

Pre-Trial Procedures Before the International Criminal Court
by Dr. Olympia Bekou*

Introduction:

Thomas Lubanga Dyilo, when asked in his first appearance before the International Criminal Court about his profession, he said he was a “politician”.¹ Thomas Lubanga Dyilo is in fact a dangerous warlord. According to the Warrant for his Arrest, he is the alleged founder of the UPC (Union des patriotes congolais), and the FPLC (Forces patriotiques pour la libération du Congo), the alleged former Commander-in-Chief of the FPLC and the alleged current president of the UPC.² Accused of war crimes under the ICC Statute, and in particular of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities,³ he became the first person to appear before the International Criminal Court.⁴

The International Criminal Court:⁵

The International Criminal Court (ICC) is the most important international institution created in the past decade in this field. The ICC was created by an international treaty, which was concluded in Rome in 1998, and entered into force on the 1st of July 2002.⁶ The Rome Statute numbers one hundred States Parties to it,⁷ which is an extraordinary achievement for this type of treaty. The Court has its seat in the Hague and it has jurisdiction over war crimes, crimes against humanity and genocide.⁸ There are currently four situations before the ICC,⁹ and Thomas Lubanga Dyilo has been arrested in connection with the situation in the Democratic Republic of Congo.¹⁰

The operation of any court, the ICC being no different in that respect, is strictly defined in a legal instrument such as a code, Act or Statute and all parties taking part in a trial have to follow a set procedure. The operation of the ICC is governed by its Statute, and the Rules of Procedure and Evidence (RPE). Where the ICC differs from a national court, is that the Statute is the result of exhausting negotiations prior to and during the 1998 Rome Conference. Every provision in the Statute had to be agreed

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¹ See transcript from the First Appearance Hearing in Open Session in Prosecutor v Lubanga Dyilo, 20 March 2006, ICC-01/04-01/06-T-3, p. 3.

² See Warrant of Arrest, Situation in the Democratic Republic of Congo, In the Case of the Prosecutor v. Thomas Lubanga Dyilo (Dated 10.02.2006 - Unsealed pursuant to Decision ICC-01/04-01/06-37) ICC-01/04-01/06-2.

³ See Article 8(2)(b)(xxvi) or 8(2)(e)(vii) ICC Statute.

⁴ See ICC Press Release ICC-CPI-20060320-128-En, 20 March 2006.

⁵ For an introduction, see Schabas W., *An Introduction to the International Criminal Court*, 2nd edn (Cambridge: Cambridge University Press, 2004).

⁶ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

⁷ As of 28 October 2005.

⁸ Article 5 ICC Statute.

⁹ Three States Parties have referred situations to the ICC: 29.01.2004 – The Republic of Uganda; 19.04.2004 – The Democratic Republic of Congo; 06.01.2005 – The Central African Republic; The United Nations Security Council has referred one situation to the Prosecutor (See SC Res. 1593, 31 March 2005, A/RES/1593 (2005): 31.03.2005 – The Darfur, Sudan.

¹⁰ For a brief summary of Lubanga’s alleged involvement in the DRC situation see ICC Press Release ICC-OTP-20060302-126-En, 17 March 2006.

among the one hundred and eighty States that took part in the Court's creation. Getting such a large number of States to agree on a criminal procedure system to be applied by a Court that deals with the most serious international crimes, is in itself a great achievement. This agreement, of course, comes at a price. The many compromises found in the Statute, not least because States favoured their own "civil" or "common" law system with which they were familiar and perhaps refused to see the merits of the "other", the "unknown" or "foreign" systems, leave us with a delicate balance which is particularly evident in the procedural aspects of the ICC Statute.

The Pre-Trial Chamber:¹¹

Having set out the background, I am moving now to the topic of my investigation. In the ICC, there is a dedicated Pre-Trial Chamber with seven judges currently assigned to it.¹² The Pre-Trial Chamber has significant functions which cover three main areas: First, the Chamber is in charge of authorising an investigation,¹³ of reviewing the Prosecutor's decision not to proceed with an investigation¹⁴ and quite importantly, of dealing with issues of admissibility.¹⁵

Second, the Chamber ensures that the rights of the person and those of the victims are safeguarded at the preliminary stage.

Third, the Chamber may be seized of a so-called "unique investigative opportunity",¹⁶ by virtue of which, if it finds that these may not be available subsequently, the taking of testimony or of a statement from a witness, or the examination, collection or testing of evidence is authorised for the purposes of a trial.

