

Hearing to deliver the decision
pursuant to Article 76

(Open Session)

ICC-01/04-01/06

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 Hearing to deliver the decision pursuant to Article 76
8 Tuesday, 10 July 2012
9 (The hearing starts in open session at 9.31 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FULFORD:
14 1. This is the summary of the Decision on sentence pursuant to Article 76 of the
15 Statute.
16 2. The Chamber, composed of Judge Adrian Fulford, Judge Elizabeth Odio Benito
17 and Judge René Blattmann, delivered the Judgment pursuant to Article 74 of the
18 Statute on 14 March 2012. It found Thomas Lubanga Dyilo guilty, as a
19 co-perpetrator, of the charges of conscripting and enlisting children under the age of
20 fifteen years into the UPC/FPLC and using them to participate actively in hostilities in
21 the Ituri region of the Democratic Republic of the Congo within the meaning of
22 Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from early September 2002 to
23 13 August 2003.
24 3. Having received written submissions on sentence from the parties and
25 participants, the sentencing hearing was held on 13 June 2012, during which the

- 1 Chamber heard the evidence of defence witnesses D01-0039 and D01-0040.
- 2 Thereafter the prosecution, the legal representatives of victims and the defence made
3 their oral submissions. Following these submissions, Mr Lubanga made a statement
4 to the Chamber. The evidence of the two additional witnesses and all the oral
5 submissions are considered in the written decision, where relevant.
- 6 4. In considering the purposes of punishment at the ICC, the Chamber has taken
7 into account the Preamble of the Rome Statute, which provides, inter alia, that "the
8 most serious crimes of concern to the international community as a whole must not
9 go unpunished" (paragraph 4).
- 10 5. Pursuant to Article 77(1) of the Statute and Rule 145(3) of the Rules, the Chamber
11 may impose a sentence of imprisonment that does not exceed 30 years, unless "the
12 extreme gravity of the crime and the individual circumstances of the convicted
13 person" warrant a term of life imprisonment.
- 14 6. In addition, the Chamber may order a fine or the forfeiture of proceeds, property
15 and assets derived directly or indirectly from the crime, or both, pursuant to
16 Article 77(2) of the Statute.
- 17 7. Article 78 of the Statute and Rule 145 of the Rules govern the Chamber's
18 determination of the sentence, providing that the Chamber must take into account
19 such factors as the gravity of the crime and the individual circumstances of the
20 convicted person, as well as any mitigating and aggravating circumstances.
- 21 8. Article 78(2) of the Statute provides that with a sentence of imprisonment, the
22 Court must deduct the time, if any, spent in detention in accordance with an order of
23 the Court. Additionally, it "may deduct any time otherwise spent in detention in
24 connection with conduct underlying the crime."
- 25 9. Rules 145(1)(a) and(b) of the Rules require that the sentence must reflect the

1 culpability of the convicted person and the Chamber needs to balance all the relevant
2 factors, including any mitigating and aggravating factors and taking into account the
3 circumstances of the convicted person and the crime. Additional factors and
4 circumstances that are to be considered are listed in Rules 145(1)(c) and (2) of the
5 Rules.

6 10. Finally, pursuant to Article 81(2)(a) of the Statute, the Chamber must ensure that
7 the sentence is in proportion to the crime.

8 11. The legal framework applicable to the sentencing stage of the proceedings,
9 applying Article 21(1) of the Statute, is set out in Articles 23, 76, 77, 78 and 81(2)(a) of
10 the Statute and Rules 143, 145 and 146 of the Rules, and it is to be noted that none of
11 these provisions limit the factors that are properly to be considered during sentencing
12 to those described in the Confirmation Decision. Instead, Article 76(1) of the Statute
13 establishes that when considering the "appropriate" sentence, the Trial Chamber
14 "shall take into account the evidence presented and submissions made during the trial
15 that are relevant to the sentence." Pursuant to Article 76(2) of the Statute, the
16 Chamber "may on its own motion, and it shall, at the request of the Prosecutor or the
17 accused, hold a further hearing to hear any additional evidence or submissions
18 relevant to the sentence [...]." In the judgment of the Chamber, the evidence
19 submitted at this stage can exceed the facts and circumstances set out in the
20 Confirmation Decision, provided the defence has had a reasonable opportunity to
21 address them.

