

THOMAS LUBANGA DYILO

INFORMAL SUMMARY
ARTICLE 74 DECISION
14 MARCH 2012



<p>Situation Case</p> <p>Hearing Chamber</p> <p>Parties:</p> <p>Participants:</p>	<p>Democratic Republic of Congo 01/04-01/06 The Prosecutor vs. Thomas Lubanga Dyilo Trial Proceedings Trial Chamber I: Judge Sir Adrian Fulford (Presiding Judge), Judge Odio Benito and Judge Blattmann OTP: Ms. Bensouda, Mr. Sachdeva, Ms. Samson, Ms. Struyven and team Defence: Ms. Mabilille, Mr. Desalliers, Mr. Biju-Duval and team</p> <p>129 victims represented by Legal Representatives for Victims and OPCV.</p>	<p>(UPC) and the <i>Forces Patriotiques pour la liberation du Congo</i> (FPLC), since September 2002 and at least until the end of 2003; Alleged President of the UPC.</p> <p>Crimes: <u>Thomas Lubanga Dyilo</u> is responsible, as co-perpetrator of the war crime of:</p> <ul style="list-style-type: none"> o Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (under article 8(2)(e)(vii) of the Rome Statute). <p>Start of Trial: 26 January 2009</p> <p>Date of Art 74 Decision: 14 March 2012</p>
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Thomas Lubanga Dyilo: born in 1920 in Djiba, Ituri district, Eastern Province; National of the DRC; Alleged founder of *Union des Patriotes Congolais*

The Trial Chamber held that the Prosecution had proved beyond all reasonable doubt that Thomas Lubanga Dyilo is guilty of the war crime of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.

An oral summary of the decision was delivered by the Presiding Judge Sir Adrian Fulford.

Intermediaries

- **Use of Intermediaries in investigation:** The Chamber was concerned by the use of intermediaries in the DRC. The OTP should not have delegated investigations to intermediaries. The use of intermediaries has led to some evidence being unreliable and certain witness testimony being inaccurate or dishonest. The use of intermediaries also led to significant expenditure, and the lack of proper oversight of intermediaries meant that certain intermediaries could take advantage of vulnerable witnesses.
- **Certain Unreliable Evidence:** The evidence provided by 6 witnesses and 3 victims was held to be unreliable.
- **Intermediaries P0143, P316 and P321:** Significant risk that these intermediaries persuaded encouraged and assisted witnesses to give false evidence.

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- **Article 70 proceedings:** The Chamber communicated to the OTP the allegations of misconduct against the 3 witnesses pursuant to Article 70 and Rule 165.

Character of the Conflict

- **Recharacterisation of conflict from international to non-international/internal armed conflict:** Pursuant to Regulation 55, the Chamber re-characterised the nature of the armed conflict from international in nature (as held by the PTC in its confirmation decision) to one of an internal armed conflict between September 2002 - August 2003.

Conscription, Enlistment and Direct Participation of Child Soldiers

- **Conscription and Enlistment: Continuing in nature:** The conscription and enlistment of children commences at the moment of joining the armed group, regardless of whether or not their participation is voluntary. These offences are continuous in nature as they only end when the child turns 15 years of age or leaves the armed group.
- **Conscription and Enlistment: Not limited to direct participation:** The Chamber concluded that the crime of using children under the age of 15 in active hostilities includes a wide range of activities, ranging from child soldiers who participated directly on the frontline to those who provided indirect support to the combatants. In the case of indirect participation, the determining factor is whether the support provided by the child exposed him or her to real danger as a possible target.

Gender Issues

- **No findings of fact made on the subject of sexual violence and rape:** Although the TC heard testimony on the subject of the sexual violence and rape of girl soldiers under the age of 15 by UPC/FPLC commanders, the Chamber did not make any factual findings regarding the individual responsibility of Mr. Lubanga for these crimes as these offences did not form part of the charges against him. The Chamber noted that it would decide later whether these matters would be considered for the purposes of sentencing and reparations.

Elements of Individual Criminal Responsibility Established Under Articles 25(3)(a) and 30 Using the Chamber's Five-Part Test

- **Agreement or common plan of the accused and his co-perpetrators:** The Chamber was satisfied beyond a reasonable doubt that Mr. Lubanga and his co-perpetrators formed a common plan to build an army for the purpose of establishing control over Ituri, which resulted in the conscription and enlistment of boys and girls under the age of 15 between September 2002 - August 2003.
- **The accused's essential contribution to the common plan:** Mr. Lubanga as president and commander-in-chief of the UPC/FPLC exercised overall leadership and coordinating role within the group. He was closely involved in making major decisions including the planning of military operations, providing logistical support, and recruitment of child soldiers.
- **The accused's awareness of his essential contribution to the common plan:** Mr. Lubanga's critical role meant that he was continuously informed of the activities of the UPC/FPLC and participated actively in recruitment initiatives to build FPLC troops for the purpose of establishing and maintaining control over Ituri.

