

The Controversial Actions of the Prosecutor of the International Criminal Court: a ‘Crisis of Maturity’? *

Introduction

The International Criminal Court (ICC) is a young institution. The Court was established by the Rome Statute, which was adopted on 17 July 1998 and entered into force on 1 July 2002. The ICC’s judges were sworn in several months later, on 3 March 2003. The election of the Prosecutor by the Assembly of States Parties took place on 21 April 2003 and Luis Moreno-Ocampo took office on 16 June 2003. Finally, on 24 June 2003, the judges of the Court, meeting in plenary session, elected the Registrar, who was sworn in on 3 July 2003. Accordingly, by mid-2003 all of the organs of the Court were in place.

It should be acknowledged that the Court, which is only five years old, is still developing and must endure the predicaments associated with the maturing process. For a criminal court, a ‘crisis of maturity’ can be defined as a situation at the end of which the relationships between the organs of the court, or certain fundamental principles of the established legal regime, have been clarified.

At the International Criminal Tribunal for Rwanda (ICTR), for example, the *Barayagwiza* case can serve as an example of a so-called ‘crisis of maturity’. In that case, the Appeals Chamber concluded that an abuse of process necessitated a halt in the proceedings.¹ The Tribunal engaged itself in an unprecedented crisis with Rwanda, which prevented the transfer of witnesses. The Prosecutor subsequently requested, successfully, reconsideration of the decision before an Appeals Chamber with a slightly different composition.² This crisis allowed the Tribunal to demonstrate the essential difference between a ‘classic’ criminal trial and a trial for international crimes. The Tribunal attempted to defend both the autonomy and the specificities of its legal regime. The reasoning adopted by the Tribunal may not have been universally convincing. But significantly, it permitted the institution to revive itself without

* For personal reasons, the author of this article does not wish to reveal his or her name. *The views expressed in this article do not necessarily reflect the views of the Hague Justice Portal Editorial Board.*

¹ See: *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19, Decision on the extremely urgent motion by the Defence for order to review and/or nullify the arrest and provisional detention of the suspect (Trial Chamber), 17 November 1998; Decision (Appeal Chamber), 3 November 1999. [Available here.](#)

² See: *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19, Decision (Prosecutor’s request for review or reconsideration) (Appeal Chamber), 31 March 2000. [Available here.](#)

losing face. Today, this crisis has essentially been forgotten and Jean-Bosco Barayagwiza is *peacefully* serving the remaining 20 years of his 32-year sentence, after dreaming of regaining his freedom, and seeking a revision of his sentence in vain.

The current crisis in the *Lubanga* case before the ICC could follow this logic. The Trial Chamber issued a stay of proceedings in the case after concluding that it was impossible to ensure a fair trial following the actions of the Prosecutor.³ The elements of the crisis can be summarised as follows: pursuant to prior agreements that prevented the disclosure of the acquired information, the Prosecutor obtained certain evidence. He relied on these prior agreements not to disclose the evidence to the Defence, even though some of the evidence was potentially exculpatory.⁴ Moreover, the Prosecutor refused to disclose the related evidence to the ICC judges, depriving them of the chance to examine the evidence thoroughly and determine whether the rights of the accused had been affected by its non-communication.

This crisis may go deeper and have an abiding effect on the institution, in the sense that it compounds other circumstances currently afflicting the Court as a whole. Among these situations, one is specific to the Prosecutor, while others reveal the generally difficult context in which the Court finds itself. In order to evaluate the full extent of this crisis, this commentary will successively discuss (1) the current status of the *Lubanga* case, followed by (2) the personal criticisms that have been levelled against the Prosecutor, and finally (3) the present general context of the Court.

1. The Prosecution undermined by the present crisis in the *Lubanga* case

In international criminal proceedings, the disclosure of evidence plays an essential role.⁵ This communication consists of giving the opposing party access to information or to copies of documents (where the original has been kept by the party who originally possessed it, and will eventually be added to the case file during the trial). The Prosecutor faces a two-fold obligation related to the disclosure of evidence: disclosing the evidence in the Prosecution's possession on the one hand, but also communicating every piece of exculpatory material of

³ See the three following documents from the Trial Chamber: Situation in Democratic Republic of Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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 (Trial Chamber I) 13 June 2008, Document No. ICC-01/04-01/06-1401 [Available here](#); Transcript of the Status Conference Open Session of 24 June 2008, Document No. ICC-01/04-01/06-T-91 [Available here](#); and Decision on the release of Thomas Lubanga Dyilo (Trial Chamber I) 2 July 2008, Document No. ICC-01/04-01/06-1418. [Available here](#).

⁴ In the opinion of the Trial Chamber, material considered exculpatory includes material "that shows or tends to show the innocence of the accused ; ... which mitigates the guilt of the accused ; and [...] which may affect the credibility of prosecution evidence." Decision of 13 June 2008, para. 59. [Available here](#).

