ICC, The Prosecutor v. Thomas Lubanga Dyilo

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007, available at http://www.icc-cpi.int, Footnotes omitted]

PRE-TRIAL CHAMBER I

Date: 29 January 2007

[…]

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

[…]

DECISION ON CONFIRMATION OF CHARGES

[...]

PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively), having held the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,

HEREBY RENDERS THE FOLLOWING DECISION.

I. INTRODUCTION

A. Factual Background

1. The District of Ituri before 1 July 2002

1. Ituri is a district in the Orientale Province of the Democratic Republic of the Congo (the DRC). It is bordered by Uganda to the east and Sudan to the north. Its population is between 3.5 and 5.5 million people, of whom only about 100,000 live in Bunia, the district capital. […]
2. In the summer of 1999, tensions developed as a result of disputes over the allocation of land in Ituri and the appropriation of natural resources. During the second half of 2002, there was renewed violence in various parts of the district.

2. Thomas Lubanga Dyilo

[…]

1. […] [I]t would appear that Thomas Lubanga Dyilo entered politics between late 1999 and early 2000. Soon thereafter, he was elected to the Ituri District Assembly.
2. On 15 September 2000, the statutes of the Union des Patriotes Congolais (UPC) were signed by Thomas Lubanga Dyilo, as the first signatory, and several other persons who subsequently held leadership positions within the party and its armed military wing, the Forces Patriotiques pour la Libération du Congo (FPLC). In August 2002, the UPC took control of Bunia.
3. In early September 2002, the UPC was renamed Union des Patriotes Congolais/Réconciliation et Paix (UPC/RP) and Thomas Lubanga Dyilo appointed its President. A few days later, in Bunia, Thomas Lubanga Dyilo signed the decree appointing the members of the first UPC/RP executive for the Ituri District. At the same time, a second decree officially established the FPLC. Immediately after the establishment of the FPLC, Thomas Lubanga Dyilo became its Commander-in-Chief.

3. Prosecution allegations against Thomas Lubanga Dyilo

1. In the "Document Containing the Charges […]," filed on 28 August 2006, the Prosecution charges Thomas Lubanga Dyilo under articles 8(2)(e)(vii) and 25(3)(a) of the Statute with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group (in this case, the FPLC, military wing of the UPC since September 2002) and

using them to participate actively in hostilities. The Prosecution submits that “the crimes occurred in the context of an armed conflict not of an international character.”
2. The Prosecution asserts that even prior to the founding of the FPLC, the UPC actively recruited children under the age of fifteen years in significant numbers and subjected them to military training in its military training camp in Sota, amongst other places.
3. The Prosecution further submits that, after its founding and until the end of 2003, the FPLC continued to systematically enlist and conscript children under the age of fifteen years in large numbers in order to provide them with military training, and use them subsequently to participate actively in hostilities, including as bodyguards for senior FPLC military commanders. […]

IV. MATERIAL ELEMENTS OF THE CRIME

A. Existence and nature of the armed conflict in Ituri

[…]

2. The characterisation of the armed conflict

1. In his Document Containing the Charges, the Prosecutor considers that the alleged crimes were committed in the context of a conflict not of an international character. The Defence contends however that consideration should be given to the fact that during the relevant period, the Ituri region was under the control of Uganda, Rwanda or MONUC. In the view of the Defence, the involvement of foreign elements, such as the UPDF [Ugandan People’s Defence Forces], could internationalise the armed conflict in Ituri. […] [R]egardless of the type of armed conflict, the Statute offers exactly the same protection, adding that the UPC had set up a quasi-state structure which could be described as a “national armed force”.
2. According to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute and the Elements of the Crimes in question, conscripting or enlisting children under the age of fifteen years and using them to participate actively in hostilities entails criminal responsibility, if

[t]he conduct took place in the context of and was associated with an international armed conflict; or the conduct took place in the context of and was associated with an armed conflict not of an international character.

[…]

a. From July 2002 to June 2003: Existence of an armed conflict of an international character

[…]

1. The ICJ finds in its disposition [in the case of the Democratic Republic of the Congo v. Uganda] [See ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo] “that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention” and that it can be considered as an occupying Power.

[…]

1. On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.

[…]

b. From 2 June 2003 to December 2003: Existence of an armed conflict not of an international character involving the UPC

[…]

1. In the instant case, the Chamber finds that an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri. In fact, many armed attacks were carried out during that period, causing many victims. […]

B. Existence of the offence under articles 8(2)(b)(xxi) and 8(2)(e)(viii) of the Statute

1. The application of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute is predicated upon a showing that the offence as such

has been committed.

