Accessible Judgments as a Practical Means to Reengage African Interest and Salvage the International Criminal Court

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Abstract

To ensure its continued viability, the International Criminal Court must find "practical" ways to appeal to its African (and global) audience, options that do not require substantial additional funding or revisions to the Rome Statute while remaining true to fundamental principles of international justice. Subject to such limitations, this article examines the "end product" of the ICC – the judgments authored by the Trial Chambers to date. Unfortunately, these opinions are simply incomprehensible to any but a few specially trained, highly interested stakeholders. They are extraordinarily complex and lengthy and fail to emphasize or address issues that are clearly important to the audiences in states where atrocities have occurred. The article reviews existing judgments and provides suggestions for future improvements, thereby increasing accessibility to African leadership, civil society organizations, and the public at large. Such efforts will contribute to increased legitimacy and, consequently, the long-term impact and relevancy of the Court.

Keywords: ICC judgments, legal writing, Katanga, Ngudjolo, Lubanga.

The International Criminal Court (hereinafter the ICC or "Court") is the product of the best of intentions. It is seeking to meet an obvious need – as failure of the rule of law prevents the worst offenders from being brought to justice by other means. Yet the ICC is facing a crisis. Many of those who could benefit the most from the Court are no longer supportive of its efforts; others who remain engaged are disappointed with its current state. Even the most ardent backers must acknowledge that the Court has failed to meet expectations, particularly those of many Africans. While many have offered varying reasons for the current rift between the ICC and various African countries and segments of their inhabitants, any region that is the sole focus of all current ICC cases would likely have an equally antagonistic relationship with the Court. In the African context, that dis-

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pleasure is rationally grounded, at least in part in the historic relationship between Africa and Western powers.[1] However, similar objections would likely arise, predicated on some other similarly compelling basis, if cases were all situated in another region.

The issues with the ICC, filtered through the varied African perspectives, cannot be easily solved. There are a multitude of factors to be considered, with the Prosecutor's selection of cases in the crosshairs. This article set out to identify practical ways to mend the gap. In short, such ideas must be able to be "used in practice; that can be applied to use" or are "designed for use."[2] As such, any actions which required Assembly of States' intervention, major structure changes, or significant cost were eliminated. Within these constraints and in light of extensive treatment of the role of the Prosecutor elsewhere,[3] the analysis turned to the "end product" itself – *i.e.*, the judgments authored by the Trial Chambers to date.

Legitimacy is the currency which only the public can mint but the Court relies upon for its survival. It can be defined as "the beliefs among the mass public that an international court has the right to exercise authority in a certain domain."[4] The judgments of the Court, while simultaneously determining the fate of an individual, proclaiming broad international criminal law principles, and advertising the benefits of the ICC, are directly, although not exclusively, a means by

1 C. Jalloh, 'Regionalizing International Criminal Law?', *Int'l Crim. L. Rev.*, Vol. 9, 2009, pp. 496-497. *See also* at Section 1.1.

2 *Webster's New Universal Unabridged Dictionary*, 2nd edn, Simon & Schuster, New York, 1972, p. 1413.

3 *See, e.g.*, M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Mich. J. Int'l L.*, Vol. 33, 2012, p. 265 *et seq.*; M. Drumbl, Atrocity, Punishment, and International Law, *Cambridge University Press, Cambridge*, 2007, pp. 151-152; W. Schabas, *An Introduction to the International Criminal Court*, 4th edn, Cambridge University Press, Cambridge, 2011, p. 21; A. Arieff *et al.*, *International Criminal Court Cases in Africa: Status and Policy Issues*, Congressional Research Service, 2 April 2010, pp. 26-27.

4 E. Voeten, 'Public Opinion and the Legitimacy of International Courts', *Theoretical Inquiries L.*, Vol. 14, 2013, p. 414. In Section 2.1 below, a distinction is made between legal and sociological legitimacy. The form of legitimacy discussed in this paper is of the sociological variety, unless otherwise expressly distinguished.

which the public determines its legitimacy.[5] Thus, absent other intervening factors, the better the product, the more public support, and, ultimately, the more legitimacy the Court receives – and vice versa.[6] The effectiveness of the product is, in large part, subjective, as one must understand that "an institution's legitimacy resides in the beliefs that actors have… it matters not what citizens should think, but what they do think."[7] Thus, a clear understanding of the perspective of various audience members allows the Court to tailor its opinions within the confines of the framework of the Rome Statute and, ultimately, build sufficient legitimacy so that the public respects, and complies with, its judgments, even when they believe those judgments are wrong.[8]

To avoid becoming little more than an interesting historical footnote, the Court must take meaningful steps to create and deliver a product that is needed and wanted by its consumer base, thereby enhancing its own legitimacy.

5 S. Dothan, 'How International Courts Enhance Their Legitimacy', *Theoretical Inquiries L.*, Vol. 14, 2013, pp. 456-457 ("A court's legitimacy describes the prevailing view of this public about the quality of the court's judgments."); M. Serota, 'Intelligible Justice', *U. Miami L. Rev.*, Vol. 66, 2012, pp. 649-650 ("while the elected branches of government are able to secure legitimacy qua consent at the ballot box, an unelected and life-tenured federal judicial branch cannot. These judges must instead rely upon the power of persuasion; that is, by providing reasoned justifications for their rulings, judges are able to secure the 'tacit approval and obedience of the governed.' And yet, persuasion demands comprehension at the very least. As such, when judicial opinions are unintelligible to the governed, judges lack the democratic legitimacy that the exercise of reason-giving would otherwise afford them."); but *see* Voeten 2013, p. 435 (among other conclusions, suggesting that significant factors for international court legitimacy is whether individuals trust their national courts and other international institutions). Indeed, given the fact that the ICC has only issued three judgments to date, legitimacy appears primarily derived from other sources; however, as more judgments are issued, it seems likely that legitimacy will become more and more effected by the public's view of those judgments, as they resolve and supersede other bases relied upon to determine legitimacy – *i.e.*, to the extent current concerns are focused on selectivity of prosecutions, the judgments, as the final word of the Court, become the focus of praise or criticism depending on their treatment of the selectivity question.

6 For example, Chief Justice Aloma Mariam Mukhtar has expressed concern that Nigeria's quality of judgments has a direct link to the public's lack of confidence in its judiciary. *See* 'Nigeria: Judgments – Jiggles, Riddles', *Vanguard*, 10 April 2013, available at <www.vanguardngr.com/2013/04/judgments-jiggles-riddles/>; 'Confidence in Judiciary Nose-Diving – CJN', *Vanguard*, 9 April 2013, available at <www.vanguardngr.com/2013/04/confidence-in-judiciary-nose-diving-cjn>.

7 Voeten 2013, p. 414.

8 *See, e.g.*, O. Bassok, 'The Sociological-Legitimacy Difficulty', *J.L. & Pol.*, Vol. 26, 2011, pp. 243-244 (discussing "the Court's 'reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.'… [A]t times, the public may disagree with a certain decision or with the substantive policy reflected in the Court's outputs. This would lower the Court's specific public support. However, the more durable diffuse support transcends the reaction to the specific performance of the Court and remains unscathed. Only sustained disappointment with the Court's decisions can lead to a decline in the Court's descriptive legitimacy.").

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1 The Consumers

Consumers of the judgment include "the parties to the case and their lawyers, courts up and down the appellate chain, the legislative and executive bodies concerned with the applicable law, legal scholars and critics, the press, and the body politic."[9] The public's view of the legitimacy of the Court, predicated on the quality of the court's judgments, "aggregates the views of all the different actors within the public. The aggregation of the views within the public must, however, give the views of different actors varying weight depending on their power to affect the court's interests and the intensity of their beliefs."[10]

Some have suggested a two-tiered approach to judicial writing, with a "primary market" composed of the parties and the court itself and a "secondary market" including any other interested persons.[11] However, such a distinction is predicated on an understanding that "[t]he basic purpose of a judicial opinion is to tell the participants in the lawsuit why the court acted the way it did."[12]

The ICC has much broader stated goals and objectives compared with traditional courts. To justify its existence, especially in its infancy, the ICC specifically recognizes that its purpose is to try "grave crimes that threaten the peace, security and well-being of the world."[13] The judgments of the ICC are intended to have broad effect, promoting accountability for individuals whose acts have affected millions.[14] Indeed, Article 7 is explicitly entitled "crimes against humanity."[15] Thus, every living person is, to one degree or another, a consumer of the ICC's

9 P. Friedman, 'What Is A Judicial Author?', *Mercer L. Rev*., Vol. 62, 2011, p. 538, *citing* R. Blomquist, 'Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82 – Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season', *U. Cin. L. Rev*., Vol. 68, 2000, p. 656. *See also* L. Helfer & A. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', *Yale L. J*., Vol. 107, 1997, p. 312 ("Individuals and their lawyers, voluntary associations, and nongovernmental organizations are ultimately the users and consumers of judicial rulings to redress a particular wrong or advance a particular cause or set of interests.").

10 Dothan 2013, pp. 456-457.

11 R. Aldisert *et al*., 'Opinion Writing and Opinion Readers', *Cardozo L. Rev*., Vol. 31, 2009, p. 17.

12 *Id*.

13 Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 June 1998, entered into force on 1 July 2002, A/CONF.183/9 (as amended) ["Rome Statute"], Preamble.

14 *Id*., Preamble.

15 *Id*., Art. 7.

wares.[16] As a result, it becomes very difficult to suggest that a judgment place any lesser importance on the general public. Moreover, international "courts need public attention. They need to establish their relevance, their integrity, and their effectiveness. To do so, they need to be seen and heard, not just by the legal and diplomatic communities, but also by a broad cross-section of the citizenry of the countries that support them… Without this visibility, the courts run the risk of indifference, leading inexorably to a drop in the support and cooperation from states that are so vital to their success."[17]

The Registry prepared a detailed Strategic Plan for Outreach, which identifies thirteen key demographics which would benefit from different means of communication and points of emphasis.[18] For present purposes, three key groups can be identified. The elite leadership of various countries have the most direct control over cooperation and promotion of the ICC and its investigations. At the same time, such leaders are often the most at risk of prosecution by the ICC.[19] Professionals, academics, and other members of civil society also play a significant role, as they are often influential in the community and potentially able to exert influence on the leadership. Finally, the population at large – often the most affected

16 "If the ICC is to prosper, it must build its legitimacy among relevant audiences--states, nongovernmental organizations (NGOs), affected communities, and the global community… Such legitimacy depends to a significant degree on whether such audiences perceive the Court – primarily the prosecutor but also the judges--as selecting appropriate crimes and defendants for prosecution. If important constituencies view the Court as making the wrong choices, they are likely to withdraw their support from the Court and possibly even seek its destruction. State actors are a particularly important legitimacy audience for the ICC – without their support the Court would have no funding, no defendants to prosecute, and no evidence with which to conduct prosecutions. The support of NGOs is also crucial to the Court's work, which relies heavily on the input of NGO networks for its investigations. Indeed, the globalization of communications increasingly means that an institution's legitimacy depends on the opinions of ordinary citizens around the world. All of these audiences will assess the Court's legitimacy in significant degree according to their evaluations of its selection decisions." De Guzman 2012, pp. 267-268, 278-280 (also addressing the tension between the need to serve the global community and "acting as surrogates for ill-functioning or non-functioning local justice systems.").

17 D. Terris *et al*., 'Toward A Community of International Judges', *Loy. L.A. Int'l & Comp. L. Rev*., Vol. 30, 2008, p. 458.

18 ICC, 'Strategic Plan for Outreach of the International Criminal Court', ICC-ASP/5/12, 29 September 2006, pp. 7-9 (these include the general population; international, regional, and local media; NGO's and civil society groups; victims; government/opposition; traditional and religious leaders; women; children and youth; refugees; legal and academic communities; persons who participated or are participating in hostilities; diaspora; and international governmental organizations, particularly the UN and members of the diplomatic community). It should be noted that "outreach" is limited to communications with affected communities, as opposed to the general public. *See, e.g*., ICC Outreach, available at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx>.

19 *See* K. Roth, 'Africa Attacks the International Criminal Court', *New York Review of Books*, 6 February 2014 (suggesting that leadership in Rwanda, Uganda, and Ivory Coast, among others, are now unsupportive of the ICC because of potential investigations into their own conduct), available at <www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/>.

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by atrocities – must be convinced that the ICC can provide some benefit and that it is not merely a tool of the political elites.[20]

1.1 African States

The Court was the result of an extraordinary series of negotiations by a large number of states over the course of a decade, with African states sending delegations beginning in 1993.[21] Members of the Southern African Development Community met in advance of the Rome Conference, agreeing to consensus principles strongly supporting the creation of the ICC,[22] and the Organization of African Unity took note of the Dakar Declaration and urged Member States to support the creation of the ICC.[23] Forty-seven African states attended the Rome Conference[24] and were well represented in various leadership positions.[25] These states often coordinated activities to wield considerable influence on the process,[26] and it is "beyond doubt that African states had the opportunity to ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible."[27] Ultimately, most if not all of the African states voted in favour of the statute.[28] At present, 34 African states have ratified the Rome Stat-

20 While these groups exist around the globe, the fact that all current cases involve African states and defendants suggests that the instant analysis should similarly focus on issues and concerns of the African audience. However, concerns regarding legitimacy and revamped judgments are equally applicable in other regions, as the principles discussed herein are predicated on tailoring judgments to fit the needs and perspectives of the readers.

