



**REFLECTIONS FROM THE BENCH (22/02/08)**

On the 20th February 2008, the UK Judge to the *International Criminal Court*, Sir Adrian Fulford gave a speech entitled 'Reflections from the bench' to an audience drawn from the legal and diplomatic community at the Residence of the British Ambassador. Sir Adrian Fulford is currently the presiding judge of the trial chamber that is responsible for conducting the first trial in the history of the [International Criminal Court](#) against Thomas Lubanga Dyilo.



Sir Adrian Fulford

**Speech by Adrian Fulford to the Friends of the ICC on 20 February 2007 at the residence of the British Ambassador to the Netherlands**

With the passing years, to a degree that has surprised me even as someone who is a judge, I have become increasingly concerned about the idea of, and the search for, the truth. Not just about the momentous issues – who committed which war crime and when – but also as regards those small, humdrum daily details of our lives. It can be so easy, even if only ever so slightly, to misrepresent, bend, manipulate or obfuscate the genuine, the real position in order to smooth the way to a particular result or to make someone else feel better about some event or other. The casual deception, however well intentioned, seems far less justifiable to me now than it did in yesteryear. Perhaps this is all merely the natural result of no longer being a member of the bar of England and Wales, that splendid cadre of advocates-for-hire who some view as a profession entirely devoid of ethics or integrity because, of course, barristers delight in being able to present the most unlikely and preposterous fictions as credible.

I mention these irksome personal dilemmas because they make you a very difficult audience. You are the friends of the Court; you form part of our bedrock; we are beholden to you individually and as a group for your support and indulgence; and I think it is not said sufficiently often nor sufficiently enthusiastically that we owe you a huge vote of thanks for all you have done for us and I add parenthetically, I earnestly hope you will continue to do. In those circumstances you are particularly deserving of hearing the truth rather than the blander utterances of a judge who is worried about saying something controversial. I will do my level best to be candid, and where the

exigencies of my office lead me into reticence, I will at least forewarn you that I am pleading the 5th Amendment.

We now have three definite cases and it is with a high degree of relief that I appear before you after the judicial Leviathan (as I hope and believe it will prove to be) has therefore started to awaken. An eye has opened and it has stretched. True, it has perhaps not thrown on its clothes and rushed out of doors but, then, a lot of frantic rushing around, particularly at the beginning of things, is not always very helpful. That said, I will make no secret of the fact of my real frustration, already expressed in no uncertain terms in open court, about the delays in getting our first trial up and running.

The warrant against Thomas Lubanga Dyilo was issued on 10 February 2006. Given he was already in custody, he was speedily transferred from the DRC on 17 March 2006 and the pre-trial chamber confirmed the charges on 29 January 2007, just under a year thereafter.

We are now over a year later and the inevitable and pressing question is why has the case not started?

The reasons, as I see them from the perspective of the bench, for what must appear to be sluggish progress are as follows. They are fivefold.

**First**, the bench has decided that for the defendant to receive a fair trial, in order for him to prepare to meet the witnesses and the documentary and other material that will be called and used against him, he is entitled to have been in possession of that evidence, essentially in its entirety, not later than 3 months in advance of the trial. Our view, founded in basic notions of fairness, is that he should not be expected to confront a case which he has not had adequate opportunity to investigate, analyse and meet. Given the instability in parts of the DRC we do not see how evidence can be explored and how research can be undertaken in a shorter timeframe.

I cannot today go into the minutiae of why, notwithstanding our orders about disclosure of the entirety of the prosecution case by mid-December, the defence currently are only aware of the identity of less than half the witnesses they will have to deal with – the Office of the Prosecutor's case been served to a significant extent in redacted and summary form – because we are about to hand down a decision on this very issue. However, I am able to say, because it has been disclosed in open court, that taking timely and appropriate steps to provide for the protection of witnesses (both incriminatory and exculpatory), victims and innocent third parties lies at the heart of this problem, and we are going to explore very closely in a written decision shortly to be handed down whether or not this incredibly important element of case preparation has been dealt with efficiently and timeously. In saying these things I am not sending out an encoded message as to what our conclusions will be; this is something that we have yet to investigate and resolve, and the jury is still out on this issue. What has struck me, however, with significant force is that the Victims and Witnesses Unit plays a key role in the work of the court, a role which is without parallel in many of our national systems. When the ICC is trying cases in countries where significant instability and violence has dominated the lives of witnesses, victims and innocent third parties, the careful assessment of the threats posed to them if they become involved in our criminal proceedings is vital. This can be a time-consuming, labour-intensive exercise and it is often the case that identities cannot be revealed until the assessment process is complete. In future years, in future budgets dare I say, we may have to recognise more generously the crucial role of this organ of the court. But I digress.

