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How Prosecution Can Lead to Prevention

Luis Moreno-Ocampo†

Introduction

I am very glad to be here, because I have worked with the Center for Victims of Torture¹ for twenty-two years. Currently, the Center works in many areas where the International Criminal Court (ICC) is working, and in fact they have programs with the Court. Indeed, the mandate of the Court requires me, in addition to the Court's legal work, to support victims of the crimes that we investigate. Kathryn Sikkink² was a young scholar in 1985 when she attended the Argentine junta trials, and I am glad she kept working on these issues. Now she is here, presenting a different perception of what is happening. The world is changing. In the last twenty-five years that we've worked on these issues, the world has changed dramatically. Ruti Teitel³ is also here, and she in fact invited me to Boston a few months ago to attend a meeting on genocide, so I'm very glad to be here with some old friends.

I. The Rome Statute and the Role of the International Criminal Court

A. *Adoption and Ratification of the Treaty*

I have the privilege and the responsibility to be the first prosecutor of this new idea, a court, created by the Rome Statute.⁴

†. Luis Moreno-Ocampo was appointed Prosecutor for the International Criminal Court in 2003. This text is the edited transcript of Prosecutor Moreno-Ocampo's opening address at the *Law and Inequality* Symposium, "International Wrongs, International Rights: The Use of Criminal Law to Protect Human Rights," September 28, 2010, University of Minnesota Law School.

1. *Who We Are*, THE CENTER FOR VICTIMS OF TORTURE, <http://www.cvt.org/page/62> (last visited Jan. 28, 2011).

2. Kathryn Sikkink is Regents Professor and McKnight Presidential Chair in Political Science at the University of Minnesota. Professor Sikkink was a panelist at the *Law and Inequality* Symposium, discussing the deterrent effect of human rights prosecutions.

3. Ruti Teitel is the Ernst C. Stiefel Professor of Comparative Law at New York Law School. Professor Teitel was a panelist at the *Law and Inequality* Symposium, discussing transitional justice as a global phenomenon.

4. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

And today I am working. My plan is to present to you what we are doing and receive your ideas, in order to learn from you. Let me first explain what we have been doing.

The idea is the following: this treaty, approved in 1998⁵ in Rome, where 139 states signed, committed to end impunity for the most serious crimes, including genocide, crimes against humanity, and war crimes, and thus contributed to the prevention of such crimes.⁶ A great number of countries have signed the treaty.⁷ The United States signed and then unsigned,⁸ and we respect the unsigned. The countries that signed the treaty include almost all the Americas, all of Africa except for some Arab countries, all of Europe including Russia, plus Australia and New Zealand.⁹ These are the countries that will decide the direction of the Rome Treaty. This idea was quite heady, because it is a new step for the Westphalia movement.¹⁰ Under this treaty, these countries signed and committed themselves to prevent and punish genocide, crimes against humanity, and war crimes.¹¹ But the second and most innovative idea was they accepted that if they don't honor these commitments, an international criminal court, permanent and independent, can take the case, and in this sense, they created a coalition with the court to ensure that no one will fail to punish these crimes.¹² And these states, the members of the treaty, are committed to support the International Criminal Court, whenever and wherever the Court decides to act. This is not a *revolution* because it's an agreement among sovereign states, but it is a huge *evolution*, because it creates a global confederation to fight for a specific goal.

5. *Id.*

6. *Ratification of the Rome Statute*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=romeratification> (last visited Jan. 28, 2011).

7. *See World Signatures and Ratifications*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=romesignatures> (last visited Jan. 28, 2011) (indicating that the Rome Statute currently has 139 signatories and 111 ratifications).

8. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 990-91 (2008).

9. *See The States Parties to the Rome Statute*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Jan. 28, 2011).

10. *See* Edward M. Wise, *The International Criminal Court: A Budget of Paradoxes*, 8 TUL. J. INT'L & COMP. L. 261, 264 (2000) (describing the "Westphalia system" as the system of international relations that is "based on the exclusive primacy of the nation-state").

11. Rome Statute, *supra* note 4, pmbl.

12. *See id.* at art. 1.

I think this momentum can be traced to three main regions: Europe, which experienced centuries of war and the crimes of the Second World War and Balkan wars,¹³ and then Africa and South America, which have also suffered many such crimes.¹⁴ These are the three regions that are leading and adopting this new concept. I think that in the United States it is difficult to understand this idea, because the United States has this idea: "We're powerful, we protect ourselves with our army." But small countries protect themselves with the law. And so for them it is a different concept. I remember at the beginning of this year we were at a meeting with some ambassadors of the Security Council and the Costa Rican ambassador explained that some people were criticizing Costa Rica, saying, "Oh, Costa Rica is naïve, they were so active in the Darfur case," and the Costa Rican ambassador took the floor and said,

You have to understand, what we are doing is absolutely in our national interest. Costa Rica has no army, so we use the law to protect our land and our citizens. So for us to strengthen the law is in our national interest. And we are selfish, because we like to strengthen the law in Sudan, which is remote, and not wait for a conflict in Costa Rica.

