

1 International Criminal Court

2 Trial Chamber I - Courtroom 1

3 Situation: Democratic Republic of the Congo

4 In the case of The Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06

5 Presiding Judge Adrian Fulford,

6 Judge Elizabeth Odio Benito and Judge René Blattmann

7 Judgment Hearing

8 Wednesday, 14 March 2012

9 (The Judgment hearing starts in open session at 10.00 a.m.)

10 THE COURT USHER: All rise. The International Criminal Court is now in session.

11 Please be seated.

12 PRESIDING JUDGE FULFORD: Mr Lubanga can remain seated.

13 A. Introduction

14 1. This is the summary of the Chamber's judgment under Article 74 of the Rome Statute
15 as to whether the Prosecutor has proved the guilt of the accused.

16 The written version of this summary issued today and signed by the Judges is to be
17 treated as the official version.

18 B. Charges against the accused

19 2. On 29 January 2007 the Pre-Trial Chamber issued its Decision on the Confirmation of
20 Charges. The Pre-Trial Chamber confirmed that there was sufficient evidence to
21 establish substantial grounds to believe that:

22 "Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of
23 enlisting and conscripting children under the age of fifteen years into the FPLC and
24 using them to participate actively in hostilities within the meaning of Articles
25 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003."

1 Additionally the Pre-Trial Chamber confirmed that there was sufficient evidence to
2 establish substantial grounds to believe that:

3 "Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of
4 enlisting and conscripting children under the age of fifteen years into the FPLC and
5 using them to participate actively in hostilities within the meaning of Articles
6 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003."

7 C. Jurisdiction

8 3. Pursuant to Article 19 of the Statute, the "Court shall satisfy itself that it has
9 jurisdiction in any case brought before it." The Democratic Republic of Congo became a
10 State party on 11 April 2002 and, pursuant to Article 14 of the Statute, President Kabila
11 referred the situation in the DRC to the Prosecutor in March 2004. Pre-Trial Chamber I
12 concluded that the case falls within the Court's jurisdiction, and the Appeals Chamber
13 confirmed the Pre-Trial Chamber's Decision on the accused's challenge to the jurisdiction
14 of the Court. The personal, temporal, territorial and subject-matter elements that are
15 relevant to the Court's jurisdiction have not altered since the decision on the Confirmation
16 of Charges, and the issue has not been raised by the parties or any State before the Trial
17 Chamber.

18 D. Brief case history

19 4. The first status conference before the Trial Chamber was held on 4 September 2007,
20 and thereafter there were 54 status conferences prior to the commencement of the trial.
21 The following is a summary of the main procedural events which had a significant impact
22 on the course of the proceedings.

23 5. The trial was stayed twice as a consequence of disclosure issues. The first stay was
24 imposed by the Chamber on 13 June 2008, and it was lifted on 18 November 2008. A
25 second stay was imposed on 8 July 2010. The presentation of evidence resumed on

1 25 October 2010.

2 6. The parties and the legal representatives of victims made their opening statements on
3 26 and 27 January 2009. The Prosecution called its first witness on 28 January 2009. The
4 Prosecution's oral evidence concluded on 14 July 2009.

5 7. On 3 September 2009, the Chamber adjourned the presentation of evidence pending
6 an interlocutory appeal. The Appeals Chamber issued its judgment on the matter on 8
7 December 2009 and the evidence resumed on 7 January 2010.

8 8. The Defence presented a bifurcated case. In the first part the Defence in essence
9 called into question the testimony of all the Prosecution's child soldier witnesses, a
10 process that included the presentation of rebuttal witnesses by the Prosecution. On 10
11 December 2010, the Defence filed an application seeking a permanent stay of the
12 proceedings. The Chamber issued a Decision dismissing the Defence application on
13 23 February 2011.

14 9. The second part of the Defence evidence was introduced thereafter and on 20
15 May 2011 the presentation of evidence formally closed.

16 10. The Trial Chamber heard 67 witnesses, and there were 204 days of hearings. The
17 Prosecution called 36 witnesses, including three experts, and the Defence called 24
18 witnesses. Three victims were called as witnesses following a request from their legal
19 representatives. Additionally, the Chamber called four experts. The Prosecution
20 submitted 368 items of evidence, the Defence 992, and the legal representatives 13 (1,373
21 in total). In addition to the written submissions, the oral closing arguments of the parties
22 and participants were heard on 25 and 26 August 2011. Since 6 June 2007, when the
23 record of the case was transmitted to the Trial Chamber, the Chamber has delivered 275
24 written decisions and orders and 347 oral decisions.

