Chapter 4
Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the *Lubanga* Case

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4.1 Introduction

The judgment delivered by Trial Chamber I of the International Criminal Court on 14 March 2012 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*[1] was welcomed by a number of experts as a landmark decision.[2] Not only was the judgment the first ever adopted by the Court, thus marking a new step in the operationalization of the Rome Statute, but it also provided an opportunity for addressing a number of procedural and substantive issues that are essential to the progressive development of both international criminal and humanitarian law.

This chapter does not seek to provide a comprehensive analysis of all these issues.[3] It focuses instead on the core of the judgment, i.e., the definitions of the war crimes for which Thomas Lubanga Dyilo was convicted (Sect. 4.3). The Trial Chamber found that the accused was guilty of conscripting and enlisting children under 15 into an armed group, namely the *Forces Patriotiques Pour la Libération du Congo* (UPC/FPLC), and of using them to participate actively in hostilities. These crimes occurred in the Ituri region of the Democratic Republic of the Congo from September 2002 to August 2003. This article also examines how the Trial Chamber addressed the preliminary question of the characterization of the situation during the relevant period (Sect. 4.2). The judgment provides essential insight into the Trial Chamber's understanding of the notion of armed conflict within the framework of the Rome Statute.

4.2 Characterization of the Situation

A detailed part of the *Lubanga* judgment analyzed the nature of the context in which the relevant facts occurred. The Trial Chamber looked into whether the situation could be characterized as an armed conflict, and if so, whether this conflict should be classified as international or non-international. This is a necessary prerequisite for determining whether the jurisdiction of the Court extended to cover the facts of the case, and also, which of the two potentially relevant Articles of the Rome Statute applied to the situation. The Chamber stressed that "[t]he relevant

[1] International Criminal Court, Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, ICC-01/04-01/06-2842.

[2] *See, e.g.*, Committee on the Rights of the Child, *Press statement—Committee on the Rights of the Child welcomes the ICC ruling in the Lubanga Case,* Geneva, 15 March 2012; Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *SRSG Coomaraswamy welcomes the International Criminal Court's first verdict—the conviction of Thomas Lubanga for child recruitment*, 14 March 2012.

[3] For a comprehensive review of the legal issues addressed in the *Lubanga* judgment, see Ambos 2012, pp. 115–153.

Elements of Crimes require that the alleged criminal conduct 'took place in the context of and was associated with an […] armed conflict'" (para 531).

The Trial Chamber embarked on its analysis by first employing interpretative efforts to clarify the notion of armed conflict. It recalled the fact that neither the Rome Statute nor the Elements of Crimes provide a definition of this notion (para 531). Likewise, there is no such definition under existing treaties of international humanitarian law, although the existence of an armed conflict is required to trigger the application of these treaties, setting limits as to their scope of application (para 532). The Trial Chamber then turned to international jurisprudence seeking further guidance on this matter, and paid special attention to the case law of the ICTY. The Trial Chamber endorsed, in particular, the Tribunal's well-known definition, which states that "an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State" (para 533).[4] This definition has been used by a number of other international bodies since,[5] and its adoption in the *Lubanga* judgment further confirms a now well-established trend.

Having established this broader framework, the Trial Chamber then developed a more detailed analysis in three main steps: it reaffirmed the legal basis for distinguishing between international and non-international armed conflicts (Sect. 4.2.1); it examined whether the context of the case under consideration represented a non-international armed conflict, in which case Article 8(2)(e)(vii) of the Rome Statute would apply (Sect. 4.2.2); after responding positively to the previous question, it evaluated whether the intervention of foreign forces during the period under examination had "internationalized" the conflict, in which case Article 8(2)(b)(xxvi) of the Statute would apply (Sect. 4.2.3).

4.2.1 Categories of Armed Conflicts

The distinction between international and non-international armed conflicts, which dates back to the origin of the law of armed conflicts, has been challenged by scholars on a number of occasions.[6] In this debate, the Trial Chamber took a very clear position. It stated that "the international/non-international distinction is not only an established part of the international law of armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework" (para 539). The Trial Chamber did not rely solely on the Rome Statute to support this statement (which would have been sufficient for the

[4] ICTY, *Prosecutor v. Tadić*, Case no. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

[5] *See, e.g.*, Commission of Inquiry on Lebanon, Report pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, 23 November 2006, para 51; ICRC 2008.

[6] *See., e.g.*, Dupuy and Leonetti 1979, p. 258; Reisman and Silk 1988, p. 465. More recently, see also Stewart 2003, pp. 313–349.

purposes of its judgment), but it also insisted that the distinction is a fundamental feature of international humanitarian law. Despite the growing convergence of the two legal frameworks governing each category of armed conflict, significant differences indeed remain. The most important difference relates to the combatant privilege, which only applies in international armed conflicts. Those enjoying this privilege are entitled to immunity from domestic prosecution for lawful acts of war. If captured by the enemy, they are considered prisoners of war and, as such, must be released and repatriated without delay after the end of hostilities.[7] They are not, however, immune from prosecution for war crimes and other violations of international humanitarian law. In non-international armed conflicts, combatant privilege does not exist. Those participating in hostilities remain subject to prosecution for violations of domestic law even if they fully respect the rules of international humanitarian law.

Pursuing this reasoning, the Trial Chamber also recognized that different types of armed conflicts may occur at the same time and on the same territory, depending on the nature of the parties involved in particular confrontations (para 540). If, for instance, foreign States become involved in an existing non-international armed conflict, any of the following different scenarios may be envisaged: Fighting may take place between the forces of the territorial State and those of an intervening State, between intervening States taking action on both sides of the front line, between government forces (of the territorial State or of a third State) and non-governmental armed groups or between such groups only. In other words, as the Trial Chamber confirmed, international and non-international armed conflicts may "coexist" within the same territory (para 540). The Trial Chamber thus implicitly recognized that different legal frameworks may apply to the distinct conflicts occurring in such situations. Inter-State confrontations are governed by the law of international armed conflict, whereas other scenarios are subject to the law of non-international armed conflict.

This approach is based on well-established international jurisprudence. The Trial Chamber itself invoked the judgment of the International Court of Justice (ICJ) in the Nicaragua Case (1986) (para 540, note 1644), which laid the basis for the theory of a fragmented application of international humanitarian law. In its analysis of the conflict, the ICJ differentiated between, on the one hand, the conflict opposing the Nicaraguan government and the armed opposition ("the Contras") and, on the other, the conflict opposing that same government and the United States of America.[8] Other international bodies, such as the ICTY, have applied this theory since then.[9]

[7] GCIII, Article 118(1).

