

ROD RASTAN\*

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

The terms 'situation' and 'case' appear throughout the ICC Statute and Rules of Procedure and Evidence, but find no definition therein. The concept of a situation has broader parameters than that of a case and denotes the confines within which the Prosecutor is to determine whether there is a reasonable basis to initiate an investigation. As negotiations during the drafting history reveal, the term was intended to frame in objective terms the theatre of investigations, thereby rejecting the idea that a referring body could limit the focus of the Prosecutor's activities by reference to particular conduct, suspect, or party.<sup>1</sup> Pre-Trial Chamber (PTC) I (DRC) has elaborated the characteristics of a situation as follows: "[s]ituations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such". In contrast, a case involves a higher level of specificity, defined by PTC I as entailing "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects".<sup>2</sup>

---

\* Ph. D. (LSE), LL. M. (Nottingham); Legal Advisor, Office of the Prosecutor, International Criminal Court. The views expressed herein are solely the author's and do not necessarily reflect those of the International Criminal Court.

<sup>1</sup> The fact that the Statute prevents a referring body from restricting the scope of preliminary examination or investigation does not mean that specific allegations against named individuals or identified incidents cannot be provided. Such information may be provided in support of the referral or at the request of the Prosecutor (article 14(2) and rule 104) or may be otherwise received in accordance with article 15(1)–(2).

<sup>2</sup> PTC I, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6 ('Decision on Applications for Participation'), ICC-01/04-101-tEN-Corr, 17 January 2006, para 65.

The elaboration of such definitions are central to the operation of the Statute, for upon their determination depend a series of procedural provisions relating, *inter alia*, to the assumption of jurisdiction, admissibility, the challenges regime, victims participation, and judicial assistance. This brief note focuses primarily on the meaning of a ‘case’ within the context of admissibility and examines a number of issues treated for the first time in the jurisprudence of the Court during the *Lubanga* proceedings.

## I. THE ‘SPECIFICITY’ TEST

On February 10, 2006, PTC I issued a warrant of arrest for Thomas Lubanga.<sup>3</sup> As part of its decision, the PTC conducted a preliminary assessment of admissibility as to whether there were any relevant national proceedings in the DRC.<sup>4</sup> In particular, Thomas Lubanga was at the time in the custody of the DRC authorities pursuant to charges for unrelated serious offences. The ICC judges observed that since the domestic charges against Lubanga did not correspond to the allegations brought before the ICC, the DRC could not be considered to be acting in relation to the same specific case.<sup>5</sup> As the Chamber held:

[I]t is a *condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.<sup>6</sup>

---

<sup>3</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06, 10 February 2006.

<sup>4</sup> *Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58 (‘Article 58 Decision’), ICC-01/04-01/06, 24 February 2006, para 29.

<sup>5</sup> *Ibid.*, paras 38–39.

<sup>6</sup> *Ibid.* See also *ibid.*, para 38, “However, the Chamber recalls that for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court”.

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

The test has been subsequently adopted by the Prosecution and has been recalled by the same Chamber in the proceedings concerning Bosco Ntaganda (DRC)<sup>7</sup> and Harun and Kushayb (Darfur),<sup>8</sup> and is mirrored broadly in PTC III ruling on the Prosecutor's application against Bemba (CAR).<sup>9</sup> Until there is a different ruling by another PTC or the Appeals Chamber, it is likely that the Lubanga 'specificity test' will continue to be applied before the ICC.

It may be useful to examine how PTC I appears to have developed this particular test. The reasoning below is not detailed in the decision itself, but is constructed by deduction. The first question is whether an assessment of a 'case' under complementarity should be a conduct-specific test. A good starting point is to look to the interoperability between the notion of a case in article 17 and the principle of *ne bis in idem* under article 20. Examining the relevant provisions of the Statute, article 17(1)(c) provides that a case will be inadmissible where "[t]he person concerned has already been tried for *conduct* which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3"; while the relevant portion of article 20(3) reads that "[n]o person who has been tried by another court for *conduct* also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless ..." (emphasis added). Article 20(3) sub-para (a) [on shielding] and (b) [on independence and impartiality], in turn, replicate the terms of article 17(2) (a) and (c).<sup>10</sup> Thus, given that the Statute requires articles 17(1)(c) and 20(3) to be read together, whenever a complementarity challenge is brought in relation to a claim that national authorities have already tried the person under Article 17(1)(c), the challenge must perforce relate to conduct.

