The Case of Thomas Lubanga Dyilo: The Implementation of a Fair and Public Trial at the Investigation Stage of International Criminal Court Proceedings

■ *by Yusuf Aksar* *

INTRODUCTION

When the Statute of the International Criminal Court (the ICC or the Court) was adopted by the international community on 17 July 1998, it was regarded as "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[1] Having reached the 60th ratification of the Statute in a short period of time, the Court came into being on 1 July 2002. As of March 2009, there were four cases which were brought before the ICC. Three of them were self-referred by the Democratic Republic of the Congo,[2] the Republic of Uganda[3] and the Central Republic of Africa[4] to the Court.[5] The fourth one relates to the Sudan's troubled

* Associate Professor of International Law, Karadeniz Technical University, Faculty of Economics and Administrative Sciences. Email: yusufaksar@ktu.edu.tr or yaksar@hotmail.com. Author would like to thank to the Turkish Academy of Sciences for its financial and moral supports without which such a work could not have been possible.

Statement by the United Nations Secretary- General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (July 18, 1998); UN Press Release, Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law, UN Doc. L/ROM/23, (July 18, 1998).

2 ICC Press Release, *Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo*, (April 19, 2004), at http://www.icc-cpi.int/pressrelease_detaileds&id=19.html.

3 ICC Press Release, *President of Uganda refers situations concerning the Lord's Resistance Army (LRA) to the ICC*, (January 29, 2004), at http://www.icc-cpi.int/pressrelase_details&id=16&l=en.html.; ICC Press Release, *Prosecutor of the International Criminal Court opens an investigation into Northern Uganda*, (July 27, 2004), at http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html.

4 ICC Press Release, *Prosecutor receives referral concerning Central African Republic*, (January 7, 2005), at http://www.icc-cpi.int/pressrelease_details&id=87.html.

5 For a general assessment of the practice of 'self-referrals', *see* Paola Gaeta, *"Is the Practice of 'Self-Referrals' a Sound Start for the ICC"?, Journal of International Criminal Justice*, Vol. 2, 2004, p.949.; Antonio Cassese, "Is the ICC Still

region of Darfur which was referred to the Court by the UN Security Council Resolution 1593 (2005).[6]

The first decision of the Prosecutor of the ICC concerning the launch of an investigation, which related to the situation in the Democratic Republic of the Congo, was announced on 23 June 2004.[7] One of the indictees, Thomas Lubanga Dyilo, allegedly responsible for the crimes committed in the *Ituri* region of the Democratic Republic of the Congo, was transferred to the ICC on 17 March 2006.[8] He was the first suspect of the ICC. Actually, this was the starting point for the first trial of the ICC. There cannot be any doubt of the fact that the very first practice of the Court would have an immense value in creating precedence in international criminal law. The *Lubanga Dyilo* case would have a historical place in the practice of the ICC since it would be the first ever interpretation and application of the provisions of the Statute, Rules of Procedure and Evidence, and Regulations of the Court, which would provide a framework for the ICC in its future cases, as the international community has witnessed what the *Tadic* case was able to do for the International Criminal Tribunal for the Former Yugoslavia.[9]

Although the *Lubanga Dyilo* case is in the pre-trial phase of proceedings, it is now possible for the world community to see the first-ever application of international human rights principles like granting a victim the status of a participant in the proceedings at the investigation stage of a case, which should be considered to be one of the highest levels of implementation of the principle of a fair and public trial in international criminal law.

The aim of this paper is to examine the application of the principle of a fair and public trial, limited to the investigation stage of the *Lubanga Dyilo* case. Before looking at the practice of the ICC in this regard, it is necessary to briefly discuss the charges against Mr. Lubanga Dyilo and the policies employed by the Prosecution Service of the Court, which should also be considered as paving the way of for Court to implement the principle of fair and public trials.

I. SUBJECT MATTER JURISDICTION IN THE *LUBANGA DYILO CASE*

In accordance with Article 25 (3) (a) of the Statute of the ICC, the

Having Teething Problems",*Journal of International Criminal Justice,* Vol. 4, 2006, p. 434, at 436.

