Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04-01/06**

Date: **7 December 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Presiding Judge**
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public Document

Defence Brief on Matters the Defence Raised During the Confirmation Hearing - Legal Observations

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1. Pursuant to the Decision of the Pre-Trial Chamber,[1] the Defence hereby files its brief. The first section, on questions of law, is in English, while the Defence's submissions on the evidence produced at the confirmation hearing is in French.

I – Applicable law

A – The principle of legality

2. As stated during the confirmation hearing on 24 November 2006, the provisions of the Rome Statute must be construed in light of peremptory norms of international law, including the principle of legality, which mandates that all laws must comply with the requirements of specificity, certainty, accessibility and foreseeability.[2] Indeed, "at least since Fuller, it cannot be denied that laws must be general, public, prospective, clear and consistent".[3]
3. The Defence acknowledges that the very nature of international law is such that it cannot remain static. However, the Defence submits that there is a clear distinction between progressive development of the law to codify conduct which is recognised as entailing individual criminal responsibility, and promulgating new laws which do not correlate to conduct which a person could have foreseen would entail individual criminal responsibility.[4]
4. As stated during the confirmation hearing, the ad hoc Tribunals have transposed the requirements of legality to the international plane, and in so doing, have focused on whether the criminality of the underlying conduct of the offence was accessible and foreseeable to the defendant.[5] In this regard, the Defence submits that there is a distinction between whether the Court has jurisdiction *in abstracto* to prosecute a certain offence under the Statute, and the obligation to ascertain whether the requirements of legality are

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[1] Decision on the schedule and conduct of the confirmation hearing, 7 November ICC-01/04-01/06-678

[2] See pages 11 – 12, citing Prosecutor v. Vasiljevic, Judgement dated 29 November 2002 at para 193, http://www.un.org/icty/vasiljevic/trialc/judgement/index.htm, and Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10 ("Hostage case"), Vol 11, 1240. See also Prosecutor v. Ojdanic, Appeals Chamber decision of 21 May 2003 para 37 – 38.

[3] G Fletcher ,and J Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' Journal of International Criminal Justice, 3, (2005) 539-561 at footnote 2. See article 22(2) of the Rome Statute. See Veeber v. Estonia, , Application no. 45771/99 Judgment of 21 January 2003 at para 31 http://worldlii.org/eu/cases/ECHR/2003/37.htm ; Kokkinakis v. Greece 52 Series A No. 260-A para 40 http://www.worldlii.org/eu/cases/ECHR/1993/20.html

[4] See M. Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of the Law?' Journal of International Criminal Justice 2 (2004) 1007-1017 http://jicj.oxfordjournals.org/cgi/reprint/2/4/1007.pdf

[5] See pages 12-13 of the Transcript (Unless otherwise stated all transcript references in Sections A & B refer to 24 November 2006), citing Prosecutor v. Furundzija Trial Judgement 10 December 1998 http://www.un.org/icty/furundzija/trialc2/judgement/index.htm, and ICTR case law, which relied on Rwandan law to determine scope of positive duties -.Prosecutor v. Mpambara Judgement of 11 September 2006, "An accused must know the scope of his obligation to be in a position to dispute his alleged default" (para 32). See also Prosecutor v. Hadzihasanovic, decision of 12 November 2002: the "emphasis on conduct rather than on the specific description of the offence, in the substantive criminal law is of primary relevance" (para 62) http://www.un.org/icty/hadzihas/trialc/decision-e/021112.pdf

met in the particular circumstances of the person charged. In this regard, the Defence observes that the Secretary-General recognised the overriding importance of the principle of legality in its report setting out the proposed text of the Statute of the Special Court for Sierra Leone.[6] In terms of the proposed offence of recruitment of child soldiers, the Secretary-General observed that "it is far less clear whether it is customarily recognised as a war crime entailing the individual responsibility of the accused".[7] The Secretary-General therefore eschewed a more administrative definition of "putting ones name on a list and formal entry into the armed forces" in favour of defining the contours of the offence in a manner which accorded to conduct which was clearly criminalised in Sierra Leone – i.e. abduction, forced recruitment, and (not or) transformation of the child into a child combatant.