21 S. Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in the Negotiations', *African Security Rev*., Vol. 9, 2000, p. 1 (identifying five states); *see also* H. Jallow & F. Bensouda, 'International Criminal Law in an African Context', *in* Institute for Security Studies, *African Guide to International Criminal Justice*, 2005, p. 42 (noting that 14 nations of the SADC had been very active at the time the International Law Commission presented a draft statute to the General Assembly).

22 *Id*.; *see also* M. Du Plessis, 'The International Criminal Court and Its Work in Africa: Confronting the Myths', *ISS Paper* 173, November 2008, pp. 4-5.

23 M. Plessis, 'The International Criminal Court that Africa Wants', Institute for Security Studies, Pretoria 2010, p. 9, available at <www.issafrica.org/uploads/mono172.pdf>. The Dakar Principles were the result of a regional conference in early February 2008, attended by more than 60 Senegalese lawyers, human rights activists, and academics, which set out key principles required for a permanent international criminal court. C. Hofmann, *Learning in Modern International Society: On the Cognitive Problem Solving Abilities of Political Actors*, VS Verlag für Sozialwissenschaften, Wiesbaden 2008, p. 90.

24 Coalition for the International Criminal Court (CICC), 'Africa and the International Criminal Court', undated, available at <www.iccnow.org/documents/Africa_and_the_ICC.pdf>.

25 Maqungo 2000, p. 1; Jallow & Bensouda 2005, p. 43. Lesotho served as a vice-chair of the conference; South Africa a member of the drafting committee; Zambia a member of the credentials committee. *Id*.

26 *Id*.

27 Jallow & Bensouda 2005, p. 43; *see also* Schabas 2011, p. 19 (noting important role played by the SADC).

28 "The vote was not taken by roll call, and only the declarations made by States themselves indicate who voted for what." Schabas 2011, p. 21. However, one commentator has stated that "African states voted in favor of adopting the Statue as agreed in the African group meeting," while another has stated that the "vast majority voted in favor." *Compare* Maqungo 2000, p. 1 and CICC, undated.

ute,[29] and many have been "particularly dedicated to implementing the provisions of the Rome Statue," implementing national legislation addressing atrocity crimes and procedural prerequisites for fulfilling obligations to the ICC.[30]

Twelve years into the operations of the Court, a rift has developed between many African states and the ICC. Rather than fulfilling "Africa's dream for a strong, independent and effective court that would assist it to secure enduring peace through the application of international justice to various conflict or post-conflict situations,"[31] many perceive that the "ICC is rapidly turning into a Western court to try African crimes against humanity… and mainly on crimes committed by adversaries of the United States."[32] The arrest warrant against President Omar Hassan Al Bashir may have served as the final straw.[33] The case was referred to the ICC by the Security Council, as Sudan was not a state party, and the sitting head of state had become the subject of prosecution.[34] Many in Africa found this to be an affront to Sudan's sovereignty to be offensive, particularly where the likelihood of a similar referral against any member, or ally of a member, of the Security Council with veto power would almost invariably avoid such a fate.[35] In both the Sudan and Kenya cases, the African Union called upon the Security Council to defer prosecution[36] (something the United States had previously obtained),[37] yet the Security Council rejected such requests.

Paul Kagame, long-time president of Rwanda and vocal critic of both the ICC and the International Criminal Tribunal for Rwanda recently argued: "This world is divided into categories, there are people who have the power to use international justice or international law to judge others and it does not apply to them… Instead of promoting justice and peace, it has undermined efforts at reconciliation and served only to humiliate Africans and their leaders, as well served the

29 ICC, 'African States', undated, available at <www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx>.

30 A. Triponel & S. Pearson, 'African States and the International Criminal Court: A Silent Revolution in International Criminal Law', *J. L. & Soc. Challenges*, Vol. 12, Spring 2010, p. 105.

31 Jalloh 2009, p. 462.

32 *Id*., quoting M. Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" Is Being Turned into an Assertion of Neo-colonial Domination', *Pambzuka News*, No. 396, 17 September 2008, available at <www.pambazuka.net/en/category.php/features/50568>.

33 *See, e.g*., Du Plessis 2008, p. 2.

34 Jalloh 2009, p. 463.

35 *Id*., p. 491.

36 *See e.g*., AU Decision on the Implementation of the Decisions on the International Criminal Court Doc. Ex.CL/639(XVIII), Assembly/AU/December 334(XVI), 31 January 2011 (also stating that Kenya and Chad's failure to arrest Al Bashir was done pursuant to AU authority). *See generally* J. Isanga, 'The International Criminal Court Ten Years Later: Appraisals and Prospects', *Cardozo J. Int'l & Comp. L*., Vol. 21, Winter 2013, pp. 303-308 (discussing AU/ICC relationship).

37 *See BBC News*, 'Dispute over War Crimes Court Settled', 13 July 2002.<news.bbc.co.uk/2/hi/americas/2125829.stm>; *see also*, UN Security Council Resolution 1422, S/RES/1422, 2002.

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political interests of the powerful."[38] Such sentiment, coupled with the Africa-centric prosecutions (including sitting heads of state), is shared by many of the members of the African Union.[39] While some had pushed for mass withdrawal, the members eventually reached a compromise, agreeing that sitting heads of state should not be subject to prosecution.[40] More recently, the African Union has urged its membership to "speak with one voice" in implementing changes to the Rome Statute in light of the Security Council's refusal to defer proceedings against the presidents of Sudan and Kenya.[41] Even Botswana, the ICC's only ardent supporter in the region, has agreed that a deferral in the Kenyatta and Ruto prosecutions would be appropriate.[42] Subsequently, the charges against

38 AFP, 'Rwanda's Kagame Criticizes "Selective" ICC Justice', *Africa Review*, 16 October 2013, available at <www.africareview.com/News/Kagame-hits-out-at-selective-ICC-justice/-/979180/2034400/-/slkdmf/-/index.html>; *see also* Security Council provisional record of 5158th meeting, UN Doc. S/PV.5158, 31 March 2005, p. 12, quoted in relevant part in R. Cryer, 'The philosophy of international criminal law', *in* A. Orakhelashvili (Ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham 2011, p. 262 (Sudanese representative stating that the ICC is "a tool for the exercise of the culture of superiority and to impose cultural superiority").

39 It is important to note that the anti-ICC sentiment is far from universal across the African continent. In addition to Batswana's dissident position and quiet support from Nigeria, South Africa, and Ghana, as well as the work of numerous civil society organizations, many influential voices, including those of former UN Secretary General Kofi Annan and Archbishop Desmond Tutu, have offered their support. *See, e.g.*, J. Mbaku, 'International Justice: The International Criminal Court and Africa', *in* Brookings Institute, *Africa Growth Initiative, Foresight Africa: Top Priorities for the Continent in 2014*, January 2014, p. 10, available at <www.brookings.edu/~/media/Research/Files/Reports/2014/foresight%20africa%202014/Foresight%20Africa_Full%20Report.pdf>; 'AU Leaders at Loggerheads with ICC, Seeking Dialogue with UN Security Council', DW, 14 October 2013, available at <www.dw.de/au-leaders-at-loggerheads-with-icc-seeking-dialogue-with-un-security-council/a-17156996>. Moreover, "[t]o properly understand the AU's apparently hostile relationship with the ICC, it is necessary to separate the body into its constituent parts. On the one hand, there is the AU Commission – the autonomous 'Secretariat of the AU' under the leadership of the chairperson of the Commission. Until recently, the AU Commission was headed by Jean Ping, who became the ICC's most vocal critic during his tenure. In 2012, Ping was replaced by South Africa's Nkosazana Dlamini-Zuma. Separate from the Commission is the AU Assembly of Heads of State and Government, the 'supreme organ' of the AU, a plenary body made up of representatives of all African states. While the Assembly has adopted a number of decisions critical of the ICC, it is important to note that its decisions are usually adopted by consensus, which has resulted in the silencing of dissenting and more moderate voices on the ICC at times. In addition to this, the influence of the AU Commission in the drafting of Assembly decisions has been raised in the past as a contributing factor to the anti-ICC rhetoric contained therein." Southern African Litigation Centre, *Positive Reinforcement: Advocating for International Criminal Justice in Africa*, May 2013, p. 27 (also stating that "relatively few states have adopted outright negative stances towards the ICC.").

40 J. Fortin, 'African Union Countries Rally Around Kenyan President, But Won't Withdraw from the ICC', *International Business Times*, 12 October 2013, available at <www.ibtimes.com/african-union-countries-rally-around-kenyan-president-wont-withdraw-icc-1423572>.

41 African Union, '22nd Ordinary Session of the African Union Assembly Concludes: A Summary of Key Decisions', 31 January 2014, available at <summits.au.int/en/22ndsummit/events/22nd-ordinary-session-african-union-assembly-concludes-summary-key-decisions-0>.

42 M. Dube, 'Botswana Now Backs President Kenyatta on ICC', *Africa Review*, 16 October 2013, available at <www.africareview.com/News/Botswana-now-backs-President-Kenyatta-on-ICC/-/979180/2035074/-/8oytjcz/-/index.html>.

Kenyatta were withdrawn, while the case against Ruto and his co-defendant Joshua Sang continued, albeit at a very slow pace.[43]

1.2 Civil Society

Like many African states, civil society organizations have long been involved in the creation and development of the ICC. In particular, the Coalition for the International Criminal Court wielded significant influence, as it served as the voice for more than 200 civil society organizations from around the globe, with some 450 representatives attending the Rome Conference.[44] Such strong support is ongoing and essential. Indeed, some 163 African civil society organizations and international organizations with representatives in 36 African countries recently signed a letter to foreign ministers of African States Parties to the ICC, urging their respective governments to affirm support of the ICC.[45]

As succinctly noted in a recent publication, one advocacy group emphasized the role of civil society organizations:

> [W]hile it is true that what happens at a regional and institutional level – AU, ICC and Security Council – is an indication of the state of the support for the international criminal justice project, it is not the sole determinant of the project's success or even a true indicator of where individual countries stand. There is a lot of space for civil society to advocate for international criminal justice issues, and there is a dynamic relationship which demonstrates that the international criminal justice project is made up of a number of components, each providing opportunity for CSO involvement. Already, a number of CSO initiatives and advocacy campaigns have been launched in respect of the AU's relationship with the ICC.[46]

In addition, the civil society organizations play a vital role in educating the public at large. Indeed, the ICC explicitly notes its reliance on NGOs for implementing

43 While the Assembly of States Parties rejected a Kenyan request to defer prosecutions against sitting heads of state, it did make certain accommodations, including a change to the Rules of Procedure and Evidence (RPE), Rule 134 to allow for "an accused…who is mandated to fulfill extraordinary public duties at the highest national level" to potentially be excused from personally attending trial proceedings or to attend by video conference. Resolution ICC-ASP/12/Res.7, 27 November 2013, available at <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf>. *See also* B. Van Schaack, 'ICC Assembly of States Parties Rundown', *Just Security*, 27 November 2013, available at <justsecurity.org/2013/11/27/icc-assembly-states-parties-rundown/>.

44 J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', *Pace Int'l L. Rev*., Vol. 11, 1999, p. 367.

45 Human Rights Watch, 'Letter to Foreign Ministers on Support for the ICC in Advance of Extraordinary AU Summit', 4 October 2013, available at <www.hrw.org/news/2013/10/04/letter-foreign-ministers-support-icc-advance-extraordinary-au-summit>; Human Rights Watch, '130 Groups Across Africa Call for Countries to Back ICC', available at <www.hrw.org/news/2013/10/07/130-groups-across-africa-call-countries-back-icc>.

46 Southern African Litigation Centre, May 2013, p. 39, available at <www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Positive-Reinforcement-Advocating-for-International-Criminal-Justice-in-Africa.pdf>.

its public information strategy: "NGOs, and civil society more broadly, are indispensable partners for the ICC public information efforts, particularly at the national level. NGOs play a key role in disseminating information and raising awareness about the Court."[47] As stated by leading rule-of-law advocate Ibrahim Tommy, "[i]nstead of just focusing on the leaders, as has so often been the case, we need to bring the public along through extensive public education and advocacy efforts."[48]

1.3 The General Public

Opinions regarding the ICC are wide-ranging, but more often than not, the general population is simply unaware of the Court and its activities. While the figures are somewhat dated, one of the few broad surveys, involving participants in 67 countries, found limited knowledge of the Court. No country had more than 50% of respondents having both knowledge and a positive opinion of the ICC; in 15 of the countries, less than 10% were aware of and supported the ICC.[49] Of those that did mention the ICC, 45% were supportive while 13% had a negative opinion; only in five countries, including the United States, did those with knowledge have a predominantly negative opinion.[50] Clearly, there is significant work to be

47 Assembly of States Parties (ASP), 'Report of the Court on the Public Information Strategy, 2011-2013', ICC-ASP/9/29, 22 November 2010, para. 49. *See also* International Bar Association, 'ICC External Communications: Delivering Information and Fairness', June 2011 (elaborating on essential role of CSOs in ICC external relations).