25 11. In accordance with Article 68(3) of the Statute, victims have participated in the case,

1 and in particular they have applied to introduce evidence, they have questioned witnesses
2 and they have advanced written and oral submissions with the leave of the Chamber and
3 with the assistance of their legal representatives. The total number of individual victims
4 authorised to participate in the proceedings is 129 (34 female and 95 male victims).

5 12. At the request of the accused and in accordance with Article 76(2) of the Statute, the
6 Chamber in an oral Decision ruled that there would be a separate sentencing hearing if
7 the accused is convicted.

8 E. Factual overview

9 13. The Trial Chamber heard the testimony of several expert witnesses and it reviewed
10 documentary evidence that relates to the existence of an interethnic conflict in Ituri
11 between 1999 and 2003.

12 14. Against this background, the UPC was created on 15 September 2000. Although
13 Thomas Lubanga was one of the UPC's founding mechanics and the President at the
14 outset, the nature of the group when it was created is a matter of dispute in this case.
15 These topics are analysed in greater detail below when the Chamber deals with the
16 individual criminal responsibility of the accused.

17 15. The UPC and its military wing, the FPLC, took power in Ituri in September 2002.

18 F. The Burden and Standard of Proof

19 16. Under Article 66 of the Statute, the accused is presumed to be innocent until the
20 Prosecutor has proved his guilt. For a conviction, each element of the crime charged
21 must be established "beyond reasonable doubt".

22 G. Intermediaries

23 17. An issue that occupied the Chamber for a significant part of this trial concerned the
24 use by the Prosecution of local intermediaries in the DRC. The Chamber is of the view
25 that the Prosecution should not have delegated its investigative responsibilities to the

1 intermediaries as analysed in the judgment, notwithstanding the extensive security
2 difficulties that it faced. A series of witnesses have been called during this trial whose
3 evidence, as a result of the essentially unsupervised actions of three of the principal
4 intermediaries, cannot safely be relied on.

5 18. The Chamber spent a considerable period of time investigating the circumstances of
6 a substantial number of individuals whose evidence was, at least in part, inaccurate or
7 dishonest. The Prosecution's negligence in failing to verify and scrutinise this material
8 sufficiently before it was introduced led to significant expenditure on the part of the Court.

9 An additional consequence of the lack of proper oversight of the intermediaries is that
10 they were potentially able to take advantage of the witnesses they contacted.

11 Irrespective of the Chamber's conclusions regarding the credibility and reliability of the
12 alleged former child soldier witnesses, given their youth and likely exposure to conflict,
13 they were vulnerable to manipulation.

14 19. The Chamber has withdrawn the right of six dual status witnesses to participate in
15 the proceedings, as a result of the Chamber's conclusions as to the reliability and accuracy
16 of these witnesses.

17 20. Likewise, the Chamber has not relied on the testimony of the three victims who
18 testified in Court because their accounts are unreliable. Given the material doubts that
19 exist as to the identities of two of these individuals, which inevitably affect the evidence of
20 the third, the Chamber decided to withdraw permission originally granted to them to
21 participate as victims.

22 21. The Chamber has concluded that there is a risk that intermediaries P-0143, P-316 and
23 P-321 persuaded, encouraged, or assisted witnesses to give false evidence. These
24 individuals may have committed crimes under Article 70 of the Statute. Pursuant to
25 Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these

1 circumstances lies with the Prosecution. Investigations can be initiated on the basis of
2 information communicated by a Chamber or any reliable source. The Chamber
3 communicates the relevant information to the OTP, and the Prosecutor should ensure that
4 the risk of a conflict of interest is avoided for the purposes of any investigation.

5 H. Armed conflict and its nature

6 22. Although the Pre-Trial Chamber in its Confirmation of Charges decision decided that
7 for part of the relevant period the conflict was international in character, the Chamber
8 concludes that the UPC/FPLC, as an organised armed group, was involved in an internal
9 armed conflict against the APC and other Lendu militias, including the FRPI, between
10 September 2002 and 13 August 2003. Accordingly, applying Regulation 55 of the
11 Regulations of the Court, the Chamber has changed the legal characterisation of the facts
12 to the extent that the armed conflict relevant to the charges was non-international in
13 character.

14 I. Legal definition of conscription, enlistment and use

15 23. The charges against the accused include three distinct criminal acts. The Chamber
16 has concluded that the crimes of conscription and enlistment are committed at the
17 moment a child under the age of 15 is enrolled into or joins an armed force or group, with
18 or without compulsion. These offences are continuous in nature. They only end when
19 the child reaches 15 years of age, or leaves the force or group.