The **second** of the five reasons, is that this, of course, is a Brave New Court – every step we take is on untrodden ground. We have no internal precedents; we are constructing our jurisprudence from scratch; we having to analyse the detail (which is occasionally less clear than one would have hoped) and the application of our written procedures: in short, our juridical *Modus Vivendi* is, of necessity, being constructed from scratch. And this is not being done by one court alone. Three different Divisions, potentially, must wrestle with many of the significant aspects of our work. The Pre-Trial and the Trial Chamber undoubtedly undertake overlapping work to which the Appeals Division may well give its attention (possibly twice on a given subject, since the Trial Chamber is not bound by Pre-Trial Chamber decisions, and the merits of many of the issues when they arise at the trial stage are not necessarily the same as they were during the pre-trial proceedings). That is eleven judges, potentially, all thinking at different times about many of the same issues that affect our court in the determination of our cases; three divisions seeking consensus for reasons of judicial

comity where that is appropriate, and where it is not, identifying, describing and explaining their differences. That takes time, and we need to consider over the long-term whether there are ways of reducing the time these processes take and we need to address their potentially repetitive nature. However, these are early days and this is a process of evolution and exploration.

This area is of great personal interest to me in that I feel that I am travelling in two different directions at the same time, because in England and Wales we are in the final stage of abolishing the pre-trial stage, in the sense that we will no longer investigate the merits of a case the prosecution seeks to bring against an accused before our preliminary court (which is called a Magistrates' Court). Instead, the court of trial (the Crown Court) has been given as its first task, if requested, a review of such issues as whether there is a prima facie case for the accused to answer and that court can consider, prior to the beginning of the trial, whether there are other reasons why there should not be a trial at all, for reasons of unfairness, alleged abuse of the process by the prosecution, substantive procedural deficiencies and the like. Therefore, the current thinking in England and Wales is that the judge trying the case (in our jurisdiction with a jury) is well equipped to decide whether there is a proper basis for the trial before there is any substantive investigation of the merits of the prosecution's case.

Accordingly, it has been of great interest me to join a court where there is substantive pre-trial work undertaken by a separate chamber before the case is passed to the Trial Chamber, if and when the charges are confirmed. The merits and the demerits of the two approaches is something that may provide a very interesting debate over the next year or two, as we see how the cases at the ICC progress. Of course, very different forces play on national and international institutions and tribunals and great caution must be applied when comparing two such systems. But there are interesting debates to come, I suspect.

I have digressed again, and I once more return to the five reasons.

**Third**, the defendant had to find new lawyers. This should not be forgotten and we lost six months or more whilst this occurred. Maitre Flamme withdrew and we have been very grateful to Maitre Mabilie for having taken up the defence baton. Her team has had a great deal of ground to cover and as I have already alluded to, Ms Mabilie has had to contend with the difficulties of researching a case in a huge and challenging country.

**Fourth**, participation by victims. I consider this to be an absolutely key ingredient of our trials. It is, of course, imbedded in the Rome Statute framework, and although it may be a concept alien to many of us because it is not found in many national criminal legal systems, we must fearlessly, as a professional tribunal well-equipped to sift and assess evidence, afford victims their opportunity for involvement in our cases, so long as this does not render the proceedings unfair for the defendant.

The early decisions from the court establishing a scheme for participation – the practical realities of this process – have been, perhaps unsurprisingly, significantly inconsistent; those who laboured in Rome left many questions unanswered and we are having to work this out very much from scratch. There are legitimate differences of opinion as to the extent and the circumstances of victim involvement and I hope that in due course (but not in the too distant future) the Appeals Chamber will be able to describe the superstructure in which we will live and operate in this regard.

