

## **Lubanga Defence Hits Out at ICC**

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Militia leader's lawyer says defence team treated unfairly on eve of historic case hearing. The International Criminal Court, ICC, the world's only permanent war crimes tribunal, faces a strong challenge to its reputation as the first case in the institution's four-year history gets underway at its headquarters in The Hague.

From November 9, the courtroom will be filled for a fortnight with prosecutors, judges, defence attorneys and victims debating whether there is sufficient evidence against Thomas Lubanga Dyilo from the Democratic Republic of Congo, DRC, to proceed to a full trial.

Lubanga's defence lawyer, Jean Flamme from Belgium, has been preparing to argue that his client has no case to answer on the charge that he conscripted child soldiers and used them to fight in the bloody ethnic conflict in the northeast of the vast DRC.

At the same time, Flamme told IWPR that his small team receives a minimal budget compared to the ICC's own prosecutors, meaning that he can only afford to pay one investigator as opposed to the twenty that work for the chief prosecutor, Argentina's Luis Moreno-Ocampo.

Flamme also said that the evidence and witness statements that prosecutors are required to hand over to the defence have been slow in arriving and are impossible to read because important names and places have been blotted out.

As such, he said, "The defence is impossible, so the trial is impossible."

According to Flamme, his client is also receiving unfair treatment at the hands of those who are supposed to defend human rights. He chided human rights organisations for accusing Lubanga - the ICC's only accused in custody - of committing numerous war crimes in the Congo province of Ituri when he is, in fact, facing trial on a sole charge of conscripting child soldiers.

Flamme said he will sue these organisations for damages for falsely accusing his client without proof of other crimes.

He stressed that prosecution investigators have launched 70 separate fact-finding missions over the last two years in the remote and war-torn region on the Congo border with Uganda and Sudan. If Moreno-Ocampo does not bring further charges "it is because he knows Lubanga is innocent", said Flamme.

Despite large resources available to him, the prosecutor had not been able to come up with additional charges, said Flamme. So from now on, Flamme suggested that the chief prosecutor is obliged "to shut up and not talk about the future".

Furthermore, Flamme accused humanitarian organisations such as Human Rights Watch and Amnesty International, which have reported cannibalism and mass rape by Lubanga's militia and the drugging of

child fighters before being sent into battle, of hypocrisy and chopped logic.

On the one hand, he said, they proclaim their trust in international justice while, on the other, they criticise Moreno-Ocampo for the limited charge he is attempting to bring.

"What kind of trust is this?" asked Flamme, reasserting that he will sue for damages against such groups and other non-government organisations, NGOs, which persist in "accusing a person falsely without proof".

Nevertheless, Lubanga does face the serious charge of recruiting children to fight as soldiers against ethnic rivals.

In a procedural step, three ICC judges were scheduled on November 9 to begin hearing arguments on whether there is sufficient evidence to move ahead with the case against Lubanga, who has been imprisoned in ICC cells in The Hague since March this year.

The hearing, scheduled to last 13 days, amounts to a mini-trial, at the end of which the judges must decide whether the evidence warrants proceeding to full trial.

Lubanga, a 45-year-old father of six, is the president and founder of the Union of Congolese Patriots, UPC, and is the alleged former commander-in-chief of its military wing, the Patriotic Forces for the Liberation of the Congo, FPLC.

Answering calls from human rights organisations to widen the indictment against Lubanga, Moreno-Ocampo has consistently said that if more evidence comes to light of other crimes committed by the defendant he will launch a separate case against him in the future.

If the child soldier charge against Lubanga is confirmed in late November and the ICC proceeds to full trial, the deputy prosecutor, Gambia's Fatou Bensouda, told IWPR that the prosecutor would not be permitted to amend the charge mid-way through the trial.

Under the ICC's strict rules and guidelines laid down under the court's founding 1998 Statute of Rome, he is able only to proceed with the existing charge, or withdraw it.

He could, however, amend the charge before the start of the full trial, but only with the permission of the three judges of the pre-trial chamber. However, Bensouda said the prosecutor had already informed this chamber and the defence that he would go ahead with only the child soldier charge.

"After the close of this case," said Bensouda, "the prosecutor may decide to continue the investigation and bring new charges against Mr Lubanga for other alleged crimes."

Flamme said this strategy would be unwise. He asked a rhetorical question: if Lubanga did conscript child soldiers, as the present charge suggests, what did he conscript them to do? He went on, "Where are the massacres associated to these charges? If you conscript children to use them in hostilities, this must have caused victims and killings, so where are these killings?"

Bensouda told IWPR that prosecutors are aware of reports that Lubanga allegedly orchestrated sexual offences against girl soldiers, and confirmed that the Office of the Prosecutor initially investigated a wide range of crimes allegedly committed by Lubanga.

In deciding the charge to bring to trial, Bensouda was adamant that the prosecutors had had to be "guided by the evidence gathered throughout the investigation" and the need to be able to prove, beyond a reasonable doubt, that "the crimes were committed, including linkage to the accused".

She added that at the time of Lubanga's transfer to the ICC's cells "we were only able to do this for the crimes of enlisting and conscripting children under the age of 15 and using them to fight actively in hostilities".