5. The Defence submits that the fact that the Security Council subsequently decided to base the text of the Statute of the Special Court on the corresponding provision in the Rome Statute does not detract from the cogency of the Secretary-General's view regarding the contours of the offence. Notably, the majority decision of the Appeals Chamber merely pronounced on the threshold question as to whether the offence in question existed under customary international law,[8] and failed to address whether the principle of legality required them to define the contours of the offence as set out in the Statute, in a manner which ensures that the underlying conduct was foreseeably criminal to the accused in question - thus leaving the issue open to future judicial determination.[9]
6. The Defence therefore submits that in accordance with the above principles, it is necessary for the Chamber to ascertain firstly, whether the offence set out under article 8(2)(e)(vii) was sufficiently accessible to Thomas Lubanga Dyilo. Secondly, in defining the contours of the offence set out under article 8(2)(e)(vii), the Chamber should construe it strictly and precisely, in a manner which is consistent with the requirement that it must have been foreseeable to Thomas Lubanga Dyilo that the underlying conduct of the offence could have entailed individual criminal responsibility.

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[6] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 4 October 2000 s/2000/915

[7] At paragraph 18.

[8] Decision on Interlocutory Appeal Concerning Lack of Jurisdiction (Child Soldiers), Prosecutor v. Norman, 28 May 2004, http://www.sc-sl.org/CDF-decisions.html. In accordance with the Rules of Procedure and Evidence, this decision was decided by the Appeals Chamber sitting with only 4 judges, in first instance. It was also subject to an extremely strong dissenting opinion by Judge Robertson.

[9] In this regard, the defence observes that due to political pressure, the Statute of the Special Court allows for the imposition of criminal responsibility for children under the age of 15 years old (see para. 35 of the SG's Report ibid). However, notwithstanding the existence of such a provision, the Prosecution has not issued any indictments for persons under the age of 15 years. Thus, it is clear that the bare text of the Statute may not always correspond to prosecutorial and judicial proceedings before the Court.

7. As stated during the confirmation hearing, during the time period set out in the charges, the area of Ituri was governed by various political and military formations, and during some time periods, the area was controlled and administered by forces linked to foreign governments.[10] As such, the applicability of international treaties ratified by the interim government in Kinshasa to the area in Ituri was not certain, nor were such laws accessible to persons in Ituri.
8. In the context of the form of the charging document, the Defence opined that the involvement of foreign elements, such as the UPDF, could transform the conflict in Ituri into an international armed conflict.[11] This possibility was recognised by the Pre-Trial Chamber in its decision on the issuance of the arrest warrant[12] and during the hearing of 2 February 2006,[13] in which the Chamber expressly referred to the findings of the International Court of Justice in the case brought by the DRC against Uganda.
9. The findings of the International Court of Justice are extremely relevant to the issue at hand.[14] The Court found, based on the submissions of the DRC, that there was sufficient evidence "to prove that Uganda established and exercised authority in Ituri (a new province created in June 1999 by the commander of the Ugandan forces in the DRC) as an occupying Power."[15] The Court thus concluded that Uganda's influence continued until its withdrawal in 2 June 2003.The Court is also seised of a similar case involving the presence of Rwanda in the area, but has yet to issue a judgment on the merits. In determining the law which would apply to the hostilities during the occupation, the Court only relied on treaties which had been ratified by both parties or which could clearly be considered to be representative of customary international law.[16]
10. Under article 64 of the Fourth Geneva Convention,[17] the "penal laws of the occupied territory shall remain in force". The Defence submits that this implies that the law in force at the time of the commencement of the occupation remain in force – not laws adopted subsequently. In addition, under the Hague regulations pertaining to the laws of occupation, the occupying power is only obliged to enforce those laws which were in

[10] P. 15 of the Transcript
[11] P. 66 Transcript
[12] At para 85.
[13] P. 30 Transcript
[14] Judgement of 19 December 2005, http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm
[15] Concretely, the DRC had submitted before the Court that "Acts of administration by Uganda of this province continued until the withdrawal of Ugandan troops. In support of this contention, the DRC states that Colonel Muzoora, of the UPDF, exercised *de facto* the duties of governor of the province between January and May 2001, and that "at least two of the five governors who succeeded Ms Lotsove up until 2003 were relieved of their duties by the Ugandan military authorities, sometimes under threat of force". The DRC claims that the Ugandan authorities were directly involved "in the political life of the occupied regions" and, citing the Ugandan daily newspaper *New Vision*, that "Uganda has even gone so far as to supervise local elections" para 168.
[16] See para 217 of the Judgement.
[17] http://www.unhchr.ch/html/menu3/b/92.htm

force prior to the commencement of the occupation. In addition, any penal laws enacted by the occupying power during the occupation only remain in force after the occupation if expressly ratified by the returning Sovereign authority.[18]

