INTERNATIONAL DECISIONS

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Rome Statute—child soldiers—war crimes—internal and international armed conflicts—prosecutorial function—victim participation—reparations—sentencing

PROSECUTOR v. LUBANGA. Case No. ICC-01/04-01/06. Judgment, Decision on Sentence, Decision on Reparations. *At* http://www.icc-cpi.int.
International Criminal Court, March 14, 2012; July 10, 2012; August 7, 2012.

Shortly before its tenth anniversary, the International Criminal Court (Court or ICC) returned its first verdict, convicting a former rebel leader of the war crimes of enlisting, conscripting, and using children under fifteen to fight in the conflict in the Democratic Republic of the Congo.[1] In a second decision four months later, Trial Chamber I levied a fourteen-year sentence on the defendant, and in a third, two months after that, it outlined the principles and procedures to be used in awarding victim reparations under the Rome Statute, which created the Court.[2] The rulings within this trilogy of decisions—on the reliability of evidence, the scope of the child-soldiering ban, and sentencing and reparations—not only established a jurisprudential core for the ICC, but also underscored challenges faced by this still-young institution.

Defendant Thomas Lubanga Dyilo was an educated man in his early forties when, in September 2000, he became the founding president of the Union des patriotes congolais (UPC) and, eventually, leader of its military wing, Forces patriotiques pour la libération du Congo (FPLC).[3] His was one of several armed groups then fighting near the border between the Democratic Republic of the Congo and Uganda—in Ituri, a poverty-stricken yet resource-rich region roughly the size of West Virginia.[4] Casualties numbered well into the

[1] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter Judgment]. Unless otherwise specified, the ICC documents cited herein are available at the Court's website, http://www.icc-cpi.int, under links on the *Lubanga* case home page to the decisions themselves or to the Court Records of Pre-trial Chamber I or Trial Chamber I, as the case may be. The three decisions discussed in this report have been appealed.

[2] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012) [hereinafter Sentence]; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations (Aug. 7, 2012) [hereinafter Reparations]; *see also* Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute].

[3] Unless otherwise specified, the details in this paragraph are drawn from the factual accounts at Judgment, paras. 67–91. On age and education, see Sentence, paras. 55–56 (stating that the accused was forty-one and "well-educated," with a degree in psychology).

[4] Adam Hochschild, *The Trial of Thomas Lubanga*, ATLANTIC, Dec. 2009, at 76, 78, *available at* http://www.theatlantic.com/magazine/; *see* Reparations, para. 31 (referring to "the general level of poverty in Ituri").

thousands.[5] Ituri comprises between 3.5 and 5.5 million people from about eighteen ethnic groups; conflict between some of these groups dates to the era of Belgian colonization. The UPC/FPLC was formed mostly by ethnic Hemas, including Lubanga and Bosco Ntaganda, a militia commander who had been trained in Uganda, one of a number of African states also involved in the conflict. In June 2002, not long after the establishment of the UPC/FPLC, Ugandan authorities seized Lubanga in Kampala and transferred him to Kinshasa, where the Congolese authorities kept him under house arrest.

Following the Congolese government's 2004 referral of the situation to the ICC, the prosecutor investigated international crimes alleged to have occurred after July 1, 2002, the date on which the Rome Statute entered into force.[6] The Court issued warrants in 2006 for the arrest of two persons on Ituri-related charges. One was Ntaganda, who remained at large. The other, Lubanga, was transferred to The Hague and first appeared before the ICC in March 2006. Early in 2007, Pre-trial Chamber I confirmed charges against Lubanga "as a co-perpetrator" for "enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities."[7]

