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## Case Against Thomas Lubanga

### Introduction

On March 24, 2013, Trial Chamber I of the International Criminal Court (ICC) rendered its first final judgment and found Thomas Lubanga Dyilo guilty beyond reasonable doubt of the charges of conscripting, enlisting, and using children under the age of 15 to actively participate in hostilities in the Ituri district of the Democratic Republic of the Congo (DRC) from early September 2002 to August 13, 2003. Lubanga was president and leader of the Union of Congolese Patriots (Union des Patriotes Congolais - UPC) and commander-in-chief of the Patriotic Forces for the Liberation of the Congo (Forces Patriotiques pour la Libération du Congo - FPLC), the military wing of the UPC and one of the principal armed militias in the Ituri conflict.

On July 10, 2012, Trial Chamber I sentenced Lubanga to 14 years of imprisonment. The time he spent in the ICC's custody will be deducted from this total sentence. On August 7, 2012, the same chamber issued a decision on the principles applicable to reparations for the victims in this case. The appeals proceedings against these three decisions (guilt, sentence, and reparations) are ongoing.

The present document aims to provide an overview of the proceedings against Lubanga before the ICC since the start of the prosecutor's investigation in 2004 until the 2012 decisions of Trial Chamber I concerning the verdict, the sentence, and reparations. The paper identifies the most important rulings and issues surrounding the case.

### The Evidence

The Lubanga case relates to events that took place between early September 2002 and August 13, 2003, in Ituri, a district of the Orientale Province in the north east of the DRC, bordering Uganda, with a population ranging from 3.5 to 5.5 million people. The conflict in Ituri has been considered one of the bloodiest of the Congo Wars.

Ituri was the place of violent conflicts linked to the campaign by Laurent-Desiré Kabila to overthrow the dictatorial regime of Mobutu Sese Seko from 1996 to 1997. In this territory, Ugandan forces (the occupying power from 1998 to 2003), Congolese forces, Rwandan forces, and numerous armed militias, which appeared at the discretion of different governments and their evolving strategies and alliances, fought one another. Notably, Ituri is one of the richest regions in Congo, with reserves of gold, diamonds, coltan (columbite-tantalite), wood, and petroleum. Thus, the struggle of the different armed forces for the control of the wealth of Ituri has been one of the main reasons for the duration, intensity, and extent of the conflict.

In this context, as of 1999, the intensification and spread of a local land dispute between the Hema (herder) and Lendu (farmer) communities worsened preexisting conflicts, while providing with them a strong ethnic dimension.

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In 1999, the Rally for Congolese Democracy (Rassemblement Congolais pour la Démocratie - RCD), a rebel group that operated in Ituri at the time, split between the RCD-Mouvement de Libération (RCD-ML), which was under Ugandan influence, and the RCD-Goma, under Rwandan influence. Lubanga first served as Minister of Defense of the RCD-ML. However, internal conflicts subsequently led to the creation by Lubanga of the UPC in 2000, the first political party with an ethnic base (Hema) in Ituri, to fight the RCD-ML, better known under the name of the Congolese People's Army (Armée Populaire Congolaise - APC). The UPC established its base in Mandro, near Bunia (Orientale Province). In September 2002, the UPC and its military branch, the FPLC, took power in Ituri.

The creation of the UPC/FPLC with its hegemonic aims prompted the creation of other predominately Lendu militias, such as the Nationalist and Integrationist Front (Front des Nationalistes et Intégrationnistes - FNI), and the Front for Patriotic Resistance in Ituri (Forces de Résistance Patriotique d'Ituri - FPRI) of Germain Katanga and Mathieu Ngudjolo. These groups clashed in violent armed conflicts for the control of Bunia and the mining towns.

The crimes attributed to Lubanga by the ICC Prosecutor were committed in this context.

## The Proceedings

### The Pre-Trial Phase

#### *The Prosecutor's Investigation*

In a letter sent in March 2004, the DRC government referred to the ICC Prosecutor the DRC situation, thus permitting the ICC to determine if one or several persons should be charged with crimes within the jurisdiction of the court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute. In this same letter, the DRC government committed itself to cooperating with the ICC.

On June 23, 2004, the then ICC Prosecutor, Luis Moreno-Ocampo, announced his decision to open the first investigation involving the most serious crimes presumed to have been committed in DRC as of July 1, 2002. The prosecutor focused on crimes committed in the Ituri district (Orientale Province). On January 13, 2006, the prosecution requested an arrest warrant against Lubanga.

