



CHECK AGAINST DELIVERY

## CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE

### International case – law (II)

#### Early PTC I Jurisprudence Overview

*Italy, Turin, 18 May 2007*

For those of you who were not present in the past days, my name is Alice Zago and I am today representing the Office of the Prosecutor of the ICC. The task that I was given by Hon. Judge Beelli, to elaborate on the war crimes-related ICC jurisprudence was quite ambitious as, as you all know, it is still at its early stage and certainly not developed as in the other international tribunals as we all learned from the presentations of the previous days.

Many articles and papers on the early ICC jurisprudence by esteemed scholars and experts are publicly available, therefore I believed that it was more interesting for you to hear today about the jurisprudence that was generated by the decision confirming charges in the case of the

Prosecutor *versus* Thomas LUBANGA DYILO<sup>1</sup>. There are pending appeals proceedings in respect of this decision, and therefore I will be cautious in my presentation and ask you to bear with me. Due to the limited amount of time available, my presentation will not encompass the appellate jurisprudence nor the one stemming from the other situations and cases currently investigated and litigated by the Office of the Prosecutor.

I will also **not** address the main jurisprudence created in the phase leading up to the Confirmation of Charges, meaning the one generated by the issuance of the arrest warrant on the “admissibility of cases before the ICC” or the “necessity of the arrest”<sup>2</sup>, and the many on victims’ participation<sup>3</sup>. My distinguished colleagues from the other organs of the Court have certainly enlightened you in their previous speeches on these various topics.

The main reason of my focusing on this case is the obvious and notorious fact that it constitutes the first, and so far the only living example of the embodiment of ICC law and procedures in the reality of a confirmation hearing which lead to a decision on the war crimes charges pressed by the Prosecution.

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<sup>1</sup> Prosecutor v. Thomas Lubanga Dyilo, ICC, Case No. ICC-01/04-01/06, Decision confirming the charges, January 29, 2007, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf).

<sup>2</sup> Prosecutor v. Thomas Lubanga Dyilo, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, February 24, 2006, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf).

<sup>3</sup> Situation 01/04 in Democratic Republic of the Congo, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, [http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_tEnglish-Corr.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf).

From this experience, and provided the pending appellate proceedings, the Prosecutor and the Court as whole, can certainly derive some lessons.

### *The Confirmation Hearing*

⇒ In fact, despite the enormous and multifaceted challenges posed to all Participants, the Confirmation Hearing can be regarded as a positive experience as some important jurisprudence was shaped. It has however to be noted that it presented many features of a trial:

- It lasted four weeks – four weeks for a case with **three counts, one suspect, and one Defence team** (in addition to the relevant victim's legal representatives);
  - There were Opening Statements and Closing Statements;
  - There was a three-day examination of a Prosecution witness;
  - Witness statements, documents and video footages were extensively discussed;
  - The final briefs were of considerable entity.
- In summarising the Pre-Trial Chamber's 29 January 2007 decision, I will devote specific attention to a number

of procedural aspects and, in particular, to those related to the **character of the armed conflict** and the **legal theory of co-perpetration** as the appropriate form of criminal liability being retained by the Chamber.

- The Confirmation Hearing took place between 9 and 28 November 2006, and the Participants filed their “Final Briefs” on 4 December and 6 December 2006 respectively. The decision was rendered at the 60<sup>th</sup> day, as provided by Regulation 53:

⇒ Since that was the first time that victims were allowed to participate in a proceeding before an internal tribunal, it is worth mentioning that also the Representatives of the Victims, representing two distinct groups of victims, took part in the Confirmation Hearing:

- They were given the opportunity to make Openings and Closings remarks, and they used it extensively;
- Their participation was limited by a respective Pre-Trial Chamber decision, for example, to question the witness only with the explicit permission of the Pre-Trial Chamber.

### *The Decision on the Confirmation of Charges*

I am sure that you all know the background and counts charged against Mr. LUBANGA DYILO, but just as a remainder I shall like to refer you to the provision of Article 8(2)(e)(vii), which criminalizes the conscriptions, enlistment and active use of children under the age of 15 to participate actively in hostilities.

- As I said on 29 January 2007, the Pre-Trial Chamber rendered its Decision on the Document Containing the Charges.

