



QUESTIONS & ANSWERS: DECONSTRUCTING LUBANGA, THE ICC'S FIRST CASE

What does the Lubanga case represent for the ICC?

The Lubanga case is a major step in the history of the International Criminal Court (ICC). Thomas Lubanga Dyilo is the first person to be tried, and also convicted, by the ICC. ICC judges will look to the Lubanga case to guide them in their decisions. People outside of the Court will look to the case to assess how the ICC functions and how well it works toward ending impunity for the world's gravest crimes.

Who is Thomas Lubanga Dyilo and what was he convicted of?

Lubanga was the President and Commander-in-Chief of a militia group of the Hema tribe, the Union of Congolese Patriots (UPC), in the Democratic Republic of the Congo (DRC). He was convicted of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.

In what sort of conflict did the crimes occur?

The crimes of which Lubanga was convicted occurred as part of the Second Congo War during a conflict between the Hema and Lendu ethnic groups in 2002 and 2003 to control the gold-mining town of Mongbwalu in Ituri, DRC. The Second Congo War is the deadliest since World War II. It has led to the deaths of over 5.4 million people and has been called "Africa's Great War." The fighting in the DRC has involved around 20 armed groups and nine national armies vying for control over resource-rich lands. Most armed groups in the DRC had children in their ranks. The UPC was reported to have forcibly recruited children into its armed forces, with some observers calling it "an army of children."

Why did the Lubanga trial take so long?

Thomas Lubanga arrived at the ICC on March 17, 2006 and the verdict in his case was handed down on March 14, 2012. Including pre-trial proceedings, the case took around six years to complete. Presentation of evidence in the Lubanga trial began on January 28, 2009 and closed on May 20, 2011. The Court encountered a number of practical difficulties and settle open issues and unanswered questions in this, its first case. It had to resolve novel procedural questions and devise ways to balance the rights of the accused with its responsibility to victims, witnesses, and others involved in the case. Delays caused by appeals about procedural issues and due process concerns, many having to do with the disclosure of evidence and information by the Prosecutor, lasted nearly a year.

What were the disputes between the Prosecutor and the Trial Chamber and how were they resolved?

The trial involved an ongoing tug-of-war between the trial judges and the Prosecutor. The Trial Chamber twice ordered a stay of the proceedings and the release of Lubanga: first, because the Office of the Prosecutor (OTP) would not release certain documents, which contained evidence potentially useful to Lubanga's defense, and second, because the Prosecutor refused to disclose the identity of an intermediary who helped the OTP find evidence for the case. Both times the Appeals Chamber reversed the orders for release and clarified the Prosecutor's obligations with respect to the Trial Chamber and the rights of the accused, always ensuring that these were protected. The appeals decisions generally upheld the orders of the Trial Chamber judges to the Prosecutor and directed him to comply with them.

What are intermediaries and what issues about them came up in the Lubanga case?

Intermediaries are individuals who facilitate contact between ICC investigators and potential witnesses and victim participants, especially in situations where it is difficult to collect evidence. The OTP's investigative team had to carry out its investigation while militias were still active in and around Ituri. The team used intermediaries to locate and communicate with potential witnesses because they concluded that witnesses would be put at risk if the team contacted them directly. Lubanga's defense argued that four of the 23 individuals used by the investigative team as intermediaries pressured witnesses into giving false testimony. The Trial Chamber found that three of them had in fact done this. Accordingly, in reaching its verdict the trial judges did not consider most of the testimony of the witnesses who may have been influenced by the intermediaries. The ICC is establishing guidelines for future interactions between the Court and intermediaries in order to prevent some of the problems that came up in the Lubanga case.

How were confidentiality agreements used to build the case against Lubanga and what problems arose from their use?

During the initial phase of the investigation, the Prosecutor obtained over 200 documents, mostly from the United Nations and NGOs through confidentiality agreements. The Rome Statute allows the Prosecutor to enter into confidentiality agreements to get information which may generate evidence to be used at trial. The agreements restricted the use and disclosure of the documents. The documents at issue contained information that was potentially useful to Lubanga's defense, and the Rome Statute requires the prosecution to disclose any potentially exculpatory evidence to the defense. The Prosecutor argued that he could not disclose any of the documents without the permission of the information providers, despite his other obligation under the Rome Statute to disclose potentially exculpatory documents. The Appeals Chamber decided that fair trial principles required that the tension be resolved in favor of the rights of the accused. It advised the prosecution to be aware of disclosure requirements and to limit the use of confidentiality agreements. Eventually, the Prosecutor, with the permission of the information providers, disclosed all of the documents and the trial proceeded.

