

## **First Reflections Lubanga Judgment – Criminal Responsibility**

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Let me begin by thanking LJIL, Grotius and GJI for the opportunity to present this book and – more importantly – to reflect on the *Lubanga*-case and share the podium with such eminent speakers.

In the following, I wish to briefly reflect on the Lubanga judgment on the point of criminal responsibility. I will do that by making essentially 6 observations. Allow me to start with some general preliminary observations on the process of law-making in international courts and tribunals.

### **1. International courts and tribunals as law labs**

If there is one thing that stands out when studying ICL and comparing it to domestic criminal justice it is the law-making process. In the words of Powderly lawmaking at the international level is a creative enterprise. At the ICTY we have witnessed progressive lawmaking with regard to liability theories and crime definitions. Nino Cassese, in whose honour this lecture series is organized, may be remembered for his progressive approach to lawmaking.

The ICC Statute with its elaborate statutory definitions, general part, EoC and Article 21 on sources of law, breathes a more ‘black letter law’ approach. Those drafting the Statute were keen to limit the discretion of judges to develop the law. Practice at the ICC, however, does not comport with this approach. The first decisions by PTCs constitute substantive lawmaking that goes well beyond the task of confirming charges.

To my mind, the ICC is not very different from the ICTY in that respect: both are like laboratories where legal officers and judges develop a criminal justice system from scanty, diverse and sometimes inconsistent sources of law. This way they develop crime definitions, procedural law and theories of liability. This is why ICL attracts so much scholarly attention; it is a playground for comparatists.

## **2 ICC as a self-contained system**

My second point relates to the ICC as a self-contained system. In seeking guidance to resolve legal issues, the *ad hoc* Tribunals have frequently resorted to decisions of courts that were established in the aftermath of the Second World War. The ICC occupies a somewhat different position as to that. Article 21(2) authorizes the ICC to apply principles and rules of law as interpreted in *its* previous decisions. While this text clearly applies to case law of the Court it cannot be taken to mean that – *a contrario* – Article 21(2) prohibits the importation of principles derived from the case law of other international courts. As Schabas points out, ICC case law often refers to the law of the *ad hoc* Tribunals and the ICJ. On the other hand, when provisions of the ICC Statute differ from their counterparts in the law of the *ad hoc* Tribunals, it is justified to ignore the precedents of these courts.

There has been resistance at the ICC to the application of principles drawn from ICTY and/or ICTR law, even when there was no provision in the ICC Statute requiring a departure from ICTY/R case law. This indicates a tendency at the Court to regard the ICC Statute as a self-contained regime rather than part of a larger system of international criminal justice. This is especially clear with regard to modes of liability. In the words of Thomas Weigend in a commentary to the PTC ruling in the Lubanga case “the Chamber has not left any doubt as to its willingness to explore its own path through the jungle of perpetrator’s and accessories’ liability’.

## **3. The Lubanga judgment**

This brings me to the Lubanga judgment, my 3<sup>rd</sup> (somewhat longer point). In its Judgment, the TC follows the Pre-Trial Chamber’s (PTC) Confirmation of Charges decision with respect to how co-perpetration in Article 25(3)(a) of the Rome Statute is to be interpreted: liability for committing a crime “jointly with another” attaches only to individuals who can be said to have control over the crime.

The Majority holds that proof is required of an agreement or common plan between two or

more persons. The plan need not be “intrinsically criminal,” but as a minimum, it must be proven that the plan included a “critical element of criminality” in the sense that “its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.” The Majority further states that what is decisive for committing a crime jointly with another is “whether the co-perpetrator performs an *essential role* in accordance with the common plan.” It is not necessary that the accused was present at the scene of the crime. As long as the accused controls or masterminds the crime.

What to think of this part of the ruling (the only part I will explore given the time)?

Let me start with the *nature of the common plan*. In the *Lubanga* case the common plan was to build an army for the purpose of establishing and maintaining political control over Ituri. This is essentially a non-criminal plan that resulted - according to the TC - in the conscription and enlistment of child soldiers. Reasoning behind this was that in the period before the charges, when Lubanga was detained, his co-perpetrators had been engaged in recruitment of young children; it was likely this was going to happen again when he established the UPC and together with his co-perpetrators was looking for the maintenance of military power over Ituri.