- The decision is 134-page long and entered into findings on each and every legal or factual topic discussed in the course of the Confirmation Hearing. I will discuss the main substantial aspects of the Decision, but first I want to provide you with an overview of the main **procedural** aspects:

⇒ First was the definition of “**substantial grounds to believe** that the person committed each of the crimes charged” as demanded by Article 61.7 (versus the **beyond reasonable ground** requirement for trial):

- The Pre-Trial Chamber, in making repeated references to the jurisdiction and the test applied by the European Court of Human Rights, defined the “substantial grounds” as being: “*des charges suffisamment sérieux*” “*sans se limiter à des simples supputations ou soupçons*”. The Pre-Trial Chamber

continued to state that “substantial grounds” are “*des raisons sérieux et avérés de croire*”.

- The outcome is that the test required at the phase of the Confirmation Hearing is relatively low.

- In establishing the reasonable grounds, the Pre-Trial Chamber clearly stated that it could evaluate the **universe of evidence submitted** by the Participants, seen as a whole, a point that was heavily disputed by the Defence during the confirmation hearing and subsequently in its appeals applications.

⇒ A second main aspect was the following: The Prosecution had included in its List of Evidence 356 evidentiary items; in the course of the Confirmation Hearing the Prosecution tendered only **91** of those items, including: documents, witness statements and video materials. The Defence argued that only the evidence that had been discussed in detail during the hearing, including aspects of chain-of-custody and authenticity of evidence, could be relied upon by the Pre-Trial Chamber in its final determination:

- The Pre-Trial Chamber ruled that: first it could take into account all evidentiary items as contained in the Prosecution’s List of Evidence and, second, that for the purposes of the confirmation of charges the Pre-Trial

Chamber worked on the **presumption of the authenticity** of the evidentiary materials as the Defence did not provide reasonable information challenging the authenticity of the materials submitted;

- The Pre-Trial Chamber, lacking such information by the Defence, took into account **all evidentiary materials** on the Prosecution's List of Evidence and decided accordingly.

⇒ **Hearsay evidence:**

- To a certain extent, the Prosecution had to rely on hearsay evidence. In this regard, the Pre-Trial Chamber decided that "hearsay" ("*preuve indirecte*") is not an issue of admissibility, rather, it is an issue of **evidentiary value**;

- The Pre-Trial Chamber, however, decided that, "in general terms" it would not use "hearsay" evidence for any other purpose than **corroboration** of other elements of first hand evidence;

- The Pre-Trial Chamber justified this approach in emphasizing the difficulties of the Defence to verify the reliability and the authenticity of the "hearsay" evidence.

⇒ **Withdrawal of a witness statement** and a transcript of an insider interview from the Defence List of Evidence:

- I would like to address this matter because it became a major issue already during the Confirmation Hearing but also in the pending proceedings on seeking leave to appeal the decision.

- The Prosecution had submitted a number of statements and transcripts of insider interviews for authorisation of redactions => the Single Judge came back and said that she would not authorise the redacted statements and transcripts in respect of a number of witnesses and insiders, and that she would not even authorise summaries thereof because the individuals providing the information could have still been identified (in any event). Consequently, those two items were removed from the List of Evidence. Meanwhile, the Defence had approached the same individuals and came to know their identities. The Defence then, anticipating that their statements could be of relevance, put them on their List of Evidence. Unfortunately, the transcript was comprised of several hundreds of pages and the Defence, probably realizing the damaging evidence in it, subsequently tried to withdraw the two statements.

- The Pre-Trial Chamber stated that once a Participant has submitted evidence to the Court, it becomes the Court's evidence and is not at the disposal of the Participants anymore.

- I would now like to move on from the procedural aspects to the more **substantial** aspects of the decision and, in this respect, I will touch upon two major issues, namely the decision on the **legal characterization** of the nature of the conflict and the form of **criminal liability**.

⇒ First, some observations on the classification of the armed conflict:

- The question arose in light of the heavy involvement of foreign neighbouring countries in the conflict in Ituri (DRC), first by one country and later by another, and both provided weapons, ammunitions, uniforms, financial support etc. to the relevant armed group.

- The question had a huge impact because the language of the law, on the criminal conduct of “child recruitment” is - surprisingly - and here maybe we could benefit from the authentic interpretation of the legislators of the Statute present, such as Judge Angius, different depending on whether the conduct occurs in an armed conflict of **non-international character** or in an **armed conflict of international** charter.

