



Democratic Republic of Congo and the International Criminal Court Hearing to Confirm the Charges against Thomas Lubanga Dyilo

Questions and Answers

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1. Who is Thomas Lubanga?

Thomas Lubanga was the president of the Union of Congolese Patriots (UPC), a militia purporting to further the interests of the Hema ethnic group in the Ituri region of northeastern Democratic Republic of Congo (DRC). This group has been implicated in ethnic massacres, torture and rape. In February 2005, DRC authorities arrested Lubanga and others following the killing of nine United Nations peacekeepers in Ituri. They were charged with genocide, war crimes, and crimes against humanity but were not brought to trial. On March 17, Lubanga was transferred to the International Criminal Court (ICC) in The Hague on charges of war crimes committed in Ituri.

2. What charges did the ICC prosecutor bring against Lubanga?

Lubanga is charged under article 8 of the Rome Statute of the ICC with the war crimes of enlisting and conscripting children under the age of 15 years as soldiers and using them to participate actively in hostilities. Pre-Trial Chamber I of the ICC determined that there were “reasonable grounds to believe” he committed these crimes and issued an arrest warrant against him on February 10, 2006.¹

3. What is the purpose of the upcoming hearing to confirm the charges against him?

The hearing, scheduled to begin on November 9, is to confirm the charges against Lubanga. It is not a trial. Rather, the hearing will allow the judges of Pre-Trial Chamber I to decide if there is enough evidence to support the charges against him to move ahead with a trial. The prosecutor must demonstrate that there are “substantial grounds to believe” that Lubanga committed the crimes alleged. This is a higher threshold than the “reasonable grounds to believe” standard used by the chamber in issuing the arrest warrant. The prosecutor has already submitted to the Pre-Trial Chamber a detailed description of the charges and a list of evidence the prosecution will present at the hearing.²

¹ *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006.

² *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Submission of the Document Containing the Charges pursuant to Article 61(3) and of the List of Evidence pursuant to Rule 131(3), August 28, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356_English.pdf (accessed on October 26, 2006).

Lubanga, through his defense counsel, can object to the charges and challenge the prosecution's evidence. His counsel can also put forward evidence on his behalf.³ However, the purpose of the hearing is not to determine his guilt or innocence.

4. Does Human Rights Watch consider the current ICC charges against Lubanga adequate?

The current charges against Lubanga represent an important step toward bringing justice to the victims of war crimes in Ituri. Enlisting, conscripting, and using children as soldiers in armed conflict are serious crimes that should be tried and appropriately punished. However, Human Rights Watch is concerned about the narrow scope of these charges. We believe much more is needed.

UPC forces led by Lubanga have been implicated in numerous other serious crimes in Ituri including murder, torture and sexual violence. For example, in December 2002 and early 2003, UPC forces attacked several towns near Ituri's gold mines, including Kilo, Kobu and Lipri. In Kilo, our research shows that UPC combatants abducted men, women and children whom they took to be Lendu, an ethnic group that they considered to be their enemy. They forced the victims to dig their own graves then killed them with hammer blows to the head. An estimated 100 people were killed in this town alone.⁴

We believe that, so long as there is sufficient evidence, the charges brought by the ICC should reflect the full range of serious crimes allegedly committed by Lubanga in the DRC, including those for which he had command responsibility. This is crucial for the victims of these crimes and for putting an end to the culture of impunity in the DRC and in the Great Lakes region.⁵

³ *Rome Statute of the International Criminal Court* (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 61(6).

⁴ Human Rights Watch, *Democratic Republic of Congo – The Curse of Gold* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/drc0505/>, pp. 29-31.

⁵ Joint letter from Human Rights Watch and other groups to Luis Moreno-Ocampo, chief prosecutor, International Criminal Court, July 31, 2006, <http://hrw.org/english/docs/2006/08/01/congo13891.htm>.

Of course, the ICC must assess through fair and effective proceedings whether Lubanga is guilty or not of committing the crimes alleged against him. In these proceedings, his right to a fair trial must be respected.

5. What are Lubanga's rights during the hearing?

Lubanga's fair trial rights extend to the hearing to confirm the charges. For example, he is presumed innocent until proven guilty before the court and he has the right to a fair and impartial hearing.⁶

Some issues that may arise during the hearing include whether:
the defense has sufficient access to all of the relevant documents the prosecution relies on at the hearing;
there is adequate translation available, both oral and written, for the defense; and,
the defense has had adequate means and time to prepare for the hearing.