⁵ A distinction must be made between the first international criminal courts (the International Military Tribunals at Nuremberg and Tokyo) and contemporary institutions (International Criminal Tribunal for the Former Yugoslavia (ICTY), ICTR, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, etc.) because authors have maintained that the disclosure requirement was not effective in trials after World War II. See May R. and Wierda M., *International Criminal Evidence*, Ardsley (New York, U.S.A.) 2002, Transnational Publishers, pp. 69-73.

which he is aware to the Defence. Given this understanding of disclosure, the obligation to disclose information in the case is clearly an ‘obligation of result’: the accused must receive the material and/or information.⁶ It should be noted that the disclosure obligation is not one-sided; it is reciprocal in order to allow the beneficiary of this material a guarantee of efficiency during the trial proceedings.⁷ The underlying principle of this rule is that neither party will deliberately introduce material unknown to the other party during the proceedings as a strategic decision to wrong-foot the other party and use the surprise effect of the revelation to gain an advantage in the trial.⁸

During his investigation of the present case, the Prosecutor signed cooperation agreements with various authorities, only one of which, the United Nations, has been publically identified.⁹ The Prosecutor signed these agreements based on Article 54(3) of the Statute. Yet the text of the measure itself is restrictive, in the sense that the agreements should solely serve “the purpose of generating new evidence”. It is only within this context that the Statute envisages that the documents provided to the Prosecutor based on Article 54 agreements may remain confidential, unless the provider of the information states otherwise.

The crisis resulting from the Prosecutor’s refusal to disclose evidence that he himself considered to be potentially exculpatory is characterised by two errors: one exclusively legal in nature and the other both legal and strategic.

1.1. A legal error committed by the Prosecution

As indicated above, the Prosecutor’s first mistake is a legal error. The agreements authorised by Article 54(3) were intended to steer the Prosecution towards the discovery of additional evidence which would not be protected by confidentiality and would therefore be subject to the obligation of disclosure. In the present instance, the Prosecutor seems to have used Article 54(3) indiscriminately in his investigations, without bothering to use subsequent

⁶ See for example: *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-I, Decision on Defence Motion to Reschedule Commencement of Trial (TC1), 28 April 2004, paras. 4-7. The defence argued that a disclosure was not effective to the extent that the prosecutor had submitted the documents to disclose in the form of electronic files contained on a CD, even though the defence did not have the technical means to access information digitally. In its decision, the Trial Chamber does not respond to this argument, but affirms that the date of receipt is when disclosure should be considered as effective, so that any delay related to the disclosure would not begin until the date of receipt.

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Case. No. ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable (PTC1), 15 May 2006, para. 13. In the particular context of the International Criminal Court, the Prosecution and the Defence are not the only parties implicated in the proceedings, there are also victims. The problem of how to assure the principle of communication of evidence between these three groups (Prosecution, Defence, and victims) has yet to be resolved.

⁸ If one accepts the analysis of May and Wierda, the effect of surprise was a cornerstone of the prosecution’s strategy during trials following World War II. See May R. and Wierda M., *op. cit.*, p. 72, para. 3.46.

⁹ Among the 207 documents that the Prosecutor says are covered by the agreements, 156 came from the United Nations. Decision of 13 June 2008, paras. 19 and 63. But it is not certain these 207 documents represent the entirety of those covered by the agreements. In a Public Annex dated 23 June 2008, the Prosecutor affirmed that his office had discovered, purely by chance, about one thousand other documents of which 747 were provided by the United Nations and would be covered by agreements based on Article 54(3)(e) of the Statute. See: Prosecution’s Request to Reclassify its Previous Information Regarding the Discovery and Examination of Additional Material in the Possession of the Prosecutor, Annex 1, 23 June 2008, Document No. ICC-01/04-01/06-1408-Anx1, paras. 2, 6-7.

confidential evidence to collect other evidence that could have been disclosed. The Statute was never intended to be used to allow a trial where the accused would not have access to evidence. If Article 54(3) is employed in a rational manner, the new evidence discovered using the agreements would be sufficient for the accused to understand the charges against him and adequately defend himself. The confidential character of the information provided under Article 54(3) is not intended to disadvantage the accused. The accused does not need to know how the Prosecutor obtained the evidence; so long as the accused receives the information his rights are not undermined, in particular the right to understand the case against him and the evidence that has been used to support the allegations.

This legal error becomes even more apparent when considering the obligation to disclose all exculpatory evidence. It is the same Article 54 that, in its first paragraph, obliges the Prosecutor to investigate both incriminating and exonerating circumstances. When faced with exculpatory evidence, the Prosecutor has two alternatives: either he is convinced by its strength and decides on his own initiative not to pursue the case, knowing that the accused would be acquitted, or he is persuaded that there maintains a degree of responsibility of the accused and pursues the case while putting all of the exculpatory evidence at the disposition of the accused. This obligation to disclose exculpatory evidence is contained in Article 67(2) of the Statute. This is a characteristic of international criminal justice that has frequently been highlighted, even though the same principle could be applied in national systems, perhaps on other grounds.¹⁰

This legal error is particularly unfathomable when coupled with the following strategic error: how is it that the Prosecutor can assume the right to determine if he should or should not disclose evidence, above all when the evidence is exculpatory?¹¹

¹⁰ In a civil law system, where there is an investigating magistrate (*juge d'instruction*), the legal question is less important because that magistrate investigates the totality of the situation in which the crime was committed in order to determine liability. It is clear that he does not investigate only incriminating or only exonerating circumstances. If he were biased in one direction or the other, it would be grounds for disqualification. Even in a common law system, where the prosecutor investigates incriminating circumstances, it is ethically inconceivable that he would not add exculpatory evidence to the case file. However, the context of this analysis does not permit an in-depth examination of the question by researching, for example, the diverse texts related to prosecutors in common law countries, in order to reinforce this idea.