- Article 8(2)(e)(vii) of the Statute, which is applicable in armed conflicts not of an international character, reads as follows: “*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to*”

*participate actively in hostilities” while Article 8(2)(b)(xxvi) of the Statute, applicable in armed conflicts of an international character, states: “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”.*

- In the Prosecution’s assessment of its evidence the relevant armed group was by no means a “national armed force”, and submitted that the armed conflict for the relevant time-period prosecuted (July 2002 to December 2003) was “not of an international character”.

- The analysis of the respective evidence by the Prosecution indicated a **heavy involvement** of the two neighbouring countries, in terms of supporting the armed group with weapons, ammunition, training, uniforms etc. **but did not meet the level required by TADIĆ’ “overall control test”**.

- The Prosecution always made it clear that it was continuing to analyse its evidence and that it may take a different approach **if and when** the assessment changed.

- The PTC indicated the factors that characterise an armed conflict as “international”, namely 1) if the armed conflict takes place between two or more States, and 2) that this definition encompasses cases of occupation, in whole or in part.

- The Pre-Trial Chamber adopted the TADIĆ criteria for the “overall control test” – “organising, coordinating or planning the military actions in addition to financing, training and equipping or providing operational support” – and denied the “international” armed conflict, in line with the Prosecution submission, in respect of one country’s involvement.

- In respect of the other one, the Pre-Trial Chamber took a different approach, in putting emphasis on the aspect of **occupation**, and heavily relying on the ICJ Judgement of 19 December 2005, which in the proceedings of the DRC *vs* Uganda stated that the Ugandan armed forces, the Ugandan People’s Defence Force, from 1999 up until the time of their withdrawal on 2 June 2003, had occupied Ituri by substituting the DRC authority with their own authority; the Pre-Trial Chamber followed the ICJ Judgement in stating that Uganda was occupying Ituri because it had engaged in military operations against the DRC on the latter’s territory and had actively extended military, logistic, economic and financial support to irregular forces operating on Congolese territory.

- The Pre-Trial Chamber determined that the conflict was of **international character** until 2 June 2003 and that the conflict was of a **non-international character** that date.

- The Pre-Trial Chamber addressed the notion of “**national armed forces**” as set forth by in Article 8(2)(b)(xxvi) of the Statute.

- The Pre-Trial Chamber held that the notion of “national armed forces” is not limited to the armed forces of a State; the reasons for that determination have been the following: (1) interpreting “national” to mean “governmental” is contrary to the purpose of the Statute to ensure that the most serious offences do not go unpunished; (2) - a more legal consideration – Additional Protocol I does not impose a requirement that the armed forces be **governmental** forces. In this context, the Pre-Trial Chamber decided that the notion of “parties to the conflict” under the Geneva Conventions and the Protocols is relatively open, and does also include actors involved in “self-determination” struggles and “national liberation” conflicts; (3) the Pre-Trial furthermore relied on customary international law such as Article 1 of the 1907 Hague Regulation, Article 31 of the Vienna Convention, and ICTY jurisprudence (TADIĆ, BLAŠKIĆ and DELALIĆ), which found that “national” allegiance is based on **ethnicity** rather than **nationality**.

- Accordingly, the Pre-Trial Chamber applied Article 8(2)(b)(xxvi) of the Statute to the extent it had determined that **there was an international armed conflict** – otherwise, for the remainder of the relevant time-period, the Pre-Trial Chamber applied Article 8(2)(e)(vii).

⇒ The second main substantial issue was the **legal theory of criminal liability**:

- The Prosecution chose to plead as form of criminal liability “co-perpetration” - jointly with another person or other persons - in terms of Article 25(3)(a);

- In its 29 January 2007 Decision, the Pre-Trial Chamber determined that there were substantial grounds to believe that the suspect was indeed criminally responsible as a **co-perpetrator**;

- The Pre-Trial Chamber devoted significant portions of its Decision to the determination of the form of criminal liability and defined co-perpetration as follows: “when the sum of coordinated individual contributions leads to the accomplishment of the objective elements of the crime and each person providing a contribution maybe imputed contributions made by others”;