---

<sup>7</sup> *Ibid.*

<sup>8</sup> "The Chamber is of the view that for a case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court". *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1, 1 May 2007, para 24.

<sup>9</sup> "The Chamber considers that ... there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application"; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 10 June 2008, para 21.

<sup>10</sup> The absence of a comparable provision in article 20(3) matching article 17(2)(c) (on delay) is explained by the fact that a trial must have already taken place for *ne bis in idem* to apply.

The next question is whether ‘conduct’ should be interpreted as incident-specific: must the case in dispute under article 17 relate to the same offence committed in the same incident (identity of time, location, perpetrator and victim) or can it refer to conduct in the generic sense, such as a case alleging the same offence, but not necessarily committed in the same incident (same perpetrator, but different location, time or victim)? As classically understood of course *ne bis in idem* relates to a specific, discreet event – such as the theft on 24th March 2006 in house A. It does not relate to other incidents of theft in other houses – such as the theft on 12th April 2008 in house B. Plainly, the trial of the person at the national level for a different event, even if the offence in question is the same, cannot be a bar to subsequent proceedings in relation to a different incident. This suggests that for the purpose of the ICC Statute, given that article 17(1)(c) necessarily ties conduct to the concept of *ne bis in idem*, the notion of ‘conduct’ under article 17 should be understood as incident-specific.

This then raises a question of consistency: would this conclusion be applicable only to article 17(1)(c) which refers specifically to the principle of *ne bis in idem* or can it be applied also to articles 17(1)(a) and (b), which both refer to ‘case’ rather than ‘conduct’? The PTC appears to have concluded it can. In particular, the PTC seems to have followed the reasoning that if the provision that is spelled out with the most clarity (article 17(1)(c) linked with article 20(3)) leads to one conclusion of what constitutes a case, there is merit to applying the same criteria to the provision defined with less certainty in articles 17(1)(a) and (b). Evidently, the case being challenged under article 19 cannot mean something different in the context of each of subparagraphs (a),(b) and (c) of article 17(1). Thus, if consistency is to prevail, the definition arrived at for the purpose of article 17(1)(c) dictates that a ‘case’ must always relate to incident-specific conduct for the purpose of the complementarity provisions of the Rome Statute. The verbatim overlap between article 20(3) sub-paras (a)–(b) and article 17(2) (a) and (c) lends further support to a close interpretive reading between the two provisions see above fn-10.

A final question is begged, however, by this analysis: is any of this convincing in the context of ICC proceedings? One could argue that for an international court examining the occurrence of crimes on a massive scale by countless perpetrators, the traditional concept of *ne bis in idem* breaks down. In the domestic theft example above there is ordinarily the expectation that the accused person should be subject

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

to further proceedings for the second theft occurring in house B: there is no reason why domestic authorities should not investigate and prosecute the re-offender. The situations under the jurisdiction of the ICC, by contrast, may include hundreds if not thousands of incidents of killings, rape and torture, with victims of forcible displacement perhaps reaching into the millions, committed by a large number of perpetrators at various levels of authority. In this context, the expectation or requirement that every single act of criminality be investigated and prosecuted appears both unrealistic and implausible. While the selection of cases in such situations will need to follow clear and objective criteria,<sup>11</sup> given the universe of criminality in atrocity-crime situations, it is unlikely that there will be a perfect incident-specific mapping of the ICC Prosecutor's cases and cases that may be brought at the national level.

What function, then, does *ne bis in idem* serve in the ICC context? Does it matter if the cases are the exactly the same? The most satisfying response is to argue that the principle of *ne bis in idem* must serve the same function under the Rome Statute as it does under domestic law, even if the context is very different. There is no reason that the ICC should compromise on the application of such a well-entrenched legal principle.<sup>12</sup> This is moreover emphasised by the language of article 20(3) which provides that “[n]o person who has already been tried by another court for *conduct* also proscribed by the articles 6,7 or 8 shall be tried before the Court with respect to the *same conduct* ...” (emphasis added).

