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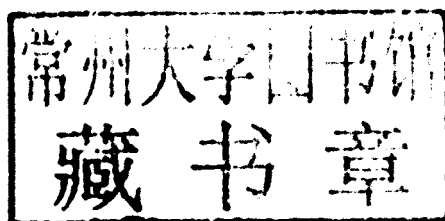
THE
INTERNATIONAL
CRIMINAL
COURT

A Commentary on the Rome Statute

WILLIAM A. SCHABAS

The International Criminal Court: A Commentary on the Rome Statute

WILLIAM A. SCHABAS OC MRIA



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to
Thomas, George and Ezra-Pierre

Preface

The International Criminal Court has just passed the self-imposed milestone of seven years since the entry into force of the *Rome Statute* on 1 July 2002. At two places in the *Statute*, seven years is treated as a moment of importance in the evolution of the institution. As of 1 July 2009, amendments may be proposed to any provision of the *Statute*.¹ Moreover, after seven years the Secretary-General of the United Nations is to convene a Review Conference,² now scheduled to take place in late May and early June of 2010. As of the seven-year mark, the Court was mid-way through its first trial, with two more expected to begin in the months to follow.

That the Court is now fully operational and that it has been able to arrest suspects and hold trials is an astounding accomplishment. Few would have expected this sixteen years ago, when international criminal justice revived, in 1993, with the creation of the International Criminal Tribunal for the former Yugoslavia. It had been more than forty-five years since the last trials, at Nuremberg and Tokyo. In 1993, the International Law Commission was working diligently on the preliminary draft of the *Rome Statute*, but probably most of its members – indeed, most knowledgeable observers – did not expect things to move very quickly.

The draft statute of an international criminal court that was adopted by the International Law Commission in 1994 was radically changed by 17 July 1998, when Giovanni Conso banged the final gavel at the Rome Conference and declared that the *Rome Statute of the International Criminal Court* was adopted. Even then, however, the prospect of early entry into force was not encouraging. The *Statute* had a daunting threshold of sixty ratifications for its entry into force. Several of the largest countries, including the United States, China, Russia, and India, were unenthusiastic or even downright negative. Again, the pessimists were proven wrong: more than sixty ratifications were deposited within a little more than three and a half years.

This exhilarating progress in the drafting and then the entry into force generated great enthusiasm, and many supporters of the Court, including myself, probably expected more from it in its first years of operation following entry into force of the *Statute* on 1 July 2002. The models of the *ad hoc* tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, all of them extraordinarily successful in accomplishing their mandates, stood as a benchmark. This created high expectations that were perhaps, in hindsight, unreasonable. The Court itself made calculations about its future activity that proved to be inaccurate. Based upon projections from the Prosecutor,³ at least one case was supposed to be in the 'trial phase' by 2005. As a result, trial judges, and their professional staff, were brought into full-time service by mid-2005. In fact, nobody was even taken into custody until 2006, and trial judges were not required until 2007.⁴ The explanation for what have proven to be difficult early years of the Court is complex. It was certainly

¹ *Rome Statute*, art. 121.

² *Ibid.*, art. 123.

³ 'Draft Programme Budget for 2005', ICC-ASP/3/2, pp. 49, 51, para. 161.

⁴ *Ibid.*, para. 148.

easier to create a temporary institution, like the *ad hoc* tribunals, than a permanent one. There has probably been a tendency to underestimate the political challenges to the work of a permanent court with general jurisdiction.

Yet even in its early years, the Court has already made many important contributions to peace and justice. Some of its problems are being resolved. It is finding its way. It will continue to improve. It has become a central component of the international system. Centuries from now, the creation of an international criminal court will be regarded as a defining moment in human history, a stage in progress towards universal norms and institutions.

