First International Criminal Court VERDICT

By Enid H. Adler

The International Criminal Court's March 2012 conviction of Congolese warlord Thomas Lubanga Dyilo marked the first verdict for the global body. The proceedings offered judicial process specialists, criminal lawyers, academics and international law experts the unique chance to watch an entire judicial system built from scratch.

An outgrowth of the World War II Nuremberg Trials, the International Criminal Court (ICC) is the first independent permanent, treaty-based, international criminal court established to bring an end to impunity for the perpetrators of the most serious crimes of concern to the international community. The offenses include war crimes, crimes against humanity, genocide and the crime of aggression. At a 1998 conference in Rome, delegates representing 160 countries met to create by treaty the International Criminal Court. After much debate and compromise, the Rome Statute, the court's governing document, was finalized on July 17, 1998. On April 11, 2002, the prerequisite 60th ratification was received to bring the ICC into force on July 1, 2002. At that time, there was no court structure – no personnel, no judges elected, no building in The Hague yet outfitted to house the court, all of which were needed to form a functioning legal institution. Taking all of this into consideration, it is understandable that it took 10 years for the ICC to complete its first trial and render its first decision.

The Lubanga case and trial was the first test of the ICC's trial management, jurisprudence and judicial procedures that revealed many gaps, glitches, process problems and open legal questions. The 593-page Lubanga verdict addresses most of these. The issues resolved range from the right of the defense to exculpatory evidence to the procedures for paying reparations to victims (a first for any court). In particular, the verdict describes the trial court's fundamentally important set of statements and actions in response to concerns about a potentially willful prosecutor. This description amounts to a detailed definition of the prosecutor's role and obligations in ICC trials, including obtaining and presenting evidence to a pre-trial chamber of the court for this body to determine if it is sufficient and there is a reasonable basis to issue a warrant of arrest for the accused.

Thomas Lubanga Dyilo emerged as a warlord with his own small army from the complicated tribal rivalries, the political, economic and military interventions of other countries and the tortured internal politics in the Democratic Republic of the Congo (DRC). The Congolese government tried to co-opt him with a generalship in its army. He became dissatisfied with the payoff, recalled his forces into an unsuccessful mutiny against the government and was jailed. The DRC's government had no effective courts in which to try him, and was faced in 2006 with a legal requirement to release him. To avoid that, it exercised its right as a state party to the ICC to refer the "DRC situation," including Lubanga's alleged crimes, to the ICC.

To preclude Lubanga's release, the DRC referral gave the ICC prosecutor short notice and little time to prepare charges

Thomas Lubanga Dyilo was found guilty of conscripting and enlisting children under 15 and using them to participate actively in hostilities from September 2002 to August 2003. He was sentenced to 14 years minus six years for time served. Photo courtesy of Getty Images

that would stand up in a confirmation of charges (indictment) hearing in the court's pre-trial chamber. Although Lubanga's activities were known to include many crimes that would be eligible for the court under the Rome Statute, admissible evidence was hard to obtain in the chaos in the DRC. The clearest crime to charge was the recruitment of child soldiers. These were numerous and very visible. There was, in fact, video footage of Lubanga exhorting soldiers "to induce" such child recruitment. The verdict explains why other charges, especially crimes against women, were not added later and includes observations on such crimes. The DRC delivered/transferred Lubanga to the court in The Hague in March 2006. His trial began in 2009.

On March 14, 2012, Trial Chamber I decided unanimously that Lubanga was guilty of the charges against him – conscripting and enlisting children under 15 and using them to participate actively in hostilities from September 2002 to August 2003. Because this was the only charge against Lubanga, his sentence was 14 years minus six years for time served in pre-trial detention in The Hague. He will serve his sentence in a country with a penal agreement with the ICC, most likely the United Kingdom. However, both parties have exercised their rights to appeal by filing notifications and substantive appeals.

In the Lubanga trial, the court devised ways to test the credibility of witnesses involved in atrocity crimes. The appeals process was refined, tested and implemented. Familiar questions of discovery, witness protection, cross-examination and prosecutorial independence were addressed and resolved. Most observers agree that the vigilance of the court resulted in a trial that more than met all due process standards. The Rome Statute, for the first time in any such court, allowed victims to be represented by legal counsel and/or testify directly at trial.

