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The ICC's Pre-Trial Chamber I Confirmation of Charges Decision in the *Case of Prosecutor v. Thomas Lubanga Dyilo*: Between Application and Development of International Criminal Law

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I. Introduction

On 29 January 2007, the Pre-Trial Chamber I of the International Criminal Court (hereinafter 'the Chamber') issued its confirmation of charges decision in the case of *Prosecutor v. Thomas Lubanga Dyilo*[1] (hereinafter 'the Decision') paving the way for the first trial before the ICC, as well as addressing for the first time several substantive issues arising from the ICC Statute such as the criteria for establishing the existence of international and non-international armed conflicts for the purposes of the exercise of that court jurisdiction, the elements of the war crimes laid down in the ICC Statute concerning child soldiers, the elements of co-perpetration as a form of criminal responsibility, the principle of legality and the defence of mistake of law. Moreover, the Pre-Trial Chamber I asserted its *proprio motu* power to substitute the charges brought by the Prosecution against an accused before the ICC at the confirmation of charges' stage. In addressing these aspects, the Chamber did not limit itself to applying the ICC Statute, but also developed it. The object of this

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1) *Le Procureur c. Thomas Lubanga Dyilo*, Cour Pénale Internationale, Chambre Préliminaire I, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges (29 January 2007). (Translation into English by the author) (hereinafter 'Confirmation of charges Decision').

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contribution is therefore twofold: to analyse the principal issues arising from the Chamber's Decision; and to identify the main techniques used by the Chamber for interpreting the ICC Statute.

With this aim, this contribution is divided in four further sections: In Section II, the background of the Decision is presented. Section III addresses the main issues arising from the Decision. Section IV deals with the developments that have taken place in the case subsequent to the Decision. Lastly, in Section V an assessment of the Chamber's techniques of interpretation is made and certain concluding remarks are presented.

II. Background of the Decision

Lubanga, former President of the *Union des patriots congolais* (hereinafter 'the UPC') and Commander-in-chief of its military wing, *the Forces Patriotiques pour la Libération du Congo* (hereinafter 'the FPLC') between the beginning of September 2002 until the end of 2003,[2] is the first person to be brought before the ICC as a defendant since the entering into force of its Statute on 1 July 2002. Lubanga was transferred from custody in the DRC to the ICC on 17 March 2006[3] after the Pre-Trial Chamber I of the ICC (hereinafter 'the Chamber') issued an arrest warrant against him for the charges brought by the ICC Prosecutor, Luis Moreno Ocampo, for the war crimes of conscription, enlistment, and use of children under the age of 15 years into the FPLC to participate actively in hostilities from the beginning of July 2002 to December 2003 in terms of Articles 8(2)(e)(vii) and 25(3)(a) of the ICC Statute.[4]

III. Analysis of the Main Issues Arising from the Decision

1. *The Nature of the Armed Conflict in the DRC Region of Ituri from July 2002 to December 2003*

As the charges brought by the ICC Prosecutor against Lubanga concerned war crimes exclusively, the Chamber, after dealing with several preliminary procedural issues,[5] had first to examine whether there was an armed conflict in the DRC's region of Ituri during the period covered by the arrest warrant against Lubanga

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2) Confirmation of charges Decision, paras 368, 372-373.

3) See Chronology of the Thomas Lubanga Dyilo's case available at the ICC website, available at <http://www.icc-cpi.int/library/about/newsletter/10/en_01.html>.

4) Confirmation of charges Decision, paras 9, 16, 227.

5) *Id.* paras 33-145.

and if so, what its nature was. Although the Chamber upheld the Prosecution's submission that there was an armed conflict at the relevant time, it disagreed with the Prosecution as to the nature of the conflict. Specifically, while the Prosecution submitted that the crimes charged were all committed within the context of a non-international armed conflict,[6] the Chamber found it necessary to draw a distinction between the period lasting from July 2002 to 2 June 2003 on the one hand, and that from 2 June 2002 to December 2003, on the other.

As to the period between July 2002 and 2 June 2003, the Chamber concluded that the Ituri's armed conflict had an international character due to the presence of the Republic of Uganda there as an occupying power until 2 June 2003.[7] In reaching this conclusion, the Chamber, in addition to state based on Article 2 Common to the 1949 Geneva Conventions that an armed conflict is of an international character when it opposes two or more states, including the case of occupation of the whole or a part of the territory of a third state,[8] relied on the finding of the International Court of Justice in the *Case concerning Armed Activities on the territory of the Congo*[9] holding that Uganda was the occupying power of the DRC region of Ituri until 2 June 2003.[10] It must, however, be noted that the Chamber dismissed similar claims made with respect to Rwanda holding that there was not sufficient evidence to find substantial grounds to believe that the latter directly or indirectly intervened at the relevant time within the armed conflict in the DRC region of Ituri.[11]

The Chamber's adoption of the finding of the International Court of Justice in the *Case concerning Armed Activities on the territory of the Congo* that Uganda was the occupying power of the DRC region of Ituri until 2 June 2003 raises two main issues: first, legal questions arise as to the specific source for the applicability of the ICC Statute to the conducts that took place in Ituri during its occupation by Uganda. In particular, doubts arise as to whether the applicability of the ICC Statute in the circumstances of the case resulted from the ratification of this international instrument by the DRC – i.e. the occupied power – , which is not

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6) *Id.* paras 9, 200.