Trial was postponed repeatedly as Trial Chamber I—composed of Presiding Judge Adrian Fulford of the United Kingdom, Judge Elizabeth Odio Benito of Costa Rica, and Judge René Blattmann of Bolivia—struggled with the Court's first prosecutor, Luis Moreno-Ocampo, over the withholding of evidence from the defense. Judges twice suspended proceedings on account of the prosecution's noncompliance with orders to disclose—in the first instance, exculpatory evidence, and in the second, the name of a Congolese person, called an "intermediary," on whom the prosecution had relied to connect and maintain contact with witnesses (Judgment, para. 10). Although resolved sufficiently to resume the trial, the matter loomed large in the verdict issued in March 2012. More than 100 of the judgment's 593 pages recounted the problems that the use of intermediaries had caused (*id.*, paras. 178–484). The chamber wrote "that the prosecution should not have delegated its investigative responsibilities to the intermediaries" (*id.*, para. 482)—some of whom were paid, and one of whom worked with the Congolese intelligence agency (*id.*, paras. 198–205, 302). Finding indications that three intermediaries may have suborned perjury, the chamber instructed the Office of the Prosecutor to investigate whether the three had violated Article 70 of the Rome Statute, pertaining to obstructions of justice (*id.*, para. 483). The chamber further excluded evidence linked to the intermediaries as unreliable; specifically, the testimony of four witnesses who said they had been child soldiers (*id.*, para. 479).

It then turned to the charges at issue. First considered was the nature of the conflict. The prosecutor had alleged these crimes solely in a noninternational armed conflict; however, when

[5] *See* ICC Press Release, Statement by Luis Moreno-Ocampo, Press Conference in Relation with the Surrender to the Court of Mr Thomas Lubanga Djilo (Mar. 18, 2006), *at* http://www.icc-cpi.int/NR/rdonlyres/699D1671-4841-4AAC-BFF4-1F1BF3F9DFEC/143842/LMO_20060318_En1.pdf (noting that since "July 2002, 8,000 people were killed" in Ituri, and "600,000 people displaced"), *quoted in* James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 305 n.333 (2006); *see also* Reparations, para. 44 (stating that the Trust Fund for Victims estimated victims in the "thousands," without specifying whether "victims" referred only to child soldiers, or also to other persons harmed in the conflict).

[6] *See* Judgment, para. 9; Rome Statute, *supra* note 2, Art. 14 (authorizing referral of situation by state party).

[7] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges 156–57 (Jan. 29, 2007) (reported by Mark A. Drumbl at 101 AJIL 841 (2007)).

the pretrial judges confirmed the charges, they did so with respect to an international armed conflict as well. The decision enlarged both the potential scope of the case and the prosecution's burden of proof. At the close of trial, the prosecution had renewed its argument that the conflict was internal; in contrast, both the defense and two of the three legal teams supporting victims[8] asserted that various states were involved to an extent that rendered the conflict international as well as internal (Judgment, paras. 503–22). Trial Chamber I sided with the prosecution. Adopting a test first articulated by the International Criminal Tribunal for the Former Yugoslavia, the chamber found insufficient evidence that the Rwandese, Ugandan, or Congolese government played a controlling role in the fighting (*id.*, para. 541).[9] At issue, it wrote, "was not 'a difference arising between two states' but rather protracted violence carried out by multiple non-state armed groups" (*id.*, para. 563).[10] The chamber thus considered only whether the accused was responsible, in a conflict "not of an international character," for—to quote the relevant subsection of the Rome Statute, Article 8(2)(e)(vii)—"[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" (*id.*, para. 569).

Trial Chamber I interpreted that provision to comprehend three separate criminal acts, conscription, enlistment, and use (Judgment, para. 609). Although it ruled that conscription typically carries an element of compulsion while enlistment is voluntary, it reasoned that children under fifteen were not entitled to choose to fight, so that enrollment of a child under fifteen in an armed force was illegal "with or without compulsion" (*id.*, para. 618). As for use, a majority of the chamber construed the phrase "to participate actively in hostilities" to include a child's support to combatants, if it "exposed him or her to real danger as a potential target" (*id.*, para. 628). The construction expanded the proscription to use beyond "the immediate scene of the hostilities" (*id.*), yet appeared to exclude children victimized not by the enemy but, rather, by the militia that had recruited them.