Thus, the crimes are imputed to Lubanga on the basis that he made an *essential* contribution to a *non-criminal* plan that resulted in the commission crimes. The TC had to construct liability this way since Lubanga, President of UPC and commander in chief, was not closely involved with the recruitment of soldiers unlike his co-perpetrators who were military men. However, as president and commander-in-chief he was in overall control and able to shape policies of UPC/FPLC. Lubanga’s liability turns on the requirement that in the ordinary course of events the implementation of the common plan (building an army to maintain control) *will result* in the enlistment, conscription and use of child soldiers. This is where his non-criminal acts become criminal. I have difficulty with this construction of Lubanga’s liability. To my mind this does not square with the Chamber’s overall finding that Lubanga controlled and masterminded the commission of crimes.

Then the TC’s finding with regard to the *nature of the contribution*. The contribution should be ‘essential’. Here the Chamber is not unanimous. Judge Fulford in a dissenting opinion

argues that requiring an essential contribution by the accused will often be unrealistic and artificial. Such an assessment results in a hypothetical investigation into what might have happened had the accused not been involved. Moreover, he finds that the text of the Rome Statute does not require any further qualification as to the contribution. He proposes an alternative approach, based on a plain reading of the text where a contribution to the crime be direct or indirect, provided there is a causal link between the contribution and the crime.

What underlies this disagreement on the nature of the contribution is a more principled disagreement on the theory underlying the TC's findings. While Judges Blattmann and Benito adopt the Control of the Crime Theory, Judge Fulford rejects it in his separate opinion.

Very quickly, for those who are not familiar with it, the control of the crime/act theory, developed by German scholar Claus Roxin, has been embraced by the PTC as the doctrinal grounding of criminal responsibility. It is understood to mean that those who are convicted as co-perpetrators under subparagraph 3(a) are regarded 'more responsible' than those who ordered, aided and abetted or in any other way contributed to commission of crimes by a group acting with a common purpose (subparas b-d). The qualifier 'essential' expresses a greater weight to the contribution than 'substantial', which is what is required for aiding/abetting in ICTY jurisprudence and which, being accessorial liability, the Majority regarded as secondary, in the sense of lesser, liability.

Judge Fulford disagrees with the reasons for relying on the Control of the Crime Theory. The first being the necessity of establishing a dividing line between principals and accessories. Such a distinction, in his view, is unnecessary. Labeling an accused as principal or as accessory has no consequence when it comes to sentencing. Moreover, Article 25 of the Rome Statute does not support a hierarchy of liability. The provision contains overlapping modes of liability; nothing indicates that these modes were intended to be mutually exclusive.

#### **4. Comments and Scholarly writing**

This principled discussion on the theory of liability between Judge Fulford and the majority has attracted interest of scholars and commentators around the world. This brings me to my fourth point.

On blogs and websites people have taken sides. In an elaborate commentary on the Judgment, that I recommend to all of you, Ambos reveals himself (again) as a defender of the CoC theory and takes issue with the points Judge Fulford raises. He argues that the drafters of the Rome Statute made a *conscious decision* to abandon a unitarian concept of perpetration that is adopted by the Ad Hoc Tribunals in favour of a differentiated system. A differentiated system calls for theories of delimitation and a theoretical grounding. Ambos faults Judge Fulford for not recognising that differentiation of liability at the level of imputation (even if it does not determine sentencing) contributes to a fairer criminal justice system.

A number of commentators subscribe to Judge Fulford's critique of the 'essential contribution' requirement. It is argued that it has no legal basis. With regard to the more theoretical and principled discussion on the Control of the Crime theory and the hierarchical structure of Article 25 the opinions are more divided. Ohlin agrees that the distinction between principals and accessories has an important value. It comports with the principle of fair labelling: the law should capture the defendant's true and accurate culpability by applying the correct legal categories. Other scholars have sided with Judge Fulford in rejecting the Control of the Crime interpretation of co-perpetration. Heller argues that JCE (First category), derived from ICTY case law, is more appropriate as underlying theory for co-perpetration at the ICC. It is interesting to note that also he, like Ambos cannot resist the temptation to sharpen legal categories and rationalize 25(3) as mutually exclusive rather than overlapping modes of liability.

