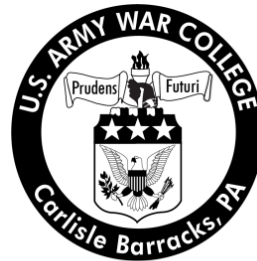


The International Criminal Court's
First Years:
Stumbling Toward Justice

by

Lieutenant Colonel Paul P. McBride
United States Army Reserve



United States Army War College
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**THE INTERNATIONAL CRIMINAL COURT'S FIRST YEARS:
STUMBLING TOWARD JUSTICE**

by

Lieutenant Colonel Paul P. McBride
United States Army Reserve

J. Sherwood McGinnis
Project Adviser

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

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This paper examines the first nine years of the operation and function of the International Criminal Court (ICC) after its establishment by the Rome Statute (RS) in 2002, particularly its first trial. The ICC's mission is to provide a permanent international judicial forum in which perpetrators of genocide, crimes against humanity, war crimes, and the crime of aggression could be adjudicated. It took 6 years for the ICC to complete the evidence phase and reach a verdict in its first trial. During that case, the credibility and relevance of the court was sorely tested. The current U.S. policy of engagement with the ICC and Assembly of States Parties (ASP) to the RS provides the best opportunity for continued development and future success of the ICC, even if the U.S. does not ratify the Rome Statute.

THE INTERNATIONAL CRIMINAL COURT'S FIRST YEARS: STUMBLING TOWARD JUSTICE

The Rome Statute (RS) founded the International Criminal Court (ICC) in 2002. As of 4 December 2011, 139 States (i.e. nations) have signed the RS and 120 have ratified it.¹ The ICC represents the most significant effort by the international community since the Geneva Conventions to prevent and prosecute horrific crimes of armed conflict. The fundamental goal of the RS and the ICC is to end impunity of any individual, including a head of state, from committing genocide, crimes against humanity and war crimes. The ICC's principal mission is to provide a permanent international judicial forum in which individuals who have committed the crimes could have their cases publicly adjudicated.² Under the principle of "complementarity" embodied in the RS, the ICC is meant to be the "court of last resort," to be used only when a case has been referred to it by a State, or when a State is unwilling or unable to carry out the investigation or prosecution.³ Even as support of the RS and ICC has risen, as documented by the increasing number of ratifying States, the ICC is struggling as a criminal trial court. The ICC is stumbling toward justice in executing its mission and jeopardizing its credibility and status as the preeminent international court of criminal justice.

The date of 14 March 2012 will be recorded as a momentous day in the annals of the International Criminal Court (ICC). On that day, the ICC reached its first judgment against an individual prosecuted for crimes prohibited by the Rome Statute (RS).⁴ Trial Chamber I of the ICC, comprised of a triumvirate of three international judges, unanimously concluded "beyond a reasonable doubt that Mr. Thomas Lubanga Dyilo is

guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities” in violation of the RS.⁵ The unanimous written judgment is 593 pages long, but there are two dissenting opinions by two of the judges on specific points of law and evidence for a total of 624 pages. The dissents highlight a few of the many significant legal issues that must still be resolved in regarding interpretation and application of international criminal law under the RS by the ICC.

The judgment is an exhaustive tome that gives credit to the judges for their thorough evaluation of the evidence, even though they publicly excoriate the prosecution for failing to properly investigate the case and vet witnesses.⁶ It took the ICC six years to go from the first appearance of Lubanga, a Congolese warlord, in the Trial Chamber to the guilty verdict in his case. Now the case plods on. No sentencing date has been set and no appeal can be lodged until Lubanga is sentenced. No one knows how long an appeal will take. But, if the pace of the evidence phase of the trial is any measure, then the appeal will take a long, long time.

This essay will discuss the ICC and its importance in preventing and redressing crimes that occur during armed conflict, the evolution of U.S. policy toward the court, and the nearly calamitous first trial in the ICC at The Hague and its ramifications for the ICC.

Historical Antecedents of the ICC and the Road to Credibility

Since its inception in 2002, the ICC has struggled to accomplish a mission that is completely dependent on the cooperation of States (i.e. nation states) yet independent of politics. The ICC was born with a certain amount of inherent credibility from its predecessors. Yet, it has struggled to build upon that credibility, even though it has

enjoyed the enthusiastic support of the international community. Its principal challenges as an institution are credibility, cooperation and politics, and a mission that needs to be tailored by effective prosecutorial and judicial discretion and judgment.

The ICC is the progeny of a 60-year history of international criminal courts that have adjudicated and redressed war crimes. From 1945 to the 2003, each international court or tribunal was created *ad hoc* to address a particular “situation,” i.e. jargon for an alleged violation of the RS occurring in a State or geographic region. In 1945, the Allies of World War II (WWII) created the International Military Tribunals in Nuremburg and Tokyo to prosecute war criminals for acts committed in the war. Four decades later, in the 1990s, the UN created the International Criminal Tribunal for Rwanda (ICTR) in Rwanda to address the war crimes that occurred during the Rwandan intertribal genocide and the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague to address the war crimes that occurred during the Balkan conflict. Most recently, in 2003, the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the “Khmer Rouge Tribunal,” was established in Cambodia to address the war crimes committed by the Khmer Rouge.

