

Trial and Tribulations at the International Criminal Court: The Thomas Dyilo Lubanga Trial

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On 26 January 2009 the first trial before the permanent International Criminal Court (ICC) finally began. The road leading to the prosecution of Thomas Dyilo Lubanga, the President of the *Union des Patriotes Congolais* (UPC) accused of the war crime of conscripting or enlisting children under the age of fifteen and using them to participate actively during the conflict in the Democratic Republic of the Congo (DRC) in 2002-2003, has been long and winding. In fact, the trial almost did not start at all. In various ways this landmark case is unprecedented, leading to a number of 'firsts' in international criminal law.

In April 2004, the Democratic Republic of the Congo referred the situation in its territory to the Prosecutor of the ICC under article 14 of the Rome Statute, which entered into force on 1 July 2002. The Prosecutor started an investigation into the DRC situation and on 10 February 2006 the ICC Pre-Trial Chamber I issued a sealed warrant of arrest against Lubanga. On 17 March 2006, Lubanga was transferred to the ICC, after having being detained from 19 March 2005 in Makala, Kinshasa. Lubanga was thus the first person in custody of the ICC, a young international organisation with world's attention directed at it.

Another 'first' is the possibility for victims to participate directly in proceedings of the ICC. As far as their personal interests are at issue, victims may present their views and concerns to the Court (article 68(3) Rome Statute). This unparalleled development of the position of victims in international criminal law is a major innovation as compared to other institutions of international criminal judiciary. Neither the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) nor the Special Court for Sierra Leone (SCSL) allow victims to take part in the proceedings as participants; instead, they could only participate as witnesses. Moreover, the victims' participation regime imbedded in the hybrid common-civil law procedural model of the ICC does not 'match' any

of the domestic civil law tradition experiences. From the outset this ambitious endeavour of victims' involvement in the proceedings before the ICC has, understandably, attracted a lot of attention and controversy.¹ The ICC judges have struggled with the implementation of participatory rights of victims and different Chambers have engendered some divergent decisions interpreting the indefinite law on the issue.² Thus in practice the 'victory for victims' rights' has 'proved to be a tortuous path marred by controversial due process issues.'³

A further 'first' in the Rome Statute is the statutory obligation of the Prosecutor to 'investigate incriminating and exonerating circumstances equally' (article 54(1)(a) Rome Statute) and the right of the accused to have access to exculpatory evidence in the possession or control of the Prosecutor (article 67(2) Rome Statute). This too represents an unprecedented development as compared to its two *ad hoc* predecessors. The Prosecutor is no longer merely a party to the proceedings, but is seen as an "impartial truth-seeker" or an "organ of justice" arguably in line with the fundamentals of the inquisitorial model of criminal proceedings.⁴

The scope of the Prosecutor's duty and the accused's right has been ostentatiously tested in the Lubanga case. The trial was scheduled to start on 23 June 2008 (after an initial postponement), however, on 13 June 2008 Trial Chamber I imposed a stay of proceedings. According to the Trial Chamber the 'trial process has been ruptured to such a degree that it is

¹ See e.g. B. McGonigle, Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court, 21 *Florida Journal of International Law* 63, 2009; S. Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC, in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Martinus Nijhoff Publishers, 2009, p. 635-690; A.H. Guhr, Victim Participation during the Pre-Trial Stage at the International Criminal Court, 8 *International Criminal Law Review* 109, 2008. C. Stahn, H. Olásolo and K. Gibson, Participation of Victims in Pre-Trial Proceedings of the ICC, 4 *Journal of International Criminal Justice* 219, 2006; S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003).

² See e.g. ICC, *Situation in Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006; ICC, *Prosecutor v. Lubanga. Situation in the DRC*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06 OA8, Appeals Chamber, 13 June 2007; ICC, *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II (Single Judge), 10 August 2007; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Trial Chamber I, 18 January 2008.

³ M. Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 *Saint Louis University Public Law Review* 249, 2007, p. 259 and 262.

⁴ G. Turone, Powers and Duties of the Prosecutor, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, p.1165.

now impossible to piece together the constituent elements of a fair trial.⁵ Fair trial was made impossible by the Prosecutor's inability to disclose potentially exculpatory evidence and evidence relevant to the preparation of the Defence to the accused. The information was contained in numerous documents obtained by the Prosecutor from several sources, particularly from the United Nations, under confidentiality agreements (article 54 (3) (e) Rome Statute) and these providers refused to consent to the disclosure of these documents to the Defence or the judges. Article 54 (3) (e) allows the Prosecutor to 'agree not disclose, at any stage of proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and *solely* for the purpose of generating new evidence, unless the provider of the information consents'.⁶ The Trial Chamber characterized the Prosecutor's practice of regularly using the confidentiality agreements in order to identify the evidence to use at the trial as 'wholesale and serious abuse' as the possibility to obtain information under the 'cloak of confidentiality' is intended to be used restrictively and only for the purpose of generating new evidence. The only remedy according to the Trial Chamber was to suspend the proceedings and release Lubanga.

