

JURISPRUDENTIAL INTERACTIONS IN THE FIRST JUDGEMENTS OF THE INTERNATIONAL CRIMINAL COURT¹

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1. Introduction

International tribunals are autonomous according to their statutes and other international legal texts. Nevertheless, their interactions, i.e. the borrowing of thoughts and sentences from other international tribunals are a well known phenomenon and the observation of the copyright rules is not a purely ethical or deontological issue in their case but the symbol of openness on the one hand and subject to traditions, an eventual aristocratism or the perception of identity on the other.

Some years ago, I analyzed² this phenomenon focusing on the practice of the International Court of Justice, the European Court of Human Rights, the Inter-American Courts of Human Rights, the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda and the International Tribunal for the Law of the Sea.

On the following pages, I would like to contribute to the already launched analysis in the community of international lawyers³ by showing how jurisprudential

¹ A tanulmány a Pázmány Péter Katolikus Egyetem TÁMOP-4.2.1.B-11/2/KMR-2011-0002. sz. projektje (A tudományos kutatások kibontakoztatása a PPKE-n) keretében jelent meg.

² Developments and Limits in International Jurisprudence. *Denver Journal of International Law and Policy*, Vol. 31., 2003/3. 461–489., and in particular at p.108–112.; Développement et limites de la jurisprudence en droit international. In: Vincent COUSSIRAT-COUSTÈRE (ed.): *La juridictionnalisation du droit international*. (Conférence de la SFDI, Lille, 2002), Paris, 2003. 269–341.), and in particular at p. 299–305; *A nemzetközi jog fejlesztésének lehetőségei és korlátai a nemzetközi bíróságok joggyakorlatában*. (= Developments and Limits in International Jurisprudence) Budapest, PPKE Jog- és Államtudományi Kar, 2010., in particular at p 119–139.

³ See e.g.:

– Alison COLE – Kelly ASKIN: Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court. *ASIL Insights*, Vol. 16., issue 12. <http://www.asil.org/insights/>

interactions appear in the first judgment of the International Criminal Court, i.e. in the Lubanga case⁴ both in the verdict⁵ and in the decision on sentence⁶. The verdict⁷ is much longer, cca. 593 pages, contrary to the 40 pages of the sentence⁸.

The references generally come on *proprio motu*, but often the prosecution or the defence also evoke “precedents” of other international tribunals, namely on behalf of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, but most often the International Criminal Tribunal for the former Yugoslavia. There are some references also to the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

If we go into the details, we can distinguish between several types of references. On the one hand, the references can be used by the Pre-Trial Chambers, the Trial Chambers and Appeals Chambers (even if up till now, no appeal has yet been deliberated.)

In the Lubanga case, there are references in the verdict but also in the sentence as well as in the dissenting opinions of Trial Chamber I, consisting of Presiding Judge Adrian Fulford and judges Elizabeth Odio Benito and René Blattmann.

Another differentiating factor could be the nature of the reference: whether it is (i) only the pure summary of the position of the prosecutor or the defence, or (ii) the Court expresses its view over the cited cases, or (iii) the Court evokes the “precedents” *proprio motu*, without any impetus emanating from the defence or the prosecutor.

We can also examine which judgments by which institution and how often they are referred to?

volume/16/issue/12/thomas-lubanga-war-crimes-conviction-first-case-international-criminal, www.asil.org/sites/default/files/insight120327.pdf;

– Stephanie KAMMER: Deconstructing Lubanga, The ICC’s First Case: The Trial and Conviction of Thomas Lubanga Dyilo American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC). A Program of the Columbia University Institute for the Study of Human Rights, http://www.amicc.org/docs/Deconstructing_Lubanga.pdf;

– Christian M DE VOS: Case Note – Prosecutor v. Lubanga ‘Someone who comes between one person and another’: Lubanga, Local Cooperation and the Right to a Fair Trial. *Melbourne Journal of International Law*, Vol. 12., 2011/1. 217. <http://www.law.unimelb.edu.au/files/dmfile/download63e01.pdf>;

– Mark A. DRUMBL: The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering. *Yearbook of International Humanitarian Law*, 2013. Washington & Lee Legal Studies Paper No. 2013-05 www.ssrn.com/abstract=2253494

– Caroline BUISMAN: Delegating Investigations: Lessons to be Learned from the Lubanga Judgment. *Northwestern Journal of International Human Rights*, Volume 11., Issue 3 Article 3, Summer 2013. <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1143&context=njihr>

⁴ Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06).