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Fourteen cases have been brought before the ICC in the context of seven situations that are under investigation: Uganda, DRC, the Central African Republic, Darfur (Sudan), Kenya, Libya and Cote d'Ivoire (the ousted past president, now in pre-trial proceedings). Note that Cote d'Ivoire is a Non Party State; therefore, it had to request and give permission for the ICC to have jurisdiction over its national. Three cases are at the trial stage. Unlike in Lubanga, the charges in most if not all subsequent cases include a wide range of crimes – sexual crimes, pillaging, forcible transfer of civilian populations, targeted attacks against them and ethnic cleansing, sexual enslavement of women and girls, imprisoning civilians with threat of bodily harm in a room full of corpses and more. Many of these attacks and acts were considered of a widespread and systematic nature and came under the Rome Statute's articles on war crimes and crimes against humanity. Most for whom arrest warrants were issued were in command positions. It is the responsibility of states parties to transfer to The Hague any persons for whom warrants of arrests are discharged. However, the 11 suspects that remain at large are in countries with ongoing internal conflicts, making it difficult to find such persons. In the case of Al Bashir, the president of Sudan, the ICC warrant of arrest has isolated him from traveling to any of the 121 countries that are states parties to the ICC. If he did that State Party would be obligated to arrest him. In such cases, the ICC sends a strong message to those leaders who would commit such horrendous acts with impunity – internally or externally. This said, he has traveled to some African countries who were reluctant to arrest him.

The Lubanga decision did much to assuage the concerns of the U.S. regarding a "runaway" ICC prosecutor and "rubber stamp" court. Early on the judges on Pre-Trial Chamber I admonished the prosecutor when he refused to turn over evidence to the defense because he had promised confidentiality to those giving it. If he didn't, the judges indicated that they would have to release Lubanga. The prosecutor complied after much discussion. In subsequent cases, the Pre-Trial Chambers dismissed charges against certain allegedly accused determining lack of sufficient evidence. In such situations, the prosecutor can have the charges reinstated if he, now she, can produce new and convincing evidence that a warrant for arrest should be issued. As the number of cases increase, more pre-trial chambers are added, with each consisting of three ICC judges. The court is comprised of 18 judges elected by the ASP.

Currently, the U.S. has determined that it is in this country's interest to be actively engaged with the ICC overall, the court and the Assembly of States Parties. The U.S. is an involved and recognized observer country in this body with one of the largest delegations – comprised of representatives from various governmental departments, the administration and congressional committees. It is working closely with the court to help countries develop functioning and sustainable judicial and justice systems, to help hunt down elusive/at large alleged accused and more. Ultimately, the position of the American Bar Association is for U.S. ratification of the ICC Treaty but, realistically not now. The current ABA focus is education about the ICC and continued U.S. engagement. This is a "baby step" situation as, it seems, is the ratification of most international treaties. Most of our allies have ratified the

ICC's Rome Statute, including the United Kingdom, France, Germany, Spain and other NATO and European Union nations. These are joined by 27 countries in Africa, Canada, Mexico, Australia, Japan, Korea, Jordan, Brazil, Argentina, Chile and almost all nations in South and Central America.

Other U.S. concerns with the court and also that pervade many of this country's international relationships and reluctance to ratify international treaties, include the questions of sovereignty, fear of political abuse of its soldiers, and general dislike of international organizations and international law. That said, the U.S. in Rome was instrumental in negotiating the Principle of Complementarity and other provisions in the Rome Statute to alleviate concerns for its military personnel. Complementarity basically states that if a country is "willing and able" and has a judicial system that can try and investigate its own, then that country has primacy over the ICC. In other words, the ICC is a court of last resort. However, the ICC judges have the right to determine if the country in fact has the resources, ability and will to try the suspect fairly.

One question that seems to confuse many is the difference between the courts such as the Yugoslavian tribunal that tried President Slobodan Milosevic and the International Criminal Court. Milosevic died before a verdict was reached. The International Criminal Tribunals for Yugoslavia, Rwanda, Sierra Leone and similar situations, known as "ad hoc" courts, were established by the U.N. Security Council for that specific situation and after the fact of the conflict. The creation of the International Criminal Court was totally different. It is not part of the U.N. It is an independent, permanent, international criminal court. It is based on the highest judicial and legal standards of rule of law and due process. It is designed to end impunity for and to have jurisdiction over the most heinous crimes. It is not a retroactive court for any crimes committed before July 1, 2002, when the ICC came into force. As a permanent court, the ICC is able to collect evidence, find witnesses and victims in ongoing conflicts. Outreach to affected communities is part of its mandate including a trust fund for victims. This takes funding, provided almost in total by the states parties. The budget negotiations at each Assembly of States Parties session are difficult. As the responsibilities and demands on the court grow, greater funding is needed.

Stephen J. Rapp, the U.S. Ambassador-at Large for Global Criminal Justice and head of the U.S. delegation to the ICC, stated on many occasions that now that the ad hoc courts are winding down, the International Criminal Court will be the only "court in town" to try individuals of such heinous crimes. ■

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