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Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court

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Introduction

On March 14, 2012, Trial Chamber I of the International Criminal Court (“ICC”) convicted Thomas Lubanga Dyilo, former president of a Congolese militia group, the Union des Patriotes Congolais (“UPC”), on one count of conscripting, enlisting and using child soldiers, a crime under the Rome Statute of the ICC. The

allegations were connected to the non-international armed conflict taking place in the Ituri region of northeastern Democratic Republic of Congo (“DRC”) between September 2002 and August 2003.[1]

The *Lubanga* judgment, the first judgment to be issued by the ICC, brings to a close six years of proceedings that began with the ICC’s issuance of an arrest warrant for Thomas Lubanga in February 2006. The trial was suspended twice for due process reasons: first, before the trial began, when the prosecutor failed to disclose information to the defense, and second, when the prosecutor refused to disclose the identity of an intermediary, as set out in further detail below. Additionally, at the pre-trial phase (and affirmed at trial), the ICC judges reversed the procedural approach of other international tribunals by prohibiting witness proofing,[2] a move which may have contributed to the first witness in the case to initially seek to retract his testimony on the stand.[3]

The case now moves to the sentencing and reparations phase, with submissions to be filed by April 18, 2012.[4] The prosecution has indicated that it will seek a sentence “close to the maximum,”[5] which according to Article 77(1)(a) of the Rome Statute cannot be more than thirty years (although life sentences are possible depending on the extreme gravity of the crime and individual circumstances of the convicted person).[6]

This *Insight* provides an overview of the prosecution and defense positions on key issues, summarizes the principal findings of the Trial Chamber, and addresses the question of the prosecution’s use of intermediaries to identify witnesses. It concludes with some remarks,

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highlighting a key point from the *Lubanga* trial which the ICC must address by the end of this year.

The Parties' Positions

The Pre-Trial judges confirmed the charges against Thomas Lubanga under Article 8(2)(e) (vii) of the Rome Statute, which prohibits “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”^[7] The prosecutor argued that the accused agreed with others to gain power in Ituri through the recruitment of young persons, including through the recruitment of children into the military wing of the UPC.^[8] The methods for recruiting children included abduction and pressuring the population to provide children to the UPC.^[9] During military training, the UPC allegedly abducted, beat, whipped, imprisoned, and inadequately fed children, and raped young girls.^[10]

The defense challenged the prosecution on two separate approaches. First, it challenged the testimony of child soldier witnesses, arguing that the proceedings should be stayed due to abuse of process. The defense alleged that prosecution intermediaries—individuals who helped the prosecution identify witnesses—coached witnesses to provide false testimony. Additionally, the defense argued that the prosecution failed to fulfill its obligations to investigate potentially exculpatory circumstances or to disclose all such exculpatory evidence.^[11] Second, the defense denied individual criminal responsibility by arguing that Thomas Lubanga was not involved in an alleged criminal plan and did not play a central role in the military wing of the UPC, but instead implemented measures prohibiting the recruitment of child soldiers and ensuring their demobilization.^[12]

The Rome Statute was the first to incorporate the victims of the atrocities into the legal proceedings by enabling victims' participation as civil parties, thus following the civil law system. Article 68(3) of the Rome Statute states that “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.” Such participation should, however, not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” The judges permitted 129 victims to participate in the *Lubanga* trial, and lawyers representing these victims attended hearings and, throughout the trial, requested leave to make interventions in the interests of the victims.^[13]

The Court's Findings

The Trial Chamber unanimously convicted Thomas Lubanga of the charges. The Trial Chamber found that “conscripting” and “enlistment” are both forms of recruitment in that they refer to “coercive” or “voluntary” incorporation, respectively, into an armed group.^[14] The Chamber affirmed that these were separate offenses, distinct from the offense of “using” children to participate actively in hostilities.^[15] The Chamber therefore concluded that consent of the child did not constitute a valid defense.^[16] With respect to children who may have an “indirect” role in a conflict, the Chamber ruled that it is necessary to determine if “the support provided by the child to the combatants exposed him or her to real danger as a potential target.”^[17] The majority found that it could not consider whether sexual violence would be incorporated within this definition since the prosecutor did not plead these facts; however, the majority indicated it could consider whether this should be considered in sentencing and reparations.^[18]

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Presiding Judge Fulford issued a separate opinion, and Judge Odio Benito wrote a separate and dissenting opinion. Judge Odio Benito stated that sexual violence could be considered “using” children in armed conflict.[19] Additionally, she found that the reference to “national armed forces” under Article 8(2)(b)(xxvi) of the Rome Statute should not be construed narrowly so to exclude militia groups.[20]

With respect to the mode of liability, the allegations concerned Article 25(3)(a) of the Rome Statute, which includes the criminal liability of “co-perpetration” by referring to commission “jointly with another.” Thomas Lubanga was charged with committing the crimes through coordination with other senior leaders within the UPC, particularly others in charge of military operations. The Trial Chamber found that co-perpetration involves two objective elements, namely: (i) the existence of an agreement or common plan between two or more persons embodying a sufficient risk that, if events follow the ordinary course, would result in the commission of a crime; and (ii) essential contribution to the common plan by the accused that resulted in the commission of the relevant crime.[21] The majority also found that co-perpetration was based upon the theory of collective control over the crime.[22] Judge Fulford’s separate opinion disputed that there was any basis for this theory under the Rome Statute, and he rejected the argument that there was a hierarchy of liability within the Rome Statute.[23] Instead Judge Fulford preferred elements that complied better with a plain reading of the Rome Statute.[24]

For the mental element, the Chamber found that it was necessary to prove that (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of fifteen to participate actively in hostilities or that they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events;” and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.[25]

The Trial Chamber also found that a non-international armed conflict took place in the DRC at the time of the charges. Relying on Regulation 55, the Trial Chamber amended the legal characterization of the charges, which the Pre-Trial Chamber initially found to pertain to an international armed conflict.[26]

Intermediaries

Intermediaries are people or organizations that help the Court connect with witnesses and others, facilitating activities such as locating or communicating with witnesses or victims, particularly in settings without mobile phone coverage or transportation access.[27] In the *Lubanga* case, the Court faced the issue of how to manage the interaction with intermediaries.

