

# THE INTERNATIONAL CRIMINAL COURT REVISITED: AN AMERICAN PERSPECTIVE

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## I. INTRODUCTION

The participation by the United States in the International Criminal Court (ICC) has been the subject of much discussion and disagreement. Many have argued that the goals of the ICC are goals that America should embrace.<sup>1</sup> The Preamble to the Rome Statute (Statute) recognizes the serious nature of crimes that threaten world peace and clearly defines the need to bring perpetrators to justice. Most Americans understand and agree with those goals.

However, opposition to the ICC coalesces around two distinct concerns. First, there exists an understandable fear that United States' leaders and soldiers could be charged and tried for crimes brought for political reasons given the United States' position and influence in the world. The second concern is that by submitting to the ICC's jurisdiction, U.S. citizens would be subject to trial without the protections contained in the United States' Constitution.<sup>2</sup> When authorizing the United States signing the Rome Statute, President Bill Clinton stated:

The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.<sup>3</sup>

The Obama Administration seems to have adopted a policy of principled engagement with international

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1. See Stephen Kaufman, *New U.S. Cooperation for International Criminal Court*, America.gov (June 2, 2010), <http://www.america.gov/st/peacesec-english/2010/june/20100602160754esnamfuak0.7448694.html> (arguing the U.S. should become a party to the ICC).

2. Jennifer K. Elsea, CONG. RESEARCH SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 6, 7, 9 (2006).

3. William Jefferson Clinton, President of the United States, Statement on the Signature of the International Criminal Court Treaty, Washington, D.C., at 1 (Dec. 31, 2000), 37 Weekly Comp. Pres. Doc. 4 (Jan. 8, 2001), available at <http://usinfo.state.gov/topical/pol/usandun/00123101.htm>.

institutions and recently participated in the ICC conference in Kampala, Uganda.<sup>4</sup>

This paper argues that the ICC, as it is currently established, operated and by the interpretation given to the Statute, falls short of the basic protections and expectations that have been ingrained in all Americans. These shortcomings include the selection and education of competent trial judges and protection of the rights of the accused.

## II. JUDGES

The success or failure of the ICC depends largely on the judges who hear and decide the cases involving genocide, war crimes, and crimes against humanity. The abilities they bring to the bench must assure that justice will be dispensed impartially and efficiently. Without a competent bench, the ICC cannot achieve the hopes envisioned for it by the signatories to the Statute.

### *A. Selection of Judges*

The selection of judges to sit at the ICC is a complicated procedure. First, they are elected by the Assembly of States Parties<sup>5</sup> after being nominated by their individual country.<sup>6</sup> This requires an interested party to potentially run two campaigns for election. More importantly, the Statute requires certain minimum qualification for judges. The first general qualification requires candidates to have “high moral character, impartiality and integrity.”<sup>7</sup> Furthermore, the same article requires that a candidate possess the qualifications to be appointed to the highest court in their country.<sup>8</sup>

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4. For an interesting discussion of this policy, see Harold H. Koh, Legal Advisor, U.S. Dep’t of State and Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Engagement With the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 15, 2010), [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm) (discussing events and impressions of the State department officials that participated in discussion on the ICC).

5. Rome Statute of the International Criminal Court art. 36(6)(a), July 17, 1998, 2187 U.N.T.S 90 [hereinafter Rome Statute].

6. *Id.* at art. 36(4)(a).

7. *Id.* at art. 36(3)(a).

8. *Id.*

In the United States, most judges have extensive practical experience in trying cases in the courtroom.<sup>9</sup> The reason for this seems to be self-evident. How can one manage a court, appropriately receive and weigh evidence, rule on motions or competently do what is routinely required of a judge if they have no prior experience in trying cases. Moving from the role of an experienced advocate to the role of a judge is difficult enough. Making that transition without prior experience would be exceptionally difficult. Understanding this concept is important when considering the additional qualifications required of an ICC judge. Article 36 (3) (b) of the Statute provides:

Every candidate for election to the Court shall:

- (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.<sup>10</sup>

Subsection (i) contains the important requirements for a trial judge. However, the Statute does not leave well enough alone. It adds subsection (ii) not with the conjunctive 'and' but with the conjunctive 'or.' Using 'and' would arguably bring to the court as judges individuals with appropriate trial experience but also those with expertise in international law. However, by using the conjunctive 'or,' the Statute allows election of judges who have no trial or courtroom management experience. While one might argue that subsection (ii) would allow the selection of qualified individuals, it does not require it. The Statute contains the definition of crimes,<sup>11</sup> the elements of crimes,<sup>12</sup> the general principles of criminal law<sup>13</sup> and the applicable law to be

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9. Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vand. J. Transnat'l L. 1083, 1113-14 (2008).