A seminal feature of all of these tribunals was that they were located either regionally close to the State or in the State where the alleged crimes occurred. Location for the proceedings is an important factor that builds trust and confidence in the judicial proceedings. First, accessible and transparent judicial proceedings engender confidence in the judicial process amongst the people who have suffered from the crimes that were committed. Second, relatively easy access to the proceedings by victims and witnesses ensures that their testimony will be heard in court. When victims

and witnesses have easy physical access to the judicial proceedings, then they are more likely to trust and participate in the process. At the same time, each of the tribunals has had to deal with serious issues, including, but not limited to, allegations of delayed justice, serious victim/witness cooperation issues, and/or the perception of “victor’s justice.”

The ICC, located at The Hague, breaks the long-standing tradition of conducting war crimes trials geographically proximate to the location where the crimes occurred. In the cases currently before the court, all from central African states, this has caused obvious difficulties at the trial for victims, witnesses, prosecution and defense. It also creates potential post verdict and post trial issues as well. In order to close the loop on “ending impunity” for war crimes, the ICC must inform and educate States, local peoples and current and potential war crimes perpetrators of the significance and meaning of any verdict or sentence. This presents a daunting challenge of strategic communication for the ICC. However, the ICC has extraordinary allies in disseminating its strategic messages: the Internet, commercial news media, State run media, the United Nations, and NGOs. In the Lubanga case, when the Trial Chamber broadcasted its real-time judgment hearing and simultaneously released its written judgment, the news of the guilty verdict was instantaneously disseminated worldwide by virtually every major television, radio, print and Internet media outlet around the world. Thus, the ICC’s judgment became a worldwide clarion call to end impunity for war crimes.

The ICC was established at The Hague in the Netherlands by the RS where it occupies a large complex of buildings.⁷ As noted above, this arrangement has created challenges and issues not envisioned by the drafters, the signatories to the RS, or

practitioners of law before the ICC. The court structure, law and procedure of the ICC are generally derived from its historical antecedents and other international judicial forums. As other international *ad hoc* tribunals (i.e. ICTY, ICTR, and ECCC) move inexorably toward their conclusion, the ICC is ascendant; being the beneficiary of substantial guaranteed financial support from annual dues paid by the Assembly of States Parties (ASP). The ICC's approved budget for 2011 is an astounding €103,607,900 (approximately \$135 million).⁸ This money supports the operations of 702 permanent court staff members (e.g. judges, clerks, etc.) and also contractors, consultants, interns and visiting professionals.⁹ The budget also included funding for the Office of Public Counsel for Victims (OCPV) that provides victim assistance and representation and the Office of Public Counsel for the Defence (OPCD) that provides defense counsel for criminal defendants.¹⁰ This major financial commitment has caused the international community to be fully vested in the utility and success of the ICC.

Pressure on the ICC to Succeed

Since its inception, the pressure on the ICC to succeed has been immense and not without consequence. Over the last decade, the ICC has attempted to build a reputation as an effective functioning court by investigating "situations" and conducting trials for individuals who violated the RS. To date, 15 cases in 7 situations (Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, Libya, Côte d'Ivoire, and Darfur, Sudan) have been brought before the ICC.¹¹ Currently, the ICC Office of the Prosecutor (OTP) has undertaken investigations in several other situations around the world, namely Afghanistan, Chad, Colombia, Georgia, Guinea, Honduras, Nigeria, the Occupied Palestinian Territories, and the Republic of Korea.¹² However,

the pace of criminal cases in the ICC is extremely slow and its legal authority has been undermined by its inability to have its arrest warrants honored by States.

It took six years for the ICC to reach a verdict in its first case: the case against Congolese “warlord” Thomas Lubanga Dyilo (Lubanga) who was responsible for the widespread conscription of child soldiers in the conflict in the Democratic Republic of Congo. Now his case will move into the sentencing phase, and later, the appellate phase. If the trial court’s pace is indicative of the pace of ICC justice, then Lubanga’s case may continue on for several more years. Meanwhile, four other accused persons are incarcerated at The Hague while their trials move through the ICC’s system, even as new cases are queued up behind them. Unless the ICC functions more efficiently and quickly, the inertia of its caseload could render it ineffective. After all, one trial and one verdict do not make it a lasting credible and successful institution.

At the same time, the credibility and apolitical nature of the ICC have been seriously challenged by its inability to execute its arrest warrants, a fundamental legal function of any viable court. In particular, the ICC’s failure to execute the arrest warrant for President Omar al-Bashir of Sudan for war crimes, genocide and crimes against humanity committed in Darfur, Sudan, has brought this issue into stark focus for the ICC and the international community. The ICC was surprised by international criticism when it issued the arrest warrant for al-Bashir. The League of Arab States, the African Union, the Organization of the Islamic Conference and the Non-Aligned Movement all criticized the action. There is a strong underlying feeling among those groups that the warrant and prosecution is politically motivated. The ICC warrant raised international concern that the pursuit of justice by the ICC could be a roadblock to peace in the region rather

than a solution.¹³ Not every State or interested party to the Darfur conflict agreed that prosecution of President al-Bashir will pave the road to lasting peace in the region. Instead, they fear that it could have the opposite effect and instead serve to prolong the conflict. As a result, Sudan and some States have indicated they might not cooperate with the ICC warrant. In fact, President al-Bashir has traveled to some signatory States after the warrant was issued, but was not arrested and surrendered to the ICC as required by the RS. Thus, the perceived political nature of the ICC and its potential conflict with inherent State actions has been graphically exposed by this situation.

