



## **Recent Development in the ICC Trial of Thomas Lubanga**

### **Questions and Answers**

#### **1. Who is Thomas Lubanga? What crimes is he charged with?**

Thomas Lubanga is the first person to be tried by the International Criminal Court (ICC). He was the president of the Union of Congolese Patriots (UPC), a militia group purporting to further the interests of the Hema ethnic group in the Ituri region of northeastern Democratic Republic of Congo (DRC). The UPC has been implicated in many serious human rights abuses including ethnic massacres, torture and rape. Lubanga is being prosecuted for the war crimes of enlisting and conscripting children under the age of 15 years as soldiers and using them to actively participate in hostilities in 2002-2003. The trial began before Trial Chamber I of the ICC in January 2009.

#### **2. Why have the judges ordered Lubanga's release?**

Trial Chamber I heard on July 15, 2010, submissions as to whether or not to keep Lubanga in detention after it had decided to stay the proceedings against him (see below question 3). Lubanga has been in preventive detention for four years. At the end of the hearing, Trial Chamber I ordered that Lubanga be released. However, this decision is not going to be executed immediately. Indeed, the prosecutor has five days to ask the Appeals Chamber to suspend the decision to release Lubanga while it is considering the appeal in relation to the stay of proceedings.

The same issue also arose in 2008, when the chamber stayed the proceedings due to the prosecution's failure to disclose exculpatory evidence (see below question 10). Although the trial chamber had initially ordered that Lubanga be released, the Appeals Chamber had then reversed this decision, indicating that a stay of proceedings subjected to conditions did not necessarily warrant the release of the accused and that other relevant factors, such as the risk that he flee or threaten witnesses should also be taken into consideration.

Thus, a stay of proceedings does not automatically mean that the accused will be released.

### **3. Why is the Lubanga trial stayed?**

On July 8, 2010, the three judges of Trial Chamber I unanimously decided to "stay" the proceedings against Lubanga – meaning that in all respects, the trial has been halted – due to the failure of the prosecutor to comply with the chamber's order that he reveal the identity of one of his intermediaries to Lubanga and his defense team. In this context, intermediaries are persons who provide assistance to the Office of the Prosecutor with discrete aspects of its investigations, including by identifying leads or witnesses. The judges found that without at least a limited disclosure to the Lubanga defense team of the intermediary's identity and in light of the prosecution's failure to comply with its orders, a fair trial is not possible under the current circumstances. The Office of the Prosecutor has appealed the decision to stay the proceedings.

### **4. What led to the decision to stay the trial?**

The current focus of Lubanga's defense is to discredit prosecution witnesses who claim to have been child soldiers in the UPC. Since the opening of the defense case on January 27, 2010, some of the defense witnesses have testified that they had been paid or coached by intermediaries of the Office of the Prosecutor to lie. Three intermediaries in particular, known by the pseudonyms "321," "316," and "143," were repeatedly cited as having engaged in such practices.

In order to enable Lubanga's team to fully investigate these allegations, the judges ordered the prosecution, on May 12, 2010, to reveal the identities of the three intermediaries to the defense, once protection measures would be in place for each of them. In addition, the judges requested that the Office of the Prosecutor present some of its staff and intermediaries "321" and "316" to be questioned in court about their working methods on the ground. They found that the allegations against intermediary 143 did not merit calling him to testify in court but that his identity should nonetheless be revealed to Lubanga and his defense team.

On July 6, after a lengthy delay in implementing the protective measures for intermediary 143, and emerging information that he had changed his mind about what these should be, and despite the lack of such measures being in place for him, the judges ordered that his

identity be disclosed in a limited manner. The prosecution was ordered to disclose the intermediary's name, but only to Lubanga, the defense team in The Hague, and an individual working on behalf of the defense in the DRC (known as a "resource person"). Disclosure was moreover ordered for the sole purpose of questioning another intermediary who is currently testifying. The judges determined that it was essential that the defense know the identity of intermediary 143 in order to be able to fully cross-examine the other intermediary, because they had had contact with each other.

At the end of the hearing on July 6, the prosecution indicated that it intended to appeal this decision and needed the five day delay provided in the ICC rules to do so. The chamber suspended its order overnight and said it would reconvene the next morning to reevaluate the issues.

On July 7, unpersuaded by the prosecution's arguments, the trial chamber once more ordered that the identity of intermediary 143 be immediately disclosed, notwithstanding the prosecution's stated intention to appeal. That day, prosecutors failed to execute the trial chamber's repeated orders to disclose the identity of intermediary 143. To explain this attitude, the prosecution said that intermediary 143's life may be at risk if his identity were revealed without protective measures in place.

##### **5. What is the basis of the judges' decision that Lubanga cannot have a fair trial in these circumstances?**

On July 7, 2010, in response to the court's third order to disclose the identity of the intermediary to the defense, the prosecution filed an urgent motion for the judges to either extend the time limit for disclosure of his identity or, alternatively, to stay the proceedings while consultations with the court's witness protection experts (the Victims and Witnesses Unit) were ongoing about the security situation of the intermediary.