48 Southern African Litigation Centre, May 2013, p. 42 (quoting Ibrahim Tommy, Centre for Accountability and the Rule of Law, Sierra Leone).

49 Voeten 2013, p. 427.

50 *Id*. It is well worth noting that the ICC is not alone when dealing with an uninformed consumer base. In the United States, "(1) close to a majority of Americans (45%) either affirmatively believes that the Supreme Court cannot strike down a statute as unconstitutional (22%) or do not know (23%); (2) a near majority (47%) believes that the justices do not regularly give written reasons for their rulings (18%) or do not know (29%); and (3) a majority (53%) believes that a 5-4 decision by the Supreme Court carries a different amount of legal weight than does a unanimous decision, while 39% believe that this split decision must either be referred to Congress for resolution (23%) or reheard by lower courts (16%). Americans even lack basic knowledge of the Court's decisions… 'large segments of the public are essentially ignorant about the Court and its work.' Such high levels of civic illiteracy, and of legal illiteracy in particular, strongly support the otherwise well-established conclusion that the Court's opinions are inaccessible to most Americans." Serota 2o12, p. 660. Similarly, William Schabas notes that "ordinary people in Sierra Leone did not appreciate the distinction between the… [SCSL] and Truth Commission." W. Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *Crim. L. Forum*, Vol. 15, 2004, p. 54. Interestingly, Schabas contends that an understanding of the distinct nature of each body is less important that the fact that "average Sierra Leoneans now understand that there are two institutions working toward accountability for the atrocities and victimisation that they suffered." *Id*. For a general discussion of the effectiveness of the SCSL Outreach Section, *see* S. Ford, 'How Special Is the Special Court's Outreach Section?', *in* C. Jalloh (Ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, Cambridge 2012, available at <ssrn.com/abstract=2021370>.

done to raise awareness of the Court throughout the world, yet ICC resources are focused primarily on affected regions rather than broader audiences.[51]

In Uganda, where parts of the country had experienced atrocities (and the ICC Outreach program had been active),[52] 69% of Ugandans surveyed in 2008 indicated that they had some knowledge of the ICC.[53] However, based on the large numbers that trusted the ICC despite favouring prosecution of both the government and the LRA, it suggests that respondents "cared more about the values the ICC stands for (which would not exempt government abuses) than the actual actions taken."[54] On the other hand, similar percentages that supported amnesty still trusted the ICC, suggesting that "specific knowledge about the ICC may be quite limited."[55] In addition, a 2011 report noted that within the affected sub-regions in Uganda, communities have very different perspectives, as one preferred restorative justice while others favoured retributive punishments.[56] Similarly, time has resulted in victim preference of capacity-building activities over victim participation in ICC proceedings.[57]

Roughly 28% in surveyed regions of the Democratic Republic of the Congo (also a focus of ICC Outreach) had some knowledge of the existence of the Court.[58] In the Central African Republic (again an ICC Outreach target), some 32% of the total population in the study were aware of the ICC.[59] Importantly, in the CAR study, education and wealth were associated with significantly greater awareness and knowledge of the Court.[60] Those in the CAR aware of the Court were highly supportive, although support varied in other states.[61] Finally, the CAR survey reveals that while 51% obtained their information from the radio, 38% relied on friends and neighbours.[62]

It seems reasonable to conclude that those who are illiterate or have very limited education would not be directly affected by written revisions to the Court's product. But given the reliance on radio and community for information,

51 While the "Registry's Public Information and Documentation Section (PIDS) is responsible for implementation of this strategy," *see* ICC-ASP/9/20, 22 November 2010, p. 4, PIDS "seeks to broaden understanding of and support for the mandate and work of the Court, primarily among victims and affected communities from situations and cases before it." ASP, 'Proposed Programme Budget for 2014 of the International Criminal Court', ICC-ASP/20/10, 29 July 2013, 140.

52 *See generally* ICC, 'Outreach in Uganda', undated, available at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/uganda/Pages/uganda.aspx>.

53 Voeten 2013, p. 429.

54 *Id*., p. 431.

55 *Id*.

56 Advocats Sans Frontiéres, *Evaluation of Knowledge and Expertise in International Criminal Justice in Uganda*, November 2011, p. 22, available at <www.asf.be/wp-content/uploads/2012/05/BaselineSurveyReport_Uganda.pdf>.

57 *Id*.

58 P. Vinck & P. Pham, 'Outreach Evaluation: The International Criminal Court in the Central African Republic', *Journal of Transitional Justice*, Vol. 1, 2010, p. 12.

59 *Id*.

60 *Id*., p. 17.

61 *Id*., pp. 19-20.

62 *Id*., p. 11.

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providing a better product, which may lead to a more favourable treatment by media and those with a high level of education, leads to wider positive public opinion.

Regardless of the target audience under consideration, much work is left to be done. While the political leadership in Africa is perhaps the most adverse to the Court, it is obviously not a lost cause – after all, there was no mass exodus after the November AU summit.[63] Many civil society organizations strongly support the ICC, but a better product makes for an easier sell. The general public is in desperate need of education. All of these groups can benefit from a better product.

2 The Product

The States Parties created the ICC, as set forth in the Rome Statute and other key instruments. The Chambers then apply the provisions contained in those documents to conduct trial and appellate proceedings, which ultimately result in a judgment from which the general public (and all other manner of particularly interested parties) must discern what the Court decided and why. The importance of the Prosecutor to the judgment cannot be understated, given the broad discretion vested in that individual by the Rome Statute to open and conduct investigations, determine what charges to bring, and present the case at trial.[64] However, the ICC Chambers have substantial powers at their disposal to address issues arising from the Prosecutor's decision-making. Each of the ICC's three judicial divisions – Pre-Trial, Trial, and Appeals Division – plays a distinct role in the final judgment.

The Pre-Trial Chamber is responsible for many key decisions which have significant effect on the ultimate outcome of a case. When the Prosecutor acts under his/her proprio motu power, he/she must obtain authorization from the Pre-Trial Chamber before opening a formal investigation. Conversely, if a case is referred by the UN Security Council or a state party and the Prosecutor refuses to open an investigation, that decision may be challenged by the relevant party in a hearing before the Pre-Trial Chamber. The Pre-Trial Chamber (as well as the Trial Chamber) often hears issues of admissibility and jurisdiction, as well as requests for arrest warrants or the issuance of summons, both of which require some analysis of admissibility and jurisdictional issues. The issue of complementarity – essentially a determination of whether a state is "unwilling or unable genuinely" to investigate or prosecute a case – is paramount.[65] Particularly given the ICC's role

63 *See DW* 2013; R. Dixon, 'African Leaders Call for International Criminal Court Immunity', 12 October 2013, available at <http://articles.latimes.com/2013/oct/12/world/la-fg-wn-african-union-international-criminal-court-20131012>.

64 *See* note 16.

65 Rome Statute, Art. 17.

as a court of last resort and the state's duty to prosecute such crimes,[66] the Court has taken on cases where countries were sufficiently able to prosecute the cases internally.[67]

The Trial Chamber, as one would expect, is primarily responsible for the actual trial proceedings. The Trial Chamber is responsible for conducting the trial, including the admission of evidence (including evidence not presented by the parties), taking of witness testimony (including witnesses that have not been called by the parties), providing for the protection of witnesses, and any function of the Pre-Trial Chamber.[68] Ultimately, the Trial Chamber will determine whether the accused is criminally liable and, if so, sentence the defendant.[69] These conclusions are set forth in the trial judgment and associated sentencing decision, as well as any appellate opinions of such determinations.

2.1 A Framework for Legal Opinions

Among the responsibilities of the various chambers, drafting of judgments is one of the most significant because they:

- Determine the outcome of the present case while also affecting decisions in future cases with similar facts.[70]
- Ensure that the judges understood the case, including the losing party's position, and acted with neutrality.[71] This is particularly important in a criminal case, where the judgment must espouse the innocence or guilt of a defendant while reflecting the fair and impartial nature of the proceedings.
- "[A]llow judges to communicate with the public…to explain the law to the public."[72] This "communicative function… should be of benefit to society as a whole, representing as it does the transparent and openly democratic functions of [the] legal system."[73]
- Provide foundations for reviews of the decisions that were made, forcing the court to base its decisions "on approved reasons (*e.g.*, statutory requirements) and not on unapproved ones (*e.g.*, bias and prejudice)."[74] Thus the

66 *Id.*, Preamble ("it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes… the [ICC] established under this Statute shall be complementary to national criminal jurisdictions.").

67 The Court has opened cases based on three self-referrals and has received such referrals from both Mali and Ukraine.

68 Rome Statute, Arts. 61 and 64.

69 *Id.*, Arts. 66, 74 and 76.

70 Aldisert 2009, p. 18.

71 J. Maxeiner, 'Thinking Like a Lawyer Abroad: Putting Justice into Legal Reasoning', *Wash. U. Global Stud. L. Rev.*, Vol. 11, 2012, p. 90.

72 G. Lebovits, 'Judgment Writing in Kenya and the Common-Law World', *Kenya Law Review*, Vol. 2, 2008-2010, p. 220; *see also* J. Mbarushimana, 'Supreme Court Judges Train in Judgment Writing', *The New Times*, 5 March 2014 (quoting Rwandan Chief Justice, Prof. Sam Rugege on the need for readers to be able to clearly understand outcomes of judgments), available at <www.newtimes.co.rw/section/article/2014-03-05/73622/>.

73 N. Kearns, 'Some Thoughts on Judgment Writing', *The Irish Times*, 10 November 2008, available at <www.irishtimes.com/news/crime-and-law/some-thoughts-on-judgment-writing-1.907813>.

74 Maxeiner 2012, p. 90.

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opinion "must be coherent with an intelligible value or policy and not measured by a random set of norms."[75]

– Make up for "shortcomings of statutes… legislation cannot always predetermine solutions."[76] Thus, there is room for a judge to make a determination as to the applicability of a provision or the legal consequences of application of the rule. However, they must also be "consistent with valid and binding legal precepts of the legal system."[77]

Despite the significance of the written opinion, the Rome Statute, like the constitutive documents of the ad hoc international penal tribunals that preceded the ICC, provides very limited guidance on the format and content of a judgment. Article 74 addresses aspects of the judgment to a degree:

> 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
>
> 3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
>
> ***
>
> 5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.[78]

Plainly, the requirement that a judgment must be based only on evidence submitted during trial seemingly limits the potential inclusions in the ultimate product. However, the Trial Chamber can call its own witnesses[79] and may take judicial

75 Aldisert 2009, p. 18.
76 Maxeiner 2012, p. 90.
77 Aldisert 2009, p. 18.
78 Rome Statute, Art. 74.
79 *Id.*, Art. 65(4). For example, the Trial Chamber in the Bemba case, called an additional witness who was mentioned in other witnesses' testimony but not proffered by any party. *See Prosecutor v. Bemba*, Order seeking observations on the admission into evidence of written statement of Witness CHM-01, ICC-01/05-01/08-2923, 13 December 2013, at para. 2; *see also Prosecutor v. Bemba*, Decision on the presentation of additional testimony pursuant to Articles 64(6)(b) and (d) and 69(3), ICC-01/05/01/08-2863, 6 November 2013 (specifically addressing its intent to call additional witnesses), and *Prosecutor v. Bemba*, Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1023, 19 November 2010, at para. 5 (noting the potential for calling additional witnesses pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute).

notice of common or known facts,[80] thereby obtaining virtually any additional information that it perceives would be beneficial for inclusion in the judgment. However, to some degree, other factors outside the direct control of the judges contribute to the outcome, as it may be influenced, but certainly not bound, by "persuasive arguments posed by the parties' lawyers and contained in judicial opinions produced in earlier cases."[81]

By and large, it appears that the opinions issued by the Trial Chambers to date have "legal legitimacy," as they objectively comply with the law as revealed by "full and candid exposition of the Court's reasoning."[82] The judges are, after all, elite jurists, with strong analytical skills and a self-awareness of what is at stake. Legal legitimacy, however, is not enough. As discussed above, the ICC carries additional burdens that a typical court does not share.[83] In short, "[t]he function of a trial in the ICC [culminating in the judgment] is… first and foremost, a proclamation that certain conduct is unacceptable to the world community."[84] As a result, the judgment is more than a simple pronouncement of innocence or guilt. To be effective, the judgment must also enhance the Court's legitimacy. "When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[85]

The judgments do not appear to be particularly effective at addressing these broader concerns to a global or regional audience. Application of key legal writing principles, such as the four principles proposed by Stephen V. Armstrong and

80 *Prosecutor v. Ngudjolo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-3, 18 December 2012, para. 37; *Prosecutor v. Germain Katanga*, *Jugement rendu en application de l'article 74 du Statut*, ICC-01/04-01/07-3436, 7 March 2014, para. 71.

81 Friedman 2011, p. 520. However, unlike opinions in an established system, ICC judgments are not just "the latest voice in a never-ending conversation in which they themselves are necessary participants." *Id*. To the contrary, they are breaking new ground and, while relying to some degree on prior cases, have the freedom to create their own dialogue, upon which future cases will build.