⁵ Prosecutor v. Thomas Lubanga Dyilo, Judgement pursuant to Article 74 of the Statute, 14/03/2012, ICC-01/04-01/06-2842 (*infra*: ICC, Lubanga verdict).

⁶ Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, 10/07/2012, ICC-01/04-01/06-2901, (*infra*: ICC, Lubanga sentence)

⁷ The Separate Opinion of Judge Fulford and the Separate and Dissenting Opinion of Judge Odio Benito added thereto another 30 pages.

⁸ Plus the 12 page Dissenting Opinion of Judge Odio Benito.

2. The Lubanga verdict and the interactions

2.1. The references to the International Court of Justice

In the conclusions of Trial Chamber I on the characterisation of the armed conflict (international armed conflict vs. non-international armed conflict), the ICJ is referred to twice, namely i) the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*⁹ and ii) *Armed Activities on the Territory of the Congo*.¹⁰

2.2. The references to the European Court of Human Rights

The jurisprudence of the European Court of Human Rights was evoked by the defence in the context of the *nullum crimen sine lege* (understood also as expecting the clear definition of the crimes) with reference to two cases namely *Veeber v. Estonia* and *Pessino v. France*.¹¹ The underlying issue was whether the ICC rules on the prohibition of enrolment of children in the army duly take two situations into account, namely when (i) children are enlisted as warriors (“*using them to participate actively in hostilities*”) and (ii) children who are “only” within the army units but without weapons or any military purpose or duty. Hereby, the defence referred also to the jurisprudence of the ICTY and that of the SCSL.

The International Criminal Court did not challenge the reference to the ECHR jurisprudence on *nullum crimen sine lege*, but after a lengthy analysis, based partly on the preparatory works (*travaux préparatoires*) of the statute, partly on the applicability of the jurisprudence of the SCSL in the matter concluded that there is no real problem in the understanding of the formula “*using them to participate actively in hostilities*”¹².

⁹ ICJ: *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgement of 27 June 1986, para. 219. (ICC, Lubanga verdict, footnote 1644, p. 246). “The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to noninternational conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict.”

¹⁰ ICJ: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005. ICC, Lubanga verdict, footnote 1651, p. 248.

¹¹ ECHR: *Veeber v. Estonia (No. 2), Application No. 45771/99*, Judgement (Merits and Just Satisfaction) 21 January 2003, para. 31; ECHR, *Pessino v. France, Application No. 40403/02*, Judgement (Merits and Just Satisfaction), 10 October 2006, para. 35. ICC, Lubanga verdict, footnote 1733, p. 266.

¹² “The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover

2.4. The references to the International Criminal Tribunal for the former Yugoslavia

The references to the cases adjudged by the International Criminal Tribunal for the former Yugoslavia are numerous, due also to the prosecution and the defence as well as to Trial Chamber I.

The prosecution used the ICTY cases in order to clarify the non-international character of the armed conflict¹³ despite of the fact the Ugandan army was also present during the course of the events on the Congolese territory. Here, the prosecution did not want to follow the Pre-Trial Chamber¹⁴ and it based its position *inter alia* on the “overall control test” of the ICTY.¹⁵

Trial Chamber I confirmed the prosecution’s position and remarked that “[t]he definition of this concept has been considered by other international tribunals and the Chamber has derived assistance from the jurisprudence of the ICTY.”¹⁶ Then, it cited the *Tadić* Interlocutory Appeal Decision¹⁷ and later it turned again to this case quoted also by the Pre-Trial Chamber¹⁸ and affirmed that “[t]he Trial Chamber agrees with

either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgement of the Chamber these combined factors – the child’s support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber’s determination of whether a particular activity constitutes “active participation” can only be made on a case-by-case basis.” ICC, Lubanga verdict, para. 628, p. 285–286.

¹³ ICC, Lubanga verdict, para. 506, p. 232.

¹⁴ “The prosecution submits the conflict was non-international in character, notwithstanding the conclusion of the Pre-Trial Chamber that it was international until Uganda withdrew from Ituri on 2 June 2003.” ICC, Lubanga verdict, para. 509, p. 233.