7) *Id.* para. 220.

8) *Id.* para. 209.

9) *Case concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J., (December 19), para. 178.

10) Confirmation of charges Decision, paras 212-217.

11) *Id.* para. 226.

self-evident in the light of the traditional notion of belligerent occupation,[12] or from that by Uganda – i.e. the occupying power – that took place on a different date and more importantly, that would have required to analyse whether the requirements under Articles 64 and 65 of the IV Geneva Convention of 1949 were satisfied. This matter is further analysed in this contribution when examining the pleas brought by the Lubanga's Defence.[13]

Secondly, the Chamber's adoption of the International Court of Justice's finding that Uganda was the occupying power of the DRC region of Ituri until 2 June 2003 puts strong pressure on the ICC Prosecutor to consider that Court's ruling on the same case that Ugandan military forces committed 'massive human rights violations and grave breaches of international humanitarian law' on the territory of the DRC[14] – including the killing and torture of civilians.[15] Such pressure will considerably increase if the Trial Chamber confirms at the trial stage the Chamber's finding that Uganda was the occupying power of the DRC region of Ituri until 2 June 2003. In this respect, it is worth noting that the Ugandan situation is currently under investigation by the ICC Prosecutor and that so far indictments have only been brought against the rebels' leaders.[16] Consequently, the opening of an investigation over Ugandan government officials implicated in the human rights violations and breaches of international humanitarian law that allegedly took place in the DRC Region of Ituri between July 2002 and 2 June 2003 could have implications for the ICC's investigation in northern Uganda.

With respect to the period between 2 June 2002 and December 2003, the Chamber concluded that the armed conflict in the DRC region of Ituri had a non-international character. In supporting such a conclusion, the Chamber first held that only two conditions must be met for a conflict to be of a non-international character under the terms of Article 8(2)(e)(vii) of the ICC Statute, namely the armed groups involved must (I) possess a certain degree of organization and (II)

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12) See Regulations Concerning the Laws and Customs of War on Land, Art. 42, Annexed to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907, reproduced in M. Sassòli & A.A. Bouvier, *How does law protect in war?* (Geneva 2006), Vol. II, p. 517.

13) See *infra* Section III, sub-section 5.

14) *Case concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J., (19 December), para. 207.

15) *Id*. para. 206.

16) Namely Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, all leaders of the rebel group Lord Resistance Army (LRA). See more information in this respect at the ICC website, <http://www.icc-cpi.int/cases/UGD/c0105.html>.

have the capacity to conceive and to carry out prolonged armed operations.[17] In the circumstances of the case, the Chamber found that all the armed groups involved in the conflict in the DRC region of Ituri satisfied these two requirements.[18]

While the requirement that armed groups involved in a non-international armed conflict must possess a certain degree of organization clearly follows from the text of Article 8, paragraph 2(f) and relevant international humanitarian law treaty provisions – i.e. Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II, questions arise as to the requirement that those armed groups must have the capacity to conceive and to carry out prolonged armed operations. Article 8, paragraph 2(f), of the ICC Statutes requires 'a protracted armed conflict.' It is worth stressing that the adjective 'protracted' in such a provision of the ICC Statute refers to the conflict and not, as interpreted by the Chamber, to the nature of the armed operations that the armed groups involved in the conflict are able to carry out. This interpretation is confirmed by the French text of the ICC Statute.[19]

In this respect, it is worth stressing that the requirement that the conflict must be protracted was drawn from the International Criminal Tribunal for the former Yugoslavia (hereinafter 'the ICTY') Appeal Chamber's Decision on Jurisdiction in *Tadic* stating that 'an armed conflict exists whenever there is a resort to armed forces between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State.'[20] The Trial Chamber's Judgment in *Tadic* elaborated further on this requirement when stating that it calls for a certain degree of intensity of the conflict.[21] Similarly, in *Delalić et al.* the Trial Chamber interpreted this requirement as referring to 'the protracted extent of the armed violence.'[22]

Most commentators are also of the view that the expression 'protracted armed conflict' in Article 8, paragraph 2(f), of the ICC Statutes refers to a time element

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17) Confirmation of charges' Decision, para. 233.

18) *Id.* para. 237.

19) The relevant part of Article 8, paragraph 2(f), of the ICC Statute in the French text reads as follows: '*conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités du gouvernement de cet État et des groupes armés organisés ou des groupes armés organisés entre eux.'*

20) *Tadic v. Prosecutor*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), para. 70. (emphasis added)

21) *Tadic v. Prosecutor*, Case No. IT-94-1-I, Judgment, Trial Chamber, paras 561-568 (7 May 1997).

22) *Delalić, Mucić, Delić, and Landžo v. Prosecutor*, Case No. IT-96-21-T, Judgment, Trial Chamber, para. 184 (16 November 1998).

in the sense that hostilities must last for a certain duration.[23] Consequently, the Chamber's interpretation of this expression as being that the armed groups involved in the armed conflict must have the capacity to conceive and to carry out prolonged armed operations seems unpersuasive in the light of the clear wording of the relevant provision of the ICC Statute and the ICTY jurisprudence from which such a requirement was drawn.

