

BRIEFING PAPER

Trial of Thomas Lubanga Dyilo at the ICC: Closing Arguments

AUGUST 2011

ON THURSDAY AUGUST 25 2011 the International Criminal Court in The Hague will hear closing arguments in the case against Thomas Lubanga Dyilo, the first case to reach this stage at the ICC. This background paper summarizes the main issues in the case so far, with hyperlinks to relevant portions of our trial monitoring website www.lubangatrial.org.

The Charges

Thomas Lubanga is the alleged former president of the Union of Congolese Patriots (UPC), which was a party to the conflict in the DRC. He is charged with committing three war crimes between July 2002 and December 2003. The specific counts against Lubanga are:

- Conscripting children under the age of 15 years into armed groups;
- Enlisting children into armed groups; and
- Using children to participate actively in armed conflict.

Lubanga's was the first trial to be launched by the ICC, and is likely to be the first completed by the world's only permanent court mandated to try war crimes, crimes against humanity, and genocide. It is the only trial to date conducted by the ICC that is solely related to the use of child soldiers.

The Legal Issues

On April 15, 2011, the Trial Chamber judges identified seven issues that need to be addressed in order to make a judgment on the charges. The seven issues are:

1. Did an armed conflict exist in Ituri, DRC, between September 1, 2002 and August 13, 2003?
2. If there was an armed conflict, is there a connection between the conflict and the alleged crimes?
3. Was the armed conflict international or non-international? Different provisions of the Rome Statute (which set up the ICC) are invoked for international and non-international armed conflicts, though both criminalize the same conduct.
4. If the chamber concludes the conflict was not of an international character, what factors should be taken into account if the judges consider modifying the legal characterization of the facts for the period from September 2002 to June 2, 2003?

The judges at the pre-trial stage found that the armed conflict in question was of an international nature due to the role of Uganda. However, depending on the trial judges' interpretation of the evidence and the law, they potentially may legally re-characterize the conflict and find that it was non-international. This would depend on the interpretation of Regulation 55, which was already at issue in the case when the Appeals Chamber ruled that it would not be possible to re-characterize the facts to admit sexual violence charges.

5. What does the prosecution need to establish to prove individual criminal responsibility under Article 25(3)(a) of the Rome Statute that provides a person shall be criminally responsible for a crime within the jurisdiction of the Court, if that person “commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible?” What is the meaning of “conscripting” or “enlisting” children under the age of fifteen years into the national armed forces, into armed forces or armed groups or “using them to actively participate in hostilities?”
6. What does the Prosecution need to establish to prove the mental element, also known as *mens rea*, of the crimes? The Trial Chamber refers to Article 30 of the Rome Statute, which provides that a person can only be held liable for a crime within the Court’s jurisdiction if the “material elements are committed with intent and knowledge.” Thus, the parties will have to address whether Lubanga knowingly and intentionally conscripted or enlisted children less than fifteen years of age into his armed forces, and knowingly and intentionally used them to participate actively in hostilities.

Why the Trial Stalled Twice

In June 2008, the ICC’s Trial Chamber suspended Lubanga’s trial before it opened due to concerns that he would not receive a fair hearing. The Office of the Prosecutor, headed by Luis Moreno-Ocampo, was found to have failed to disclose a portion of potentially exculpatory information in their possession due to the fact it had been collected through providing assurances that it would remain confidential. Exculpatory information can facilitate the defense in countering the prosecution case, and it is required to be disclosed in order to maintain fair trial standards.

The Office of the Prosecutor initially refused to disclose more than 200 documents that had been collected with the help of other organizations, including the United Nations and nongovernment organizations, claiming that they needed permission from those organizations in order to disclose the materials to third parties, including the defense. Eventually, this permission was obtained and the materials were disclosed. In November 2008, the judges ruled that the prosecutor has taken the necessary steps to ensure Lubanga’s fair trial rights were respected, [allowing the trial to proceed](#).

A second stay of proceedings was ordered in July 2010, and the judges [ordered that Lubanga be released from ICC detention](#) when prosecutors refused to honor an order by trial judges to disclose to the defense the identity of an intermediary, who had helped prosecution investigators contact witnesses. The order was prompted by defense claims that prosecution intermediaries bribed and coached witnesses to provide false evidence.

The prosecution [immediately appealed](#) while also securing the agreement of the intermediary in question to be identified to the defense, accompanied by witness

protection measures. In October 2010, the Appeals Chamber [ruled that the Trial Chamber erred](#) in immediately staying proceedings without first applying less drastic measures, such as imposing sanctions against the prosecutor following his failure to comply with the Trial Chamber's orders. The trial resumed less than three weeks later. No sanctions were imposed on the prosecutor.

The Prosecution

The prosecution claims that Thomas Lubanga contributed to a common plan of assuming military control in Ituri. To achieve this goal he was involved in recruiting child soldiers, ensuring they were trained, and deployed in the inter-ethnic conflict. As the alleged leader of the UPC, the Prosecution claims Lubanga visited military training camps, oversaw the conduct of the military, secured financing for the UPC, and negotiated the provision of their weapons and other military equipment.

Children under the age of 15 years old were allegedly used as bodyguards and in active combat.