22 12. The defence has had a sufficient opportunity to challenge the evidence and the
23 allegations relevant to the sentence as advanced during the trial. In addition, the
24 Chamber has provided the defence an opportunity to respond to all the submissions
25 and evidence that have been relied on for the purposes of sentence following

1 Mr Lubanga's conviction and the defence has been provided with adequate time and
2 facilities, including the opportunity to identify and introduce evidence relevant to
3 sentence.

4 13. It is for the Chamber to establish the standard of proof for the purposes of
5 sentencing, given the Statute and the Rules do not provide any guidance. Since any
6 aggravating factors established by the Chamber may have a significant effect on the
7 overall length of the sentence Mr Lubanga will serve, it is necessary that they are
8 established to the criminal standard of proof, namely "beyond a reasonable doubt."

9 14. The Chamber accepts that the mitigating factors are not limited to the facts and
10 circumstances described in the Confirmation Decision, particularly given
11 Rule 145(2)(a)(ii) of the Rules refers to "the convicted person's conduct after the act,"
12 in this context. As to the standard of proof, the Chamber is of the view that the in
13 dubio pro reo principle applies at the sentencing stage of the proceedings, and any
14 mitigating circumstances are to be established on a balance of probabilities.

15 15. Any factors that are to be taken into account when assessing the gravity of the
16 crime will not additionally be taken into account as aggravating circumstances, and
17 vice-versa.

18 16. The crimes of conscripting and enlisting children under the age of fifteen and
19 using them to participate actively in hostilities are undoubtedly very serious crimes
20 that affect the international community as a whole. Additionally, as set out in the
21 Judgment, the crime of conscription is distinguished by the added element of
22 compulsion. The crime of using children to participate actively in hostilities involves
23 exposing them to real danger as potential targets. The vulnerability of children
24 means that they need to be afforded particular protection that does not apply to the
25 general population, as recognised in various international treaties.

1 17. As the Chamber described in the Judgment, the principal historical objective
2 underlying the prohibition against the use of child soldiers is to protect children
3 under the age of 15 from the risks that are associated with armed conflict, and
4 particularly they are directed at securing their physical and psychological well-being.
5 This includes not only protection from violence and fatal or non-fatal injuries during
6 fighting, but also the potentially serious trauma that can accompany recruitment,
7 including separating children from their families, interrupting or disrupting their
8 schooling and exposing them to an environment of violence and fear.

9 18. Against this general background the Chamber has considered the gravity of
10 these crimes in the circumstances of this case, with regard, inter alia, to the extent of
11 the damage caused, and in particular the "harm caused to the victims and their
12 families, the nature of the unlawful behaviour and the means employed to execute the
13 crime; the degree of participation of the convicted person; the degree of intent; the
14 circumstances of manner, time and location; and the age, education, social and
15 economic condition of the convicted person."

16 19. The Chamber has not reached conclusions to the criminal standard, namely
17 beyond reasonable doubt, as to the precise number, or proportion, of the recruits who
18 were under 15 years. The Chamber, in passing sentence, has reflected its earlier
19 determination that the involvement of children was widespread.

20 20. The Chamber determined that Mr Lubanga agreed to, and participated in, a
21 common plan to build an army for the purpose of establishing and maintaining
22 political and military control over Ituri. The Chamber did not conclude that
23 Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the
24 UPC/FPLC and to use them to participate actively in hostilities. Instead, the
25 Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this

1 would occur. It was in this context that Mr Lubanga was convicted as a
2 co-perpetrator who made an essential contribution to the common plan.