10. *Id.* at art. 36(3)(b).

11. *Id.* at arts. 6-8.

12. *Id.* at art. 9.

13. *Id.* at Part III.

applied.<sup>14</sup> Given this comprehensive statutory framework of the Statute, there appears to be a limited need for experience in international law alone.

How in reality has the selection process worked? Most judges at the ICC have impressive credentials in their own fields. The question remains whether that is sufficient for a trial or appellate judge hearing some of the most important criminal trials in the world. The Court is divided into three divisions: Pre-Trial, Trial and Appeals.<sup>15</sup> The following table indicates the current assignment of judges at the ICC.

Table 1

<u>Pre-Trial Division</u> <sup>16</sup>	<u>Trial Division</u> <sup>17</sup>	<u>Appeals Division</u> <sup>19</sup>
Fernández de Gurmendi (Argentina)	Joyce Aluoch (Kenya)	Erkki Kourula (Finland)
Hans-Peter Kaul (Germany)	Bruno Cotte (France)	Akua Kuenyehia (Ghana)
Sanji Monageng (Botswana)	Fatoumata Diarra (Mali)	Daniel Nsereko (Uganda)
Sylvia Steiner (Brazil)	Sir Adrian Fulford (United Kingdom)	Sang-Hyun Song (Republic of Korea)
Cuno Tarfusser (Italy)	Elizabeth Odio Benito (Costa Rica)	Anita Ušacka (Latvia)
Ekaterina Trendafilova (Bulgaria)	Kuniko Ozaki (Japan)	
	Christine Van den Wyngaert (Belgium)	
	[René Blattman (Bolivia) <sup>18</sup> ]	

14. *Id.* at art. 21.

15. *Id.* at art. 34(b).

16. *Pre-Trial Division*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Pre+Trial+Division/>.

17. *Trial Division*, INT'L CRIM. CT., <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB>.

The Pre-Trial Chamber of the Court operates essentially as a protection against an overzealous prosecutor through the confirmation of charges process.<sup>20</sup> That Chamber must confirm or deny the prosecutor's request for charges.<sup>21</sup> In essence, it acts like a United States court in determining whether there is sufficient evidence to proceed to trial through a preliminary hearing.<sup>22</sup> Of these judges, only Judges Steiner and Monogeng have previous judicial experience.<sup>23</sup> Judges Trendafilova and Tarfusser have previous experience as prosecutors.<sup>24</sup> Judge de Gurmendi has no judicial experience and Judge Kaul was a diplomat.<sup>25</sup>

The Trial Division has eight judges, which are divided as needed into three judge panels.<sup>26</sup> Of these judges, six have some degree of judicial experience at either the domestic level or at another international criminal tribunal.<sup>27</sup> Judges Ozaki and Blattman have no judicial experience and little if any trial experience.<sup>28</sup>

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18. Judge Blattman's term ended in 2009, but he will remain in office until the completion of the *Lubanga* trial, as permitted in Rome Statute, *supra* note 5, at art. 36(10).

19. *Appeals Division*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Appeals+Division/>.

20. Rome Statute, *supra* note 5, at art. 61(7) (identifying the rulings the Pre-Trial Chamber may make on the evidence).

21. *Id.*

22. *See*, FED. R. CRIM. P. 5.1(e) (rule on hearing and finding at the preliminary trial).

23. Judge Steiner served on the Brazilian Federal Court of Appeal. Judge Monogeng served on the High Court of the Republic of the Gambia. *Pre-Trial Division*, INT'L CRIM. CT., *supra* note 16.

24. Judge Trendafilova was a deputy district attorney at the Sofia District Court. Judge Tarfusser was Chief Public Prosecutor of the Bolzano District Court. *Pre-Trial Division*, INT'L CRIM. CT., *supra* note 16.

25. Judge de Gurmendi was Director General for Human Rights at the Argentinean Ministry of Foreign Affairs. Judge Kaul was Ambassador and Commissioner of the Federal Foreign Office for the International Criminal Court. *Pre-Trial Division*, INT'L CRIM. CT., *supra* note 16.

26. Rome Statute, *supra* note 5, at art. 39.

27. Judge Aluoch served on the Kenyan Court of Appeals. Judge Cotte served as President of the Criminal Chamber of the *Cour de Cassation*. Judge Fulford is a High Court Judge of England and Wales on secondment. Judges Diarra, Odio Benito, and Van den Wyngaert all served as judges on the International Criminal Tribunal for the former Yugoslavia. *Trial Division*, INT'L CRIM. CT., *supra* note 17.

