

Thomas Lubanga Dyilo:
The Chronicle of a Case Foretold

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Abstract: The developments in Lubanga case continue to bear the surprise element. Despite the initial decision of the International Criminal Court (ICC) to stay the proceedings and release the accused due to the impossibility to hold a fair trial, eventually the Appeals Chamber reversed recently the above decision. Moreover, less unexpectedly thereafter the Trial Chamber I, to which the case was referred, decided the commencement of the hearing on 26 January 2009. [pp. 27-42]

Thomas Lubanga Dyilo was the founder and former leader of the political and paramilitary group ‘Union of Congolese Patriots’ (UPC - Union des Patriotes Congolais), which was formed in 2000 in Congo with the participation of people mainly from the Hema ethnicity. The ‘Patriotic Forces for the Liberation of Congo’ (Forces Patriotiques pour la Libération du Congo (FPLC), which essentially constitutes the military wing of the Union was also under Lubanga’s leadership at least until the end of 2003.¹

The Ituri province, a region in the north-eastern side of Congo, rich in minerals and thus with plenty of mines, became at the dawn of the new millennium a field of fierce

conflict between various paramilitary and rebel groups; as a consequence over sixty thousand innocent people were killed and about one hundred thousand were displaced from their homes during 1999-2005.² The Union of Congolese Patriots was accused *inter alia* of massacres against civilians in the above province in 2002. Furthermore, the same organization was blamed by UN and Non-Governmental Organisations for the murder of eight hundred citizens, mainly members of the Lendu ethnicity, in the town of Mongbwalu and the surrounding villages, as well as for the recruitment of child soldiers. According to testimonies, Lubanga's soldiers would frequently conduct after the battle searches to every house in order to arrest, torture and execute people who were of Lendu ethnicity, while characteristic of the atrocities committed is that after the battle in the town of Hema, the arrested civilians were executed via the smashing of their skull with a sledgehammer.³

Moreover, the radio station 'Okapi', which belongs to the Mission of the United Nations in the Democratic Republic of Congo (MONUC),⁴ had announced that Lubanga ordered each family living in the zones under his control to contribute to the war either money or a cow or a child for recruitment into his rebel group. Consequently, many children between the age of ten and fifteen became rebel soldiers, carried arms and committed atrocities under his orders.

Due to the above situation and following a request by the Democratic Republic of Congo,⁵ the Office of the Prosecutor of the International Criminal Court (ICC) had already commenced since March 2004 an examination for the crimes committed in Congo after 1 July 2002⁶ and fell under its jurisdiction according to Article 14 of the Rome Statute of International Criminal Court,⁷ while it is noteworthy that the situation in Ituri province was unofficially observed already since 2003.

Nonetheless, despite the aforementioned atrocities of both Lubanga's and rival rebel and paramilitary groups in the particular province of Congo, the sensitivity of the

‘international community’⁸ was potently expressed only after the death of nine Bangladeshi blue helmets⁹ at the end of February 2005.¹⁰ Thus, the government of Congo, which until very recently had kept a quite ambiguous position,¹¹ was forced to arrest four leaders of the regional paramilitary organisations (Lubanga included), although the murder of the Bangladeshi blue helmets had initially been attributed exclusively to Floribert Njabu, leader of the Nationalist and Integrationist Front (Front des Nationalistes et Intégrationnistes (FNI)).

After his arrest on March 2005, Lubanga stayed for a whole year inside a prison in Kinshasa, capital of Congo,¹² but before being tried there for crimes against humanity and genocide, the Pre-Trial Chamber I of the ICC¹³ –having been convinced of reasonable grounds for the committal of the war crime of conscripting and enlisting children under fifteen years old and then using them in hostilities– issued a sealed arrest warrant against him on 10 February 2006.¹⁴ With this arrest warrant, the ICC practically demanded the extradition of Lubanga in order to become the first accused tried by the ICC. Then the ICC Registrar transmitted the arrest warrant in the government of Congo and consequently Lubanga was transferred to The Hague.¹⁵ Thenceforth, he is being held in the United Nations Detention Unit, which in the past kindly hosted Slobodan Milosevic and today Radovan Karadzic.