11. In this regard, in an analogous situation, the United Nations Mission in Kosovo, which is charged under Chapter VII with the administration of the territory of Kosovo, has held that although Kosovo still falls within the sovereign territory of Serbia, the applicable law in Kosovo shall be the law in force prior to Kosovo's unconstitutional annexation by Serbia in 22 March 1989, and such regulations and laws which were subsequently promulgated by the Special Representative of the Secretary-General. As such, any laws issued by Serbia would have no legal effect vis à vis the legal obligations of persons in Kosovo.[19] Similarly, the United Nations Mission which was appointed to administer East Timor prior to its independence was authorised to enact any new laws or suspend/repeal existing laws: it was thus implied that any laws enacted by Indonesia in the interim would not have any effect.[20]
12. In terms of the practice within the DRC as regards international treaties signed by various parties during the conflict, the Defence refers to resolution No. DIC/CEF/04 which held that any treaties pertaining to economic resources which were ratified during the conflicts of 1996-97 and 1998 should be submitted to the Parliament to assess their continued validity. [21]
13. During the time period set out in the charging document, the area of Ituri could be considered to have fallen under the control of Uganda, Rwanda or MONUC at various times. The Defence further submits that the power of the government in Kinshasa to represent the DRC was only recognised with the promulgation of the Transitional Constitution on 4 April 2003.

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[18] Y. Dinstein, Fall 2004, 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding' http://www.hpcr.org/pdfs/OccasionalPaper1.pdf

[19] Article 1.1 'On the Law Applicable in Kosovo' UNMIK/REG/1999/24 12 December 1999, http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_24.htm

[20] S/RES/1272 (1999)25 October 1999 http://daccessdds.un.org/doc/UNDOC/GEN/N99/312/77/PDF/N9931277.pdf?OpenElement. Similarly, as regards the situation of possible conflicts between the laws of East and West Germany, the Unification Treaty (*Einigungsvertrag*) of 31 August 1990, taken together with the Unification Treaty Act (*Einigungsvertragsgesetz*) of 23 September 1990, provides, in the transitional provisions of the Criminal Code (sections 315 to 315(c) of the Introductory Act to the Criminal Code (*Einführungsgesetz in das Strafgesetzbuch*)), that the applicable law is in principle the law of the place where an offence was committed (*Tatortrecht*). That means that, for acts committed by citizens of the GDR inside the territory of the GDR, the applicable law is in principle that of the GDR. Pursuant to Article 2 § 3 of the Criminal Code, the law of the FRG is applicable only if it is more lenient than GDR law – see Streletz, Kessler and Krenz v. Germany - 34044/96;35532/97;44801/98 [2001] ECHR 230 (22 March 2001) http://www.worldlii.org/eu/cases/ECHR/2001/230.html

[21] This resolution, which was signed in Sun City in April 2002, was attached to the Final Act concerning Inter-Congolese dialogue http://www.reliefweb.int/library/documents/2003/ic-drc-2apr.pdf

14. The Luanda peace accords, signed in September 2002, recognise that at that time, Ituri was not subject to the laws promulgated in Kinshasa, and accordingly, that after the withdrawal of the Ugandan troops, it would be necessary to establish a mechanism to determine the administrative, political and legal structure of the area.[22] The terms of the peace accords also recognise that the government in Kinshasa did not consider that it exercised sovereignty over the area in Ituri at that time.[23]
15. In this connection, the Rome Statute only came into effect for Uganda on 1 September 2002,[24] and Rwanda has not ratified the Rome Statute. Article 65 of the Fourth Geneva Convention further provides that if the Occupying Power wishes to introduce new penal provisions, they shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The Prosecution has not plead or provided any evidence that Uganda publicised its ratification of the Rome Statute throughout the occupied territory, or promulgated its provisions in the language of the inhabitants.
16. The Defence refers to its submissions at the confirmation hearing to the effect that even after the cessation of the occupation, the DRC government did not make any efforts to bring to the attention of the persons in Ituri the fact that in the interim, it had ratified laws pertaining to the conscription and enlistment of child soldiers, which entail individual criminal responsibility.[25] In this regard, the Prosecution's reliance on an alleged meeting between a law student and Thomas Lubanga Dyilo in late 2003 merely confirms that prior to this time, Thomas Lubanga Dyilo was not familiar with the provisions of the Rome Statute.
17. In terms of the approach of MONUC and the United Nations, the Defence refers to its submissions regarding the deficiencies in the information provided by Ms. Peduto, in

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[22] Agreement Between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations Between the Two Countries.
http://www.usip.org/library/pa/drc_uganda/drc_uganda_09062002.html.