Although many intermediaries are volunteers, some require compensation for their expenses, and sometimes, due to security concerns, the Court must provide protection to intermediaries because they may be “persons at risk on account of the activities of the Court.”[28] The defense argued that a prosecution intermediary had been misusing the Court to receive money and as a result had coached witnesses to tell the prosecution false evidence. The Chamber found that there was a risk that three intermediaries may have persuaded, encouraged, or assisted witnesses to give false evidence, which could itself constitute a crime under Article 70 of the Rome Statute and which the prosecutor can investigate under Rule 165 of the Rules.[29] The Chambers did not direct the prosecutor to stop working with intermediaries; instead it indicated that the prosecution could not

delegate its investigative work to intermediaries.

Last year the Court finalized Draft Guidelines on Intermediaries. These Draft Guidelines will be considered by the ICC Assembly of States Parties meeting in November 2012.

Conclusion

In convicting Thomas Lubanga, the judges found that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted in the conscription and enlistment of boys and girls under the age of fifteen, and their use to participate actively in hostilities.^[30] This judgment sets a clear precedent that such crimes are not beyond the reach of the law.

To some extent, concerns raised in *Lubanga* have been addressed in subsequent cases. Although the *Lubanga* case lasted for six years, because it was the first ever case at the ICC, it addressed previously unconsidered procedural and technical matters, such as disclosure and protection requirements. Additionally, all subsequent ICC trial proceedings have included more than one charge, and all have included sexual violence charges.

Perhaps a key area for future attention is the assistance the Court receives from intermediaries. All previous international war crime tribunals focused solely on one country or region but still required cooperation from non-tribunal staff. The need to work with intermediaries is even more pressing in the case of the ICC, which is the only court with global jurisdiction. The ICC must cover all 120 State Parties and countries referred to it by the Security Council (currently the situations in Darfur and Libya). To date, seven situations are under investigation by the ICC: Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur (Sudan), Kenya, Libya, and Côte d'Ivoire. Five individuals are in ICC custody, and eleven suspects are at large. Since the Court is required to cooperate with intermediaries, it should make a concerted effort to ensure that the Draft Guidelines on Intermediaries are implemented this year.

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Endnotes:

[1] See background papers at <http://www.lubangatrial.org/2012/03/12/briefing-paper-the-trial-of-thomas-lubanga-dyilo-at-the-icc/>.

[2] Prosecutor v. Thomas Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov. 30, 2007).

[3] Rachel Irwin, *Lubanga Trial, Week 1: Prosecutors Stumble out of the Gate*, Open Society Justice Initiative (Jan. 30, 2009), <http://www.lubangatrial.org/2009/01/30/lubanga-trial-week-1-prosecutors-stumble-out-of-the-gate/>.

[4] Prosecutor v. Thomas Lubanga, Case No. ICC-01/04-01/06, Scheduling Order Concerning Timetable for Sentencing and Reparations, ¶¶ 3, 8, 9 (Mar. 14, 2012).

[5] See Lubanga Case: Press Conference by ICC Prosecutor (Mar. 14, 2012), *available at* http://www.youtube.com/watch?v=eoj_qCwHePk.

[6] Rome Statute of the International Criminal Court art. 77(1)(a), 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

[7] Prosecutor v. Thomas Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 158 (Jan. 29, 2007).

[8] Prosecutor v. Thomas Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 22 & 29 (Mar. 14, 2012) [hereinafter *Lubanga Trial Judgment*].

[9] *Id.* ¶ 30.

[10] *Id.* ¶ 32.

[11] *Id.* ¶¶ 37-38.

[12] *Id.* ¶¶ 40-51.

[13] *Id.* ¶¶ 54-56.

[14] *Id.* ¶ 607.

[15] *Id.* ¶ 609.

[16] *Id.* ¶ 617.

[17] *Id.* ¶ 628.

[18] *Id.* ¶¶ 630 & 631.

[19] *Id.* (Odio Benito, J., dissenting, ¶ 17).

[20] *Id.* (Odio Benito, J., dissenting, ¶¶ 12-14).

[21] *Id.* ¶¶ 980, 981, 985, 999-1006.

[22] *Id.* ¶ 994.

[23] *Id.* (Fulford, J., dissenting, ¶¶ 6-12).

[24] *Id.* (Fulford, J., dissenting, ¶ 16).

[25] *Id.* ¶ 1013. *See also* ¶ 1016 (on the *mens rea* for the contextual elements).

[26] *Id.* ¶¶ 523-67.

[27] *See* Commentary on the Draft ICC Guidelines on Intermediaries (Open Society Justice Initiative Aug. 18, 2011), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/icc-intermediaries-20110818.

[28] International Criminal Court Rules of Procedure and Evidence Rule 87, Doc. No. ICC-ASP/1/3 (Sept. 9, 2002), *available at* <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm> (Rule 87 pertains to protective measures).

[29] Lubanga Trial Judgment, *supra* note 8, ¶¶ 178-484.

[30] *Id.* ¶ 1351.