

A Laboratory for Global Justice

In July 2002, after hasty renovations to an old Dutch telecom building on the margins of The Hague, the International Criminal Court (ICC) opened its doors to the world. Created by treaty in 1998, the ICC was a bold response to the hopes of many nations for a more compelling way to enforce the fundamental rights of humanity. A permanent international court would soon begin to prosecute suspects accused of mounting attacks on innocent populations – even if those accused were government officials, including heads of state. Amid investigations into more than a half-dozen global trouble spots, the ICC launched its first courtroom trials by charging a handful of men from the Democratic Republic of Congo. The following chapters tell the story of these pioneering trials, which dominated the ICC’s first decade of operation.

Courtroom trials show us the law in action. The trial itself is not some quiet research survey or academic inquiry – even though courts do provide fruitful topics for researchers and scholars. In the core dynamics of a trial, out of the drama of adversarial testing, the outcome emerges as something greater than the sum of its parts. International trials are a kind of proving ground. And for new courts like the ICC, the initial trials unfolded like a brash laboratory experiment.

In the alchemy of the courtroom, trials set off reactions between legal norms in the statute book and concrete facts in the particular case. These frictional sparks signal the appearance of a new organic bond at the conclusion of the trial. In international courts the legal norms begin as grand abstractions, proclaiming broad humanistic ideals, while the concrete facts of individual cases are as raw and unpredictable as life itself.

From all these elements, the first ICC trials yielded a highly combustible mix. Unexpected twists and turns lengthened all the proceedings. Twenty years after the founding treaty was signed, the Court had completed just three full trials – in which two of four Congolese men were acquitted. These are the

Congo trials, and their close analysis will instruct us on the future of international criminal justice.

Criminal law takes action in many ways beyond the trials inside the courtroom. Crimes have to be investigated; cases and suspects have to be identified; charges need to be confirmed. Being new, international courts have to be created, and a dedicated professional staff must work out how to administer them. These tasks all manifest elements of politics, morality, and culture – another way of saying that legal systems belong to the larger human endeavor. It is up to the officials running this volatile system to conserve the defining marks of genuine criminal trials: the aspirations to objectivity and impartiality.

But can these noble qualities truly be realized in practice? Any account of the Congo trials must include tensions and doubts surrounding the legal process. Clearly this is no ordinary laboratory exercise. Courtroom inquiry needs to defend its core legal values in the face of political and moral pressure.

Inside the courtroom, where the law operates in a protected space, the process demands fair treatment and the rational scrutiny of facts and laws. But the courtroom is only one part of a larger institutional structure of inquiry, interacting with an array of global actors. These interactions too are regulated by law; but they must also enter into practical judgments extending outside the courtroom. When these external dealings go beyond the strict logic of legal process, they open themselves to critical attacks as political in nature. The legal experiment taking place in The Hague is itself a test of how Court officials manage the tensions between legal values and effective, pragmatic action. Their challenge is to avoid reducing the law to *mere politics*.

Another set of tensions arises when the legal process is surrounded by intense moral energy, going to the core purpose of the Court: to pass judgment on those responsible for committing mass atrocities. The legal experiment carried out in Hague courtrooms will be judged by how it balances the joint and several claims of law and morality. By adhering to strict legal practice, the Court earns its authority to declare justice in individual cases. But legality alone may not be enough to satisfy the moral demands of activists, particularly when initial trials end in acquittals, or in reduction of key criminal charges. Tensions between law and morality are present even inside the courtroom – in the passion of opening statements, but even more with the inclusion of crime victims as trial participants.

As crossroads for law, politics, and morality, international trials are often assessed in polarizing, all-or-nothing terms. This study of the first ICC trials avoids common rhetorical extremes – the skeptical reduction of law to politics or culture, or the true believer's zeal for collapsing legal rules into moral imperatives. Such strong reactions are always tempting with new and

experimental trials – especially with the mixed results of the Congo trials. But here we steer a middle course between faith and skepticism, finding a balance in the play of legal process. Both inside and outside the courtroom, a critical approach to ICC trials opens up deeper connections to political, moral, and cultural realities.

Before studying any trial as a complex process, one might describe it more simply as a performance. Playwrights, novelists, and screenwriters have long known that courtroom trials hold the capacity for high drama. Legal actors may be cast in symbolic roles, as the trial becomes a proxy struggle between good and evil.

