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INTERNATIONAL CRIMINAL LAW

Qui Ne Dit Mot, Consent



by
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This is the introductory article in a series on international criminal law issues that will appear in *The Defender*. Hopefully, these articles will provide some insight to those interested in international criminal law, educate Florida practitioners on what the rest of the world's criminal systems are doing, and spur thought and action to tackle international criminal law issues that affect all of us.

The creation of the International Criminal Court (ICC) as the first permanent tribunal for genocide, war crimes and crimes against humanity raised world-wide hopes that those responsible for the most heinous crimes would be held accountable for their actions. During the sometimes contentious discussions in drafting the Rome Statute (the substantive and procedural framework for the ICC), all countries agreed that both actual and perceived fairness of the trials were of paramount

concern. While some prosecutors might disagree, the prior ad-hoc tribunals for the former Yugoslavia, Sierra Leone and Rwanda provided inadequate resources to the defense teams, limiting their ability to receive a "fair" trial and casting doubt on the tribunals as sources of justice. Those charged with defending the accused in the novel and complex proceedings cried foul.

In an attempt to create greater balance, Article 67(b)(1) of the Rome Statute was enacted.¹ In an effort to put the fairness issue to rest, the Article conferring "Rights of the Accused" encompassed the principle of "equality of arms," a term attorneys in the U.S. fighting for adequate resources for indigent defendants would translate as "level playing field." Although the ICC rules promise an equality of arms, the reality is a diluted version of the ideal and a scenario all too familiar to Florida defense attorneys. Without equality of arms, justice is imperiled; without justice, all international tribunals are seen as merely validating the prosecutor's case. If a defendant is unable to mount a defense, the ICC will prove impotent to effect any real improvement on the fairness of the

ad-hoc tribunals. The world-wide hopes of legitimacy for the ICC may be dashed.

The ICC's first prosecution is of a man named Thomas Lubanga Dyilo. He is accused of being a leader of the Union of Congolese Patriots (UPC) in the Democratic Republic of Congo (DRC). The UPC is/was an armed militia linked to murders of UN peacekeepers and hundreds of civilians. Further, the UPC was responsible for displacing tens of thousands of people due to conflicts involving the UPC. The charges against Mr. Lubanga Dyilo include enlisting children to participate in hostilities. Under Article 8, the enlistment and conscription of children is a war crime. The history, geography, location of witnesses, victim involvement, lack of internal governmental cooperation, and accusations in this new court present a most complex criminal case.

Jean Flamme, a Belgian lawyer, was appointed to represent Mr. Lubanga Dyilo. A fine attorney and man, Mr. Flamme was eager to be the first defense lawyer in the world to appear before the ICC. The issues he faced were extremely complex and without legal precedent.

Almost immediately, he complained about the inequality of arms provided to him and voiced these concerns via pleadings. Soon, the normally jovial Jeanne Flamme was, well, bitter. At a meeting in Montreal, he openly complained about the lack of resources he was allocated as well as a lack of privileges, immunities and personal security when traveling to Africa for investigative purposes. When he and I discussed the specifics, I felt that he could be any member of FACDL bemoaning the unlevel playing field too often found throughout our judicial circuits. As recently as May 2007, Dan Arschack, international criminal attorney extraordinaire, delivered a scathing speech in Tokyo, warning of the pitfalls of the inequality of arms in the ICC. He said, inter alia, "The one thing which is clear is that without adequate resources allocated for the defense by professionals who truly

understand the defense function in an adversarial system, the notion of equality of arms in the newest jewel of international criminal justice at the ICC will be revealed as a complete sham." Is this not comparable to Florida?

We too must continue to demand a level playing field in Florida. If we are truly interested in justice, then the indigent accused must have competent counsel and the resources necessary to adequately defend against the allegations. Since our government retains the power to execute people, we must insist on this fundamental principle of criminal law. If you find others resistant, and you will, remind them, as I do, that the most important lesson from Nuremburg was not that most were convicted, but that some were exonerated. 🏠

¹ The full text of the Rome Statute can be found at www.icc-cpi.int/library/about/officialjournal/Rome_Statute.

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