



## ***THE DELAY AND RESUMPTION OF THE CASE OF THE PROSECUTOR V. THOMAS LUBANGA DYILO AT THE ICC***

During the summer of 2008, the fate of the International Criminal Court's first trial, of Thomas Lubanga Dyilo, was uncertain because the Prosecutor had failed to disclose certain material to the defense. As a result, Trial Chamber I imposed an indefinite delay. Following multiple judicial decisions and the consent of the UN and NGOs to release certain documents, the trial is set to start on January 26, 2009.

### Delays Due to Non-Disclosure of Evidence by the Prosecutor

On June 13, 2008 the ICC ordered a stay of the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, a Congolese warlord accused of enlisting and conscripting children under 15 as soldiers. Because the prosecution failed to share evidence with the defense which might have helped Mr. Lubanga's case, Trial Chamber I decided to stay the proceedings just ten days before the trial was to begin. It considered that without this evidence the accused was hindered in preparing his defense, thus violating his right to a fair trial. Therefore, the Court ordered his release pending further appeals. As a result, the Prosecutor has been criticized by some for undermining the case and for abusing his powers. Nevertheless, the Rome Statute provides for a system of checks and balances that has been proved to work in this case. Consequently, the Court was able to resolve the disclosure issues. Starting in early 2009, the *Lubanga* case will be the first trial for the ICC.

In the course of its investigation, the prosecution collected and was in possession of 204 items which could have exculpatory effect. Exculpatory evidence at the ICC is "any evidence which shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which could affect the credibility of prosecution." Article 67(2) of the Rome Statute establishes the obligation of the prosecution to disclose this type of evidence in order to comply with the requirements of due process – a fair trial. In addition, this provision also provides that in case of doubt, the Court should decide on the exculpatory character of evidence. Therefore, the Chamber acted as the Statute requires when it requested from the prosecution the disclosure of the information to it to determine its nature. However, these documents were provided to the Prosecutor by the United Nations under Article 54(3)(e) which allows him to enter into confidentiality agreements for the purpose of generating new evidence. Agreements of this type with the United Nations have been used in the past. Furthermore, under Rule 82 of the Rules of Procedure and Evidence, the Prosecutor may not disclose information obtained through these agreements without the prior consent of the information providers. Accordingly, evidence obtained under these agreements cannot be used in a trial without permission. It can only help the Prosecutor to obtain similar or new evidence which can be used in a trial and must be disclosed to the defense.

Defense counsel for Mr. Lubanga argued that confidentiality should not prevail over the right of the accused to a fair trial. In addition, international jurisprudence – including at the ICC – establishes that it is for the judges to decide whether the information has exculpatory impact. Under Article 54(1)(a) of the Rome Statute, the Prosecutor is required to fully investigate the guilt and innocence of the accused. Without the guarantees of confidentiality, the prosecution would not have been able to collect a substantial body of relevant material. However, it is the decision of the judges to resolve any doubt about the disclosure or status of evidence. This is an example of how the Court's judges ensure that there are sufficient checks and balances on the Prosecutor.





Since the Trial Chamber has the obligation to ensure full respect for the rights of the accused as well as the fairness and speed of the process, the Trial Chamber concluded that Article 54(3)(e) was used inappropriately and that the Prosecutor should disclose all the information in his possession or control. As a consequence, following the provisions in Article 64(3)(c), the Trial Chamber decided that it should review all the materials to allow it to determine if they show or tend to show the innocence of the accused.

Out of the 204 items in question, 152 were provided by United Nations and 52 by NGOs. As of September 3, 2008 the prosecution had disclosed 185 of them. Nonetheless, since the materials were provided under confidentiality agreements, information providers limited the access of the Court to the information, allowing it to review the documents in their original form but requiring it to return them afterwards. The Trial Chamber stated that in order to ensure the right of the accused to a fair trial and to guarantee a proper appeal, a copy of the documents had to be kept by the Court throughout the proceedings. Moreover, it declined to consider the materials until the information providers agreed that the Appeals Chamber would be able to review the documents. However, the prosecution argued that whether the Appeals Chamber could review them is not the concern of the Trial Chamber.

Furthermore, the prosecution raised on appeal whether it was a mistake for the Trial Chamber to maintain the stay of the proceedings and to refuse to consider the materials until all 204 documents were disclosed to the Court. The Appeals Chamber took the position that the accused be given sufficient access to them in order for there to be a real prospect for a fair trial.

On September 15, 2008, acting pursuant to Regulation 28 of the Regulations of the Court, the Prosecutor submitted an application to the Appeals Chamber in order to provide the Chamber with further details on the referred documents but without introducing additional arguments. However, the Chamber declined to consider such clarifications because it would constitute a serious breach of fair trial rights if the Appeals Chamber were to rule on a different basis from the Trial Chamber.