Finally, individual criminal liability was assessed pursuant to Article 25(3)(a) of the Rome Statute, which applies to a person who "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." A majority of the trial chamber embraced the five-part test for such liability that the pretrial chamber had laid down upon approval of the charges, so that the prosecution was required to prove that the accused, first, was part of a common plan with another coperpetrator; second, had made "an essential contribution" to the plan; third, "meant" to recruit or use child soldiers, or "was aware" that the crimes would "'occur in the ordinary course of events'";[11] fourth, was aware that he had made an essential contribution to implementing the plan; and fifth, was aware both of factual circumstances establishing an armed conflict and of the link between those circumstances and his acts (Judgment, para. 1018).

[8] The three teams were the ICC Office of Public Counsel for Victims and two groups designated, respectively, as "V01" and "V02." *See, e.g.*, Judgment, paras. 52, 61, 64; Reparations, para. 13.

[9] Here the chamber adapted the "overall control" test set forth in Prosecutor v. Tadić, Case No. IT-94-1-A, paras. 120–40 (July 15, 1999), *at* http://www.icty.org.

[10] As detailed in the Judgment, para. 541 & n.1646, the internally quoted phrase adapts commentary on Article 2 common to the four Geneva Conventions on the Protection of Victims of War of 1949.

[11] Quoting Rome Statute, *supra* note 2, Art. 30(2)(b), (3) (describing the mental elements of "intent" and "knowledge," respectively).

Applying this legal framework to the evidence, the chamber found beyond reasonable doubt that the UPC/FPLC militia had recruited, both forcibly and nonforcibly, an unspecified number of children under the age of fifteen, and used them as guards, domestic workers, and frontline combatants (Judgment, paras. 882, 916). The chamber credited evidence that some children were whipped and otherwise harshly punished (*id.*, paras. 883–89). It further cited testimony that girls as young as twelve were subjected to sexual abuse at the hands of commanders and other soldiers in their own militia, resulting in pregnancies, abortions, ostracism, stigmatization, and "catastrophic" psychological and physical traumas (*id.*, paras. 890–95). The chamber recalled a witness's statement regarding one girl, called a "'wife'" because she was required to "provide sexual services" to a militia leader: "She prepared the commander's food and notwithstanding her saying 'I don't want to', her cries were heard at night" (*id.*, paras. 894–95; footnote omitted). Despite its rehearsal of this testimony the chamber's majority declined to make findings of fact, deeming sexual violence "irrelevant" to the determination of guilt or innocence on account of "the prosecution's failure to include allegations of sexual violence in the charges" (*id.*, para. 896).

As much eyewitness testimony had been excluded, videotapes depicting the accused proved pivotal. In one he had rallied troops at Rwampara training camp—among them, the chamber determined by its viewing, "recruits who were clearly under the age of 15" (Judgment, paras. 792–93). These tapes, together with the leadership role by the defendant and statements he had made before his arrest, grounded the chamber's conclusion that the prosecution had established individual criminal liability according to the posited test (*id.*, paras. 1356–57).

Judge Fulford agreed with the majority that the five-part individual criminal liability inquiry applied to the case at bar, but only because the accused deserved fair notice of the charges he would have to refute. Fulford objected to future application of the test, writing that it "is unsupported by the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution" (sep. op., para. 3).[12] In his view, subsections in Article 25(3) were meant not to create a hierarchy of mutually exclusive forms of liability, as the majority view maintained; rather, they were intended to anticipate the myriad, interrelated ways that a person might incur criminal responsibility (*id.*, paras. 7–9). Fulford thus contended that simply proving that the accused had acted in coordination with someone else, in a manner that had contributed to the offense at issue, would suffice (*id.*, paras. 15–16). Locating the origin of the contrary standard in the practice of German courts—which, unlike the ICC, base sentencing on a determination of the precise mode of liability—Fulford faulted the majority for failing to examine the German doctrine's compatibility *vel non* with the structure of the Rome Statute (*id.*, paras. 10–12).

