about their situation in the criminal proceedings by which they are substantially affected. The measuring of the length of the proceedings ends with the final determination of the status of the person concerned in the respective criminal proceedings.
Disclosure	Refers to each party revealing information, documents and other material relevant to a case to the other party or parties, and either providing such information and material to them, or allowing them to inspect it.
Disproportionately long proceedings	Means unreasonably long proceedings as well as proceedings in which there has been undue delay.
Document Containing the Charges (DCC)	The document containing the charges on which the Prosecutor intends to bring the person to trial.
Expert Initiative on Promoting Effectiveness at the International Criminal Court 2014	Report on promoting effectiveness at the ICC, including factors relating to the confirmation process, disclosure, the presentation and admission of evidence, interlocutory appeals, the orality of proceedings, victims' participation, Defence, institution building and administration, cooperation and witness protection.
Factor	Defined as abstract concepts underlying procedural activities at the ICC.
Final Closing Statements	From the day after the conclusion of the presentation by the Defence until the last day of the closing statements.
First Appearance Stage	From the day after the completed transfer of the suspect to the ICC until the date of their first appearance before the judges of the ICC.
German proportionality test	A test containing the elements of a legitimate aim, suitability, necessity and proportionality in the narrower sense.
Human factor	The conduct of the authorities and parties in the proceedings.

Key term	Definition
ICC Chambers Practice Manual	Best practices in recurring procedural challenges identified by the ICC Pre-Trial Division Judges.
ICC Independent Expert Review 2020 (IER)	A review drafted by experts to strengthen the ICC and the Rome Statute system.
Interlocutory Appeal	From the date of the filing of an interlocutory appeal until the date of the decision on that interlocutory appeal.
Issuance Stage	From the date of the Prosecutor's first application for a W/S until the date of issuance of the first W/S.
Judicial authorities in the German legal context	Courts and prosecution offices and their individual representatives.
Justizbedingte Verfahrensverzögerungen	Judiciary-related delays of proceedings.
Lange '(nicht notwendigerweise rechtsstaatswidrige)' Gesamtdauer	German legal practice concept referring to proceedings that are overly long, irrespective of whether that length is contrary to the rule of law.
Leave to Appeal	From the date of the request for leave to appeal until the date of the decision on leave to appeal.
Legitimate objective	The objective pursued has, for the most part, to be identified on a case-by-case basis and is intrinsically linked to the infringed right itself. Objectives that are generally considered legitimate include crime prevention, criminal prosecution, State security interests, public interests and basic rights of third parties such as protection of health or life.
Necessity	A measure is necessary when it is the mildest one available, that is to say that it has the least infringing impact on the basic right concerned among all those measures that would be equally suitable to pursue the legitimate objective. The condition of necessity therefore further delimits the condition of suitability.
Opening	From the date of the opening of the confirmation hearing until the day before the beginning of the presentations by the parties and participants.
Opening Statements	From the first day of the opening statements until the last day of the opening statements.

Key term	Definition
Paris Declaration 2017	A declaration on the effectiveness of international criminal justice, produced by the representatives of the international criminal courts and tribunals.
Post-Appearance Stage	From the day after the first appearance until the day before the beginning of the confirmation hearing.
Post-Confirmation Hearing Stage	From the day after the closing of the confirmation hearing until the date of the decision on the charges by the Pre-Trial Chamber.
Post-Confirmation Stage	In the event of an appeal against the CoC: From the day after the decision on the charges until the date of the final decision on the charges by the Appeals Chamber.
Post-Hearing Stage	From the day after the closing of the appeals hearing until the date of the final decision on the appeal.
Pre-Hearing Stage	From the date of the filing of the first appeal by either party until the day before the opening of the appeals hearing.
Presentation by OTP	From the first day of the presentation by Prosecution until the last day of their presentation.
Presentation by the Defence	From the day after the conclusion of the presentation by the victims until the last day of the presentation by the Defence.
Presentation by the Victims	From the day after the conclusion of the presentation by the Prosecution until the last day of the presentation by the victims.
Presentations	From the date of the beginning of the presentation by the parties and other participants until the conclusion of their presentations.
Principle of acceleration	The elimination of out-of-date procedures and unnecessary formalities and ensuring proper use of the right to appeal, in order not to delay proceedings.
Principle of judicial costs	Simplifying the system of court fees.
Principle of Proportionality	Testing whether an infringement of a basic right can be justified or whether it amounts to a violation of that right. As a legal standard, it strikes a balance between competing interests.
Principle of public information	Informing the public about proceedings.

Key term	Definition
Principle of simplification	Simplifying all procedural documents.
Principle of special procedures	Accelerating special family law procedures, and simplifying the procedures where there is a dispute about a small amount of money.
Procedural activities	Defined as concrete episodes in the case proceedings that deal with a distinct subject and have a measurable duration. They may be initiated by a Chamber, a party, or a participant, and they often, but not always, conclude with a Chamber decision.
Procedural activity	A concrete episode in the proceedings at the ICC which is initiated by a Chamber, a party or a participant and usually ends with a decision of a Chamber.
Proceedings according to The German Judicature Act (*Gerichtsverfassungsgesetz*, *GVG*)	Section 198(6)(1) GVG defines a set of court proceedings as meaning every set of proceedings from their introduction until their conclusion with final and binding force, including proceedings for granting provisional court relief and for granting legal aid.
Proceedings in the ICC legal framework	The Rome Statute uses the term “proceedings” both when describing judicial processes of the ICC itself and when describing national ones and does not define the term for either purpose. Implicitly, however, by referring to “the investigation or the court proceedings” of the ICC when setting out the process for issuing an arrest warrant, and to the ICC’s “investigation[s] and proceedings” in provisions on State Party cooperation, the Statute excludes investigations from the definition of proceedings of the ICC.
Proportionality *strictu sensu*	A test consisting of balancing the intensity of an infringement with the importance of the reasons for the interference. Put differently, it is a weighing up (*Abwägung*) between different protected rights and the public interest.
Reasonable time	Encompasses the whole procedure.
Rechtsstaatswidrige Verfahrensverzögerung	German legal practice concept referring to delays in proceedings that are contrary to the rule of law.
Rechtsstaatswidrige Verzögerung	Delay which is contrary to the rule of law.

Key term	Definition
Redaction	The redaction of confidential or sensitive information in documents, meaning the removal or “blackening” of parts of documents that contain that information.
Scope of proceedings	The period between the date on which the Prosecutor applied for a warrant for a person’s arrest or a summons to that person to appear before the Court and the date of the decision of a Trial Chamber or Appeals Chamber ending the case against that person, excluding reparation proceedings and Article 110 Rome Statute sentence review proceedings. For those cases analysed that have not yet reached such decisions because they are still ongoing, the project has set 31 July 2021 as an end date for case analysis.
Sentencing Stage	In the event of a guilty verdict: from the day after the issuance of an Article 74 RS decision until the date of the issuance of a decision under Article 76 RS.
Serious impact	When the activity with regard to the contested issue and particular circumstances cause rescheduling of the proceedings.
Suitability	A measure is suitable if the legitimate objective can be achieved by the measure.
Suspect/Accused/Defendant	The concerned person in the criminal proceedings.
Suspensive impact	When the activity causes a complete halt of the proceedings.
Tatferne	German legal practice concept referring to the length of time between the offence and the final judgment.
Transfer Stage	From the day after the arrest/surrender of the suspect until the date of their completed transfer to the ICC.
Trial Deliberations Stage	From the day after the conclusion of the closing statements until the date of the issuance of a decision under Article 74 RS.
Trial Hearing Stage	From the date of the opening of the trial until the last date of the closing statements.

Key term	Definition
Trial Phase	From the date of the opening of the trial until the date of the issuance of a decision under Article 74 RS.
Trial Preparation Phase	From the day after the final decision on the charges (be it by the Pre-Trial Chamber if not appealed or by the Appeals Chamber if appealed) until the day before the opening of the trial.
Überlange Verfahrensdauer	Overly long proceedings.
Unangemessene/unverhältnismäßige Verfahrensdauer	Unreasonable/disproportionate length of proceedings.
Undue delay	An occasion where a certain activity during the proceedings was postponed.
Unnötige Verfahrensverzögerungen	Unnecessary delays of proceedings.
Verletzung des Beschleunigungsgebotes/-grundsatzes	Violation of the requirement/principle of acceleration.
War Crimes Research Office Report on Expediting Proceedings at the International Criminal Court 2011	Report highlighting the delays arising at the pre-trial stage and the trial stage in ICC proceedings.
What is at stake for the applicant	The criterion taking into consideration the situation of the person concerned, which can be affected by the length of proceedings, such as their life or health.
Witness preparation	In some international criminal tribunals, the parties may prepare witnesses in a substantive way before giving evidence (“witness proofing”).
W/S Phase	From the date of the Prosecutor’s first application for an Arrest Warrant or Summons to Appear until the date of the suspect’s completed transfer to the ICC.

Executive Summary

Based on the resolution of the German Bundestag (Federal Parliament) of 26 June 2018 (BT-Drucksache 19/2983), the International Nuremberg Principles Academy (INPA) together with the International Criminal Law Research Unit (ICLU) of the Friedrich-Alexander-Universität Erlangen-Nuremberg (FAU) have been requested by the Foreign Office of the Federal Republic of Germany

> "to determine, based on a review of proceedings conducted to date at the ICC, which causes contribute to the disproportionate length of proceedings and to formulate proposals for speeding up the proceedings".

Results:

The academic study of seven trials conducted at the International Criminal Court (ICC) to date (Ongwen, Bemba Gombo, Ntaganda, Katanga & Ngudjolo Chui, Ruto et al., Gbagbo & Blé Goudé) concludes that **while trials at the ICC are long, they are not disproportionately long**.

Given the complexity of the cases, the conduct of the participants and the organs of the ICC, as well as the importance of the proceedings in each case, **the proceedings studied are not disproportionate in terms of their length**. Nevertheless, analysis shows that proceedings may be **accelerated** by individual measures based on the current ICC Statute (ICCSt).

1. Definitions and Key Points

The analysis of the proceedings is based on the following definitions and key points:

The starting point for assessing the length of proceedings was taken to be the date on which the Office of the Prosecutor (OTP) has applied for an arrest warrant or for a summons to appear before the ICC.

The end point was taken as the day on which a Trial or Appeals Chamber decides to end the proceedings against a person. This can be a conviction, an acquittal or another decision ending the trial. Sentence review or sentence reduction proceedings pursuant Art. 110 ICCSt were not taken into account. For the purpose of this research project, the definitions deliberately exclude preliminary and investigation proceedings as well as compensation proceedings.

The study focuses on proceedings for core international crimes pursuant Art. 5 ICCSt. This means that criminal proceedings for offences against the administration of justice pursuant Art. 70 ICCSt were also excluded.

After a comprehensive analysis of human rights case law (European Court of Human Rights ECtHR, Inter-American Human Rights Court IACHR), of national legal systems as well as other international criminal tribunals, disproportionately long proceedings were defined as unreasonably long proceedings and as proceedings in which there has been undue delay.

Various expert studies at international criminal tribunals were taken into account in this research. This applies particularly to the *Independent Expert Review* submitted to the Assembly of States Parties (ASP) on 20 September 2020. The recommendations of this review were aligned with the recommendations made here in the following. However, this review did not specifically address the issue of the length of proceedings since this point was not included in the list of questions submitted to the experts.

2. Basis for the Assessment of the Length of Proceedings

a. Basics

To enable a detailed and precise analysis of the proceedings, ICC proceedings are divided up into three levels of investigation, namely into (i) five phases (arrest warrant and summons; confirmation; trial preparation; trial; appeal), within these phases into (ii) stages and within those stages into (iii) procedural activities.

These procedural activities are categorised as to whether they have a suspensive impact on the length of proceedings, that is whether the activity causes a complete halt of the proceedings; whether they have a serious impact, that is whether they cause rescheduling of the proceedings; or whether they have just a contributory impact, that is to say they do not result in a suspensive or serious effect, while, however, continuous repetition of this activity would lead to a significant increase in the workloads of the participants.

b. Criteria

In accordance with the case law of human rights courts and individual national legal systems, a total of four criteria is applied to assess the length of proceedings: (1) the **complexity** of the case, (2) the **conduct of the parties** and other participants, (3) the **conduct of the authorities** or official bodies, and (4) the **importance of the proceedings** for the accused.

(1) **Complexity** can refer to various circumstances. On the one hand we speak of *legal complexity* which can arise from both substantive and procedural law. Specific questions regarding perpetration or superior responsibility can play a role here, as can questions of jurisdiction or of disclosure of evidence. On the other hand we speak of *factual complexity* if the complexity of the case arises from the factual situation, such as the number of accused persons, their political roles, the number and content of charges, the amount and scope of evidence, as well as the necessity of state cooperation to obtain evidence. Finally we speak of *procedural complexity* if in individual cases specific circumstances shape the proceedings, such as, for example, the participation of victims and witnesses, of States, experts and *amici curiae*, the necessities of translation, logistical and organisational difficulties during the proceedings, the number of interlocutory appeals and the number of hearings.

(2) The **conduct of the defendant** and **other participants** has an immediate impact on the length of proceedings, since they trigger and shape procedural activities. However, the accused cannot be held responsible for the procedural activities of other participants. The onus here is on the authorities referred to in the following point, which have to react appropriately to the procedural activities.

(3) The conduct of the participants must be distinguished from the **conduct of the authorities/official bodies**, that is to say from the conduct of the ICC and its organs (Presidency, Chambers, Office of the Prosecutor, Registry), of States Parties which are obliged to cooperate with the ICC and have to fulfil this obligation promptly.

(4) What is at stake for the **accused** is relevant and must be taken into account by the authorities/official bodies in the course of prosecution. This includes, for example, the

right to life and physical integrity, the right to family as well as the duration of pre-trial detention.

3. Factors Affecting the Length of Proceedings

The study showed that, based on the above criteria, ten main factors are responsible for causing the length of proceedings. These are:

(1) **The Human Factor**: The behaviour of the individuals involved in the proceedings is of utmost importance for the speedy conduct of the proceedings. The chief prosecutor and his/her prosecutors are of outstanding importance, as are the judges and especially the presiding judges of the chambers involved. They control the preliminary proceedings (Office of the Prosecutor) as well as the trial (Court) and can substantially accelerate proceedings by setting deadlines and reaching quick decisions. Defence teams cannot be held responsible for delays in the proceedings when exercising the accused's procedural rights.

(2) **Charges**: When seen against the backdrop of national criminal proceedings, the ICC practice of having the Office of the Prosecutor prepare a Document Containing the Charges (DCC), which is subject to mandatory confirmation by a Pre-Trial Chamber, is highly unusual. This DCC may still be changed until it is confirmed by the Pre-Trial Chamber, but after this confirmation it is basically fixed. Re-characterisation of facts is possible during the main proceedings, but will lead to enormous difficulties of delimitation. This legal inflexibility is a problem at this point. The fact that DCCs vary in their approach to handling matters of scope, structure and detail is also problematic. Similarly, the oral hearings for the confirmation of the DCC vary greatly, and it cannot always be foreseen which further documents will be required by the Pre-Trial Chamber. From the point of view of accelerating proceedings, it would certainly be desirable to keep efforts involved in the confirmation procedure low and to consider a clearly defined preliminary check of the DCC to be sufficient.

(3) **Disclosure of evidence**: At the ICC, the Defence has no right to inspect files. Instead, the parties are obligated to disclose in advance any materials relevant for the trial (disclosure of evidence); this applies both to incriminating material the Prosecution intends to rely on during the main trial and to exculpatory material for the accused. Disputes concerning this disclosure are one of the main factors causing procedural delay. This is due to the unclear legal framework, to the abundance of material and also to additional factors, such as, for example, witness protection, security aspects and protective measures (necessary redactions) or translations. In addition, investigations at the ICC are ongoing and, unlike in German criminal proceedings, no conclusion of the investigation is recorded in the file. Thus the topic of disclosure is an ongoing issue.

(4) **Protective Measures**: Confidential and sensitive information must be redacted in documents. This plays an important role on the one hand with regard to the disclosure topic (see above), but also with regard to other documents such as submissions, victims' applications, decisions and transcripts. This topic has not been comprehensively codified in legally binding form; the Chambers Practice Manual contains a practice

recommendation in this aspect. In all proceedings examined, redaction proves to be a cause of delay in the proceedings.

(5) **Evidence and Presentation of Evidence**: The presentation of evidence is insufficiently regulated in the ICC rules. In practice, the Chambers tend to adopt an adversarial trial structure, that is to say presentation of evidence is the responsibility of the parties, rather than that of the Court. In this approach, the evidence presented by the Office of the Prosecutor is heard first, followed by the Defence's presentation of its case. It is only then that the Court may call further evidence. Cross-examination dominates the examination of witnesses, with the witness being first examined by the calling party and then cross-examined by the opposing party, after which the Court asks supplementary questions.

Neither the adversarial procedure as such nor the separation of the presentation of evidence into a case presented by the Prosecution and a case presented by the Defence has a basis in the ICC Statutes or in the ICC Rules of Procedure (ICCRP). Rather, they are practices which had already been put in place at the ad-hoc tribunals for Rwanda and former Yugoslavia and which were adopted by the ICC and its Chambers.

It is in particular the dominant **witness evidence** which is enormously time-consuming. The parties tend to come up with a great number of witnesses and a substantial amount of other evidence to support their case (to prove the charges or to sow reasonable doubt). Each piece of evidence raises questions as to availability, willingness to cooperate, admissibility as well as relevance. In the case of witnesses, there are also questions of the duration of their journey to the Court as well as the need for translation services (interpreters and translators for the languages spoken by the witnesses).

(6) **Victims**: The ICC was the first international tribunal to provide for victim participation in criminal proceedings. There was great concern about the negative effects this might have on the length of criminal proceedings. Thus, in the first proceedings, this procedural innovation did actually lead to a number of unresolved legal questions and organisational difficulties until, however, an accepted practice was established relatively quickly. While the individual Chambers have different approaches to the recognition of victims, a practice which creates a certain unfortunate legal uncertainty, we did not observe that this had any negative effects on the length of proceedings.

(7) **Orality of Proceedings**: It is in particular in the Confirmation and Preliminary Phases of criminal proceedings that it can be observed that the exchange of pleas prolongs proceedings. In this context, an oral exchange of arguments leads to a significant shortening of proceedings.

(8) **Appeals and Legal Remedies**: Under the ICCSt, the parties may file interlocutory appeals with the Appeals Chamber against decisions of individual judges, of the Pre-Trial Chambers as well as of the Trial Chambers. While this is in principle a permissible course of action, it might nevertheless be abused to delay proceedings.

(9) **Languages**: Translation and interpretation are a key challenge for ICC criminal proceedings. This does not only apply to the Court's working languages, English and French, but above all to the additional languages spoken in the situation countries and by the accused and their defence counsel, as well as by witnesses and victims. Some of

these are extremely rare languages, for which it is difficult to find translators at all, and for which translation of the complex legal language of the Statute and the Rules of Procedure and Evidence poses additional problems. Here, the ICC must not only find and maintain appropriate personnel, but also provide the necessary legal training.

(10) **Other Factors**: We were able to identify the following further factors affecting the length of proceedings: inconsistency of jurisprudence and ambiguity of legal rules, obtaining opinion of *amici curiae*, requests for early termination of proceedings due to lack of evidence ("no case to answer" applications and decisions), as well as proceedings for violation of the administration of justice under Art. 70 ICCSt.

4. Recommendations for Further Acceleration

Given the factors affecting the length of proceedings and the analysis of various cases, this report recommends the following measures for accelerating proceedings:

Presidency and Chambers:

(1) Increased **standardisation** of the Court's approach and streamlining of key elements in the Court's work. This includes: the Document Containing the Charges (DCC), the participation of victims, evidence, procedural organisation for the Chambers as well as handling of witnesses.

(2) The judges must continue and intensify their efforts towards standardising and codifying some standard practices in the **Chambers Practice Manual**. The existing manual is not binding. In order for the ICC finally to be able to develop a uniform culture of procedure and evidence, the Presidency must take steps to make the Chambers Practice Manual binding; in future, the manual should also contain provisions which ensure flexible options for amendments and which safeguard regular review of its provisions. This would ensure that certain aspects of the Court's approach which have become common practice will become standardised, and that other provisions that affect the Court's efficiency can be amended on a regular basis. The most important aspects of the Court's approach include deadlines for the pronouncing of judgments and decisions at the various stages of the proceedings, timing for the defendant's initial appearance in court, timing for oral hearings to confirm the charges and a maximum time period for trial preparation.

(3) The Presidency should assign cases to judges according to their management and language skills.

Office of the Prosecutor:

(4) The Prosecutor must develop a **strategy** for each case, establishing a minimum scope for investigations which must be conducted before an arrest warrant or summons to appear is applied for. Thus procedural delays caused by necessary further investigations could be prevented as much as possible.

(5) Ideally, the OTP's case strategies should provide a concept for **deciding about the indictment** in order to prevent a multiplicity of charges whose proof would require additional evidentiary procedures for each charge and prolong the proceedings while not necessarily increasing the chances of conviction. This will require balancing the facts

necessary to prove the charge against those facts which merely supplement the proven facts.

(6) In addition, the OTP's **case strategies** must provide the Chamber with the possibility of determining, before presentation of the indictment (DCC), which witnesses and evidence the OTP has, what information it intends to disclose and which protective measures are likely to be necessary so that repeated proceedings on disclosure, on redaction and questions of evidence may be avoided after submission of the indictment. This also avoids the need for further investigations during the confirmation and trial phases. In situations where the Prosecutor anticipates that many proceedings will be initiated for a situation in any particular country, the investigation may be shortened by establishing interim investigation offices in these situation countries to ensure that the Office of the Prosecutor will be able to have regular and speedy access to information.

(7) The Office of the Prosecutor, in cooperation with the Presidency, needs to formulate and adopt a series of **guidelines** on the scope, the structure, the content and the methods for drafting the indictment, the **Document Containing the Charges** (DCC). A useful starting point for the Office of the Prosecutor would be to adopt best practices identified in previous situations and cases. In particular, these guidelines should take precautions to ensure that the selection of charges is clear and specific. Furthermore the guidelines should discourage long lists of charges and modes of responsibility. The outcome of cases to date does not suggest that an extensive accumulation of charges and/or a large number of witnesses and amount of evidence will result in a higher conviction rate.

(8) The Presidency and the Office of the Prosecutor, as well as the professional representation of defence counsel appearing before the ICC, should cooperate in redesigning the **regime for redactions**. To do this, best practices on redaction and disclosure should be identified and adopted so that comprehensive provisions can be created and made binding for all participants. Key issues to be worked through include the scope of redactions necessary to protect the individual or information in question; the question whether and which redactions can be made without prior approval by the Chamber; and when previously necessary redactions should be lifted. This regulation then has to be submitted to the Assembly of States Parties for approval and would therefore require the States Parties' willingness to implement such changes. The adoption of standardised regulations on redactions and disclosure, if implemented consistently and with adherence to strict deadlines, will help judges and OTP staff to be better prepared for disclosure.

Defence:

(9) On the part of the Court's **Registry**, delays caused by the Defence can be avoided by scheduling regular meetings with defence counsel, in particular prior to the trial phase, in order to identify their need for translation, funding and legal support, and then taking the necessary steps to meet those needs, always in consultation with the Chambers and other parties involved.

(10) Likewise, the **Office of the Prosecutor** can limit delays caused by the Defence by establishing, as part of its procedural strategy, a plan for mitigating problems which could lead to repeated defence requests. This would include, among other things, informing

the defence in advance about the languages spoken by the prosecution witnesses, filing applications for redaction and other protective measures in a consolidated manner (instead of in separate individual motions), ensuring timely disclosure of evidence and of information about potential witnesses and avoiding vague, ambiguous and contradictory language when drafting the indictment.

(11) Whenever, in spite of proactive measures implemented by the Registry and the Office of the Prosecutor, the Defence files **motions** which could wilfully delay proceedings, the respective Chambers and the presiding judges must adopt a stricter approach for their conduct of the proceedings.

Registry:

(12) The Registry should review the process of preparing witnesses and experts in consultation with the Court's other organs and develop the necessary standards in order to avoid repeated discussions about the conduct of proceedings from one Chamber to another and from one stage of the proceedings to the next.

(13) In consultation with all other organs of the Court, the Registry should develop criteria for determining under which circumstances witness hearings may take place virtually. This approach would be less costly for the Court and more convenient for the witnesses. Secondly, the Chambers should encourage the Office of the Prosecutor to opt for alternative forms of hearing evidence whenever possible, in order to avoid admitting large numbers of possibly redundant witnesses.

(14) The Registry should take the lead in establishing a binding legal framework for victim participation modalities. This framework should be created with the objective of establishing clear and transparent selection procedures. The Presidency should also coordinate and ensure the consistent selection of participants in each stage of the proceedings.

Assembly of States Parties:

(15) The Assembly of States Parties should initiate **follow-up measures** for some of the most important steps already taken to address the problem of lengthy proceedings at the ICC, such as the establishing of the Study Group on Governance in 2010, in order to accelerate proceedings and improve the efficiency and effectiveness of the ICC.

(16) The Assembly of States Parties should engage with the Registry, the Office of the Prosecutor, the Presidency and the Chambers to obtain their **strategies** for avoiding lengthy proceedings. The wording of such strategies by the Court's various organs would put into perspective the recommendations and results of the steps taken to date to address the problem of lengthy proceedings at the Court. In doing so, the States Parties should also consider amending the Rules of Procedure and Evidence as a way to improve the situation, if other measures do not achieve the desired effect.

1 Introduction and Project Details

1.1 Mandate and Research Questions

On 26 June 2018[1] and on 27 October 2020,[2] the Bundestag, the German Parliament, expressed its concern about withdrawals from the Rome Statute (RS) of the International Criminal Court (ICC) and called on the German Government to take measures to support the institution. Particular attention was paid to the length of the proceedings at the ICC. The Parliament requested the Federal Government "to ascertain, with the help of a study of proceedings conducted by the ICC to date, which factors lead to the disproportionate length of proceedings and to formulate proposals on accelerating proceedings".[3]

The German Parliament found that, since the Court was first established, ground-breaking trials have been held and judgments issued in The Hague. The first ruling by the ICC was made in the case of the former Congolese militia leader, Thomas Lubanga, who was sentenced to 14 years in prison for the deployment of child soldiers in July 2012. The ruling on the appeal two years later upheld this decision. In its most recent judgment on 6 May 2021, the Court imposed a prison sentence of twenty-five years for crimes against humanity and war crimes against the Ugandan militia leader, Dominic Ongwen. To date, the Court has issued a total of 35 arrest warrants and nine summonses to appear in 30 cases, and 17 people have been detained by States and have appeared before the Court. A further 13 people remain at large, and charges have been dropped against three people due to their deaths. The ICC judges have issued ten convictions and four acquittals.

Germany played an active role in the drafting of the Rome Statute and is the second largest contributor to the Court after Japan. To date, of the 195 States recognised by the United Nations (UN), 123 States have become ICC States Parties, including all European Union (EU) members. Of the five permanent members of the UN Security Council, two – France and the United Kingdom – are States Parties. Of the top twenty world economies, thirteen are States Parties and seven are not. In those seven are included the largest two economies: the US and China. (According to two estimates, the top twenty are: the US, China, India, Russia, Indonesia, Saudia Arabia, Turkey, Japan, Germany, UK, France, Italy, Brazil, Canada, South Korea, Australia, Spain, Mexico, the Netherlands and Switzerland.)

Given that about 63% of the world is under the ICC's territorial jurisdiction, a jurisdiction which is to some degree expanded by personal jurisdiction over State Party nationals on the territories of non-States Parties, it goes nearly without saying that the ICC does not exercise worldwide or universal jurisdiction,[4] which in practice limits the number of country situations potentially within its purview. That jurisdiction may be expanded by UN Security Council referrals, of which there have thus far been two: of the situations in Darfur (Sudan) and Libya. Other efforts to secure a situation referral have thus far been unsuccessful.

Jurisdiction may contract if States Parties withdraw their accession to the Statute, as happened in 2017 when Burundi withdrew from the Statute, citing what they perceived as an ICC bias against Africa. Other States (Kenya, Namibia, South Africa, the Philippines) have considered the option of withdrawal, but have thus far not enacted their expressed intentions. In the case of Burundi, the ICC retains jurisdiction over the time during which Burundi was a State Party.

[1] German Bundestag: Printed Paper 19/2983, 19th Legislative Period, 26 Jun 2018.
[2] Ibid.
[3] Ibid.
[4] See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS, International Criminal Court, 8 Apr 2015, www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1 (accessed 4 Oct 2022).

Unfortunately, the ICC receives no support from the United States, Russia or China – all members of the United Nations (UN) Security Council. This makes it impossible to implement the principle of universal jurisdiction and greatly weakens the ICC. Efforts to get the UN Security Council to refer war crimes outside the ICC's jurisdiction to the Court have failed on many occasions with regard to Syria and Iraq.[5] Furthermore, at the time the German Parliament adopted its resolutions, there was a growing trend of African States withdrawing from the Statute. For example, Burundi, Kenya, Namibia and other African countries, as well as the Philippines, were considering withdrawal. The reason behind the changed perception of the Court is the accusation that the ICC mainly works against African governments. It was correct that, at the time of the resolutions, proceedings have mainly concerned African States. However, it should be noted that half of the proceedings had been initiated by the governments of the affected States themselves. Fatou Bensouda, the second ICC Prosecutor and formerly the Minister of Justice and Attorney General of The Gambia, once argued that although the investigations had hitherto been mainly directed against suspected perpetrators from Africa, millions of Africans suffered from their actions and that the investigations thus serve the best interest of Africans.[6]

The above-cited request of the German Parliament may be rephrased in the form of the following research questions:

a) Which factors may lead to the disproportionate length of proceedings at the ICC?
b) How can the proceedings at the ICC be accelerated?

In order to answer these research questions, a study was carried out as a cooperation project between the International Nuremberg Principles Academy (INPA) and Friedrich-Alexander University Erlangen-Nuremberg (FAU).

The results of the project are presented in this report. The report consists of five chapters. While this chapter provides details of the project, including its methodology and general information on ICC cases, the second chapter describes the international practice as to assessment of the length of proceedings. Moreover, the second chapter sets out the criteria used by German national courts, regional human rights courts, the UN Human Rights Committee (HRC), *ad hoc* tribunals, hybrid courts and the ICC, and also examines the reasons for delays in the institutions mentioned. It includes a comparison of the length of the proceedings between national cases related to international crimes with universal jurisdiction characteristics and international criminal cases. In the third chapter, the cases before the ICC are analysed one by one. Each analysis of a case includes a summary of the respective proceedings, an assessment of the length of the proceedings according to the above-mentioned criteria and a determination of factors that influenced the length of the case's proceedings. In the fourth chapter, the factors are analysed individually on a more general level. The final chapter summarises the report and contains the recommendations based on the criteria.

1.2 Background

Since the Rome Statute of the ICC was adopted on 17 July 1998 and since it came into force on 1 July 2002 with the ICC commencing operations in March 2003, the Court has, as of 31 July 2021, dealt with 30 cases against a total of 45 individuals. Investigations are conducted in 13 situations, namely Afghanistan, Bangladesh/Myanmar, Burundi, Central African Republic

[5] Ibid.
[6] See Interview with Fatou Bensouda from 7 Dec 2013 in: German Review on the United Nations 2014(1), p. 5. dgvn.de/fileadmin/user_upload/DOKUMENTE/English_Documents/Interview_Fatou_Bensouda.pdf. (accessed 4 Apr 2022)

(CAR) I and II, Côte d'Ivoire, Darfur (Sudan), Democratic Republic of the Congo, Georgia, Kenya, Libya, Mali and Uganda. In 14 cases, preliminary examinations have been or are being carried out by the Office of the Prosecutor (OTP), namely in the State of Bolivia; Columbia; Registered Vessels of Comoros, Greece and Cambodia; Gabon; Guinea; Honduras; Iraq/United Kingdom; Nigeria; State of Palestine; Republic of Korea; Republic of Philippines; Ukraine; Venezuela I and II.

Since 2003, eight cases against nine defendants have proceeded to a final conviction or acquittal for core crimes within the jurisdiction of the Court (Article 5 RS crimes): Thomas Lubanga Dyilo (convicted), Mathieu Ngudjolo Chui (acquitted), Germain Katanga (convicted), Jean-Pierre Bemba Gombo (acquitted), Ahmad al Faqi al Mahdi (convicted), Koudou Laurent Gbagbo and Charles Blé Goudé (acquitted), Bosco Ntaganda (convicted) and Dominic Ongwen[7] (convicted) [8]. A further four cases are classified by the Court as closed,[9] where for example the charges are withdrawn due to either a lack of evidence or due to the defendant's death, or where the judges decide not to confirm the charges and not to commit the case to trial due to a lack of evidence. In the latter event, the Prosecutor can re-open the case based on new evidence. Out of the remaining 19 cases, nine cases are currently in the confirmation phase[10] and one is on trial[11], pending the arrest of the other suspects or their voluntary appearance before the Court. As of 31 July 2021, four cases are in the confirmation phase or trial proceedings are ongoing;[12] four other cases relate to offences against the administration of justice under Article 70 RS.[13]

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[7] Appeal proceedings are still ongoing (as of September 2022).

[8] Four cases entered the reparation proceedings, and they are still ongoing: *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/1, https://www.icc-cpi.int/mali/al-mahdi (accessed 4 Oct 2022), *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07, www.icc-cpi.int/drc/katanga (accessed 4 Oct 2022); *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-2205 (accessed 4 Oct 2022); and *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, www.icc-cpi.int/CourtRecords/CR2014_04750.PDF (accessed 4 Oct 2022).

[9] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11. https://www.icc-cpi.int/pages/record.aspx?uri-=1223134, (accessed 4 Oct 2022); *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11, www.icc-cpi.int/kenya/rutosang (accessed 4 Oct 2022); *The Prosecutor v. Bahr Idriss Abu Garda*, https://www.icc-cpi.int/darfur/abugarda (accessed 25 Mar 2022); *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, https://www.icc-cpi.int/drc/mbarushimana (accessed 25 Mar 2022).

[10] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, https://www.icc-cpi.int/darfur/albashir, (accessed 25 Mar 2022); *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17 (accessed 25 Mar 2022); *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11. https://www.icc-cpi.int/libya/gaddafi (accessed 25 Mar 2022); *The Prosecutor v. Ahmad Muhammad Harun*, ICC-02/05-01/07, https://www.icc-cpi.int/darfur/harun (accessed 25 Mar 2022); *The Prosecutor v. Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, https://www.icc-cpi.int/darfur/hussein (accessed 25 Mar 2022); *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, ICC-01/11-01/13, https://www.icc-cpi.int/libya/khaled (accessed 25 Mar 2022), *The Prosecutor v. Joseph Kony and Vincent Otti*, ICC-02/04-01/05, https://www.icc-cpi.int/uganda/kony (accessed 25 Mar 2022); *The Prosecutor v. Sylvestre Mudacumura*, ICC-01/04-01/12, https://www.icc-cpi.int/drc/mudacumura (accessed 25 Mar 2022); *The Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, https://www.icc-cpi.int/cdi/simone-gbagbo (accessed 25 Mar 2022).

[11] *The Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, https://www.icc-cpi.int/darfur/banda (accessed 25 Mar 2022).

[12] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, https://www.icc-cpi.int/darfur/banda (accessed 25 Mar 2022); *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18, https://www.icc-cpi.int/carII/yekatom-nga%C3%AFssona (accessed 25 Mar 2022); *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20, https://www.icc-cpi.int/darfur/abd-al-rahman, (accessed 25 Mar 2022); *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/21, https://www.icc-cpi.int/carII/said#:~:text=The%20warrant%20of%20arrest%20against,ICC%20on%2024%20January%202021 (accessed 25 Mar 2022).

[13] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (Bemba et al.)*, ICC-01/05-01/13, https://www.icc-cpi.int/car/Bemba-et-al, (accessed 25 Mar 2022); *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13, https://www.icc-cpi.int/kenya/barasa/pages/alleged-crimes.aspx, (accessed 25 Mar 2022); *The Prosecutor v. Philip Kipkoech Bett*, ICC-01/09-01/15, https://www.icc-cpi.int/kenya/bett, (accessed 25 Mar 2022); *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, https://www.icc-cpi.int/kenya/gicheru (accessed 25 Mar 2022).

1.3 Methodology

An assessment of the length of proceedings of any court requires an objective approach. However, no consensus exists on the requisite standards and process for assessing the length of proceedings either internationally or nationally. The differences in trial contexts and the diverse nature of courts pose a challenge to developing a universally applicable approach for assessing the length of proceedings of each one of them.[14]

A look at existing literature, however, evinces four notable approaches used to analyse the issue of the length of proceedings. These approaches entail: firstly, examining what constitutes a reasonable length of proceedings;[15] secondly, examining the legal basis for having expeditious trials,[16] thirdly, ascertaining the factors that may result in delay during the proceedings;[17] and fourthly, assessing the plausible avenues for expediting the trial at the court in question.[18]

In adopting an objective approach to examining the length of proceedings at the ICC, this report adopts a multi-dimensional approach comprising the above approaches.

Firstly, for examining the legal basis for having expeditious trials, the study has identified a catalogue of criteria from the case law of the European Court of Human Rights (ECtHR), the Inter-American Court for Human Rights (IACtHR), the African Court on Human and Peoples' Rights (AfCtHPR), the HRC and the international criminal tribunals. Legal literature addressing the question of how to assess the proportionality of the length of criminal proceedings has been collected and reviewed.

Secondly, to examine what constitutes a reasonable length of proceedings, the study examines empirical data on 26 cases at the ICC (excluding cases regarding offences against the administration of justice under Article 70 RS) collected from available public documents, including transcripts of oral proceedings and the written court record. The overall assessment of the length of proceedings of any given case starts with the application filed by the OTP pursuant to Article 58 RS for the issuance of an arrest warrant or summonses to appear and ends with the final judgment delivered by the Trial Chamber or the Appeals Chamber, excluding the reparation stage.

The proceedings were divided into phases, stages and procedural activities. Phases may be classified as the "macro"-level, stages as the "meso"-level and procedural activities, in general, as the "micro"-level. While phases and stages can, by and large, be generalised for all ICC proceedings, procedural activities differ from case to case. Procedural activities are concrete episodes in the proceedings at the ICC which are initiated by a Chamber, a party or a participant and usually end with a decision of a Chamber.

Thirdly, for ascertaining the factors that may result in delay during the proceedings, this is answered in part using empirical data relating to ICC cases with a view to identifying the factors that affect the Court's proceedings. These factors are further defined as abstract concepts underlying procedural activities at the ICC. These factors enable a comparative analysis of the length of procedural activities both with regard to national and other international criminal proceedings and against the background of relevant recommendations and developments since 2003. In the course of such a comparative analysis, the differences in the procedural rules in national systems are given special consideration and their impact is evaluated using

[14] See Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, ICC-OTP (2003).
[15] See for instance Edel (2007); Gumpert/Nuzban (2019); Henzelin/Rordorf (2014); and Calvez/Regis (2018).
[16] Edel (2007); Henzelin/Rordorf (2014).
[17] Calvez/Regis (2018), pp. 13–35.
[18] See Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings. ICC-OTP (2003).

the methods of functional comparative law, as warranted by the autonomous procedural system at the ICC.

Once those factors with the greatest impact on the length of the proceedings at the ICC were identified, the research team undertook 40 expert conversations with high-level practitioners and other experts from the field of international criminal law and designed a survey open to the staff of the international criminal tribunals and experts. The results of the expert conversations and the survey are incorporated in the report's findings.

The fifth step consisted of the assessment of the proportionality or disproportionality of the length of proceedings at the ICC applying the criteria to the cases and identifying the factors impacting the most important cases. A general assessment was not possible given the particularities of each one of the proceedings and the inability to establish patterns from one case to the next.

Finally, the recommendations for modifications and accelerations were developed with respect to the factors impacting the most important cases and to the proceedings in general. This was done in consultation with experts at two workshops, a survey and key informant interviews with international criminal law experts and practitioners. This report however excludes the survey results, since it yielded few responses and did not contribute additional information, beyond what had already been obtained from the other aspects of the project.

In summation, the methodology of the project consists of six steps:

1) Identification of definitions of the concepts and terms to be used in this project and catalogue of criteria for assessing the length of proceedings at the ICC
2) Data collection for ICC cases based on a model of phases, stages and procedural activities
3) Identification of factors affecting the length of proceedings at the ICC
4) Data collection through expert conversations and a survey
5) Assessment of the proportionality or disproportionality of the length of proceedings at the ICC by applying the criteria to the cases
6) Drafting recommendations for possible acceleration of the proceedings

1.4 Limitations of the Research Methods

The methods used in this research project are unavoidably accompanied by limitations. Firstly, although studies have previously been conducted on the length of court proceedings generally, little empirical research exists on the specific topic of the length of ICC proceedings. This limitation is mitigated by expert consultations to discuss findings of the conversations and of the survey. Secondly, since the respondents for the expert conversations and the survey were selected using non-probability sampling, there is little chance of ascertaining the extent to which the sample will be representative of the population from which the sample is selected. Also, in light of the use of purposive sampling, the respondents for the expert conversations were selected mainly based on the judgment of the researchers, thereby posing risks of sampling bias. Moreover, it is difficult to calculate the confidence intervals and margins of error before commencing the research in view of the mode of selecting participants. To allay the effects of all mentioned limitations, it was anticipated that the use of the survey in addition to the expert conversations would reduce the sampling bias and make the study more representative.

2 Proportionate and Disproportionate Length of Criminal Proceedings

2.1 Proportionality as a General Legal Concept

As the German Parliament has requested an account of the factors leading to the disproportionate length of ICC proceedings, a core element of the research design is the identification of the proportionality standard for the length of criminal proceedings.

The principle of "*Verhältnismäßigkeit*" or "proportionality" is one of the most important legal principles within German constitutional[19] law. The origin of this principle is unclear. On the one hand, it is put forward that this principle emerges from the Prussian Police Act,[20] later integrated into the German legal system.[21] On the other hand, the principle of proportionality is linked to that of fairness, with roots in ancient Roman and Greek laws, and as such, has a common European legal heritage[22] integrated in most legal systems and interpreted contextually.[23]

The principle of proportionality as a legal standard strikes a balance between competing interests. [24] It is applied when testing whether an infringement of a basic right can be justified or whether it amounts to a violation of that right.[25] It is not confined to constitutional or administrative law but also extends into criminal law, criminal procedural law,[26] civil law and employment law.[27]

According to German constitutional practice, the principle of proportionality requires that any measure imposed by the State that infringes a protected right must have (i) a legitimate objective.[28] When pursuing such an objective, the measure must be (ii) adequate or suitable, (iii) necessary and (iv) reasonable or proportionate *stricto sensu.*[29]

Legitimate objective: The objective pursued has, for the most part, to be identified on a case-by-case basis and is intrinsically linked to the infringed right itself. Objectives that are generally considered legitimate include crime prevention, criminal prosecution, State security interests, public interests, basic rights of third parties such as protection of health or life.[30]

Suitability: A measure is suitable if the legitimate objective can be achieved by the measure.[31]

Necessity: A measure is necessary when it is the mildest one available, that is to say that it has the least infringing impact on the basic right concerned among all those measures that would be equally suitable to pursue the legitimate objective.[32] The condition of necessity therefore further delimits the condition of suitability.

Proportionality stricto sensu: This test consists of balancing the intensity of an infringement with the importance of the reasons for the interference.[33] Put differently, it is a weighing up (*Abwägung*) between different protected rights and the public interest.[34] According to Robert

[19] Lerche (1961).
[20] See Schlink (2012), pp. 294 et seqq.
[21] See Hirschberg (1981), p. 1; Vranes (2009), p. 11.
[22] Oreschnik (2019), p. 15.
[23] See Vranes (2009), p. 5; Sieckmann (2018), p. 10.
[24] Sieckmann (2018), p. 5.
[25] Ibid., p. 148.
[26] BVerfGE 100, 313.
[27] Oreschnik (2019), p. 24.
[28] BVerfGE 77, 84, 105.
[29] Ibid., 63, 144.
[30] E.g. Art. 20, See Grzeszick (2020), Para. 111.
[31] Klatt/Meister (2014), p. 195; Bultmann (2008), p. 58; Alexy (2014), pp. 51 et seqq.
[32] Daiber (2020); BVerfGE 53, 135 (146).
[33] Sieckmann (2018), p. 11.
[34] See Voßkuhle (2007).

Alexy, the weighing up can be rationalised and conducted in three steps: First, one has to determine the extent or degree to which one principle is not fulfilled. Second, one has to determine the extent or degree to which the contrasting second principle is fulfilled. The third step entails establishing whether the importance of fulfilling the second principle justifies the non-fulfilment of the first principle. In that context, the intensity of the concrete interference with the basic right becomes relevant and is to be evaluated as light, medium, or grave.[35]

2.2 Assessment of Length of Proceedings in German Legal Literature

German literature also addresses the principle of proportionality of the length of proceedings:

- According to Imme Roxin, it has to be assessed whether, in the context of the objective circumstances of the case, the actual length of the proceedings exceeded the necessary length.[36] Accordingly, the requirement of acceleration is violated if the delay attributable to the authorities is not justified by the complexity and the scope of the case.[37]
- Martin Waßmer indicates that the essential part of assessing the reasonableness of the length of proceedings is to identify those causes of delay which are attributable to the authorities.[38]
- Uwe Scheffler and Silke Baumanns apply the constitutional law proportionality test on procedural measures/activities in the context of the truth-finding process. By that they aim to distinguish between reasonably and unreasonably long proceedings.[39] As for suitability, it must first be assessed whether the procedural measures taken by the authorities were suitable for achieving the truth.[40] As for necessity, it must be tested whether there were no alternative measures that would have been less intrusive on basic rights while still being equally effective.[41] As for proportionality in a narrower sense or adequacy, it has to be assessed whether the extended length of the criminal proceedings disproportionately damages the objectives of these proceedings.[42]
- According to Kai Otto, the length of the proceedings is reasonable if it is suitable, necessary and proportional in relation to the basic rights of the person concerned (that being the suspect or accused in the criminal proceedings) in order to achieve the aim of the proceedings.[43]
- Juliane Plankemann criticises the application of the proportionality test, arguing that there is no need to assess suitability in cases of obvious inactivity on the part of the authorities. The other two elements of the proportionality test are equally rejected by her.[44] She advocates examining the reasonableness of the length of the proceedings solely on the basis of the objective circumstances of the individual cases.[45]

[35] Moreso (2012); Clérico (2018), p. 42; Alexy (1986), p. 146; Klatt/Meister (2014), p. 196; Petersen (2020), p. 164.
[36] Roxin (2005), p. 158.
[37] Ibid.; see contrary opinon in Reich (2012), p. 35.
[38] Waßmer (2006).
[39] Baumanns (2011), p. 122; see also Scheffler (1991), p. 111.
[40] Baumanns (2011), p. 123; see also Scheffler (1991), p. 112.
[41] Baumanns (2011), p. 125, see also Scheffler (1991), p. 113.
[42] Baumanns (2011), p. 130; Scheffler (1991), p. 117. See the contrary opinion on disproportionality test in Plankemann (2015), pp. 58–60; and in Steger (2008), pp. 234–235.
[43] Otto (1995), p. 172.
[44] Plankemann (2015), p. 59.
[45] Ibid., p. 82.

2.3 Assessment of Length of Proceedings and Reasons for Lengthy Trials

The length of judicial proceedings is not a new issue. It has informed or triggered national judicial reforms[46] and bears great significance within the Council of Europe's legal framework.[47]

The terminology for normative assessments of the length of proceedings can differ greatly. German national legislation and case law adopts a range of terminology,[48] including

- *Anspruch auf Durchführung des Strafverfahrens in angemessener Zeit*[49] – right to have criminal proceedings completed within a reasonable time
- *Verletzung des Beschleunigungsgebotes/-grundsatzes*[50] – violation of the requirement/principle of acceleration
- *Überlange Verfahrensdauer*[51] – overly long proceedings
- *Unangemessene/unverhältnismäßige Verfahrensdauer* – unreasonable/disproportionate length of proceedings[52]
- *Unnötige Verfahrensverzögerungen*[53] – unnecessary delays of proceedings
- *Justizbedingte Verfahrensverzögerungen*[54] – judiciary-related delays of proceedings
- *Rechtsstaatswidrige Verzögerung*[55] – delay contrary to the rule of law

By comparison, international law has its own terminology, mainly focusing on the accused's rights. Human rights treaties and the statutes of international criminal courts and tribunals refer to:

- The right to a trial or hearing within a *reasonable time* – Article 9(3) ICCPR, Article 6(1) ECHR, Article 8(1) IACHR, Article 7(1)(4) AfCHPR,[56] Article 47 of the Charter of Fundamental Rights of the European Union
- The right to be tried without undue delay – Article 14(3)(c) ICCPR, Article 67(1)(c) RS,[57] Article 21(4)(c) ICTY Statute, Article 20(4)(c) ICTR Statute
- The right to be brought before the judiciary without undue delay – Article 8 of the Arab Charter on Human Rights
- The obligation of a Chamber to ensure that a trial is expeditious – Article 64(2) RS.[58]

Each of these is considered below, to identify criteria suitable to assess the proportionality of the length of proceedings at the ICC.

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[46] See e.g. the German law on legal protection in the event of lengthy judicial proceedings and criminal investigations from 24 Nov 2011, BGBl. I Nr. 60, 2 Dec 2011, 2302.
[47] See e.g. European Commission for Democracy Through Law (Venice Commission). Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings: Adopted by the Venice Commission at Its 69th Plenary Session (Venice, 15-16 Dec 2006), CoE Publishing (2007); CoE. Recommendation CM/Rec(2010)3 of the Committee of Ministers to Member States on Effective Remedies for Excessive Length of Proceeding, CoE Publishing (2010); and Kuijer (2013), pp. 777–794.
[48] See Pest (2017), p. 51.
[49] NJW 2003, 2225 (2226).
[50] BeckRS 2011, 2144.
[51] NStZ-RR 2021, 185; NVwZ 2003, 451.
[52] BVerfGE 8, 260 (263).
[53] BeckRS 2011, 17617.
[54] BeckRS 2003, 8239.
[55] NStZ-RR 2005, 346.
[56] Articulating it as "the right to be tried within a reasonable time", emphasis added.
[57] The RS also includes, in Article 60(4), a related obligation specifically concerning pre-trial detention. It requires the Pre-Trial Chamber to "ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor".
[58] Art. 64(2), in Part 6 RS, applies to ICC Trial Chambers, but Rule 149 RPE imposes the obligations in Part 6 *mutatis mutandis* on the ICC Appeals Chamber. See also Articles 64(3)(a) and 82(1)(d) RS, referring to "the… expeditious conduct of proceedings", Articles 18(4), 56(3)(b) and 82(2), providing for expedited appeals against decisions of the Pre-Trial Chamber and Article 90(3), providing for expedited determination of admissibility in the event of a competing extradition request.

2.3.1 Scope of Proceedings

Before the proportionality of the length of proceedings can be assessed, it must be clarified when those proceedings begin and when they end. In addition to the legal framework of the ICC itself, the project has considered German legal practice and the jurisprudence of international human rights courts as an aid in reaching a suitable definition of proceedings in this temporal sense. It has also taken into account some practical constraints on its research and conceptual differences between certain types of ICC proceedings.

2.3.1.1 "Proceedings" in German Law

German legal practice has established three distinct "yardstick" concepts concerning the length of proceedings that are relevant in different contexts and have different consequences.[59]

The first concept is that of *Tatferne*, meaning the length of time between the offence and the final judgment. This procedural length plays an important role for the statute of limitations as well as for the determination and enforcement of an adequate sentence.[60]

The second concept is that of *lange '(nicht notwendigerweise rechtsstaatswidrige)' Gesamtdauer*, meaning proceedings that are overly long, irrespective of whether that length is contrary to the rule of law. Within this concept, the length of proceedings is understood to include the time between the initiation of investigations and the judgment, that is the time in which a defendant is considered to be *"*burdened*"* by the criminal proceedings. This also includes the moment when a defendant was seriously affected, that is to say when a defendant was notified of the initiation of the investigation or it became known to them through a measure directed against him/her (for example, arrest, search).[61] Overly long proceedings in this sense become relevant in the context of sentence mitigation, when the judges have to weigh up this "burden" on the individual.[62]

The third concept is that of *rechtsstaatswidrige Verfahrensverzögerung*, meaning delays in proceedings that are contrary to the rule of law. This concept encompasses, but is not limited to, criminal proceedings. It is based on the procedural maxim demanding expeditious proceedings as enshrined in Articles 19(4),[63] 20(3)[64] of the German Basic Law and Article 6(1) ECHR, which, as noted above, articulate the right to a hearing within a reasonable time.[65]

The third concept is applied by determining whether the time taken by the proceedings was unreasonable *(unangemessen)* and whether, where the authorities have caused delays, these delays would most likely not have occurred had the authorities acted differently. Delays caused by the defendants generally do not qualify as unreasonable and contrary to the rule of law.[66]

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[59] E.g., NJW 2003, 2228, NStZ-RR 2011, 171.
[60] NStZ 1992, 229, See Section 46 II StGB.
[61] Kreicker (2018), GVG § 198 para 20.
[62] Eckhardt (2020), pp. 31 et seqq.
[63] The so-called "*Beschleunigungsgrundsatz*", for further information see Pest (2017), p. 16; Tiwisina (2010), pp. 75 et seqq.; and Valerius (2017), p. 37; Article 19(4) of the German Basic Law reads: "Should any person's rights be violated by public authority, they may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. […]".
[64] Eckhardt (2020), p. 40; See Sachs/Degenhart GG, Article 103 para 52; See Article 20(3) of the German Basic Law reads: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice". Translation taken from German Federal Ministry of Justice. Basic Law for the Federal Republic of Germany (2020), www.gesetze-im-internet.de/englisch_gg/ (accessed 4 Apr 2022).
[65] Article 6(1) ECHR relevantly provides, "In the determination of… any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[66] Eckhardt (2020), p. 34.

The German Judicature Act (*Gerichtsverfassungsgesetz, GVG*) contains a definition of proceedings, which was introduced in 2011 as part of a law establishing a compensation regime for unreasonably lengthy proceedings. Section 198(6)(1) GVG defines a set of court proceedings as meaning every set of proceedings from their introduction until their conclusion with final and binding force, including proceedings for granting provisional court relief and for granting legal aid.[67]

The third concept is particularly relevant for this project because of its emphasis on whether the length is unreasonable or contrary to the rule of law. This can be equated with the concern of the 2018 Parliament Resolution, namely to address the "disproportionate" length of proceedings at the ICC.

2.3.1.2 The European Court of Human Rights Concept of "Proceedings"

The ECtHR has also addressed the temporal scope of criminal proceedings in its jurisprudence on the right to a hearing within a reasonable time under Article 6(1) ECHR.

Similarly to the German provision in Section 198(6)(1) GVG, it measures the overall length of criminal proceedings from the point in time when a competent authority notifies the person concerned about their situation in the criminal proceedings by which they are substantially affected. This may have been the date of their arrest, the date when the person was officially notified that they would be prosecuted, or when a preliminary or police investigation was opened.[68] The measuring of the length of the proceedings ends with the final determination of the status of the person concerned in the respective criminal proceedings, for example by their conviction or acquittal with no further right of appeal or by a decision of the prosecutor to terminate the investigations.[69]

The temporal concepts of proceedings shared by international criminal courts and tribunals are consistent with this ECtHR definition.

2.3.1.3 "Proceedings" in the ICC Legal Framework

The Rome Statute uses the term "proceedings" both when describing judicial processes of the ICC itself and when describing national ones[70] and does not define the term for either purpose. Implicitly, however, by referring to "the investigation or the court proceedings" of the ICC[71] when setting out the process for issuing an arrest warrant, and to the ICC's "investigation[s]

[67] Section 198(6)(1) GVG reads "Ein Gerichtsverfahren [ist] jedes Verfahren von der Einleitung bis zum rechtskräftigen Abschluss einschließlich eines Verfahrens auf Gewährung vorläufigen Rechtsschutzes und zur Bewilligung von Prozess- oder Verfahrenskostenhilfe; ausgenommen ist das Insolvenzverfahren nach dessen Eröffnung; im eröffneten Insolvenzverfahren gilt die Herbeiführung einer Entscheidung als Gerichtsverfahren"; A semi-official English translation of the German Judicature Act is available at https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html (accessed 19 Jul 2021).

[68] See Karpenstein/Mayer (2015), EMRK Article 6 para 74-75; Edel (2007), p. 22–25; see also *Mikolajová v. Slovakia*, EctHR, 18 Jan 2011, para 40; *Suárez Rosero v. Ecuador,* Judgment, IACtHR, 12 Nov 1997, paras 70–74, www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf (accessed 4 Apr 2022); and Trechsel (2006), pp. 137–140.

[69] See Roagna (2018), pp. 18–23; Kuijer (2013), p. 781; and Calvez/Regis (2018), pp. 35–36.

[70] For examples of the latter, see Article 17(2) and (3) RS.

[71] Article 58(1)(b)(ii) RS.

and proceedings"[72] in provisions on State Party cooperation, the Statute excludes investigations from the definition of proceedings of the ICC.[73]

This exclusion aside, in the Rome Statute and its subsidiary instruments the term "proceedings" clearly encompasses a broad range of stages[74] and types of activity before the ICC. Examples from the Rome Statute itself include "any proceedings conducted prior to the commencement of the trial",[75] "appeal proceedings"[76] and proceedings on offences against the Court's administration of justice[77] – showing that for the ICC, "proceedings" are not limited to cases which concern core crimes within the jurisdiction of the Court (Article 5 RS crimes).

The Rules of Procedure and Evidence as well as other regulations of the ICC use "proceedings" for these and many more ICC judicial processes. Even though the Rome Statute does not explicitly identify all of them as "proceedings" as such, that Statute's broad, varied use of the term and the ordinary meaning of the term suggest that all of these processes fall within its concept of proceedings. Notably, some of them can take place after final determination of the individual criminal responsibility and, if convicted, the sentence of the accused person in question, victims' reparations proceedings being one example.[78] Another is the obligatory review of the sentence of a convicted person, after he or she has served two-thirds of it or 25 years of a life sentence.[79]

2.3.1.4 Further Considerations

Three practical considerations that have influenced this project's definition of proceedings are, firstly, whether it is possible to obtain sufficient information about a particular proceeding at the ICC to make an accurate and constructive assessment of its length; secondly, which types of ICC proceedings were sufficiently similar in kind to be analysed together; and thirdly, whether there is a sufficiently large body of proceedings of the same type to enable effective collective and comparative assessment.

The first consideration was potentially relevant for ICC proceedings prior to the Prosecutor's application for an arrest warrant or summons to initiate the prosecution of an individual. Whereas proceedings from that point onwards are generally public – so that the fact of the application is eventually publicised even if the document itself is initially, or permanently, confidential – OTP investigations concerning the person in the preliminary examination and investigation phases are not. It is thus questionable whether the length of such pre-prosecution investigation can be accurately assessed.

The second and third considerations may be relevant in particular for ICC reparation proceedings, which are underway in four ICC cases, and which are substantially different from

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[72] Article 93(8)(a) RS refers to "the investigation *and* proceedings described in [a] request" by the Court for State Party cooperation, Article 127(2) RS to "criminal investigations *and* proceedings in relation to which [a] withdrawing State had a duty to cooperate". All emphases added.

[73] The distinction between investigations and proceedings also appears in subsidiary instruments, e.g. Rules 49(1), 111(1) RPE, Regs 7(b), 21, 37, 40(g) ROTP.

[74] This does not refer to stages as defined for the purpose of this project. Instead, the word is used here in the wider sense in which the governing legal instruments of the ICC appear to use it, when referring to "stage[s] of the proceedings". See e.g. Article 72(1) and (4) RS; Rules 16-18 RPE, Reg. 86 RoC and Reg. 103(1) RReg on victims' and/or witnesses' rights and participation; Reg. 55(2) RoC; Regs 23(2) and 60 ROTP; and the titles of Chapter 4, RPE, Chapter 3, Section 1, RoC and Chapter 2, Section 1, RReg.

[75] Article 68(5) RS. See also Article 82(1)(d) RS, which distinguishes between "the proceedings" and "the trial" in its definition of a particular type of appellable decision, by referring to "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".

[76] Article 81(4) RS. In addition, Article 83 RS is entitled "proceedings on appeal".

[77] Referred to in Article 70(2) RS as "proceedings under" Article 70.

[78] Referred to as "proceedings" in Rules 96, 217 RPE.

[79] Under Article 110(3) RS. Rule 224(2) and (5) RPE explicitly refer to the relevant judicial process as "the review *proceedings",* emphasis added.

investigation and prosecution proceedings. Since the reparation proceedings are not completed it is difficult to make an effective assessment.

2.3.1.5 Scope of Proceedings for the Purpose of This Project

The project defines the scope of proceedings as follows:

- The starting point for measuring the length of proceedings for the purpose of this project is the date on which the Prosecutor applied for a warrant for a person's arrest or a summons to that person to appear before the Court.
- The end point is the date of the decision of a Trial Chamber or Appeals Chamber ending the case against that person, excluding reparation proceedings and Article 110 Rome Statute sentence review proceedings. For those cases analysed that have not yet reached such decisions because they are still ongoing, the project has set 31 July 2021 as an end date for case analysis.

Consistent with the ICC's concept of proceedings as excluding investigations, the preliminary examination and investigation phases are not included in the length measurement conducted in this research project. This approach is also consistent with the ECtHR and with German law, insofar as proceedings are seen to begin when a specific person concerned can be identified and is likely to be aware of and directly burdened by the court proceedings. While it is accepted that an ICC investigation could directly affect a potential defendant earlier, this is not likely. The alternative German law notions of proceedings beginning prior to prosecution can be distinguished because of this, and because they apply in substantively different contexts to the one here, such as the determination of limitation periods. The practical difficulty of examining ICC activity concerning a person before a warrant or summons is sought was another, but only secondary, reason for selecting this starting point.

The project will not analyse reparation proceedings and sentence review proceedings, even though it accepts that both are "proceedings" under the ICC legal framework. This approach keeps the focus of the project on the period when a defendant is most directly affected by the proceedings and is also consistent with the ECtHR and German *rechtsstaatswidrige Verfahrensverzögerung* (delay contrary to the rule of law) concepts of proceedings. Regarding the ICC reparations phase, moreover, the importance of the process and its practical and conceptual considerations have led the project to conclude that it is preferable to analyse those separately. Finally, the time at which ICC sentence review occurs, namely two-thirds or 25 years into the sentence, means that these reviews are uncommon to date, meaning there is a lack of examples to compare and collectively analyse.