And the last point was great; he said, "And also, we have a moral obligation, because there are twenty-six countries in the world with no army, and Costa Rica is the biggest." So that is this concept.

B. Appointment of a Prosecutor

This agreement was interesting because the United States and the Clinton administration, particularly Madeleine Albright, were pushing for this idea, but then a coalition of other countries and NGOs pushed past the U.S. position. The biggest conflict was about the prosecutor, because the United States was pushing for a prosecutor, but one who was dependent on the Security Council to

13. See JACOB GOULD SCHURMAN, *THE BALKAN WARS: 1912–1913* (1914), for background on the Balkan Wars of the early twentieth-century. See also STEVEN L. BURG & PAUL S. SHOUP, *THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION* (1999).

14. See Salvador Herencia Carrasco, *Implementation of War Crimes in Latin America: An Assessment of the Impact of the Rome Statute of the International Criminal Court*, 10 INT'L CRIM. L. REV. 461 (2010) (explaining the challenge of implementing the Rome Statute in Latin American countries that are plagued by a history of war crimes and crimes against humanity); see also Lutz Oette, *Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond*, 8 J. INT'L CRIM. JUST. 345 (2010) (providing an overview of the obstacles to using the system of international criminal justice to prosecute infamous war criminals of Africa).

initiate cases. European, South American, and African leaders said, "No, the Security Council will always make deals." So the question of an independent prosecutor was a major part of the debate over the agreement, and at the end, in a very shocking way, the independence of the prosecutor prevailed.¹⁵ The next question asked who would ratify the treaty. But one after another ratified, and by July 1, 2002, more than sixty countries had ratified the treaty.¹⁶

Next, the states started to look for judges and prosecutors to implement the idea. In December, I got a phone call; they said, "I'm calling you because your name is on the list to be a candidate for the Prosecutor's Office, but we don't know if you're interested in the job." I was a lawyer in those days in Argentina, and never thought I would be appointed. I told my wife, "Don't worry, they will never appoint me." But three months later, they called me, and I was appointed. So a new life started for me. It's very interesting. So I would like to give you some idea of what it means to be prosecutor for, now, 114 states.¹⁷

Before I became Prosecutor, I set up meetings with the ambassadors of the countries that were parties to the agreement. And in one of the meetings with the European ambassadors, the French ambassador asked me: "Okay, Prosecutor, you are from Argentina, a civil-law country, but you've spent a lot of time in the U.S. So are you a common-law lawyer or a civil-law lawyer?" So I took my copy of the Statute and I said, "Look, I am a lawyer, and this is my law. I will apply the law. That is it." I thought it was a perfect answer. Wrong. The ambassador jumped on me: "Oh, no! You have to defend the civil law." So that is part of the problem. My constituencies have consensus, but it is a tiny consensus, and there are so many differences that to represent them is a really interesting activity. And in this sense, my background in Argentina is really relevant for this, because in Argentina the law is not as firm as it is in the United States, so it is important to explain and shape the law. In my current position, it is also important to explain as much as possible, to the Court's states parties, what I am doing.

When I was appointed there were seventy-eight states parties,¹⁸ and today there are 114 states parties.¹⁹ With ratification

15. See Rome Statute, *supra* note 4, art. 15 (granting the Prosecutor broad authority to initiate and proceed with investigations).

16. See *Ratification of the Rome Statute*, *supra* note 6.

17. See *The States Parties to the Rome Statute*, *supra* note 9.

18. See Press Release, United Nations, States Parties to Rome Statute Elect

comes increasing acceptance of the idea that the treaty represents. When I started, the Bush administration was hostile to the Court, but that changed with the Darfur affair, when the Bush administration adopted a strategy of “pragmatic engagement,” in which it supported the Court if it liked the case.²⁰ But now the United States likes almost all of the cases.

C. Goals of the Court

Another interesting effect of the Statute is the idea of prevention. It is not about the number of prisoners; it is not about the number of trials; it is about how people in these 114 states adjust to the law. And in this sense, the Court is doing what international law does—it confirms and establishes the extent of the law. The beauty of this court is that one case in the Hague impacts 114 states—a few cases in the Hague can have a global impact. For me that is the main idea.

In February 2003, the judges were appointed: eighteen judges appointed, no prosecutor.²¹ So for three months the judges were saying, “Where is the prosecutor with the cases? We are here, waiting.” But I said at the time that the best outcome of this Court would be zero cases, because that means either (1) there is no genocide, or (2) in cases of genocide, national systems are handling the prosecutions. I have to respect national decisions to prosecute cases, because the Court is just a backup system.²² The judges were not very happy with my comments, saying, “Where are the cases, Prosecutor?” I still think the best outcome is zero cases, but when we have to do cases, we have to do cases. Let me tell you where are we today, seven years later, in terms of trials.

