

BRIEFING PAPER

The Trial of Thomas Lubanga at the International Criminal Court: The Appeal Judgment

EXECUTIVE SUMMARY

The International Criminal Court (ICC) will release its appeal judgment in the case against Thomas Lubanga Dyilo on Monday, December 1, 2014. This briefing paper sets the stage for that decision by summarizing the main issues in the appeal, with hyperlinks to relevant portions of the Open Society Justice Initiative's trials monitoring website: www.ijmonitor.org.

The Charges

Thomas Lubanga is the former president of the Union of Congolese Patriots (UPC), which was a party to the conflict in the Democratic Republic of Congo (DRC) from 2001 to 2004. Lubanga was tried and convicted of the war crimes of enlisting and conscripting children under the age of 15 into the UPC rebel group and using them to participate actively in hostilities. The crimes occurred between September 1, 2002 and August 13, 2003 during an armed conflict in the DRC.

Lubanga's was the first trial to be launched by the ICC and will be the first to be completed by the world's only permanent court mandated to try war crimes, crimes against humanity, and genocide. It is the only trial to date conducted by the ICC that is solely related to the use of child soldiers.

The Conviction

On March 14, 2012, Trial Chamber I of the ICC ruled that the prosecution had proved beyond reasonable doubt that Lubanga was [guilty of the crimes charged](#). Judge Adrian Fulford, presiding judge of the trial chamber, in delivering the verdict, said that there was reasonable evidence to believe that Lubanga was involved in a recruitment drive for his UPC rebel group and that this drive included conscripting children and using them for combat purposes. The judges also found that Lubanga personally used children as his bodyguards.

However, the judges agreed with the defense on allegations that the prosecution had delegated its investigations to local intermediaries in the DRC and that these intermediaries manipulated and influenced some witnesses to lie against Lubanga. The evidence provided by these prosecution witnesses was therefore disregarded by the judges. But on the strength of other prosecution evidence, including video footage of Lubanga addressing children at a UPC training camp, the judges found that Lubanga is guilty of the charges against him.

The Sentencing

On July 10, 2012, Trial Chamber I [sentenced Lubanga to 14 years of imprisonment](#). The chamber deducted the time Lubanga had already spent in detention since his arrest in March 2006, which reduced his remaining time in prison to eight years. In sentencing Lubanga, the judges took into consideration the gravity of the crimes, extent of the damage caused, and the degree of participation by the individual convicted.

In its submission for sentencing, the prosecution recommended that Lubanga should be given a prison sentence of 30 years. The prosecution cited a number of aggravating circumstances, including Lubanga's position of authority as the president of the UPC and the cruel treatment of the children, particularly being abducted from their homes and being trained to murder and rape.

The defense submitted that in addition to time spent in ICC custody, the time Lubanga spent under house arrest and detention in the DRC between 2003 and 2006 should also be deducted from his sentence. The defense argued that the detention in DRC was imposed as a result of the same conduct Lubanga engaged in as president of the UPC.

The Legal Issues in the Appeal

On December 3, 2012, the prosecution and defense filed submission before the Appeals Chamber. The prosecution appealed the 14 year prison sentence while the defense appealed both Lubanga's conviction and prison sentence.

The Prosecution

On appeal, the prosecution asked the judges to [increase Lubanga's 14 year prison sentence](#). The prosecution considered that sentence to be "manifestly inadequate and disproportionate to the gravity of the crime," and said that the sentence failed to give sufficient weight to the severity of the crimes against children and the extent of the damage to victims and their families. In addition, according to the prosecution, the sentence did not give sufficient weight to Lubanga's unlawful behavior, his degree of participation, and the means used to commit the crimes.

The prosecution further argued that the trial chamber failed to consider two aggravating circumstances: the abuse of the authority and trust held by Lubanga and the cruel treatment and sexual violence committed against children. These errors should result in the upward revision of Lubanga's sentence, the prosecution claims.

The Defense

The defense raised several issues in its appeal, namely that Lubanga's fair trial rights were violated, the trial chamber failed to establish the presence of child soldiers under the age of 15 in the military wing of the UPC, and the chamber incorrectly applied the standard of law relating to his individual criminal liability.

Regarding Lubanga's fair trial rights, the defense claimed that the trial chamber erred when it did not find that the prosecution committed a serious violation of its obligation to investigate exonerating circumstances. The trial chamber also failed to address any potential prejudice to Lubanga arising from late disclosures by the prosecution, the defense said. Among the materials that the defense claimed were disclosed late was a list of soldiers in Lubanga's UPC, dating from December 2004. The defense also argued that the trial chamber misjudged the evidence in finding that children under that age of 15 were present in the UPC's militia, including improperly drawing conclusions about the age of individuals based on video footage.