¹⁵ ICC, Lubanga verdict, para. 511, p. 234.

¹⁶ ICC, Lubanga verdict, para. 533, p. 242.

¹⁷ “[...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”. (ICTY, *Prosecutor v. Tadić, Case No. IT-94-I-AR72*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Interlocutory Appeal Decision”, para. 70). See ICC, Lubanga verdict, footnote 1629, p. 242.

¹⁸ „the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.” (ICC-01/04-01/06-803-tEN, para. 233) ICC, Lubanga verdict, para. 535, p. 243.

this approach”.¹⁹ (There is also a remark in the given footnote that the defence had misunderstood the Pre-Trial Chamber’s position.)

Some ICTY-cases²⁰ were also evoked in the context of the perception of the intensity of the conflict as a constituent element of the non-international armed conflict. The ICTY cited the classic Geneva distinction to be made between armed conflict and riots²¹ but its explanation was also partly inspired by the text of Geneva Additional Protocol II and apparently by the practice of the United Nations as well: “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.”²²

The pertinent paragraph of the verdict ends by confirming that “[t]he Trial Chamber is of the view that this is an appropriate approach.”²³

Trial Chamber I also followed the ICTY jurisprudential line declaring that “[t]he Chamber endorses this view and accepts that international and noninternational conflicts may coexist.”²⁴ (In the last footnote, the Nicaragua case of the ICJ is also referred to, as mentioned *supra*.)

Another issue the interpretation of which was backed by the ICTY jurisprudence is the notion of the international armed conflict, which is not defined by the Rome Statute. In order to clarify – if needed – this expression, the Pre-Trial Chamber relied on *Tadić* Appeals Judgement²⁵ and apparently, Trial Chamber I consented.²⁶ Soon

¹⁹ ICC, Lubanga verdict, para. 536, p. 243.

²⁰ ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 90; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgement, 3 April 2008, para. 60; ICTY, *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Trial Chamber, Judgement, 10 July 2008, paras 199 – 203. See ICC, Lubanga verdict, footnote 1637, p. 244.

²¹ “[...] used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” ICTY, *Prosecutor v. Dornević*, Case No. IT-05-87/1-T, Trial Chamber I, Public Judgement with Confidential Annex – Volume I of II, 23 February 2011, para. 1522. ICC, Lubanga verdict, para. 538 p. 244–245.

²² ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgement, 27 September 2007, para. 407. See ICC, Lubanga verdict, footnote 1639, p. 245.

²³ ICC, Lubanga verdict, para. 538, p. 245.

²⁴ *Tadić* Interlocutory Appeal Decision, paras 96–98 and para. 119. The Chamber addressed the emerging issue of a blurred legal differentiation between international and non-international armed conflicts. The Chamber indicated that “it is only natural that the aforementioned dichotomy should gradually lose its weight.” *Tadić* Interlocutory Appeal Decision, paras 72–77.; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-I-A, Appeals Chamber, Appeals Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), para. 84. See ICC, Lubanga verdict, footnotes 1642–1644, p. 245–246.

²⁵ ICC-01/04-01/06-803-tEN, para. 209.

²⁶ An armed conflict is international „if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition an internal armed conflict that breaks out on the territory of a State may become international – or depending upon the circumstances, be international in character

after, there was another short reference to the ICTY²⁷ in the context of scholars' scientific writings and then, Trial Chamber I concluded that it could apply the test of the „overall control“. For the assessment of the required degree, Trial Chamber I cited the ICTY affirming that a state is in this position when it “*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.”²⁸ Pre-Trial Chamber adopted this approach, as Trial Chamber I noted²⁹ and a bit further, it remarked that Pre-Trial Chamber had put special emphasis on the military occupation factor of the international armed conflict.

Apparently, Trial Chamber I felt the necessity of a deeper analysis but finally consented to the above *dictum* because after the comparison of the text of the Statute with the Elements of Crimes, the Geneva Conventions, the first Additional Protocol of 1977, and the *supra* referred ICJ Case of *Armed Activities on the Territory of the Congo*, it concluded “that for the purposes of Article 8(2)(b)(xxvi) of the Statute, an ‘international armed conflict’ includes a military occupation.”³⁰

Following the defence, Trial Chamber I mentioned another abstract reference to the ICTY – together with the ICTR-jurisprudence.³¹

alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).” The citation is from the *Tadić* Interlocutory Appeal Decision, para. 70 (cited above) and the footnote adds also ICTY, *Prosecutor v. Delalić et al., Case No. IT-96-21-T*, Trial Chamber, Judgement, 16 November 1998, para. 183 and ICTY, *Prosecutor v. Brnanić, Case No. IT-99-36-T*, Trial Chamber, Judgement, 1 September 2004, para. 122.