20 24. As regards the offence of using children under the age of 15 to participate actively in
21 hostilities, the Chamber has concluded that this includes a wide range of activities from
22 those children on the front line (who participate directly) through to the boys or girls who
23 are involved in a myriad of roles that support the combatants. All of these activities,
24 which cover either direct or indirect participation, have an underlying common feature:
25 The child concerned is, at the very least, a potential target. The decisive factor, therefore,

1 in deciding if an "indirect" role is to be treated as participation in hostilities, is whether the
2 support provided by the child to the combatants exposed him or her to real danger as a
3 potential target. In the judgment of the Chamber, these combined factors - the child
4 support and this level of consequential risk - mean that, although absent from the
5 immediate scene of the hostilities, the individual was nonetheless actively involved in
6 them.

7 J. The facts relating to the conscription and enlistment of children under the age of 15
8 and using them to participate actively in the hostilities

9 25. It is alleged that the accused, jointly with others, conscripted and enlisted children
10 under the age of 15 years into the armed group of the UPC/FPLC and that he used them to
11 participate actively in hostilities between 1 September 2002 and 13 August 2003.

12 26. The Chamber has concluded that the UPC/FPLC was an armed group.

13 27. The Chamber finds that, between 1 September 2002 and 13 August 2003, the armed
14 wing of the UPC/FPLC was responsible for the widespread recruitment of young people,
15 including children under the age of 15, on an enforced as well as a "voluntary" basis.

16 28. Multiple witnesses testified credibly and reliably that children under 15 were
17 "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters
18 of the UPC/FPLC in Bunia, or its military training camps, including at Rwampara,
19 Mandro and Mongbwalu. Video evidence clearly shows recruits under the age of 15 in
20 the Rwampara camp.

21 29. The evidence demonstrates that children in the military camps endured harsh
22 training regimes and were subjected to a variety of severe punishments. The evidence
23 also establishes that children, mainly girls, were used by UPC/FPLC commanders to carry
24 out domestic work. The Trial Chamber heard evidence from witnesses that girl soldiers
25 were subjected to sexual violence and rape. Witnesses specifically referred to girls under

1 the age of 15 who were subjected to sexual violence by UPC/FPLC commanders. Sexual
2 violence does not form part of the charges against the accused and the Chamber has not
3 made any findings of fact on the issue, particularly as to whether responsibility is to be
4 attributed to the accused.

5 30. The evidence has established beyond reasonable doubt that children under the age of
6 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002
7 and 13 August 2003.

8 31. The testimony of multiple witnesses and the documentary evidence have
9 demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC
10 between 1 September 2002 and 13 August 2003. The evidence proves that children were
11 deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took
12 part in fighting, including at Kobu, Songolo and Mongbwalu. It has been established
13 that the UPC/FPLC used children under the age of 15 as military guards. The evidence
14 reveals that a special "Kadogo Unit" was formed, which was comprised principally of
15 children under the age of 15. The evidence of various witnesses, as well as video footage,
16 demonstrates that commanders in the UPC/FPLC frequently used children under the age
17 of 15 as bodyguards. The accounts of several witnesses, along with the video evidence,
18 clearly prove that children under the age of 15 acted as bodyguards, or served within the
19 Presidential Guard of Mr Lubanga.

20 32. In all the circumstances, the evidence has established beyond reasonable doubt that
21 children under the age of 15 were used by the UPC/FPLC to participate actively in
22 hostilities between 1 September 2002 and 13 August 2003.

23 K. Legal analysis of Articles 25(3)(a) and 30 of the Statute

24 33. The Chamber has concluded that, pursuant to Articles 25(3)(a) and 30 of the Statute,
25 the Prosecution must prove in relation to each charge that:

- 1 (i) there was an agreement or common plan between the accused and at least one
2 other co-perpetrator that, once implemented, will result in the commission of the
3 relevant crime in the ordinary course of events;
- 4 (ii) the accused provided an essential contribution to the common plan that
5 resulted in the commission of the relevant crime;
- 6 (iii) the accused meant to conscript, enlist or use children under the age of 15 to
7 participate actively in hostilities, or he was aware that by implementing the
8 common plan these consequences "will occur in the ordinary course of events";
- 9 (iv) the accused was aware that he provided an essential contribution to the
10 implementation of the common plan; and
- 11 (v) the accused was aware of the factual circumstances that established the
12 existence of an armed conflict and the link between these circumstances and his
13 conduct.

14 L. The facts relating to the individual criminal responsibility of Mr Thomas Lubanga

15 34. The evidence has confirmed that the accused and his co-perpetrators agreed to, and
16 participated in, a common plan to build an army for the purpose of establishing and
17 maintaining political and military control over Ituri. In the ordinary course of events,
18 this resulted in the conscription and enlistment of boys and girls under the age of 15 and
19 their use to participate actively in hostilities.