6. What happens after the hearing to confirm the charges?

The judges of Pre-Trial Chamber I have 60 days from the end of the hearing to provide a written decision.⁷ The charges against Lubanga will be confirmed if they agree that there are "substantial grounds to believe" that he committed the crimes alleged. The case will then move forward to trial.⁸ This would be the first-ever trial before the ICC.

However, the judges could decide that there is not enough evidence to confirm some or all of the charges. If that happens, the prosecutor can submit additional evidence to support the charge(s) in question and then request confirmation.

The judges could also adjourn the hearing and ask the prosecutor to consider providing more evidence or conducting further investigations in relation to a

⁶ Rome Statute, arts. 66-67.

⁷ Regulations of the Court, International Criminal Court, ICC-BD/01-01-04, May 26, 2004, http://www.icc-cpi.int/library/about/officialjournal/Regulations_of_the_Court_170604-EN.pdf (accessed October 26, 2006), reg. 53.

⁸ Rome Statute, art. 61(7).

particular charge. In addition, they could request the prosecutor to consider amending a charge because the evidence appears to establish a different crime.⁹

7. Can the prosecutor include more charges in the case against Lubanga after the hearing?

The prosecutor can amend the charges before the trial (for example, to include additional crime scenes/incidents to support the charges), but only once he informs the defendant and the Pre-Trial Chamber agrees. If the prosecutor wants to add or substitute more serious charges, however, there must be another confirmation hearing before the start of the trial.¹⁰

The prosecutor has stated that if the case against Lubanga goes to trial, it will only relate to the current charges.¹¹ However, he has left open the possibility of prosecuting Lubanga for other crimes under the Rome statute in separate proceedings after this trial has been completed.¹²

8. Can victims participate in the hearing to confirm the charges?

For the first time in an international criminal tribunal, victims can participate as independent parties in the hearing beyond giving testimony as witnesses. Four victims will participate in the proceedings against Lubanga through their legal representatives.¹³ These victims will participate in the hearing anonymously, meaning their identities will not be revealed to the public or to the defense.

⁹ Ibid.

¹⁰ Ibid., art. 61(9).

¹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Information following the Pre-Trial Chamber's decision on the Prosecution deadline of 12 September 2006 and the Defense deadline of 12 September 2006, September 12, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-429_English.pdf (accessed October 26, 2006); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision sur les demandes de participation a la procedure a/0004/06 a a/0009/06, a/0016/06 a a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, October 20, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-601_French.pdf (accessed October 26, 2006), para. 2.

¹² Mike Corder, "International prosecutor says Congolese warlord may face additional war crimes charges," Associated Press, August 7, 2006.

¹³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, September 22, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf (accessed October 26, 2006); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision sur les demandes de participation a la procedure a/0004/06 a a/0009/06, a/0016/06 a

The legal representatives of the victims can make opening and closing statements at the hearing, but only if the views and concerns expressed in these statements are related to the current charges. The legal representatives cannot add any evidence or interview witnesses.¹⁴ The victims cannot participate in a manner that is prejudicial to or inconsistent with the defendants' fair trial rights. If a victim participates as a witness during a later trial, Lubanga would retain the right to confront him or her.¹⁵

9. Will there be other cases from the DRC before the ICC?

The prosecutor has indicated that his office is working "in sequence" in the DRC. This means that he will investigate each group suspected of having committed ICC crimes and will select specific cases for prosecution where possible.

To date the ICC has not issued arrest warrants for the leaders of the Lendu-based militias, despite their alleged involvement in a number of serious crimes, nor against senior political figures in the DRC, Uganda or Rwanda who backed these armed groups.¹⁶ The prosecutor has indicated that he is currently investigating armed groups in Ituri other than the UPC, so further arrests may be forthcoming.¹⁷ Human Rights Watch believes it is important to investigate other suspected perpetrators of ICC crimes in Ituri and, where feasible, to bring forward cases for prosecution as soon as possible.

Once the investigation in Ituri has been completed, the prosecutor has indicated that he will focus on other regions in the DRC, a move Human Rights Watch supports.

a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, October 20, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-601_French.pdf (accessed October 26, 2006).

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, September 22, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf (accessed October 26, 2006).

¹⁵ The Rome Statute allows for such proceedings to be closed to the public (in camera) and for the presentation of evidence through electronic or other special means. Rome Statute, art. 68.

¹⁶ See Human Rights Watch, *Ituri: "Covered in Blood," Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://hrw.org/reports/2003/iturio703/>; Human Rights Watch, *Democratic Republic of Congo – The Curse of Gold* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/drc0505/>.