See ICC, Lubanga verdict, para. 541, p. 247 with footnote 1645.

²⁷ *Tadić* Appeal Judgement, paras 84, 90, 131, and 137–145.; See ICC, Lubanga verdict, with footnote 1646, p. 247.

²⁸ Lubanga verdict, para. 541, p. 248 with footnote 1649 evoking the ICTY cases as follows: *Tadić* Appeal Judgement, para. 137 (emphasis in the original); see also: “[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).” (*ibid.*, para. 137, emphasis in the original). See also, ICTY, *Prosecutor v. Aleksovski, Case No. IT-95-14/1-A*, Appeals Chamber, Appeals Judgement, 24 March 2000, paras 131 - 134; ICTY, *Prosecutor v. Delalić et al., Case No. IT-96-21-A*, Appeals Chamber, Appeals Judgement, 20 February 2001, para. 26; ICTY, *Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A*, Appeals Chamber, Appeals Judgement, 17 December 2004, paras 306 – 307.

²⁹ ICC, Lubanga verdict, para. 541, p. 248.

³⁰ ICC, Lubanga verdict, para. 542, p. 249.; Article 8(2)(xxvi) is formulated as follows:

“Article 8 – War crimes

1.The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2.For the purpose of this Statute, “war crimes” means: [...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

³¹ ICC, Lubanga verdict, para. 584, p. 268.

A number of references are due to the defence's critics concerning a position taken by the Pre-Trial Chamber in the subjective component of the crime, ie. the *mens rea* which is established if the accused "is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it [also known as *dolus eventualis*]"³² The defence observed rightly that the Pre-Trial Chamber had based its conclusions on the first instance Decision in *Prosecutor v. Milomir Stakić*.³³

Trial Chamber I answered this question after studying the motions of the Legal Representatives of Victims dealing *inter alia* with the 'should have known' test of the mental element.

During the analysis of "essential contribution" in the context of the material element of crimes, Trial Chamber I emphasized the importance of the distinction between principal liability and accessory liability and stated that "principal liability 'objectively' requires a greater contribution than accessory liability. If accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect."³⁴

Hereby, the criteria of 'substantial effect on the commission of the crime' is backed by a long list of ICTY cases³⁵ completed with ICTR cases and a SCSL case.

2.5. The references to the International Criminal Tribunal for Rwanda

The first reference was apparently made in the context of the interpretation of the expression "actively participating in hostilities" as being synonymous – according to the defence, relying upon the Rutaganda and Akayesu cases – with "direct

³² ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgement, 31 July 2003, para. 587; ICC, Lubanga verdict, para. 957, p. 414.

³³ As the Trial Chamber I points it out, the ICC-01/04-01/06-2773-Red-tENG, para. 80, referring to ICC-01/04-01/06-803-tEN, para. 352, was a quotation. See ICC, Lubanga verdict, footnote 2658, p. 414.

³⁴ ICC, Lubanga verdict, para. 997, p. 430.

³⁵ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-I-T, Trial Chamber, Opinion and Judgement, 7 May 1997, paras 688 – 692; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, paras 325–329; ICTY, *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgement, 31 March 2003, para. 63; ICTY, *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgement, 17 January 2005, para.726; ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 352; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/I-T, Trial Chamber, Judgement, 10 December 1998, paras 226, 229, 231, 233 – 235; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-T, Trial Chamber, Judgement, 25 June 1999, para. 61; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-I-A, Appeals Chamber, Judgement, 15 July 1999, para. 229; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgement, 25 February 2004, para. 102; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgement, 29 July 2004, paras 46, 48; ICTY, *Prosecutor v. Brdanić*, Case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, para. 271; See ICC, Lubanga verdict, footnote 2704, p. 430.

participation” understood as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”³⁶