[8] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment, ICJ Reports 1986, para 219. See Vité 2009, p. 86.

[9] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgment, 15 July 1999, para 84. A number of scholars also support this approach (see Schindler 1982, pp. 255–264).

This approach suggests that foreign intervention in a purely internal armed conflict would not necessarily automatically confer an international character on such a conflict. The classification of the situation in this case will depend on the relationship between the intervening troops and the non-state armed groups that are parties to the conflict, and on the degree of influence the former may potentially exert over the latter. This is a key issue that the Trial Chamber further analyzed in another part of the judgment (see Sect. 4.2.3). However, before addressing this question, the Trial Chamber first assessed whether there was, in actual fact, an armed conflict of a non-international character occurring on the territory during the relevant period.

4.2.2 Non-international Armed Conflict

For this purpose, the Trial Chamber began its reasoning by providing its understanding of the notion of non-international armed conflicts within the meaning of Article 8(2)(f) of the Rome Statute. This is the provision that sets out the scope of application of the previous paragraph of the Statute (Article 8(2)(e)), which itself enumerates a list of serious violations of the laws and customs of war, including the conscription and enlistment of children under 15 into armed forces or groups, or their use to participate actively in hostilities (Article 8(2)(e)(vii)). Article 8(2)(f) states that the armed conflicts to which it applies are those "that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".

To fully understand this paragraph, it must be compared to Article 8(2)(d) of the Rome Statute, which defines the scope of application of another set of war crimes, namely "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949" (Article 8(2)(c)). While both provisions deal with offences committed during "armed conflicts not of an international character", Article 8(2)(f), unlike Article 8(2)(d), requires an additional element, stating that such conflict must be "protracted".[10] This difference between the two provisions gives rise to the question of whether Article 8(2)(f), by referring explicitly to the criterion of duration ("protracted armed conflict"), merely clarifies the terms of para (2)(d), without creating a separate category of armed conflict, or whether it instead applies to a distinct category of non-international armed conflict, thus defining a distinct field of application for the list of crimes in Article 8(2)(e). This question has been debated amongst scholars, who hold diverging views on the matter.[11]

[10] For an analysis of the notion of non-international armed conflict under both provisions, see Dörmann Dörmann 2003, pp. 384–389 and 441–442.

[11] For a reminder of this debate, see Schabas 2010, pp. 205–206; Vité 2009, pp. 80–83; Sivakumaran 2009, pp. 371–380.

While it did not address this question directly, the Trial Chamber did make a number of comments, which serve to shed new light on this debate. It is important to note in this regard that the Chamber referred to Additional Protocol II governing non-international armed conflicts[12] as the main source for interpreting Article 8(2)(f). This is a coherent approach as this provision relates to a list of war crimes, which, to a certain extent, amount to violations of the Protocol. By contrast, Article 8(2)(d), as previously mentioned, focuses on serious violations of Article 3 common to the four Geneva Conventions of 1949. The Chamber's approach is also consistent with the drafting history of the Rome Statute. Article 8(2)(f) was originally conceived as a provision covering serious violations of Additional Protocol II. Explicit reference to the Protocol in the draft text of the provision was replaced during the negotiations with the notion of "protracted armed conflict".[13] This would therefore suggest that both Additional Protocol II and Article 8(2)(f) have an identical scope of application.

Although it adopted this approach, the Trial Chamber did not seem completely at ease with this reasoning. While referring to Additional Protocol II as the main legal source for interpreting Article 8(2)(f), it immediately stressed that this provision "only requires the existence of a 'protracted' conflict between 'organised armed groups'" (para 536). This implies that elements of the restrictive scope of application of Additional Protocol II should not be transposed to Article 8(2)(f). In the Chamber's views, these elements include the requirements that organized armed groups involved in the conflict must be "under responsible command" and "exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (para 536).[14] It is surprising in this respect that the Trial Chamber did not mention another restrictive element, namely that Additional Protocol II only applies to armed conflicts opposing State armed forces and dissident armed forces or other organized armed groups. The Protocol does not extend to armed conflicts between such groups only. The Trial Chamber however implicitly admitted that this restrictive element is not part of Article 8(2)(f), when it referred to the jurisprudence of the ICTY as an additional source for clarifying the notion of armed

[12] Protocol Additional to the Geneva Conventions of 12 August 1949a, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[13] The wording of para (2)(f) is the outcome a compromise between delegations in favor of introducing a list of war crimes applicable to non-international armed conflicts and those against the introduction of such a list. An initial proposal in the direction of such a compromise was submitted by the 'Bureau of the Committee of the Whole' and consisted of limiting the field of application of the crimes mentioned in para (2)(e) by taking up the restrictive criteria elaborated in Article 1(2) of APII (A/CONF.183/C.1/L.59). As an agreement could not be reached on that proposal, Sierra Leone suggested the text of para (2)(f) that was ultimately retained, with a reference to the notion of "protracted armed conflict". The aim was to appease the delegations that were reluctant to introduce war crimes into the law of non-international armed conflict, while avoiding a threshold of application as high as that in APII. Other delegations were indeed opposed to inserting such a threshold in the Rome Statute (A/CONF.183/C.1/SR.35, para 8).

[14] Additional Protocol II, Article 1(1).

conflict for the purposes of the Rome Statute. The Tribunal has indeed clearly stated that non-international armed conflicts include those that involve "protracted violence between governmental authorities and organized armed groups *or between such groups* within a State" (emphasis added).[15]

Thus, while relying on Article 1 of Additional Protocol II as the main source for interpreting Article 8(2)(f) of the Rome Statute, the Trial Chamber nonetheless set aside some of the specificities of the Protocol, i.e., those requirements that result in a narrow scope of application of this instrument. It would seem that the Trial Chamber felt obliged to refer to Additional Protocol II in order to be consistent with the internal structure and drafting history of Article 8 of the Rome Statute, but that it simultaneously sought to ensure that both sub-para 2(d) and 2(f) of this provision are understood to address the same types of situations. Indeed Article 1 of Additional Protocol II without its restrictive elements has the same scope of application as Article 3 common to the four Geneva Conventions of 1949. The Trial Chamber's reasoning would therefore seem to support the views of those who consider that there is no difference between the thresholds of application of the two sub-paragraphs of the Rome Statute discussed above.