The project's definition of proceedings encompasses cases of offences against the administration of justice under Article 70 RS. However, given that the core proceedings at the ICC relate to international crimes and the *raison d'être* of the resolutions of the German Parliament was to understand the length of proceedings of cases of international crimes, the assessment of the Article 70 RS cases is also excluded. The nature of Article 70 RS cases and that of international crimes differ, which makes it impossible to compare their length.

2.3.2 German Criteria for Assessing Whether the Length of Proceedings is Reasonable

The German courts have developed contradictory approaches to the assessment of the reasonable length of legal proceedings, applying the aforementioned concept of *rechtsstaatswidrige Verfahrensverzögerung* (delay contrary to the rule of law). The *Landgericht*

(district court) (*LG*)[80] Frankfurt am Main (a. M.) took into account individual personal/subjective (*personenbezogene*) and material/objective (*sachbezogene*) factors for the assessment of what is reasonable time. Specifically, material factors the court considered were "whether the time required for the proceedings is in reasonable proportion to the importance of the subject of the proceedings and the degree of guilt of the accused, whether, taking these circumstances into account, the Prosecution is still required and, given the time that has passed, there is still an expectation of a reliable and complete investigation of the truth".[81] In addition, the court differentiated the scope of the case, the complexity and conduct of the investigation, as well as the expected conviction of the accused as material factors.[82] Where the analysis of these material factors did not establish an unreasonable length of proceedings, the court turned to personal factors, considering whether the proceedings' length has negatively affected the health and economic status of the accused.[83]

The LG Krefeld, on the other hand, understood the ECtHR to assess, when interpreting Article 6(1) ECHR, only whether the Prosecution and the Court have violated their obligation to accelerate the proceedings as enshrined in that provision. The LG Krefeld adopted this approach, finding it persuasive to assess the reasonableness of the length of proceedings by looking at their necessary length.[84]

The Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) later also addressed the issue of significant procedural delays that amount to violations of the accused's basic rights. The Court assessed whether a procedural delay of such significance occurred by reason of these criteria: the part of the procedural delay caused by the judicial authorities, the overall length of the proceedings, the gravity of the charge against the accused, the scope and complexity of the case and the impact of the length on the individual.[85]

The German legislature reacted to the jurisprudence of the national courts and the ECtHR by enacting a new law in 2011 providing for a compensation regime for unreasonable lengthy proceedings. The law amends the GVG to insert the definition of a set of court proceedings. As to the core matter, Section 198(1)(2) GVG states that the assessment of the proceedings' reasonableness shall be made in the light of the circumstances of the case concerned, in particular its complexity, the importance of what is at stake and the conduct of the participants and of third persons therein.[86] This legislative change and the guidance it gives to German courts when confronted with potentially unreasonable length of proceedings has to be borne in mind throughout the following paragraphs.

Judicial authorities: "Authorities" in the German legal context refers to both courts and prosecution offices and their individual representatives. The main criterion for the assessment of unreasonable length is the conduct of authorities. The BVerfG focuses on whether, under particular circumstances, the delays caused by the court or by the office of the prosecutor are unjustifiable.[87] Such unjustifiable delays have been found in cases of inaction of authorities or the reversal of a judgment where it contained obvious procedural mistakes.[88] The reversal of judgments by a higher court, however, is acknowledged as a regular feature of judicial systems

[80] Commonly translated as "district court" or "regional court", serving both as a first instance for serious crimes as well as an appellate instance for less serious crimes, see Sections 73-76 of the German Judicature Act.
[81] LG Frankfurt a. M. 5 Nov 1970, JZ 1971, 236.
[82] Ibid.
[83] Ibid., See also Scheffler (1991), p. 25, Plankemann (2015), p. 48; Pest (2017), p. 61.
[84] LG Krefeld, 18 May 1971, JZ 735; Plankemann (2015), p. 49.
[85] NStZ 1984, 128; See also NJW 2008, 860.
[86] Section 198(1)(2) GVG in German: "Die Angemessenheit der Verfahrensdauer richtet sich nach den Umständen des Einzelfalles, insbesondere nach der Schwierigkeit und Bedeutung des Verfahrens und nach dem Verhalten der Verfahrensbeteiligten und Dritter".
[87] NStZ 1984, 128.
[88] NJW 2003, 2897 (2898).

and may be considered an unjustifiable delay only in exceptional circumstances, such as blatant violations of law.[89]

Overall length: As there are no rules prescribing how long proceedings may take in absolute numbers of months or years,[90] this criterion is of subsidiary significance. The overall length cannot alone cause the unreasonableness of the length of proceedings, but it can serve as an indicator triggering a more detailed analysis of the length of the proceedings at hand.[91]

Gravity of the charge: This criterion can in principle justify a lengthy duration of proceedings.[92] However, the criterion has been sharply criticised in the German legal literature, as the gravity of the charges has no effect on the length of the proceedings, since lower gravity of charges can prescribe more complicated proceedings than those for serious offences.[93] This criterion was later rejected.

Scope and complexity of the case: This criterion includes the number of accused persons, the number and scope of files and materials for the case, the number of trial hearings,[94] the number of interlocutory appeals,[95] as well as the involvement of third parties or the necessity of judicial cooperation in criminal matters, including evidence requests.[96] Even when a case's complexity creates lengthy proceedings, it does not necessarily mean that this length is unreasonable.[97] Similarly to the overall length, this criterion should again be considered on a subsidiary level.[98]

Impact of length: Under this criterion, the impact of the length of proceedings on the accused is considered. The German Federal Court of Justice (BGH)[99] held that, in addition to the blatant delay caused by the inactivity of prosecuting authorities, procedure-related health impairments of the accused should have been given decisive weight in the compensatory sentencing evaluation.[100]

2.3.3 Reasons for Delay in the German National Context

In the German national context, one reason for delay is the extension of substantive criminal law: "whoever sows laws will reap proceedings".[101] In legal literature, economic and environmental crimes are considered to be the main trigger for lengthy proceedings due to their considerable legal complexity and undefined legal terms, which require interpretation.[102] Another factor that may be put forward as causing lengthy proceedings is if the Defence appears to deliberately prolong the proceedings for its own interests.[103] The Defence spends time on applications to take evidence, which can become a form of Defence strategy.[104] Another factor is the principle of legality, which may oblige the prosecuting authorities to build cases against a multiplicity of accused persons and/or with a multiplicity of charges.[105] An overload of the judiciary due to a lack of personnel and insufficient technical and financial

[89] NJW 2006, 1529 (1532); NJW 2005, 1814.
[90] See NJW 2006, 672.
[91] Plankemann (2015), p. 61.
[92] Ibid., p. 65; see also Pest (2017), p. 49, differing (1991), p. 110.
[93] See Waßmer (2006); Plankemann (2015), p. 66; See Pest (2017), p. 49; BVerfG 8, 260 (264).
[94] NJW 1996, 2739.
[95] NStZ 1982, 291.
[96] NJW 1972, 404 (405).
[97] NVwZ 2013, 789.
[98] See Plankemann (2015), p. 64.
[99] The Federal Court of Justice serves as the highest appellate instance in criminal cases, see Section 135 of the German Judicature Act.
[100] NStZ-RR 2004, 231.
[101] See Papier (2006).
[102] See Pest (2017), p. 125.
[103] Landau (2007), p. 122; See also Pest (2017), pp. 126–127.
[104] Landau (2007), p. 122.
[105] "Verfolgungszwang", See Peters (2016) in: MüKo, § 152, paras 35 et seqq.

resources[106] has further effects on the length of the proceedings,[107] but is not accepted by the ECtHR as a justification for their extension.[108] Other factors are improper management of the proceedings and excessive appeal systems.[109] There are other reasons that can affect length including time spent on the logistics of the witnesses and experts and health problems of the accused.[110]

2.3.4 International Human Rights Courts' Criteria for Assessing Whether the Length of Proceedings is Reasonable

According to Article 6(1) of the ECHR, "everyone charged with a crime has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". A similar provision is contained in Article 8(1) of the Inter-American Convention on Human Rights (IACHR) and in Article 7(1)(4) of the African Charter on Human and Peoples' Rights (AfCHPR). To start with, the ECtHR developed three criteria when interpreting the term "reasonable time" in Article 6(1) ECHR.[111] These criteria were developed continuously and later joined by a fourth[112] and were later adopted and implemented in the case law of the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (AfCtHPR).[113] The criteria are used to assess not only criminal but also civil and administrative proceedings, hence the terminology used by the courts does not always neatly fit that of criminal proceedings. The Court defines criminal proceedings specifically as starting when the person concerned is notified and ending when their status is finally determined – similarly to this project's definition of proceedings in the ICC context.

In assessing the reasonableness of the length of proceedings the ECtHR takes into account the following criteria in light of the particular circumstances of the case: (i) the complexity of the case, (ii) the conduct of the applicant,[114] (iii) the conduct of the competent authorities including prosecution agencies and (iv) what is at stake for the applicant.[115] Bearing in mind the particularities of national individual cases, the Court may use other additional criteria.[116] The Court is further not bound to the criteria and may make a general assessment of the length of proceedings.[117]

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[106] See Kudlich (2010); Pest (2017), p. 130.
[107] See Landau (2011).
[108] See *Tibi v. Ecuador*, IACtHR, 7 Sep 2004, para 176, www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf (accessed 2 Apr 2022); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, IACtHR, 21 Jun 2002, paras 143–152, www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_94_ing.pdf (accessed 2 Apr 2022).
[109] Pest (2017), pp. 132–135.
[110] Ibid. 136.
[111] *Neumeister v. Austria*, ECtHR, 27 Jun 1968, para 18, www.jstor.org/stable/20690501?seq=1 (accessed 2 Apr 2022).
[112] *Guillemin v. France*, ECtHR, 21 Feb 1997, para 43, www.hrcr.org/safrica/property/guillemin_france.html (accessed 3 Apr 2022).
[113] *Genie-Lacayo v. Nicaragua*, IACtHR, 29 Jan 1997, para 78, www.corteidh.or.cr/docs/casos/articulos/-seriec_30_ing.pdf (accessed 3 Apr 2022); *Valle Jaramillo et al. v. Colombia*, IACtHR, 27 Nov 2008, para 155, www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf (accessed 3 Apr 2022); *Rajabu v. Tanzania*, AfCtHRP, 28 Nov 2019, para 64, africanlii.org/afu/judgment/african-court/2019/7 (accessed 3 Apr 2022).
[114] The applicant in ECtHR contexts is not always necessarily the defendant of national criminal proceedings but can also be the plaintiff or respondent of other types of proceedings, according to Article 34 ECHR. The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.
[115] *Humen v. Poland*, ECtHR, 15 Oct 1999, para 60, www.globalhealthrights.org/wp-content/uploads/2013/10/-Humen-Poland-1995.pdf (accessed 3 Apr 2022).
[116] See for example, *Gjashta v. Greece*, ECtHR, 18 Oct 2007, para 16.
[117] *Mianowski v. Poland*, ECtHR, 16 Dec 2003, para 46, www.stradalex.com/en/sl_src_publ-_jur_int/document/echr_42083-98 (accessed 3 Apr 2022); see also Schmidt (2018), p. 18; and *Tibi v. Ecuador,* IACtHR, 7 Sep 2004, para 176, www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf (accessed 3 Apr 2022).

Complexity: The assessment of complexity is conducted with a general overview of all aspects of the case, including the facts, legal rules, court rulings and procedural issues. *Complexity of facts* relates not only to the examination of the evidence, participating witnesses and expert opinions, but also to the nature of the charges as determined by the facts, which might be sensitive, relate to national security, or include a multiplicity of victims and defendants.[118] *Complexity of law* may arise from jurisdictional and constitutional issues, unclear and complex statutes, as well as the need to interpret potentially applicable international treaties.[119] *Complexity of the proceedings* is another sub-category that may include language barriers, the need for international cooperation in criminal matters, the number of interlocutory appeals, participation of victims and other organisational challenges.[120] However, complexity alone is not sufficient to assess the unreasonableness of the length of proceedings, which must also be evaluated in light of the other criteria below.[121]

Conduct of parties: In its case law, the ECtHR held that only the State is able to violate the right to proceedings within a reasonable time.[122] The person concerned may not be held responsible for using all possible means to defend themselves,[123] but the ECtHR acknowledges that proceedings may be delayed by that person's actions, such as requests for adjournments, changes of lawyer, submission of evidence, failure to appear, delayed filings or making numerous appeals.[124] If this is the case, the State is not legally responsible for the delay.[125] Nonetheless, an unjustifiably delayed reaction of the authorities to retarding actions of the person concerned may not be tolerated either.[126] According to the ECtHR the term "parties" does not encompass the prosecutor.[127]

Conduct of authorities: The ECtHR considers this criterion to be the most important one when assessing the length of criminal proceedings. This criterion, as understood by the ECtHR, refers to the judges, courts' registries, the prosecutor, investigators and other national public authorities that are involved in the proceedings in whatever official manner. The relevant authorities are not in every instance responsible for delays that would lead to a violation of Article 6(1) ECHR; for example, cases where the proceedings have been extended or postponed due to the political and social climate, where uprisings have led to massive litigation and increased court workload,[128] would not lead to the State being held responsible for the resulting increased length of proceedings.[129] At the same time, bearing in mind Article 27 of the 1969 Vienna Convention on the Law of Treaties, a State cannot simply justify the length by pointing to an overload. Instead, the State is responsible for modifying its domestic system

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[118] Edel (2007), p. 16, www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16(2007).pdf (accessed 2 Apr 2022); Becker (2007), para 50; See *Acosta Calderón v. Ecuador*, IACtHR, 24 Jun 2005, paras 106–108, www.corteidh.or.cr/docs/casos/articulos/seriec_129_ing.pdf (accessed 4 Apr 2022); See *Eckle v. Germany*, ECtHR, 21 Jun 1983, para 51; a more complex case e.g. *Bejer v. Poland*, ECtHR, 4 Oct 2001, para 41, See also a more complex case due to macro criminality *Ituango Massacres v. Colombia*, IACtHR, Judgment, 1 Jul 2006, paras 294-300, www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_148_ing.pdf (accessed 4 Apr 2022).
[119] *Lorenzi, Bernardini and Gritti v. Italy*, ECtHR, 30 Oct 1991, para 16.
[120] Roagna (2018), p. 25.
[121] See European Commission for the Efficiency of Justice (CEPEJ): Length of Court Proceedings in the Member States of the Council of Europe Based on the Case Law of the European Court of Human Rights, CoE Publishing (2018), p. 17.
[122] See for example, *Monet v. France*, ECtHR, Judgment, 22 Sep 1993, para 30.
[123] *Erkner, Hofauer v. Austria,* ECtHR, 23 Apr 1987, para 68.
[124] See the full list of certain actions by the concerned person in Edel (2007), pp. 52–54.
[125] *Eckle v. Germany*, ECtHR, 21 Jun 1983, para 82.
[126] *Mincheva v. Bulgaria*, ECtHR, 2 Sep 2010, para 68.
[127] See Edel (2007), p. 51.
[128] See the workload of labour courts in Germany; see *Buchholz v. Germany*, ECtHR, 6 May 1981, paras 39 et seqq. and para 61.
[129] Calvez/Regis (2018), p. 20.

so that it does not cause violations.[130] Accordingly, neither the ECtHR nor the IACtHR consider budgetary, structural or organisational issues as sufficient justification.[131] If the State is not able to bring a justified explanation for the delays, the human rights courts may find a breach.[132] The practice shows that excessively long intervals between hearings and unjustified adjournments of hearings,[133] backlogs in the judicial system,[134] or legislative changes in the criminal procedure[135] do not justify delays. The relevant authorities bear responsibility if the witnesses, defendants or other persons involved in the proceedings do not attend, resulting in adjournments.[136] When the Court is not satisfied with the justifications the State brings forward, it may find a violation of the right to proceedings within a reasonable time.[137]

What is at stake for the applicant: This relatively new criterion, which is referred to by a variety of terms,[138] takes into consideration the situation of the person concerned, which can be affected by the length of proceedings, such as their life or health.[139] The IACtHR held that if the passage of time has a relevant impact on the legal status or relations of the individual, the procedure should progress more rapidly to resolve the case as soon as possible.[140] However, this fourth criterion is not always applied in the assessment of whether the length was reasonable, or the Court does not find anything that could be taken into account and remains silent on it.[141]

2.3.5 Findings of the Council of Europe on Causes of Delay in National Proceedings and Recommendations for Addressing Them

The 2018 Report of the European Commission for the Efficiency of Justice (CEPEJ) (part of the Council of Europe) has identified, on the basis of the case law of the ECtHR, three types of reasons which cause delays in national legal[142] (civil, criminal and administrative)

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[130] Karpenstein/Mayer EMRK Article 6, para 82; Henzelin/Rordorf (2014); Kuijer (2013), p. 781, www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/KUIJER_Fair_Trial_Lengthy_Proc_CoE_2013.pdf (accessed 11 Nov 2022); and *Ricardo Canese v. Paraguay,* IACtHR, 31 Aug 2004, para 148, www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf (accessed 11 Nov 2022).

[131] See the list of delays caused by the authorities in Roagna (2018), pp. 58–63; See *Tibi v. Ecuador,* ACtHR, 7 Sep 2004, para 176, www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf (accessed 11 Nov 2022); and *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* ACtHR, 21 Jun 2002, paras 143–152, www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_94_ing.pdf (accessed 11 Nov 2022).

[132] See *Corigliano v. Italy*, ECtHR, 10 Dec 1982, para 47, www.legal-tools.org/doc/1c845e/pdf/ (accessed 3 Apr 2022).

[133] *Ilijkov v. Bulgaria*, ECtHR, 26 Jul 2001, paras 116 et seqq.

[134] *H.T. v. Germany*, ECtHR, 11 Oct 2001, paras 31–38.

[135] *Sahiner v. Turkey*, ECtHR, 25 Sep 2001, paras 25–30, www.legal-tools.org/doc/514d0f/pdf/ (accessed 3 Apr 2022).

[136] See also *Tychko v. Russia*, ECtHR, 11 Jun 2015, para 68; See also "Guide on Article 6 of the European Convention on Human Rights", ECHR (2021), https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf (accessed 11 Nov 2022), para 333.

[137] See, Edel (2007), pp. 35–36; See *Las Palmeras v. Colombia*, IACtHR, Preliminary objections, 4 Dec 2000, para 38.

[138] On such as "impact of the proceedings", see Henzelin/Rordorf (2014), p. 86, www.lalive.law/data/publications/-NJECL_05_01_0078.pdf (accessed 3 Apr 2022); on such as "what is at stake for the applicant" see *Mikulić v. Croatia*, ECtHR, 7 Feb 2002, para 44; for "any detrimental effects that the delay may have had on the legal position of the complainant", review *Vojnovic v. Croatia*. HRC, 30 Mar 2009, para 8.4; regarding "the level of prejudice to the defendant", see www.worldcourts.com/hrc/eng/decisions/2009.03.30_Vojnovic_v_Croatia.htm (accessed 4 Apr 2022); See Clooney/Webb (2021), p. 400, for "adverse effect of the duration of the proceedings on the judicial situation of the person involved in it".

[139] See *Portington v. Greece,* ECtHR, 23 Sep 1998, para 34; See *Rajabu v. Tanzania*, ACtHPR, 28 Nov 2019, para 64, africanlii.org/afu/judgment/african-court/2019/7 (accessed 3 Apr 2022); see also Clooney/Webb (2021), p. 400.

[140] *Valle Jaramillo et al. v. Colombia*, IACtHR, 27 Nov 2008, para 155; *Garibaldi v. Brazil*, IACtHR, 23 Sep 2009, para 138.

[141] See *Rajabu v. Tanzania*, 007/2015 AfCHPR 7, 8 Nov 2019, paras 64 et seqq.

[142] See Feltes (1989), pp. 42 et seqq.

proceedings. The first are external reasons, which include major political events, reforms and economic transitions.[143] The second are common among ECHR member States and include geographically uneven distribution of courts not reflecting the demographic and economic situation, an insufficient number and transfers of judges, backlogs of cases, the time spent by judges on extrajudicial activities, inaction of judicial authorities, the rules of evidence and systematic deficiencies in the rules of procedure. Furthermore it includes granting of, or the late refusal of, a request for legal aid, failure to summon parties or witnesses, late transmission of the case by the lower court to a higher instance, delay in serving evidence, numerous adjournments of hearings either out of the court's own motion or at the parties' request, excessive intervals between hearings or judicial errors of law.[144] The third includes delays specific to criminal proceedings, such as structural problems of the prosecution services, excessively long periods between hearings or failure of witnesses to attend hearings.[145]

2018 also saw the CEPEJ revise its guidelines for judicial time management. These guidelines assist stakeholders to monitor the length of proceedings. CEPEJ therein suggests the drafting of substantial and procedural law to be as clear as possible and the implementation of the CoE recommendations for efficient justice.[146]

Recommendations: The 1981 CoE Recommendations on measures facilitating access to justice distinguish five central principles:[147]

- *Principle of public information*: inform the public about proceedings
- *Principle of simplification*: simplify all procedural documents
- *Principle of acceleration:* eliminate out-of-date procedures and unnecessary formalities and ensure proper use of the right to appeal, in order not to delay proceedings
- *Principle of judicial costs:* simplify the system of court fees
- *Principle of special procedures*: accelerate special family law procedures, simplify the procedures where there is a dispute about a small amount of money

The 1986 CoE Recommendation concerning measures to prevent and reduce excessive workload in courts advises a reduction of the non-judicial tasks entrusted to judges, distribution of the workload in a balanced manner and evaluation of the possible impact of legal insurance on the increasing number of cases brought to court.[148]

The 1987 CoE Recommendation on the simplification of the criminal justice system suggests establishing principles for discretionary prosecution, summary procedures, out-of-court settlements and special simplified procedures and proposes a simplification of ordinary judicial procedures.[149] On simplification, the CoE recommends that trial court decisions be taken within strict time limits if the defendant is being detained. Furthermore, the Council recommends that written decisions, if they are necessary, should include nothing but the information the parties require for further use in the appeal phase.

The 1995 CoE Recommendations on the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases held that the Member States must implement all measures possible to accelerate appeals proceedings. Two such would be

[143] Calvez/Regis (2018), pp. 38–40.
[144] Ibid., pp. 40–58.
[145] Ibid., pp. 58–61.
[146] CEPEJ. *Revised Saturn Guidelines for Judicial Time Management (3rd Revision)*. 4 Feb 2018. p. 6.
[147] See CoE, "Recommendation No. R (81) 7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice" from 14 May 1981.
[148] CoE, "Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts" from 6 Sep 1986.
[149] CoE, "Recommendation No. R (87) 12 concerning the simplification of criminal justice" from 17 Sep 1987.

(i) limiting the number of written submissions exchanged between parties to a minimum and (ii) reducing the length of oral hearings to what is strictly necessary.[150]

The 1995 CoE Recommendations on the management of criminal justice recommend monitoring court proceedings in the Member States. This should inform the promotion of useful improvements because criminal justice management cannot always and everywhere be subject to the same rules.[151]

2.3.6 Criteria of UN Human Rights Committee for Assessing Whether Delay in Proceedings is Undue

In addition to the international human rights courts, the UN HRC has also established case law on the length of proceedings, also relying on the assessment of undue delay in light of the special circumstances of each case. It considers, among other things, the case's complexity and the conduct of the authorities, especially the manner in which the case was dealt with by the administrative and judicial authorities.[152] As a last criterion, the Committee assesses whether the delay had any detrimental effects on the legal position of the applicant.[153]

Complexity: The HRC, when examining complexity, held that a State cannot simply claim that a delay is due to the complexity of the case, but must prove the nature of the complexity.[154]

Conduct of the applicant or victim: Similarly to the human rights courts, the Committee does not see any violation of Article 14(3)(c) ICCPR simply resulting from adjournments[155] requested by the authors.[156]

Conduct of the authorities: The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State Party[157] does not justify unreasonable delays.[158] Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings justify such delays.[159]

Prejudice to the author: HRC case law is not consistent as to this criterion which is, in some cases, not even mentioned when long proceedings are assessed.[160] Undue delay is a concept designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary.[161] In the limited case law of relevance, the HRC mentions the impact on the author's deprivation of liberty, or delay due to pre-trial detention.[162]

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[150] CoE, "Recommendation No. R (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases" from 7 Feb 1995.
[151] CoE, "Recommendation No. R. (95) 12 on the management of criminal justice" from 11 Sep 1995.
[152] Clooney/Webb (2021), p. 400.
[153] Taylor (2020), pp. 270 et seqq. and 386 et seqq; See also Clooney/Webb (2021), pp. 400 et seqq.; See *Kelly v. Jamaica*, HRC, 17 Jul 1996, www.bayefsky.com/pdf/202_jamaica006.pdf (accessed 18 Mar 2022).
[154] *Hill v. Spain*, HRC, 2 Apr 1997, para 12.4, www.bayefsky.com/pdf/109_spainvws526.pdf (accessed 18 Mar 2022). See also Clooney/Webb (2021), p. 403.
[155] *Yasseen and Thomas v. Guyana*, HRC, 31 Mar 1998, para 7.11, hrlibrary.umn.edu/undocs/-session62/view676.htm (accessed 18 Mar 2022).
[156] The author is the person who makes the complaint to the HRC according to HRC terminology, see Rule 91 Rules of procedure of the Human Rights Committee.
[157] See "General Comment 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial", HRC from 23 Aug 2007, para 27.
[158] See Joseph/Castan (2013), p. 371; See also Smith (2019).
[159] *Fillastre and Bizouarn v. Bolivia*, HRC, 6 Nov 1990, para 6.5, www.bayefsky.com/html/101_bolivia336.php (accessed 21 Mar 2022).
[160] See "General Comment 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial", HRC (2007), para 35; See also Clooney/Webb (2021), p. 417.
[161] *Lumanog and Santos v. Philippines*, HRC, 20 Mar 2008, para 8.4, www.worldcourts.com/hrc/eng/Dec.isions/2008.03.20_Lumanog_v_Philippines.htm (accessed 21 Mar 2022).
[162] The Detention is, however, not the main issue which is under consideration in this project.

For example, a delay of four years and four months during which the complainant was kept in custody […] cannot be deemed compatible with Article 9(3) ICCPR, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the complainant or their representative.[163]

2.3.7 Criteria of International Criminal Tribunals for Assessing Whether Delay in Proceedings is Undue

The length of proceedings is not only a question of national proceedings; the international criminal justice system also faces the challenge posed by the length of proceedings.

The length of proceedings was already an issue at the International Military Tribunal for the Far East (IMTFE) at Tokyo.[164] This major war crimes trial in Japan was supposed to last no more than six months.[165] On 24 June 1947, more than one year after the trial had commenced, President Webb held a status conference on "matters in relation to expedition of the trial" with 23 Prosecution and 48 Defence Counsel;[166] the main factor creating undue length was the presentation of irrelevant or immaterial evidence by both the Prosecution and more so the Defence.[167] Another time-creating factor that "cannot be avoided" in the President's view was the difficulty of translation between Japanese and English.[168] Webb proposed speeding up the trial by setting time limits for each remaining subject-matter phase of the ongoing Defence case, the rebuttal and the summations, aiming to conclude the trial before the end of 1947.[169] Webb stated: "We must grant a just trial. Everything is subject to granting a just trial, but we must do our best to shorten the trial, to make it as short as is consistent with justice."[170]

The Defence opposed the suggested time limits as being too short and pointed instead to other factors creating undue length, namely too many charges brought forward in the indictment and sustained by the Tribunal,[171] the "uncertain character by the rules of evidence" on which even the Tribunal itself was divided in some instances,[172] factual difficulties for Defence investigations,[173] Prosecution objections to Defence evidence "time and again on the same point which had just been ruled upon",[174] overly extensive and detailed cross-examination,[175] lengthy debates on "collateral issues" that do not form part of the indictment,[176] and the

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[163] *Koné v. Senegal*, HRC, 27 Oct 1994, hrlibrary.umn.edu/undocs/html/vws386.htm (accessed 21 Mar 2022).

[164] Both the Nuremberg and the Tokyo International Military Tribunals were equipped with the following provision on the conduct of the trial in their legal frameworks, namely Article 18 of the Nuremberg Charter and Article 12 of the Tokyo Charter:

> The Tribunal shall:
> (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
> (b) take strict measures to prevent any action which will cause unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever […].

[165] See "Records of Far East Military Tribunals, International Military Tribunal for the Far East, Conference on Matters in Relation to Expedition of the Trial", National Archives of Japan, 24 Jun 1947, p. 31; See also Sedgwick (2012); Upon the eventual conclusion of the trial in November 1948, the Dutch Judge Röling reported a saying that had been circulating at Tokyo suggesting that "the judges enjoyed life so much, and the accused disliked death that much" that they had found a "gentleman's agreement" ensuring endless proceedings as stated in a letter from Judge Röling to Veen [not identified], Letter, 18 Nov 1948, Nationaal Archief (Netherlands), Collectie 544 B.V.A. Röling, 2.21.273, inv.nr. 27, *Officieuse briefwisseling*, pp. 149–150.

[166] "Records of Far East Military Tribunals, International Military Tribunal for the Far East, Conference on Matters in Relation to Expedition of the Trial", National Archives of Japan, 24 Jun 1947, pp. 1–3.

[167] Ibid., pp. 4–5.

[168] Ibid., p. 48.

[169] Ibid., pp. 5–11.

[170] Ibid., p. 32.

[171] Ibid., pp. 15–16.

[172] Ibid., pp. 16, 19.

[173] Ibid., pp. 19–20.

[174] Ibid., p. 20.

[175] Ibid., pp. 29–30.

[176] Ibid., p. 30.

Tribunal's erroneous rejection of Defence motions for dismissal ("no case to answer" motions).[177]

Prosecution counsel present at the conference found these arguments to be "evidence of a conscious feeling on the part of the Defence that they have delayed in the progress of the Defence phases".[178] Their suggestions for accelerating the trial were that the Defence no longer present objectionable documentary evidence,[179] that the tribunal rule on objections without the latter being argued by both sides,[180] that the Defence serve its documents three days instead of 24 hours in advance to the Prosecution so that any objections may be argued in writing,[181] that Defence Counsel's explanatory statements when introducing evidence should be limited more strictly,[182] that all of the judges have all evidentiary documents sufficiently in advance to form an opinion so to be able to immediately rule on objections to their tendering,[183] and that the Tribunal give more directions as to what is expected in cross-examination and summations.[184] According to one Prosecution counsel, their side was "most anxious to cooperate with the tribunal and the Defence in any plan that can shorten the length of this trial but we feel that the onus of this matter will lie with the Tribunal and that, after all, the Tribunal may have to act in a more definite way in regard to it."[185]

The International Criminal Tribunal for Rwanda (ICTR) was the first modern international criminal tribunal the Chambers of which assessed the length of its own proceedings. Later, the ICTY and ICTR determined that, because of their mandate and the inherent complexity of the cases before them, it was not unreasonable to expect that the judicial process would not always be as expeditious as before domestic courts.[186] However, the Tribunals were eager to take all possible measures to accelerate the proceedings.[187] The ICTR held that the accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about those serious crimes with which the accused is charged.[188] In consequence, the Tribunal adopted the human rights criteria for the assessment of an undue delay of proceedings,[189] although it did not apply them consistently.[190] In particular it considered five criteria:

1) The length of the delay;
2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of the facts and law;

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[177] Ibid., pp. 48–50.
[178] Ibid., p. 53.
[179] Ibid., p. 54.
[180] Ibid., pp. 54–56.
[181] Ibid., p. 57.
[182] Ibid., p. 61.
[183] Ibid., pp. 66–67.
[184] Ibid., pp. 71–72, 74–76.
[185] Ibid., p. 65.
[186] *Prosecutor v. Nahimana et al.*, ICTR, 28 Nov 2007, para 1076, www.legal-tools.org/doc/4ad5eb/ (accessed 21 Mar 2022).
[187] See *Prosecutor v. Renzaho*, ICTR, 1 Apr 2011, para 240, www.legal-tools.org/doc/0abb32/ (accessed 21 Mar 2022).
[188] *Prosecutor v. Mugenzi et al,* ICTR, 8 Nov 2002, para 31, www.legal-tools.org/doc/2aa246/ (accessed 21 Mar 2022). In assessing the undue delay of a particular case, the Chambers often compared their case to other cases of the same tribunal, see *Prosecutor v. Bizimungu et al*, ICTR, 30 Sep 2011, para 78, http://www.legal-tools.org/doc/7077fa/ (accessed 21 Mar 2022), see also *Prosecutor v. Kvocka et al*, ICTY, 25 May 2001, para 20; *Prosecutor v. Halilovic*, ICTY, 27 Nov 2006, para 18; See also Press Release of the Special Court for Sierra Leone: "The Court Rules Trials Should be Held without Undue Delay", 5 Nov 2003, rscsl.org/Documents/Press/2003/pressrelease-110503.pdf (accessed 4 Apr 2022); See also Besnier (2014), p. 11.
[189] *The Prosecutor v. Mugiraneza*, ICTR, 27 Feb 2004, p. 3, cld.irmct.org/assets/filings/04-02-27-Mugiraneza-Decision-on-Indictment-and-Speedy-Trial.pdf (accessed 4 Apr 2022), See Dissenting opinion of Judge Pocar; See *The Prosecutor v. Mugiraneza*, ICTR, 27 Feb 2004, p. 13, cld.irmct.org/assets/filings/04-02-27-Mugiraneza-Decision-on-Indictment-and-Speedy-Trial.pdf (accessed 4 Apr 2022).
[190] See Farrell (2003), p. 113.

3) The conduct of the parties;
4) The conduct of the relevant authorities;
5) The prejudice to the accused, if any.

The length of the delay: The ICTR was, in one exemplary case, of the view that a length of twelve years from arrest to judgment does not *per se* constitute undue delay under the ICTR Statute. Any delay must be evaluated with regard to the totality of those matters outlined by the Chamber.[191] A delay that is substantial would be undue if it occurred because of any improper tactical advantage sought by the Prosecution.[192] The Appeals Chamber in the *Nyiramasuhuko et al.* case noted under the Statute the right to be tried without undue delay does not protect against every delay in the proceedings.[193] It is noteworthy that the ICTR regards the terms "delay" and "length" of proceedings as equivalent. The reasonableness of a period of delay cannot be translated into a fixed length of time and must be assessed on a case-by-case basis.[194]

The complexity: The criterion of complexity as applied by the ICTR comprises a multitude of phenomena. Besides the number of charges, the number of accused, the number of witnesses, the volume of the evidence, the particular complexity of the facts and the law,[195] the ICTR also considered the role and the position of the accused persons as directly influencing the complexity of a case.[196] In the *Gatete* case, the Appeals Chamber found that the Trial Chamber had erred in assessing the complexity of a single-accused case. The Appeals Chamber held that a 30-days trial with 49 witnesses and 146 exhibits justified a pre-trial delay of more than seven years.[197] Assessing the length of proceedings, however, does not end with assessing the complexity of a case.[198]

Though in a different context from the assessment of the length of proceedings, namely the remuneration guidelines for Defence Counsel, the ICTY developed an instructive scale for the complexity of cases, dividing them into three levels and considering various factors, not limited to the position of the accused, the number of accused, the witnesses, the number of counts, the spatial scope of the charges and the legal or factual arguments.[199]

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[191] *The Prosecutor v. Bizimungu et al,* ICTR, 30 Sep 2011, para 74, ucr.irmct.org/scasedocs/case/ICTR-99-50#trialJudgment (accessed 4 Apr 2022); *The Prosecutor v. Bizimungu et al,* ICTR, 23 Jun 2010, para 11, www.worldcourts.com/ictr/eng/decisions/2010.06.23_Prosecutor_v_Bizimungu.htm (accessed 4 Apr 2022); See *The Prosecutor v. Nahimana et al,* ICTR, 28 Nov 2007, para 1075, ucr.irmct.org/scasedocs/case/ICTR-99-52#eng (accessed 4 Apr 2022). It is noteworthy that the ICTR equals the terms "delay" and "length" of proceedings.

[192] *The Prosecutor v. Kovačević,* ICTY, para 32, www.icty.org/x/cases/milan_kovacevic/acDec./en/80702ms3.htm (accessed 3 Apr 2022).

[193] *The Prosecutor v. Halilovic.* ICTY, 27 Oct 2006, para 17, www.icty.org/x/cases/halilovic/acDec./en/061027.pdf (accessed 3 Apr 2022); *The Prosecutor v. Nyiramasuhuko et al.* ICTR, 14 Dec 2015, para 364, unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-42/appeals-chamber-judgements/en/151214-judgement.pdf (accessed 3 Apr 2022).

[194] *The Prosecutor v. Bizimungu et al,* ICTR, 23 Jun 2010, para 11, www.worldcourts.com/-ictr/eng/Dec.isions/2010.06.23_Prosecutor_v_Bizimungu.htm (accessed 3 Apr 2022).

[195] See *The Prosecutor v. Nyiramasuhuko et al*, ICTR, 24 Jun 2011, para 142, www.worldcourts.com/ictr/-eng/Dec.isions/2011.06.24_Prosecutor_v_Nyiramasuhuko.htm (accessed 21 Mar 2022); *The Prosecutor v. Karadžić*, ICTR, 8 Sep 2016; *The Prosecutor v. Ndindiliyimana*, ICTR, para 43; See also how the ICC later adopted this approach, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-43, para 41 https://www.icc-cpi.int/pages/record.aspx?uri=1599831# (accessed 21 Mar 2022).

[196] *The Prosecutor v. Bizimungu et al.*, ICTR, 30 Sep 2011, para 77, http://www.legal-tools.org/doc/7077fa/ (accessed 21 Mar 2022).

[197] *The Prosecutor v. Gatete.* ICTR, 9 Oct 2012, para 29, https://ucr.irmct.org/LegalRef/CMSDocStore/-Public/English/Judgement/NotIndexable/ICTR-00-61/MSC40138R0000566220.PDF (accessed 3 Apr 2022); See Hoven (2011), pp. 834 et seqq., www.zis-online.com/dat/artikel/2011_10_621.pdf (accessed 3 Apr 2022).

[198] *The Prosecutor v. Nyiramasuhuko et al,* ICTR, 15 Dec 2015, para 359, unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-42/appeals-chamber-judgements/en/151214-judgement.pdf (accessed 3 Apr 2022).

[199] Level 1 - difficult; level 2 - very difficult; and level 3 - extremely difficult/leadership cases, see ICTY Manual on Developed Practices (2009), p. 213 www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022); See also Gut et al (2013), p. 1229; and Van Sliedregt/Vasiliev (2014), p. 280.

In addressing the question of the length of the proceedings within the Special Tribunal for Lebanon (STL), the Tribunal highlighted the complexity of the case, which is based on the trial records including over 3,000 exhibits, the evidence from over 300 witnesses, the transcript of 37,000 pages and special circumstances surrounding the Tribunal and multiple indictments.[200] The STL emphasised that several factors such as the need for witnesses to travel, the challenges of witnesses testifying with simultaneous translation into at least two other languages and the protection of witnesses all slowed down the proceedings as a whole.[201]

The conduct of the parties:[202] While examining this criterion, the *ad hoc* tribunals believed that the conduct of the defendant could speak against an allegation of undue delay.[203] In its ruling, the STL considered the Defence's strategic litigation to have been a factor in extending the proceedings, but did not find the delay it caused was undue.[204]

The conduct of the relevant authorities: The ICTR Appeals Chamber in the *Gatete* case identified an undue delay attributable to the Prosecutor, who was not able to justify it.[205] With regard to the Prosecutor having joined the cases and prolonged the proceedings, the Appeals Chamber in *Nyiramasuhuko et al.* did not find any violation of the fair trial principle, but noted that continued non-compliance with disclosure deadlines created an unjustified delay.[206] In dealing with the authorities, the defendant in that case complained about the failure of national authorities to cooperate as well as about problems arising at the Tribunal, namely the replacement of a judge and witnesses not being able to travel to Arusha on time.[207] The Appeals Chamber found that these activities or non-activities may affect the length of the proceedings, but not necessarily to the degree of causing an undue delay.[208] However, delays which result from simultaneous participation of the judges in multiple proceedings may not be considered as justified.[209] Accordingly, workload logistics may not be an explanation for delays and may not hinder their assessment as undue.[210] The STL did not find the adjournments at the beginning of the proceedings that had resulted from the indictment and the joinder of the cases to have been undue.[211]

The prejudice to the accused, if any: The case law of the *ad hoc* tribunals is not consistent as to the assessment of prejudices to the accused. In any event, the Tribunal requires proof from the defendant that the delay caused prejudice to them and that it was, accordingly, undue.[212]

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[200] *The Prosecutor v. Ayyash et al*, STL, 18 Aug 2020, paras 967–970, www.stl-tsl.org/crs/assets/Uploads/-20200818-F3840-PUBLIC-Summary-of-Judgment-FILED-EN-FINAL.pdf (accessed 3 Apr 2022).
[201] Ibid., para 967.
[202] The *ad hoc* tribunals used this criterion less in comparison to the others, see more in Zeegers (2016), pp. 314 et seqq.
[203] *The Prosecutor v. Šešelj*, ICTY, 29 Sep 2011, para 26, www.icty.org/x/cases/seselj/tdec/en/110929.pdf (accessed 3 Apr 2022).
[204] *The Prosecutor v. Ayyash et al,* STL, 18 Aug 2020, para 975, www.stl-tsl.org/crs/assets/Uploads/20200818-F3840-PUBLIC-Summary-of-Judgment-FILED-EN-FINAL.pdf (accessed 3 Apr 2022); See disclosure process by the Co-Prosecutors does not violate the right to fair trial in the light of additional time and resources provided to the Defence; see also *Case 002/02,* ECCC, 16 Nov 2018, para 148, www.eccc.gov.kh/en/document/court/case-00202-judgement (accessed 3 Apr 2022); and *Case 002/01,* ECCC, 7 Aug 2014, para 44, www.legal-tools.org/doc/4888de/pdf/ (accessed 3 Apr 2022).
[205] *The Prosecutor v. Gatete.* ICTR, 9 Oct 2012, para 23, ucr.irmct.org/LegalRef/-CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-00-61/MSC40138R0000566220.PDF (accessed 3 Apr 2022).
[206] *The Prosecutor v. Nyiramasuhuko et al,* ICTR, 15 Dec 2015, paras 365–372, www.legal-tools.org/doc/b3584e/ (accessed 21 Mar 2022).
[207] Ibid., para 364.
[208] Ibid., para 364.
[209] Ibid., para 376.
[210] *The Prosecutor v. Šainović et al*, ICTY, 23 Jan 2014, para 101, www.icty.org/x/cases/milutiNov.ic/-acjug/en/140123.pdf (accessed 21 Mar 2022).
[211] *The Prosecutor v. Ayyash et al*, STL, 18 Aug 2020, paras 969–974, www.stl-tsl.org/crs/assets/-Uploads/20200818-F3840-PUBLIC-SumMar.y-of-Judgment-FILED-EN-FINAL.pdf (accessed 21 Mar 2022).
[212] Zeegers (2016), p. 327. See also Clooney/Webb (2021), p. 418.

In the case of *Nyiramasuhuko et al*., where the Appeals Chamber identified unjustified delays attributable to the Prosecutor and the judges resulting in prolonged detention, it found that these delays were *per se* prejudicial.[213]

2.3.8 Reports and Findings on the Length of International Criminal Proceedings at the Ad Hoc Tribunals

In order to expedite their proceedings, the *ad hoc* tribunals developed and published various procedural instructions.[214] In the 2009 ICTY Report on Developed Practices, it was noted that the judges are confronted with high numbers of witnesses and transcripts and high volumes of evidence, the assessment of which was time-consuming.[215] In order to deal with the high amount of cases, not only was the number of judges at the *ad hoc* tribunals increased[216] but also the court facilities were enlarged.[217]Another factor slowing down the proceedings was found to be the multilingualism at the tribunals.[218] This included, for example, the transcription in Kinyarwanda from the original audio tapes and the subsequent translation into the official languages of the tribunal.

The ICTY Report identified several factors that slowed down the proceedings at the *ad hoc* tribunals, such as the overloading of the indictments with charges[219] that made it difficult to cope with the extent of issues to be proven,[220] or the joinder of accused[221] and crimes, [222] which made it difficult to jointly prosecute all individuals of one criminal case. The report highlighted

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[213] *The Prosecutor v. Nyiramasuhuko et al*, ICTR, 15 Dec 2015, para 388, www.legal-tools.org/doc/b3584e/ (accessed 21 Mar 2022).

[214] See average time used at the tribunals in Galbraith (2009), pp. 113 et seqq., repository.law.umich.-edu/cgi/viewcontent.cgi?article=1103&context=mjil (accessed 1 Apr 2022). See also Practice Direction on The Length of Briefs and Motions on Appeal, ICTR, 8 Dec 2006, unictr.irmct.org/sites/unictr.org/files/legal-library/pd-appeal-briefs_en_fr.pdf (accessed 5 Apr 2022); Further, see the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, ICTR, 8 Dec 2006, https://unictr.irmct.org/sites/unictr.org/files/legal-library/pd-written-submissions_en_fr.pdf (accessed 5 Apr 2022); United Nations International Residual Mechanism for International Criminal Tribunals. Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his or her Sentence of Imprisonment, 24 Apr 2014, https://www.irmct.org/sites/default/files/documents/140424-practice-direction-procedure-designtion-state-mict-2-rev-1.pdf (accessed 5 Apr 2022); United Nations International Residual Mechanism for International Criminal Tribunals. Practice Direction on Formal Requirements for Requests for Review of Administrative Decisions, 20 Feb 2019, https://www.irmct.org/sites/default/files/documents/190220-practice-direction-mict-9-rev-1-en.pdf (accessed 5 Apr 2022); United Nations International Residual Mechanism for International Criminal Tribunals. Practice Direction on Requirements and Procedures for Appeals, 20 Feb 2019, https://www.irmct.org/-sites/default/files/documents/190220-practice-direction-requirements-procedures-appeals_0.pdf (accessed 5 Apr 2022); United Nations International Residual Mechanism for International Criminal Tribunals, Practice Direction on Filings made before the Mechanism for International Criminal Tribunals, 4 Jan 2019, https://www.irmct.org/sites/default/files/documents/121214-practice-direction-filings-irmct-190401.pdf (accessed 5 Apr 2022).

[215] ICTY Manual on Developed Practices, ICTY and UNICRI (2009), p. 9, paras 13–14, www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022).

[216] UNSC Resolution 1411 from 17 May 2002, www.refworld.org/docid/3d528a60e.html (accessed 3 Apr 2022); Shahabuddeen (2012), pp. 10 et seqq.; Bohlander (2007), p. 193; and Cline (2018), p. 72.

[217] Cline (2018), p. 73.

[218] Ibid., p. 75. See also Møse (2014), p. 8, unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-managing-trials-mose.pdf (accessed 1 Apr 2022).

[219] ICTY Manual on Developed Practices, ICTY and UNICRI (2009), p. 36, para 6, www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022). See also Sander (2021), p. 129, Khan et al (2010), p. 174.

[220] The jurisprudence of the ICTY found there is no need for the Prosecution to include evidence in the indictment. See ICTY and UNICRI. ICTY Manual on Developed Practices, ICTY and UNICRI (2009), p. 36, para 8, www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdfw (accessed 1 Apr 2022).

[221] However, the ICTY Manual on Developed Practices found that where joinder of accused was possible, it was advisable. See ibid., p. 41, para 24.

[222] Ibid., p. 41, para 22.

that, due to the number of procedural steps, a minimum period of eight months was required after the defendant arrives at the seat of the Tribunal to begin the trial.[223] The timeline of pre-trial proceedings included the arrival of an accused, the assignment of the case to a Trial Chamber, the issuance of orders for the initial appearance, the assignment of duty counsel to the accused, their initial appearance, the designation of a pre-trial judge, the assignment of permanent counsel to the accused, their entry pleas, disclosure to the accused of supporting material accompanying the indictment and of prior statements of the accused obtained by the Prosecution and a meeting with the parties for implementation of the work plan.[224] This appears to have happened during the first month of the pre-trial proceedings.[225] In order to move forward in the pre-trial proceedings, other procedural steps were taken, such as decisions on preliminary Defence motions, a first status conference, prosecutorial disclosure to the accused of copies of witness statements and of exculpatory and other relevant material, further status conferences and decisions on other motions.[226] As soon as the preliminary motions were dealt with, the Chamber ordered the filing of pre-trial briefs. This included a pre-trial brief by the Prosecution no less than six weeks prior to the pre-trial conference and a pre-trial brief by Defence no less than three weeks prior to the pre-trial conference.[227]

To shorten the time of the pre-trial proceedings, the Chamber can request the Prosecution to reduce the indictment[228] or order a redaction or review of the list of witnesses to avoid unnecessary cumulative evidence.[229] It can further encourage the parties to agree on certain facts which are not the subject of dispute.[230] With respect to the trial management, the ICTY established time limits for the presentation of evidence, which encourages the parties to be highly organised and prepare only the most important and valuable evidence to be presented through live testimony.[231] To speed up the proceedings Rule 87(C) ICTY-RPE has been amended to combine guilty verdicts and sentencing judgments in one decision.[232]

Although the ICTR was set to complete its cases in 2010,[233] there was no real pressure to finish the work by the agreed date.[234] The former President of the ICTR, Judge Møse, raised the issue that Tribunal's legal officers should be informally in contact with the parties to enquire whether there were upcoming problems, to avoid unexpected delays.[235] He found that one of the reasons for delay was new evidence obtained during witness preparation that had not been stated in the prior testimony, which led to granting additional time for the preparation of cross-examination.[236] Another issue at the ICTR affecting length of time was the delayed disclosure

[223] Ibid., p. 54, para 1.
[224] Stage 1 of the pre-trial phase at the ICTY.
[225] See ICTY Manual on Developed Practices, ICTY and UNICRI (2009), Annex 5, p. 71, www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022).
[226] Stage 2 of the pre-trial phase at the ICTY.
[227] Stage 3 of the pre-trial phase at the ICTY.
[228] See ICTY Manual on Developed Practices, ICTY and UNICRI (2009), p. 66, www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022). See more in Kuczyńska (2015), p. 331. Similar provision was considered at the ICTR, see more in Møse (2014), p. 9, unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-managing-trials-mose.pdf (accessed 1 Apr 2022).
[229] ICTY Manual on Developed Practices, ICTY and UNICRI (2009), p. 60, www.icty.org/x/file/About/-Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (accessed 1 Apr 2022).
[230] Ibid., p. 75.
[231] Ibid., p. 75, paras 1–5,13.
[232] Safferling (2012), p. 115.
[233] See UNSC Resolution 1503 from 28 Aug 2003, p. 115, www.icty.org/x/file/Legal%20Library/-Statute/statute_1503_2003_en.pdf (accessed 1 Apr 2022).
[234] See Safferling (2012), p. 28. See also a letter from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council dated 17 Nov 2015, p. 115, unictr.irmct.org/sites/unictr.org/files/legal-library/151117_ictr_final_report_en.pdf (accessed 1 Apr 2022).
[235] Møse (2014), p. 13, www.unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-managing-trials-mose.pdf (accessed 1 Apr 2022).
[236] Ibid., p. 11.

of evidence.[237] These disclosure delays led to the development of a specific disclosure database (Electronic Disclosure System, EDS).[238]

Overall, it can be stated that at all three levels of the national, regional human rights and *ad hoc* tribunals, similar criteria were used to assess the reasonableness of the length of the proceedings. Likewise the findings on the reasons for the delay are also relatively similar.

2.4 Comparative Length of Criminal Proceedings Regarding Crimes Under International Law

At this point, the practical length of international criminal proceedings must also be taken into account, which will make it possible to see how long international criminal proceedings really take.

To allow meaningful legal comparison of the length of proceedings, only those criminal proceedings may be considered that are of a similar nature. This includes criminal proceedings before the *ad hoc* tribunals and hybrid courts and national criminal proceedings which can be characterised as coming under universal jurisdiction (genocide, crimes against humanity, war crimes). This is based on the fact that the international crimes were committed abroad and the evidence is similarly located. The plea agreement cases are excluded because of their unique nature.

2.4.1 ICTR and ICTY Cases

The average duration of all ICTR proceedings from the arrest of the accused to the final decision is 2,842 days, or almost 7.7 years. The overall length at the ICTY is shorter at 2,428 days, which makes on average of almost 6.6 years. It is also important to see the duration of the individual phases of the proceedings, such as between:[239]

- the arrest and the commencement of the trial (trial preparation),
- the first day of the opening of the trial and the last day of the closing arguments (trial),
- the last day of the trial and the judgment (deliberation),
- the start and finish of the appeal proceedings (appeal).

[237] See Baghel (2014), pp. 7 and 14, unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-streamlining-cases-through-evidence-icty-perspecitve-baghel.pdf (accessed 1 Apr 2022).
[238] Ibid., p. 14. See also Safferling (2012), p. 373.
[239] All numbers were exported from publicly available documents.

Days on average of the phases of the proceedings at the ICTR and ICTY					
	Trial preparation	**Trial**	**Deliberation**	**Appeal**	**Total**
Overall ICTR	1,305	661	228	646	2,842
Overall ICTY	745	587	180	898	2,412
Multi-accused cases ICTR	1,640	1,504	392	1,069	4,607
Multi-accused cases ICTY	771	580	145	1,056	2,554
Single-accused cases ICTR	1,221	450	187	541	2,400
Single-accused cases ICTY	756	617	213	817	2,405
Single-accused cases with max. 3 charges ICTR	1,323	305	161	384	2,174
Single-accused cases with max. 3 charges ICTY	811	453	124	720	2,109
Single-accused cases with 4-8 charges ICTR	1306	515	200	586	2,606
Single-accused cases with 4-8 charges ICTY	766	510	127	829	2,233
Single-accused cases with more than 8 charges ICTR	849	484	190	668	2,190
Single-accused cases with more than 8 charges ICTY	711	834	358	871	2,774

Table 1 Days on average of the phases of the proceedings at the ICTR and ICTY

It is not correct that, if the trial preparation took longer compared to the other trials, the trial itself also took longer. This proved true also with trial deliberations. In particular, there is a need to consider the procedural activities that contributed to the length of each phase of the case.

The following section contains the longest procedural phases of the cases in the practice of the ICTR and ICTY, which describe the reasons for the length of every procedural phase and provide information on the charges, witnesses and the materials included in the case. They are divided into single and multi-accused cases. This is linked to the different dimensions of

the cases given especially that the multi-accused cases have differing lengths of proceedings due to the number of accused persons, the number of charges, as well as the number of witnesses and documentary evidence presented in the case.

2.4.1.1 ICTR

Longest trial preparation phases of the single-accused cases: The longest trial preparation before the ICTR took 2,596 days (more than 7 years) in the *Gatete* case. The defendant was charged on six counts and 49 witnesses were heard at the trial. It included indictment amendments, number of protective measures, unsuccessful request of the Prosecutor to refer the case to the national jurisdiction, withdrawal of the Defence Counsels.[240] The trial itself lasted only 384 days and it took another 143 days for the verdict to be pronounced. Another 558 days were spent on the appeal process.

In the *Hategekimana* case with five charges, the trial preparation lasted for 2,214 days (more than 6 years), which is the second longest trial preparation of a single-accused case at the ICTR. The length of time it took to prepare for the trial in this case was linked to the fact that it was initially a multi-accused case which was later separated, and a request to refer the case to the courts of the Republic of Rwanda was considered and rejected several times after which the Prosecution filed an amended indictment.[241] The *Hategekimana* trial lasted 416 days and included presentation of 40 witnesses. Another 222 days were spent on the judgment.

Another lengthy trial preparation of 1,956 days (more than five years) in the *Nchamihigo* case was connected with the multiple withdrawals of the defendant's legal counsels.[242] The trial with four charges, 60 witnesses and 154 exhibits lasted for 484 days and the judgment was passed after another 294 days. The third longest single-accused trial with preparation with three charges lasted another 1,930 days in the *Nsengimana* case. The length was due to the court being overloaded and unable to set the commencement date of the trial.[243] Another 518 days with 42 witnesses and 105 exhibits were spent on the trial, the length of which was caused by adjournments, subject to the hearing of an expert and a witness.[244]

Longest trial phases of the single-accused cases: The longest single-accused trial phase with 1,036 days (almost three years), six charges and 55 witnesses and 151 exhibits was the *Ngirabatware* case. The trial preparation with 737 days included time for the amendment of the indictment, preparation time for the Defence and withdrawal of the Defence Counsel.[245] The length of the trial phase with 1,036 days was due to cooperation issues between the Defence and France, Belgium, Togo, the World Bank, Senegal, Switzerland, non-disclosure by the Defence, issues around protection, logistics, testimonies of the witnesses and numerous other activities.[246]

The second longest trial phase of single-accused cases at the ICTR was the *Zigiranyirazo* case with five charges, 66 witnesses and 227 exhibits which lasted for 969 days. Trial

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[240] See *The Prosecutor v. Gatete*, ICTR, 31 Mar 2011, Annex A, paras 2–12, www.legal-tools.org/doc/f6c347/ (accessed 1 Apr 2022).

[241] See *The Prosecutor v. Hategekimana*, ICTR, 6 Dec 2010, Annex A, para 8, www.ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-00-55B/MSC39403R0000562988.PDF (accessed 1 Apr 2022).

[242] See *The Prosecutor v. Nchamihigo*, ICTR, 18 Mar 2010, Annex A, para 405, www.ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-01-63/MSC50956R0000561436.PDF (accessed 1 Apr 2022).

[243] See *The Prosecutor v. Nsengimana*, ICTR, 17 Nov 2009, Annex A, para 857, www.ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-01-69/MSC31576R0000560727.PDF (accessed 1 Apr 2022).

[244] Ibid., para 863.

[245] See *The Prosecutor v. Ngirabatware*, ICTR, 20 Dec 2012, Annex A, paras 7–12, www.unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-54/trial-judgements/en/121220.pdf (accessed 1 Apr 2022).

[246] See narrow in ibid., paras 17 et seqq.

preparation lasted for 1,530 days and included several amendments to the indictment. The length of the trial phase was due to the "no case to answer" motion, actual violation of the right to be tried in the defendant's presence and other issues.[247] Deliberation in this trial lasted for 193 days, followed by appeal proceedings spanning another 343 days.

The third longest trial phase of single-accused cases at the ICTR was the *Rwamakuba* case with 876 days. The trial preparation with four charges and 49 witnesses lasted for 1,863 days and was connected to the joinder of the multi-accused case, withdrawal of the Presiding Judge and severance of the case. During the trial phase, the defendant refused to be present in court believing the witnesses to be manipulated, witnesses refused to testify, the Court found that the Prosecution demonstrated a lack of diligence and had failed to persuade the Tribunal that two witnesses were critical to the case against the accused.[248] The deliberation in this case lasted for another 152 days.

Longest appeal phase of the single-accused cases: The longest appeals phase among all single-accused cases took place in the *Rutaganda* case with 41 witnesses which lasted for 1,267 days (almost three and a half years). The length was due to a change of Defence Counsel, translation issues, protective measures for the witnesses and late examination of an expert witness. It took another 325 days to deliver the appeals judgment after the appeal hearing.[249]

Longest trial preparation phase of the multi-accused cases: The longest trial preparation phase among the multi-accused cases at the ICTR took place in the *Karamera et al.* case with 2,663 days (more than seven years). This case included three accused, 153 witnesses and over 1,400 exhibits. The *Karamera et al.* trial phase was also one of the the longest trial phases among multi-accused cases at the ICTR with 2,166 days (almost six years). The trial judgment in this case was delivered after 161 days, after which the appeal proceedings lasted another 1,031 days (almost three years).

Longest trial phase of the multi-accused cases: The longest multi-accused trial lasted for 2,879 days (almost eight years) in the *Nyiramasuhuko et al.* case. The case included six accused persons, 11 charges and 189 witnesses. Another 1,060 days were needed to prepare the trial. The trial included numerous adjournments for various reasons, such as absence of the defendants, replacement of a judge, unavailability of some witnesses and presentation of evidence for almost seven to eight months per defendant.[250] Another 785 days were spent on delivering the judgment, which was the second longest deliberation after the *Bizimungu et al.* case, which latter took 1,029 days.

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[247] See *The Prosecutor v. Zigiranyirazo,* ICTR, 18 Dec 2008, Annex A, paras 14 et seqq., www.worldcourts.com/ictr/eng/Dec.isions/2008.12.18_Prosecutor_v_Zigiranyirazo.htm (accessed 1 Apr 2022).

[248] See *The Prosecutor v. Rwamakuba* ICTR, 20 Sep 2006, paras 7–10, www.refworld.org/cases,ICTR,48abd580d.html (accessed 1 Apr 2022).

[249] See *The Prosecutor v. Rutaganda*, ICTR, 26 May 2003, Annex A, paras 1 et seqq., www.ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-03/MSC18282R0000621975.PDF (accessed 1 Apr 2022).

[250] See *The Prosecutor v. Nyiramasuhuko et al,* ICTR, 24 Jun 2011, paras 62, 76 et seqq., https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-42/trial-judgements/en/110624.pdf (accessed 1 Apr 2022).

Days before the ICTR by case							
N	**Case**	**Trial preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**	**Total years**
1	Akayesu	457	441	160	1,003	2,061	5
2	Bagaragaza	1,463	79	13	0	1,555	4
3	Bagilishema	260	358	231	391	1,240	3
4	Bagosora *et al.*	2,205	1,886	566	1,237	5,894	16
5	Bikindi	1,894	616	190	471	3,171	8
6	Bizimungu *et al.*	1,729	1,856	**1,029**	493	5,107	13
7	Gacumbitsi	768	217	108	750	1,843	5
8	Gatete	2,596	384	143	558	3,681	10
9	Hategekimana	2,214	416	222	519	3,371	9
10	Kajelijeli	1,012	855	138	539	2,544	6
11	Kalimanzira	909	350	63	485	1,807	4
12	Kamuhanda	508	758	252	606	2,124	5
13	Kanyarukiga	1,872	266	161	554	2,853	7
14	Karamera *et al.*	**2,663**	2,166	161	1,031	6,021	16
15	Karera	1,542	319	378	423	2,662	7
16	Kayishema *et al.*	313	585	185	742	1,825	4
17	Mpambara	1,552	226	131	0	1,909	5
18	Muhimana	1,603	297	98	753	2,751	7
19	Munyakazi	1,813	281	158	511	2,763	7
20	Musema	1,444	154	213	659	2,470	6
21	Muvunyi	1,850	480	81	717	3,128	8
22	Nahimana *et al.*	1,671	1,033	103	1,456	4,263	11
23	Nchamihigo	1,956	484	294	491	3,225	8
24	Ndahimana	391	381	99	717	1,588	4

Days before the ICTR by case							
N	**Case**	**Trial preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**	**Total years**
25	Ndindabahizi	781	183	135	915	2,014	5
26	Ndindilyimana *et al.*	1,696	1,740	325	1,505	5,266	14
27	Ngirabatware	737	1,036	148	728	2,649	7
28	Niyitegeka	1,224	256	77	420	1,977	5
29	Nizeyimana	469	248	271	893	1,881	5
30	Nsengimana	1,930	518	330	0	2,778	7
31	Nshogoza	364	49	99	251	763	2
32	Ntagerura *et al.*	1,646	1,061	194	863	3,764	10
33	Ntakutimana *et al.*	1,785	338	181	663	2,967	8
34	Ntawukulilyayo	567	323	131	498	1,519	4
35	Nyiramasuhuko *et al.*	1,060	**2,879**	785	**1,634**	6,358	17
36	Nzabonimana	630	711	223	915	2,479	6
37	Renzaho	1,562	403	515	626	3,106	8
38	Rukundo	1,952	443	392	0	2,787	7
39	Rutaganda	374	833	172	1,267	2,646	7
40	Rwamakuba	1,863	876	152	0	2,891	7
41	Semanza	289	611	330	736	1,966	5
42	Seromba	957	645	169	455	2,226	6
43	Setako	1,643	438	111	580	2,772	7
44	Simba	1,007	312	158	714	2,191	6
45	Zigiranyirazo	1,530	969	193	343	3,035	8

Table 2 Days before the ICTR by case

This chart shows the phases of the cases and the cumulative workload of the ICTR.