Luis Moreno Ocampo as Prosecutor of International Criminal Court, U.N. Press Release L/3035 (Apr. 22, 2003).

19. *The States Parties to the Rome Statute*, *supra* note 9.

20. See Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT'L L. 155, 161–65 (2010) (explaining that, though the Bush administration initially took an “isolate and ignore” policy in regard to the Court, it relented somewhat during President Bush’s second term, most notably by refraining from vetoing a proposal to refer the situation in Darfur to the Court); Arlene Getz, *ICC Prosecutor to Name 6 Next Week in Kenya Clashes*, REUTERS AFR. (Dec. 9, 2010), <http://af.reuters.com/article/topNews/idAFJOE6B805W20101209?sp=true> (describing the Bush administration’s policy toward the ICC as “pragmatic engagement” in regard to the Court’s involvement with Sudan).

21. *First Election*, INT’L CRIMINAL COURT, <http://www.icc-cpi.int/NR/exeres/DE9BEA6B-EEC4-4B97-82E3-F5F922F9E5D5.htm> (last visited Feb. 5, 2011).

22. See Rome Statute, *supra* note 4, pmbl. (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . .”).

D. *The Court's Work*

We selected the following situations to investigate: Darfur, Democratic Republic of Congo (DRC), Uganda, Kenya, and Central African Republic (CAR).²³ I think it is important to understand, in the world today, the worst conflicts are here. That is why I have to work here. Congo in particular is still suffering the Congo wars. The Congo wars are the consequence of the Rwandan genocide, committed by Hutus against Tutsis.²⁴ Then Paul Kagame, who was the leader of a Tutsi rebel group [and later became president of Rwanda], expelled the Hutus.²⁵ More than one million Hutus went to Congo and Tanzania, but in Congo the Hutu leaders of the genocide were there, and they used the refugee camps to organize themselves to attack Rwanda.²⁶ Those attacks caused Rwanda and Uganda, along with militia leader Laurent Kabila, to attack Congo—then Zaire—resulting in the First Congo War.²⁷ In 1997 Laurent Kabila took Kinshasa and removed President Mobutu Sese Seko.²⁸ [About one year] after this coup, Laurent Kabila grew tired of this Rwandan and Ugandan presence, and he made a coalition including the Hutu militias [and hostilities between Rwanda and Congo immediately resumed].²⁹ This Second Congo War was between Kabila's coalition on one side, and Uganda and Rwanda on the other.³⁰ As a consequence of these wars, four million people died, which is the greatest number of civilian deaths since the Second World War.³¹ So my cases in Congo are related to these wars.³² Who of you have heard of the Congo wars before? Okay, so a very well-educated audience. In my country, if I ask this question, they know more or less there was genocide in

23. *Cases & Situations*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=casessituations> (last visited Feb. 5, 2011).

24. HERBERT WEISS, NORDISKA AFRIKAINSTITUTET, CURRENT AFRICAN ISSUES NO. 22, WAR AND PEACE IN THE DEMOCRATIC REPUBLIC OF THE CONGO 2 (2000).

25. IDA SAWYER & ANNEKE VAN WOUDEBERG, HUMAN RIGHTS WATCH, "YOU WILL BE PUNISHED": ATTACKS ON CIVILIANS IN EASTERN CONGO 116 (2009).

26. *Id.*

27. WEISS, *supra* note 24, at 3–4.

28. Howard W. French, *Mobutu Sese Seko, Zairian Ruler, Is Dead in Exile in Morocco* at 66, N.Y. TIMES, Sept. 8, 1997, at A1.

29. WEISS, *supra* note 24, at 13–14.

30. *Id.* Kabila's coalition eventually included forces from Angola, Zimbabwe, Namibia, Chad, and possibly Sudan. *Id.* at 14. Rwanda and Uganda were also supported by anti-Kabila Congolese forces. *Id.* at 13–14.

31. INT'L RESCUE COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS 1 (2007).

32. See *Democratic Republic of Congo*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=drc> (last visited Feb. 5, 2011), for information on the Court's cases arising from these conflicts.

Rwanda, but they have no idea there were Congo wars. So it is the neglected war.