2. *The Elements of the War Crimes of Conscription, Enlistment, and Use of Children under the Age of 15 Years Pursuant to Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute*

Although the Appeals Chamber of the Special Court for Sierra Leone in *Norman* in May 2004 held that the prohibition of child recruitment and enlistment had reached customary law status and entailed individual criminal responsibility,[24] the Chamber's Decision in this case is the first one of an international tribunal that deals with the elements of the war crimes of conscription, enlistment, and use of children under the age of 15 years to participate actively in hostilities as codified in Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute.

In doing so, the Chamber first addressed the crimes of conscription and enlistment of children under the age of fifteen years. In this respect, the Chamber first distinguished the term 'conscription' from 'enlistment', holding that the former refers to forced recruitment while the latter concerns voluntary recruitment.[25] In supporting such a conclusion, the Chamber referred to the individual opinion of Judge Robertson in the Special Court for Sierra Leone Appeals Chamber's judgment in *Norman*.[26] The Chamber added that consent of the child is not a valid defence in this context; however, it did make clear whether that applies with respect to both 'conscription' and 'enlistment' or only to the latter.[27] Despite the Chamber's silence in this respect, it is reasonable to infer that this is only true with

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23) M. Bothe, 'War Crimes', in A. Cassese *et al.*, eds., *The Rome Statute of the International Criminal Court: a commentary* (Oxford 2002), Vol. I, p. 423. See also A. Zimmermann, 'Article 8 paragraph 2(c)-(f) and paragraph 3', in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden 1999) p. 285.

24) *Prosecutor v. Sam Hinga Norman*, SCSL Case No. 2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), paras 17-24, 37-51 (31 May 2004).

25) Confirmation of charges Decision, para. 246.

26) *Id.* para. 246, note 320. (citing *Prosecutor v. Sam Hinga Norman*, SCSL Case No. 2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), individual opinion of Judge Robertson, para. 5. (31 May 2004).

27) Confirmation of charges Decision, para. 247.

respect to the crime 'enlistment' that, according to the Chamber, precisely refers to voluntary recruitment.

The Chamber also held that the crimes of conscription and enlistment of children under the age of fifteen years are crimes of a continuous nature in the sense that their commission last as long as the child is part of the armed group or national forces and has not reached the age of fifteen years.[28] The Chamber recognition of the continuous nature of the crimes laid down in the ICC Statute concerning child soldiers could have wide reaching consequences with respect to the temporal jurisdiction of the ICC in the context of those and other crimes proscribed under the ICC Statute, such as the crime against humanity of enforced disappearance of persons[29] and the war crime of taking of hostages.[30] In particular, under the theory of continuous crimes, the ICC could deal with these crimes, even if their commission had commenced before 1 July 2002, provided that their commission continued at least until 1 July 2002, date in which the ICC Statute entered into force.

Subsequently, the Chamber interpreted the constitutive elements of the crime of 'using children under the age of fifteen to participate actively in hostilities.' In particular, the Chamber held that the expression 'participate actively in hostilities' must be interpreted as encompassing not only direct participation in combats, but also active participation in activities related to combats.[31] Although the Chamber did not define the exact nature of the link required in this respect, its approach in this respect seems to be wide as it only excluded those cases in which the activity in question is manifestly unrelated to the hostilities[32] and expressly considered watching military objectives and protecting the physical integrity of military commanders[33] as activities implying an active participation in hostilities for the purpose of the crime of 'using children under the age of fifteen to participate actively in hostilities' under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute.

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28) *Id.* para. 248.

29) See the Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 12 July 1998, Art. 7(i), U.N. Doc. A/CONF.183.9. (hereinafter the 'the ICC Statute'). As to the recognition of the continuous nature of the crime of forced disappearance, see International Convention for the Protection of All Persons from Enforced Disappearance, Art. 8(1)(b), adopted by the UN General Assembly on 20 December 2006, but not yet into force, UN GA Res. A/RES/61/177. The text of the Convention is available at <http://www.ohchr.org/english/law/disappearance-convention.htm>.

30) See for international armed conflicts, the ICC Statute, Art. 8(2)(a)(viii), and for non-international armed conflicts, Art. 8(2)(c)(iii).

31) Confirmation of charges Decision, para. 261.

32) *Id.* para. 262.

33) *Id.* para. 263.

As analysed below, this latter consideration was material in the present Decision as the Chamber held that since the beginning of September 2002, there was an agreement or common plan between Lubanga and other high ranks officials of the FPLC whose objective was, *inter alia,* to use minors as bodyguards,[34] and that in implementing this plan, between the beginning of September 2002 until 13 August 2003[35] minors, including children under the age of fifteen years, were effectively used as bodyguards by the highest commanders of the FPLC, including Lubanga.[36]

Lastly, the Chamber analysed the meaning of the expression 'national armed forces' included in Article 8(2)(b)(xxvi) of the ICC Statute concerning the war crimes of conscription and enlistment of children under the age of fifteen years in international armed conflicts and differing from the one used in Article 8(2)(b)(xxvi) concerning non-international armed conflicts, i.e. 'armed forces and groups.' In this respect, the Chamber concluded that 'national armed forces' under Article 8(2)(b)(xxvi) of the ICC Statute are not limited to the armed forces of a State and thus they also comprise non-state armed groups taking part in an international armed conflict.[37] In supporting such a conclusion, the Chamber based itself on the object and purpose of the ICC Statute when holding that interpreting the expression 'national armed forces' included in the above-mentioned provision as limited to the armed forces of a State would contravene the object and purpose of this international instrument that, in the Chamber's words, consists in ensuring that 'the most serious crimes of concern to the international community as a whole must not go unpunished.'[38] This wide interpretation of the expression 'national armed forces' included in Article 8(2)(b)(xxvi) of the ICC Statute allowed the Chamber to consider charges against Lubanga for the conscription, enlistment, and use of children under the age of 15 years into the FPLC, which was a non-state armed force, during both the international and non-international stages of the conflict in the DRC region of Ituri.