[23] Article 2(1) of the Peace Accord refers to the need to "work towards the restoration of the dignity and sovereignty of the DRC as well as address Uganda's security concerns". See also the "Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo: Inter-Congolese Dialogue - Political negotiations on the peace process and on transition in the DRC", signed in Pretoria on 16 December 2002, which sought to prospectively legitimise government institutions.
http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII-65G8B8?OpenDocument

[24] Uganda deposited its instrument of ratification on 14 June 2002. In accordance with article 126 (2) of the Rome Statute "For each State ratifying, accepting, approving , or acceding to the Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession."

[25] See pages 14-15 of the Transcript.

particular in connection with Security Council resolution 1460.[26] Regarding the emphasis in SCR 1460 on the individual responsibility for conscription into national armed forces, the Defence submits that this should be read in connection with the view of the United Nations and the ICJ that the conflict in Ituri could be characterised as an international armed conflict. As observed during the hearing, article 8(2)(b)(xxvi), which is the corresponding provision for an international armed conflict, limits responsibility to national armed forces.[27]

18. The Defence observes that the offences set out under article 8(2)(e)(vii) are subject to the caveat that they exist within the "established framework of international law".[28] The Defence thus submits that the contours of the criminal offence should be defined in a manner which clearly demarcates between conduct which entails criminal responsibility, and conduct which is permitted under international and national law.[29]
19. In this connection, the Defence submits that a clear distinction should be made between obligations under human rights law, and conduct entailing individual criminal responsibility, and responsibility which is properly attributed to a State. In terms of the latter, it has been observed that "during an ICC criminal prosecution only the individual will be punished. The defendant alone will serve the jail time. It is for this reason that we urge fidelity to basic principles of criminal law that ensure that defendants are punished only for crimes that they are personally responsible for, as opposed to crimes of States. For these crimes, the State as a whole bears ultimate responsibility".[30]
20. The Defence submits that the primary burden regarding the conscription and use of child soldiers falls on the State to "take all feasible measures to prevent such recruitment and

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[26] Pages 26 and 27 of the Transcript.

[27] "It would appear that it is only recruitment into national armed forces that is criminal in international armed conflicts. Excluded from the ambit of this offence are those persons who conscript of enlist children under 15 years of age into other military groups participation in such conflicts: guerrillas, resistance groups, and all other forms of 'private armies'." M. Happold, Child Soldiers in International Law (Manchester University Press 2005) at pp 134-135.

[28] See M. Bothe, "War Crimes" to the effect that the offence referring to child soldiers was a "new crime", the terms of which "go[ ] beyond" article 77(2) of Protocol I, and which includes a *mens rea* standard which "is not in conformity with Article 30 of the Statute" (p. 416) The Rome Statute of the International Criminal Court Vol. 1 (Cassese, Gaeta and Jones eds, Oxford University Press, 2002). As stated during the confirmation hearing, (p. 28 Transcript) several governments had reservations regarding the provision, and the United States expressed the opinion that the provision "was more a human rights than a criminal law provision" M. Happold Child Soldiers in International Law ibid p128

[29] In this regard, the Inter-American Commission, in its Report on Terrorism and Human Rights, stipulated that the criminal provisions pertaining to terrorism should be classified and described in precise and unambiguous language that narrowly defines the punishable offence, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable by other penalties. Report on Terrorism and Human Rights, OEA/ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, "Recommendations", No. 10 (a) http://www.cidh.org/Terrorism/Eng/part.s.htm

[30] G. Fletcher, and J Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' Journal of International Criminal Justice, 3, (2005) 539-561 at page 543.

use, including the adoption of legal measures necessary to prohibit and criminalize such practices."[31] The responsibility of individual actors must therefore be assessed in light of whether the State took appropriate measures to criminalise the practices in question, and all feasible measures to create a stable environment and appropriate infrastructure for the demobilisation of child soldiers.