In the time allocated to me I have chosen to elaborate on some aspects of the Pre-Trial procedures before the ICC. Obviously, I will not be able to go into much detail. I have decided to focus on the procedure following the first appearance of the person, until the confirmation of the charges, which signifies the end of the Pre-trial process, and the beginning of the main trial. What I will be concentrating upon is known as pre-trial procedure *stricto sensu*.¹⁷

The Initial Hearing:

So, what should Mr Lubanga expect from the moment he was transferred to the Hague?

The first contact of a suspect with the Court is at the initial hearing, whose purpose is to ensure that he has been informed of the crimes allegedly committed but also to

¹¹ See Fourmy O., 'Powers of the Pre-Trial Chamber', in Cassese A., Gaeta P. and Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court, Volume II* (Oxford: Oxford University Press, 2002) 1207-1230.

¹² These are: Akua Kuenyehia, Claude Jorda, Hans-Peter Kaul, Mauro Politi, Fatoumata Diarra, Sylvia Steiner, Ekaterina Trendafilova. Article 39(2)(iii) ICC Statute stipulates that the Pre-Trial Chamber is composed either of a single judge or of a bench of three judges.

¹³ Article 15(4) ICC Statute.

¹⁴ Article 53(3) ICC Statute.

¹⁵ Articles 17-18 ICC Statute.

¹⁶ Article 56 ICC Statute.

¹⁷ Articles 60-61 ICC Statute. See also Marchesiello M., 'Proceedings before the Pre-Trial Chambers' in Cassese A., Gaeta P. and Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court, Volume II* (Oxford: Oxford University Press, 2002) 1231-1246.

ensure that the he has been informed of his rights.¹⁸ Also, quite importantly, it is the moment where the Court seeks to establish whether any violations of the person's rights have taken place during his arrest or surrender.¹⁹ At this point I need to stress that the Statute explicitly provides for compensation to the victims of unlawful arrest or detention.²⁰ If such irregularities occur, a State is not entitled to refuse surrender to the ICC, but instead, they ought to transfer the person to the Court which will then deal with this issue.²¹

Interim Release:

On, or just after the initial proceedings before the Pre-trial Chamber, the Accused is entitled to request interim release.²² This may come as a shock particularly to those of us trained in the civil law tradition. How can someone accused of crimes falling under the jurisdiction of the Court, which by definition are the most serious international crimes, be entitled to provisional release pending trial? How can we guarantee that this person will not flee? That their victims and witnesses will not be intimidated if not put at risk? The right to interim release exists in the Statute, but is by no means granted automatically. If the conditions found in Article 58(1) with regard to the issuance of the arrest warrant are met, then the person shall continue to be detained.²³ That is, if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that his arrest appears necessary in order to ensure the person's appearance at trial, and that the investigation or proceedings will not be obstructed or endangered, or to ensure that the person will be prevented from continuing with the commission of that crime or another related crime arising out of the same circumstances.²⁴ It seems to me that this is a considerable burden to discharge. In the event however that the Pre-trial Chamber finds that the conditions of Article 58(1) are not satisfied, then interim released shall be ordered, with or without conditions attached.²⁵ What might seem as a stringent requirement for provisional release to be granted, is balanced out by paragraph 4 of Article 60 which states that the Pre-Trial Chamber "shall ensure that a person is not detained for an unreasonable period prior to the trial due to inexcusable delay by the Prosecutor." In such a case, the Pre-Trial Chamber shall consider release of the person with or without conditions.²⁶ Of importance here is the reference to an "unreasonable" period of

¹⁸ Although the relevant rights are those outlined in Article 55 of the Statute, in Mr Lubanga's Initial Appearance, Judge Jorda emphasised the rights to apply at the confirmation hearing and during trial and can be found in Article 67 ICC Statute. *Ibid.* supra n.1, p. 4-5.

¹⁹ See for instance in Lubganga's Initial Appearance *ibid.* supra n. 1, p. 5

²⁰ Article 85 ICC Statute. At the initial appearance, his Defence Counsel raised the issue of Mr Lubanga's arrest and detention since August 2003 without a warrant, without having been informed of the charges against him and without a domestic hearing. See Initial Appearance *ibid.* supra n. 1, p. 9.

²¹ The Counsel for Mr Lubanga has recently filed a motion for his immediate release alleging irregularities in the arrest and detention prior to the transfer to the ICC. See *Requête de Remise en Liberté*, 23 May 2006, ICC-01/04-01/06-121.