Nonetheless, one could still maintain that the Court has misapplied the principle. The purpose of the careful wording of article 20(3), arguably, is to limit the scope of intervention by the ICC into

---

<sup>11</sup> For the OTP case selection policy see *Report on Prosecutorial Strategy* (2006) and *Report on the activities performed during the first three years (June 2003–June 2006)* (‘Three Year Report’); available at [http://www.icc-cpi.int/organs/otp/otp\\_public\\_hearing/otp\\_ph2.html](http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html). See also F. Guariglia, ‘The selection of cases by the Office of the Prosecutor of the International Criminal Court’, in C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008), 211.

<sup>12</sup> Note should be taken, nonetheless, of the absence of any national or international principles governing the application of *ne bis in idem* across different jurisdictions; C. Van den Wyngaert & T. Ongena, ‘Ne bis in idem Principle, Including the Issue of Amnesty’, in A. Cassese, P. Gaeta & J.R.R. Jones (eds.), *The Rome Statute of the International Criminal Court* (2002), 708. See also generally M.R. Damaška, calling for greater reliance by international criminal courts on national criminal law principles, ‘What is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* 329–365 (2008).

national proceedings: it provides that the Court's interest in a particular case, and its assessment of related national proceeding, must be very specific. It is not meant, by reverse, to limit the ability of States to invoke complementarity. It might be said that a narrow interpretation of the Court's admissibility provisions could negatively impact on the purposeful design of the Statute – which was meant to encourage domestic proceedings – by requiring national authorities to meet a very stringent test for any complementarity challenge to succeed. Such a view, however, appears to be supported primarily by policy guided considerations rather than strict legal interpretation. Moreover, the reference in articles 89(4) and 94 to domestic investigation or prosecutions in relation to a “different crime” and “different case” supports the proposition that the notion of a ‘case’ under the ICC Statute is to be understood in strict terms.<sup>13</sup>

One thus appears left with the conclusion that, for all the intriguing questions it raises, the Chamber was correct in coming to the only determination available on a plain reading of the Statute; leaving the broader policy question of institutional development for the Assembly of States Parties to consider, as appropriate, in the context of their review functions over the Court's legal instruments.

## II. WHEN DOES A ‘CASE’ BEGIN?

Another important question is when does a ‘case’ come into being for the purpose of triggering a raft of inter-connected provisions.<sup>14</sup> The Statute appears to admit three possibilities: (i) during pre-investigative and investigative stages; (ii) at the moment the Prosecutor makes an application for an arrest warrant or summons to appear; or (iii) when the PTC issues a decision to issue a warrant of arrest or summons to appear. For the Court's complementarity regime, in particular certainty as to ‘case’ formation is critical for the initiation of the challenges procedure under article 19.

The earliest stage at which the Statute refers to the notion of a ‘case’ is in articles 15 and 53 and rule 48, in the context of the

---

<sup>13</sup> See also inter-linkage within article 89 between para 2 (relating to *ne bis in idem*) and para 4.

<sup>14</sup> See discussion by C. Hall, ‘Challenges to the Jurisdiction of the Court or Admissibility of a Case’, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., 2008) 640–644; *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003), 9–10; Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (2005), 40, 145–171.