One week later, the Appeals Chamber confirmed the stay of the proceedings and decided to keep Mr. Lubanga in the Court's custody because there was a risk that he would return to the Democratic Republic of the Congo and not attend the trial. The Chamber considered that the stay was not premature or excessive, as alleged by the Prosecutor in his appeal, because the Trial Chamber acted following its obligations under Articles 64(2) and (3) of the Rome Statute. These obligations entail ensuring the fairness of the proceedings and applying and interpreting the Statute in accordance with internationally recognized human rights. Therefore, the decision of a conditional stay was reaffirmed by the Appeals Chamber because at the time the Trial Chamber rendered its decision on release the essential preconditions of a fair trial were not met. However, the Appeals Chamber stressed the obligation of Trial Chamber to review all of the materials to determine if a fair trial could take place.

As to the interpretation of Article 54(3)(e) of the Rome Statute, the Appeals Chamber agreed with the Trial Chamber that the provision should only be used exceptionally for the purpose of generating new evidence. Article 54(3)(e) confers on the Prosecutor powers in order for him to fulfill his mandate and under Article 18(3) he may agree not to disclose materials gathered under Article 53. However, these articles must be interpreted under the specific circumstances of the case and in accordance with their literal meaning as required in Article





31 of the Vienna Convention on the Law of Treaties of 1969. Furthermore, the use of the Prosecutor's powers must never lead to breaches of the accused's rights. Among those, Article 67(2) establishes the right of the defense to receive by disclosure any materials in possession or control of the Prosecutor.

Judge Georghios M. Pikis dissented from the Appeals Chamber decision although this did not affect the majority's ruling. He considered that the accused should be released because his fundamental right to a fair trial and his right to freedom were violated. However, the threat of Mr. Lubanga's release was removed by the Court's decision to keep him in custody.

## Fair Trial Rights at the ICC and Under International and Domestic Law

The right to a fair trial is an essential right in the Rome Statute and in all countries respecting the rule of law. It is explicitly included in Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention of Human Rights, as well as numerous other national constitutions and international declarations and conventions. Both common law systems and civil law systems recognize it as a primary principle of law.

This right can be split into three categories: pre-trial rights, rights to be respected during the proceedings and post-trial rights. Among these one of the most fundamental is the right to an effective defense, which the Rome Statute recognizes in Article 67(1)(b) as "the right to have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in confidence." It applies not only to the defendant but also extends to the defense counsel as well and is to be observed in all stages of the proceedings. In its *Lubanga* decisions, the Court also referred to other international conventions which include this right, such as the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

This right relies on two main elements: the adequacy in time and in access to facilities. The time element depends on the nature of the proceedings and the factual circumstances of a case, such as the complexity of the case; the defendant's access to evidence; the time limits provided for in domestic law; and other factors. Among the important facilities that must be granted to the accused and defense counsel, there is access to appropriate information, files and documents which are necessary for the preparation of a defense. The European Commission has stated that this right permits the defense to have reasonable access to the prosecution's files (*X v Austria* (7138/75), 5 July 1977, 9 DR 50) but this may be subject to reasonable security restrictions (*Haase v Federal Republic of Germany* (7412/76, 12 July 1977, 11 DR 78). There is also the defendant's right to communicate, in confidentiality, with counsel of his or her own choosing.

In the United States, the Sixth Amendment to the Constitution also establishes the right to a fair trial. The right to timely prepare a defense was established in the US by *Brady v. Maryland* (1963). In this decision, the US Supreme Court ruled that the failure to disclose relevant exculpatory information was a violation of the defendant's due process rights. The prosecutor's good faith or bad faith in such failure is not a decisive factor. However, the prudent prosecutor will resolve doubtful questions in favor of disclosure (*Pennsylvania v. Ritchie*, 1987). In *US v. Agurs* (1967), the failure to disclose evidence which can change the result of the trial was also considered a constitutional violation. Moreover, a state has a constitutional duty under the due process clause of the Fourteenth Amendment of the US Constitution to disclose to the defendant any material evidence that is





favorable to the defense for trial or a sentencing hearing. Similarly, in the *Lubanga* case the Prosecutor has the same obligation to disclose any evidence which tends to show the innocence of the accused, or mitigates his or her guilt, or when this information could create a reasonable doubt of the defendant's guilt that otherwise would not exist. In the *Lubanga* case, both Trial Chamber I and the Appeals Chamber considered the failure to disclose such material to be a grave violation of the accused's right to a fair trial.<sup>1</sup>

However, to this extent there is a difference between the US and the ICC systems. Whereas in the US the defendant has to establish the basis for claim that material in the possession of the prosecution has exculpatory nature in order to be entitled to have records reviewed by the judge (*State v. Smith*, 1994, *Love v. Johnson*, 1995, *US v. Valenzuela-Bernal*, 1982), at the ICC the defense counsel need not to establish such basis. Under Article 67(2) of the Rome Statute, the disclosure of information in the possession of the Prosecutor when there is doubt about such disclosure has to be decided by the Court. Therefore, when ICC Chief Prosecutor Luis Moreno Ocampo decided to confer with the Court on the possibility of the existence of exculpatory material among the documents he had gathered under Article 54(3)(e) of the Rome Statute, he upheld his statutory obligations. Yet, he is bound to investigate equally incriminatory and exculpatory evidence which are subject to disclosure requirements (Article 54(1)(a)).