82 M. Wells, '"Sociological Legitimacy" in Supreme Court Opinions', *Wash. & Lee L. Rev*., Vol. 64, 2007, pp. 1019-1021, citing, among others, R. Fallon, Jr., 'Legitimacy and the Constitution', *Harv. L. Rev*., Vol. 118, 2005, pp. 1851-1853.

83 *See* Section 1.

84 Du Plessis 2008, p. 3.

85 Wells 2007, p. 1019, quoting Fallon 2005, p. 1795.

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Timothy P. Terrell, will assist in producing a more useful product for end-users, which in turn increases the Court's legitimacy.[86] They include the following:

1 "Readers absorb information best if they can absorb it in pieces."[87]
2 "Readers absorb information best if they understand its significance as soon as they receive it."[88]
3 "Readers absorb information best if its form (its structure and sequence) mirrors its substance (the logic of an analysis, the plot of a story, the theme of an argument)."[89]
4 "Readers pay more attention if you approach your material from their perspective not yours. Therefore, [u]nderstand your readers as thoroughly as possible: their goals, their expectations, their reading habits, their intellectual framework, and what they already know."[90]

2.2 Concerns with ICC Trial Chamber Judgments

While the chambers have substantial flexibility in crafting their orders and judgments, the judgments leave much to be desired, especially in light of such principles.

2.2.1 Digestible Presentation of Information

The three judgments are posted on the ICC website and should eventually be available in all six official languages of the Court.[91] Thus, anyone with Internet

86 There is no universal set of criteria for good legal writing. These principles are merely a starting point for what I believe is a critical and essential discussion. They can and should be supplemented, revised, and even contested by those with differing legal, cultural, and educational perspectives. One particular challenge is the differing emphasis on the importance of the opinion in the common law and civil law traditions. Virtually all of the literature identified on the instant topic comes from common law countries, given the importance (often precedential) of opinions. Within the common law system, many of the principles discussed here have been articulated by scholars and members of the judiciary in a variety of jurisdictions. *See, e.g.*, 'Nigeria: Judgments – Jiggles, Riddles', *Vanguard*, 10 April 2013, available at <www.vanguardngr.com/2013/04/judgments-jiggles-riddles/>; T. Sivagnanam, 'The Salient Feature of the Art of Writing Orders and Judgments', Tamil Nadu State Judicial Academy, 11 April 2010, available at <www.hcmadras.tn.nic.in/jacademy/article/JudgmentWrtTSSJ.pdf>; Lebovits 2008-2010, pp. 219-221; Kearns 10 November 2008; R. Atkinson, 'Judgment Writing', AIJA Conference, 13 September 2002, available at <http://aija.org.au/Mag02/RoslynAtkinson.pdf>. The hybrid nature of international criminal law proceedings suggests that there is much room for growth in opinion writing in this relatively new forum.

87 S. Armstrong & T. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, 3rd edn, Practicing Law Institute, New York 2008, p. 16 (and in detail at Chapter 5). *See also* J. Van Detta, 'The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future from the Roberts Court to Learned Hand – Context and Congruence', *Barry L. Rev.*, Vol. 12, 2009, p. 60 (citing 2003 edition of Armstrong & Terrell 2008).

88 *Id.*, p. 15 (and in detail at Chapter 3).

89 *Id.*, p. 16 (and in detail at Chapter 4).

90 *Id.*, p. 17 (and in detail at Chapter 6).

91 RPE, Rules 40 and 43. To date, however, none of the judgments are available on the Court's Website in anything but English and/or French. It would also seemingly be important to translate and post the judgment in the language of those in the affected region; however, no such translations are available on the Website.

access (which is far from a given for many in the most affected regions) can view a copy of the judgments, although they must be able to read one of the languages in which the document is published. However, unless one is a trained attorney or academic, the judgments are virtually useless. The sheer volume of the judgments of guilt is extraordinary. The *Lubanga* verdict is 593 pages long, comprised of 1,364 paragraphs.[92] It also includes two separate and dissenting opinions: Judge Fulford's is 14 pages long (21 paragraphs) and Judge Benito's is 17 pages (43 paragraphs).[93] Similarly, the *Katanga* judgment tops out at 711 pages and 1,696 paragraphs.[94]

Judge Van den Wyngaert filed a 170-page dissent (320 paragraphs),[95] and the majority responded in a three-page concurrence.[96] In 2004, Judge Wald complained that the "ICTY opinions continue to be excessively long… exposing the committee product they sometimes are."[97] If anything, the ICC judgments have gotten longer.

Justice Hugo Black was rather obsessed with the length of his opinions, reflecting his desire to ensure the lay person could understand his writing. "Black wanted litigants, people in barber shops, 'your momma,' he once told a clerk, to understand his opinions. 'Writing in language that people cannot understand is one of the judicial sins of our times.'"[98] After creating a first draft by hand, he would have a clerk revise the draft to flush out legal concepts and include authorities.

> Since the opinion peaked for complexity after the clerk's revisions, they reviewed it together, word for word, taking out commas and every unnecessary word… He wanted this draft, which he considered the second, to be half the length of the first. Then it will be twice as good, he said… Sometimes several additional drafts went by before Black felt he had an opinion he wanted to circulate, but not before going over the opinion again to eliminate any syllable not needed. ("Too long," Black replied when asked about a concurring opinion of seventy-five pages. "It'll hurt in the future. You can't tell which part is important.").[99]

92 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012.

93 *Id*.

94 *Katanga* Judgment, 7 March 2014.

95 *Prosecutor v. Germain Katanga*, Dissent to Judgment, ICC-01/04-01/07-3436-AnxI, 7 March 2014.

96 *Prosecutor v. Germain Katanga*, Concurrence to Judgment, ICC-01/04-01/07-3436-AnxII, 7 March 2014.

97 P. Wald, 'Reflections on Judging: At Home and Abroad', *U. Pa. J. Const. L.* 219, Vol. 7, 2004, p. 243. Indeed, extraordinarily lengthy judgments in the international criminal tribunals are certainly not limited to the ICC and ICTY. Charles Taylor's judgment of guilt was a mind-boggling 6,993 paragraphs long, spread over 2,478 pages (before annexes). *See Prosecutor v. Charles Ghankay Taylor*, Judgement, SCSL-03-01-T-1283, 18 May 2012.

98 R. Newman, *Hugo Black: A Biography*, 2nd edn, Fordham Univ. Press, Bronx 1997, p. 325, quoted in part in Serota 2012, p. 656.

99 *Id*., p. 236.

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Discerning "which parts" of the judgments issued by the Trial Chambers are important is exceedingly challenging, a task few are willing to undertake. Thus, reducing the overall length of the judgments, and further breaking down the judgments into more palatable sections, is critical.

Beyond the sheer length of the judgment itself, which is off-putting to most, the overall format itself does little to lend itself to breaking up the text into smaller, more palatable segments. One generally encounters page after page of double-spaced lines, with regular indentions (accompanied by paragraph numbers) and an occasional bolded header. While the judgments provide fairly regular headers and probably accomplish the "segmentation" principle better than the others suggested by Armstrong and Terrell, additional steps could be taken to further break out the information, using more distinctive headers, shorter paragraphs, lists, bulleting, and additional spacing on the page.[100]

2.2.2 Understanding the Significance of the Information Presented

The trial judgments are rather cold and formalistic, beginning with a detailed table of contents outlining the sections of the judgments. For those with familiarity to such structure, it is relatively easy to navigate, as each of the Trial Chambers appears to have generally adopted the stylistic format developed over years of practice at the ad hoc tribunals.[101] However, the Trial Chamber judgments do not provide any meaningful summary or overview of their ultimate holdings. They do not "give [the reader] a context or framework that helps [them] grasp the details' relevance [and importance] before inundating them with details."[102] Instead, the reader is thrust directly into a listing of the charges and procedural history of the case and a discussion of the credibility of the evidence before reading a discussion of the legal requirements for the various charges juxtaposed against the facts established by the OTP. Such a detailed approach is important, yet it simply does not provide the lay person, or anyone not directly interested and legally educated, with a meaningful opportunity to ascertain the basic facts and holding of the judgment.

A short review of the *Katanga* judgment serves as a useful example.[103] The judgment begins with a formal two-page cover sheet listing the names of those involved in one capacity or another. Pages 3 through 13 are a non-descriptive table of contents, requiring one to look at the referenced sections themselves to

100 J. Van Detta, 'The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor', *Barry L. Rev*., Vol. 13, 2009, p. 33.

101 Judge Wald, discussing the ICTY opinions provided: "The template for judgments at the ICTY, especially in the early years, was sometimes a lengthy statement of facts, hornbook expositions of the law, and then judgment with scant analysis in between as to how the law was applied to the facts – ironically, a result much like our jury verdicts. Over time, however, the bureaucratic style of the earlier ICTY judgments has been replaced by more reader-accessible discussions of the issues; this comes, I think, from the court's increasing adjustment to the bright light of transparency and from its own maturation and the interaction of its judges from both systems." Wald 2004, p. 243.

102 Van Detta 2009, p. 60.

103 *Katanga* Judgment, 7 March 2014.

understand the nature of the contents referenced. The actual opinion starts on page 14, with an "Overview" section. That section begins with a paragraph wherein the Court states that this document is the judgment – an unnecessary redundancy given the cover page. Paragraph 1 states the date and location of the crimes of which Katanga is accused although it does not describe the crimes at that point or indicate the result of its determination. Paragraphs 2 through 4 describe where the atrocity occurred. Paragraph 5 names the accused and his ethnicity and the date and location of birth. Paragraph 6 describes his rank and duties (a year after the atrocity occurred). Paragraphs 7 through 10 list the crimes that he is facing, which have been confirmed by the Pre-Trial Chamber. In Paragraph 11, the Court recalls that Katanga pled not guilty. The Overview section concludes with two paragraphs regarding the limits on what Katanga can be convicted of. The judgment then proceeds to discuss the history of the case, interpretation of texts, and the like.

Thus, the reader is left without direction as to what to expect or how the judgment will present the relevant information. Much of the information, in the overview, while important, is addressed elsewhere. The ultimate issues – declarations of innocence and guilt – are not addressed until the closing pages of the 711-page document.

A judgment complying with the context principle would present the key information to the reader first while providing a map of the rest of the judgment. Non-essential information from the two-page cover page and the table of contents (with additional descriptive information) could be moved to the end of the judgment. The Overview section would be much more concise and effective if it provided something along the lines of the following (with non-essential portions moved to subsequent applicable sections):

> Germain Katanga is guilty of crimes against humanity (murder) and war crimes (murder, attack against a civilian population, and destruction of property). He is not guilty of other crimes against humanity (use of child soldiers, rape, and sexual slavery) or war crimes (rape and sexual slavery).
>
> These crimes occurred on 24 February 2003 during an attack on Bogoro, a village in Ituri, DRC. During the attack, approximately 200 civilians were killed, property was intentionally destroyed, and women were raped and forced into sexual slavery.
>
> Katanga was convicted as an accessory, for providing weapons and other support for the attack, despite knowing that the militia utilized murder and destruction of property as a part of its military operations. However, prior to that attack, such operations had not involved widespread rape or sexual slavery, so Katanga cannot be found guilty for those crimes.
>
> This judgment provides the basis for Katanga's conviction and acquittal on the various counts. It will begin with a discussion of the history of the case, including the confirmation of charges and subsequent recharacterization of those charges. The credibility of key witnesses will then be addressed, before

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> turning to a finding of facts regarding the events of 24 February 2003 and Katanga's responsibility for those events. The judgment concludes with application of those facts to the legal requirements for liability under the various charges.

Application of a methodology, which (in some form or fashion) includes provision of key issues early in the analysis, followed by a roadmap for what is to come would greatly improve the reader's experience with the judgment.

2.2.3 The Organization of the Information and the Flow of the Analysis

It is not clear that any attempt has been made to tailor the organization of information and the flow of analysis. Rather, it feels as if international criminal law judgments have been constructed the way they are because that is how they have been constructed.[104] Indeed, the *Tadić* trial judgment (the first other than the sentencing judgment for Erdemović at the ICTY) and the *Akayesu* trial judgment (the first at the ICTR) use strikingly similar formats.[105] Such an approach, which might have been seen as the best option in early international criminal law judgments, does little to assist the reader.

> [T]he congruence principle counsels that a legal writer "should break free from any organization that does not arise directly from the actual logic of [the] analysis." Otherwise, the writer "will be asking [his or her] readers to retrace the path of [his or her] thinking--or of someone else's thinking--rather than offering them a coherent discussion of [the] results" of the writer's thinking.[106]

Within the judgments, there is a litany of key issues buried within the seemingly pages of text. A few of particular interest, which should be given priority in the organization of the judgment, includes the nature of the charges and resulting convictions and acquittals, the culpability of the defendant, and other significant prior holdings in the case.

104 Such a sentiment echoes the theory of "organizational path dependence." Put succinctly, path dependency explains that, as an organization becomes more institutionalized, a tapering process occurs, limiting discretion in favour of a locked-in process. *See* G. Schreyögg & J. Sydow, 'Organizational Path Dependence: A Process Review', *Organization Studies*, 2011, p. 323. While this process may lead to increased efficiency and predictability, it may also lead to a "path that replicates inefficient solutions." *Id.*, p. 325.