However, it is a fact that Lubanga was transferred to The Hague because the Pre-Trial Chamber I ruled – admittedly, with dubious legality-¹⁶ that the accused should have been tried by the ICC and not by the national courts of his country (in which, the juridical proceedings against him had already been started) for the crime of conscripting children into his paramilitary group.¹⁷ The rare selection of this particular crime was obviously made because Lubanga was already accused according to the competent national jurisdiction of crimes against humanity and genocide, but not of conscripting and deploying children in hostilities. Nonetheless, since the Rome Statute and the

complementarity principle¹⁸ give priority to the national courts for hearing international criminal law cases, this judicial manoeuvre was probably considered as the only available 'pathway' in order to circumvent the complementarity principle and allow ICC to try the Lubanga case. The collective criticism against this prosecutorial approach, as well as the voices demanding for justice, i.e., for trying Lubanga for the several other, more egregious crimes he has allegedly committed, have recently made the ICC Prosecutor state that he might prosecute Lubanga again in the future for other crimes.

Therefore Lubanga appeared for the first time before ICC on 20 March 2006¹⁹ and declared during the first session that he is a politician by profession.²⁰ Five months later, on 28 August 2006, it was confirmed that the charges brought against him would only concern the war crime of conscripting children and deploying them in hostilities.²¹

Meanwhile, on 31 July 2006, the ICC granted the request of three people²² to participate in the trial of Thomas Lubanga Dyilo, because the court considered there were reasonable grounds to believe that these people have been victims of Lubanga's actions. For this reason, the court ordered the disclosure of all public documents²³ to the counsel of the three victims. Undoubtedly, the above decision, which enabled the victims of violations of international criminal law to participate from the first moment in the judicial proceedings, constitutes an important precedent, since nothing similar had ever happened in the past neither by the Special International Criminal Tribunals for the Former Yugoslavia/Rwanda (ICTY/ICTR) nor the Special Court for Sierra Leone (SCSL) since their statutes did not foresee any participation of the victims in their trials.²⁴

The confirmation of charges began on 9 November and finished on 28 November 2006. On 29 January 2007, the Pre-Trial Chamber I confirmed the accusations imputed to the accused by the ICC Prosecutor, Luis Moreno-Ocampo, but the judicial proceedings temporarily stopped due to security issues in Ituri. Contemporaneously, the resignation of Lubanga's counsel resulted in a period of negotiations between ICC and

his new counsel, Ms Katherine Mabilie, regarding the available resources and the means provided for his defence.

On 9 November 2007 the Trial Chamber I issued the ‘Decision regarding the timing and the manner of disclosure and the date of the trial’, where it was clarified regarding the confidential information the Prosecutor would receive that “from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under the obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay.”²⁵ Given that during this period the commencement of the trial was scheduled on 31 March 2008, the Court considered that the disclosure of evidence by the Prosecutor to the defence should have taken place until mid December 2007 the latest, while the obligation for the disclosure of potentially exculpatory evidence²⁶ would continue to exist during the whole trial, as soon as this was practically feasible.²⁷

A little later, the commencement of the trial was finally set on 23 June 2008. Nonetheless, on 13 June 2008, the Trial Chamber I imposed a stay on the case proceedings, because according to its view no fair trial could be held, as long as the Prosecutor did not reveal a great number of documents which included potentially exculpatory evidence and information on the preparation of the defence. According to the information the court had received by the prosecution on 10 June 2008, the ‘missing’ documents were 156.²⁸ In her opening statement before the commencement of the actual trial on 27 January 2009 the counsel for the defendant, Ms Katherine Mabilie, endorsed that the secret documents amounted to the 55% of the Prosecutor’s evidence on the Lubanga case.

Summing up the reasons, the Trial Chamber I clarified that: **a)** The disclosure of exculpatory evidence to the accused is an essential prerequisite for the protection of

his/her right to a fair trial.²⁹ **b)** The Office of the Prosecutor mistakenly interpreted and utilised Article 54(3)(e) when it reached agreements with information-providers, which resulted in the exclusion of the accused from receiving a significant part of the exculpatory evidence of which he should have been aware of, and consequently this illegally hindered the accused in the preparation of his defence. **c)** The fact that even the Court had not taken cognizance of this evidence, obstructed the exercise of its jurisdiction according to Articles 64(2) (fair trial), 64(3)(c) (access to documents) 67(2)(disclosure of evidence to the defence by the prosecutor), and rendered impossible the issue of a sound judgment on whether the potentially exculpatory evidence constituted a violation of the right of the accused to a fair trial.³⁰

At this point, one should emphasize that the Rome Statute does not include any relevant provision for the stay of proceedings. Nevertheless, the right to a fair trial is founded upon Article 67 of the Rome Statute³¹ and subsequently the only accepted solution to this legal problem would be the disclosure of all documents to the defence, which, however, in turn, would constitute a violation of the confidentiality agreement signed between the Office of the Prosecutor of ICC on one hand and the UN and non-governmental organizations on the other. Nevertheless, in case one had to inevitably weight one right contrary to the other (right to a fair trial/ right of confidentiality), the right of the accused to a fair trial should prevail because it is inalienable and inviolable for every accused of the ICC, although, due to the gravity of the tried offences, these accused are considered the worst of the worst criminals.