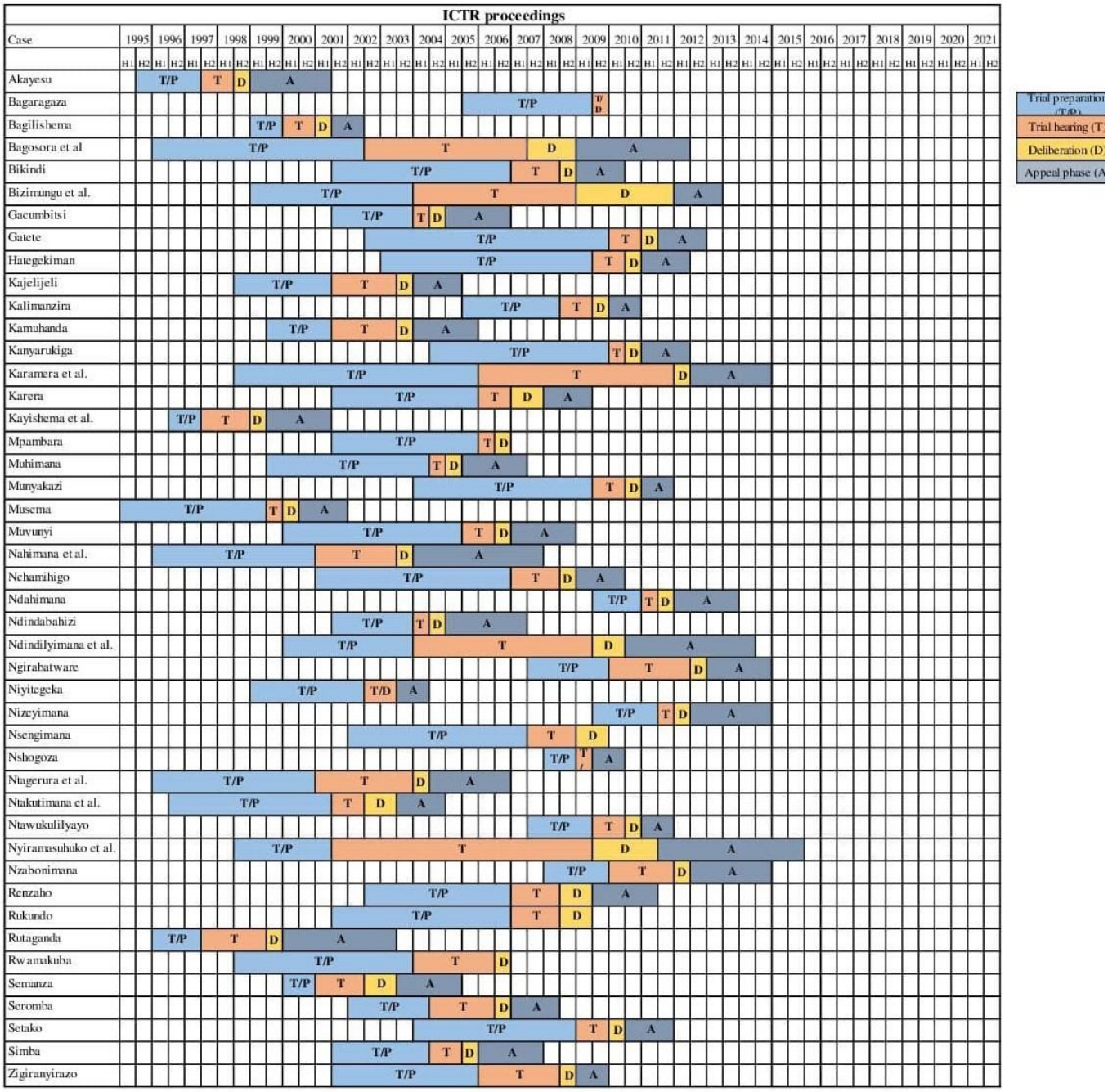

Image 1 Workload of the ICTR

2.4.1.2 ICTY

Longest trial preparation phases of the single-accused cases: The longest criminal proceedings before the ICTY were those in the *Šešelj* case with 5,526 days (more than 15 years). The case included 14 charges, 198 witnesses and 1,399 exhibits. Besides being the longest case before the ICTY, its 1,718 days (more than four and a half years) of trial preparation also made this the longest trial preparation phase to come before the Tribunal. Another 1,595 days were spent on the trial phase, 1,472 days on the deliberation of the judgment[251] and 741 days on the appeal proceedings. The trial preparation phase included time spent on amendments to the indictment, challenges to the legality and jurisdiction of the Tribunal, changes of the Chambers and new composition of the bench, disqualification of a judge, familiarisation of a new judge with the case, self-representation of the defendant, contempt of court proceedings, proceedings against the Prosecution and other numerous procedural activities which affected the length of proceedings.[252]

Of the cases at the ICTY the second longest trial preparation phase lasted for 1,400 days in the case of *Krajišnik* with three charges, 75 witnesses and 562 exhibits. The length of the trial preparation included the time for the motions on defects in the indictment, on jurisdiction, a motion for the joinder with another case, withdrawal of counsel, severance of the case because of the plea agreement in the other case and motions for legal aid.[253] Another 941 days were spent on the trial phase, where the Defence unsuccessfully requested that the trial be adjourned due to lack of time for preparation. The length of the trial phase in this case was tied to the withdrawal of a judge, self-representation of the defendant and disqualification of a judge. The trial deliberation in this case lasted only 27 days. Another 902 days were spent on the appeal proceedings.

Longest trial phases of the single-accused cases: Other long trial phases at the ICTY were held in the cases of *Karadžić* (1,807 days, or almost five years, with 11 counts, 586 witnesses and 11,481 exhibits) and *Mladić* (1,674 days, or more than four and a half years, with 11 counts, 377 witnesses and 9,914 exhibits). Astonishingly, the time spent in those cases for the trial preparation is relatively short (462 days in *Karadžić*, 356 days in *Mladić*). The trial preparation in the *Karadžić* case revolved around issues like self-representation, language, challenges to jurisdiction and disqualification of a judge. The time spent on the trial was tied to a motion on Rule 98 *bis* RPE (early judgment of acquittal after the close of the Prosecution case), re-opening of the rebuttal and rejoinder, disclosure, subpoenas, protective measures, access to confidential materials and contempt proceedings.[254] Another 534 days were spent on delivering the judgment. The appeal proceedings in the *Karadžić* case lasted for 1,095 days.

Longest trial preparation phase of the multi-accused cases: The longest multi-accused trial preparation before the ICTY was that of the *Šainović et al.* case (1,537 days or more than four years) with six accused persons, five counts, 242 witnesses and 4,369 exhibits. Another 779 days were spent on the trial and only 183 days on the deliberation of judgment.[255] This case also recorded the longest appeals proceedings at the ICTY with 1,792 days. The second longest trial preparation phase proceedings were those in the case of *Simić et al.* The trial preparation of the case covering three accused, three charges, 135 witnesses and 625 exhibits lasted for 1,304 days and included issues around assignment of counsel, conflict of interest,

[251] Which appears to be the longest deliberation at the ICTY.

[252] *The Prosecutor v. Šešelj*, ICTY, 31 Mar 2016, Annex 2, paras 1 et seqq., www.icty.org/x/cases/seselj/tjug/en/160331.pdf (accessed 1 Apr 2022).

[253] *The Prosecutor v. Krajišnik*, ICTY, 27 Sep 2006, paras 1205–1235, www.icty.org/x/cases/krajisnik/tjug/en/kra-jud060927e.pdf (accessed 1 Apr 2022).

[254] *The Prosecutor v. Karadžić*, ICTY, 24 Mar 2016, paras 6120 et seqq., www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf (accessed 1 Apr 2022).

[255] *The Prosecutor v. Šainović et al*, ICTY, 26 Feb 2009, paras 15 et seqq., www.icty.org/x/cases/milutiNov.ic/tjug/en/jud090226-e1of4.pdf (accessed 1 Apr 2022).

an unsuccessful motion for separation of case, contempt proceedings and disclosure. Trial proceedings in this case lasted for 662 days, following which the judgment was delivered after another 105 days.

Longest trial phase of the multi-accused cases: The longest trial phase proceedings were those in the case of *Popović et al.* with seven accused persons, 16 counts, 315 witnesses, 5,383 exhibits. The trial preparation in this case lasted for only 456 days and the trial for 1,158 days (more than three years). The trial proceedings included issues around Rule 98 *bis* RPE, contempt proceedings, expert witnesses and reconstitution of Defence teams.[256]

[256] *The Prosecutor v. Popović et al*, ICTY, 10 Jun 2010, Annex II, paras 1 et seqq., www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf (accessed 1 Apr 2022).

Days before the ICTY by case							
N	**Case**	**Trial preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**	**Total years**
1	Aleksovski	577	441	94	638	1,750	4
2	Blagojević & Jokić	568	580	108	842	2,098	5
3	Blaškić	449	766	217	1,609	3,041	8
4	Boškoski & Tarčulovski	768	337	114	678	1,897	5
5	Brđanin	932	820	132	944	2,828	7
6	Delić	861	338	96	0	1,295	3
7	Đorđević	590	533	224	1,069	2,416	6
8	Furundžija	172	14	171	589	946	2
9	Galić	714	522	210	1,091	2,537	6
10	Gotovina *et al.*	831	904	226	581	2,542	6
11	Hadžihasanović & Kubura	852	591	243	769	2,455	6
12	Halilović	1,224	212	77	699	2,212	6
13	Haradinaj *et al.*	686	364	71	837	1,958	5
14	Jelisić	312	360	19	569	1,260	3
15	Karadžić	462	**1,807**	534	1,095	3,898	10
16	Kordić & Čerkez	1,106	613	73	1,390	3,182	8
17	Krajišnik	1,400	941	27	902	3,270	8
18	Krnojelac	868	263	238	612	1,981	5
19	Krstić	465	474	34	991	1,964	5
21	Kunarac *et al.*	747	247	92	475	1,561	4
22	Kupreškić *et al.*	315	450	65	648	1,478	4
23	Kvočka *et al.*	666	532	106	1,214	2,518	6
24	Limaj *et al.*	375	552	90	727	1,744	4

Days before the ICTY by case							
N	**Case**	**Trial preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**	**Total years**
25	Lukić Milan & Lukić	869	315	61	1,233	2,478	6
26	Martić	1,308	395	151	484	2,338	6
27	Milošević, Dragomir	768	273	63	701	1,805	4
28	Mladić	356	1,674	342	1,294	3,666	10
29	Mrkšić *et al.*	1,245	486	230	1,107	3,068	8
30	Mucić *et al.*	335	479	137	1,573	2,524	6
31	Naletilić & Martinović	763	416	151	1,129	2,459	6
32	Orić	545	551	81	734	1,911	5
33	Perišić	1,305	910	159	541	2,915	7
34	Popović *et al.*	456	1,158	269	1,695	3,578	9
35	Šešelj	**1,718**	1,595	**1,472**	741	5,526	15
36	Šainović *et al.*	1,537	779	183	**1,792**	4,291	11
37	Simić *et al.*	1,304	662	105	1,138	3,209	8
38	Stakić	389	364	107	965	1,825	4
39	Stanišić & Župljanin	460	991	295	1,195	2,941	8
40	Strugar	803	268	144	1,263	2,478	6
41	Tadić	349	206	159	799	1,513	4
42	Tolimir	1,001	909	111	847	2,868	7
43	Vasiljević	594	185	260	453	1,492	4

Table 3 Days before the ICTY by case

This chart shows the phases of the cases and the cumulative workload of the ICTY.

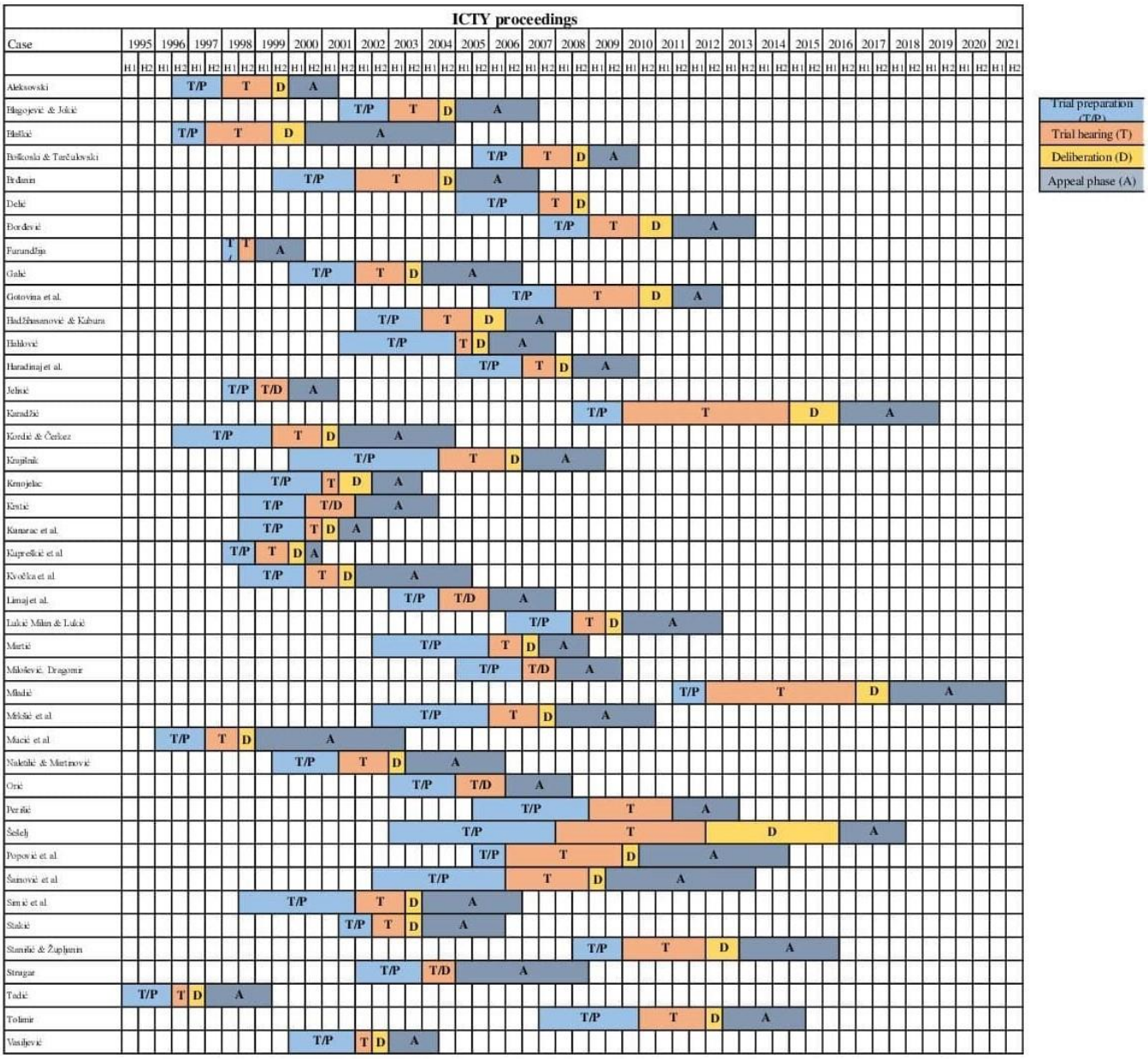

Image 2 Workload of the ICTY

It is difficult to develop and apply a standard timeframe and it is not possible to set general limits on how long the trial preparation phase, trial phase or appeal phase may last without violating the right of the accused to be tried within a reasonable time. The above description of the length of cases conducted at the UN *ad hoc* tribunals shows that the number of accused persons, the number of charges, the number of witnesses or documents, not to mention a multitude of other potentially influential factors, will affect the length of proceedings in ways that cannot be predicted.

2.4.2 Hybrid Courts

Compared to the *ad hoc* tribunals, the hybrid courts have advantages in procedural management. They have limited jurisdiction and adapt better to challenges, such as the languages spoken by varying nationalities or access to evidence.

At the Extraordinary Chambers in the Courts of Cambodia (ECCC) the first case initially including five accused persons with 28 witnesses and 22 civil parties lasted overall 1,648 days from the detention to the final judgment (more than four and a half years), of which 608 days were spent on the trial preparation phase. It included the investigation, challenge of the lawfulness of provisional detention and the closing order by the co-investigating judges, as well as appeal of the closing order and joining of the civil parties. The trial preparation phase included also relatively short periods of time for the trial management issues.[257] The trial phase, which already included a single accused was conducted in 242 days and the judgment was delivered on 3 February 2012 in 241 days. Another 557 days were spent on the appeal proceedings.[258]

The second case at the ECCC with initially four accused persons lasted overall for 3,403 days (more than nine years) with 92 witnesses and 31 civil parties. The trial preparation phase lasting for 1,574 days included severance from the Case 001, investigation, closing order as well as appeals of the closing order and admission of civil parties.[259] Furthermore it included issues/questions raised by the parties before the commencement of the trial, such as the jurisdiction, the legality of the Internal Rules, statutes of limitations for domestic crimes, fitness of the accused to stand trial, professional misconduct of the Defence Counsel and severance of the case. 710 days were spent on the trial proceedings with 222 hearing days. The judgment was delivered after 280 days. Another 839 days were spent on the appeal proceedings.

The second part of the second case including the same accused persons lasted much longer and included 307 witnesses, 63 civil parties and 10,800 exhibits. Trial preparation phases lasted for 2,635 days, including also the case C002/1 and other issues such as requests to stay proceedings, disqualification of judges, fitness to stand trial, translation-related issues and other matters relating to the trial management meetings.[260] The trial proceedings for Case 002/2 started after the judgment in the Case 002/1 had been rendered and lasted for another 817 days, which also included a boycott of the proceedings.[261] Almost four years after the commencement of the trial (1,491 days) the judgment was delivered. At the time of writing this report, the proceedings are in the appeal phase.

Days before the ECCC by Case					
Case	**Trial Preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**
Case 001	608	242	241	557	1,648
Case 002/1	1,574	710	280	839	3,403
Case 022/2	2,635	817	674	ongoing	5,114+

Table 4 Days before the ECCC by case

[257] *Kaing Guek Eav alias Duch*, ECCC, 26 Jul 2010, p. 252, www.refworld.org/cases,ECCC,4c56ccfb2.html (accessed 1 Apr 2022).
[258] *Ibid*., pp. 247 et seqq.
[259] *Khieu Samphan, Nuon Chea*, ECCC, 7 Aug 2014, Annex 1, paras 1–10, www.legal-tools.org/doc/4888de/pdf/ (accessed 1 Apr 2022).
[260] *Khieu Samphan, Nuon Chea*, ECCC, 16 Nov 2018, Annex 1, paras 1–66, www.drive.google.com/file/d/1LA9ttO7C4fgC1aSb1cAoe9ofzwDuERx5/view?ts=5c9c9bb0 (accessed 1 Apr 2022).
[261] Ibid., paras 67 et seqq.

At the Special Court for Sierra Leone (SCSL) the trial preparation for the first multi-accused case *Norman et al.* lasted 454 days, including combination of separate indictments, challenges for jurisdiction, self-representation, detention conditions, motions concerning the command responsibility and other issues.[262] The trial phase including initially three accused persons charged with eight counts and 119 witnesses started on 3 June 2004 and lasted for 910 days, which also included an unsuccessful motion of judgment for acquittal, witnesses' issues in regard to protection, admissibility of evidence, abuse of process, preparation time for the Defence and numerous other issues.[263] During the deliberation of the judgment one of the accused died. The judgment was delivered in 245 days. The appeal proceedings lasted for another 300 days.

The second SCSL multi-accused case, again with three persons charged, covered 18 counts and 170 witnesses and lasted overall for 2,425 days. This included 487 days for the trial preparation phase, including preliminary motions on jurisdiction, disqualification of the judge, consolidated indictment and amendments to indictment.[264] Another 1,083 days were spent for the trial phase, including issues such as withdrawal of Counsel, absence of the accused, witnesses' issues, disclosure issue, Defence resource issues.[265] 617 days for the deliverance of the judgment and another 238 days for the appeal proceedings.

The trial of the former president of Liberia, Charles Taylor, lasted overall 3,856 days. It was the longest case at the SCSL. The accused was charged on 17 counts. The trial preparation phase lasted for 1,550 days and included indictment and amended indictment, arrest of the accused after almost three years, challenge of jurisdiction, transfer to The Hague and Defence request for preparation time. The trial phase lasted for 1,376 days and included boycott of the proceedings by the accused, change of legal counsel, numerous adjournments, examination of 100 witnesses and a dismissed motion for the judgment of acquittal.[266] Another 412 days were needed to deliver the judgment. The proceedings before the Appeals Chamber lasted for another 518 days.

Days before SCSL by case					
Case	**Trial Preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**
Norman *et al.*	454	910	245	300	1,909
Sesay *et al.*	487	1,083	617	238	2,425
Brima *et al.*	731	641	194	247	1,813
Taylor	1550	1,376	414	518	3,856

Table 5 Days before SCSL by case

[262] *The Prosecutor v. Fofana, Kondewa,* SCSL, 2 Aug 2007, Annex F, paras 1 et seqq., www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=46e123dc2&page=search (accessed 1 Apr 2022).
[263] *Ibid*., paras 21 et seqq.
[264] *Prosecutor v. Sesay et al,* SCSL, 2 Mar 2009, Annex F, paras 1–30, www.refworld.org/cases,SCSL,49b102762.html (accessed 1 Apr 2022).
[265] Ibid., paras 37 et seqq.
[266] *The Prosecutor v. Taylor*, SCSL, 18 May 2012, Annex B, paras 7001 et seqq., www.refworld.org/cases,SCSL,50589aa92.html (accessed 1 Apr 2022).

At the STL, the multi-accused terrorism proceedings that were held *in absentia* lasted for 3,616 days (almost ten years). This included 1,121 days for the trial preparation and another 1,683 days for the trial proceedings. The judgment was delivered on 11 December 2020 after 812 days of deliberations. As of 31 July 2021, the appeal proceedings have been suspended because of lack of funding.

Days before STL by case					
Case	**Trial Preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**
Ayyash *et al.*	1,121	1,683	812	ongoing but suspended	3,616+

Table 6 Days before STL by case

It is difficult to draw a strict line for all cases between the hybrid courts and the *ad hoc* tribunals, because of different particularities of each institution and of each case. This includes for example different structure of the proceedings, domestic nature of the charges and other matters. However, while generalising the cases, it is possible to observe that the proceedings at the hybrid courts as well as at the *ad hoc* tribunals are long by their very nature and include numerous similar issues affecting the length of the proceedings.

The days on average of the international criminal proceedings could be as follows:

Days on average of the phases of the proceedings at the hybrid court and the *ad hoc* tribunals					
Institution	**Trial Preparation**	**Trial**	**Deliberation**	**Appeal**	**Total**
ICTR	1,305	661	228	646	2,842
ICTY	745	587	180	898	2,412
STL	1,121	1,683	812	x	x
SCSL	805	1,002	367	325	2,500
ECCC	1605	589	389	698	2,525
	5,581	4,522	1,976	2,567	10,279
Av.	**1,116**	**904.4**	**395.2**	**641.75**	**2569.75**

Table 7 Days on average of the phases of the proceedings at the hybrid court and the ad hoc tribunals

2.4.3 National Criminal Proceedings Based on Universal Jurisdiction

In addition to considering the length of the proceedings in the hybrid courts and *ad hoc* tribunals, the length of those proceedings at the national level must also be taken into account, which have similar characteristics to the proceedings before the ICC. However, given the differing structures of criminal proceedings between States as well as the unavailability of the details of those criminal proceedings, it will only be possible to measure the duration from the day of arrest to the day of judgment.

Before turning to the cases of universal jurisdiction and international crimes, at this point the report of the CEPEJ on the length of the national criminal cases must be recalled, in order to recall the length of the national criminal cases. The CEPEJ report indicated a reasonable time limit for simple and complex national criminal proceedings and highlighted the ECtHR finding that the duration of a simple banking fraud case in three instances was three years and six months.[267] In cases involving illegal demonstrations and use of explosives causing death, a reasonable duration was five years and 11 months in four instances.[268] The length is different in complex criminal cases. The ECtHR found the length of eight years and five months for fraud and conspiracy cases to be reasonable.[269] Criminal proceedings of six years and three months for negligent homicide[270] and of seven years and nine months for attempted murder[271] were not considered unreasonable.[272]

Criminal cases related to international crimes committed abroad cannot be compared with purely domestic cases, because of their different evidentiary basis and the involvement of other States. After the European refugee crisis in 2015, following the Syria and Iraq conflict, some States started investigations and criminal proceedings against alleged perpetrators who had fled.[273] States exercising universal jurisdiction include Argentina,[274] Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Mexico, the Netherlands, Senegal, Spain, Sweden, Switzerland and the UK.[275]

Such States face many of the obstacles and difficulties as similarly encountered by international courts and tribunals. They lack capacity in the criminal justice system, including knowledgeable court staff. They have issues with language and State cooperation, evidence collection and witnesses abroad, witness protection, lack of public support, political will and resources and lack of collaboration between national institutions, and between immigration authorities and war crimes units.[276]

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[267] *Kuibichev v. Bulgaria*, ECtHR, 30 Sep 2004.
[268] *Önder v. Turkey*, ECtHR, 12 Jul 2005.
[269] *Hozee v. Netherlands*, ECtHR, 22 May 1998.
[270] *Calvelli, Cigilio v. Italy*, ECtHR, 17 Jan 2002.
[271] *Pecheur v. Luxembourg*, ECtHR, 11 Dec 2007.
[272] See narrow in Calvez/Regis (2018), pp. 75 et seqq.
[273] See Safferling/Petrossian (2019), pp. 401–406; and Safferling/Petrossian (2021), pp. 242–263.
[274] The cases of the Spanish dictatorship are still being investigated. On 18 Sep 2013, the Argentine court issued an arrest warrant for Antonio Pachecho and others, Spain refused extradition, in 2020 the main suspect died of Covid-19. See also the case of Martín Villa under investigation, Marraco (2020), www.elmundo.es/espana/2020/09/03/5f4fee7d21efa077638b4751.html (accessed 3 Apr 2022).
[275] See the whole list: "Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update" by Amnesty International from 9 Oct 2012, Annex I.
[276] Crawford (2019), www.justiceinfo.net/en/40328-international-crimes-spotlight-on-switzerland-s-war-crimes-unit.html (accessed 4 Apr 2022); Petrasek/Hicks (2019), p. 35, see also "'These Are the Crimes We Are Fleeing', Justice for Syria in Swedish and German Courts" by Human Rights Watch, 3 Oct 2017; as well as "UJAR 2019: Evidentiary Challenges in Universal Jurisdiction Cases" by Trial International (2019), trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf (accessed 1 Apr 2022); Van Sliedregt, (2007), pp. 895 et seqq.

Detailed information on national criminal proceedings based on universal jurisdiction is not always publicly available. This part of the report describes cases and the duration of the cases that are closed.

In Austria, a Palestinian refugee alleged to have committed multiple war crimes in Syria was sentenced to life imprisonment within 1,596 days. The trial began on 1 February 2017 with an adjournment due to the defendant's health problems, and the verdict was delivered on 10 May 2017 after 98 days.[277] After a further 216 days, the Austrian Supreme Court of Justice overturned the judgment as three witnesses were not summoned, violating the fair trial principle. The case was retried and on 13 September 2019, the OLG Innsbruck (*Oberlandesgericht* Innsbruck, Innsbruck Higher Regional Court) again sentenced the defendant to life imprisonment.[278]

In Belgium, an originally joint case of three suspects in the Rwandan genocide was severed on 9 October 2019, despite all three suspects having been arrested in the first half of 2011. The *Fabien Neretsé* case went to trial on 4 November 2019 and judgment against him was delivered on 19 December 2019 after 45 days. He was sentenced to 25 years imprisonment for genocide and war crimes. On 27 May 2020, after 160 days, the Supreme Court of Belgium upheld the judgment. The case of the other two suspects was adjourned because of the pandemic.[279]

In Finland, a case of twin brothers from Iraq lasted for 1,523 days until it ended with their first-instance acquittal. The two Iraqi asylum seekers were arrested in December 2015 and their war crimes trial started on 13 December 2016, almost 378 days after the arrest. After 162 days the court acquitted both defendants due to lack of evidence. The Prosecution appealed, and appeal judgment was delivered after another 983 days. During this time other witnesses were heard in Iraq in the presence of the Prosecutor and Defence Counsel.[280] In another case in which the defendant was charged with violating the dignity of a corpse, the entire case lasted for 559 days and the defendant was sentenced to 18 months imprisonment.[281]

In France, a case of two Rwandans charged with genocide lasted 3,421 days from the day the first defendant was arrested on 4 June 2010. The trial opened on 10 May 2016 (after 2,167 days). An extradition request from Rwanda was denied and 14 civil parties participated in the process. The judgment was rendered on 6 July 2016, 57 days after the start of the trial. The second instance judgment was rendered on 2 May 2018 (665 days after the first instance judgment). Another 532 days were spent until the judgment of the third instance closed the case.

Numerous trials were held in Germany, the length depending on the nature of the charge. For example, the trial of Aria L., who was charged with violating the dignity of dead bodies,[282] lasted 272 days after the defendant's arrest. Another trial with similar allegations took 187 days from arrest to deliverance of the judgment.[283] The longest international crimes trial held was against

[277] See also "UJAR 2019: Evidentiary Challenges in Universal Jurisdiction Cases", Trial International (2019), p. 21, https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/ (accessed 13 Nov 2022).
[278] Fellner (2019).
[279] See also "UJAR 2021: A Year like No Other? The Impact of Coronavirus on Universal Jurisdiction', Trial International (2021), p. 21.
[280] See "UJAR 2020: Atrocities Must Be Prosecuted Soundly and Rigorously", Trial International (2020), p. 20, https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/ (accessed 1 Apr 2022).
[281] See also "UJAR 2019: Evidentiary Challenges in Universal Jurisdiction Cases", Trial International (2019), p. 27.
[282] OLG Frankfurt, 12 Jul 2016 Az. 5-3 StE 2/16 - 4 - 1/16.
[283] KG Berlin, 1 Mar 2017 (2A) 172 OJs 26/16 (3/16), 2A 172 OJs 26/16 (3/16).

Dr Ignace Murwanashyaka, which took 2,141 days, [284] with 1,179 days for the appeal proceedings.[285]

The trial in Senegal of the former president of Chad, Hissène Habré, lasted 1,398 days. The former president was initially arrested at the request of Belgium and released in 2005, followed by lengthy negotiations on how to try him. An agreement between Senegal and the African Union to try him before a special court was signed on 22 August 2012. Hissène Habré was arrested on 30 June 2013. On 5 July 2013, 1,015 victims joined the trial as civil parties. The trial began on 20 July 2015. 315 days later, the judgment was delivered. The appeal judgment was pronounced after 332 days. Overall, it took 4,181 days, including political negotiations on how Hissène Habré had to be brought to justice.

[284] OLG Stuttgart, 5 - 3 StE 6/10 28 Sep 2015, BGH 3 StR 236/17 - 20 Dec 2018.
[285] BGH, 3 StR 236/17 – 20 Dec 2018.

Days of the domestic cases							
State	**Case**	**Day of arrest**	**Day of judgment**	**Total days of trial**	**Day of final judgment**	**Total days for final judgment**	**Total days of the case**
Austria	Palestinian national Farouq Brigades	1 May 2015	10 May 2017	740	12 Dec 2017	216	956
Belgium	Fabien Neretsé	29 Jun 2011	19 Dec 2019	3,095	27 May 2020	160	3,255
Finland	Iraqi twin brothers	1 Dec 2015	24 May 2017	540	1 Feb 2020	983	1,523
	Ahmed Jabbar Hasan	30 Jun 2017	10 Jan 2019	559	x	x	559
	Gibril Massaquoi	10 Mar 2020	1 Sep 2021	540	x	x	540
France	Octavien Ngenzi & Tito Bahira	4 Jun 2010	6 Jul 2016	2,224	16 Oct 2019	1,197	3,421
	Hocine Mohamed & Abdelkader Mohamed	29 Mar 2004	19 Jan 2016	4,313	29 Mar 2017	435	4,748
	Pascal Simbikangwa	28 Oct 2008	14 Mar 2014	1,963	24 May 2018	1,532	3,495
Germany	Novislav Đajić	17 Jan 1996	26 Sep1997	618	30 Apr 1999	581	1,199
	Nikola Jorgić	16 Dec 1995	15 Dec 1999	1,460	21 Jan 2001	403	1,863
	Đurađ Kušljić	1 Sep1998	29 Nov1999	454	21 Jan 2001	419	873
	Dr Ignace Murwanashyaka	17 Nov 2009	28 Sep 2015	2,141	20 Dec 2018	1,179	3,320
	Onesphore Rwabukombe	22 Dec 2008	18 Mar 2014	1,912	21 May 2015	429	2,341
	Ibrahim Al F.	6 Apr 2016	28 Sep 2018	905	6 Aug 2019	312	1,217
	Suliman Al-S.	21 Jan 2016	20 Sep 2017	608	23 Jan 2019	490	1,098
	Abdul Jawad A. K. *et al.*	1 Jun 2016	13 Jan 2020	1,321	x	x	1,321
	Sultan K./Mustafa K./Ahmed K.	12 Jun 2017	13 Dec 2018	549	16 Oct 2019	307	856

Days of the domestic cases							
State	**Case**	**Day of arrest**	**Day of judgment**	**Total days of trial**	**Day of final judgment**	**Total days for final judgment**	**Total days of the case**
	Ahmad Zaheer D.	26 Oct 2018	26 Jul 2019	273	28 Jan 2021	552	825
	Eyad A.	12 Feb 2019	26 Feb 2021	745	x	x	745
	Kassim A.	18 Jul 2017	13 Feb 2020	940	x	x	940
	Aria L.	14 Oct 2015	12 Jul 2016	272	27 Jul 2017	380	652
	Abdelkarim E.	25 Feb 2015	28 Jul 2017	884	x	x	884
	Iraqi officer	26 Aug 2016	1 Mar 2017	187	29 Jul 2017	150	337
	Ibrahim Al Suliman	21 Jan 2016	20 Sep 2017	608	x	x	608
Hungary	Hassan Faroud	30 Dec 2018	1 Jan 2020	367	x	x	367
Italy	Osman Matammud	26 Sep 2016	10 Oct 2017	379	20 Mar 2019	526	905
	Mohammed Condè *et al.*	1 Sep 2019	28 May 2020	270	x	x	270
Netherlands	Eshetu Alemu	1 Sep 2015	15 Dec 2017	836	x	x	836
Norway	Sadi Bugingo	3 May 2011	14 Feb 2013	653	16 Jan 2015	701	1,354
Senegal	Hissène Habré	30 Jun 2013	30 May 2016	1,066	27 Apr 2017	332	1,398
Spain	Carlos Vielmann Montes	13 Oct 2010	6 Mar 2017	2,336	26 Jul 2018	507	2,843
Sweden	Stanislas Mbanenande	22 Dec 2011	20 Jun 2013	546	19 Jun 2014	364	910
	Claver Berinkindi	24 Sep 2014	16 May 2016	600	15 Feb 2017	275	875
	Mouhannad Droubi	4 Oct 2014	26 Feb 2015	145	5 Aug 2015	160	305
	Haisam Omar Sakhanh	11 Mar 2016	16 Feb 2017	342	31 May 2017	104	446
	Tabaro Theodore (Rukertabaro)	25 Oct 2016	27 Jun 2018	610	1 Apr 2019	278	888

Days of the domestic cases							
State	**Case**	**Day of arrest**	**Day of judgment**	**Total days of trial**	**Day of final judgment**	**Total days for final judgment**	**Total days of the case**
	Raed Abdulkareem	1 Sep 2016	6 Dec 2016	96	1 Jan 2018	391	487
Switzerland	Alieu Kosiah	10 Nov 2014	18 Jun 2021	2,412	x	x	2,412

Table 8 Days of the domestic cases

In conclusion, minor cases such as violating the dignity of a dead body take much less time at the national level, especially when one case as a "parent-case" has already clarified the legal issue at stake or where evidence such as photos or videos are easily accessible on the Internet or in the alleged perpetrator's mobile phone. The *Hissène Habré* case in Senegal or a similarly complex case such as that of Dr Ignace Murwanashyaka at the German court lasted much longer. The judgment against Dr Ignace Murwanashyaka was overturned, but as the defendant died in prison there will be no retrial.[286]

2.5 Unique System of the ICC

The ICC has a unique system. As the *ad hoc* tribunals or hybrid courts address limited situations and cases, the ICC must be prepared for a greater diversity of challenges, in particular a greater workload in dozens of situation countries and languages. The ICC proceedings are also unique, incorporating novel elements such as victims' participation, the document containing charges (DCC) and confirmation proceedings.

The ICC employs a mixture of civil and common law procedural traditions, sometimes experiencing the inherent conflicts between the two systems,[287] as did its predecessor, the International Military Tribunal in Nuremberg,[288] where those differences were present during the cross-examination of witnesses. Potential conflict in approaches increases in the many key areas left to the discretion of the ICC judges who already have their own individual approaches, such as in conduct of the proceedings, admissibility of evidence and witness preparation.[289]

2.5.1 Criteria of the ICC for Assessing Whether Delay in Proceedings is Undue

The ICC has taken notice of the ECtHR criteria on several occasions.[290] In the *Gbagbo* case, the Court stated that the Prosecutor's request at the confirmation hearing stage to provide

[286] BGH 3 StR 236/17–20 Dec 2018.
[287] Schmitt (2021), pp. 485–510. See Ambos (2003); Eboe-Osuji (2010), p. 360. See more in Kress (2003), pp. 603–617.
[288] See for example, misunderstandings between the Russian, French, US and UK delegations in Safferling (2012), p. 53.
[289] See Schmitt (2021), pp. 485–510; See Powderly (2020), p. 53. See also *The Prosecutor v. Gbagbo and Blé Goudé*, 16 Jul 2019, para 3.
[290] *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, paras 39–43; t*he Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-AnxI, 7 Mar 2014, paras 118 et seqq.; T*he Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-

further evidence or to conduct further investigation with respect to a particular charge (Article 61(7)(c)(i) RS) may infringe the right of the suspect to be tried without undue delay and has to be determined on a case-by-case basis, taking into account the particular circumstances of the case and internationally recognised rights.[291] In its decision, the ICC paid heed to three ECtHR criteria, not including prejudice to the defendant.[292]

Complexity: In assessing complexity, the ICC highlighted the seriousness of the charges against the accused, the number of incidents and alleged perpetrators, the length of time covered and other factual and legal issues.[293] It also included complexity of the investigations and that further evidence was requested during the proceedings, under Article 61(7)(c)(i) RS.[294]

Conduct of the defendant and participants: In the *Gbagbo* case, the Pre-Trial Chamber noted the time spent by the Defence on the question of Gbagbo's fitness to take part, including the appointment of three medical experts and a hearing.[295] In the *Bemba* case, the ICC balanced its obligation to ensure a fair and expeditious trial and that the accused be tried without undue delay against its duty to give the accused adequate time for preparation. The ICC found it appropriate to suspend the hearing at the Defence's request to allow the Defence time to prepare for Regulation 55 RoC proceedings.[296] At the same time, the Court found that Defence Counsel is also bound by the principle of expeditious proceedings. They must represent the accused expeditiously in order not to unnecessarily delay the conduct of proceedings under Article 24(5) Code of Professional Conduct for counsel.[297]

Conduct of the relevant authorities: The *Gbagbo* Pre-Trial Chamber did not find allowing the Prosecutor to provide more evidence or conduct further investigations for a limited period of time to be inconsistent with the right of the defendant to be tried without undue delay.[298] In the *Kenyatta* case, the ICC found that the delays caused by non-compliance with the Court's request for State cooperation were substantially unexplained.[299] In the same case, the Chamber held that the Prosecutor was not effectively pursuing that request and that this was not adequately explained.[300] A Trial Chamber found that a re-characterisation according to Reg. 55 RoC may generally prolong proceedings, but under special circumstances it does not violate the right to be tried without undue delay.[301] On another occasion the Appeals Chamber stated that periods of inactivity on the part of the Pre-Trial Chamber and Trial Chamber, which are beyond the control of either the Prosecutor or the Court, do not infringe the right to be tried without undue delay.[302]

This shows that, although not a frequent occurrence, the ICC has had opportunity to practise the criteria for assessing the length of its own proceedings.

01/05-01/08-3694, 18 May 2020, paras 66 et seqq.; t*he Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1019, 9 Nov 2007, para 1; *the Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-2487-Red, 16 Jan 2013, para 15; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, 7 Jun 2016, paras 29-30; *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, 16 Dec 2011, para 44; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2487-Red, 16 Jan 2013, para 33; Cline (2018), p. 71.

[291] *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-4323, Jun 2013, para 39.

[292] Ibid., para 39, footnote 55.

[293] *The Prosecutor v. Germain Katanga,* ICC-01/04-01/07-3319-tENG/FRA, 21 Nov 2012, para 43.

[294] *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-4323, Jun 2013, para 41.

[295] Ibid., para 40.

[296] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-3694, 18 May 2020, paras 66 et seqq.

[297] See *The Prosecutor v. Germain Katanga,* ICC-01/04-01/07-2259, 12 Jul 2010, para 45.

[298] *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, 3 Jun 2013, para 42.

[299] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-908, 31 Mar 2014, paras 50–51.

[300] Ibid., ICC-01/09-02/11-9813, Dec 2014, para 51.

[301] *The Prosecutor v. Germain Katanga,* ICC-01/04-01/07-3319-tENG/FRA, 21 Nov 2012, paras 43–46.

[302] See *The Prosecutor v. Jean-Pierre Bemba Gombo et al,* ICC-01/05-01/13-2351, 27 Nov 2019, paras 91–92.

2.5.2 Reports and Findings on the Length of International Criminal Proceedings at the ICC

The subject of long international criminal proceedings is not a new issue in international criminal law. It was an issue before the *ad hoc* tribunals and already existed during the establishment of the ICC. Experts have repeatedly addressed the need to speed up criminal proceedings at the ICC and proposed recommendations, but the proceedings remain relatively long, although a lot has been developed at the ICC.

At the beginning of the ICC operations, the OTP believed the length of proceedings would be one of the most important touchstones for success.[303] In 2002 a group of international experts was set up to identify those factors which might affect the length of trials. The group divided factors among different phases of the proceedings, including investigation, pre-trial, preparation and trial phases and made recommendations.[304] For the pre-trial and preparation phase the group noted that the confirmation hearing risks turning into a quasi-trial,[305] which could be avoided by the Prosecutor relying only on documentary or summary evidence instead of on witnesses.[306] For a speedy trial the parties were to hold regular meetings according to Rule 132 RPE (status conferences),[307] and to agree on the facts of the case according to the Rule 69 RPE.[308] The group identified other factors such as the disclosure system, availability of the dossier to the judge, number of motions and interlocutory appeals and change of legal counsel.[309]

In the trial proceedings, factors affecting length included concentrated trials, time limits for the presentation of a case, the form of adjudication, judicial regulations, admissibility of evidence, evidence by witness testimony, written statements and testimonies in lieu of oral testimony, overview witnesses, some documentary evidence, judicial notice, unsworn statements of the accused and victims' participation.[310]

War Crimes Research Office Report on Expediting Proceedings at the International Criminal Court 2011

The 2011 War Crimes Research Office Report highlights the delays arising at the pre-trial stage and the trial stage in ICC proceedings. Its authors raise concerns about the length of the confirmation stage,[311] the time spent on witness testimonies,[312] the delays resulting from the financial situation of the Defence,[313] language[314] and disclosure[315] issues.

Expert Initiative on Promoting Effectiveness at the International Criminal Court 2014

In 2014, members of an independent expert initiative published a report on promoting effectiveness at the ICC, including factors relating to the confirmation process, disclosure, the presentation and admission of evidence, interlocutory appeals, the orality of proceedings, victims' participation, Defence, institution building and administration, cooperation and witness protection.[316]

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[303] See more in Bergsmo/Tochilovsky (2017), pp. 651 et seqq.
[304] Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, ICC-OTP (2003).
[305] Ibid., para 49.
[306] Ibid., para 50.
[307] Ibid., para 53.
[308] Ibid., para 55.
[309] Ibid., paras 52–82.
[310] Ibid., paras 82–120.
[311] For example, the proceedings would be expedited if the Prosecutor were to rely on fewer witnesses at that stage. See Expediting Proceedings at the International Criminal Court, War Crimes Research Office (2011), p. 21.
[312] For example, recommending to use audio-video technologies. See ibid., p. 37.
[313] Recommending to adopt a flexible interpretation of Regulation 83(3) RoC. See ibid., p. 58.
[314] Ibid., p. 59.
[315] Ibid., p. 61.
[316] Mettraux et al (2014).

The experts proposed recommendations to shorten proceedings, including modifying the conditions for the admissibility of evidence with the aim of excluding poor quality evidence.[317] The experts further suggested that the Chambers rely less on written proceedings.[318]

ICC Chambers Practice Manual

In 2015, the ICC Pre-Trial Division Judges identified best practices in recurring procedural challenges.[319] The Practical Manual that resulted from this exercise has been updated three times and focuses on all phases of ICC proceedings. The 2019 version is double the size of the original. It is divided into five chapters and one annexe. The Manual recommends timing and deadlines for the proceedings, and stipulates that a suspect's first appearance should be made within 48 to 96 hours of their arrival at the seat of the Court.[320] The confirmation hearing should open between four to six months after the suspect's first appearance.[321] The Prosecutor should disclose all evidence in their possession no later than 30 days prior to the confirmation hearing according to the Rule 121(3) RPE.[322] The Manual advises that the decision on confirmation of charges be within 60 days of the confirmation hearing.[323] After the confirmation of charges, the record should be transmitted to a Trial Chamber pursuant to Rule 130 RPE. Within a week of the Trial Chamber's composition, the Manual suggests the first status conference should be scheduled.[324] The Manual proposes that written decisions under Article 74 RS shall be delivered within ten months (approximately 300 days) from the date on which the closing statements end.[325] The Manual also suggests deadlines of four months for interlocutory appeal judgments and ten months for final appeal judgments.[326]

Paris Declaration 2017

In 2017, the representatives of the international criminal courts and tribunals met in Paris, where they jointly produced a declaration on the effectiveness of international criminal justice. The declaration highlighted, *inter alia*, the expediency of the trials and was mostly directed towards the judges. It encouraged the judges to actively fulfil their managerial roles, to set deadlines for the disclosure of materials, to prefer oral decisions over written ones and to simplify written decisions.[327]

ICC Independent Expert Review 2020

The 2020 Independent Expert Review (IER) was established by the Assembly of States Parties to the Rome Statute (ASP). As part of its role as the ICC's management oversight and legislative body, the ASP appointed nine experts to "identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning."[328] The experts were tasked

[317] Ibid., p. 20, para 81.
[318] Ibid., p. 24, para 105.
[319] See more in McDermott (2017), pp. 873–904.
[320] See Chambers Practice Manual of the ICC (2019), para 7.
[321] Ibid., para 12.
[322] 15 days before the confirmation hearing when new evidence is collected, see Rule 121 (5) RPE.
[323] See Reg. 53 RoC. See also Chambers Practice Manual of the ICC (2019), para 55. Notably, the 60-day deadline was rarely met, it appears that only in the case of *Ongwen* the decision on confirmation of charges was made after 55 days from the confirmation hearing, in the case of *Lubanga* after 61 days, in *Blé Goudé* after 70 days, in *Katanga* after 72 days, in *Al Hassan* after 75 days, in *Yekaton and Ngaïssona* after 83 days, in *Mbarushimana* after 85 days, in *Banda* after 89 days, in *Abu Garda* after 101 days, in *Kenyatta* after 110 days, in *Ntaganda* after 119 days, in *Bemba* after 151 days, *Gbagbo* after 469 days.
[324] See Chambers Practice Manual of the ICC (2019), para 71.
[325] Ibid., para 87. In the case of *Katanga* the deliberation lasted 661 days, in *Bemba* 494 days, in *Ongwen* 329 days, in *Ntaganda* 313 days, and in *Lubanga* 198 days.
[326] Chambers Practice Manual of the ICC (2019), paras 91–93.
[327] Paris Declaration on the Effectiveness of International Criminal Justice, 16 Oct 2017, paras 7–25. See also Bourguiba (2020), pp. 282 et seqq.
[328] ICC-ASP, Independent Expert Review of the International Criminal Court and the Rome Statute System, ICC-ASP/18/Res.7., 6 Dec 2019, Annex I, A, para 1.

with delivering "concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole."[329] The experts also provided recommendations on the length of proceedings.

The experts argued the pre-trial stage can be lengthy and cumbersome,[330] showing inconsistent and contradictory practices across Chambers; the Pre-Trial and Trial Chambers duplicate one another's roles and some decisions are unnecessarily voluminous.[331] The experts raised concerns about the disclosure system,[332] recommending it be reviewed.[333] They also expressed concerns about factual, legal and structural uncertainties with the Document Containing Charges (DCC)[334] and about non-compliance with the Chambers Practice Manual.[335]

For the trial preparation stage, the experts suggested that the relevant protocols, namely on witness familiarisation, witness preparation, dual status witnesses, vulnerability assessment and support procedure, be standardised.[336] They further recommended starting trial preparation as soon as charges are confirmed.[337] Other issues were the lack of legislation on "no case to answer" procedures[338] and active participation of *amici curiae*, recommending that reasons for the latter's authorisation and appropriateness of their participation be given.[339] The experts pointed to inconsistencies in Chambers' practice as to submission and admission regimes for evidence[340] and witness preparation.[341] They recommended making greater use of audio-visual and other technologies when hearing witnesses.[342]

The IER report highlights the lack of guidelines for decisions on interlocutory appeals on substantive and procedural issues and recommends this be regulated in the Chambers Practice Manual.[343] Another recommendation is to amend the Rome Statute to allow substitute judges.[344]

On 20 November 2021 the judges of the ICC, during their retreat, agreed on reforms in response to the IER report, including amendment of the Chambers Practice Manual. As part of the announced amendment, the judges adopted a model for the decision on Directions for the Conduct of Proceedings which is intended to be annexed to the Chambers Practice Manual.[345] This model comprises an agreed single evidentiary system (submission system) for documentary, digital and physical evidence, as well as concerns such as the start of the trial, the order of evidence, witness testimony and protective measures. The judges also decided to revise the Chambers Practice Manual to reflect current practice regarding how victims' applications to participate in the proceedings are transmitted. The judges agreed to use the

[329] Ibid.
[330] ICC ASP, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report. 30 Sep 2020, para 490.
[331] Ibid., para 474.
[332] Ibid., paras 476 and 481.
[333] Ibid., para R190 (P).
[334] Ibid., para 484.
[335] Ibid., para 504, See also ibid., paras R192 (P) and R193 (P).
[336] Ibid., para 513.
[337] Ibid., para R200 (P).
[338] Ibid., paras 517 and R201.
[339] Ibid., para R202.
[340] Ibid., para 546.
[341] Ibid., para 551.
[342] Ibid., R204 (P). See also ibid., paras 554 and R207 (P). See para 576. See also ibid., paras R208 (P) and R209 (P).
[343] Ibid., para R213.
[344] Ibid., paras 606 and R214 (P).
[345] See "ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat", 22 Nov 2021.

"A-B-C Approach," which has been used by a number of Chambers in recent cases and has been found to be consistent with the Court's legal framework by the Appeals Chamber.[346]

2.6 The Criteria Applied in the Project

Although different terminologies and approaches are used in legal literature, national and international case law share established criteria for assessing the length of proceedings.[347] They do not draw a clear line separating the notions "undue delay" and "reasonable time".[348] This is illustrated in the ICTR *Kanyabashi* case:

> The Chamber examines the Defence allegation regarding the Prosecutor's conduct and concludes that there is no violation of the Accused's right to *be tried without undue delay*. The Chamber notes that the *issue of reasonable length of proceeding* has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights.[349]

From a linguistic point of view, "undue delay" refers to an occasion where a certain activity during the proceedings was postponed. In contrast, the term "reasonable time" encompasses the whole procedure.[350] Regardless, this research project has found that courts and tribunals assess "undue delay" and "reasonable time" using the same criteria.

As the Rome Statute and the ICC legal framework do not include a methodology to assess the length of the proceedings, reference must be made to Article 21 RS, which allows the application of treaties, principles or rules of international law or general principles of national laws of States. Such an application must be consistent with internationally recognised human rights. In this way, the interpretation of applicable criteria by national courts, regional human rights courts and the *ad hoc* tribunals becomes relevant for the ICC.[351]

Application of additional criteria such as the German proportionality test, with its elements of a legitimate aim, suitability, necessity and proportionality in the narrower sense, would require further deliberation and possible revision of the ICC legal framework, were it to be included.

For the purposes of this project, disproportionately long proceedings means unreasonably long proceedings as well as proceedings in which there has been undue delay.

2.6.1 Measuring the Length of Proceedings

This project considers proceedings from the date when the Prosecutor applies for an arrest warrant or summons to appear until either the date of the Trial or Appeals Chamber decision ending the proceedings against the person concerned, or – for ongoing cases – 31 July 2021.

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[346] Ibid.

[347] *The Prosecutor v. Nyiramasuhuko et al,* ICTR, 24 Jun 2011, paras 134 et seqq.; *The Prosecutor v. Nyiramasuhuko et al,* ICTR, 14 Dec 2015, paras 397–399; *The Prosecutor v. Bizimungu et al*, ICTR, 30 Sep 2011, paras 73 et seqq.; *The Prosecutor v. Nahimana et al*, ICTR, 27 Nov 2007, para 1074; *The Prosecutor v. Šešelj*, ICTY, 29 Sep 2011, para 3; *Nganyi v. Tanzania*, AfCtHPR, 1 Jan 2013, paras 117 et seqq.

[348] Clooney/Webb (2011), para 241.

[349] *The Prosecutor v. Kanyabashi,* ICTR, 23 May 2000, para 68.

[350] This understanding is based both on the jurisprudential usage of these terms in the case law analysed for this project and on the plain language meaning as reflected by relevant dictionary entries; see for example, "delay, n." and "time, n., int., and conj." *Oxford English Dictionary*, Oxford University Press (2021) www.oed.com (accessed 17 Mar 2022); see also "delay" and "time", *Merriam-Webster Dictionary*, Merriam-Webster (2021) www.merriam-webster.com/dictionary (accessed 17 Mar 2022).

[351] Undue delay, reasonable time, etc.

Reparation proceedings, Article 70 proceedings and sentence review proceedings are excluded.

To allow for a more detailed assessment, the full proceedings of each case are divided and scrutinised into three levels: phases, stages and procedural activities. Among these, phases are the overarching units and procedural activities are the detailed ones, although not necessarily the shortest. A case at the ICC generally consists of up to five phases, each of these comprising one or more stages, and each stage comprising numerous procedural activities. The following chart provides an overview of phases and stages as developed for the purpose of this project:

The levels of the proceedings at the ICC	
1. Arrest Warrant and Summons to Appear (W/S) Phase	From the date of the Prosecutor's first application for a W/S until the date of the suspect's completed transfer to the ICC.[352]
1.1. Issuance Stage	From the date of the Prosecutor's first application for a W/S until the date of issuance of the first W/S.
1.2. Arrest/Surrender Stage	From the day after the issuance of the first W/S until the date of the arrest/surrender of the suspect.[353]
1.3. Transfer Stage	From the day after the arrest/surrender of the suspect until the date of their completed transfer to the ICC.
2. Confirmation Phase	From the day after the completed transfer of the suspect to the ICC until the date of the final decision on the confirmation of charges (CoC).
2.1. First Appearance Stage	From the day after the completed transfer of the suspect to the ICC until the date of their first appearance before the judges of the ICC.
2.2. Post-Appearance Stage	From the day after the first appearance until the day before the beginning of the confirmation hearing.
2.3. Confirmation Hearing Stage	From the date of the opening of the confirmation hearing until the date of the closing of the confirmation hearing.
2.3.1. Opening	From the date of the opening of the confirmation hearing until the day before the beginning of the presentations by the parties and participants.[354]

[352] The term "from" is used here in a sense that the date or day to which it refers is to be counted as the first day of the respective time period. The term "until" is used here in a sense as "up to and including" or "through", meaning that the date or day to which it refers is to be counted as the last day of the respective time period. No date or day shall be assigned to two time periods.
[353] In case of multiple defendant cases, the stage starts with the issuance of the first W/S against the first suspect.
[354] In case the Prosecution starts the presentation of evidence on the first day of the hearing, the opening is not taken into account as a distinct stage.

The levels of the proceedings at the ICC	
2.3.2. Presentations	From the date of the beginning of the presentation by the parties and other participants until the conclusion of their presentations.
2.3.3. Closing Statements	From the date of the beginning of the closing statements until the closing of the confirmation hearing.
2.4. Post-Confirmation Hearing Stage	From the day after the closing of the confirmation hearing until the date of the decision on the charges by the Pre-Trial Chamber.
2.5. Post-Confirmation Stage	In the event of an appeal against the CoC: From the day after the decision on the charges until the date of the final decision on the charges by the Appeals Chamber.
3. Trial Preparation Phase	From the day after the final decision on the charges (be it by the Pre-Trial Chamber if not appealed or by the Appeals Chamber if appealed) until the day before the opening of the trial.
4. Trial Phase	From the date of the opening of the trial until the date of the issuance of a decision under Article 74 RS.
4.1 Trial Hearing Stage	From the date of the opening of the trial until the last date of the closing statements.
4.1.1. Opening Statements	From the first day of the opening statements until the last day of the opening statements.
4.1.2. Presentation by OTP	From the first day of the presentation by Prosecution until the last day of their presentation.
4.1.3. Presentation by the Victims	From the day after the conclusion of the presentation by the Prosecution until the last day of the presentation by the victims.
4.1.4. Presentation by the Defence	From the day after the conclusion of the presentation by the victims until the last day of the presentation by the Defence.
4.1.5. Final Closing Statements	From the day after the conclusion of the presentation by the Defence until the last day of the closing statements.

The levels of the proceedings at the ICC	
4.2. Trial Deliberations Stage	From the day after the conclusion of the closing statements until the date of the issuance of a decision under Article 74 RS.
4.3. Sentencing Stage	In the event of a guilty verdict: From the day after the issuance of an Article 74 RS decision until the date of the issuance of a decision under Article 76 RS.
5. Appeal Phase	From the date of the filing of the first appeal by either party until the date of the final decision on the appeal.
5.1. Pre-Hearing Stage	From the date of the filing of the first appeal by either party until the day before the opening of the appeals hearing.
5.2. Appeals Hearing Stage	From the date of the opening of the appeals hearing until the date of closing of that hearing.
5.3. Post-Hearing Stage	From the day after the closing of the appeals hearing until the date of the final decision on the appeal.
*Leave to Appeal	From the date of the request for leave to appeal until the date of the decision on leave to appeal.
*Interlocutory Appeal	From the date of the filing of an interlocutory appeal until the date of the decision on that interlocutory appeal.

Table 9 The levels of the proceedings at the ICC

2.6.2 Drivers in the Proceedings at the ICC

To move forward from phase to phase and from stage to stage at the ICC, certain requirements must be met. In parallel, various problems materially unrelated to them can arise.

- To open a case, upon successful application of the Prosecutor, Pre-Trial Chamber issues arrest warrant or summons to appear to the suspect according to Article 58 RS. This is followed by the arrest or arrival / transfer of the suspect to the ICC.
  W/S Phase: *successful application of the Prosecutor.*
- To initiate the confirmation of charges proceedings the suspect has to be present at the ICC according to Article 60(1) RS and Rule 121(1) RPE.
  First appearance stage in confirmation phase: *presence of the suspect.*
- To hold a confirmation hearing, the Prosecutor must inform the suspect of the charge and evidence under Article 61(3) RS and Rule 121(3) RPE through presentation of the Document Containing the Charges (DCC), and must disclose the evidence within a period no later than 30 days before the confirmation of charges hearing.
  Confirmation hearing stage in confirmation phase: *DCC and disclosure*
- To confirm or decline the charges, they should be first litigated during the confirmation hearing according to Article 61(5) RS and Rule 122 RPE.

Post-confirmation hearing stage in Confirmation phase: *confirmation hearing.*

- To prepare the case for trial, the Pre-Trial Chamber must confirm charges against the suspect under Articles 61(7) and 63(3) RS and the ICC President shall constitute a Trial Chamber under Article 61(11) RS and Rule 130 RPE.
  Preparation phase: *confirmation of charges*, *constitution of a Trial Chamber*.
- To commence the trial, the Trial Chamber must organise the trial under Article 64(3) RS and enable disclosure of the evidence under Rule 84 RPE.
  Trial phase: *organisation of the trial dependent on the factual circumstances and enabling disclosure*.
- To deliberate on the merits of the case, the Prosecutor, the accused and the victims present their cases before the Trial Chamber according to Rule 140(1) RPE.
  Deliberation stage in Trial phase: *presentation of evidence, closing the presentation of evidence and closing statements.*
- To decide on the sentence, a guilty verdict must be delivered under Article 74 RS and the parties and participants must present their submissions to decide on the sentence under Article 76 RS. However, under the current legal regime, unified procedure is also possible.
  Sentencing stage in trial phase: *guilty verdict.*
- To render judgment on the appeal, the parties may appeal the judgment on both the question of guilt and the sentence under Article 81 RS and Rules 150–152 RPE.
  Appeal phase: *appeal against decision of acquittal or conviction or against sentence*.