Judge Odio Benito also wrote separately. She objected, inter alia, to the majority's decision that the Rome Statute's war crimes provisions supported liability in the context only of a noninternational, and not also of an international, armed conflict (sep. & diss. op., paras. 9–14). The chamber, she observed, had shirked a "duty" to adopt "a comprehensive legal definition," and thus had done harm to victims of the conflict in Ituri (*id.*, paras. 7, 17). "By failing to deliberately include within the legal concept of 'use to participate actively in the hostilities' the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber," she asserted, "is making this critical aspect of the crime invisible" (*id.*, para. 16). Of particular

[12] *See also* Judgment, Separate Opinion of Judge Adrian Fulford, para. 20.

concern to her was the exclusion of harms children had suffered at the hands of their own militia; notably, sexual violence and enslavement, offenses with "a clear gender differential impact" (*id.*, para. 21).

In July 2012, Trial Chamber I imposed the first-ever ICC sentence. The prosecution had asked for thirty years' imprisonment—the presumptive maximum under the Rome Statute—and for the determination of all sentences according to a mathematical baseline formula (Sentence, paras. 92, 95).[13] The chamber did not accede to either request. Nor did it find much guidance in precedents from the Special Court for Sierra Leone, where sentences for similar offenses had ranged from seven to fifty years in prison (*id.*, paras. 12–15).[14] Rather, in its fifty-two-page decision, the *Lubanga* chamber employed a nuanced analysis to arrive at a concurrent sentence of fourteen years for the three crimes of conviction, minus approximately six years already served in ICC custody (*id.*, paras. 93–104).

Rebuffing a defense effort to limit the scope to evidence presented at trial, the chamber held that it could consider other evidence pertinent to an "appropriate" sentence; that is, a sentence proportionate to the offense, determined by balancing all relevant factors (Sentence, paras. 25, 29–31). Given the Rome Statute's silence on standard of proof, the chamber applied the *in dubio pro reo* principle to benefit the accused, so that aggravating factors were to be proved beyond a reasonable doubt, and mitigating factors by a "balance of probabilities," akin to the U.S. standard of preponderance of evidence (*id.*, para. 34).

Applying this framework, the chamber then established, with references to its trial verdict, that the use of children under fifteen as soldiers had been "widespread"—a term applied without any specific finding of numbers—and had carried grave consequences (Sentence, paras. 49–50). Describing the accused as a "President and commander-in-chief" who was "intelligent and well-educated," the chamber concluded that he "would have understood the seriousness of the crimes," and had made an "essential contribution" to a "common plan" to conscript and enlist children (*id.*, paras. 51–52, 56). In mitigation of sentence, it recognized the "notable cooperation" of the accused, "notwithstanding some particularly onerous circumstances"; in particular, the prosecution's refusal to disclose evidence and the consequent delays (*id.*, para. 91).

The chamber found no factors in aggravation (Sentence, paras. 59, 76, 78, 81). It ruled, inter alia, that the evidence failed to show beyond a reasonable doubt that child soldiers under the age of fifteen had suffered punishments such as whippings and canings "in the ordinary course," let alone that the accused himself had "ordered or encouraged" such punishments (*id.*, para. 59). Its reasoning on sexual violence, another factor proffered by the prosecution, was much the same. Yet here the chamber placed clear blame on Moreno-Ocampo, who had finished his term the previous month. The "former Prosecutor," as the chamber called him, incurred reprimand for failing not only to seek to add sexual violence charges during the trial phase, but also to introduce new evidence of gender-based crimes during the sentencing phase

[13] *See* Sentence, para. 21; Rome Statute, *supra* note 2, Art. 77(1) (making no allowance for capital punishment, permitting imposition of prison terms "for a specified number of years, which may not exceed a maximum of 30 years," and authorizing life sentences only "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person").