21. Moreover, as submitted during the confirmation hearing,[32] the approach adopted by the Security Council vis à vis non State actors does not emphasise individual criminal responsibility, but focuses instead on the importance of open dialogue and progressive implementation of the demobilisation process. The emphasis on progressive implementation of demobilisation is echoed in relevant treaty provisions and reports.[33] This is logical – only States rather than individuals have the resources to properly ensure the demobilisation of children who could be traumatised and/or represent a danger to themselves and other persons.
22. In this connection, the Defence submits that failure to demobilise is not in itself part of the offence under article 8(2)(e)(vii), which is defined by the discrete acts of conscription or enlistment, or active use in hostilities. Indeed, if the offence set out under article 8(2)(e)(vii) could be comprised of the continuous offence of having child soldiers, then the second alternative limb (their active use in hostilities) would be superfluous.
23. It would also create an offence entailing strict liability. In this sense, as submitted during the hearing,[34] such a reading of the offence could be extremely deleterious to the protection of children: if the mere admission of the fact that there are child soldiers is a crime, no armed force would admit to it or seek assistance for the implementation of demobilisation programmes. It would also mean that if rebel group overthrows a government which utilises child soldiers, as the new nominal head of the government, the members of the rebel group would incur automatic criminal responsibility, in clear contravention of article 30 of the Rome Statute.
24. The Defence further submits that there is a clear distinction between the constituent elements of offences under the Rome Statute, which could be construed as continuous offences,[35] and the elements of the offence set out under article 8(2)(e)(vii), which is

[31] Art 4(2), Optional Protocol on the Use of Children in Armed Conflict, http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm
[32] Transcript pp 25-28.
[33] See ICRC commentary to the Optional Protocol to the CRC, which refers to the obligation set out therein as a "moral, as opposed to a legal, obligation under international law" D. Helle, International Review of the Red Cross 30 September 2000, No. 839, p. 797-809 http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQQE cited at p. 25 Transcript
[34] Page 28 of the Transcript
[35] See footnote 25 in the Elements of Crimes pertaining to article 7(1)(i), the enforced disappearance of persons, which express states that "the word "detained" would include a perpetrator who maintained am existing

defined in discrete terms. In this regard, the defence emphasises that article 22(2) prohibits the extension of the definition of an offence by analogy and requires any ambiguity to be construed in favour of the Defence.

25. As stated during the hearing, the defence submits that the contours of the offence should also be defined to exclude conduct which is lawful,[36] and, in light of countervailing obligations during armed conflict, conduct which would promote the best interests of the child.[37] In this regard, the Defence submits that the Prosecution's reliance on factors beyond the control of the perpetrator to argue vitiation of consent is not consistent with article 30, which stipulates that the conduct and consequences must be attributable to the perpetrator;[38] the Prosecution is also seeking to broaden the definition of the offence by analogy.[39]
26. The Defence further submits that the principle of foreseeability, in combination with the requirement that the Court only exercises jurisdiction over the most serious crimes of concern to the international community, must influence the contours of the meaning of conscription and enlistment. In this regard, the Defence submits that the act of enlistment *simplicter* does not correspond to any underlying conduct which Thomas Lubanga Dyilo could foreseeably have anticipated would entail individual criminal responsibility. The

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detention. See also the description regarding the war crime of unlawful confinement – subsection (1) "the perpetrator confined or continued to confine […]".

[36] The defence would like to utilise this opportunity to correct an incorrect citation. During the hearing, the Defence submitted that the Cape Town principles "recommend against requiring children to hand in any weapons in their possession prior to the demobilisation process" (p. 19 of Transcript). In fact, this principle is derived from a report prepared by the Special Representative of the Secretary-General on Child and Armed Conflict, which stipulates that the "eligibility criteria should be sufficiently broad and based upon the Cape Town Principles for children associated with armed forces or groups. Children should not be required to hand in weapons in order to participate in disarmament,
demobilization and reintegration programmes" (Incorporation of best practices in disarmament, demobilization and reintegration programmes for children) http://www.un.org/children/conflict/english/ddrforchildren86.html

[37] In this regard, the Defence relied *inter alia* on Art. 5 of the Optional Protocol of the CRC, which provides that "Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child."; UNICEF Report 20 November 2001 addressed to the Security Council, http://www.unicef.org/media/media_10383.html (p.20, line 12 Transcript); and T Bennett, Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising Recruitment of Child Soldiers, Dec, 1998 http://www.iss.co.za/Pubs/Monographs/No32/Ccriminalising.html (p. 20, line 18-22 Transcript).
See also pages 22 et seq. of the Transcripts regarding the definition of active participation versus direct participation. In this regard, the Defence notes that no international instruments use the term active participation with respect to the use of child soldiers in hostilities.