The Appeals Chamber endorsed the Trial Chamber's decision to stay the proceedings; but it overturned the decision on immediate and unconditional release of the accused, ordering the Trial Chamber to determine the matter anew, in light of the new developments.⁷ According to the Appeals Chamber the stay ordered by the Trial Chamber was conditional and not definite. In the meantime, the Prosecutor has found himself in the position to disclose all the necessary material to be evaluated by the Trial Chamber. Consequently, on 18 November 2008, in an oral decision the Trial Chamber lifted the stay as 'the reasons for imposing the stay, and thereafter for retaining it have fallen away' and the trial was set to continue. Throughout the procedure, Lubanga remained in custody, as the Trial Chamber suspended his immediate release until the issue had been resolved by the Appeals Chamber.

In his Separate Opinion Judge Pikiš dissents from the majority decision of the Appeals Chamber. He emphasizes the definitive character of the Trial Chamber's decision for a 'stay of proceedings for impossibility to hold a fair trial brings the proceedings to an end'. The Trial Chamber has actually noted that there was no prospect that the situation would be corrected in a visible future. A stay of proceedings for an indefinite time with the possibility to lift the stay at any time in the future goes against the basic understanding of the minimum rights of the accused in a criminal process. Even if considered a possibility, the release of the accused would still be inevitable as the ICC can only hold individuals in custody for the

⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1401, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues Raised at the Status Conference on 10 June 2008, Trial Chamber, 13 June 2008.

⁶ Emphasis added.

⁷ ICC, Appeals Chamber, Judgment on the appeal of the prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA13, 21 October 2008.

purposes of standing trial. Moreover, if the Chamber intended to reprimand the Prosecutor for his dubious practice in regard to the confidentiality agreements, it could definitely have done so in an explicit manner: either disclosure or the proceedings will be stayed. This critique of the Appeals Chamber, however, is surpassed by the commendable commitment of the judges to protect the rights of the accused in the first place. At the same time, these decisions demonstrate the immense importance attached to the prosecutions before the International Criminal Court.

After the tribulations in the pre-trial process, the trial has had an equally remarkable start, dubbed by one newspaper as 'an inauspicious start for a noble project'.⁸ In the presentation of the Prosecutor's case, the first witness to testify before the Court revoked his earlier statement that he was recruited by militia, claiming that he was instructed by an NGO on what to say. The Court was criticized for not foreseeing that the young witness might have been affected by Court's warning that his testimony might lead to criminal prosecution back home, and by being visually exposed to all present in court, including Lubanga. Two weeks later, the witness did testify about his time in Lubanga's militia training camp, this time the people present in the courtroom were reduced to the 'bare minimum' and the witness was not directly visible to Lubanga (the view was blocked by a curtain, but Lubanga could see the witness on a monitor). The issue of protection of victims and witnesses before the international criminal institutions is as essential as it is challenging due to the high profile cases before the ICC and the unstable situation in the conflict areas. The practice of the international criminal courts reveals how delicate the balancing exercise is between providing adequate protective measures for victims and witnesses testifying before them and ensuring that the rights of the accused to a fair and expeditious trial are fully protected.

Generally, the ICC met with considerable reproof, for instance that the ICC badgers poor African countries, that the ICC is politicized and that prosecutorial policy impedes effective peace negotiations. Since the Prosecutor's announcement of an indictment against the Sudanese President Omar al-Bashir last summer the emotions have been stirred up around the world. On 4 March 2009 Pre-Trial Chamber I issued a warrant of arrest against the Sudanese President, the first time ever against a sitting head of state, for crimes against humanity and war crimes committed in Darfur, but excluded the genocide charges submitted by the Prosecutor (lack of proof of specific intent, Prosecutor appealed that part of decision). The controversy surrounding this historic decision is immense and goes directly to the heart of the Peace *versus* Justice Debate: the push for international justice in the sense of criminal prosecution would stand in the way of effective peace negotiations in the troubled region of Darfur. Following the decision al-Bashir expelled all the aid groups from the region of Darfur, consequently, a major rebel group in Darfur, the Justice and Equality Movement cancelled the peace talks with the Sudanese government. Moreover, the legal issue of diplomatic immunity of a sitting president poses an interesting question in the realm of contemporary international law. This bold decision also exposes a crucial weakness of this newly-established institution, namely the absence of coercive powers and thus the dependence on state cooperation for proper functioning. The Arab leaders form a united block

⁸ The Times newspaper, 2 February 2009.

behind al-Bashir opposing the warrant of arrest issued by the ICC and thus the implementation of the warrant seems unfeasible.

The unfolding of the first, long-awaited Lubanga trial fuels the concerns surrounding the effective and impartial functioning of the Court. However, such critique is to some extent anticipated of a touchstone institution that is expected to pave the way, but which has still to learn by doing. The Prosecutor Moreno-Ocampo said: 'The first trial is the first trial, so I think it's very, very important for the court to show how well it works.' And indeed, the Lubanga pre-trial shows the ICC judges' commitment to their responsibility to oversee that the trial is fair for the accused on the one hand, while not underestimating the overall importance of the prosecutions before the ICC on the other. The strong reminder of the Prosecutor's duties under the Statute can only be commended. An obvious but inescapable conclusion is that the ICC needs time to implement all its 'firsts'.