



DECONSTRUCTING LUBANGA, THE ICC'S FIRST CASE: THE TRIAL AND CONVICTION OF THOMAS LUBANGA DYILO

Why the Lubanga Case Matters

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. Future ICC judges will look to the Lubanga case to guide them in their decisions, and people outside of the Court will look to the trial to assess how the Court functions and how well it works toward ending impunity for the world's most serious crimes.

Thomas 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. These are war crimes under the Rome Statute of the ICC (Article 8) whether arising in either an international¹ or non-international² armed conflict. The Trial Chamber characterized the conflict in the Lubanga case as non-international.

The Second Congo War and the Conflict in Ituri

The Second Congo War in the DRC is the deadliest war since World War II. Lasting over a decade, with conflicts still ongoing despite a formal peace agreement, it has led to the death of over 5.4 million people.³ During the fighting entire villages were burned and millions were displaced. The displacement of large populations and the devastation of infrastructure led to a lack of food and clean water. There was also a breakdown of healthcare facilities. Most of the conflict's casualties were from starvation or diseases that might have been treatable with proper access to healthcare. The fighting in the DRC involved around 20 armed groups and nine national armies vying for control over resource-rich lands. It has been called "Africa's Great War."

Most armed groups in the DRC had children in their ranks. In 2003, an estimated 30,000 children were awaiting demobilization. The UPC was reported to have forcibly recruited children into its armed forces, with some observers calling it "an army of children."

¹ Rome Statute of the International Criminal Court art. 8(2)(a)(xxvi) (July 17, 1998) ("Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.") [hereinafter "Rome Statute"].

² *Id.* art. 8(2)(e)(vii) ("Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.").

³ As of 2007. INTERNATIONAL RESCUE COMMITTEE MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS (2007).

Another chilling characteristic of the war, reported by humanitarian and human rights groups, was the widespread use of sexual violence as a weapon of war.⁴ The Congolese national army, the UPC, and other armed groups were reported to have raped women and girls or kidnapped them to be used as sexual slaves or war brides.⁵

The ICC currently has cases pending in the DRC against other militia leaders: Germain Katanga, alleged commander of the Force de résistance patriotique en Ituri (FRPI); Mathieu Ngudjolo Chui, alleged former leader of the Front des nationalistes et intégrationnistes (FNI); Sylvestre Mudacumura, alleged Supreme Commander of the Forces Démocratiques pour la Libération du Rwanda (FDLR); and Bosco Ntaganda, Lubanga's second-in-command, and alleged former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (UPC/FPLC) and currently alleged Chief of Staff of the Congrès national pour la défense du peuple (CNDP).

The events of the Second Congo War are difficult to unravel because they involve at least ten different conflicts and many national armies and militias. Most of the conflicts of the war took place in and around Ituri, a fertile region rich in resources, located in the Orientale Province of the DRC. These conflicts were caused by competition over resources, particularly the control of gold mines and trade routes. Armed groups were formed based on ethnic affiliations and were supported at various stages by the government of the DRC, or the surrounding countries of Rwanda and Uganda.

The crimes for which Lubanga was convicted occurred in 2002 and 2003 during the conflict between the Hema and Lendu ethnic groups over control of the gold-mining town of Mongbwalu in Ituri. The DRC has close to 450 different ethnic groups and there are around 18 ethnic groups in Ituri alone. Tension between the Hema and Lendu was heightened by Belgium's colonial rule, which favored the Hema. The Hema remained the landowning business elite in the DRC, even after the nation's independence from Belgium. Beginning in the late 1990s, the Ugandan national army (UPDF) exploited this tension and unrest by supporting the Rassemblement congolais pour la démocratie (RCD), a rebel group in control of Orientale Province, in an effort to overthrow then President Laurent Kabila. By 1998, the UPDF had established a base in Bunia, the capital city of Ituri. Violence in Ituri erupted in 1998/99 when the Hema tried to evict the Lendu from their land. The UPDF supported the Hema and attacked Lendu villages. In response, the Lendu created self-defense forces and retaliated by attacking Hema villages. The Hema, in turn, also created self-defense forces. In 1999, the RCD split into two groups; the RCD-Goma supported by Rwanda, and the RCD-ML, supported by Uganda.

The Prosecution's Case Against Thomas Lubanga Dyilo

The prosecution's case was the following:

Thomas Lubanga was Minister of Defense for the RCD-ML, which controlled Ituri in 2001. Lubanga and a number of others broke away from the RCD-ML in April of 2002 and in the same year founded the UPC. From the group's start, Lubanga was its President and the Commander-in-Chief of its military wing; the Forces patriotiques pour la libération du Congo (FPLC). The group's military activity was directed by a "common plan" of gaining power in Ituri. To achieve this goal, it formed a military force and recruited young people, regardless of age, in schools and in villages. Some of these recruitment efforts were

⁴ Sexual violence has also become a large part of general violence among the war-torn populations of the DRC. See e.g., Human Rights Watch, *The War Within the War*, available at <http://www.hrw.org/node/81076/section/2>.

⁵ *Id.*

coercive, sometimes abductions. In any case, they inevitably led to the recruitment of children under 15 years old, whether or not this was specifically intended. The children were then sent to training camps, where they were beaten, whipped, imprisoned and inadequately fed, and young girls were raped. They were encouraged to smoke cannabis and drink alcohol and were frequently intoxicated.

Lubanga gave orders to the FPLC and ensured that it was properly equipped. Lubanga and his co-perpetrators, with the support of elders in villages, orchestrated campaigns to recruit soldiers of all ages by putting pressure on villagers to enlist their children in the FPLC. Lubanga knew that children under 15 were being conscripted or enlisted or he was aware that this was an inevitable consequence of the “common plan” of gaining power in Ituri. Lubanga saw child soldiers between 13 and 17 years old in the forces of the FPLC and among his own personal bodyguards. When the international community became alarmed by the presence of child soldiers in the FPLC, he issued false demobilization orders to dispel these concerns. The prosecution determined that the demobilization orders were false because the situation of children in the UPC/FPLC remained unchanged; after issuing the orders Lubanga visited a training camp in Rwampara where there were soldiers significantly under 15 years old visible even among the bodyguards of other senior UPC commanders.