2. The relevant parts of article 8(2) read as follows:
    1. 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;

[…]

- (e)Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[…]

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

[…]

1. Enlisting or conscripting children under the age of fifteen years

- 1. The concept of children participating in armed conflicts emerged in international law in 1977 during the drafting of the Protocols Additional to the Geneva Conventions.
  2. 243. In this regard, the Chamber recalls that Article 77(2) of Protocol Additional I which applies to international armed conflicts, provides that:

  The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

  Article 4(3) of Protocol Additional II, which applies to non-international armed conflicts, provides that:

  Children shall be provided with the care and aid they require, and in particular:

  (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

  1. The term used in this article – recruitment – differs from those used in the Rome Statute – enlisting and conscripting. Whereas the preparatory work of the Protocols Additional appears to consider only the prohibition against forcible recruitment, the commentary on Article 4(3)(c) of Protocol Additional II refers to “[t]he principle that children should not be recruited into the armed forces” and makes clear that this principle “also prohibits accepting voluntary enlistment.”
  2. Numerous international instruments have since been adopted, prohibiting the recruitment of minors of a certain age. A review of these international instruments and the two Protocols Additional to the Geneva Conventions shows that a distinction can be drawn as to the very nature of the recruitment, that is to say between forcible and voluntary recruitment.
  3. The Rome Statute prefers the terms “conscripting” and “enlisting” to “recruitment”. In light of the foregoing, the Chamber holds the view that “conscripting” and “enlisting” are two forms of recruitment, “conscripting” being forcible recruitment, while “enlisting” pertains more to voluntary recruitment. In this regard, the Chamber points out that this distinction was also made by Judge Robertson in his separate opinion appended to the judgement rendered by the Appeals Chamber of the Special Court for Sierra Leone on 31 May 2004 in the case of The Prosecutor v. Sam Hinga Norman. [See Sierra Leone, Special Court Ruling on the Recruitment of Children]
  4. It follows therefore that enlisting is a “voluntary” act, whilst conscripting is forcible recruitment. In other words, the child’s consent is not a valid defence.

  […]

  a. Conscripting and enlisting children under the age of fifteen years by the UPC/FPLC between July 2002 and 2 June 2003

  […]

1. The Chamber holds the view that the evidence admitted for the purpose of the confirmation hearing is sufficient to establish that there are substantial grounds to believe that the recruitment policy established by the FPLC also affected minors under the age of fifteen years.

b. Conscripting and enlisting children under the age of fifteen years by the FPLC between 2 June 2003 and late December 2003

[…]

1. Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from 2 June to late December 2003, in the context of an armed conflict not of an international character, the FPLC enlisted and conscripted children under the age of fifteen years into its armed group.

2. Active participation in hostilities

1. Regarding the involvement of children in armed conflicts, Article 77(2) of Protocol Additional I to the Geneva Conventions states that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities […].

1. According to the commentary on Article 77(2) of Protocol Additional I to the Geneva Conventions, the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform services such as the gathering and transmission of military information, transportation of arms and ammunition or the provision of supplies.
2. "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.
3. In this respect, the Chamber considers that this article does not apply if the activity in question is clearly unrelated to hostilities. Accordingly, this article does not apply to food deliveries to an airbase or the use of domestic staff in married officers' quarters.
4. Nevertheless, the Chamber finds that articles 8(2)(b)(xxvi) and 8(2)(e)(vii) apply if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards). These activities are indeed related to hostilities in so far as i) the military commanders are in a position to take all the necessary decisions regarding the conduct of hostilities, ii) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.
5. In view of these considerations, the Chamber finds that in the instant case there are substantial grounds to believe that the FPLC used children under the age of fifteen years to participate actively in hostilities.
6. Indeed, the Chamber notes that after their recruitment, children were allegedly taken to FPLC training camps […] where they allegedly received military training. […]
7. The Chamber points out that it appears that upon completion of their military training, the children were deemed fit for combat and that FPLC commanders then sent them to the front line to fight. […]
8. In addition, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that children under the age of fifteen years were also used as bodyguards by the FPLC commanders and that Thomas Lubanga Dyilo personally used them.

[…]

Discussion

[***See also*** Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

1. (*Paras 200-235*) Does the classification of the conflict as international or non-international matter? Was Mr Lubanga bound by the IHL of international armed conflict between July 2002 and June 2003 if Uganda was an occupying power in Ituri? Even if he was neither linked to Uganda nor an organ of the DRC? Could he have committed an offence under Art. 8(2)(b)(xxvi) of the ICC Statute?
2. (*Paras 259-267*) According to the Pre-Trial Chamber, when is a child under the age of fifteen actively participating in hostilities? Does the Chamber give a detailed definition of "active participation in hostilities"? Is the Chamber's conclusion on the acts and activities that amount to active participation in hostilities in accordance with the ICRC's Interpretive Guidelines on Direct Participation in Hostilities?
3. Is there a difference between "active participation", "direct participation", "participation" and "use" in hostilities? Does IHL prohibit the use of children in armed conflicts only for activities which constitute direct participation in hostilities? By States? By armed opposition groups? (P I, Art. 77; P II, Art. 4(2) and (3); ***See*** Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict)

4. (*Paras 260 and 261*) Do transportation of arms and ammunitions and provision of supplies amount to active participation in hostilities according to the Chamber? Do these acts amount to direct participation in hostilities as defined by the ICRC's Interpretive Guidelines? What about scouting, spying, sabotage, acting as a decoy or a courier? What about guarding a military objective or acting as a bodyguard for military commanders?
5. When can someone be directly targeted? Do children also lose their protection as civilians when they directly participate in hostilities? If so, can they be directly targeted when they are engaged in any of the activities mentioned by the Chamber?
6. Is there a contradiction between the notion of "direct participation in hostilities", allowing targeting of persons directly involved in combat, and the purposes of the special protection granted to children by IHL? Should children be excluded from the notion of direct participation in hostilities? Would it be realistic to require from the parties to a conflict not to target children even when they are directly engaged in combat?