

STAGES OF THE CRIMINAL JUSTICE PROCESS & STANDARDS OF PROOF



Filming for human rights can be dangerous. It can put you, the people you are filming and the communities you are filming in at risk. Carefully assess the risks before you press “record.”

INTRODUCTION

In this section, we explore video’s role in the criminal justice process by outlining the stages of the process and describing various standards of proof. Criminal justice and accountability are about holding perpetrators responsible for the crimes they committed and ensuring that those who are innocent are not wrongfully convicted. Criminal justice refers to the process by which crimes are investigated, evidence gathered, arrests made, charges brought, defenses raised, trials conducted, sentences rendered, and punishment imposed. We will also review a case from the Democratic Republic of Congo to see how video was woven into an investigation and trial that eventually brought a warlord to justice.

GOAL

After reading this section, frontline documenters should have a sense of how NGOs, criminal investigators, analysts, and lawyers can successfully use the videos they capture in the field throughout the criminal justice process.

THE CRIMINAL JUSTICE PROCESS

IN SUMMARY

Thanks to all the crime shows on television, the various stages of the criminal justice process and the accompanying standards of proof are known to many of us. While the names of the stages and standards vary depending on the particular country and court, generally speaking the stages and standards are as follows.

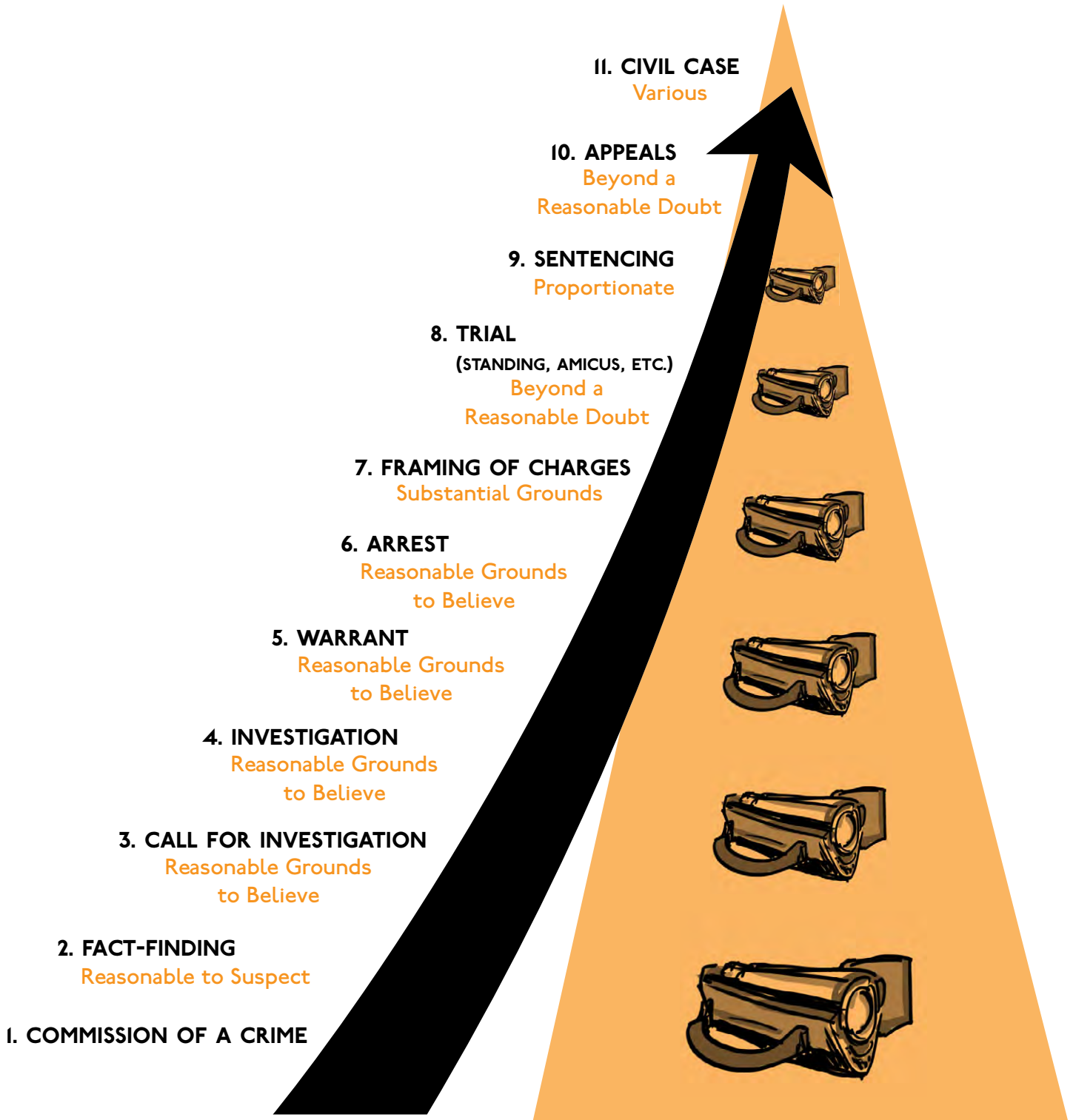
STAGE	STANDARD	ABOUT
Commission of a crime	Physical act and mental state	To have violated criminal law, the perpetrator must have committed a harmful act, usually with intent to commit harm.
Fact-finding	Reasonable grounds to suspect a crime was committed	When international crimes are committed, the first teams on the ground after frontline documenters will be charged with fact-finding. The fact-finders will be authorized to assess a situation if it is suspected that a crime was committed within the jurisdiction of the investigating body. Their job is to collect detailed information that institutions such as the UN Security Council or Commissions of Inquiry need to make decisions about peace and security. This information also helps investigators determine if there are reasonable grounds to launch a full investigation.
Call for an investigation	Reasonable grounds to believe a crime was committed	In both national and international contexts, investigators and lawyers will examine the initial evidence collected and decide if there is enough evidence to believe that a crime was committed. If so, they will launch an official investigation.
Investigation	Reasonable grounds to believe a crime was committed	An investigation is the continued systematic collection, preservation, and analysis of evidence to uncover the truth about the commission of a crime, including who committed the crime (or crimes) and how.
Warrant for arrest	Reasonable grounds to believe that the particular person committed the crime	Once lawyers, working with the investigators, have enough evidence against a particular person, they will ask a judge for a “warrant for arrest,” an official document that gives them authority to take the suspect into custody.
Arrest	Reasonable grounds to believe that the particular person committed the crime	Physically taking and keeping a person in lawful custody, in accordance with the warrant.
Initial appearance	Reasonable grounds to believe that the particular person committed the crime	This is the first time the suspect goes in front of a judge. The judge notifies the suspect of the charges against him or her, advises the suspect of his or her rights, sets bail, or dismisses the case for lack of evidence.