In other words, the Prosecutor had obtained these documents from different sources, such as the United Nations (predominantly), under the condition of confidentiality,³² i.e., after the Prosecutor's assurance to the information providers that their identity and submitted information would not be revealed neither to the defence nor the ICC judges. Hence, under these circumstances the Trial Chamber I ordered the

stay of proceedings and Lubanga's release on 2 July 2008, while the Prosecutor Moreno-Ocampo quite understandably appealed the decision.

Finally on 21 October 2008, the Appeals Chamber -despite the dissenting opinion of the Cypriot Judge Georgios M. Pikis- ruled that the "impugned decision was erroneous because the Trial Chamber, when ordering the unconditional release of Mr. Lubanga Dyilo, did not take properly into account the conditional character of the stay of the proceedings." Moreover, the Appeals Chamber underlined that the issue should be brought back "to Trial Chamber for new evaluation regarding the release of the detainee according to its decision to that appeal...taking into account all the relevant real facts during the *new evaluation*" (my emphasis).³³ The conclusion of the Appeals Chamber emerged as a 'natural' inference of its initial remark that "if a chamber imposes a conditional stay of the proceedings, the unconditional release of the accused is not the *inevitable* consequence...[i]nstead the Chamber will have to consider all the relevant circumstances and base its decision on release or detention according to the criteria of articles 60 and 58(1) of the Statute".³⁴

Subsequently, on 18 November 2008, the Trial Chamber I put an end to this lengthy essentially pre-trial process by ordering the disclosure of all relevant documents to the defence and announcing the revocation of the stay of proceedings against Thomas Lubanga Dyilo, due to the current inexistence of the initial causes which had rendered impossible holding a fair trial. The concise decision of the Court was announced orally in public session on 18 November 2008, while the commencement of the trial was scheduled for Monday, 26 January 2009. As it has already been mentioned, the exact text of the decision was missing for some time³⁵ and was handed to the defence counsel, as Ms Mabilille stressed at her opening statement, a couple days before the commencement of the trial, on Friday 23 January 2009.

Thus with the above decision, the Trial Chamber I, which first examined the controversial evidence,³⁶ decided the commencement of the trial procedure on 26 January, despite the sharp comments of the defence for the undue delay and abusive exercise of the right of the prosecution in Article 54(3)(e) concerning the confidential use of documents or information for the purpose of generating new evidence, as long as the information provider desires secrecy.³⁷

Apparently, the unexpected decision of the Trial Chamber I for the recommencement of the proceedings at the end of January was reached because the prosecution did a strategic turnaround and proceeded to the provision of the thus far secret documents to the court and defence (the defence got redacted versions which were originally approved by the Trial Chamber I).³⁸ Thus, the confidential documents' impediment which included potentially for the accused was surpassed and the Trial Chamber I ruled that the proceedings could be continued.

The initial decision of stay of the proceedings had been of inestimable value both for the status of the ICC itself and international criminal law, since it liberated both from the customary accusation that the international criminal law and ICC in particular constitute one more subtle mean of the powerful states' imposition in the international arena, where the cases are foretold and the conviction of the accused is certain, while simultaneously it vigilantly promoted the value of the fundamental legal principles. By the Trial Chamber I initial decision the principle of a fair trial in international criminal law was projected vividly more than ever before, while it was confirmed that without its existence it is impossible to dispense justice for anybody, even if the accused might have committed the most heinous crime(s).

Moreover, the first decision of Trial Chamber I for the stay of the proceedings significantly contributed to the promotion of the Court's impartiality. During the first years of its function the ICC received severe criticism *inter alia* due to the fact that the

prosecution exclusively investigated incidents within the weak in the international political scene Dark Continent (Africa), in order to succeed easily and politically costless sentences which would establish its role, while contemporaneously it systematically avoided to even cursorily examine cases concerning powerful states which were potentially under its jurisdiction, such as the white phosphorous case in Al Fallujah by American and British forces or the invasion of Gaza by Israeli forces today.³⁹ The entirely unexpected and initial quasi-exoneration of Thomas Lubanga Dyilo, i.e., the first accused who would be tried by the ICC, seemed able to spectacularly reverse this criticism, shield the respect for the fundamental rights of the accused and banish the accusations that in international criminal law ‘the end justifies the means’. However, the last unexpected once again judicial u-turn refuted the great expectations too soon.