Preparing for Trial

The ICC only has jurisdiction over cases that deal with events after the entry into force of the Rome Statute on July 1, 2002. The prosecution charged Lubanga with three counts of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities from early September 2002 (the founding of the FPLC) to June 2, 2003.

During the early stages of the ICC’s investigation of Lubanga, Congolese authorities unexpectedly detained Lubanga. It was uncertain how long they would keep him in custody. At this stage, the ICC prosecution had strong evidence to charge Lubanga with child soldier crimes but had not yet gathered enough evidence to charge him with other crimes, including of sexual violence. The Prosecutor decided to move ahead with only the child soldier charges.

Before sending the case to trial, the Pre-Trial Chamber held a confirmation of charges hearing to determine whether there was sufficient evidence to establish substantial grounds to believe that Lubanga committed each of the crimes charged. This hearing is similar to the indictment procedure and hearing in many national legal systems. The Pre-Trial Chamber found that there was sufficient evidence to establish Lubanga’s responsibility as a co-perpetrator (one who commits a crime jointly with another) of the crimes the crimes charged against him. The ICC has also issued two warrants for one of Lubanga’s co-perpetrators, Bosco Ntaganda, alleged Deputy Chief of the General Staff of the FPLC, for war crimes and crimes against humanity. He is at large.

The Charges

To convict Lubanga, the prosecution had to prove all of the elements of the war crime of enlisting or conscripting children under the age of 15 and using them to participate actively in hostilities, under the Rome Statute. The elements of crimes are the sets of facts which the prosecution must prove beyond a reasonable doubt in order to convict a defendant. In the United States, crimes and their elements are defined by state and federal legislatures and jurisprudence. The ICC has a separate document, the

Elements of Crimes,⁶ outlining the elements of each of the crimes in the Court's jurisdiction. This document guides the Court in interpretation and application of the Rome Statute.

The Rome Statute, the Elements, and the ICC's Rules of Procedure and Evidence are first in the hierarchy of sources that the Court can look to find the applicable law in a case. Treaties and established principles and rules of international law and international humanitarian law are second. Lastly, the Court can look to principles established in the national laws of States, so long as those laws are consistent with the Rome Statute and other international law.

The ICC's elements for the crime of enlisting and conscripting children under 15 and using them in non-international hostilities are:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

One of the more difficult elements for the prosecution to prove was the second element: that the soldiers recruited, enlisted, or used by the UPC were under 15 years old. The civil administration in the DRC was not fully functional at the time of the investigation and records of the ages of children were difficult to get. Forensic evidence on the ages of children according to their bone structure was not entirely reliable; the models were based on American and European populations and there was an uncertain margin of error. Ultimately, the Trial Chamber relied most on the testimony of witnesses about their personal impressions of the ages of the children they encountered. The defense contested the subjective nature of this evidence.

Why It Took 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. Presentation of evidence in the trial began on January 28, 2009 and closed on May 20, 2011. Including pre-trial proceedings, the case took around six years to complete. In a decision separate from the verdict, the Trial Chamber sentenced Lubanga to 14 years imprisonment for these crimes. If the conviction and sentence are upheld, the six years Lubanga spent in custody will be deducted from his sentence as time served. The defense and the prosecution have the opportunity to appeal the verdict or the sentence within 30 days of August 31, 2012, the date of the release of the translations of these decisions into French.

⁶ Elements of Crimes, *available at* <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

Delays caused by appeals during trial about procedural issues and due process concerns, many having to do with the disclosure of evidence and information by the Prosecutor, added together, lasted nearly a year. Interlocutory appeals (appeals during the course of a trial) are much more common at the ICC than they are in the US system. While interlocutory appeals technically increase the duration of the trial itself, they allow the Appeals Chamber to address issues while a trial is ongoing, and this may allow a Trial Chamber to correct things that it may not be able to correct once the trial has ended. In this way, interlocutory appeals can help decrease the chance of a reversal.

The trial judges identified many of the elements of the trial that caused it to take so long. The verdict begins by setting out the four most contentious issues at trial:

1. The prosecution's failure to disclose potentially exculpatory evidence;
2. The Trial Chamber's attempt to change the legal characterization of the facts of the case;
3. The Prosecutor's refusal to disclose the identity of an individual who acted as an "intermediary" by bringing witnesses to the Office of the Prosecutor's investigative team; and
4. The defense's motion that the entire trial be dismissed because a fair trial would be impossible given the Prosecutor's failure to disclose potentially exculpatory evidence and the unreliable nature of the evidence submitted by the prosecution.

The resolution of these questions was essential for the fairness of the trial, and they required significant time and resources.

Victim Participation at the ICC

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 purpose of this extensive support to and involvement of victims is to give them redressive justice by giving them a voice in the trial, and by giving the world an authoritative account of the events in which they suffered.

The ICC also focuses on restorative justice—rehabilitation, mending relationships, and restoring trust between various groups. In 2002, the ICC's governing body, the Assembly of States Parties (ASP), set up the Trust Fund for Victims (TFV). The TFV has two mandates: 1) to implement court-ordered reparations, and 2) to provide physical and psychosocial rehabilitation or material support to victims.

Reparations

The ICC is the first international criminal court with the power to order a defendant to pay reparations to victims. If a defendant is indigent, as Lubanga was found to be, the Trust Fund for Victims can finance reparations from its own resources. Victims can call witnesses and introduce evidence during trial for the purpose of reparations after the verdict. The Trial Chamber can then order either individual

reparations or collective reparations (for a group of victims or a community). Reparations can take the form of restitution, indemnification, or rehabilitation.

Following the guilty verdict, the Lubanga Trial Chamber issued the ICC's first decision on reparations. In the decision, the Trial Chamber emphasized the importance and uniqueness of reparations as a feature of the ICC because the reparations process focuses on considerations beyond the punishment of crimes, such as rehabilitation and redress for victims. The Chamber explained, "the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings."

Under the Rome Statute,⁷ the Court can establish the principles and procedure for reparation proceedings. Among the principles set out by the Trial Chamber to guide the reparations process in the Lubanga case were:

- Reparations should be non-discriminatory and gender-inclusive.
- Reparations should take into account the needs of all the victims, particularly children and victims of sexual or gender crimes.
- Reparations should be sensitive to cultural variations and contexts.
- Priority should be given to especially vulnerable victims.