Given that victim participation will affect the shape, length and content of our trials it is likely that leave to appeal will be granted at this interlocutory stage, as least on the issues that will have the greatest impact on the trial to come. Simultaneously, there are appeals on victims' issues wending their way to the Appeals Division from the Pre-Trial Chambers and it must be a real possibility that there will be conjoined appellate proceedings, although I hasten to add that is a decision that falls to other judges to make. Given the importance, the novelty and the marked divergence of opinion on this issue, it is likely to cause some material delay, and since we intend for victims to make opening speeches at the commencement of the trial, we cannot commence the proceedings until this has been resolved.

**Fifth**, there may be a misconception that the investigation, and if appropriate, the implementation of the necessary steps for holding part of the trial in the Democratic Republic of the Congo has delayed the opening of the case, or has the capacity for doing so at some stage down the line. I want to underline, to the contrary, that thus far this plan has not contributed to any delay in the case, and the view of the judges, once again publicly expressed in court, is that we will only

recommend this course of action if it does not entail any material adverse consequences as regards the start date. Therefore, I included this as one of the five reasons for the purpose of immediately demolishing it. It needs to be stressed that we are committed to doing everything we can to secure the earliest possible hearing date.

Those, in my view, are the five most significant reasons (in truth, of course, four), although others can no doubt be identified.

The last leads helpfully to the next topic I want to mention – the possibility of an in situ hearing – which I am sure you appreciate is a matter about which I am significantly constrained in what I am able to say because this is currently the subject of research, evaluation, submission and decision. However, given that certain aspects of this proposal have already been ventilated in open court, there are various threads which I can pull together now without fear of exceeding the bounds of what a judge should properly say. There has been an extensive logistical investigation by the Registry which will be presented, I hope, to the plenary of judges next week, because the ultimate arbiters on this issue are not the trial judges but a 2/3 majority of the judges in plenary. However, that final decision cannot be made next week because the agreement of the government must be secured and that critical ingredient is, as yet, outstanding, and, furthermore, the judges in plenary must have an opportunity of digesting the detail of the suggestion. The proposal from the trial chamber is currently founded on the basis that the accused will accompany the court to the DRC and that the suggested African sitting should not extend beyond three weeks. We hope to use that time to hear the prosecution's opening speech, any speech that Ms Mabille is minded to make on behalf of the accused at this stage of the case and, as I indicated a short while ago, we are likely to permit the victims or their representatives to make time-limited speeches outlining their views and concerns. We anticipate that there may be significant advantages to victims if they are able to fulfil this function in the DRC rather than in Northern Europe, and in some instances this may represent the burden of their involvement in the case. Thereafter, we will expect the parties and participants to call such witnesses in the case as will materially benefit from being heard in the DRC as opposed to The Hague. It is likely that these will be drawn from the category of witnesses who do not require significant protection. We are taking a very keen interest in the budget, and the trial judges are determined to ensure that this suggestion only goes forward if the costs are low: the number of people travelling is to be kept to a minimum (although there will be no stinting as regards security); the technological support will be limited to the bare essentials only; the court (and this includes the judges) is likely to be housed in portacabins as opposed to hotels; the courtroom will be a temporarily adapted warehouse or similar building; and no element of superfluous expenditure should be allowed. This will be less the court of the Sun King when moving between Versailles and Fontainebleau and more a small group of itinerant Trappist monks going out into the community, clothed in sackcloth and ashes. I exaggerate, of course, but the underlying point is serious.

Therefore, before this plan can be implemented (if at all) the logistical requirements and the security imperatives, for the court and the accused, will need to have been anxiously investigated and scrutinised; the agreement of the government of the DRC will need to have been given; the views of the United Nations will need to have been canvassed; and the judges in plenary will need to be reassured, inter alia, that the project will not contribute adversely to a sometimes fragile political situation.

It is interesting to note that although a while ago there was some press commentary in which this proposal was met with a mix of encouraging and cautionary noises, of late I have been aware only support for it. Of course, I am sure that those with reservations remain but the extent of the enthusiasm for the trip has been reassuring.

That is where we are currently. The Bench is champing at the bit to get on with the trial but without allocating any blame at this stage, for the reasons I have summarised we are unable to do so immediately; indeed, as canvassed with the parties and participants in court last week there is a real possibility the date will move from 31 March 2008 to a date in June 2008. For those of you who are interested it may be appropriate, in pencil only at this point, to enter Monday 23 June 2008 into your diaries. That is a date that is being focussed on only after very careful discussion and consideration, but I stress it is a subject on which the judges have yet to make a final decision.