STAGE	STANDARD	ABOUT
Confirmation of charges / preliminary hearing or grand jury	Substantial grounds to believe the person in custody committed the crime	The goal of this day (or days) in court is to ensure that innocent persons are not wrongly put on trial. Here the prosecutor summarizes the evidence he or she has against the suspect so the judge can determine whether there is enough evidence to charge the suspect with the crimes he or she is accused of. If there is enough evidence, an indictment is filed. An indictment is simply a list of the crimes the suspect is accused of committing. If there is not enough evidence, the suspect is released from custody.
Trial	Beyond a reasonable doubt	Here the prosecution and the defense present evidence (witnesses, documents, videos, photos, expert reports, etc.) so that the judge or jury can make a decision about the guilt or innocence of the accused.
Sentencing	In proportion to the crime	<p>If an accused person is found guilty, then he or she appears at a sentencing hearing. The prosecutor often asks the judge to order the maximum sentence. The lawyer for the defendant typically asks for the minimum sentence.</p> <p>In proportion to the crime means that the penalty should reflect the crime. For example, a defendant should not get a life sentence for stealing one candy bar.</p> <p>When determining whether and how long to imprison someone, judges consider factors such as the seriousness and scale of the crime, the number of victims, the strength of the evidence presented in court, the circumstances of the person convicted, and the impact of the crime on the victims' lives.</p>
Appeal	Beyond a reasonable doubt	If the defendant feels he or she was wrongly convicted because his or her rights were violated during the criminal justice process, evidence was wrongly considered, or other errors were made, he or she can ask a higher court to reconsider the lower court's decision and set them free.
Civil suits	Varies depending on issue, but generally reasonable or substantial grounds to believe	If a person is wrongly prosecuted, they can bring a case against the government that wrongly charged them and took them to trial, asking for monetary damages.