3 21. Mr Lubanga is clearly an intelligent and well-educated individual, who would
4 have understood the seriousness of the crimes of which he has been found guilty.
5 This marked level of awareness on his part is a relevant factor in determining the
6 appropriate sentence.

7 22. Although the Chamber found that a number of recruits were subjected to a
8 range of punishments during training with the UPC/FPLC, in the view of the Majority
9 the evidence does not support a conclusion beyond reasonable doubt that the
10 punishment of children below 15 years of age occurred in the ordinary course of the
11 crimes for which Mr Lubanga has been convicted. Furthermore, nothing suggests
12 that Mr Lubanga ordered or encouraged these punishments, that he was aware of
13 them or that they can otherwise be attributed to him in a way that reflects his
14 culpability. Therefore, it has not been demonstrated that the individual
15 punishments referred to by the Chamber were the responsibility of Mr Lubanga and
16 the Chamber has not taken this into account as an aggravating factor in the
17 determination of his sentence.

18 23. The Chamber strongly deprecates the attitude of the former Prosecutor in
19 relation to the issue of sexual violence. He advanced extensive submissions as
20 regards sexual violence in his opening and closing submissions at trial, and in his
21 arguments on sentence he contended that sexual violence is an aggravating factor that
22 should be reflected by the Chamber. However, not only did the former Prosecutor
23 fail to apply to include sexual violence or sexual slavery at any stage during these
24 proceedings, including in the original charges, but he actively opposed taking this
25 step during the trial when he submitted that it would cause unfairness to the accused

1 if he was convicted on this basis. Notwithstanding this stance on his part
2 throughout these proceedings, he suggested that sexual violence ought to be
3 considered for the purposes of sentencing.

4 24. The prosecution's failure to charge Mr Lubanga with rape and other forms of
5 sexual violence as separate crimes within the jurisdiction of the Court is not
6 determinative of the question of whether that activity is a relevant factor in the
7 determination of the sentence. The Chamber is entitled to consider sexual violence
8 under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii)
9 as regards the nature of the unlawful behaviour and (iii) in relation to the circumstances
10 of the manner in which the crime was committed; additionally, this can be considered
11 under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.

12 25. The Chamber is entitled to consider sexual violence in determining the sentence
13 that is to be passed, notwithstanding the fact that it did not form part of the
14 Confirmation Decision. Given the procedural safeguards, there will be no
15 consequential unfairness if the Chamber decides that sexual violence is a relevant
16 factor.

17 26. However, that said, it remains necessary for the Chamber to be satisfied beyond
18 reasonable doubt that: (i) child soldiers under 15 were subjected to sexual violence;
19 and (ii) that this can be attributed to Mr Lubanga in a manner that reflects his
20 culpability pursuant to Rule 145(1)(a).

21 27. On the basis of the totality of the evidence introduced during the trial on this
22 issue, the Majority is unable to conclude that sexual violence against the children who
23 were recruited was sufficiently widespread to mean that it could be characterised as
24 occurring in the ordinary course of the implementation of the common plan for which
25 Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or

1 encouraged sexual violence, that he was aware of it or that it could otherwise be
2 attributed to him in a way that reflects his culpability.

3 28. Although the Prosecutor was entitled to introduce evidence on this issue during
4 the sentencing hearing, he failed to take this step, or to refer to any relevant evidence
5 that had been given during the trial. As a result, in the view of the Majority, the link
6 between Mr Lubanga and sexual violence in the context of the charges has not been
7 established beyond reasonable doubt. Therefore, this factor cannot properly form
8 part of the assessment of his culpability for the purposes of sentence.

9 29. As already indicated, the factors that are relevant for determining the gravity of
10 the crime cannot additionally be taken into account as aggravating circumstances.
11 Therefore, the age of the children does not both define the gravity of the crime and act
12 as an aggravating factor. Accordingly, the age of the children does not constitute an
13 aggravating factor as regards these offences.