This conclusion is further confirmed in looking at the criteria used by the Trial Chamber to determine whether the situation under consideration actually amounted to an armed conflict in the sense of Article 8(2)(f). The Chamber stated that two conditions must be fulfilled in this regard, namely a certain level of "intensity", and the involvement of "organized armed groups" (para 536). In order to assess each of these conditions, the Chamber identified "factors" which could be potentially relevant, but which are not, in themselves, *sine qua non* requirements for determining the existence of intensity and organization. These factors include, for instance, the "command structure and rules" of a group, or its "ability to plan military operations and put them in effect" (organization). They also include "the seriousness of attacks and potential increase in armed clashes", or "their spread over territory and over a period of time" (intensity) (paras 537–538). These two conditions and the related factors are taken from the jurisprudence of the ICTY to which the Trial Chamber makes explicit reference.[16] Yet these criteria were developed by the Tribunal in order to distinguish non-international armed conflicts "from banditry, unorganised and short–lived insurrections, or terrorist activities, which are not subject to international humanitarian law".[17] They relate to all forms of non-international armed conflicts, and as such,

[15] ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

[16] The Trial Chamber explains that the lists of factors provided in its judgment are not exhaustive. Other factors may be found in case law of the ICTY. See ICTY, *Prosecutor v. Boškoski et al.*, IT- 04-82, Trial Judgment, 10 July 2008, paras 173–206. See also ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005, paras 83–174; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgment, 3 April 2008, paras 37–60.

[17] ICTY, *Prosecutor v. Limaj et al.*, ibid., para 84.

are not meant to define a specific category among these conflicts corresponding to a higher threshold of application.[18]

As for the facts, the Trial Chamber noted that the military wing of the *Forces Patriotiques Pour la Libération du Congo* (UPC/FPLC), the armed group for which Thomas Lubanga Dyilo was commander-in-chief, "was organised with a leadership structure that was capable of training troops as well as imposing discipline, and it carried out sustained military operations in Ituri during the relevant timeframe" (para 543). It further noted that the FPLC had been engaged in prolonged hostilities against other organized armed groups during the period of the charges (paras 544–547). Lastly, the Trial Chamber remarked that no "peaceful settlement" between the parties had been reached despite international efforts to put an end to the conflict (para 548). It therefore concluded that the conditions necessary to classify these confrontations as a non-international armed conflict were fulfilled during the relevant period (para 550).

However, the characterization of the situation in the *Lubanga* judgment did not end with this analysis. The Trial Chamber went further, with a view to determining whether the involvement of foreign forces had affected the nature of the situation, potentially turning it into an international armed conflict.

4.2.3 *Internationalization of a Non-international Armed Conflict*

An international armed conflict[19] may occur in two different ways: (i) when States directly resort to armed force against each other; and (ii) when a State exercises a sufficient amount of control over a non-state armed group, which is itself a party to an armed conflict involving another State. The Trial Chamber, citing Pre Trial Chamber II, in this way noted that "an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State" (para 541).

Though the formulation of the Trial Chamber is correct in distinguishing these two forms of international armed conflict, the statement that such situations are characterized by "armed hostilities" may be misleading, as this may be interpreted as requiring an excessively high threshold of violence. The general view is that international armed conflicts, as opposed to non-international armed conflicts, do not require a particular threshold of armed violence to be reached. The ICRC commentary to the Geneva Conventions of 1949 defines an international armed conflict as "[a]ny difference arising between two States and leading to the

[18] This conclusion was already anticipated by Sivakumaran on the basis of the decision of the Pre-Trial Chamber I on the confirmation of charges; see Sivakumaran 2009, pp. 377–380.

[19] Rome Statute, Article 8(2)(a) and (b).

intervention of armed forces".[20] It further explains that "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place".[21] The ICTY also reminds us that an international armed conflict exists, "whenever there is a resort to armed force between States".[22] The Tribunal further specifies that "*le recours à la force armée entre Etats suffit en soi à déclencher l'application du droit international humanitaire*".[23] It is true however, that this position has recently been challenged. Some argue that a distinction must be made between international armed conflicts (reaching a certain level of intensity) and other expressions of hostility between States, such as minor "incidents", "border clashes" or "skirmishes".[24] The Trial Chamber could therefore have expounded on its views on this issue, given its use of the phrase "armed hostilities between States".

It is not disputed however, that an assessment of the level of violence is necessary to determine whether foreign intervention has led to internationalization of internal armed conflicts. In such cases, the characterization of the situation as an international armed conflict requires the following two steps: first, it must be shown that the conditions of "organization" and "intensity" necessary to establish the existence of a non-international armed conflict have been met; second, it must be demonstrated that the level of control exercised by foreign forces over an organized armed group is sufficient to conclude that the conflict is, in fact, a confrontation between States. In other words, the classification of such a situation as an international armed conflict supposes a pre-existing non-international armed conflict, which in turn implies that the required threshold of intensity has been met.

As for the nature of the control exercised over the armed group, the Trial Chamber relied fully on the criteria developed by the ICTY. The Chamber considered that "the 'overall control' test is the correct approach" (para 541). Quoting the ICTY, it confirmed that the armed conflict becomes international when the foreign State "*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group" (para 541).[25]

Regarding the facts, the Trial Chamber noted that there were a number of simultaneous conflicts in the region during the period covered by the charges, some of them including the UPC/FPLC (para 543). It considered, however, that

[20] Pictet 1952, p. 32. This sentence was also quoted by Pre-Trial Chamber I in the confirmation of charges. (Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para 207).

[21] Pictet 1952, p. 32. For further details on the notion of international armed conflict in international criminal law, see Dörmann 2003, pp. 23–28.

[22] ICTY, *Prosecutor v. Tadić*, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

[23] ICTY, *Prosecutor v. Delalić et al.* ("*Čelebići* Camp"), IT-96-21, Trial Judgment, 16 November 1998, para 184.

[24] This view was most notably developed in International Law Association 2010, pp. 28–32.