The Chamber tasked the implementation of reparations procedure to the Trust Fund for Victims pursuant to a five-step plan, which focused on involving more victims and engaging them at the local level. The TFV currently has total assets of \$5.5 million, and of this, \$2.7 million has been set aside for grants in the DRC and Uganda. A new Trial Chamber will be constituted to oversee the implementation of reparations by the TFV. On August 29, 2012, the Trial Chamber granted the defense leave to appeal the reparations decision on four issues which the defense argued "affect the fairness and expeditiousness of the proceedings."⁸

Although crimes of sexual violence were not included in the charges, the guidelines established by the Chamber for reparations in the case made it possible for sexual violence to be considered at the reparations stage. The Chamber explained that it would allow "the widest possible remedies for the violations of rights of the victims and the means of the implementation."

The Lubanga Trial Chamber's decision on reparations is not binding in future cases. However, the principles and procedures set out may be used by future chambers where they are practicable and applicable. Since the Trial Chamber very carefully explained all of the relevant concerns of victims, victims' advocates, and the parties, and how it came to its conclusions, the decision on reparations in the Lubanga case is likely to be a useful guide for future cases with factual similarities, i.e. other child soldier cases or, more generally, cases involving women or children as victims.

⁷ Rome Statute, art. 75

⁸ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2911, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations (August 29, 2012).

Evidence

Much of the evidence introduced in the Lubanga trial took the form of oral testimony by witnesses. The Trial Chamber heard the in-court testimony of 67 witnesses; the prosecution called 36 witnesses including three experts; the defense called 24 witnesses; the Trial Chamber called four expert witnesses; and the participating victims called three witnesses.

Some defense witnesses testified that a number of witnesses for the prosecution had been pressured to give false testimony by “intermediaries.” Intermediaries were individuals whom the Office of the Prosecutor’s (OTP) investigative team enlisted during its investigation before trial to help identify witnesses in the DRC. They were used to contact witnesses who would have been endangered or apprehensive if the ICC investigative teams approached them directly. The intermediaries were human rights activists with local non-governmental organizations (NGOs) or members of international organizations familiar with the region. Testimony by some of the prosecution’s witnesses also supported the allegations against the intermediaries, thus undermining the credibility of some witnesses:

This is contrary to the statement given to the OTP and that’s why I wanted to make the statement and explain why I came here. That’s why I met the OTP’s intermediary who told me the following. He said, You have to change your name, you have to change your identity. Don’t give the true story that took place; in other words, there was a story that they were telling to the witnesses. And I say that they’re crooks. Why is it that I say that they’re crooks and swindlers? Well, instead of letting me tell the true story of what took place and instead of letting me describe all of the events I lived through, they are inventing statements in order to manipulate the investigation.⁹

The Trial Chamber found it was likely that three out of 23 individuals used by the OTP’s investigative team as intermediaries pressured witnesses into giving false testimony. The Trial Chamber also found that it was likely that the three witnesses called to testify by the legal representatives of the victims provided false testimony.

How the Court Weighed Evidence

Under the Rome Statute¹⁰ the Trial Chamber’s decision on the guilt or innocence of the accused must contain a full and reasoned statement of the findings on the evidence and how it reached its conclusions. Because each of the findings of the Trial Chamber is appealable, and possibly because of the serious concerns with the reliability of the evidence introduced at trial, the Trial Chamber, in the verdict, carefully tied each of its conclusions to the evidence presented. The verdict spans 593 pages (not including the separate opinions, dissenting from discrete parts of the decision, but not the judgment itself, by Judge Adrian Fulford and Judge Elizabeth Odio Benito).

In the verdict, the Chamber gives an account of relevant testimonial and non-testimonial evidence and how it assessed the credibility of the testimony or the reliability of a piece of evidence, before explaining how it arrived at a particular conclusion about the evidence overall. When recounting relevant testimony, the Chamber summarized and included references to trial records, conferences with the

⁹ Trial Chamber I, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/06-2434-Red2, Decision on the Intermediaries (May 31, 2010).

¹⁰ Rome Statute, art. 74.

parties and evidence. Some of the material cited in these accounts is not readily accessible on the ICC's website.

Procedure at the ICC has been created from both common law and civil law traditions. The fundamental principles of due process in the common law system and in Article 14 of the International Convention on Civil and Political Rights (the right to remain silent, the right to an attorney, the right to be informed of the charges, the right to face one's accuser) are incorporated in the ICC's Rules of Procedure and Evidence.¹¹ In certain other areas, among these procedures, the ICC incorporates civil law principles. The drafters of the Rome Statute gave the judges at the ICC more control over the proceedings than they would have in the common law system, but less than they would have in a civil law system. For example, under Article 69(3) of the Rome Statute, the Chamber can request the submission of evidence it "considers necessary for the determination of the truth." In a common law system, it would not have this power.

One of the main differences between the ICC and American courts is the absence of a jury in ICC proceedings. The negotiators of the Rome Statute seriously considered the possibility of ICC juries. They decided that given the nature of the crimes and the accused, it would be practically impossible to empanel credible juries. The judges of the Trial Chambers decide whether evidence is sufficient to establish the guilt of the accused beyond a reasonable doubt. These findings by the Trial Chamber, unlike the findings of a jury in the American system, will be subject to appellate review.¹²

Rules governing the admissibility of evidence are also more flexible at the ICC. The Chamber explained that this flexible approach is:

...particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.¹³

To clarify how it evaluated all of the admissible evidence to find "proof beyond a reasonable doubt," the Trial Chamber offered an explanation of how it weighed each kind of evidence introduced at trial. For assessing witness testimony, the Chamber sets out a long list of factors considered: the manner in which witnesses gave testimony, the plausibility of the testimony, the extent to which it was internally consistent and consistent with other evidence, the seriousness of any inconsistency, and the circumstances of the individual witness. The Chamber made concessions for the frailty of memory and for the impact of trauma on a witness's testimony, even acknowledging, "that it is possible for a witness to be accurate on some issues and unreliable on others." For evidence other than oral testimony, like

¹¹ Rules of Procedure and Evidence, Official Records ICC-ASP/1/3, available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf

¹² Rome Statute, art 81.

¹³ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr (June 13, 2008).

written statements, the Trial Chamber made allowances for the potential problem of the defense not having the opportunity to cross-examine the individuals behind the evidence.¹⁴ For documentary evidence, the Trial Chamber considered the author of the document and how it came to the ICC (the chain of custody). The Chamber explained that it assessed the reliability of each individual piece of evidence in the context of all other evidence admitted at trial.