Now, if I may, I want to spend a few minutes on the view from the bench as regards other issues, given it is in some ways a very different experience from sitting as a High Court Judge in the United Kingdom.

Well, for a start, the clothes are very different; I am used to wearing a thick horse-hair wig and a crimson robe edged in fur, carrying in my hand a pair of white gloves and the black cap that High Court judges used to put on over their bench wig when passing the death sentence. Our robes date back to 1635 and they have scarcely changed since then. It is slightly unnerving to wear an outfit that for 400 years has resisted all changes in fashion. Kate Moss and Naomi Campbell would be horrified – if the world followed our example they would soon be out of a job!!

Another substantial difference is that I am used to having the bench to myself for first instance work – that is, trial work. Before arriving in The Hague I only sat in court with other judges during the limited part of each year when I discharged the function of a judge of the Court of Appeal.

The ICC communal approach to the role of the judge (which is the norm for international tribunals) has been a challenging, interesting and pleasurable experience; it has involved, self-evidently, discussing each and every decision between the three judges, with the bench striving for the right answer instead of each of us working alone in a solitary judicial tower. Perhaps the strangest part has been drafting decisions in committee – judges get used to expressing themselves in their own way, and redrafting the work of others and being on the receiving end of the same process can be unsettling for all involved. This process often affects everything in a draft judgment, from the insignificant to the apparently insignificant; along with wrestling with the ingredients of the crimes the accused has been charged with, we have also spent time discussing, for instance, whether the entity referred to as the prosecution is singular or plural: is an “it” or a “they”? However, these new lessons have been learned very quickly since we started work, and I now feel as though I have done this all my life. When I return to the UK, I am sure I will miss the views and the support of my two judicial colleagues, Judges Odio-Benito and Blattmann.

For the rest, I am learning that much of judicial work may well be the same the world over. We are hugely dependent on the work of the advocates, and good counsel are, I suspect, the same in all jurisdictions: treat them well and with respect, but also insisting on efficiency and professionalism, and you will in turn be treated with courtesy and your orders will be acted on. That is not a guarantee that things will always be done correctly, but it does mean that there will be a willingness to assist the process, and it helps the advocates, I believe, to perform at their best. Bullying and shouting at counsel – intemperate outbursts – rarely produce anything but resentment and missed opportunities for those involved to get their true point of view across. As a cliché the school master’s expression “firm but fair” has a lot to commend it in this context.

The truly paperless, electronic court has been fascinating to get used to – indeed, I have been persuaded without real reservation that it is high time that courts world wide (where these facilities can be afforded) stopped printing out endless reams of documents – and the availability of quick access to exhibits, statements, filings and decisions is extremely impressive. At times I confess I miss the process of moving between lever arch files (a page flagged in a document at page 5,200 in one file, which can be compared with a statement buried 20,000 pages later in another file) and somehow the information feels more real if you can see the printed word lying on your desk, for as long as you wish it to be there, rather than appearing and disappearing from your screen. When you close the window on your computer, suddenly the document is gone – almost as if it never existed. However, the benefits of the paperless e-court far outweigh these concerns over the lack of physical tangibility of our e-court processes. And this is a critical factor in our proposed trip to the DRC – we will be able to have instant access to the entirety of the trial papers because they will be retrievable on the court officer’s computer, which in turn will be linked via a secure line to the court’s central electronic storage facility in The Hague. The case papers will then also be available to the parties and the participants. The daily transcript will be sent via the ether from The Hague to The Congo and, indeed, as a linked issue, the world will be able to watch our proceedings contemporaneously via the court web site and its live broadcasting facility.

When I began in practice the photocopier was just making its first appearance and most court documents were simply typed out in triplicate on old-fashioned typewriters. In 30 years the landscape has changed unrecognisably and as will be apparent from this little machine I am currently using, I believe we should use these computer-based opportunities to the full.

Those are a few personal observations from the Bench at this interesting and challenging time. I would only wish to add that it is a very great privilege to work as a judge on the first trial chamber and, given that the fiercest and most valuable critics are often one’s closest supporters, I only hope

that the bench will survive the cool and searching evaluation and judgment you will no doubt subject us to in due course. Please remember in doing so that mercy is one of the cardinal virtues of a judge.



Sir Adrian Fulford and British Ambassador  
Mr. Lyn Parker

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