28. Judge Blattman served as Bolivian Minister of Justice and Human Rights. Judge Ozaki worked as Director for Treaty Affairs for the United Nations Office on Drugs and Crime. *Trial Division*, INT'L CRIM. CT., *supra* note 17.

The Appeals Division is composed of five judges.<sup>29</sup> Judges Song and Kuenyehia are academics with no previous judicial experience before being elected to the ICC.<sup>30</sup> Judges Kourula, Ušacka and Nsereko have either judicial or trial experience.<sup>31</sup>

### B. *Judicial Experience*

It is apparent that six of the nineteen<sup>32</sup> judges sitting on the ICC, or almost 33% of the bench, have little if any experience in a courtroom either as a judge or an advocate. This appears to be an intended result of the Statute.<sup>33</sup> The Statute requires judges to choose to be listed either on the A list (experience in criminal trials or procedure) or the B list (experience in international law).<sup>34</sup> The first election required that there be nine judges from the A list and five from the B list.<sup>35</sup> Furthermore, subsequent elections should maintain that proportion.<sup>36</sup> There may be a justification for including international law experts on the ICC bench, but only if they were assigned to the Appeals Division. It has been suggested that this may have been the unwritten intent of the statute.<sup>37</sup> However, it is important that appellate judges understand the difficulties and issues presented to a trial court. The skill set necessary to be a competent trial judge is significantly different than those required of an academic or an appeals judge. Trial judges do

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29. Rome Statute, *supra* note 5, at art. 39.

30. Judge Song was a Professor of Law at Seoul National University Law School, but started his career as a judge-advocate in the Korean army. Judge Kuenyehia served as the Dean of the University of Ghana, but does have some experience as a solicitor of the Supreme Court of Ghana. *Appeals Division*, INT'L CRIM. CT., *supra* note 19.

31. Judge Kourula was a district judge in Finland. Judge Ušacka served as a judge on the Latvian Constitutional Court. Judge Nsereko worked as a civil and criminal defense attorney in Uganda and was on the List of Counsel eligible to appear before the ICC. *Appeals Division*, INT'L CRIM. CT., *supra* note 19.

32. Including Judge Blattman.

33. Rome Statute, *supra* note 5, at art. 36(3)(b).

34. *Id.* at art. 35(5).

35. *Id.*

36. *Id.*

37. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 346 (3rd ed. 2007) ("Reading between the lines, the Statute seems to be saying that the more practically oriented criminal law specialists should focus on trials, while their more cerebral brethren in the international law field should focus on appeals.").

not have the luxury of time to ponder at great length the issues that come before them. If they did, trials would become lengthy academic debates rather than an efficient administration of justice. Trial judges who lack trial experience will have to learn the art of being a trial judge at the expense of those whose cases are being heard. Similarly, in the Pre-Trial Division, two of the seven judges lack the legal experience necessary for the efficient operation of that division.<sup>38</sup>

A central concern to the United States before agreeing to the jurisdiction of the Statute should be that any American coming before the ICC will face experienced and capable jurists. While it is true that many American judges must learn their craft, they typically will never have assigned to them a complicated or highly controversial case prior to gaining the necessary experience. But at the ICC, all cases entail complicated facts, controversial situations and defendants whose status is unlike the typical street criminal. For example, the *Katanga* and *Ngudjolo* cases involve multiple counts of crimes against humanity and war crimes.<sup>39</sup> In *Lubanga*, the defendant was charged with enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.<sup>40</sup> Unless they have served on another international criminal tribunal, most judges will have no experience trying these types of cases. America cannot allow its high-ranking civilian or military officials to be brought to trial before judges who simply lack the critical skills required of a trial judge in complicated and controversial cases. To do so would place them in jeopardy simply due to the inexperience of judges who hold the fate of those individuals in their hands.

### C. Judicial Systems

A further complication that must be carefully reviewed is the systems from which these judges are selected. The drafters of the Statute attempted to craft a system that

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38. Specifically Judges de Gurmendi and Kaul, *supra* note 25.

39. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008).

40. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Jan. 29, 2007).

embodies parts of both the civil law and common law systems.<sup>41</sup> This almost impossible task has created additional problems for the ICC judges.