Problematic Evidence

On December 10, 2010, the defense filed an application for a permanent stay of the proceedings, arguing that any chance of a fair trial was lost because the prosecution withheld potentially exculpatory evidence and because the evidence it introduced at trial was unreliable. Although the Trial Chamber was not persuaded by this argument, much of the verdict and the later sentencing decision address this issue. The Chamber spends 230 pages recounting the problematic evidence introduced during trial by witnesses, before reaching the evidence proving Lubanga's guilt. This section begins:

Given the specific circumstances of the case, and in particular the defence submissions that the reliability of the entire body of prosecution evidence is affected, the Chamber has set out the history to the investigations extensively in order to demonstrate the extent of the problems the investigators faced and the background to the considerable reliance that the prosecution placed on certain intermediaries..."¹⁵

The Use of Intermediaries

Notably, the Lubanga trial included testimonial evidence about how investigators gathered evidence to be used in the trial. Because of the controversy surrounding the ICC investigative team's use of intermediaries, the Chamber ordered the prosecution to call representatives to "testify as to the approach and the procedures applied to the intermediaries" during trial. Bernard Lavigne, the leader of the ICC investigation team in the DRC, and Nicholas Sebire, one of the investigators on the team, provided testimony about the investigation and the team's use of intermediaries.

The OTP's investigation team began its investigation in Bunia in 2004. It encountered a difficult and unexpected situation on the ground: the investigators had to carry out their work with militias still active in and around Ituri. Lavigne testified that he heard gunfire every night during the beginning stages of the investigation.

The team concluded that witnesses would be put at risk if investigators contacted them directly. They feared that militia leaders who did not want to be implicated in any crimes might threaten witnesses, or that family members, loyal to a militia, might reveal the identities of witnesses to the militias. Because of this danger, the team did not visit schools or the families of witnesses. The team built up relationships with local NGOs and human rights activists or members of international organizations familiar with the region to navigate the dangers they encountered on the ground. Eventually, these individuals began to

¹⁴ Rome Statute, art. 67(1)(e) (the accused has the right to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute...").

¹⁵ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (March 14, 2012).

act as “intermediaries” and helped the team identify potential witnesses and victims to participate at trial. Sebire testified that using intermediaries to contact witnesses was the only solution to the security problems the team faced.

The defense argued that four intermediaries pressured witnesses into giving false testimony. The Trial Chamber found that three out of 23 intermediaries were likely to have done so. Lavigne testified that it became known in Bunia that the Court might relocate threatened witnesses and that some might have seen this as a chance to obtain free housing.

Most intermediaries did not receive any form of compensation for their services, apart from reimbursement for their expenses. But the investigative team did enter into contracts with some intermediaries, whose contributions were deemed particularly valuable: P-0316, Intermediary 143, and Intermediary 154. The Trial Chamber found that of the two of the contracted intermediaries, P-0316, an individual with some connection to the DRC government, and Intermediary 143, a human rights activist, were likely to have influenced witness testimony.

The Chamber recounted the background of each of the four intermediaries brought into question, and the evidence provided by each witness they had put in contact with the OTP, before deciding whether the testimony of these witnesses should be given weight. To explain their approach to these witnesses, the Trial Chamber wrote:

...the Chamber has recognised that [the witnesses] may well have given a truthful account as to elements of their past, including their involvement with the military, whilst at the same time – at least potentially – lying about particular crucial details, such as their identity, age, the dates of their military training and service, or the groups they were involved with. As regards this aspect of the case, the Chamber needs to be persuaded beyond reasonable doubt that the alleged former child soldiers have given an accurate account on the issues that are relevant to this trial...¹⁶

Ultimately, the Trial Chamber discounted the evidence given by nearly all of the witnesses who were in contact with unreliable intermediaries, except in two instances: where the evidence was based on a video and where a witness’s account was internally consistent and credible despite his contact with an unreliable intermediary.

The Trial Chamber concludes its extensive discussion on the use of intermediaries by reprimanding the prosecution for its handling of this aspect of the case:

The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The

¹⁶ *Id.* at 91.

prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court."¹⁷

Defining the Nature of the Conflict

Was the Conflict in Ituri International or Non-International?

Article 8 of the Rome Statute, which deals with war crimes, is separated into two parts: one dealing with war crimes during an international armed conflict,¹⁸ and one dealing with war crimes during a non-international armed conflict.¹⁹ The separation of war crimes into these two sections corresponds to the historical development of the law of armed conflict.

The Pre-Trial Chamber, in the decision confirming the charges against Lubanga, characterized the conflict in Ituri as international because of Uganda's presence in the DRC. The Trial Chamber, however, decided that the involvement of outside countries was not substantial enough to make the conflict "international." The Trial Chamber concluded that the sections of Article 8 that deal with war crimes in international armed conflicts were not applicable, but that jurisprudence from the Special Court for Sierra Leone²⁰ interpreting the crime of "conscripting or enlisting children under fifteen and using them to participate in hostilities" in an international armed conflict did apply.

Do "National Armed Forces" Under the Rome Statute Include Non-State Actors?

Under the Rome Statute, armed forces are described in the section of Article 8 dealing with an international armed conflict differently from the section of Article 8 dealing with a non-international armed conflict. In an international context, child soldier crimes are listed as: "Conscripting or enlisting children under the age of fifteen years into the *national armed forces* or using them to participate actively in hostilities" (emphasis added). In a non-international armed conflict the crimes are listed as: "Conscripting or enlisting children under the age of fifteen years into *armed forces* or groups or using them to participate actively in hostilities" (emphasis added). When the Pre-Trial Chamber assessed the conflict in Ituri as an international armed conflict, it concluded that the term "national armed forces" was not limited only to the armed forces of a state actor. It remains to be seen if the Trial Chamber would also have given "national armed forces" a broad interpretation had it agreed with the Pre-Trial Chamber's assessment of the conflict as international. Arguably, it would have been more difficult to prosecute Lubanga if the "national armed forces" element applied and they had to be of a state actor, given that Lubanga was charged with recruiting children under 15 into a militia.