105 *Prosecutor v. Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997 (299 pages divided into the following sections: introduction, background and preliminary factual findings, factual findings, defense of alibi, evidentiary matters, applicable law, legal findings); *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998 (191 pages divided into the following sections introduction, historical context, genocide in Rwanda, evidentiary matters, factual findings, the law, legal findings, verdict).

106 Van Detta 2009, p. 65.

2.2.3.1 Nature of the Charges and Resulting Convictions/Acquittals

A significant concern with the judgments is the limited charges upon which defendants have been convicted. This is not, in any way, to suggest that defendants should simply be convicted because they are charged – it speaks more to the selection of the cases to be prosecuted, the nature of the charges, and the evidence proffered by the OTP to support its contentions. Regardless, if the goal of the ICC is to convict those most responsible for the worst crimes,[107] then the nature of culpability of the defendant and the acts for which the defendant is found to be guilty are extremely important.

Any conviction at the ICC will be rightly labelled as one of profound gravity – by express jurisdictional limitation, only genocide, crimes against humanity, and war crimes charges are properly brought before the Court.[108] The Statute then enumerates underlying acts that may qualify as atrocity crimes if the other requirements contained in the *chapeau* or introductory paragraph of each crime are found to exist.[109] But within the catalogue of horrific crimes, some are of particular importance to the public (and especially certain civil society groups).

In *Lubanga*, the OTP sought a warrant of arrest for the defendant, alleging he committed the war crimes of enlistment, conscription, and use of children soldiers.[110] Despite having been accused of masterminding the murder of nine peacekeepers in Ituri,[111] no charges relating to those deaths were filed by the OTP. The Pre-Trial Chamber, in issuing the warrant of arrest, determined there were reasonable grounds to believe Lubanga had committed the war crimes and thus issued the warrant of arrest.[112] The Pre-Trial Chamber later confirmed and the Trial Chamber found Lubanga guilty of those same charges.[113]

The case against Katanga and Ngudjolo reflected a very different approach by the OTP, which obtained warrants of arrest for war crimes based on wilful killing, inhuman treatment, use of child soldiers, sexual slavery, intentionally targeting civilians, and pillaging, as well as crimes against humanity – murder, inhumane acts, and sexual slavery.[114] In its decision on the confirmation of charges as to both defendants, the Pre-Trial Chamber determined that there were substantial grounds to believe that the defendants were responsible for multiple categories of

107 Rome Statute, Preamble ("determined to put an end to impunity for the perpetrators" of the "most serious crimes of concern to the international community"); Office of the Prosecutor, 'Strategic Plan – June 2012-2015, 11 October 2013, pp. 6, 13 ("investigating and prosecuting perpetrators bearing the greatest responsibility"), available at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

108 Rome Statute, Art. 5.

109 *Id*., Arts. 6-8.

110 *Prosecutor v. Lubanga*, Warrant of Arrest, ICC-01/04-01/06-2, 10 February 2006.

111 B. Schiff, *Building the International Criminal Court*, Cambridge Univ. Press, Cambridge 2008, p. 220.

112 Lubanga Warrant of Arrest, 10 February 2006.

113 *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803, 29 January 2007; Lubanga Judgment, 14 March 2012.

114 *Prosecutor v. Katanga*, Warrant of Arrest, ICC-01/04-01/07-1, 2 July 2007; *Prosecutor v. Ngudjolo*, Warrant of Arrest, ICC-01/04-02/07-1 (6 July 2007).

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war crimes, including wilful killing, use of child soldiers, intentionally directed attacks against the civilian population, pillaging, and destruction of property, but declined to confirm the existence of war crimes for inhuman treatment and outrages upon personal dignity, finding insufficient evidence existed as to those counts.[115] Similarly, the Pre-Trial Chamber found substantial grounds to believe the defendants were responsible for crimes against humanity – murder.[116] By majority, the Pre-Trial Chamber confirmed charges for war crimes of rape and sexual slavery and crimes against humanity – rape and sexual slavery – while declining crimes against humanity charges for inhumane acts.[117] On 18 December 2012, the Trial Chamber unanimously found Ngudjolo not guilty on all counts.[118] As to Katanga, while convicted (for his "assistance" as opposed to the direct liability originally charged) for a variety of counts, he was found not guilty for any conduct related to rape, sexual slavery, and use of child soldiers.[119]

Many have noted the lack of convictions for sexual crimes.[120] In the *Lubanga* verdict and sentencing judgment, the Trial Chamber plainly reflected an understanding of the importance of the issue to its consumer base. The Trial Chamber soundly criticized the OTP for failing to charge acts of sexual violence or to subsequently submit evidence of such conduct for sentencing purposes.[121] Similarly, in the *Katanga* judgment, despite finding the defendant not guilty of rape and other crimes involving sexual violence, the Court made a clear effort to address these issues, finding that all the militias in the region launched attacks at civilians that included subjecting women to sexual violence, certain women were specifically subjected to sexual assault, and rape and sexual slavery did in fact occur (pointing to testimony of three particular witnesses).[122] As a result, at least one key civil society organization, while acknowledging the acquittal, also positively noted findings relating to sexual violence: "[i]t appears the majority of the Trial Chamber found the three witnesses who testified in relation to the charges of sexual

115 *Prosecutor v. Katanga*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008.

116 *Id*.

117 *Id*.

118 *Ngudjolo* Judgment, 18 December 2012. This determination was essentially predicated on the fact that it could not find that Ngudjolo was commander-in-chief of the Lendu combatants from Bedu-Ezekere present in Bogoro when the massacre occurred. *Id*., para. 499.

119 *Katanga* Judgment, 7 March 2014.

120 K. Askin, 'Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence', 11 March 2014, available at <www.opensocietyfoundations.org/voices/katanga-judgment-underlines-need-stronger-icc-focus-sexual-violence>; CICC, 'ICC Finds Congolese Rebel Katanga Guilty in Third Judgment', 7 March 2014, available at <www.iccnow.org/documents/CICC_PR_Kantaga Verdict_7March14.pdf>, quoting William Pace, Convenor of the CICC.

121 *Lubanga* Judgment, 14 March 2012, paras. 629-630; Prosecutor v. Lubanga, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, paras. 60-75.

122 *Katanga* Judgment, 7 March 2014, paras. 99, 516, 832, 833, 1000, 1023. Notably, the Court also generally pointed out that just because an accused is not guilty "does not necessarily mean that the Chamber finds him innocent." *Id*., para. 70.

violence credible and stated that they believed rape and sexual slavery had been committed by Ngiti combatants on the day of the Bogoro attack."[123]

It is essential that the Court continue to use its judgments to clearly address issues that are known to be important to its audience, without allowing popular pressure to affect the administration of justice while seeking to anticipate those areas that may become important and even steer the direction of future areas of discussion. By carefully articulating its position, the Court may be in a far better position to justify its determinations regarding guilt or innocence, explain the nature of the charges brought against the defendant, and moderate future expectations.

2.2.3.2 Culpability of the Defendant

The Rome Statute provides multiple means by which a defendant may be found criminally liable for an atrocity crime. These include personally committing a crime; ordering, soliciting, or inducing the commission of a crime; and aiding, abetting, or otherwise assisting in the commission of a crime and acts with a common purpose with others to commit a crime or attempts to commit a crime.[124] In addition, commanders can be found criminally responsible if they knew or should have known that their subordinates were committing atrocity crimes and failed to prevent or repress such crimes or submit them to competent authorities for investigation and prosecution.[125] Such various modes of liability plainly impact the culpability of the defendant. In other words, a military dictator who directly orders or participates in an effort to exterminate the inhabitants of a city is far more culpable than one who should have known – essentially a negligence standard[126] – that inferior officers would order their troops to murder a large number of civilians. Indeed, in such a scenario, the inferior officers who actually direct the criminal activity would likely be the most responsible and thus more appropriately the target of ICC prosecution.

Neither Lubanga nor Katanga was found to be solely responsible for committing or ordering the crimes that occurred. Lubanga was convicted as a co-perpetrator, which, according to the majority:

> requires that the offence be the result of the combined and coordinated contributions of those involved, or at least two of them. None of the participants exercises, individually, control over the crime as a whole but, instead, the

123 CICC, 7 March 2014, quoting Brigid Inder, Executive Director of Women's Initiatives for Gender Justice.

124 Rome Statute, Art. 25.

125 *Id*., Art. 28. Similarly, non-military superiors can be liable for the actions of their subordinates where they "knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes," as opposed to the "should have known" standard imposed on military commanders. *Id*.

126 Schabas 2011, p. 233. Interestingly, despite the "should have known" language of Art. 8(2)(e)(vii) of the Elements of Crimes, the OTP submitted that a conviction should only occur if the Court found that the accused knew there were children conscripted, enlisted, or used that were under the age of 15. *Lubanga* Judgment, 14 March 2012, para. 944.

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> control over the crime falls in the hands of a collective as such. Therefore, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.[127]

The Trial Chamber ultimately concluded that "as a result of the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC."[128] The Trial Chamber found that Lubanga personally carried out the following acts:

> He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.[129]

One is left to ponder why, if the Court found that Lubanga "personally used children… amongst his bodyguards," he was not found individually liable for the crime.[130] Regardless, Lubanga was ultimately sentenced to 14 years of imprisonment for co-perpetrating crimes against humanity for the conscription, enlistment, and use of child soldiers.[131]

127 *Lubanga* Judgment, 14 March 2012, para. 994. Consistent with the above discussion regarding differing levels of culpability, the majority provided that "the contribution of the coperpetrator who "commits" a crime is necessarily of greater significance than that of an individual who "contributes in any other way to the commission" of a crime." *Id*., para. 996. The majority further indicated that "principal liability 'objectively' requires a greater contribution than accessory liability. If accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect." *Id*., para. 997. But *see* Judge Fulford's Dissent at para. 8, rejecting the idea of a strict hierarchy, with 25(3)(a) as the most culpable to 25(3)(d) as the least.

128 *Id*., para. 1355.

129 *Lubanga* Judgment, 14 March 2012, para. 1356.

130 *Id*.

131 *Lubanga* Sentencing Judgment, 10 July 2012.

Katanga, however, was not convicted of primary liability (whether as an individual or co-perpetrator) or even as an aider or abettor but rather as one who "in any other way contributed to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."[132] For a finding of guilt, the Court had to determine, beyond a reasonable doubt, that:

- a crime under the jurisdiction of the Court was committed;
- the persons who committed the crime belong to a group with a common purpose, which was to commit the crime, or were involved in its commission, including in the ordinary course of events;
- the Accused made a significant contribution to the commission of the crime;
- the contribution was made with intent, insofar as the Accused meant to engage in the conduct and was aware that such conduct contributed to the activities of the group acting with a common purpose; and
- the Accused's contribution was made with the knowledge of the intention of the group to commit the crime forming part of the common purpose.[133]

Critical to its ultimate determination was the majority's finding that Katanga knew the attack would occur, the attacks in Ituri generally and those by this particular group resulted in atrocities to civilians, these particular fighters had already attacked civilians, and they were driven by a hostile ideology.[134] Nonetheless, the majority found that Katanga supplied the group with guns and other supplies, which allowed the group to easily defeat their opponents, take the town, and commit the numerous atrocities against civilians.[135] The majority concluded that the "substantial" contribution requirement was fulfilled as follows:

> In that context, it is apparent, therefore, that Germain Katanga's contribution proved to be of particular relevance to the commission of the crimes which form part of the common purpose, since that contribution had considerable influence on their occurrence and the manner of their commission. His involvement allowed the militia to avail itself of logistical means which it did not possess and which, however, were of paramount importance in attacking Bogoro. His involvement, therefore, had a truly significant part in bringing about the crimes. Germain Katanga's contribution secured the military superiority of the Ngiti combatants over their adversary, the UPC, and allowed them to see through their purpose of eliminating from Bogoro the predominantly Hema civilian population.[136]

132 Rome Statute, Art. 25(3)(d).

133 *Katanga* Judgment, 7 March 2014, para. 1620, citing its *Prosecutor v. Katanga*, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), ICC-01/04-01/07-3371, 15 May 2013, para. 16.

134 *Id*., para. 1689.

135 *Id*., paras. 1674-1678.

136 *Id*., para. 1679.

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Plainly, Katanga's culpability, essentially for supplying weapons while knowing an attack would likely follow, is substantially less than if he had directly participated in the attack or ordered the atrocities to occur. Ultimately, Katanga was not found to be primarily liable for any atrocity but rather for "contributing" to a wider array of war crimes, including committing murder, attacking a civilian population, destroying property, and pillaging, and one crime against humanity (murder) but only relating to the single attack on Bogoro.[137]

Ngudjolo's case resulted in an acquittal, a result that leaves many victims dissatisfied, even if it was the required result of fair and impartial proceedings. Of particular concern, however, is the fact that Katanga was convicted after his case was recharacterized by the Trial Chamber to find him guilty as an accessory, while Ngudjolo never faced the same recharacterization for very similar conduct. The majority lost a significant opportunity to clarify the situation, as it did not address Article 25(3)(d) at all in the Ngudjolo judgment and only spent one paragraph attempting to distinguish the two defendants in the *Katanga* judgment.[138]

The distinctions between the types of liability under Article 25 and those related to command responsibility in Article 28 are very nuanced and have yet to be fully explicated by the Court; however, they are vitally important for the determination of both guilt and sentence. A clear, concise opinion helps the reader evaluate the legal theory of culpability and the appropriateness of the corresponding sentence.