#### *Arrest Warrant and Limited Scope of the Charges*

On February 10, 2006, Pre-Trial Chamber I issued an arrest warrant under seal against Lubanga for the crimes of enlisting and conscripting children under the age of 15 in the FPLC and using them to participate actively in hostilities within the context of an armed conflict from July 2002 to December 2003, pursuant to Article 8(2)(b)(xvi) and Article 8(2)(e)(vii) of the Rome Statute.<sup>1</sup>

Lubanga was arrested in March 2005 and detained in Kinshasa by the Congolese authorities for his alleged involvement in the killing of several UN peacekeepers in Ituri one month earlier. A year later, on March 17, 2006, the DRC authorities transferred Lubanga to the ICC and its detention center in The Hague. The seal of the arrest warrant was lifted on March 17, 2006. On March 20, 2006, Lubanga appeared for the first time before the court for the verification of his identity and to confirm that he had been notified of the charges against him.

One of the first criticisms lodged against the Lubanga proceedings before the ICC were regarding the limited scope of the charges against Lubanga, given the extent of the abuses allegedly committed in Ituri, such as murders, acts of torture, and sexual violence, among others.

The prosecutor attributed his limited choice of charges to the difficulty of conducting on-site investigations due to security issues and to the need to not prolong indefinitely the investigation

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<sup>1</sup> ICC-01/04-01/06-2

phase and ensure the expeditious conduct of the proceedings. These factors thus prevailed over having more representative proceedings reflecting the extent of the violations committed in Ituri.

#### *Hearing on the Confirmation of Charges*

The confirmation of charges hearing took place at the seat of the Court from November 9–28, 2006. On January 29, 2007, Pre-Trial Chamber I confirmed the charges of war crimes against Lubanga and transferred the case to Trial Chamber I.<sup>2</sup> The Pre-Trial Chamber found that there were sufficient grounds to believe that Lubanga was responsible, as co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute, for the crimes of enlisting and conscripting children under the age of 15 in the FPLC and using them to participate actively in hostilities from September 2002 until June 2, 2003, within the context of an armed international conflict pursuant to Article 8(2)(b)(xxvi), and from June 2 to August 13, 2003, within the context of an armed conflict not of an international character, pursuant to Article 8(2)(e)(vii) of the Rome Statute.

#### *First Suspension of the Proceedings for Abuse of the Exception of Confidentiality*

On June 13, 2008, Trial Chamber I ordered the suspension of the proceedings against Lubanga.<sup>3</sup> The Trial Chamber considered that a fair trial could not be carried out because the Prosecutor had not disclosed to the defense some 200 documents of potentially exculpatory evidence, nor did he make these documents available to the judges. The prosecutor had obtained the evidence under an assurance of confidentiality pursuant to Article 54(3)(e) from several sources, notably the United Nations and nongovernmental organizations. These sources had refused to provide them to the defense and, for the most part, to the chamber. Consequently, on July 2, 2008, Trial Chamber I decided to unconditionally release Lubanga.<sup>4</sup> This decision was not executed, however, because the prosecutor requested its suspension while his appeals against the two decisions (suspension of the proceedings and release) were decided by the Appeals Chamber.

On October 21, 2008, the Appeals Chamber confirmed Trial Chamber's I decision suspending the proceedings,<sup>5</sup> but invalidated the decision to release Lubanga and sent it back to Trial Chamber I to issue a new decision, taking into account the criteria of Articles 60 and 58(1) of the Rome Statute, as well as some new developments, in particular, that the sources agreed to submit the documents to the judges.<sup>6</sup>

On November 18, 2008, with most of the documents having been disclosed following the lifting of the confidentiality, Trial Chamber I considered that the conditions for a fair trial were in place and thus ordered the continuation of the proceedings.

### **The Trial**

The trial before Trial Chamber I started on January 26, 2009. The chamber accepted the participation of 129 victims, represented by 3 teams of lawyers, thereby allowing them to express their views on all matters examined by the court as well as to interrogate witnesses.