3. *The Chamber's* Proprio Motu *Substitution of the Crimes Charged by the Prosecution*

The Chamber's finding that the Ituri's armed conflict had, between July 2002 and 2 June 2003, been of an international character meant that the charges brought

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34) *Id.* para. 377(i).

35) *Id.* paras 395-397.

36) *Id*. para. 379 (ix).

37) *Id.* paras 275-6.

38) *Id.* paras 281, 282.

by the Prosecution, namely the war crimes of conscription, enlistment, and use of children under the age of 15 years into the FPLC under Article 8(2)(e)(vii)[39] – concerning non-international armed conflicts – were at least for that period no longer applicable. In these circumstances, the Chamber decided to substitute *proprio motu* the crimes charged by the Prosecution for that period, these under Article 8(2)(e)(vii) with these under Articles 8(2)(b)(xxvi).

In supporting such a decision, the Chamber stated that 'paragraphs 2-b-xxvi and 2-e-vii of Article 8 of the ICC Statute proscribe as crimes the same conducts, regardless of being committed in the context of an international or a non-international armed conflict.'[40] Consequently and after recalling the wording of Article 61(7)(c)(ii) of the ICC Statute[41] and stating that 'the object of [that provision] of the ICC Statute is to avoid that a person is sent to trial for crimes substantially different from those included in the document of notification of charges and with respect to which that person did not have the possibility of presenting his or her observations during the confirmations of charges' audience,'[42] it concluded that it was not necessary to adjourn the Confirmation of Charges' hearing and request the Prosecutor to consider amending the charge[43] due to the large similarities that exist between the conducts proscribed in paragraphs 2-b-xxvi and 2-e-vii of Article 8 of the ICC Statute.[44]

Although, at first sight, the Chamber's approach could be seen as having far-reaching consequences with respect to the ICC Prosecutor's powers on charging, the Chamber seems to have recognized in its reasoning that its *proprio motu* power to substitute the charges brought by the Prosecution is limited to those cases in which the objective and subjective elements of the crimes concerned largely – if not completely – correspond. This was certainly true in the circumstances of the case as except for the requirement under Article 8(2)(b)(xxvi) that the conscription or enlistment of children under the age of fifteen years is made into 'the national armed forces', the elements of the conducts proscribed by these two provisions are the same.

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39) *Id.* paras 9, 16, 227.

40) *Id.* para. 204.

41) Article 61(7)(c)(ii) of the ICC Statute requires the Pre-Trial Chamber to adjourn the confirmation of charges' hearing and request the Prosecutor to consider amending the charge if 'the evidence submitted appears to establish a different crime within the jurisdiction of the Court.'

42) *Id.* para. 203.

43) *Id.* para. 204.

44) *Id.* para. 204.

4. *The Link between the Armed Conflict and the Alleged Crimes*

The Chamber first held, based on the jurisprudence of the ICTY,[45] that the applicable test as to the link between the armed conflict and the alleged crimes required for war crimes consists at the confirmation of charges' stage on whether there are substantial motives to believe that there is a sufficient and manifest link between the alleged crime and the armed conflict.[46] In the circumstances of the case, the Chamber was satisfied that such a test was met as the conscription and enlistment of children under the age of 15 years within the UPC and the FPLC was associated with the armed conflict that took place in the DRC's region of Ituri between July 2002 and the end of 2003.[47]

5. *Defences Based on the Principle of Legality and Mistake of Law*

Although presented in a confusing manner,[48] the Defence made a twofold plea against the charges brought by the Prosecution: first, it asked the Chamber to verify whether the principle of legality as provided for Article 22(1) of the ICC Statute was respected in connection with the charges of conscription, enlistment, and use of children under the age of fifteen to participate actively in hostilities brought against Lubanga. The Defence supported this plea in two grounds: first, it claimed, based on Article 64 of the IV Geneva Convention of 1949, that only the legislation in force at the beginning of the occupation was applicable in the occupied territory – i.e. Ituri – and thus that subsequent laws, including the ICC Statute, adopted by the occupied power – i.e. the DRC – were not applicable.[49] Second, the Defence claimed that the ICC Statute only entered into force with respect to Uganda on 1 September 2002[50] and that there was a lack of divulgation in Ituri of the provisions of that treaty by Uganda, the occupying power, as required under Article 65 of the IV Geneva Convention of 1949.

The second plea put forward by the Defence was the impossibility of the defendant to foresee that the alleged conducts were criminals and that they entailed criminal responsibility at the moment when they were committed.

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45) *Id.* para. 287 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, 70 (2 October 1995); *Prosecutor v. Radoslav Brdjanin*, Judgment, Case No. IT-99-36-T, 123 (1st September 2004).

46) Confirmation of charges Decision, para. 288.

47) *Id.* paras 289, 293.

48) *Id.* paras 294-5.

49) *Id.* para. 295.