Endnotes

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1. See *infra* Arrest Warrant of Thomas Lubanga Dyilo, ICC-01/04-01/06-2-tEN 03-04-2006 1/5 UM PT, footnote 14.

2. Nevertheless the total number of dead people in the whole country is estimated to be 3.800.000. Webpage of the Press Office of United Nations, Annan Condemns Murder of Nine UN Peacekeepers in DR of Congo <http://www0.un.org/apps/news/story.asp?NewsID=13462&Cr=democratic&Cr1=congo>, last access on 10 December 2008.

3. Human Rights Watch, ‘Arrest All Ituri Warlords’, 10 March 2005, electronically available on the website of the Human Rights watch, <http://www.hrw.org/en/news/2005/03/10/arrest-all-ituri-warlords>, last access on 10 December 2008.

4. Regarding the role of the UN mission (MONUC) in region see M. Plaut, UN Troops ‘Traded Gold with Guns’, BBC NEWS, 23 May 2007, available on the internet on website <http://news.bbc.co.uk/2/hi/africa/6681457.stm>, last access on 10 December 2008.
5. Office of the Prosecutor, Decision Assigning the Situation in The Democratic Republic of Congo to Pre-Trial Chamber I, ICC-01/04-1/06-07-2004, electronically available on the webpage http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-10_English.pdf, last access on 10 December 2008.
6. The date when the Statute of Rome of ICC was signed by 60 countries as it was legally required and entered into force. This exact point was set as the starting point of exerting its jurisdiction according to Article 11(1) of Rome Statute of ICC.
7. According to Article 14 of Rome Statute of ICC entitled ‘Referral of a situation by a State Party’: “1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”
8. Announcement of the President of Security Council President, “Security Council Condemns Murder of Nine UN Peacekeepers In Democratic Republic of Congo”, SC/8327/Rev.1, 4 March 2005, available on the internet on webpage <http://www.un.org/News/Press/docs/2005/sc8327.doc.htm>, last access on 10 December 2008.
9. U.N. Troops in Congo Kill 50 Militiamen in Gun Battle, NEW YORK TIMES, 3 March 2005, electronically available on <http://www.nytimes.com/2005/03/03/international/africa/03congo.html?fta=y>, last access 10 December 2008. Once again it seems that the UN is not devoid of serious responsibilities, since its members are reputed for having been involved into a novel trade of the turned in-confiscated weapons for gold given by regional paramilitary groups in 2005. Given that this fact timely coincides with the death of the nine UN Bangladeshi Blue Helmets, one cannot avoid presuming that this highly profitable trade was perhaps the root cause of the tragic incident. M. Plaut, loc. cit., footnote 4.

10. The United Nations Mission in the Democratic Republic of Congo (MONUC) is one of the biggest missions in the world, since around 14.000 soldiers served in this in order to contribute to the reconciliation process. *Loc. cit.*, footnote 8.

11. It is noteworthy that on 10 January 2005, the leader of Congolese National Defence General Staff nominated five former rebel leaders who were taking action in the province of Congo as generals of Congo. Four of them have been accused of committing serious violations of human rights, war crimes and crimes against humanity, while one of them, Germain Katanga, has already been prosecuted by the ICC Office of Prosecutor and will be tried in The Hague. See Human Rights Watch, D.R. Congo: Army Should Not Appoint War Criminals, 13 January 2005, website of the Observatory for Human Rights, <http://www.hrw.org/en/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals>, last access on 10 December 2008.

12. See webpage http://www.trial-ch.org/en/trial-watch/profile/db/facts/thomas_lubanga_dyilo_294.html, last access on 12 December 2008.

13. In the Greek version of this article, despite any personal reservations, I followed the terminology used in Law 3003/2002 for the ratification of the Rome Statute of International Criminal Court.

14. See Arrest warrant of Thomas Lubanga entitled 'Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Under Seal Warrant of Arrest', ICC-01/04-01/06-2-tEN 03-04-2006, electronically now available on the internet (since revised as a public document) in webpage http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf, last access 10 December 2008. According to the arrest warrant, Lubanga was considered to be criminally responsible pursuant to Article 25(3)(a) of the Rome Statute: [3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:(a)Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible] for offenses that are described on Articles 8(2)(b) (xxvi) or 8(2)(e) (vii) of the Rome Statute. Moreover, according to Article 58(1)(b) of the Rome Statute, his arrest was considered necessary in order to ensure his presence in the trial and allow the judicial investigations unobstructed.