I am especially grateful to Juan Pablo Pérez-León Acevedo, who worked on the Spanish-language sources, and Wibke Timmermann, who researched and reviewed the German-language sources. Their work has greatly enriched the manuscript. I also thank Kimberly Prost, Margaret McAuliffe deGuzman, and Gene Enders, for answers to questions and other contributions to the work on this project. Much of the writing was done while I was a visiting professor at Cardozo Law School in New York and LUISS University in Rome, and a visiting fellow at All Souls College in Oxford. I am grateful to all three institutions for their hospitality, as well as to my permanent academic home at the Irish Centre for Human Rights of the National University of Ireland, Galway. I wish to thank John Louth and Merel Alstein of Oxford University Press for their encouragement and assistance. Finally, as always, to Penelope, for all of her support.

William Schabas

Oughterard

30 June 2009

Abbreviations

<i>Ad Hoc Committee Report</i>	'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22
<i>AJIL</i>	<i>American Journal of International Law</i>
Calvo-Goller, <i>Trial Proceedings</i>	Karin N. Calvo-Goller, <i>The Trial Proceedings of the International Criminal Court</i> , Leiden/Boston: Martinus Nijhoff, 2006
Cassese, <i>Rome Statute</i>	Antonio Cassese, Paola Gaeta and John RWD Jones, eds., <i>The Rome Statute of the International Criminal Court: A Commentary</i> , Oxford: Oxford University Press, 2002
<i>CLF</i>	<i>Criminal Law Forum</i>
Doria, <i>Legal Regime</i>	José Doria, Hans-Peter Gasser and M. Cherif Bassiouni, eds., <i>The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blisshchenko</i> , Leiden/Boston: Martinus Nijhoff, 2009
Dörmann, <i>Elements of War Crimes</i>	Knut Dörmann, <i>Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary</i> , Cambridge: Cambridge University Press, 2002
<i>EJCLCJ</i>	<i>European Journal of Crime, Criminal Law and Criminal Justice</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
Fischer, <i>International and National Prosecution</i>	Horst Fischer, Claus Kreß and Sascha Rolf Lüder, eds., <i>International and National Prosecution of Crimes under International Law: Current Developments</i> , Berlin and Baden-Baden: Verlag Arno Spitz GmbH and Nomos, 2001
Guevara and Del Maso, <i>La Corte penal</i>	José A. Guevara B. and Tarciso Dal Maso J., <i>La Corte penal internacional: Una vision iberoamericana</i> , Mexico City: Editorial Porrúa, 2005
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>ICLR</i>	<i>International Criminal Law Review</i>
ILC 1993 Working Group Report	'Revised report of the Working Group on a draft statute for international criminal court', UN Doc. A/CN.4/L.490 and Add.1, in <i>Yearbook... 1993</i> , UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), annex, pp. 100–132
ILC 1994 Final Report	'Report of the International Law Commission on the work of its forty-sixth session (2 May–22 July 1994)', in <i>Yearbook... 1994</i> , UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 15–73
IMT	International Military Tribunal
<i>IRRC</i>	<i>International Review of the Red Cross</i>
<i>JICJ</i>	<i>Journal of International Criminal Justice</i>

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- Lee, *States' Responses* Roy S. Lee, ed., *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, Ardsley, NY: Transnational, 2005
- LJIL *Leiden Journal of International Law*
- LRTWC Law Reports of the Trials of the War Criminals
- Malaguti, *International Cooperation* Maria Chiara Malaguti, ed., *ICC and International Cooperation in Light of the Rome Statute*, Lecce, Italy: Argo, 2007
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Tables of Cases

INTERNATIONAL CRIMINAL COURT

Abu Garda (ICC-02/05-02/09)

Decision on the Prosecutor's Application under Article 58, 7 May 2009	202, 206, 214, 215, 229, 243, 298, 437, 647, 711, 713
Summons to Appear, 7 May 2009	705

Bashir (ICC-02/05-01/09)