[14] The chamber distinguished, inter alia, *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Sentencing Judgment, para. 187 (Apr. 8, 2009), *at* http://www.sc-sl.org, and *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Sentencing Judgment, para. 94 (Oct. 9, 2007), *at id.*

(*id.*, paras. 60, 75). Judge Odio Benito dissented in part, and argued that each count of conviction warranted a sentence of fifteen years (diss. op., para. 26).[15]

Trial Chamber I spoke with one voice in its third ruling, on the matter of reparations. A signal innovation of the 1998 Rome Statute is Article 75, which authorizes the Court to award "reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." This remedial provision, the chamber wrote, "reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive" (Reparations, para. 177). Although Articles 75(2) and 79 specify two paths to reparations—through "an order directly against a convicted person" or through the Trust Fund for Victims—the Rome Statute is silent on other details. Accordingly, in its August 2012 decision, Trial Chamber I set out principles and procedures for reparations awards.

For the first two-thirds of that ninety-four-page decision, the chamber described submissions from the defense and from ICC units like the Office of the Prosecutor, the Registry, and the Office of Public Counsel for Victims, as well as from the two teams of victims' lawyers, UNICEF, and nongovernmental organizations including the Hague-based Women's Initiatives for Gender Justice. The survey revealed disagreement, for example, on the identification of victims, the proper nature of reparations, the tension inherent in allotting benefits in a society afflicted by structural inequalities, and the evidence needed for inclusion in any reparations program.

According to the chamber, reparations help ensure that perpetrators are held to account and "repair the harm they caused to the victims" (Reparations, para. 179). Acknowledging the indigence of the defendant, the chamber noted that he could make a voluntary apology, yet stressed repeatedly that he could not be compelled to apologize (*id.*, paras. 179, 241, 269). It called for a "broad and flexible," "gender-inclusive," and "community-based" approach that would include both monetary and nonmonetary remedies (*id.*, paras. 180, 202, 274). Given the large number of persons affected and the "very limited financial resources available in this case," collective reparations primarily were envisaged; however, the chamber also contemplated individual awards in special circumstances, as well as "affirmative action" measures for sexual violence victims, HIV patients, and other acutely vulnerable persons (*id.*, paras. 200, 288).

The chamber declined to limit reparations to the eighty-five applications previously filed; it made clear that "victims were to be treated fairly and equally" without regard to whether "they participated in the trial proceedings" (Reparations, para. 187). Those included would be not only "direct victims" of the conscription, enlistment, and use of child soldiers, but also "indirect victims" like family members and persons harmed while trying to help direct victims (*id.*, para. 194). Human beings and entities such as schools, hospitals, and nonprofit organizations were to be considered (*id.*, para. 197). The chamber wrote that entitlement to reparations required "a 'but/for' relationship between the crime and the harm"; that is, proof by a balance of probabilities that "the crimes for which Mr Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought" (*id.*, para. 250).

[15] *See* Sentence, Dissenting Opinion of Judge Odio Benito, paras. 19–25 (supporting her preferred sentence by contending that more consideration should have been given harm from punishments and sexual violence).

Having outlined the contours, the chamber delegated implementation steps to the Trust Fund for Victims. It tasked the fund, which according to its website has 1 million euros available for reparations,[16] to raise money for the eventual award. The fund was also instructed to embark on an evaluation process: first, to pinpoint the Ituri localities due reparations; next, to work with experts in consulting with persons in those localities, assessing harm and identifying victims and beneficiaries; and finally, to present a reparations plan for the chamber's approval (Reparations, paras. 282–87).

* * * *

This trilogy of decisions in *Lubanga* marked a turning point for the first permanent criminal justice mechanism designed to address the world's worst crimes. The ICC's initial trial concluded with a judgment that convicted the defendant of offenses relating to internal armed conflict, yet declined to enter findings on charges relating to an international conflict. The verdict reinforced a global consensus against the enrollment or use of young children in armed conflict, a consensus reflected earlier in holdings by the Special Court for Sierra Leone, United Nations experts' reports, treaties, and national legislation. The decision imposing a fourteen-year sentence properly resisted a baseline approach not found in the Rome Statute and, instead, assessed the specific case and defendant at bar. Finally, the reparations decision envisioned a process by which a range of victims might receive some modicum of redress for the harms wrought by the recruitment and deployment of young children. Examination of these achievements revealed challenges, however.