14 30. The prosecution contends that the evidence demonstrates that the female
15 recruits were subjected to sexual violence, rape and "conjugal subservience" on the
16 basis of their gender. In the judgment of the Chamber, the Court has not been
17 provided with any evidence that Mr Lubanga deliberately discriminated against
18 women in committing these offences in the sense suggested by the prosecution or the
19 victims. Accordingly, "motive involving discrimination" pursuant to
20 Rule 145(2)(b)(v) cannot constitute an aggravating factor.

21 31. The Chamber accepts that Mr Lubanga hoped that peace would return to Ituri
22 once he had secured his objectives, but this is only of limited relevance given the
23 persistent recruitment of child soldiers during the period covered by the charges.
24 The critical factor is that in order to achieve his goals he used children as part of the
25 armed forces over which he had control, and the Chamber has set out in the judgment

1 its conclusions as to their continued presence in the UPC/FPLC, notwithstanding
2 public statements to the contrary and the demobilisation orders he issued. Whether
3 or not Mr Lubanga genuinely feared attacks by others, his response should not have
4 included using children as part of the armed wing of the UPC.

5 32. The Chamber has, however, reflected certain factors involving Mr Lubanga in
6 the aftermath of the offences, along with his notable co-operation with the Court as
7 set out hereafter. He was respectful and co-operative throughout the proceedings,
8 notwithstanding some particularly onerous circumstances which included:

- 9 • the prosecution gathered an extensive quantity of evidence under
10 confidentiality agreements (Article 54(3)(e)) leading to a failure to disclose
11 exculpatory material, which in turn resulted in a stay of the proceedings and a
12 provisional order to release Mr Lubanga;
- 13 • the prosecution repeatedly failed to comply with the Chamber's disclosure
14 orders, leading to a second stay of the proceedings and a second provisional
15 order releasing Mr Lubanga;
- 16 • the prosecution's use of a public interview, given by Ms Beatrice le Fraper du
17 Hellen, to make misleading and inaccurate statements to the press about the
18 evidence in the case and Mr Lubanga's personal conduct during the
19 proceedings.

20 33. The prosecution argues that, in order "to avoid inexplicable sentencing
21 discrepancies," the sentencing policy of the Court should presume a "consistent
22 baseline" for sentences, which should not be adjusted on the basis that some crimes
23 are less serious than others. It is submitted that the appropriate "baseline" or starting
24 point for all sentences should be set at approximately 80% of the statutory maximum,
25 and this should then be adjusted in accordance with Rule 145 to take into account any

1 aggravating and mitigating circumstances and other factors relevant to the convicted
2 person and the circumstances of the crimes.

3 34. No established principle of law or relevant jurisprudence under Article 21 of the
4 Statute has been relied on in support of this suggested approach, which would bind
5 the judges to a minimum starting point of 24 years in all cases. In the judgment of
6 the Chamber, the sentence passed by a Trial Chamber should always be proportionate
7 to the crime (see Article 81(2)(a)) and an automatic starting point - as proposed by the
8 former Prosecutor - that is the same for all offences would tend to undermine that
9 fundamental principle.

10 35. A life sentence would be inappropriate in the instant case, given the requirement
11 in Rule 145(3) that imposing this sentence is "justified by the extreme gravity of the
12 crime and the individual circumstances of the convicted person, as evidenced by the
13 existence of one or more aggravating circumstances." Given the Chamber has not
14 found any aggravating factors in this case, a whole life term would be inappropriate.

15 36. Mr Lubanga has been convicted of having committed, jointly with others, the
16 crimes of conscripting and enlisting children under the age of 15 and using them to
17 participate actively in hostilities in the context of an internal armed conflict. The
18 Chamber has borne in mind the widespread recruitment and the significant use of
19 child soldiers during the time-frame of the charges; the position of authority held by
20 Mr Lubanga within the UPC/FPLC and his essential contribution to the common plan
21 that resulted, in the ordinary course of events, in these crimes against children; the
22 lack of any aggravating circumstances; and the mitigation provided by his consistent
23 co-operation with the Court during the entirety of these proceedings, in
24 circumstances when he was put under considerable unwarranted pressure by the
25 conduct of the prosecution during the trial as just referred to.