On July 8, the judges unanimously decided to stay the proceedings, but not for the reason put forward by the prosecution.

The judges found that the failure of the prosecution to reveal the identity of intermediary 143 prevented the defense team from effectively cross-examining the other intermediary who was currently testifying before the court.

Additionally, the judges found that the repeated refusal of the Office of the Prosecutor to implement the chamber's orders of July 7 constituted "an abuse of the process of the Court" and created a situation in which the "fair trial of the accused [was] no longer possible, and justice [could not] be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework."

#### **6. Are the judges being insensitive to security risks faced by intermediaries?**

The July 8 decision staying proceedings reveals a disagreement between the judges and the prosecution about the security situation of intermediary 143 and about the possible consequences of limited disclosure of his identity.

The prosecution claimed that it cannot implement the judges' order to disclose the identity of intermediary 143 because doing so puts the intermediary at risk of being killed. The prosecution stressed that "it has an independent statutory obligation to protect persons at risk on account of the Prosecution's actions. It should not comply, or be asked to comply, with an order that may require it to violate its separate statutory obligation by subjecting the person to foreseeable risk."

In accordance with their responsibilities under the Rome Statute, ICC judges have routinely made decisions relating to the protection and security of witnesses, sources and intermediaries. In this instance, the judges have stressed that they are "alive to the potential risks to the intermediaries employed by the prosecution once their identities are revealed to the accused." The trial chamber decision of May 12, 2010 provided that the identity of the three concerned intermediaries would be revealed to the defense only once protective measures had been put in place for each of them. Protection measures were implemented for the two other intermediaries. Intermediary 143 initially agreed to the protective scheme proposed by the Victims and Witnesses Unit. But he changed his mind at the last minute, on July 6, 2010, just as the scheme was about to be implemented, and asked for additional guarantees.

The judges consulted again with the court's protection experts who informed them that, in their view, disclosure of intermediary 143's identity under the strict conditions the chamber had set would not endanger him. The judges then decided that Lubanga's right to a fair and expeditious trial compelled immediate disclosure even in the absence of protective measures. The prosecution disagreed with this assessment.

Difficult decisions and careful balancing of various interests are at play in this series of decisions.

**7. What is the security situation in Bunia? Have there been threats to witnesses and intermediaries?**

Human Rights Watch has no information about the identity of intermediary 143 or his personal security situation. Human Rights Watch has, however, documented some security threats in the Ituri district connected to the Lubanga trial, including threats that allegedly came from members of Lubanga's armed group. A number of Lubanga's supporters remain influential. Several human rights activists and journalists linked to the work of the ICC have reported death threats, intimidation and other forms of harassment. Some were compelled to leave Bunia and believe it is not yet safe for them to return. The court itself has recognized that those who have helped the ICC have done so in the face of substantial safety risks. To date, most witnesses in the Lubanga trial have benefited from some forms of protection measures. The appointment of Dieudonné Mbuna, a well known UPC leader, as resource person in the DRC for Lubanga's defense team has raised concerns. This may be one reason the prosecution is particularly cautious in this situation. However the judges have found that concerns expressed in court about Mbuna have not been substantiated thus far.

**8. Do prosecutors regularly use intermediaries for investigations?**

Intermediaries are individuals or organizations that facilitate victims and witnesses' cooperation with the ICC. Various organs and units of the court rely on intermediaries to assist in performing their tasks. The Office of the Prosecutor uses intermediaries to facilitate contacts between investigators and possible witnesses and to provide background information, among other things. The office has emphasized that intermediaries do not conduct investigations. In light of the difficult security situation in Ituri at the time investigations were conducted, intermediaries enabled ICC investigators to contact potential witnesses in a more discreet and secure manner.

Intermediaries perform essential tasks that contribute to enabling the court to successfully discharge its mandate. The ICC has been working for years to standardize its policy on intermediaries between the Office of the Prosecutor and the Registry and its various units. Current developments underscore the importance and urgency of that task. While different policies may be appropriate for different kinds of intermediaries, intermediaries like those

at the center of the current developments in the Lubanga trial should be carefully selected, well trained – including with regard to ethical aspects of their tasks– and financially compensated for their work, as appropriate. They should also benefit from some measure of protection when their lives are put in danger directly because of work performed at the request of the ICC. The current impasse in the trial shows that, while intermediaries may be indispensable in the course of investigations, their use comes with challenges. An evaluation of current practices and policies in this regard is important, with a view to determining carefully under what circumstances and within what limits intermediaries should be used.

#### **9. What about the prosecution’s refusal to execute the judges’ orders?**

Implementation of court orders by the various parties is of course an essential aspect of efficient and fair judicial proceedings.