Supporters of international criminal justice could derive no solace from the trial chamber's lengthy and heated criticism of aspects of the prosecution; in particular, the delegation of investigatory duties to local intermediaries, the resistance to disclosure orders, and the decision not to charge sexual violence. Also provoking concern was the fact that it took the ICC six years to render a trial verdict in a case involving a single defendant accused only of the war crime of child soldiering. Assumptions that this was a simple case seemed vindicated when Trial Chamber I, having discarded direct testimony by tainted witnesses, nevertheless entered convictions, based on expert testimony, militia documents, and videotapes that showed the defendant surrounded by soldiers who, the chamber concluded, were under fifteen years of age.

The trial chamber laid the blame for the shortcomings of *Lubanga* squarely at the foot of the man to whom it pointedly referred as "the former Prosecutor." That is too easy an evaluation, for the case revealed other sources of strain, among them the ICC's novel, many-sided litigation model. Most national criminal justice systems invite active participation by the prosecution, defense, and trial bench. Some also permit a measure of victim participation; in contrast, the Rome Statute has been interpreted to afford an active role to multiple teams of victims' lawyers who, in *Lubanga*, disagreed at times on litigation strategy. Adding more sides to the model were the pretrial judges, who ordered the presentation of evidence of an international armed conflict that prosecutors had argued could not be proved, and an appeals chamber called upon to decide an interlocutory matter. The tendency of this layered judiciary to complicate proceedings was

[16] Trust Fund for Victims, *Financial Info*, *at* http://www.trustfundforvictims.org/financial-info (stating that 1 million euros had been put in reserve for this purpose, and that in addition, "approximately €2.2 million were obligated for grants in the Democratic Republic of the Congo and Uganda").

apparent in the five-step liability test that Judge Fulford persuasively criticized. Further evident, in the contrasting opinions of Judges Fulford and Odio Benito, was a tension, often seen in post–Cold War international criminal justice, between the rights of the accused and the rights of the victims. Notwithstanding these considerations, in singling out the prosecution Trial Chamber I effectively issued a challenge to Fatou Bensouda, the new ICC prosecutor; it is thus notable that, shortly before her swearing-in, the prosecution added allegations of sexual violence to the child-soldiering charges lodged against Lubanga's co-defendant, Ntaganda.[17]

That Ntaganda remained a fugitive exposed other impediments. Until he resumed fighting it in 2012, the Congolese government had shielded him from arrest, an example of the absence of state cooperation that has impeded the ICC. As of this writing, forces said to be under Ntaganda's command have stirred new violence in Ituri[18]—a region promised some reparations by the trial chamber's third decision in *Lubanga*, at some date yet in the future, for harms that occurred a decade ago. This delay may also be attributed to the Rome Statute, Article 75 of which links reparations to conviction. That linkage bears reconsideration. Given that most ICC defendants will likely claim indigence,[19] reparations will have to come from the Trust Fund for Victims, which might find the raising of funds more successful and the distribution of redress more effective nearer the time of the offenses. Tying reparations closely to the crime of conviction also may work to exclude many who suffered from the underlying conflict. In this case that may include girls who endured sexual abuse away from the battlefield and at the hands of their own commanders, as Judge Odio Benito pointed out, not to mention persons whose injuries cannot be shown to bear the requisite relation to child soldiering.

The trial chamber's handling of the question of sexual violence implicates another purpose of international criminal justice. The nearly six-hundred-page length of the *Lubanga* verdict would seem to meet the requirement, in Article 74(5) of the Rome Statute, for "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions." Yet in one important sense the decision fell short. Not only did the majority label "irrelevant" the cries of an unnamed girl of unspecified age, but the chamber also failed to paint a complete picture of the Ituri region, its size, its economy, and the causes of its conflict. The accused likewise remained obscure: although the trial judgment devoted a hundred pages to painstaking assessment of witness testimony that it would in the end reject, it nowhere stated the place and date of birth of the defendant, his background, the languages he understands, what led him to leadership of the militia at issue, whether he himself had been a soldier, and if so, at what age.[20] In

[17] *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58, paras. 5, 66, 83 (redacted version, July 13, 2012) (granting the request); *see also* Marlise Simons, *The Hague: New Prosecutor Sworn In*, N.Y. TIMES, June 16, 2012, at A9, *available in* LEXIS, News Library, Individual Pubs. File.