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

Prosecutor's determination of whether there is a reasonable basis to open an investigation. As part of this process, s/he must consider, *inter alia*, whether "the case is or would be admissible under article 17". The PTC, in examining the request of the Prosecutor to proceed with an investigation *proprio motu* under article 15, similarly must consider whether "the case appears to fall within the jurisdiction of the Court". The reference to 'case' at this early pre-investigative stage is problematic and seems to be the result of the disjunctive drafting process.<sup>15</sup> Clearly, before the Prosecution has opened an investigation it does not know with any certainty what evidence it will gather, against which persons and for what conduct. As noted above, the drafters were at pains to ensure that referrals from States Parties and the Security Council relate to the situation as a whole and not to individual case files.<sup>16</sup> Instead, the Statutory requirement at this stage is for the Prosecutor (and the PTC under article 15), before opening an investigation, to be satisfied on the basis of the information available that the *type of cases* that would be investigated in the situation would fall within the jurisdiction of the Court and would be admissible. A linear approach to the provision shows that the Prosecutor is being tasked to determine firstly whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" (article 53(1)(a)) and secondly, that any cases brought in relation to such a crime(s) would be admissible (article 53(1)(b)). Strictly speaking this is a 'case hypothesis', not a 'case' as such. Undoubtedly, a determination at this stage by the Prosecution and/or the PTC that a case is or would be admissible would not trigger the availability of the challenges regime under article 19.

Any concern that such a reading might deprive a State of its right to invoke complementarity is remedied by the availability at the 'situation' stage of the procedure foreseen in article 18. Similarly here, any preliminary rulings by the PTC on admissibility would be in relation to potential cases or case hypotheses of the Prosecutor, as no concrete case will have yet been identified. While Rule 52 provides that the Prosecutor must provide in his notification to States "information about the acts that may constitute crimes", the level of specificity and symmetry required at this stage between any cases

---

<sup>15</sup> See Olasolo, *supra* note 14, 67, 148; Hall, *supra* note 14, 641, fn. 13.

<sup>16</sup> See, e.g., Zutphen Draft Article 45[25]; Article 25, A/AC.249/1997/L.8/Rev.1; S. Fernandez de Gurmendi, 'The Role of the Prosecutor', in R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 180. See above fn.1

investigated or prosecuted at the national level and those being considered for investigation by the Prosecution is yet to be treated by Chambers of the Court. Interestingly, Rule 55(2) provides that in examining issues of contested jurisdiction under article 18, the PTC “shall consider the factors in article 17”. Since no warrant application will have as yet been presented by the Prosecutor in relation to named individuals for particular conduct, it is unclear how the Court will apply this provision; particularly given that article 17 deals with case-specific assessments relating to complementarity, *ne bis in idem* and gravity. As the wording of the provision indicates, it appears that the judges must only ‘consider’ the ‘factors’ set out in article 17 to the extent possible without being constrained by the inadequacy of the fit. Moreover, article 18(2) seems to provide some flexibility for the PTC to determine the appropriate distribution of caseloads so as to allow, for example, the Office of the Prosecutor to proceed where it can show that national cases are dealing with only low level offenders or relatively minor offences, whereas its case hypotheses relate to persons most responsible and/or particularly grave conduct.

The second postulate, that a case is formed when the Prosecution presents its application for an arrest warrant, has already been addressed by PTC I in its rejection of the preliminary remarks submitted by the ad hoc counsel for the Defence on the jurisdiction of the Court, the admissibility of the case and the existence of a unique investigative opportunity:

Considering that challenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2)(a) of the Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; that *at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen*; and that the Ad hoc Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute; (emphasis added)<sup>17</sup>

Similarly, in a later decision on victims participation, PTC I observed “[c]ases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, *entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear*”

---

<sup>17</sup> Situation in Democratic Republic of Congo, PTC I, Decision following the consultation held on 11 October 2005 and the Prosecution’s submission on jurisdiction and admissibility filed on 31 October 2005, ICC-01/04-93, 9 November 2005.



WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

(emphasis added).<sup>18</sup> Nonetheless, in its decision on the Prosecutor's application for an arrest warrant against Thomas Lubanga, the PTC appears to have deviated from its previous reasoning by invoking article 19(1) as the basis of its preliminary consideration of admissibility. Article 19(1) provides that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17". During the article 58 proceedings, as no case had yet been judicially determined as such and the Chamber was only faced with an application for an arrest warrant, it is doubted whether it could have rightly had resort to article 19.<sup>19</sup> A better approach would have been for the PTC to limit its consideration to those factors expressly stipulated by article 58(1) and for it to have proceeded to consider issues related to admissibility, if required at all, only after issuing any affirmative decision on the application.<sup>20</sup> The Court cannot argue that there is no 'case' at the article 58 application stage for the purpose of defining the challenges regime under one limb of article 19, while availing itself of its powers to determine the admissibility of a case under the opening paragraph of the same provision. The PTC could have otherwise relied on a theory of inherent powers to enter a preliminary assessment as to whether the case appeared to be admissible, which it chose not to.<sup>21</sup> It thus appears that the Court can neither invoke statutory procedures prematurely nor selectively.

