



A Summary of the Case Law of the International Criminal Court

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Introduction

Early decisions by the Pre-Trial Chambers of the International Criminal Court are creating a foundation for interpretation of the Rome Statute. Although these decisions are not yet final and may be subject to appeal, they provide interesting insights into how the International Criminal Court will operate. As the first court rulings on many novel issues of international criminal law, including victim participation, they show how the court is applying the Rome Statute in practice. To aid in understanding the court's early jurisprudence, Human Rights Watch has created a short summary of a few key decisions in the past year. This summary is not exhaustive. Rather, it focuses on a small number of decisions Human Rights Watch believes might be of interest to those following the workings of the court. This summary is designed to provide readers a sense of the important developments in the court to date and does not contain analysis of or commentary on the decisions themselves. The full text of the decisions may be found on the website of the court at <http://www.icc-cpi.int>.

A. Admissibility of Cases before the ICC

On February 10, 2006, Pre-Trial Chamber (PTC) I issued a warrant of arrest for Thomas Lubanga.¹ In making its decision on the prosecutor's application for the arrest warrant, PTC I held that two issues must be evaluated when determining admissibility: first, whether there are national investigations and prosecutions pertaining to the case at hand that might pre-empt ICC jurisdiction, and second, whether the gravity threshold for the ICC is met.² This decision is important in that it clarifies the criteria used to determine which cases are sufficiently grave and the "type" of perpetrators who will be targeted by the ICC. It is also the first decision by the court pertaining to another key element of the Rome Statute: complementarity.³

¹ *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court (ICC), Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.

² *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, para. 29; see also Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, art. 17(1)(c) (adding that a case is inadmissible where the person concerned has already been tried for the conduct in question).

³ The preamble of the Rome Statute provides that the ICC shall be "complementary to national criminal jurisdictions."

1. Complementarity

PTC I first considered whether states with jurisdiction over the Lubanga case had remained inactive or were unwilling or unable to proceed in relation to his case. This was particularly relevant as Thomas Lubanga was in custody in Kinshasa at the time of the decision and had been charged by the Congolese judicial system.

In determining admissibility, PTC I held that “it is *a conditio 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.”⁴ (emphasis added)

Observing that the warrants of arrest issued by the Democratic Republic of the Congo (DRC) against Lubanga contained no reference to his alleged criminal responsibility for the crimes charged in the prosecutor’s application, PTC I held that the DRC could not be considered to be acting in relation to the specific case before the court.⁵

2. Gravity

In identifying suspected individuals for prosecution, the Rome Statute refers simply to the “perpetrators” of “the most serious crimes of concern to the international community as a whole.”⁶ The scope of potential defendants is therefore broad. To narrow this otherwise broad class of perpetrators who would be eligible for trial by the ICC, the prosecutor has adopted a policy of pursuing “those who bear the greatest responsibility” for crimes within the ICC’s jurisdiction.⁷

PTC I found that the gravity requirement under article 17(1)(d) “is intended to ensure that the Court initiates cases only against the most senior leaders suspected of

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, para. 31.

⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, paras. 38-39.

⁶ Rome Statute, preamble, art. 5.

⁷ Office of the Prosecutor, ICC, “Paper on some policy issues before the Office of the Prosecutor,” p. 7; Office of the Prosecutor, ICC, “Criteria for Selection of Situations and Cases,” draft policy paper on file with Human Rights Watch, June 2006, p. 13

being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.”⁸ In order to meet the gravity threshold, the chamber held that the following three questions must be answered affirmatively:

- “Is the conduct which is the object of a case systematic or large-scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?
- Considering the position of the relevant person in the State entity, organization or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
- Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?”⁹

In applying these three questions to the Lubanga case, PTC I decided that it met the gravity threshold under article 17(1)(d).

B. Victims’ Participation

Unlike the ad hoc tribunals, the ICC establishes the right for victims to participate as independent parties in the international justice process. This is a groundbreaking development in international justice. Determining how best to realize the right of victims to participate in the ICC process is one of the major challenges the new court faces. Recent decisions by PTCs I and II have discussed the scope of victims’ rights

⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, para. 50.

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, para. 63.

to participate in proceedings and have clarified how the court will interpret relevant provisions of the Rome Statute and the Rules of Procedure. These decisions establish a distinction between participation in proceedings relating to a “situation” and participation in proceedings relating to a “case” before the court. Situations are “generally defined in terms of temporal, territorial and in some cases personal parameters, [...], [they] 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”¹⁰ A case is defined to include “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” and as entailing “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.”¹¹

1. Criteria for victims’ participation in a situation

The first applications for victims’ participation were received by PTC I on June 14, 2005. PTC I issued its “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”¹² on January 17, 2006.

In making its decision, PTC I considered whether the Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court provide for victims’ participation during the investigation of a situation. PTC I found that the term “proceedings,” in article 68(3) of the Rome Statute, should be construed to include court proceedings that occur before the issuance of arrest warrants; it therefore found that article 68(3) is also applicable to the investigation stage of a situation.¹³

¹⁰ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 65.

¹¹ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 65.