¹¹ In a Status Conference on 3 April 2008, the Prosecution clearly refused to submit the documents in question to the Judges unless the Chamber undertook not to hand over the documents to the Defence. Decision of 13 June 2008, paras. 44 and 45. [Available here](#). The Prosecutor's fear that the Chamber would divulge the documents is not unfounded. For example, the Trial Chamber III of the ICTR recently disclosed information to the Prosecution that it had obtained from the Defence in *ex parte* proceedings. See: *The Prosecutor v. Édouard Karemera, Mathieu Ndirumutse, Joseph Nzirorera*, Case No. ICTR-98-44-T, Décision relative aux requêtes d'Édouard Karemera en modification de la liste de ses témoins ainsi qu'en extension des mesures de protection, 2 June 2008 [see trial order VI wherein the Chamber orders the Registrar to make previously confidential evidence accessible to all parties implicated in the proceedings, concerning materials that the Defence had deposited in *ex parte*]; Ordonnance intérimaire confidentielle relative à la requête *ex parte* de M. Ndirumutse en vue d'être autorisé à obtenir des informations spécifiques du gouvernement des États-Unis, 20 June 2008 [the Chamber made materials deposited by the Defence *ex parte* confidential]; Ordonnance relative au mémoire de Mathieu Ndirumutse suite à la décision du 17 avril 2008 relative à l'administration de la preuve de la Défense, 25 June 2008 [in trial order II of the disposition, the Chamber adopts the same measure of reclassification]; and finally Order to Joseph Nzirorera on the Presentation of His Defence Evidence, 30 July 2008 [in trial order IV of the disposition, the Chamber adopts the same measure of reclassification].

1.2. The Prosecution's legal and strategic error

In international criminal proceedings, the Prosecutor remains a party, even if he can be perceived as representing the interests of humanity. The judges are the arbitrators of the proceedings, with varying powers. This principle can be summarised as follows: every conflict between the parties is within the judges' jurisdiction and the texts offering elements of resolution are assessed by them entirely independently. Moreover, this conforms to what the Statute and the Rules of Procedure and Evidence seem to have envisaged regarding the communication of exculpatory evidence. As the last sentence of Article 67(2) clearly states, in cases of doubt it is the Court which decides. Rule 83, which addresses Article 67(2) specifically and exclusively, adds that "[t]he Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under Article 67, paragraph 2."¹² Reading these two items together reinforces the principle as set out above. And, for the Prosecutor, it is a legal error to believe that he has the right to free himself from the disclosure obligation, particularly for exculpatory evidence.

It is also a strategic error to not have realised how to rectify the situation when the judges gave him the opportunity to do so on 13 June 2008,¹³ convening a status conference and expressing their profound disapproval. In fact, on 13 June, the Trial Chamber judges established that the Prosecutor had *abused* Article 54(3) of the Statute and acknowledged that they were in a situation where it would be difficult to guarantee a fair trial. They explained:

71. [...] in the view of the Chamber the wording of the subsection is clear, and its purpose is readily apparent. In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. The restrictions are that the prosecution should receive documents or information on a confidential basis **solely** for the purpose of generating new evidence - in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilised), unless Rule 82(1) applies.

72. The prosecution has given Article 54(3)(e) a broad and incorrect interpretation: it has utilised the provision routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply. Indeed, the prosecution conceded in open court that agreements reached under Article 54(3) (e) have been used generally to gather information, unconnected with its springboard or lead potential. [...]

73. [...] The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances.¹⁴

The judges therefore called the parties for a status conference on 24 June 2008. In the meantime, the Prosecutor sent the judges a series of letters in which he appears to be looking for a way out of his predicament. The indirect proposition made to the judges by the Office of Legal Affairs of the United Nations was to be able to *consult* some of the evidence in question, but under conditions which were far from acceptable to the judges. For example, the judges had to be alone in a room without linguistic assistance even though not all of the

¹² See in this regard the analysis of the Judges: Decision of 13 June 2008, para. 50. [Available here](#).

¹³ Decision of 13 June 2008, paras. 75-76, 88-89, 91. [Available here](#).

¹⁴ Decision of 13 June 2008, paras. 71-73.

judges were comfortable with French, the language of many of the documents in question.¹⁵ Additionally, the presiding judge questioned whether the Appeals Chamber would be able to adequately assess the reasoning behind the decision of the Trial Chamber judges reached under such conditions.¹⁶ One must admit that this situation is not without its irritations – and in this way it constitutes a strategic error.

On 10 July 2008, after the 24 June hearing and the decision of the Chamber on 2 July to order the release of the accused (pending review by the Appeals Chamber), the Prosecution made a second—this time confidential—attempt which was just as inept as earlier actions. The Prosecutor submitted a request for the stay on proceedings to be lifted. This motion was accompanied by additional submissions from the Prosecution. In the motion and the additional submissions, the Prosecution affirmed that at the time¹⁷ there were 204 documents in total that were covered by Article 54(3), 152 of which came from the United Nations, while the others came from various non-governmental organisations (NGOs).¹⁸ The Prosecution proposed sharing half of these documents without imposing conditions, but for the other half of the documents it proposed disclosing the documents only after they had been redacted. The Prosecution also named 16 documents from the United Nations, as well as others from NGOs, which would not be disclosed except in summary form. Furthermore, the Prosecution proposed, on behalf of the United Nations, that the Trial Chamber judges could only access these documents if they guaranteed, in writing, that they would not disclose the documents or the content of the documents to the Defence without first obtaining the consent of the United Nations. Finally, concerning the documents from NGOs, it should be noted that the Prosecution submitted copies of documents (sometimes redacted) to the judges although the organisations did not agree that these documents could be disclosed to the Defence.¹⁹ In its decision of 3 September 2008, the Chamber denied the motion rejecting the proposal, which had an obvious shortfall: it did not confirm the judges’ power to control the proceedings by deciding whether evidence should be disclosed or not, including making decisions about redacting documents that were to be disclosed.²⁰ By making its decision partially public, the Trial Chamber judges made the international community a witness to their action, blaming the Prosecutor by insisting that the responsibility for the crisis did not lie with the United Nations or NGOs, who engaged in the agreements in good faith, but rather with the Prosecutor himself.