Trial Chamber I answered this question later, after having studied the *travaux préparatoires*, the position of the victims and the special UN rapporteurs’ reports as well as the SCSL-jurisprudence (see *infra*.) and apparently rejected the ICTR-line when it put that “[g]iven the different types of roles that may be performed by children used by armed groups, the Chamber’s determination of whether a particular activity constitutes ‘active participation’ can only be made on a case-by-case basis”.³⁷

The ICTR-line is followed however in the *ratione temporis* determination of the end of the crime of enrolling or enlisting children in the armed forces, i.e. when the child leaves the army or when the child reaches 15 years of age.³⁸

The defence evoked the ICTR in order to back the position that “an accused should not be at risk of a conviction on a basis that differs from the ‘mode of responsibility’ alleged when the proceedings were instituted”.³⁹ (The issue is interrelated with the clarity of norms understood in the context of the *nulla poena sine lege*.)

The fact that accessories’ contribution should reach the threshold of a “substantial effect on the commission of the crime” is required as a constitutive part of the material element of liability is founded *inter alia* also on the ICTR’s jurisprudence.⁴⁰

3.6. The references to the Special Court for Sierra Leone

The prosecution evoked the SCSL for a proper interpretation of the expression ‘enlistment’ (i.e. childrens’enlistment in armed forces). The SCSL meant in this way „any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations”.⁴¹

³⁶ ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 99; reference is also made to ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 629, See ICC, Lubanga verdict, para. 584 and footnote 1740, p. 268.

³⁷ See ICC, Lubanga verdict, para. 628, p. 286.

³⁸ See ICC, Lubanga verdict, para. 584 and footnote 1790, p. 282 (ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 721.)

³⁹ See ICC, Lubanga verdict, para. 946 and footnote 2640, p. 410 (ICTR, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgement, 20 October 2010, para. 37.)

⁴⁰ ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 43; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 126; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Chamber I, Judgement, 22 January 2004, para. 597; ICTR, *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber I, Judgement, 21 February 2003, para. 787; SCSL, *CDF Appeal Judgement*, para. 73. See ICC, Lubanga verdict, footnote 2704 p. 430.

⁴¹ SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008 (“*CDF Appeal Judgement*”), para. 144. See ICC, Lubanga verdict, para. 573 and footnote 1719, p. 263.

The question before the ICC in the Lubanga case was *inter alia* whether all the children being in the camps of the army and with the adult warriors had to be considered as enlisted or only those who were *de facto* warriors.

According to the prosecution, inspired by the SCSL practice „using children as bodyguards, allowing children (armed with cutlasses, knives and guns) to be present in active combat zones, using children to monitor checkpoints and leading ‘Kamajors’, or dancing in front of them as they go into battle, constitute the use of children to participate actively in hostilities.”⁴² As the prosecutor quoted the SCSL „the ‘use’ of children to participate actively in hostilities occurs when their lives are put at risk in combat and if they are present when crimes are committed, irrespective of their particular duties.”⁴³ and „participation in hostilities includes any work or support that gives effect to, or helps maintain, the conflict.”⁴⁴

Trial Chamber I also found elements at least partly confirming this approach in the preparatory works of the Rome Statute.⁴⁵ (The defence tried to rebut this approach by evoking the ECHR principles, as presented *supra* and also by reminding that the given SCSL *dictum* was not unanimous and a dissenting opinion was attached thereto.⁴⁶) The legal representatives of the victims relied on another SCSL-decision.⁴⁷

Before Trial Chamber I answered all these issues, it expressed its opinion in an abstract way on the help and value of other international tribunals and namely those of the SCSL:

“The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL’s case law

⁴² ICC-01/04-01/06-2748-Red, para. 141; referring to SCSL, *Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T*, Trial Chamber I, Judgement, 2 August 2007 (“*CDF Trial Judgement*”), para. 688. See ICC, Lubanga verdict, para. 576 and footnote 1723, p. 264–265.

⁴³ SCSL, *Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T*, Trial Chamber I, Judgement, 20 June 2007 (“*AFRC Trial Judgement*”), para. 1267. See ICC, Lubanga verdict, para. 576 and footnote 1724, p. 265.

⁴⁴ SCSL, *CDF Trial Judgement*, para. 193; SCSL, *AFRC Trial Judgement*, para. 736. See ICC, Lubanga verdict, para. 576 and footnote 1725, p. 265.

⁴⁵ ICC, Lubanga verdict, para. 576, p. 265.