---

<sup>18</sup> Decision on Applications for Participation (PTC I), para 65. See also Olasolo, *supra* note 14, 40; Hall, *supra* note 14, 641, fn. 13.

<sup>19</sup> For an exploration of different approaches to this topic see M. El Zeidy, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings Before the International Criminal Court', 19 *LJIL* (2006), 741–751.

<sup>20</sup> To this extent, the finding of PTC I that a determination of admissibility is "a prerequisite to the issuance of an arrest warrant" also appears flawed; *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06, 24 February 2006, para 18; see *id.*, 746–748.

<sup>21</sup> Note that article 58(1)(a) already vests the PTC with the authority to determine its own jurisdiction in any application before it in considering whether "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". Compare PTC III in the warrant application against Bemba which, while invoking article 19(1), alternatively relies on a theory of inherent powers; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 10 June 2008, para 11 and 20.

## III. WHICH CASE? WHOSE CASE?

Another question raised by the Lubanga proceedings is who controls the allegation and charging process: the Prosecution or the Pre-Trial Chamber? The discrepancy between the crimes charged by the Prosecutor and those determined by PTC I, in its decision on the confirmation of the charges has already been addressed elsewhere.<sup>22</sup> Suffice to recall that the PTC while entering findings with respect to the material elements for the conduct alleged as war crimes under article 8 of the Statute decided, on its own motion, to substitute the charges of conscripting, enlisting and using children to participate actively in hostilities in the context of a non-international armed conflict (article 8(2)(e)(vii)) for the charges of conscripting, enlisting and using children to participate actively in hostilities in the context of an international armed conflict as pleaded by the Prosecution (article 8(2)(b)(xxvi)), but without following the adjournment procedure set out in article 61(7).<sup>23</sup> In doing so, the PTC found that since the two offences criminalise the same material conduct, the procedural requirements of article 61(7) could be dispensed with. While laudable in upholding the formal identity of the two crimes, the decision appears to inadequately treat the substantial difference in evidentiary standards for proof of the existence of an international as opposed to non-international armed conflict as a material element of the crime. Both the Prosecution and the Defence sought leave to appeal the decision in relation to the authority of the PTC to reformulate the charges *proprio motu* as opposed to considering only the “crimes charged” by the Prosecution, as indicated in the language of Article 61(7). The PTC denied both leaves to appeal and suggested the parties address their concerns over the legal characterisation of the facts to the Trial Chamber.<sup>24</sup>

As a result, the Trial Chamber was confronted, at the outset, with the peculiar situation of the Prosecution stating it could not prosecute

---

<sup>22</sup> M. Miraglia, ‘Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga’, 6 *JICJ* (2008), 501–503.

<sup>23</sup> The Chamber reformulated the charges in relation to an international classification for the period of allegation starting from September 2002 to 2 June 2003, leaving the charges confirmed in the context of a non-international armed conflict for the period 2 June 2003 until 13 August 2003; *Prosecutor v. Lubanga*, Decision on the confirmation of charges, Case. No. ICC-01/04-01/06-803, 29 January 2007.

<sup>24</sup> *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para 44.