In Sudan, Darfur is a consequence of the Khartoum policies. Khartoum fought Southern Sudan for twenty years.³³ To understand Sudan, you have to understand Khartoum is like ancient Rome; it's an empire, not a country, so when they have a rebellion in the South they send the army to kill them.³⁴ If there is a rebellion in Darfur, they send the army there—that is the way they are working. If there is a rebel in a city, the city becomes the target and they just attack the people in the village. The CAR case is also connected with the Congo conflict.³⁵ The only outlier is Kenya—our cases in Kenya relate to violence following a disputed election.³⁶

In our first case, warrants were issued for [Congoese militia leaders] Thomas Lubanga³⁷ and Bosco Ntaganda.³⁸ They are charged with crimes of conscripting and enlisting children under the age of fifteen, and using them in hostilities.³⁹ Conscripting and enlisting are both different forms of recruitment, so we do not care if the members of the family accepted the kid going into the army, because there is no freedom there to decide, so in whatever way the kids were included, it is a crime. Any kid under fifteen working for these militias is a crime.⁴⁰ Our evidence shows the impact on these kids who were going to school or playing football and were abducted and turned into killers.⁴¹ You can see how this training system brutalized them. For instance, they're forced to discipline their friends. If they refuse, they receive 250 hits, or if

33. See HUMAN RIGHTS WATCH, "THERE IS NO PROTECTION": INSECURITY AND HUMAN RIGHTS IN SOUTHERN SUDAN 2 (2009).

34. See *Darfur*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=darfur> (last visited Feb. 5, 2011), for information on the Court's cases arising from this conflict.

35. See *Central African Republic*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=car> (last visited Feb. 5, 2011), for information on the Court's cases arising from the CAR.

36. *Kenya*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=kenya> (last visited Feb. 5, 2011).

37. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>.

38. Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>.

39. See *Democratic Republic of Congo*, *supra* note 32.

40. Rome Statute, *supra* note 4, art. 8(2)(b)(xxvi) (defining as a "war crime" the act of "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities").

41. See *DRC: ICC's First Trial Focuses on Child Soldiers*, HUMAN RIGHTS WATCH (Jan. 23, 2009), <http://www.hrw.org/en/news/2009/01/22/drc-icc-s-first-trial-focuses-child-soldiers>.

they lose a bullet, they receive 250 hits. If a girl refuses to be raped, then one of the kids must kill the girl. So that is the way they transform the kids into monsters.

Our charges emphasize the role of the girls because the girls were used as killers, cooks, and sexual slaves all at the same time. Because they were sexual slaves, they became the wives of the commanders or the soldiers, so that later, when the United Nations (U.N.) intervenes, they may ignore the girls, thinking that as commanders' wives they are not also victims. So we emphasize that the recruitment of girls is in itself a gender crime. Prosecutions of such gender crimes are somewhat new. The Sierra Leone tribunal prosecuted this type of crime based on customary law,⁴² but this is the first time we have a treaty that describes the crimes and defines the elements of the crimes.⁴³ So this would be a substantial decision.

Another legal issue is that the judge will determine if it is an international conflict or a national conflict. The Ugandan army was occupying the area, but we have no evidence that Uganda was driving the decisions; they were supporting the militias in different moments, different militias, but we have no information that they were deciding the targets of the crimes. So we are arguing that it is a national conflict but we let the judges decide, and since we can be involved in national or international situations, that decision will not make a big difference to us.

The final legal issue, which is very important, is the punishment. The International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) created gradations for the severity of crimes, with genocide the worst and war crimes less important.⁴⁴ For us it is different. My view is all these crimes are so serious that we request close to the

42. Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 88-90 (2005) (discussing the efforts to address gender-related violence in Sierra Leone).

43. Rome Statute, *supra* note 4, art. 7(1)(h) (prohibiting persecution on the basis of gender); art. 7(3) (defining "gender" as referring to "the two sexes, male and female").

44. Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), incorporating U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 40, 44, 46, 49, U.N. Doc. S/25704 (May 3, 1993), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (criminalizing grave breaches of the Geneva Conventions, war crimes, genocide, and crimes against humanity); Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex arts. 2-4, U.N. Doc. S/RES/955 (Nov. 8, 1994) (criminalizing genocide, crimes against humanity, and certain violations of the Geneva Conventions).

maximum punishment for all of them. This can be an emotional issue that will likely be discussed in the future.

II. The Trials

A. *Lubanga Trial*

Three months before the start of the Lubanga trial—the first trial—the judges stayed the proceedings and ordered the release of the prisoners because we did not disclose documents to the defense.⁴⁵ We were characterized as bad prosecutors, but I like the fact that the Court took its role so seriously to enforce procedural requirements. Of course, we have a duty to disclose to the defense information that could be material for the defense.⁴⁶ In fact, we had disclosed two hundred documents saying Uganda was occupying the area where the crimes took place, and we had another one hundred documents that were confidential that were saying the same. So we informed the judges, “We have one hundred documents that could be material for the defense.” The documents could have been material for the defense, because the militia can say, “Uganda was there, they were the real organizers of the crimes.” So we told the judges that we had the documents but that we could not disclose them to the judges or the defense, because neither had a duty of confidentiality and could put sources at risk. They said, “Thank you, but in this case we must stay the proceedings.” So this was a big issue, particularly for the victims in Congo, because in that area, Lubanga is God. So we appealed the stay, and the Appeals Chamber ruled that we had to disclose our documents to the judges, but that the judges would have a duty of confidentiality.