2.6.3 Procedural Activities

Procedural activities are here defined as concrete episodes in the case proceedings that deal with a distinct subject and have a measurable duration. They may be initiated by a Chamber, a party or a participant and they often, but not always, conclude with a Chamber decision. An example is a request for an extension of time to file a document, beginning with a party filing that request and ending with a Chamber decision granting or declining to grant it.[355]

When assessing these procedural activities, they can be accorded one of three types of impact on the length of proceedings:

1) Suspensive impact, which is when the activity causes a complete halt of the proceedings
2) Serious impact, which is when the activity with regard to the contested issue and particular circumstances cause rescheduling of the proceedings
3) Contributory impact, which is when an individual activity's impact on the length of proceedings is neither suspensive nor serious, but its continuous repetition contributes discernibly to the workload of the parties, the participants and the Chamber.

[355] This definition of procedural activities developed for this project has been inspired by similar concepts in case law, see for example, *Valle Jaramillo et al. v. Colombia*, IACtHR, 27 Nov 2008, paras 61, 155, and 164; and in legal literature, see for example, the definition in Pastor (2011), p. 1294: "A period of time determined by a beginning and an end within which a valid and effective procedural act has to be performed" (translated by authors).

3 Assessment of the Length of Cases at the International Criminal Court

3.1 General Information

Since 2003 eight ICC cases for core crimes against nine defendants have proceeded to a conviction or acquittal. A further four cases are classified as “closed” (the charges were either withdrawn or not confirmed due to a lack of evidence) and another four are ongoing.

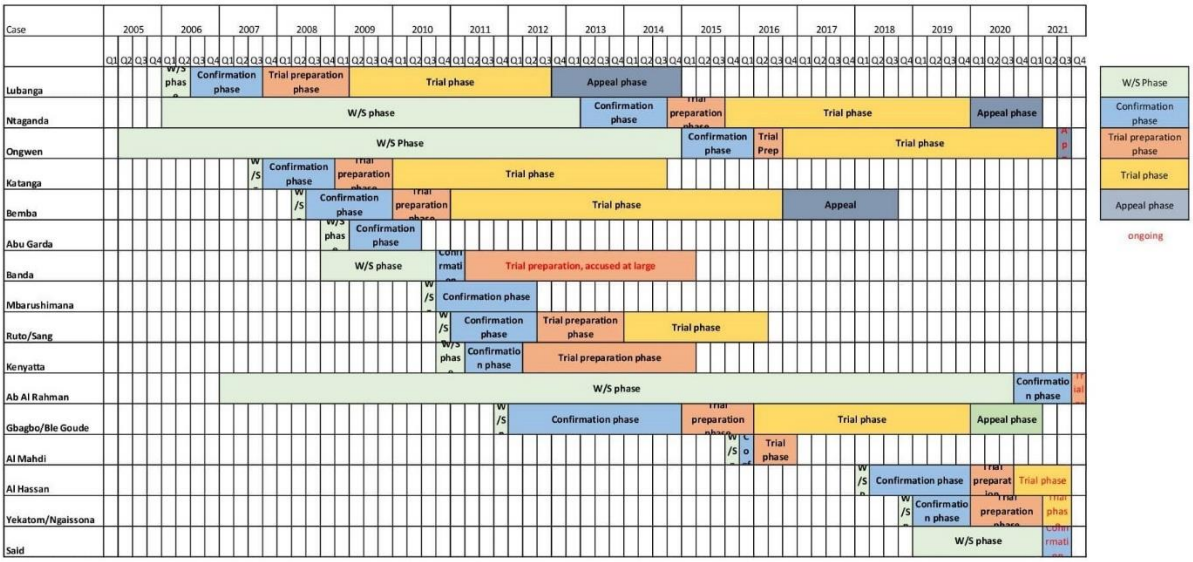

Image 3 The proceedings at the ICC

Days before the ICC by case																												
		Confirmation phase										Trial preparation phase	Trial phase														Days in proceedings	Years in proceedings
		W/S phase	Issuance stage	Arrest/summons stage/	Transfer stage	Confirmation phase	First appearance stage	Post-appearance stage	Confirmation hearing stage	Post-confirmation hearing	Post-confirmation stage		Trial Phase	Hearing stage						Deliberation stage	Sentencing stage	Appeal phase	Appeal phase					
N														Hearing stage	Opening	OTP	LRVs	Defence	Closing				Pre-hearing stage	Hearing stage	Post-hearing stage		
1	Lubanga	64	29	35	1	454	4	233	20	62	135	592	1262	943	2	168	14	453	130	200	119	790	593	2	195	3244	8,8
2	Ntaganda	2627	223	2400	4	469	4	320	5	115	25	423	1529	1095	14	562	14	317	188	312	122	569	399	3	167	5556	15,2
3	Ongwen	3547	63	3478	4	465	6	359	7	56	37	220	1613	1193	2	452	42	567	91	329	91				Ongoing	5930+	16,2
4	Katanga	119	11	107	1	372	4	249	19	72	28	395	1642	912	1	379	79	259	194	653	77	78	N/A	N/A	N/A	2560	7
5	Ngudjolo Chui	231	15	214	1	260	4	137					1121							209	N/A	800	670	1	129	2807	7,6
6	Bemba	56	15	1	40	442	1	191	4	151	95	429	2039	1453	1	484	98	650	220	494	93	796	645	3	148	3683	10
7	Ruto and Sang	114	84	28	0	414	1	146	8	137	121	473	939	939	1	938	N/A	N/A	N/A	81		Case terminated without prejudice				1938	5,3
8	Gbagbo	37	30	N/A	7	1017	6	441	10	469	91	503			6	853				286	Aquited	624	341	3	280	3446	9,4
9	Blé Goudé	832	10	394	430	272	5	185	4	70	7	405	1266	980			N/A	N/A	N/A							3398	9,3
10	Al Hassan	N/A	7	4	1	594	1	461	10	75	48	239	Ongoing	Ongoing	1	382+									Ongoing	1230+	3,3
11	Yekatom	18	11	6	1	475	6	299	23	61	91	340	165+	Ongoing		165+	Ongoing									1006+	2,7
12	Ngaissona	86	38	5	43	413	2	237																		1006+	2,7
13	Abd Al Rahman	4913	60	4852	1	423	6	343	3	45	23	Ongoing														5269+	14,4
14	Said	818	70	748		Ongoing	5	255	Ongoing																	1006+	2,7
15	Banda & Jerbo	604	312	291	0	264	1	174	1	89	N/A		At large													868+	2,3
16	Mbarushimana	158	40	13	105	491	3	230	6	86	166		Charges not confirmed													650	1,7
17	Kenyatta et al	113	84	29	0	290	1	165	15	110	121	1047	Case terminated													1451	3,9
18	Abu Garda	179	169	10	N/A	341	1	153	12	101	74		Charges not confirmed													550	1,5

Image 4 Days before the ICC by case

3.2 The Prosecutor v. Dominic Ongwen

Uganda referred the situation of the Lord’s Resistance Army (LRA) to the ICC.[356] The LRA is a self-described Christian rebel group led by Joseph Kony, established in 1987 and operating in Uganda and neighbouring countries. The organisation is allegedly responsible for human rights violations, war crimes and crimes against humanity.

[356] See “ICC - President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC”, www.icc-cpi.int/pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc (accessed 18 Mar 2022).

On 21 January 2000, Uganda adopted an Amnesty Act intended to encourage LRA fighters to voluntarily surrender to the authorities. This policy was criticised as promoting a culture of impunity, the LRA rejected it, and atrocities continued.[357]

In response, Uganda decided not to focus on amnesties but on prosecuting perpetrators. On 16 December 2003, Uganda referred the situation to the ICC. The referral was communicated via an official letter sent to the Prosecutor, Luis Moreno Ocampo. After a public announcement, the situation was assigned to the Pre-Trial Chamber on 5 July 2004 and the investigations began.

In 2005, the first arrest warrants were issued against top LRA members, including Joseph Kony. None of the suspects could be located and arrested until Dominic Ongwen surrendered on 16 January 2015.

Ongwen had originally been charged with seven counts of crimes against humanity (murder, enslavement and other inhumane acts) and war crimes (murder, cruel treatment, attack against the civilian population and pillaging). The OTP then applied a new open-ended charging strategy, expanding the charges from the original seven to 70 counts. On 4 February 2021, Trial Chamber found Dominic Ongwen guilty of 61 charges. He was sentenced to 25 years imprisonment on 6 May 2021. Other top members of the LRA, like Joseph Kony and Vincent Otti, remain at large until today.[358]

The proceedings in the case of Dominic Ongwen			
N	**Phase/Stage**	**Dates**	**Days**
1.	**W/S phase**	**6 May 2005-20 Jan 2015**	**3547**
1.1.	Issuance stage	6 May 2005-8 Jul 2005	64
1.2.	Arrest stage	9 Jul 2005-16 Jan 2015	3479
1.3.	Transfer stage	17 Jan 2015-20 Jan 2015	4
2.	**Confirmation phase**	**21 Jan 2015-29 Apr 2016**	**465**
2.1	First appearance stage	21 Jan 2015-26 Jan 2015	6
2.2	Post-appearance stage	27 Jan 2015-20 Jan 2016	359
2.3	Confirmation hearing stage	21 Jan 2016-27 Jan 2016	7
2.4	Post-confirmation hearing stage	28 Jan 2016-23 Mar 2016	56
2.5	Post-confirmation stage	24 Mar 2016-29 Apr 2016	37
3.	**Trial preparation phase**	**30 Apr 2016-5 Dec 2016**	**220**
4.	**Trial phase**	**6 Dec 2016-6 May 2021**	**1613**

[357] McKnight (2015), p. 200.
[358] See more in Akhavan (2005).

The proceedings in the case of Dominic Ongwen			
4.1.	Hearing stage	6 Dec 2016-12 Mar 2020	1193
4.1.1	Opening statements	6 Dec 2016-7 Dec 2016	2[359]
4.1.2	Presentation by the Prosecution	16 Jan 2017-12 Apr 2018	452
4.1.3	Presentation by the victims	13 Apr 2018-24 May 2018	42
4.1.4	Presentation by the Defence	25 May 2018-12 Dec 2019	567
4.1.5	Closing statements	13 Dec 2019-12 Mar 2020	91
4.2.	Trial deliberation stage	13 Mar 2020-4 Feb 2021	329
4.3.	Sentencing stage	5 Feb 2021-6 May 2021	91
5.	**Appeal phase**	**4 May 2021 – ongoing**	

Table 10 The proceedings in the case of Dominic Ongwen

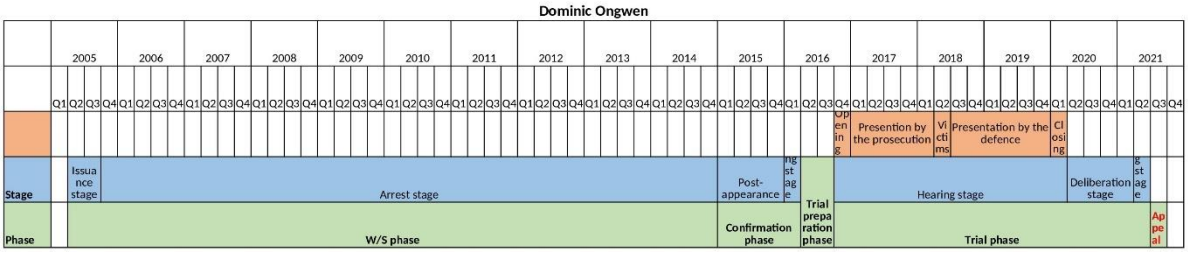

Image 5 The proceedings in the case of Dominic Ongwen

3.2.1 Summary of the Proceedings

Summary of the W/S phase: The W/S phase lasted 3,547 days until the suspect arrived at the ICC detention centre on 21 January 2015. The warrant had been issued on 8 July 2005 on the application of the OTP dated 6 May 2005 (63 days). Ongwen was arrested on 16 January 2015, which is 3,479 days (9 years) after the arrest warrant was issued.

Summary of the confirmation phase: The confirmation phase of the proceedings against Ongwen lasted for 465 days, from the date of his arrival in The Hague on 21 January 2015 until the final decision on the confirmation of charges on 23 March 2016. The confirmation hearing was initially scheduled for 24 August 2015 but then postponed to 21 January 2016.[360] Most of the confirmation phase was spent in the post-appearance stage (358 days), which is the third longest preparation for an ICC confirmation hearing.[361] The post-appearance stage included procedural activities around victims' applications, their representation[362] and

[359] Gap of 40 days before the OTP started its presentation.
[360] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-T-4-ENG, p. 14.
[361] Excluding Article 70 cases; in the case of Mr Gbagbo, the post-appearance stage lasted for 441 days, in the case of Mr Al Hassan for 464 days.
[362] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-350.

participation,[363] the applicability of Article 101 RS (the rule of specialty)[364] with an unsuccessful request for leave to appeal[365], a unique investigative opportunity under Article 56(1)(a) RS,[366] the disclosure regime and an interlocutory appeal in that regard,[367] potential *in situ* proceedings,[368] restrictions of the suspect's communications[369] and interim release of the suspect.[370]

On 12 February 2015, the OTP requested the Pre-Trial Chamber (PTC) to postpone the August 2015 confirmation hearing date so that the OTP could adequately review all materials for disclosure. The detailed reasons included that the OTP should re-contact the victims who had been interviewed many years before, and that further witnesses had to be interviewed. Additional reasons were the translation of all materials into Acholi and the lifting of confidentiality restrictions under Article 54(3)(e) RS, both of which were aimed at disclosure.[371] On 6 March 2015, the PTC decided to postpone the confirmation hearing until 21 January 2016.[372] From May 2015 onwards, the OTP disclosed materials on a rolling basis. On 18 September 2015, the OTP provided notice of the intended charges.[373] Although the confirmation hearing had already been postponed, the Defence unsuccessfully requested twice to further postpone it due to the breadth of the intended charges, including their increased geographical scope, and the late disclosure by the Prosecutor of over 20,000 additional pages of evidence, which included over 40 witnesses not previously disclosed.[374]

After the confirmation hearing on 23 March 2016, it took the PTC an additional 55 days to deliver its decision to confirm the charges against Mr Ongwen.[375] Another 36 days were spent to consider and reject the Defence application for leave to appeal the decision on the confirmation of charges.[376]

Summary of the trial preparation phase: The trial preparation phase lasted for 219 days, from 30 April to 5 December 2016. This is the shortest among ICC cases. The TC had made the date of the trial commencement dependent on OTP disclosure, which proposed to start the trial on 6 December 2016 and declared its readiness to disclose incriminatory evidence three months prior.[377] The OTP based its declaration on an estimate that yet another 4,500 pages were likely to be produced from audio-recorded interviews, supplementary investigations that were scheduled to end on 30 June 2016, and translation of witness testimonies.[378] During the trial preparation, other parties raised questions about the conduct of the proceedings,[379] the victims' application and participation system and legal aid funds for the representatives,[380] restriction of Mr Ongwen's telecommunications,[381] release and detention of Mr Ongwen,[382]

[363] Ibid., ICC-02/04-01/15-205, ICC-02/04-01/15-384.
[364] Ibid., ICC-02/04-01/15-260.
[365] Ibid., ICC-02/04-01/15-298.
[366] Ibid., ICC-02/04-01/15-277-Red.
[367] Ibid., ICC-02/04-01/15-203, ICC-02/04-01/15-251.
[368] Ibid., ICC-02/04-01/15-330.
[369] Ibid., ICC-02/04-01/15-241, ICC-02/04-01/15-28.
[370] Ibid., ICC-02/04-01/15-349.
[371] Ibid., ICC-02/04-01/15-196-Red2.
[372] Ibid., ICC-02/04-01/15-206.
[373] Ibid., ICC-02/04-01/15-305-Red2.
[374] See Ibid., ICC-02/04-01/15-348-Red, ICC-02/04-01/15-396.
[375] Ibid., ICC-02/04-01/15-422-Red.
[376] Ibid., ICC-02/04-01/15-428.
[377] This was opposed by the Defence, which claimed to disclose the materials six months before the trial. See ibid., ICC-02/04-01/15-T-25-ENG, 23.
[378] Ibid., ICC-02/04-01/15-438 and ICC-02/04-01/15-T-25-ENG 19-24.
[379] Ibid., ICC-02/04-01/15-497.
[380] Ibid., ICC-02/04-01/15-445, ICC-02/04-01/15-476, and ICC-02/04-01/15-586.
[381] Ibid., ICC-02/04-01/15-553.
[382] Ibid., ICC-02/04-01/15-503.

adoption of protocols and exclusion of a witness preparation protocol[383] and admission of Article 56 RS (unique investigative opportunity) evidence.[384] Another issue arose as to the Defence disclosure related to Article 31(1)(a) RS, where the Defence for three months alleged that it was unable to make an early filing, but the TC insisted on meeting the deadline.[385] The Defence successfully requested another postponement of the original deadline with regard to the OTP's request for the introduction of the previously recorded testimony of 38 witnesses.[386]

Summary of the trial phase: The trial started on 6 December 2016 and was closed on 6 May 2021 (1,613 days), making it the third longest ICC trial so far, ranking behind the *Bemba* case (2,038 days) and the *Katanga* case (1,642 days). In detail, the hearing stage of the *Ongwen* case has been the second longest hearing stage at the ICC to date, with 1,193 days, after the hearing stage of the *Bemba* case (1,453 days). The Prosecution started its presentation only 40 days after the trial commencement, on 16 January 2016.[387] The TC allocated 400 hours to the OTP to present its evidence, which was based on the number of witnesses expected to appear (69 out of 116 witnesses appeared before the Court).[388] 141 of the 452 days that the OTP case lasted, from 16 January 2017 to 13 April 2017, were hearing days in the courtroom. It then took 139 days until the Defence started its presentation. This timespan included the presentation of evidence by the victims (eight hearing days),[389] but also a three-day judicial visit to the Republic of Uganda[390] and preparation time out of court for the Defence. The Legal Representatives of Victims (LRVs) called seven witnesses. After the summer recess,[391] the Defence started presenting its evidence on 18 September 2018. This presentation lasted until 6 December 2019 (567 days with 77 hearing days).[392] When the Defence closed its presentation, it highlighted that it was assessing potential evidence, which might be presented at a later stage, however, the TC decided not to allow further presentation of evidence by the Defence.[393] The Defence presented 63 witnesses in total. 54 appeared before the Court, and another nine witnesses provided written evidence. On 12 December 2019, the TC declared the submission of evidence closed.[394]

A total of 91 witnesses were brought to the ICC, 35 witnesses were heard via video link, 51 written statements were introduced, and three witnesses were present and introduced by hybrid means.[395] The average time spent per witness was six hours.[396]

Another three months of the trial phase passed until the closing of the hearing stage on 12 March 2020 (with three hearing days). The subsequent 329 days were spent in deliberation on the judgment. However, the drafting of the judgment had already started. On 12 November 2020, after eight months, the TC scheduled the delivery for 12 January 2021.[397] The Defence successfully requested a postponement of this delivery by almost a month because of the

[383] Ibid., ICC-02/04-01/15-504. The OTP requested leave to appeal, which was rejected. See also Ibid., ICC-02/04-01/15-537.
[384] Ibid., ICC-02/04-01/15-520, ICC-02/04-01/15-596-Red and ICC-02/04-01/15-622. The Defence requested leave to appeal, which was rejected,
[385] Ibid., ICC-02/04-01/15-515.
[386] Ibid., ICC-02/04-01/15-470.
[387] Ibid., ICC-02/04-01/15-497, para 7.
[388] Ibid., ICC-02/04-01/15-497, paras 11–15.
[389] Ibid., ICC-02/04-01/15-1021 and ICC-02/04-01/15-1199-Red.
[390] Ibid., ICC-02/04-01/15-1292-Anx.
[391] Ibid., ICC-02/04-01/15-T-178-ENG, 31.
[392] Ibid., ICC-02/04-01/15-1275 and ICC-02/04-01/15-1699.
[393] Ibid., ICC-02/04-01/15-1699.
[394] Ibid., ICC-02/04-01/15-1699.
[395] Report of the Court on Key Performance Indicators, ICC (2019), p. 17.
[396] Ibid.
[397] Interview D5; and *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-1754.

elections in Uganda.[398] After the guilty verdict had been rendered, another 91 days were used for the sentencing stage.

Parallel to the presentation of the evidence, several other procedural activities took place, addressing matters such as: duplicated victims' applications,[399] interception of evidence[400] and other issues concerning evidence,[401] numerous other requests in regard to witnesses[402] especially for protective measures,[403] disclosure of requests for assistance and other communications related to cooperation between the OTP and Uganda, which led to the collection of evidence used against Ongwen,[404] disclosure of the identity of an informant,[405] resources for the Defence,[406] non-cooperation of Ugandan authorities with the Defence,[407] an unsuccessful Defence request for leave to file a "no case to answer" motion[408] and requests for leave to appeal.

Numerous procedural activities were initiated regarding Ongwen's mental health throughout, such as an unsuccessful request for a stay of proceedings under Rule 135 RPE,[409] an unsuccessful application for leave to appeal the Defence's dismissed request for a psychiatric examination under the same Rule,[410] disclosure of clinical notes[411] and an examination of the accused by three experts.[412] Furthermore, the Defence unsuccessfully argued that Ongwen did not understand the nature of the charges and made unsuccessful requests alleging fair trial violations in respect of translation, asking for a temporary stay of proceedings until these violations were remedied.[413] Halfway through and towards the end of its presentation of evidence, the Defence filed two requests about alleged errors in the confirmation of charges decision. Both requests were unsuccessful,[414] although one of the requests had even been put before the Appeals Chamber by means of an interlocutory appeal.[415]

Overall: Depending on the content of the procedural activity, the time between an OTP filing and a Defence response thereto ranged from eight to ten days. Decisions on OTP filings were delivered 14 days after the last response to the filing. In comparison, the OTP responded to Defence requests within five days. Decisions were delivered within 12 days. During the judicial proceedings the OTP filed at least 292 documents totalling 3,932 pages,[416] and 5,149 items were recognised as formally submitted into evidence. The OTP disclosed 25,975 items of written material totalling 159,369 pages. The Defence submitted at least 202 documents totalling 1,768 pages and disclosed 651 items totalling 7,035 pages. The victims presented at least 39 documents totalling 412 pages. During the proceedings the Chambers rendered 814 decisions, comprising written (338), oral (73) and email (403) decisions.

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398 *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-1759.
399 Ibid., ICC-02/04-01/15-639.
400 See ibid., ICC-02/04-01/15-615, where the Defence unsuccessfully requested leave to appeal. See also ibid., ICC-02/04-01/15-641.
401 See for example, ibid., ICC-02/04-01/15-711; ICC-02/04-01/15-698; and ICC-02/04-01/15-795.
402 See ibid., ICC-02/04-01/15-699; and ICC-02/04-01/15-817.
403 See ibid., ICC-02/04-01/15-974-Red; ICC-02/04-01/15-1005; and ICC-02/04-01/15-1095.
404 See ibid., ICC-02/04-01/15-1161, where the request was rejected and Defence unsuccessfully applied for leave to appeal. See also ibid., ICC-02/04-01/15-1179.
405 Ibid., ICC-02/04-01/15-1267-Corr.
406 Ibid., ICC-02/04-01/15-1115.
407 Ibid., ICC-02/04-01/15-1254 ; and ICC-02/04-01/15-1263.
408 Ibid., ICC-02/04-01/15-1309.
409 Ibid., ICC-02/04-01/15-650.
410 Ibid., ICC-02/04-01/15-637; and ICC-02/04-01/15-650.
411 Ibid., ICC-02/04-01/15-709; and ICC-02/04-01/15-744.
412 Ibid., ICC-02/04-01/15-1073.
413 Ibid., ICC-02/04-01/15-1127; and ICC-02/04-01/15-1163.
414 Ibid., ICC-02/04-01/15-1476; and ICC-02/04-01/15-1652.
415 Ibid., ICC-02/04-01/15-1562.
416 See data from performance indicators 2019.

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Dominic Ongwen			
	Defence response	OTP response	Decision from last response
OTP filing	9	—	14
Defence filing	—	5	12

Table 11 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Dominic Ongwen

Five languages were used: English, French, Acholi, Ateso and Lango, although French was not employed during the trial. 4,139 victims applied of whom 4,100 were authorised to participate via representation by external LRVs and the Office of Public Counsel for Victims (OPCV).

Interlocutory appeals in the case of Dominic Ongwen						
N	**Phase**	**Party**	**Issue on appeal**	**Dates**	**Total days**	**Outcome**
1	Pre-trial	OTP	Disclosure system	28 Apr 2015-17 Jun 2015	51	reversed
2	Trial	Defence	Defects in confirmation of charges decision	11 Apr 2019-17 Jul 2019	98	confirmed

Table 12 Interlocutory appeals in the case of Dominic Ongwen

3.2.2 Assessment

Complexity: Ongwen's unexpected surrender in 2015 led to the separation of his case from the multi-defendant case against LRA leaders, opened in 2005.[417] The separation reduced the case's complexity, as it now concentrated on charges against one defendant. But after the OTP evidence review, the initial seven charges in relation to one attack were expanded to 70, including further war crimes and crimes against humanity. The geographical scope was also extended to include crimes committed in different parts of Northern Uganda. This is the first case with a high number of charges[418] covering multiple attacks and novel charges, including previously uncharged sexual and gender-based crimes. These rendered the case complex.

[417] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/05-57, https://www.icc-cpi.int/uganda/ongwen (accessed 5 Apr 2022.

[418] See Lubanga 3 charges, Bemba 5 charges, Ntaganda 18 charges, Gbagbo/Ble Goudé 4 charges, Al Madi 1 charge.

That complexity also arises from modes of criminal liability. While the warrant had identified Ongwen as a low-ranking offender, after the review process he was charged as a principal perpetrator.[419] Further complexity arises out of the debates around the criminal responsibility of the so-called "victim-perpetrator". [420] His situation was linked to his child soldier background and to his arguable mental illness or deficiency at the time of the crimes. Notwithstanding the eventual finding of the Trial Chamber that there was no ground for excluding Ongwen's criminal responsibility,[421] these questions were additional "firsts" coming with a special need for litigation.

Although Uganda is a State Party to the Rome Statute and was the first to request an ICC investigation, cooperation between Uganda and the ICC was not always ideal.[422] However, in the particular case of Ongwen, the cooperation between Uganda and the ICC has been evaluated positively by the expert interviewed.[423]

The OTP pre-confirmation review process encompassed not only recalling the witnesses that had been contacted ten years previously, but also reviewing 17,791 items (94,620 pages)[424] for disclosure. This led to expanding the initial charges. Disclosure was on a rolling basis, investigations were ongoing, and a considerable amount of witness evidence had to be translated between English and Acholi.[425] The initial absence of any judicial dictionary in Acholi and the time used for training Acholi court interpreters added to the complexity as mentioned by the expert.[426]

The complexity was linked also to the large number of victims (4,100) and witnesses testifying before the Court (130) and logistical difficulties arising from their remoteness, as well as protective measures in the event of relocation, which continued also during the trial.[427]

Conduct of defendant and participants: The Defence contributed to the length of proceedings, which, however, should not be considered to be unreasonable as it is its right to use all possible means. The Defence unsuccessfully initiated numerous procedural activities to postpone deadlines to enable preparation,[428] to stay the proceedings due to alleged violations of the fair trial principle[429] and to request leave to appeal decisions of the TC.[430] Although they added more workload for the Registry, the OTP and Chambers, they do not appear to have been unreasonable. The challenges raised as to the mental fitness of the defendant have contributed to the proceedings' length, but were unavoidable.

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[419] See Minkova (2020), pp. 34, 223–245, 237 et seqq.
[420] Pieters (2021).
[421] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/05-57, paras 2580, 2671–2672.
[422] See e.g. Kersten (2017), See more in Cark (2018), pp. 171 et seqq.; and *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-T-5, 20-21.
[423] One expert interviewed in the course of this study stated "We are lucky, I will say, with the Ongwen case because we have an embassy and an ambassador in The Hague which is extremely positive for the Court", Interview D2, see also Branch (2017), pp. 44–45; and *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-T-24, p. 8.
[424] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-196-Red2, paras 4 et seqq.
[425] See ibid., ICC-02/04-01/15-T-25-ENG, pp. 17–19.
[426] An expert interviewed during this study stated that "One of the first things we have done is to find the best word judicially to have to be able to say, this term in English means this in Acholi, and we have given almost a dictionary to the country", Interview D2.
[427] One of the respondents in this study mentioned that "there is always some difficulty with some witness, or because of the protection, or because of logistical issue. If you bring someone from one of the villages six hours from Kampala, that means it's of course it's a day", Interview D2, another expert mentioned e.g. that "Many of these witnesses were flying in from Uganda and depending on many factors. Some of the witnesses, for example some of the Prosecution witnesses, were State actors. Getting authorization for them to participate, I think that contributed to some delays in the proceedings because if you are a State actor and you are, say, a serving military officer you need authorization from your commanding officer", Interview D1.
[428] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-1248, ICC-02/04-01/15-1254, ICC-02/04-01/15-1263, ICC-02/04-01/15-1476.
[429] Ibid., ICC-02/04-01/15-1127.
[430] Ibid., ICC-02/04-01/15-1173.

The non-cooperation between the Defence and Uganda complicated the Defence's efforts to identify and communicate with witnesses.[431] This is linked to the Defence team's capacity to manage the case's complexity and to certain procedural activities.[432] Although the Defence had fewer witnesses, the Defence spent almost the same amount of time on the presentation of evidence at trial (415 days, from 18 October 2018 to 6 December 2019). This is, however, shorter than the Defence presentations in the cases of *Bemba* and *Lubanga*, and the number of charges against the latter defendants was smaller *(Lubanga* three; *Bemba* five) than in the case of *Ongwen*. At the same time, the Defence had a smaller team to consider all material disclosed to them (159,369 pages).[433]

During the presentation of its evidence, the Defence twice alleged defects in the decision on the confirmation of charges but without success.[434] Although one of the challenges lasted six months including interlocutory proceedings before the Appeals Chamber, the proceedings before the TC and the hearing of the witness testimonies continued in parallel.[435]

The Defence successfully requested postponing the deadline for the notice of appeal against the trial judgment to take into account the time needed for the translation of the latter,[436] which also may not be considered unreasonable.

While the victims joined the unsuccessful request of the Defence to adjourn the proceedings at the beginning,[437] the overall participation of the victims including the time for preparation and presentation of their evidence (calling only seven witnesses) compared to the Defence or the OTP did not unreasonably lengthen the proceedings.[438]

Conduct of authorities: The unexpected surrender of Ongwen nearly ten years after the issuance of the arrest warrant led the OTP to re-examine the material in its possession, and to collect new evidence under Article 67(2) RS and Rule 77 RPE.[439] This review included 17,791 items and 94,620 pages in total, which the OTP advised the PTC would be reviewed at a rate of 50 pages per day with the reviewers working full-time.[440] The time requested took into account issues such as re-allocation and employment of new staff to accelerate the review process, protective measures, location and protection of witnesses, redactions of information concerning its witnesses, further investigations into the charges, language issues,[441] the addition of charges and review of approximately 47,000 pages of material obtained on condition of confidentiality under Article 54(3)(e) RS.[442] As noted above, from May 2015 onwards, the OTP made the material available to the Defence on a rolling basis. On 18 September 2015, the OTP gave notice of the new set of charges[443] and filed the DCC, the OTP's pre-trial brief and its list of evidence.[444] Although it is the OTP's responsibility to refresh the evidence at hand for ten years, in this particular case the process was necessary for avoiding adjournments at a later stage. Additional procedural activities did not contribute to the length of the proceedings as the decision on the confirmation of charges and, consequently, the deadline for disclosure had already been postponed due to the review process.

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[431] Interview D4.
[432] See Interview D1, D3.
[433] See Interview D4.
[434] See also Lyons (2020).
[435] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-1562.
[436] Ibid., ICC-02/04-01/15-1781.
[437] Ibid., ICC-02/04-01/15-396.
[438] Interview D1, D2, D3, D4, D5.
[439] Gumpert/Nuzban (2019); and interviews D2, D3, D5.
[440] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-T-6-ENG.
[441] Interview D2.
[442] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15-196-Red2.
[443] Ibid., ICC-02/04-01/15-T-6-ENG 17, ICC-02/04-01/15-305-Red2.
[444] Ibid., ICC-02/04-01/15-375-Conf-AnxA.

After the decision on the confirmation of the charges on 23 March 2016, more than a month passed until the PTC decided, on 29 April 2016, not to grant leave to appeal that decision.[445] It was not until 2 May 2016 that the Registry transmitted the record of the proceedings, including the confirmation decision, to the Presidency, after which on 4 May 2016 the TC scheduled its first status conference.

On 1 June 2016, the OTP requested the TC to vacate the 1 July deadline for the provisional list of Prosecution witnesses, because there were still more witnesses whom the OTP intended to contact.[446] Evidentiary material was still being disclosed to the Defence on a rolling basis, investigations and translations were ongoing.[447] Given the complexity, the OTP preparations from May to September 2016 (three months prior to the opening of the trial) were not overly long. Considering the number of motions and other filings of the Defence, the OTP and the Chambers responded in a relatively short time.

The OTP presentation of evidence lasted for 451 days, compared with the *Bemba* (485 days), the *Ntaganda* (561 days) and the *Gbagbo/Ble Goudé* (853 days) cases, which is, bearing in mind the number of charges brought and witnesses invited,[448] a much shorter timeframe. The time spent by the OTP does not therefore seem to have been unreasonable.

Cooperation between the OTP, the Court and Uganda has been considered positively in comparison to the Kenya cases.[449] However, this has not been the case with the Defence and Uganda, which caused the Defence difficulties in compiling and presenting its evidence.[450]

The active case management of the presiding judges of the Chambers was a factor in favour of expeditious proceedings, bearing in mind the requests to adjourn the proceedings,[451] and established protocols were adopted in an expeditious manner. However, the TC did not adhere to all practices followed in previous cases and deviated from the witness preparation protocol[452] and on submission of evidence.[453] The time which was used for the deliberation was 329 days, the third longest deliberation at the ICC.[454]

Overall: The OTP was not prepared for Ongwen's surrender, for which it bears responsibility. However, the additional time which the OTP then took to review and re-visit the evidence was necessary to avoid later adjournments. Likewise the Defence wanted to be granted more time for preparation at various stages of the proceedings. Besides the short gaps of almost one month each, for example between the decision on the confirmation of charges and the assignment of the TC (bearing in mind that the former decision still was not final), or between the opening statements and the first day of the presentation of evidence by the OTP, there is hardly any gap during which the parties and participants were inactive. Accordingly, the proceedings were not unreasonably long. This does not mean that no factor influencing the length of the proceedings could be ascertained.

3.2.3 Factors Impacting the Length of Proceedings in the Ongwen Case

Serious impact: The OTP review process led to a postponement of the disclosure deadline and confirmation hearing. This included not only re-contacting of witnesses, but also the

[445] Ibid., ICC-02/04-01/15-428.
[446] Ibid., ICC-02/04-01/15-452.
[447] Ibid., ICC-02/04-01/15-T-25-ENG 17-19.
[448] Interview D3.
[449] Interview D2, D3.
[450] Interview D1.
[451] Interview D2, D3, D5.
[452] Interview D3.
[453] Guariglia (2018), p. 321.
[454] Katanga 653 days, Bemba 494 days, even taking into account that the Defence had requested a postponement of one month because of the elections in Uganda.

implementation of protective measures and redactions, as well as translation of materials. The translation of the briefs and decisions was a special factor; for example, in order to appeal, the Defence needed the translation of the judgment (1,077 pages).

Contributory impact: Besides having a serious impact, language issues are a major factor in judicial proceedings and have a contributory impact. When defendants and other participants are not fluent or comfortable in English, they choose to speak their mother tongue for fear of saying something that might be misunderstood or that could incriminate them. In the *Ongwen* case most witnesses gave evidence in their mother tongue, the translation of which contributed to the length of the proceedings. The procedural activities concerning the defendant's health issues were another factor, as were the number of charges brought, which in turn affected the number of witnesses presented, along with necessary protective measures and redaction issues. The remoteness of certain locations also had a contributory impact.

Numerous activities initiated by the parties contributed, such as the Defence's numerous leaves to appeal. Although the management of those procedural activities was regulated positively,[455] the lack of cooperation with the State relative to Defence witnesses and evidence was another factor.

3.3 The Prosecutor v. Jean-Pierre Bemba Gombo

Jean-Pierre Bemba Gombo, a national of the Democratic Republic of the Congo, was charged with two counts of crimes against humanity (murder, rape)[456] and three counts of war crimes (murder, rape, pillaging)[457]. Originally charged with individual responsibility, the mode of liability was changed to command responsibility under Article 28 RS during the confirmation phase.

Jean-Pierre Bemba Gombo was the President and Commander-in-chief of the *Mouvement de libération du Congo* (MLC). The organisation started operating in 1998 as a rebel group in the Democratic Republic of Congo with the goal of overthrowing the government in Kinshasa. It later became an official political party and formed the main opposition party from 2006 until 2011.

From 2002 to 2003, Bemba was alleged to have commanded his armed forces to attack the forces of François Bozize, who was the Chief of Staff of the Armed Forces of the Central African Republic (CAR) at that time. Bozize was in conflict with the President of CAR, Ange-Félix Patasse. Bemba and Patasse had previously made an agreement that MLC forces would support CAR government forces in exchange for the CAR government not supporting the DRC government. As leader of the MLC, Bemba held broad formal powers and had ultimate decision-making authority. In consequence, Bemba allegedly ordered his army to enter CAR, to murder civilians, to commit rape and sexual violence and to destroy property to terrorise the local population. Entire families were victimised by MLC soldiers, victims included the elderly, men, women and children.[458]

On 21 December 2004, the CAR government referred the case to the ICC to investigate the alleged atrocities. In January 2007, Bemba was elected senator for the MLC, but was arrested on an ICC warrant in Belgium only one year later. The trial began on 22 November 2010. Bemba was charged on two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging), allegedly committed between 2002 and

[455] Interviews with D1, D2, D3, D5.
[456] Article 7(1)(a) and (g) RS, respectively.
[457] Article 8(2)(c)(i), 8(2)(e)(vi), and 8(2)(e)(v) RS, respectively.
[458] Wakabi (2012). See more in International Federation for Human Rights: Déjà-Vu: Peace (Dis)Agreements That Are Detrimental to Victims, 4 Dec 2008, Déjà-vu: Peace (dis)agreements that are detrimental to victims (fidh.org) (accessed 3 Oct 2022).

2003 in CAR. While being sentenced to 18 years imprisonment in the first instance, eventually, he was acquitted on appeal on 8 June 2018.

The proceedings in the case of Jean-Pierre Bemba Gombo			
N	**Phase/Stage**	**Dates**	**Days**
1.	**Arrest Warrant Phase**	**9 May 2008-3 Jul 2008**	**56**
1.1	Issuance stage	9 May 2008-23 May 2008	15
1.2	Arrest stage	24 May 2008	1
1.3	Transfer stage	25 May 2008-3 Jul 2008	40
2.	**Confirmation phase**	**4 Jul 2008-18 Sep 2009**	**442**
2.1	First appearance stage	4 Jul 2008	1
2.2	Post-appearance stage	5 Jul 2008-11 Jan 2009	191
2.3	Confirmation hearing stage	12 Jan 2009-15 Jan 2009	4
2.4	Post-confirmation hearing stage	16 Jan 2009-15 Jun 2009	151
2.5	Post-confirmation stage	16 Jun 2009-18 Sep 2009	95
3.	**Trial preparation phase**	**19 Sep 2009-21 Nov 2010**	**429**
4.	**Trial phase**	**22 Nov 2010-21 Jun 2016**	**2039**
4.1.	Hearing stage	22 Nov 2010-13 Nov 2014	1453
4.1.1	Presentation by the OTP	23 Nov 2010-20 Mar 2012	484
4.1.2	Presentation by the LRVs	21 Mar 2012-26 Jun 2012	98
4.1.3	Presentation by the Defence	27 Jun 2012-7 Apr 2014	650
4.1.4	Closing statements	8 Apr 2014-13 Nov 2014	220
4.2.	Deliberation stage	14 Nov 2014-21 Mar 2016	494
4.3.	Sentencing stage	21 Mar 2016-21 Jun 2016	93
5.	**Appeal phase**	**4 Apr 2016-8 Jun 2018**	**796**
5.1.	Pre-hearing stage	4 Apr 2016-8 Jan 2018	645

The proceedings in the case of Jean-Pierre Bemba Gombo			
N	**Phase/Stage**	**Dates**	**Days**
5.2.	Hearing stage	9 Jan 2018-11 Jan 2018	3
5.3.	Post-hearing stage	12 Jan 2018-8 Jun 2018	148
	Final Judgment	8 Jun 2018	

Table 13 The proceedings in the case of Jean-Pierre Bemba Gombo

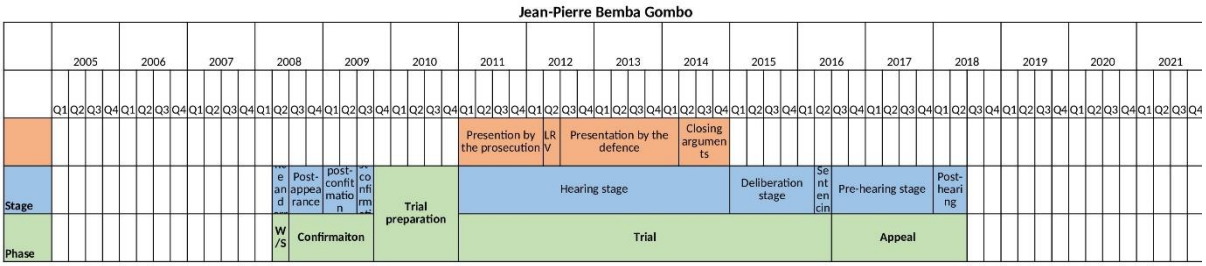

Image 6 The proceedings in the case of Jean-Pierre Bemba Gombo

3.3.1 Summary of the Proceedings

Summary of the W/S Phase: This phase in the *Bemba* case took 56 days, one of the shortest to date. Mr Bemba was arrested by the Belgian authorities the day following the issuance of the first arrest warrant against him (and 16 days after the Prosecutor's first request for a warrant), but his transfer to the Court took 40 days. While he exhausted all local remedies, the PTC issued a second warrant adding two counts at the Prosecution's request,[459] which enabled Mr Bemba to seize the Belgian courts a second time.[460]

Summary of the confirmation phase: The confirmation phase lasted for 442 days, from the day of Bemba's first appearance on 4 July 2008 until the final decision on the confirmation of charges on 18 September 2009. The longest part was spent in the post-appearance stage (191 days), although this is below average when compared to other ICC cases to date.

The length of the post-appearance stage was linked to the confirmation hearing being postponed twice. The hearing that had originally been scheduled to commence on 4 November 2008 (after 123 days) was first postponed without a new opening date on 17 October 2008, the reasons being an amended DCC filed on the same day, and delays in the disclosure and disclosure-related redactions processes. The PTC was concerned that part of the evidence on which the Prosecution intended to rely was not yet accessible to the Defence, hence the hearing had to be postponed to a new date.[461] On 31 October 2008, the Chamber rescheduled the confirmation hearing for 8 to 12 December 2008.[462] However, on 2 December 2008, the Chamber again postponed the confirmation hearing to no earlier than 12 January 2009, this

[459] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-15-tENG.
[460] Ibid., ICC-01/05-01/08-22.
[461] Ibid., ICC-01/05-01/08-170-tENG.
[462] Ibid., ICC-01/05-01/08-199-tENG.

time because of the leave of absence that the ICC Presidency had granted to one of the Chamber's judges due to grave family circumstances.[463]

The length of the post-confirmation hearing stage was linked to the 3 March 2009 decision of the PTC to adjourn the confirmation hearing and to request the Prosecutor to reconsider charges under Article 28 RS.[464] Complying with the deadlines set by the Chamber, the Prosecutor filed a third amended DCC on 30 March 2009.[465] The PTC confirmed the charges as put forward in the third amended DCC.[466] One of the experts interviewed pointed to the novelty and accompanying uncertainties of charges under Article 28 RS, combined with charges of sexual slavery, as having been central to the DCC process.[467]

Other procedural activities that occupied the Chamber, the parties and the participants during the confirmation phase were related to incomplete and ineffective Defence disclosure,[468] repeatedly amended lists of evidence,[469] monitoring of Bemba's communications and contacts in detention,[470] the funding situation of the Defence team including an unsuccessful request to suspend the proceedings and the related withdrawal of two Defence team members,[471] State cooperation as to Bemba's frozen assets,[472] three requests for interim release of which one was granted but then overturned by the Appeals Chamber,[473] victims' applications[474] and *amicus curiae* requests for participation[475].

Summary of the trial preparation phase: With an overall duration of 429 days, from 19 September 2009 until 21 November 2010, the trial preparation phase lasted almost as long as the confirmation phase. The opening of the trial was postponed three times during that phase. The first opening date of 27 April 2010[476] (after 220 days) was abandoned at a status conference on 8 March 2010. The TC wanted to resolve the admissibility challenge that had been raised by the Defence before the first trial hearing, which was postponed to 5 July 2010 (lengthening the trial preparation phase by another 69 days).[477] In a decision of 25 June 2010, the Chamber postponed the trial commencement to 14 July 2010 for administrative reasons, in particular an expected change in the Bench composition, and to facilitate necessary preparations.[478] On 7 July 2010, the TC decided to vacate the opening date of 14 July 2010

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[463] Ibid., ICC-01/05-01/08-304.
[464] Ibid., ICC-01/05-01/08-388.
[465] Ibid., ICC-01/05-01/08-395.
[466] Ibid., ICC-01/05-01/08-424.
[467] One of the experts who participated in this study stated that that "the biggest challenge that the Prosecution had was despite finding evidence, which is very difficult in such circumstances was the article 28 RS; the command responsibility. Very early on, the Prosecution understood that this will be a key element in these charges. The Prosecution had a team that was focusing specifically on that. It even recruited from the trial lawyer […] who was an expert and really specialized in this area", Interview C3.
[468] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-311, ICC-01/05-01/08-327.
[469] Ibid., ICC-01/05-01/08-170-tENG, ICC-01/05-01/08-225, ICC-01/05-01/08-264, ICC-01/05-01/08-330.
[470] Ibid., ICC-01/05-01/08-85, ICC-01/05-01/08-118-tENG, ICC-01/05-01/08-231-Corr, ICC-01/05-01/08-271, ICC-01/05-01/08-272, ICC-01/05-01/08-300, ICC-01/05-01/08-313, ICC-01/05-01/08-332, ICC-01/05-01/08-342, ICC-01/05-01/08-501, ICC-01/05-01/08-508, ICC-01/05-01/08-514.
[471] Ibid., ICC-01/05-01/08-76-tENG, ICC-01/05-01/08-249, ICC-01/05-01/08-339-Red, ICC-01/05-01/08-530, ICC-01/05-01/08-524.
[472] Ibid., ICC-01/05-01/08-254.
[473] Ibid., ICC-01/05-01/08-73, ICC-01/05-01/08-323, ICC-01/05-01/08-321, ICC-01/05-01/08-403, ICC-01/05-01/08-475, ICC-01/05-01/08-631-Red.
[474] Ibid., ICC-01/05-01/08-103-tENG, ICC-01/05-01/08-184, ICC-01/05-01/08-253, ICC-01/05-01/08-320, ICC-01/05-01/08-322, ICC-01/05-01/08-349.
[475] Ibid., ICC-01/05-01/08-401, ICC-01/05-01/08-421, ICC-01/05-01/08-451, ICC-01/05-01/08-453, ICC-01/05-01/08-504, ICC-01/05-01/08-602.
[476] Ibid., ICC-01/05-01/08-598.
[477] Ibid., ICC-01/05-01/08-T-20-Red-ENG, 14-15.
[478] Ibid., ICC-01/05-01/08-803. The change in the Bench composition, notable Judges Kuniko Ozaki and Sylvia Steiner replacing Judges Adrian Fulford and Elizabeth Odio Benito, was described as having resulted in the new Bench needing some time to familiarise itself with the procedural decisions made by their predecessors. However,

and fix a new date at a status conference on 30 August 2010, as it wanted to await the Appeals Chamber's decision on whether the appeal against its admissibility decision had suspensive effect.[479] Eventually, the TC decided on 21 October 2010 that the trial would commence on 22 November 2010.[480]

Other procedural activities during this phase related to the above-mentioned admissibility challenge coupled with an abuse of process challenge,[481] the trial venue, namely whether parts of the trial should be held *in situ*,[482] another amendment of the DCC and Defence requests for revision thereof,[483] the funding of the Defence team,[484] restrictions on the use of confidential material in Defence investigations,[485] two procedures on interim release,[486] disclosure of contentious material,[487] the *prima facie* admission of evidence (with an interlocutory appeal lasting into the trial phase),[488] the training of Sango interpreters,[489] translations to French requested by the Defence,[490] modalities of victims' participation[491] and requests for participation under Rule 103 RPE[492].

Summary of the trial phase: The trial began on 22 November 2010 and lasted until 21 June 2016 (2,038 days or more than five and a half years), the longest trial at the ICC. The Prosecution started its presentation on the day after the trial opened.[493] 181 trial hearings were conducted and 40 witnesses heard before the Prosecution rested its case after 485 days on 20 March 2012. After a preparatory period, the victims' representatives began their factual presentation on 1 May 2012 and concluded on 26 June 2012. During this 57-day period, only eight trial hearings were held. The LRV called two witnesses, and three victims presented their views in person. It then took until 14 August 2012 for the Defence to start presenting its case, which lasted until 14 November 2013. These 458 days contained only 124 trial hearings, meaning that despite the Defence phase looking longer than the Prosecution phase at first glance, it took less courtroom time. The Defence called 34 witnesses. Subsequently, the Trial Chamber called one witness on which five hearing days were spent. Overall, the Chamber heard the *viva voce* testimony of 77 witnesses, including seven experts, who appeared either at The Hague or via video link.

On 21 September 2012, TC rendered a decision notifying the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) RoC. The judges announced that they may remain within the same mode of liability under Article 28(1)(a) RS, but consider the alternate form of knowledge, namely the "should have

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the overall impact of this change on the Bench on the length of the Bemba case was assessed not to have been very noteworthy when compared to other issues in the case, Interview C1.

[479] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-811. www.icc-cpi.int/car/bemba (accessed 22 Mar 2022).

[480] Ibid., ICC-01/05-01/08-T-30-ENG, 4.

[481] Ibid., ICC-01/05-01/08-802, ICC-01/05-01/08-962.

[482] rICC-01/05-01/08-555, ICC-01/05-01/08-584.

[483] Ibid., ICC-01/05-01/08-593, ICC-01/05-01/08-694, ICC-01/05-01/08-836, ICC-01/05-01/08-894-Red, ICC-01/05-01/08-935.

[484] Ibid., ICC-01/05-01/08-568, also ICC-01/05-01/08-567-Red, ICC-01/05-01/08-596-Red, ICC-01/05-01/08-852-Red.

[485] Ibid., ICC-01/05-01/08-813-Red.

[486] Ibid., ICC-01/05-01/08-743, ICC-01/05-01/08-843, ICC-01/05-01/08-1019.

[487] Ibid., ICC-01/05-01/08-655, ICC-01/05-01/08-589, ICC-01/05-01/08-750-Red, ICC-01/05-01/08-1008.

[488] Ibid., ICC-01/05-01/08-1020, ICC-01/05-01/08-1386, ICC-01/05-01/08-1470.

[489] Ibid., ICC-01/05-01/08-709.

[490] Ibid., ICC-01/05-01/08-879.

[491] Ibid., ICC-01/05-01/08-651, ICC-01/05-01/08-699, ICC-01/05-01/08-1005.

[492] Ibid., ICC-01/05-01/08-602, ICC-01/05-01/08-743.

[493] Ibid., ICC-01/05-01/08-T-33-Red2-ENG.

known" standard. On 13 December 2012, the TC decided to temporarily suspend the proceedings and ordered the Defence presentation to re-commence on 4 March 2013.[494]

After the witness called by the Trial Chamber had been heard in November 2013, it took almost one year until the parties and participants made their closing statements on 12 and 13 November 2014.[495] In October 2014, three more hearing days were spent on re-calling a witness after the witness had made allegations of corruption and ill-treatment.[496] A Defence request for also re-calling another witness was unsuccessful.[497]

Notably, in April 2014, during the stage of closing arguments, the parties and participants made submissions on whether the Trial Chamber should render separate decisions on guilt and sentencing. While the victims and the Prosecution requested separate decisions,[498] Bemba waived his right to a bifurcated trial and his Defence requested a single decision, arguing that this was the only option compliant with his right to an expeditious trial.[499] On 26 May 2014, TC decided that it would issue two separate decisions.[500]

After the closing statements, the TC went into deliberations that lasted for 494 days, until the guilty verdict was delivered on 21 March 2016. These were the second longest deliberations, ranking after the *Katanga* case (661 days). On the day before closing statements, the Defence filed a request for relief for abuse of process, asking for a stay of proceedings and Bemba's immediate release.[501] As the filing exceeded the page limit by 67 pages and only contained the request to extend the page limit within the same filing, it took more than a month of litigation until the Defence filed a new consolidated request,[502] on which then a substantial exchange took place and which the Trial Chamber eventually rejected on 17 June 2015;[503] subsequent leave to appeal was not granted.[504] On 19 June 2015, however, reacting to a disclosure notice by the Prosecution related to the Article 70 proceedings, the Defence requested not only further disclosure but again requested a stay of proceedings, or alternative measures including a delay of the judgment delivery.[505] Although not many related filings appear on the public record, the Trial Chamber took until 7 March 2016 to reject the Defence request;[506] subsequent leave to appeal was again not granted.[507]

The sentencing stage following the guilty verdict lasted for three months, from 21 March 2016 until 21 June 2016. Aside from the parties' and participants' written submissions and observations on sentencing,[508] the main procedural activities related to if and how additional evidence should be taken. In the end, a hearing with two additional witnesses, two victims

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[494] Ibid., ICC-01/05-01/08-2480, ICC-01/05-01/08-3076. One of the experts mentioned that "we also had obstacles when the trial chamber gave [the] notice that it might recharacterize the charges under regulation 55, really late in the day, which threw a huge spanner into the works because [the Defence] running a case along the lines of a particular level of (unintelligible) for Mr Bemba, […] and [the Defence] really didn't know what to do at that point; whether [it] should completely readjust the defence strategy or try and bring different evidence or more evidence, Interview C5.

[495] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-T-364-Red-ENG, ICC-01/05-01/08-T-365-Red2-ENG.

[496] Ibid., ICC-01/05-01/08-3154-Red2, ICC-01/05-01/08-3155, ICC-01/05-01/08-3157-Red.

[497] Ibid., ICC-01/05-01/08-3204-Red.

[498] Ibid., ICC-01/05-01/08-3050, ICC-01/05-01/08-3053.

[499] Ibid., ICC-01/05-01/08-3054-Red.

[500] Ibid., ICC-01/05-01/08-3071.

[501] Ibid., ICC-01/05-01/08-3203-Red2.

[502] Ibid., ICC-01/05-01/08-3217-Red2.

[503] Ibid., ICC-01/05-01/08-3255.

[504] Ibid., ICC-01/05-01/08-3273.

[505] Ibid., ICC-01/05-01/08-3257-Red.

[506] Ibid., ICC-01/05-01/08-3335.

[507] Ibid., ICC-01/05-01/08-T-367-ENG, 3.

[508] Ibid., ICC-01/05-01/08-3363-Red, ICC-01/05-01/08-3371-Red, ICC-01/05-01/08-3379-Red.

presenting their views and concerns, and final oral submissions took place from 16 to 18 May 2016.[509] On 21 June 2016, Trial Chamber III sentenced Bemba to 18 years imprisonment.[510]

Throughout the hearing phase several other procedural activities took place, addressing matters such as: evidence admission item-by-item instead of *prima facie*;[511] numerous small issues regarding video link testimony,[512] additional sitting hours with witnesses[513] and Prosecution contact with Defence witnesses;[514] an unsuccessful Defence request for delayed disclosure;[515] a Defence motion to reopen or prolong its evidence presentation;[516] mutual allegations of formatting tricks in the final trial briefs;[517] at least eight requests for and one additional decision on interim or provisional release;[518] large sets of victims' applications;[519] the discovery of duplicate applications;[520] the modalities of victim participation, especially as to questioning witnesses;[521] numerous procedural activities related to the Article 70 proceedings,[522] two intermediaries' potential involvement in fraud or forgeries of victim applications;[523] and two witnesses potentially at risk but then raising dubious compensation claims leading to one of them being re-called,[524] compare *supra*.

Summary of the appeal phase: The appeal phase began on 4 April 2016 and concluded with the judgment on 8 June 2018. Lasting 796 days. Bemba appealed his conviction,[525] and both he[526] and the Prosecution[527] also appealed the sentencing decision. The public record does not show many procedural activities aside from the substantive submissions pertaining to these appeals. For both types of appeal, the AC had to decide whether and how the victims may participate therein.[528] One Defence team member that also worked on the Article 70 case successfully requested leave to withdraw due to a potential conflict.[529] From 19 September 2016 until 31 May 2017, the parties and participants litigated a Defence request[530] for the admission into evidence of 23 additional documents. After the AC had ruled on 17 October 2016 that the documents should be filed and their admissibility would be decided on jointly with all other issues on appeal,[531] the parties and participants made several substantial filings as to

[509] Ibid., ICC-01/05-01/08-3384, ICC-01/05-01/08-3387.
[510] Ibid., ICC-01/05-01/08-3399.
[511] Ibid., ICC-01/05-01/08-1386, ICC-01/05-01/08-1470.
[512] See for instance, ibid., ICC-01/05-01/08-2614, ICC-01/05-01/08-2806-Red.
[513] See for instance, ibid., ICC-01/05-01/08-2646, ICC-01/05-01/08-2745.
[514] Ibid., ICC-01/05-01/08-2293.
[515] Ibid., ICC-01/05-01/08-2236-Red.
[516] Ibid., ICC-01/05-01/08-2899-Corr-Red, ICC-01/05-01/08-2925-Red.
[517] Ibid., ICC-01/05-01/08-3091, ICC-01/05-01/08-3136.
[518] Ibid., ICC-01/05-01/08-1088, ICC-01/05-01/08-1565-Red, ICC-01/05-01/08-1691, ICC-01/05-01/08-1789-Red, ICC-01/05-01/08-2022-Red, ICC-01/05-01/08-2034-Red, ICC-01/05-01/08-1626-Red, ICC-01/05-01/08-1937-Red2, ICC-01/05-01/08-2151-Red, compare also ICC-01/05-01/08-3087, ICC-01/05-01/08-3221, ICC-01/05-01/08-3249-Red.
[519] Ibid., ICC-01/05-01/08-1091, ICC-01/05-01/08-1590, ICC-01/05-01/08-1862, compare also ICC-01/05-01/08-T-200-Red2-ENG, 59-60, ICC-01/05-01/08-2011, ICC-01/05-01/08-2162, ICC-01/05-01/08-2401.
[520] E.g., ibid., ICC-01/05-01/08-2178.
[521] Ibid., ICC-01/05-01/08-1729, ICC-01/05-01/08-1935, ICC-01/05-01/08-2027, ICC-01/05-01/08-2091, ICC-01/05-01/08-2138, ICC-01/05-01/08-2158, ICC-01/05-01/08-2180, ICC-01/05-01/08-2220, ICC-01/05-01/08-2751, ICC-01/05-01/08-3346
[522] Ibid., ICC-01/05-01/08-2412, ICC-01/05-01/08-2548-Red4, ICC-01/05-01/08-3001, ICC-01/05-01/08-2907 etc.
[523] Ibid., ICC-01/05-01/08-1125, ICC-01/05-01/08-1844, ICC-01/05-01/08-2247-Red.
[524] Ibid., ICC-01/05-01/08-1623-Red3, ICC-01/05-01/08-1727-Red, ICC-01/05-01/08-2218-Red, ICC-01/05-01/08-2845-Red2, ICC-01/05-01/08-3077-Red, ICC-01/05-01/08-3138-Red2, ICC-01/05-01/08-3157-Red, ICC-01/05-01/08-T-361-Red-ENG, ICC-01/05-01/08-T-362-Red-ENG, ICC-01/05-01/08-T-363-Red-ENG, compare also ICC-01/05-01/08-3204-Red.
[525] Ibid., ICC-01/05-01/08-3348, ICC-01/05-01/08-3434-Red.
[526] Ibid., ICC-01/05-01/08-3412, ICC-01/05-01/08-3450-Red.
[527] Ibid., ICC-01/05-01/08-3411, ICC-01/05-01/08-3451.
[528] Ibid., ICC-01/05-01/08-3369, ICC-01/05-01/08-3432.
[529] Ibid., ICC-01/05-01/08-3413.
[530] Ibid., ICC-01/05-01/08-3435-Red.
[531] Ibid., ICC-01/05-01/08-3445, ICC-01/05-01/08-3446.

the admissibility decision to be taken by the Appeals Chamber. Lastly, the Defence team from the Article 70 RS case unsuccessfully applied to the Appeals Chamber for the lifting of a freeze order regarding certain of Bemba assets.[532]

Overall: Depending on the content of the procedural activities, the time between a filing and the related response thereto by the respective other party ranged from seven to ten days. The Chambers frequently took the initiative, inviting the parties and participants to make observations on certain issues. Decisions on the parties' filings were delivered within a timeframe of 21 to 31 days, counting from the last party or participant filing pertaining to the matter.

Throughout the judicial proceedings, the Prosecution filed at least 532 documents with approximately 4,357 pages. The Defence filed no less than 432 documents with approximately 4,673 pages. From the victims' side, encompassing the LRV and the OPCV, at least 146 documents with approximately 1,545 pages were filed.[533] The TC issued at least 1,219 written decisions, orders, notifications and cooperation requests as well as 277 oral decisions and orders. The TC admitted 733 items of evidence, which included 5,724 pages of documents.[534] Summing up all hearings, the Chamber sat for 350 hearing days.[535]

Out of 5,708 individual applications, which were submitted to the Chamber in 24 transmissions, a total number of 5,229 victims were authorised to participate.[536]

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Jean-Pierre Bemba Gombo			
	Defence response	OTP response	Decision from last response
OTP filing	7	—	31
Defence filing	—	10	21

Table 14 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Jean-Pierre Bemba Gombo

[532] Ibid., ICC-01/05-01/08-3560.
[533] The number of documents can only be assessed on the basis of the public record, meaning that confidential filings have to be added to this number. Similarly, the page count is based on the public documents which are at times redacted and, by that, potentially shortened versions of the original filings.
[534] See, *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-3343, para 17.
[535] See "Case Information Sheet: Situation in the Central African Republic", The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08" (ICC-PIDS-CIS-CAR-01-020/18_Eng).
[536] T*he Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-3343, paras 18, 20, www.icc-cpi.int/car/bemba (accessed 22 Mar 2022).

The interlocutory appeals in the Bemba case lasted for 93 days on average.