For example, at the ICC, the Pre-Trial Chamber hears evidence and confirms charges against defendants.<sup>42</sup> This system comes from the civil law countries. This procedure is designed to protect defendants from defending charges that are not supported by “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”<sup>43</sup> The Chamber does not simply decide whether the charges requested by the prosecutor are legally sufficient, it may change or alter the prosecutor’s theory of the case.<sup>44</sup> In this role, the judges seem more like prosecutors than neutral judges. In most American jurisdictions, the prosecutor files charges and their evidentiary sufficiency can be challenged in probable cause proceedings. In the federal courts, the prosecutors must present evidence to support their request for felony charges to a grand jury.<sup>45</sup> The grand jury can then issue an indictment or not. In the U.S. system, the decision as to which charges to bring and the theory of criminal responsibility rests solely with the prosecutor. At the ICC, the Pre-Trial Chamber inserts itself into this role.

Another example that causes difficulty is the type of legal system to which each judge is accustomed. Twelve judges are from civil law countries,<sup>46</sup> four judges from common law countries<sup>47</sup> and three from arguably mixed systems.<sup>48</sup> The

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41. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27 (2001) (discussing the development of the Rome Statute).

42. Rome Statute, *supra* note 5, at art. 61.

43. *Id.* at art. 61(5).

44. *See, e.g.*, Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, para. 469–71 (Sept. 30, 2008) (holding that because the defendants were tried together as principals in the offense, there was no value in an accessory charge).

45. FED. R. CRIM. P. 7.

46. Judges Blattman (Bolivia), Cotte (France), Diarra (Mali), de Gurmendi (Argentina), Kaul (Germany), Kourula (Finland), Odio Benito (Costa Rica), Steiner (Brazil), Tarfusser (Italy), Trendafilova (Bulgaria), Ušacka (Latvia) and Van den Wyngaert (Belgium). *Legal Systems*, THE CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

47. Judges Aluoch (Kenya), Fulford (United Kingdom), Kuenyehia (Ghana), and Nserko (Uganda). *Id.*

ICC has characteristics from both systems. For example, the office of the prosecutor investigates crimes and sets forth the charges it wishes to bring before the Pre-Trial Division.<sup>49</sup> This function is similar to common law countries. However, in civil law countries, the power to investigate is controlled by the judge.<sup>50</sup> In civil laws countries, judges typically have all of the evidence before them before the trial begins.<sup>51</sup> Since they have already determined the relevance of that evidence, objections on admissibility of evidence are rarely heard.<sup>52</sup> By contrast, in common law jurisdictions, judges typically do not see the evidence before pre-trial motions or trial and are required to rule on the admissibility of evidence regularly.<sup>53</sup> In the ICC, only two of eight trial judges, Aluoch and Fulford, come from common law countries.

At the ICC, any trial judge from a civil law system has been thrust into an adversarial trial system in which the judge has no expertise, necessitating on the job learning. This necessarily requires exercising more caution to avoid errors. While some may argue that the ICC is not an adversarial system, a close examination of the trials occurring at the ICC today would indicate the contrary. The Trial Chamber has issued written decisions on questions of admissibility that could easily be decided in the courtroom. For example, a decision was issued on 15 July 2010 on a request to admit prior recorded testimony. This decision was ten pages in length.<sup>54</sup> The record is replete with written decisions on various motions that common law judges would have handled orally from the bench.<sup>55</sup> These written

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48. Judges Monageng (Botswana), Ozaki (Japan), and Song (Republic of Korea). *Id.*

49. Rome Statute, *supra* note 5, at arts. 42, 53, and 54.

50. See Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 840 ("Civil law jurisdictions predominantly conceive the judge as a public official whose role is to investigate the truth . . . [The judge is] able to pursue lines of investigation and produce evidence . . .").

51. *Id.*

52. *Id.*

53. *Id.* at 843.

54. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2233, Decision on Request to Admit Prior Recorded Testimony of P-30 as well as Related Video Excerpts (June 30, 2009).

55. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2233-Corr, Corrigendum to the Decision on Request to Admit Prior Recorded Testimony of P-30 as well as Related Video Excerpts (June 30, 2009); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-1728, Decision on the Communication of P-

decisions cause delay in the proceedings since the decisions have to be drafted and circulated for review and approval among the judges.<sup>56</sup> This process is more akin to an appellate court than a trial court. It would be more efficient and eliminate delay if the presiding judge of each trial chamber made all rulings concerning admissibility. These delays are inherent in a system where experienced jurists in one system are required to operate within the boundaries of another system that is foreign to them. With delays come increased costs for defense counsel and their staff. The court's 2008 legal defense budget for Katanga totaled €472,459 of which €128,103 were for three months of trial.<sup>57</sup> Similar costs for Ngudjolo totaled €442,309 with €128,103 for trial.<sup>58</sup>