So we started the trial after summary motions, but then there was a second motion in which two of the judges ruled that they would like to add gender crimes to the charges in the middle of the trial.⁴⁷ We said that was impossible, and the defense agreed, but two judges were in favor of adding the charges, with one judge against, so they ruled to add the charges, and we appealed, slowing down the process for another four months. We

45. See *Lubanga Case*, COAL. FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited Jan. 4, 2011).

46. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 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, ¶ 92 (June 13, 2008), <http://www2.icc-cpi.int/iccdocs/doc/doc511249.PDF>.

47. See *Lubanga Case*, *supra* note 45.

won the appeal, and the trial is moving forward.⁴⁸

Currently, there is a stay of the proceedings, but on a different issue than before.⁴⁹ The defense is alleging abuse of process by the prosecutor because we disclosed that one of our intermediaries, who we used to get some witnesses, was lying. So we told the defense that fact—that we believe the witnesses are serious but the intermediary was lying. The defense took this opportunity to present [a motion suggesting we were abusing court process],⁵⁰ and requested information about all our intermediaries, which jeopardized their lives. So we tried to fight with the judges, “Please don’t expose them to these people.” The judges ordered disclosure, but also protection—they ordered that we disclose another three intermediaries, but after they were protected.⁵¹ The defense complained, and the judges finally said, “Okay, we can disclose, just a limited disclosure to Lubanga himself and one of his close associates. Prosecutor, disclose in one hour.” And we said, “Look, Lubanga’s a criminal, we believe he’s a criminal, so we would not like to disclose to him, and this person is number two at the organization, so don’t do it.” So the judges were now thinking we were just ignoring the ruling, and then they stayed the proceeding, this time because the prosecutor was refusing to comply with the Trial Chamber’s orders.⁵² So they again ordered disclosure to Lubanga, and we went to the Appeals Chamber and we are waiting for the decision of the Appeals Chamber in a few days. I think we will be okay. I think we are right. Because in a way this is allowing us to discuss with the Appeals Chamber the process of protection. Because the Trial Chamber believes they have the final word and also the first word in protection. And we are saying, “Yes, you have the final word, but you have to listen to us because we know the situation on the ground; we are there. So before you make any decision on protection, please let us present our arguments.” So that is the debate, and I think we will win.⁵³

48. *Id.*

49. *Id.*

50. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on Intermediaries, ¶ 25 (May 31, 2010), <http://www2.icc-cpi.int/iccdocs/doc/doc881407.pdf>.

51. *Id.* ¶ 150.

52. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on the Prosecutor’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ¶ 21 (July 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>.

53. *Prosecutor Moreno-Ocampo* did win this appeal. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on Appeal of Prosecutor

In any case, we disclose now after we know that our sources are protected.

B. Katanga–Ngudjolo Chui Trial

The second case is against [Congolese warlords] Mathieu Ngudjolo Chui and Chairman Germain Katanga.⁵⁴ They were the leaders of the militias who were fighting with Lubanga's militias. And in this case we charged them for the attack in Bogoro, a village in the Congo, in the troubled region of Ituri.⁵⁵ Basically, they used child soldiers, they raped women, they killed more than two hundred people, and they pillaged the entire community.⁵⁶ In this case there are two militias working together. So what we are saying is they are co-perpetrators because they agreed to work together.⁵⁷ So we don't care who are the soldiers committing the crimes because both commanders are responsible for both groups. That is our allegation of liability.

C. Bemba Trial

The next trial which is coming in probably three or four weeks is against Jean-Pierre Bemba.⁵⁸ He is the son of the former minister of the economy of DRC,⁵⁹ so his father was the minister of the economy of both Mobutu and Kabila. When Bemba saw the chaos in Congo he used his money to build a militia, because that is the way to get power in this area, you kill people and you get power. In fact, he was appointed Vice President of Congo after the end of the Congo wars.⁶⁰

Against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, ¶¶ 23–26 (Oct. 8, 2010), <http://www2.icc-cpi.int/iccdocs/doc/doc947862.pdf>.

54. *Katanga–Ngudjolo Chui Case*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=drctimelinekatanga> (last visited Jan. 4, 2011).

55. *Id.*

56. *See id.*

57. *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Prosecution's Observations on the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui (Feb. 14, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc440431.PDF>.