¹⁵ Letter dated 20 June addressed to the Prosecutor by Under-Secretary General for Legal Affairs, appended to the Prosecutor’s observations: Prosecution’s provision of the letter of the United Nations dated 20 June 2008 concerning documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2), 23 June 2008. See the transcript of 24 June 2008 (ICC-01/04-01/06-T-91), *op. cit.*, pp. 26-30, for critical observations made by the Judges regarding the practical details of consulting the documents according to the letter from the United Nations.

¹⁶ Transcript of 24 June 2008, p. 30.

¹⁷ See footnote 10 *supra*.

¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Version of “Decision on the Prosecution’s Application to Lift the Stay of Proceedings” (Trial Chamber I), 3 September 2008, Document No. ICC-01/04-01/06-1467, para. 5. [Available here](#).

¹⁹ *Idem*, paras. 6-17.

²⁰ *Idem*, para. 39.

This persistent strategic error will not be without consequences, especially if the Appeals Chamber has to reverse the decision to end proceedings.²¹ It is difficult to believe that these same judges can remain seized of the matter and decide on its merits without there being some bad blood *vis-à-vis* the Prosecutor, unless the Prosecution team is changed. In other words, if the Appeals Chamber were to reverse the Trial Chamber's decision, one would certainly expect the judges to recuse themselves or to be recused. The Prosecutor can, in any case, restore his image and show the necessary deference to the judges by spontaneously changing his team, even if that would not necessarily prevent recusal.

If, however, the Appeals Chamber confirms the Trial Chamber's decision, we should expect a domino effect in the other ongoing cases, because these cases could present identical situations. This would result in the proceedings in more than one case being stopped.

This crisis, connected to the first ever case to come before the Court, *does* constitute a 'crisis of maturity'. At its end, the powers of judges should be accepted and respected in order to assure the right to a fair trial on the one hand, and—on the other—all organisations working with the Prosecutor will be aware of the recourse of Article 54(3) of the Statute. This crisis has been aggravated by personal criticism levelled against the Prosecutor himself.

2. Personal criticism of the Prosecutor

This criticism falls into two categories. In one category, there is the contention of the action taken by the Prosecutor against a sitting Head of State. In the other, there is controversy surrounding his management of the office that he heads, and it is based on certain personal allegations.

2.1. Indicting a sitting Head of State

Indicting the current President of Sudan, Omar al-Bashir, exacerbated the crisis in *Lubanga* and gave it an additional dimension. Regarding the situation in Darfur (Sudan), referred to the Court by the United Nations Security Council,²² two arrest warrants had already been issued,²³ one for Ahmad Harun,²⁴ then Minister of State for Humanitarian Affairs, and the other for Ali Kushayb,²⁵ a leader of the *Janjaweed*. Recently, the Prosecutor

²¹ For the Prosecution's arguments in its appeal, see : Prosecution's Application for Leave to Appeal "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", 23 June, Document No. ICC-01/04-01/06-1407; and Prosecution's Document in Support of Appeal Against "Decision on the release of Thomas Lubanga Dyilo", 10 July 2008, Document No. ICC-01/04-01/06-1429.

²² United Nations Security Council Resolution S/RES/1593, March 2005.

²³ Both arrest warrants form part of the single case: *The Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07.

²⁴ Warrant of arrest for Ahmad Muhammad Harun ("Ahmad Harun"), 27 April 2007, Document No. ICC-02/05-01/07-2. [Available here.](#)

²⁵ Warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 27 April 2007, Document No. ICC-02/05-01/07-3. [Available here.](#)

requested that the Pre-Trial Chamber deliver a third warrant of arrest for the Head of State, Omar Hassan Ahmad al-Bashir.

On 14 July 2008, the Prosecutor submitted his request in accordance with Article 58 of the Statute.²⁶ He requested that Pre-Trial Chamber I issues a warrant of arrest against Omar al-Bashir for genocide, crimes against humanity, and war crimes. The first question that arises here is whether the decision to make such request violates the immunity of jurisdiction that the International Court of Justice has recognised as based in customary international law.²⁷ A response can be found in the Rome Statute adopted by States Parties: Article 27(2) expressly states that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” The question has the advantage of being defined, even though the issue remains somewhat ambiguous.²⁸

But there is another strategic question: what is the most opportune moment to take such a move, indicting a Head of State? Is it sensible to issue a warrant of arrest when the President is still in office or would it be better to do it when he is no longer in power? The response must take into account the fact that the Court does not have its own police force and therefore relies on the cooperation of States, particularly the state in which the situation addressed by the Court occurs. It seems evident that a State headed by a widely-supported leader will not easily cooperate with the Court if the leader is subject to a prosecution and threatened to be arrested. Karadžić and Mladić did not have such national positions, but patriotism permitted them to avoid being transferred to the United Nations Detention Unit in The Hague. The recent arrest of Karadžić can solely be credited to the changing internal circumstances in Serbia.