In a separate opinion, dissenting on this issue, Judge Odio Benito argued that the Trial Chamber should have found that the crime of conscripting or enlisting children under the age of 15 years and using them to participate actively in hostilities can apply to any armed group, national or otherwise, regardless of whether the conflict is international or non-international. She also noted that the decision of the Trial

¹⁷ *Id.* at 219.

¹⁸ Rome Statute, at art. 8(2)(a) and (b).

¹⁹ *Id.* at art. 8(2)(c) and (d).

²⁰ Specifically that of the Special Court for Sierra Leone which has the same crime in its statute and recently convicted Charles Taylor of crimes against humanity and war crimes, including conscripting or enlisting children under 15 into the armed forces or using them to participate actively in hostilities. See Human Rights Watch, "Even a 'Big Man' Must Face Justice," *available at* http://www.hrw.org/sites/default/files/reports/sierraLeone0712ForUpload_0.pdf

Chamber to characterize the conflict in the Lubanga case as non-international would possibly be raised on appeal.

Evidence of Sexual Violence

Why Wasn't Lubanga Charged with Crimes of Sexual Violence?

Thirty of the 129 victims participating in the trial referred to suffering or witnessing acts of sexual violence, and the prosecution mentioned these acts their opening and closing statements. However, crimes of sexual violence were not included in the charges brought by the Prosecutor against Lubanga. Former Prosecutor Luis Moreno-Ocampo explained, "I knew to arrest Lubanga I had to move my case fast. So, I had strong evidence about child soldiers. I was not ready to prove the connection between Lubanga and some of the killings and rapes. And then I decided to move just with the case I had proofs [sic]." ²¹

Because the Prosecutor did not charge crimes of sexual violence, these crimes or facts related to them were not included in the decision on the confirmation of charges handed down by the Pre-Trial Chamber. This decision effectively sent the case to the Trial Chamber for trial. Consequently, the Trial Chamber declined to consider sexual violence crimes or facts related to them in reaching a judgment in the case because they were not included in the confirmation of charges decision. Under the Rome Statute, the Trial Chamber's verdict cannot "exceed the facts and circumstances described in the charges and any amendments to the charges." The Appeals Chamber has also interpreted Article 67 of the Statute—that the accused has a right "to be informed promptly and in detail of the nature, cause and content of the charge..."—to prohibit a verdict from exceeding the facts and circumstances in the confirmed charges. Therefore, the majority of the Trial Chamber concluded that considering evidence of sexual violence crimes in reaching a verdict would be improper under the Statute and would violate the rights of the accused. The Chamber left open the possibility that evidence of sexual violence might be considered during Lubanga's sentencing hearing or during reparations proceedings.

The Debate Over Including Evidence of Sexual Violence by Changing to a Charge More Suitable to the Facts

Under Regulation 55 of the Regulations of the Court, entitled "Authority of the Chamber to Modify the Legal Characterization of Facts," a Trial Chamber can change what crime is established by the facts in a case, if those facts are more suitable to make out another crime under the Rome Statute. Regulation 55 was intended to allow the Trial Chamber to correct flaws in the legal characterization of the charges. ²² Before ultimately concluding that evidence of sexual violence could not be considered for the judgment, the Trial Chamber made an effort to include crimes of inhumane treatment and sexual slavery in the trial using Regulation 55.

When participating victims applied to have the facts in the case legally re-characterized to include charges of inhumane treatment and sexual slavery, the Trial Chamber (with a dissent by Judge Fulford) issued a "decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change." The prosecution and the defense both appealed this decision and argued

²¹ Interview with Luis Moreno-Ocampo, *The Reckoning: The Battle for the International Criminal Court* (2009), Skylight Pictures.

²² The Chamber used Regulation 55 to change the charges in the case to be about a non-international armed conflict. This change meant that a different section of the Rome Statute applied to the acts.

that changing the legal characterization of facts and incorporating new facts, not included in the conformation of charges decision, would be unfair to the accused. The Prosecutor argued that the Trial Chamber's decision to effectively add new charges would confuse the roles of the judges and the prosecution: "The judges cannot themselves take cognizance of facts the Prosecutor has not pursued. In other words, the judge cannot be both judge and prosecutor."²³

The Appeals Chamber overturned the Trial Chamber's decision. The Appeals Chamber concluded that the decision was not sufficiently supported and was based on a flawed interpretation of Regulation 55.²⁴

The Trial Chamber mentions the Prosecutor's appeal of its Regulation 55 decision, in the later Sentencing Decision with strong language explicitly admonishing then-Prosecutor Luis Moreno-Ocampo:

The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards to sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for purposes of sentencing.²⁵

Incorporating Evidence of Sexual Violence into the Definition of "Participate Actively" in Hostilities

The ICC is one of the first international criminal tribunals to interpret the war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities. It was important for victims' groups to have the definition of "participate actively" include sexual roles because some estimates hold that 40 percent of child soldiers worldwide are girls; often these girls are conscripted in armed forces, not only to fight in combat, but also to perform domestic duties and as sexual slaves or war brides. The participating victims and the prosecution wanted the Trial Chamber to interpret "participate actively in hostilities" as broadly as possible to include all of the children who were recruited by the UPC, even those who did not engage in combat on the front lines. Thus, advocating for a broad definition of this aspect of the crime was another avenue through which the prosecution and the participating victims hoped to present evidence of sexual violence at trial.

The applicable law. The ICC has jurisdiction over war crimes which occur either during a non-international armed conflict or during an international armed conflict. The Trial Chamber determined

²³ *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06 OA15, Prosecution's Document in Support of Appeal against the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" and urgent request for suspensive effect (September 14, 2009).

²⁴ The Trial Chamber's decision was based on an interpretation of Regulation 55 which separated its three sections. The Appeals Chamber held that the three sections could not be read separately.

²⁵ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012).

that the conflict in Ituri was a non-international armed conflict. Under the Rome Statute, war crimes in a non-international armed conflict are either: ²⁶

1. "Serious violations of article 3 common [a.k.a. "Common Article 3"] to the four Geneva Conventions of 12 August 1949..." [or]
2. "...Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law."

Common Article 3 of the Geneva Conventions requires that "[p]ersons *taking no active part in the hostilities* ... shall in all circumstances be treated humanely" (emphasis added). The other applicable international law for armed conflicts not of an international character is Additional Protocol II of the Geneva Conventions, which says that civilians are protected "unless and for such time as they *take a direct part in hostilities*" (emphasis added).