WATCH THE JUSTICE PROCESS

Though real courtroom work is not nearly as dramatic as we see on television, if you would like to see what happens inside a courtroom at the different stages of the process, the International Criminal Court records and uploads many of its hearings onto its YouTube Channel: www.youtube.com/user/IntlCriminalCourt

STAGES OF THE CRIMINAL JUSTICE PROCESS



ROLE OF VIDEO

ESCALATING STANDARD OF PROOF

The presumption of innocence is a principle acknowledged in all major legal systems, because societies have decided it is preferable to see a guilty person walk free than to imprison someone who is innocent. For that reason, courts have developed a sliding scale when it comes to standards of proof: the greater the consequences to personal liberty, the higher the standard.

For example, if the police suspect you have committed a crime, they can arrest you and temporarily take you into custody. This, obviously, impacts your immediate personal liberties. But because this is only short-term, the standard of proof is relatively low. On the other hand, if you are taken to trial and found guilty, you may face a much longer sentence, and, for that reason, the standard of proof is much more rigorous at trial (beyond a reasonable doubt) than at the arrest stage (reasonable ground to believe).

WHY DOES THIS MATTER?

This matters to frontline documenters because this sliding scale also applies to evidence. At the investigation stage, an investigator can rely on a video if they have reasonable grounds to believe the video is authentic and not faked or manipulated. If a lawyer wants to use that same video in trial, they must prove to the court that the video is wholly trustworthy and in fact shows what it purports to show.

Since investigators, analysts, and lawyers often rely upon information and assistance from frontline documenters, it is important that the information you gather – including video documentation – meets at least the lowest standard of proof, so it can be used at the initial stages of the criminal justice process.

For example, if you have a video of a mass grave, an investigator must have *reasonable grounds* to believe that it is in fact a real mass grave and not a fictional clip from a Hollywood film. To use that same clip in court, the lawyer must be sure, *beyond a reasonable doubt*, that the clip is in fact of a real mass grave.

KEY POINT

As highlighted in the section “The Role of Video Beyond the Courtroom,” the video you collect *does not have to meet the highest standard to be valuable*. It is often impossible for frontline documenters to collect trial-ready footage. However, if it is possible and practical to collect evidence to the highest standard, then why not do so? If you can, this will make it easier for everyone involved, from journalists and investigators to lawyers and decision-makers, to rely upon your content. The easier you make it for them to use the video you collect, the better your chances that they will not only see it, but that they will use it, even if not as evidence in court.

To illustrate how video activists, human rights organizations, and lawyers have used video at different stages of the advocacy and criminal justice processes, below is a story about the warlord Thomas Lubanga Dyilo from the Democratic Republic of Congo (DRC).

FOR MORE INFORMATION

Find techniques for capturing and preserving footage to a trial-ready standard in “Filming Secure Scenes,” “Adding Essential Information,” and “The Activists’ Guide to Archiving Video” at library.witness.org

FIELD NOTE

THE ROLE OF VIDEO IN THE CRIMINAL JUSTICE PROCESS: FROM THE DRC TO THE ICC THE PROSECUTOR V. LUBANGA

Basics

Tribunal: International Criminal Court (ICC)

Who: Thomas Lubanga Dyilo

What Crimes: Enlisting, conscripting, and using child soldiers under the age of 15 actively in hostilities

How: Co-perpetration

Backstory

Between 1994 and 2003, the Democratic Republic of Congo (DRC) was embroiled in a complex conflict fueled by foreign armies and local militias. This war led to the loss of some five million lives. Thomas Lubanga Dyilo served as one of the many militia leaders. He was the president of the Union of Congolese Patriots (UPC), a militia group that claimed to represent the interests of the Hema ethnic group in the Ituri region of northeastern DRC. The Hema have been implicated in many serious abuses including ethnic massacres, torture, rape, and the use of child soldiers.

Specifically, the military wing of the UPC, under Lubanga's leadership, was known to recruit young people, regardless of age, in schools and in villages. Some of these recruitment efforts were coercive, including abductions. This meant that children under 15 years old were recruited – in violation of international law – whether or not this was specifically intended. The children were sent to training camps where they were beaten, whipped, imprisoned, and inadequately fed. Young female recruits were raped. The children were encouraged to smoke cannabis and drink alcohol and were frequently intoxicated.

The ICC initially charged Lubanga with thirty-three crimes. After the evidence was analyzed, the strongest body of admissible evidence allowed the ICC to charge Lubanga for the war crimes of conscripting, enlisting, and using child soldiers under the age of 15 actively in hostilities.

DEFINED

Chain-of-custody: Chain-of-custody simply means that the ICC needed to know how the video got from the military training camps, where it was filmed, to AJEDI-Ka and then to the ICC. More simply put, whose hands did the footage pass through on its way to the ICC?