2.2.4 Writing for the Audience

Empathy can be defined as "understand[ing] a case by imagining the perspectives and situations of others."[139] It requires "a judge to consider thoughtfully the unique context that surrounds a dispute and to recognize the individual perspective or 'life story' that each litigant brings to court."[140] Moreover, "it is well-documented that the general public desires empathy as a quality of any lawyer – practitioner or judge – in the legal system with whom they come into contact"[141] While empathy is certainly not the sole consideration, any court seeking to draft any opinion tailored to its audience and ultimately increase its legitimacy must pay it close attention.

> Deciding any given case likely requires a judge to rely on a combination of different abilities and knowledge including a firm understanding of rules of law, statutes, and precedent; an appreciation for legal theory and policy; and an

137 *Katanga* Judgment, 7 March 2014, para. 1.

138 *Id*., para. 1358 (suggesting that it was essential that Ngudjolo be proven to be one of the commanders of the Bedu-Ezekere group for any mode of liability to exist, despite the fact no such element is found in Art. 25).

139 C. O'Grady, 'Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.', *Ariz. St. L. J*., Vol. 33, 2001, pp. 4, 7, quoted in Van Detta 2009, p. 80.

140 *Id*.

141 Van Detta 2009, p. 80, citing K. Gerdy, 'Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering', *Neb. L. Rev*., Vol. 87, 2008, pp. 12-15; M. Zimmer, 'Systemic Empathy', *Colum. Hum. Rts. L. Rev*., Vol. 34, 2003, p. 575 *et seq*.

> incorporation of common sense and judgment informed by an empathic understanding of context. [E]mpathy [may therefore be understood] as an integrated component of the decision making process that may enhance, but does not undermine, other vital judicial considerations.[142]

In the ICC context, empathy requires the author of the judicial opinion to consider many factors that have a significant influence on the audience. Indeed, the needs and wants of consumers are greatly impacted by the state and regional "agendas, preferences and priorities. The agenda of the public determines the salience of the court's judgments and their impact on its legitimacy."[143] Appreciating the importance of those perspectives allows the court to address such concerns and potentially increase its legitimacy: "A court can improve its domestic support by showing that its judgments regularly suit the preferences of the domestic public. If domestic publics approve of the court's judgments, they can influence the international community to view them as just and correct and improve the court's legitimacy."[144] A reserve of legitimacy, built up over years of positive interaction, must be developed, as "in the African context, 'with high levels of legal pluralism and a limited rights culture,' reliance on international law norms may cause the court to be viewed as out of step with the general population, if not with internationally educated elites."[145]

Unfortunately, the Trial Chamber judgments, as have many other international tribunal opinions, to one degree or another, fail to take advantage of many opportunities to make the verdicts more meaningful to the audience (and particularly regional audiences), as they minimize the human story, local and regional laws and traditions, and broader regional conflicts and state actors.

142 Van Detta 2009, p. 80.

143 Dothan 2013, p. 458. "Just as a supranational tribunal may align its case law with the independent incentives facing some national courts, it can also address itself to the individuals and groups who are likely to be the ultimate beneficiaries of the enforcement of international norms and instruments." Helfer & Slaughter 1997, p. 312, quoted in Terris 2008, p. 458.

144 Dothan 2013, p. 474. A court taking such an approach is directly manifesting an expressive legal approach. "Expressive theories posit that law, like other forms of expression, manifests states of mind, including beliefs, attitudes, and intentions. Law, therefore, has 'social meaning.' Such meaning derives not from the intent of the person making or enforcing the law, but rather from the ways in which relevant communities understand and interpret the law in light of existing social norms. An expressivist's normative agenda therefore includes both crafting law to express valued social messages and employing law as a mechanism for altering social norms." De Guzman 2012, pp. 312-313.

145 J. Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation', *Yale J. Int'l L.*, Vol. 38, 2013, p. 442 (further noting that "The sensitivity may be heightened, in some instances, by the historical experience of Western colonialism."); *see also* J. Widner, 'Building Judicial Independence in Common Law Africa', *in* A. Schedler *et al.* (Eds.), *The Self-Restraining State*, Lynne Rienner, Boulder 1999, pp. 189-190; A. Thiruvengadam, 'In Pursuit of "the Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia', *Indian J. Const. L.*, Vol. 2, 2008, p. 71 ("In respect of colonies, the historic reasons favoring trans-judicial influence have been counteracted by the pressure to cast off the imperialist past to establish strong foundations of indigenous constitutionalism.").

2.2.4.1 The Human Story

The *Lubanga* verdict simply does not mention anything about the defendant's personal history, failing to provide any detail on his personal history. The *Katanga* verdict goes a bit further, mentioning his ethnicity and date and place of birth[146] before describing his military background and training in some detail.[147] The opinion in the *Ngudjolo* case provides significantly more, noting that "[Ngudjolo's] roots are in Likoni locality in Bedu-Ezekere *groupement*, Walendu-Tatsi *collectivité*, Djugu territory, the DRC."[148] It described how he attended school until the third year of secondary school and undertook medical studies.[149] His training and subsequent practice as a nurse put him in contact with a number of influential people and provided him with a place of respect in the community.[150] The opinion also included a discussion of his military training and his military career.[151]

While the judgment need not provide a blow-by-blow account of an accused's life story, some sense of how the defendant ended up in the position in which he/she occupied when the atrocities occurred would provide a means to localize and personalize the judgment. Such factors are particularly relevant in sentencing, when the Trial Chamber is required to look at the "individual circumstances of the convicted person,"[152] which include factors such as "age, education, social and economic condition" of that individual.[153] Nonetheless, in the *Lubanga* sentencing – the only sentencing to date – the Trial Chamber dedicated only two paragraphs to Lubanga's personal circumstances, noting that based on his age and education, he was particularly aware of the harmful effect of utilizing children as soldiers.[154] Such a limited discussion seems to fall well short of the requirement to consider individualized circumstances and denies the defendant and the victims of a fuller account and analysis of that individual and the reasons behind his conduct.

Witnesses are in a different situation, as there are legitimate safety concerns at play. As one of a multitude of steps employed to ensure at-risk witness identities remain confidential, names are replaced with alpha-numeric identifiers. Yet their personal history, status in the community, and other similar factors are directly relevant to their credibility and the context in which their testimony should be evaluated, provided it is done in a manner that does not significantly

146 *Katanga* Judgment, 7 March 2014, para. 5. It also mentions his appointment as Brigadier General of the Armed Forces of the Congo in 2004. *Id*., para. 6.
147 *Id*., paras. 1246-1250.
148 *Id*., para. 5.
149 *Id*., paras. 408-411.
150 *Id*., paras. 410, 412-415.
151 *Id*., paras. 6, 425-428.
152 Rome Statute, Art. 78(1).
153 RPE, Rule 145(1)(c).
154 *Lubanga* Sentencing Judgment, 10 July 2012, paras. 55-56.

increase the risk of exposure. It also serves to personalize their testimony, providing the reader a basis to understand their perspective and experiences.[155]

Justice Roslyn Atkinson, Supreme Court of Queensland, provided an excellent example of the drawbacks of substituting initials for names when she compared the opening paragraphs of the opinions of Lord Dening and Lord Salmon in *Beswick v. Beswick*.[156] The former wrote:

> Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business... The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them. The business was to be transferred to the nephew: old Peter Beswick was to be employed in it as a consultant for the rest of his life at £6 10s. a week. After his death the nephew was to pay to his widow an annuity of £5 per week, which was to come out of the business.[157]

Conversely, the latter opened with the following statement:

> Throughout this judgment I will, for the sake of clarity, refer to A, B, and C. A is the late Mr. Peter Beswick and also the plaintiff standing in his shoes in her capacity as administratrix. B is the defendant and C is the plaintiff in her personal capacity."[158]

There is simply no comparison – Lord Denning's approach, at least in part by the use of the parties' names, brings instant interest into the topic at hand; the replacement of such names with letters does the exact opposite.

The judgment in Ngudjolo provides a similarly limited description and discussion of "Witness D03-88," noting he was the "traditional chief" of Bedu-Ezekere

155 Replacing names with numbers has repeatedly been used as a means to dehumanize. *See, e.g.*, S. Herrmann, 'Social Exclusion: Practices of Misrecognition', *in* P. Kaufmann *et al.* (Eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, Springer, New York 2011, p. 144 ("Where the name humanizes, the number dehumanizes, because while the former indicates a belonging to the community of human beings, the latter stands for the marking of the non-human."); P. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil*, Random House, New York 2007, p. 55 (the creators of the infamous Stanford experiment consciously implemented means by which they could take the individuality from their volunteer student prisoners: "They're going to be wearing uniforms, and at no time will anybody call them by name; they will have numbers and be called only by their numbers. In general, what all this should create in them is a sense of powerlessness.").

156 Atkinson 13 September 2002, at p. 4.

157 *Id.*, citing Beswick, p. 549.

158 *Id.*, citing Beswick, p. 563.

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groupement but without elaborating his role in further detail.[159] The judgment relies upon his testimony at length – he is mentioned or referenced 171 times in the judgment – but provides no other background information. At the same time, it provides that his testimony was "credible in the main… [but] that the sections which directly deal with Mathieu Ngudjolo's liability must be treated with a great deal of caution."[160] Thus, a reader is left with relatively little information regarding the witness, to assess his credibility or to simply understand his role in the community.[161]

More detail about the individuals involved is not necessarily intended to create sympathy for the defendant or to raise the public's ire, and it certainly cannot put witnesses at further risk. But it can certainly make the judgments more meaningful and interesting to the reader, again leading to a more valuable product and increased legitimacy.

2.2.4.2 Limited Discussion of Local or Regional Law or Tradition

While innocence or guilt clearly is necessarily predicated on the application of the provisions of Rome Statute, as well as the Elements of Crimes and Rules of Procedure and Evidence, it seems rather remarkable that the judgments ignore any mention of local law. At most, the majority opinion mentions that, under Article 21(1)(c), domestic law may provide guidance, without noting that that provision explicitly includes judicial consideration of "general principles of law derived… from… the national laws of States that would normally exercise jurisdiction over the crimes, provided that those principles are not inconsistent with this Statute…"[162] In short, while the court is explicitly authorized by statute to consider state laws, it seemingly avoids it, despite such laws' direct relevance to the proceedings.[163] Given the critical need for the Court's decisions to find acceptance in

159 *Ngudjolo* Judgment, 18 December 2012, paras. 92, 98, 309, 354, 368. Indeed, an explanation of the role of traditional chieftain might well lend credibility to his testimony or shed light on a potential bias in favour of the defendant. But such issues were not addressed.

160 *Id*., para. 313, *see also*, paras. 308, 309.

161 There are often very valid concerns regarding the security of witnesses, many of whom were also victims. Thus, a balance must exist between providing contextual information and details, which could pose a risk to the witness. However, using the instant example, if the Trial Chamber felt comfortable enough to identify the witness as a "traditional chief," it seems as though more explanation could be provided as to the role of the "traditional chief" and the importance of such a position without revealing information that would lead to the identification of the individual.

162 *Lubanga* Judgment, 14 March 2012, para. 976. The dissent also mentioned domestic law, but not any related to the DRC. *Prosecutor v. Thomas Lubanga Dyilo*, Dissent – Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 10.

163 This issue is not limited to the ICC but is a matter of broader concern in the development of international criminal law. *See, e.g*., A. Greenawalt, 'The Pluralism of International Criminal Law', *Ind. L.J*., Vol. 86, 2011, p. 1078 ("Domestic law has obvious importance to the traditional sources of international law. Identifying rules of customary international law and the general principles of law recognized by civilized nations routinely involves consideration of national legal obligations. In these cases, however, the goal of the interpretive exercise is to announce a single, universal rule of international law and not to give effect to any particular domestic law. Moreover, the ICL case law has given even this limited use of domestic law diminished status, privileging the prior case law of international tribunals over domestic law.").

the eyes of those most affected by atrocities in a given situation, it is essential to understand that merely "citing to parallel reasoning by more established courts may allow for a borrowing of their perceived legitimacy by a court lacking in its own."[164] They can help "demonstrate a posture of acceptance and engagement" of "competence and relevance," making judgments resonate with audiences from which the legal principles are drawn.[165]

As described by one author, "[t]he African continent is a patchwork and combination of traditional, religious western common law, and civil legal traditions… many of these combinations are not the result of voluntary development of African legal system; rather they are often influenced by domineering colonial powers."[166] Given the emphasis placed on the effects of colonialism by many Africanist scholars and politicians – "that international law was used to justify and legitimate the suppression of Third World peoples and therefore shaped the relationships of power and subordination inherent to the colonial order"[167] – it would seem particularly important to acknowledge and accept local and regional law, history, and tradition.

Nonetheless, the verdicts to date provide very little discussion of local or regional law. The *Lubanga* judgment does mention that it took the African Union Solemn Declaration on Gender Equality, the African Charter on the Rights and Welfare of the Child, and the Cape Town Principles into consideration when defining the war crimes of enlistment, conscription, and use of children in hostilities.[168] The *Katanga* verdict only mentioned the Cape Town Principles as recounted by a witness' testimony,[169] while the *Ngudjolo* judgment makes no mention of these documents at all.