And surely, international trials ignite this ritual battle, starting with opening statements from Prosecutors – and sustained with impassioned commentary from observers outside the courtroom. But given the sheer length of the first ICC trials, the dramatic arc soon flattens out under the weight of time and tedium. On any given day, public visitors in The Hague are astonished by the ordinariness of it all: astonished by the dulled passions and subdued demeanor of the parties; by the fanatical tracking of documents down to the smallest filing details; by the seemingly bottomless descent into minutiae with witness testimony. Year after year, virtually every action in the courtroom, however minor, is verbally prefaced by invoking the precise legal or procedural code authorizing its occurrence.

In the Congo trials, there was little drama where good playwrights would have scripted it. But as a laboratory experiment, the surprising results, arising from masses of deeds and documents, have been deeply challenging. The following chapters explore these dynamic outcomes, observing closely as the ICC legal code began its long path to implementation.

Cambridge University Press
978-1-108-48801-3 — The Congo Trials in the International Criminal Court
Richard Gaskins
Excerpt
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TESTING A NEW COURT

Even following the best part of a decade since [the ICC's] establishment, the strong feeling remains that so much is still in the process of being established . . . There are successes and not a few problems, and the unexpected occurs almost on a daily basis.

Each time a case is conducted in a particular way, the more difficult it is to break free from the trend of established precedent; yet it is dangerous for first-instance judges to use a serious war crimes trial as a laboratory experiment.

ICC Judge Adrian Fulford
 “Reflections of a Trial Judge”

And at this stage in the life of the Court we are still discussing our basic vocabulary.

ICC Judge Christine Van den Wyngaert
 Bemba appeals hearing

This is a game of ties and junctures, balancing contradictions and tensions.

Alex Veit
Intervention as Indirect Rule

A stranger settling into the public gallery at the International Criminal Court has to weave together a bundle of impressions, taking in far more than meets the eye. The legal code may be sitting there on the judicial bench, in thick binders; but the law itself comes alive only in the action taking place inside the courtroom. A criminal trial is a process of testing that can spread out over many years: finding ways to combine laws and facts, to reconcile competing stories from the Prosecution and Defense (among others), and to refine outcomes through procedures and proof standards. Culturally, the events inside the Hague courtroom could not be more distant from the underlying facts and circumstances – facts rooted in a distant place and time (central Africa in the years 2002 and 2003). These contrasts in culture and context must all be reimagined within the sterile confines of court proceedings.

Focusing on contrasts and tensions picks up the jagged rhythm of the Congo trials, as these troubled cases worked their way through the ICC. First there are tensions between what happens *inside* the courtroom and *outside* it. Then there

are tensions between the strictly legal and the more elusive political ingredients of a trial. These differences open up further social dichotomies: between the distant culture where crimes allegedly occurred and the secure space in which trials take place; between the individual on trial and the shadowy groups through which his actions were implemented; between the social imperatives of local events and the legal norms enshrined in international law.

As these various contrasts are laid out, action inside the Hague Court starts to take on fuller meaning. The trials must reckon with mixed goals: on one side, a quiet confidence in the procedural neutrality of law; on the other, the moral angst of battling to end mass atrocities. Even after the courtroom spectacle has run for many years, it remains hard to measure the results in terms of winners and losers. Close observers come away from the trials with mixed satisfactions and concerns, with alternating moods of faith and skepticism about the entire venture.

This first glimpse into the ICC courtroom, anticipating the three Congo trials, introduces the contrasts and tensions that define the field of international criminal law. As in a lengthy trial, answers must be delayed until one finds the right questions, and until one explores the topic from various perspectives. Later parts of this book will offer in-depth studies about central African conflicts, about the history and design of the ICC, and about the ideas and philosophies that compete within its courtrooms. These first two chapters reveal some of the complications. They are meant to introduce key players and basic rules of the game, as a preview of central tensions that emerged within these historic first trials.