Another issue for the ICC is its lack of functional independence. The ICC is completely dependent on the cooperation of States in acquiescing to jurisdiction of the court, including referral of issues to the court, cooperation with investigation, and adherence to orders of the court. So far, the ICC has been unable to act independently and credibly by compelling compliance as courts do in the United States. It is important to note that States continue to engage in actions and policies that further their interests, not the ICC's. Thus, it is unlikely that the ICC will ever be a truly independent and unbiased forum for international adjudication of genocide, crimes against humanity, war crimes, and the crime of aggression—although it will continue to strive toward that goal.

While cooperation issues are significant, the ICC's lack of functional capacity has consequences as well. The ICC is hamstrung in the investigation of crimes and the collection and preservation of evidence. Even so, the ICC must satisfy world opinion that its proceedings are fair, effective, impartial, and enhance the rule of law. This challenge is daunting. The ICC must operate across a vast spectrum of cultural, language and geographic barriers and through a wide range of state capabilities to

investigate, document, and try the crimes within its jurisdiction. Although it typically relies upon the investigation assets indigenous to the regions and States where the crimes occurred, it also can consider evidence provided by non-State sources, e.g. individuals, non-governmental organizations (NGOs), or news media. Nonetheless, whatever evidence is provided to the ICC must meet the standards of admissible evidence to be used in court proceedings. However, if a State has little or no capacity (or willingness) to support the ICC and the prosecution of crimes that occurred within the State's territory, then the consequence is that individuals may not be held accountable for the crimes they committed and the purpose of the RS will be frustrated.

Fortunately, there are forums for long-term and short-term solutions to these issues. For long-term solutions, especially dealing with State compliance to the RS, the Assembly of States Parties (ASP) to the Rome Statute meets annually to address and find solutions to these vexing problems. The ASP meetings and working groups attempt to build consensus, collective international will and cooperation among States. Concurrently, the ICC, through and with the ASP, is working to develop capacity in individual States to investigate, prosecute and adjudicate violations of the RS in their own jurisdiction. The impetus for this is consistent with the mission of the ICC to be the court of last resort because it is preferred that each State should be willing and genuinely able to carry out the investigation and prosecution of cases in its own jurisdiction.¹⁴ At the same time, judicial opinions within the ICC, e.g. the judgment in the Lubanga case, serve as compelling guidance for trial practice and procedure issues to ensure swift improvements occur at the trial court level.

The Evolving U.S. Position on the Rome Statute and the ICC

There has been much international criticism of the U.S. failure to ratify the RS. The U.S. is not alone—it is notably accompanied by China, Iran, Iraq, Libya, Israel, North Korea and a few other states.¹⁵ As a nation, the U.S. has been at the forefront of development of international criminal law and was an important contributor to the drafting of the RS and has a long history of supporting every war crime tribunal since 1945. The fact that the U.S. has not re-signed the RS should not be taken as a sign that it will not. As the ICC strives to mature into a credible and effective international institution, President Barak H. Obama's current policy of constructive engagement and support of the ICC by the U.S. Government (USG) may be the best path toward ensuring the long term and ultimate success of the ICC.

U.S. policy regarding the ICC has fluctuated over three administrations. The RS was negotiated with substantial U.S. involvement under the Clinton administration. Although President William J. Clinton directed the RS be signed on 31 December 2000, he did not submit it for ratification and explicitly stated it was flawed and recommended that his successor, President George W. Bush, not submit it for ratification.¹⁶ In 2002, President Bush formally withdrew the U.S. signature on the RS and negotiated numerous Bilateral Immunity Agreements under RS Article 98(2) with many nations in an effort to minimize the effect of the RS on U.S. military operations abroad.¹⁷

President Obama has not re-signed the Rome Statute. In part, this is a tacit acknowledgement of the difficulty of U.S. Senate ratification of the RS. Instead, as a matter of policy, he chose to support the ICC's principles, missions and functions. The current U.S. policy towards the ICC is articulated in President Obama's May 2010

National Security Strategy.¹⁸ It is published on the U.S. Department of State's (DOS) website and states:

From Nuremberg to Yugoslavia to Liberia, the U.S. has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. The U.S. is thus working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and the U.S. will continue to support institutions and prosecutions that advance this important interest. Although the U.S. is not at present a party to the Rome Statute of the International Criminal Court, and will always protect U.S. personnel, U.S. authorities are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.¹⁹

The Obama administration has articulated a clear policy to support the ICC's prosecutions and provide assistance in response to specific requests from the OTP and other court officials, consistent with U.S. law, when it is in U.S. national interest to do so. Consistent with the policy of engagement, the U.S. has participated in an observer capacity in meetings of the ICC Assembly of States Parties (ASP) since November 2009 and recently sent an observer delegation to the ICC Review Conference held in Kampala, Uganda from May 31 to June 11, 2010.²⁰

The Obama administration's position is a significant change from the Bush administration and is more in line with the intent of the Clinton administration. Although the U.S. officially has "observer" status in the ASP, for all practical purposes the U.S. behaves as if it were a "signatory" even though it is not. In general, signature of a treaty obligates a State not to engage in acts that would defeat the treaty's object and purpose, whereas ratification obligates a State to be bound by the treaty and it becomes a party to it. States that have not signed the treaty, but agree to be bound by it, have "acceded" to it. Active engagement with the ASP is important to the overall success of

U.S. policy. It gives the U.S. a voice in the annual ASP meeting and in the working groups in development of the RS. It makes the U.S. a stakeholder in the success of the RS and the ICC.