50) This is correct as Uganda deposited its instrument of ratification on 14th June 2002. Consequently and according to Article 126 of the ICC Statute, it entered into force with respect to this State on 1st September 2002.

Although the Chamber held that the two Defence pleas fell within this of mistake of law,[51] it in fact dealt with both: the one concerning the principle of legality and the other related to mistake of law. As regards the principle of legality, the Chamber held that it was observed as 'the Statute and the Elements of Crime of the ICC, which entered into force on 1 July 2002, define with sufficient precision the conducts of conscription, enlistment, and use of children as involving individual criminal responsibility'.[52] The Chamber, however, remained silent as to the plea made by the Defence under Articles 64 and 65 of the IV Geneva Convention of 1949. The Chamber's silence in this respect is problematic as given its finding that Uganda occupied the DRC region of Ituri between July 2002 and 2 June 2003[53] an explanation as to the specific source for the applicability of the ICC Statute to the conducts that took place in Ituri during its occupation by Uganda was necessary. In particular, an explanation was required as to whether the applicability of the ICC Statute in the circumstances of the case resulted from the ratification by the DRC – i.e. the occupied power-, which is not self-evident in the light of the traditional notion of belligerent occupation,[54] or from this of Uganda – i.e. the occupying power – that took place on a different date and more importantly, that would have required analysis of whether the requirements under Articles 64 and 65 of the IV Geneva Convention of 1949 were satisfied.

In addressing the Defence's plea of mistake of law, the Chamber not only dealt with the elements of such a plea strictly considered, but also elaborated on the recognition of child recruitment as a violation of humanitarian law under customary international law. As to the former aspect, the Chamber held that only in two exceptional circumstances may the defence of mistake of law be a ground for excluding criminal responsibility under the ICC Statute: if it negates the mental element required for the crime concerned; or if it amounts to the defence of superior order or prescription of law laid down in Article 33 of the ICC Statute,[55] meaning that a subordinate, who did not know that the order was unlawful, committed the

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51) Confirmation of charges Decision, para. 301.

52) *Id.* para. 302.

53) *Id.* para. 220.

54) See Regulations Concerning the Laws and Customs of War on Land, Art. 42, Annexed to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907, reproduced in M. Sassòli & A.A. Bouvier, *How does law protect in war?* (Geneva 2006), Vol. II, p. 517. For the customary nature of these regulations, see e.g. *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J., (July 8), para. 75; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (July 9), para. 89.

55) *Id.* para. 315.

crime concerned following superior orders or prescriptions of law provided that those orders or prescriptions were not manifestly unlawful.

As to the recognition of child recruitment as a violation of humanitarian law under customary international law, the Chamber referred specifically to Article 77(2) of Additional Protocol I, the 1989 Convention on the Rights of the Child and the judgment of the Appeals Chamber of the Special Court for Sierra Leone in *Norman* holding that previous to November 1996 the prohibition of child recruitment and enlistment had reached customary law status and entailed individual criminal responsibility.[56]

6. *Co-perpetration as a Form of Criminal Responsibility under the ICC Statute: The Notion of Control Exercised Jointly over the Crime*

In analysing Lubanga's forms of criminal responsibility, the Chamber defined its task rather narrowly stating that if reasonable grounds existed to believe that Lubanga was responsible as a co-perpetrator of the crimes charged as alleged by the Prosecution,[57] it would not be necessary to examine other forms of criminal responsibility.[58]

The Chamber then went on to analyse the notion of co-perpetration under Article 25(3)(a) of the ICC Statute concluding that it is based on the notion of control exercised jointly over the crime.[59] According to the Chamber, this notion comprises both objective and subjective elements. The objective elements being the following two: the existence of an agreement or common plan between two or more persons;[60] and the fact that each co-perpetrator must make an essential contribution to the execution of the objectives elements of the crime.[61]

As to the subjective elements of the notion jointly control over the crime, the Chamber identified the following three: first, the suspect must satisfy the subjective elements of the concerned crime – i.e. as a general rule intent and knowledge-,[62] including any *dolus spécial* or ulterior intent required with respect to a specific

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56) *Id.* para. 311. (citing *Prosecutor v. Sam Hinga Norman*, SCSL Case No. 2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), paras 17-24, 37-51 (31 May 2004).

57) *Id.* para. 319.

58) *Id.* para. 321.

59) *Id.* paras 338, 341. In French, the Chamber used the expression '*coaction fondée sur le contrôle exercé conjointement sur le crime.*'

60) *Id.* para. 343.

61) *Id.*, para. 346. (Citing *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgment, para. 496 (31 July 2003).

62) Confirmation of charges Decision, paras 349, 350.

crime.[63] Specifically, the Chamber held that the general requirement of intent and knowledge must be satisfied with respect to the objective elements of the war crimes of conscription, enlistment, and use of children under the age of 15 years to participate actively in hostilities, except for the requisite concerning the age of the victim with respect to which negligence by the author suffices according to the ICC Elements of Crime.[64] Second, all the co-perpetrators must know and accept that the execution of the objective elements of the crime may probably result from carrying out their common plan.[65] Based on this latter criterion, the Chamber held that because Lubanga was charged under the form of responsibility of control exercised jointly over the crime, even with respect to the age of the victim, the general requirement of intent and knowledge was to be satisfied.[66] Lastly, the suspect must know the factual circumstances allowing him to exercise a joint control over the crime.[67]

In examining the objective elements of the jointly control over the crimes concerned in the present case, the Chamber first found that there were substantial grounds to believe that since the beginning of September 2002, there was an agreement or common plan between Lubanga and other high ranks officials of the FPLC having as an objective to recruit voluntarily or forcibly minors into the forces of the FPLC, subject them to military training, make them to actively participate in the hostilities and use them as bodyguards.[68] According to the Chamber, although this common plan did not solely target children under the age of fifteen years, in the normal course of event its execution entailed the objective risk that it would include children under that age.[69]

Additionally, the Chamber held that in implementing this plan, between the beginning of September 2002 until 13 August 2003[70] minors, including children under the age of fifteen years, were recruited by the FPLC,[71] subject to military

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63) *Id.* para. 349.