Given these conditions, it should be asked why the Prosecutor of the Court, who has not yet succeeded in arresting the first two accused, would engage himself in this pernicious and unrealistic direction. This kind of strategy in the exercise of his mandate risks weakening his authority. Even non-governmental organisations for the defence of human rights did not support his approach, although this kind of prosecution gratifies the majority of civil society.

This approach is even more damaging to the Prosecution’s authority considering the personal criticism of the Prosecutor that has been made public.

²⁶ Summary of Prosecutor’s Application under Article 58, 14 July 2008, Document No. ICC-02/05-152.

²⁷ International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), 14 February 2002, In its second finding, the Court “[finds] that the issue against Mr. Abdulaye Yerodia Ndongbasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law”.

²⁸ However, Article 98(1) of the [Rome Statute](#) seems to leave an opening, since “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” This provision could prevent the execution of an arrest warrant against a State official who would benefit from diplomatic immunity. However, if the requested State is a party to the Rome Statute, one could argue that this article does not apply, since the State has already consented to the letter and spirit of Article 27.

2.2. The allegations against the Prosecutor

The boomerang effect of this tactic seems to become apparent through the criticism of how the Prosecutor is exercising his mandate; some have already suggested that he tenders his resignation.²⁹ A recent judgement of the Administrative Tribunal of the International Labour Organization concluded that the Office of the Prosecutor had erred in its improper dismissal of a staff member, suggesting poor management of personnel.³⁰ The dismissal relates to allegations of sexual misconduct in connection to a South African journalist.

The events occurred in March 2005. During a mission in Cape Town, South Africa, the ICC Prosecutor was alleged to have engaged in inappropriate sexual behaviour with a female journalist. The affair was documented by an employee of the Court who, although not an eye-witness to the events, had first-hand knowledge of the affair. After a year of equivocation, this employee brought a complaint before the ICC Presidency on 20 October 2006, conforming to regulation 119 of the Regulations of the Court.³¹ The Presidency subsequently appointed a panel of three judges to examine the claim. But after separately questioning the alleged victim and the Prosecutor, who both denied that the events took place, the judges dismissed the claim. The Presidency of the Court later ordered the employee to surrender all existing copies of critical evidence related to the complaint, for their destruction.³² This main evidence consisted of a voice recording of another employee who had served as an intermediary between the journalist and the Prosecutor, arranging a meeting between the two, and with whom the journalist discussed the episode in detail. The employee who filed the complaint had recorded his colleague without the colleague's knowledge or consent.

A little more than a month after the end of these proceedings, the Prosecutor suspended the employee for serious professional misconduct, specifically the illegal recording of a colleague. Next, the Prosecutor, after consulting an external legal advisor, dismissed the employee without notice, contending that the employee had brought false allegations against him with evident malicious intent, seeking to harm the Prosecutor's professional and personal reputation. The employee contested his dismissal before the Court's Disciplinary Advisory Board, which unanimously censured the Prosecutor and recommended that he void his original decision. But the Prosecutor, on the contrary, upheld the dismissal. The employee in question was fired on 13 July 2007. On 17 August 2007, the employee brought the case before

²⁹ See, for example: Pallister David, "Human Rights: Growing Clamour to Remove the Hague Prosecutor who Wants Sudanese President Arrested", *The Guardian*, 18 August 2008. [Available here](#).

³⁰ See: International Labour Organization, Administrative Tribunal, Judgement No. 2757, 9 July 2008. [Available here](#).

³¹ The judgement of the Administrative Tribunal reported the complaint in these terms:

"On 20 October 2006 he submitted an internal complaint to the Presidency of the Court pursuant to Regulation 119.1 of the Regulations of the Court, alleging inter alia that the Prosecutor had:

"committed serious misconduct, either in the course of his official duties, which is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court; or of a grave nature outside the course of his official duties that causes or is likely to cause serious harm to the standing of the Court, by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse against [a named individual] and that for this reason he should be removed from Office by the Assembly of State Parties."

³² There are two questions here. First, why did the Presidency of the Court ask that all copies of the evidence submitted by the petitioner be destroyed? Wasn't it enough to dismiss the claim as without merit? Second, what weight should be given to the denial of the supposed victim given the initial evidence presented by the petitioner?

the Administrative Tribunal of the International Labour Organization, based on Regulation 111.5 of the Staff Regulations of the Court.

On 9 July 2008, the Administrative Tribunal rendered its judgement, which was definitive. The Tribunal overturned the dismissal and granted the petitioning employee (i) his salary and benefits from the date of his suspension until the date that his contract was set to expire, (ii) two years of salary, (iii) compensation of € 25,000 for personal tort and (iv) € 5,000 for expenses; in total he received at least € 200,000 in compensation.³³

In addition, the Administrative Tribunal noted one point: objectively, the original complaint was not unfounded (an observation which the panel of three judges appointed by the Presidency of the Court itself could have made). First, the Administrative Tribunal noted, in accordance with the Disciplinary Advisory Board, that the employee did not have malicious intentions when he brought his complaint before the Presidency.³⁴ Secondly, the Tribunal pointed out that neither the Disciplinary Advisory Board nor the panel of three judges reviewed the precise allegations put forward by the employee. The Tribunal expressed itself in the following weighty terms:

10. In determining whether a statement is objectively true or false, it is necessary to have regard to the statement actually made. The same is necessary when deciding whether the person who made the statement believed on reasonable grounds that it was true. In that process, regard must be had to the whole statement, not selected excerpts or, as in this case, a single excerpt. The charge of serious misconduct was based on a single word in the internal complaint filed against the Prosecutor, namely, “rape”. Doubtless, it was for this reason that the Disciplinary Advisory Board considered that the absence of confirmation by the alleged victim that force was used was vital to the question of reasonable belief. However, a proper reading of the internal complaint makes it clear that there was no allegation of force. Rather, the allegation was that the alleged victim had consented to sexual intercourse in order to regain possession of her keys. Thus, for example, the complainant states that the alleged victim was “apparently under the erroneous belief” that, because there was no physical force, there was no rape or sexual assault. In so doing, he referred to a decision of the European Court of Human Rights indicating what, he said, was “a universal trend” to regard lack of consent, rather than force, as the essential element of rape and sexual abuse. Moreover, the complainant did not categorically assert that rape had occurred. Rather, he characterized the Prosecutor’s alleged conduct as “rape, or sexual assault, or sexual coercion or sexual abuse” which, given differing national law, is tolerably accurate. That being so, the question is whether the complainant had reasonable grounds for believing that the conduct had taken place.

11. The information available to the complainant came primarily from a colleague who knew the alleged victim and to whom she apparently turned for support. The colleague’s evidence was secondary evidence but, depending on the circumstances, it may have been probative in criminal proceedings. Moreover, there is nothing to suggest that the complainant’s colleague was unreliable or untrustworthy, much less that he was known to be so by the complainant. The recorded telephone conversation that occurred two days after the alleged event indicated that the journalist was distressed. And in that conversation, she indicated unambiguously that the Prosecutor “took [her] keys” and that she had consented to sexual intercourse “to get out of [the situation]”. In these circumstances, there is no basis for concluding that the complainant did not believe on reasonable grounds the truth of what he put in his internal complaint.

[...]

13. [...] In this case, however, it is not established that the complainant did not believe on reasonable grounds that what he put in his internal complaint against the Prosecutor was true. Nor is it suggested that he communicated his belief to anyone other than those who were charged with consideration of the conduct of the Prosecutor.³⁵

³³ See findings 2, 3 and 4 of Judgement No. 2757. [Available here](#).

³⁴ Judgement, No. 2757, paras. 7 and 17.

³⁵ Judgement No. 2757, paras 10-11, 13. Emphasis added.

Understandably, the controversy surrounding the Prosecutor himself leads to questions about his ability to serve, which in turn lead to a call for his resignation.³⁶ But the judgement also leads to further questions about the Court in general and in particular about the conclusions of the panel of three judges: how did the judges on this panel convince themselves that the complaint was unfounded? In addition, in seeking to destroy the evidence, wasn't the Presidency trying to 'hush up' the affair? Clearly, beyond the allegations of reprehensible behaviour, it is surprising to see such solidarity between the Presidency and the Chambers, the two Court organs which shape the institution as a whole. In addition, there is a more general context within which the weaknesses of the Court are manifested.

3. A global context characterised by structural weaknesses

When the Rome Statute was adopted in July 1998, a myth died: the alleged impossibility of establishing international criminal jurisdiction. The international community had been considering this issue on and off since 1947, when the United Nations General Assembly created the International Law Commission and gave it a mandate to codify the principles of international law contained in the Statute of the International Military Tribunal of Nuremberg and its judgements.³⁷ The end of this myth has by no means led to a world which is no longer fraught with danger. Today, it seems that some of these dangers are becoming real and constitute—in this author's opinion—the elements of a global crisis in which the Court could get bogged down. These dangers concern the participation of victims, the absence of trials, and the non-execution of arrest warrants in the situation in Uganda.

3.1. The participation of victims remains theoretical

The participation of victims is an innovation of the Rome Conference which led to the establishment of the International Criminal Court.³⁸ And yet the jurisprudence of the Court, as it has developed so far, tends to strictly limit this participation.³⁹ Certainly the Court has accepted that victims can participate as early as in the investigations stage, even before specific individuals have been charged.⁴⁰ At the same time, even after a victim is recognised as such and authorised to participate in ICC proceedings, the victim still has to ask, on a case-

³⁶ See *supra* footnote 29.

³⁷ For the creation of the International Law Commission, see Resolution A/RES/174(II) 21 November 1947. For the mandate of the Commission, see Article I(1) of the Statute of the International Law Commission annexed to the resolution, and Resolution A/RES/174(II) of the same day.

³⁸ Narantsetseg O. & Sevgili U., "Role of the Victims in the Hearing Leading to the Confirmation of Charges in the *Lubanga* Case Before the International Criminal Court", *African Yearbook of International Law* 14 (2006), pp. 171-172.

³⁹ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" (Appeal Chamber), 13 February 2007, Document No. ICC-01/04-01/06-824, para. 43. The dissenting opinion of Judge Song addresses this specific issue and is more conducive to the participation of victims.