In view of the difficulties attendant to treaty ratification in the U.S., the Obama administration's policy may be the best course of action for both the U.S. and the ICC. It is fair to say that as a culture, Americans are wary of foreign legal systems and supranational courts. Thus, the current policy provides the U.S. with the best opportunity to participate in and to support the ICC's development as an effective and credible institution. It enables the U.S. to influence and mold the ICC's practices and procedures. As the ICC gains credibility, its palpability to the American people and the U.S. Congress may increase. The support of both is essential to the RS treaty ratification. It is aphoristic that Congress is the voice of the American people and ratification of the RS by 67 U.S. Senators is unlikely without popular support of the ICC among Americans. If the Obama administration (or any administration) were to submit the RS for ratification and it failed, then the ICC could face a substantial loss of standing both in the U.S. and in the international community. That result would not be in the best interests of the U.S., the international community nor the ICC.

Ongoing U.S. Issues with the RS

The U.S. has articulated a number of issues with the RS and the ICC. However, the Obama administration's policy of engagement, together with the maturation of the ICC and appropriate judicial interpretation of the RS will allay these concerns.

Jurisdiction of the ICC, especially personal jurisdiction, continues to be a critical issue for the U.S. The ICC has jurisdiction over crimes that occurred on or after 1 July 2002, "universal" territorial jurisdiction over a crime that occurs in the territory of a signatory

State, including on vessels or aircraft registered to a signatory State, and “universal” personal jurisdiction over individuals that are nationals of a signatory State, or to a case in which a non-party State has accepted the ICC’s jurisdiction.^{21,22}

For the U.S., potential jurisdiction by the ICC over elected and appointed officials and military leaders and service members is particularly troublesome. Under the RS, there is no immunity for heads of state or an elected official within a government, even if immunity or special procedural rules attach to that official capacity of the person under national or international law.²³ Hypothetically, if U.S. officials were acting in the course and scope of their official duties, but their actions were deemed violations of the RS, then they could be prosecuted in the ICC—even if what they did was legal and sanctioned under U.S. law. There is also substantial concern that the RS is inherently in conflict with the U.S. Constitution, both with regard to the primacy of the Constitution and the rights it affords U.S. citizens. Yet, the jurisdiction of the ICC over a U.S. citizen who commits a crime in violation of the RS in another country is very similar to that of any other sovereign State exerting jurisdiction over the U.S. citizen for a crime committed on its territory, and that issue is well settled--that State has jurisdiction to try the U.S. citizen in its courts and pursuant to its laws. While both of these concerns may not be well founded, they do exist and may make U.S. ratification of the RS problematic in the U.S. Senate.

The ICC only has jurisdiction over cases when nations are unwilling or unable to carry out investigation or prosecution.²⁴ Thus, the ICC could assert jurisdiction in cases where U.S. law or policy does not justify or support investigation or prosecution of alleged crimes under the RS. Even though this may be an extremely unlikely event,

only time will tell how and when the ICC will assert its jurisdiction. Consequently, this issue has created tension between the ICC and some States, including the U.S., because it is viewed as an infringement upon the right of a State to act in its own interest, or defense (from either external or internal enemies).

However, the U.S. must monitor whether the ICC is being spread too thin. There is a real potential of too many cases, not enough resources, lack of cooperation by States or incompetent cooperation, politicization of the ICC, and/or “bad” results that could endanger its future credibility and the effectiveness. Under the current U.S. policy, the U.S. provides assistance to the court based upon specific requests by the ICC. There is no restriction on the type or quantum of support that can be provided except that it is consistent with U.S. law and national interest. For the ICC to succeed, every case must be conducted to the highest standard. If it is seen as cutting corners, doing its job poorly or ineffectively, or being a political pawn, then the international community and the victims will lose trust and confidence in it and perpetrators of war crimes and crimes against humanity will be emboldened. Should this happen, the great experiment in international criminal law will have failed. And, although the court may still exist, it will be marginalized and/or ineffective in carrying out its mission. Thus, every State, including the U.S., is vested in ensuring its success, even if that means the U.S. engages in many years of assistance and support before ratifying the RS.

The First Trial and Allegations of Mischarging and Misconduct

The first nine years of the ICC, and especially its first criminal trial, have highlighted the immense challenges facing the ICC. The Lubanga trial was filled with missteps and errors, and even teetered on disaster (i.e. Lubanga was nearly released due to prosecutorial misconduct during the trial). Even with a guilty verdict, it is still an

open question whether the ICC will be able to effectively and credibly carry out its mandate. However, it appears the will of the international community shall drive it to become a successful institution, even if that maturation process takes many years.