¹² *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf.

¹³ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 46.

PTC I found that the “personal interests” of victims, as set forth in article 68(3), are affected at the situation stage, “since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”¹⁴

PTC I also held that rule 85(a) of the Rules of Procedure and Evidence establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the court; and there must be a causal link between the crime and the harm suffered.¹⁵ The court concluded that it was not necessary to determine at this stage the precise nature of the causal link between the crime and the harm suffered nor the identity of the person(s) responsible for the crimes.¹⁶

At the time of this writing, and based on publicly available information, PTC I has granted six victims the right to participate in the DRC situation.¹⁷

2. Criteria for victims’ participation in a case

After Thomas Lubanga was transferred to the ICC on March 17, 2006, PTC I automatically reviewed the applications of the victims participating in the DRC situation and considered several new applicants for participation in the case against Lubanga.¹⁸ In its decisions on these applications, PTC I found that at the “case”

¹⁴ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 63.

¹⁵ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 79.

¹⁶ *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, para. 94.

¹⁷ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf.

¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, June 29, 2006, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172-tEnglish.pdf>; see *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, July 28, 2006, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228-tEnglish.pdf>; see also *Prosecutor v. Thomas Lubanga Dyilo*,

stage, in addition to the four criteria established by rule 85, victim applicants must “demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant.”¹⁹

PTC I ruled that the causal link is demonstrated “once the victim, and if applicable, the immediate family or dependants of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed.”²⁰

As of this writing, PTC I has granted the right to participate in the Lubanga case to four victims, referred to as a/0001/06, a/0002/06, a/0003/06 and a/0105/06.²¹

3. Modalities of victims’ participation

PTC I established different modalities of participation for victims participating in a situation and for victims participating in a case.

PTC I held that victims participating in a situation at the investigation stage may present their views and concerns to the chamber, file documents pertaining to the investigation, and request the Pre-Trial Chamber to order specific proceedings.²²

ICC, Case No. ICC-01/04-01/06, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, October 20, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-601_tEnglish.pdf.

¹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, July 28, 2006, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228-tEnglish.pdf>, p.9.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, June 29, 2006, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172-tEnglish.pdf>, p.8.

²¹ See ICC Newsletter, no. 10, November 2006, http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL10-200611_En.pdf, p. 7.

²² *Situation 01/04 in Democratic Republic of the Congo*, ICC, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, January 17, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, p. 42.

Guidance as to how victims may participate in a case was provided by PTC I prior to the confirmation of charges hearing in the Lubanga case. PTC I noted the need to ensure that victims participate in a manner that is not prejudicial to or inconsistent with the rights of the defense.²³ The chamber allowed the victims to remain anonymous in light of security concerns, but decided that this would also limit their ability to participate in the proceedings.²⁴ The chamber indicated that it would review the modalities of victims' participation if they decided to disclose their identities to the defense. Victims were able, through their legal representatives, to present observations at the beginning and end of the hearing, and to seek leave to intervene during public sessions. Victim intervention was restricted to the scope determined by the charges brought against Lubanga. Out of concern for the rights of the defense, in light of the anonymity of victims, the court held that victims would not have access to the entire file on the DRC situation and would not be able to add any point of fact or any evidence to the prosecution's case file nor to question witnesses.²⁵

4. Victims' right to legal representation

In its decision with respect to several applications for participation in the Ugandan situation and in the Lord Resistance's Army²⁶ case at all stages of the proceedings, PTC II found that "applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber's decision on the merits of the [victim's] application [to participate]."²⁷

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, September 22, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf, p. 4; .

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, September 22, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf, pp. 7-8.

²⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, September 22, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf, p. 8.

²⁶ *Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, ICC, Case No. ICC-02/04-01/05.

²⁷ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, ICC, Case No. ICC-02/04-01/05, Decision on legal representation, appointment of counsel for the defense, protective measures and time-limit for submission of observations of applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, February 1, 2007, http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-134_English.pdf, para. 11.

C. Confirmation of Charges

On February 10, 2006, PTC I issued a sealed warrant of arrest²⁸ against Thomas Lubanga on charges of war crimes, namely, enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. Lubanga was surrendered to the ICC on March 17, 2006 and the confirmation of charges hearing took place in November 2006. On January 29, 2007, PTC I confirmed the charges against Lubanga and ordered him to appear before a Trial Chamber for trial.²⁹ Several elements of the chamber's first decision confirming charges against a suspect are noteworthy.

1. Clarification of the standard used to confirm charges

Article 61(7) of the Rome Statute provides that the Pre-Trial Chamber must, on the basis of the hearing, determine whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” The prosecution, the legal representatives of victims and the defense all presented different interpretations of “substantial grounds to believe” during the confirmation hearing.

In its decision, PTC I held that the prosecution has to bring concrete and tangible evidence in support of its charges at the confirmation hearing and demonstrate a clear direction in the reasoning supporting its specific allegations. PTC I further held that the criteria “substantial grounds to believe” must allow the judges to assess the evidence as a whole. After examining the evidence, the chamber will determine whether it is convinced that the prosecution's allegations are solid enough to send a suspect to trial.³⁰

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court (ICC), Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf. The text is not yet available in English. The discussion in this section is based on an unofficial translation of the decision.

³⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf, para. 39.

2. Definition of the notion of co-perpetration

The prosecution charged Lubanga as a co-perpetrator under Rome Statute article 25(3)(a).³¹ PTC I held that the notion of co-perpetration is linked to the notion of joint control of the crime. The court held that a finding of co-perpetration requires the following elements:³²

- An existing agreement or common plan between two or more persons;
- An essential and coordinated contribution from each co-perpetrator leading to the realization of the elements of the crime;
- The person must satisfy the subjective elements of the crime (i.e. have intent and knowledge);
- The person, as well as other co-perpetrators, must all, in a shared manner, know and accept that the implementation of their common plan may lead to the elements of the crime being committed;
- The person must know the circumstances that allow him/her to exercise joint control of the crime.

3. Change in the legal characterization of the charge

The prosecution charged Lubanga with enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities *in the context of an armed conflict not of an international character*, a war crime punishable under article 8(2)(e)(vii) of the Rome Statute. According to the prosecution, the alleged acts occurred between July 1, 2002 and December 31, 2003.³³

PTC I however held that the armed conflict in Ituri was international from July 2002 to June 2, 2003, due to Uganda's presence in Ituri as an occupying force. As a result, the chamber substituted the crime charged by the prosecution under article 8(2)(e)(vii) with a different one (enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities *in the context of an*

³¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Document Containing the Charges, Article 61(3)(a), August 28, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf, para. 20.

³² *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf, paras. 342-67.

³³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Document Containing the Charges, Article 61(3)(a), August 28, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf, para. 6.

international armed conflict) under article 8(2)(b)(xxvi) until June 2, 2003. PTC I found that because both articles criminalize the same behavior, it was not necessary to adjourn the hearing and to request the prosecutor to amend the charges.³⁴

The prosecution has since requested leave to appeal this aspect of the decision.³⁵ The prosecution argued that the Rome Statute “only allows the Chamber to adjourn the proceedings and request the Prosecution to consider amending a charge, if the Chamber is of the view that the evidence submitted appears to establish a different crime.” In addition, the prosecution points out that as a result of the substitution of the crime, it is forced to prosecute at trial a crime containing specific elements which it considers not to be supported by the evidence currently in its possession.³⁶

4. Reduction of the temporal scope of the charges

The prosecution charged Lubanga with crimes committed between July 1, 2002 and December 31, 2003.³⁷ However, PTC I confirmed the charges for a shorter time period starting early September 2002³⁸ and ending on August 13, 2003. PTC I found that Lubanga continued to exercise his power while under house arrest from August 13, 2003, but did not play a coordinating role in relation to the implementation of the

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, *Décision sur la confirmation des charges*, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf, para. 204.

³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, 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"*, February 5, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-806_English.pdf.

³⁶ The Defense has also appealed the decision on the confirmation of charges under article 82(1)(b). This article provides that either party may appeal “a decision granting or denying release of the person being investigated or prosecuted.” The Defense argued that by confirming the charges against Lubanga, the January 29 decision has the effect of denying his release and may therefore be appealed. The Appeals Chamber decided to examine in limine whether the appeal is admissible under article 82(1)(b) before addressing any other issue in the cause of the appeal. The parties have been directed to address this issue. *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, *Defense Appeal Against the Pre-Trial Chamber's "Décision sur la confirmation des charges" of 29 January 2007*, January 30, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-797_English.pdf; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Directions and Decision of the Appeals Chamber*, February 1, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-800_English.pdf.

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, *Document Containing the Charges, Article 61(3)(a)*, August 28, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf.

³⁸ After Lubanga's release and appointment as President of the Union of Congolese Patriots (UPC) and the creation of the Patriotic Forces for the Liberation of the Congo (FPLC).

common plan – one of the elements of the notion of co-perpetration – after this date.³⁹

5. The scope of the term “national armed forces”

The prosecution charged Lubanga under article 8(2)(e)(vii),⁴⁰ which addresses the conscription or enlistment of children under the age of fifteen years *into armed forces or groups*.

Article 8(2)(b)(xxvi), the crime substituted by PTC I, however, addresses the conscription or enlistment of children under the age of fifteen years *into the national armed forces*.

PTC I considered whether the term “national” armed forces restricted the scope of the article to government armed forces.⁴¹ The chamber relied on the Geneva Conventions as well as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. It also observed that interpreting the word “national” as meaning “governmental” would contravene the Rome Statute as the Court would not be able to prosecute an armed group party to a conflict; in Lubanga’s case, Lubanga would not be prosecuted because the armed conflict was of an international character. PTC I found that the scope of the words “national armed forces” in article 8(2)(b)(xxvi) is not restricted to government armed forces, and thus includes Lubanga’s armed group.

³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf.

⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Document Containing the Charges, Article 61(3)(a), August 28, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf.

⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, January 29, 2007, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf, paras. 268-285.