6 For a detailed work concerning the referral of the situation in Darfur by the UN Security Council Resolution 1593 (2005) of 31 March 2005 to the ICC, *see* Yusuf Aksar, "The UN Security Council and the Enforcement of Individual Criminal Responsibility: The Darfur Case", *African Journal of International and Comparative Law,* Vol. 14, 2006, p. 104.

7 ICC Press Release, *The Office of the Prosecutor of the International Criminal Court opens its first investigation,* (June 23, 2004), at http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html.

8 Human Rights Watch, Democratic Republic of Congo and the International Criminal Court Hearing to Confirm the Charges against Thomas Lubanga Dyilo, at 1, *available at* www.hrw.org/backgrounder/ij/lubangaqna1106/, (visited November 11, 2006).

9 M. Cherif Bassiouni, "Where is the ICC Heading? The ICC- Quo Vadis?", *Journal of International Criminal Justice,* Vol. 4, 2006, p. 421, at 425.

basis for the individual criminal responsibility of Mr. Lubanga Dyilo was three different types of war crimes: a) enlisting children under the age of fifteen into armed groups,[10] b) conscripting children under the age of fifteen into armed groups,[11] and c) using children under the age of fifteen to actively participate in hostilities.[12]

As has been indicated by the prosecutor of the ICC, the charges brought against Mr. Lubanga, were, for the time being, limited to the crimes indicated above. In fact, this was the first time in international criminal law that an individual responsible for war crimes concerning children has been brought before an international criminal tribunal or court. The *Lubanga Dyilo* case, in the history of international criminal law, seems to be landmark decision in the fight against impunity for the crimes affecting children in time of armed conflicts.[13]

II. THE POLICY OF FOCUSED INVESTIGATIONS AND PROSECUTIONS

The practice of the Prosecution Service of the ICC appears to be quite different from the practice of the *ad hoc* tribunals which were established by the UN Security Council for the prosecution of war criminals in the Former Yugoslavia and Rwanda.[14] As ıt is well-known from the practice of the prosecution service of *ad hoc* tribunals, all crimes that have been allegedly committed by the suspect(s) were included in indictments. As an example of this practice, we can briefly discuss the first case of the International Criminal Tribunal for the Former Yugoslavia, the *Tadic* case: The First Indictment of the Prosecution Service was dated 13 February 1995.[15] In a short period of time after the First Indictment, as a result of new information and evidence, the Office of the Prosecutor had to amend the indictments. For the *Tadic* case, it had to be done twice on 1 September and 14 December 1995.[16] According to the crimes with which Dusko Tadic was charged:

a) with grave breaches of the Geneva Conventions of 1949, including the acts of willful killing, willfully causing serious injury to the body or health, torture, inhuman treatment, and unlawful deportation, which are punishable under Article 2 of the Statute of the ICTY;

b) with violations of the laws or customs of war, including the acts

10 It is a war crime punishable under Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) of the ICC Statute.
11 It is a war crime punishable under Article 8 (2) (e) (b) (xxvi) or Article 8 (2) (vii) of the ICC Statute.
12 It is a war crime punishable under Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) of the ICC Statute.
13 ICC Press Release, *Prosecutor presents evidence that could lead to first ICC trial,* Doc. No. ICC-OTP-20061109-178-En, (November 9, 2006), at http://www.icc-cpi.int/press/pressreleases/201.html.
14 The UN Security Council Resolution 827 of May 1993 establishing the International Criminal Tribunal for the Former Yugoslavia was adopted unanimously by the Security Council at its 3217 meeting, on May 25, 1993. SC Res. 827, UNSCOR, 48th Year, 1993 SC Res. & Dec. At 29, UN Doc. S/INF/49 (1993); The UN Security Council Resolution 955 of November 1994 establishing the International Criminal Tribunal for Rwanda was adopted by a vote 13-1-1 by the Security Council at its 3453rd meeting, on November 8, 1994. SC Res. 955, UNSCOR, 49th Year, 3453 meeting at 1, UN Doc. S/Res/955 (1994).
15 Prosecutor v. Dusan Tadic a/k/a/ "Dule" Goran Borvnica, Initial Indictment, Case No. IT-94-1-I (February 13, 1995).
16 Prosecutor v. Dusan Tadic a/k/a/ "Dule" Goran Borvnica, First Amended Indictment, Case No. IT-94-1-I, (September 1, 1995); Prosecutor v. Dusan Tadic a/k/a/ "Dule" Goran Borvnica, Second Amended Indictment, Case No. IT-94-1-I (December 14, 1995).