²² Article 60 ICC Statute. See also Rule 118(1) ICC RPE. Note that there is no equivalent provision in the ICTY and ICTR Statutes, but provisional release is envisaged in Rule 65 RPE.

²³ Article 60(2) ICC Statute.

²⁴ Article 58(1) ICC Statute.

²⁵ Article 60(2) ICC Statute. See also Rule 119, outlining conditions restricting liberty. It needs to be noted that the Chamber's ruling on the release or detention of a person is reviewed periodically (Article 60(3)). See also Article 60(5) with regard to the issuance of a warrant of arrest to secure attendance of a released person.

²⁶ Article 60(4) ICC Statute.

detention, which is down to an “inexcusable” delay by the Prosecutor. The Statute does not provide any indication of what length of time would be considered as unreasonable nor what would be regarded as an inexcusable delay. This of course can only be decided *in concreto*. I think this provision is there to guarantee the person’s rights before the ICC and serves at the same time, as a reminder to the Prosecutor that efficacy of the process is important. Provisional release at the pre-trial stage of the ICC is therefore a careful weighting of the rights of the suspect and respect for the judicial process.

Disclosure:²⁷

I would now like to draw your attention to another issue; that of disclosure of evidence. This phase covers the exchange of evidence by the Prosecutor to the Defence prior to the confirmation hearing.²⁸ Although disclosure is specifically provided for in the Statute,²⁹ the system of disclosure and how this is to be used in practice is not settled. This has led in the recent months to a frenzy of activity before the Pre-Trial Chamber in the *Lubanga Dyilo Case* regarding “how”, “what” and “when” evidence should be disclosed.³⁰ I do not wish to burden you with the intricate procedure enshrined in the Statute and the RPE. To me, the source of this confusion is the fact that in Rome the exact nature of the process with regard to this issue was not strictly defined.³¹ How could it have been anyway? When it comes to procedure, it seems that States were happy to have reached a decision on the guiding principles and not to the finer details of it. Now that disclosure is about to take place, some grey areas in the Statute emerge. The main point of contention in disclosure is not whether disclosure covers both incriminatory and exculpatory evidence gathered by the Prosecutor, which needs to be disclosed to the Defence in order for them to adequately prepare for the confirmation hearing.³² An underlying concern is whether

²⁷ See generally, Brady H., ‘Disclosure of Evidence’ in Lee R.S., (ed.), *The International Criminal Court; Elements of Crimes and Rules of Procedure and Evidence*, (Ardsley, New York: Transnational Publishers, 2001).

²⁸ As evidenced from Article 61(3)-(5) ICC Statute.

²⁹ Article 61(3), 67(1)(a) and (b), 67(2) and RPE 76-84.

³⁰ See Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure (“the First Decision on Disclosure”) 23 March 2006, ICC-01/04-01/06-58; Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure (“the Second Decision on Disclosure”) 27 March 2006, ICC-01/04-01/06-54; “Prosecution’s Observations on Disclosure, 6 April 2006, ICC-01/04-01/06-66; “Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006”, 6 April 2006, ICC-01/04-01/06-68 ; “Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing” 7 April 2006, CC-01/04-01/06-74; hearing before Judge Sylvia Steiner on 24 April 2006, ICC-01-04-01-04-T-4-EN which resumed on 26 April 2006, ICC-01-04-01-04-T-5- CONF-EN; “Prosecution’s Final Observations on Disclosure” 2 May 2006, ICC-01/04-01/06-91; “Observations of the Defence relating to the System of Disclosure in View of the Confirmation Hearing” 2 May 2006, ICC-01/04-01/06-92. It seems that the issue is not yet settled. See Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Articles 81(2) and (4) of the Statute, 19 May 2006, ICC-01/04-01/06-108-Corr. The Prosecutor has filed on the 24th of May a Motion for Reconsideration and, in the Alternative, Leave to Appeal ICC-01/04-01/06-125, thus challenging the May 19th Decision.

³¹ This is true for the procedure generally. For an insight into the negotiating process regarding procedures see Fernández de Gurmendi S., ‘International Criminal Law Procedures’, in Lee R.S. (ed.), *The International Criminal Court; The Making of the Rome Statute; Issues; Negotiations; Results*, (The Hague, London, Boston: Kluwer, 1999), 217-227.