In its closing arguments, the prosecution is expected to argue that its witnesses have fully demonstrated how children were forcefully abducted, conscripted, trained under inhumane conditions at the UPC's military camps and then were forced to take part in combat. The prosecution will highlight the plight of these children, their parents, and communities during and after the conflict and how many of them still suffer physical, emotional, and psychological pain. Furthermore, the prosecution will likely emphasize that Lubanga did nothing to implement demobilization orders, and maintained some of the youths in his personal entourage.

The Defense

Thomas Lubanga has pleaded not guilty to all charges. Responding to prosecution allegations, Lubanga claims he was not the overall leader of the UPC, and that his activities were restricted to political matters and as such he played no active role in the military wing of the UPC.

Lubanga does not argue that children were not to be found in the UPC forces. Instead, he claims children voluntarily joined and that he did all he could to demobilize any minors identified. Lubanga further argues that all prosecution witnesses who identified themselves as child soldiers lied.

Lubanga's defense is expected to argue in its closing statements that he neither initiated the recruitment of minors into the UPC forces nor helped recruit minors. Further, the defense will likely argue that Lubanga sought to demobilize the child soldiers from the UPC's armed wing and did not have the intent required under Article 30 for the commission of the crimes.

The defense may also argue that many children volunteered to join UPC because they wanted to be like their peers, who were soldiers and routinely extorted money from civilians, or because they had nothing better to do in light of the war situation.

The defense is also likely to suggest that children in an ethnically-motivated war were highly likely to be forced by their families or community elders to join armed groups in order to defend their communities and to guard against ostracization.

Witnesses for the Prosecution

The prosecution in the Lubanga case called 28 witnesses including three expert witnesses. Three of the 118 victims were sworn in as witnesses to give evidence which broadly supported the prosecution case.

Selected Testimony Describing the Alleged Crimes

- **Christina Peduto:** A child protection specialist, who worked for the United Nations Mission to Congo (MONUC), testified that she referred former child soldiers to reintegration centers after they had been demobilized. Among the children she worked with [was an 11 year-old boy who was recruited into UPC](#) at age 10 and worked as a body guard for FPLC chief-of-staff Floribert Kisembo. Another child Ms. Peduto worked with [told her that Lubanga, in the company of six soldiers, kidnapped him.](#)
- **Witness 10:** A girl former child soldier testified that she was conscripted at the age of 13 and was repeatedly sexually assaulted by her commanders. [Other testimony heard at the trial](#) showed that some of the young girls fell pregnant and were forced to abort and use local herbs for treatment.

Selected Evidence Linking Lubanga to the Alleged Crimes

- **Video Evidence:** Lubanga is depicted visiting a UPC training camp and delivering a speech to a large group of soldiers and recruits, some of whom appear to be children. [In one portion of the video footage](#), Lubanga was shown mentioning the large number of children stating, “We went to your homes to ask you for help to create the army.”
- **Witness 17:** Served as head of the military wing of the UPC. [While describing the structure and hierarchy of the UPC](#), he told the court that Lubanga was the direct superior of the chief-of-staff of the UPC’s military. He confirmed the presence of child soldiers among UPC recruits and Lubanga’s personal guards.

- **Witness 55:** Served as a UPC platoon controller. [He also confirmed the presence of child soldiers among UPC recruits](#) and Lubanga's personal guard.

Witnesses for the Defense

The defense called 19 witnesses, some of who claimed that certain prosecution intermediaries allegedly coached witnesses and that prosecution witnesses lied regarding their testimony that they were former child soldiers in the UPC.

Selected Testimony on Credibility of Prosecution Witnesses

- **Witness 02:** The first defence witness to testify stated that his son, who had earlier testified for the prosecution, [was never a soldier in the UPC](#) and had stayed at home with his father throughout the conflict. He said an organization that has promised to find a job and a scholarship for his son, started passing him off as a child soldier.
- **Maki Dera Joseph:** He testified [that an ICC prosecution intermediary paid him \\$200](#) to convince his nephew to give false testimony before the court and that his nephew subsequently testified as a prosecution witness claiming to be a former child soldier. Dera Joseph also stated that at the bidding of the OTP intermediary, he lied to court officials that he knew Lubanga and that he was aware there were child soldiers in UPC.
- **Claude Nyéki Django:** This [witness testified that he and a group of other young boys were falsely paraded](#) before some unnamed people as child soldiers.
- **Dieudonné Tonyfwa Urochi and Jean Paul Bejijjo Chong:** Witnesses 229 and 225 both [recounted how they were abducted, tortured during training, and were forced to take part in battles](#). The defense argued that these witnesses [had stolen the identities of two defense witnesses](#) who were presented to the court claiming that they were the true witnesses 229 and 225 the testimony presented by the prosecution witnesses 229 and 225 was false.

Testimony Disconnecting Thomas Lubanga from Crimes Involving Child Soldiers

- **Bede Djokaba Lambi Longa:** A senior UPC official testified that Lubanga, as president of the UPC and secretary of national defense, [issued a decision to demobilize all soldiers under 18 years of age](#). The witness stated that Lubanga issued the order twice more - in November 2002 and January 2003 - because the military had not fully implemented it. He said there were never any cases of forced conscription and that he never saw minors in Lubanga's personal guard.

- **Michel Angayika Baba:** Lubanga's former private secretary told the trial that once appointed the head of the UPC, Lubanga [declared that he was against the recruitment of child soldiers](#). He said while Lubanga ordered the demobilization of child soldiers, the order was resisted by military commanders and community elders.

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