[18] *See Yet Again, Congo Faces the Specter of Civil War* (Nat'l Pub. Radio broadcast Sept. 9, 2012), *available in* LEXIS, News Library, Most Recent 90 Days File.

[19] By way of example, as *Lubanga* neared judgment, ICC Pre-trial Chamber III granted the request of the ex-president of Côte d'Ivoire for "l'aide judiciaire totale." Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Décision relative à la «Requête de la Défense sur le champ de l'aide judiciaire», para. 4 (Jan. 27, 2012).

[20] To the extent that such details are provided *supra* in text at notes 3–5, 7, they turn on sources other than the Judgment.

sum, the decision did not meet the bar that a renowned jurist once set, of "a fully reliable record," established "so that future generations can remember and be made fully cognisant of what happened."[21] Improved narration, no less than improvements in doctrine and process, could do much to advance goals of retribution, redress, and prevention.

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United Nations Convention on the Law of the Sea—maritime boundary delimitation—methodology—territorial sea—exclusive economic zone—continental shelf beyond 200 nautical miles

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL (Bangladesh/Myanmar). Case No. 16. *At* http://www.itlos.org.
International Tribunal for the Law of the Sea, March 14, 2012.

On March 14, 2012, the International Tribunal for the Law of the Sea (Tribunal) rendered its judgment on the dispute between Bangladesh and Myanmar concerning the delimitation of their maritime boundary in the northeastern part of the Bay of Bengal.[1] The Tribunal established a single maritime boundary starting from the agreed terminus of the land boundary and delimiting the territorial sea of each state, as well as its exclusive economic zone (EEZ) and continental shelf. The Tribunal used the equidistance method to delimit the territorial sea, and the equidistance/relevant circumstances methodology, as described by the International Court of Justice (ICJ),[2] to delimit the EEZ and the continental shelf, the latter both within and beyond 200 nautical miles. This was the Tribunal's first maritime boundary decision and the first judicial decision to delimit the continental shelf beyond 200 nautical miles.

Myanmar and Bangladesh have adjacent mainland coasts (see map, p. 818) and an agreed land boundary. Bangladesh's territory includes St. Martin's Island, a relatively small, inhabited feature situated near the terminus of the land boundary, just to the south of Bangladesh's mainland and in front of the mainland of Myanmar. The boundary established by the Tribunal starts at the terminus of the land boundary at the mouth of the Naaf River (point 1) and runs generally southward, following the equidistance line between base points on St. Martin's Island and the mainland coast of Myanmar, as far as point 8 where the respective 12-nautical-mile limits of the territorial sea cease to overlap. The boundary then follows the 12-nautical-mile limit measured from St. Martin's Island, running in a west-northwesterly direction to point 9 where the EEZ boundary begins. Between points 9 and 11, a distance of about 29 nautical miles, the EEZ boundary is an equidistance line drawn between points on the mainland coasts selected by the Tribunal as appropriate. From point 11, the boundary follows the azimuth of

[21] Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998) (emphasis omitted).

[1] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Case No. 16 (ITLOS Mar. 14, 2012) [hereinafter Judgment]. The basic documents, pleadings, transcripts, press releases, and other materials on the case are available on the Tribunal's website, http://www.itlos.org. *See also Bangladesh-Myanmar*, Report No. 6-24 (Add.1), *in* INTERNATIONAL MARITIME BOUNDARIES ONLINE: REGION (06) VI, INDIAN OCEAN AND SOUTH EAST ASIA (Coalter Lathrop ed., forthcoming 2012), *at* http://nijhoffonline.nl/book?id=IMBO_IMBO-Book-6 (by subscription).

[2] See, most recently, *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), 2009 ICJ REP. 61 (Feb. 3).