⁴⁶ Justice Robertson wrote: „[...] forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front lines.” SCSL, *Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E)*, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, para. 9. See ICC, Lubanga verdict, para. 582, footnote 1737 p. 267.

⁴⁷ „Using children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat [...] [A]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.” SCSL, *AFRC Trial Judgement*, paras 736 and 737. See ICC, Lubanga verdict, para. 594, footnote 1756 p. 271.

therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.²⁴⁸

As for the content of the expressions 'conscripted' and 'enlisting' in the Rome Statute, Trial Chamber I – following the position of the Pre-Trial Chamber – emphasized that they cover both the voluntary and the coercive forms of recruitment and cited a view expressed in a SCSL dissenting opinion.⁴⁹ When clarifying the content of the article 8(2)(e)(vii)⁵⁰ – it referred to the SCSL practice in order to state that here the justice is facing three alternatives (conscripted, enlistment and use), which are separate offences.⁵¹

Further on the question of the adequacy of the children's consent was examined. The SCSL seems to back the orthodox position ("where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence"⁵² and "the distinction between [voluntary enlistment and forced enlistment] is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is [...] of questionable merit."⁵³), and apparently the Pre-Trial Chamber followed it⁵⁴, but Trial Chamber I was open towards a more nuanced approach: "The manner in which a child was recruited, and whether it involved compulsion or was 'voluntary', are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence."⁵⁵

In matter of the interpretation of the legal content of 'participation in armed conflict' concerning children's prohibited participation in the armed conflict, Trial Chamber I benefited once again from the jurisprudence of the SCSL pronouncing that "[a]n armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages,

⁴⁸ ICC, Lubanga verdict, para. 603, p. 275.

⁴⁹ See ICC, Lubanga verdict, para. 607, footnote 1776 p. 278, dissenting opinion of Justice Robinson, see *supra*.

⁵⁰ „Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities...”

⁵¹ See SCSL, *AFRC Trial Judgement*, para. 733; *CDF Appeal Judgement*, para. 139, and Dissenting Opinion of Justice Robertson, para. 5. See ICC, Lubanga verdict, para. 609, footnote 1781 p. 279.

⁵² SCSL, *Prosecutor v. Fofana and Kondewa case or CDF Appeal Judgement*, para. 139. See ICC, Lubanga verdict, para. 616, footnote 1788 p. 281.

⁵³ SCSL, *CDF Trial Judgement*, para. 192. See ICC, Lubanga verdict, para. 616, footnote 1789 p. 281.

⁵⁴ „[...] a child's consent does not provide a valid defence to enlistment.” (ICC-01/04-01/06-803-tEN, para. 248). See ICC, Lubanga verdict, para. 616 and footnote 1787, p. 281.

⁵⁵ ICC, Lubanga verdict, para. 617, p. 281–282.

making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.”⁵⁶

Trial Chamber I summarized the SCSL’s position as follows: “The SCSL therefore held that the concept of “using” children to participate actively in hostilities encompasses the use of children in functions other than as front line troops (participation in combat), including support roles within military operations.”⁵⁷ It quoted that “[u]sing’ children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat.”⁵⁸

Much later, during the analysis of the difference between *principal liability* and *accessory liability*, Trial Chamber I considered it important to refer to the SCSL, thus completing the long list of references to certain ICTY and ICTR judgments.⁵⁹

2.7. International tribunals not mentioned in the Lubanga verdict

Apparently, no reference was made either to the jurisprudence of the Inter-American Court on Human Rights or to the International Military Tribunal of Nuremberg or of Tokyo. One can remember how often the International Military Tribunal of Nuremberg was referred to in the early jurisprudence of the ICTY. In the Lubanga case however as far as the accusation was based on the enlisting of child soldiers, the Nuremberg and Tokyo tribunals as well as the current jurisprudence of the IACHR could serve less pertinent „precedents” than the above mentioned ones.

3. The Lubanga sentence and the interactions

The presentation of interactions is easier in the sentence than in the case of the verdict: only two cases are cited from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and twenty references come from the Special Court for Sierra Leone.

Apparently no reference is made on the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for Rwanda and International Military Tribunals of Nuremberg and Tokyo.