of murder, torture and cruel treatment, which are punishable under Article 3 of the Statute of the ICTY; and

c) with crimes against humanity, including the acts of murder, inhumane acts, persecutions on political, racial and/or religious grounds and rape, which are punishable under Article 5 of the Statute of the ICTY.

The methods by which all international crimes (war crimes, crimes against humanity and the crime of genocide) and the acts (like murder, torture and rape etc.) are included in indictments are too difficult to follow. The presentation of evidence, witnesses concerning each category of crime and each act both by the prosecutor and the defense make the job of *ad hoc* tribunals unimaginable. However, it should be noted here that the practice of *ad hoc* tribunals has produced a great deal of material and procedural law sources, all of which undoubtedly contributed to the development of international criminal law and also facilitated the work of the ICC.[17]

On the contrary, the method followed by the Prosecution Service of the ICC in the *Lubanga Dyilo* case is called "a policy of focused investigations and prosecutions." In accordance with the policy in question, the prosecution service of the Court limits its charges to only the war crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. However, the policy of focused investigations and prosecutions does not constitute an obstacle for the continuation of investigations of other crimes allegedly committed by the suspect/accused after the proceedings concerned are closed.[18]

According to the Prosecution Service of the ICC, the advantages of employing the policy of focused investigations are: limiting the length of trials, using shorter trials to use resources in a more efficient way, limiting the number of witnesses for each trial, and reducing the risk of reprisals against witnesses, victims and their communities.[19]

From the point of view of international criminal law, the method adopted by the Prosecution Service of the ICC should be welcomed. To justify this view, it would be sufficient to only look at the substantial pre-trial activities of the ICC since the transfer and initial appearance of Mr. Lubanga Dyilo in March 2006: *inter alia,* multiple filings from the parties and related decisions of Pre-Trial Chamber concerning the disclosure of evidence, the procedural challenges relating to victims' participation in proceedings, disclosure and inspection of around 400 documents and more than 5,000 pages of information, including both

17 For the practice of *ad hoc* tribunals and their contribution to international criminal law and possible impact on the ICC, see, Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court,* London and New York, Routledge, 2004.

18 ICC Newsletter November 2006 #10 (Special Issue), at 2, *available at* http://www.icc-cpi.int.

19 *Ibid*.

incriminatory and exculpatory evidence.[20] If for a while we think that in addition to the war crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities, the Prosecution Service of the ICC charged Mr. Lubanga Dyilo with some other crimes such as murder, torture, rape and mutilation, it would not have been possible to follow/implement the principle of a fair and public trial in the same manner that the international community has already been witnessing. It would not have been possible to grant the victims the status of participants in the proceedings at the stage of investigation. Of course, there cannot be any doubt of the fact that the Prosecution Service of the ICC will pursue more charges and perpetrators after the current proceedings are closed. In other words, the prosecution service prefers to bring charges before the ICC on a one-by-one basis through the use of focused investigations and prosecutions.

III. THE PRINCIPLE OF A FAIR AND PUBLIC TRIAL

As one of fundamental human rights contained both in customary and conventional rules of international law, everyone is entitled to a fair and public trial.[21] The Statute, Rules of Procedure and Regulations of the Court include all the legal doctrine needed to implement the principle of a fair and public trial in the cases brought before it.[22] However, the interpretation and application of these provisions by the ICC will be judged by the international community as to whether or not the trials are fair. Until now, the practice of the ICC in the *Lubanga Dyilo* case seems to be that the Court has fully committed itself to the conduct of a fair and public trial, according to which all parties in the proceedings have an opportunity to be heard.[23] To justify such an idea, it would be enough to look at the method used in the investigation stage of the *Lubanga Dyilo* case by the Court.