Another similarity between the national US system (*State v. Hardy*, 1977; *State v. Bailey*, 1988) and the ICC system is that in both, courts are responsible for reviewing the material in possession of the prosecutor and for determining the possible exculpatory character of such documents. If that is the case, the trial judge will provide the defendant with all exculpatory material in the prosecutor's possession. Moreover, whereas in the US system the withhold evidence must be considered collectively, in the ICC documents are considered item by item.

The issue of a fair trial due to the failure to disclose came up in a US criminal trial during the same period as the *Lubanga* delay. In the case of the Alaska Senator Ted Stevens, federal Judge Emmet G. Sullivan almost suspended the trial for the same reasons as ICC judges in the case of Mr. Lubanga. He considered that the trial could proceed despite the prosecution's delayed disclosure of exculpatory information. "Although the court is persuaded there is... a violation, the court is not persuaded that dismissal of the indictment or mistrial is the appropriate remedy," he reported saying in the *Washington Post*.<sup>2</sup>

In sum, the right to fair trial is a fundamental safeguard to ensure due process and the protection of human rights. Moreover, the effective administration of justice relies on the successful accomplishment of this right. One of the main elements of fulfilling this right is the prosecutor's obligation to disclose all the necessary information to the other party for it to be able to prepare an adequate defense. This requirement is even more important when information falls into the category of "exculpatory evidence." Therefore, when the Prosecutor failed to disclose to the defense the evidence which could potentially show Mr. Lubanga's innocence –

<sup>1</sup> Cynthia G. Barnhill, *Practical and Legal Aspects of Exculpatory Evidence*, Prosecutor 19 C – Rowan, available at [www.ncdistrictattorney.org/traininghandout/legalaspects.pdf](http://www.ncdistrictattorney.org/traininghandout/legalaspects.pdf).

<sup>2</sup> Carol D. Leonnig, *Judge Refuses to Dismiss Charges Against Stevens*, *Washington Post*, October 3, 2008. available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/02/AR2008100201492.html>.





evidence that the OTP itself asked the judges to review – the Court based its decision on the legal principles set out in the Rome Statute and which are common to many legal systems, including the US.

## Subsequent Steps for Trial

On November 18, 2008 Trial Chamber I decided to lift the stay of proceedings and proposed January 26, 2009 as the date to start the trial. This was the result of the prosecution providing the Chamber with all the undisclosed evidence obtained from the information providers in the form in which it has been held by the OTP, for the duration of the trial and without limitation. Therefore, the obstacles to conducting a fair trial which justified the stay were removed. Nevertheless, the defense claimed that at that stage it had not been able to see any of the documents and that it would need to see all of them in order to assess them and be able to make observations. Consequently, the Chamber requested the prosecution to do everything it could to ensure that the defense understood the conducts of disclosure entails and the links between the documents.

In addition, Thomas Lubanga Dyilo was to remain under the Court's custody until the beginning of the trial despite the defense argument that there is no risk of flight by the accused prior to trial. Under Article 60(4) of the Rome Statute, a release could be justified because of the delays caused by the Prosecutor. However, the Trial Chamber considered that the delays were a consequence of delicate negotiations with the information providers which were necessary to ensure the fairness of the trial. The detention was necessary because there was a high possibility of the accused returning to Congo and not attending the trial voluntarily (Article 58(1) of the Rome Statute).

Other issues relating to the start of the trial were the subjects of the most recent decisions on technical logistics of the proceedings. For example, one of the decisions rejected the Prosecutor's application to speak to witnesses who are not included in the Court's protection program prior to their appearance in Court. The Chamber considered that it is for the Registry's Victims and Witnesses Unit to deal with witnesses before they give testimony at trial. However, the OTP and the VWU will collaborate closely in ensuring the security of witnesses. Under Rule 87 of the Rules the prosecution will have to give all the necessary and relevant information to the VWU in order to adopt protective measures. Finally, the Chamber decided that in light of the circumstances surrounding the case – specifically, all the time that has passed since the charges were confirmed – the prosecution would have to update the document containing the charges. The intention is to ensure the accused's right to be informed of the charges against him.

The trial was set to start on Monday, January 26, 2009, as confirmed by Trial Chamber I on Monday, January 12, 2009.

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