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- **The accused's intent to conscript and enlist children:** Mr. Lubanga's intent to conscript and enlist child soldiers under the age of 15 is evidenced by the fact that he personally used children below the age of 15 as bodyguards and regularly saw his UPC/FPLC staff members use child bodyguards. The evidence also showed that he encouraged children to join his armed group and to provide security. The video footage of his speech at the Rwampara training camp provided important evidence regarding Mr. Lubanga's level of knowledge.
- **The accused's awareness of the factual circumstances of the armed conflict and the link between these circumstances and his conduct:** The Court was satisfied that the overall evidence supported the fact that by using child soldiers to implement the common plan or military aims of the UPC/FPLC in Ituri, Mr. Lubanga was fully aware of the factual circumstances surrounding the armed conflict in Ituri and aware of the link between those circumstances and his own conduct that resulted in the conscription and enlistment of child soldiers under the age of 15.

Separate Opinion on one issue by Judge Fulford

- **Judge Fulford put forward a simpler test for mode of liability under 25(3)(a):** Judge Fulford disagreed with the PTC and TC approach for establishing co-perpetrator liability. He argued that the current test aimed at assessing whether those accused "have control over the commission of the offence" is burdensome to the prosecution and unsupported by the Statute. He found the elements of the majority's approach to be too speculative in terms of the extent of the individual's "essential" contribution, level of awareness of the ordinary consequences of the common plan, and level of control. Applying the plain text principles of the Vienna Convention on the Law of Treaties (VCLT), he puts forward a simpler test for 25(3)(a), which establishes the objective elements for co-perpetration before establishing the subjective elements. In other words, his approach to Article 25(3)(a) considers the acts before considering the mental element of the crime charged: (i) involvement of at least two individuals, (ii) coordination between those who commit the offence, in the form of an agreement, common plan etc., that in the ordinary course of events will lead to the commission of the crime, (iii) a direct or indirect contribution to the crime, and (iv) intent and knowledge as defined under Article 30. He is however in agreement with the application of the majority's approach in the judgment as applying a new test at this stage lacked fair notice to the accused.

Separate and Dissenting Opinion of Judge Benito

- **Agreed with final decision but dissented on three Issues:**
 - (i) **Incomprehensive legal definition of scope of activities covered under 8(2)(e)(vii):** Judge Benito argued for a comprehensive legal definition of the crime as opposed to the case-by-case analysis approach of the majority, limited by the scope of charges against the accused, which is detrimental to the rights of affected children. A comprehensive definition must:

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- a. Encompass both Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) by recognizing conscription and enlistment as a crime regardless of the type of armed group involved or the nature of armed conflict which occurs.
 - b. Recognize that indirect forms of active participation in hostilities not only include situations where the child is at risk of becoming a potential target of an external enemy, but also situations where they will be at risk from their own armed group, which will often subject child soldiers to harsh trainings, sexual violence, and other forms of maltreatment.
 - c. Recognize sexual violence as part of acts inherent in the crime of enlisting, conscription and use of children under 15 in hostilities. It is especially discriminatory to young girls not to do so, given the clearly gendered impact of sexual violence.
- (ii) **Disagreed with the manner of assessment of dual status victims/witnesses for participation:** Judge Benito is of the opinion that the unreliability of P-0007, P-0008, P-0010, P-0011, P-0298 and P-0299 as witnesses should not have resulted in the additional withdrawal of their participatory status as victims by the Chamber. She also argued that it is unfair to place a higher evidentiary threshold (beyond a reasonable doubt) on dual status individuals with regard to their victim status, especially in the light of future reparations considerations.
- (iii) **Disagreed with the evidentiary value assigned by majority to some of the video footage shown in the trial:** Judge Benito argued that the majority should have relied on more compelling video evidence, particularly the video sequences introduced through witness P-0030, where Mr. Lubanga is seen addressing political rallies that included children clearly below the age of 15 in the audience.

Scheduling Order

On 14 March 2012 the Chamber also issued a Scheduling Order concerning the timetable for sentencing and reparations.

Sentencing Hearing - No date was set. However, a number of dates and steps are have been set to enable the hearing to take place

Reparations - No date for reparations hearings was set. But a number of dates and steps have been set in order to commence possible reparations proceedings and parties have been invited to submit comments on reparations principles.

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