- 1 37. Under Article 78(3) of the Statute, when the person has been convicted for more
2 than one crime "the Court shall pronounce a sentence for each crime and a joint
3 sentence specifying the total period of imprisonment." Taking into account all the
4 factors that we have discussed, the Majority sentences Mr Lubanga:
- 5 1. for having committed, jointly with other persons, the crime of conscripting
6 children under the age of 15 into the UPC to 13 years' imprisonment;
 - 7 2. for having committed, jointly with other persons, the crime of enlisting children
8 under the age of 15 years into the UPC to 12 years' imprisonment; and
 - 9 3. for having committed, jointly with other persons, the crime of using children
10 under the age of 15 to participate actively in hostilities to 14 years' imprisonment.
- 11 38. Pursuant to Article 87(3) of the Statute, the total period of imprisonment on the
12 basis of the joint sentence is 14 years' imprisonment.
- 13 39. Pursuant to Article 78(2) of the Statute, the Court shall deduct the time "[...]
14 spent in detention in accordance with an order of the Court. The Court may deduct
15 any time otherwise spent in detention in connection with conduct underlying the
16 crime."
- 17 40. Under this provision, the defence submits that the Chamber should deduct the
18 period of Mr Lubanga's house arrest and detention by the DRC authorities between
19 2003 and 2006. The defence argues that the detention of Mr Lubanga in the DRC
20 was imposed as a result of the same conduct underlying the crimes for which he has
21 been convicted at the Court, namely his activities as President of the UPC/RP in
22 2002-2003. On this basis, the defence requests that the Chamber deducts this period
23 of domestic detention from Mr Lubanga's sentence.
- 24 41. In the judgment of the Chamber, there is insufficient evidence that Mr Lubanga
25 was detained in the DRC for conduct underlying the crimes for which he was

1 convicted at the Court, namely the conscription and enlistment of children under the
2 age of 15 and using them to participate actively in hostilities. This contention has
3 not been established on the balance of probabilities and, as a result, the Chamber
4 declines to deduct this period of time from Mr Lubanga's sentence.

5 42. On 10 February 2006, the Pre-Trial Chamber I issued a warrant of arrest against
6 Mr Lubanga, and on 24 February 2006 a request for his arrest and surrender was
7 transmitted to the Democratic Republic of the Congo.

8 43. On 16 March 2006, the convicted person was surrendered to the Court and
9 transferred to its detention centre in The Netherlands.

10 44. The Chamber therefore deducts the time from Mr Lubanga's surrender on
11 16 March 2006 until the date of this Decision from his sentence.

12 45. Pursuant to Article 77(2) of the Statute and Rule 146(1) of the Rules, the Chamber
13 considers it inappropriate to impose a fine in addition to the prison term given the
14 financial situation of Mr Lubanga. Despite extensive enquiries by the Court, no
15 relevant funds have been identified.

16 46. We add that Judge Odio Benito has written a separate and dissenting Opinion on
17 a particular and discrete issue. She disagrees with the Decision to the extent that, in
18 her view, it disregards the damage caused to the victims and their families,
19 particularly as a result of the harsh punishments and sexual violence suffered by the
20 victims of these crimes pursuant to Rule 145(1)(c) of the Rules.

21 47. In consequence, Judge Odio Benito considers that Mr Lubanga should be
22 sentenced to an overall term of 15 years' imprisonment.

23 48. In accordance with the Majority decision Mr Lubanga is sentenced to a total
24 period of 14 years' imprisonment, from which the time commencing with his
25 surrender to the Court on 16 March 2006 is to be deducted.

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ICC-01/04-01/06

- 1 We shall rise.
- 2 THE COURT USHER: All rise.
- 3 (The hearing ends in open session at 10.02 a.m.)