The application of the principle of a fair and public trial in the investigation stage of the ICC proceedings concerning the *Lubanga Dyilo* case can be examined in two different levels: a) the implementation of the principle of a fair and public trial before the hearing for the confirmation of charges, and b) the implementation of the principle of a fair and public trial at the hearing for the confirmation of charges. It is necessary to look at those levels in more detail.

a) The Pre-Trial Chamber of the ICC in the *Lubanga Dyilo* case

20 *Ibid.* at 3.

21 Article 10 of the UN Universal Declaration of Human Rights (1948) provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".
Article 14 (I) (2) of the International Covenant on Civil and Political Rights provides: "In the determination of any criminal charge against him… everyone shall be entitled to a fair and public hearing by a … tribunal established by law".
Article 6 of the European Convention on Human Rights uses the same wording and indicates some of the rights in this regard.

22 Articles 55 and 67 of the ICC Statute indicate the rights of persons during an investigation and the rights of accused in respectively. All rights provided in this regard can be considered to be a reflection of the principle of a fair and public trial.

23 *See* Newsletter, *supra* note 18, at 1.

applied the highest standards of human rights, even before the hearing for the confirmation of charges, in implementing the principle of a fair and public trial. Amongst them, the arresting of the suspect by the decision of the Chamber, the initial appearance before the Pre-Trial Chamber, the temporarily appointment of counsel by the Registrar for the suspect, and the granting of participation to victims can be listed.

The application of the Prosecution Service of the Court to the Pre-Trial Chamber for the issuance of a warrant of arrest against Mr Lubanga Dyilo was dated 12 January 2006. The arrest warrant was made public on 17 March 2006 when he was also transferred to the ICC. Mr Lubanga's initial appearance before the Pre-Trial Chamber took place only three days after his transfer to the Court on 20 March 2006. At the initial appearance before the Pre-Trial Chamber, legal assistance to Mr Dyilo was provided by Mr Jean Flamme from Belgium who was appointed temporarily as duty counsel by the Registrar of the ICC.[24] In protecting the the rights of the suspect and the interests of a fair trial, in the ICC practice, it is witnessed that in addition to the appointment of a defense counsel, legal assistants Ms Veronique Pandanzyla and Mr Geoff Roberts, were also assigned to assist Mr. Jean Flamme with the defense of Mr Lubanga Dyilo.[25]

The practice of the ICC with regard to the arrest of the suspect, appearance before the Court in a short period of time and legal assistance at the time of the investigation is clearly in accordance with international human rights instruments such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights.[26]

In ensuring the principle of a fair and public trial even before the hearing for the confirmation of charges, the decision of the Pre-Trial Chamber rendered on 17 January 2006 has a historical significance in international criminal law on the ground that it is the first time that victims could participate in an international criminal court/tribunal proceedings at the early stage of investigation.[27] The legal basis of the decision of the Pre-Trial Chamber was Article 68(3) of the ICC Statute which provides: "where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to

24 *See* Newsletter,*supra* note 18, at 1.

25 In accordance with Rule 21 (2) of the Rules of Procedure and Evidence, the Registry has created a list of counsel. As of November 2006, 151 persons can be counsel before the Court. For the information about the Defence team, *see* Newsletter, *supra* note, at 6.

26 Article 14 (3) (a) of the International Covenant on Civil and Political Rights, Article 8 (2) (b) of the American Convention on Human Rights and Article 6 (3) (a) of the European Convention on Human Rights provide the right of suspects to be notified about charges at the time of investigation.
Article 14 (3) (d) of the International Covenant on Civil and Political Rights and Article 6 (3) (b) of the European Convention on Human Rights include the right of suspects to have counsel at the time of investigation. Article 55 of the ICC Statute entitled "rights of persons during an investigation" provide the same rights to suspects.