[38] In this connection, the defence submits that vitiation of consent by environmental factors has been employed by the ICTY in situations in which the perpetrator was responsible for the factors voiding consent. See Kunarac Appeal Judgement, 12 June 2002, at para. 132 http://www.un.org/icty/kunarac/appeal/judgement/index.htm

[39] In this regard, the Elements of Crimes clearly stipulate when consent is not a defence to an offence (see footnote 46 regarding the war crime of mutilation) or where consent can be vitiated through external factors (see footnote 51 regarding war crime of rape).

offence of enlistment is not provided for in either API or APII to the Geneva Conventions, or the Optional Protocol to the CRC.[40]

27. In framing the contours of the offence under the Special Court to comport with the requirement of legality, Judge Robertson opined that the *actus reus* would turn "on the use of physical force or threats in order to recruit children and the *mens rea* element required an intention to involve them in potentially lethal operations".[41]The Defence observes that the arrest warrants issued by Trial Chamber II in the Uganda situation also refer to enlistment "through abduction", as constituting a war crime under article 8(2)(e)(vii).[42]
28. Finally, the Defence observes that the impact that the aforementioned factors has had on the principle of legality has in fact been recognised by the Courts in the DRC. In March 2006, Jean Pierre Biyoyo from the 10th Military Region was condemned to five years' imprisonment for arbitrary arrest and illegal detention of children committed in South Kivu in 2004. Since, the offence of conscription, enlistment or use of child soldier in hostilities was not criminalised in the DRC at the time of the offence, the charges were framed to limit criminal responsibility for conduct which could be considered to entail individual criminal responsibility under the applicable law.[43]

B – Modes of liability

29. In accordance with article 67(1) of the Statute, Thomas Lubanga Dyilo has a right to be promptly informed of the nature and cause of the charge. The nature of the charge refers to the precise legal qualification of the offence, and the cause of the charge refers to the facts underlying it.[44] In terms of the cause of the charge, the Prosecution must plead all material facts, which to the extent possible, should include the identity of the victims,[45]

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[40] Article 2 provides that State parties shall take measures to ensure that children are not "compulsorily recruited" into armed forces. http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm

[41]Prosecutor v. Norman, Opinion of 4 May 2004, at para 4 *ibid* .

[42] See inter alia, Count 5 of the Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53 http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf

[43] Amnesty DRC report, 11 October 2006, http://web.amnesty.org/library/Index/ENGAFR620172006

[44] The Prosecutor is expected to know its case before going to trial. It is not acceptable to omit materials aspects with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds: Prosecutor v. Kupreskic, Appeals Judgement, 23 Oct 2001 para 92. http://www.un.org/icty/kupreskic/appeal/judgement/index.htm

[45] See Appeals Chamber, Prosecutor v. Kupreskic, ", since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so" para 90 < http://www.un.org/icty/kupreskic/appeal/judgement/index.htm > The jurisprudence of the ICTR recognises that witness protection can not be relied upon by the Prosecutor as a valid reason for not including the identity of victims in the indictment: Prosecutor v. Ntagerura, 25 February 2004, Trial Judgement at footnote 41 "Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence.", citing *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 11("The protection of witnesses should not . . . serve to frustrate or hinder an effective defence.").

the place and approximate date[46] of the acts and the means by which the offences was committed. Information which is irrelevant, but prejudicial, should be excluded.[47]

30. During the confirmation hearing, the Defence argued that the pleading practice adopted by the Prosecution in relation to modes of liability has been extremely deleterious in relation to the right of the Defence to be informed promptly, of the nature, cause and content of the charge, and to the ability of the Defence to challenge the Prosecution case during the confirmation hearing.[48]

31. In particular, the Defence submitted that all material information pertaining to the nature and cause of the charge should be contained in the charging document itself,[49] and not ancillary documents or pleadings.[50] In this connection, the Defence referred *inter alia* to the following material defects: ambiguous, [51] contradictory[52] and vague pleadings