[25] This quote comes from ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgment, 15 July 1999, para 137 (emphasis in the original).

there was no sufficient evidence supporting the view that the UPC/FPLC had acted under the "overall control" of any of the States involved in the relevant conflicts, namely Uganda, Rwanda or the Democratic Republic of the Congo (paras 551–567).[26] It thus concluded that "[s]ince the conflict to which the UPC/FPLC was a party was not 'a difference arising between two states' but rather protracted violence carried out by multiple non-state armed groups, it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC" (para 563). With this statement, the Trial Chamber changed the legal characterization of the facts adopted by the Pre-Trial Chamber I when confirming the charges. The latter had concluded that the conflict had been internationalized through the occupation of the Ituri region by the Ugandan army until 2 June 2003.[27]

4.3 Protection of Children Under 15

The most innovative developments in the *Lubanga* judgment relate to the criminalization of acts that seek to involve children as participants in armed conflict. The Trial Chamber undertook an in-depth analysis of Article 8(2)(e)(vii) of the Rome Statute, which states: "2. For the purpose of this Statute, 'war crimes' means: […] (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: […] (vii) *Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*; […]"(emphasis added).[28]

A large part of the judgment is dedicated to clarifying the meaning of the three types of criminal conduct referred to in this provision, and to assessing the extent to which these acts might be interconnected. To begin its analysis, the Trial Chamber recalled that the three relevant concepts are not defined in the Statutes, the Rules of Procedure or Evidence or the Elements of Crimes (para 600). The Trial Chamber therefore first endeavoured to provide its interpretation of the notions of conscripting and enlisting children under 15, and examined the relation between these two notions and the third, namely using children to participate actively in hostilities (Sect. 4.3.1). Secondly, the Trial Chamber provided its own

[26] This assessment has been questioned by K. Ambos. The author stresses that the Trial Chamber has itself recognized that parties to the non-international armed conflict had received support from States, namely the Democratic Republic of the Congo (providing support to the *Armée du people congolais* (APC)) and Uganda and Rwanda (providing support to the UPC/FPLC) (see Judgment, paras 553 and 554, 558) (Ambos 2012, pp. 115–153).

[27] Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para 220.

[28] For detailed analyses of this provision, see Happold 2009 and Kurth 2010.

understanding of the third notion, and proposed new criteria for identifying those activities that amount to "active participation in hostilities" (Sect. 4.3.2).

With these objectives in view, the Trial Chamber recalled that the legal sources for interpreting Article 8(2)(e)(vii), as stipulated in Article 21 of the Statute, include "the established principles of the international law of armed conflict" adding that such interpretation must be "consistent with internationally recognized human rights" (para 600). More specifically, the Trial Chamber announced that it would rely on Article 4(3) of Additional Protocol II and Article 38 of the Convention on the Rights of the Child. Both instruments prohibit the recruitment of children under 15 and their participation in hostilities, although in different terms. Under the Protocol, all forms of participation in hostilities are prohibited without further specification, while the Convention only bans "direct" participation in hostilities.[29]

4.3.1 Conscripting or Enlisting Children into Armed Forces or Groups

With a view to clarifying the concepts of conscription and enlistment under Article 8(2)(e)(vii) of the Rome Statute, the Trial Chamber examined how these concepts relate to two other notions, namely "recruitment" (Sect. 4.3.1.1) and "use to participate actively in hostilities" (Sect. 4.3.1.2).

4.3.1.1 "Conscripting or Enlisting" Versus "Recruiting"

The Trial Chamber endorsed the definition proposed by Pre-Trial Chamber I,[30] according to which "'conscription' and 'enlistment' are both forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively (conscription) or voluntarily (enlistment)" (para 607). This definition indicates that there is no difference between the material scope of application of Article 8(2)(e)(vii) and that of the corresponding provisions of international humanitarian law and human rights law. "Conscripting" and "enlisting" are both forms of "recruitment", which is the notion used in these two legal frameworks, most notably in Additional Protocol II (Article 4(3)(c)) and the Convention on the Rights of the Child (Article 38(2)).[31] This is further confirmed

[29] Article 4(3)(c) of APII reads: "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". Article 38(2) of CRC reads: "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities".

[30] Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para 246.

[31] International practice also shows that this prohibition has crystallized into customary international law, binding both States and non-state parties to armed conflicts. See Henckaerts

by the ICRC Commentary to Additional Protocol II, which states that "[t]he principle of non-recruitment also prohibits accepting voluntary enlistment".[32] The three bodies of law concerned therefore address the same practice, i.e. all forms of recruitment of children, even though different wording is used in the Rome Statute. There is no gap in the material scope of application of the rules prohibiting and punishing such conduct.[33]

While neither international humanitarian law nor human rights law envision consent-based recruitment of children under 15, the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (OP-CAC) takes this practice into account for older children. This instrument prohibits States Parties from "compulsorily"[34] recruiting children under 18, but allows "voluntary recruitment" of such children under certain conditions.[35] The OP-CAC therefore follows the example of the Rome Statute in establishing two categories of recruitment.[36] It is not clear however whether these categories are fully identical under each of these instruments. While the OP-CAC refers to "compulsory" recruitment, the Trial Chamber preferred the notion of "coercive" recruitment. The Chamber did suggest however that both notions should have the same meaning in this context, stressing that the distinctive characteristic of conscription (as compared to enlistment) is "the added element of *compulsion*" (para 608) (emphasis added).

Concerning recruitment by non-state armed groups, however, the OP-CAC does not provide for such a distinction based on consent. It states that these groups "should not, under any circumstances, recruit or use in hostilities persons under

(Footnote 31 continued)
and Doswald-Beck 2005, pp. 482–485. For a different view on the notions used in the Rome Statute, see the dissenting opinion of Justice Robertson of the Special Court of Sierra Leone, who declared that "'(r)ecruitment' is a term which implies some active soliciting of 'recruits', i.e., to pressure or induce them to enlist: it is not synonymous with 'enlistment'" (Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman*, SCSL-2004-14-AR729E, Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, Dissenting Opinion, para 27).

[32] Sandoz et al. 1987, para 4557.

[33] K. Ambos explains in this regard that "the interplay between (voluntary) enlistment and (compulsory) conscription prevents a punishability gap since any form of child recruitment (voluntary or not) is covered by the offence", Ambos Ambos 2012, p. 134. In this sense, see also Happold 2009, p. 587.

[34] OP-CAC, Article 2.

[35] For more details on the conditions and limits of voluntary recruitment by States into armed forces under the OP-CAC, see Article 3.

