

# BULLETIN

No. 46 (379) • May 4, 2012 • © PISM

Editors: Marcin Zaborowski (Editor-in-Chief), Katarzyna Staniewska (Executive Editor),  
Jarosław Ćwiek-Karpowicz, Beata Górka-Winter, Artur Gradziuk, Beata Wojna

---

## The First Verdict by the International Criminal Court

Rafał Tarnogórski

*Ten years after its establishment, the International Criminal Court has issued its first verdict. In the case of Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I of the International Criminal Court (ICC) unanimously found Lubanga guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the context of an armed conflict not of an international character. This war crime is punishable under Article 8(2)(e)(vii) of the Rome Statute with a sentence of not more than 30 years. The case now moves to the sentencing phase.*

**Facts.** Ten years ago, on 1 July 2002, the International Criminal Court (ICC) was created, when its founding treaty—the International Criminal Court Statute, referred to in short as the “Rome Statute”—entered into force. The ICC is an international permanent tribunal that prosecutes individuals for genocide, crimes against humanity, war crimes, and the crime of aggression committed on or after that date. As of April, 121 states are parties to the Rome Statute, including all of South America, nearly all of Europe and roughly half the countries in Africa. However, some states, such as Russia or Iran, have signed but not ratified the Statute. Israel and the United States signed but formally withdrew their intent to ratify it, and some states have not signed, including India and China.

The ICC can exercise its jurisdiction only in three cases: if the accused is a national of a state that is a party to the Statute, if the alleged crime took place on the territory of such a state, or if a complaint is referred to the Court by the UN Security Council. To date, the Court has opened investigations into seven situations in Africa, three referred to the Court by states (Uganda, Democratic Republic of the Congo and the Central African Republic), two referred by the Security Council (Darfur and Libya), and two begun by the Prosecutor (Kenya and Côte d'Ivoire), in total with 20 warrants of arrest issued.

Thomas Lubanga Dyilo was the first person arrested and transferred to The Hague to be tried by the ICC, as well as the Court's first detainee. He was arrested for his role in the armed conflict in the Democratic Republic of Congo (formerly called Zaire) that erupted in the late 1990s and turned into one of the deadliest wars in modern African history. In 2008, it was estimated that the conflict and its aftermath claimed 5.4 million victims. Lubanga was the leader of a group called the Congolese Rally for Democracy–Liberation Movement. In 2002, he took control of a province and demanded autonomy. Human Rights Watch noted units that subordinate to him participated in ethnic cleansing, rape, mutilation and the recruitment of child soldiers. In February 2005 in Ituri, an armed group killed nine MONUC peacekeepers. Lubanga had been associated with these events and was arrested in March 2005 by Congolese authorities.

**Proceedings Before the Court.** The DRC ratified the International Criminal Court Statute on 11 April 2002. In March 2004, the Congolese government presented a memorandum authorising the ICC to investigate and prosecute crimes within the jurisdiction of the Court allegedly committed anywhere on the territory of the DRC since the entry into force of the Rome Statute. In response, in June 2004 the Prosecutor opened an investigation. Then in February 2006, a Pre-Trial Chamber of the ICC issued a sealed warrant for the arrest of Lubanga. The next month, Congolese authorities transferred him to ICC custody at The Hague, where he has been held in the ICC detention centre.

In early 2007, the judges of the Pre-Trial Chamber confirmed the charges against him, and in January 2009, a trial commenced before Trial Chamber I. Prosecutor Luis Moreno-Ocampo decided to formulate the content of the charges only on the basis of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities, which met the criteria under Article 8(2)(e)(vii) of the Rome Statute. The limits of the prosecution's approach sparked criticism because armed groups under Lubanga's command have been alleged to have pillaged, raped and killed many civilians. However, the need for procedural economy probably outweighed the need for further charges as well as when Lubanga was handed to The Hague the best evidence the Prosecutor had in his possession was about child recruitment.

Failures committed at the initial stage of the trial that almost led to the release of the defendant should also be noted. It turned out that the intermediaries working in the Democratic Republic of Congo had been involved in fabricating evidence and instructing witnesses. The defence contended that evidence helpful to the defendant had been hidden. However, even after rejecting the questionable testimony, the hard evidence was sufficient to conduct the trial. This evidence included films documenting the presence of Lubanga in training camps for child soldiers and certificates of victims directly questioned by the Court. The charges proved to be correct, and on 14 March Trial Chamber I unanimously found Lubanga guilty. On 24 April, Trial Chamber I issued an order to start on 13 June hearing oral submissions for sentencing in the case. The prosecutor is likely to ask for 30 years in prison. Given the consensus of the judges on the question of guilt, it may be assumed that the Trial Chamber shall accede to the request of the prosecutor.

**Conclusions.** In assessing the Lubanga case, one should realise that this was the first case ever before the ICC, Lubanga the first defendant to appear before the Court, and resulted in the first verdict issued. This was the likely cause of the mistakes made during the trial and also a factor in its excessive length (the Lubanga proceedings lasted six years). Nevertheless, it seems that a global assessment of the Court on the basis of its first completed case would be unfair.

As a strong supporter of an independent international criminal court, the EU is interested in the success of the Court. The Lubanga case is important both for the EU, and for the future functioning of the ICC. After this trial, one of the most important lessons seems to be the prevention of the replication of similar errors in future proceedings. In particular, this concerns the Court's practice of hiring intermediaries and ensuring that evidence gathered by them is reliable. Furthermore, from the perspective of the EU this case is also of major importance in terms of the development of humanitarian law and the protection of children in armed conflict. The Court ruled that "conscripting" and "enlistment" are both forms of recruitment into an armed group. The Trial Chamber I affirmed that these were separate offenses, distinct from the offense of "using" children to actively participate in hostilities. The Court also concluded that the consent of the child does not constitute a valid defence. Judges of the Court, however, were not in agreement about whether sexual violence may be regarded as acts fulfilling the condition of "using" children to participate actively in hostilities.

The comparison of the ICC to the International Military Tribunal at Nuremberg, which within 10 months sentenced 22 accused persons does not take into account the differences between the courts. The ICC is meant to be the first permanent world court with nearly universal jurisdiction. However, its role will decline if it is perceived as "victor's justice" with the power only to prosecute minor African warlords released to The Hague by political opponents. A test of the ICC's real value would be trials of leaders such as those of Syria, though this would require international consensus on the matter. The best time to reflect on the future significance of the ICC is now. A special responsibility rests with the Security Council, which has the power to refer to the Court situations that would not otherwise fall under the ICC's jurisdiction. The EU also bears responsibility as a strong protector of the ICC and a major donor to the budget of the Court. An especially clear and strong position by the EU, including Poland, on the liability of Syria's Bashar al-Assad before the Court would be a strong confirmation of the role of the ICC in the exercise of international justice.