Interlocutory appeals in the case of Jean-Pierre Bemba Gombo						
N	Phase	Party	Issue on appeal	Dates	Overall days	Outcome
1	Pre-trial	Defence	Interim release	22 Aug 2008-16 Dec 2008	117	dismissed
2	Pre-trial	OTP	Conditional release granted by PTC	14 Aug 2009-2 Dec 2009	111	reversed
3	Trial preparation	Defence	Admissibility challenge	28 Jun 2010-19 Oct 2010	114	dismissed
4	Trial preparation	Defence	Interim release	29 Jul 2010-19 Nov 2010	114	reversed
5	Trial	Defence, OTP	Admission of evidence	29 Nov 2010-3 May 2011	156	reversed
6	Trial	Defence	Interim release (2x)	29 Jun 2011-19 Aug 2011	52	partly reversed, partly dismissed
7	Trial	Defence	Interim release to DRC	1 Sep 2011-9 Sep 2011	9	dismissed
8	Trial	Defence	Interim release over weekends etc.	27 Sep 2011-23 Nov 2011	58	dismissed
9	Trial	Defence	Interim release during judicial recesses etc.	9 Jan 2012-5 Mar 2012	57	dismissed
10	Trial	Defence	Interim release during deliberations etc.	29 Dec 2014-20 May 2015	143	dismissed

Table 15 Interlocutory appeals in the case of Jean-Pierre Bemba Gombo

3.3.2 Assessment

Complexity: The complexity of the case arose in this case because it was the first in which a State actor, the former Vice President of the DRC, was charged with crimes committed by his

subordinates in another State. Besides his political role in the region, the mode of liability and the nature of charges such as sexual violence, which were novel, added complexity. [537]

Cooperation with different States, such as Portugal, [538] Belgium and the CAR, also contributed, as did Article 70 proceedings.[539] The complexity of the case also arose because of the translation and interpretation issues regarding French and Sango,[540] an official language of the CAR.

Conduct of defendant and participants: Because of the frozen assets, the Defence had difficulties with self-funding, which contributed to the length of proceedings.[541] Although the Defence was interested in accelerating the proceedings,[542] it challenged admissibility, which caused rescheduling of trial and interlocutory appeal proceedings. This challenge, however, may not be considered unreasonable. Although there were uncertainties about the victims' application process, which took time and resources,[543] the participation of 5,229 victims did not affect the length of the proceedings unreasonably.

Conduct of authorities: The litigation around the (amended) DCC(s) filed by the OTP caused several postponements because of the unclear structure of the document.[544] The time intervals and disagreements between the Chamber, OTP and Defence around the DCC linked to the novelty of Article 28 RS[545] were not unreasonable, although having a clear DCC framework would avoid delays. The amendments to the DCC created uncertainty around the victims' application process, especially with the question of who exactly may apply for victimhood. [546]

The postponements caused by the OTP's disclosure indicate that the OTP was not ready, which caused the start of the confirmation hearing to be postponed. Although cooperation with Belgium was assessed positively by the expert, difficulties arose in cooperation with other States, especially with the investigation of assets, which contributed to the length of the proceedings.[547]

The absence of the judge due to grave family circumstances in the confirmation phase and the replacement of two judges in the trial preparation also had an impact on the length of the

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[537] Interview C3.

[538] For instance, one expert stated that "In the front of cooperation there was very challenging cooperation with Portugal. […] Bemba had some assets in Portugal. It was very difficult to engage negotiation and the discussions with the authorities of Portugal and was lasting very long time", Interview C2.

[539] One respondent in this study highlighted: "Well, it's very difficult to say because the Article [70], this investigation has been conducted under the control of Pre-Trial Chamber. And the thing is that Trial Judges have no information about that and it's all of a sudden that [they] know. So to that extent there'll be a lot of litigation and documents and so on and so forth. In that extent it [the Article 70 proceedings] affects the trial proceedings, but I really don't see any reasonable solution to avoid that kind of situation", Interview C1.

[540] Interview C1, C2.

[541] The expert stated "[The Defence] is still litigating this question because Mr Bemba's assets are still frozen, with the court insisting that it's up to the State to execute the ICC's freezing orders to unfreeze them and the State saying we can't unfreeze it without an order from the ICC […] [the Defence] has forensic accounting reports that place the losses sustained by the non-maintenance of his assets. […] And this battle went on from day one till the end, [the Defence] spent an inordinate amount of time on trying to secure resources for the team and in order to do investigations […]", Interview C5.

[542] Interview C5.

[543] One of the experts noted: "The fact that the Registry transmitted in the end 6,000 of victims' applications to the chamber for review in the Bemba case, significantly slowed down the pre-trial phase and significantly impacted on the ability of the Defence to prepare for trial. Because each of those 6,000 on applications was a handwritten twenty-page document, which in the professional exercise about duties we were required to review and comment on", interview C5; Another expert mentioned the victims' application process: "The victim application process in Bemba case was really not ideal at all […] it was one of the earlier cases where we followed the very first set of process which was decided in Lubanga where there are not so many victims. But in Bemba case it's, it's more than four thousand [victims]. It is really [a] very lengthy process and it used a lot of resources which honestly speaking could have been used for better reasons", Interview C1, See interview C2.

[544] Interview C1,

[545] Interview C3.

[546] Interview C1, C5.

[547] Interview C2.

proceedings. This postponed the commencement of the confirmation hearing for 35 days and the commencement of the trial for nine days; the time spent here was assessed negatively by one of the experts.[548] One of the reasons for the postponement of the commencement of the trial were the interlocutory appeal proceedings on the admissibility challenge raised by the Defence, which delayed the commencement of the trial for another 140 days. Various other procedural activities were running during that time in the Trial Chamber, such as victims' applications, Defence redaction requests and expert witnesses' replacement.

Numerous procedural activities regarding Article 70 proceedings, abuse of process and stay of proceedings and release matters continued while the trial judges deliberated on the judgment and it took 494 days for the latter to be pronounced. This has been the second longest trial deliberation at the ICC to date. One of the experts expressed astonishment for the time spent for the judgment.[549]

Overall: The case lasted over ten years ending with an acquittal. Even if the time loss caused by various postponements is discounted, when considering Chambers' role directing the parties to make submissions, it seems not to have been sufficiently active in accelerating the proceedings and delivering final decisions. The same can be seen in the appeal phase, even though the appeal judgment was issued more quickly than the trial judgment. At the same time, the case raised a number of novel problems, created because of unclear legal provisions.

3.3.3 Factors Impacting the Length of Proceedings in the Bemba Case

Suspensive impact: Reg. 55(2) RoC notice suspended the proceedings for over three months.

Serious Impact: Amending the DCC affected the length of the proceedings.[550] The litigation concerning the DCC appears linked to a later procedural activity which had a serious impact: the notice under Reg. 55(2) RoC. Disclosure of the evidence is another factor which seriously affected length.[551]

Contributory Impact: Numerous factors contributed to length, including Article 70 proceedings, victims' applications, State cooperation requests, translation issues, numerous requests and appeal proceedings on release issues, passive judges and unclear legal framework.

[548] One of the experts mentioned in particular "any postponement has […] a negative side where you have a personal disappointment or where you have to rearrange everything with witnesses […] but on the other side it gives you time to prepare better to look into things to question to rehearse", Interview C3.
[549] See Interview C4.
[550] One of the experts interviewed found the DCC in the *Bemba* case to have been "one of the factors which affected the length of proceedings", Interview C1. Another expert stated, however, while acknowledging that some time could have been saved with regard to the DCC, it did not make much of a difference in terms of the overall length of the *Bemba* case, Interview C3.
[551] One of the experts intuitively associated those factors with each other and, upon request, suggested that the problem underlying both and, by that, linking the repeated DCC amendments and the Regulation 55(2) notice was the Prosecution "not having the evidence", Interview C5, See C1.

3.4 The Prosecutor v. Thomas Lubanga

The Ituri conflict took place between ethnic groups of the Hema and the Lendu in the Ituri region in the north-east of the DRC. The conflict developed steadily for several decades, mainly caused by the 1973 General Property Law, which increased a pre-existing economic imbalance between Hema and Lendu.[552] In 1999, the mutual antipathy escalated to an armed conflict, resulting in the so-called Blukwa massacre.

Thomas Lubanga Dyilo was born on 29 December 1960 and is of Hema ethnicity. He is considered a key figure. In July 2001, he founded a rebel group, the Union of Congolese Patriots (*Union des patriotes congolais*, UPC), and in 2002, its military wing, the Patriotic Force for the Liberation of the Congo (*Forces patriotiques pour la libération du Congo*, FPLC). The organisation seized control of Bunia, the capital of the gold-rich Ituri region and demanded the DRC government recognise the independence of the Ituri province.[553] Under his leadership, the UPC allegedly destroyed dozens of villages, caused the deaths of hundreds of civilians and abducted thousands of children who were then forced to serve as child soldiers or slaves in the militia.

Lubanga was charged on three counts of war crimes, including conscripting, enlisting and using child soldiers under Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii) of the Rome Statute in the DRC conflict between July 2002 and December 2003. In 2012, he was found guilty and sentenced to 14 years imprisonment, the first to be convicted at the ICC. He served his sentence with detention time deducted, and was released on 15 March 2020.

The proceedings in the case of Thomas Lubanga			
N	**Phase/Stage**	**Dates**	**Days**
1.	**W/S phase**	**13 Jan 2006-16 Mar 2006**	**64**
1.1	Issuance stage	13 Jan 2006-10 Feb 2006	29
1.2	Arrest stage	11 Feb 2006-15 Mar 2006	35
1.3	Transfer stage	16 Mar 2006	1
2.	**Confirmation phase**	**17 Mar 2006-13 Jun 2007**	**454**
2.1	First appearance stage	17 Mar 2006-20 Mar 2006	4
2.2	Post-appearance stage	21 Mar 2006-8 Nov 2006	233
2.3	Confirmation hearing stage	9 Nov 2006-28 Nov 2006	20
2.4	Post-confirmation hearing stage	29 Nov 2006-29 Jan 2007	62
2.5	Post-confirmation stage	30 Jan 2007-13 Jun 2007	135

[552] Pottier (2008), p. 435.
[553] See "Democratic Republic of Congo: Our Brothers Who Help Kill Us: Economic Exploitation and Human Rights Abuses in the East", Amnesty International (2013), p.7.

The proceedings in the case of Thomas Lubanga			
N	**Phase/Stage**	**Dates**	**Days**
3.	**Trial preparation phase**	**14 Jun 2007-25 Jan 2009**	**592**
4.	**Trial phase**	**26 Jan 2009-10 Jul 2012**	**1262**
4.1.	Hearing stage	26 Jan 2009-26 Aug 2011	943
4.1.1	Opening statements	26 Jan 2009-27 Jan 2009	2
4.1.2	Presentation by the OTP	28 Jan 2009-14 Jul 2009	168
4.1.2.x	Interruption /preparation	15 Jul 2009-6 Jan 2010	176
4.1.3	Presentation by the LRVs	7 Jan 2010-20 Jan 2010	14
4.1.4	Presentation by the Defence	21 Jan 2010-18 Apr 2011	453
4.1.5	Closing statements	19 Apr 2011-26 Aug 2011	130
4.2.	Deliberation stage	27 Aug 2011-13 Mar 2012	200
4.3.	Sentencing stage	14 Mar 2012-10 Jul 2012	119
5.	**Appeal phase**	**3 Oct 2012-1 Dec 2014**	**790**
5.1.	Pre-hearing stage	3 Oct 2012-18 May 2014	593
5.2.	Hearing stage	19 May 2014-20 May 2014	2
5.3.	Post-hearing stage	21 May 2014-1 Dec 2014	195
	Final Judgment	1 Dec 2014	

Table 16 The proceedings in the case of Thomas Lubanga

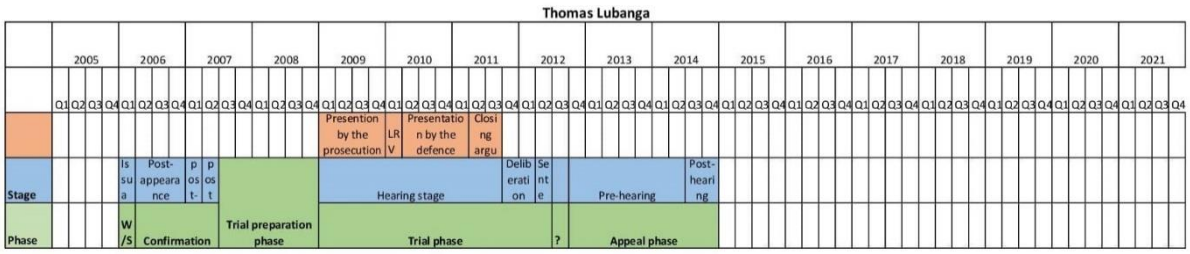

Image 7 The proceedings in the case of Thomas Lubanga

3.4.1 Summary of the Proceedings

Summary of the W/S phase: Lubanga was transferred to ICC custody on 16 March 2006, 34 days after the arrest warrant had been issued (10 February 2006). Lubanga had already been arrested by UN peacekeepers in March 2005 and charged.[554] Although the UN and French and Congolese authorities cooperated,[555] it took over a month for Lubanga to arrive at the Court.

Summary of the confirmation phase: The confirmation phase lasted for 453 days, from the date of arrival at the ICC detention centre on 16 March 2006 to the final decision on the confirmation of charges on 13 June 2007.

The post-appearance stage in the *Lubanga* case lasted for 233 days.[556] The post-appearance stage included procedural activities around release issues of Lubanga, one of which was later changed to a challenge of the jurisdiction[557] and later appealed,[558] an interlocutory appeal of the warrant,[559] a disclosure system with an appeal, [560] two redaction issues[561] with two interlocutory appeals and victims' issues. One of the first activities undertaken by the Defence was an unsuccessful appeal against the arrest warrant arguing its inadmissibility.[562]

The confirmation hearing was initially scheduled for 27 June 2006 (99 days after the first appearance). However, the OTP being unable to disclose the identities of the witnesses on whom it intended to rely until protective measures were implemented, the confirmation hearing was postponed another 93 days to 28 September 2006.[563] In order to grant the Defence time for preparation, the PTC postponed the confirmation hearing again for another 30 days.[564] This second postponement was linked to disagreements around the disclosure system under Rule 121(2)(b) RPE. The decision on disclosure was later appealed on three grounds. 151 days after establishing the general principles for the disclosure, the AC on 13 October 2006 reversed some parts of the PTC decision on the disclosure system.[565]

During the post-appearance stage, because of the OTP non-disclosure, the Defence twice successfully appealed PTC decisions on redactions.[566] Another issue the Defence raised during the post-appearance stage related to release issues. Although the Defence requested he be released to the UK or Belgium, they later unsuccessfully re-characterised the request to reject the criminal proceedings for lack of jurisdiction,[567] the appeal of the Defence was dismissed by the Appeals Chamber.[568] Another Defence request for interim release of Lubanga was equally rejected by the PTC[569] and a subsequent interlocutory appeal dismissed by the AC.[570] Several other procedural activities unfolded around victims' participation.[571]

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[554] Behringer (2012).
[555] Heller (2022).
[556] Ongwen 359 days, Bemba 191 days, Ruto & Sang 146 days.
[557] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/04-01/06-772, www.icc-cpi.int/car/bemba (accessed 22 Mar 2022).
[558] Ibid., ICC-01/04-01/06-532.
[559] Ibid., ICC-01/04-01/06-176.
[560] Ibid., ICC-01/04-01/06-568.
[561] Ibid., ICC-01/04-01/06-774.
[562] Ibid., ICC-01/04-169-US-Exp.
[563] Ibid., ICC-01/04-01/06-126.
[564] Ibid., ICC-01/04-01/06-521.
[565] Ibid., ICC-01/04-01/06-568.
[566] Ibid., ICC-01/04-01/06-773, ICC-01/04-01/06-774.
[567] Ibid., ICC-01/04-01/06-512; See also Safferling (2012), p. 544.
[568] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/04-01/06-772, www.icc-cpi.int/car/bemba (accessed 22 Mar 2022).
[569] Ibid., ICC-01/04-01/06-586.
[570] Ibid., ICC-01/04-01/06-824.
[571] Ibid., ICC-01/04-01/06-172-tEN, ICC-01/04-01/06-462, ICC-01/04-01/06-972. See also Safferling/Petrossian (2021).

The confirmation hearing of 12 hearing days lasted from 9 to 28 November 2006. 62 days after the confirmation hearing had closed, the PTC confirmed the charges. The post-confirmation stage lasted 135 days. On 30 January 2007, the Defence appealed the confirmation and requested that the decision be reversed and immediate release be granted. On 13 June 2007 the AC dismissed the Defence appeal.[572]

During the post-confirmation stage, for 73 out of 135 days, the defendant did not have counsel (21 February 2007 to 4 May 2007). On 4 May 2007, a duty counsel was appointed for Lubanga, but the defendant was not satisfied. After the confirmation of charges, the OTP unsuccessfully requested leave to appeal against what it considered to be the substitution of the OTP crimes under Article 8(2)(e)(vii) of the Rome Statute with different ones under Article 8(2)(b)(xxvi) RS.[573]

Summary of the trial preparation phase: This phase lasted for 591 days, from the date of the final decision on the confirmation of charges on 13 June 2007 through to commencement of the trial on 26 January 2009. The trial preparation is one of the longest trial preparations in all cases at the ICC.[574] This phase included numerous procedural activities on the preparation, such as the language to be used in the trial,[575] timing and the manner of disclosure of the evidence,[576] an e-court protocol,[577] the role of the victims,[578] the procedures to be adopted for instructing expert witnesses, the approach to be adopted for witness familiarisation and witness proofing,[579] the status of evidence heard before the PTC, the status of the decisions of the PTC in the trial and the manner in which evidence should be submitted.[580] Another group of procedural activities was linked to the questions of the victims' participation, [581] the role of the OPCV, disclosure by the Defence, the scope of witness examination by the non-calling party, statements by the Prosecution and Defence, live testimony by means of audio and video technology, agreements on fact and evidence, the manner in which traumatised and vulnerable witnesses were to present evidence[582] and the missing signature of the third judge in a decision.[583]

On 11 November 2007, the TC ordered commencement of the trial on 31 March 2008 (292 days after trial preparation had begun),[584] but due to withdrawals of witnesses and non-disclosure by the OTP, it was postponed to mid-June 2008.[585] Once the consequences of non-disclosure caused by an agreement according to Article 54(3)(e) RS became clear, the TC ordered a stay of proceedings and Lubanga's release.[586] The Prosecution unsuccessfully appealed that decision. The stay of proceedings was only resolved after 139 days (18 November 2008), when the OTP was able to take all necessary steps for Lubanga to get a fair trial.[587]

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[572] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-926, www.icc-cpi.int/drc/lubanga, (accessed 25 Mar 2022).
[573] Ibid., ICC-01/04-01/06-806.
[574] Yekatom & Ngaïssona 433 days, Bemba 429 days, Katanga 424 days.
[575] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1091 www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[576] Ibid., ICC-01/04-01/06-1210.
[577] Ibid., ICC-01/04-01/06-1263.
[578] Ibid., ICC-01/04-01/06-1191.
[579] Ibid., ICC-01/04-01/06-1351.
[580] See Ibid., ICC-01/04-01/06-942.
[581] Ibid., ICC-01/04-01/06-1556-Corr.
[582] Ibid., ICC-01/04-01/06-1083.
[583] Ibid., ICC-01/04-01/06-1349.
[584] Ibid., ICC-01/04-01/06-1019.
[585] Ibid., ICC-01/04-01/06-T-75-ENG, ICC-01/04-01/06-T-90-ENG.
[586] Ibid., ICC-01/04-01/06-1401.
[587] Ibid., ICC-01/04-01/06-T-98-ENG.

Summary of the trial phase: The trial started on 26 January 2009 and closed on 10 July 2012 (1,262 days). Despite interruptions, the trial is one of the shortest.[588] The hearing stage lasted for 943 days, the second shortest after the Katanga hearing stage with 903 days.

The first part included numerous procedural activities involving experts,[589] *tu quoque* information,[590] cross-examination,[591] victims' participation,[592] language and interpretation[593] and protective measures for witnesses.[594] Five months after the trial's commencement, the LRVs successfully requested the Chamber to consider a re-characterisation of the facts pursuant to Reg. 55 RoC as to the crimes of sexual slavery and inhuman or cruel treatment.[595] The respective TC decision was appealed and the trial interrupted until the AC's reversal judgment.[596] The interruption lasted for 89 days, but the entire procedural activity around the re-characterisation including the interruption lasted for 175 days, from 15 July 2009 to 6 January 2010.

The second part included procedural activities around questioning of witnesses by victims[597] and by the Court,[598] witnesses' asylum application[599] and appeal proceedings,[600] issues of professional conduct,[601] witnesses' withdrawals[602] and Defence financial issues.[603]

During the second part, the TC ordered the second stay of proceedings because of the OTP's inability to disclose the identity[604] of the intermediary.[605] The TC's decision to stay the proceedings and its order to release the accused were successfully appealed by the OTP.[606] After four months, however, the TC ordered disclosure of information regarding intermediaries.[607] These procedures suspended the trial for another 97 days. The Defence resumed its presentation only from 25 October 2010 until 10 December 2010.[608] Because of an application by the Defence seeking a permanent stay of the proceedings, the trial was suspended for another 136 days. The trial resumed on 21 March 2011, only after the TC refused the Defence's application. The Defence continued to present its case until 18 April 2011. The presentation of evidence was closed on 20 May 2011 and the closing arguments were delivered on 26 August 2011.

During the 204 hearing days, a total of 71 witnesses were heard. 129 victims participated.

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[588] Excluding the trials with "no case to answer" motions, such as the Ruto & Sang case with 938 days.
[589] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1671, ICC-01/04-01/06-1897, www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[590] Ibid., ICC-01/04-01/06-1980-Anx2.
[591] Ibid., ICC-01/04-01/06-2177.
[592] Ibid., ICC-01/04-01/06-1813, ICC-01/04-01/06-2115, ICC-01/04-01/06-2127.
[593] Ibid., ICC-01/04-01/06-T-124-ENG, ICC-01/04-01/06-1974-Conf.
[594] Ibid., ICC-01/04-01/06-2206-Red.
[595] Ibid., ICC-01/04-01/06-1891, ICC-01/04-01/06-2049, (minority opinion) ICC-01/04-01/06-2054, ICC-01/04-01/06-2061 ICC-01/04-01/06-2069.
[596] Ibid., ICC-01/04-01/06-2205.
[597] Ibid., ICC-01/04-01/06-2340.
[598] Ibid., ICC-01/04-01/06-2360.
[599]Ibid., ICC-01/04-01/06-2766-Conf, ICC-01/04-01/06-2768.
[600] Ibid., ICC-01/04-01/06-2799.
[601] Ibid., ICC-01/04-01/06-2383-Red.
[602] Ibid., ICC-01/04-01/06-T-355-ENG.
[603] Ibid., ICC-01/04-01/06-2800.
[604] Ibid., ICC-01/04-01/06-T-110-CONF-ENG CT starting already from the second day of the presentation of the Defence on 28 January 2009, where the witness mentioned, that he was told to tell the story which was not true and he was given money by the intermediary. See also ibid., ICC-01/04-01/06-T-143-CONF-EXP-ENG CT, ICC-01/04-01/06-T-152-CONF-ENG CT.
[605] Ibid., ICC-01/04-01/06-2517-Red.
[606] Ibid., ICC-01/04-01/06-2582, ICC-01/04-01/06-2583.
[607] Ibid., ICC-01/04-01/06-2585.
[608] Ibid., ICC-01/04-01/06-2690-Red2.

The judges deliberated for another 200 days, which is the shortest such deliberation.[609] Another 119 days were spent on sentencing proceedings, which is the longest such after the *Ntaganda* case.

Summary of the appeal phase: The appeal phase lasted for 790 days, from the date of filing the first notice of appeal on 3 October 2012 until the final judgment on 1 December 2014. This is one of the longest after that of the *Bemba* case (796 days). The appeal proceedings included procedural activities around translation of the judgment,[610] additional evidence issues,[611] victims' issues,[612] disclosure[613] and applications by NGOs.[614] After the appeals hearing, the AC took another 194 days to deliver its judgment. These were the second longest after the *Gbagbo & Blé Goudé* case.

Overall: Depending on the content of the procedural activities, the time between a filing and the other party's response thereto ranged from 11 to 12 days. Decisions were delivered within 35 days on average after the last related filing, be it a response or a reply. The Chambers frequently initiated procedural activities by inviting or directing the parties to make observations, such as on victims' applications or the conduct of proceedings. During the proceedings, Chambers rendered at least 854 decisions; the Defence presented at least 304 filings, the OTP at least 509 filings and victims at least 186 filings. The OTP submitted 368 items of evidence, the Defence 992 and the victims 13.

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Thomas Lubanga			
	Defence response	OTP response	Decision from last response
OTP filing	12	—	35
Defence filing	—	11	35

Table 17 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Thomas Lubanga

[609] Excluding the cases with "no case to answer" motions.
[610] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2834, www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[611] Ibid., ICC-01/04-01/06-3057-Corr.
[612] Ibid., ICC-01/04-01/06-3045-Conf-Red.
[613] Ibid., ICC-01/04-01/06-3017.
[614] Ibid., ICC-01/04-01/06-3044.

The interlocutory appeals in the Lubanga case lasted for 94 days on average.

Interlocutory appeals in the case of Thomas Lubanga						
N	**Phase**	**Party**	**Issue on appeal**	**Dates**	**Overall days**	**Outcome**
1	Pre-trial	Defence	Warrant for arrest	20 Mar 2006-6 Sep 2006	170	dismissed
2	Pre-trial	OTP	General principles on disclosure	24 Jun 2006-13 Oct 2006	111	1 issue confirmed, 4 issues reversed
3	Pre-trial	Defence	Redaction issues 1	28 Sep 2006-14 Dec 2006	77	reversed
4	Pre-trial	Defence	Redaction issues 2	4 Oct 2006-14 Dec 2006	71	reversed
5	Pre-trial	Defence	Jurisdiction	9 Oct 2006-14 Dec 2006	66	dismissed
6	Pre-trial	Defence	Interim release 1	20 Oct 2006-13 Feb 2007	116	dismissed
7	Pre-trial	Defence	Confirmation decision	30 Jan 2007-13 Jun 2007	134	dismissed
8	Trial Prep.	Defence OTP	Victims' issues	10 Mar 2008-11 Jul 2008	123	2 issues confirmed, one reversed
9	Trial Prep.	Defence	Redactions and disclosure	17 Mar 2008-11 Jul 2008	116	confirmed
10	Trial Prep.	OTP	Interim release 2	2 Jul 2008-21 Oct 2008	111	reversed
11	Trial Prep.	OTP	Non-disclosure consequences	14 Jul 2008-21 Oct 2008	99	dismissed
12	Trial	Defence	Reg. 55 RoC	10 Sep 2009-8 Dec 2009	89	reversed
13	Trial	OTP	Stay of proceedings	19 Jul 2010-8 Oct 2010	81	reversed
14	Trial	OTP	Interim release 3	16 Jul 2010-8 Oct 2010	84	reversed
15	Trial	State	Netherlands question	17 Aug 2011-26 Aug 2011	9	reversed

Table 18 Interlocutory appeals in the case of Thomas Lubanga

3.4.2 Assessment

Complexity: The case was one of the ICC's first. The legal framework was novel for the parties and participants, which made it difficult for them to apply the law. The new and unclear rules

first had to be litigated between parties and participants in order to conduct the proceedings.[615] These complex issues included how victims should participate, the role of the confirmation phase and how the disclosure system should work.[616] Although the case's legal complexity was high because of the uncertainty about the legal framework, factually the small amount of charges against the defendant reduced the complexity.

Another factual difficulty was in the languages. It was challenging to identify the relevant languages spoken in the DRC and to find sufficiently qualified interpreters and linguists for these.[617] Also, because of the dangerous situation in the DRC, the OTP relied on intermediaries,[618] which complicated the case factually and procedurally in view of the disclosure of identities and protective measures as well as not permitting direct contact with the witnesses.[619] Other procedural difficulties arose because of witness withdrawals and non-cooperation of the UN.[620]

Conduct of the defendant and participants. During the confirmation phase, the confirmation hearing was postponed several times, including once to give the Defence time to prepare. However, the initial postponement was not related to the Defence and the postponement for preparation time may not be considered unreasonable in any way. For another 72 days, due to a disagreement with his previous counsel, Lubanga was not represented, which again had no direct effect on the length of the proceedings because the Defence had already filed its appeal against the decision of the confirmation of charges. However, new Defence Counsel needed appropriate time to prepare.[621]

In the trial preparation and trial stages, the stay of proceedings was not initiated by the Defence but arose out of OTP non-disclosure. In the course of the trial, the Defence appealed the majority decision giving notice under Reg. 55 RoC as to a re-characterisation of the facts. This led to an interruption of the trial for 89 days. The Defence request for a definitive suspension of the proceedings because of false evidence that led to a renewed interruption of the presentation of evidence may not be regarded as unreasonable because it is a prerogative of the Defence.

Lubanga's case was the first in which victims had the opportunity to participate in international criminal proceedings. The victims' application process created additional workload for the Registry and the parties but did not delay the proceedings.[622] The participation of 129 victims with nine lawyers contributed to the Defence's workload,[623] but the participation did not cause delays in the proceedings apart from the fact that they had requested re-characterisation of the facts according to Reg. 55 RoC, which led to the appeal by the Defence.

Conduct of authorities: Right from the start, the OTP was not able to meet the deadlines for disclosure of the identities of the witnesses on whom it intended to rely. On 15 May 2006, the PTC rejected the Defence request for full access to Prosecution files and instead established

[615] Interviews A1, A3, A5.
[616] Interview A1.
[617] Interview B1.
[618] Interviews A4, A2.
[619] This included both international relocation of the witnesses as well as their local protection.
[620] Interviews A5, A2, A4.
[621] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-940, www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[622] During interview A5, one of the experts mentioned that "The court has moved away from that practice and also from those long victims' application forms. Apart from that, I don't think victims' participation have delayed the proceedings. They have created an amount of work because at the time of Lubanga also, the parties could comment on the redacted versions of the victims' application. So Registry had to implement redactions. […] The parties had to review them also to make comments. The amount of work it created is immense, but in its essence victims' application didn't delay the proceedings, it was basically the whole process we created to review these applications".
[623] Interview A3.

an *inter partes* disclosure system.[624] The OTP was not obliged to disclose all evidence at the confirmation phase but had to prepare a DCC.[625] In her decision on general principles on disclosure the Single Judge of the PTC argued that, if OTP had to disclose all evidence on the pre-trial level, the nature of the confirmation phase would be significantly altered.[626] The postponement because of the disclosure is connected to unclear provisions on the disclosure system. It is the duty of the authorities to have a clear legal framework in order not to cause delays.

OTP non-disclosure led to a stay of proceedings of 139 days during trial preparation rooted in a non-disclosure agreement between the OTP and the UN which did not allow the OTP to disclose the confidential material received without the provider's consent. It remained the authorities' responsibility to find quick solutions to their disclosure obligations.[627]

The second stay of proceedings, caused by the non-disclosure of intermediaries' identities, was ordered during the trial proceedings. It lasted another 97 days, until the OTP complied with its obligation. The OTP relied on intermediaries because of the dangerous and difficult situation in the DRC, but it remained the obligation of the OTP to only provide evidence which was reliable and credible.[628] The trial proceedings would hypothetically have been shortened by 97 days, if the OTP had been able to comply with the deadlines for its disclosure obligation.

After the OTP closed its presentation of the evidence, the LRV's request for a re-characterisation of the facts led to an interruption of the presentation of evidence lasting 176 days. Had the AC confirmed the TC notice under Reg. 55 RoC, the proceedings would hypothetically have taken much longer as this would have led to an increase in the charges. Moreover, since the AC had determined that Reg. 55(2) and (3) RoC may not be used to exceed or change the facts and circumstances described in the charges, the non-initiation of this procedural activity would hypothetically have shortened the trial proceedings by another 175 days. The OTP presentation of evidence over 167 days is, when compared to other cases and bearing in mind the procedural obstacles and the number of charges, the shortest time.

As stated by experts, after the confirmation hearing, the trial preparation did not appear to be a continuation but a completely new process; it was as if there had been no confirmation phase.[629] The experts had the impression that, as the first case before the Court, the PTC and TC did not manage to establish an adequate degree of continuity and the issues discussed at the pre-trial level reappeared during the trial preparation.[630] On the other hand, it appears that the parties and participants were bound by deadlines and page limits, but then had to wait for several months until obtaining decisions. To avoid those lengthy written submissions and decisions, more oral decisions would have been helpful.[631]

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[624] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[625] See also Kaoutzanis (2013), p. 275.
[626] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, para 54, www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022), See further explanations in Klamberg (2013), pp. 318–325.
[627] Interview A2.
[628] Interview A2.
[629] One of the experts mentioned: "the trial started again as if there had been no confirmation of charges practically" Interviews A3, A5.
[630] Interviews A3, A5.
[631] One of the experts esp. mentioned that "[…] the Defence has one week to explain their arguments, the Prosecutor has one week to answer on it. The victims can make an observation and one month later [the parties and participants] will have a decision. You could also have more oral procedures. Everything is in writing. You could have some procedures - especially when it is on procedural issues - the Court could call the parties and say, okay, what will we do? Do not give your arguments in writing, let us just discuss in-camera and make a decision.", Interview A1.

Overall: The practical difficulties in the first case before the ICC led to a rethinking with lessons learned procedures and subsequent reforms.[632] If the interruptions of the proceedings had not taken place and the OTP had been able to comply with its disclosure deadlines, the proceedings would hypothetically have been shortened by 705 days (overall 2,539 days or approximately 6.9 years instead of 3,244 days or approximately 8.8 years, from the request for the arrest warrant until the final judgment). This includes 123 days in the post-appearance stage, 221 days during the trial preparation phase and 361 days during the trial proceedings. Even without the interruptions, the proceedings in the Lubanga case do appear to be long.

3.4.3 Factors Impacting the Length of Proceedings in the Lubanga Case

Suspensive impact: Non-compliance with the disclosure obligations to a stay of proceedings had suspensive impact on the length of the proceedings. The disclosure system affected the length of the proceedings significantly. Another suspensive factor was the TC decision on Reg. 55 RoC, which interrupted the trial proceedings.

Serious impact: The OTP list of witnesses was frequently changed because of withdrawals.

Contributory impact: Victims' applications and modes of participation were a contributory factor, as this was the first case where victims could participate. Language and translation was another factor. In the appeal proceedings, numerous filings and replies contributed as well.

3.5 The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda is known for having served as chief of military operations in the FPLC, the military wing of the UPC, under its founder Thomas Lubanga Dyilo.

Ntaganda and other military leaders of the UPC/FPLC worked together and agreed on a common plan to drive out all members of the Lendu ethnicity from a certain area. Their aim was to destroy the Lendu community and to ensure that the Lendu could not return to the villages that were attacked. Under the command of Ntaganda, the soldiers of the UPC committed many serious crimes, including ethnic massacres, torture, rape and the widespread recruitment of children who had to serve in the militia. As an example, the massacre in the village of Kobu on 25 and 26 February 2003 resulted in the killing of nearly 50 persons.

Investigations began in 2004, after the DRC's self-referral of the situation. In August 2006, the ICC issued an arrest warrant, first under seal, but then made public in April 2008. On 18 March 2013, Ntaganda handed himself over to the US embassy in Kigali, Rwanda.

Ntaganda was charged with crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against civilian objects and destroying the adversary's property).

On 30 March 2021 the AC confirmed the judgment delivered by the TC's judgment on 8 July 2019 (sentence 7 November 2019) that found Ntaganda guilty of crimes against humanity and war crimes. While some charges presented by the Prosecutor were not retained by the TC and AC, the final judgment includes 18 counts proven beyond reasonable doubt. TC sentenced Ntaganda to 30 years' imprisonment.

[632] Interviews A5, D5. According to interview A4, "one of the key challenges in the Lubanga case was the difficulty of obtaining forensic evidence. This was mainly due to the environmental factors in Eastern Congo and the number of years that had lapsed after the crimes in question had been perpetrated before the case was initiated. As a result of the limitation of pure forensic evidentiary material, there was a great degree of reliance on witnesses."

The proceedings in the case of Bosco Ntaganda			
N	**Phase/Stage**	**Dates**	**Days**
1.	**Arrest Warrant Phase**	**12 Jan 2006-22 Mar 2013**	**2627**
1.1	Issuance stage	12 Jan 2006-22 Aug 2006	223
1.2	Arrest stage	23 Aug 2006-18 Mar 2013	2400
1.3	Transfer stage	19 Mar 2013-22 Mar 2013	4
2.	**Confirmation phase**	**23 Mar 2013-4 Jul 2014**	**469**
2.1	First appearance stage	23 Mar 2013-26 Mar 2013	4
2.2	Post-appearance stage	27 Mar 2013-9 Feb 2014	320
2.3	Confirmation hearing stage	10 Feb 2014-14 Feb 2014	5
2.4	Post-confirmation hearing stage	15 Feb 2014-9 Jun 2014	115
2.5	Post-confirmation stage	10 Jun 2014-4 Jul 2014	25
3.	**Trial preparation phase**	**5 Jul 2014-31 Aug 2015**	**423**
4.	**Trial phase**	**1 Sep 2015-7 Nov 2019**	**1529**
4.1.	Hearing stage	1 Sep 2015-30 Aug 2018	1095
4.1.1	Opening statements	1 Sep 2015-14 Sep 2015	14
4.1.2	Presentation by the OTP	15 Sep 2015-29 Mar 2017	562
4.1.3	Presentation by the LRVs	30 Mar 2017-12 Apr 2017	14
4.1.4	Presentation by Defence	13 Apr 2017-23 Feb 2018	317
4.1.5	Closing statements	24 Feb 2018-30 Aug 2018	188
4.2.	Deliberation stage	31 Aug 2018-8 Jul 2019	312
4.3.	Sentencing stage	9 Jul 2019-7 Nov 2019	122
5.	**Appeal phase**	**9 Sep 2019-30 Mar 2021**	**569**
5.1.	Pre-hearing stage	9 Sep 2019-11 Oct 2020	399

The proceedings in the case of Bosco Ntaganda			
N	**Phase/Stage**	**Dates**	**Days**
5.2.	Hearing stage	12 Oct 2020-14 Oct 2020	3
5.3.	Post-hearing stage	15 Oct 2020-30 Mar 2021	167
	Final judgment	30 Mar 2021	

Table 19 The proceedings in the case of Bosco Ntaganda

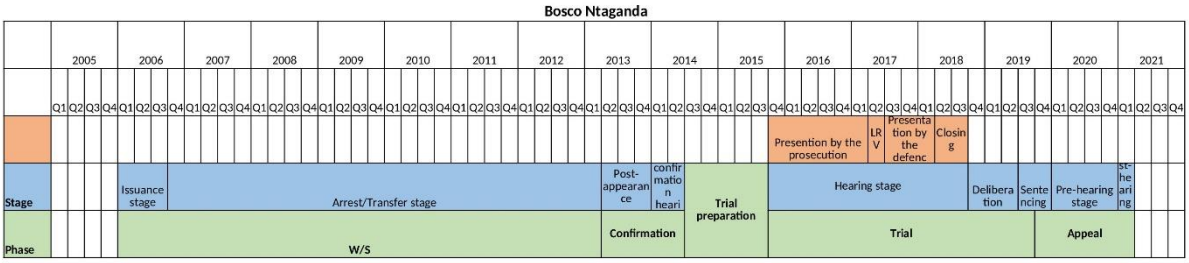

Image 8 The proceedings in the case of Bosco Ntaganda

3.5.1 Summary of the Proceedings

Summary of the W/S Phase: The arrest warrant phase commenced on 12 January 2006 and ended on 22 March 2013 with Ntaganda's transfer to the ICC, lasting 2,626 days. After several OTP submissions and a hearing, on 10 February 2006, the PTC held the case against Ntaganda inadmissible, refusing to issue the requested warrant. Four days later, the Prosecutor appealed the decision. On 13 July 2006, the Appeals Chamber reversed the PTC decision and remanded the matter.[633] On 22 August 2006, the PTC issued an arrest warrant against Ntaganda.[634] The duration of the issuance stage, 222 days, can be explained with the initial refusal and appeal proceedings. The arrest/surrender stage lasted 2,400 days. This extraordinary length is mainly because Ntaganda could not be apprehended until he surrendered and asked to be transferred. On 14 May 2012, the Prosecution applied for a second arrest warrant against Ntaganda, namely for three counts of crimes against humanity and four counts of war crimes.[635] On 13 July 2012, PTC granted the application and accordingly issued a second warrant.[636] On 4 September 2012, the Registrar requested the DRC to execute both warrants.[637] On 18 March 2013, Ntaganda presented himself to the US Embassy to Rwanda and requested to be transferred to the ICC.[638]

Summary of the confirmation phase: The confirmation phase lasted from 23 March 2013, the day after the surrender to the ICC, until 4 July 2014, when the final decision on the confirmation of charges was rendered (469 days). After the first appearance, it took 320 days before the

[633] *The Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06-1-tENG-Red, www.icc-cpi.int/drc/ntaganda (accessed 25 Mar 2022).
[634] Ibid., ICC-01/04-02/06-2-tENG.
[635] Ibid., ICC-01/04-611-Red.
[636] Ibid., ICC-01/04-02/06-36-Red.
[637] Ibid., ICC-01/04-02/06-38.
[638] See "U.S. Confirms Bosco Ntaganda Turned Himself in at U.S. Embassy in Kigali" by Reuters, 18 Mar 2013, www.reuters.com/article/us-rwanda-warcrimes-usa-confirmation/u-s-confirms-bosco-ntaganda-turned-himself-in-at-u-s-embassy-in-kigali-idUSBRE92H0T620130318 (accessed 25 Mar 2022).

confirmation hearing commenced. Once the PTC delivered the final decision, it still took 14 days until the case was transferred to a TC. The court record for the confirmation phase is comprised of 294 documents. Only 237 of these documents are public and available for research.

The initial hearing was held on 26 March 2013.[639] The first appearance stage lasted four days. In this stage, the OTP, Defence and the LRVs initiated many procedural movements regarding the trial management, the DCC, the disclosure system and the evidence management, language issues, the interim release of Ntaganda and the first interlocutory appeal of four such appeals.[640]

The post-confirmation hearing stage lasted 115 days, from the day after the confirmation hearing had ended until the confirmation decision was given on 14 June 2014. There were relatively few procedural activities. At the confirmation hearing, the Chamber had granted the parties and participants the opportunity to file final written observations on the issues discussed at the hearing.[641] On 9 June 2014, PTC rendered its decision on the confirmation of charges. The Chamber decided that it had jurisdiction, determined that the case was admissible, and confirmed all charges except for Ntaganda's alleged liability as a direct co-perpetrator.[642] On 4 July 2014, the PTC denied leave to appeal the decision.

After that final decision on the confirmation of charges, the case record was not immediately transmitted to the Presidency so that the case could proceed to trial. It still took an additional 13 days during which, *inter alia*, a detention review was held. After requesting the parties and participants to submit observations, on 17 July 2014, the Single Judge decided that Ntaganda should continue to be detained. In the same decision, she ordered the Registrar to transmit the confirmation decision and the case record to the Presidency so that a TC might be constituted.[643]

Summary of the trial preparation phase: The trial preparation phase lasted for 423 days. It started on 5 July 2014. It was, however, not until 18 July 2014 that the Presidency referred the case to the newly constituted TC. Trial preparation concluded on 31 August 2014, the day before the opening of the trial. On 15 August 2014 the TC rescheduled the status conference for 18 September 2014 because of the appointment of new Defence Counsel and set a deadline for written observations of 12 September 2014.[644] On 26 August 2014, the TC rescheduled the status conference for 11 September 2014.[645] On 9 October 2014, the TC scheduled a second status conference and decided that the trial would commence on 2 June 2015. In its decision it mainly highlighted that delayed disclosure would be granted only in exceptional circumstances and set the deadline for delayed disclosure of 16 February 2015.[646] The opening of the trial was delayed until 2 September 2015.

Summary of the trial phase: The trial phase of the *Ntaganda* case lasted for 1,526 days. It started with the opening of the trial on 2 September 2015, encompassed the verdict of 8 July 2019, and ended with the sentencing decision of 7 November 2019. The trial phase includes

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[639] *The Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06-T-2-ENG. www.icc-cpi.int/drc/ntaganda (accessed 25 Mar 2022).
[640] Twice regarding the jurisdiction of the ICC, once on limitation of pages and once on disclosure, lasting on average for 150 days each.
[641] *The Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06-258 and ICC-01/04-02/06-T-11-ENG, p. 11, www.icc-cpi.int/drc/ntaganda (accessed 25 Mar 2022).
[642] Ibid., ICC-01/04-02/06-309.
[643] Ibid., ICC-01/04-02/06-335.
[644] Ibid., ICC-01/04-02/06-354.
[645] Ibid., ICC-01/04-02/06-358.
[646] Ibid., ICC-01/04-02/06-382.

more than 1,600 documents, of which roughly 910 are publicly available for research.[647] The hearing stage lasted from 2 September 2015 until 30 August 2018 (1,093 days).

Before the beginning of the OTP presentation, on 1 September 2015, the Defence filed an application challenging the jurisdiction of the Court in respect of two counts of the updated DCC.[648] On 17 September 2015, the TC provided guidance that, pending the decision, it would allow the OTP to ask questions.[649] On 9 October 2015, the TC rejected the Defence challenge.[650] On 19 October 2015, the Defence filed a notice of appeal requesting the AC to quash the decision and to find that the *ratione materiae* jurisdiction of the Court did not include rape and sexual slavery of child soldiers as a war crime.[651] On 22 March 2016, the AC reversed the decision on jurisdiction.[652]

The OTP started presenting evidence on 15 September 2015 and closed its presentation on 29 March 2017 (562 days). The LRV made its presentation from 30 March 2017 to 12 April 2017.[653] The Defence's presentation did not follow immediately after the LRV closed its presentation. On 27 March 2017, the Defence requested clarification from the TC on the application of the contacts protocol. Specifically, the Defence indicated that, while the OTP had not declared the end of the presentation of its case, the Defence was actively involved in the preparation of its case, including conducting investigations and interviewing potential witnesses for the Defence. On 4 April 2017 the TC guided the Defence to comply with the protocols.[654]

The Defence presentation started on 29 May 2017 and ended on 23 February 2018.[655] (280 days). The main procedural activities regarded authorisation for witnesses to present their deposition via video link, [656] an LRV's request seeking measures pursuant to Rule 87 and 88 RPE,[657] changes in the schedule of the trial,[658] the documents to be presented by the Defence[659] and the date and conditions of Ntaganda's deposition.[660]

An important procedural activity in this stage was that, on 13 April 2017, the Defence requested a time extension until 25 April 2017 to file a "no case to answer" motion, which was granted by the TC on the same day. On 25 April 2017, the Defence requested leave to file a motion for partial judgment and acquittal in relation to the second attack and for count 17 in its totality.[661] Then the Defence filed a request for suspensive effect in its appeal against the decision.[662] On 19 June 2017, the AC rejected the suspensive effect.[663] On 27 June 2017, the Defence filed an appeal and requested, on an interim basis, that proceedings be suspended before the trial.[664] On 28 June 2017, the AC dismissed the request *in limine*.[665]

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[647] Documents filed during the sentencing stage but materially related to the appeal against the trial judgment are not included in this calculation but may be found in the chapter on the appeal phase.
[648] *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-804, www.icc-cpi.int/drc/ntaganda (accessed 25 Mar 2022).
[649] Ibid., ICC-01/04-02/06-T-27-Red-ENG.
[650] Ibid., ICC-01/04-02/06-892.
[651] Ibid., ICC-01/04-02/06-1331.
[652] Ibid., ICC-01/04-02/06-1225.
[653] Ibid., ICC-01/04-02/06-T-203-ET.
[654] Ibid., ICC-01/04-02/06-1849.
[655] Ibid., ICC-01/04-02/06-2243.
[656] Ibid., ICC-01/04-02/06-1780.
[657] Ibid., ICC-01/04-02/06-1823.
[658] Ibid., ICC-01/04-02/06-1843-Conf-Red.
[659] Ibid., ICC-01/04-02/06-1855.
[660] Ibid., ICC-01/04-02/06-1914 and ICC-01/04-02/06-1945.
[661] Ibid., ICC-01/04-02/06-1879.
[662] Ibid., ICC-01/04-02/06-1960.
[663] Ibid., ICC-01/04-02/06-1968.
[664] Ibid., ICC-01/04-02/06-1968.
[665] Ibid., ICC-01/04-02/06-1976.

In June 2017, many activities worth highlighting took place. By an oral decision on 14 June 2017, the TC granted an OTP request to use audio recordings as well as logs between Ntaganda and Lubanga.[666]

Ntaganda testified before the TC from 14 June to 13 September 2017.[667] On 31 August 2017, the TC ordered the Defence to provide further submissions on its position on one of the agreed facts because of the misunderstandings, commenting that it would evaluate afterwards whether it would require further observations.[668] On 22 December 2017, the TC ordered the closing statements, indicating that the Defence was going to close its presentation of the case on 16 February 2018.[669]

On 23 February 2018 the Defence notified TC of the end of the presentation of its evidence. On 21 May 2018, the Defence requested a three-week extension to file its closing brief.[670] This was partially granted on 29 May 2018 with a deadline of 2 July 2018 being set.[671] On 4 July 2018, the TC ordered a public hearing for the closing statements from 28 August to 30 August 2018.[672] After the conclusion of the presentation of evidence by the Defence, 188 days passed from 24 February 2018 until the conclusion of the closing statements on 30 August 2018.

The deliberation stage commenced on 31 August 2018, the day after the oral statements had concluded, and ended with the issuance of the Article 74 judgment on 8 July 2019.[673] It lasted 311 days. On 1 April 2019, the Defence requested a temporary stay of deliberations until it had a reasonable opportunity to litigate as to whether Judge Ozaki should be disqualified.[674] On 18 April 2019, the TC rejected the request.[675] The sentencing stage lasted from 9 July until 7 November 2019, or for almost four months.

Summary of the appeal phase: The appeal phase of the *Ntaganda* case lasted from 9 September 2019 until the final judgment on 30 March 2021.[676] The verdict was appealed by both parties,[677] whereas Ntaganda alone also appealed the sentencing decision.[678] The AC confirmed both the conviction and the sentence.

The pre-hearing stage lasted 309 days, from 9 September 2019 to 11 October 2020. Due to the Covid-19 pandemic, the hearings were rescheduled on 29 June 2020, adding another unexpected period of time of 105 days. The hearing stage started on 12 October and ended on 14 November 2020. The post-hearing stage started on 15 November 2020 and ended on 30 March 2021, lasting for 167 days.

Overall: The case proceedings show a big difference from one stage to the next. If the proceedings are counted from the OTP's application for the arrest warrant, the total number of years is more than 15; if only the period from the defendant's surrender to the end of the proceedings is counted, it is eight years. The case was essentially dormant until the defendant surrendered of his own accord and was transferred to The Hague.

When Ntaganda was transferred to The Hague, the confirmation stage was impacted by the discussion around the DCC and its amendment. The disclosure system was also a problem for the parties; this was connected to translation and interpretation issues. Numerous requests

[666] Ibid., ICC-01/04-02/06-T-209-CONF-ENG ET.
[667] Ibid., ICC-01/04-02/06-2058.
[668] Ibid., ICC-01/04-02/06-T-234-Red-ENG.
[669] Ibid., ICC-01/04-02/06-2166.
[670] Ibid., ICC-01/04-02/06-2287.
[671] Ibid., ICC-01/04-02/06-229 (because of transcript corrections, final list etc.).
[672] Ibid., ICC-01/04-02/06-2299, ICC-01/04-02/06-2308.
[673] Ibid., ICC-01/04-02/06-2359.
[674] Ibid., ICC-01/04-02/06-2328.
[675] Ibid., ICC-01/04-02/06-2335.
[676] Ibid., ICC-01/04-02/06 A A2.
[677] Ibid., ICC-01/04-02/06-2395 and ICC-01/04-02/06-2396.
[678] Ibid., ICC- 01/04-02/06-2468-Conf.

regarding protective measures were filed. He applied for interim release, which was rejected; he appealed the PTC's denial but with the same result. During this stage, the parties' requests were replied to by the other party after six days and the decisions were made by the judges in a timeframe of 20 to 30 days. The same applies to the trial stage and the proceedings before the AC; the importance of the guidance from the bench and the capacity to organise the proceedings were highlighted.

The total number of filings and Chamber's decisions exceeded 2,300. The Trial Chamber issued 347 written decisions and 257 oral decisions during the trial phase and 1,791 items were admitted into evidence.[679] A total of 2,129 victims were authorised to participate in the proceedings through legal representation.

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Bosco Ntaganda			
	Defence response	OTP response	Decision from last response
OTP filing	6	—	31
Defence filing	—	9	21

Table 20 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Bosco Ntaganda

The interlocutory appeals in the Ntaganda case lasted for 130 days on average.

Interlocutory appeals in the case of Bosco Ntaganda						
N	Phase	Party	Issue on appeal	Dates	Overall days	Outcome
1	Pre-trial	Defence	Interim release	25 Nov 2013-5 Mar 2014	100	confirmed
2	Trial	Defence	Challenging jurisdiction	19 Oct 2015-22 Mar 2016	155	reversed
3	Trial	Defence	Disclosure request	10 Dec 2015-20 May 2016	162	confirmed
4	Trial	Defence	Limitations	6 Oct 2016-8 Mar 2017	153	confirmed
5	Trial	Defence	Second jurisdiction	26 Jan 2017-15 Jun 2017	140	confirmed

[679] See "Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06" https://www.icc-cpi.int/CaseInformationSheets/ntagandaEng.pdf (accessed 23 Mar 2022).

6	Trial	Defence	No case to answer	14 Jun 2017-5 Sep 2017	70	confirmed

Table 21 Interlocutory appeals in the case of Bosco Ntaganda

3.5.2 Assessment

Complexity: The complexity of the *Ntaganda* case lies in part in the conflict situation in the Ituri region. The OTP's capacity to collect evidence and include oral testimonies was limited. Regardless, compared with other cases, this is one of the biggest cases in terms of evidence, charges and victims.

The time during which the case lay dormant contributed to the complexity of restarting analysis of facts and the inclusion of additional charges originally overlooked by the OTP. The inclusion of charges regarding sexual violence led to unexpected litigation.[680] The protection of the victims, informants and witnesses imposed a complex system of disclosure and redactions. Another layer of complexity was added by the translation issues and the interpretation of the working languages of the ICC into Kinyarwanda.[681]

Conduct of defendant and participants: The Defence encountered difficulties from the outset due to the illness of one of the lawyers, irreconcilable differences between Ntaganda and his Counsel and the recurrent issue of financial resources prior to the defendant being declared eligible for legal aid. The Defence submitted four interlocutory appeals and one "no case to answer" motion.[682] Although there was a high number of victims authorised to participate and although *amici curiae* participated in different phases, this did not contribute to the length of the proceedings.

Conduct of authorities: The litigation around the DCC caused several postponements because of certain OTP misinterpretations of some elements in the DCC.[683] The Defence's requests to modify the DCC and its challenge to the Court's jurisdiction over part of the charges impacted the timeline from the start. The postponements of the confirmation hearing caused by the OTP's disclosure indicate that they were not ready after seven years. This cannot be considered reasonable, since the OTP is obliged to be ready for the start of proceedings when the defendant is under arrest. Some procedural activities were connected to the OTP's conduct regarding disclosure and redactions. This was observed by some of the interviewed experts as something that could have been avoided, given the lengthy procedure involved.[684]

Overall: As mentioned above, this case was dormant for seven years. The total number of more than 15 years since the issuance of the first arrest warrant seems too long for any criminal proceeding. At the same time, the judges and OTP were surprised by the appearance of Ntaganda at the US embassy.

Once the defendant appeared, the proceedings suffered exceptional setbacks and minor stoppages which were dealt with by judges in an acceptable length of time. Some Defence issues were long in comparison to other cases, but this was also solved by the Registry. The apparently large number of witnesses was accepted by the parties and participants as a

[680] One of the experts mentioned "[the litigation on sexual war crimes against child soldiers] was a very big decision that was going to decide the law on that issue for all future cases. So, I don't begrudge the Appeals Chamber taking its time even putting that down as lower priority", Interview G3.
[681] Interview G2.
[682] Interview G3.
[683] Interview G3.
[684] Interview G3.

common issue, in that there were many charges to be analysed. Finally, the large number of victims accepted did not affect the length of the proceedings.[685]

3.5.1 Factors Impacting the Length of Proceedings in the Ntaganda Case

Serious Impact: The disclosure litigation led to a postponement of the confirmation hearing because of the OTP's review and preparation seven years after the first issuance of an arrest warrant. The DCC, which was amended several times, and not only during the confirmation phase, seriously affected the length of the proceedings.

The starting day of the trial was postponed twice due to the discussion regarding arrangements for witness protection and the OTP's respect of the deadline for disclosure. The appeals hearings were delayed due to the Covid-19 pandemic

Contributory Impact: Numerous requests regarding protective measures for witnesses also added days. The high number of witnesses and experts (112) contributed to the total amount of days in court. The litigation connected to redaction issues impacted the trial phase, alongside the language issues and the translation of transcripts into Kinyarwanda.

3.6 The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

Germain Katanga is a Congolese national born on 28 April 1978 in the territory of Mambasa, in the district of Ituri in the DRC. Prior to his arrest in March 2005, he was a brigadier general in the *Forces Armées de la République Démocratique du Congo* (FARDC). The crimes with which Katanga was charged were alleged to have been committed in the course of an attack on Bogoro, a village in Ituri in the DRC.

Mathieu Ngudjolo Chui was born on 8 October 1970 in the Likoni locality, in the Djugu territory of the DRC. In October 2006, he obtained the rank of colonel in the FARDC and was based in Ituri.

On 2 July 2007,[686] an arrest warrant was issued against Katanga by PTC. Katanga was charged with one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging), rape and sexual slavery as a crime against humanity and the war crimes of using children under the age of fifteen years to participate actively in hostilities. Another arrest warrant was issued against Ngudjolo on 6 July 2007.[687] He was charged with three crimes against humanity and seven war crimes allegedly committed on 24 February 2003 during the attack on the Bogoro village.

Although the case against Katanga was initially joined to the case against Ngudjolo, TC severed the charges on 21 November 2012.

On 18 December 2012, Ngudjolo was acquitted of three counts of crimes against humanity and seven counts of war crimes. On 21 December 2012, he was released from ICC custody. His acquittal was subsequently confirmed by the AC on 27 February 2015. On 7 March 2014, Katanga was found guilty of one count of crimes against humanity and four counts of war crimes. He was sentenced to 12 years' imprisonment on 23 May 2014. On 13 November 2015, the AC reviewed the sentence and decided to reduce it.

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[685] One of the experts mentioned that all Chambers now follow the well-established process on victims applications, the research is done by the VPRS and the judges only focus on the "grey area" victims so that the victims' applications are not an issue anymore, Interview G4.

[686] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-1, www.icc-cpi.int/drc/katanga (accessed 25 Mar 2022).

[687] Ibid., ICC-01/04-01/07-260.

The information provided in this report covers the joined and severed cases against Katanga and Ngudjolo.

The proceedings in the case of Germain Katanga & Mathieu Ngudjolo Chui			
N	**Phase/Stage**	**Dates**	**Days**
1.	**W/S phase(Katanga)**	22 Jun 2007-18 Oct 2007	**119**
	W/S phase(Ngudjolo Chui)	22 Jun 2007-7 Feb 2008	**231**
1.1.	Issuance stage (Katanga)	22 Jun 2007-2 Jul 2007	11
	Issuance stage (Ngudjolo Chui)	22 Jun 2007-6 Jul 2007	15
1.2.	Arrest/Surrender stage (Katanga)	3 Jul 2007-17 Oct 2007	107
	Arrest/Surrender stage (Ngudjolo Chui)	8 Jul 2007-6 Feb 2008	214
1.3.	Transfer stage (Katanga)	18 Oct 2007	1
	Transfer stage (Ngudjolo Chui)	7 Feb 2008	1
2.	**Confirmation phase (Katanga)**	19 Oct 2007-24 Oct 2008	**372**
	Confirmation phase (Ngudjolo Chui)	8 Feb 2008-24 Oct 2008	**260**
2.1	First appearance stage (Katanga)	19 Oct 2007-22 Oct 2007	4
	First appearance stage (Ngudjolo Chui)	8 Feb 2008-11 Feb 2008	4
2.2	Post-appearance stage (Katanga)	23 Oct 2007-27 Jun 2008	249
	Post-appearance stage (Ngudjolo Chui)	12 Feb 2008-27 Jun 2008	137
2.3	Confirmation hearing stage	28 Jun 2008-16 Jul 2008	19
2.4	Post-confirmation hearing stage	17 Jul 2008-26 Sep 2008	72
2.5	Post-confirmation stage	27 Sep 2008-24 Oct 2008	28
3.	**Trial preparation phase**	25 Oct 2008-23 Nov 2009	**395**
4.	**Trial phase (Katanga)**	24 Nov 2009-23 May 2014	**1,642**

The proceedings in the case of Germain Katanga & Mathieu Ngudjolo Chui			
N	**Phase/Stage**	**Dates**	**Days**
	Trial phase (Ngudjolo Chui)	24 Nov 2009-18 Dec 2012	**1,121**
4.1.	Hearing stage	24 Nov 2009-23 May 2012	912
4.1.1	Opening statements	24 Nov 2009	1
4.1.2	Presentation by the Prosecution	25 Nov 2009-8 Dec 2010	379
4.1.3	Presentation by the victims	9 Dec 2010-25 Feb 2011	79
4.1.4	Presentation by the Defence	26 Feb 2011-11 Nov 2011	259
4.1.5	Closing statements	12 Nov 2011-23 May 2012	194
4.2.	Trial deliberation stage (Katanga)	24 May 2012-7 Mar 2014	653
	Trial deliberation stage (Ngudjolo Chui)	24 May 2012-18 Dec 2012	209
4.3.	Sentencing stage (Katanga)	8 Mar 2014-23 May 2014	77
5.	**Appeal phase (Katanga)**	9 Apr 2014-25 Jun 2014	**78**
	Appeal phase (Ngudjolo Chui)	20 Dec 2012-27 Feb 2015	**800**
5.1.	Pre-hearing stage	20 Dec 2012-20 Oct 2014	670
5.2.	Hearing stage	21 Oct 2014	1
5.3.	Post-hearing stage	22 Oct 2014-27 Feb 2015	129
5.4	Final Judgment	27 Feb 2015	

Table 22 The proceedings in the case of Germain Katanga & Mathieu Ngudjolo Chui

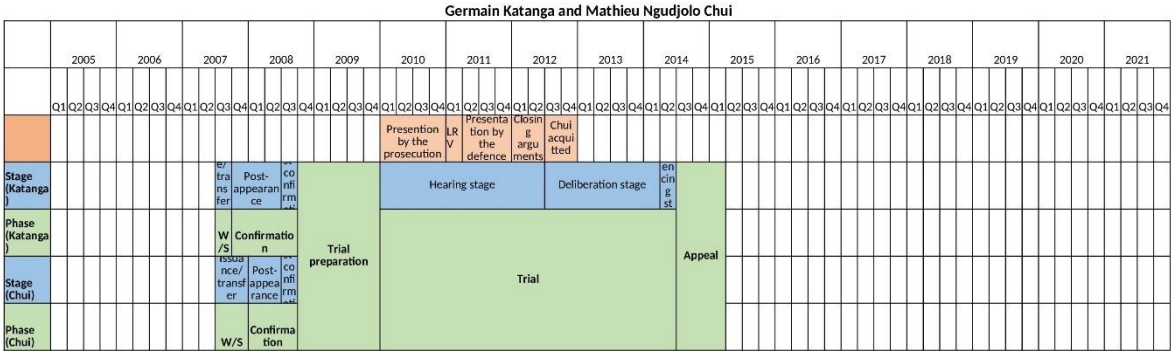

Image 9 The proceedings in the case of Germain Katanga & Mathieu Ngudjolo Chui

3.6.1 Summary of the Proceedings

Summary of the W/S phase: This phase lasted for 230 days for Ngudjolo and 118 days for Katanga. The Prosecutor applied separately for arrest warrants against the two suspects. The time between the application for and the issuance of the warrants was ten days for Katanga and 14 days for Ngudjolo, mainly because the Prosecutor had requested expedited consideration. The arrest, surrender and transfer of the two, each undertaken separately, overall took 107 days (Katanga) and 214 days (Ngudjolo Chui). In the *Katanga* case, the suspect's transfer was facilitated by the fact that he was already in national detention at the time of his arrest. As for Ngudjolo, his arrest and transfer required cooperation with DRC authorities.

