

**Report on the Rapid-Response Seminar
“The First Judgment of the International Criminal Court – the Lubanga Case”
3rd April 2012 - BIICL**

On the 3rd April 2012 the Institute hosted a rapid response seminar to discuss the first judgment of the International Criminal Court, in the case of Thomas Lubanga Dyilo which was issued on the 14th March 2012. The panel included: Dr Andraz Zidar, Dorset Senior Research Fellow in public international law at the Institute (Chair), Olympia Bekou, Associate Professor at the University of Nottingham, Robert Cryer, Professor at the University of Birmingham, Dr Mia Swart, Research Fellow in the rule of law at the Institute and finally Stephanie Barbour International Justice Coordinator at Amnesty International.

The overall assessment of the panel was that the judgment was a landmark one but only for the reason that it was the very first judgment of the Court. In terms of substance, despite the fact that proceedings took nearly 6 years to complete and required over 600 hundred pages of ink, the panel were in broad agreement that it was rather disappointing. They suggested that it lacked major jurisprudential developments, was overly technocratic and most significantly failed to confront and effectively deal with various important issues.

Another general issue which was raised during the discussion was the overall cost of the proceedings. The trials of Lubanga and Katanga together have cost, so far, an enormous €41,585,800; an amount which Olympia Bekou questioned in light of the quality of the judgment and more importantly the affect that it will have on the ground. She stated that the judgment had been greeted with indifference in the DRC and was sceptical that it would have any real impact.

Afterwards the panel considered a number of specific issues that were raised by the judgment. Firstly, the panel took issue with the way in which the Court dealt with the concept of the *use* of child soldiers under the age of 15 in hostilities. It did so on two grounds. The first issue arose out of the majority's refusal to provide an abstract definition of what constitutes *use* of child soldiers to actively participate in hostilities, the judgment instead implying that such a decision should be made on a case by case basis. Both Robert Cryer and Olympia Bekou criticised this approach and sympathised with the views of Judge Odio Benito on the matter, suggesting that as this was the first judgment considering the issue of child soldiers the Court should have taken the time and used the opportunity to clarify the remit of *use* as set out in the Statute.

Robert Cryer also analysed the Court's use of *targeting* as a means to determine 'active participation in hostilities'. The Court held that the underlying element, and therefore determinative factor, of active participation is whether the child is exposed to danger as a potential target. Robert Cryer suggested that this approach was problematic as the Court did not make clear what it meant by 'target' – had the Court in mind a lawful target as defined under the law of armed conflict or a target in a more general sense?

The second related issue which dominated the discussion and on which the panel had diverging views was the failure of the Court majority to adopt the position that sexual violence perpetrated against child soldiers could constitute an act of the offence within the context of the crime of *using* of child soldiers. This was despite the fact that the UN Special Representative for Children in Armed Conflict, testifying as an expert witness in the case, urged the Court to include any sexual act perpetrated against child soldiers within the understanding of the *using* of child soldiers and also in the face of significant amounts of

evidence detailing the extent of the sexual violence perpetrated against both girl and boy child soldiers during the conflict.

Olympia Bekou expressed understanding for the Court in refusing to consider sexual violence as a constitutive element of *using* child soldiers. She stated that although she would have liked to see criminalisation of sexual violence before the ICC, she would not have liked to see it introduced through the back door, as would be the case in the Lubanga judgment. The Trial Chamber was unable to consider additional standalone charges of sexual violence as they were not put before the Court by the Prosecutor, an omission which Olympia Bekou also criticised.

Stephanie Barbour however was highly critical of the Court's refusal to make any findings of fact concerning sexual violence against child soldiers, in light of the copious evidence available. She shared the dissenting opinion of Judge Odio Benito on the matter. Stephanie Barbour reiterated the purposive and human rights oriented view of Judge Odio Benito, in that the Court does not merely exist to decide upon guilt or innocence but is responsible for the progressive development of international law. In doing so the Court must take account of the interests that it seeks to protect. The dissenting judge stated that the prohibition on the use of child soldiers in hostilities exists to 'protect the physical and psychological well being of the victims and since sexual violence is a failure to provide this protection it is embedded within the crime'.