27 Situation in the Democratic Republic of the Congo, Public Redacted Version, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, Case No. ICC-01/04-101 (January 17, 2006). (Hereinafter Decision on the Applications for Participation).

be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial …". According to the ruling of the Pre-Trial Chamber, when two conditions are met victims can participate in proceedings at the investigation stage: the personal interests of the victims must be affected[28] and applicants must have the status of victims.[29]

The participation of victims in investigation proceedings should be welcomed in international criminal law. As has been indicated above, their rights to defend their interests before an international criminal court/tribunal became possible for the first time at the international level. The rights of suspects/accused persons have been well-established both in international criminal law and in the practice of international tribunals/courts. However, until the decision of the Pre-Trial Chamber of the ICC, it was not possible for victims to participate in a personal capacity in the proceedings. When the practice of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda is examined, it can clearly be seen that victims could intervene only if the Prosecutor decided to call them as witnesses at trial.[30] In other words, in the context of the procedure of the two *ad hoc* tribunals, victims did not have an opportunity to express their views, and concerns or to exercise their rights to defend their interests at the investigation proceedings nor did they have the right to participate in the trial proceedings. The practice of the ICC to allow the victims to participate in the investigation phase of proceedings in the *Lubanga Dyilo* case is a new concept, which has already been criticized by international lawyers.[31]

The participation of victims to express their views and concerns in the investigation stage of proceedings may be perceived as the judges exerting some pressure on the prosecution service to proceed with an investigation that might affect the impartiality and independence of the Prosecutor.[32] Such a view may lead to an unacceptable conclusion that the prosecutor and judges of the ICC are in conflict. However, I believe that such a view is inconsistent with the purpose of the establishment of the ICC and the structure of the Court for the following reasons.

First, the ICC was established in order to put an end to impunity

28 In relation to the condition that the personal interest of victims must be affected, the related part of the Pre-Trial Chamber can be quoted as follows: "the personal interest of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations for the harm suffered". (*See* Decision on the Applications for Participation, *supra* note 27 at para. 63).

29 The Pre-Trial Chamber by means of interpretation of Rule 85 established four conditions in giving an applicant to the status of victim: a) applicant must be a natural person, b) applicant must suffer from harm, c) the alleged crimes by the applicant must be under the jurisdiction of the ICC, and d) there must be a casual link between the alleged crimes and the harm suffered by the applicant. (*See* Decision on the Applications for Participation,*supra* note 27 at para. 79. For the interpretation of these conditions, *see* at paras. 80-101).

30 Jerome de Hemptinne and Francesco Rindi, "ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings", *Journal of International Criminal Justice,* Vol. 4, 2006, p. 342, at 346 (2006).

31 *Ibid*. at 347-349.

32 *Ibid*. at 346-347.

for the perpetrators of the most serious crimes of concern to the international community, and it was created as an independent permanent court with jurisdiction over the crime of aggression, war crimes, crimes against humanity and the crime of genocide.[33]

Second, the ICC was created in a way of providing the impartiality and independence of each body: The Presidency; An Appeal Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry.[34] The elections, qualifications and the duties of each body of the Court are governed by the detailed provisions of the Statute and the Rules of Procedure and Evidence. For example, Article 36 (3) (a) of the ICC Statute provides: "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." Furthermore, Article 40 (1) of the ICC Statute states that "the judges shall be independent in the performance of their functions." Similarly, the Prosecution Service of the ICC is regulated in a manner that the Office of the Prosecutor will act independently as a separate body of the Court.[35] The Prosecution Service of the ICC is mainly responsible for international justice and has to act independently and impartially in establishing the truth. That is why, in accordance with Article 54 (1) (a) of the Statute, the prosecutor is under the obligation investigate both incriminating and exonerating circumstances. In a sense, he/she is not a party to the case, but the representative of both sides and of the international community as well.[36] The establishment of the truth can become a reality only as long as all the bodies of the ICC work together in cooperation, not in conflict.