This is a missed opportunity. Among other regional actors, the African Commission on Human and Peoples Rights also developed a substantial body of human rights law, predicated on the African Charter for Human and Peoples

164 Kalb 2013, p. 440.

165 *Id*., pp. 441-442.

166 C. Okeke, 'African Law in Comparative Law: Does Comparativism Have Worth?', *Roger Williams U. L. Rev*., Vol. 16, Winter 2011, p. 2 (further noting that "African State boundaries were delineated by colonizing powers based on longitude lines without regard for cultural and tribal locations… [with] borders that cut through the middle of villages or tribes.").

167 Jalloh 2009, p. 496; *see also* K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge Univ. Press, Cambridge 2009, pp. 47-49 (detailing two "scrambles for Africa," the first being European colonialism and the second current American and Asian efforts to control African resources, which in turn has contributed to an ICC lacking moral power).

168 *Lubanga* Judgment, 14 March 2012, at para. 6, n. 2 and 4. The Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa were adopted at a UNICEF symposium in Cape Town, South Africa in 1997. Available at <www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf>. The Cape Town Principles were also cited by the Prosecution and the Office of Public Counsel for Victims (which also cited to the AU Solemn Declaration). *Lubanga* Judgment, 14 March 2012, paras. 574, n. 1720, 598.

169 *Katanga* Judgment, 7 March 2014, para. 1054, n. 2534 & 2538.

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Rights.[170] Additionally, many states have made changes to their national laws to reflect international criminal law norms,[171] and others should be encouraged to do so. Thus, in addition to localizing the judgment and adding validity by referencing such laws, the Court can acknowledge the progress made by more progressive countries and encourage others to do the same.

Nor is there meaningful discussion of local traditions, government or hierarchy. In passing, the *Lubanga* judgment recounted the testimony of a witness who said children were sent for military training by their parents and "traditional chiefs," without exploring this critical social dynamic any further.[172] Similarly, the majority in Katanga note that the armed militia leaders usurped the normal functions of traditional leaders[173] and delved into the increasingly important role played by witch doctors, indicating that, during the relevant period, they had more power than civil administrators and wielded significant influence over many fighters.[174] However, the judgment did not address the historic roles of the witch doctors or the traditional chiefs and civil leadership.

Perhaps the most detailed discussion of pertinent history and tradition found in the three cases is Katanga's own testimony, as he describes the Lendu understanding of the UPC. From the Lendu perspective, the Hema-Tutsi militia was seen as invading force, with the goal of taking traditional farm lands from the Lendu to use as pasture for their cattle.[175] Similarly, in the *Ngudjolo* judgment, the Trial Chamber explicitly referred to the Hema as "pastoralists by tradition," although it subsequently noted that the inhabitants of Bogoro, the majority of which were Hema, also "cultivated the land."[176]

The *Lubanga* judgment acknowledged significant testimony presented by the experts presented by the parties but determined that any historical discussion predating 1997, before Laurent Kabila came into power, was too remote to be rel-

170 The extensive case law of the African Commission is available on the African Human Rights Case Law Analyser. <http://caselaw.ihrda.org/afchpr/>.

171 Triponel & Pearson Spring 2010, p. 105.

172 *Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842 (14 March 2012), para. 1027.

173 *Katanga* Judgment, 7 March 2014, para. 667. Interestingly, the majority determined there was no evidence of "traditional" ethnic hatred between the Hema and Lendu and that the Bogoro attack was unrelated to ancestral ethnic hatred. *Id*., para. 699.

174 *Id*., paras. 665; 1251-1258. In particular, the majority apparently rejected the prosecution's contention that the witch doctors had no authority over the military activities of Katanga and the Ngiti fighters, para. 1251, noting they were directly involved in military matters and recognizing the close and occasionally deferential relationship Katanga had with one such witch doctor. para. 1258.

175 *Id*., para. 712. This is a very similar dynamic to a predominant theory regarding the Hutu-Tutsi dynamic in Rwanda, where the current focus is on the Hutu-Tutsi distinction being one of economics rather than that ethnicity, as, in pre-colonial Rwanda, one could move from one group to the other based on wealth (which was often measured in ownership of livestock). *See, e.g.*, D. Koosed, 'The Paradox of Impartiality: A Critical Defense of the International Criminal Tribunal for Rwanda', *U. Miami Int'l and Comp. L. Rev*., Vol. 19, 2012, pp. 250-251.

176 *Ngudjolo* Judgment, 18 December 2012, para. 318.

evant to Lubanga's case.[177] Similarly, the *Katanga* judgment expressly provided that it would "summarize the main events that occurred in the territory starting… not with the story of the colonial past of the DRC but in May 1997…."[178]

Given the importance of colonial history to many African leaders and academics, the Trial Chambers' conscious decision to acknowledge the legacy but then consciously forgo any discussion again feels like a lost opportunity. In some ways, it could be seen as an affront, further confirming the Western identity of the ICC. Simply acknowledging the profound effect of colonialism in a few sentences could provide a more meaningful product for many African states and their citizenry.

2.2.4.3 Limited Discussion of Regional Events, the Larger Conflict, and the Role of Foreign Governments

The regional events, larger conflict, and the role of foreign governments are often key to understanding the atrocities under scrutiny and the offender's place within such a setting. After all, there has yet be a crime prosecuted by the ICC (or any other tribunal) that was exclusively the result of a single actor. This broader perspective is particularly important in light of many political and academic voices in Africa who believe, with good reason, that inquiry should be made into "the roles that these other international actors played in promoting and exacerbating the situation."[179] While the ICC is constrained by the evidence presented to it (although the judges do have some discretion to seek and obtain additional information), consideration of the role of regional actors, and ultimately the decision not to prosecute such actors, is an issue the Court should not run from.

The Congo situation provides a valuable starting point for such a discussion. It is easy for one to suggest that the ICC serves up victors' justice, as those with sufficient resources avoid prosecution. Thus, it is rather remarkable that the three verdicts fail to more directly address the simple fact that both sides of the conflict in Ituri are being prosecuted, with Lubanga "representing" the Hema, while Ngudjolo and Katanga are Lendu. In that regard, it is difficult to argue that the loser is the only one being prosecuted.

However, such an analysis can quickly turn to the failure of the ICC to prosecute bigger fish. "[A] number of Iturians… see regional actors in the region as those most responsible for the crimes committed."[180] Within court proceedings,

177 *Lubanga* Judgment, 14 March2012, para. 70. Oddly, a few paragraphs later explicitly discussed the role of Belgian colonial rule in emphasizing the ethnic divisions between tribes and its post-colonial effect, as the Hema remained the landowning and business elite. *Id*., para. 74. It also noted that "documentary material was not available to the investigators, especially in the first months, which would have enabled them to understand the geographical and historical context of the issues they were dealing with." *Id*., para. 133.

178 *Katanga* Judgment, 7 March 2014, para. 428. Additionally, the Ngudjolo judgment simply did not address the historical context.

179 A. Anghie & B. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', *Chinese J. Int'l Law*, 2003, p. 90.

180 O. Bueno, 'In Ituri, Katanga Verdict Viewed as a Limited Success', *International Justice Monitor*, 21 March 2014, available at <www.ijmonitor.org/2014/03/in-ituri-katanga-verdict-viewed-as-a-limited-success/>.

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"several witnesses described the existence of a secret military structure coordinated by the Congolese army that planed military operations and provided weapons and financial support to local militias in Ituri allied to the central authorities."[181]

While leaving the discussion rather abbreviated, the Trial Chamber in *Lubanga* did acknowledge: "Experts have suggested that much of the violence in Ituri during the period from 1999 to 2003 was initially economically motivated, and that the conflict was due in significant part to the involvement of members of the Ugandan national army... who exploited social unrest for their own economic advantage."[182] It further explained: "[S]oldiers from the UPDF initially supported certain Hema landowners and were allegedly responsible for attacks on Lendu villages. The Lendu began to create self-defense forces and these militias attacked Hema villages with the support of individual Ugandan officers, the Congolese pre-transition government and certain rebel movements."[183] In 1999, the rebel group controlling Ituri split, with one faction supported by Uganda and another by Rwanda;[184] at least some of the Hema fighters, including Lubanga and Ntaganda, received training in Uganda.[185] Per a MONUC report accepted into evidence by the Trial Chamber in Lubanga, "the local ethnic problems 'would not have turned into massive slaughter without the involvement of national and foreign players' including the Ugandan and Rwandan armies."[186]

Thus, non-governmental organizations have called for broader prosecutions: "To ensure that justice is done, the prosecutor should focus on senior officials in Congo, Rwanda, and Uganda who armed and supported local militias."[187] This call gains credibility from the fact that "[T]he International Court of Justice had already found that Uganda was, during at least part of the conflict, an occupying power in the DRC."[188]

Additionally, while the *Katanga* case does not deal with a head of government but rather a local rebel leader, the verdict has the potential of raising serious concerns on the part of African leaders and other political elites around the world. Much as the United States expressed exaggerated fears over the "rogue prosecutor" scenario during the negotiation of the Rome Statute, the potential application of the Katanga holding could serve as another reason for African leaders to decry the ICC. One can easily see a scenario where the *Katanga* verdict is read as a conviction merely based upon the provision of weapons in a conflict region. Under such an interpretation, virtually every leader is at risk. For example, Nigerian armed forces acting under the ECOMOG umbrella have been accused of com-

181 Human Rights Watch, 'ICC: Congolese Rebel Leader Found Guilty', 7 March 2014, available at <www.hrw.org/news/2014/03/07/icc-congolese-rebel-leader-found-guilty>.

182 *Lubanga* Judgment, 14 March 2012, para. 72.

183 *Id*., para. 75.

184 *Id*., para. 77.

185 *Id*., para. 82.

186 *Id*., para. 76.

187 Human Rights Watch, 7 March 2014.

188 Bueno 21 March 2014, citing 'International Court of Justice Press Release – Armed Activities on the Territory of the Congo (*DRC v. Uganda*)', 19 December 2005, available at <www.icj-cij.org/docket/files/116/10521.pdf>.

mitting atrocities when combating rebel forces in Sierra Leone.[189] Arguably, under even a more narrow view of the *Katanga* verdict, member countries providing financial assistance for future ECOMOG operations utilizing Nigerian troops could be liable for future atrocities.[190]

Moreover, if Katanga is merely an accessory, then others must be more culpable. Given the regional actors involved, including members of the Rwandan and Ugandan forces, have been implicated by a number of sources – including experts and witnesses before the Court[191] – leadership in Rwanda and Uganda, among others, has a direct interest in the continued investigations of the Court. Such interests are heightened by the relatively weak culpability standard employed in the case.

2.3 Dissenting Voices and the Perception of Fairness of Proceedings

While the Rome Statute clearly prefers unanimity, each of the three cases decided to date has included at least one separate opinion.[192] However, the dissent of Judge Christine Van den Wyngaert is a bird of a different feather, a scathing reflection on her "disagreement with almost every aspect of [the majority opinion]."[193]

Much has been made of the propriety of dissenting opinions in international judgments:

> Judges are divided on the merits of formal individual opinions. In the case of concurring individual opinions, it is argued that they enrich the judgment because, having been usually drafted by a single judge, they show a higher degree of inner logic and consistency than the majority opinion. In the case of dissenting opinions, by letting dissenters go their way, the judgment of the majority looks less like a patchwork of various opinions and a compromise solution. Dissenting opinions may also help the defeated party accept the verdict because they signal that the court gave full consideration to the arguments presented.[194]

189 Human Rights Watch, 'Sierra Leone: Getting Away with Murder, Mutilation, Rape', Vol. 11, No. 3(A), July 1999, available at <www.hrw.org/reports/1999/sierra/SIERLE99-04.htm>.

190 Such a scenario ignores temporal, jurisdictional and other constraints but illustrates a legitimate concern for African leaders.

191 *Lubanga* Judgment, 14 March 2012, paras. 72, 76; *see also Katanga* Judgment, 7 March 2014, paras. 506-507, 1168 (a sampling of paragraphs were the Trial Chamber found involvement on the part of Rwanda and Uganda).

192 While including dissents, both Lubanga and Ngudjolo included separate opinions on discrete issues, the determinations of guilt were unanimous.

193 *Katanga* Dissent, 7 March 2014, para. 1. She similarly concludes: "I continue to hold the view that… Germain Katanga should have been acquitted alongside Mathieu Ngudjolo Chui on 18 December 2012. I therefore distance myself from everything that has happened between then and now." *Id*., para. 320.

194 Terris 2008, p. 452 (also noting that opinions regarding dissents often split along common law and civil law lines, as the former often views a judgment as the sum of the decisions of the individual judges while the latter typically sees the court as a uniform entity with a single viewpoint of the majority).