Why was Lubanga convicted given that the judges found that witnesses likely provided false evidence?

Even though the Trial Chamber had to rule out some unreliable evidence, it still found that there was sufficient reliable evidence to convict Lubanga as a co-perpetrator for the crimes of conscripting and enlisting children under 15 and using them to participate actively in hostilities. The prosecution at the ICC has the same burden of proof as criminal prosecutors in the US system: they must prove each element of a crime beyond a reasonable doubt. Among the persuasive evidence considered by the Trial Chamber was: video footage of Lubanga visiting a training camp in Rwampara in military uniform and addressing recruits clearly under the age 15, video footage of Lubanga's office showing a bodyguard clearly under 15, and video footage of a rally for Lubanga showing children under 15 guarding him with machine guns.

Why wasn't Lubanga charged with any crimes of sexual violence?

The Prosecutor decided early in the case not charge Lubanga with any crimes of sexual violence because he was confident only about the evidence of child soldier crimes. Criminal charges at the ICC are limited to those brought by the Prosecutor and confirmed in a hearing by the Pre-Trial Chamber. During the trial, however, evidence emerged of sexual violence crimes. Of the 129 victims who participated in the Lubanga trial, 30 referred to suffering or witnessing acts of sexual violence. The Trial Chamber, in the verdict, decided that considering crimes of sexual violence or facts related to them would be improper

under the Rome Statute and would violate the rights of the accused because they were not included in the Pre-Trial Chamber's decision on the confirmation of charges and thus the accused would not have been adequately notified of them. One of the judges, in dissent, argued that sexual violence was included in the crime of conscripting, enlisting, and using child soldiers under the Rome Statute.

How did victims participate in the Lubanga case?

The Lubanga trial presented victims with a historic opportunity to participate in an international criminal trial. One hundred and twenty nine victims participated in the Lubanga trial. The central role of victims in the ICC's proceedings is one of the most noteworthy features of the Court and a significant innovation in international criminal justice. During trial, victims can introduce evidence, question witnesses, challenge relevance or admissibility, and advance written and oral submissions. Victims authorized to participate in the proceedings take part in the trial through legal representatives. Since the number of participating victims might be very high, the Office of Public Counsel for Victims (OPCV) was established to support victims and their legal representatives with legal research and advice. The ICC also is the first international criminal court with the power to order a defendant to pay reparations to victims.

How will victims in the Lubanga case receive reparations?

In a decision separate from the verdict, the Trial Chamber set out principles and procedures for reparations in the Lubanga case and tasked the implementation of reparations to the Court's Trust Fund for Victims (TFV). These are thorough and detailed and are likely to stand in the future as the procedures and guidelines for the handling of court-ordered reparations by the TFV.

The TFV was set up in 2002 by the Assembly of States Parties, the ICC's governing body, to implement court-ordered reparations and to provide rehabilitation or material support to victims. If a defendant is indigent, as Lubanga was found to be, the TFV can finance reparations from its own resources. Reparations can be either individual or collective, but generally those distributed by the TFV will be collective. The Trial Chamber instructed the TFV to implement reparations pursuant to a five-step plan which focused on involving more victims and engaging them at the local level. A new Trial Chamber will be constituted to oversee the implementation of reparations by the TFV.

Although crimes of sexual violence were not included in the charges, the Trial Chamber's reparations decision made it possible for sexual violence to be considered in providing reparations.

What will happen to Lubanga now that the trial is over?

In a separate decision, after his conviction, the Trial Chamber sentenced to Lubanga to 14 years imprisonment. The defense and the prosecution have the opportunity to appeal the verdict or the sentence within 30 days of the release on August 31, 2012 of the translations of these decisions into French, the language spoken by Lubanga and the working language of Lubanga's defense. If Lubanga is acquitted on appeal he will immediately be released. If the verdict and sentence are upheld, he will serve his sentence in one of the eight countries that have to date entered into an agreement with the ICC to host convicted persons in their prisons. It has not yet been decided where Lubanga would serve his sentence. If the sentence stands, six years will be deducted from it, because Lubanga has been in ICC custody since 2006, and he will thus serve eight more years.

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