Third, as the practice of the Pre-Trial Chamber in the *Lubanga Dyilo case* has indicated, granting the right to victims to participate can speed up proceedings, which is one of the ways of ensuring a speedy trial[37] and which is another aspect of the principle of a fair and public trial as included in the main instruments of international human rights.[38] The idea that a large number of individuals claiming the right to participate might impinge on the efficiency and expeditiousness of the proceedings[39] should not be supported in international criminal law. The use of the policy of focused investigations and prosecutions which is ex-

33 Preamble of the ICC Statute.

34 Article 34 of the ICC Statute.

35 Article 42 of the ICC Statute.

36 Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *European Journal of International Law,* Vol. 10, 1999, p. 144, at 168.; Christoph J. M. Safferling, *Towards an International Criminal Procedure,* Oxford, Oxford University Press, 2001, p. 86.

37 The *Decision to Convene a Status Conference* of the Pre-Trial Chamber can be accepted as one of the other practice of the ICC concerning the speeding up the investigations. Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo, Case No: ICC-01/04 (February 17, 2005). For the criticism of the Decision, *see* Michela Miraglia, "The First Decision of the ICC Pre-Trial Chamber International Criminal Procedure under Construction", *Journal of International Criminal Justice,* Vol. 4, 2006, p. 188.

38 Articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights; Articles 5 (3) and 6 (1) of the European Convention on Human Rights.

39 *See* Hemptinne and Rindi, *supra* note 30, at 348.

plained above can be seen as paving the way for the ICC in this regard.

Finally, the participation of victims in the investigation stage of proceedings should not be considered as affecting the balance between the rights of victims and suspects/accused. The rights of the suspects/accused are well recognized in accordance with the principle of a fair and public trial. All international human rights and international criminal institutions exercise maximum care not to violate any of the rights concerned. On the contrary, it is not possible to say the same thing for the victims who have suffered from international crimes. As the practice of the *ad hoc* tribunals has shown, they can only participate in proceedings when they are called as witnesses to the case. Such a practice should not have been used by the ICC because it is supposed to reflect the highest level of human rights principles in its actions. There cannot be any doubt of the fact that the investigation stage is very significant for the suspects and they must have all their legal rights recognized, such as having legal assistance/counsel. However, it should also be noted that the victims should also have an opportunity to express their views and concerns through their legal representatives. By allowing victims to participate in proceedings before the Court, they become a participant in the case, not just a witness to be considered as evidence. In this sense, the decision of the Pre-Trial Chamber plays a vital role to show that justice not only be done but also that justice needs to be seen being done.

b) *The Decision on the Schedule and Conduct of the Confirmation Hearing* of the Pre-Trial Chamber[40] clearly sets out the procedure to be followed at the hearing for the confirmation of charges in the *Lubanga Dyilo* case. The method used by the Pre-Trial Chamber reflects the maximum care of the ICC in implementing the principle of a fair and public trial in the investigation phase of proceedings before the trial, through which all the participants – the prosecutor, the defense and the legal representatives of victims – have a chance to be heard in accordance with a detailed schedule:

The hearing for the confirmation of charges against Mr Thomas Lubanga Dyilo started on 9 November 2006 and ended on 28 November 2006. As a principle, all hearings are conducted in public sessions unless otherwise decided by the Pre-Trial Chamber.

In accordance with the Rules of Procedure and Evidence of the ICC, on 9 November 2006, the Presiding Judge opened the hearing and all the charges were read by the Registry.[41] Then, all participants – the prosecutor, the legal representatives of victims and the defense

40 Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Public Document, Decision on the Schedule and Conduct of the Confirmation Hearing, Case No: ICC-01/04-01/06, (November 7, 2006). (*Hereinafter* Decision on the Schedule and Conduct of the Confirmation Hearing).