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009	102, 124–6, 130, 131, 148, 156, 160–2, 165, 169, 175, 179, 202, 206, 226, 243, 265, 272, 298, 349, 366, 367, 385, 386, 389, 396–7, 408, 428, 429, 451, 474, 705, 706, 707, 709, 710, 764, 1042
Decision on the Prosecutor's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 24 June 2009	395, 708, 714
Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 10 March 2009	1057
Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009	124, 125, 130, 265, 266, 386, 707, 708
Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009	997

Bemba (ICC-01/05–01/08)

Application for Legal Assistance Paid by the Court, 10 February 2009	596
Decisão e pedido com vista a obter a identificação, a localização, o congelamento e a apreensão de bens e haveres, apresentados a República Portuguesa, 27 May 2008	982
Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009	742, 1209
Decision Authorising Photographs at the Confirmation of the Charges Hearing on 12 January 2009, 8 January 2009	736
Decision on Application for Interim Release, 20 August 2008	689, 719, 725
Decision on Application for Interim Release, 13 December 2008	724, 725, 729
Decision on Application for Interim Release, 16 December 2008	728
Decision on Application for Interim Release, 14 April 2009	724, 726–8
Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 9 April 2009	772
Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 17 July 2009	773
Decision on the Defence's Request Related to Language Issues in the Proceedings, 4 December 2008	803, 813
Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008	739
Decision on the Implementation of Disclosure to the Defence, 5 December 2008	739
Decision on the Postponement of the Confirmation Hearing, 17 October 2008	740
Decision on the Postponement of the Confirmation Hearing, 2 December 2008	559
Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, 10 June 2008	707, 709, 710, 738
Decision on the 'Request for Review of the Registrar's Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court', 10 February 2009	547, 596
Decision on the Request for Withdrawal of a Counsel, 21 November 2008	593

Decision on the Second Defence's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal, 14 November 2008.	798
Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009	148–52, 153, 154–6, 158, 167–71, 200, 202–4, 206, 207, 214, 215, 242, 243, 365, 366, 389, 393, 395, 399, 410, 424, 429, 456, 458–64, 475, 476, 707, 736, 738–40, 742, 784, 844, 845
Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 12 November 2008	676, 817
Decision Requesting Observations of the Prosecutor on the Defence's Application for Interim Release, 4 August 2008.	724
Decision Requesting Observations on the Defence's Application for Interim Release, 12 November 2008.	724
Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008	393
Decision to Hold a Hearing Pursuant to Rule 118(3) of the Rules of Procedure and Evidence, 16 June 2009	728
Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique, 23 May 2008	712
Dissenting Opinion of Judge Georgios M. Pikis, 16 December 2008.	559, 724
Enregistrement des déclarations de Maître Tjarda E. Van der Spoel et de Maître Aimé Kilolo-Musamba acceptant l'extension de leur mandat comme conseil de permanence de M. Jean-Pierre Bemba Gombo, 15 July 2008	593
Enregistrement des documents relatifs à la désignation de Maître Tjarda E. Van der Spoel et de Maître Aimé Kilolo-Musamba comme conseils de permanence pour représenter M. Jean-Pierre Bemba Gombo, 4 July 2008.	593
Fourth Decision on Victims' Participation, 12 December 2008	284, 396, 799
Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Pre-Trial Chamber III entitled 'Decision on Application for Interim Release', 16 December 2008.	398–400, 687, 708, 711, 724–6, 799, 805, 944, 953
Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo, 23 May 2008	309
Order Concerning Notification by way of Personal Service, 16 December 2008.	957
Registrar's Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo, 25 August 2008.	596
Request for Clarification on Document Containing the Charges, 4 November 2008	738
Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008.	705, 738, 996
Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, 10 June 2008.	705, 996
Harun et al. (ICC-02/05–01/07)	
Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007.	178, 284, 344, 366, 367, 399, 424, 429, 433, 437, 706
Warrant of Arrest for Ahmad Harun, 17 April 2007.	705, 997
Katanga et al. (ICC-01/04–01/07)	
Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008.	734, 741
Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118–2), 13 November 2008.	728
Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, 24 January 2008	729
Decision Concerning Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui, 17 June 2008	724

Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, 9 July 2008	724
Decision Constituting Trial Chamber II and Referring to it the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, 24 October 2008	545, 558
Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui Against the Decision on Joinder, 9 April 2008	395
Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008	83, 396, 675, 678, 679, 817, 818, 826, 838
Decision on 'Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008', 10 March 2009	548
Decision on a Number of Procedural Issues Raised by the Registry, 14 May 2009	804, 842
Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12, 18 April 2008	735
Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, 27 March 2008	726
Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008	395
Decision on the Conditions of the Pre-Trial Detention of Germain Katanga, 21 April 2008	712
Decision on the Confirmation of the Charges, 30 September 2008	40, 42, 148, 150, 153, 155, 156, 158, 161, 171, 172, 184, 186, 202, 203, 207, 209–12, 214, 215, 223, 225, 226, 240, 242, 243, 249, 250, 254, 255, 390, 391, 393–5, 409, 424, 429, 432, 437, 440, 475, 583, 598, 638, 676, 734, 736, 741, 742, 817, 841, 844, 845, 849, 850
Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, 18 January 2008	945
Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007	945
Decision on the Defence Request Concerning Languages, 21 December 2007	803
Decision on the Defence Request Concerning Time Limits, 27 February 2008	640
Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, 6 July 2007	285, 308, 344, 367, 429
Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, 5 November 2007	284, 299, 367
Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, 6 July 2008	708, 709
Decision on the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008	388, 767
Decision on the Powers of the Pre-Trial Chamber to Review <i>Proprio Motu</i> the Pre-Trial Detention of Germain Katanga, 18 March 2008	712, 724, 727, 729
Decision on the Request to be Excused from Sitting on the Appeal Against the Decision on Admissibility in the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Pursuant to Article 41 of the Rome Statute, 3 July 2009	572
Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008	741
Décision relative à l'admissibilité, aux fins de l'audience de confirmation des charges, des transcriptions de l'entretien avec le témoin 12, aujourd'hui décédé, 18 April 2007	841
Decision Replacing a Judge in Trial Chamber II, 29 April 2009	545, 558
Decision Replacing Judges in the Appeals Chamber, 3 July 2009	545, 555, 562
Decision Requesting Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, 2 June 2008	680
Dissenting Opinion of Judge Georghios M. Pikis and Judge Daniel David Ntanda Nsereko, 26 November 2008	387, 389, 578, 591, 682, 694, 957

Dissenting Opinion of Judge Pikis, 13 May 2008	682
Dissenting Opinion of Judge Pikis, 27 May 2008	682
Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 Against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008	706, 708, 712, 723, 725, 726, 801
Judgment on the Appeal Against the Decision on Joinder Rendered on 10 March 2008 by the Pre-Trial Chamber in The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008	408, 767, 806
Judgment on the Appeal of Mr Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008	799
Judgment on the Appeal of Mr Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Defence Request Concerning Languages', 27 May 2008	687, 804
Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008	682, 799, 818
Judgment on the Appeal of the Prosecutor Against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, 26 November 2008	387, 389, 597, 598, 682, 953
Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut), 16 June 2009	50, 54, 311, 342, 345, 363, 369, 999
Mr Katanga's Waiver of his Right to be Present at the Confirmation Hearing Pursuant to Rule 124 of the Rules of Procedure and Evidence, 9 July 2008	737, 756
Partly Dissenting Opinion of Judge Anita Ušacka, 30 September 2008	186, 742
Reasons for the 'Decision on "Victims and Witnesses Unit's Considerations on the System of Witness Protection and the Practice of "Preventive Relocation" and "Prosecution's request for Leave to File a Response to "Victims and Witnesses Unit's Considerations on the System of Witness Protection and the Practice of "Preventive Relocation"'"', 11 July 2008	941, 942
Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (Rule 118(2) of the Rules of Procedure and Evidence), 19 November 2008	726
Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008	726, 729
Version publique expurgée de la Décision relative à la protection des témoins à charge 267 et 353 du 20 mai 2009 (ICC-01/04-01/07-1156-Conf-Exp), 28 May 2009	766
Warrant of Arrest for Germain Katanga, 2 July 2007	705, 996
 Kony (ICC-02/04-53)	
Decision Appointing a Single Judge for Unsealing of Documents, 30 May 2006	559
Decision Initiating Proceedings Under Article 19, Requesting Observations and Appointing Counsel for the Defence, 21 October 2008	365
Decision on 'Requête de la Défense en extension de délai afin de répondre aux "Observations de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06"', 23 February 2007	640
Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009	365-7
Decision on the Prosecutor's Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006	800
Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005	159, 163, 171, 172, 185, 215, 216, 226, 275, 290, 308, 342, 440, 705, 709, 710, 997