3.1. The references to the International Criminal Tribunal for the former Yugoslavia

While in the preliminary considerations, Trial Chamber I enumerates its guiding principles and emphasizes the avoidance of ‘double counting’. (“Any factors that are to be taken into account when assessing the gravity of the crime will not additionally

⁵⁶ SCSL, *AFRC Trial Judgement*, para. 737. See ICC, Lubanga verdict, para. 624, footnote 1798, p. 284–288.

⁵⁷ ICC, Lubanga verdict, para. 625, p. 285.

⁵⁸ SCSL, *AFRC Trial Judgement*, para. 736. See ICC, Lubanga verdict, para. 626, footnote 1800, p. 285.

⁵⁹ SCSL, *CDF Appeal Judgement*, para. 73. See ICC, Lubanga verdict, para. 997, footnote 2704, p. 430.

be taken into account as aggravating circumstances, and *vice versa*.”), there is a reference on the ICTY.⁶⁰ The same judgment is referred to to underline that the “gravity of the crime” is one of the principal factor in the determination of the sentence,⁶¹ which should be proportional and reflect the individual culpability.

3.2. The Special Court for Sierra Leone in the Lubanga verdict

The SCSL appears first in a special chapter entitled „The jurisprudence of other courts in relation to sentencing regarding child soldiers”.

It begins with an abstract and correct evocation – similar to the already quoted one, see *supra* – of the utility and the limits of studying the corresponding jurisprudence of other courts: “Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the ad hoc tribunals are in a comparable position to the Court in the context of sentencing. However, the only convictions by an international criminal tribunal for the recruitment or use of child soldiers are from the Special Court for Sierra Leone.”⁶²

Then, follows a good recapitulation of the SCSL jurisprudence: “There have been seven⁶³ convictions at the SCSL in four cases for the crime of using child soldiers under the age of 15.⁶⁴ In two of those cases⁶⁵, the Trial Chamber did not address each count separately in its sentencing decision, and accordingly it is impossible to determine the effect the conviction for the use of child soldiers had on the overall sentences. The two cases in which separate sentences were handed down for the crime of using child soldiers are briefly discussed below.”⁶⁶ The references themselves are in footnotes where the RUF case is presented in details⁶⁷ and the CDF sentence is presented only briefly.⁶⁸

⁶⁰ ICTY, *Prosecutor v. Nikolic*, Case No. IT-02-60/1-A, Appeals Chamber, Judgement on Sentencing Appeal, 8 March 2006, para. 58. See Lubanga sentence, para. 35, footnote 52, p. 14.

⁶¹ See Lubanga sentence, para. 36, footnote 53, p. 14–15.

⁶² See Lubanga sentence, para. 12, p. 6–7.

⁶³ *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008. See Lubanga sentence, para. 12, footnote 22, p.7. (NB: The original footnote 22 of the sentence became my footnote 63.)

⁶⁴ SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgement, 2 August 2007 (“CDF case”); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgement, 18 May 2012 (“Taylor case”); *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgement, 25 February 2009 (“RUF case”); *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber, Judgement, 20 June 2007 (“AFRC case”). See Lubanga sentence, para. 12, footnote 23, p. 7. (NB: The original footnote 23 of the sentence became my footnote 64.)

⁶⁵ The AFRC and Taylor cases. See Lubanga sentence, para. 12, footnote 24, p. 7. (NB: The original footnote 24 of the sentence became my footnote 65.)

⁶⁶ Lubanga sentence, para. 12, p. 7.

⁶⁷ Lubanga sentence, para. 13–14, p. 7–8.

⁶⁸ Lubanga sentence, para. 15, p. 7.

The main thesis is the following: “it is universally recognised and accepted that a person who has been convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes.”⁶⁹

4. Conclusion

The Lubanga judgments (the verdict and the sentence) contain a good number of references to the jurisprudence of other international tribunals. These references are sometimes *verbatim* quotations, sometimes rather general allusions to the jurisprudential line developed by these tribunals, especially in issues where the given element or construction of the underlying statute or convention are identical or very similar and so the *voluntary* importation is not hampered by difference of concept.

These issues were apparently the appreciation of circumstances of enlisting children into the army, some responsibility issues (i.e. principal liability and accessory liability), the „overall control” test, procedural fairness and the determination of the punishment.

The Lubanga judgments are not the only ones to be open to the jurisprudence of other international tribunals.