⁴⁰ Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-trial Chamber I), ICC-01/04-100-Conf-Exp., 17 January 2006, para. 54: "Having presented its terminological, contextual and teleological arguments, the Chamber finds that article 68 (3) is applicable to the stage of investigation of a situation."

by-case basis, to participate in the proceedings.⁴¹ For example, a recognised victim in the *Lubanga* case who already participated by submitting observations for the accused's motion for provisional release would still require authorisation from the Appeals Chamber if he wanted to submit observations regarding the accused's appeal of the Trial Chamber's decision. This is an unnecessarily cumbersome approach to the participation of victims that increases the burden of victims, who only have limited legal assistance⁴² (which is becoming more limited as their numbers grow). This approach also negates the logic of the participation of victims, except by relegating it to passive participation, a mere presence. Moreover, during the hearing of the confirmation of charges during the *Lubanga* case, this is how the Trial Chamber judges allowed for the participation of victims: their legal representatives could make opening and closing statements, but as soon as they wanted, for example, to pose a question to a witness, the question had to first be subjected to the Trial Chamber for consideration...⁴³ Additionally victims were excluded from all closed sessions.

Victim participation provides added value to proceedings before the International Criminal Court and is essential in order to assure balance in the institution's texts. Reducing this participation to a purely exceptional system and to spectator participation will have an effect on the general stability of the system and the support of the international community for this significant evolution in the international social order.

3.2. The absence of trials

The *raison d'être* of the Court is to conduct trials for crimes that fall within its jurisdiction. Since the ICC was established and the first arrest occurred in 2006,⁴⁴ members of the international community, and in particular the States Parties that finance the Court, have been waiting to see the first trial. Thomas Lubanga Dyilo was the first accused to be arrested and one would have thought that his trial would be the first to take place. Two and a half years after his arrest and more than a year and a half after the confirmation of charges against him⁴⁵ the wait goes on, and no one knows when, if ever, the trial will begin.

Today, it is clear that it was the Prosecutor who is at the origin of the report *sine die* of this trial, which will not take place if the Appeals Chamber confirms the decision of the Trial Chamber. In light of this situation, one has to wonder how patient the States Parties, who have financed the Court up to this point, will be. We should keep in mind the fact that the Court's

⁴¹ Appeals Chamber Decision of 13 February 2007, *supra*.

⁴² Pursuant to rule 90(5) of the ICC Rules of Procedure and Evidence, "[a] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance." This arrangement means that judicial assistance for victims is not an obligation, but a power that the Registrar will exercise according to the resources of the Court.

⁴³ Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Pre-trial Chamber I), 22 September 2006, Document No. ICC-01/04-01/06-462, and Decision on applications for participation in proceedings a/0004/06 à a/0009/06, a/0016 à a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 20 October 2006 Document No. ICC-01/04-01/06-601.

⁴⁴ ICC, First Arrest at the International Criminal Court, 17 March 2006, Press Release No. ICC-CPI-20060302-15. [Available here](#). Also see the Hague Justice Portal (<http://www.haguejusticeportal.net/eCache/DEF/4/396.TGFuZz1GUg.html>).

⁴⁵ Decision on the Confirmation of Charges (Pre-trial Chamber I), 29 January 2007 Document No. ICC-01/04-01/06-803.

budget is equivalent to those of the ICTY and ICTR, which are both working at full capacity.⁴⁶ This absence of trials can only damage the institution in the long term.

3.3. The non-execution of arrest warrants in Uganda

Another element of the crisis within the Court is the non-execution of arrest warrants in the situation in Uganda.⁴⁷ Even though it is public knowledge that the Ugandan government is engaged in arduous negotiations with rebel forces, the government has continuously claimed that it cannot proceed with the execution of these warrants⁴⁸ as it is unaware of the location of rebels, including Joseph Kony. By now, Uganda claims that the implicated individuals are beyond its borders, and that it would be a violation of international law if it engaged in military activity in order to arrest them in their safe haven in the Democratic Republic of the Congo.⁴⁹

Sudan, for its part, has not done any better. Sudan is the principal source of support for rebels and their sponsor in peace negotiations.⁵⁰ The Lord's Resistance Army has long used

⁴⁶ By way of comparison: the budget of the Court was € 77 463 900 [approx. \$ 113 612 583] in 2007 and is € 90 381 400 [approx. \$ 132 558 061] for 2008 and € 102 626 000 [\$ 150 512 628] for 2009 [Document ICC-ASP/7/9, p. 160]. The budget of the Court for 2008-2009 is therefore around \$ 283 070 689. At the ICTR, the budget for 2006-2007 was \$ 279 512 400 and the budget for 2008-2009 is \$ 267 356 20 [Resolution A/RES/62/229, I par. 5, II par. 7]. For a retrospection, the budget of the ICTR in 2004-2005 was \$ 255 909 500 [Resolution A/RES/59/273, par. 13]. For 2008-2009, the two budgets are essentially equal, with the ICC's budget having approximately \$15 million more.

⁴⁷ In December 2003, the Kampala government decided to refer the situation with the Lord's Resistance Army to the Prosecutor of the International Criminal Court. See Press Release 29 January 2004, Document No. ICC-20040129-44. [Available here](#). On 29 July 2004, the Prosecutor decided to open an investigation, having decided that there was a reasonable basis to do so. See Press Release, Document No. ICC-OTP-20040729-65. [Available here](#). One year later, the Pre-Trial Chamber issued arrest warrants for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. Approximately every six months, Pre-Trial Chamber II requests information on the status of the execution of the arrest warrants that it issued: *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05, Order to the Registrar and the Prosecutor for the submission of information on the status of the execution of the warrants of arrest in the situation in Uganda, 15 September 2006, Document No. ICC-02/04-01/05-111 ; Order Granting a New Deadline to the Registrar for the Submission of Additional Information and Comments on the Status of Cooperation in the Situation in Uganda, 13 October 2006, Document No. ICC-02/04-01/05-119 ; Decision to Convene a Status Conference on the Status of Cooperation for the Execution of the Warrants of Arrest in the Case of *The Prosecutor v. Joseph Kony Vincent Otti, Okot Odhiambo andt Dominic Ongwen*, 8 November 2007, Document No. ICC-02/04-01/05-259.

