

Thomas Lubanga and the ICC

In 2004 the Democratic Republic of Congo (DRC) requested that the International Criminal Court (ICC) investigate and prosecute crimes that had occurred in the DRC since July 1, 2002. In 2006 the ICC issued an arrest warrant accusing Thomas Lubanga Dyilo of war crimes for conscripting, enlisting and using child soldiers. The court halted the proceedings against Lubanga in June 2008 because of complex procedural issues. After appeals by the prosecutor, the court's Trial Chamber reinstated the proceedings. Lubanga is the first accused to be tried by the court.

BACKGROUND

Laurent-Désiré Kabila's 1996–1997 campaign to overthrow the repressive rule of Mobutu Sese Seko began a decade of war in the DRC, formerly known as Zaire. A military stalemate and formal foreign occupation by Ugandan and Rwandan forces came to an end with the signing of peace accords in 2002, but fighting continued in the Ituri district in the country's northeast. Thomas Lubanga led the Union des Patriotes Congolais (UPC) and its militia, the Forces Patriotiques pour la Libération du Congo.

DRC authorities arrested Lubanga in March 2005 and charged him with genocide, crimes against humanity and war crimes based on provisions of DRC's military criminal code. The International Criminal Court (ICC) was conducting its own investigation of crimes in Ituri and issued an international arrest warrant for Lubanga's alleged role in conscripting child soldiers. DRC authorities transferred Lubanga to ICC custody in The Hague in March 2006.

AT THE ICC

Shortly before Lubanga's trial was scheduled to begin in June 2008, the Trial Chamber in charge of the case halted the proceedings, after finding fault with the prosecutor's proposed use of evidence collected by the UN and NGOs. At issue were some 200 documents that contained potentially exculpatory evidence – that is, evidence that might help the defense prove Lubanga's innocence. The prosecutor said it could not share these documents with the court or defense lawyers as it obtained them through confidentiality agreements and did not have consent to share them.

The prosecutor appealed the decision to halt the proceedings to the ICC's Appeals Chamber, which in October 2008 issued a decision agreeing with the lower chamber. Over the summer and in the fall, however, the prosecutor had worked to obtain permission to share confidential information from the UN and NGOs that had provided it. On November 18, 2008, the Trial Chamber of the ICC ruled that because the prosecutor could now make most of the documents available, this was sufficient to guarantee a fair trial for Lubanga. The court reinstated the proceedings against him and scheduled his trial to begin January 26, 2009.

LESSONS LEARNED FROM THE LUBANGA CASE

Lubanga is the first defendant now formally scheduled to go to trial at the ICC. The court's decisions offer some important lessons for the ICC's work going forward:

- **The ICC Statute gives a more limited scope for confidentiality agreements than presumed by the prosecutor:** The court's Lubanga decisions determined that full confidentiality for sources can only be offered in limited circumstances and solely for the purpose of generating new evidence, and that it must be balanced with other rules such as the requirement to disclose exculpatory evidence. The challenge for the ICC is that some investigations of alleged crimes take place in the midst of ongoing conflict. The court in the Lubanga trial demonstrated its attempt to strike a balance between acknowledging the security and confidentiality concerns of "intermediary" sources of evidence, such as the UN and Congolese NGOs, and the right of defendants to a fair trial.
- **The ICC is committed to fair trial standards:** The procedural decisions from the Trial and Appeals Chamber of the ICC in the Lubanga case confirm the court's commitment to guaranteeing fair trials for persons charged with serious crimes. The judges' vigilance in Lubanga's case is welcome and rightly sets a high standard for proceedings going forward. The integrity of international justice rests on meeting the highest standards of due process and respect for the rights of the accused.
- **The ICC must continuously improve its outreach:** Keeping the public well informed is a vital task for any court. This is an especially difficult challenge for an international court whose proceedings are complex and take place far from where the alleged crimes occurred, where witnesses and victims live, and where the public has the most at stake in the outcome. It is important that the ICC keep the Congolese people informed of the court's work, its decisions, and the reasons behind them.

THE ICC

Office of the Prosecutor: An independent organ of the court, it investigates allegations of the commission of war crimes and determines whether to pursue prosecutions against selected alleged perpetrators. Situations can be referred to the court for investigation by member states, as occurred with the DRC, or by the UN Security Council, as is the case with the situation under investigation in the Darfur region of Sudan.

The Pre-Trial Chamber: Has authority to issue an arrest warrant after considering submissions by the prosecutor. When a wanted person appears before the court, the Pre-Trial Chamber holds a hearing to confirm the charges that will be the basis of the trial.

The Trial Chamber: If the charges are confirmed the court assigns the case to a three-judge Trial Chamber responsible for conducting fair and expeditious proceedings. After the conclusion of testimony the Trial Chamber issues its decision, acquitting or convicting the accused. If the person is convicted the Trial Chamber issues a sentence of imprisonment and may also order reparations to victims.

Appeals Chamber: Throughout the proceedings the parties can appeal decisions to an Appeal Chamber of five judges. The Trial Chamber's verdict or sentence may be appealed by the prosecutor or the accused.

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