The Rome Statute sets out a non-exclusive list of acts, which are "serious violations" of the above humanitarian laws. Among the acts listed is "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

Defining "participate actively." Under the Rome Statute,²⁷ when a crime is not defined, a Trial Chamber can look to "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" and "failing that, general principles of law derived by the Court from national laws of legal systems of the world." The relevant acts, which constitute the crimes of conscripting, enlisting, and using children under 15 to participate actively in hostilities, are not defined in the Rome Statute, the Rules of Procedure and Evidence for the Court, or in the Elements of Crimes. To inform its definition of child soldier crimes, the Trial Chamber looked to the Convention on the Rights of the Child, the jurisprudence of the Special Court for Sierra Leone, the object and purpose of the Rome Statute, international human rights norms and the Geneva Conventions.

The defense relied on criteria set out by the International Committee of the Red Cross²⁸ and argued that "active participation" should have the same meaning as "direct participation" under the Geneva Conventions, and only include acts of war likely to cause harm to the enemy. The defense argued that international criminal law only prohibited using children to participate in military operations. Under this definition, evidence of children in roles such as bodyguards would not be relevant to the charges.

²⁶ Under the Rome Statute, war crimes in an international armed conflict are "grave breaches" of the Geneva Conventions or other serious violations of the laws of armed conflict.

²⁷ Rome Statute, art. 21.

²⁸ International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,' 90 International Review of the Red Cross (2008) ("1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part; 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another...").

The participating victims argued that there is a deliberate difference between the term “participating actively” under the Rome Statute and the term “direct participation” under the Geneva Conventions. They argued that the drafters of the Rome Statute intended “participating actively” to encompass a wider range of activities than “taking direct part” under the Geneva Conventions. The participating victims argued that the crimes should be interpreted to protect girls who are recruited for sexual purposes, since this is often the primary reason for their recruitment.

The prosecution also argued that “participate actively” should be defined broadly to include any child whose role is essential to the functioning of the armed group, including: cooks, porters, messengers, scouts, spies, couriers, guards, bodyguards, those used at checkpoints as decoys, and those used for sexual purposes and those forced to act as wives to commanders.

The Trial Chamber agreed that the use of the term “active participation” was a purposeful decision by the drafters of the Rome Statute, and was intended to be broader in meaning than “direct participation” under the Geneva Conventions. The Chamber concluded that the decisive factor for whether an indirect role amounts to “active participation” was whether the support the child gave to the military group exposed him or her to real danger as a potential target. The Chamber said this determination could only be made on a case-by-case basis.

The Trial Chamber’s broader definition could create confusion about the application of certain elements of international humanitarian law. If even children not on the front lines are “active participants,” so long as they are exposed to danger as a potential target, there may be uncertainty about whether these children will still be protected under other sections of the Rome Statute and international law, which punish attacking those “not taking direct part in hostilities.”²⁹

The Trial Chamber left open whether using children in sexual roles was using them to “participate actively in hostilities” within the meaning of the Statute. The Chamber declined to consider sexual roles, in the Lubanga case specifically, as a matter of law, because facts related to sexual violence were not included in the Pre-Trial Chamber’s decision on the confirmation of charges. Likewise, when evidence was given that young girls assisted with domestic work, the Trial Chamber only considered this relevant to the charges where the girl was exposed to danger as a potential target.

Judge Odio Benito dissented from the majority of the Trial Chamber on this issue. She argued that sexual violence was included in the crime of conscripting, enlisting, and using child soldiers, and that the details of the facts and charges in a particular case should not determine how a Trial Chamber defines a crime under the Rome Statute. She wrote, “The use of young girls and boys bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused.” Judge Odio Benito found that declining to consider evidence of sexual violence and the possible gender aspects of child soldier crimes was discriminatory to women and girls.

Although Judge Odio Benito agreed with the majority that active participation should be based on whether a child was exposed to potential danger as a target, she asserted that this is not limited to being a target of the enemy, but also includes being a target for mistreatment from within the armed group.

²⁹ Rome Statute, art 8(2)(e)(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (June 8, 1977).

Sexual Violence Crimes at Sentencing

In the verdict, the Trial Chamber left open the possibility that evidence of sexual violence might be considered during sentencing or reparations. In its later sentencing decision,³⁰ the Trial Chamber set out the elements which the Prosecution needed to prove for evidence of sexual violence to be considered during Lubanga's sentencing:

1. Child soldiers were subject to sexual violence; and
2. This can be attributed to Lubanga "in a manner that reflects his culpability."

Although the Chamber heard evidence that child soldiers were subject to sexual violence, there was insufficient evidence to support the second element—that sexual violence could be attributed to Lubanga.

Lubanga's culpability as a co-perpetrator for child soldier crimes depended on these crimes being part of a "common plan" among the perpetrators to gain power in Ituri. The Trial Chamber could not find, based on all the evidence presented, that sexual violence was sufficiently widespread, such that it could be characterized as occurring during the course of the implementation of the "common plan." There was also no evidence presented showing that Lubanga ordered, encouraged, or was aware of sexual crimes. The Chamber observed that the Prosecutor could have introduced evidence on this issue during the sentencing hearing or could have referred to relevant evidence given during the trial, but he did not. Thus, the Chamber concluded that the link between sexual violence crimes and Lubanga was not proved beyond a reasonable doubt.

The Trial Chamber sentenced Lubanga to 14 years imprisonment. Judge Odio Benito dissented from the sentencing decision and argued that, given the harm to victims, the Trial Chamber should have considered evidence of sexual violence regardless under Rule 145(1)(c) of the ICC's Rules which permits any "additional factor to be considered" during sentencing.

Co-Perpetration

Lubanga was found guilty of the child soldier crimes under a theory of "co-perpetration," a kind of liability for those who commit crimes jointly with others. The other co-perpetrators in the Lubanga case were a group of Hema soldiers, including Bosco Ntaganda, who sought to bring about political change in Ituri. The group participated in a rebellion against the RCD-ML in the summer of 2000 and formed the UPC in September of 2000.

The Lubanga Trial Chamber clarified the elements of "co-perpetration" as a theory of criminal responsibility. The Trial Chamber stated that in order to find Lubanga responsible as a co-perpetrator, the Prosecution had to show: 1) that there was a "common plan;" 2) that the defendant offered an "essential contribution" to this plan; 3) that the accused meant to commit the criminal acts or knew they would occur in the ordinary course of events; and 4) that the accused knew he provided an essential contribution.