15. In Ituri Province, many people have applauded ICC intervention as an alternative solution against the ineffective and manipulated national justice system, while others seem more reserved and suspicious of the 'white people' justice which utilises 'double standards': on one hand by

allowing Lubanga to commit crimes through the use of weapons they have provided him with and on the other by wishing now to try and punish him. Redress, VICTIMS, PERPETRATORS OR HEROES? CHILD SOLDIERS BEFORE THE INTERNATIONAL CRIMINAL COURT, (London: The Redress Trust), (2006), p. 22.

16. For reasons analyzed below the legality of the decision is being questioned.

17. According to Article 38(2) of the International Convention on the Rights of the Child “the contracting State Parties shall take all feasible measures to ensure that persons under fifteen years old do not take direct part in hostilities”. See also the Optional Protocol of the Convention regarding the involvement of children in armed conflicts, which raises the age limit to 18 years and has been ratified by 123 countries since February 2002 (time entered into force) until today. See UNICEF and electronic’s encyclopedia Wikipedia webpages http://www.unicef.org/crc/index_30203.html and http://en.wikipedia.org/wiki/Optional_Protocol_on_the_Involvement_of_Children_in_Armed_conflict, last access on 3 January 2009. It is should be stressed that the Convention was unanimously adopted by the General Assembly of United Nations on 20 November 1989. Up to now it has been ratified by 191 countries, with the notable exceptions of the USA and Somalia. One of the main reasons that the USA have not ratified the Convention, despite the fact that they played a leading role in its drafting, is the prohibition of imposing the death penalty to juveniles for any crime committed before they become 18 years old. However, Barak Obama, before his election, pledged to the revision of the USA stance if he was elected. See video on <http://debate.waldenu.edu/video/question-12/#content>, last access on 10 December 2008.

18. The complementarity principle is declared from the outset in the preamble of the Rome Statute. This principle is fundamental and cannot be deviously overlooked, as in the Lubanga case, but only be surpassed in cases which are explicitly defined in the Rome Statute. See Articles 13-15 of the Rome Statute, but also Article 17 of the Rome Statute entitled ‘Issues of admissibility’ where it is clarified *inter alia* that “the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. Nonetheless, in the particular case the government of Congo had already prosecuted Lubanga and in fact for much more and more grave from a moral perspective crimes (i.e. genocide).

19. From the outset there were advanced the issues of Lubanga's illegal arrest and detention for one year in Congo, the ICC jurisdiction (as traditionally happens in the international criminal law from Nuremberg trials up to present with the trials of Tadic, Milosevic and so on), as well as the issue of the deadlines during which Lubanga could appeal the ICC decisions, about which he became aware of after the five days deadline had long expired. See International Criminal Court, Pre Trial Chamber I, Situation Democratic Republic of Congo, case number ICC01/04-01/06, First Appearance Hearing in Open Session, Monday 20 March 2006, pp. 9-10, electronically available http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-3_English.pdf, last access on 26 December 2008.

20. Ibid., p. 4.

21. The case of Lubanga brings a little to mind the famous case of Alphonse Gabriel Capone, widely known as Al Capone, who was finally sentenced to many years imprisonment only for tax evasion and not for murders or frauds. See relevant webpages: http://en.wikipedia.org/wiki/Al_Capone (Encyclopedia Wikipedia), <http://www.chicagohs.org/history/capone/cpn3.html>, <http://www.chicagohs.org/history/capone/cpn3a.htm> (webpage on the history of Chicago), and <http://www.alcaponemuseum.com/timeline.html> (digital museum of Al Capone), last access on 20 December 2008

22. Eventually 74 applications of persons were overall submitted, who requested to be recognized as victims, but finally the Court granted only three requests. See Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007, (20).