³² The latter should be disclosed pursuant to Article 67(2) ICC Statute and Rule 77 RPE.

in fact, the Prosecutor ought to gather evidence that will potentially help the Defence and then make it available to all, thus creating a “dossier” tradition found in civil law systems³³, or whether each party is ultimately responsible for gathering its own evidence which would be subsequently disclosed *inter partes* only,³⁴ a system similar to the common law tradition. The issue is far from settled. In the *Lubanga Dyilo* case and in an Annex to the *Decision on the Final System of Disclosure and the Establishment of a Timetable*³⁵ the single judge outlines the discussion on the Final Disclosure system. This takes a rather balanced view on the issue. In allowing the disclosure of evidence that will only be relied upon at the confirmation hearing to be communicated to the Chamber by filing in the record of a case³⁶ the Judge favours *inter partes* disclosure prior to communication,³⁷ whilst emphasising the aim of the disclosure procedure to guarantee the right to a fair trial for the accused and effectiveness of the process.³⁸ Of importance to the Judge is the effectiveness of the disclosure, as well as the protection of victims and witnesses, the confidentiality of certain information, the preservation of evidence and a guarantee that the victims in this case are in a position to exercise their rights under the Statute and the Rules.³⁹ In the light of the above, a detailed timetable for the disclosure of evidence has been drawn up. It remains of course to be seen whether this system is workable in practice.

The Confirmation Hearing:

The Pre-Trial Process ends with the confirmation hearing.⁴⁰ The role of such a hearing is to determine whether sufficient evidence exists to establish substantial grounds to believe that the person is criminally liable. The guilt or innocence of the person will of course be determined at trial. Of interest in the confirmation hearing is that although there are no trials *in absentia* before the ICC⁴¹ a limited hearing in the absence of the person may take place at the confirmation stage. This is only if the person concerned has waived his right to be present, has fled or cannot be found.⁴² Such a hearing does not violate the rights of the person to be tried in his presence, but is necessary in limited situations, in order to decide whether there is scope for a main trial, which in any event may only take place in the presence of the accused. The Pre-Trial Chamber may confirm or decline to confirm the charges, or it might request further evidence or the conduct of further investigations and even the amendment of the charges.⁴³ The Chamber therefore potentially acts as a restraint on the Prosecutor, by protecting the person from a frivolous trial. It also protects the Court from unnecessarily committing its resources to a futile process. The merits therefore of the Pre-Trial process should not be underestimated. At the same time, the limitations of the process should not be forgotten. Pre-Trial procedures are important insofar as they pave the way for a successful trial. I had hoped to have been able to comment on the

³³ See "Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006", *ibid.* supra n. 30, p.8, requiring access to the entire prosecutorial file.

³⁴ ICC-01/04-01/06-T-4 EN, p. 12, lines 20 to 24.

³⁵ Decision of 15 May 2006, ICC-01/04-01/06-102.

³⁶ *Ibid.* para. 57 of the Annex.

³⁷ *Ibid.* para. 63 of the Annex.

³⁸ *Ibid.* para. 66 of the Annex.

³⁹ *Ibid.* para. 6 of the Annex.

⁴⁰ Envisaged in Article 61 ICC Statute.

⁴¹ Article 63 ICC Statute.

⁴² Article 61(2) ICC Statute.

⁴³ Article 61(7) ICC Statute.

confirmation hearing at the *Lubanga Dyilo Case*, but this has been postponed for September 28th.⁴⁴ In the run up to this hearing, there is plenty of activity before the Pre-Trial Chamber which will certainly give us all something to think about.

Conclusion:

I hope I have shed some light on some of the issues on the pre-trial proceedings before the ICC. I would like to emphasise that although the functions of the Pre-Trial Chamber are outlined in the Statute, the specific application of the provisions therein has not been fully tested in practice. In fact, in many respects the *Lubanga Dyilo* case constitutes a good opportunity to assess the Court's efficacy. All parties involved are operating within the framework set by Statute and the RPE but their various motions have been aimed at delimiting their outer limits. Be that as it may, we should always remember that procedure does matter. In the case of the ICC this procedure is neither civil nor common law; it is a distinct international criminal law procedure. The Statute is by no means perfect, but it is all we have got. It is now the Court's task to render this a workable instrument. Respect for an individual's rights is pivotal, but so is maintaining the efficacy and integrity of the judicial process. This is a fine balance indeed, but is one which will need to guide us when assessing the pre-trial procedures before the ICC.

⁴⁴ See Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, 24 May 2006, ICC-01/04-01/06-126.