58. *Bemba Case*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=bemba> (last visited Jan. 28, 2011). Bemba's trial officially began on November 22, 2010. *Id.*

59. *See Profile: Jean-Pierre Bemba*, B.B.C. NEWS (Nov. 22, 2010, 05:58 ET), <http://www.bbc.co.uk/news/world-africa-11809250> (describing the relationship between Bemba and his father Bemba Saolona).

60. *See* TATIANA CARAYANNIS, U.S. INST. OF PEACE, SPECIAL REPORT: ELECTIONS IN THE DRC: THE BEMBA SURPRISE 1 (2008), available at <http://origin.usip.org/pubs/specialreports/sr200.pdf>; *see generally id.* (describing Bemba's rise to power).

The first time my people went to the Congo to meet President Kabila, I told them they also had to meet Bemba—at the time, the government was fighting among itself. My advisor went to see President Kabila's chief of cabinet, and he said to her, "Look, working in Congo is very difficult; we are together, but we are fighting each other, and six months ago we were killing each other, and now we are together. It's so difficult to play together. Imagine how we can be in the same government with Bemba. He was eating pygmies in Ituri, he is a cannibal." Then, my advisor asked me, "I have to meet this guy, the cannibal?" I responded, "Yes. You have to go to see him, because we have to be fair." And then she went to see Bemba. And Bemba said, "Oh, I'm very glad you came here, because I was waiting for you. I have to explain to you, it's so difficult for us to work here, because we were killing each other and now we're working together." So the same speech. And he said, "It's difficult, because they say stupid things. They are saying I was eating pygmies in Ituri. Imagine. I can eat pygmies in my own state. Why would I go to Ituri to eat pygmies?" Great defense. But he was ready for us. He said, "I have this folder with information for you; if you investigate me, I'm ready."

We pursued a different case against Bemba. There was a coup d'état in CAR, which borders Congo, and Ange-Felix Patassé, the ousted president, called Bemba's militia to help him regain power.⁶¹ Bemba had a special interest in CAR because in the past, Kabila's forces reached Congo through CAR, so for him it was important to control CAR. So Bemba went to CAR, and they raped more than five hundred women and some men, and then pillaged. Their actions demonstrated how rape can be a part of war, because here, the soldiers were going house to house, looking for the chief of the neighborhood. They particularly used rape against the families of those who were perceived to have authority, to destroy enemy leaders. For instance, in one of the cases we presented, they were looking for the chief of the neighborhood, and when they found the family, they first raped the daughters, then the wife, and then they raped the man himself, in the public square. Catharine MacKinnon⁶² is my gender advisor. I asked her, "Why did they rape the man?" And she gave me a great explanation, she told me, "Look, rape is the normal way to discriminate against

61. Patassé was overthrown on March 15, 2003. Bureau of Afr. Affairs, *Background Note: Central African Republic*, U.S. DEPT ST. (Dec. 28, 2010), <http://www.state.gov/r/pa/ei/bgn/4007.htm>.

62. Catharine MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan Law School. Professor MacKinnon is also the founder of *Law and Inequality: A Journal of Theory and Practice*.

women, and in this case, they tried to treat this man as a woman. They humiliated him, raping him in public.” This man will be one of the witnesses in the case. And in legal terms, this would be the first case of command responsibility for rapes committed by the troops.

D. Sudanese Rebel Leaders

The last case is a militia from Sudan.⁶³ Bahar Idriss Abu Garda was a leader and there are two others, Saleh Mohammed Jerbo Jamus and Abdallah Banda Abakaer Nourain, and we issued a summons against them.⁶⁴ The allegation in this case is attacking peacekeepers.⁶⁵ These men were part of the rebel groups in Darfur, and in order to get weapons and cars, and also in order to be recognized as powerful people who should be invited to the peace process, they attacked peacekeeper operations and killed twelve peacekeepers.⁶⁶ One issue here is gravity—twelve is not so many; normally our cases are hundreds or thousands of people killed, or millions displaced, but we believe peacekeepers are protecting millions of people, so protecting peacekeepers is very important. Also, the case presents the issue of the status of African Union and U.N. peacekeepers—are they protected or not—because there were allegations that they were working for the Sudanese government. The hearing for confirmation of charges in that case is due in November.⁶⁷

This was the first case in which our challenge was how to arrest individuals—those charged were in Darfur, and Sudan would not let us in. Before this case we did other cases against the government, including [against Sudanese President Omar] Al Bashir,⁶⁸ so we talked to all rebel groups and said, “Look, you supported us on the Al Bashir case, but if we investigate you, you have to say that you respect the Court.” The five rebel groups agreed. And I said, “Okay, now we are prosecuting you, so you have to come to us.” They agreed to come, so we needed to extract them from Sudan. It was a big operation, because at the beginning we said, “Okay, we can go to you in U.N. helicopters from Darfur to Juba, Sudan, and then from Juba by plane, but we

63. *Darfur*, *supra* note 34.