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

the case as confirmed.<sup>25</sup> In particular, it argued that the confirmation decision as it stood forced it to plead a case it did not have evidence for given its own assessment that it lacked a sufficient basis to substantiate an internationalised classification of the conflict: simply put, this was not its case. In the light of the apparent procedural irregularity of the confirmation process and the unavailability of access to the Appeals Chamber, it argued that the trial judges should set aside and consider as void the charges insofar as they related to the internationalised classification of the conflict, which it argued had been irregularly superimposed over the material facts as otherwise confirmed. In the alternative, it argued that it should be allowed to lead all of its evidence in relation to both the international and non-international aspects of the armed conflict so as to enable the Chamber to entertain the appropriate legal characterisation of the facts in due course, pursuant to Regulation 55 of the Regulations of the Court. It contended that, in the interests of fairness and expeditiousness, the Trial Chamber should clarify on what basis the trial proceedings would be conducted so that the parties know precisely what case they are expected to prove or answer. The Defence disputed all of the Prosecution's proposed solutions, arguing that the Trial Chamber was bound by the terms of the Statute to observe one of three solutions: to withdraw the charges on application of the Prosecution; to refer the charges back to the PTC; or to leave the charges as confirmed. The Defence also disputed the lawfulness of Regulation 55 itself.<sup>26</sup>

The Trial Chamber was placed in a novel situation: it was being asked to consider a matter that fell within the unique competence of the PTC and one which the latter had declined to entertain, despite having ostensibly violated the statutory procedure. At the same time, the Trial Chamber was unable either to exercise supervisory, appellate review over the PTC's prior decision, nor exceed its own powers to regulate the conduct of the trial: yet a remedy was needed that

---

<sup>25</sup> *Prosecutor v. Lubanga*, Prosecution's submission regarding the subjects that require early determination: status of the evidence heard by the PTC; status of the PTC; and manner in which evidence shall be submitted, ICC-01/04-01/06-953, 12 September 2007, para 15.

<sup>26</sup> *Prosecutor v. Lubanga*, Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: statut devant la Chambre de première instance des témoignages entendus par la Chambre préliminaire, statut des décisions de la Chambre préliminaire dans, ICC-01/04-01/06-1033, 16 November 2007. See generally in Regulation 55, C. Stahn, 'Legal characterization of facts in the ICC system: A portrayal of Regulation' 55, 16, *CLF* (2005), 1–31.

would guarantee fairness to the parties and the expeditiousness of proceedings. In its Decision, the Trial Chamber rejected the assertion that it had the authority to annul or otherwise effectively amend the charges as confirmed by the PTC and confirmed that “[t]he power to frame the charges lies at the heart of the Pre-Trial Chamber’s functions”.<sup>27</sup> It accepted, nonetheless, the Prosecution’s proposition that the parties present the totality of their evidence relating to both classifications of the conflict so as enable the Chamber to modify the legal characterisation of the facts pursuant to Regulation 55 if required, so long as the facts and the circumstances as described in the charges were not exceeded and no unfairness would result.<sup>28</sup> The decision thus fell short of a formal amendment of the charges (i.e. to charging in the alternative), but provided a procedural avenue, through the early notice of the Chamber’s possible resort to Regulation 55, to enable the parties to present the totality of their evidence. The case would thus remain the Prosecution’s, enabling it to present the evidence and case theory it intended; while, formally, the charges would continue to be those defined by the PTC, subject to the power of the Trial Chamber to change the legal characterisation of the facts. As a result, the Defence was notified that it would effectively be facing six charges at trial covering the entire period of allegation: conscripting, enlisting and using children in hostilities in the context of a non-international armed conflict (article 8(2)(e)(vii)) and conscripting, enlisting and using children in hostilities in the context of a international armed conflict (article 8(2)(b)(xxvi)). A curious solution to a curious problem created by the confirmation decision, but one intended to practically facilitate the conduct of the trial.

#### IV. GRAVITY

The argument over whether the Prosecutor’s policy decision to focus on “persons most responsible” should form a legally binding criteria in the context of the Court’s gravity assessment under article 17(1)(d),

---

<sup>27</sup> *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the PTC and the decisions of the PTC in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06, 13 December 2007, para 39.

<sup>28</sup> *Ibid.*, para 47. The Trial Chamber also signalled its preparedness to consider arguments as to whether the crimes contained in article 8(2)(e)(vii) can be considered as lesser included offences to those in article 8(2)(e)(vii); *ibid.*, paras 49–50.