41 Rule 122 (1) of the Rules of Evidence and Procedure.

counsel– made their opening statements.[42]

According to *the Decision on the Schedule and Conduct of the Confirmation Hearing*, the presentation of evidence by the Prosecution Service was planned to last from 10 to 16 November. Throughout the openning period, the prosecution had the opportunity to address the charges against Mr Lubanga Dyilo, the evidence relating to the UPC (*Union des Patriotes Congoalis*) and to the FPLC (*Forces Patriotiques pour la liberation du Congo*), the evidence relating to the alleged enlistment into the FPLC, conscription by the FPLC and active use in hostilities of children, the evidence relating to the alleged role of Mr. Lubanga Dyilo and evidence relating to individual cases. On 15-16 November, the prosecution's examination of one witness in public session was scheduled.[43]

After the prosecution finished its presentation of evidence and examination of witness, the defense had a chance to prepare for the examination of the witness from 16 November to 20 November 2006. On 20-21 November, the defense cross-examined the Prosecution witness in public session. Until 27 November, the defense team had opportunity to present its evidence and also to discuss the evidence provided by the prosecution.[44]

All participants, made closing statements on 28 November.[45]

According to Regulation 53 of the ICC, the Pre-Trial Chamber had to deliver its written decision concerning the hearing for the confirmation of charges against Mr. Lubanga Dyilo within 60 days of the date the confirmation hearing ends. In its decision, the Pre-Trial Chamber could:

1. confirm the charges in relation to which it has found sufficient evidence;

2. decline to confirm charges in relation which it has not found sufficient evidence;

3. adjourn the hearing and request the Prosecutor to consider providing further evidence or conducting further investigations; or finally,

4. adjourn the hearing and request the Prosecutor to consider amending a charge if the evidence appears to establish a different crime within the jurisdiction of the Court.[46]

As it is well known, Pre-Trial Chamber I confirmed the charges against Mr. Lubanga Dyilo on 29 January 2007[47] and the trial of Mr.

---

42 Rules 122 (2) and (3) of the Rules of Evidence and Procedure.
43 *See* Decision on the Schedule and Conduct of the Confirmation Hearing, *supra* note 39, at 12.
44 *Ibid.,* at 12-13.
45 *Ibid.,* at 13-14.
46 Article 61 (7) (a-c) of the ICC Statute.
47 For the detailed decision of the ICC, see *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges*, Case No.: ICC-01/04-01/06, (29 January 2007).

Lubanga Dyilo started on 26 January 2009. From the perspective of international criminal law, whether the charges against Mr. Lubanga Dyilo were confirmed is not important. The real significance of the hearing confirmation lies in the fact that it is the first of its kind before the ICC and will undoubtedly establish precedence for the future cases of the Court. As long as the implementation of the principle of a fair and public trial is concerned, it can clearly be understood both from the *Decision on the Schedule and Conduct of the Confirmation Hearing* and the brief explanation made above that all fundamental principles concerning a trial, such as the principles of public trial, defendant being present during trial, speedy trial and equality of arms are respected even at the investigation stage of proceedings. Additionally, the victims, through their legal representatives, for the first time in international criminal law, were able to express their views and concerns both at the opening and closing sessions of the hearing for the confirmation of charges.

CONCLUSION

Undoubtedly, due to being the first case before the ICC, the *Lubanga Dyilo* case creates the same effect with the ICC as the *Tadic* case did for the International Criminal Tribunal for the Former Yugoslavia. In a sense, the construction of the ICC practice will be built upon the *Lubanga Dyilo* case, as has been in *Tadic* case. Thus, it would be expected that the *Lubanga Dyilo* case will have an immense precedential value for the future cases of the Court and will be referred to in almost every case. Some aspects of the precedential value could be examined, *inter alia,* in the employment of the policy of focused investigations and prosecutions as well as in victims' participation in a personal capacity in the proceedings even in the investigation phase of proceedings. It will also be possible for the international community to witness that the *ad hoc* tribunals for the Former Yugoslavia and Rwanda will be affecting the interpretation and application of the principles of international criminal law provided by the ICC since the ICC has already getting the benefits of their practice. Hopefully, the practice of the ICC will even affect on domestic criminal law concerning international crimes in the near future since the jurisdiction of the Court is complementary to national criminal jurisdictions.