64. *Id.*

65. *Id.*

66. The alleged war crimes occurred against African Union peacekeepers at the Haskanita military base in Darfur. *Id.*

67. *See infra* note 70 and accompanying text.

68. *See infra* note 76 and accompanying text.

needed U.N. approval." So I went to New York, talked to the U.N., and gave instructions. But the rebels didn't trust just any pilot, so we had to find a pilot they trusted. Then the Sudanese government demanded the names of the passengers, which we would not provide. So we had to look for a new idea. So in those days, we were awaiting the decision of the Court in the Al Bashir case, and George Clooney and Ann Curry, a journalist from NBC, were going to Darfur with Nicholas Kristof. So we called the rebels and said, "Look guys, we cannot extract you by air, but if you go the border with Chad, I know you don't trust the government of Chad, but George Clooney will be there, and he can assist you." And they said, "Who is George Clooney? Okay, if you are there, if Europe is there, we trust you, we'll do it." So we went there, but the group, which is basically a mobile militia with fifty cars that move around Darfur, was several days late in arriving. So George Clooney left, but we convinced Ann Curry to stay. We had to convince the French to give us a plane from N'Djamena, Chad to the Chad-Sudan border. So everything was settled. We were coming, everyone was in the plane, and Ann Curry was filming the crew in the plane. And the French commander said, "You cannot tape our people, it's a covert operation. Give me the tape."

[Ann Curry responded,] "No. Freedom of the press."

"Give me the tape."

"Freedom of the press."

So the mission was aborted, back to N'Djamena. But the rebels were coming in their fifty trucks, and they said we will drive around for two days, but then you have to be there. So we begged the French, "Please, no Ann Curry, just us." So we went there, we received the guys. There were some other little problems, but in the end they came out.

However, the judges were not deciding this case yet. So these individuals tried to go to Libya, because Muammar Gaddafi was supporting them. Gaddafi was supporting Al Bashir, supporting the rebels, supporting me, supporting everyone. So, we stopped them from going to Libya, then we agreed they could go to Kenya—basically no European countries would accept them, because they were afraid that they would claim asylum, and also they were criminals—so they went to Kenya and were put in jail. We begged Kenya to release them; they were released and went back to Libya. It's funny that Libya allowed these individuals to enter their country—even Libya cooperates with us. So the individuals came to the Court, we had a confirmation hearing, and interestingly the

judges refused to confirm the charges against Abu Garda.⁶⁹ And at the end we did a similar thing with two other commanders, they came to the Court also, and the confirmation judgment will be in November 2010.⁷⁰ So that's just a framework to see our legal work, our complicated operations on the ground, and the different dimensions of our work. Those are our trials and hearings.

III. Making Arrests

A. Uganda

The next challenge is to arrest individuals. Of these guys, Lubanga was in jail, so Congo just transferred him to us; Katanga was also in jail, transferred to us; and Ngudjolo was more difficult. Ngudjolo was the head of intelligence of the Congolese army in Ituri, so that was a problem, because when we were going to Ituri, we could not release any information about our activities, because we knew Ngudjolo would get that information. So Congo arrested Ngudjolo, and Jean-Pierre Bemba was arrested in Belgium.⁷¹ It is more complicated when these guys are surrounded by militias. That is the case with both Ntaganda, who is managing a big militia in the Kivu region of Congo, and Joseph Kony.⁷² I don't know if you know Joseph Kony. For the last twenty-two years he has abducted children in Northern Uganda, forcing them to kill their parents, in order to destroy the relations of the village and transform the children into killers. He would abduct girls from the schools to give the most beautiful girls to the commanders as rewards. He did not abduct a few girls, he abducted entire schools. The intervention of the Court forced him to leave Sudan, which was protecting him, and move to Congo. That move stopped his activities in Uganda. When we started operations in Gulu, which

69. The charges hearing for Abu Garda occurred in October 2009. *Darfur, Sudan, ICC-02/05-02/09, Case The Prosecutor v. Bahar Idriss Abu Garda*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209.htm>. On February 8, 2010, the Pre-Trial Chamber declined to confirm the charges against him, finding that there was insufficient evidence to support the allegations that Abu Garda participated in the attack on peacekeepers. *Id.*

70. The confirmation of charges hearing for Banda and Jerbo occurred on December 8, 2010. *Darfur*, *supra* note 34.

71. Jean-Pierre Bemba was arrested June 10, 2008, and Mathieu Ngudjolo Chui was arrested February 7, 2009. Veronica Glick, *Timeline of the Status of Cases Before the International Criminal Court*, THE AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT (last updated Jan. 28, 2011), <http://www.amicc.org/docs/TimelineCasesICC.pdf>.