Co-perpetrator: The ICC defines a co-perpetrator as a person who makes an essential contribution to a common plan to commit a crime. This essential contribution can be made when the plan is being conceived, when preparations to commit the crime are being made, or when the crime is being executed.

VIDEO'S ROLE AT THE DIFFERENT STAGES OF THE CRIMINAL JUSTICE PROCESS

1: Video's Role in INITIATING AN INVESTIGATION

In 2003, the DRC-based organization, AJEDI-Ka, alongside other courageous NGOs, started capturing video documentation of the use of child soldiers to complement their other forms of evidence collection. AJEDI-Ka took this risk in hopes that, someday, the military leaders responsible for using child soldiers would be held criminally liable.

As part of AJEDI-Ka's work towards this goal, they partnered with WITNESS to produce two films to contextualize the human rights crime, *A Duty to Protect*¹ (14 min.) and *On the Frontlines*² (15 min.).

After the films were completed, AJEDI-Ka met with the DRC investigations team at the Office of the Prosecutor (OTP) for the ICC. AJEDI-Ka screened the two films to provide the OTP with the broad factual context on the use of child soldiers in hopes that the OTP would ramp up its investigations into the use of child soldiers in war. The Prosecutor requested all the original, unedited footage from AJEDI-Ka and asked AJEDI-Ka to provide chain-of-custody information.

The result: The provision and presentation of this video footage, in part, gave the ICC's Office of the Prosecutor the information it needed to initiate an in-depth investigation into the enlistment, conscription, and use of child soldiers in eastern DRC.

2: Video's Role at the CONFIRMATION OF CHARGES HEARING

Over the next three years, the ICC's OTP collected evidence – including video evidence – against Lubanga. When they had sufficient admissible legal evidence, they issued an **arrest warrant** charging Lubanga for the war crimes of enlisting, conscripting, and using child soldiers actively in hostilities.

Once arrested, Lubanga appeared at his **confirmation of charges hearing**. At this hearing, the ICC Prosecutor told the judges he intended to show twelve video clips that would prove there were **substantial grounds to believe** that Lubanga enlisted, conscripted, and used child soldiers and, therefore, he should stand **trial** for the alleged crimes. Lubanga's lawyers asked the judges to exclude these clips. They argued that the clips should not be admitted as evidence and not seen by the judges because:

- the authenticity of the clips had not been proven,
- the chain-of-custody of the clips had not been provided, and
- some of the clips included discussions in Swahili and Kingwana (local languages) and Lubanga's lawyers did not trust the prosecutor's translations.

The result: After two days of arguing, the judges decided to view the twelve videos. In the end, the judges gave special consideration to the video of Lubanga visiting the camps in determining that there was in fact **substantial ground to believe** that Lubanga used child soldiers in his militia. Then, based on all the evidence, the judges ordered Lubanga to stand trial.

SHOWN IN THESE VIDEOS

These films tell the story of how child soldiers were used in the DRC's civil war. The films include footage of child training in military camps and compelling testimony from demobilized child soldiers recounting the horrifying memories of life as soldiers. The videos are not legal evidence.

3: Video's Role at TRIAL

Every crime is broken down into what are called the “elements of the crime.” For example, to secure a conviction for the larger war crime of “enlisting, conscripting, or using child soldiers actively in hostilities,” one of the seventeen elements the ICC Prosecutor needed to prove is that some of Lubanga’s soldiers were under the age of 15 .

In many places across the globe, it’s easy to prove age. Documents such as birth certificates, baptism records, school registrations, diplomas, driver’s licenses, and voter ID cards are all key sources of evidence for proving age. Medical experts can determine an approximate age by reviewing x-rays of bones and teeth; another option would be to ask family or community members how old a child is.

In this case, documents, medical exams, and witnesses were not viable sources of evidence to prove age, because:

- **Documents** were either non-existent or extremely difficult to access.
- **Medical exams** could not pinpoint the age of children in the DRC because models for determining age are based on healthy, well-fed European and American populations; the malnourished child soldiers from sub-Saharan Africa met neither criteria.
- **Witnesses** could not always speak safely with investigators and sometimes could not tell the truth even when they wanted to because their personal well-being would be at risk if they spoke out against a militia.

Instead, the Prosecutor relied, in part, on a series of video clips to show that some of Lubanga’s recruits were clearly under the age of 15. The clips showed children visibly under the age of 15

- at training camps where Lubanga is encouraging young recruits;
- serving as bodyguards in a number of situations, including being part of the presidential convoy when moving locations, during negotiation meetings, and outside of Lubanga’s residence and his office;
- present at rallies, political speeches, and assemblies where Lubanga addresses audiences that include young people. He discusses the work that remains to be done, the need to be trained, and the need to take up arms, and thanks audiences for the support they have given; and
- present at a “grading ceremony” that includes the parents of the soldiers that are receiving their military grades.

