

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 9 December 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION
IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF
THE PROSECUTOR v.
THOMAS LUBANGA DYILO***

**Public
Order for the prosecution to file an amended document containing the charges**

Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Ekkehard Withopf, Senior Trial
 Lawyer

Counsel for the Defence

Ms Catherine Mabilie
 Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
 Mr Franck Mulenda
 Mr Carine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

**The Office of Public Counsel for the
 Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Sylvia Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Background

1. On 28 August 2006, the Office of the Prosecutor (“prosecution”) submitted the Document containing the charges and a list of supporting evidence pursuant to Article 61(3)(a) of the Rome Statute (“Statute”) and Rule 121(3) of the Rules of Procedure and Evidence (“Rules”).¹ It included three counts for the respective war crimes of conscription of children into armed groups, enlistment of children into armed groups, and the use of children to participate actively in hostilities, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Statute.² The document included the following “General Allegations”: (1) all the acts alleged in the document occurred between 1 July 2002 and 31 December 2003 in the district of Ituri, Province Orientale, Democratic Republic of the Congo (“DRC”); (2) the alleged crimes occurred in the context of an armed conflict not of an international character; and (3) at all times relevant to the present charges, Thomas Lubanga Dyilo was aware of the existence of an armed conflict in Ituri.³

2. On 29 January 2007, the Pre-Trial Chamber issued its Decision on the confirmation of charges.⁴ In this decision, the Pre-Trial Chamber determined that from July 2002 to June 2003 the armed conflict in the DRC involving the Union des Patriotes Congolais (“UPC”) was of an international character⁵ and that from June 2003 to December 2003 the armed conflict in the DRC involving the UPC was not of an international character.⁶ It confirmed that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the Forces patriotique pour la libération du Congo (“FPLC”) and using them to

¹ Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), 28 August 2006, ICC-01/04-01/06-356 with annexes.

² ICC-01/04-01/06-356-Anx2, after paragraph 87

³ ICC-01/04-01/06-356-Anx2, paragraphs 6-8.

⁴ Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN

⁵ ICC-01/04-01/06-803-tEN, paragraphs 205-226

⁶ ICC-01/04-01/06-803-tEN, paragraphs 227-237

participate actively in hostilities within the meaning of Articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003. It also confirmed that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003. Charges falling into the period of 1 July to September 2002 and 13 August 2003 to December 2003 were not confirmed.

3. On 4 September 2007 during the first status conference before the Trial Chamber, the Chamber requested the Court Officer to read out the summary of charges as confirmed by the Pre-Trial Chamber in its Decision on the confirmation of the charges (which set out the charges in their amended form).⁷
4. In its decision of 9 November 2007, the Trial Chamber ordered the prosecution to file a summary of presentation of evidence, defining it as “a document which explains its [the Prosecution’s] case by reference to the witnesses it intends to call and the other evidence it intends to rely upon. Furthermore, this document shall explain how the evidence relates to the charges.”⁸
5. On 13 December 2007, the Chamber in its decision entitled “Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber

⁷ Transcript of hearing on 4 September 2007, ICC-01/04-01/06-T-50-ENG, page 3, lines 2-17; page 26, lines 19-25, page 27, lines 1-11.

⁸ Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 26.

and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted"⁹ set out the following:

20. On 29 January 2007 the Pre-Trial Chamber confirmed six charges against the accused on which he was committed for trial, in the following way:

- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003 (emphasis added);

- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June 2003 to 13 August 2003 (emphasis added);

21. The Chamber describes these as six charges, because the Pre-Trial Chamber in each instance referred to the charges of:

- enlisting
- conscripting, and
- using

22. The Document containing the Charges, dated 28 August 2006, had formulated the crimes alleged against the accused differently:

Count 1: CONSCRIPTING CHILDREN INTO ARMED GROUPS, a War Crime, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

Count 2: ENLISTING CHILDREN INTO ARMED GROUPS, a War Crime, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

Count 3: USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a War Crime, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

6. On 14 December 2007, the prosecution filed its first summary of presentation of evidence.¹⁰ At the request of the Trial Chamber it filed an updated version of the summary of presentation of evidence on 23 May 2008.¹¹

⁹ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, paragraphs 20-22.