[36] A similar distinction also exists under ILO *Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour* (1999). This Convention mentions among the different forms of the worst forms of child labor "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, *including forced or compulsory recruitment of children for use in armed conflict*" (emphasis added) (Article 3(a)).

the age of 18 years".[37] It allows no exception to the "straight 18 rule", although the exact implications of this rule have been discussed.[38] The OP-CAC further requires States Parties to take all feasible measures to prohibit and criminalize such practices by non-state armed groups.[39]

As for the reasons for separating "conscription" and "enlistment" of children in the Rome Statute, the Trial Chamber raised a somewhat audacious question. It examined whether the distinction between the two forms of recruitment is actually relevant for the purpose of criminal prosecution. External experts consulted on this question during the procedure gave a clear answer. One of them explained that "from a psychological point of view, children cannot give 'informed' consent when joining an armed group, because they have a limited understanding of the consequences of their choices; they do not control or fully comprehend the structures and forces they are dealing with; and they have inadequate knowledge and understanding of the short- and long-term consequences of their actions" (para 610). Perhaps even more categorically, the UN Special Representative of the Secretary-General for children and armed conflict clearly considers that "the line between voluntary and forced recruitment is […] not only legally irrelevant but practically superficial in the context of children in armed conflict" (para 612). According to these experts, there is therefore no such thing as voluntary recruitment of children under 15. Any incorporation of such children into armed forces or groups therefore entails, to a certain extent, some form of coercion or deception.

While claiming to endorse these views, the Trial Chamber adopted a less straightforward position, creating confusion on the issue. On the one hand, it held that "it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force" (para 613). The Chamber therefore implied that, although "frequent", this is not necessarily always the case. It seemed to support the view that it may be possible in practice for children under 15 to genuinely consent to their recruitment. It thus suggested that the distinction between conscription and enlistment in the Statute is actually relevant.

On the other hand, the Chamber also declared that "the consent of a child to his or her recruitment does not provide an accused with a valid defence" (para 617).[40] The Chamber seemed to refer here to recruitment taken as a whole, irrespective of the two subcategories mentioned in Article 8(2)(b)(vii). This statement indicates that even though consent may be used in a specific case as a valid defense for the crime of conscription, as the lack of agreement is a constitutive part of the offense,[41]

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[37] OP-CAC, Article 4.

[38] The nature of this prohibition, whether legally binding or not under the OP-CAC, has been debated. See Vité 2011, pp. 27–28.

[39] For further details on the OP-CAC, see Vandewiele 2006.

[40] This is also the position adopted by the Special Court for Sierra Leone. See for instance *Fofana and Kondewa*, SCSL-04-14-A, Appeals Chamber, 28 May 2008, para 140.

[41] For an interesting discussion on this point, see Ambos 2012, pp. 134–136.

those responsible for the incorporation of children into armed forces or groups would have to be prosecuted and punished anyway for enlistment.[42] The distinction based on the consent of the child thus does not appear to be relevant for the purpose of the judgment on the merits. It is significant in this regard that the Trial Chamber did not differentiate between conscription and enlistment when examining the facts of the case (para 759). It declared that the difference may be taken into consideration only at the following stage of the procedure, i.e., when determining the sentence and reparations (para 617).[43] The Trial Chamber therefore followed a more nuanced approach than the experts. It considered that free consent to recruitment by children under 15 is actually possible, although irrelevant in deciding whether the accused has committed a crime under Article 8(2)(e)(vii).

4.3.1.2 "Conscripting or Enlisting" Versus "Using to Participate Actively in Hostilities"

After emphasizing the close connection between the first two key concepts of Article 8(2)(e)(vii), the Trial Chamber examined the relation between these concepts and a third, namely the use of children under 15 to participate actively in hostilities. More precisely, the Chamber raised the question of whether the three offenses are characterized by a common purpose, i.e., the active participation of children in hostilities. It noted that the Rome Statute is not clear in this regard, as the last part of Article 8(2)(e)(vii) ("to participate actively in hostilities") could be interpreted as relating either to the three notions as a whole or to the last one only ("use"). Choosing the first interpretation, as suggested by the defense,[44] would considerably restrict the scope of application of the provision. In practice, children are very often recruited for purposes other than actual involvement in combat. The Trial Chamber suggested however, that the Elements of Crimes provides further guidance in this regard, as they draw a clearer separation between conscripting and

[42] See Graf 2012, p. 956.

[43] In its decision on the sentence of 10 July 2012, the Trial Chamber did not elaborate on this question (Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo,* Decision on sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012). It simply indicated that criteria to assess the gravity of the crimes that were committed and thus to determine the sentence include "the nature of the unlawful behaviour and the means employed to execute the crime" (para 44). On this basis, Thomas Lubanga received different sentences for the crimes of conscripting and enlisting children under 15, respectively 13 and 12 years' imprisonment. In this gradation, the use of these children to participate actively in hostilities was considered the most serious crime and the related sentence was fixed at 14 years' imprisonment (para 98). These differences in sentencing were however criticized by Judge Odio Benito in her dissenting opinion annexed to the decision of 10 July 2012 (paras 24–27).

[44] The defense defines enlistment as "integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in the hostilities on behalf of the group" (ICC-01/04-01/06-2773-RED-tENG, para 34).

enlisting on the one hand and using children to participate actively in hostilities on the other. The first two offences are mentioned without further specification regarding their purpose, while active participation in hostilities is presented as a constitutive element of the third one only. The Chamber therefore concluded that "the status of a child under 15 who has been enlisted or conscripted is independent of any later period when he or she may have been 'used' to participate actively in hostilities, particularly given the variety of tasks that he or she may subsequently be required to undertake. Although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the Rome Statute" (para 609, see also para 620).[45] While the conclusion reached by the Trial Chamber is correct, the added value of resorting to the Elements of Crimes in this respect is not obvious. This instrument simply repeats what is already clear in the Rome Statute. The latter separates the different offences by using the word "or", as explained by the Chamber itself in the beginning of its reasoning.[46] The argument could therefore have been based on the plain wording of the Statute.