The official name of the case involving the first criminal defendant before the ICC is *The Prosecutor v. Thomas Lubanga Dyilo*, Case Number, ICC-01/04-01/06. From its inception, the chief prosecutor, the Office of the Prosecutor (OTP) and the ICC were brought under intense scrutiny by the international community and found wanting—long before the verdict was rendered. Allegations of prosecutorial incompetence, misbehavior and misconduct dogged the case and eroded the foundations of the ICC even as it struggled to become a relevant institution for international criminal justice. In its published verdict in the Lubanga case, the Chamber publicly excoriated The Prosecutor and the OTP. It described the fundamental prosecutorial incompetence and negligence that permeated the case, especially with regard to the prosecution for failing to properly investigate the case and ensure reliable and truthful witness statements and testimony.²⁵ Such a public flogging of the prosecution's misconduct should give the ASP and the U.S. substantial cause for concern. The unanimous judicial opinion is a red flag for immediate and drastic reform within the ICC and OTP that must be addressed by the ICC itself, the ASP, and other interested states, including the U.S., to ensure the credibility and effectiveness of the court.

The Defendant and His Crimes

Thomas Lubanga Dyilo (aka Thomas Lubanga) was a relatively late bloomer in his own remarkable career in Africa. He was born into the Hema-Gregere ethnic group on 29 December 1960, in Djiba in the Ituri Province of the Democratic Republic of Congo (DRC).²⁶ He attended the University of Kisangani and was awarded a degree in

psychology.²⁷ The Ituri Province (Ituri) has many natural resources, both agricultural and mineral, including gold. In 1999, the simmering issues of land and resources among the tribes and ethnic groups in the area flared into violence. After a short abatement, violence flared again in 2002 over these same issues. The combatants were armed groups, formed along tribal ethnic allegiances.²⁸ In September 2002, Lubanga founded the *Union des Patriotes Congolais* (Union of Congolese Patriots, “UPC”). He became President of the UPC and from September 2002 to late 2003 was the Commander-in-Chief of its military wing, the *Forces Patriotiques pour la Liberation du Congo* (FPLC).²⁹ Due to his leadership and actions as head of the UPC and FPLC, the appellation, “warlord,” was added to this list of titles by some human rights organizations.³⁰

Lubanga was a forceful and galvanizing leader of the UPC/FPLC. He planned to gain political and military control of the Ituri using the FPLC.³¹ In 2002, the FPLC took control of the town of Bunia and substantial parts of Ituri.³² To enhance its combat power, the FPLC allegedly recruited children throughout Ituri.³³ These recruitments included both boys and girls and were carried out by FPLC commanders.³⁴ Some of the children were younger than fifteen years old.³⁵ FPLC recruitment of children fell into two categories—“forced” recruitment and “voluntary” recruitment.³⁶ However, regardless of the type of recruitment, it is a war crime under the RS to conscript or enlist children younger than fifteen (15) years of age in any military or use them in any combat or hostilities.³⁷

The FPLC conducted a campaign of forced recruitment wherein children were allegedly abducted from schools and villages and forced to undergo military training at

various FPLC military encampments. At the camps, they suffered many hardships, including beatings, lack of food, sleep deprivation, and abysmal living conditions. Girls allegedly endured the worst conditions, by being repetitive victims of sexual assault (i.e. rape) or being farmed out as concubines or wives to senior leaders.³⁸

The FLPC also conducted a parallel campaign of voluntary recruitment wherein the FPLC “encouraged” families and villages to supply their children to the FPLC fighting force. The effect of this recruitment was to provide families with justification for giving their children up to ensure the protection of their village by the FPLC and/or revenge the killing of a family member or relative.³⁹

Once the children completed their two-month military training they were moved on the frontlines of the conflict—as cannon fodder. Children under the age of 15 participated in battles in Ituri in October 2002 and early 2003.⁴⁰ Some of these child soldiers killed people during the fighting and some child soldiers were killed in combat.⁴¹ The children were also used in a variety of other military capacities by the FPLC, e.g. as scouts, as couriers, or as personal bodyguards to Lubanga and other FPLC commanders.⁴²

Lubanga knew, directed and perpetuated the recruitment and use of child soldiers under the age of fifteen years in the FPLC.⁴³ However, after international scrutiny of the conflict and FPLC recruitment practices, he issued several documents allegedly prohibiting the practice of child recruitment. However, these documents were widely characterized as a ruse by Lubanga to create plausible deniability and to avoid criminal culpability for the crimes under the RS, even as child recruitment continued.⁴⁴

The Wheels of Justice Begin to Grind

Human Rights Watch (HRW) and other organizations built pressure upon the world community regarding the conduct of the FPLC and its alleged human rights violations in the conflict in Ituri. Corroborating evidence and reports from other NGOs (including United Nations personnel), eyewitness accounts, video recordings and photographs, documented and identified Lubanga and other FPLC leaders' recruitment, use and abuse of child soldiers. Then, the DRC (Democratic Republic of Congo) ratified the RS on 11 April 2002.⁴⁵ Nearly two years later, on 3 March 2004, the Government of the DRC referred the "situation" (i.e. the events allegedly falling under the ICC's jurisdiction) regarding FPLC and violations of the Rome Statute (RS) that had occurred on its territory to the ICC from the date of entry into force of statute, namely 1 July 2002.⁴⁶

Referral by the DRC of the "situation" spurred Luis Moreno-Ocampo, The Prosecutor of the ICC, and his office, the Office of the Prosecutor (OTP), into action. After a preliminary review of the situation, The Prosecutor (Moreno-Ocampo) initiated an investigation on 21 June 2004. On 13 January 2006, he filed an application for the issuance of the warrant of arrest for Lubanga. Twenty-eight days later, on 10 February 2006, ICC Pre-Trial Chamber I issued a warrant of arrest under seal for Lubanga. Shortly thereafter on 17 March 2006, DRC authorities surrendered Lubanga to the ICC. The same day, Lubanga was transferred to the ICC Detention Centre at The Hague and the warrant was unsealed.⁴⁷ Prior to his arrest on the ICC warrant and transfer to the ICC, Lubanga had been incarcerated in the *Centre pénitentiaire et de rééducation de Kinshasa* (Kinshasa Penitentiary and Re-education Centre), DRC, after his capture by DRC authorities.