64) *Id.* paras 357, 358, 359. See also ICC Elements of Crime, Article 8 (2) (b) (xxvi), element 3, and Article 8 (2) (e) (vii), element 3.

65) Confirmation of charges' Decision, paras 361, 365. (Citing *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgment, para. 496 (31 July 2003).

66) Confirmation of charges' Decision, para. 365.

67) *Id.* paras 366-367.

68) *Id.* para. 377(i).

69) *Id.* para. 377(ii).

70) *Id.* paras 395-397.

71) *Id.* para. 379 (ii).

training,[72] and once the training was finished they were provided with a uniform and a weapon and ordered to combat in several military operations conducted in different locations of the DRC region of Ituri during the period between October 2002 and June 2003,[73] and used as bodyguards by the highest commanders of the FPLC, including Lubanga.[74]

The Chamber also found that Lubanga played an essential role in the implementation of the common plan by keeping permanent and direct contact with the other participants, inspecting several military training camps and providing the necessary financial means for the plan's implementation.[75]

As to the subjective elements of the notion of joint control over the crime, the Chamber found that in the circumstances of the case the first two elements were satisfied as Lubanga and the others commanders of the FPLC knew and accepted that in the normal course of events children under the age of fifteen years would be recruited voluntarily and forcibly and used to actively participate in military operations.[76] The Chamber also held that Lubanga knew the essential character of his coordination function of the common plan and his capacity of preventing the plan's implementation in case he would had failed to carry out his functions.[77]

Based on these findings, the Chamber concluded that there were substantial grounds to believe that Lubanga is responsible, as co-perpetrator, for the war crimes of conscription, enlistment, and use of children under the age of 15 years into the FPLC to participate actively in hostilities from the beginning of September 2002 to 2 June 2003 in terms of Articles 8(2)(b)(xxvi) and 25(3)(a) of the ICC Statute, and from 2 June 2003 to 13 August 2003 under Articles 8(2)(e)(vii) and 25(3)(a) of the ICC Statute.[78]

IV. Developments Subsequent to the Decision[79]

Both the Defence and the Prosecution applied for leave to appeal the Chamber's confirmation of charges decision in the present case. Nevertheless, the scope of the requests of both parties significantly differed: while the Prosecution's request

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72) *Id.* para. 379 (v).

73) *Id.* para. 379 (viii).

74) *Id.* para. 379 (ix).

75) *Id.* para. 383 (ii).

76) *Id.* paras 404, 408.

77) *Id.* para. 409.

78) *Id.* para. 410. See also the *dispositif* of the decision.

79) This Section includes developments in the case as of 13 July, 2007.

only concerned the Chamber's *proprio motu* substitution of the charges against Lubanga,[80] the Defence's request contained nine grounds for seeking leave to appeal the Chamber's Decision.[81]

In supporting its request for leave to appeal, the Prosecution made a threefold plea: first, it argued that it is exclusively up to the Prosecution to select the crimes to be prosecuted before the ICC's Chambers as this matter appertains to its autonomy under the ICC Statute.[82] Secondly, the Prosecution claimed that the Chamber's decision 'forces [it] to proceed to trial with a charge that [it] does not consider to be substantiated by the evidence in its possession.'[83] Lastly, the Prosecution submitted that the Chamber's Decision deprived the Defence of its procedural rights under Article 61(6) of the ICC Statute with respect to an integral element of the crime under 8(2)(b)(xxvi), namely this requiring that the concerned conduct 'took place in the context of and was associated with an international armed conflict.'[84]

The nine grounds of criticism included in the Defence's request for leave to appeal can be grouped in three categories: the first category relates to evidentiary matters;[85] the second one refers to the Chamber's *proprio motu* substitution of the charges against Lubanga;[86] and the last category relates to the nature of the indictment, which was depicted by the Defence as 'vague.'

As regards the Chamber's *proprio motu* substitution of the charges against Lubanga, the Defence mainly argued that the ICC Statute contains an additional element for the crimes concerned in the case when committed in an international armed conflict, namely 'the conscription or enlistment into a national armed force.'[87] Specifically, the Defence contended that the parties did not have the possibility to present their views either before or during the confirmation of charges'

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80) *Le Procureur c. Thomas Lubanga Dyilo*, International Criminal Court, The Office of the Prosecutor, Case No. ICC-01/04-01/06, Application for leave to appeal Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges,' para. 1 (5 February 2007). (hereinafter 'Prosecution's leave to appeal')

81) *Le Procureur c. Thomas Lubanga Dyilo*, Cour Pénale Internationale, Défense, Case No. ICC-01/04-01/06, Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chambre Préliminaire du 7 et 16 février 2007 (22 Février 2007). (hereinafter 'Defence's leave to appeal')

82) Prosecution's leave to appeal, paras 12, 14.