¹⁷ "Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo," ICC press release, March 17, 2006, <http://www.icc-cpi.int/press/pressreleases/133.html> (accessed October 26, 2006).

10. How will people in the DRC know about what is happening in The Hague?

The ICC is faced with the challenge of making sure the proceedings are meaningful for the communities most affected by the crimes in the DRC. The ICC must therefore make every possible effort to publicly communicate important legal proceedings in The Hague, including the hearing to confirm the charges against Lubanga, to the people of the DRC. To be effective justice must not only be done, but also must be seen to be done.

Security situation permitting, this could include holding a press conference in The Hague – the seat of the court – and transmitting it via video link for live broadcast in the DRC, as well as making audio, video and written summaries available in an easily accessible and understandable format after the hearing.

11. How did the ICC become involved in the DRC?

In March 2004, the government of the DRC referred the situation in the country to the ICC.¹⁸ The DRC authorities then invited the ICC prosecutor to investigate to determine whether crimes within the jurisdiction of the ICC had been committed there since the entry into force of the Rome Statute on July 1, 2002. The ICC prosecutor announced the opening of an investigation in the DRC in June 2004.¹⁹ He decided to initially focus his investigations on the Ituri region of northeastern DRC because of the serious crimes in violation of the Rome Statute committed there.

12. What has happened in Ituri?

Ituri is one of the areas worst affected by Congo's devastating wars. A local armed conflict between Hema and Lendu ethnic groups that began in 1999 was exacerbated by Ugandan military forces and through linkages to the broader conflict in the Great Lakes region. As the conflict spiraled and armed groups multiplied, more than 60,000 civilians were slaughtered in Ituri, according to the UN. Competition for the

¹⁸ "Prosecutor receives referral of the situation in the Democratic Republic of Congo," ICC press release, April 19, 2004, http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html (accessed October 26, 2006).

¹⁹ "The Office of the Prosecutor of the International Criminal Court opens its first investigation," ICC press release, June 23, 2004, http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html (accessed October 26, 2006).

region's lucrative gold mines and trading routes was a major contributing factor to the fighting. Foreign armies and local militia groups – seeing control of the gold mines as a way to money, guns and power – fought each other ruthlessly, often targeting civilians in the process. In their battles for gold, armed groups such as Lubanga's UPC were implicated in widespread ethnic slaughter, torture, and rape.

Human Rights Watch has been documenting human rights abuses committed in Ituri since 1999. We published detailed reports in 2001, 2003 and 2005, as well as dozens of press releases and briefing papers detailing the widespread atrocities by all armed groups. These include war crimes and crimes against humanity.

13. Why can't Lubanga be prosecuted in the DRC?

The ICC is not meant to replace national justice systems. Rather, the ICC is “complementary” to national justice efforts to hold to account perpetrators of serious international crimes such as war crimes and crimes against humanity. This means that the ICC only becomes involved in those country situations and in specific cases involving such crimes that the local authorities are either unwilling or unable to handle effectively. Indeed, when the situation was referred to the ICC in March 2004, the authorities in the DRC indicated that the justice system was not in a position to address complex criminal cases involving serious human rights violations.²⁰

In March 2005, the DRC authorities arrested Lubanga and charged him with crimes against humanity, genocide, murder, illegal detention and torture. He was kept in detention in the DRC in relation to those charges until his surrender to the ICC in March 2006. Our research suggests that the Congolese authorities took only minimal steps in carrying out the investigation against him for these crimes.²¹ Lubanga did not stand trial for these charges in the DRC.²²

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf (accessed October 26, 2006), para. 34 (“Lubanga Arrest Warrant Decision”).

²¹ Human Rights Watch interviews, civilian and military justice officials, Bunia and Kinshasa, October 2005 and September 2006.

²² Lubanga Arrest Warrant Decision, para. 33.

The charges alleged by the ICC prosecutor against Lubanga were different than those brought forward by the DRC authorities. Pre-Trial Chamber I therefore made a preliminary assessment that the case against him was admissible before the ICC and issued an arrest warrant against him.

Since that time, Lubanga has challenged the admissibility of his case before the ICC. This challenge was rejected by Pre-Trial Chamber I.²³ The defense has appealed this decision.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, October 3, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-512_English.pdf (accessed October 26, 2006). Generally, a defendant or a State with jurisdiction over a case has only one opportunity to challenge the admissibility of a case before the ICC before the trial, although there are exceptions. See Rome Statute, art. 19(4).