Stephanie Barbour insisted that the failure to take a victim centric approach and adopt this position was a missed opportunity by the Court, one which makes this critical aspect of the crime invisible and which will have serious tangible consequences for the victims of sexual violence; 'who are left unacknowledged by the judgment and unsure if they can access reparations for the harm that they suffered as a consequence of those experiences'. Robert Cryer expressed sympathy for such an opinion but suggested that in reality applying such reasoning would have been deeply problematic from a strictly legal perspective especially because of how *use* was tied to targeting by the Court. One of the fundamental principles of international criminal law is the principle of legality, which such a broad interpretation of the word 'use' would violate.

The third issue dealt with by the panel was the fact that the guilt of the individual was so closely tied to the provision of reparations for victims, which the panel concluded was problematic. Under Article 75 (2) Rome Statute the ICC can award reparations to specific victims of crimes but only on the basis that the accused is convicted of the crime which had caused the injuries to the victims for which they are claiming damages. Mia Swart argued that this creates the unfortunate possibility that: one, individuals are denied reparations if an individual is found not guilty and two, the Court may therefore be pressured into finding an individual guilty, as to fail to do so may deny, possibly many thousands of individuals, reparations.

Mia Swart went on to suggest that the problem is somewhat ameliorated by the existence of the General Assistance Mandate of the Trust Fund which allows the Fund to assist individuals affected by crimes committed by the accused even if a conviction is not secured. This mandate is far broader and more flexible and is already undertaking some great work. It has allowed the Trust Fund to reach over 80,000 people and has helped communities which have been affected by the use of child soldiers.

The fourth matter which was raised during the discussion was the manner in which the Court dealt with co-perpetration, the basis of liability used in the Lubanga judgment. Robert Cryer highlighted two issues with the Court majority's interpretation of the concept. Firstly, he suggested that the majority had been right to hold that co-perpetration is established when the individuals are aware that implementing a common plan *will result* in the commission of

the crime, rather than *may result* which was applied in prior ICC decisions, as this suggested the application of *dolus eventualis* which was not what the wording of the Statute intended.

He then expressed criticism regarding the inclusion of 'essential contribution' as a requirement to establish co-perpetratorship, which the majority concluded was necessary to distinguish co-perpetration from accessorial liability, something they considered to be a less serious form of liability. He instead agreed with the dissenting opinion of Judge Fulford, who argued that no such requirement was provided by the Statute and therefore this requirement should not be included. Olympia Bekou also sympathised with the simple statute based approach of Judge Fulford.

The final issue highlighted by the panel was the use of intermediaries by the Office of the Prosecutor. As Stephanie Barbour explained, the Trial Chamber was very critical of the use of intermediaries because there were a large number of evidentiary problems which could be traced back to them including, most seriously, a finding that one intermediary had suborned testimony from witnesses. The Court was however also critical of the OTP for failing to check the evidence collected and corroborated by the intermediaries before it was submitted to the Court. Olympia Bekou pointed out the two sides of the issue: on the one hand she expressed sympathy for the OTP, noting that collecting evidence on the ground is a very difficult task but she also criticised the OTP for contracting out what is essentially a prosecutorial task. She suggested that, overall, we need a balance together with a framework of accountability, neither of which the judgment shed any light on or offered a constructive solution.

Overall the panel was quite critical of the judgment and touched upon a lot of issues that will merit further elucidation in the forthcoming jurisprudence of the Court. Nevertheless, the panel was unanimous that this was the first judgment of the International Criminal Court in which the Court had a hard task to resolve many issues related to the conduct of proceedings. The single major contribution of the Court is a clear message that the use of child soldiers is a crime sanctioned under international law.

Following the conclusion of the presentations there was a lively and intellectually fruitful question and answer session, during which various important issues were raised and discussed. The first contribution supposed that there was an inherent disconnect between liability and reparations and one which the Court had failed to sufficiently grapple with in the judgment. Another individual questioned the Court's omission to refer to relevant human rights instruments when dealing the issue of child soldiers and lastly a question was put to the panel as to how the Trust Fund was able to determine who was a victim for the purposes of providing reparations.

Prepared by Daniel Wand