The Katanga decision⁷⁰ taken by Pre-Trial Chamber I, composed of Presiding Judge Akua Kuenyehia & judges Anita Usacka and Sylvia Steiner, also contains numerous interactional references. Some of them are *quasi* identical to the Lubanga verdict e.g. the reference to the International Court of Justice and namely to the case of the *Democratic Republic of Congo v. Uganda*⁷¹. Several judgments of the European Court of Human Rights are also cited⁷² and the most number of references concern the International Criminal Tribunal for the former Yugoslavia.⁷³ The International

⁶⁹ SCSL, RUF Sentencing Judgement, para. 18. Lubanga sentence, para. 14, footnote 33, p. 8.

⁷⁰ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, decision on the confirmation of charges, 30/9/2008, ICC-01/04-01/07. To the 213 page long decision, judge Anita Usacka wrote a 13 page long partly dissenting opinion.

⁷¹ ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgement, I.C.J. Reports 2005, 19 December 2005.

⁷² ECHR (indicated in the decision as ECtHR, *enumeration in order of appearance*), Kostovski v The Netherlands, Judgement of 20 November 1989, Application No. 11454/85, para. 44.; Imbrioscia v. Switzerland, Judgement, 24 November 1993, Application No. 13972/88, paras. 35, 36.; Brennan v. The United Kingdom, Judgement, 16 October 2001, Application No. 39846/98, para. 45.; John Murray v. The United Kingdom, Judgement, 8 February 1998, Application No. 41/1994/488/57, paras 62-63; Magee v. The United Kingdom, Judgement, 6 June 2000, Application No. 28135/95, para. 41.; Schenk v. Switzerland, Judgement, 12 July 1988, Application No. 10862/84; Öcalan v. Turkey, Judgement, 12 March 2003, Application No. 46221/99. para. 140 and Grand Chamber Judgement of 12 May 2005, para. 131; Salduz v Turkey, Judgement of 26 April 2007, Application No. 36391/02, para. 22.

⁷³ ICTY (*enumeration in order of appearance*), Prosecutor v. Naser Oric, Case No. IT-03-68-T, Trial Chamber, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October, 2004, para. 8; Prosecutor v. Milan Manic, Case No. IT-95-11-T, Trial Chamber, Decision adopting guidelines on the standards governing the admission of evidence, 19

Criminal Tribunal for Rwanda⁷⁴ is also well referred to and the Special Court for Sierra Leone⁷⁵ is also cited in the Katanga decision.

The judgments to be taken in the future will reveal whether the above presented tendencies will continue.

January 2006, para.5; Prosecutor v. Radoslav Brdanin and Momir Talic, Case No. IT-99-36-T, Trial Chamber, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 18; Prosecutor v Mucic et al., Case No. IT-96-21, Trial Chamber, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, paras 33-34; Prosecutor v. Kupreskic et al, Case No. IT-95-16-A, Appeals Judgement, 23 October 2001, para. 31; Prosecutor v. Blaskic, Case No. IT-95-14, Trial Judgement, 3 March 2000, para. 36 and Case No. IT-95-14-A, Appeals Judgement, 29 July 2004, paras 101, 124; Prosecutor v. Naletilic and Martinovic, Case No. IT- 98-34-T, Trial Judgement, 23 March 2003, para. 203-205; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgement, 25 June 1999, para. 229 and Case No. IT-95-14/1-A, Appeals Judgement, 24 March 2000, paras 147-152; Prosecutor v. Tadic Case No IT-04-1-AR72-A, Appeals Judgement, 15 July 1999, para. 166; Prosecutor v. Kvočka et al. Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001, paras 173, 179; Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 179 and Case No. IT-95-14/2-A, Appeals Judgement, 17 December 2004, paras 94, 99; Prosecutor v. Kunarac, IT-96-23&23/1, Trial Judgement, 22 February 2001, para. 157.

⁷⁴ ICTR, (*enumeration in order of appearance*), Prosecutor v. Bagosora, Case No. ICTR-94-1-T, Trial Chamber, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 40; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, para. 332; Prosecutor v. Akayesu, Case No. ICTR-96-40- T, Trial Judgement, 2 September 1998, para. 580; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, para. 123; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, 6 December 1999, paras 67-68; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paras 869-870.

⁷⁵ SCSL, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T, 20 June 2007, para. 110.