³⁰ Trial Chamber I, *Situation in the Democratic Republic of Congo, Prosecutor v. Lubanga*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 12, 2012).

In a separate opinion, dissenting on the issue of co-perpetration, Judge Fulford wrote that the second requirement of an “essential contribution” puts an unfair burden on the prosecution, and that they should only be required to show that a defendant contributed in some way to the common plan. Although Judge Fulford thought the burden on the prosecution was high, he found that this burden was met in the Lubanga case and that there was sufficient evidence that Lubanga offered an “essential contribution” to the “common plan.”

The Relationship Between the Judges and the Prosecutor

The Lubanga trial involved an ongoing tug-of-war between the judges of the Trial Chamber and the Prosecutor. Various sections of the Rome Statute provide the Prosecutor with considerable independence from the other organs of the Court to protect him or her from political pressure and interference by the judges. The Lubanga trial was the first time the relationship between the Office of the Prosecutor (OTP) and the other organs of the Court was tested.

The Prosecutor at the time of the Lubanga trial, Luis Moreno-Ocampo, was deeply concerned with maintaining the independence of his office so as to avoid criticism that the ICC was a political tool of States Parties. The judges, on the other hand, were careful to uphold the fair trial rights of the accused. To meet these requirements, the Trial Chamber twice ordered the release of Lubanga because of what it deemed the Prosecutor’s abuse of process; first, because the Prosecutor refused to disclose exculpatory materials, and second, because the Prosecutor refused to disclose the identity of an intermediary. 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 the latter were protected. The appeals decisions generally upheld the orders of the Trial Chamber judges to the Prosecutor and directed him to comply with them.

The First Standoff: The Prosecutor’s Refusal to Disclose Potentially Exculpatory Evidence

On June 13, 2008, ten days before trial was set to begin, the Trial Chamber stayed the proceedings. The Chamber concluded that the accused would not be able to prepare his case and that there was no prospect that a fair trial could be held because the Prosecutor refused to disclose over 200 documents potentially containing information useful to the defense.

The prosecution had informed the Trial Chamber on September 11, 2007, in its “submission regarding the subjects that require early determination,” that:

a comparatively high proportion of the materials that comprise the DRC collection were obtained on the condition of confidentiality pursuant to Article 54(3)(e). While the Prosecution will seek the lifting of the restrictions for any of these items which it must disclose or provide for inspection in a timely manner, the granting of the Prosecution’s lifting requests and their timing are largely beyond the Prosecution’s control.³¹

Under Article 54(3)(e), the Prosecutor may “Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for

³¹ *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-951, Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol (September 11, 2007).

the purpose of generating new evidence, unless the provider of the information consents..." This presented a problem because the Prosecutor has another obligation under the Rome Statute to disclose any potentially exculpatory information, or information that might mitigate a defendant's responsibility, to the defense as soon as it becomes available.³²

Of the 207 documents, which were restricted by confidentiality agreements and contained potentially exculpatory evidence, 156 were provided by the United Nations.³³ The Prosecutor, citing Article 54, refused to disclose these documents because the information providers had not given their consent to release them. Even more problematic was that the information providers would not consent to the Trial Chamber seeing the documents and under the Rome Statute³⁴ it is up to the Trial Chamber to decide whether the Prosecution has to disclose evidence for a trial to be fair. To make this decision, it must be able to see this evidence.

The Trial Chamber found that the Prosecution's widespread use of confidentiality agreements to collect a large amount of evidence was "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."³⁵ The Trial Chamber stayed the proceedings on June 13, 2008 and ordered the release of Lubanga on July 2, 2008. The Trial Chamber found that the Prosecutor's refusal to disclose the documents, even to the Trial Chamber, made a fair trial impossible and rendered Lubanga's detention unjustified: "It would be unlawful for the Chamber to order him to remain in what, in reality, would be preventative detention or to impose conditional release."³⁶

On appeal, the Prosecutor argued that confidentiality agreements were not numerically limited, or only applicable in highly restricted or exceptional circumstances. The Prosecutor explained that because of the ongoing conflict in the DRC, confidentiality agreements serve "as a safeguard to the fairness and integrity of the proceedings."

The Appeals Chamber resolved the tension in the Rome Statute between the importance of confidentiality in ICC investigations and the Prosecutor's duty to disclose potentially exculpatory evidence in favor of the rights of the accused. The Appeals Chamber unequivocally stated that the Prosecutor's interest in maintaining confidentiality:

³² Rome Statute, art 67.

³³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1 (July 22, 2004) ("The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations").

³⁴ *Id.* at art. 67(2) ("In case of doubt as to the application of this paragraph, the Court shall decide."),

³⁵ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1401, 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 (June 13, 2008).

³⁶ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1418, Decision on the Release of Thomas Lubanga Dyilo (July 2, 2008).

must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or the accused person... Therefore whenever the Prosecutor relies on article 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.³⁷

The Appeals Chamber expressed concern that the Prosecutor would accept large amounts of materials from the UN, which he could not disclose to judges of the Court, because this prevented the Chambers from assessing whether a fair trial could be held.

The Appeals Chamber confirmed the stay of the proceedings but reversed the Trial Chamber's order to release Lubanga. Eventually the prosecution, with permission of the information providers, disclosed all of the evidence in its possession and the trial resumed.

The Second Standoff: The Prosecution's Refusal to Release the Identity of Intermediary 143

The Appeals Chamber had to step in again to resolve competing obligations of the Prosecutor and the Trial Chamber when the Prosecutor refused to reveal the identity of an intermediary, despite being ordered to do so by the Trial Chamber.

After it was revealed that intermediaries likely influenced witness testimony (see section on "The Use of Intermediaries," above), the Trial Chamber ordered the prosecution to disclose the identifying information of a number of intermediaries, among them Intermediary 143, so that the defense might conduct a further investigation and ensure a fair trial. The defense needed information about the identity of Intermediary 143 in order to conduct its cross-examination of another intermediary, Intermediary 321. The Prosecutor refused to comply with the order to disclose the identity of Intermediary 143. The Prosecutor felt that the Rome Statute imposed a duty on him to protect those who dealt with the Court,³⁸ and since individuals who were considered traitors in the Hema community could be killed, he could not disclose the identity of the intermediary and put his life at risk.