The chamber heard 67 witnesses and held 204 days of hearings. The prosecution called 36 witnesses, including 3 experts, while the defense called 24. Three victims were called to appear as witnesses, on the request of their legal representatives. In addition, the chamber called four experts to testify. The prosecution tendered 368 pieces of evidence for the record, the defense tendered 992, and the legal representatives 13 (making 1,373 pieces of evidence in total). In addition to the written closing briefs, the parties and participants presented their oral closing statements from August 25–26, 2011. Since June 6, 2007, when the case file was transmitted to Trial Chamber I, the chamber issued 273 written rulings and orders, and 347 oral rulings.<sup>7</sup>

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<sup>2</sup> ICC-01/04-01/06-803.

<sup>3</sup> ICC-01/04-01/06-1401.

<sup>4</sup> ICC-01/04-01/06-1418.

<sup>5</sup> ICC-01/04-01/06-1487.

<sup>6</sup> Ibid, para 28.

<sup>7</sup> Details recapitulated in the verdict, ICC-01/04-01/06-2842, para. 11.

*Victims' Requests for Extension of the Charges and Legal Requalification*

In May 2009,<sup>8</sup> 27 victims participating in the trial requested Trial Chamber I to add the crimes of sexual slavery and cruel and inhuman treatment to the charges against Lubanga, based on the evidence submitted by the prosecution at trial.

On July 14, 2009, the majority of the judges (Judge Adrian Fulford dissenting) agreed with the victims' request and notified the parties that the legal qualification of the evidence was susceptible to change to include the above-mentioned crimes in application of Regulation 55 of the Regulations of the Court.<sup>9</sup> Both the defense and the prosecution appealed the decision, mostly on the grounds that the requalification went beyond the facts and circumstances established within the charges, which was a prerequisite to apply Regulation 55.

On December 8, 2009, the Appeals Chamber invalidated the Trial Chamber's decision, stating that once the trial begins, the chambers cannot consider other facts than those initially alleged by the prosecution and accepted by the judges at the decision on the confirmation of charges. It considered that, although the chamber can interpret the evidence as to the most pertinent legal qualification, it must refer only to the facts that are part of the charges.<sup>10</sup>



*Thomas Lubanga, right, enters the courtroom at the International Criminal Court, The Hague, January 26, 2009. © AP Photo/ICC-CPI/Michael Kooren, HO*

*Second Suspension of the Proceedings and Challenging of the Intermediaries*

On July 8, 2010,<sup>11</sup> Trial Chamber I ordered, once again, the suspension of the proceedings, considering that the fairness of the proceedings was no longer guaranteed due to the prosecution's lack of compliance with the orders of the chamber. In particular, the prosecution did not comply with the Chamber's order to disclose to the defense the name of Intermediary 143 (against

<sup>8</sup> ICC-01/04-01/06-1891.

<sup>9</sup> ICC-01/04-01/06-2049; Regulation 55 states: "The Chamber may change the legal characterization of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges."

<sup>10</sup> ICC-01/04-01/06-2205.

<sup>11</sup> IC-01/04-01/06-2517-Red.

whom allegations of manipulating witnesses had been leveled) as well as other identifying information.<sup>12</sup> On October 8, 2010, the Appeals Chamber reversed this decision, considering that the Trial Chamber erred in immediately resorting to the suspension of the proceedings rather than first imposing sanctions to compel the prosecutor to comply with its orders.<sup>13</sup> As a result, the proceedings resumed.

### Verdict<sup>14</sup>

On March 14, 2012, Trial Chamber I found Lubanga guilty of the crimes for which he had been tried: the enlisting and conscripting of children under the age of 15 into the FPLC and using them to actively participate in hostilities, within the context of an armed conflict not of an international character, from September 1, 2002, to August 13, 2003, pursuant to Article 8(2)(e)(vii) of the Rome Statute. This was the first judgment ever issued by the ICC. Its most salient findings are presented below.

#### *Intermediaries*

Trial Chamber I considered that the prosecution should not have delegated its investigative duties to intermediaries (third parties and noncourt personnel who liaised between the witnesses and the prosecution), whatever challenges it faced. In particular, the chamber indicated that three intermediaries may have interfered with witness evidence. It, therefore, rejected the testimony of nine former child soldiers presented by the prosecution due to their links with those intermediaries.<sup>15</sup>

#### *Non-international Armed Conflict*

In the decision on the confirmation of charges, Pre-Trial Chamber I had concluded that the conflict was international from September 2002 to June 2003 and non-international from June 2003 to August 13, 2003. Trial Chamber I, however, concluded that the armed conflict between the UPC/FPLC and other armed groups was non-international for the entire period of September 2002 to August 13, 2003, in spite of the existence of a concurrent international conflict between Uganda and the DRC.<sup>16</sup> Thus, the chamber applied Regulation 55 of the Regulations of the court and modified the qualification of the armed conflict established by the Pre-Trial Chamber.