83) Prosecution's leave to appeal, paras 9, 16.

84) Prosecution's leave to appeal, para. 15.

85) Defence's leave to appeal, para. 8, sub-paragraphs 1, 3, 4, 5, 6, 7, 8.

86) *Id.* para. 8, sub-paragraph 2.

87) *Id.* para.14.

stage with respect to whether a non-state armed group could be considered as falling within the notion of 'national armed group' under the conducts proscribed by Article 8(2)(b)(xxvi) of the ICC Statute.[88] Surprisingly, the Defence did not reiterate in its request for leave to appeal its arguments as to the inapplicability of the ICC Statute with respect to the crimes allegedly committed during the international phase of the Ituri's armed conflict due to the Uganda occupation of that region until 2 June 2003.

After several delays due to the designation of a new Defence Counsel, the Chamber issued on 24 May 2007 its decision on the Prosecution and Defence applications for leave to appeal the Decision.[89] Due to the significant importance of this decision, it is analysed separately in the next sub-section of this contribution.

Lastly, on 5 June 2007 the ICC Presidency transmitted to Trial Chamber I the full record of the proceedings against Lubanga before the Pre-Trial Chamber.[90] This trial chamber is composed of Judge Elizabeth Odio Benito, Judge René Blattmann and Judge Adrain Fulford.[91]

1. *Chamber's Decision on the Prosecution and Defence Applications for Leave to Appeal the Confirmation of Charges' Decision*

In its decision on the Prosecution and Defence applications for leave to appeal the Decision, the Chamber first held that interlocutory decisions can only be appealed in exceptional circumstances and to avoid irreparable prejudice to the appellant.[92] According to the Chamber, three requirements must be fulfilled for granting such a leave: 1) the issue subject of appeal should have been addressed in the impugned decision; 2) the issue at stake would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and 3) in the opinion

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88) *Id.* para. 14.

89) *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the Confirmation of Charges (24 May 2007).

90) *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision Transmitting the Pre-Trial Record in the case of the Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber I (5 June 2007).

91) The *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, The Presidency, Decision constituting Trial Chamber I and referring to it the case of the Prosecutor v. Thomas Lubanga Dyilo (6 March 2007).

92) *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the Confirmation of Charges (24 May 2007), para. 28.

of the Pre-Trial or Trial Chamber, the immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.[93]

Secondly, the Chamber noted the need that the proceedings before the ICC take place in an expeditious manner,[94] in particular when the suspect is under detention.[95]

Thirdly, the Chamber analysed the parties' grounds for leave to appeal the Decision. The Chamber grouped these grounds in four categories: the first category relates to the characterisation of the Ituri's armed conflict and the charges brought against Lubanga. The Chamber rejected the parties' plea in this respect based on three arguments: first, it held that the legal characterisation of the Ituri's armed conflict at the relevant time as of an international nature had been mentioned in the *Decision on the arrest warrant* against the accused. Since the latter decision remains confidential,[96] verification of this statement is impossible. Secondly, the Chamber noted that the Defence submitted at the confirmation hearing that the Ituri's conflict at the relevant time was of an international nature,[97] and that both the Prosecution[98] and the representatives of the victims presented their views on this matter.[99] Finally and more generally, the Chamber stated that the Trial Chamber has the power, in accordance with Regulation 55 of the ICC, to change the legal characterisation of the facts described in the charges brought against Lubanga as confirmed by the Chamber.[100]

The second category of grounds for leave to appeal analysed by the Chamber were those concerning evidentiary issues. The Chamber rejected all of them mainly holding that issues relating to the admissibility and relevance of evidence can be raised by either party at the trial stage pursuant to Article 64 of the Statute and Rule 63 of the ICC Rules.[101]

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93) *Id.* para. 21.

94) *Id*. para. 29.

95) *Id*. para. 30.

96) ICC-01/04-01/06-l-US-Exp-Corr, para. 99.

97) The Chamber cites in this respect the following document: ICC-01-04-01-06-T-44-EN, p. 73, lines 1-4.

98) The Chamber cites in this respect the following documents: ICC-01-04-01-06-T-33-EN, p. 6, lines 12-23; and ICC-01-04-01-06-T-47-EN, p. 16, lines 12-18.

99) The Chamber cites in this respect the following document: ICC-01-04-01-06-T-47-EN, pp. 49-51.

100) *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the Confirmation of Charges (24 May 2007), para. 44.

101) *Id.* paras 32, 39, 54, 68, 74.

The third plea for leave to appeal analysed by the Chamber was that the confirmation hearing was held while two appeals were pending before the Appeals Chamber. The Chamber rejected it mainly holding that these appeals had been already decided in its oral decision of 10 November 2006.[102]

The last plea for leave to appeal analysed by the Chamber was the one brought by the Defence claiming that the charging documents were vague. The Chamber rejected it finding that it was not sufficiently substantiated.[103] Based on all these reasons, the Chamber rejected both the Prosecution and Defence applications for leave to appeal the Decision.[104] An analysis of the main findings of the Chamber in this decision and its effects in the proceedings in this case is made in the following Section of this contribution.

