

## **First Sentencing Judgement by the ICC**

### ***The Prosecutor v. Thomas Lubanga Dyilo***

11 July 2012

*A new era in prosecutions for the ICC*

On 10 July 2012, Trial Chamber I sentenced Thomas Lubanga Dyilo (Lubanga) to 14 years imprisonment, in the first sentencing judgement issued by the International Criminal Court (ICC). The Chamber also ordered that the six years already spent in detention since his surrender to the ICC in March 2006 are to be deducted from his sentence. Lubanga was convicted on 14 March 2012 by Trial Chamber I for the war crimes of conscripting, enlisting and using children under the age of 15 to participate actively in hostilities from 1 September 2002 to 13 August 2003. The case involved two stays of proceedings, an adjournment, 67 witnesses and the participation of 129 victims. The Chamber will issue a reparations order at a later date.

“That the ICC has reached the stage of sentencing in its first case is an important milestone,” said Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice.

“Yesterday’s sentencing decision signals an end to the accountability process for Thomas Lubanga, who was rightfully convicted of serious war crimes and will now serve almost 10 more years in prison. It also importantly signals the start of a new era in prosecutions before the ICC,” Inder said.

Presiding Judge Fulford indicated that in sentencing Lubanga to 14 years imprisonment, the Chamber evaluated submissions from the parties and participants on aggravating and mitigating factors, and took into account the widespread recruitment and significant use of child soldiers, Lubanga’s position of authority within the UPC, and his essential contribution to the common plan.

The Trial Chamber also addressed the Prosecution’s arguments that sexual violence could be taken into account as an aggravating factor, without having brought charges for rape and sexual violence.<sup>1</sup> The Chamber noted that the Prosecution’s failure to charge the accused with rape and sexual violence is not determinative of whether this activity is a relevant factor for sentencing.<sup>2</sup> The Chamber stressed that it pursuant to Rule 145(1)(c) it may consider sexual violence first as part of the harm suffered by the victims, second in regards to the nature of the unlawful behavior, third in relation to the circumstances in which the manner in which the crime was committed and, pursuant to Rule 145(2)(b)(iv), to show the crime was committed with particular cruelty.<sup>3</sup> Further, the Chamber underscored that it may consider

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<sup>1</sup> The Chamber had indicated in its Trial Judgement that it would consider in due course whether evidence of sexual violence could be taken into account for the purposes of sentencing and reparations. ICC-01/04-01/06-2842, para 631. For a detailed discussion of the Chamber’s findings on the sexual violence testimony presented by Prosecution witnesses during trial, see the first [Special Issue of Legal Eye on the ICC](#) on the Lubanga Judgement.

<sup>2</sup> ICC-01/04-01/06-2901, para 67.

<sup>3</sup> ICC-01/04-01/06-2901, para 67.

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sexual violence in sentencing notwithstanding that it did not form part of the confirmation proceedings.<sup>4</sup> The Chamber stressed that it remains necessary for the Chamber to be satisfied beyond a reasonable doubt that '(i) child soldiers under 15 were subjected to sexual violence; and (ii) this can be attributed to Lubanga in a manner that reflects his culpability'.<sup>5</sup>

However, having evaluated the evidence, the Chamber found that the link between sexual violence in the context of the charges was not established beyond a reasonable doubt and thus could not form part of the assessment of culpability for sentencing.<sup>6</sup> The Trial Chamber indicated that on the basis of the evidence presented by the Prosecution, 'it was unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Lubanga is responsible'.<sup>7</sup> The Chamber also could not conclude on the basis of the evidence presented that the acts of sexual violence could be attributed to Lubanga in a manner that reflects his culpability.<sup>8</sup>

"We are disappointed that the majority of Judges did not recognise the widespread commission of sexual violence as an aggravating factor in the sentencing decision given the number of witnesses, both Prosecution and Defence, who testified about this issue as well as the filings on sexual violence submitted by the Legal Representatives for victims," said Brigid Inder. "This is a lengthy decision and we have not yet had a chance to review it in full. It is likely that the Trial Chamber's decision in the final judgement discounting almost all of the testimonies of child soldiers due to witness interference by three prosecution intermediaries reduced the evidence available to reach this finding to the level required of beyond reasonable doubt. However, we had hoped the remaining evidence was still significant in relation to sexual violence and its impact on the harm suffered by victims, in particular girl soldiers.<sup>9</sup> We were hoping to see this reflected in the sentence," Inder said.