Kushayb (ICC-02/05–01/07)

Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007	344
Warrant of Arrest for Ali Kushayb, 27 April 2007	202, 705, 907

Lubanga (ICC-01/04–01/06)

Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges', 5 February 2007	743
Appointment of Duty Counsel, 19 April 2007	593
Appointment of Ms Annick Mongo as Duty Counsel Pursuant to the Appeals Chamber's Decision of 3 April 2007, 4 May 2007	593
Decision Constituting Trial Chamber I and Referring to it the Case of The Prosecutor v. Thomas Lubanga Dyilo, 6 March 2007	545, 558
Decision Inviting Observations from the Special of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2009	773
Decision of the Appeals Chamber on Mr Thomas Lubanga Dyilo's Request of 4 May 2007, 11 May 2007	593
Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, 13 June 2007	32, 811, 933, 942
Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007, 27 April 2007	389, 543, 557, 588, 589
Decision of the Presidency upon the Document Entitled 'Clarification' Filed by Thomas Lubanga Dyilo on 3 April 2007, the Requests of the Registrar of 7 April 2007 and the Requests of Thomas Lubanga Dyilo of 17 April 2007	548
Decision on Defence's Request for Extension of Time, 22 January 2008	639
Decision on Defence's Request to Obtain Simultaneous French Transcripts, 14 December 2007	640
Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008	389, 392, 396, 561, 748, 764, 818, 826
Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence', 22 April 2008	933
Decision on Opening and Closing Statements, 22 May 2008	771, 815
Decision on the Admissibility of Four Documents, 13 June 2008	838, 840, 843, 844
Decision on the Admissibility of the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled 'Décision sur la confirmation des charges' of 29 January 2007, 13 June 2007	32
Decision on the Application for Interim Release of Thomas Lubanga Dyilo, 18 October 2006	725, 727–9
Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, 18 July 2006	829
Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Thomas Lubanga Dyilo and of the Investigation in the Democratic of the Congo, 28 July 2007	741
Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Thomas Lubanga Dyilo, 29 June 2006	829
Decision on the Confirmation of the Charges, 29 January 2007	202, 203, 206, 207, 252–4, 393, 394, 396, 408, 416, 419, 424, 425, 427, 428, 436, 475, 478, 503, 734, 736, 741, 742, 787, 848–50
Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, 13 June 2008	82, 83, 377, 389, 390, 396, 399, 676, 679, 680, 681, 768, 795, 799, 817, 818, 1023
Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008	831, 945–8