V. Concluding Remarks

In addressing the substantive and procedural aspects dealt in the Decision, the Chamber did not limit itself to applying the ICC Statute, but also developed it. The Chamber did the latter when interpreting the requirement of 'a protracted armed conflict' under Article 8, paragraph 2(f), of the ICC Statute provided for the existence of a non-international armed conflict under that Statute; the expression 'participate actively in hostilities' under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute proscribing the crime of using children under the age of 15 years to participate actively in hostilities; the expression 'national armed forces' included in Article 8(2)(b)(xxvi) of the ICC Statute concerning the war crimes of conscription and enlistment of children under the age of fifteen years in international armed conflicts; and especially, Article 61(7)(c)(ii) of the ICC Statute which was interpreted by the Chamber as not excluding, under certain circumstances, its *proprio motu* power to substitute the charges brought by the Prosecution against an accused at the confirmation of charges' stage.

The main technique used by the Chamber for supporting its wide interpretation of the ICC Statute's provisions on these matters was through a teleological interpretation. In particular, it is unsurprising that the most far-reaching consequence of this teleological interpretation – i.e. the Chamber's *proprio motu* power to substitute the charges brought by the Prosecution against an accused at the confirmation of charges' stage – constituted the main ground of contention of both the Prosecution and the Defence against the confirmation of charges' Decision.

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102) *Id.* para. 50.

103) *Id.* paras 62-63.

104) *Id.* para. 21.

In its decision on the Prosecution and the Defence applications for leave to appeal the Decision, the Chamber confirmed such a power providing as a rationale the need of carrying out the proceedings before the ICC with expedience. Acknowledging the Chamber's recognition that its power in this subject is limited,[105] its approach is troublesome in light of the need for a strict respect for the procedural and substantive provisions of the ICC Statute and in particular, those providing for the rights of the accused and the functions and powers of the different organs of the ICC. Although it is true that all parties in the proceedings expressed their observations as to the characterisation of the armed conflict in Ituri at the relevant time, no evidence is found in the sources cited by the Chamber in its latest decision that they equally manifested their views as to the elements of the crimes concerned when committed in the context of an international armed conflict.

Additionally, the Chamber's *proprio motu* power to substitute the charges brought by the Prosecution at the confirmation of charges' stage, even if limited, seems difficult to conciliate with the very terms of Article 61(7)(c)(ii) of the ICC Statute.

A further question arises as to the value of the establishment and legal characterisation of the facts made by the Chamber *vis-à-vis* the Trial Chamber. In particular, the question is whether, despite the Chamber's decision on the Prosecution and Defence applications for leave to appeal the Decision, the Trial Chamber may at the trial stage change the establishment and legal characterisation of the facts made by the Chamber. The answer to this question is in the affirmative as, according to the ICC Statute, the Trial Chamber is not bound by the findings made by the Pre-Trial Chamber as to either matters of facts or law. As regards the former, it is clear that due to the substantially different evidentiary threshold applicable at the trial stage – i.e. beyond reasonable doubt[106] – in comparison with this at the pre-trial stage – i.e. substantial grounds to believe –, the Trial Chamber is not bound by the Chamber's findings as to matters of fact. The Chamber expressly recognized this in its latest decision.[107]

As regards matters of law, Article 74(2) of the ICC Statute, as developed by Regulation 55 of the ICC, confers upon the Trial Chamber a considerable margin of freedom on the legal characterisation of facts established during the trial, including the forms of responsibility of the accused.[108] It is therefore clear that the

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105) See *supra* Section III, sub-section 3.

106) ICC Statute, Art. 66, para. 3.

107) *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the Confirmation of Charges (24 May 2007), paras 32, 39, 54, 68, 74.

108) Article 74(2) of the ICC Statute reads as follows: 'The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts

Trial Chamber is not bound by the findings made by the Pre-Trial Chamber as to matters of law.

The parties could therefore challenge and the Trial Chamber may address at the trial stage both the establishment and legal characterisation of the facts made by the Pre-Trial Chamber. *Inter alia*, when determining the nature of the Ituri's armed conflict between July 2002 and 2 June 2003, the Trial Chamber will have to decide whether or not Uganda was the occupying power of that region until 2 June 2003 as established by the Pre-Trial Chamber; and in case the Trial Chamber established that it was so, this Chamber would be called to address the consequences thereof and in particular, to identify the specific source for the applicability of the ICC Statute to the conducts that took place in Ituri during its occupation by Uganda.

Another aspect worth mentioning of the Chamber's Decision is its high reliance in supporting several of its conclusions on matters of law on the jurisprudence of the ICTY. These matters include the applicable test as to the link required between the armed conflict and the alleged crime with respect to war crimes,[109] and the objective and subjective elements of co-perpetration as a form of criminal responsibility.[110] This was done without any attempt by the Chamber to elaborate on the sources of authority of the ICTY judgments *vis-à-vis* the ICC. In particular, it is troublesome the lack of any reference to Article 21 of the ICC Statute defining the sources of law that the ICC is called on to apply.

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and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.' Moreover, Regulation 55, paragraph 1, of the ICC that develops this article of the ICC Statute reads as follows: 'In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.'

109) Confirmation of charges Decision, para. 287 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 70 (2 October 1995); *Prosecutor v. Radoslav Brdjanin*, Judgment, Case No. IT-99-36-T, para. 123 (1st September 2004).

110) *Id.* paras 346, 361, 365.