The Trial Chamber's conclusion, however, is extremely important for two main reasons. First it avoids any loopholes in the legal protection of children under 15 against conscription or enlistment. It ensures that all forms of recruitment can actually be prosecuted, whatever the purpose of the incorporation of the children into military structures. This position is in line with recent developments in international law related to the prevention of this phenomenon. A comprehensive approach to recruitment is followed most notably in the *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris Principles 2007). The use of the word "associated" in this instrument is intended to encompass all possible reasons for which children are integrated into armed forces or groups in practice. The Paris Principles apply to all children (in this case "any person less than 18 years of age in accordance with the Convention on the Rights of the Child"[47]) who have been recruited or used "in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".[48] Even though the Trial Chamber does not use the notion of "association" with armed forces or groups in its judgment,[49] its understanding of conscription and enlistment mirrors the definition given in the Paris Principles.[50]

[45] See Graf 2012, p. 959.

[46] On the same line, see Ambos 2012, p. 133.

[47] Paris Principles, para 2.0.

[48] Ibid., para 2.1.

[49] The Trial Chamber discusses the notion of association "with armed conflict" only (para 606).

[50] The Trial Chamber does not however answer the question whether recruitment for sexual purpose is included in Article 8(2)(e)(vii) of the Statute. Under the Paris Principles recruitment for such purpose is explicitly considered a form of "association" with armed forces or groups covered by the scope of application of this instrument.

The second reason that the Trial Chamber's interpretation is so important in practice is related to the third crime mentioned in Article 8(2)(e)(vii). The Chamber explains that the prohibition of the "use" of children for their active participation in hostilities does not require their previous conscription or enlistment (para 620). This means that seeking support from "civilians" under 15, i.e., children who are not members of armed forces or groups, for combat operations may amount to a war crime under Article 8(2)(e)(vii) of the Rome Statute. This happens in practice for instance when a boy or a girl living in the area of the hostilities is required, with or without coercion, to provide intelligence to the belligerents.

Thus, the recognition that both forms of recruitment on the one hand, and the "use" of children on the other, are separate offences ensures maximum protection for children against any form of involvement in military activities. This includes protection against recruitment for purposes other than combat, as well as against active participation in hostilities without previous incorporation into armed forces or groups.

4.3.2 Using Children to Participate Actively in Hostilities

The need to ensure the most comprehensive protection possible for children involved in armed conflict is also reflected in the reasoning that the Trial Chamber developed concerning the third offence of Article 8(2)(e)(vii) of the Rome Statute. The Chamber stressed that the crime of using children to participate actively in hostilities encompasses a range of activities, which are not limited to involvement in actual fighting. Quoting the *travaux préparatoires* of the Rome Statute, the Trial Chamber confirmed that "[t]he words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities *linked* to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover *activities clearly unrelated to the hostilities* such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation" (emphasis added by the Trial Chamber).[51]

Thus, according to the Trial Chamber, "active participation in hostilities" for the purpose of Article 8(2)(e)(vii) is an intermediate notion between two other categories. On the one hand, it is broader than "direct participation in hostilities", as it includes some activities, which might be characterized as "indirect" participation in hostilities (Sect. 4.3.2.1). On the other hand, it does not include forms of

[51] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 21, footnote 12.

support to armed forces or groups, which are "clearly unrelated to the hostilities" (Sect. 4.3.2.2).

4.3.2.1 "Active" Versus "Direct" Participation in Hostilities

The Trial Chamber stressed in its judgment that "[t]he use of the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation' (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under 15 actively to participate in hostilities" (para 627). The Chamber further supported this statement by arguing that the notion of direct participation in hostilities is basically limited to functions "on the front line" (para 628).

This position, however, does not take into account that both the notions of active and direct participation in hostilities are not only used in relation to the involvement of children in military operations, but have broader implications both under international humanitarian law and criminal law. Common Article 3 to the Geneva Conventions of 1949 provides that all "[p]ersons taking no *active part in the hostilities*" (emphasis added) must be treated humanely in all circumstances. Similarly, the personal scope of application of Article 8(2)(c) of the Rome Statute covers "persons taking no active part in the hostilities". In addition, both treaty and customary international humanitarian law provide that civilians are protected against attack during armed conflict "unless and for such time as they take *a direct part in hostilities*" (emphasis added).[52] In the same way, the war crimes listed in the Rome Statute include, both in relation to international and non-international armed conflicts, "[i]ntentionally directing attacks against the civilian population as such or against *individual civilians not taking direct part in hostilities*" (emphasis added) (Article 8(2)(b)(i) and 8(2)(e)(i)).

Therefore, it is surprising that the Trial Chamber chose not to take these provisions and related practice into account, or even to mention them, in giving its own interpretation of the notions of active and direct participation in hostilities within the framework of Article 8(2)(e)(vii) of the Rome Statute. This is particularly surprising as the "chapeau" to this provision describes the crimes thereafter listed as "serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*" (emphasis added). This suggests that the Trial Chamber should have at least discussed this framework before proposing its own interpretation of the provision. This would have been particularly welcome, as its interpretation partly differs from the conclusions of recent in-depth research and expert discussions on these notions in the framework of the law governing the conduct of hostilities in armed conflict.

[52] API, Article 51(3); APII, Article 13(3); Henckaerts and Doswald-Beck 2005, r 6.

Relevant work on this issue includes, most notably, the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Interpretive Guidance) issued by the ICRC in 2009.[53] This document draws on a variety of sources, such as the *travaux préparatoires* of relevant treaties, international jurisprudence, military manuals, and legal doctrine. In addition, it is based on discussions held during a series of meetings involving the participation of experts from different backgrounds.[54] It expresses, however, the ICRC's view on this topic and does not necessarily reflect the unanimous views of participants.

If examined in the light of the ICRC's Interpretive Guidance, the Trial Chamber's reasoning is based at once on a broad definition of the notion of active participation in hostilities, as well as a narrow understanding of the notion of direct participation in hostilities. This interpretation may have undesirable consequences. It carries first the risk of a loss of protection for the children whose situation is addressed in Article 8(2)(e)(vii). Second, it may allow the prosecution, under the Rome Statute, of acts which are not prohibited under international humanitarian law.