23. In other words the court ordered the disclosure to victims' counsels of all the non-secret documents. Ever since the victims' legal representatives had the opportunity not just to officially follow the procedure, but also make written submissions on various issues as participants. See for instance "Submissions on preliminary issues", ICC-01/04-01/06-957-IENG and "Submissions of the legal representative of victim a/0105/06 in response to the Order setting out schedule for submissions and hearings regarding the subjects that require early determination", ICC-01/04-01/06-961-tENG, on 24 September 2007. However, the new institution is not devoid of problems since great issues have emerged among others regarding the exact number of victims, the form and the persons representing them as well as the demanded amounts of money for their sponsorship by the ICC. See suggestively, "Proposed Programme Budget for 2008 of the International Criminal

Court, ICC-ASP/6/8, 25 July 2007". It is remarkable that despite the fact that the amount of the total budget is 97,57 millions euros, the total amount estimated to be spend for the participation of the victims to the court proceedings is around 14 million euros, i.e., about 15% of the total budget of the court! Also see The Budget and Finance Team of the Coalition for the International Criminal Court, "Submission to the Ninth Session of the Committee on Budget and Finance on 10-18 September 2007, Comments on the Proposed Programme Budget for 2008 of the International Criminal Court, 7 September 2007", §§ 6, 7 and 19.

25. "From the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay." See. "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial", 9 November 2007, ICC-01/04-01/06-1019, §19.

26. I.e., mitigating or exonerating evidence.

27. See. "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, §§25-29.

28. On 1 October 2007 the documents were '500 and the total number of pages 3080'. On 7 April 2008 the documents were 'rather 212 than 216', while on 10 June 2008 the number of documents was reduced to 156. Among these "the Prosecution informed the court that 112 fell into Rule 77 Code of Criminal Procedure of ICC, while the other 95 (*sic*) were considered to contain potentially exculpatory or mitigating material". See. "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", pp. 8-10, §§ 15, 18-20.

29. *Ibid.*, pp. 34-36, §§77-81, *supra*, where the decision of the European Court of Human Rights *V. v Finland*, no 40412/98, on 24 July 2007, §74, is also cited. In this decision it is noted that "both [the] prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party...prosecution authorities [must] disclose to the defence all material evidence in their possession for or against the accused".

30. *Ibid.*, pp. 41-42, §§92-95.

31. Article 67(1) of the Rome Statute stipulates that "1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality."

32. However, it is true that the Prosecution first referred to the issue of confidentiality via its submitted document on 11 September 2007 to the Court entitled 'Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol', 11 September 2007, ICC-01/04-01/06-951.

33. Appeals Chamber, Judgment ICC-01/04-01/06 OA12, available on the internet on webpage <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1487-ENG.pdf>, accessed 26 December 2008, §§44-45, p. 18

34. *Ibid.*, p. 3.

35. The text of the decision which explains this reversal is still pending. See press release of ICC, Stay of Proceedings in the Lubanga Case is Lifted - Trial Provisionally Scheduled for 26 January 2009, (The Hague, 18 November 2008), ICC-CPI-20081118-PR372_ENG, electronically available on the webpage http://www.icc-cpi.int/pressrelease_details&id=445&l=en.html, accessed 10 December 2008.

36. Redacted copies of which are expected to be given a little later to the defence, by the beginning of December.

37. According to the official translation of the article 54(3) of the Statute of ICC the Prosecutor may;

- (a) Collect and examine evidence;
- (b) Request the presence of and question persons being investigated, victims and witnesses;
- (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose, at any stage of the 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.

38. According to an observer who conveyed his experience to me and who wishes to remain anonymous.

39. The same 'unwillingness' was demonstrated by the ICC Prosecutor in Venezuela and Iraq cases, http://www.iccnw.org/documents/Update_on_the_Court_CommunicationsReceivedOTP_10Feb06.pdf, last access on 3 January 2009. In the Iraq case indeed the denial of the prosecutor to initiate an investigation was based on the following points; 1) Iraq has not joined the Rome Statute which

establishes the International Criminal Court. 2) There were insufficient evidence for the committal of the crime of genocide or war crimes during the period between March and May 2003. 3) Despite the great number of dead people who were civilians the evidence did not indicate intentional murder of civilians and in fact in disproportion with the acquisition of a military advantage. Slightly different is the case of Georgia, since the General Prosecutor of ICC Luis Moreno Ocampo stated in August 2008 that he initiated the analysis of the situation created in the territory of Georgia and particularly in South Ossetia during its recent armed conflict with Russia. In fact Ocampo stated meaningfully that one of the reasons of conducting an investigation was that Georgia had joined the Rome Statute. However the ICC Press Office hastened to disassociate the term 'analysis of a situation' from the official conduct of a preliminary investigation. See <http://www.rnw.nl/internationaljustice/icc/theicc/080820-georgia-ICC>, last access on 3 January 2009.