#### D. *Education of Judges*

This experiment of utilizing parts of the common law and civil law systems has certain inherent problems. However, these problems can be reduced if certain actions are undertaken. First, each judge should have to complete a training program in the theory and operation of the other system. This will assist them in understanding the actions of other judges from that system. Furthermore, civil law judges and non-common law trial judges need to be educated in the decision-making processes and issues that are normal for adversarial proceedings. Also, judges need to be educated in effective trial management in such a system. Second, if the Assembly of States Parties is going to continue electing judges without criminal trial experience, there must be a training course on the skill sets necessary for a trial judge. Third, there should be a program of study to educate judges on the differences in international criminal law and procedure and domestic, national criminal law and procedure. Finally, a yearly educational program should be

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316's Statement (Dec. 17, 2009); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-1817, Order in Relation to the Disclosure of the Identity of P-143 (Feb. 1, 2010).

56. ICC R. PROC. & EVID. 64.

57. International Criminal Court, Assembly of States Parties, 7th Sess., Report on Different Legal Aid Mechanisms before International Criminal Jurisdictions, 29, ICC-ASP/7/23 (Oct. 31, 2008), [http://www.icc-cpi.int/icedocs/asp\\_docs/ASP7/ICC-ASP-7-23%20English.pdf](http://www.icc-cpi.int/icedocs/asp_docs/ASP7/ICC-ASP-7-23%20English.pdf).

58. *Id.*

established on current issues of importance to the ICC. Each of the judges elected to the ICC bench have very strong and impressive curriculum vitae. Should an education program be established and required of newly elected judges, but not current judges, the now existing inefficiencies will merely continue. For the ICC to operate efficiently as a trial court, its judges must better understand the processes and operations of a criminal trial.

Simple election to the ICC bench does not make an individual an effective judicial officer. If judges of the ICC believe that mere election bestows upon them the traits of an effective trial judge, the result is a state of ignorance that the United States best avoid. If the judges of the ICC do not implement an effective training program for themselves, regardless of their background, the United States should not become a signatory to the Rome Statute. While one can understand that the ICC is still developing as an institution, the fact remains that the court has faltered as a judicial body in failing to resolve its cases in a timely and efficient manner.

Finally, there must be recognition from the court itself that the sole purpose of the court is to try defendants charged with the most serious criminal charges. The Court is not a body designed to provide a stage for new and novel theories of law much discussed by academics. Furthermore, it is not an institution to be glorified by diplomats as an international effort to bring the worst among us to justice. Until the Assembly of States assures the election of trial and appellate judges appropriately trained and experienced, the ICC will merely remain a hope of what could be encased in the reality of what it has become.

### III. INDIVIDUAL RIGHTS

During the course of the debate on whether the United States should ratify the Statute, arguments were made that the Statute was consistent with the rights guaranteed by the U.S. Constitution.<sup>59</sup> While these comparisons of the

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59. See, e.g., Monroe Lee *The U.S. Constitution and the ICC*, CITIZENS FOR GLOBAL SOLUTIONS, [http://globalsolutions.org/files/public/documents/ICC\\_constitution.pdf](http://globalsolutions.org/files/public/documents/ICC_constitution.pdf) (comparing language used in the United States Constitution and the Rome Statute of the ICC describing a criminal defendant's rights).

language of the Statute and the U.S. Constitution may be accurate, the interpretation given to the language of the Statute by the ICC differs substantially.

#### A. *Reasonable Doubt*

In the United States, every criminal case has to be proven beyond a reasonable doubt.<sup>60</sup> With few exceptions, all members of a jury must agree that there is no reasonable doubt before a defendant can be found guilty.<sup>61</sup> Leaving aside the fact the Statute does not provide for jury trials, it does provide that a three-judge panel will decide the question of whether the prosecutor has met the necessary burden of proof.<sup>62</sup> If two of the three judges believe the charges have been proven beyond a reasonable doubt, the defendant will be convicted regardless of whether the third judge has a reasonable doubt.<sup>63</sup> Obviously, the statutory requirement of proof beyond a reasonable doubt at the ICC has a significantly different meaning than it does in U.S. courts.