Bensouda said Lubanga had already been in custody in the DRC for almost a year before his transfer to The Hague. Therefore, she said, "We had to move quickly to initiate charges and decided to postpone investigation of further crimes allegedly committed by Lubanga until after his initial trial."

It was in April 2004 that the DRC president Joseph Kabila wrote to the ICC asking the prosecutor to open an investigation into the violence in Ituri, where some 60,000 people have been killed in inter-tribal warfare since 1999. In June 2004, Moreno-Ocampo announced his decision to do just that - making it the first investigation in the short history of the ICC, which began operating in July 2002.

The ICC issued a warrant for the arrest of Lubanga in February this year, and he was transferred from the Congo into the custody of the ICC the following month.

The ICC is determined to avoid wasting time. Following the protracted International Tribunal for the Former Yugoslavia, ICTY, case against Slobodan Milosevic, the former president of Serbia who died in custody in The Hague in March this year, the ICC says its determined to be a proponent of expeditious justice.

Milosevic died in the fourth year of the case against him, and it is believed that had he lived, his trial would have continued for at least another two years.

But the ICC faces problems in carrying out expeditious justice.

The prosecution is under an obligation to reveal witness statements to the defence, so that Flamme and Lubanga know what precisely is being alleged.

However, the prosecutors only recently disclosed 7,400 pages of witness statements to Flamme, and he has estimated it would take at least six months to read them all, plus two or three months more to build a case against them. "This schedule is impossible," he told the ICC.

Regardless, Judge Claude Jorda, who conducted preliminary hearings, ordered that the confirmation of charges hearing begin in November, giving the defence only two months to read and prepare.

"This is not a fair trial," said Flamme. "We are working to an impossible time schedule and will not have read everything, which I consider an outrage."

A further cause for concern is that even though a huge number of documents have now been made available to the defence, many names and dates have been blotted out.

Prosecutors argue that this is essential in order to ensure the protection of witnesses, who often give testimonies at great risk and do not want their communities to know.

Flamme argued to IWPR that the "redactions" are so extensive that "I can read only one quarter of a phrase. So in reality I cannot read the redacted statements and cannot defend against them".

One typical sentence in the indictment reads, "REDACTED, born in REDACTED, and REDACTED, born in REDACTED, were abducted in early 2003 by FPLC troops from their parents' house in the village of REDACTED."

Flamme said this means that in the courtroom the defence will be at a severe disadvantage when cross-examining prosecution witnesses, "If a witness says she heard that child soldiers were recruited by a particular militia, and I ask who told her, the prosecutor wants the witness not to be bound to tell the courtroom. This amounts to anonymous hearsay - and I want to render this impossible."

Whilst understanding that such measures are intended to protect witnesses against the public in Ituri, where Lubanga retains popular support, Flamme insists they also need to be subject to the prevailing rights of the defence, "Although you can have some protection measures against retribution, the prosecutors must disclose everything before the hearings."

He argued that witnesses who decide to become parties to the trial have to "abandon their anonymity". He compared the situation to someone receiving a writ through the post in the morning, telling them to appear in court, and the claimant is unknown. "How can you defend yourself?" he asked.

If the November hearing confirms that there is enough evidence to proceed with the ICC's first full trial, another precedent in international law will also be set, as victims of the crimes alleged to have been perpetrated will be able to play a part in proceedings.

In addition to the prosecution's witnesses, another 68 injured parties have applied to participate as "victims" in the legal process, and four have been accepted by the ICC. They will be represented in court by their own attorneys and supported by NGOs and human rights groups who work in Ituri and other parts of the Congo.

However, Flamme is concerned about the power the support groups will exercise and about their legitimacy in terms of legal process.

He told IWPR about a woman in the Congo who told him that she was approached by an NGO which would not listen to her version of events, but was "only interested in the truth they wanted to hear".

Flamme said that NGOs acting for the "victims" had built their own files of evidence and testimonies against Lubanga and given them to the prosecutor. "The prosecutor's file against Lubanga contains a lot of reports from NGOs, which is very questionable," said the Belgian lawyers. "He must be careful because the court has to be independent from the UN Security Council [which has the right to refer cases to the ICC], the states [that are signatories to the ICC's charter], and NGOs. This is a big problem."

The ICC's prosecutors are funded by the international community, but Flamme is concerned that the budget for the defence makes those defending the accused the "lowest level of the actors of the court".

Moreno-Ocampo has teams of investigators, lawyers and assistants, with a separate team dedicated to appeals. Flamme has no co-counsel, just two legal assistants, a part-time investigator only recently appointed, and two unpaid, temporary assistant interns - as against 20 prosecution investigators. "Logically we cannot compete with the investigations of the prosecutor," he told IWPR.

Flamme said that he had to "fight for every penny" in order to afford an investigator to work on the defence case in the Congo - a difficult and dangerous job. The ICC has not yet made available a list of qualified investigators who can work for the defence, so finally Flamme himself found a local lawyer from Ituri for the position. "I have to build my own file, but I cannot do this with my current resources," he said.

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