

Can Excess of Justice Lead to Injustice?

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A man who does public relations for Sudan's foreign ministry recently asked me if I thought Ahmed Harun would get a fair trial at the International Criminal Court, ICC. He insisted it was impossible, and in the 45 degree heat of a Sudanese summer afternoon it was simply too hot to talk ICC politics. As it happens, I do think Harun – accused of war crimes in Darfur – would get a fair hearing in The Hague, but instead of arguing I stared glumly into my Coca Cola.

Recent developments in the case against another ICC indictee – Thomas Lubanga from Sudan's neighbour the Democratic Republic of Congo – makes me wish I had tried harder to make the point.

Judges have indefinitely suspended proceedings after prosecutors failed to hand over key evidence to the defence. They accused the prosecution of abusing its power and in a June 13 decision said the trial "has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial".

Next could come Lubanga's release from a prison in The Hague beach resort of Scheveningen where he has been for more than two years.

The idea of accused war criminals going before answering such serious charges is an unpleasant one for many reasons. But that the court is prepared to scrap its first-ever case to ensure Lubanga's rights are preserved says a lot. It legitimises the ICC. Despite the noisy anti-Sudan rhetoric of prosecutor Luis Moreno Ocampo, Harun or fellow Sudan war crimes suspect Ali Kushayb could get a fair trial in The Hague. Lubanga's judges have proved that.

That's not to say the current situation isn't a disaster for the court and more importantly the victims of the crimes that Lubanga allegedly committed.

The ICC's already shaky credibility has taken another serious blow in the Congo where people are understandably asking whether it is acceptable to release him, even if mistakes were made in the case.

As a lawyer for the victims said in court this week, "An excess of justice can lead to injustice." He said the Congolese justice system has already let down the victims and now in their eyes international justice is doing the same. They neither understand nor care about court politics or the myriad interpretations of the various subsections of the Rome Statute. Instead of a trial, they see Lubanga's supporters holding prayer vigils for his release, citing recent events as proof of his innocence.

What's unfolding in Courtroom One in The Hague has nothing to do with Lubanga's guilt or innocence, but many in Ituri and elsewhere in Congo don't see it that way. They don't know anything about the law.

The ICC's outreach teams need to move in, to explain what has happened and why.

But whether they'll do this effectively is uncertain. This situation had been brewing for many months as prosecutors consistently failed to meet their disclosure obligations to the defence. Yet no one from the ICC

had prepared the Congolese for the possibility that this failure could jeopardise the trial. Does the court even care what ordinary Congolese people think?

If he does go free, speculation is rampant in Congo that ICC indictee and former rebel leader Jean-Pierre Bemba will be next to walk. That is possible if prosecutors built their case against this one-time vice-president in the same way they did against Lubanga – with confidential documents and agreements with the United Nations.

Ituri militia commanders Germain Katanga and Mathieu Ngudjolo Chui have already made a bid for freedom on the same grounds. Their lawyers also asked for an indefinite halt to that case, citing hundreds of documents from the UN obtained by prosecutors on the condition they wouldn't be seen by judges or the defence. The judge this week denied the stay but strongly criticised prosecutors.

It's worth mentioning that the ICC isn't the first international tribunal to have a secret documents crisis.

At the International Criminal Tribunal for the Former Yugoslavia, ICTY, parts of transcripts from wartime meetings of Serbia's Supreme Defence Council, SDC, were reportedly granted confidential status by tribunal judges at Serbia's request. They cited rules which allow a state to keep its documents secret if their disclosure could affect national security interests.

Later, judges at the International Court of Justice, ICJ, found that Serbia was not to blame for the genocide in Bosnia. While ICJ judges never requested the SDC documents from the tribunal, many observers believe their confidential status meant that they were not submitted as evidence during the case – and some speculate that this could have altered its outcome.

It wasn't hidden documents that jeopardised the case against Jean Bosco Barayagwiza at International Criminal Tribunal for Rwanda, ICTR, but the length of time it took to bring him to trial. He also complained of delays in hearing the charges against him – inciting genocide and crimes against humanity.

Barayagwiza was the director at the notorious Milles Collines radio station that encouraged Hutu militias to kill Tutsi "cockroaches".

ICTR appeals judges in 1999 found prosecutors had violated his rights and ordered him released. Carla del Ponte, the ICTR prosecutor at the time, led efforts to have the case reviewed, arguing that releasing Barayagwiza violated the rights of victims. She was successful, and the chamber reversed its decision in March 2000.

Whether ICC judges will be swayed by similar arguments in the Lubanga case is as yet unclear. Defence lawyers say judges have no choice but to release him. The victims in Ituri are asking them to consider the consequences if they do.

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