Summary of the confirmation phase: The length of the confirmation phase differed for the *Katanga* and *Ngudjolo* cases. Katanga arrived in The Hague on 19 October 2007, triggering the confirmation phase which ended on 24 October 2008 when the Defence application for leave to appeal the confirmation decision was rejected (372 days). Due to Ngudjolo's later arrival in The Hague, on 8 February 2008, the confirmation phase that also ended on 24 October 2008 for him only lasted 259 days.

The post-appearance stage accounted for the highest number of days, lasting 248 days for Katanga and 136 days for Ngudjolo. This stage was characterised by procedural activities relating to the languages spoken by Katanga, protective measures, issues on redaction, disclosure and evidence, reconsideration of charges, interim release, Defence applications, the joinder of the *Katanga* and *Ngudjolo* cases and requests for cooperation.

The activities relating to the spoken languages lasted for approximately 219 days and were initiated because Katanga had informed the Court during his first appearance that he was not fully fluent in French but spoke Lingala. Following a Court order, the Registrar submitted that Katanga was considered to speak, write, understand and read French on the basis of information gathered.[688] Rejecting the Defence request to provide Lingala translation for all French documents and proceedings for Katanga,[689] the PTC decided that Katanga be provided with a French version of witness statements and ordered the Registrar to make a French interpreter permanently available to Katanga to assist where the documents were available in English.[690] Upon an appeal by Katanga's Defence, the AC reversed the PTC decision.[691]

[688] Ibid., ICC-01/04-01/07-62.
[689] Ibid., ICC-01/04-01/07-78.
[690] Ibid., ICC-01/04-01/07-127.
[691] Ibid., ICC-01/04-01/07-522.

Other procedural activities during the post-appearance stage related to applications for redaction of witness statements and documents. The OTP filed at least 19 applications for redactions, which resulted in the PTC issuing approximately eight decisions. Other activities and filings during the post-appearance stage related to disclosure and evidence, including submission of pre-inspection reports, inspection reports, electronic versions of the redacted witness statements, and electronic versions and the originals of statements and interview notes of witnesses. As regards interim release, the PTC issued nine decisions during the post-appearance stage, in which it either gave orders for parties to submit their observations on the defendants' pre-trial detention or ordered that the defendants remain in detention.

The post-confirmation hearing stage lasted for 72 days from 17 July 2008 to 26 September 2008, when the decision on the confirmation of charges was rendered. The procedural activities during this stage related to filings about the confirmation of charges.[692]

The post-confirmation stage included an application on 6 October 2008 by the Defence for leave to appeal the decision on the confirmation of charges.[693] The PTC, however, on 24 October 2008 rejected the Defence's application thereby ending the confirmation phase.[694]

At least 671 public documents were filed during the confirmation phase, including at least 153 documents emanating from the OTP, 259 from the PTC, 68 from the Registry and 99 from the Defence.

Summary of the trial preparation phase: The trial preparation phase lasted for 395 days, from 25 October 2008 to 23 November 2009. The main procedural activities that occurred during the period related to case management, interim release and the conditions of detention, the DCC, disclosure and admissibility, protective measures, victims' participation and language.

In relation to Ngudjolo's interim release, the PTC issued seven decisions in which it ordered the parties to file their observations, and reviewed the decision rejecting the application for the interim release of Ngudjolo. The Chamber also issued four review decisions regarding the interim release of Katanga, in which it decided to uphold his detention.

Procedural activities relating to the DCC were initiated due to an application by the Defence for Katanga requesting the DCC be amended to make them reflective of the decision on the confirmation of charges.[695] Further proceedings related to the difficulties associated with using a table of evidence that had been filed by the OTP.[696] The TC subsequently instructed the Prosecutor to prepare a summary of the charges reiterating the language used by the PTC in its confirmation decision and to amend a column in the said table of evidence.

Most of the procedural activities that occurred during the trial preparation phase related to protective measures. These activities were associated particularly with the OTP's applications for redaction of documents relating to witnesses, forensic reports, transcripts of the records of medical examinations and witness statements. Other applications filed concerned the modalities for disclosure of witness statements, proposals for redacting documents, the OTP's request for voice and facial distortion for various individuals appearing in video recordings, maintenance of deletions concerning exculpatory evidence and a request for disclosure of material relating to witness orders.

Other procedural activities during the trial preparation phase pertained to various issues about the treatment of victims' applications to participate in the proceedings, the procedure to be followed by the Victims Participation and Reparations Section (VPRS) for the treatment of

[692] Ibid., ICC-01/04-01/07-717.
[693] Ibid., ICC-01/04-01/07-721.
[694] Ibid., ICC-01/04-01/07-727.
[695] Ibid., ICC01/04-01/07-954.
[696] Ibid., ICC-01/04-01/07-1310.

applications for participation and the modalities for the redaction of applications prior to their disclosure. In this regard, the VPRS submitted six different reports on 271 victims to inform the Court of its proposed redactions. The Registry also submitted reports to the Chamber on the applications of victims that the PTC had rejected, further proposed redactions and the appointment of representatives for two different groups of victims.

Additionally, some procedural activities during the trial preparation phase concerned the question of whether interpretation into Lingala should continue to be provided for Katanga. In this regard, the Chamber ordered and appointed two experts to advise on language matters.

Summary of the trial phase: The trial phase started on 24 November 2009 and ended on 23 May 2014, thereby lasting for 1,641 days. This makes it the second longest trial, with the *Bemba* case having had the longest trial at 2,038 days.

The longest stage of the trial phase was the hearing which lasted for 911 days, from 24 November 2009 to 23 May 2012. The presentation of evidence accounted for the major part of the hearing and occurred over a period of 804 days, from 25 November 2009 to 7 February 2012. The OTP's factual presentation began on 25 November 2009 and concluded on 8 December 2010, that is after a period of 347 days. This was followed by a long recess of 75 days before the Chamber resumed its hearings on 21 February 2011. The OTP called 25 witnesses. At the request of the LRV of the main group of victims, two victims gave evidence in hearings held between 21 and 25 February 2011. The Defence's factual presentation began on 21 March and ended on 11 November 2011. The 17 witnesses called by the Defence for Katanga testified from 21 March to 12 July 2011, that is for a period of 113 days. The witnesses for Ngudjolo were 11 in number and testified from 15 August to 16 September 2011. Upon completion of the testimonies by Defence witnesses, both accused persons also testified as witnesses. Katanga's testimony lasted for 10 days, over the period from 27 September 2011 to 19 October 2011, and Ngudjolo testified for seven days between 27 October and 11 November 2011. On 18 and 19 January 2012, the Chamber conducted a judicial site visit to the DRC, accompanied by the parties and participants and representatives of the Registry. The presentation of evidence was declared closed on 7 February 2012.[697] The oral closing submissions took place between 15 and 23 May 2012.

The deliberation stage lasted nearly as long as the hearing and covered a period of 730 days, starting a day after the last oral closing submissions on 24 May 2012. A notable procedural activity was the TC's decision to trigger Reg. 55 RoC on the mode of liability under which Katanga was charged, aiming to re-characterise it under Article 25(3)(d) RS. Based on this, the Chamber decided to sever the case against Ngudjolo. Ngudjolo was then acquitted, on 18 December 2012. On 21 December 2012, he was released from ICC custody. The deliberation stage for the *Katanga* case, however ended only on 7 March 2014 when TC found the accused guilty of five charges and unanimously acquitted him of the other five charges. Unlike the long hearing and deliberation stages, the sentencing stage lasted for 76 days and ended on 23 May 2014, when the TC imposed a 12-year sentence on Katanga.

In summation, the main activities that occurred during the trial phase related to case management, interim release, protective measures, disclosure and evidence and victim participation. Activities related to protective measures were a majority of the procedural activities, with the TC having issued a minimum of 23 decisions in respect of specific protective measures, redactions of some witness statements, and the disclosure of the victims' identities to the parties and the appropriate measures to be taken to protect the anonymity of others. Another procedural occurrence that was peculiar to the case was Ngudjolo's application requesting the Chamber to provide assurances with respect to self-incrimination to a number

[697] Ibid., ICC-01/04-01/07-3235.

of Defence witnesses, including Ngudjolo himself. The TC rejected the request and recalled the right of the accused to make an unsworn statement in their defence pursuant to Article 67(1)(h) RS. Another notable occurrence during the trial was a request by the Defence for Katanga for assistance to secure the cooperation of the DRC in obtaining some documents.[698] On 6 December 2010, TC granted the motion in part.[699]

Summary of the appeal phase: The appeal phase in the *Katanga* case partly overlapped with the trial phase due to the severance of the *Katanga* and *Ngudjolo* cases during the trial and the acquittal of Ngudjolo before Katanga's conviction. The appeal phase for Katanga lasted 77 days due to the discontinuance of the OTP and Defence appeals, thereby making the Article 74 judgment final. In the case of Ngudjolo, however, the appeal stage proved to be long and lasted 800 days, running from 20 December 2012 to 27 February 2015. During this period, 56 decisions were issued by the Appeals Chamber in relation to case management, disclosure and evidence, language, protective measures and victim participation. The total number of OTP notices, submissions, responses, applications and requests were 20 whilst those of the Defence were 36.

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Germain Katanga & Mathieu Ngudjolo Chui			
	Defence response	OTP response	Decision from last response
OTP filing	6		10
Defence filing		8	15

Table 23 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Germain Katanga & Mathieu Ngudjolo Chui

The interlocutory appeals in the *Katanga* and *Ngudjolo* case lasted for 142 days on average.

Interlocutory appeals in the case of Germain Katanga & Mathieu Ngudjolo Chui						
N	Phase	Party	Issue on appeal	Dates	Total days	Outcome
1	Pre-trial	Defence	Interim release	4 Apr 2008-9 Jun 2008	66	dismissed
2	Pre-trial	Defence	Joinder of the cases	21 Apr 2008-9 Jun 2008	49	dismissed
3	Pre-trial	Defence	Language	31 Jan 2008-27 May 2008	117	reversed
4	Pre-trial	OTP	Redaction I	3 Dec 2007-13 May 2008	162	reversed

[698] Ibid., ICC-01/04-01/07-1900-Conf-Exp.
[699] Ibid., ICC-01/04-01/07-2619-Red.

5	Pre-trial	Defence	Redaction II	21 Dec 2007-27 May 2008	158	dismissed
6	Pre-trial	OTP	Preventive Relocation and Disclosure	18 Apr 2008-26 Nov 2008	222	dismissed
7	Trial preparation	Defence	Admissibility	12 Jun 2009-25 Sep 2009	105	dismissed
8	Trial preparation	OTP	Contacts	28 Jul 2009-9 Dec 2009	134	reversed
9	Trial	Defence	Unlawful detention and stay of proceedings	20 Nov 2009-12 Jul 2010	234	dismissed
10	Trial	Defence	Modalities of victims' participation	22 Jan 2010-16 Jul 2010	175	dismissed

Table 24 Interlocutory appeals in the case of Germain Katanga & Mathieu Ngudjolo Chui

3.6.2 *Assessment*

Complexity: The complexity of the case was increased by the joinder of the *Katanga* and *Ngudjolo Chui* cases. Although the joinder proved to be an efficient way of handling the two cases,[700] the subsequent turn of events prolonged the proceedings. In particular, the TC decision to trigger Reg. 55 RoC for the purpose of re-characterisation of the mode of liability under which Katanga was charged posed some complexity because, whilst it delayed the *Katanga* case, it was considered prudent to avoid prejudice to Mr Ngudjolo and end the case against him promptly.

Complexity also arose out of the fact that the *Katanga* case was handled at a time when the Court did not have well-established practices, in particular any for the handling of victim applications.[701] For instance, prior to the holding of confirmation hearings, the pendency of almost 150 applications for victim participation requiring adjudication was one of the reasons the Chamber put forward for requesting a postponement of the hearing. The Chamber also had to address various issues subsequently raised by the parties concerning modalities for participation of victims. In total, 366 victims were authorised to participate in the trial.

The Defence faced some difficulties due to the complexity of the case. For instance, in one application for postponement of the confirmation hearing, the reasons cited by the Defence for Ngudjolo were logistical and organisational obstacles which had hindered their ability to prepare.[702] In addition they cited the build-up of many procedural requirements relating to the documents disclosed by the OTP as well as the need for documents that had been submitted by the OTP to be translated. In particular, the Defence encountered difficulties in undertaking investigations. The Defence initially informed the Court of its intention to carry out different investigations in Ituri from 4 to 15 December 2008, in Kinshasa from 15 to 25 January 2009,

[700] Interview H1.
[701] Interview H2.
[702] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/10-378, www.icc-cpi.int/drc/katanga, (accessed 25 Mar 2022).

in Ituri from 16 to 28 February 2009, in Kinshasa from 23 to 29 March 2009 and in Ituri from 20 April to 3 May 2009. Nevertheless, Defence Counsel for Katanga later informed the Court that investigations had been delayed, and that he needed six months to prepare, following the Prosecutor's final disclosure of evidence.

The parties faced organisational challenges. The Katanga Defence requested more time to complete its investigations; pending their completion, admissibility issues relating to observations from DRC authorities and the victims were put on hold. Meanwhile, the OTP also requested an extension of the time to tabulate and submit its incriminating evidence properly. The Chamber also had to postpone the date for commencing the confirmation hearings due to the incomplete disclosure of exculpatory evidence and evidence falling under Rule 77 RPE, and the possibility that the Chamber would have to determine the admissibility of several exhibits. Another factor that contributed to the postponement was the need to allow the legal representatives of newly admitted victims sufficient time to familiarise themselves with the material and to determine which issues were relevant for protecting the interest of victims.

The conduct of witnesses also affected the length of proceedings in different ways. In particular, three detainees in the DRC who were transferred to The Hague in cooperation with the DRC to serve as witnesses in the case subsequently made a request to the Court to be permitted to apply for asylum with the Dutch authorities. In light of the application of these witnesses, the TC had to issue several decisions relating to the continued detention of the witnesses as well as measures to protect them.[703]

Conduct of defendant and participants: The differing conduct of the two defendants in the case prolonged the proceedings. In particular, Katanga's assertion that he was not fluent in French gave rise to the need for other parties to file their observations and a decision had to be made on his application before the confirmation hearing could be proceeded with. In order to hold the confirmation hearing within a reasonable time, the Chamber refrained from making findings about the level of his fluency and held that Katanga should continue to be assisted by an interpreter during the hearings held in the remaining proceedings before PTC.[704] However, the language issue resurfaced during the trial preparation phase and the Court appointed two experts to ascertain whether Katanga fully understood and spoke French.[705]

Other Defence actions which delayed Court proceedings included Ngudjolo's request for postponement of the confirmation hearing for a minimum of 60 days, on grounds of organisational challenges. The Katanga Defence filed an application to seek DRC cooperation, and requested the PTC to declare that a functional interpretation of Part 9 of the ICC Rome Statute obliges the DRC to cooperate in good faith with the Defence. Katanga submitted applications seeking legal assistance from the Court for his legal representation. Moreover, the Defence application for leave to appeal the decision on the confirmation of charges gave rise to subsequent filings from other parties, delaying the case's transmission to the Trial Chamber.

Among the situations that resulted in postponements of the trial hearings, a notable protracting cause was an application filed by the Defence for Ngudjolo to request the removal of more than 290 items listed by the Prosecutor in support of the charges. Moreover, prior to commencement of the trial hearings, Katanga applied for a declaration of unlawful detention and stay of proceedings wherein he alleged he was unlawfully arrested and detained by the Congolese authorities and that the Prosecutor and the Registry bore responsibility for the continuation of this unlawful detention. Pending the determination of these applications, the

[703] Interview H1.
[704] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-539, www.icc-cpi.int/drc/katanga (accessed 25 Mar 2022).
[705] Ibid., ICC-01/04-01/07-539.

Court had to postpone the start of the trial phase. Also the Defence for Ngudjolo applied for a third postponement of the trial date on the grounds that the OTP had recently added new witnesses to the list about whom it needed to conduct further investigations in the DRC, and there were still pending issues to be decided by the Chamber. Although this application was not granted, it was decided that the hearings would commence on the planned date with opening statements alone, since the Defence for Ngudjolo had indicated that it would not be ready to cross-examine any witnesses at the already planned date for the hearing.

Another notable act that prolonged the trial was the admissibility challenge by Katanga's Defence during the trial preparation. The activities resulting from this application lasted for 227 days.

Conduct of authorities: The Court and the OTP received the requisite cooperation needed from the DRC, but the Defence did not. Katanga's Defence, for instance, had to seek the Court's assistance on two occasions, to obtain information from the DRC as part of its investigations.[706]

The nature of the decision on the confirmation of charges posed challenges prior to the trial. There was little clarity about the charges. There was thus the need to ask for clarity. This proved to be challenging as there was no jurisprudence.[707] First, the Katanga Defence requested an amended DCC, and in another application expressed the difficulties it faced in using the table of evidence that the OTP had submitted. The Chamber ordered the OTP to prepare a summary of the charges referred to in the decision on the confirmation of charges and make some changes to its table of evidence. The procedural activities relating to the charges lasted from 12 March until 19 November 2009.

The starting date for the trial was postponed twice. Although the initial postponement was based on factual and legal complexities, the second postponement was caused by the OTP's late filing of applications seeking new redactions and the addition of new incriminating and exculpatory evidence. The nature of the OTP applications required that the Defence be given time to process the evidence. On these bases, the trial was postponed.[708]

Overall: The joinder of the *Katanga* and *Ngudjolo* cases made the process efficient and enabled the Court to handle the charges against the two defendants concurrently. The delays in fixing a date for the trial were caused by the parties' fulfilment of the different procedural requirements. The OTP's tardiness in submitting some documents at different stages of the trial, and Defence delays in completing their investigations, although avoidable, could be attributed to the number of witnesses, redactions and evidential material. In total, the Prosecution called 24 witnesses, the Katanga Defence called 17 and the Ngudjolo Defence called 11. The number of exhibits the OTP tendered was 261 and the Defence 372 (that is 240 for the Katanga Defence and 132 for the Ngudjolo Defence). Arguably, the volume of evidence and the participation of two defendants in the case gave rise to the need for more preparation by all parties. While the subsequent severance of the case prolonged the *Katanga* case, such a decision was inevitable, as it had significant implications for the Court's verdict. In summation, the length of proceedings for the *Katanga* case could be considered as reasonable.

[706] Ibid., ICC-01/04-01/07-478.

[707] One of the experts mentioned "one of the first decisions that Chamber took, […] was to ask [for] clarity about the charges. For the prosecutor to put an instrument—a document, with a clarification, or the summary of the charges […]. And that was a problem because there was no tradition in this regard. It was only the second case (after Lubanga), and even here the Pre-Trial Chamber has grossly over-stated its role. That was one of the fundamental errors that judges took in the beginning of the life of the Court.", Interview H1.

[708] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-1442, www.icc-cpi.int/drc/katanga (accessed 25 Mar 2022).

3.6.3 *Factors Impacting the Length of Proceedings in the Katanga & Ngudjolo Chui Case*

Serious impact: The lack of cooperation by the DRC with the Defence prolonged investigations and led to a postponement of the confirmation hearing. The Defence's challenge to the admissibility of the case also caused delay in starting the trial as the determination of the issue had direct implications on whether or not to proceed with the trial. The lack of clarity on the charges as stated in the decision on the confirmation of charges led to difficulties for both the Defence and the OTP and caused delays as the OTP was required to amend the charges before the trial could proceed. The OTP's late filing of applications for new redactions and the addition of new incriminating and exculpatory evidence led to the second postponement of the trial date.

Contributory impact: The joinder of the cases resulted in undue delay in the *Katanga* case as his trial was linked to that of Ngudjolo. The subsequent re-characterisation of the modes of liability for Katanga prolonged deliberations, although it shortened the time leading to the Ngudjolo verdict. The translation of documents into Lingala for Katanga caused delays by increasing the workload of the Court and giving rise to different proceedings on the issue.

The determination of individual applications from victims also increased the Court's overall workload and gave rise to the need to address various issues that were subsequently raised by the parties concerning the modalities for participation of victims in the proceedings.

3.7 The Prosecutor v. William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey

After the 2007 elections in Kenya, civil unrest erupted and led to the killing of an estimated 1,200 persons. The ICC opened an investigation and charged high-ranking officials of the Government, William Ruto, Joshua Arap Sang, Francis Muthaura and Uhuru Kenyatta, with crimes against humanity. As a result, the government called on the parliament to withdraw from the Rome Statute of the International Criminal Court and end its cooperation with the ICC.

Vice-President Ruto, the former Minister of Agriculture, was accused of having organised Kalenjin militias. The ICC Prosecutor brought charges against him in 2011, alleging that Ruto incited murder, displacement and persecution during the post-election riots in 2007 and 2008. Charges were also brought against Joshua Arap Sang, a journalist for the radio station Kass FM. Sang was accused of having used the station to win supporters for the movement and to communicate with members of the network by encrypted messages as to when and where attacks should take place. Like Ruto, he was charged with three counts of crimes against humanity. Henry Kiprono Kosgey was chairman of the Orange Democratic Movement and Ministry of Trade & Industry. Together with Ruto and Sang, he allegedly set up a network to commit crimes against members of the Party of National Unity (PNU). During the unrest, the houses of supporters of the PNU were attacked and civilians were tortured, killed and abducted. Kosgey was charged by the Prosecutor with four counts of crimes against humanity. The case against Ruto and Sang was suspended in April 2016, and the charges against Kosgey were dropped at the confirmation phase.

The proceedings in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey			
N	**Phase/Stage**	**Dates**	**Days**
1.	W/S phase	15 Dec 2010-7 Apr 2011	114
1.1	Issuance stage	15 Dec 2010-8 Mar 2011	84
1.2	Summons stage	9 Mar 2011-6 Apr 2011	28
2.	**Confirmation phase**	**7 Apr 2011-24 May 2012**	**414**
2.1	First appearance stage	7 Apr 2011	1
2.2	Post-appearance stage	8 Apr 2011-31 Aug 2011	146
2.3	Confirmation hearing stage	1 Sep 2011-8 Sep 2011	8
2.4	Post-confirmation hearing stage	9 Sep 2011-23 Jan 2012	137
2.5	Post-confirmation stage	24 Jan 2012-24 May 2012	122
3.	**Trial preparation phase**	**25 May 2012-9 Sep 2013**	**473**

The proceedings in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey			
N	**Phase/Stage**	**Dates**	**Days**
4.	**Trial phase**	**10 Sep 2013-5 Apr 2016**	**939**
4.1.	Hearing stage	**10 Sep 2013-5 Apr 2016**	939
4.1.1	Opening statements	10 Sep 2013	1
4.1.2	Presentation by the OTP	11 Sep 2013-5 Apr 2016	938
4.1.2.1	Presentation by the OTP (factual)	11 Sep 2013-10 Sep 2015	730
4.1.2.2	Presentation by the Defence (“no case to answer” motion)	11 Sep 2015-15 Jan 2016	127
4.1.2.3	“No case to answer” motion deliberation	16 Jan 2016-5 Apr 2016	81

Table 25 The proceedings in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey

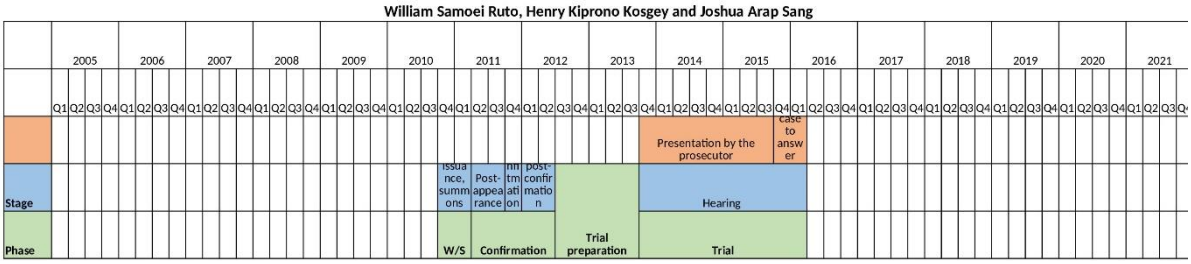

Image 10 The proceedings in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey

3.7.1 Summary of the Proceedings

Summary of the W/S phase: The suspects appeared voluntarily before the ICC after being issued with summonses to appear on 8 March 2011.[709]

Summary of the confirmation phase: The confirmation phase of the *Ruto et al.* case lasted for 414 days. At the first appearance of the suspects, on 7 April 2011, the PTC scheduled the commencement of the confirmation hearings for 1 September 2011 (after 146 days). The

[709] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-01, www.icc-cpi.int/kenya/rutosang (accessed 25 Mar 2022).

Defence teams unsuccessfully requested a postponement of the confirmation hearing due to the limited number of live witnesses, with formal and informal requests addressed to the government and responses from various Kenyan institutions.[710] With its 146 days, the *Ruto et al.* post-appearance stage appears to be the shortest one compared to the other cases having come before the ICC to date. It included procedural activities around admissibility initiated by the Kenyan Government,[711] interlocutory appeal proceedings,[712] the disclosure system[713] with unsuccessful leave to appeal,[714] disclosure to the Defence,[715] modalities of the summons conditions,[716] the victims' participation and the number of the witnesses to be called.[717]

After an eight-day confirmation hearing, the PTC required 136 days not to confirm the charges against Kosgey and to confirm the charges against Ruto and Sang. Another 121 days were taken until the final decision on appeal, where the Defence unsuccessfully raised the issue of jurisdiction.[718]

Summary of the trial preparation phase: The trial preparation lasted for 473 days, making it one of the longest trial preparations at the ICC to date. On 9 July 2012, the TC scheduled the commencement of the trial for 10 April 2013 (320 days from the final decision on the confirmation of charges).[719] On 14 February 2013, the Defence raised the issue of delayed OTP disclosure and filed an application to shift the trial start date, which led to the 24 May 2013 trial date being vacated (postponed for 48 days).[720] The commencement of the trial was vacated again because of the amount of evidence disclosed by the OTP and the need for adequate time for Defence preparation (another 105 days).[721]

The trial preparation phase included procedural activities around modification of the DCC because of factual uncertainties,[722] a new redaction regime,[723] numerous late disclosures of information related to witnesses by the OTP,[724] Article 56 RS,[725] the witness protocol,[726] unsuccessful amendment of the charges by the OTP[727] and the unsuccessful appeal proceedings,[728] Reg. 55(2) RoC application[729] and attendance of the accused persons[730] with following appeal proceedings.[731]

Summary of the trial phase: The trial phase lasted for 939 days. The OTP's case presentation lasted from 11 September 2013 to 10 September 2015 (729 days),[732] after which the Defence filed a successful "no case to answer" motion, which lasted from 10 September 2015 to 5 April 2016 (208 days). The "no case to answer" motion was already emerging on 9 August 2013

[710] Ibid., ICC-01/09-01/11-260, ICC-01/09-01/11-301. The Defence unsuccessfully requested leave to appeal the decision of the PTC rejecting the postponement.
[711] Ibid., ICC-01/09-01/11-101.
[712] Ibid., ICC-01/09-01/11-307.
[713] Ibid., ICC-01/09-01/11-44.
[714] Ibid., ICC-01/09-01/11-74.
[715] Ibid., ICC-01/09-01/11-85.
[716] Ibid., ICC-01/09-01/11-86.
[717] Ibid., ICC-01/09-01/11-221.
[718] Ibid., ICC-01/09-01/11-414.
[719] Ibid., ICC-01/09-01/11-440.
[720] Ibid., ICC-01/09-01/11-642.
[721] Ibid., ICC-01/09-01/11-762.
[722] Ibid., ICC-01/09-01/11-522.
[723] Ibid., ICC-01/09-01/11-458-AnxA-Corr, ICC-01/09-01/11-458.
[724] Ibid., ICC-01/09-01/11-497, ICC-01/09-01/11-518, ICC-01/09-01/11-556, ICC-01/09-01/11-571-Red, ICC-01/09-01/11-718-Red, ICC-01/09-01/11-743, ICC-01/09-01/11-886, ICC-01/09-01/11-904-Red.
[725] Ibid., ICC-01/09-01/11-491.
[726] Ibid., ICC-01/09-01/11-449-anx.
[727] Ibid., ICC-01/09-01/11-859.
[728] Ibid., ICC-01/09-01/11-1123.
[729] Ibid., -01/09-01/11-1122.
[730] Ibid., ICC-01/09-01/11-777.
[731] Ibid., ICC-01/09-01/11-1066.
[732] Two days of opening statements.

before the commencement of trial, the TC allowed the Defence to file a “no case to answer” motion at the end of the OTP case.[733] On 10 September 2015, after the OTP closed its presentation, the Defence notified its intention of filing a “no case to answer” motion. Based on this, the TC vacated the hearing in November and later moved it to 14 to 15 January 2016. On 5 April 2016, 81 days after the hearing on the “no case to answer” motion, the TC vacated the charges against the accused persons.

At the start, the Defence advised about OTP witnesses withdrawing from the case.[734] At the OTP’s request on Articles 64(6)(b) and 93 RS, the TC required the appearance of the witnesses as a matter of obligation, that they should testify before the TC by video link from a location in Kenya. The TC requested government assistance in this regard.[735] The Defence appealed unsuccessfully against the decision to summon the witnesses.[736] The issue of witness security arose frequently during the Prosecution’s presentation of evidence.[737]

The OTP presentation included procedural activities around admission of evidence,[738] admission of the prior recorded testimony of witnesses and successful appeal proceedings,[739] disclosure of audio files,[740] alleged payments made by the OTP to the witnesses,[741] the appointment of a disclosure officer due to disclosure failures by the OTP[742] and other matters.[743]

Over 157 trial days, 42 witnesses were supposed to be summoned, but 16 refused to cooperate with the Court and some other witnesses admitted that they were supposed to tell lies to the Prosecutor in return for money.[744] Because of alleged witness intimidation and threats against witnesses in the *Ruto & Sang* case, contempt of court proceedings were opened against Paul Gicheru and Philip Kipkoech Bett. 628 victims were authorised to participate in the proceedings.

Overall: The time between a filing by a party and a response to it by the respective other party was ten days. Decisions on the parties’ filings were delivered within 28 to 33 days from the last response or reply. In course of the proceedings, at least 302 decisions were rendered by the Chambers, the Defence made at least 234 filings, the OTP at least 289 filings and the victims at least 46 filings.

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[733] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-847, www.icc-cpi.int/kenya/rutosang (accessed 25 Mar 2022).
[734] Ibid., ICC-01/09-01/11-936-Conf-Exp, ICC-01/09-01/11-953-Conf-Exp, ICC-01/09-01/11-T-26, p. 19; see also Maliti (2014).
[735] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-1274-Corr2, www.icc-cpi.int/kenya/rutosang, (accessed 25 Mar 2022).
[736] Ibid., ICC-01/09-01/11-1598.
[737] Ibid., ICC-01/09-01/11-1289, ICC-01/09-01/11-1363, ICC-01/09-01/11-1426, etc.
[738] Ibid., ICC-01/09-01/11-1045, ICC-01/09-01/11-1353, ICC-01/09-01/11-1527, ICC-01/09-01/11-1753, ICC-01/09-01/11-1761, etc.
[739] Ibid., ICC-01/09-01/11-2024.
[740] Ibid., ICC-01/09-01/11-992.
[741] Ibid., ICC-01/09-01/11-1100, ICC-01/09-01/1 I-T-132-Conf-ENG.
[742] Ibid., ICC-01/09-01/11-1774.
[743] Ibid., ICC-01/09-01/11-1465.
[744] Duerr (2016).

Days between parties' filings and responses, and between the last response and the Court's decision in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey			
	Defence response	OTP response	Decision from last response
OTP filing	10	—	33
Defence filing	—	10	28

Table 26 Days between parties' filings and responses, and between the last response and the Court's decision in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey

The interlocutory appeals in the *Ruto* and *Sang* case lasted for 109 days on average.

Interlocutory appeals in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey						
N	Phase	Party	Issue on appeal	Dates	Overall days	Outcome
1	Pre-trial	Defence	Admissibility	6 Jun 2011-30 Aug 2011	85	confirmed
2	Trial	OTP	Attendance	29 Jul 2013-25 Oct 2013	88	reversed
3	Trial	OTP	Amending the updated DCC	19 Sep 2013-13 Dec 2013	85	dismissed
4	Trial	Defence	Witness Summonses	29 May 2014-9 Oct 2014	134	dismissed
5	Trial	Defence	Admission of prior recorded testimony	11 Sep 2015-12 Feb 2016	154	reversed

Table 27 Interlocutory appeals in the case of William Samoei Ruto, Joshua Arap Sang & Henry Kiprono Kosgey

3.7.2 Assessment

Complexity: The multi-accused *Ruto et al.* case had a unique complexity because of the contemporary political roles of the defendants. Unlike the case against Gbagbo and Blé Goudé, where the defendants were former politicians, the defendants in this case had power. This case ran parallel to that of the Kenyan President, Uhuru Kenyatta. However, charges against the President were dropped before Ruto and Sang entered "no case to answer" proceedings. Both Kenya cases were linked by their highly political features and because of the non-

cooperation of the government.[745] Another complexity was the withdrawals of witnesses and pressure on those who did cooperate.[746] At the same time, due to interference with the witnesses, Article 70 RS investigations and proceedings were initiated parallel to the main case, which added complexity, by reason of the OTP's late or non-disclosure.[747]

Complexity arose also from questions of admissibility raised by Kenya and from questions of jurisdiction,[748] as well as the nature of the charges brought against the defendants, where the Prosecution had difficulties bringing enough evidence to prove the organisational structure of the political hierarchy.[749]

Litigation around novel aspects such as protocols on witness familiarisation or the redaction regime, and the conduct of the "no case to answer" motion were other factors that made the case more complicated, given the lack of a legal framework addressing these issues.[750] The notice under Reg. 55 RoC and modification of the unclear DCC also added their share of complexity.

Conduct of the defendants and participants: Although the Defence was well-equipped, it sought to postpone proceedings due to the lack of adequate time for preparation[751] of the massive amount of OTP materials disclosed and for its own investigation. Because of the OTP's delayed disclosure, the Defence was granted more time, which postponed the trial for 156 days. The decision under the Reg. 55(2) RoC also had an impact on the Defence's preparation time.[752]

Kenya raised the question of admissibility during the confirmation phase, which had an impact on the entire proceedings. Although the State formally complied with procedural obligations, the admissibility challenge affected the OTP's investigations into other matters.[753] As soon as the obstacle of the admissibility challenge was overcome (lasting for 152 days), the OTP did not have much time left for its further investigations.[754]

Conduct of authorities: The withdrawals of OTP witnesses affected OTP strategy crucially and on a long-term basis. The OTP did not have a full picture of what exactly was happening in Kenya.[755] Although the OTP had indications of witness interference in the confirmation phase, these were underestimated at first and checks on witnesses and their protection were late. The OTP then selected only a few witnesses to be included in the protection programme and did

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[745] One of the experts expressed the opinion "[…] there was also equally other dynamics at place in Kenya, which [we] were not necessarily at the time fully aware of". The expert further stated that the centres of power in Kenya lacked a sustainable interest in progress of the cases, Interview E2, similar Interview E1.
[746] Interview E2.
[747] The expert stated that "the Prosecution had routine requests to disclose, lift redactions, explain why this and explain why that but it wasn't necessarily extraordinary. I wouldn't say that it's something that had a major impact on the Prosecution. The only issue on disclosure that really became complicated was when, during the trial proceedings, the office decided to initiate an Article 70 investigation at the same time. So, Ruto and Sang was in trial and in parallel you had another team that was investigating Article 70 offences affecting the Ruto and Sang witnesses, […] this other team investigating in parallel were generating and collecting evidence that was relevant in the main case. But could not be disclosed in the main case because it could affect the ability of the investigation into the Article 70 to continue pursuing different avenues and lines of investigation. [The Prosecution] didn't want to disclose certain information to the Defence" Interview E2.
[748] Interview E2, See E1.
[749] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-2027-Red-Cor, www.icc-cpi.int/kenya/rutosang, (accessed 25 Mar 2022).
[750] Interview E4.
[751] The expert expressed the opinion that the Defence was well-equipped Interview E4.
[752] Interview E2.
[753] The expert mentioned that "when Kenya filed the admissibility challenge that investigation which was going super-fast at the time […] the Prosecution had to stop it. […]. I think this challenge equally affected the investigation and, once the admissibility was resolved, the Prosecution Office was left with very limited time to, let's say, not adjust but further corroborate or define the contours of the case that they wanted to bring to confirmation", Interview E2.
[754] Interview E2, according to the expert this policy however was changed by the new OTP administration.
[755] Interviews E2, E3, E4.

not look at the strategy in a more holistic manner. Witnesses left many family members behind and those family members were exposed and put under pressure.[756] The withdrawals, non-cooperation by the government, investigations into contempt of court proceedings, and delayed disclosures of the protected witnesses later extended the trial proceedings and led to the "no case to answer" proceeding.

There were misunderstandings between the OTP and the Chamber around the DCC, which led to modifications and unsuccessful attempts to amend the DCC at a later stage, because the OTP was not sufficiently clear on the charges at the outset.[757]

Overall: The *Ruto & Sang* case should be considered in parallel with the *Kenyatta* case, in which Kenya's non-cooperation and the withdrawal of witnesses decisively influenced the work of the OTP and the Court. Notwithstanding all of the OTP's efforts to keep the case going, it was found that the case was at risk right from the start. However, it is also important to note that none of the defendants was detained, which reduces the impact of the length of the proceedings on what was at stake for the defendants.

3.7.3 Factors Impacting the Length of Proceedings in the Ruto/Sang Case

Serious impact: Kenya's non-cooperation, the contempt of court investigations, late disclosures, witness withdrawals, all interrelated, seriously affected the length of the proceedings.

Contributory impact: The DCC, Reg 55(2) RoC and litigation on the novel aspects contributed to length. Every Chamber has different expectations of the DCC, so there were often misunderstandings, requiring modification of the DCC.[758] The OTP put forward its Reg. 55(2) RoC notice on 3 July 2012, but it was not until 12 December 2013, more than a year later, that the TC directed that changes be made under Reg. 55(2) RoC.[759]

3.8 The Prosecutor v. Laurent Gbagbo & Charles Blé Goudé

Violence broke out in Côte d'Ivoire after the 2010 presidential election. Laurent Gbagbo and Alassane Ouattara both claimed victory for themselves. Ouattara was recognised as the legitimate president by the UN Security Council, the European Union and the African Union, but Gbagbo refused to step down. As a result, clashes broke out between the two camps. More than 3,000 people lost their lives, and up to a million fled.

The ICC Prosecutor charged Former President Laurent Gbagbo in 2011 with four counts of crimes against humanity, including murder, attempted murder, rape and other inhumane acts. Charles Blé Goudé, former Minister for Sports and Youth, has also been charged with crimes against humanity, including murder, rape and other forms of sexual violence, persecution and other inhumane acts.

Although the cases of Gbagbo and Blé Goudé started separately due to the late arrest of Mr Blé Goudé, the cases were joined in their respective trial preparation phase. The alleged crimes having been committed during the unrest after the elections, in particular during a march by Ouattara supporters in December 2010, a women's demonstration in March 2011 and during the shelling of an area in Abobo and Yopougon in March and April 2011.

[756] Interview E2.
[757] Interview E2.
[758] Interview E2.
[759] Interview E4.

In 2019, Gbagbo and Blé Goudé were acquitted of all charges. The acquittals were confirmed upon appeal in 2021.

The proceedings in the case of Laurent Gbagbo & Charles Blé Goudé			
No.	**Phase/Stage**	**Dates**	**Days**
1a	**Arrest warrant phase – Gbagbo**	**25 Oct 2011-30 Nov 2011**	**37**
1a.1	Issuance stage	25 Oct 2011-23 Nov 2011	30
1a.2	Transfer stage	24 Nov 2011-30 Nov 2011	7
1b	**Arrest warrant phase – Blé Goudé**	**12 Dec 2011-22 Mar 2014**	**832**
1b.1	Issuance stage	12 Dec 2011-21 Dec 2011	10
1b.2	Arrest stage	22 Dec 2011-17 Jan 2013	394
1b.3	Transfer stage	18 Jan 2013-22 Mar 2014	430
2a	**Confirmation phase – Gbagbo**	**30 Nov 2011-11 Sep 2014**	**1,017**
2a.1	First appearance stage	30 Nov 2011-5 Dec 2011	6
2a.2	Post-appearance stage	6 Dec 2011-18 Feb 2013	441
2a.3	Confirmation hearing stage	19 Feb 2013-28 Feb 2013	10
2a.4	Post-confirmation hearing stage	1 Mar 2013-12 Jun 2014	469
2a.5	Post-confirmation stage	13 Jun 2014-11 Sep 2014	91
2b	**Confirmation phase – Blé Goudé**	**23 Mar 2014-19 Dec 2014**	**272**
2b.1	First appearance stage	23 Mar 2014-27 Mar 2014	5
2b.2	Post-appearance stage	28 Mar 2014-28 Sep 2014	185
2b.3	Confirmation hearing stage	29 Sep 2014-2 Oct 2014	4
2b.4	Post-confirmation hearing stage	3 Oct 2014-11 Dec 2014	70
2b.5	Post-confirmation stage	12 Dec 2014-18 Dec 2014	7

The proceedings in the case of Laurent Gbagbo & Charles Blé Goudé			
No.	**Phase/Stage**	**Dates**	**Days**
3a	**Trial preparation phase – Gbagbo**	**12 Sep 2014-10 Mar 2015**	**180**
3b	**Trial preparation phase – Blé Goudé**	**19 Dec 2014-10 Mar 2015**	**82**
3c	**Joint trial preparation phase**	**11 Mar 2015-27 Jan 2016**	**323**
4	**Trial phase**	**28 Jan 2016-16 Jul 2019**	**1,266**
4.1	**Hearing stage**	**28 Jan 2016-3 Oct 2018**	**980**
4.1.1	Opening statements	28 Jan 2016-2 Feb 2016	6
4.1.2	Presentation by the OTP	3 Feb 2016-4 Jun 2018	853
4.1.3	No case to answer	5 Jun 2018-16 Jul 2019	407
4.1.3.1	Pre-hearing	5 Jun 2018-30 Sep 2018	118
4.1.3.2	Hearing	1 Oct 2018-3 Oct 2018	3
4.2.1	Deliberation of the oral decision	4 Oct 2018-15 Jan 2019	104
4.2.2	Deliberation of the reasons	16 Jan 2019-16 Jul 2019	182
5	**Appeal phase**	**17 Jul 2019-31 Mar 2021**	**624**
5.1	Pre-hearing stage	17 Jul 2019-21 Jun 2020	341
5.2	Hearing stage	22 Jun 2020-24 Jun 2020	3
5.3	Post-hearing stage	25 Jun 2020-31 Mar 2021	280
	Final Judgment	31 Mar 2021	

Table 28 The proceedings in the case of Laurent Gbagbo and Charles Blé Goudé

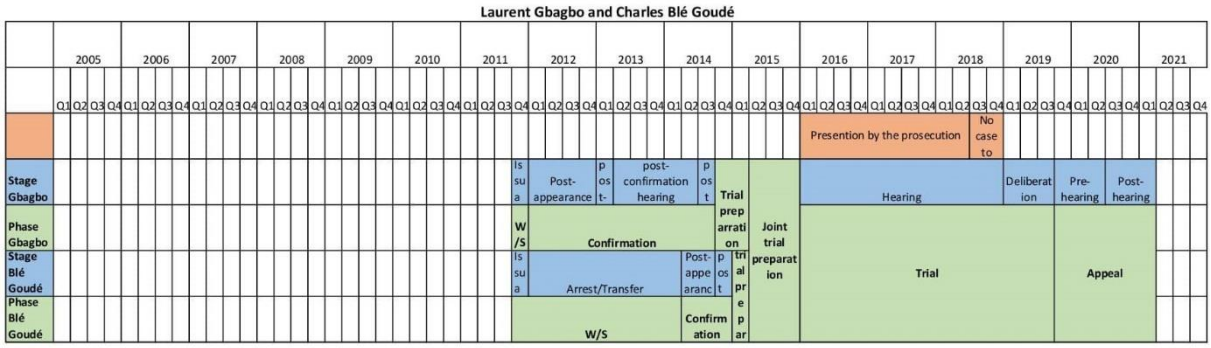

Image 11 The proceedings in the case of Laurent Gbagbo and Charles Blé Goudé

3.8.1 Summary of the Proceedings

Summary of the W/S phase: The arrest warrant phase in the *Gbagbo* case lasted 37 days in total. The major part of this period passed between the OTP's application for an arrest warrant on 25 October 2011 and the issuance of the warrant on 23 November 2011. After the warrant was issued, it took only seven days to transfer Gbagbo to the ICC.

In the *Blé Goudé* case, the arrest warrant phase lasted 832 days overall. While the warrant was issued on 21 December 2011, merely ten days after the OTP had filed its request, it took 393 days until Blé Goudé was arrested in Ghana and then another 429 days until he was transferred to the ICC. In relation to the arrest in Ghana, it seems unclear whether the ICC, in particular the Registry, was aware of this until Mr Blé Goudé's Defence Counsel asked the Court for help to get access to his client.[760] Côte d'Ivoire was not responsive to cooperation and contact requests until it eventually asked the ICC to postpone the surrender to allow for national judicial proceedings against Mr Blé Goudé. The PTC rejected this request on 3 March 2014 and the suspect was transferred on 22 March 2014.[761] Meanwhile the confirmation of charges phase against Gbagbo was already making progress.

Summary of the confirmation phase: The confirmation phase for Gbagbo lasted 1,016 days (approximately 2.7 years) from the date after his transfer up until the final decision on the confirmation of charges. Gbagbo's confirmation phase was different from others as, after the confirmation hearing, the PTC again called on the parties to make submissions and present their cases and it was only after a second confirmation hearing the case could go to trial. The post-appearance stage lasted 441 days. This stage is the second longest post-appearance stage after that in the *Al Hassan* case, which took 464 days.

On 5 December 2011, the PTC scheduled the confirmation of charges hearing for 18 June 2012 (196 days after the first appearance).[762] The Defence successfully requested a postponement for another 56 days (13 August 2012) due to Gbagbo's health, which made him unfit to stand trial and due to the Defence's limited resources for preparation.[763] It was postponed again until the issue of Gbagbo's fitness to take part in the proceedings against him was settled.[764] This issue was not resolved until 2 November 2012[765] (150 days after the Defence application regarding the fitness of Gbagbo to stand trial on 5 June 2012).[766] On 14 December 2012, after the Defence's unsuccessful request for leave to appeal the

[760] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* ICC-02/11-02/11-42, www.icc-cpi.int/cdi/gbagbo-goude (accessed 25 Mar 2022). This matter could not be evaluated during the research conducted for this study.
[761] Ibid., See ICC-02/11-02/11-46.
[762] Ibid., ICC-02/11-Ol/11-T-l-ENG, p. 8
[763] Ibid., ICC-02/11-01/11-152-Red.
[764] Ibid., ICC-02/11-01/11-201.
[765] Ibid., ICC-02/11-01/11-286-Red.
[766] Ibid., ICC-02/11-01/11-142.

decision finding Gbagbo fit to stand trial, the Chamber ordered the OTP to file the DCC on 17 January 2013 and to commence the confirmation hearing on 18 February 2013.[767] After filing the DCC, the Defence unsuccessfully requested that the confirmation hearing be postponed because the documents disclosed in January comprised thousands of pages.[768]

The post-appearance stage further included procedural activities around the disclosure system[769] and redactions,[770] legal assistance to the Defence,[771] a collective approach to victims' participation,[772] jurisdiction[773] with interlocutory appeal proceedings,[774] release issues[775] with subsequent interlocutory appeal proceedings[776] and an unsuccessful admissibility challenge.[777]

After the confirmation hearing, conducted from 19 to 28 February 2013, and the related written submissions, the PTC held on 3 June 2013 that the OTP's evidence, viewed as a whole, was insufficient, so the PTC declined the charges, adjourned the hearings and requested that further evidence be provided, adopting a new calendar for the disclosure of evidence.[778] On 26 September 2013, the PTC decided to hold a second confirmation hearing on 9 October 2013. However, due to the ongoing interlocutory appeal proceedings on the adjournment hearings resulting from the insufficient OTP evidence (judgment on 12 December 2013), the PTC decided to hold a hearing after the decision of the AC.[779] After setting a new calendar for further proceedings, a further 86 days, later extended to 118 days,[780] were considered for the amendment of the DCC and the final statements of the parties and participants on the charges. After the final submission of the Defence, the PTC required another 59 days to confirm the charges against Gbagbo.

On 13 June 2014, the Defence successfully requested an extension of time limits for an application for leave to appeal based on the French translation of the decision and the appended dissenting opinion.[781] It filed its request for leave to appeal the decision on the confirmation of charges on 29 July 2014. The PTC rejected it after 44 days. On 11 September 2014, the PTC ordered the Registry to transmit the case to the Presidency.[782] The post-confirmation stage lasted 91 days.

In comparison to the confirmation phase of the *Gbagbo* case, the confirmation phase of the *Blé Goudé* case took a much shorter time, namely 272 days. Of this period 185 days were spent in the post-appearance stage and included procedural activities around the DCC, the

[767] Ibid., ICC-02/11-01/11-325.
[768] Ibid., ICC-02/11-01/11-403.
[769] Ibid., ICC-02/11-01/11-30.
[770] Ibid., ICC-02/11-01/11-339.
[771] Ibid., ICC-02/11-0l/11-32.
[772] Ibid., ICC-02/11-01/11-86.
[773] Ibid., ICC-02/11-01/11-212.
[774] Ibid., ICC-02/11-01/11-321.
[775] Ibid., ICC-02/11-01/11-193.
[776] Ibid., ICC-02/11-01/11-278-Red.
[777] Ibid., ICC-02/11-01/11-436-Red.
[778] Ibid., ICC-02/11-01/11-432.
[779] Ibid., ICC-02/11-01/11-515.
[780] The Defence successfully requested to suspend all original deadlines for the Defence because of the numerous procedural activities running parallel. Ibid., ICC-02/11-01/11-614, such as release issues. See also ibid., ICC-02/11-01/11-633, ICC-02/11-01/11-597, ICC-02/11-01/11-598, ICC-02/11-01/11-599, ICC-02/11-01/11-602, ICC-02/11-01/11-603, ICC-02/11-01/11-607, ICC-02/11-01/11-608.
[781] Ibid., ICC-02/11-01/11-658.
[782] Ibid., ICC-02/11-01/11-680.

disclosure system,[783] contact restrictions of the defendant,[784] State cooperation,[785] victims' participation[786] and an unsuccessful admissibility challenge by the Defence.[787]

The confirmation hearing, initially scheduled for 18 July 2014, was first postponed to 22 September 2014 due to the deadline for completing disclosure and for submitting the DCC and the evidence list.[788] At the Defence's request, the confirmation hearing was again postponed for a week.[789]

After four days of confirmation hearings, another 70 days were required for the PTC to confirm the charges against Mr Blé Goudé. Although the Defence notified its intent to seek leave to appeal, it did not do so in the end, and the Registrar forwarded both the confirmation decision and the records of the proceedings to the Presidency on 18 December 2014.[790]

Summary of the trial preparation phase: The trial preparation for Gbagbo lasted 180 days until it was joined to the case against Blé Goudé on 10 March 2015. While the case against Gbagbo was already in the trial preparation phase, the confirmation phase of the *Blé Goudé* case was still ongoing. The trial preparations of both cases included relatively minor procedural activities on a detention review of Gbagbo,[791] release for three days due to Gbagbo's mother's funeral,[792] a redaction regime,[793] LRV access to confidential materials[794] and the admission system for the victims.[795]

On 16 December 2014, the OTP requested that the two cases be joined, which, although opposed by the Defence, was granted after 85 days on 11 March 2015.[796]

After the joinder, another 323 days were required to start the trial. The trial preparation, which also included the time for the joinder, lasted for 503 days. This is the second longest trial preparation after the *Lubanga* case.

On 7 May 2015, the TC set the date for the trial on 10 November 2015 (244 days after the joinder) and adopted a schedule leading up to it. The schedule set deadlines for OTP disclosure, witness and evidence lists, auxiliary documents, agreed facts and motions prior to commencement.[797] Upon a successful Defence request, the commencement of the trial was postponed for another 79 days for Gbagbo's medical examination. The trial was rescheduled for 28 January 2016.[798]

The trial preparation phase included numerous lengthy procedural activities on Gbagbo's fitness and unsuccessful requests for leave to appeal the resulting decision,[799] a notice under Reg. 55(2) RoC[800] with interlocutory appeal proceedings,[801] interim release[802] with interlocutory

[783] Ibid., ICC-02/11-02/11-57.
[784] Ibid., ICC-02/11-02/11-133.
[785] Ibid., ICC-02/11-02/11-56.
[786] Ibid., ICC-02/11-02/11-83, ICC-02/11-02/11-111.
[787] Ibid., ICC-02/11-02/11-185.
[788] Ibid., ICC-02/11-02/11-108-Red.
[789] Ibid., ICC-02/11-02/11-139.
[790] Ibid., ICC-02/11-02/11-191.
[791] Ibid., ICC-02/11-01/11-718-Red.
[792] Ibid., ICC-02/11-01/11-711-Red.
[793] Ibid., ICC-02/11-01/11-737.
[794] Ibid., ICC-02/11-01/11-754.
[795] Ibid., ICC-02/11-01/11-800.
[796] Ibid., ICC-02/11-02/11-222.
[797] Ibid., ICC-02/11-01/15-58.
[798] Ibid., ICC-02/11-01/15-322.
[799] Ibid., ICC-02/11-01/15-349, the issue on the fitness of Mr Gbagbo was raised again on 21 Apr 2015 and finally resolved with the decision of the TC on 27 Nov 2015 (220 days later).
[800] Ibid., ICC-02/11-01/15-185, where the TC ordered the OTP to include Article 28(a) and (b) RS for all counts.
[801] Ibid., ICC-02/11-01/15-369.
[802] Ibid., ICC-02/11-01/15-127-Red.

appeal proceedings,[803] victims' application[804] and participation,[805] familiarisation protocol[806] and protective measures.[807]

Summary of the trial phase: The trial phase of the *Gbagbo & Blé Goudé* case lasted for 1,266 days, starting with the opening on 28 January 2016, encompassing the oral acquittal of 15 January 2019, and ending with the filing of written reasons for the judgment on 16 July 2019. This is the second longest ICC trial to date after that of Bemba (1,453 days). Notably, in contrast to the *Bemba* case, this length did not include a presentation of evidence by the victims or the Defence as it ended with a successful "no case to answer" motion.

The OTP presentation lasted 853 days. It began after opening statements, on 3 February 2016.[808] The last Prosecution witness concluded on 19 January 2018.[809] On 4 June 2018, the TC declared the OTP presentation closed.[810] Gbagbo's Defence had already announced halfway through the Prosecution's presentation of evidence that they would file a "no case to answer" motion and that it would take at least another four months to analyse the Prosecution's case.[811] After filing the mid-trial brief, the Defence requested a revised and corrected French translation of the brief in order to file the "no case to answer" motion and achieve a full acquittal on all charges.[812]

Parallel to the Prosecution presentation, numerous procedural activities revolved around disclosure issues,[813] documentary evidence[814] with interlocutory appeal proceedings,[815] evidence issues,[816] prior recorded statements[817] with interlocutory[818] appeal proceedings, witness issues,[819] interim release issues[820] with two interlocutory appeals[821] and lifting redactions to victims' applications[822] with interlocutory appeal proceedings.[823]

The "no case to answer" stage began on 4 June 2018 when TC, after having declared the OTP presentation closed, ordered both Defence teams to file submissions on how, in their view, the OTP evidence was insufficient.[824] This stage encompasses the oral decision to acquit both accused and concluded with the filing of the written reasons for the judgment on 16 July 2019 (408 days overall).[825] In detail, it took the parties 117 days to make their submissions and three

[803] Ibid., ICC-02/11-01/15-208.
[804] Ibid., ICC-02/11-01/15-379.
[805] Ibid., ICC-02/11-01/15-205.
[806] Ibid., ICC-02/11-01/15-355.
[807] Ibid., ICC-02/11-01/15-202.
[808] Ibid., ICC-02/11-01/15-T-13-Red3-ENG.
[809] Ibid., ICC-02/11-01/15-1113-Red.
[810] Ibid., ICC-02/11-01/15-1174.
[811] Ibid., ICC-02/11-01/15-1041-Red.
[812] Ibid., ICC-02/11-01/15-1177, ICC-02/11-01/15-1157-Red, ICC-02/11-01/15-1158-Corr-Red.
[813] Ibid., ICC-02/11-01/15-467, ICC-02/11-01/15-583-Red.
[814] Ibid., ICC-02/11-01/15-773.
[815] Ibid., ICC-02/11-01/15-995.
[816] Ibid., ICC-02/11-01/15-T-57-Red2-ENG, p. 38, ICC-02/11-01/15-T-145-Red-ENG, p. 3, ICC-02/11-01/15-921, ICC-02/11-01/15-T-154-Red-ENG, p. 1-2, ICC-02/11-01/15-1123 etc.
[817] Ibid., ICC-02/11-01/15-573-Red.
[818] Ibid., ICC-02/11-01/15-744.
[819] Ibid., ICC-02/11-01/15-417, ICC-02/11-01/15-T-20-Red2-FRAU, p. 58, ICC-02/11-01/15-T-27-ENG, p. 26, CC-02/11-01/15-T-45-Red-ENG, See ICC-02/11-01/15-T-50-Red3-ENG, p. 2, etc.
[820] Ibid., ICC-02/11-01/15-846, ICC-02/11-01/15-1038-Red.
[821] Ibid., ICC-02/11-01/15-992-Red, ICC-02/11-01/15-1047.
[822] Ibid., ICC-02/11-01/15-T-107-Conf-FRA, p. 1.
[823] Ibid., ICC-02/11-01/15-744.
[824] Ibid., ICC-02/11-01/15-1174.
[825] Ibid., ICC-02/11-01/15-1263.

days to present them orally. It then took another 103 days to give an oral decision on the defendants' acquittal and another 182 days for the written reasons.[826]

During the 230 hearing days, a total of 104 witnesses were heard.[827] 726 victims were authorised to participate.

Summary of the appeal phase: The appeal phase of the *Gbagbo & Blé Goudé* case began with a Prosecution request for an extension of time to file its notice of appeal and the appeal brief dated 16 July 2019. It includes only this appeal by the Prosecution, the notice of which was filed on 16 September 2019. This phase concluded on 31 March 2021 with the AC's final decision confirming the acquittal.

The pre-hearing stage lasted from 17 July 2019 until 21 June 2020 (341 days). On 17 April 2020, the OTP requested, in light of the Covid-19 pandemic, that the appeal hearing be postponed or cancelled, and applied for an alternative procedure, as outlined in its submission, as a means of ensuring that the appeals proceedings progress in a fair and expeditious manner. The Appeals Chamber vacated the initial hearing scheduled for 27 May 2020 due to technical and operational measures and intended to schedule a partially virtual appeal hearing for 22 to 24 June 2020.[828]

Because of the time necessary for French translations of the opinions of the judges[829] and other documents the Defence was granted more time for the submission.[830]

On 7 October 2019, the Defence requested the AC to reconsider the decision of 1 February 2019 and to order Gbagbo's immediate and unconditional release.[831] On 28 May 2020, without considering the Defence request to the Presidency on the denial of justice of eight months,[832] the AC rendered its decision on the original request. The Chamber dismissed the request for reconsideration of its 1 February 2019 decision but reviewed the decisions of conditional release for Gbagbo and Blé Goudé, revoking four conditions and maintaining four others.[833]

On 31 March 2021 (after 280 days), the Appeals Chamber rendered its final judgment in this case by confirming the TC decision.

Overall: Depending on the content of the procedural activities, the time between a filing and a response to it ranged from nine to 11 days. The Defence teams often challenged the Chamber's decisions and unsuccessfully requested leave to appeal the decisions.[834] The OTP often successfully requested an extension of time for various procedural activities, especially for disclosure of evidence.[835] Decisions were delivered within 23 to 26 days after the last related response or reply. Many of the procedural activities were initiated by the Bench, the Chamber inviting or directing the parties to make observations on particular issues, especially on the release of the defendants. During the proceedings, at least 406 decisions were rendered, the Defence made at least 394 filings, the OTP at least 454 filings and victims at

[826] On 1 February 2019, the AC rendered its judgment. The Chamber amended the oral TC decision of 16 Jan 2019 in that certain conditions were imposed on Gbagbo and Blé Goudé upon their release into a willing and able State and gave instructions on the implementation to the Registrar. The AC noted its right to review and vary the conditions of release. See Ibid., ICC-02/11-01/15-1251-Red2.
[827] Average time used per witness was 9 hours, see Report of the Court on Key Performance Indicators (2019), p. 17.
[828] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* ICC-02/11-01/15-1359, www.icc-cpi.int/cdi/gbagbo-goude (accessed 25 Mar 2022).
[829] Ibid., ICC-02/11-01/15-1289.
[830] On other translation issues, see ibid., ICC-02/11-01/15-1365-Conf.
[831] Ibid. ICC-02/11-01/15-1272-Red.
[832] Ibid., ICC-02/11-01/15-1376-Red.
[833] Ibid., ICC-02/11-01/15-1355-Red.
[834] Ibid., ICC-02/11-01/11-383, ICC-02/11-01/11-318, ICC-02/11-01/11-514, ICC-02/11-01/11-530, ICC-02/11-01/11-809 etc.
[835] Ibid., ICC-02/11-01/15-115-Red, ICC-02/11-01/15-118, ICC-02/11-01/15-203, ICC-02/11-01/15-312-Red, etc.

least 146 filings. The OTP submitted 11,088 items of evidence numbering 72,018 pages,[836] and the Defence 95 items numbering 941 pages overall.