Decision on the Defence Request for Leave to Appeal the 'Decision on Disclosure by the Defence', 8 May 2008	946
Decision on the Defence 'Request to Exclude Video Evidence Which has not been Disclosed in One of the Working Languages', 7 November 2006	638
Decision on the Defence Request to Postpone the Confirmation Hearing, 8 November 2006	739
Decision on the 'Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves' and on the 'Urgent Request for the Appointment of a Duty Counsel' filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, 29 June 2007	543, 547, 593, 595
Decision on the Participation of Victims in the Appeal, 6 August 2008	933, 942
Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, 24 May 2006	739
Decision on the Postponement of the Confirmation Hearing, 20 September 2006	739
Decision on the Practices of Witness Familiarization and Witness Proofing, 8 November 2006	50, 388, 399, 842, 907
Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 14 May 2007	941, 946, 947
Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses, 15 January 2009	825, 840
Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006	51, 307, 308, 311, 340, 341, 345, 346, 348, 424, 427, 705, 708, 709, 743, 1006
Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 24 February 2006	200, 344
Decision on the Request by Mr Thomas Lubanga Dyilo for an Extension of Time, 12 October 2008	637
Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006	639, 813
Decision on the Requests of the Prosecutor and the Defence for Suspensive Effect of the Appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, 22 May 2008	949
Decision on the Schedule and Conduct of the Confirmation Hearing, 7 November 2006 ..	736
Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings, and the Manner in Which Evidence shall be Submitted, 13 December 2007	387, 651, 743, 768, 841
Decision on the Temporary Substitution of the Single Judge, 11 August 2006	559
Decision on the Third Defence Motion for Leave to Appeal, 4 October 2006	599
Decision on Victims' Participation, 18 January 2008	109, 115, 366, 400, 828, 829, 831, 833, 834, 843
Decision on Whether Two Judges Alone may Hold a Hearing and Recommendations to the Presidency on Whether an Alternate Judge should be Assigned for the Trial, 22 May 2008	558, 559, 766, 875
Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, 30 November 2007	390, 394, 397, 677
Decision Regarding the Protocol on the Practices to be Used to Prepare Witnesses for Trial, 23 May 2008	842
Décision relative au système définitif de divulgation et à l'établissement d'un échéancier, Annexe I, Analyse de la décision relative au système définitif de divulgation, 15 May 2006	739, 740, 800
Decision Replacing a Judge in the Appeals Chamber, 29 August 2008	545
Decision Reviewing the 'Decision on the Application for Interim Release of Thomas Lubanga Dyilo', 9 October 2007	729
Decision Reviewing the Trial Chamber's Ruling on the Detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008,	725
Décision sur la demande d'autorisation d'appel de la Défense relative à la transmission des Demandes de participation des victimes, 6 November 2006	799

Decision to Classify the 'Registrar's Decision Pursuant to Regulation 196(1) of the Regulations of the Registry, ICC-BD/03-01-06' as a Public Document, 23 March 2006	387, 591
Decision to Give Access to the Prosecution to the Evidence Included in the Defence List of Evidence Filed on 2 November 2006, 8 November 2006	740
Decision Transmitting the Pre-Trial Record of Proceedings in the Case of Thomas Lubanga Dyilo to Trial Chamber I, 5 June 2007	546
Dissenting Opinion of Judge Georghios M. Pikis, 13 October 2006	391
Dissenting Opinion of Judge Georghios M. Pikis, 21 October 2008	763
Dissenting Opinion of Judge Rene Blattmann, 8 May 2008.	806, 945
Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, 13 February 2007.	562
Instructions to the Court's Expert on Background and Context, 17 December 2008	843
Judgment on the Appeal of Mr Lubanga Dyilo Against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008.	676
Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 13 February 2007	387, 389, 723, 726-9, 806, 942, 933, 1209
Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008	818
Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006.	398, 874, 953
Judgment on the Appeal of Mr. Lubanga Dyilo Against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008.	813
Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled 'Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008', 21 October 2008	390, 398, 399, 676, 680, 681, 818, 819, 1023
Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled 'Decision on the Release of Thomas Lubanga Dyilo', 21 October 2008	943, 944
Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006	365, 366, 370, 377, 399, 795
Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008	771, 828, 829, 830, 832, 833, 843
Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006.	675, 739, 787, 946, 953
Order for Submissions on Whether Two Judges of the Trial Chamber may Hold a hearing, 14 February 2008.	559
Order Issuing Public Redacted Annexes to the Decisions on the Applications by Victims to Participate in the Proceedings of 15 and 18 December 2008, Annex A, 8 May 2009	830
Order on the Application for Release, 29 May 2006.	729
Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, 17 March 2006.	723
Ordonnance autorisant la prise de photographies a l'audience du 9 novembre 2006, 6 November 2006.	736
Partly Dissenting Opinion of Judge Georghios M. Pikis, 11 July 2008.	816, 830, 832
Partly Dissenting Opinion of Judge Philippe Kirsch, 23 July 2008.	832
Reasons for 'Decision of the Appeals Chamber on the Defence application "Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense" filed on 20 February 2007' Issued on 23 February 2007, 9 March 2007.	389, 399, 546, 557, 594, 744, 809, 810, 949, 957