The Appeals Hearing

On May 19-20, 2014, the ICC Appeals Chamber heard oral submissions from the prosecution and defense relating to Lubanga's appeal. The hearing mainly centered around [the age of the soldiers](#) in the UPC, with the defense arguing that the trial chamber "erred gravely" by relying on the physical appearance of soldiers—as seen in a video—to determine that the fighters shown were child soldiers. The defense also highlighted the prosecution's failure to release the list of Lubanga's soldiers before the verdict was issued.

Two of [Lubanga's former bodyguards](#), who were part of the presidential guard of the UPC, also testified during the appeals hearing. They gave evidence that at the time of the crimes, they were 18 and 19 years old, respectively.

The prosecution said that the evidence provided by the defense on the age of the soldiers in Lubanga's UPC was insufficient to alter his conviction. The prosecution also rejected the defense claim that Lubanga's rights were violated by the failure to disclose certain documents because Lubanga had the means to know who those soldiers were.

What Happens after the Appeal Judgment Is Delivered?

If the Appeals Chamber upholds, reduces, or increases the 14 year jail term to which Lubanga has been sentenced, he will remain in prison. Throughout the appeal process, Lubanga has been serving his sentence at the ICC detention facility in The Hague.

If the Appeals Chamber reverses Lubanga's conviction on all charges, he will be allowed to walk out of court as a free man. Any decision of the Appeals Chamber will be final and will not be subject to further appeal.

Timeline of Significant Events

February 10, 2006: An ICC arrest warrant is issued for Thomas Lubanga after two years of investigations by the ICC prosecution into the conflict in the Ituri region of the Democratic Republic of Congo. Lubanga is handed over to the ICC on March 17, 2006.

June 13, 2008: Ten days before the trial is due to start before the ICC's Trial Chamber I, the judges halt the proceedings. The court rules it is impossible for Lubanga to receive a fair trial after it learns the prosecutor withheld potentially exculpatory evidence from the defense.

July 2, 2008: The court orders Lubanga's unconditional release from detention.

October 21, 2008: The ICC Appeals Chamber reverses the release order, but maintains the stay of proceedings. It returns the case to the trial chamber, which subsequently determines that the necessary information has been handed over, and sets a trial date.

January 28, 2009: [The trial begins.](#)

May 22, 2009: Victims participating in the trial file an application claiming existing evidence warranted the additional charges of sexual slavery and cruel and inhuman treatment.

July 14, 2009: [The prosecution closes its case.](#) The trial chamber judges rule in favor of the victims' application to add new charges based on both fresh and existing evidence.

December 8, 2009: After months of delay, the Appeals [Chamber reverses the trial chamber decision to allow additional charges.](#)

July 8, 2010: The court [stays the case a second time](#), after the prosecution refuses to obey an order to disclose the identity of an intermediary used by the prosecution to contact witnesses. The court again orders Lubanga's release from detention. The defense claimed that this intermediary had coached and bribed witnesses. The court issued a formal warning to the ICC prosecutors for refusing to implement the chamber's orders.

October 8, 2010: [The stay of proceedings is reversed](#) by the Appeals Chamber which says the trial chamber erred when it stayed the proceedings without first considering less drastic measures.

April 15, 2011: [Final defense witness concludes his testimony.](#)

May 20, 2011: The official [close of the evidence phase](#) of the trial.

August 25-26, 2011: Closing statements are held at the court.

March 14, 2012: Trial Chamber I [finds Lubanga guilty](#) of committing the war crimes of enlisting and conscripting children under the age of fifteen.

July 10, 2012: Trial Chamber I [sentences Lubanga to 14 years](#) of imprisonment.

August 7, 2012: Trial Chamber I issues the first ICC [decision on reparations](#) for victims and orders that proposals for reparations be submitted to the Trust Fund for Victims for the chamber's approval.

December 3, 2012: Lubanga files an appeal against his conviction and 14 years prison sentence. The prosecution also files an appeal, asking the Appeals Chamber to increase Lubanga's prison term.

May 19-20, 2014: An appeals hearing is held at the ICC. Appeals Chamber judges hear [testimony of two former bodyguards](#) to Lubanga, who say they were not child soldiers when they joined his militia. Lubanga also makes an unsworn statement.

December 1, 2014: [Judgment in the appeal](#) will be announced.

To speak to one of our experts at the Open Society Justice Initiative, contact:
jonathan.birchall@opensocietyfoundations.org
Tel: +1 212 547 6958

E-mail: info@justiceinitiative.org
www.justiceinitiative.org

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