On 20 March 2006, Lubanga made his first appearance before the ICC. He identified himself and was advised of the charges against him and his rights as a defendant before the court.⁴⁸ Even though Lubanga had been President of the UPC, and Commander-in-Chief of the FPLC, on 31 March 2006, the Court found him indigent and assumed the costs of his defense.⁴⁹ Then, before the trial even began, the wheels of international criminal justice began to grind ever more slowly and nearly came off.

Allegations of Mischarging—Sexual Assault Crimes not Charged

Once Lubanga was incarcerated at The Hague, Moreno-Ocampo and his prosecution team from the OTP found themselves under the intense scrutiny and pressure of human rights groups and victim's advocates. The first crisis for the OTP and the ICC involved the criminal charges against Lubanga under the RS. The critics made very public statements that, in their opinion, the charges against Lubanga were incomplete because he was not charged with any sexual crimes under the RS for the many girls that were sexually abused/assaulted after being recruited by the FLPC. To these groups, e.g. Human Rights Watch (HRW) and Womens Initiatives and Gender Justice (WIGJ), it was as if the OTP had missed the boat and dismissed the allegations of sexual crimes against women and children out of hand.⁵⁰

The human rights community pulled no punches in their criticism. In an online statement, HRW stated:

Human Rights Watch believes that the charges brought by the ICC should reflect the full range of serious crimes under ICC jurisdiction committed by perpetrators against civilians. In Congo, this is crucial for the victims and to bring accountability to that country and to the Great Lakes region overall. While the current charges against Lubanga are very serious, the failure to include a broader range of serious crimes has led many victims in Ituri to question the credibility of the ICC and its relevance in addressing their suffering. This has undermined the ICC's impact there. This offers an important lesson for the ICC on the importance of selecting charges that

represent the range of crimes under its jurisdiction allegedly committed by perpetrators.⁵¹

HRW then went on to point out, “Of course, the prosecutor can only put forward charges for which there is sufficient evidence. That is precisely why it is so important for the Office of the Prosecutor to ensure that it has the necessary resources-including experienced staff-to gather enough evidence by conducting quality investigations on the ground.”⁵²

Even more damning was the comment by Women’s Initiatives and Gender Justice (WIGJ). WIGJ is an international women’s human rights organization located in The Hague that advocates for justice for women through the International Criminal Court (ICC) and through domestic (i.e. nation state) mechanisms, including peace negotiations and judicial processes.⁵³ The predecessor to the WICJ was one of the early members of the Coalition of NGOs for the International Criminal Court and the WICJ continues to serve on the Coalition’s Steering Committee.⁵⁴

WIGJ pointed out that the DRC, including the area controlled by the UPC/FLPC, had one of the highest rates of sexual violence against women in Africa and the world. WIGJ quoted Margot Ahlstrom, the United Nations Secretary General’s Special Representative on Sexual Violence in Conflict, who described eastern DRC as the ‘rape capital of the world.’ WIGJ then went on to state:

It was therefore shocking to many of us that the announcement in 2006 of the case against Thomas Lubanga did not include charges for such crimes and overlooked the suffering of thousands of victims of this conflict and victims of this militia. It was unimaginable to us and to our partners in eastern DRC, grassroots women’s rights and peace advocates, that the Office of the Prosecutor (OTP) had not investigated these crimes in their initial strategy. It was also beyond comprehension that the OTP then decided not to undertake any specific investigations into these crimes in the six months between when Mr. Lubanga was taken into ICC custody in March 2006 and before the Confirmation Hearing in November of that

year. Still further, the OTP did not investigate these crimes between the Confirmation Hearing and the start of the trial two years later in January 2009. In fact, there was almost three years from when Mr. Lubanga was taken into custody until the trial started – plenty of time in which the OTP could have conducted investigations of gender-based crimes in relation to child soldiers, thereby expanding thematically on their original charges and providing a more accurate reflection of the crime base. In our view, the OTP could have amended the document containing the charges, sought and held a Confirmation Hearing on such charges and still have been ready for trial three years later, with the rights of the accused to prepare his defense fully observed.⁵⁵

Clearly, the human rights community felt that from the beginning the OTP botched the investigation, charging, and ultimate opportunity for a trial on all of the crimes Lubanga had committed. Clearly, confidence in the OTP and the ICC was not high at the start of the case. With no oversight except in the forum of public opinion, the OTP was floundering. Lacking a credible investigative task force, experience and resources, the groundbreaking case at the ICC was not going well.