#### B. *Speedy Trial*

The U.S. Constitution guarantees citizens a speedy trial.<sup>64</sup> Some states require trials to begin within a certain period of time from the defendant's first appearance.<sup>65</sup> In Washington

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60. *In re Winship*, 397 U.S. 358, 361–64 (1970) (noting the long history of the requirement in American jurisprudence and holding “explicitly” that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

61. *Apodaca v. Oregon*, 406 U.S. 404, 406, 410–14 (holding explicitly that unanimity is not required for state criminal juries because the jury's role of providing “between the accused and his accuser . . . the commonsense judgment of a group of laymen” is “equally well served” by unanimous and non-unanimous verdicts; because the Sixth Amendment does not require unanimity; because the Fourteenth Amendment forbids only “systematic exclusion of identifiable segments of the community from [juries];” and because the Court could not assume in the absence of proof that jury verdicts decided by a mere majority vote would necessarily ignore the arguments for acquittal of the minority jurors). Federal criminal jury verdicts must be unanimous. FED. R. CRIM. P. 31(a).

62. Rome Statute, *supra* note 5, at art. 39(2)(b)(ii).

63. *Id.* at art. 74(3) (providing merely that “[t]he judges shall *attempt* to achieve unanimity in their decision,” but requiring only a majority vote) (emphasis added).

64. U.S. CONST. amend. VI.

65. *E.g.*, *State v. Naveira*, 873 So.2d 300 (Fla. 2004) (discussing the requirements of the Florida statute, which requires trial within 175 days of arrest and holding that the statute had not been violated where trial had been scheduled

State, a defendant in custody has the right to be brought to trial within sixty days if in custody and ninety days if not in custody.<sup>66</sup> While these deadlines are frequently waived by the defendant or, under certain circumstances, increased by the judges, courts normally require exactly what the state rule or constitution demands.<sup>67</sup>

The Statute also requires a defendant to be brought to trial without undue delay.<sup>68</sup> At the ICC, the reality of a speedy trial is quite different. In the *Lubanga* case, the defendant was taken into custody on 17 March 2006.<sup>69</sup> Charges were confirmed on 29 January 2007.<sup>70</sup> His trial began on 26 January 2009.<sup>71</sup> Germain Katanga was taken into custody on 17 October 2007, charges were confirmed on 30 September 2008<sup>72</sup>, and trial began on 24 November

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within that time period and the defendant had filed a continuance claiming to be unprepared to proceed to trial); *State v. Broughton*, 581 N.E.2d 541 (Ohio 1991) (discussing a similar rule); *People v. Bagato*, 188 N.E.2d 716 (Ill. 1963) (holding that a statutory right to trial within a certain time of arrest was not violated where defendant's actions had caused delay); *State v. Stimson*, 704 P.2d 1220 (Wash. Ct. App. Div. 3 1985) (holding that the defendant's constitutional right to a speedy trial was not violated where defendant established no prejudice and had remained silent when the statutory period expired).

66. WASH. REV. CODE ANN. § 10.3.3 (West 2002).

67. See, e.g., *Naveira*, 873 So.2d at 307–08 (holding that “the trial court erred in granting the motion for discharge” because “Naveira was not ready for trial on the date trial was scheduled and . . . requested a continuance; thus, he was unavailable for trial under subdivision (k) and was not entitled to be discharged” and that “mere fact that Naveira had to elect between a speedy trial under the rule and adequate preparation, however, did not violate his constitutional rights”); *Broughton*, 581 N.E.2d at 544–47 (discussing the legal effect of the Sixth Amendment's guarantee of the right to a speedy trial and its relevance in analyzing the state statute at issue in the case); *Bagato*, 188 N.E.2d at 719–20 (holding that a grant of continuance on defendant's motion did not cause a delay sufficient to trigger operation of a statute mandating trial within a four-month time frame and noting that because constitutional concerns would be raised in a case in which prosecutors hypothetically claim defendant filed a continuance in order to obtain more time to prepare for trial, in the obverse, defendant could not raise constitutional issues where any delay was self-inflicted); *Stimson*, 704 P.2d at 387–90 (acknowledging that “while founded upon the constitutional right to a speedy trial, the 60-day trial rule for a defendant in custody prescribed by [state statute] is not of constitutional magnitude” and holding that defendant's constitutional right to a speedy trial was not adversely affected where counsel failed to alert the court that defendant's trial was scheduled for a date beyond the sixty day window).

68. Rome Statute, *supra* note 5, at art. 67(1)(c).

69. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

70. *Id.*

71. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Transcript of the Trial Court (Jan. 26, 2009).

72. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

2009.<sup>73</sup> Mathieu Ngudjolo Chui entered custody on 6 February 2008.<sup>74</sup> Since he is being tried with Katanga<sup>75</sup>, the dates of his confirmation of charges and trial are the same as Katanga's.