20 35. The Chamber has concluded that from late 2000 onwards Thomas Lubanga acted
21 with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa
22 and commanders Tchaligonza, Bagonza and Kasangaki. Mr Lubanga's involvement with
23 the soldiers (including young children) who were sent to Uganda for training is of
24 significance. Although these events fall outside the period covered by the charges and
25 are outwith the temporal jurisdiction of the Court, they provide evidence on the activities

1 of this group and they help establish the existence of the common plan before and
2 throughout the period of the charges.

3 36. The accused was in conflict with Mr Mbusa Nyamwisi and the RCD-ML from at least
4 April 2002, and he led a group that sought to bring about political change in Ituri
5 including the removal of Mr Mbusa Nyamwisi by force, if necessary. The accused
6 remained in control, by delegated authority, whilst he was detained during the summer of
7 2002 and he sent Chief Kahwa and Mr Beiza to Rwanda to obtain arms. During that
8 period, Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused's
9 principal alleged co-perpetrators, were generally responsible for recruitment and training,
10 which included girls and boys under the age of 15.

11 37. The accused and at least some of his co-perpetrators were involved in the takeover of
12 Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC,
13 appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda, to senior positions
14 within the UPC/FPLC. The evidence has established that during this period the leaders
15 of the UPC/FPLC, including Chief Kahwa and Bosco Ntaganda, and Hema elders such as
16 Eloy Mafuta, were active in mobilisation drives and recruitment campaigns in order to
17 persuade Hema families to send their children to join the UPC/FPLC. Those children
18 recruited before the formal creation of the FPLC were incorporated into that group and a
19 number of military training camps were added to the original facility at Mandro. The
20 Chamber has concluded that between 1 September 2002 and 13 August 2003 a significant
21 number of high-ranking members of the UPC/FPLC and other personnel conducted a
22 large-scale recruitment exercise directed at young people including children under the age
23 of 15 on both voluntary and coercive bases.

24 38. The Chamber is satisfied beyond reasonable doubt that as a result of the
25 implementation of the common plan to build an army for the purpose of establishing and

1 maintaining political and military control over Ituri, boys and girls under the age of 15
2 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13
3 August 2003. Similarly, the Chamber is satisfied beyond reasonable doubt that the
4 UPC/FPLC used children under the age of 15 to participate actively in hostilities,
5 including during battles. They were used during the relevant period as soldiers and as
6 bodyguards for senior officials, including the accused.

7 39. Thomas Lubanga was the president of the UPC/FPLC and the evidence demonstrates
8 that he was simultaneously the commander-in-chief of the army and its political leader.
9 He exercised an overall co-ordinating role as regards the activities of the UPC/FPLC. He
10 was informed on a substantive and continuous basis of the operations of the FPLC. He
11 was involved in the planning of military operations and he played a critical role in
12 providing logistical support including providing weapons, ammunition, food, uniforms,
13 military rations and other general supplies to the FPLC troops. He was closely involved
14 in making decisions on recruitment policy and he actively supported recruitment
15 initiatives, for instance by giving speeches to the local population and the recruits. In his
16 speech at the Rwampara military training camp -- I start that again. His speech at the
17 Rwampara military camp, he encouraged children including those under the age of 15
18 years to join the army and to provide security for the populace once deployed in the field
19 after their military training. Furthermore, he personally used children below the age of
20 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff
21 members who were below the age of 15. The Chamber has concluded that these
22 contributions by Thomas Lubanga taken together were essential to a common plan that
23 resulted in the conscription and enlistment of girls and boys below the age of 15 into the
24 UPC/FPLC and their use to participate actively in hostilities.

25 40. The Chamber is satisfied beyond reasonable doubt, as set out above, that Thomas

1 Lubanga acted with the intent and knowledge necessary to establish the charges (the
2 mental element required by Article 30). He was aware of the factual circumstances that
3 established the existence of the armed conflict. Furthermore, he was aware of the nexus
4 between the said circumstances and his own conduct which resulted in the conscription,
5 enlistment and use of children below the age of 15 to participate actively in hostilities.

6 M. Conclusion of the Chamber

7 41. Although Judges Odio Benito and Fulford have written separate and dissenting
8 opinions on particular discrete issues, the Chamber has reached its decision unanimously.

9 42. The Chamber concludes that the Prosecution has proved beyond reasonable doubt
10 that Mr Thomas Lubanga Dyilo is guilty of the crimes of conscripting and enlisting
11 children under the age of 15 years into the FPLC and using them to participate actively in
12 hostilities within the meaning of Article 8(2)(e)(vii) and 25(3)(a) of the Statute from early
13 September 2002 to 13 August 2003.

14 An order relating to the future steps in this case will be issued a little later today.

15 Mr Lubanga will remain in custody and that concludes this hearing.

16 THE COURT USHER: All rise.

17 (The Judgment hearing ends in open session at 10.34 a.m.)