Reasons for Oral Decision Lifting the Stay of Proceedings, 23 January 2009 . . .	681, 763, 769, 818
Reasons for the 'Decision of the Appeals Chamber on the Request of Counsel to Mr Thomas Lubanga Dyilo for Modification of the Time Limit Pursuant to Regulation 35 of the Regulations of the Court of 7 February 2007' Issued on 16 February 2007, 21 February 2007	592
Reasons for the Decision on the Request of the Prosecutor for Suspensive Effect of his Appeal Against the 'Decision on the Release of Thomas Lubanga Dyilo', 22 July 2008	948
Redacted Version of 'Decision on "Indirect Victims"', 8 April 2009	830
Review of the 'Decision on the Application for the Interim Release of Thomas Lubanga Dyilo', 14 February 2007	726, 728
Second Review of the 'Decision on the Application for Interim Release of Thomas Lubanga Dyilo', 11 June 2007	725, 728, 766
Separate and Dissenting Opinion of Judge Blattmann Attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and Other Procedural Matters, 28 April 2008	389, 826
Separate and Dissenting Opinion of Judge Rene Blattmann, 18 January 2008	366, 828, 829
Separate and Dissenting Opinion of Judge Rene Blattmann, 22 May 2008	771, 842
Separate Opinion by Judge Georgios M. Pikis, 14 December 2006	678, 805
Separate Opinion of Judge Georgios M. Pikis, 13 February 2007	706, 723, 727, 728, 736
Separate Opinion of Judge Georgios M. Pikis, 13 June 2007	389, 829
Separate Opinion of Judge Sang-Hyun Song, 13 June 2007	396, 829
Submission by the Registrar of Additional Correspondence Received from the United Nations in Relation to the Expert Testimony of Mr Roberto Garreton, 4 February 2009	82
Warrant of Arrest, 10 February 2006	996
Lukwaya (ICC-02/04)	
Decision to Terminate the Proceedings Against Raska Lukwaya, 11 July 2007	308
Warrant of Arrest for Raska Lukwaya, 8 July 2005	163, 216, 226, 243, 275, 308, 705, 709, 710, 997
Ntaganda (ICC-01/04-02/06)	
Warrant of Arrest, 22 August 2006	308, 705, 714, 997
Odhiambo (ICC-02/04)	
Warrant of Arrest for Okot Odhiambo, 8 July 2005	159, 163, 215, 226, 243, 275, 308, 705, 709, 710, 997
Ongwen (ICC-02/04)	
Warrant of Arrest for Dominic Ongwen, 8 July 2005	159, 163, 185, 215, 216, 226, 243, 275, 308, 705, 709, 710
Otti (ICC-02/04)	
Warrant of Arrest for Vincent Otti, 8 July 2005	159, 163, 171, 172, 185, 215, 216, 226, 243, 275, 308, 440, 705, 709, 710, 997
Situation in Central African Republic (ICC-01/05)	
Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006	346
Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006	346
Situation in Darfur, Sudan (ICC-02/05)	
Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, 21 April 2005	82, 303, 544
Décision du Greffier relative à la nomination de Me Hadi Shalluf en qualité de conseil ad hoc de la Défense, 23 August 2006	594
Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006	594, 677, 773