## **5. Hierarchy?**

This brings me to the fifth point: the question whether Article 25 contains a hierarchy of liability. Let me start by saying that in my view, the text of Article 25(3) allows for the incorporation of Roxin's theory. The provision, by extending perpetration beyond physical perpetration, reflects a normative approach to perpetration. Principals are also those who are 'most responsible', not just those who physically cause the *actus reus*, i.e. commit crimes (naturalistic approach). The *Lubanga* PTC and TC go one step further by holding that

‘control of the crime’ is incorporated into Article 25(3)(a) *by exclusion* of other theories of liability. This in my view is a step too far.

Nothing in the drafting history of the ICC suggests that it was to constitute a self-contained system of criminal participation with a coherent doctrinal grounding. To the contrary, as the chairman of the Working Group on General Principles recalls, drafting Article 25(3) posed great difficulties to negotiate and that eventually a near-consensus was reached where there would be one provision to cover the responsibility of principals and all other modes of participation. Article 25(3) was to provide the court with a range of modalities from which to choose from.

The modes of liability listed in subparagraphs (b-d) can be referred to as the classic scheme of criminal participation that we find in most national criminal justice systems. The modalities in (b-d) differ from (a) in that they are derivative or accessory; liability depends on the principal crime. For some one who orders a crime, to be culpable the crime must have been committed. This does not mean that he who orders a crime is less responsible than say some one who co-perpetrates a crime. Here we have the fatal error in the TCs theory: accessory liability is equated to lesser liability (most clearly in para 998) From a comparative law point of view, there is no rule or theory that links accessory liability to lesser responsibility. Even those systems that provide for a distinction between principals and accessories where labelling comes with a sentence reduction, ‘principal liability’ may still be derivative/accessory. For instance, co-perpetration in Dutch law is accessory liability; crime has to be committed or attempted.

## **6. Mixed models of participation**

The most important reason for rejecting the CoC as the exclusive theory for a differentiated theoretical grounding of Article 25 – this is my last point – is that it would endorse a false dichotomy between the ICC and the ad hoc Tribunals. The analysis that ICC adopts a differentiated system of liability and the ad hoc Tribunals a unitary approach is in my view too simplistic. In reality the models of participation at both the ICTY and ICC are much more alike and have traits of both a differentiated and unitary system of participation. ICTY is like

ICC differentiated when it comes to imputation (different ways of contributing to a crime are recognized) and the ICC is like ICTY unitary when it comes to sentencing (an aider/abettor to rape is convicted for rape not for supporting or encouraging the rape). As I make clear in my book, there is no such thing as a clear distinction between differentiated and unitary models. For the PTC and TC to rely on that as an argument to move away from ICTY and ICTR jurisprudence simply does not make sense.

As I point out in my book, the ICC and the international criminal tribunals rely on theories of liability that differ on conspicuous points but also overlap. Generally, there is an unwillingness on either side to uncover similarities and overlap between co-perpetration and JCE, let alone apply each other's case law with regard to these concepts. The reason for this is the difference in the underlying approach to criminal participation. The ad hoc tribunals adopt a (predominant) naturalistic approach, which clashes with the normative approach of the ICC and its control of the crime theory. Thinking in terms of the naturalistic/normative contrast (confusingly referred to by the ICC PTCs as subjective/objective respectively), however, is deceptive. In reality the participation models at the ICC and ICTY are mixed models and are much more alike than some are willing to admit.

### **Concluding observations**

I conclude by leaving you with a question to which I have not found the answer yet: in what way does the theory of liability in Lubanga constitute fair labelling? To what extent does the Control of Crime theory capture the defendant's true and accurate culpability by applying the correct legal categories? Does a 600 page judgment, which for a large part contains complex observations on the law, contribute towards expressing liability? Are the findings understandable for the average defendant, not to mention the victims. One must admit, like the PTC ruling, this is a difficult judgment to digest even for professional lawyers Here I return to my earlier observations on lawmaking at international courts and tribunals. The temptation to use these courts as law labs should be resisted to the extent that it is only necessary. In that sense, I welcome Judge Fulford's common sense approach and I remain critical of the species to which I belong myself: academics.