#### *Crimes of Conscripting and Enlisting Children Under the Age of 15 and Using Them to Participate Actively in Hostilities*

The Trial Chamber noted that the conscription and enlistment of children under the age of 15 and their use to participate actively in hostilities constitute three distinct crimes.<sup>17</sup> The chamber concluded that the jurisprudence of the Special Court for Sierra Leone (SCSL) guides the interpretation of the pertinent provisions of the Rome Statute due to the identical wording of Article 8(2)(e)(vii) of the Rome Statute and Article 4(c) of the SCSL Statute.

The chamber, based on the testimony of experts, further stated that children under the age of 15 are not in a position to give informed consent at the time that they join an armed group.<sup>18</sup> Moreover, the chamber indicated that “active participation in hostilities” includes direct participation in combat as well as other activities of indirect participation. The fundamental common characteristic of these activities focuses on the support that the child provides to combatants that makes him/her a target in the conflict and exposes him/her to danger. Any determination of what constitutes “active participation” can only be made on a case-by-case basis.<sup>19</sup>

<sup>12</sup> Due to the difficulties in identifying and approaching witnesses, the Prosecution resorted to local persons, called “intermediaries” in the proceedings, who were trusted by the local community and whose role was to assist the Prosecution to locate and be put in contact with the witnesses.

<sup>13</sup> IC-01/04-01/06-2582.

<sup>14</sup> IC-01/04-01/06-2842.

<sup>15</sup> *Ibid.*, paras. 482–484.

<sup>16</sup> IC-01/04-01/06-2842., paras. 549–567.

<sup>17</sup> IC-01/04-01/06-2842, paras. 607–609.

<sup>18</sup> IC-01/04-01/06-2842, paras. 610–613.

<sup>19</sup> IC-01/04-01/06-2842, para. 628.

*Mode of Responsibility as Co-perpetrator, Pursuant to Article 25(3)(a)*

The chamber found that the defendant and his co-perpetrators agreed to a common plan to build an effective army, in order to ensure the UPC/FPLC's political and military control over Ituri.<sup>20</sup> The execution of this common plan led to the conscription and enlistment of children under the age of 15 within the UPC/FPLC, and to use them to participate actively in hostilities, especially during battles, as soldiers or bodyguards for high-ranking officials, including Lubanga's, between September 1, 2002, and August 13, 2003.<sup>21</sup>

Lubanga, as president of the UPC/FPLC, operated concurrently as commander-in-chief of the army and political leader. He was responsible for the overall coordination of activities and was continuously kept informed of the progress of the FPLC operations. He also participated in the planning of military operations and held a crucial role in terms of logistical support. He actively took part in decisions related to policies and campaigns for recruitment of children, he used children under the age of 15 as his own bodyguards, and he regularly observed these children performing guard duty for other members of the UPC.<sup>22</sup>

The chamber concluded that these contributions, taken together, were essential for putting into place a common plan that led to the commission of the crimes charged, namely, conscripting and enlisting children under the age of 15 in the UPC/FPLC and using them to actively participate in hostilities.<sup>23</sup>

**Decision on the Sentence<sup>24</sup>**

On July 10, 2002, Trial Chamber I sentenced Lubanga to a total of 14 years imprisonment, from which the time served in detention in The Hague would be deducted. The Prosecution and Defense have appealed the decision, and the appeal proceedings are still ongoing.

The Trial Chamber rejected the prosecutor's submission to consider sexual violence against girl soldiers under the age of 15 as an aggravating circumstance in the determination of the sentence. The judges considered that the prosecutor had neither presented sufficient evidence of this crime, nor linked Lubanga to this crime. In addition, the judges underlined the fact that the prosecutor had refused during the trial to expand the charges against Lubanga to include, in particular, the charges of sexual crimes and even more the fact that the prosecutor refused to present evidence on this point during the sentencing hearing.

Judge Elizabeth Odio Benito issued a dissenting opinion on this matter. According to Judge Odio Benito, sexual violence is inherent to, and an intrinsic element of, crimes of enlisting, conscripting, and using child soldiers, and sexual violence. Sexual violence thus would not constitute new charges, but would relate to a more complete understanding of the infraction and of the entire extent of its criminal dimension.