Of particular concern are the actions of the Pre-Trial Chambers. They have been given a relatively simple task of determining the sufficiency of the evidence. However, they have taken this simple statutory mandate and transformed it into a time consuming and cumbersome task. The charging documents, the Confirmation of Charges cited above, is 226 pages in length in the *Katanga* and *Ngudjolo* case and 157 in *Lubanga*.<sup>76</sup> This procedure, which allowed the defendants to be held in custody from seven months to nearly a year prior to charges being confirmed, is unjust at best.

As of August of 2010, none of the three trials has concluded. Prior to the start of trial, Mr. Lubanga was in custody nearly three years.<sup>77</sup> Mr. Katanga was in custody more than two years and Mr. Ngudjolo 21 months prior to commencement of trial.<sup>78</sup> Clearly, this is not acceptable under American jurisprudence. Furthermore, there is no justification to allow an American citizen to be held in confinement for years prior to the commencement of trial. One can only wonder whether there exists an unconscious pressure to convict in order to justify the lengthy confinement of the defendants.

### C. Hearsay

In the United States, hearsay is not admissible unless it falls within an exception to the hearsay rule.<sup>79</sup> However, at

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73. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Transcript of the Trial Court (Nov. 24, 2009).

74. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

75. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Joinder of the Cases against Katanga and Ngudjolo (Mar. 10, 2008).

76. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

77. Mr. Lubanga was held Mar. 17, 2006–Jan. 26, 2009. *Supra* notes 70–72.

78. Mr. Katanga was held Oct. 17, 2007–Nov. 24, 2009. *Supra* note 73. Mr. Chui was held Feb. 6, 2008–Nov. 24, 2009. *Supra* notes 73–75.

79. FED. R. EVID. 802.

the ICC, hearsay evidence is allowed and the only protection for the defendant is that the court must consider the probative value of the hearsay evidence.<sup>80</sup> The United States considers hearsay evidence to be inherently unreliable since the maker of the statement is not before the court, under oath, and subject to cross-examination.<sup>81</sup> Without cross-examination, the four risks of a witness's testimony for truthfulness, the perception, memory, narration, and sincerity, cannot be tested.<sup>82</sup> At the ICC, however, a defendant must rely on the judges to appropriately decide if there is reliability to a hearsay statement. These two approaches are significantly different. The decisions of the ICC allowing hearsay evidence to be introduced place potential American defendants at risk in a manner that U.S. courts simply would not allow.

#### D. Confrontation

Closely aligned with the hearsay rule is the right to confront ones accusers as guaranteed by the Sixth Amendment to the U.S. Constitution. If an out of court statement does not fall within the exceptions to the hearsay rules, it is not admissible. Furthermore, if the statement is testimonial in nature, it would not be allowed as a violation of the confrontation clause.<sup>83</sup> The Statute seems to provide defendants with the right to confront witnesses against them by cross-examination.<sup>84</sup> However, in the ICC, a hearsay statement would be admissible and would result in the denial of a defendant's right to cross-examine. At the ICC, the right to confront is only one factor in determining the probative value of the statement.<sup>85</sup> A defendant's right to confront the witnesses against them is so fundamental to the American concept of justice that the approach adopted by the ICC is not an option.

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80. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges ¶ 118 (Sept. 30, 2008).

81. See FED. R. EVID. art. VIII advisory committee's note.

82. See *id.*

83. Crawford v. Washington, 541 U.S. 36, 54–57 (2004).

84. Rome Statute, *supra* note 5, at art. 67(1)(e).

85. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 109 (Sept. 30, 2008).

*E. Double Jeopardy*

The concept that one cannot be placed in jeopardy of a criminal conviction after being found not guilty of the crime runs deep in the American experience. For good reason, this protection against double jeopardy was embodied in the Fifth Amendment to the U.S. Constitution.<sup>86</sup> The Statute seems to address this issue in Article 20 (1) which states: "Except as provided in this statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."<sup>87</sup> However, when one examines the section on Appeal and Revision, a different result emerges.<sup>88</sup> When the Trial Chamber decides the guilt or innocence of a defendant, it must issue a written judgment that contains a full and reasoned statement as to its findings on the evidence and its conclusions.<sup>89</sup> It is at that point that the Trial Chamber, much like a jury in the United States, weighs the probative value of the evidence and the credibility of the witnesses. In the United States, if the jury reaches a verdict of not guilty, the defendant is free from further criminal liability for those actions on which the charges are based.

