

IHRP Final Report

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It's been a whirlwind few months in the often snail-paced field of international criminal law. Since May, the International Criminal Court issued a surprising arrest warrant against then-sitting president Muammar Gaddafi of Libya; Ratko Mladic was finally extradited by Serbia to The Hague to stand trial for the Srebrenica massacre and other crimes; closing oral arguments were made in the *Lubanga Case*, the ICC's first trial, which now awaits judgement; and pre-trial hearings commenced for six high-profile Kenyans, mostly sitting politicians, accused of orchestrating post-election violence. News and gossip on these momentous events swirled during my summer in The Hague, though I was not directly involved in any of them. I spent my summer working for the Defence Team of Abdallah Banda and Saleh Jerbo, two Darfurian rebels accused of war crimes before the ICC.

On September 29, 2007, Banda and Jerbo, then military commanders in two different rebel factions in Darfur, allegedly attacked an African Union peacekeeping base, resulting in the death of 12 peacekeepers and the pillaging of the base. The charges are murder as a war crime; intentional attacks against peacekeepers or peacekeeping equipment; and pillaging. The case is noteworthy for a variety of reasons.

For one, this is not the only Sudanese case at the ICC, but it is the only case in which proceedings have begun. There are arrest warrants against sitting president Omar Al-Bashir, government minister Ahmad Harun and Janjaweed leader Ali Kushayb but all three remain at large. This creates a situation, perhaps surprising to followers of the Darfur conflict, in which the only individuals being tried by the ICC for crimes in Darfur are those fighting against the regime widely accused of genocide and crimes against humanity. Nevertheless, the case proceeds; trial is set to commence later this year or early next.

Banda and Jerbo were never arrested. Rather, they voluntarily complied with summons for their appearance; they continue to cooperate with the ICC, meaning they are not detained and travel to the Court when called upon. This is unprecedented in the short history of the ICC (with the exception of fellow Darfur rebel Abu Garda, whose charges in relation to the same attack were not confirmed by the Pre-Trial Chamber due to insufficient evidence). The approach of the Parties to the evidence is also noteworthy. In May, the Prosecution and the Defence made a joint submission (publicly available) agreeing to certain key elements of the charges: the confidential agreed facts "narrow, to a very significant extent, the issues in dispute between the parties and will facilitate the fair and expeditious conduct of proceedings."¹ Indeed, the Accused have agreed to only contest three specific issues at trial on the basis of the agreed facts:

¹ *Banda and Jerbo Case*, Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011, ICC-02/05-03/09, available online: <http://www.icc-cpi.int/NR/exeres/5736EC7C-B00D-43B1-AC64-9C8B04B01A3A.htm>.

- 1) Whether the attack on the [peacekeeping base] on 29 September 2007 was unlawful;
- 2) If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
- 3) Whether [the African Union Mission in Sudan] was a peacekeeping mission in accordance with the Charter of the United Nations.

My work in large part involved analyzing evidence with an eye to these three contested issues, in long-term preparation for trial. I wrote internal memos on the consistency of evidence relating to specific factual questions or events; summarized and analyzed the strengths and weaknesses of past witness statements; and reviewed, organized and drew conclusions from other disclosed evidence. This factual, evidence-based work gave me a clear sense of the process of building a case before the ICC or other international criminal tribunals. I very much look forward to following the trial and watching the evidence around these three contested issues play out in court.

The rest of my work consisted of a variety of legal tasks relating to pre-trial procedural matters ongoing between the parties. Issues I worked on include witness re-interviews and proofing before the ICC; conflict of interest jurisprudence; witness protection measures and disclosure obligations; and procedures for translation and interpretation. These more short-term assignments relating to back-and-forth filings by the parties exposed me to the actual conduct of ICC cases, a nice complement to the long-term evidence analysis that occupied the rest of my time. Without getting into details, I thoroughly enjoyed the opportunity to witness and be a part of the development of a Defence case.

This case, for the various reasons mentioned above and for the unusual nature of the contested issues, holds the potential to make very interesting and potentially influential contributions to ICL – on the expeditiousness of ICC trials, the compliance with summons, the benefits and challenges of Rule 69 agreed facts and substantive issues in international humanitarian law relating to use of force and the mandate of peacekeeping missions.