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At the same time, a dissent may serve to weaken the authority of a court or "undermin[e] the perception that an accused has been found guilty beyond a reasonable doubt."[195] Dissents may also be extremely useful, developing points that are discussed further in subsequent cases or they may serve only to indulge a judge's ego.[196]

As dissents are clearly permitted under the Rome Statute, Judge Van den Wyngaert was well within her discretion to issue her separate opinion, where she raised two distinct issues with the majority's determination: (1) the propriety of the recharacterizing the form of criminal responsibility and (2) even under the recharacterized charges, the finding that the evidence supports a conviction beyond a reasonable doubt.[197] The first is particularly damning of the majority's opinion:

> [T]he Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just…
>
> the trial must be first and foremost fair towards the accused. Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused. After all, when all is said and done, it is the accused – and only the accused – who stands trial and risks losing his freedom and property. In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential, in my view, to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. It is not good enough that most of the trial has been fair. All of it must be fair.[198]

Regardless, Judge Van den Wyngaert states that, even if the charges were properly brought, "a lot of potentially relevant evidence is missing from the case record and that quite a lot of the available evidence suffers from serious credibility problems. Under these circumstances, it is simply not possible, in my opinion, to come to any meaningful findings beyond reasonable doubt. In fact, I am firmly of the view that a different interpretation of the evidence is possible, if not more plausible."[199] As a result, she would find Katanga not guilty.

Without delving into the merits of this dissent (which, notably, is very well written although still exceedingly lengthy), the mere fact that it exists provides

195 *Id*., p. 454.
196 *Id*., pp. 454-455.
197 *Katanga* Dissent, 7 March 2014, paras. 7, 309.
198 *Id*., para. 310-311.
199 *Id*., para. 317.

an opportunity and a legitimate source for those that oppose the ICC.[200] To put it another way, when a sous chef comes to the front of the house and declares that the busboy has spit in the soup, customers leave the restaurant – or at least ask for the salad. This is not to suggest that Judge Van den Wyngaert should have simply acceded to the majority opinion but rather that the chambers truly need to seek unanimity and address what are clearly rational concerns. To the extent they remain at odds, the competing opinions need to complement each other whenever possible and ensure that the public understands that differing opinions actually promote a full discussion of the merits rather than suggesting the end product is defective.

2.4 A Way Forward

There is no absolute right or wrong answer, no specific recipe for creating the perfect judgment. Indeed, the formulaic approach is one hindrance the Court is now facing. However, a number of workable changes to the style and content of the judgments could be extremely beneficial, ultimately providing the consumer with a better product and the Court with increased legitimacy. Such changes could include, among others:

- significantly more concise judgments;
- a syllabus or narrative summary of the case;
- early, clear statements of the holdings;
- a focus on the needs and interests of the affected region and the public at large;
- explanations of expectations and limitations imposed on the Court;
- a cleaner text, potentially moving paragraph numbers into the margin and using endnotes rather than footnotes; and
- dissenting and concurring opinions that, while presenting differing perspectives and maintaining judicial independence, consider how their contributions can challenge the majority without attacking the legitimacy of the Court.

Indeed, the Appeals Chamber, in recent months, seems to have addressed at least some of these concerns. For example, the *Lubanga* judgment on conviction and sentencing judgment, as well as the *Ngugjolo* appeal judgment, all explicitly include, on the first page of substantive text, the ultimate determination of the appeals chamber – in each instance "confirming" the decision of the Trial Cham-

200 Judge Van den Wyngaert is not the first and certainly will not be the last. One of the most famous dissents in international law is that written by Judge Radhabinod Pal, as he refused to join the majority in convicting the Japanese defendants at the International Military Tribunal for the Far East. It has been suggested that Judge Pal's opinion is one of the earliest examples of TWAIL scholarship, as it is firmly rooted in the colonial past of the region. *See* Cryer 2011, p. 262; P. Singh, 'International Law as "Intimate Enemy"', *Or. Rev. Int'l L.*, Vol. 14, 2012, p. 379. Ultimately, his dissent serves as a cautionary tale, as it has been used by revisionist historians in Japan to deny or minimize the Rape of Nanking. C. Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought*, Columbia Univ. Press, New York 2007, p. 188.

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ber.[201] The next portion of each appeals judgment is entitled "Key Findings," in which the most significant determinations of the Appeals Chamber are presented.[202] The judgments are also significantly shorter; yet the majority opinions in the *Lubanga* and *Ngugjolo* judgments on guilt of 193 pages and 117 pages, respectively, cannot be considered "short" by any stretch. Ultimately, the Appeals Chamber opinions to date are a step in the right direction but have not reached the level of accessibility one would hope for.

An improved judgment is not the cure-all, but it has the potential to help address issues the Court is facing from a variety of perspectives. Across all three segments of the general public – political leaders, civil society, and the general public – judgments which are clear and concise and address local and regional concerns can improve understanding and expectations. Some reasons for political unwillingness to support the ICC arise from "a lack of understanding of international criminal law, acceptance of arguments that the ICC is biased against Africa, the belief that other priorities are more pressing for African states, [and] the general public is unaware of international criminal justice and its importance."[203]

Providing reader-friendly judgments certainly help educate regarding international criminal law, including the relative importance of the essential work done by the ICC. While the judgments alone cannot solve the allegations of bias, clear legal reasoning coupled with citations to local law and regional instruments and acknowledgement of colonial contributions to conflict situations can address the concerns to some degree. Reworked judgment may be most useful to civil society organizations, both for their own digestion of pertinent information and as a tool for use in advocacy directed at political leaders and the general population. The general public, by way of direct access and through civil society advocacy, can gain a better understanding of the Court and its work. Ultimately, increased grassroots support may then influence the debate at the national level.[204]

3 Marketing

At present, judgments are not simply pronounced and then uploaded to the ICC website. Rather, to some degree, they are marketed to the public and particularly the media, NGOs, and academics through "summaries" of the judgments and

201 *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04/01/06 A 5, 1 December 2014, p. 6; *Prosecutor v. Thoma Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute," ICC-01/04-01/06 A 4 A 6, 1 December 2014, p. 5; *Prosecutor v. Ngudjolo*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "judgment pursuant to article 74 of the Statute," ICC-01/04-02/12 A, 7 April 2015, p. 6.

202 *Id*.

203 Southern African Litigation Centre, May 2013, p. 41.

204 *Id*., p. 39 ("Greater advocacy within countries for support for the Rome Statute is needed (bottom up) and will inevitably inform and possibly influence the debate within the deliberations of the bodies and institutions concerned.").

"press releases."[205] The summaries of the judgments are produced by the Trial Chambers but are little more than extractions from the judgments with minimal emphasis, if any, on providing more concise, user-friendly texts.[206] It is unclear exactly what purpose the summary is intended to serve. In part, it serves as a "crib sheet" for the presiding judge to read aloud when pronouncing judgment. It is also translated for dissemination – given the abbreviated length, this is obviously a much easier task for those responsible for translation. Yet the summaries fail to address the concerns discussed above and do nothing to enhance the legitimacy of the Court.[207]

The Registry also disseminates a press release providing a short recap of the judgment.[208] Given the contemporaneous nature of the press release, it is likely that the Trial Chamber is involved to some degree in its preparation. The press releases are excellent resources for their primary audience – the media – but do little for the general public, particularly those with limited prior contact with the Court or the underlying facts of the case. The releases are very short – really too limited to convey the salient details of the judgment. Yet brevity does not necessarily produce readability. The press releases remain difficult to assimilate, as they include many dates, names of judges, military groups, and statutory references.

Although neither the summaries nor the press releases bridge the gap between judgment and audience, they do suggest that resources are available to develop a précis (a summary or abstract) that could be used for this very purpose. In attempting to address a similar problem between United States Supreme Court opinions and the American public, Michael Serota has argued for a "Public Opinion program," which would be mandated with "translat[ing] each of the Court's published opinions into a publicly accessible medium of judicial communication, which accounts for both the low rates of civic literacy and the limited time the

205 One challenge facing the Court is that there is no single person responsible for communicating and advocating on behalf of the Court as an institution. Instead, the responsibility is shared by "public relations" arms of the Presidency, Office of the Prosecutor and Registry. *See generally* ICC, 'Integrated Strategy for External Relations, Public Information and Outreach', 18 April 2007, p. 1, available at <www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf>.

206 *Prosecutor v. Thomas Lubanga Dyilo*, Summary of the "Judgment Pursuant to Article 74 of the Statute," ICC-01/04-01/06-2843, 14 March 2012; Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to Article 74 of the Statute in the case of *The Prosecutor v. Germain Katanga*, available at <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf>.

207 Another option is for judges to "speak publicly about their cases." However, "judges have traditionally been reluctant to [do so], preferring to let the texts of their judgments speak for themselves. Yet, judgments are legal documents, precise enough to follow the dictates of the law, parsed by lawyers, but usually inaccessible to those outside the profession." Terris 2008, p. 458.

208 Press Release, 'ICC First Verdict: Thomas Lubanga Guilty of Conscription and Enlisting Children under the Age of 15 and Using Them to Participate in Hostilities', ICC-CPI-20120314-PR776, 14 March 2012; Press Release, 'ICC Trial Chamber Acquits Mathieu Ngudjolo', ICC-CPI-20121218-PR865, 18 December 2012; Press Release, 'Germain Katanga Found Guilty of War Crimes and One Count of Crime against Humanity Committed in Ituri, DRC', ICC-CPI-20140307-PR986, 7 March 2014.

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average American has to devote to reading the Court's work."[209] Such a Public Opinion, according to Serota, would consist of three parts: (1) an "Essentials" section, quickly informing the reader of the opinion's essential legal facts and concepts; (2) a "Background" section, covering facts, procedure, and law in a narrative style highlighting the human drama; and (3) a "Decision" section, translating the essential parts of the Court's rationale.[210]

While the exact format is up for debate – I would personally prefer to start with bulleted, one- or two-sentence key holdings before introducing the other aspects of the case – Serota's general concept is sound, particularly in the instant circumstances, given the ICC's currently available resources and its critical need to develop its legitimacy. Nor is there a need to recreate the wheel, as substantial guidance can be garnered from the excellent work produced by a variety of non-governmental organizations and academics, who have rapidly digested the judgments and disseminated their understanding of the Court's decision on various websites and blogs.

Serota raises the issue of duplication – *i.e.*, why provide a public opinion if the media is going to synthesize the opinion for the general public.[211] The robust efforts of non-governmental organizations and academics with regard to each ICC verdict further supports such a contention and even, in large part, addresses concerns that media coverage is to superficial and biased. The simple fact, however, is that third-party coverage distances the public from the Court. On the one hand, the judges who authored the opinion can control the message, ensuring there are no problems in translation. They can include a disclaimer, informing readers that the précis is not legally binding or that the full opinion is controlling if there are any discrepancies. On the other hand, if a lay person is provided a document directly from the Court, perhaps including the signatures of the judges carries an additional gravitas and indicia of reliability while connecting the reader more intimately with the Court.

Thus, short of major changes to the judgments at the ICC, much can be done in marketing the product to consumers to make it more useful and desired, thereby improving the legitimacy of the Court.

4 Conclusions

The Court faces a near impossible task, with expectancies exceeding any possible actual performance of the Court. As former ICC President Phillipe Kirsch has acknowledged:

209 Serota 2012, p. 662 (unlike the ICC situation where resources simply need to be refocused, Serota's suggestions for US reforms are less likely to occur given the need to create a new bureaucratic structure and the associated expense).

210 *Id.*, pp. 662-663.

211 *Id.*, p. 665 (answering the question with a quote from Justice William O. Douglas: "the author of the court opinion would hardly recognize [the media's reporting] as descriptive of what he had written.").

> While the ICC will do everything it can to fulfill its role effectively, it is simply not possible to meet all of the expectations," he continued. "An accurate understanding of the court is important to ensuring sustained, effective – and necessary – support. This is why, when speaking about the court, I explain not only its potential, but also the limitations of the court's jurisdiction, the complexity of situations in which it operates in the field, and its dependence on external support....[212]

Unfortunately, the ICC is failing to adequately explain and address such concerns, despite having a particularly useful medium – the judgment – within its complete discretion and control.

The ICC does not have an "Africa problem" per se – rather, it has universal issues that are exacerbated in the African context. In fact, one could say that the African issues are, by definition, universal, since the only cases at the ICC are in African countries. Regardless, the opinions of the Court leave much to be desired. Simply put, "judicial opinions should be intelligible not only to the legal community, but to the general public. That the average [person] be able to comprehend the work of our judiciary is an essential component of our legal order."[213]

The Court will likely always be more expensive than other alternatives short of continued conflict, but many other issues can be addressed, at least in part, through meaningful judgments. While issues of fit and use will generally be a matter for the Prosecutor and Pre-Trial Chamber, expectations can be tempered, local concerns addressed, and issues much more clearly explained through reimagined judgments. The Court needs an increase in its legitimacy now more than ever, and one significant means that can be practically achieved is a more meaningful judgment or, at a minimum, a précis formulated to meet the needs of its constituency.

To succeed, the ICC must evolve. Neither continuing "as is" nor closing up shop is a viable option. There are far too many individuals committing atrocities that simply cannot go ignored. Rather, changes, both big and small, are necessary to meet the current crisis. While addressing significant issues in the ICC judgments or, alternatively, propounding a useful summary will not alone resolve the ICC-African relations or broader relations with the public, providing a meaningful product is essential to increased legitimacy.

212 Terris 2008, pp. 460-461; *quoting*, D. Terris, C. Romano & L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, Brandeis University Press, Lebanon 2007, p. 172.

213 *Id.*, p. 669.

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