## WHAT IS A 'CASE' FOR THE PURPOSE OF THE ROME STATUTE?

as proposed by PTC I in the Lubanga case,<sup>29</sup> has been treated in some detail by a number of commentators and may well be the subject of further interpretation by other Chambers of the Court.<sup>30</sup> Another noteworthy aspect of the gravity threshold in the Lubanga case, however, is the frank assertion by the Prosecution that this was not the case, or the entire case, it had set out to prosecute. As stated in its *Three Year Report*, the Office of the Prosecutor had initially selected Thomas Lubanga for investigation in relation to a broad range of conduct, pursuant to its policy approach presenting “focused cases while aiming to represent the entire range of criminality”. As the Report notes, pragmatic considerations relating to the anticipated imminent release of Lubanga, who was at the time being held in custody by the domestic authorities in relation to a different case, led the Prosecutor to move ahead with that part of the case that had been established beyond reasonable doubt,<sup>31</sup> and to eventually suspend related investigations into other conduct.<sup>32</sup>

This partly responds to questions that have been raised as to whether the Lubanga case meets the gravity criteria compared to other dismissed situations that concerned such serious conduct as wilful killing and rape, insofar as the case hypothesis that was originally the subject of investigations related to a gravity assessment of a broader range of criminality.<sup>33</sup> This included allegations relating to intentionally directing attacks against civilian populations, murder, pillage and the forced displacement.<sup>34</sup> At the same time, as emphasised by the PTC, the case as brought for Prosecution satisfies the gravity threshold.<sup>35</sup> Paradoxically, moreover, the admitted pragmatic considerations that led to the case focussing on a narrower range of conduct has resulted in throwing the spotlight on, and emphasising the particular gravity of, the child soldier phenomena. For whereas

---

<sup>29</sup> Article 58 Decision (PTC I), paras 43–64.

<sup>30</sup> See, e.g., War Crimes Research Office, *The Gravity Threshold of the International Criminal Court* (March 2008), 25–52; M. El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’, 19, *CLF* (2008), 50–51.

<sup>31</sup> “The decision on the timing and the content of the charges was triggered by the possible imminent release of Thomas Lubanga Dyilo”; *Three Year Report* (OTP), 8, 12.

<sup>32</sup> *Prosecutor v. Lubanga*, Prosecutor’s Information on Further Investigation, ICC-01/04-01/06-170, 28 June 2006.

<sup>33</sup> See El Zeidy, *supra* note 30, 40–41; War Crimes Research Office (2008), 54–57.

<sup>34</sup> Prosecutor’s Information on Further Investigation (28 June 2006), para 3.

<sup>35</sup> Article 58 Decision (PTC I), paras 47, 67.

the conscription, enlistment and use of child soldiers features in a number of other cases before the Court, it is the exclusive focus of the Lubanga case that has brought these charges to prominence, including among effected communities in the DRC. For similar reasons, it should be noted, the absence of charges related to rape and other forms of sexual violence in the ICC's first case, despite the inclusion of these offences in all the other cases before the Court, has led some victims groups to condemn the inadequacy of the ICC's efforts.<sup>36</sup> Clearly, the selection of situations and cases are emotive issues and will remain hotly debated. Nonetheless, as the Lubanga case demonstrates, while the process can be guided by objectives policies and standard-setting documents that help promote coherence and predictability, they will also be affected by practical considerations relating to the availability of evidence as well as strategic decisions aimed at securing arrest and surrender.

## V. CONCLUSION

The parameters of what exactly constitutes a 'case' will continue to be litigated and interpreted in future proceedings before the ICC. The discussion above demonstrates that the Court will need to come to a settled view on so fundamental an issue fairly soon, as divergence between Chambers could lead to irregular triggering of the inter-related procedures in other parts of the Statute and Rules in different proceedings, bringing into doubt fairness for the parties and participants. As argued above, the issues involved go not only to the heart of the Court's procedural framework, but also define the very meaning of the Statute's complementarity regime and the precise relationship that is formed between national courts and the ICC.

---

<sup>36</sup> See e.g. Women's Initiative for Gender Justice, Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (with Confidential Annex2), ICC-01/04-01/06-403, 7 September 2006, and accompanying Annex 1.