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 (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’).
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 2006³ 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.
⁴) Confirmation of charges Decision, paras 9, 16, 227.
⁵) Id. paras 33-145.