Even after the Trial Chamber determined that protective measures put in place by the Court's Victims and Witnesses Unit (VWU) were sufficient to protect Intermediary 143, the Prosecutor would not comply with the order to disclose the identifying information. The Prosecutor maintained that the prosecution: "would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with [the] office. This is not a challenge to the Chamber; it is instead a reflection of the Prosecutor's own legal duty under the statute."³⁹

³⁷ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "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" (October 21, 2008).

³⁸ Rome Statute, art. 68(1) ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses").

³⁹ *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2516, Prosecution's Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay, 8 July 2010 (filed on July 7, 2010 and notified on July 8, 2010).

The Trial Chamber stayed the proceedings indefinitely on July 8, 2010 and again ordered the unconditional release of Lubanga in an oral decision on July 15, 2010. In its decision to stay the proceedings a second time, the Trial Chamber wrote:

The Prosecutor, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution. Essentially, for the issues covered by Article 68 in this way, he appears to argue that the prosecution has autonomy to comply with, or disregard, the orders of the Chamber, depending on its interpretation of its responsibilities under the Rome Statute framework... No criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations.⁴⁰

On appeal, the Prosecutor argued that it is not only up to the Trial Chamber to assess whether protective measures are sufficient, rather “all organs share responsibility and must act in a coordinated fashion to provide adequate protection.” The Prosecutor argued that his actions were not non-compliance, but grew out of a sense of obligation to this shared duty. In response, the Appeals Chamber straightforwardly reprimanded the Prosecutor’s behavior in refusing to comply with the Trial Chamber’s orders:

The Prosecutor’s non-compliance was deliberate. The Appeals Chamber finds that such willful non-compliance constituted a clear refusal to implement the orders of the Chamber. To characterize such willful non-compliance as anything other than refusal, as the Prosecutor does in his Document in Support of Appeal, is, at best, disingenuous. At worst it is an expression of what the Trial Chamber correctly described as “a more profound and enduring concern”, namely that the Prosecutor may decide whether or not to implement the Trial Chamber’s orders depending on his interpretation of his obligations under the Statute.⁴¹

The Appeals Chamber made clear that “when there is a conflict between the Prosecutor’s perception of his duties and the orders of the Trial Chamber, the Trial Chamber’s orders must prevail to ensure a fair trial. It also said that “the Prosecutor’s duties are subordinate to the authority of the Trial Chamber,” whose responsibility under the Rome Statute “encompasses ensuring not only that a trial is conducted fairly,” but also that the trial is conducted with “due regard for the protection of victims and witnesses.”

⁴⁰ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (July 8, 2010).

⁴¹ *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” (October 8, 2010).

The Appeals Chamber found that the Trial Chamber erred in staying the proceedings before utilizing less severe alternatives like sanctions against the Prosecutor. Because the stay was in error, so was the order for Lubanga's release. The Appeals Chamber overruled the stay and the order for release. On September 13, 2010 the Prosecution offered to disclose Intermediary 143's identity to the defense and the trial resumed on October 25, 2010.

Going Forward

The world watched closely as the ICC struggled through a number of difficult due process issues and friction among the organs of the Court during the Lubanga trial. There were dramatic turns of events, which included witnesses giving false testimony, standoffs between the Trial Chamber and the prosecution, two instances of the Trial Chamber ordering Lubanga's release, and the defense's motion to permanently stay the proceedings for abuse of process.

The Court's first case posed major challenges to the young institution, not only because it was the first ever case, but because the ICC is an institution that operates unlike any domestic court, on a global stage fraught with complicated logistical and political considerations. Although the Court may have to conduct investigations in areas devastated by war or widespread atrocities, where witnesses fear for their lives, process at the ICC has to meet the highest international standards. Ensuring this level of process was the Court's foremost priority in its first case.

The Lubanga Trial Chamber tenaciously championed the rights of the accused.⁴² When the Prosecutor's advocacy for victims and desire to protect witnesses and information providers became so intense that it threatened to compromise the fairness of the trial, both the Trial Chamber and the Appeals Chamber were firm with the Prosecutor. The Trial Chamber refused to conduct a trial where the rights of the accused were compromised in any way, even if this meant the unconditional release of an accused.

Although the Lubanga trial was a success, there are lessons to be learned from it and improvements to be made so that future cases run more quickly and smoothly and to deflect criticism that the ICC is slow and inefficient.

Gathering Evidence

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. The OTP must ensure that all the evidence presented at trial is reliable, even if it is gathered in conflict situations. One way the OTP might do this is by making sure that any intermediaries used by the OTP have been thoroughly vetted. By thoroughly examining intermediaries before relying on the information they provide, the OTP will be able to prevent the significant, time-consuming problem of witnesses providing false information from recurring. Cost will need to be a consideration for the Court in developing and implementing mechanisms for gathering evidence. The Assembly of States Parties has cut back the Court's budget and many of the largest contributors to the ICC have reduced funding citing economic restraints in their respective countries.

⁴² The Trial Chamber even considered Lubanga's cooperation during trial as a mitigating factor during his sentencing. See, Trial Chamber I, *Situation in the Democratic Republic of Congo, Prosecutor v. Lubanga*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 12, 2012).

Charging all Crimes

The omission of sexual violence crimes from the confirmed charges seemed to be a problem particular to the Lubanga case. The omission of the charges and the problems this caused were the direct result of the Prosecutor moving forward with the case before collecting all of the available evidence, because he feared Lubanga might be released. It is unlikely that this factual scenario will be repeated in the future. Sexual crimes are included in the charges against all of the other cases pending against defendants in the DRC situation: Germain Katanga, Mathieu Ngudjolo Chui, Sylvestre Mudacumura and Bosco Ntaganda.

The Role of the Prosecutor

The Appeals Chamber has clarified the role of the Prosecutor in relation to the Trial Chamber. Future Prosecutors will know that that the ultimate authority to ensure due process and the protection of witnesses rests with the Trial Chamber. They are also put on notice that they must be aware of any potentially exculpatory information from the beginning of an investigation, that they must be prepared to disclose this kind of information and that they should strictly limit the use of confidentiality agreements in future investigations.

*Researched and drafted by Stephanie Kammer
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