1

Spreading Justice to Distant Conflicts

1.1 INSIDE AND OUTSIDE THE COURTROOM

Trial Chamber: Day One

“All rise! The International Criminal Court is now in session.” With this declaration from the Court usher – delivered on a brisk January morning in The Hague in 2009 – Trial Chamber I opened the case of *Prosecutor v. Thomas Lubanga Dyilo* – the first of the Congo trials and the very first trial conducted by this controversial new court.¹

At center stage was Presiding Judge Sir Adrian Fulford. From his high judicial bench, Judge Fulford extended resonant greetings to all the participants in the crowded courtroom, identifying key players in the drama set to unfold. Down on the floor, to his left, was the Prosecution team, represented by the mercurial Luis Moreno-Ocampo and members of his office. Opposite the Prosecution, across the courtroom to the right, was the equally large Defense team, deep with seasoned Francophone advocates. Directly beneath the judges’ bench sat a row of Court officers and legal assistants, including technicians ready to ensure that all computer systems were performing well – systems visible to those in the public gallery looking out onto a vast ocean of computer screens. There were also interpreters hidden away in cramped booths, waiting to ease the differences between the Court’s two official languages, French and English, and to render into these languages the testimony yet to come in Swahili and Lingala, among other tongues. A keen observer would have noticed an additional lawyerly group, sitting between the judges’ elevated bench and the Prosecution team: the Legal Representatives for

¹ Lubanga Trial Chamber, transcript, January 26, 2009, ICC-01/04-01/06-T-107-ENG. “Dyilo” is a customary post-name. It appears in official ICC records, while the trial transcripts and outside commentary generally used the family name “Lubanga.”

Victims of specific crimes alleged to have occurred in the Congo. Ready to inject a compelling human story into these proceedings, they wore the same black gowns and ruffled white collars as the Prosecutors and Defenders; although their official role was unique, still to be tested.

In his celebratory round of introductions, Judge Fulford neglected to welcome the accused, Thomas Lubanga, an oversight he corrected most graciously at the outset of the second day. Lubanga's name had never previously figured in the headlines of leading European newspapers. He was a provincial player from Ituri district in the far northeastern corner of the Congo, forty-eight years old, who described himself simply as a "politician." Lubanga sat alone at a short desk in the far corner of the courtroom, flanked by two unarmed security guards and excused from any mandatory speaking role during the proceedings. From this angle, he could study the backs of his Defense team, sitting at two ranks of tables directly in front of him, staring ahead either at their computer screens or toward the judges at stage center. But Lubanga himself was easily seen from the public gallery, behind thick transparent, soundproof glass, where curious visitors from around the world took note of his dignified bearing – military in posture – as well as his deep ebony skin and lidless eyes. Many in the gallery were eager to speculate on what might be going through his mind as his trial unfolded.

Seated next to Judge Fulford that morning were two distinguished judges from Costa Rica and Bolivia, rounding out the membership of Trial Chamber I. Judge Fulford came from the United Kingdom, and, from his confident courtroom demeanor, one could sense his long legal experience, articulated in rich tones reminiscent of the classic BBC commentator. The polish of his diction and deportment fully matched that of his bald scalp, caught in the unnaturally bright light levels pervading this ultra-modern courtroom, reflecting off the blond paneling that covered every surface of wall and ceiling. On the bench, the three Caucasian judges were resplendent in dark gowns trimmed in royal blue. In the case of *Prosecutor v. Thomas Lubanga Dyilo*, they alone would hear the evidence, apply the law, and pass criminal judgment. At the International Criminal Court, there are no juries.

Background to the Congo Trials

The start of the Lubanga trial was but a ceremonial flourish in a longer-running legal drama. When the curtain rose on Monday morning, January 26, 2009, the basic scenery had barely shifted. Most of the actors in the courtroom that day had been rehearsing together for almost two years, laying the groundwork for this first trial – and indirectly for others to follow.

Thomas Lubanga had been delivered to The Hague three years earlier, in March 2006, after being bundled onto a French military plane, straight from his detention cell in the Congolese capital of Kinshasa. During his first year at the ICC, his status was managed by a different group of judges in a Pre-Trial Chamber, who scrutinized the conditions of his arrest, framed the charges against him that would be tested at trial, and set key ground-rules to ensure the fairness of that trial. The Trial Chamber took over in early 2007 and would remain tied to the case for more than five years. It finished its required tasks in late 2012, which included handing Lubanga a fourteen-year sentence, four months after releasing a massive written judgment (over 600 pages) detailing reasons for his conviction.² During this lengthy trial period, all three judges saw their judicial terms expire; but they stayed on to complete the work of this historic first case. In the end, two additional years ran off the calendar before the Appeals Chamber (involving yet another team of judges) sorted through various challenges to the trial judgment.³ Altogether, starting from the Prosecutor's initial investigations in the Congo, the Lubanga case occupied more than a decade in the life of the ICC.