Days between parties' filings and responses, and between the last response and the Court's decision in the case of Laurent Gbagbo & Charles Blé Goudé			
	Defence response	OTP response	Decision from last response
OTP filing	11	—	23
Defence filing	—	9	26

Table 29 Days between parties' filings and responses, and between the last response and the Court's decision in the case of Laurent Gbagbo & Charles Blé Goudé

The interlocutory appeals in the *Gbagbo & Blé Goudé* case lasted for 88 days on average.

Interlocutory Appeals in the case of Laurent Gbagbo & Charles Blé Goudé						
N	Phase	Party	Issue on appeal	Dates	Overall days	Outcome
1	Pre-trial	Defence	Jurisdiction	21 Aug 2012-12 Dec 2012	113	dismissed
2	Pre-trial	Defence	Interim release I	23 Jul 2012-26 Oct 2012	95	dismissed
3	Pre-trial	Defence	Interim release II	19 Jul 2013-29 Oct 2013	102	dismissed
4	Pre-trial	OTP	Adjournment of hearings	12 Aug 2013-16 Dec 2013	126	dismissed
5	Trial	Defence	Interim release I	14 Jul 2015-8 Sep 2015	57	dismissed
6	Trial	Defence	Regulation 55(2) RoC	21 Sep 2015-18 Dec 2015	89	dismissed
7	Trial	Defence	Prior recorded statements	21 Jul 2016-1 Nov 2016	104	dismissed
8	Trial	Defence	Lifting of redactions	13 Feb 2017-08/12 May 2017	89	reversed, remitted
9	Trial	Defence	Interim release II	20 Mar 2017-19 Jul 2017	122	reversed, remitted

[836] Ntaganda case: 12,886 items with 102,415 pages; Ongwen case: 18,613 items with 126,141 pages.

10	Trial	Defence	Documentary evidence	15 May 2017-24 Jul 2017	71	dismissed
11	Trial	Defence	Interim release III	2 Oct 2017-5 Oct 2017	4	dismissed *in limine*

Table 30 Interlocutory appeals in the case of Laurent Gbagbo & Charles Blé Goudé'

3.8.2 Assessment

Complexity: The multi-defendant case of *Gbagbo* and *Blé Goudé* was a high-status official case. Although no longer incumbent during the ICC proceedings, the formal role of the defendants created factual complexity. The nature of the four counts of crimes against humanity and the mode of liability further added to the legal complexity of the case. Particular difficulties arose from the non-cooperation of the insider witnesses,[837] which made the evidence base difficult and led to the alternative submission of circumstantial evidence.[838] Côte d'Ivoire showed itself to be cooperative, which together with an absence of technical or organisational aspects, meant comparatively short delays, which reduced complexity.[839]

Procedural complexity arose due to the different and non-streamlined rules, especially in the admission and submission of evidence and on the framework of the "no case to answer" motion.[840] Another dimension of procedural complexity arose out of the need to cater for the local languages spoken in Côte d'Ivoire and the amount of translation necessary from French to English.

Conduct of the defendant and participants: The Gbagbo Defence raised the issue of Gbagbo's fitness to stand trial twice. Although the related procedural activities contributed to the length by adding 220 days, these activities should not be viewed as unreasonable.

The Defence challenges, such as requests for leave to appeal the Chamber's decisions as well as numerous appeals against the decisions denying release of the defendant added more workload for the Registry, the OTP and Chambers.[841] However, they did not unreasonably delay the proceedings. The participation of 726 authorised victims did not contribute to an unreasonable length. Compared to the other cases, the new collective approach to the victims' applications had a positive effect.[842]

Conduct of authorities: From the start of the *Gbagbo* case, the OTP had difficulties with the DCC and, as the expert mentioned, the impression arose that the OTP did not know exactly what its strategy was and what it wanted.[843] The ambiguous DCC led not only to misunderstandings between the parties, but also to frustration among the victims, who were thus unable to participate in the proceedings.[844] The problems around the DCC and insufficient evidence led to the postponement of the confirmation of charges, extending that phase for a further 469 days, which in this case appears to be the first major factor in the length of the proceedings and later also led to the successful "no case to answer" motion before the TC.[845]

[837] Interview F1.
[838] Interview F2.
[839] One of the experts mentioned that "the Government of Côte d'Ivoire was very cooperative, they presented what they wanted to present: military, public service in general, facilitated individuals to travel, without any hindrance to the Court. The Court benefited with the cooperation", Interview F4.
[840] Interviews F2, F5.
[841] Interview F1.
[842] Interview F1.
[843] Interview F3.
[844] Interview F1. Those victimized after midnight on 18 Dec were unable to participate in the proceedings.
[845] Interview F4.

As the expert stated, not only is it the responsibility of the OTP to bring sufficient evidence before the Chamber for its case, but it is the responsibility of the Chamber not to permit matters to proceed when the DCC is unclear.[846] In the second case, that of Mr Blé Goudé, who was transferred to the Court during the confirmation phase of the *Gbagbo* case, the general impression arises that the OTP did not appear to have been sufficiently well prepared for the DCC, which led to another postponement for 66 days. The OTP was already in the final stage of the confirmation phase in the *Gbagbo* case. It had to be able to quickly prepare the DCC against Mr Blé Goudé, since the cases were similar and the OTP intended to join them later.[847]

The joinder of the cases resulted not only in Gbagbo having to wait three months for the charges to be confirmed in the case of Mr Blé Goudé, but the joinder proceedings themselves took an additional 80 days to complete. It is nevertheless hard to say that the cases, if treated separately, would have been shorter than they were when joined. The need for a joinder of the cases was unavoidable, as the defendants were considered to be subjects of a common plan, as stated by the experts.[848]

As already mentioned, the health situation of one of the defendants, brought up twice by his Defence, cannot be seen as unreasonably affecting length. But the way in which the Chambers managed this seems inefficient, bearing in mind the expeditious management of the fitness issue in the *Ongwen* case.[849] The Chambers have a responsibility to act and solve such issues instead of stretching them out. This also refers to the other objections on which an immediate ruling was required.[850]

After 853 days of presentation of the OTP's 72,000 pages of evidence, especially the circumstantial materials without crime-based evidence, the impression was that the Chamber did not understand what the case was about. The request for a mid-trial brief from the OTP[851] was a further factor indicating that the case had reached a dead end. The question arises as to whether the Chamber had the opportunity to manage the OTP's presentation of evidence at an earlier point in time so as not to let the proceedings run for 853 days without success.

Following the oral acquittal, the reasons with different separate opinions of the judges were delivered after 182 days, which led again to delays because of the time needed for translation.[852]

Overall: The case against Gbagbo and Blé Goudé lasted over nine years without a regular presentation of evidence by the Defence but a "no case to answer" motion instead. This appears to be one of the longest cases, and the second case after *Ruto* and *Sang* with a "no case to answer" motion, which is missing within the ICC's legal framework. Hypothetically, even by discounting the delays due to Gbagbo's medical examination or the delays caused by the DCC or rejoinder, the case remains a lengthy one.

3.8.3 Factors Impacting the Length of Proceedings in the Gbagbo/Blé Goudé Case

Serious impact: The issue of fitness to stand trial affected not only the confirmation hearing[853] but also the trial on account of Gbagbo's medical examination.[854] The factor of Gbagbo's health

[846] One of the experts mentioned that this was also linked to the fact that the judges were politically unwilling to stop the cases because the OTP could not provide enough evidence, Interview F3.
[847] Interview F1.
[848] Interviews F2, F4.
[849] Interviews F2, F1.
[850] Interview F1.
[851] Interviews F2, F3, F5.
[852] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* ICC-02/11-01/15-1289, www.icc-cpi.int/cdi/gbagbo-goude (accessed 25 Mar 2022); Interviews F1, F3.
[853] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,,* ICC-02/11-01/11-142, www.icc-cpi.int/cdi/gbagbo-goude (accessed 25 Mar 2022).
[854] Ibid., ICC-02/11-01/15-322.

was an unavoidable one which seriously impacted the length of proceedings. It would, however, have been possible to have managed this in a more efficient manner.[855]

The DCC is another factor that seriously affected length and ultimately led to a successful "no case to answer" motion. Insufficient evidence relating to the DCC and the evidence being mostly circumstantial had a serious impact on the whole case. The nature of the charges, crimes against humanity, required evidence on contextual elements. This can often lead to a massive evidential basis and the presentation of single details of the big picture not only contributed to length, but in the absence of sufficient crime-based evidence, seriously impacted length.[856] This caused a repetition of the confirmation hearing in the *Gbagbo* case and therefore a delay of 469 days.

Language in the *Gbagbo & Blé Goudé* case was another factor that seriously affected length not only in the trial hearing but also in the appeal proceedings. The translation of briefs into the defendants' language put back Defence deadlines. Although the parties and participants pleaded in French, the Chamber required a translation into English.[857] The joinder of the initially separate *Gbagbo* and *Blé Goudé* cases, which was necessary, had a serious impact on the calendar.

Contributory impact: Frequent review of the detention with interlocutory appeal proceedings contributed to length but was unavoidable. Numerous objections and requests for leave to appeal, as well as OTP requests for extension of time for disclosure had a contributory impact.

3.9 Other cases

3.9.1 The Prosecutor v. Bahr Idriss Abu Garda

Abu Garda was charged with three counts of war crimes: violence to life; intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission; and pillaging.

On 7 May 2009 (169 days after the OTP's request), the PTC issued a summons to appear for Abu Garda. On 18 May 2009, during the first appearance, the confirmation hearing was set for 12 October 2009, 147 days later. The confirmation hearing was later postponed by a week as the OTP needed additional time to translate the list of evidence into Arabic.[858] The post-confirmation hearing stage lasted for 101 days and the Chamber declined to confirm the charges against Abu Garda. The application for leave to appeal the decision was rejected on 23 April 2010 after 74 days.

The confirmation phase in the *Abu Garda* case lasted for 341 days.

3.9.2 The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus

Abdallah Banda and Saleh Jerbo were each charged with three counts of war crimes, namely violence to life, intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission and pillaging.

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[855] Interviews F1, F2.
[856] Interviews F2, F3.
[857] Interview F1.
[858] *The Prosecutor v. Bahr Idriss Abu Gardam,* ICC-02/05-02/09-99, www.icc-cpi.int/-Pages/record.aspx?docNo=ICC-02/05-02/09-99 (accessed 25 Mar 2022).

On 27 August 2009 (312 days after the OTP's request) the PTC issued a summons to appear for Banda and Jerbo. At that point, the post-appearance proceedings in the *Abu Garda* case were already running. It was not until 291 days later, on 17 June 2010, that the suspects voluntarily appeared before the Court. The confirmation hearing was set for 22 November 2010 (after 158 days) but was postponed until 8 December 2010 due to the unavailability of courtroom facilities.[859] During the confirmation hearing the suspects waived their right to be present. After the confirmation hearing, on 8 December 2010, another 89 days were spent on confirming the charges. The proceedings against Jerbo were terminated due to his death. Banda is still at large because of his non-appearance, and the case remains in the trial preparation phase.

The *Banda* confirmation phase lasted 264 days, which appears to be the shortest such phase.

3.9.3 The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

On 8 March 2011 (83 days after OTP's request) the PTC issued a summons to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. The Chamber decided that there were reasonable grounds to believe that the suspects were criminally responsible for the crimes against humanity of murder, forcible transfer of population, rape, other inhumane acts and persecution. The suspects appeared before the Court on 8 April 2011 and the confirmation hearing was set for 21 September 2011 (after 165 days). As with the *Ruto & Sang* case, this case included an unsuccessful admissibility challenge by Kenya.[860]

After the confirmation hearing, the parties and participants submitted their final observations, with the last written observation by the Defence delivered on 21 November 2011. Counting from the hearing, another 110 days from 5 October 2011 were required to confirm the charges against Kenyatta and Muthaura and not to confirm the charges against Ali. Another 121 days were spent on an unsuccessful appeal of the decision on the confirmation of charges.[861]

The trial was set for 5 February 2014 (after 621 days). In the meantime, the OTP had dropped the charges against Muthaura. Due to witness withdrawals and for the purpose of further investigations, the OTP, in the middle of trial preparation, successfully requested that the trial date be vacated.[862] Later, because of Kenya's non-cooperation, it indicated that it would not be able to proceed on 7 October 2014 and again asked to vacate the trial date. On 5 December 2014, the OTP filed a request to withdraw the charges against Kenyatta, who, since 2013, was the President of Kenya. This request was made for lack of evidence and of Kenyan cooperation. On 13 March 2015 after 1,047 days of trial preparation, the Trial Chamber terminated the proceedings against Kenyatta.

3.9.4 The Prosecutor v. Callixte Mbarushimana

Mbarushimana was charged with five counts of crimes against humanity, namely murder, torture, rape, inhumane acts and persecution, and eight counts of war crimes, namely attacks

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[859] *The Prosecutor v. Abdallah Banda Abakaer Nourain,* ICC-02/05-03/09-81, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02%2F05-03%2F09-81 (accessed 25 Mar 2022).

[860] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-274 *https://www.icc-cpi.int/pages/record.aspx?uri=1223134* (accessed 25 Mar 2022).

[861] Ibid., ICC-01/09-02/11-425.

[862] Ibid., ICC-01/09-02/11-425.

against the civilian population, murder, mutilation, torture, rape, inhumane treatment, destruction of property and pillaging.

On 28 September 2010 (40 days after the Prosecutor's request) the PTC issued a warrant for Mbarushimana, who was arrested on 11 October 2010 by French authorities. 105 days later, on 28 January 2011, he was transferred to The Hague. The confirmation hearing was set to be commenced on 4 July 2011 (after 132 days), then it was postponed for another 74 days due to the review of a large amount of electronic materials seized at the suspect's premises and the failure of the parties to comply with pre-trial obligations.[863] The PTC found mainly that the Defence had failed to exercise due diligence in asserting its rights, namely by waiting until nine days before the confirmation hearing to raise its allegation that disclosure was deficient and that the OTP had not given the Defence an opportunity to meaningfully prepare. The post-appearance stage included numerous procedural activities along with an unsuccessful admissibility challenge.[864] After the six-day confirmation hearing, the Chamber required 86 days to decline to confirm the charges. Another 166 days were required for the decision to become final.

The confirmation phase in the *Mbarushimana* case lasted 491 days. In its decision, the Chamber stressed that the Defence's request to readmit evidence, which it had successfully sought to exclude on grounds it violated the defendant's rights, caused unnecessary delays in the proceedings.[865]

3.9.5 The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

On 27 March 2018 (seven days after the OTP's request) the PTC issued an arrest warrant for Al Hassan for the alleged commission of 13 counts of crimes against humanity, namely torture, rape, sexual slavery, persecution for religious and sexist reasons and other inhumane acts, committed in Timbuktu in Mali between April 2012 and January 2013; also for the commission of war crimes, namely attacks on bodily integrity, outrages upon personal dignity, sentences handed down without a prior judgment, rendered by a regularly constituted court affording judicial guarantees generally recognised as indispensable, rape and sexual slavery, all also committed in Timbuktu in Mali between April 2012 and January 2013, as well as the war crime of attacking protected property, committed in Timbuktu in Mali between the end of June and mid-July 2012.

On 4 April 2018, during the first appearance, the confirmation hearing was set for 24 September 2018 (173 days later). The confirmation hearing, however, was postponed to 6 May 2019 due to security issues in Mali which prevented the Prosecutor from disclosing evidence in a timely manner as well as number of requests she intended to put before the Chamber in connection with 30 witnesses requiring protection; there were also translation tasks.[866] The confirmation hearing was postponed again to 8 July 2019 (for another 63 days) due to time needed for the OTP to update the DCC as requested by the Chamber.[867] The post-appearance stage of the Al Hassan case lasted for 461 days, which appears to be the longest post-appearance stage of all ICC cases. After the confirmation hearing stage from 8 to 17 July 2019, the final observation of the Defence was delivered on 31 July 2019. Another 75 days were required to deliver the decision on the confirmation of charges against Al Hassan.

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[863] *The Prosecutor v. Callixte Mbarushimana,* ICC-01/04-01/10-374 www.icc-cpi.int/pages/record.aspx?uri-=1203623 (accessed 25 Mar 2022).
[864] Ibid., ICC-01/04-01/10-290.
[865] Ibid., ICC-01/04-01/10-465-Red.
[866] *The Prosecutor v. al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,* ICC-01/12-01/18-94-Red-tENG www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01%2F12-01%2F18-94-Red-tENG (accessed 25 Mar 2022).
[867]Ibid., ICC-01/12-01/18-313-tENG.

On 18 November 2019 (after 48 days) the PTC rejected the Defence request for leave to appeal the confirmation of charges.

The confirmation phase in the Al Hassan case lasted 594 days and included numerous procedural activities, amongst which an unsuccessful challenge to admissibility.[868]

On 6 January 2020, as the OTP had already disclosed most of the evidence but still had to comply with the disclosure obligation, the TC set the trial for 14 July 2020 (after 239 days). The trial preparation phase included numerous procedural activities on the victims' applications and victims' participation, witness familiarisation, an unsuccessful stay of proceedings request by the Defence, a medical examination of the defendant under Rule 135 RPE and withdrawals of Defence Counsel.

Since 14 July 2020, the *Al Hassan* case has been in the hearing stage. The hearing stage so far included procedural activities on Reg. 55 (2) RoC with appeal proceedings,[869] fitness of the defendant,[870] victims' participation, pre-recorded testimonies and other matters. The presentation of evidence by the OTP is still ongoing.

3.9.6 The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona

On 11 November 2018 (12 days after the OTP's request) and on 7 December 2018 (38 days after the Prosecutor's request), the PTC issued arrest warrants for Alfred Yekatom and Patrice-Edouard Ngaïssona. On 23 November 2018 at Yekatom's first appearance, the confirmation hearing was set for 30 April 2019 (after 158 days). In the *Ngaïssona* case, the hearing was set for 18 June 2019 (144 days after his first appearance on 25 January 2019). In order to avoid double presentation of evidence, the cases were joined on 20 February 2019, and the confirmation hearing was set for 18 June 2019. However, because of disclosure deadlines, the OTP successfully requested that the Chamber postpone the hearing until 19 September 2019, increasing the length of the post-appearance stage to 299 days.[871] The confirmation hearing lasted 23 days.[872] On 11 December 2019, after 61 days, the Chamber partially confirmed the charges. After another 91 days, on 11 March 2020, the Chamber rejected a request for reconsideration and an application for leave to appeal.

Overall, the confirmation phase of the *Yekatom & Ngaïssona* case lasted for 475 days.

On 16 July 2020, the trial was set for 9 February 2021 (after 334 days) due to the OTP's numerous organisational activities and obligations.[873] The trial preparation phase also included procedural activities on victims' participation, an unsuccessful challenge to admissibility and appeal proceedings,[874] contact restrictions, cooperation issues and other matters. Since 9 February 2021, the case has been in the hearing stage and the proceedings are ongoing.

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[868] Ibid., ICC-01/12-01/18-459-tENG, ICC-01/12-01/18-601-Red.
[869] Ibid., ICC-01/12-01/18-1211-Red, ICC-01/12-01/18-1562-Red.
[870] Ibid., ICC-01/12-01/18-1467, ICC-01/12-01/18-1503.
[870] *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*. www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/14-01/18-199 (accessed 25 Mar 2022).
[871] Ibid., ICC-01/14-01/18-199.
[872] Ibid., ICC-01/14-01/18-T-004-Red2-ENG.
[873] Ibid., ICC-01/14-01/18-T-004-Red2-ENG.
[874] Ibid., ICC-01/14-01/18-493, ICC-01/14-01/18-678-Red.

4 Factors Affecting the Length of the Proceedings at the International Criminal Court

During the second experts' meeting organised as part of this project, experts were of the opinion that international criminal trials are inherently lengthy in nature, and a lot of delays are occasioned by inherent factors that come from the design of the Court.[875] The preceding analysis of the individual cases makes it possible to identify those factors that generally have an impact on the length of the proceedings. Some of these factors have already been mentioned in other reports,[876] and recommendations have indeed already been put forward as to how to make improvements, but the question about the length of the proceedings remains nonetheless unresolved. Although lessons have been learned from previous cases, each new case brings a number of new and unexpected issues that create lengthy procedural activities.[877] The particularities of the ICC's legal framework and the numerous difficulties inherent in international criminal proceedings make the judicial process complicated. The discussion on the length of the proceedings will, therefore, be ongoing. The proceedings may not be perfectly "short" because of the various reasons described here.

In general, the proceedings before the ICC are long but they are not unreasonably long. However, some procedural activities of the ICC proceedings are lengthy and heavy and there is much room for acceleration of those activities.

Before going into the legal framework for the individual factors, it is important to mention the human factor behind the length of proceedings. The data collected from the individual cases represents only one side of this huge machine. On the other side are the individuals, whose actions can either speed up or slow down the proceedings.

4.1 Human Factor

The human factor plays a crucial role in the length of the proceedings. To analyse the reasonableness of the length of proceedings, the conduct of the authorities and parties matters. It is not possible to identify the intentions of the individuals responsible for moving the procedural activities along, but motivation matters. Where Court staff and Defence team members are paid by the day or month, speedy trials may not be in their personal interest.

Again, any real pressure from stakeholders seems to be missing, especially at the grassroots level. One of the experts mentioned that in domestic proceedings there are time pressures because of the quantity of cases that require domestic authorities to solve a particular issue as fast as possible and if the proceedings come to a standstill, there will likely be an interested party who will complain about the slowness. In the case of the ICC, however, this attitude appears to be weak on the part of the victims' communities, relevant NGOs, the media and States.[878] Even when the will of the communities is there, there may be little power to impose additional pressure on the Court. After twenty years of activity, the ICC remains a distant institution to the affected communities and its operations remain unclear and uncertain for many States and organisations.

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[875] In addition, during interview C4, the respondent stated that some delays were caused by the fact that "the Court was at the beginning struggling with which direction to take, due to people coming from different backgrounds and having different legal education. However, the Court now has a fairly established and steady jurisprudence."

[876] See "Expediting Proceedings at the International Criminal Court", War Crimes Research Office (2011), https://www.lalive.law/wp-content/uploads/2019/11/Report-14-Expediting-Proceedings-at-the-International-Criminal-Court-June-2011-1.pdf (accessed 25 Mar 2022); and "Expert Initiative on Promoting Effectiveness at the International Criminal Court", International Criminal Court (2014).

[877] See Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, ICC-OTP (2003), p. 4.

[878] Interview K2.

Two individuals within the Court have the most power to speed up proceedings: the Presiding Judge of the Chamber[879] and the Prosecutor. These individuals set deadlines and push the institution forward in an effective manner. The players most likely to slow proceedings down are naturally the trial and Defence teams, who usually need more time to prepare, as mentioned by one of the experts.[880] Because an investigation can be ongoing during all stages of ICC proceedings and is encouraged in the interest of thoroughness, the process can be protracted indefinitely. The solution may be to set and meet strict deadlines and set limits to the investigative period, something which requires strong management skills on the part of the Prosecutor and the Presiding Judge.[881]

The ICC is faced with hard decisions every day because of the nature, particularities and the novelty of its cases. There may be a temptation to avoid hard decisions. This seems to be so when looking at the public files. The parties and participants are often extremely busy with procedural activities. However, the invention of new legal obstacles and the time invested in overcoming them is concerning.[882] The recommendation to make more of the proceedings oral is relevant here. The Judges, parties or participants may prefer to have more time to decide issues in writing, rather than orally. The Presiding Judge should look to this and other methods to reduce the time-consuming and asymmetrical dialogue that results from written proceedings.

4.1.1 Judges

A majority of the experts who participated in the second workshop forming part of this research reiterated that judges play a very important role in ensuring that the proceedings are not delayed. In many instances, poor management of cases is due to the fact that judges may not have experience in international criminal proceedings, despite having extensive experience from their own countries. Bearing in mind that judges are coming from common law as well as civil law systems, they can either take an active or a passive role in determining the truth and achieving the primary goals of the ICC.[883]

In this regard, experts who participated in the second workshop were of the opinion that it is important to highlight the differences between the roles of judges in common law jurisdictions, which usually use the adversarial system, and judges in civil law systems, characterised by the inquisitorial system.[884] The adversarial system's fundamental feature is that judges should primarily avoid interfering in the proceedings since they see themselves as arbiters or "referees," balancing the "scales of justice" on both sides, whereas civil law judges may feel

[879] Under certain circumstances also the Single Judge.
[880] Interview K2.
[881] Interview K2.
[882] One of the experts expressed his disappointment: “The legal framework is also complex. But the quality of lawyers’ work strongly affects how this framework is implemented. Something seems to be completely wrong at the ICC and continue as a self-fulfilling prophecy - there is a certain heaviness to everything. Most of the complexity at the ICC comes through extensive filings. Everything litigated in writing, and not short writings, but incredibly lengthy filings full of unnecessary content. Then reflected in lengthy decisions full of unnecessary content. Why can’t we debate more orally? Despite legal uncertainties here and there, even lawyers at the ICC do not need to reinvent the wheel every time. Parties seem to invent new questions that need to be resolved by the judges. If there is something important to litigate in the pre-trial phase, why not schedule a hearing, discuss it on our feet, and render an oral decision after no more than a few hours of deliberations. Completely different in national cases. If the ICC moves on like this, it gets worse and worse. Problem: Many people working in international institutions also grew up there and don’t have an outside perspective or even national experience”.
[883] De Smet (2009), p. 131.
[884] One of the experts who participated in this study stated that “many judges feel a level of comfort when referring to their national systems. Spoke to colleagues at the Tribunals - unlike at the *ad hoc* Tribunals where judges came in rounds every 4, 5 years, the ICC sees a fresh injection of sometimes very strident views every three years. This allows less harmonisation through long work together”, Interview F5.

more compelled to direct the proceedings more actively.[885] The differing approaches will engender different expectations amongst the parties about how much evidence to submit and when, and about how to interpret the judges' interventions. Given this fact, judges in international criminal proceedings may require the management skills to balance these different approaches, and lack of such skills can be considered as a key human factor impacting on the length of proceedings at the ICC. Some may lack confidence in this new arena or struggle to settle disagreements, especially as such disagreements may be entirely novel to them.[886] No matter their origin, most judges will struggle with some unfamiliar aspects in a mixed system. This adaptation takes time to sort out.[887]

Further, some judges in international courts lack judicial experience in criminal matters and the political and diplomatic skills required to carry out their work. Judges who are experienced in criminal matters in a national context will have more confidence in the process than those without such experience. A judge who has experience in criminal matters will also have the authority to regulate the proceedings, to speed up (or not) the proceedings, as he/she considers necessary.[888] Language is another challenge. If a judge does not speak the working languages of French or English with proficiency, this creates difficulties: the judge may be hesitant to intervene, or will need time to receive the submission in a written format. If the working language of the case is French, the Presidency should allocate those judges to the case who speak French.[889]

Experts also emphasised that there is a level of unpredictability in the proceedings which can sometimes cause challenges for case management. There are already numerous discussions about the different ways judges interpret laws and about the disagreements between them.[890] Where disagreements cannot be resolved, the result may be the issuance of multiple dissenting or concurring or separate or minority (and other) opinions together with the decision or judgment. The last two judgments of the Appeals Chamber in the *Ntaganda* case (30 March 2021) and *Gbagbo/Blé Goudé* case (31 March 2021) are examples of this trend. In those cases, all five Appeal Judges issued either separate or dissenting opinions. The issuance of multiple opinions has several drawbacks:[891]

- Opinions diminish the validity and authority of the majority decision. A unanimous decision or judgment represents the united view of three or five judges and weighs more than a decision that was signed by a (thin) majority, reflecting a split Bench.
- Opinions with divergent reasoning and *obiter dicta* contribute to the fragmentation of ICC jurisprudence and adversely affect the foreseeability and predictability of the law. It is detrimental for external actors such as domestic prosecuting authorities and courts that are looking for authoritative interpretations in ICC decisions and judgments. As the jurisprudential corpus of the Court increases, the ICC must aim to consolidate and harmonise its jurisprudence. This task rests particularly upon the Appeals Chamber (the "guardian" of ICC case law). Multiple opinions accompanying a decision or

[885] Eser (2008). pp. 216–217.
[886] One expert stated: "There was some discussion as to why more litigation disputes are not resolved orally. I believe the principal reason for this is that many judges lack the experience and confidence to do it and therefore seek security in having everything done on paper (this is also sometimes true of the parties, who might prefer to brief arguments in writing rather than orally)" K2; another expert expressed its opinion that "[The] judge's role is to make strong case management of trial procedure. If judges get lost, [the] whole case gets lost" Interview G4.
[887] Interview F5.
[888] Another expert stated the personal view that "Efficiency has not been the primary mission of the ICC so far", Interview C2.
[889] Interview F1.
[890] Schmitt (2021), p. 3; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* ICC-02/11-01/15-1263-AnxA, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/15-1263-AnxA (accessed 28 Mar 2022).
[891] The bullet points were addressed by interviewee D5.

judgment harm such efforts. Individual opinions do not make the "case law" of the ICC, unless they are applied subsequently in judicial decisions by other Chambers.

- Opinions are sometimes used to advance personal views, regardless of whether the issue discussed by the differing judge is decisive for the decision or the appeal. It should be clear to the judges that opinions should not be used for academic theorisations or to advance personal views on the law. *Obiter dicta* should be avoided at all costs. The task of a judge is to resolve a legal issue *sub judice* together with the rest of the Bench. Judges must seek to convince their fellow judges of their views; if they cannot do this, they should, in general, subordinate their view to the views of the majority. It must be made clear to the judges that decisions and judgments should be issued, if possible, unanimously. Opinions should only be used as a last resort if the differences between the majority and the minority are irreconcilable and of a fundamental nature. For the moment, it appears that opinions are issued without limitation, even on minor issues (such as the structure of the majority decision) or issues that do not affect the outcome of the trial. The Rome Statute, while mentioning the taking of a decision by majority (Articles 57(2)(a), 74(3) and 83(4) RS), also mentions that the (Trial and Appeals) Chambers shall issue one decision and that, if this is not possible, the judicial decision shall contain the views of the majority and the minority (see Articles 74(5) and 83(4) RS). Constraint and prudence on the part of the judges is essential for the long-term "success" of ICC jurisprudence.
- The drafting of opinions is time-consuming and labour-intensive for legal officers. Sometimes the opinion addresses additional issues, not raised in the majority decision/judgment, and is longer than the actual majority decision/judgment. If a judge intends to issue an opinion, a team of legal officers must devote additional time to the research for, and elaboration of, the opinion. If there are several opinions to be drafted, the work can easily triple or quadruple. Sometimes, individual legal officers cannot contribute to the majority decision or judgment at all. This means that additional staff must be allocated for the drafting of the majority decision/judgment and the opinion(s). This process also prolongs deliberations and the delivery of the decision/judgment.
- Lastly, if opinions are appended to a majority decision/judgment, both documents must be delivered at the same time. The belated delivery of an opinion diminishes even further the value of the opinion and means that legal officers work longer than expected on this matter. Other pending matters cannot be addressed until the opinion is delivered.

There is another discussion about judges playing a bigger role in the confirmation phase to narrow down issues and increase efficiency. This has been difficult in the past because (1) the judges may be inexperienced, (2) as the parties conduct the investigations, the judges are one step behind on imposing decisions on the trial with respect to witnesses and proof and (3) the Defence can contest all issues which can then make it difficult for the judge to try to narrow down the case. [892] However, the judges can reassert control by imposing time limits. To do this, the judges can assess the complexity of the case according to number of defendants, types and number of charges, temporal scope, etc., and then impose a specific number of trial hours for each side.[893] The parties can make it work as long as the time limits are reasonable.

[892] Interview K2.
[893] Ibid.

This tool is incredibly effective in disciplining parties and participants and worked well at the ICTY. [894]

The judges, and especially the Presiding Judge, should not be permissive and passive in the proceedings. The *Ongwen* case is an example of effective management of judicial proceedings with an enormous number of charges brought against the defendant. Had the case not been well managed, the proceedings could still be ongoing. It is largely down to the judges if the proceedings are taking longer than expected at the beginning of the trial or if schedules are not respected. It is the judges that are responsible for controlling proceedings. Ultimately, this remains the responsibility of the Presidency of the Court to allocate judges to cases according to their management and language skills.

It is important to note that there are currently encouraging steps being taken by the judges, especially under the current presidency of the ICC, to develop a common legal culture at the ICC. The fact that all the judges have recently attended a retreat is a good sign that there is some progress ahead. The next crucial step will be to codify the manual in the rules or find a way to make it binding.

4.1.2 Prosecutor

The second key actor in the length of the proceedings is the Prosecutor. The charges and amount of evidence the Prosecutor brings affect the length of the proceedings dramatically. It is up to the Prosecutor to decide on the evidence which he/she intends to bring, and this is where the length starts to count. It is a difficult balance to strike. The more the Prosecutor brings, the longer the process takes, but insufficient evidence means failed trials.

In the early cases, it seems the Prosecutor regularly needed more time to carry out investigations. [895] This would be in keeping with the original OTP policy to investigate to the level required for each phase, and not much further, in the interests of economy of resources; this policy changed with the second Prosecutor's commitment to be fully trial-ready by the time of the first stage of the confirmation phase.

In the recent cases of *Al Hassan*, *Yekatom* and *Ngaïssona* and *Abd-Al Rahman*, the OTP was not ready and successfully requested that the confirmation hearings be postponed. In justification of this, the Prosecution argued that a certain amount of time had elapsed between the crime's commission and the appearance of the suspect as also in the *Ntaganda* or *Ongwen* cases, and the OTP required time to review the records and make necessary changes. Instead of being prepared for the cases from the W/S phase, the Prosecution seemed to fall back into the previous practice regardless. [896]

It is acknowledged that the facts are sometimes too many in number and that they cover a large number of allegations, all of which requires an immense amount of work as regards evidence collection, witness management and disclosure. This in turn requires that the Defence reply to each piece of material and for the judges to consider all of them in lengthy decisions. Such decisions may also lead to massive appeals and appeals judgments.

The new Prosecutor is strongly encouraged to reorganise his/her case strategy along more pragmatic lines, considering the true costs for all parties and in particular the Defence when choosing charges, investigative lines, filings and other litigation steps. In the OTP, the Prosecutor and senior management should focus on setting deadlines and pushing the institution forward. This requires an extremely skilled Prosecutor and a senior management

[894] Ibid.
[895] See the confirmation phases of Lubanga, Bemba, Katanga, and Gbagbo.
[896] Interview B3.

team that is on top of the work and has the management/prosecution skills to drive the work forward.

4.1.3 Defence

This research project also found that the data suggests that the Defence has less responsibility for the length of proceedings. But it is no secret that some Defence lawyers are interested in proceedings being lengthy in the service of Defence strategy, financial reasons or for other reasons. Defence lawyers highlight translation issues, if the defendant has the right to receive a translation of the documents in a language he fully understands. However, delays are problematic if caused by the Defence lawyer's lack of understanding of one of the working languages.[897] Even if the Defence intends to prolong the proceedings, the responsibility of the Presiding Judge is always superior regarding acceleration of proceedings. Other issues which are brought forward by the Defence are health issues of the defendant, lack of funding of the Defence team or change of Defence Counsel. All these factors may have the potential to cause delays in the proceedings if the judges do not play an active role in handling them.

4.1.4 States

The work of the ICC relies to a great extent on State cooperation, which in turn plays an important role in the length of proceedings[898] as one of the main sources of evidence, but also as one of the main actors accelerating or slowing down proceedings. The Kenya cases are obvious examples, where State non-cooperation slowed down the proceedings. In such situations, the Court and the Prosecutor must seek out alternative sources of support to collect evidence[899] and protect witnesses.[900] The OTP likely has to explore multiple sources in parallel to increase the chances of success.

Lack of cooperation may stem from the deliberate intention not to cooperate or from bureaucratic inefficiencies within the national systems.[901] In the former case, there is not much to be done. Even in the case of cooperation agreements or memoranda of understanding, a State that is not willing to cooperate will not do so under any circumstances, or it will officially show that it is cooperating but there will be no result. The alternative is to impose political or economic sanctions to promote cooperation,[902] but even assuming these can be put in place, they may negatively affect the relationship.

It is important to highlight that State cooperation is an obligation for States Parties. The 66 recommendations of the ASP[903] on State cooperation and the recommendations of expert review R272-R278 may also have little effect if States are unwilling. Difficult and slow bureaucracy of national authorities is another challenge for cooperation. These difficulties arise not only between the ICC and States Parties, but also between States in other fora, such as

[897] Interview B3.
[898] As mentioned by the expert "[cooperation] is classified as one of the biggest risks in the risk management document of the Court", Interview D2.
[899] One of the experts mentioned: "I saw the request by the OTP [of] March 2020 and they received the response eight months [later], there should be something pushing the States to cooperate", Interview B3.
[900] Interview B3.
[901] See "Report on Cooperation Challenges Faced by the Court with Respect to Financial Investigations", Workshop 26-27 Oct 2015, the Hague, Netherlands Forward-Looking Conclusions, ICC (2015).
[902] Expert Initiative on Promoting Effectiveness at the International Criminal Court, ICC (2014), p. 244.
[903] See "Strengthening the International Criminal Court and the Assembly of States Parties", ICC Assembly of States Parties from 14 Dec 2014 (Resolution ICC-ASP/6/Res.2).

the European Union or within bilateral or multilateral agreements on cooperation in criminal matters.[904]

Cooperation between the ICC and States may benefit from motivated and well-equipped national institutions (either an official or a department) that accelerate ICC requests. Against this there may be obstacles within the national system in the form of financial and institutional problems, since even if the national institution itself is willing to cooperate, a lack of resources may affect the promptness of responses and the quality of the documents and evidence shared.

4.1.5 Victims' Representatives

If there were uncertainties and negative assumptions at the beginning of the ICC operation regarding the participation of victims and its impact on the length of proceedings, it is now obvious from the practice of the Court, as evinced in the cases analysed above, that their participation does not cause significant delays.[905]

4.2 Charges and Judicial Re-characterisation of Facts

Article 61(3)(a) RS requires that a person "[b]e provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial", within a reasonable time before the hearing to confirm those charges. The term "Document Containing the Charges" is unique to the ICC.[906] A number of other aspects of the legal framework concerning charging and judicial re-characterisation, described in this section, are also either unique or comparatively unusual – in substance as well as in form.[907]

Rule 121(3) RPE supplements Article 61(3)(a) RS with a precise deadline: the Prosecutor must give the person and the PTC "a detailed description of the charges" no later than 30 days before the hearing. Reg. 52 RoC specifies that the DCC must include: (a) relevant information identifying the person, (b) a "statement of the facts… which provides a sufficient legal and factual basis to bring the person… to trial" and (c) a "legal characterisation of the facts to accord both with" the crimes and the form of participation alleged.[908] These Regulations also require the DCC to be personally served on that person.[909]

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[904] See "Manual on International Cooperation in Criminal Matters Related to Terrorism" by United Nations (2009), p. 76, www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf (accessed 28 Mar 2022); See also New Start: A Report, Committee of Experts on The Operation of European Conventions on Co-Operation in Criminal Matters, Council of Europe (2011), p. 5; Allegrezza (2010), p. 571; Luchtmann (2020), p. 14.

[905] One of the experts mentioned, "[…] indeed very true that the first time in history civil parties and victims can have a say in ICC proceedings. But […] I had the feeling that the two legal representatives, […] were just standing on the side-line and observing the whole", Interview E1. Another expert mentioned: "I think that the way that victim representation works is not only not a big deal or a problem, but, often quite helpful in the Defence case", Interviews G3, G5, H3, A2,

[906] The governing legal instruments of the other international criminal courts and from the International Military Tribunal onwards, have provided instead for charges to be pleaded in an indictment.

[907] Reg. 55 RoC on judicial re-characterisation of facts, discussed below, is an example. For a recent survey of the different approaches to this issue at other international criminal courts and tribunals, see *the Prosecutor v. Salim Jamil Ayyash and Others*, 18 Aug 2020, STL-11-01/T/TC F3839/20200818/R331945-R334626/EN/dm, paras 261 and 273, www.stl-tsl.org/crs/assets/Uploads/20200818-F3839-PUBLIC-Full-Judgement-Annexes-FILED-EN-WEB-Version-v0.2.pdf (accessed 30 Mar 2022).

[908] Since the adoption of the ROTP in April 2009, there has been additional explicit guidance for the OTP on the content of the DCC, in Reg. 58 of that instrument. In summary, Reg. 58 requires that the DCC be based on the warrant or summons application under Art. 58 RS, "taking into consideration the decision on that application and any subsequent amendments thereto", and clearly state the mode(s) of liability alleged.

[909] Reg. 31(3)(c) RoC.

These provisions give effect to the fundamental rights of defendants in all criminal proceedings. The primary relevant right, as articulated in Article 67(1)(a) RS, is "[t]o be informed promptly and in detail of the nature, cause and content of the charge".[910] Whether this right is fulfilled intrinsically affects the fulfilment of both the right to have adequate time and facilities for the preparation of the Defence[911] and the overarching right to a fair hearing.[912]

The Rome Statute expressly permits the Prosecutor to amend charges both before the confirmation hearing[913] and, with the PTC's leave, after that hearing but before the trial.[914] The defendant must be notified in advance in either case.[915] Under Article 61(9) RS, any post-confirmation hearing, pre-trial amendments "to add additional charges or to substitute more serious charges" must be confirmed at a new hearing.[916] The Statute also provides for the Prosecutor to withdraw charges with leave after the trial has begun.[917]

From the start of a trial onwards, the only other means that the ICC legal texts provide for remedying defects in the charges is the power of a Trial Chamber to change the legal characterisation of facts, in its ultimate decision on the individual criminal responsibility of a defendant. This re-characterisation power is not mentioned in the Statute or Rules of Procedure and Evidence. It appears only in Reg. 55 RoC, adopted by the judges themselves.

Regulation 55 RoC imposes several conditions on the exercise of this power, many of which are evidently directed at safeguarding the rights of the defendant.[918] They include that the Chamber must give "the participants"[919] notice of the possibility of change and adequate time and facilities to prepare,[920] and that the changes cannot in any event exceed the facts and circumstances described in the charges.[921] However, the Regulation permits the Chamber to give relevant notice "at any time during the trial"[922] and to re-characterise the charged facts as *any* core crime or mode of responsibility.[923]

Although Regulation 55 does not provide for parties or participants to seek its use, they have done so in practice[924] and in 2009 the Prosecutor adopted a Regulation addressing this scenario.[925] It reads: if "at any stage in the proceedings, the [OTP] considers that the evidence available … does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued", it will promptly submit the matter for consideration to the Trial Chamber in light of that Chamber's Regulation 55 powers.[926]

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[910] Persons subject to warrants or summons enjoy this right, and the other Article 67 rights that are described below, pursuant to Rule 121(1) RPE.
[911] Codified in Art. 67(1)(b) RS.
[912] Codified principally in Art. 67(1) RS. On the provisions on each of these rights in human rights treaties, see further Schabas (2016), pp. 1656–1657, 1660–1663.
[913] Art. 61(4) RS.
[914] Art. 61(9) RS. See also Rule 128 RPE, Art. 61(7)(c)(ii) RS.
[915] Arts 61(4), 61(9) RS; Rules 121(4), 128(1) RPE.
[916] See also Rule 128 RPE.
[917] Art. 61(9) RS. See also Reg. 60 ROTP.
[918] See *The Prosecutor v. Thomas Lubanga Dyilo*. 17 Dec 2009, ICC-01/04-01/06-2205, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-2205 (accessed 30 Mar 2022); Cryer (2019), p. 429.
[919] The term "participants" in Reg. 55(2) is used broadly to encompass the parties, as shown by the reference to the accused in Reg. 55(3).
[920] Regs 55(2), 55(3) RoC.
[921] Including any amendments to those charges. Reg. 55(1) RoC.
[922] Reg. 55(2) RoC.
[923] Under Articles 6-8 RS, and 25-28 RS, respectively. Reg. 55(1) RoC.
[924] E.g. *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,* ICC-01/09-02/11-445, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-445 (accessed 30 Mar 2022); *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1891, 22 May 2009, www.icc-cpi.int/pages/record.aspx?uri=712021 (accessed 12 Nov 2022).
[925] Reg. 60 ROTP (instrument adopted Apr 2009, as stated earlier).
[926] Reg. 60(b) ROTP. Reg. 60(a) allows the OTP alternatively to seek to amend or withdraw charges, but the OTP cannot do the former after trial begins or the latter without leave, as explained above.

The ICC legal texts do not address whether the Prosecutor may charge cumulatively (that is to say allege that the same conduct constitutes *more than one* crime)[927] or alternatively allege that the same conduct constitutes *either one or another of* more than one crime or mode of responsibility.[928] The Chambers Practice Manual recommends permitting both[929] and many ICC Chambers have done so,[930] ICC judicial practice to date not having been consistent regarding either.[931]

Three other key issues that the legal texts leave open are:

- the precise structure and degree of detail required of the DCC;
- how Pre-Trial Chambers should present their findings confirming charges; and
- what – if any – documents the OTP should prepare besides the DCC to support or explain charges, either before or after confirmation.

Notoriously, the approaches of ICC pre-trial judges and Chambers to these three issues have been inconsistent and some of them have been widely criticised, including in decisions made by other judges and Chambers.[932] Past reviews of the ICC have highlighted this, in support of the conclusion that the confirmation of charges process or pre-trial processes, in general, are flawed.[933] Judicial practice to date regarding Reg. 55 RoC has also been particularly controversial. Besides inconsistencies in its application, some, including sitting judges, have criticised the fact that judges have often resorted to Regulation 55 RoC late in proceedings.[934]

The Chambers Practice Manual provides directions on several of these issues.[935] These include specific rejection of some practices followed in cases before the Manual was adopted. *Inter alia*, the Manual cautions Pre-Trial Chambers to limit their interference with the Prosecutor's formulation of charges[936] and not to impose on parties any "particular

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[927] See "The Practice of Cumulative Charging at the International Criminal Court", War Crimes Research Office International Criminal Court Legal Analysis and Education Project, May 2020, pp. 2, 4; Ambos (2014), pp. 246–266; Werle et al (2017), pp. 391–399.

[928] Stahn (2019), p. 363.

[929] The Manual recommends that the Pre-Trial Chamber confirm cumulative charges only if each crime charged contains a materially distinct legal element to the others. See Chambers Practice Manual of the ICC (2019), paras 67–68, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022).

[930] See, e.g., *The Prosecutor v. Omar Hassan Ahmad al Bashir*, 4 Mar 2009, ICC-02/05-01/09-3, paras 95–97; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* 23 Jan 2012, ICC-01/09-01/11-373; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, 9 Jun 2014, ICC-01/04-02/06-309, paras 97–100, *The Prosecutor v. Charles Blé Goudé*, 12 Dec 2014, ICC-02/11-02/11-186, paras 133, 158, 166, 171, 181; *The Prosecutor v. Dominic Ongwen*, 23 Mar 2016, para 147; Bradfield (2020).

[931] See, e.g.,*The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, 20 Dec 2019, ICC-01/14-01/18-403-Red; T*he Prosecutor v. Jean-Pierre Bemba Gombo.* 10 Jun 2008, ICC-01/05-01/08-14; T*he Prosecutor v. Jean-Pierre Bemba Gombo.* 15 Jun 2009, ICC-01/05-01/08-424, paras 72, 190, 199–209, 302, 310–312; and The Practice of Cumulative Charging at the International Criminal Court, War Crimes Research Office International Criminal Court Legal Analysis and Education Project, May 2020, pp. 1, 3–5, 11–24, 27.

[932] For a detailed review of confirmation of charges jurisprudence of the ICC up to 2015, see International Criminal Court Legal Analysis and Education Project, War Crimes Research Office: The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change (Oct 2015), pp. 19–74; See Chaitidou (2020), pp. 288, 302–303, 306 describing improvements in and "standardisation" of judicial approaches to some charging issues over time.

[933] See Mettraux et al (2012), pp. 2–3, 83–84; and Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 Sep 2020, paras 474, 483–489, 491, 503, see also paras 607–608, 612–613; International Criminal Court Legal Analysis and Education Project, War Crimes Research Office: The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change (Oct 2015), pp. 85–86. See also Safferling, (2012), p. 342.

[934] See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-3319, ICC-01/04-01/07-3363 and ICC-01/04-01/07-3436-AnxI; See further Fry (2016), pp. 577–597; Heller (2014); International Criminal Court Legal Analysis and Education Project, War Crimes Research Office: The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change (Oct 2015), pp. 82–83; and Cryer et al (2014), p. 429.

[935] Chambers Practice Manual of the ICC (2019), paras 31–48, 56–68, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022).

[936] Ibid., para 38.

modality/format" to argue their cases and to present their evidence at the confirmation hearing;[937] it states that "the confirmation decision constitutes the final, authoritative document setting out the charges";[938] it recommends a structure for that decision, including a clearly differentiated "operative part" that reproduces *verbatim* the charges confirmed;[939] and it claims that Regulation 55 RoC is "an exceptional instrument which, as such, should be used only sparingly if absolutely warranted".[940]

Most of the experts interviewed complained about the lack of guidance on the DCC. One of the experts mentioned that all Chambers and the Prosecution have different views on the DCC: they seem to be talking at cross purposes and they never understand each other and it is still unclear whether Trial Chambers are bound by the contours of the decision containing the charges, or if they can go beyond them.[941] Due to the lack of detailed guidelines as to what the DCC should look like, each Chamber expects the DCC to be framed according to its own ideas. Therefore, the OTP has to face not only the challenges of each new case, but also the expectations of every new Chamber. Another expert stated that the DCC has multiple goals: it tells the international community what the OTP charges are and what kind of crimes are involved; it prepares the OTP's strategy; and it tells the Judges what they have to decide on.[942] But because of the impreciseness of the DCC not only were the confirmation phases prolonged, but the trial preparation and trial phases were also. In two other cases, *Ruto & Sang*, *Gbagbo & Blé Goudé*, an imprecise DCC was one of the reasons leading to a "no case to answer" motion.[943]

Although there have been some developments in establishing best practices for the DCC, and new and simplified types of DCC have already been used in the recent cases, there is still a great need for guidance. The problem with the DCC persists.[944]

At the same time, Regulation 55 RoC can either lengthen or shorten proceedings.[945] The application of Regulation 55 RoC in the early cases was problematic and lengthy, but the issue around Reg. 55 RoC was later included in the Chambers Practice Manual with the application of Reg. 55 RoC being limited to exceptional cases. However, amending the DCC and applying Reg. 55 RoC is frequently a binary process.[946] Reg. 55 RoC might not be avoidable in cases where the evidence changes,[947] but a problem arises when notices thereunder are rendered at a later stage of the proceedings.

4.3 Disclosure

"Disclosure" principally refers to each party revealing information, documents and other material relevant to a case to the other party or parties, and either providing such information and material to them, or allowing them to inspect it. The Rome Statute and subsidiary texts also refer to disclosure in the sense of making information or material known, including disclosure of a State's national security information[948] or disclosure by a State of information

[937] Ibid., para 43.
[938] Ibid., para 57.
[939] See Ibid., para 66.
[940] Ibid., para 67.
[941] Interview E2.
[942] Interview F2.
[943] Interview F3.
[944] See Mettraux (2012), p. 14, para 51; See also Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 Sep 2020, para 484.
[945] Interview E2, C1, C5.
[946] Interview E1.
[947] Interview H3.
[948] Art. 72 RS.

or documents provided to it in confidence by a third party.[949] Unless otherwise expressly stated, the following analysis in this report concerns disclosure in its principal, inter-party sense.

The provisions of the ICC legal texts on disclosure – in other words, the component of the disclosure regime that is legally binding and common to all cases – consist of a combination of:

(i) Articles of the Rome Statute setting out specific disclosure obligations and exceptions, many of which are confined to one party, one stage of proceedings and/or particular sorts of information or material;

(ii) Articles 61(3) and 64(3)(c) RS, granting Pre-Trial and Trial Chambers general powers to make orders regarding disclosure (the latter Chambers' power explicitly subjected to "any other relevant provisions of the Statute" and limited to documents and information not previously disclosed); and

(iii) subsidiary provisions elaborating on these obligations, exceptions and powers, most notably Rules 76 to 84 RPE.

Three features evident from these legal provisions are that the Prosecutor has more extensive disclosure obligations than the Defence,[950] that disclosure continues over multiple stages of proceedings,[951] and that not only Pre-Trial but also Trial Chambers have considerable discretion and a potentially significant role.[952] The legal provisions also clearly exempt some material entirely (for example, neither privileged communications and information[953] nor parties' internal documents connected with the investigation or preparation of a case[954] need be disclosed) and they permit restricted or qualified[955] disclosure of other material. One key basis is the protection of victims, witnesses and other people who are at risk due to witnesses' testimony.

Subject to these exemptions and restrictions, prosecutorial disclosure obligations expressly extend to, *inter alia,* names and statements of witnesses the Prosecutor intends to call,[956] exculpatory evidence in the Prosecutor's possession or control[957] and any tangible objects material to the Defence's preparation or intended for use as evidence either for the confirmation hearing or at trial.[958] Express Defence disclosure obligations include notifying intent to raise an alibi[959] or a ground for excluding criminal responsibility[960] and, as for the Prosecutor, to allow inspection of objects intended for use as evidence for the confirmation hearing or at trial.[961]

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[949] Art. 73 RS. On the scope of the term "disclosure" as used in these provisions, see Schabas (2016), p. 866; Klamberg (2017), pp. 550, 553; Rastan (2016), p. 1792.
[950] See e.g. the obligations summarised in the next paragraph and accompanying footnotes; Art. 61(3)(b) RS; Rules 121(3)-(5) RPE. See also Büngener (2016), pp. 352, 357.
[951] See also Reg. 55(2) ROTP referring to fulfilment of Prosecutorial disclosure and inspection obligations "on an ongoing basis".
[952] In addition to Arts 61(3) and 64(3)(c), see e.g. Rules 79(4), 84, 121(2) and (for proceedings since late 2012, when it was adopted) 132*bis*(5)(a) RPE, Regs 54(f) and (l) RoC. See also Cryer et al (2019), p. 466; Stahn (2019), p. 365.
[953] Rule 73 RPE. See also Art. 69(5) RS.
[954] Rule 81(1) RPE.
[955] Klamberg (2013), p. 276.
[956] Rule 76 RPE. See also Reg. 54(f) RoC.
[957] Art. 67(2) RS. See also Rule 83 RPE and the reference to documents or information with exculpatory value in Reg. 55(3) ROTP.
[958] Rule 77 RPE.
[959] Rule 79(1)(a) RPE.
[960] Under Article 31 of the Rome Statute. Rules 79(1)(b) and 80(1) RPE.
[961] Rule 78 RPE.

However, the ICC legal texts either do not address, or leave open to debate, other questions such as timing of each party's disclosure[962] and its precise scope.[963]

The ICC disclosure regime has been further developed over time with an array of non-legally binding guidance, particularly jurisprudence interpreting the legal provisions, documents that identify standard or "best" practices to follow (some of them public, such as the Chambers Practice Manual, others confidential), and documents adopted in individual cases to regulate the disclosure process in those cases. The nomenclature for the latter two types of guidance varies and both the Court and external commentators sometimes use the term "protocol" for both.[964] Strictly speaking, however, there is no ICC "protocol" on either disclosure generally, or on the e-court system for effecting disclosure electronically, independent of a particular case. Instead, Chambers in a case adopt protocols on these topics for the purpose of that case, that may be, but are not automatically, identical to those used in previous or concurrent ICC cases.[965]

On the e-court protocol, the Chambers Practice Manual recommends: "[u]ntil [that] protocol is somehow codified, the current version … be put on the record of [a] case as soon as possible after the first appearance in order to guide disclosure at all stages of the proceedings".[966]

The latest version of the Manual directly incorporates the text of a procedure and a protocol, respectively, on exceptions to prosecutorial disclosure that are subject to judicial control,[967] and various issues related to protection of confidential information and investigations, which include inadvertent disclosure.[968] The exceptions procedure includes standard categories of redactions and codes the Prosecutor should use.[969] The Manual recommends that this procedure and protocol be included in a Chamber's decision, ideally the first one regulating disclosure following the initial appearance, and that it be applied throughout.[970]

As for jurisprudence, from the *Lubanga* case onwards "[e]xtensive instructions for disclosure have been issued by the Pre-Trial and Trial Chambers in each case"[971] and in many cases, Chambers of all three judicial divisions have issued decisions interpreting legal provisions on disclosure in detail. As the analyses highlight, judicial approaches to the issue vary considerably. There is a large and ever-increasing, if inconsistent, body of judicial guidance on the disclosure regime.[972]

Disclosure is one of the main factors causing postponements, from three different angles:

i) Unclear legal framework on the disclosure regime;
ii) Correlation with other factors;
iii) Number of materials being disclosed.

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[962] See Schabas (2016), pp. 1504–1506; Bitti (2016), p. 1603.
[963] Klamberg (2013), pp. 277, 280, 291–292, 318–325, 333; and Cryer et al (2019), p. 466; Stahn (2019), p. 365.
[964] Chambers Practice Manual of the ICC (2019), paras 77–80, 103-104, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022); Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 Sep 2020, paras 475, 513, R190, R192, Appendix, Annex I, para 43.
[965] The latest version of the Chambers Practice Manual alludes to the lack of a stand-alone E-court protocol, as opposed to one filed in a case, with the words "[U]ntil the E-court protocol is somehow codified" in the passage from para 20 quoted immediately below.
[966] Chambers Practice Manual of the ICC (2019), Annex, para 20.
[967] Ibid., para 101. See also Rules 81(2) and (4) RPE.
[968] Chambers Practice Manual of the ICC (2019), Annex, paras 18–21.
[969] Ibid., para 101(2).
[970] Ibid., paras 101, 104.
[971] Cryer et al (2019), p. 467, Fn. 394.
[972] See further Klamberg (2013), pp. 1506, 1513–1519; Scheffer (2008), pp. 157–162, (on early *Lubanga* jurisprudence); Stahn (2019), p. 365; Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 Sep 2020, para 475.

Even though there is some positive precedent on disclosure, this is not enough to give a clear understanding of how the regime works in practice. Interviewees mentioned on several occasions that there is no common understanding.[973] This also relates to the inconsistent approach of the Chambers to the disclosure regime,[974] which makes it unpredictable for the parties in each new case.

But inconsistency is only one part of the disclosure challenge. Another issue related to disclosure is the number of other factors which must be considered before disclosure is actually done. These include redaction, witness protection, translation, Article 70 proceedings and other factors. In contrast to civil law systems, where investigations stop when the dossier is completed, ICC investigations are ongoing, and this complicates the system. The discussion is not new;[975] it was an issue with serious impact on length in the first case, and is still in the most recent cases.

Thirdly, the disclosure factor depends on the number of materials. However much the Prosecutor collects, that is what he must disclose. This amount can affect not only the time spent for disclosure but also the time spent preparing the defence. In most cases, the disclosure proceeds on a rolling basis. This is more of an organisational difficulty because of ongoing investigations. Therefore, as is the OTP's obligation, they must oversee the other overlapping factors to avoid disclosure issues.[976]

In addition to standardising the regime and applying it consistently, it is important for the judges to maintain strict deadlines and for the OTP to be better prepared. The process should be organised and prepared during the investigation and not just during the judicial proceedings, bearing in mind the particularities of the case. Once the OTP has collected its evidence, it must plan how it will disclose the material during the judicial proceedings.

4.4 Redactions and Other Protective Measures

Redaction of confidential or sensitive information in documents, meaning the removal or "blackening" of parts of documents that contain that information,[977] is common. Many different types of documents are regularly redacted. They include disclosed documents, submissions, victim applications, decisions and transcripts.[978] To date, the typical, though not the only,[979] purpose for redaction has been to protect victims, witnesses or other people who are at risk on account of witnesses' testimony, such as their family members. Redaction may thus implement the Court's obligation to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", as stated in Article 68(1) RS and referred to in numerous other provisions of the Court's legal texts.[980] However,

[973] See Interview F5, B3, E4.
[974] Mettraux *et al.* (2012), p. 107.
[975] Retreat on Strengthening the Proceedings at the International Criminal Court, Federal Department of Foreign Affairs FDFA, Sep 2014, p. 5.
[976] During Interview H3, it was described as the Achilles Heel of the OTP.
[977] See Chaitidou (2020), p. 295; Stahn (2019), p. 364; Kim (2016), p. 55; Gumpert/Nuzban (2019).
[978] See e.g. Regs 25(3)-(5), 27(2)(b)(v) RRegs; Chambers Practice Manual of the ICC (2019), Annex, paras 46, 74(iii), 83(vi), 96(i), 96(vi), 99-101 and Annex, paras 18–21, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022) (each further discussed below). The term "document" in the above description is used broadly, to encompass any written record, not restricted to documents as defined in Reg. 22 RoC or as the term is used in Regs 25(3)-(5), 27(2)(b)(v) RReg.
[979] Other purposes include the preservation of evidence, the protection of national security information, the protection of a State's servants or agents and the protection of "confidentiality of information", "confidential information" or "confidential or sensitive information" generally. See especially Arts 54(3), 57(3)(c), 64(6)(c), 64(7), 68(6), 72, 93(j) RS. See also Arts 64(6)(c), 73 RS.
[980] See e.g. Arts 43(6), 54, 57(3), 64(2), 64(6)(e), 64(7), 68(2), 68(4)-(5), 87(4), 93(1) RS; Rules 43, 81(3)-(4), 87-88 RPE; Regs 46, 48(1) ROTP. The Rome Statute also explicitly obliges the Registry's Victims and Witnesses Unit

in practice, various actors both internal and external to the Court, including Defence teams, undertake redactions.[981] Which actors lead or participate in the process of redacting a document depends on the type and/or source of the document.[982]

There are a few codified legally binding rules on redaction procedures at the ICC[983] and, as mentioned above, since 2016 the Chambers Practice Manual has set out a recommended procedure.[984] The Manual also contains a variety of other guidance measures on both disclosure-related and other redactions.[985] But in addition, as has happened for disclosure, Chambers in each case have adopted redaction protocols for the purpose of that particular case. Their contents can – and notwithstanding the recommendations in the Chambers Practice Manual,[986] they still sometimes do – differ substantively not only between cases, but also between stages of the same case.[987] Common subjects of regulation and dispute in cases to date have included the extent of redaction necessary to protect the person or information in question, whether and which redactions can be made without seeking a Chamber's permission in advance, and when once-necessary redactions should be lifted.[988]

Besides redaction, measures that may be taken to protect people or information or preserve evidence in ICC proceedings include summarising material or information instead of disclosing it;[989] holding hearings in closed session (*in camera*)[990] or without one or more parties or participants (*ex parte*);[991] filing documents[992] with a Chamber under seal or confidentially;[993] altering pictures or voices of those testifying;[994] and operational and physical security measures such as physically protecting witnesses in their home countries or even relocating them internationally.[995] The diversity of these measures reflects the broad discretion afforded (to Chambers, the Prosecutor and the Registry, among others) by the legal provisions on this issue. In proceedings, ICC Chambers have tended to adopt protocols on some of these

(VWU) to provide protective measures, for witnesses, victims who appear before the ICC and others at risk on account of such witnesses (Art. 43(6) RS). Although Art. 68 itself refers only to victims and witnesses, many of the other relevant provisions expressly cover family members and/or others at risk (as Art. 43(6) illustrates). ICC Chambers have also interpreted the relevant protection obligations and powers broadly, with respect to redactions; see e.g. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-476, paras 45–66, www.icc-cpi.int/drc/katanga (accessed 25 Mar 2022).