At the ICC, however, the prosecutor may appeal a factual determination made by the Trial Chamber.<sup>90</sup> If the Appeal Chamber determines that a verdict of not guilty was materially affected by an error of fact, it may reverse or amend the decision<sup>91</sup> or order a new trial before a different Trial Chamber.<sup>92</sup> Because of this statutory framework, a defendant can be found guilty by the Appeals Chamber without ever having heard the live testimony of a witness. The question must be asked: how can one judge the credibility of witness without having the opportunity to observe their testimony in person?

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86. U.S. CONSTT. amend. V.

87. Rome Statute, *supra* note 5, at art. 20(1).

88. *Id.* at Part VIII.

89. *Id.* at art. 74(5).

90. *Id.* at art. 81(1)(a)(ii).

91. *Id.* at art. 83(2)(a).

92. *Id.* at art. 83(2)(b).

This issue is addressed in United States' courts by a jury instruction setting forth how this judgment on credibility should be made. A typical instruction reads:

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory; (3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe.<sup>93</sup>

As indicated in the instruction, an important component in determining a witness's credibility is the individual's manner while testifying. A witness's manner, body language and expressions often say more than the words they employ. Yet, in the ICC, the Appeals Chamber may make value judgments on testimony without seeing the person actually testify. More importantly for this discussion, the Appeals Chamber has the authority to convict a defendant after the defendant has been found not guilty by the judges who have observed all the witnesses. While the Statute appears to protect an individual from double jeopardy, one can readily observe that this protection is illusory.

#### *F. Exclusionary Rule*

In the United States, the exclusionary rule prohibits the admission of evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments.<sup>94</sup> This issue is covered in the ICC founding documents:

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93. Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 1.06, available at <http://www.med.uscourts.gov/practices/crjji.97nov.pdf>.

94. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- a) The violation casts substantial doubt on the reliability of the evidence; or
- b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.<sup>95</sup>

Whereas in the United States the purpose of the exclusionary rule is to prohibit police misconduct, the Rome Statute has different purposes. In Article 69(7)(a), the concern is “the reliability of the evidence” rather than the problems arising from the violation.<sup>96</sup> In subsection (b), the concern is “the integrity of the proceedings.”<sup>97</sup> This is more in line with previous justification for the exclusionary rule. However, the Statute requires that the integrity be seriously damaged. Evidently, damage to the court’s integrity not rising to the level of “serious” is acceptable. Article 69(7) simply does not provide the protections against illegally obtained evidence to which Americans are accustomed. Recently, the Appeals Chamber denied an appeal challenging the lawfulness of an arrest on procedural grounds of timely filing.<sup>98</sup> Typically, in the United States, one can raise a constitutional violation at any time.<sup>99</sup> These constitutional protections are so important that procedural limitations to raising them are very limited. Furthermore, the existence of these constitutional protections would not be considered at the ICC in determining admissibility.<sup>100</sup> Also, the ICC has the authority to request the submission of evidence for the determination of the truth.<sup>101</sup> In essence, at the ICC, like many civil law jurisdictions, the search for the truth is more important than the protection of individual

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95. Rome Statute, *supra* note 5, at art. 69(7).

96. *Id.*

97. *Id.*

98. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2259, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” (July 19, 2010).

99. See, e.g., WASH. R. APP. P. 2.5, TEX. R. APP. P. 44.2.

100. Rome Statute, *supra* note 5, at art. 69(8); ICC R. PROC. & EVID. 63(5).

101. *Id.* at art. 69(3).

rights. While this may be a worthy goal, it comes at a price—the lessening of individual protections against government intrusions.

#### IV. CONCLUSION

The selection of judges who have a strong background and experience in the effective and efficient operation of a trial court is a crucial requirement before the United States becomes a signatory to the Rome Statute. While some individuals may not possess that background, a comprehensive education and training program for judges can be developed to overcome that deficiency. The need for appropriate case management skills is apparent at the ICC, but can be easily addressed if the judges embark on an appropriate educational program and thorough and systematic review of court procedures.

The language contained in the Rome Statute seems to offer the same protections contained in the U.S. Constitution. However, it is clear that the constitutional rights enjoyed by citizens of the United States are not similarly protected by the Statute as interpreted by the judges of the International Criminal Court. It is not being argued here that these interpretations are legally wrong or even inappropriate. They are, however, unacceptable from an American perspective. These interpretations simply run counter to the expectations of liberty that we as a people have.

While the hopes and dreams embodied by the Rome Statute are worthy goals, they must be viewed carefully before the United States submits to the jurisdiction of the court. President Clinton warned us correctly that we should observe the court before adopting the Rome Statute. Time has shown us that the court has not met the minimal requirements that citizens of the United States demand. Until those changes have been demonstrated, the United States should continue to observe the court from afar.