It is, of course, not possible to give a comprehensive account of the legal argumentation and conclusions contained in the Interpretative Guidance in the limited framework of this article. Suffice it to stress first that this document recalls that persons "taking no active part in the hostilities," in the sense of Article 3 common to the Geneva Conventions of 1949, are mentioned in the equally authentic French text of the same provision as persons "qui ne participent pas *directement* aux hostilities" (emphasis added). This suggests that the terms "direct" and "active" were intended to have the same meaning at the time of the adoption of the Conventions. The ICRC confirms that these terms "refer to the same quality and degree of individual participation in hostilities".[55]

The broader understanding adopted by the Trial Chamber for the notion of "active" participation in hostilities is thus confusing and may potentially have a negative impact on the children that Article 8(2)(e)(vii) intends to protect. This interpretation may be used to justify extending the circle of persons who can be the object of legitimate attacks under international humanitarian law.[56] In addition, it also tends to limit the number of individuals protected by Article 3 common to the Geneva Conventions and Article 8(2)(c) of the Rome Statute, as these provisions apply to persons taking "no" active part in the hostilities.[57] The Special Court for

[53] Melzer Melzer 2009.

[54] Ibid., p. 9.

[55] Ibid., p. 43. See also M. Happold, who reaches the same conclusion on the basis of Resolution 2675 of the UN General Assembly and jurisprudence of the ICTY and ICTR. Happold 2009, pp. 594–595.

[56] Graf 2012, p. 963.

[57] Urban 2012.

Sierra Leone had already remarked in this regard that "an overly expansive definition of active participation in hostilities would be inappropriate as its consequence would be that children associated with armed groups lose their protected status as persons *hors de combat* under the law of armed conflict".[58]

Additionally, according to the Interpretive Guidance, an act amounting to "direct participation in hostilities" is composed of three cumulative elements: a) it must be likely to reach a certain threshold of harm, b) there must be "a relationship of direct causation between the act and the expected harm", and c) it must be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another" (belligerent nexus).[59] With regard to the second requirement (direct causation), the ICRC further explains that the expected harm must be brought about "in one causal step".[60] Such a relationship of direct causation is present not only in cases where the act itself is intended to reach the required threshold of harm, but also when it is an integral part of a coordinated military operation designed to reach this threshold.[61] This means that the notion of "direct participation in hostilities" is not limited solely to the use of weapons during combat operations. It also includes conduct which, taken in isolation, would not meet the required threshold of harm, but which, in conjunction with other acts, would contribute to reaching that threshold.[62]

As a consequence, the definition adopted by the ICRC is broader than the one used by the Trial Chamber. Some acts amounting to "direct participation in hostilities" under the *Interpretive Guidance* would not be considered as such by the Chamber. Conduct comprising acts such as scouting, spying, or sabotage, which are mentioned as "active participation in military activities *linked* to combat" in the *Lubanga* judgment, would certainly amount to "direct participation in hostilities" under the criteria proposed by the ICRC.[63]

Without further explanation, the position adopted by the Trial Chamber on this point raises a number of questions. It is not clear whether this position suggests that a legal concept could be interpreted in different ways when used in relation to distinct provisions of the same legal instrument. If so, this would imply that the International Criminal Court would have to give a certain meaning to the notion of "direct participation in hostilities" to interpret Articles 8(2)(e)(vii) and 8(2)(b)(xxvi) (use of children under 15) on the one hand, and a separate distinct

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[58] Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon, Gbao (RUF Case)*, SCSL-04-15-T, Judgment, Trial Chamber I, 2 March 2009, para 1723.

[59] Melzer 2009, pp. 46–64.

[60] Ibid., p. 53.

[61] Ibid., pp. 51–55.

[62] Ibid., pp. 54–55. Example of such conduct include "the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation"; see Melzer Meler 2009, p. 55.

[63] See Urban 2012.

meaning to the same notion as it appears in Articles 8(2)(b)(i) and 8(2)(e)(i) (principle of distinction in the conduct of hostilities) on the other. The alternative, i.e., a single, consistent understanding of the notion of "direct participation in hostilities" in the framework of the Rome Statute, would be problematic. It would confirm the existence of different interpretations of this notion under international criminal law and international humanitarian law respectively. This would have unwelcome practical consequences. Combatants targeting civilians would risk being prosecuted and sentenced by the International Criminal Court, in application of Articles 8(2)(b)(i) or 8(2)(e)(i) of the Statute, while such conduct would not necessarily be prohibited under international humanitarian law. This would happen each time that acts carried out by these civilians would be considered as amounting to "direct participation in hostilities" under international humanitarian law, but not under the Rome Statute.[64]

These uncertainties are unfortunate, especially because comparing "active" and "direct" participation in hostilities was not necessary for the purposes of the judgment. It would have been sufficient to clarify the distinction between acts that amount to "active" participation in hostilities, and those that do not, i.e. those that are "clearly unrelated to the hostilities". In other words, it would have been sufficient to focus the analysis on the threshold of application of the third offense mentioned in Article 8(2)(e)(ii) of the Rome Statute.

4.3.2.2 "Active Participation in Hostilities" Versus "Activities Clearly Unrelated to the Hostilities"

With respect to this threshold of application, the Trial Chamber noted that the "decisive factor […] in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target" (para 628). The Chamber thus identified the following two "combined factors" to determine when the use of a child under fifteen amounts to a war crime under the Rome Statute: a) the child's support to combatants; b) the "level of consequential risk" the child is exposed to (para 628). The Chamber further explained in this regard that assessments of particular situations, informed by these two criteria, must be made "on a case-by-case basis" (para 628). The use of these two combined factors is in line with the view that the notion of "active participation in hostilities" is not limited to front line functions. These factors allow for a broad definition of this notion, as they potentially include activities that are rather remotely linked to the hostilities. One could therefore ask whether the Trial Chamber perhaps went too far down this path.

With regard to the first factor, the concept of "support" seems so broad that it may include almost all forms of contact that a child may have with armed forces or

[64] Ibid.

groups. The Trial Chamber recognized that, in practice children "are involved in a myriad of roles that support combatants" (para 628). Activities carried out in this regard do not need to be likely to reach a certain threshold of harm, as would be the case with the notion of "direct participation in hostilities".[65] Moreover, the Trial Chamber did not seek to define any particular causal relationship between such activities and actual combat operations. Neither did it require that the children concerned have any particular intention to play, or even awareness of playing, a role in the hostilities. "Support to combatants" is sufficient, regardless of the ultimate purpose of the concerned activities. Therefore the first criterion used by the Trial Chamber does not help to differentiate between activities amounting to "active participation in hostilities" and those that are "clearly unrelated to the hostilities".