Allegations of Prosecutorial Misconduct Nearly Derail the Trial

The Lubanga case continued to proceed at a slow pace from 2006 to 2008. Then, on 13 June 2008, the Trial Chamber hearing the Lubanga case ruled that Moreno-Ocampo and the OTP failed to disclose potentially exculpatory material to Lubanga's defense team in direct violation of the court's order. In a harshly worded opinion, the court found that Moreno-Ocampo and the OTP had breached Lubanga's right to a fair trial. On 2 July 2008, the court ordered Lubanga's release from custody on grounds that that he had been deprived of his fundamental right to a fair trial. Suddenly, the findings of flagrant prosecutorial misconduct riveted the international community's attention on the OTP and ICC. Could the bad judgment of Moreno-Ocampo and the OTP permanently prejudice the case against Lubanga and dash the hopes of his victims and the international community in ending impunity against war crimes?

The OTP appealed the immediate release order, and fortunately, the Appeals Chamber agreed to keep Lubanga in custody while the Prosecutor appealed the Trial Chamber's order. The Appeals Chamber decided that the Trial Chamber could compel the Prosecutor to comply with the discovery order without dismissing the case and releasing Lubanga. Then, on 18 November 2008, Moreno-Ocampo finally complied with the court's order and agreed to make all the confidential information available to the court, after which the Trial Chamber ordered the trial to proceed. A disaster of international proportions was averted, but not without a cost--Moreno-Ocampo's prosecutorial style had jeopardized the credibility of the OTP and the ICC.

The Way Ahead and the Future of the ICC

Arguably, the credibility of the OTP and ICC was not resurrected until the Lubanga guilty verdict was published. When Moreno-Ocampo's problematic nine-year term comes to an end in June 2012, his chief deputy prosecutor, Fatima Bensouda from Gambia, shall assume the helm of the OTP and become The Prosecutor. She will become the de facto public face of the ICC in an era of an ever-increasing caseload, mostly referred to the ICC from African states. Doubtless, her participation in the Lubanga case will be scrutinized as she begins her tenure. She will have to shoulder the burden of reforming the OTP into a more credible and effective organization of the ICC and strive to build confidence in the ICC, the OTP, and the international criminal justice process under the RS.

In the long term, the ICC and the OTP must work towards the goal of making the case that those states that have not ratified the RS should do so, e.g. U.S., China, Iran, Iraq, Libya, Israel, and North Korea. Bensouda will have a key role in this. She must demonstrate that she and the OTP will exercise practical and professional prosecutorial

judgment and discretion to inspire confidence and trust in the OTP and the ICC. To succeed, the OTP and ICC will have to shed its political baggage and endeavor to be as apolitical as possible.

The fulcrum of the ICC's future is now. The "Arab Spring," the uprising in Syria, and the continuing humanitarian crises and conflicts across northern and central Africa, are providing a substantial number of situations of potential ICC jurisdiction.

Appropriate discretion must be used to ensure that the situations that are selected for investigation and prosecution meet the intent of the RS. With so many stakeholders completely vested in the ICC's success, including States, NGOs, victims of crimes, and the international community at large, it is fair to say that all of those parties want it to succeed and are working toward that goal.

Current U.S. policy with regard to the RS and ICC should remain unchanged. The ICC is an organization that is maturing, albeit rapidly, through necessity. Even so, its trial procedures and processes are still in their infancy and its sentencing and appeals processes are yet to be tested. It is still attempting to interpret the RS, and if the 624-page Lubanga judgment is any indication, there are a myriad of legal issues to be resolved. Underlying all of this, the ICC is attempting to ascertain the appropriate limits of its prosecutorial and judicial discretion and jurisdiction. With those significant issues still to be resolved over the next decade or more, the U.S. should continue to do whatever it can to foster the ICC's successful development into a credible and competent forum for adjudicating violations of the RS. Thus, the policy of engagement provides the best method for the U.S. to affect change to the RS and the ICC. Ratification of the RS would not provide any greater benefits U.S. strategic policy

because the U.S. would be merely one more voting member of the ASP. As an observer to the ASP, the U.S. may participate in discussions and debate and still work to make the institution of the ICC a capable and credible supranational court.

Conclusion

The ICC is an institution that is here to stay. The ICC is going through some severe growing pains and will continue to do so for the foreseeable future. Nearly 10 years into its existence, it has only recently issued a verdict as a result of its first trial under the RS. The ICC has come a long way, but as a fledgling organization with a massive mandate, it is consumed with working out the Gordian knots in its law, procedure and cases. As an institution, it has a long, long way to go. In view of these issues and concerns, the current U.S. policy of engagement is the best strategy and method to ensure success of the ICC and preserve U.S. strategic interests in the long term.

Endnotes

¹ Coalition for the International Criminal Court, Ratification of the Rome Statute, http://www.iccnw.org/documents/RATIFICATIONSbyRegion_December2011_eng.pdf (accessed December 17, 2011).

² Rome Statute of the International Criminal Court, 1 July 2002, Articles 1, 5 and 64(7).

³ *Ibid.*, Articles 1, 12, 13, and 19(2).

⁴ International Criminal Court, Press Release 03.14.2012, <http://www.icc-cpi.int/NR/exeres/A70A5D27-18B4-4294-816F-BE68155242E0.htm> (accessed March 14, 2012).

⁵ International Criminal Court, Summary of the “Judgment pursuant to Article 74 of the Statute,” 16, <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> (accessed March 14, 2012).

⁶ International Criminal Court, “Judgment pursuant to Article 74 of the Statute,” <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (accessed March 14, 2012).

⁷ Rome Statute of the International Criminal Court, 1 July 2002, Article 3.