In this case, as discussed above, the prosecution justified its unwillingness to comply with the judicial orders on its assessment that the life of intermediary 143 would be at risk if it did so. The prosecution argued that its interpretation of the Rome Statute is that, while it has an obligation to comply with the judges’ orders, it also has a separate, autonomous obligation under the Rome Statute to ensure the protection of persons put at risk on account of the prosecution’s actions.

For its part, the chamber, in its decision staying the proceedings, expressed profound concern at the prosecution’s position that it does not consider itself under a strict obligation to execute the judges’ decision when they relate to protection issues. The judges said that, under the Rome Statute, it is the judges who have the ultimate responsibility to deal with protection issues during trial. The judges added in their decision that “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.”

#### **10. Haven’t proceedings against Lubanga been stayed before?**

Yes. Proceedings against Lubanga have already been stayed once before.

On June 13, 2008, the judges of Trial Chamber I decided unanimously to stay the proceedings against Lubanga because the prosecution had been unable to disclose over

200 “exculpatory” documents to the defense. The judges found that “the right to a fair trial includes an entitlement to disclosure of exculpatory material” and that the trial could not start on a fair basis if it was not disclosed. On November 18, 2008, however, the trial chamber decided to lift the stay and resume the proceedings against Lubanga because it was satisfied that the problem had been successfully addressed by the Office of the Prosecutor.

#### **11. What happens next? Is the Lubanga trial over?**

The prosecutor has appealed the decision to stay the proceedings, on July 15, 2010.

In addition, in light of the Appeals Chamber’s decision on the previous stay, it may be possible for the trial chamber itself to lift the stay, if the obstacles that led to its imposition can be overcome. The judges have already indicated that at least one of the two issues justifying their stay, namely the disclosure of the identity of intermediary 143, will likely be solved, as soon as protection measures acceptable to intermediary 143 are put in place. It is not clear what will be required to address the second source of impasse, that is, the prosecution’s refusal to implement the chamber’s orders. The judges have issued warnings to Prosecutor Luis Moreno Ocampo and Deputy Prosecutor Fatou Bensouda that they are considering sanctions about the prosecution’s refusal to execute chambers’ orders.

#### **12. Why is this trial taking so long? Is the court inefficient?**

Although Lubanga was arrested and transferred to the ICC in March 2006, his trial did not begin until January 2009. This was due to a number of factors, including the ICC’s pre-trial proceedings which provide for a confirmation of charges hearing to decide whether or not the case should be sent to trial and, as explained above in question 10, because proceedings were stayed once due to the inability of the prosecution to fully disclose exculpatory information. Once the trial began, the prosecutor had presented all his evidence and witnesses by the court’s summer recess in July 2009, and the defense started its case at the end of January 2010.

In the normal course of things, trials of international crimes do take time, with the prosecution and the defense entitled to vigorously present and defend their positions. In addition, some delays in the ICC’s first trials are also to be expected. The ICC is a new institution with innovative pre-trial procedures and a clear recognition of the right of victims to participate in proceedings. These innovations need to be worked out in practice. In

addition, as a court of last resort, the ICC has a careful relationship with national courts that has given rise to challenges over the admissibility of proceedings before the ICC in most of its cases. As discussed above, questions have also arisen about how to balance the prosecution's disclosure obligations with its need to protect the confidentiality of sources.

In the face of these challenges, judges of the ICC must remain committed to ensuring that justice is done, which includes respecting the accused's rights to a fair and expeditious trial.

### **13. Why are all defendants at the ICC Congolese?**

The presence of four Congolese nationals before the ICC is a tribute to effective cooperation in executing ICC arrest warrants against them by the DRC authorities (in the case of Lubanga, Katanga and Ngudjolo) and Belgium (in the case of Jean-Pierre Bemba). One arrest warrant, against the former chief of staff of Lubanga's UPC, Bosco Ntaganda, has not yet been executed. Ntaganda is still at large in the Kivus region in eastern Congo. He is currently a general in the Congolese army and the DRC government has said that it is not, at the moment, willing to arrest him, despite its obligation under the ICC statute to do so.

The ICC has issued seven other arrest warrants in relation to its investigations in Uganda and in Darfur but these warrants have not been executed. The ICC does not have its own police force and relies on state cooperation to arrest suspects.

Not all of those who have appeared before the ICC are Congolese. The ICC heard in November 2009 confirmation of charges proceedings against Darfur rebel leader Abu Garda. Abu Garda had presented himself voluntarily to the court. The ICC judges later declined to confirm the charges against him and to move the case to trial. The prosecutor has indicated that he would present additional evidence against Abu Garda. Also responding voluntarily to summons to appear from the court, two other rebel leaders from Darfur recently presented themselves to ICC judges. Abdallah Banda, the commander in chief of the Justice and Equality Movement (JEM), and Saleh Mohammed Jerbo, former chief of staff of the SLA-unity, are both charged with three counts of war crimes in relation to an attack on African Union peacekeepers in Haskanita in 2007.