7. On 2 May 2008, the prosecution informed the Chamber and the defence that it would not lead evidence at trial on 2 individual case histories included in the Document containing the charges and the prosecution's summary of presentation of evidence.¹²
8. During a status conference held on 28 May 2008, the Trial Chamber requested the prosecution and the defence to discuss the creation of a formal document that accurately reflects the charges confirmed by the Pre-Trial Chamber, to be read out to the accused at the beginning of the trial pursuant to Article 68(8)(a) of the Statute.¹³
9. The prosecution sent a proposed wording of the charges to the Chamber on 6 June 2008, informing the Chamber that the parties could not fully agree on the wording. The prosecution proposed wording the charges as follows:

Thomas Lubanga Dyilo is charged, as a co-perpetrator, for having enlisted and conscripted children under the age of 15 years into the UPC/FPLC and for having used them to participate actively in hostilities within the meaning of Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute from early September 2002 to June 2003.

Furthermore, Thomas Lubanga Dyilo is charged , as a co-perpetrator, for having enlisted and conscripted children under the age of 15 years into the UPC/FPLC and for having used them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from 2 June 2003 to 13 August 2003.¹⁴

¹⁰ Submission of the Prosecution's Summary of Presentation of Evidence, 19 December 2007, ICC-01/04-01/06-1099.

¹¹ Prosecution's Updated Summary of Presentation of Evidence and Annexes, 23 May 2008, ICC-01/04-01/06-1354-Conf; Public version: Prosecution's Updated Summary of Presentation of Evidence, 30 May 2008, ICC-01/04-01/06-1363.

¹² Prosecution's information on not leading evidence on two individual cases, 2 May 2008, ICC-01/04-01/06-1303 and ICC-01/04-01/06-1302-Conf.

¹³ Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG, page 14, lines 23-25 and page 15, lines 1-8. Given the short time frame before the start of the trial on 23 June 2008, the parties were requested to set out the results of their discussions by way of email, ICC-01/04-01/06-T-88-ENG, page 15, lines 11-25.

¹⁴ Email communication to the Chamber through the Legal Adviser to the Trial Division on 6 June 2008.

10. The defence responded on the same day with alternative wording, objecting to the addition of “UPC” before “FPLC”.¹⁵
11. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings.¹⁶ Following the resolution of the issues that had necessitated the imposition of the stay, the Chamber lifted the stay at the status conference on 18 November 2008.¹⁷ At this status conference, the Chamber provisionally set the date for the commencement of the trial as 26 January 2009.¹⁸

A Document containing the Charges

12. Pursuant to Article 64(8)(a) of the Statute, “[a]t the commencement of the trial the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber”, “shall satisfy itself that the accused understands the nature of the charges”, and “afford him an opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.” Regulation 52 of the Regulations of the Court, headed “Document containing the charges” provides that the prosecution, pursuant to Article 61, shall provide a document that shall include:

- a) The full name of the person and any other relevant identifying information;
- b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the court;
- c) A legal characterisation of the facts to accord with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

¹⁵ *Ibid.*

¹⁶ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

¹⁷ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, lines 22-25, page 4, line 1

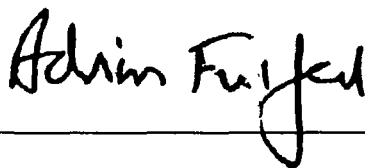
¹⁸ *Ibid.*, page 7, lines 23-25

13. Although Article 61 and Regulation 52 relate to proceedings before the Pre-Trial Chamber, in light of the history set out above, the Trial Chamber considers that filing an amended “Document containing the charges” is necessary to ensure that there is a complete understanding of the “statement of facts” underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute).

14. Furthermore, since the original Document containing the charges does not reflect the charges that were confirmed against the accused by the Pre-Trial Chamber, at the commencement of the trial, the Officer of the Court will read out to the accused the 6 charges identified in the Chamber’s decision of 13 December 2007, as set out above.

15. For these reasons, pursuant to Articles 64(8)(a), 67(1), 64(2) and 64(6)(f) of the Statute, the Chamber orders the prosecution to submit an amended Document containing the charges, drafted in accordance with Regulation 52 of the Regulations by 22 December 2008.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 December 2008

At The Hague, The Netherlands