⁴⁸ See the report submitted by Uganda in response to the request by the pre-trial Chamber, Annex 2 to Document No. ICC-02/04-01/05-118 [Rapport du Greffier sur l'état d'exécution des mandats d'arrêt dans la situation en Ouganda], 6 October 2006.

⁴⁹ See the report submitted by Uganda in response to the request by the pre-trial Chamber. Annex 2 of Document No. ICC-02/04-01/05-305 [Report by the Registrar on the Execution of the "Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest"], 10 July 2008. In the interim, Uganda informed the Court of a peace agreement project which envisaged the creation of a special division of the High Court and the establishment of traditional mechanisms to address the crimes committed, so that the individuals accused by the ICC would be put on trial within Uganda. See the report submitted by Uganda in response to the request by the Pre-trial Chamber. Annex 2 of Document No. ICC-02/04-01/05-286 [Report by the Registrar on the Execution of the "Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest"], 28 March 2008.

⁵⁰ So, for example, it was Sudan who approached the Kampala government to begin the recent peace negotiations. See the report submitted by Uganda in response to the request by the Pre-trial Chamber, Annex 2 to Document No. ICC-02/04-01/05-118 [Rapport du Greffier sur l'état d'exécution des mandats d'arrêt dans la situation en Ouganda], 6 October 2006.

Sudanese territory as a base for operations and some negotiation sessions have taken place in Sudan. Yet Sudan also feigns ignorance about the location of the rebels insofar as it has not executed the arrest warrants.⁵¹

This kind of situation demonstrates how a State can use the Court as part of its political strategy, which in this case is essentially internally oriented. Requesting the Court to prosecute crimes committed in northern Uganda allowed the government to crystallise the support of the international community while gaining a legal weapon against the rebels. This worked so well that, as of today, (known) arrest warrants have only been issued for the rebels even though there is evidence of wrongdoing within the Ugandan government's armed forces.⁵² It is up to the Court to distance itself from this predictable strategy of States or groups that approach the Court. Without this distance, the credibility of the institution will be damaged.

Conclusion

Taken together, these issues lead us to conclude that there are numerous facts to support the claim that the Court is undergoing a 'crisis of maturity.'

Considering the overall situation, this assertion is completely justified; especially considering the current restrictive approach to victim participation, the dearth of trials, and the relative success of Uganda's political manoeuvres.

But if we focus on the *Lubanga* case, the crisis has more to do with the Prosecutor's monumental error than with a crisis of maturity, unless we are talking about a crisis of maturity within the Prosecutor's own office. The Office of the Prosecutor is the institution with the greatest responsibility during the current phase of the life of the Court. It is also the organ that takes the greatest risks, which leads, naturally, to criticism of the Prosecutor. The strategic choices that the Prosecutor was able to make, often contrary to general opinion, are more questionable—whether they stemmed from the cases he managed or the personnel assisting him in the administration of cases. These controversial strategic choices can occasionally heighten a general crisis.

⁵¹ In October 2006, the Registrar reported to the Chamber as follows: « [l]es engagements pris par les gouvernements d'Ouganda, de la république démocratique du Congo et du Soudan quant à l'exécution des mandats d'arrêt n'ont pas été suivis d'effets. Ce constat ne préjuge en rien des mesures prises à titre confidentiel par ces États dans le cadre de leur procédure nationale et qui, de ce fait, n'auraient pas été portées à la connaissance du Greffier ou du public. » Unofficial translation: "The commitment of the governments of Uganda, the democratic Republic of the Congo, and Sudan to execute the arrest warrants has not delivered results. This report does not prejudice confidential measures taken by States within the framework of national proceedings which, therefore, have not been made known to the Registrar or to the public." See pp. 5-6 of the Rapport complémentaire du Greffier sur l'état d'exécution des mandats d'arrêt dans la situation en Ouganda, Document No. ICC-02/04-01/05-122, 20 October 2006.

⁵² See for example the situation of victim a/105 in the *Lubanga* case: Transcript of Confirmation of charges hearing, 28 November 2006, Document No. ICC-01/04-01/06-T-47: "It started with the forced enlistment of the UPDF, or by the UPDF, the Ugandan troops. Around May - mid 2002 victim a/0105 was in Ngote, Mahagi territory, Ituri district, with a group of children. The Ugandan soldiers enlisted them to transport arms and ammunition into Fatiki via Nioka, still in the district of Ituri, approximately 100 kilometres further away."

Given this last perspective, one must hope that the Prosecutor, as an institution of contemporary international criminal justice, will overcome these trials and tribulations in a revitalised and effective manner, and—ultimately—thereby safeguard the interests of humanity. This is, of course, a difficult mission which has been entrusted, in part, to him. Men will come and go, but the institution will remain, and it is in the interest of the international community to use the lessons learned to build a more efficient Court. The current crisis is not the fault of the Prosecutor exclusively; the whole institution needs to address it, without losing sight of the fact that the Assembly of States Parties is an integral part of the system. At every level, solutions should be sought, because they do exist. Let us hope that we can find them quickly enough.