**Rights of Victims****Participation of Victims in Proceedings: The Construction of a Statute of "Participant"**

The rights of victims are a pillar of the ICC mandate, and the position of victims is one of the characteristics of the Rome Statute, which established the principle of victims' participation and their right to reparation. Article 68(3) indicates that this participation is designed to permit victims to present their "points of view and preoccupations" if the personal interests of the victims are concerned and if the court considers it appropriate and not prejudicial or

20 ICC-01/04-01/06-2842, see especially paras. 1134–1146.

21 ICC-01/04-01/06-2842, see especially paras. 1132–1136.

22 ICC-01/04-01/06-2842, see especially paras. 1111–1116 and para. 1169.

23 ICC-01/04-01/06-2842, paras. 1213–1222.

24 ICC-01/04-01/06-2901

contrary to the rights of the defense and the requirements of a fair and impartial trial. This provision is complemented by Rule 85 et seq. of the Rules of Procedure and Evidence. These provisions represent a very general framework that gives the chambers a large margin of interpretation. The chambers have therefore filled and given effect to the notion of victim as “participant” through their rulings.

The modalities of victim participation recognized by the chamber are: (a) victims can express their views and concerns in written form or orally, preliminarily or as final submissions, on all questions in which their interests are affected; (b) the right to question witnesses, regardless of the fact that witnesses are called by parties; (c) the right to contest the admissibility or relevance of evidence when their interests are affected; and (d) the right to tender evidence regarding the guilt or innocence of the defendant, within the chamber’s power to request additional evidence pursuant to Article 69(3).

The extent and scope of victims’ rights depend on the stage of the proceedings. They are limited during the hearing on the confirmation of charges and are broader during proceedings. For example, victims may participate with the authorization of the chamber in proceedings regarding the amendment of charges and the release of the accused. However, victims cannot appeal a decision to refuse their participation or award them the status of victim. They can only appeal decisions on reparations made after the conviction. Nevertheless, they have the right to participate in appeal proceedings on sentencing, as the court considers that their personal interests are also affected.

### **The Right to Reparation<sup>25</sup>**

On August 7, 2012, Trial Chamber I decided on the principles applicable to reparation for the victims in the case.

In the chamber’s view, reparations, as provided in the Rome Statute and Rules, are to be applied in a broad and flexible manner, allowing the chamber to approve the widest possible remedies for violations of the rights of the victims and the means of implementation. Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings. Pursuant to Rule 85(b), reparations can also be granted to legal entities, such as NGOs and hospitals. Moreover, pursuant to Rule 97(1), reparations may be awarded to individual victims, or groups of victims, if in either case they suffered personal harm. Individual and collective reparations may be awarded concurrently.

Notably, the chamber stated that the specific forms of reparation referred to in the statute (restitution, compensation and rehabilitation) are not exclusive and do not bar the court from ordering other forms of reparation. With respect to compensation, the harm suffered does not necessarily need to have been direct, but it must have been personal to the victim. Compensation requires a broad application, to encompass all forms of damage, loss, and injury, including material, physical, and psychological harm. Reparations should not be limited to «direct» harm or the «immediate effects» of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the court should apply the standard of «proximate cause.» This means, among other implications, that all injuries resulting from sexual violence can entitle the victim to reparation.

Moreover, the chamber adapts the forms of reparations to the needs of the victims, encourages victims’ participation in their elaboration, and notes the specific character of reparations for victims of sexual violence.

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25 ICC-01/04-01/06-2904

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Proposals related to reparations coming from the victims themselves should be addressed to the Trust Fund for Victims (TFV) and presented to a future Trial Chamber. Reparations will be provided through the TFV using the resources that the fund had collected through voluntary contributions and donations from states and set aside for this eventuality. The chamber has nonetheless given some direction concerning the attribution of reparations in the Lubanga case (which will be the focus of subsequent procedural developments). The chamber has also indicated that Lubanga has been declared indigent and no assets or property referable to him had been identified to date. Therefore, this status only permits symbolic reparations (such as public apology), which should be provided by the accused only on a voluntary basis.

In sum, the TFV is responsible for financial reparation, taking into account the availability of resources. In this respect, the chamber has accepted the position of the TFV to only grant collective reparations because of its finite resources. The accused and the victims have appealed this decision, particularly on the limitation of collective reparations and the delegation of powers to the TFV.