The second factor proposed by the Trial Chamber provides further guidance in this regard. It identifies the level of risk to the children resulting from the support to combatants as the relevant link between the use of children and the hostilities. It is not clear, however, how such risk must be assessed in practice or, in the words of the Chamber, how to determine when a child is exposed to "real danger as a potential target" (para 628). It may be argued first that children taking an active part in hostilities should include at the very least those that are legitimate military targets under international humanitarian law. These are members of regular State armed forces (with the exception however of medical and religious personnel)[66] or of other armed groups or units belonging to the State, as well as members of dissident armed forces or other organized armed groups.[67] In addition, as previously mentioned, legitimate military targets also include civilians taking a direct part in hostilities, for the duration of such participation only.

Second, the Trial Chamber's reference to the "level of consequential risk" also suggests that "active participation in hostilities" includes persons who cannot be considered legitimate targets under international humanitarian law, but who are in such a situation as to make them potential victims of an attack in practice. This could include a category of children who are not members of State armed forces, dissident armed forces or other organized armed groups, but who are in another way "associated with" such forces or groups. Their use would constitute a war crime each time that they were exposed to a certain level of risk on the basis of criteria that must still be specified. One relevant criterion in this regard could be, for instance, the level of proximity to military objectives. The use of a child under

[65] Melzer 2009, p. 47.

[66] GCI, Article 24-26; GCII, Article 36; GCIV, Article 20; API, Article 15; Henckaerts and Doswald-Beck 2005, r 3 and 25.

[67] According to the ICRC, individual membership in an organized armed group other than dissident armed forces includes any person assuming "a continuous function for the group involving his or her direct participation in hostilities" ("continuous combat function"); see Melzer 2009, pp. 21–25, 32–34.

15 would amount to a war crime under the Rome Statute each time that such use occurs in the vicinity of a military objective.[68]

It is not obvious, however, that Article 8(2)(e)(vii) of the Rome Statute should really apply to this last category. Relevant conduct may be so remotely linked to the hostilities that it may hardly be categorized as "active participation". The reason for this is that the second factor used by the Trial Chamber does not focus on the nature of the activities carried out by the children, but rather on the context in which these activities take place or, in other words, on factual elements resulting in the risk that the children are exposed to real danger as potential targets. The definition of "active participation in hostilities" therefore depends on the circumstances surrounding every single situation, opening the notion up to include almost any form of support given to armed forces or groups.

The Chamber itself seems to be hesitant in this regard. Its approach based on the two factors discussed above appears to be at odds with the categories presented in the beginning of its analysis, namely "direction participation in hostilities", "active participation in hostilities", and "activities clearly unrelated to the hostilities". Using these factors means that it is not possible to identify, in the abstract, activities belonging to the third category. Yet, the Trial Chamber gives examples of such activities, namely "food deliveries to an airbase or the use of domestic staff in an officer's married accommodation". Following the logic presented with regard to the two factors, such activities could, however, amount to "active participation in hostilities" depending on the resulting "level of consequential risk" involved. These activities may indeed take place close to combat areas, where risks of being targeted are high.

The lack of clarity on this point is similarly evident in elements of the Trial Chamber's analysis of the facts of the case. With regard to domestic work for instance, the Chamber first made a clear reference to the two combined factors. It stated that domestic work amounted to a war crime under the Rome Statute "when the support provided by the girl exposed her to danger by becoming a potential target" (para 882). However, in the same paragraph, the Trial Chamber also emphasized that the girls concerned were used for domestic work, "in addition to the other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and acting as bodyguards". It is therefore unclear whether the Trial Chamber considered that domestic work as such might amount to "active participation in hostilities" if it involved risks of being targeted, or whether this is the case in this instance because the girls were also involved in other activities acquiring the required threshold of danger.[69]

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[68] See Article 58(a) of API, which requires Parties to international armed conflicts to endeavor to remove civilians under their control "from the vicinity of military objectives". See also Henckaerts and Doswald-Beck 2005, r 24.

[69] The same question was raised regarding the use of children for sexual purposes, but the Trial Chamber did not take a position on this issue, stressing that this practice was not included in the decision on the confirmation of charges (para 629). Judge Odio Benito however, in her separate and dissenting opinion, suggested that sexual violence should have been included in a

4.4 Conclusion

The *Lubanga* judgment was an occasion for the International Criminal Court to take a position on a number of crucial issues, thus providing legal guidance for its future work and for the development of international criminal law. With respect to some of these issues, the Trial Chamber drew on the well-established practice of other international jurisdictions, most notably the ICTY. It endorsed, for instance, the criteria and reasoning developed by the Tribunal to define non-international armed conflict, and to determine the point at which such a conflict could become international owing to foreign intervention. Thus, a significant contribution of the *Lubanga* judgment consists of importing such previous practice into the system of the Rome Statute.

The judgment is also important because the Trial Chamber settled certain issues that have recently been debated. It reaffirmed that the fundamental distinction between international and non-international armed conflicts remains an essential feature of both international criminal and humanitarian law. It also indicated that Articles 8(2)(d) and 8(2)(f) of the Rome Statute do not define different material scopes of application despite their differences in wording. The expression "protracted armed conflict" in Article 8(2)(f) therefore does not create a higher threshold of application for that provision.

The most innovative part of the judgment relates to the involvement of children in armed conflicts. The Trial Chamber clarified fundamental concepts and proposed new criteria for the application of the relevant provisions of the Rome Statute. It adopted a broad definition of the notions of conscription and enlistment, stressing that the purpose of the integration of children into armed forces or groups is not relevant. It thus followed an approach that is legally correct and certainly abides by the principle of the best interests of the child. On the other hand, its reasoning concerning the war crime of using children under 15 to participate actively in hostilities is subject to more controversy. This reasoning ignores recent key developments related to the notion of participation in hostilities (both active and direct) under international humanitarian law and may potentially weaken the protection enjoyed by these children under existing rules. Moreover, the two combined factors adopted by the Chamber do not appear to be precise enough to really facilitate the identification of a clear threshold of application of the relevant notion of Article 8(2)(e)(vii) of the Rome Statute, and may therefore undermine the predictability of this rule.

(Footnote 69 continued)
comprehensive legal definition of recruitment and active participation of children in hostilities, and as such should have been addressed in the *Lubanga* Judgment (paras 6–8). On this specific issue, see Aptel 2012; Graf 2012, pp. 965–966.

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