⁸ International Criminal Court, Registry Facts and Figures (The Hague, 8 April 2011):2, <http://www.icc-cpi.int/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf> (accessed March 20, 2012)

⁹ Ibid.

¹⁰ Ibid., 3-5.

¹¹ International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed March, 20, 2012)

¹² Coalition for the International Criminal Court, Situations and Cases, <http://www.iccnw.org/?mod=casessituations> (accessed March 20, 2012).

¹³ Human Rights Watch, *Making Kampala Count, Advancing the Global Fight against Impunity at the ICC Review Conference*, (New York: Human Rights Watch, 2010), 30.

¹⁴ Rome Statute of the International Criminal Court, 1 July 2002, Articles 1, 12, 13, and 19(2).

¹⁵ Coalition for the International Criminal Court, Ratification of the Rome Statute, http://www.iccnw.org/documents/RATIFICATIONSbyRegion_December2011_eng.pdf (accessed December 17, 2011).

¹⁶ President Clinton Statement on Signature of the International Criminal Court Treaty, Washington, DC, December 31, 2000, The American Non-Governmental Organizations Committee for the International Criminal Court, http://www.amicc.org/docs/Clinton_sign.pdf, (accessed March 20, 2012).

¹⁷ Marc Grossman, Under Secretary for Political Affairs, "American for Policy and the International Criminal Court," Washington, DC, May 6, 2002, The American Non-Governmental Organizations Committee for the International Criminal Court, http://www.amicc.org/docs/Grossman_5_6_02.pdf, (accessed March 20, 2012).

¹⁸ Barack H. Obama, *National Security Strategy*, (Washington, DC: The White House, May 2010), 48.

¹⁹ Department of State, <http://www.state.gov/j/gcj/icc/>, (accessed March 20, 2012).

²⁰ Ibid.

²¹ Rome Statute of the International Criminal Court, 1 July 2002, Article 126. (Note: 1 July 2002 was the 60th day after the 60th ratification was deposited with the Secretary General, UN).

²² Ibid., Article 12.

²³ Ibid., Article 27.

²⁴ Ibid., Article 17.

²⁵ International Criminal Court, Summary of the “Judgment pursuant to Article 74 of the Statute,” 7-8, <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> (accessed March 14, 2012).

²⁶ Wikipedia, Thomas Lubanga Dyilo, http://en.wikipedia.org/wiki/Thomas_Lubanga_Dyilo (accessed March 14, 2012).

²⁷ Ibid.

²⁸ International Criminal Court, Summary of the “Judgment pursuant to Article 74 of the Statute,” 13-14, <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> (accessed March 14, 2012).

²⁹ Ibid., 15.

³⁰ Human Rights Watch News Page, http://www.hrw.org/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_Is_Lubanga's_UPC, (accessed December 14, 2011).

³¹ International Criminal Court, Summary of the “Judgment pursuant to Article 74 of the Statute,” 13, <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> (accessed March 14, 2012).

³² Ibid., 14.

³³ Ibid., 13-16.

³⁴ Ibid.

³⁵ Ibid.

³⁶ International Criminal Court Case information page, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (accessed December 14, 2011).

³⁷ Rome Statute of the International Criminal Court, 1 July 2002, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

³⁸ International Criminal Court transcript 25.08.2011, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06 Prosecutor v. Lubanga, <http://www.icc-cpi.int/NR/exeres/501D0ADD-C8AD-4E8A-93FC-64EEFB9FA168.htm> (accessed December 14, 2011).

³⁹ Ibid.

⁴⁰ International Criminal Court Case information page, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (accessed December 14, 2011).

⁴¹ International Criminal Court Case information page, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (accessed December 14, 2011).

⁴² International Criminal Court transcript 25.08.2011, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06 Prosecutor v. Lubanga, <http://www.icc-cpi.int/NR/exeres/501D0ADD-C8AD-4E8A-93FC-64EEFB9FA168.htm> (accessed December 14, 2011).

⁴³ International Criminal Court, Summary of the “Judgment pursuant to Article 74 of the Statute,” 13-16, <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> (accessed March 14, 2012).

⁴⁴ International Criminal Court transcript 25.08.2011, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06 Prosecutor v. Lubanga, <http://www.icc-cpi.int/NR/exeres/501D0ADD-C8AD-4E8A-93FC-64EEFB9FA168.htm> (accessed December 14, 2011).

⁴⁵ http://www.iccnw.org/documents/RATIFICATIONSbyRegion_December2011_eng.pdf (accessed March 20, 2012)

⁴⁶ International Criminal Court Case information page, The Prosecutor v. Thomas Lubanga Dyilo, Case number ICC-01/04-01/06, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (accessed December 14, 2011).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Human Rights Watch, http://www.hrw.org/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_Is_Lubanga's_UPC (accessed December 14, 2011).

⁵¹ Ibid.

⁵² Ibid.

⁵³ International Criminal Court Womens Organization, <http://www.iccwomen.org/> (accessed 12/17/2011).

⁵⁴ WICJ, *Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence*, Situation of Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, 9, <http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf> (accessed December 17, 2011).

⁵⁵ Open Society Foundations, The Lubanga Trial, Commentary Trial Reports, August 31, 2011, <http://www.lubangatrial.org/2011/08/31/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/> (accessed December 14, 2011).