A sample of the footage from the opening argument can be [watched here](#).³

The defense argued that it is impossible to reliably distinguish between a 12- or 13-year-old and a 15 - or 16-year-old on the basis of video alone. The trial judges agreed that it is often difficult to determine the age of a person from a video and in turn relied on the video evidence only in cases where the video “clearly” showed that a child was under the age of 15.

The result: On March 14, 2012, Lubanga was found guilty of enlisting, conscripting, and using child soldiers actively in hostilities and was sentenced to fourteen years in prison.

FOR MORE INFORMATION

To learn more about elements of a crime, see “Anatomy of a Crime” or “Collection Planning” at vae.witness.org

SHOWN IN THIS CLIP

This clip takes us inside the courtroom at the ICC where the Prosecutor, Luis Moreno Ocampo, is making his opening statement in the trial against Thomas Lubanga Dyilo. During his opening statement he shows multiple raw video clips of what he states are children at the isolated training camps and serving as Lubanga’s bodyguards.



Video shown during the opening statement, ICC v. Lubanga

4: Video's Role in the APPEAL

In May of 2014, the ICC's Appeals Chamber heard Lubanga's case. An overarching focus of the two-day hearing was whether the first judges to hear the case – the trial judges – could reasonably conclude that the children in the video excerpts were under the age of 15 .

Lubanga argued that the trial judges could not rely on the video excerpts showing the physical appearance of soldiers to conclude – beyond a reasonable doubt – that the persons seen in the video excerpts were under the age of 15 years.

The prosecution stressed that trial judges have the ability – and duty – to evaluate the strength of the videos and reach reasonable conclusions as to the age of the persons depicted. The prosecution also emphasized that the trial judges were very cautious and conservative in their consideration of the video evidence.

Specifically, the trial judges stated on the record that there are indeed limitations to determining age on the basis of physical appearance as seen in video excerpts. And indeed, the trial judges were not convinced that all the individuals said to be under 15 years old were, in fact, under 15. In light of this limitation, the judges were cautious and allowed for a wide margin of error when reviewing the videos and reaching conclusions about age based on appearance. In the end, they were convinced that certain individuals depicted in the body of video evidence were “clearly” under the age of 15 years.

The Appeals Court concluded, among other findings, that the trial judges were “fully entitled to evaluate the videos and reach a reasonable conclusion as to the age of the person depicted on them.”

The result: On December 1, 2014, Lubanga's conviction was upheld.



TAKE HOME POINTS

First, the videos captured by activists may never find their way into a courtroom. But this does not diminish the value of video to support the pursuit of accountability. As the investigation and trial against Lubanga illustrate, video is useful at different stages, from supporting the call for an investigation to serving as evidence in the courtroom. In this case, video was used from the beginning to the end of the process.

Second, the video you film must be relevant and reliable. However, in the earlier stages of the criminal justice process, the burden is lower — your video does not have to meet the same high standards necessary to be introduced as evidence at a trial — so don't worry if the video you collect does not meet the standard for being "trial-ready." It can still be valuable.

Third, video evidence serves different purposes at trial. In the example above, we see how video served as key prima facie evidence, proving that some of the Lubanga's forces were under the age of 15.

FOR MORE INFORMATION

To learn more about the purposes video can serve, see "All About Evidence." vae.witness.org

ADDITIONAL RESOURCES

ICC v. Lubanga

Decision on the Confirmation of Charges, January 29, 2007.

http://www.mediafire.com/view/3h89ym762ozdduc/2007_1_29_ICC_v_Lubanga_Decision_on_Confirmation_of_Charges.pdf

Judgment, March 24, 2012.

http://www.mediafire.com/view/6t3eaaavg05c1zf/2012_3_14_ICC_v_Lubanga_Judgment.pdf

Judgment on Appeal, December 1, 2014.

http://www.mediafire.com/view/j4mdg7s4bqg591r/2014_12_1_ICC_v_Lubanga_Appeal_Decision.pdf

END NOTES

¹*A Duty to Protect*: <http://bit.ly/1Od3Dyp>

²*On the Frontlines*: <http://bit.ly/22e3Cyl>

³*Prosecution v. Lubanga* - Opening argument: <http://bit.ly/1RX7Fe3>