"The charging decision back in 2006 to not include gender-based crimes in this case has hampered the progress and potential impact of this case all the way along, including at the sentencing stage," Inder added. "This case and sentence is unlikely to send the strong message we had hoped for regarding the serious nature of these crimes," said Brigid Inder. "We now look forward to a new era of ICC prosecutions."

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<sup>4</sup> ICC-01/04-01/06-2901, para 68.

<sup>5</sup> ICC-01/04-01/06-2901, para 69.

<sup>6</sup> ICC-01/04-01/06-2901, para 75.

<sup>7</sup> ICC-01/04-01/06-2901, para 74. The Chamber also underlined that 'although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial'. ICC-01/04-01/06-2901, para 75.

<sup>8</sup> ICC-01/04-01/06-2901, para 74. Judge Odio Benito issued a separate and dissenting opinion, disagreeing with the majority decision to the extent that it disregards damage caused to victims, particularly with respect to sexual violence.

<sup>9</sup> See Women's Initiatives for Gender Justice's observations on reparations and gender justice submitted to Trial Chamber I on 10 May 2012 <http://www.iccwomen.org/documents/Observations-on-reparations.pdf>



“We hope the reparations order will recognise the gender dimensions of enlistment, conscription and the forced participation of children in hostilities,” Inder said.

The Women’s Initiatives for Gender Justice was accepted to participate in the reparations proceedings in this case, and on 10 May 2012 filed observations from a gender perspective on questions of reparations.<sup>10</sup>

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<sup>10</sup> The Women’s Initiatives submitted observations on principles and procedure to be applied to reparations, in particular the following issues: (i) whether reparations should be awarded on a collective or an individual basis; (ii) to whom reparations are to be directed, how harm is to be assessed and the criteria to be applied to the awards; (iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2); and (iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2). Read the filing [here](#).

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The Women's Initiatives, together with our partners, has been working on the Lubanga case since 2006. Our involvement includes a filing to the Judges regarding the exclusion of sexual violence charges, girl soldiers and the impact of the limited charges on victims participation issues, and more recently on gender and reparations; the submission of a dossier to the Office of the Prosecutor in 2006 including interviews with victims/survivors of gender-based crimes allegedly committed by Lubanga's UPC militia group; medical and psychosocial support for victims/survivors of sexual and gender-based violence; the relocation of women's human rights defenders in Ituri due to threats to their safety as a result of their local advocacy for victims and accountability; and support for victim participants and their legal representatives to ensure the gender dimensions and experiences of former girl soldiers were recognised in the public record of this case.

For more information about this case please see:

- For a detailed analysis of the 14 March trial Judgement, see the Special Issues of *Legal Eye on the ICC*, available [here](#)
- Read the Women's Initiatives for Gender Justice's observations on reparations submitted to Trial Chamber I on 10 May 2012, available [here](#)
- *Gender Report Card 2011*, available [here](#); *Gender Report Card 2010*, available [here](#); *Gender Report Card 2009*, available [here](#); *Gender Report Card 2008*, available [here](#);
- For an analysis of the gender aspects of this case, see 'The ICC, child soldiers and gender justice', *Brigid Inder*, 21 November 2011, available [here](#);
- In May and July 2006, the Women's Initiatives conducted two documentation missions in Ituri, eastern DRC, and interviewed victims/survivors of gender-based violence, committed by a range of militias, including the UPC. We produced a dossier, which we subsequently shared with the Office of the Prosecutor, detailing 51 individual interviews with predominantly women victims/survivors of rape and other forms of sexual violence. Of these, 31 interviewees were victims/survivors specifically of acts of rape and sexual slavery allegedly committed by the UPC. On 16 August 2006, the Women's Initiatives submitted the confidential report and a letter to the Office of the Prosecutor describing our grave concerns that gender-based crimes have not been adequately investigated in the case against Thomas Lubanga and providing information about the commission of these crimes by the UPC. A redacted version of this confidential letter submitted to the Office of the Prosecutor is available [here](#);
- For a detailed description of the Prosecution's closing arguments, see Women's Initiatives for Gender Justice, 'Summary of the closing statements in *The Prosecutor v. Thomas Lubanga Dyilo*', *Legal Eye on the ICC e-letter*, October 2011, available [here](#). See also *Gender Report Card 2011*, p 203-218, available at [here](#).

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