[981] Illustrating this, Reg. 56 ROTP, Reg. 73(2) RReg and Chambers Practice Manual of the ICC (2019), paras 96(vi), www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022), respectively refer to redactions by the Office of the Prosecutor, a chamber, party or participant, and the Registry.

[982] Ibid.

[983] See Regs 48(1), 56 ROTP (which entered into force on 23 April 2009), Regs 25(3)-(5), 27(2)(b)(v) and 73(2) RReg, See also Art. 72(5)(d) RS specifically permitting "providing…redactions" as a protective measure for information whose disclosure a State considers would prejudice its national security interests. This is the sole reference to redaction as such in the Rome Statute.

[984] Chambers Practice Manual of the ICC (2019), paras 101, 99–100, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022).

[985] See especially ibid., paras 46, 73(iii), 74(iii), 77, 83(vi), 96(vi), 96 (i). The protocol annexed to the Manual also indirectly addresses redaction, specifically procedures to be followed if material that should have been disclosed in redacted form was inadvertently disclosed unredacted, in paras 18–21.

[986] These include a recommendation in para 77 that in general, protocols on redactions adopted by the Pre-Trial Chamber continue to apply at later stages of the proceedings.

[987] Compare, e.g., t*he Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*. ICC-01/14-01/18-64-Red, ICC-01/14-01/18-677-Anx3, https://www.icc-cpi.int/carII/yekatom-nga%C3%AFssona (accessed 25 Mar 2022).

[988] As illustrated in Chambers Practice Manual of the ICC (2019), paras 101, 99–100.

[989] Article 68(5), 72(5)(d) RS; Rule 81(6) RPE; Reg. 48 ROTP.

[990] Article 68(2), 72(5)(d), 72(7)(a)(i) RS; Rules 57, 87(3), 88(2) RPE; Reg. 94(e) RReg (the latter applicable since late 2013 only). See also Regs 50(1), 50(3) ROTP.

[991] Article 72(5)(d), 72(7)(a)(i) RS; Rules 57, 88(2) RPE. See also Rule 81(2) RPE; Reg. 23*bis* RoC (applicable since late 2007 only); Regs 50(1), 50(3) ROTP; Reg. 24(4) RReg (applicable since late 2013 only).

[992] E.g. motions and requests, as provided for in Rule 87(2)(e) RPE.

[993] See e.g. Reg. 23*bis* RoC (as noted above, applicable since late 2007 only); Reg. 50 ROTP.

[994] With respect to victims, witnesses and those at risk from their testimony: Rule 87(3)(c) RPE; Reg. 94(b)-(c) RReg (the latter applicable since late 2013 only, as noted above).

[995] See e.g. Regs 92 and (applicable since late 2013 only) 93, 95-96 RReg; for more see Shokar (2020).

measures, separate to those on redactions and disclosure; for instance, protocols addressing confidential information and protection of vulnerable witnesses.[996]

Redaction is a factor contributing to length of proceedings. Some experts mentioned the complicated methodology and were in favour of excluding redaction altogether. On the other hand, however, in some cases witnesses were at risk because of the late protection provided by the OTP, and decided to withdrew their testimony. This suggests that the application of the redactions plays an important role in the protection of witnesses.[997] The OTP should be more vigilant in the implementation of redactions and protection measures.[998] At the same time, redaction regimes have become more efficient in comparison to earlier cases, it not being necessary to justify redactions. Although there is some development in making redactions more effective, streamlining the regimes leaves much to be desired.

4.5 Witnesses and Evidence

According to Article 69 RS, there are two types of evidence: testimony and documentary[999] evidence.[1000] In most cases, the trial is predicated on evidence presented by the Prosecutor, the Defence or a witness. As a result, categorisation and the examination of evidence that goes with it are crucial aspects of the trial.[1001] Parties to a case are free to present whatever piece of evidence they believe is relevant to the case. The Court does, however, have the jurisdiction to request the production of all material that it deems essential for determining the truth.[1002]

The wording of Article 69 (2) of the Rome Statute points out the preference for live testimony of a witness over evidence in trial. Hence, the Chamber will only accept a written statement or a prior recorded statement of a witness if there are exceptional circumstances.[1003] In cases where the Pre-Trial Chamber has not taken any measures during an investigation to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the Defence, the Trial Chamber has the authority, after hearing the parties, to allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony. Such testimony must be allowed by the Trial Chamber on condition that it will not be prejudicial to, or inconsistent with, the rights of the accused. In addition to the need to respect the rights of the accused, the admission of such evidence will be possible if any of the following conditions are met: 1) if the witness who gave the previously recorded testimony is not present before the Trial Chamber and both the Prosecutor and the Defence have been given the opportunity to examine the witness during the recording; 2) if the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused; 3) if the testimony comes from a person who has subsequently died, is presumed dead, or is, due to obstacles that cannot be overcome with reasonable

[996] As acknowledged in Chambers Practice Manual (2019), paras 77, 80 www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022). See also the reference to "protocols regarding witness protection… used in previous cases" in the IER Final Report, para 475 and the recommended protocol on confidential information and contacts annexed to the Chambers Practice Manual. For an example of a confidential information and contacts protocol as adopted in a recent case, see t*he Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-677-Anx5, https://www.icc-cpi.int/carII/yekatom-nga%C3%AFssona (accessed 25 Mar 2022).
[997] The Kenyan cases.
[998] See Interview E2, G4.
[999] See *Prosecutor v. Musema, Judgment and Sentence*, 27 Jan 2000, para 53, ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-13/MSC21028R0000532581.PDF (accessed 1 Apr 2022).
[1000] Farthofer (2012), p. 463.
[1001] Ibid., p. 462.
[1002] Article 69 RS.
[1003] Article 69(2) RS.

diligence, unavailable to testify orally; and 4) the prior recorded testimony comes from a person who has been subjected to interference.[1004]

The term “witness” is not defined under the RS or by the RPE of the ICC. Nevertheless, the legal framework of the ICC contains different provisions relating to the participation and protection of witnesses in the proceedings of the Court. Witnesses are safeguarded for numerous reasons, including: to decrease the trauma of participation in the proceedings; to avoid major intrusions into their privacy and dignity; and to minimise serious dangers to their security.[1005]

In this regard, the organs of the ICC are under the obligation to take reasonable steps to ensure the safety, physical and mental well-being, dignity and privacy of victims and witnesses.[1006] In protecting witnesses, the Court considers all relevant factors, including age, gender and health, as well as the nature of the offence. Moreover, witness protection measures must not jeopardise or be incompatible with the accused's rights to a fair and impartial trial.[1007]

The major types of protective and specific measures for witnesses which are based on these factors are: anonymity as regards the accused and his attorney (anonymity measures); confidentiality from the press and public (confidentiality measures), such as pseudonyms for victims and witnesses, image or voice distortion, and closed sessions; and measures to avoid retraumatisation or secondary victimisation (avowal measures), such as avoiding confrontation with the accused in person.[1008]

Such steps will be taken by the OTP, especially during the investigation and prosecution of such offences.[1009] The Chambers are also permitted to conduct any part of the proceedings *in camera* or to allow the presentation of evidence by electronic or other special means for the purposes of protecting witnesses and victims. In particular, unless the Court orders otherwise, such measures must be taken in the case of a sexual violence victim or a child who is a victim or a witness, taking into account all circumstances, including the victim's or witness's opinions.[1010]

When the witness in question is a victim, and the victim's personal interests are in jeopardy, the Court shall allow the victim's views and concerns to be presented and considered at stages of the proceedings determined by the Court to be appropriate, and in a manner that is not prejudicial to, or inconsistent with, the accused's rights to a fair and impartial trial. Where the Court deems it appropriate, such views and concerns may be expressed by legal representatives of the victims, in conformity with the RPE.[1011] Moreover the Victims and Witnesses Unit can advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.[1012] If the Prosecutor believes that disclosing evidence or information would put a witness or his or her family in grave danger, the Prosecutor may withhold such evidence or information and instead submit a summary for the purposes of any proceedings held prior to the start of the trial.[1013]

The ICC has primarily opted for an adversarial approach regarding the participation of witnesses in its proceedings. Therefore, the parties have the primary responsibility for the evidence and may call witnesses, who will be either “Prosecution witnesses” or “Defence

[1004] Rule 68 RPE.
[1005] De Brouwer (2015), p. 704.
[1006] Article 68(1) RS.
[1007] Ibid.
[1008] De Brouwer (2015), p. 704.
[1009] Article 68(1) RS.
[1010] Article 68(2) RS.
[1011] Article 68(3) RS.
[1012] Article 68(4) RS.
[1013] Article 68(5) RS.

witnesses". The accused may also give testimony as a witness, but only in his or her own defence. A witness giving testimony under oath is required to speak the truth and does so with criminal liability for a false testimony.[1014] Therefore, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by him or her.[1015] Protection against self-incrimination is provided for and certain witness privileges apply. The ICC Trial Chambers may compel a witness to give testimony.[1016]

The testimony of a witness at trial shall be given in person, except in instances where measures need to be taken in order to protect the witness.[1017] The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts.[1018] These measures shall not be prejudicial to, or inconsistent with, the rights of the accused.[1019]

It should be noted that the adversarial nature regarding participation of witnesses in ICC trials can have unfavourable results on the length of proceedings. The adversarial proceedings normally begin with the Prosecution presenting its evidence, followed by the Defence presenting its own evidence following a possible "interim acquittal" by the Court on counts lacking evidence capable of securing a conviction. The inquisitorial system on the other hand starts with thorough pre-trial investigations and interrogations aimed at avoiding the prosecution of an innocent individual. Unlike the adversarial system that determines facts through a competitive procedure between the Prosecution and the Defence, the inquisitorial system entails an official investigation to find the truth, and the judge who oversees the process has more power.[1020] In an adversarial environment, the sequential Prosecution and Defence cases are further made longer by the fact that each phase begins with the respective party's examination-in-chief, followed by the cross-examination and sometimes a re-examination by the first party. [1021] Moreover, because witnesses are called by either the Prosecution or the Defence, the so-called "Prosecution witnesses" and "Defence witnesses" may feel pressed into a one-sided role from the start. This introduces further animosity into the proceedings, and the various parties involved must strive to maintain a level playing field. In this regard, it may be impossible to avoid time-consuming procedures, even in a simple case, because evidence on the same items may be provided in multiple ways. This situation is aggravated further in international criminal trials, where one side must give its evidence well before the other, without knowing what the eventual counter-evidence would be, compelling one party to present evidence that covers as much ground as possible. [1022]

In addition, the number of witnesses and the amount of documentary evidence play a detrimental role in the length of proceedings. The parties and participants who present their evidence to prove guilt or sow reasonable doubt rely on it. Theoretically, the more evidence, the longer the proceedings.[1023] This factor has thus been one of the permanently recurring issues impacting on length, which are:

- Remoteness of the witnesses
- Willingness of witnesses to cooperate

[1014] Rule 66 RPE.
[1015] Ibid.
[1016] Rule 65 RPE.
[1017] Article 69(2) RS.
[1018] Article 69 RS.
[1019] Ibid.
[1020] See Decaigny (2014), pp. 149–166.
[1021] Eser (2008), pp. 218–219.
[1022] Ibid., pp. 218–219.
[1023] On the other side e.g. the IMTFE had 419 witnesses and dealt with them in less than two years of evidence presentation as opposed to ICC cases which have much fewer witnesses and last considerably longer. But at the same time it is difficult to make a proper comparison between these two institutions because of the political circumstances after WWII.

- Number of witnesses
- Permissibility of witness preparation
- Relevance of evidence
- Admission v. submission

4.5.1 Remoteness of the Witnesses

The remoteness of witnesses is a big challenge. Many who testify in Court are from remote areas. This makes contact with them more difficult, and travel to The Hague a logistical challenge. In contacting the witnesses and arranging their travel, there is a high degree of reliance on the efficient functioning of Court organs. In the early cases, intermediaries were used to identify and locate witnesses.[1024] However, this ultimately endangered cases.[1025] Hence reliance on such intermediaries was later on employed only in exceptional circumstances. In cases where a long time passed between the warrant and the defendant's appearance, it took a while for the OTP to re-contact witnesses from the investigation phase.

There is a need to record testimony during the investigative phase, as witnesses may not be available later. Some of the experts mentioned a preference for grouping the witnesses and inviting fewer crime-based witnesses.[1026]

There are already visible changes, especially during the course of the pandemic, about relying on technology for the conduct of proceedings.[1027] Another discussion is the reliance on technology to invite witnesses via video tools rather than physically bringing witnesses in.[1028] Some practitioners advocate *viva voce* hearings,[1029] while others advocate their digital presence, the latter being cost-efficient and logistically easier for the witnesses. Either way, the presence of witnesses from remote areas plays an important role in the proceedings. Their digital presence would have an impact on shortening the length of the proceedings, although this would depend on the case. The pandemic has increased use of video technologies;[1030] But the presence of witnesses from remote areas also plays an important role in the proceedings.

[1024] Interview A2. Also, during interview A4, the respondent indicated that "there's a big back-up preparation before witnesses finally appear before the court. Usually, it is difficult to meet the time limit for bringing a witness before the court due to logistical challenges, including difficulties of locating and communicating with the witnesses at the time of submitting the application before the court. Once a witness is located, the witness might also need some time to prepare before travelling to the court to testify due to visa issues, travel medical checks, family situations and the acquisition of travel documents (such as passports, birth certificates)".

[1025] E.g. the case of t*he Prosecutor v. Thomas Lubanga Dyilo*. www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).

[1026] Interview D1, A2, A5.

[1027] See e. g. The Prosecutor v. al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-824, www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01%2F12-01%2F18-94-Red-tENG (accessed 25 Mar 2022).

[1028] During interview A4, the respondent indicated that "It is debatable whether the use of a video link testimony for instance can address the challenges of bringing witnesses to testify in person and it's also a way to reduce exposure of the witnesses. On the one hand, it's easier to organize a video link and testimony from a local place and avoid travel and other logistical arrangements. On the other hand, having witnesses in the courtroom creates different dynamics in the trial. For instance, the defence can sometimes object to the use of video link interviews on grounds that they cannot properly cross-examine a witness in a video link. Moreover, judges sometimes prefer to have witnesses appear in person."

[1029] Mostly because of the defendant's right to confront the witnesses against him/her.

[1030] Interview G4, one of the experts stated "I know that oral testimony is the best evidence. We cannot replace the oral testimony with the written statement. Written statements can be used during the examination-in-chief, for example, in the cross-examination of a witness, and is used normally. Because it's the judge, who will judge on the credibility of the witnesses [which] cannot be done on the basis of a written statement. Because the judge can be motivated […] observing the attitude, observing the gesture of the witness, can be motivated to put questions. And so we cannot replace this. But we have the video conference . [And] we used it with success", Interview C2; another expert mentioned "I think [video link testimony] which is less in the lives of the witnesses makes perhaps things a little bit easier, […] and I have to tell you that it worked perfectly […] there was hardly ever a technical problem, […] when getting the evidence it was as if the person was sitting in front of me', Interview D5.

4.5.2 Willingness of the Witnesses to Cooperate

Another problem arises when, for various reasons, witnesses do not want to cooperate. Their remoteness can lead to loss of contact; or witnesses become distrustful, fearing a lack of protection. One of the experts mentioned that there is a need to put an obligation on witnesses to cooperate.[1031] Non-cooperation of witnesses with the Court may have an impact on length.

4.5.3 Number of Witnesses

Although some of the experts interviewed during the project expressed their satisfaction with the number of witnesses per case,[1032] if there are alternative options to provide sufficient evidence without calling witnesses, such an alternative method should be used. The number of witnesses prolongs the length of proceedings. The experts often queried whether hearing witnesses was essential. But it is at the discretion of the parties and participants to bring as many as they deem necessary, although the Chamber may limit the number. And if there is an alternative to live testimony, the parties and participants should make use of such in giving evidence.

4.5.4 Witness Preparation

Another recurring problem, which does not affect the length of the proceedings by its implementation but by litigation as to its permissibility, is witness preparation. In some international criminal tribunals, the parties may prepare witnesses in a substantive way before giving evidence ("witness proofing"). This is a contentious matter for which different legal traditions have different responses. While the ICTY and ICTR enable it, an ICC Pre-Trial Chamber has barred the Prosecutor from doing so. "Witness familiarisation", on the other hand, is sometimes recognised at the ICC.[1033] Although the preparation of witnesses is an option for the parties and those involved,[1034] different approaches are still used by different judges. Some Chambers have used preparation of the witnesses, others have refused. Consistency would be desirable so that the parties and participants do not have to engage in the same discussions each time about whether or not certain procedural activities should take place.

4.5.5 Relevance of Evidence

The Court has already ruled that evidence presented makes the existence of a fact at issue more or less probable.[1035] The amount of evidence that parties in international criminal proceedings seek to present is vast. The amount of information presented to the Court will have to be discussed by the parties and digested by the judges during different stages, in particular the deliberation stage. The more evidence is presented, the longer the Chamber will take to digest it. There is a discussion on the relevance and importance of the evidence presented by the parties.[1036] This includes circumstantial, crime-based and hearsay evidence. As one of the experts mentioned "*If there is a need to prove the forest, there is no need to prove every tree".*[1037] The question arises whether presenting such amounts of evidence is

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[1031] Interview E3.
[1032] Interview D2, D3, H1, G3.
[1033] Cryer (2019), p. 462.
[1034] Interview B3.
The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-2635, para 16, www.icc-cpi.int/drc/katanga (accessed 25 Mar 2022).
[1036] Interviews A4, F2, F5, see also Expert Initiative on Promoting Effectiveness at the International Criminal Court (2014), pp. 135 et seqq.
[1037] Interview F2.

necessary. It is the OTP's obligation to bring evidence which is important and not to rely only on circumstantial evidence.[1038] It is, of course, understandable that reliance on this latter type of evidence comes from the difficulty of obtaining solid evidence for international crimes. But if the OTP does not have enough evidence to begin with, it must not initiate proceedings.

One means that can be used to shorten proceedings is agreed facts.[1039] However, finding such an agreement is at the Defence's discretion. The Defence has the right to fundamentally contest every fact on which the Prosecutor bases the charges;[1040] at the same time the Chamber is not bound by that agreement on the facts.[1041]

4.5.6 Admission v. Submission of Evidence

Like other international criminal tribunals, the governing instruments of the ICC provide a broad and permissive regime in relation to evidence. Unlike criminal trials in common law jurisdictions, where the rules of evidence employ a variety of preventative measures to limit the proof on which lay juries may rely, evidentiary rules in international criminal trials rely heavily on the presumption that the finders of fact are professional judges, who are expected to accord the requisite weight to the evidence based on the context of the case.[1042]

The evidentiary rules of the ICC use a two-pronged test to evaluate whether a party's proposed proof should be included in the case's record. Firstly, any witness, document or other prospective evidence must be relevant, in the sense that it must be linked to one or more claims levelled against the accused. Secondly, the suggested evidence must have probative value, meaning that if accepted, it must be capable of proving or refuting one or more claims against the accused. In reality, judges try to combine the two procedures. Thus, a Chamber's decision that a proposed piece of evidence is relevant generally reflects a view that it has at least some probative value as presented.[1043]

In deciding on the relevance or admissibility of any evidence, the factors that the Court takes into account include the probative value of the evidence and any prejudice that the evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness. The ICC does not require proof for facts of common knowledge, although it can take judicial notice of such facts. Evidence which is obtained illegally is not admissible if the means by which the evidence was obtained casts substantial doubt on the reliability of the evidence and the admission of the evidence would seriously damage the integrity of the proceedings.[1044] In practice, however, these rules are not always applied strictly. For example, the fact that evidence was obtained in violation of domestic laws does not necessarily mean that it must be excluded. Trial

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[1038] One of the experts expressed disappointment by giving an example that "if I have 500 photographs is it really necessary to disclose 500 photographs? What does it add, does this help the Chamber to understand better the destruction of the building, if actually I only need one photograph and . […] if I disclose […] as a prosecutor 500 pictures in which two persons who are in the back need to be protected and I need to apply redactions, black them out. Then I must do it 500 times. So also it is tied to the very far-reaching [up] disclosure system we have and . […] the Chambers have very little authority or powers to direct the parties", Interview D5.

[1039] As one of the experts mentioned "if you have other cases piling up you might want to just focus on what's really contentious. In one case you might want to agree on facts like the agreement on facts, It is […] like nothing is agreeable. I think in some cases they don't even agree on the map created by Google maps of the country . […] let us just focus on the link and the context", Interview A5.

[1040] As mentioned by the expert "you can't force [the Defendant] to accept that black is black, not white or grey or some speckled colour. […] I mean, it impacted [the Prosecution] because it made [the Prosecution] call some of those 179 witnesses […] And they did not dispute that it was his voice on the radio. They kind of raised all sorts of arguments about why it might be or it might not be, but they never actually said, It's not him, it's somebody else, because it obviously was him", Interview D3.

[1041] The agreement of facts was positively considered by some experts e.g. Interview G4, where the expert mentioned that the agreement on fact reduces efforts and lifts burden from judges.

[1042] Boas et al (2011), p. 336.

[1043] Ibid., pp. 339–340.

[1044] Article 69 RS.

Chambers have thus admitted intercepted communications, regardless of whether prior legal authorisation was obtained, and documentary evidence obtained in a search of the accused's residence, regardless of whether local procedural requirements were satisfied.[1045]

Where the Prosecutor and the Defence agree that an alleged fact – as contained in the charges, the contents of a document, the expected testimony of a witness or other evidence – is not contested, a Chamber may consider such alleged fact as proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.[1046]

The question of submission and admission of evidence is one of the frequently raised questions before the Court, and is also related to differences in legal systems. Chambers have adopted different approaches in this regard. In November 2021 the judges agreed on submission of evidence in a single evidentiary system for the Court.[1047]

4.6 Victims

The ICC is the first international criminal institution where victims can apply to participate and to receive compensation for the harm suffered. The unique system considers two steps in order to allow victims to participate in the proceedings. Once the victim has met the requirements of the victim definition under Rule 85 RPE, his or her direct participation may be allowed if the personal interests of the victim are affected at the stage of the proceedings according to Article 68(3) RS. The definition taken into account in Rule 85 RPE is generalised and modelled on the definition of the 1985 UN Declaration.[1048] In order to claim victimhood before the ICC, the victims need to fulfil and prove elements such as *prima facie* identification of their person or the existence of sustained harm that is caused by a crime within the jurisdiction of the RS.[1049] The wording of the definition embodied in Rule 85 RPE does not include limitation to direct and indirect harm for a natural person.[1050] Although the jurisprudence of the ICC tries to limit the circle of victims,[1051] this wording allows dozens of indirect victims affected by international crimes to claim victimhood.[1052] Each Chamber considered different modalities for the victims' participation in the proceedings and granted their LRVs different rights in the proceedings.[1053]

The length of proceedings also affects victims. When the Court was first established, practitioners and academics believed the participation of victims would add to the length.[1054] It is true that the victims' applications and participation initially created some uncertainty and increased the workload of the Court and the parties, but subsequently the overall impact was reduced.[1055] This included shortening the application forms and simplifying the recognition

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[1045] Boas et al (2011), pp. 342–343.
[1046] Rule 69 RPE.
[1047] See press release of the ICC "ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat" www.icc-cpi.int/Pages/item.aspx?name=pr1627#:~:text=22%20November%202021- (accessed 5 Apr 2022).
[1048] Safferling/Petrossian (2021), pp. 143 et seqq.
[1049] See Cherif-Bassiouni (2014), pp. 123.
[1050] See Moffett (2016), p. 91; *The Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06-1432, paras 29–39. www.icc-cpi.int/drc/lubanga (accessed 25 Mar 2022).
[1051] The indirect victims have to prove the close relationship to the direct victims, see *Prosecutor v. Lubanga*, ICC, Decision on Indirect Victims, 8 Apr 2009, paras 50–52.
[1052] See Olásolo (2021), pp. 153 et seqq.
[1053] See Safferling/Petrossian (2021), pp. 199 et seqq.
[1054] See Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, ICC-OTP (2003), para 120.
[1055] See Interview K1. According to Respondent C4, "The victims' participation process is a very good example of how the court has struggled in finding the best way of dealing with the application forms. Because the nature of the crimes on which the court focuses is mass crimes, there are usually hundreds of thousands of victims who want to

process. Recognition and participation are linked to the DCC. If the victims are not connected to the charges brought against the defendant, they will not be able to apply.[1056] The Chambers again have different approaches on the modalities, but this is not a factor which impacts on the length of the proceedings, as it is with witnesses' preparation, or admission and submission of evidence.

4.7 Orality v. Written Statements

International criminal proceedings include lengthy litigations on various aspects that affect the length. One of the experts shared the view that parties seem to invent new questions that need to be resolved by the judges. Why there are so many legal disputes on various aspects of international criminal law? This is due, on the one hand, to the uncertainty of the Rome Statute and, on the other hand, to the relationship between adversarial and inquisitorial principles, a challenge recognised from the start.[1057] Some experts were in favour of the oralisation of the proceedings rather than exchanging written submissions.[1058] This applies in particular to the confirmation or the trial preparation phases. The trial phase already contains many weeks of hearings for the presentation of evidence. There was and is room for more hearings.[1059] On the other hand, some of the experts highlighted that these problems could last longer if they are presented orally and that written submissions accelerate discussion.[1060]

The *Ongwen* Chamber's decisions were rendered by email and that was relatively quick. Solving relatively small issues through alternative ways should be welcomed. This would save time and push proceedings forward.

4.8 Interlocutory Appeals and Appeal Proceedings

Under the legal framework of the Rome Statute parties are allowed to file interlocutory appeals in the Appeals Chamber against decisions made by the PTC and TC or single judges. There are two types of interlocutory appeals. Interlocutory appeals against certain sorts of judgments are available as a matter of right, and the appellant may submit the appeal to the Appeals Chamber immediately. Other interlocutory appeals are discretionary, and permission to file must be acquired from the Judge or Chamber that issued the contested decision.[1061]

Interlocutory appeals that can be filed as of right relate to: decisions on jurisdiction or admissibility; decisions on release from detention pending or during trial or appeal; decisions by the Pre-Trial Chamber *proprio motu* in relation to a "unique investigative opportunity"; and orders for reparations.[1062] Such appeals may be filed not later than five days from the date

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participate in the proceedings. The court had to find a way to make sure that this process is efficient and at the same time respect the rules and procedures and the legal framework of the courts. In the beginning, we were making [a] very detailed analysis of all these applications, a lot of time and resources were required to go through these forms. Applications were transmitted on a rolling basis. Every few months batches of hundreds of application forms were submitted to Chambers. Currently, applications are grouped under different categories, and once the Chamber issues its decisions at the beginning based on the specific criteria, all subsequent applications will be covered by the decision on that category. The court was at the beginning struggling with which direction to take, due to people coming from different backgrounds and having different legal education and different legal systems. However, there is now a fairly established and steady jurisprudence".

[1056] See Safferling/Petrossian,(2021), p. 171.

[1057] See Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings. ICC-OTP (2003), para 86.

[1058] Interview D3, F1, E1, E4, H3, G3.

[1059] Gumpert/Nuzban (2019), www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/ (accessed 22 Mar 2022).

[1060] Interview G3.

[1061] Boas et al (2011), p. 435.

[1062] Article 82 RS.

upon which the party filing the appeal is notified of the decision. In the case of decisions by the Pre-Trial Chamber *proprio motu* on a "unique investigative opportunity", the appeal may be filed not later than two days from the date upon which the party filing the appeal is notified of the decision.[1063]

Appeals against any other rulings require permission from the Chamber that issued the contested decision. In such cases, the party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The Chamber that made the impugned decision has complete discretion over whether a party may file an interlocutory appeal on an issue for which interlocutory appeal does not lie as of right. The standard by which such discretion is exercised is whether the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and whether, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".[1064]

As a result, the party seeking leave to appeal must satisfy the Chamber of two conditions: the first is concerned with the influence of the impugned judgment on the fairness of the procedures, and the second is concerned with the benefit of the Appeals Chamber's intervention in the proceedings. Regardless of the importance of the point of law being contested, the party requesting authorisation to appeal must satisfy the lower Chamber on both conditions.[1065] The Chamber shall render a decision and notify all parties who participated in the proceedings that gave rise to the decision in question.[1066]

The second step is the interlocutory appeal itself.[1067] Although the Chambers Manual sets out that the judgment in cases of interlocutory appeals should be delivered in four months after the response to the appeal brief,[1068] it still appears to be questionable why so much time is needed to deliver the appeals judgment. An appeal does not of itself have a suspensive effect on the ongoing proceedings at the lower court unless the Appeals Chamber so orders, upon request to do so.[1069] They otherwise run parallel. Two steps need to be considered more closely. First, the request to grant leave to appeal and the appeal itself. Article 82 (1) (d) RS enables the parties to appeal against a decision involving an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. This is designed as a "catch-all" rule for appeals,[1070] but at the same time it sets requirements that must be met in order for a matter to be an issue of appeal. The Chamber concerned should believe that an immediate decision can significantly advance the proceedings.

During the proceedings of an appeal, the Appeals Chamber shall have all the powers of the Trial Chamber. Where the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may reverse or amend the decision or sentence and order a new trial before a different Trial Chamber. Moreover, the Appeals Chamber has the power to call evidence to determine an

[1063] Rule 154 RPE.
[1064] Article 82(1d) RS.
[1065] Boas, et al (2011), p. 437.
[1066] Rule 155 RPE.
[1067] This includes not only Article 82(1)(d) RS, but also Article 82(1)(a),(b) and (c) RS.
[1068] See Chambers Practice Manual of the ICC (2019), para 92, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022).
[1069] Article 82(3) RS.
[1070] Hartwig (2012), p. 546. See more in "Interlocutory Appellate Review of Early Decisions by The International Criminal Court", Project War Crimes Research Office International Criminal Court Legal Analysis and Education from January 2008.

issue or remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly.[1071]

4.8.1 Leave to Appeal

The Rome Statute foresees an interlocutory appeal mechanism for almost any type of decision. This instrument, however, must not be misused. Of course, this may be a party's strategy, as mentioned by the experts.[1072] However, filing an appeal against any decision can potentially increase length. The Chamber should grant or deny the requests for leave to appeal in a more decisive way. In the *Bemba* case, for example, the Trial Chamber required another 31 days on average from the last response to the request to actually delivering the decision, in *Gbagbo/Blé Goudé* 33 days, in *Ruto/Sang* 26.5 days and in *Lubanga* 31 days. A totally different picture emerges in *Ongwen*, where the Trial Chamber made decisions on frequently requested appeals in an average of 8.5 days. Even though the Defence made frequent requests to appeal against the decisions of the Trial Chamber, the TC got through procedural activities quickly. When the Chamber takes an active role, it can move procedural activities forward quickly and the proceedings accordingly. This shows that it makes a measurable difference when the Chamber takes a decidedly active role.

4.8.2 Interlocutory Appeal

The second step is the interlocutory appeal itself, which is regulated not only by Article 82(1)(d) RS but also by Article 82 (1)(a), (b) and (c) RS. Interlocutory appeals last for more than three months (104 days) on average,[1073] including appellate submissions and responses.

Average total days of interlocutory appeals per case	
Case	**Days**
Bemba	93
Lubanga	94
Ruto/Sang	109
Gbagbo/Blé Goudé	88
Ntaganda	130
Katanga	142
Ongwen	74,5

Table 31 Average total days of interlocutory appeals per case

After the last response to the appeal, the AC's judgments were delivered on average in 62 days.

[1071] Article 83(1), (2) RS.
[1072] E.g. Interviews F1, D3.
[1073] See time limits for the parties Regs 64 and 65 RoC.

Average days between AC's judgments and the last response of the party per case	
Case	**Days**
Bemba	51
Lubanga	53
Ruto/Sang	52
Gbagbo/Blé Goudé	66
Ntaganda	108
Ongwen	42

Table 32 Average days between AC's judgments and the last response of the party

Although the Chambers Practice Manual sets out that the judgment in the case of interlocutory appeals should be delivered in four months after the response to the appeal brief,[1074] it is questionable why so much time is needed to deliver the appeals judgment.[1075]

4.9 Language

Language, including translation and interpretation, is another key challenge, involving not only the working languages, but also additional languages that relate to the situations before the Court and the individuals involved in cases arising out of these situations, including defendants, victims and witnesses.

The working languages of the Court are French and English. Those languages are used in the courtroom as well as in written litigation, and translation and interpretation between them is standard. Beside these there are also four official languages: Russian, Chinese, Spanish and Arabic. There are also around 20 so-called judicial cooperation languages that are needed for communication with States Parties and in other diplomatic correspondence.[1076] Besides those languages there are also the situation languages.[1077]

There are approximately 6,000 languages spoken in the world.[1078] If the OTP starts an investigation in one of the situation countries, it first must identify which languages are spoken by the affected communities in that country.

4.9.1 Working Languages of the Court

Language issues relate not only to situation languages, but also to Court officials' lack of knowledge of the Court's working languages.[1079] For example, one of the experts mentioned

[1074] See Chambers Practice Manual of the ICC (2019), para 92, www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf (accessed 31 Mar 2022).
[1075] See one of the experts stated "in principle, [the interlocutory appeal] could slow things down. In practice, they grant so few, it definitely doesn't", Interview G3.
[1076] Interview B5.
[1077] Interview B5.
[1078] Interview B5.
[1079] Interviews F1, B3.

that, if the Defence Counsel speaks French, the Counsel must wait for the documents to be translated from English and act upon their receipt, instead of acting immediately. Complicated problems arise when an English-speaking judge presides over a case that is conducted predominantly in French.[1080] And another problem is when English-speaking investigators are sent to French-speaking situation countries.

Aside from these issues, a problem arises if a defendant who is fluent in either English or French nevertheless requests the Court to be provided with interpretation and translation services into either the respective other working language or into their native language. This is certainly one of the fundamental rights of the suspect or accused according to the Articles 55(1)(c) and 67(1)(a)(f) RS, but in some cases there is a potential abuse of right as stated by an expert.[1081]

The delays related to the authorities' lack of language skills are not to be justified. The judges or other officials involved in the case must speak and use the working language of the Court fluently, an issue the Presidency and the Prosecutor should monitor and manage. But prior to that, it is also the responsibility of the States Parties to only nominate candidates that possess adequate language skills, and of the HR offices within the Court to only employ individuals that are fluent in both working languages.

4.9.2 Situation Languages

Further difficulties arise with situation languages, such as a lack of professional interpreters and translators, lack of essential vocabulary or legal terminology in the language concerned, or a written form of the language.[1082] The Court faces not only the task of finding skilled personnel, but also of training this personnel. Even if the Languages Service Section could find quick and efficient solutions, situation languages will permanently remain a major issue/problem/challenge. The Language Service Section's speed in performing its duties depends on the resources they get. The experts pointed to instances where excellent interpreters were lost due to lack of funds and their knowledge could not be kept at the Court, creating the need to search for and then train new interpreters again and again, which costs time.[1083]

4.10 Other Factors

There are also other factors which have affected the length of proceedings.

4.10.1 Inconsistency of the Jurisprudence and Lack of Codification

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[1080] Interview B3.

[1081] The expert stated that "[There were] years of interpretation for [the accused person] and then [the accused person] decided to speak in French […]. It's his right to do that and I think it was a genuine belief. And he was convinced that he could. What can we say? Nothing. Now for the lawyers. […] Lawyers abuse those rights. […] when the detained person understands French or understands English, the Defence team wants [x] to be their translation services", Interview B4.

[1082] Interview B1, D2.

[1083] One of the experts mentioned "it's more a question of appropriate funding, an appropriate number of resources that [Language Service Section] can deploy to support all the needs of the Court. Then, the fact that it's not mentioned in the legal framework, because in a legal framework, […] it clearly states that persons in the investigations and suspects are allowed to address the court in a language they fully speak and understand and so on. So whatever language it is, is not specified but it's already triggered. A need is already triggered by the legal framework. So we're working within the framework, but it's a matter of finding the right resources and defending to have a sufficient pool of interpreters and translators for all of the languages that need to be supported", Interview B5.

Most experts raised the inconsistent application of case law. This pertains particularly to the issues of witness preparation, admission and submission of evidence, victims' participation, the disclosure system and the redaction regime, but may arise for any other factor addressed above. Each new case seems to be a new field of interpretation.[1084] In each new case there is a discussion about how the proceedings should be conducted. And the litigation on the particularities prolongs the proceedings. Although the conduct of proceedings was initially left to the Chambers to decide, it appears that it is evolving into endless new approaches without any stable base. On the other hand, the flexibility of the legal framework enables the parties and Chambers to create guidelines for the circumstances of each case. But there already exists an established practice for different steps. The ICC judges had agreed with the Chambers Practice Manual on some of these procedural steps and deadlines. Yet the Chambers Practice Manual remains non-binding for judges, thus enabling them not to follow established practice. At the same time, the Appeals Chamber often renders judgments with separate dissenting opinions, which, as mentioned above, does little to streamline ICC case law.[1085] The solution is to review the established best practices and adopt the new simplified practices in the regulations or rules, thus making them mandatory for everyone. Some flexibility will always remain. In late November 2021 the judges agreed to adopt a model for the decision on Directions for the Conduct of Proceedings related to the opening of the trial, order of evidence and other matters.[1086]

4.10.2 Article 70 Proceedings

Article 70 proceedings, which refer offences against the administration of justice, may have an impact on length of proceedings in varying degrees. One reason is delays caused in the main proceedings because of witness protection[1087] or evidence not being able to be disclosed to the Defence because of ongoing Article 70 proceedings investigations.[1088] Further, based on the *Bemba* case, the Article 70 proceedings may affect the length of the proceedings because of the additional burden put on the Defence if team members are arrested. New counsel has to be found, which might require a suspension of the proceedings so that new counsel can familiarise themselves with the case record.

4.10.3 "No Case to Answer" Motion

The IER report highlights the fact that the "no case to answer" motion is already part of the Court's reality and there is no way of avoiding it. So the motion must be regulated. A "no case to answer" motion will prolong the proceedings if the motion is unsuccessful in its entirety. If successful, however, it may shorten the judicial proceedings compared to the – admittedly hypothetical – situation in which proceedings had simply continued with the victims and the Defence presenting their cases. In any case, whether proceedings are prolonged or shortened after a "no case to answer" motion will only become clear in the end, once the Chamber has ruled on the motion. Even narrowing the case to fewer charges or counts has a benefit. If a TC

[1084] In the words of Respondent C5, "the ways that the trials take place really vary in terms of the procedural norms, depending on the Chamber, and that creates a lot of uncertainty as to what's going to happen, even in terms of basics aspects like admissibility of evidence. The fact that the RoP and the RS leave a lot of procedural issues up to the discretion of the judges is the cause".

[1085] See Mettraux et al (2014), p. 160; Hrdličková et al. (2018), p. 192, www.springerprofessional.de/improving-the-efficiency-of-international-criminal-courts-and-tr/19549268 (accessed 1 Apr 2022).

[1086] See press release of the ICC: "ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat", www.icc-cpi.int/Pages/item.aspx?name=pr1627#:~:text=22%20November%202021- (accessed 5 Apr 2022).

[1087] Mettraux et al. (2012), p. 246.

[1088] Interview E2.

considers a “no case to answer” motion to be without merit, it should so decide and keep the decision simple.[1089] The experts mentioned also that a “no case to answer” motion may have a positive impact if it does not last long and is successful.[1090]

4.10.4 Amici Curiae

Another matter, also raised in the 2020 IER Report, is the Court’s frequent invitation of outside opinions.[1091] *Amici curiae* submissions serve as guidance for the Chamber to rule on one or more issues. However, those submissions of the *amici curiae* do not impact the length of proceedings.

4.11 Analysis by Phase of the Proceedings

A number of factors influence length, but there are only a few places where “surgery” would be necessary; overall the procedure would not be significantly shorter without them.

Confirmation phase: The confirmation phase discussion started at the beginning of ICC operations, but till now not much has been changed. Converting the confirmation phase into a mini-trial is not the aim but is very often the result, because although the OTP does not have to disclose all its evidence, the fear of setting a low standard disclosing only one particular part of the evidence drives a broader approach. The data gathered in this project suggests that, in order to minimise the risk of the PTC declining to confirm the charges, the Prosecution discloses based on the motto “the more the better”. On the other side, the Defence may challenge every issue raised during the confirmation so as not to cede any ground. This leads immediately to lengthy proceedings and many experts agree it must change. [1092]

The length of the post-appearance stage is also tied to the OTP continuing its investigations against the suspect(s), which remains controversial. In the past, this practice has led to amended charges and further related evidence to be disclosed.[1093] The 2020 IER Report recommends that “the judges should have regard to the purpose of the confirmation process as a filter for inadequately supported charges and to ensure the fair trial rights of the accused, including by conducting efficient and expeditious proceedings leading to a clear and unambiguous confirmation of charges decision”.[1094] This is essential to reduce the time spent at this phase.

Trial preparation phase: As the 2020 IER Report aptly phrased it, there is a “waiting mode” between a PTC’s confirmation of the charges and the TC taking up the trial preparation, until a decision on the confirmation of charges becomes final by either the PTC decision becoming unappealable or the AC confirming it upon appeal.[1095]

Trial phase: Trial proceedings should not include unnecessary suspensions during the presentation of the evidence, and the judgment on guilt and sentence should be combined.

[1089] Interview G3.
[1090] Interviews G2, F2.
[1091] See Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 Sep 2020, para 533.
[1092] Interviews E4, B3, C1, C3, F3,
[1093] Al Hassan, Ongwen.
[1094] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report from 30 Sep 2020, para 191.
[1095] Ibid., para 510.

Appeal phase: Different issues remain with the appeal proceedings. Up till now, there have been only four appeal judgments on conviction and acquittal,[1096] two of which[1097] were partly affected by the pandemic. Even in those appeal cases, there is room for improved efficiency in conducting the proceedings. For example, after completing the Defence's final reply on the Bemba appeal from February 2017 to November 2017 (263 days), no active development can be observed, considering that the OTP's response to the Defence's appeal was filed in November 2016. It remains questionable why, in that example, the Chamber did not play a more active role in setting the date for the appeals hearing.

4.12 Overall

It is sometimes forgotten that the ICC is a relatively young and unique institution, facing a good deal of criticism; the problems and challenges that practitioners of this institution face are not always immediately apparent. Not only do the States involved in the situations sometimes create difficulties, but also the international community expects the ICC to come up with quick results. The high political pressure appears to be unavoidable. However, from the criminal law perspective this need not worry the parties and participants to the judicial process itself.

It remains the responsibility of the authorities, such as the Chambers and the Prosecutor, to avoid unnecessary and undue delays; they must handle matters quickly. A reorganisation of the ICC's work towards a more pragmatic and focused approach, aiming to expedite cases, might be of help.

In most of the cases mentioned, which are either still ongoing or which did not get through the confirmation phase, there were numerous delays. A frequently recurring problem was the postponement of the confirmation hearing due to the OTP's disclosure obligations. This involves not only translation and cooperation issues, but also organisational aspects within the OTP.[1098] In most cases it appears that the OTP was not ready. Even when materials were available well in advance, the OTP still needed time to review and prepare its disclosure.

[1096] Lubanga, Bemba, Ntaganda, Gbagbo/Blé Goudé.
[1097] Ntaganda, Gbagbo/Blé Goudé.
[1098] Interview B3.

5 Summary and Recommendations

5.1 Summary

One of the core issues affecting the research design of the project was the identification of the proportionality standard for the length of criminal proceedings. Legal literature, national and international human rights case law to a large extent share the following criteria for assessing the length of proceedings in light of the particular circumstances of the case: (i) the complexity of the case, (ii) the conduct of the applicant, (iii) the conduct of the competent authorities including prosecution agencies and (iv) what is at stake for the applicant.

The assessment of the length of the proceedings in the most important cases before the ICC was done using the following criteria: (i) the complexity of the case, (ii) the conduct of the defendant and participants and (iii) the conduct of the competent authorities. The slight adaptations when compared to the above-mentioned human rights-based criteria were considered necessary due to the characteristics of the international criminal law justice system. The criterion "what is a stake for the applicant" refers directly to the international human rights system, elements of which are analysed through the "the conduct of the applicant" and "the conduct of the competent authorities" criteria.

As has been described in this report, the international criminal law justice system and, more specifically, the ICC have particularities to be considered in the design of the research project, the assessment of the cases and the drafting of recommendations. For the purposes of this project, disproportionately long proceedings have been considered to mean unreasonably long proceedings as well as proceedings in which there have been undue delays.

The ICC has been active for two decades and faces many challenges and a good deal of criticism, but the problems the practitioners of this institution face are not immediately apparent. As highlighted in this research project, it is sometimes the case that States involved in situations under investigation, or that have referred situations, are at the same time creating difficulties; and the international community expects quick results even in these turbulent times.

Complexity: Although the ICC length of proceedings might not be considered disproportionate, this project found that factors affecting the length of proceedings negatively are mainly human, involving the background of judges, the amount of OTP evidence and charges, Defence resource and logistical challenges and lack of State cooperation. Other factors are the charges and judicial re-characterisation of facts, disclosure, redactions and other protective measures, numbers and types of witnesses and problems relating to remoteness of witnesses, cooperation with witnesses and witness preparation, relevance, admission and submission of evidence.

Although the length of the Court's proceedings have not changed much, different aspects of the Court's procedural practice have evolved. For example, in relation to the Document Containing Charges, experts had the impression that there has been a move in the right direction, as seen in some of the Court's more recent cases such as the *Yekatom* and *Ngaisona* case where the ICC is exercising judicial restraint with a swift confirmation process.

In comparison to other international criminal proceedings or national criminal proceedings based on universal jurisdiction, the ICC proceedings are not long or short. All proceedings have individual circumstances which must be taken into account. The ICC proceedings are long and do, in almost all cases, include lengthy procedural activities, but generally they are not disproportionately long when taken in the light of the criteria of this research project.

International criminal cases are complex. They include a number of difficulties arising from factual, legal and procedural circumstances. The cases before the ICC relate not only to multiple defendants, persons with political power, persons connected to non-State actors that control territories of different States, but also and always to international crimes with difficult

evidential bases. International criminal procedure includes elements from both common and civil law traditions, which also complicates the judicial proceedings on the international level because of the clash of different views and approaches. High numbers of evidential material, witnesses and victims create another level of complexity for the length of the proceedings before the ICC. Language barriers between the persons involved is another technical obstacle to communication.

The ICC relies to a large extent on State cooperation, which unsurprisingly turned out to play an important role in the length of the proceedings. The States are not only one of the main sources of evidence, but also one of the main actors accelerating or slowing down the proceedings indirectly. The lack of cooperation or the non-cooperation of the State can be based either on deliberate non-cooperation or on difficult and slow bureaucracy within the national authorities' systems.

The conduct of the defendant and participants: The conduct of the parties and participants plays an important role in assessing the length of proceedings, seeing that it triggers and shapes the procedural activities and thereby extends their duration, if the Chambers do not take an active role in managing them. The Defence has less responsibility for the length of the proceedings. Although the Defence may exercise their clients' fair trial rights on their behalf in different ways by expanding the length of the proceedings through health issues of the defendant, financial situation of the Defence, translation issues, frequent requests and applications to grant leave to appeal and other mechanisms available through the legal framework for its own strategy, it is the task of the Chamber to manage the proceedings.

If there were uncertainties and initial assumptions concerning the participation of victims, namely that their presence would extend the judicial proceedings, this has not however extended the proceedings in a disproportionate manner. The application forms and recognition of the victims' status at the beginning of the ICC operations added to the Court's workload, but efficient solutions were found. Neither has the participation of States impacted on length disproportionately so far.

The conduct of the authorities: The States Parties, Presidency, Chambers and Prosecutor are the central point in the length of the proceedings; they bear all responsibility for the length of the cases before the ICC.

5.2 Recommendations

The analysis of the casework at the ICC has shed light on a series of factors that influence the length of the proceedings as stated above. The overall structure of the ICC, that is to say its Statute and Rules of Procedure, is difficult to amend. Our recommendations thus pertain to changes on the basis of the current law at the ICC and to speed up the proceedings by little modifications in the practice of the Court and its organs. We have also identified in the following where responsibility for the implementation of these recommendations lies.

5.2.1 Human Factor

The lengthiness of international criminal proceedings can be curtailed by addressing the human factors that cause delays. The overall conduct of judges, the OTP, Defence, States and victims' representatives can effectively avoid stagnation of the procedural activities when they are all given a stake in taking steps to avoid delays in proceedings.

5.2.1.1 Judges

Responsibility: ASP, Presidency

Judges can help reduce the lengthiness of proceedings when presiding judges adopt a stringent case management approach by giving clear guidance to the parties and participants, from the beginning of a case, on adherence to timelines and the non-tolerance of undue delay. The presiding judges should take proceedings into their hands and be strict in setting schedules, deadlines and time limits. The Presidency should allocate judges to cases according to their management and language skills.

Experts who participated in the second workshop forming part of this project also emphasised that there is the need for judges to address all forms of unpredictability which can pose challenges for proper case management. This can be done through codification of some standard practices in the Chambers Practice Manual. Although the Chambers Practice Manual can address some of the uncertainties in the Court's procedure, it is not binding. Given these challenges, a practical means of standardisation would be a multi-step approach by the ICC Presidency to a regular review and amendment of the Court's regulations. For the ICC to eventually develop a common procedural and evidentiary culture, the Presidency needs to initiate steps towards making the Chambers Practice Manual binding; henceforth, it should contain provisions that ensure flexible amendment possibilities and regular review of its provisions. This will ensure that aspects of the Court's procedure that have become common practice will be standardised and those that are impeding the Court's efficiency can be changed regularly. Key aspects of the Court's procedure that can be made binding are the timelines for delivering judgments and decisions at different stages of the proceedings, timing of the first appearance of accused persons, the time for starting confirmation hearings and the maximum time limit for trial preparation.

5.2.1.2 Prosecutor

Responsibility: OTP

Efforts to address lengthy proceedings must include revisiting the Prosecutor's case strategies to eliminate elements that prolong proceedings. Firstly, the Prosecutor must devise a strategy for each case, which ensures that investigations are near completion, if not completed, before applying for an arrest warrant or summons to appear. Secondly, case strategies must ideally provide a blueprint for deciding on charges that avoid multiple counts, the proof of which might require additional evidentiary procedures for each count and prolong proceedings without necessarily promoting the chances of securing a conviction. This will require striking a balance between the facts needed to prove the case and facts that merely complement proven facts. Thirdly, case strategies must create an avenue for the OTP to decide on witnesses, evidentiary materials, the intended information to be disclosed and the foreseeable protective measures, doing this prior to the indictment so as to avoid repeated processes on disclosure, redactions and other evidentiary issues after the indictment. This will avoid the need for continued investigation during the confirmation and trial stages. In situations where the Prosecutor foresees a lot of cases being initiated in a particular country situation, the investigative process can be shortened by setting up interim investigative offices in the situation countries to ensure regular and speedy access to information by the Prosecutor.

5.2.1.3 Defence

Responsibility: Registry, OTP

Although the actions of the Defence can also impact the length of proceedings adversely, measures to address defence-caused delays can be implemented more effectively through the Registry, the OTP and the Chambers adjudicating the case, since it is no secret that some defence lawyers can be advantaged by lengthy proceedings and may therefore have no motivation to ensure speedy trials. The OTP, Registry and Chambers in pursuance of the effectiveness of the Court, must be proactive in meeting the needs of the Defence, during the pendency of a case, to allay possibilities of frivolous applications by the Defence. On the part of the Registry, delays can be avoided by scheduling regular meetings with Defence Counsel, especially prior to the trial stage, to ascertain their needs in relation to translations, finances as well as legal assistance, and to take the necessary steps to address those needs in consultation with Chambers and other affected parties. The OTP can also play a role by creating a blueprint, as part of its case strategy, to curtail issues that can give rise to recurrent applications by the Defence. This includes informing the Defence in advance about the languages spoken by Prosecution witnesses, consolidating (rather than submitting isolated) applications for redactions and other protective measures, ensuring timely disclosure of received witness information and evidentiary material, and adopting drafting procedures that will avoid vagueness, ambiguity and inconsistency in charging documents. In instances where the Defence, despite proactive measures by the Registry and the OTP, makes requests and applications which can delay proceedings, the Chambers in question and the Presiding Judge must adopt a stricter approach to managing the case.

5.2.1.4 States

Responsibility: ASP

Given the fact that the ICC is an international institution which does not deal with the same pressures faced by national adjudicatory bodies to speed up proceedings, the ASP continues to serve as the main stakeholder that can initiate a system to motivate authorities and parties to speed up some processes of the Court. Moreover, it is said that the ICC's design does not allow for faster proceedings without substantial reforms, such as amendments to the Rome Statute and the Rules of Procedure and Evidence.[1099] Standardising the ICC's best practices on key procedural aspects of its work will enable streamlining of proceedings and therefore remains key for the Court's future. The idea is not new. However, changing the rules has always been a difficult subject because, unlike in the *ad hoc* tribunals, amendments to the Rules of Procedure and Evidence of the ICC can only take effect after a two-thirds majority of the members of the Assembly of States Parties has approved them. Moreover, according to Article 51 (2) of the Rome Statute, amendments to the Rules of Procedure and Evidence may be proposed by any State Party, the judges acting by an absolute majority, or the Prosecutor. Hence, any significant change in the length of proceedings will therefore result from the ASP's intervention or approval.

Firstly, the ASP should initiate follow-up measures for some of the key steps that have already been taken to address the Court's lengthy proceedings, such as the 2010 establishment of the Study Group on Governance to expedite the proceedings and enhance the ICC's efficiency and effectiveness.

[1099] Gumpert/Nuzban (2019).

Secondly, although a number of studies have already been conducted on the subject of the length of the Court's proceedings by different external groups, no known steps have been taken by the different organs and authorities at the ICC to formulate strategies on how to avoid lengthy proceedings. After nearly twenty years of operation, the experiences of the ICC now provide proper perspectives for amendment of the key procedural aspects of the Court's work that cause delays in proceedings. In order for this to materialise, the ASP should engage with the Registry, the OTP, the Presidency and Chambers to obtain their written strategies on avoidance of lengthy proceedings. The formulation of such strategies by the different organs of the Court will put into proper perspective the recommendations and outcomes of the previously taken steps to address the Court's lengthy proceedings.

5.2.2 Charges and Judicial Re-characterisation of Facts

Responsibility: OTP, Presidency

The DCC continues to create a lot of uncertainties in the Court's work, as each Chamber and the Prosecution have distinct perspectives on what it should include. This is because there are no explicit rules on how it should be framed, and each Chamber follows its own process. This creates challenges for the OTP which must not only deal with the issues of each new case, but also contend with the expectations of each new Chamber.

In order to address this challenge, the OTP, in cooperation with the Presidency, must adopt a set of guidelines on the scope, structure, content and means of creating the DCC. A useful starting pointing will be for the OTP to implement the best practices identified in previous situations and cases. In particular, the guidelines should make provisions to ensure that the selection of charges is clear and specific to the situation under investigation. Moreover, the guidelines should discourage long lists of charges and forms of liability. This will give the Chambers clarity regarding what it can expect from the confirmation hearing and enable it to be ready for the whole proceedings.

5.2.3 Redactions and Other Protective Measures

Responsibility: OTP, Presidency

There are a few legally binding rules on redaction procedures at the ICC. Although the Chambers Practice Manual has set out a recommended procedure since 2016, Chambers have in many cases developed redaction protocols according to the facts of specific cases. Hence, their contents can alter substantively not only between cases, but even between stages of the same case, notwithstanding the instructions in the Chambers Practice Manual. The Court's redaction and disclosure regime leaves a lot to be desired.

The Presidency and the OTP should collaborate to redesign the redaction regime. It will be necessary to identify best practices on redaction and disclosure and adopt such practices to create comprehensive provisions, making them mandatory for everyone. Key issues to be addressed include the extent of redaction necessary to protect the person or information in question, whether and which redactions can be made without seeking a Chamber's permission in advance, and when once-necessary redactions should be lifted; all these have been common subjects of regulation and dispute in cases to date. This must subsequently be submitted to the ASP for its approval and will therefore require willingness on the part of States Parties to implement such changes. The adoption of standardised rules on redactions and disclosure, applied consistently with strict deadlines, will help judges and the officials of the OTP to be better prepared for disclosure.

5.2.4 Witnesses and Evidence

Responsibility: Registry, Parties, Chambers

The Registry should play an active role regarding the preparation of each stage of the proceedings. The process of witness familiarisation, preparation of witnesses and experts and other matters should be reviewed and necessary standards applied in order to avoid repeated discussions on the conduct of the proceedings from one Chamber to another and from one stage to the next. Firstly, in relation to the challenge of dealing with remote witnesses, the Court can, where feasible, accommodate them using digital methods by, for instance, inviting witnesses through secured online video tools rather than physically bringing them to The Hague. Although this may not be feasible in all cases, criteria can be developed to determine which category of witnesses can be heard and admitted digitally. Such an approach will be more cost-effective for the Court and more convenient for the witnesses. Secondly, Chambers should encourage the OTP and Defence teams to opt for alternative forms of evidence where possible, to avoid admission of a potentially unnecessarily high number of witnesses.

5.2.5 Victims

Responsibility: Registry

Even though the Court has gradually developed its practice in relation to victims' participation, the Chambers continue to adopt different approaches. The Registry should take the lead in the creation of a binding legal framework regarding victims' participation modalities. This framework should be established aiming to provide a clear and transparent process of selection. The Presidency should also coordinate and ensure the coherent selection of the participants in each stage of the proceedings.

5.2.6 Orality v. Written Statements

Responsibility: Chambers

Simpler means of decision-making, such as oralisation or electronic communication of minor applications, such as applications for amendment of documents, applications for extension of time, submissions in relation to review of detention, and requests for information, should be considered in the standard practice of the Chambers and be included in the new binding framework.

5.3 Conclusions

Delivering justice is a complex endeavour; it is even more difficult to deliver international justice. Even before the creation of the Nuremberg International Military Tribunal, the ideas connected to individual criminal responsibility had gradually been shaped by different experiences from warfare.[1100] Nevertheless, the results of this study indicate that, even today, those ideas have not yet merged into a uniform legal framework. Approaches to international criminal proceedings lead to clashes and to lengthy litigation.[1101]

As has been analysed in this project, concerns about the length of international criminal proceedings are not new.[1102] From the very beginning, a multitude of potential and then real problems arising from lengthy trials was raised in various reports. Numerous experts and academics provided recommendations and, in some cases, improvements were made as to specific aspects; other matters such as the *raison d'être* of the confirmation phase remain open. Although there are some difficulties with the legal framework of the ICC, where misunderstandings or unclear framework can cause lengthy discussions, the human factor at the ICC proceedings remains one of the crucial points to consider in addressing the problem of lengthy proceedings.

The international criminal justice system has particularities represented by the tribunals and legal systems in which it operates, and in this regard the ICC is not an exception. As the only Court working in a global environment with actors that do not always make things easy and smooth-running, the ICC has particularities not shared by other courts and tribunals.[1103] In this project it was possible to find other examples of criminal proceedings to compare the time invested in cases with similar jurisdictions *ratione materiae*. The comparative time spent on different criminal proceedings which have similarities with the ICC shows that international criminal proceedings are similar to national proceedings based on universal jurisdiction in being long. Those other proceedings also include similar challenges, but how these challenges manifest themselves in legal and procedural difficulties is different.

When comparing the cases at the ICC with each other, the proceedings appear to be long, but it is hardly possible to identify any time within the proceedings when there is no activity by the parties. There are factors which either seriously affect the length of proceedings or contribute to this. There are, however, also factors which suspend the proceedings. These include, for example: disclosure, remoteness of witnesses, review of the evidence, withdrawals of the witnesses and amendment of the DCC.

As has been highlighted in this report, the need to accelerate proceedings results from the need for parties and participants to achieve justice in a reasonable time. On the other hand, the ICC's legal framework coupled with the human factor, charges and judicial re-characterisation of facts, redactions and other protective measures, witnesses and evidence related processes and other factors at the international level add elements of complexity to the lengthy proceedings.

By way of comparison and contrast, other manifestly different courts – such as the European Court of Human Rights, the Inter-American Court of Human Rights or the International Court of Justice, which have been operating for several decades now – have an established practice in dealing with international cases and yet there are still disparities in the length of proceedings in each one of them, bearing in mind the different nature of those courts.

[1100] On the origins of individual criminal responsibility, see Greppi (1990).
[1101] See Chapter 2.3.
[1102] See Chapters 2.6, 2.1, 2.2 as well as the Bibliography.
[1103] See Chapter 2.4.

This report's recommendations represent possibilities and new approaches for the ICC organs to consider as to what direction to take if they want to move faster and invest their time better. Governments of States Parties and Non-States Parties both have an important role to play in the implementation of changes. In this process, the executive branch of States will be directly concerned, but the responsibility cannot be limited to them. These recommendations can also be analysed by officials of the legislative and judiciary branches aiming to enhance and strengthen the ICC's work.

The list of recommendations will hopefully inspire actions towards sustained support for the Court, in line with the objectives in the UN Resolution "Transforming our world: the 2030 Agenda for Sustainable Development"[1104] and especially "Sustainable Development Goal 16" which aims to strengthen relevant national and international institutions, including through international cooperation, for building capacity at all levels for the rule of law and the fight against impunity.

[1104] United Nations General Assembly, Seventieth Session, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 Oct 2015.

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