It was a rocky start for the new ICC, after its initial launch in July 2002, in accordance with its founding document, the 1998 Treaty of Rome. After the Treaty was initialed by the negotiating countries, following a contentious drafting process, friends of the Court were surprised by the speed with which it was formally ratified by sixty nations. This number was the legal threshold for opening the world's first permanent court dedicated to the prosecution of crimes linked to the very worst human atrocities. During its first ten years of operation, another sixty-plus nations joined the ICC – although not some of the very largest countries. China, India, Indonesia, Russia and the United States have not joined. The ICC's ambitious mission was driven by the twentieth century's appalling record of mass violence, including war crimes and genocide. But the Treaty (also known as the "Rome Statute") does not allow the Court to look backwards in time: its jurisdiction is strictly limited to events occurring after July 1, 2002. The Lubanga trial focused on events running for a twelve-month period (September 2002 to August 2003). Although this was only a small temporal slice of armed violence endemic in eastern Congo, it was a timely segment that handed the ICC the first opportunity to implement its historic mission.

By early 2008, as the Trial Chamber prepared for the groundbreaking Lubanga trial, the ICC pre-trial judges started picking up the pace. From the Congo there arrived two additional Ituri figures, erstwhile opponents of

² Lubanga Trial Judgment, March 14, 2012, ICC-01/04-01/06-2842.

³ Lubanga Appeals Judgment, December 1, 2014, ICC-01/04-01/06-3121.

Lubanga in the same series of local conflicts taking place during the period 2002–03. The first was Germain Katanga in late 2007, to be joined in early 2008 by Mathieu Ngudjolo. The joint trial of these two figures would be the second trial undertaken by the ICC and would move at much the same pace as the first trial. For many months the Prosecutor had been searching other venues for suspects, including in Uganda, and in Sudan, where in 2009 he finally obtained an arrest warrant against President Omar al-Bashir for alleged crimes committed in Darfur. But gaining custody of suspects in those places proved elusive.

More fruitful was a case growing out of the Central African Republic (CAR), where the prime suspect was a well-known Congolese politician, Jean-Pierre Bemba, who had briefly crossed paths with local factions in Ituri district, prior to sending his personal militia into the CAR. In early 2008, Bemba's surprise arrest in Belgium opened the way for the third ICC trial. In all, these three groundbreaking trials of four Congolese nationals marked the ICC's emergence as a functioning tribunal – no longer just a lofty ideal. It was a sea change from a bold humanitarian promise to concrete legal reality. These three overlapping trials would leave no doubt that the new international court faced daunting challenges.

Much later, as the three Congo trials were winding down, another Congolese figure arrived in The Hague through a most surprising route. Having eluded arrest during the many years Lubanga sat in detention, Bosco Ntaganda had played a continuing role in conflicts persisting in Ituri and in volatile Congo provinces farther south. Like some other Lubanga associates, he found temporary refuge in the reorganized Congolese national army; but he was far more inclined to join rebellions and paramilitaries, some sponsored by neighboring countries. In early 2013 his luck finally ran out. Pursued by all factions in an armed standoff, he fled to the unlikely safe haven of the United States Embassy in Rwanda. Although Americans had expressed profound doubts about the ICC over the years since its creation, they quietly arranged for Ntaganda's immediate transfer to The Hague. Following a trial judgment in 2019, his conviction and sentence are currently under review by the Appeals Chamber.

Ituri and The Hague

As the trials played out over time, they drew worried responses from many of the ICC's ardent supporters. Had the Prosecutor chosen his first trials judiciously?⁴ It was too late now to go back. When Moreno-Ocampo managed

⁴ Of the many attempts to answer this question, one of the best informed comes from a Congolese human rights lawyer, who sees these suspects as “small fish.” Pascal