- The Pre-Trial Chamber also noted that co-perpetration is based on a **control over the crime**; originating in the functional division of essential tasks between two or more perpetrators acting in a concerted way to commit a crime;

- On the objective elements, the *actus reus*, the Pre-Trial Chamber considered: (1) the existence of an agreement or

common plan between two or more persons, and (2) the essential and coordinated contribution from each co-perpetrator leading to the realization of the objective elements of the crime;

- On the subjective elements, the *mens rea*, the Pre-Trial Chamber referred to Article 30 of the Statute, meaning that the co-perpetrators must have committed the material elements with **intent** and **knowledge**; the Pre-Trial Chamber stated that in this context also situations of *dolus directus* of the second degree (the suspect is aware that the objective elements of the crime will result from his/her acts or omissions) and – in relation to the age of the children only – of *dolus eventualis* (the suspect is conscious of the risk that the objective elements of the crime may result from his/her acts or omissions and he or she accepts this result) satisfy the *mens rea* requirement.

As I said, there were many other aspects that were dealt by the PTC in its decision that today was not possible to address in their full extent, but my attempt was not provide you with a fair overview of it. I believe that I shall conclude here my presentation only by reminding that there are considerable pending appellate proceedings and that we may or may not see a new jurisprudence being formed in this respect hopefully soon. However at this stage any speculations in this respect would be inappropriate.

I thank you.

## *Appeals proceedings*

The Decision triggered a whole series of appeals proceedings, namely:

- A direct appeal of the Defence against the Decision<sup>4</sup>, despite the fact that the ICC law does not provide for a direct appeal:

⇒ The Defence tried to convert the Decision into a decision denying release for which an appeal right exists;

⇒ The Appeals Chamber has immediately reacted and instructed the Participants to make submissions on the admissibility of the appeal.

- Defence's application seeking leave to appeal<sup>5</sup>, in this context using the proper procedural avenue:

⇒ Based on ten distinct issues, alleging, *inter alia*, that the pre-Trial Chamber erred:

- In the definition of the evidentiary threshold for "substantial grounds";

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<sup>4</sup> Prosecutor v. Thomas Lubanga Dyilo, ICC, Case No. ICC-01/04-01/06, Defence Appeal Against the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 January 2007, 30 January 2007, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-797\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-797_English.pdf).

<sup>5</sup> Prosecutor v. Thomas Lubanga Dyilo, ICC, Case No. ICC-01/04-01/06, Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute, 7 February 2007, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-812\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-812_English.pdf).

- In making determinations that were not raised by either Participants during the confirmation hearing;
  - In refusing the Defence request to withdraw the statements of witnesses on its List of Evidence;
  - In admitting all evidence on the Prosecution's List of Evidence (rather than the materials that had been discussed in detail only);
  - In permitting the trial to proceed on a vague indictment.
- The Prosecution's application seeking leave to appeal (publicly available document)<sup>6</sup>:
    - ⇒ Is limited to the Pre-Trial Chamber's legal characterization of the crime charged by the Prosecution as enshrined in Article 8(2)(e)(vii) with a different crime under Article 8(2)(b)(xxvii) / this is obviously related to the issue of the nature of the armed conflict;
    - ⇒ The Pre-Trial Chamber has altered the characterisation of the charges: in such a situation, the Statute only allows the Pre-Trial Chamber to adjourn the proceedings and to

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<sup>6</sup> Prosecutor v. Thomas Lubanga Dyilo, ICC, Case No. ICC-01/04-01/06, Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007, "Décision sur la confirmation des charges", 5 February 2007, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-806\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-806_English.pdf)

request the Prosecution to consider amending a charge, if the Pre-Trial Chamber is of the view that the evidence submitted appears to establish a different crime;

⇒ As a result, the Prosecution would be forced to proceed with a crime that it had already determined should not be charged based on the assessment of the evidence available, and to devote time and resources to supplement that evidence, if possible, in order to adequately substantiate that crime, as re-qualified by the Pre-Trial Chamber, at trial;

⇒ Thus, the Decision affects both the fairness and the expeditiousness of the proceedings; the Decision infringes the Prosecution's fundamental right and duty to bring before the Trial Chamber only cases the Prosecution believes to be firmly supported by the evidence collected during the investigation, meaning that the legal prerequisites of the applicable law on seeking leave to appeal are met.