72. See *Northern Uganda*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=northernuganda> (last visited Jan. 28, 2011).

is a city in the north of Uganda, you had more than one thousand kids who were walking each night to sleep in the center of Gulu. Now it's different; the situation has improved a lot. The problem is, the situation in Congo is worse, because Kony and others now commit the same crimes there. So arresting Joseph Kony is important. He is Lubanga's number two officer and the leader in the Kivu region. I am currently investigating him and this group that perpetrated genocide, who went from Rwanda to Congo. We are working with Germany on this case, because the chairman of this group of criminals is in Germany.

B. Darfur

The Darfur case is very important, because on the day of my swearing in I remember talking to my advisor, the one who met Bemba, about how we can get the Security Council to refer the case to ICC, because that would be the easiest way to start the case. And she said, "Forget it, in nine years, ten years, we have not seen one Security Council referral." And that was true. I was ignorant. However, two years later, the Security Council referred the Darfur case.⁷³ That shows how fast things are changing. In our first case, it was a big challenge to investigate the case, because I had to protect the witnesses, but I could not protect the witnesses in Darfur, so we collected information from people who were escaping from Darfur to different countries. So we identified six hundred possible people from eighteen different countries. We took testimony in eighteen different countries.

We presented the first case against Ahmad Harun.⁷⁴ Ahmad Harun was the Sudanese minister for humanitarian affairs.⁷⁵ He coordinated attacks against villagers. For me it was fascinating, because in Argentina the crimes are committed by the state—it's a military operation against civilians. The method in Sudan was to organize at the local level, where they integrate police, army, intelligence, tribal leaders, and political leaders, and they discuss what to do in the city, because they know the city very well. Then they report to the State Security Committee, and the State Security Committee reports to one person, Ahmad Harun. When Ahmad Harun went to Darfur the first time, the Fur ethnic group leaders there met him and said, "We are very glad you came here,

73. *Darfur*, *supra* note 34.

74. See *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd Al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest (April 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>.

75. *Darfur*, *supra* note 34.

because we are under attack. You have to protect us.” And he immediately told them, “You are wrong. You are my enemies. I will destroy you.” Imagine you go to the police and say, “Yesterday someone came to my house and raped my daughter, you have to protect us,” and the police say, “We did it, and tomorrow we will do it again.” What do you do? That is happening today in Darfur. We presented this case, and after that President Omar Al Bashir said he will not hand over Harun, because he was following instructions.⁷⁶ So we collected evidence against him, showing how Al Bashir and Harun, after coordinating the attacks against the villages and seeing the reaction of the international community, organized a second phase of genocide, a more subtle genocide, through rape, fear, and hunger, against the people in the refugee camps. There are 2.5 million people living in refugee camps.⁷⁷ Women were raped, so often that now they are not even reporting the rapes. They also used hunger and fear. Who coordinated these attacks? The minister of humanitarian affairs. And who was the minister of humanitarian affairs? Ahmad Harun, the same person. And interestingly, where is Ahmad Harun today? You know, today the big issue is Southern Sudan, in particular Abyei, which is in Southern Sudan, where the oil is. Who is today the governor of that area? Ahmad Harun. So if this Court was created to prevent genocide, I hope people can understand that Ahmad Harun in Southern Sudan is a very early warning that genocide may be coming again to that area.

Conclusion

As I said before, the most important cases we are doing are the cases we are not doing. For the ICTY the most important case they did was the case they never did—the North Atlantic Treaty Organization (NATO) bombing.⁷⁸ The threat to investigate created a huge change in NATO. Today, if you are a colonel in the NATO system, the first legal training you receive starts with this: the legal advisor of NATO explains to you, “Colonels, listen to me,

76. See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Case Information Sheet (July 12, 2010), <http://www.icc-cpi.int/NR/rdonlyres/08B26814-F2B1-4195-8076-B4D4026099EC/282348/bashirEng1.pdf> (stating that Al Bashir either authorized the role that Harun played in the crimes, or was actually in full control of the crimes that occurred).

77. Alfred de Montesquiou, *African Union Force Ineffective, Complain Refugees in Darfur*, WASH. POST, Oct. 16, 2006, at A15.

78. See COMM. ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FED. REPUBLIC OF YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR (2000), http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.

because if not, what will happen is in twenty years, when you are retired two-star generals, sitting on the beach, suddenly you are surrounded by gendarmerie and they handcuff you and you go to the Hague. And the evidence will be your orders, signed as part of NATO." So it is really working.

This idea, what we are doing with the Court, is not just doing cases. The cases are just part of the Rome Statute, just a phase of the system. The strength of the system is the commitment of the states that ratified the treaty to end impunity for the most serious crimes. It is not just the states that are committed—probably most of the citizens concerned are from the United States, which is not a state party; individuals like yourselves are part of the community that supports this idea. That is why I would like to understand how we can work together to keep assuring that there is no more impunity for these crimes. Thank you very much.