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[46] "It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance." Prosecutor v.. Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment , 24 February 1999, para. 40 http://www.un.org/icty/krnojelac/trialc2/decision-e/902247325494.htm

[47] Prosecutor v. Stanisic, Decision on Defence Motions Regarding Defects in Second Amended Indictment, 12 April 2006, paras 12 and 17. http://www.un.org/icty/simatovic/trialc/decision-e/060412.htm

[48] The Defence is aware that in its decision on the arrest warrant, dated 10 February 2006, the Chamber held that in light of the fact that article 58(1) of the Statute refers to a crime, rather than a specific crime, it was permissible for the Chamber to issue an arrest warrant even if the Chamber's disagrees with the legal characterisation of the relevant conduct (para 16). In contrast, the Defence submits that article 61expressly sets out a mandatory procedure which should be followed in the event that the Chamber finds that the evidence does not support the charge, as formulated by the Prosecutor: the Chamber shall decline to confirm the charge, or adjourn the proceedings and order the Prosecutor to amend the charge (see p. 31 of the Transcript).

[49] See Trial Judgement in Prosecutor v. Ntagerura: "Although Article 20(4)(a) of the Statute does not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the Statute and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein." 25 February 2004, para 29 (available on ICTR website).

[50] See Prosecutor v. Brdjanin and Talic 'Decision on Motion to Dismiss Indictment' 5 October 1999: The Chamber held that for the purpose of determining whether a *prima facie* cases existed in relation to the confirmation of the indictment, "the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute." at para 13. http://www.un.org/icty/brdjanin/trialc/decision-e/91005DC29627.htm
The Defence submissions at p. 33 lines 12-19 of the Transcript were based inter alia on Prosecutor v .Krnojelac, 24 February 1999, para 15
http://www.un.org/icty/krnojelac/trialc2/decision-e/902247325494.htm

[51] The Defence submitted that Prosecution is obliged to clearly and separately set out which conduct and acts support each mode of liability it intends to rely on (p33 Transcript): See Prosecutor v. Strugar, Decision of 28 June 2002 at para 19, http://www.un.org/icty/strugar/trialc1/decision-e/04165925.htm
Prosecutor v. Ntagerura decision of 25 February 2004 at para 38, and Prosecutor v. Semanza, Trial Judgment, 15 May 2003 at para 59.

[52] As stated during the confirmation hearing, the Prosecutor cannot simultaneously rely on the material facts pleaded in the charging document to support both common purpose and co-perpetration since they are not compatible theories (p. 37 Transcript –citing separate opinion of Judge Shahubudeen in the Gacumbitsi Appeals judgement at para 50).

concerning which liability the Prosecutor intended to rely on; the failure of the Prosecutor to plead common purpose or indirect perpetration as material facts in the charging document;[53] failure to identify the alleged facts or conduct which would support common purpose either in the document or at the confirmation hearing;[54] failure to identify the co-perpetrators or indirect perpetrators with sufficient precision to enable the Defence to ascertain whether they shared the same intent,[55] and whether their level of contribution was such as to warrant the term co-perpetrator; and failure to clearly specify in the charging document whether the Prosecution intend to charge him as a physical perpetrator.[56] Such defects in pleading are not merely technical: both the ICTY and ICTR Appeals Chamber have recently reversed convictions on the grounds that the mode of liability in question was pleaded in ambiguous or insufficient terms in the indictment,[57] and have emphasised that the need to plead with sufficient particularity is heightened with respect to novel forms of liability.[58]

32. In light of the fact that the Defence raised the issue of lack of notice prior to the confirmation hearing, the burden falls squarely on the Prosecution to prove that failure to

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1. [53] See Appeals Judgement of 28 November 2006, Prosecutor v. Blagoje Simic ,at paras 21-22.

[54] Article 25(3)(d) sets out two different standards of liability: subsection (i) implies that the person must have shared the intent of the group of commit a specific crime under the Statute of the ICC, whereas subsection (ii) appears to correlate to the standard of *mens rea* applicable to aiding and abetting. The Prosecution has not specified which sub-section of article 25(3)(d) they would rely on, nor have they specified the identity of the group of persons, who shared the common criminal purposes. In this regard, the Defence submits that reference to the UPC/FLPC in its entirety is impermissibly broad, since its does not enable the Defence to ascertain which group of members within the UPC/FLPC shared the common criminal purpose, which has been imputed to Thomas Lubanga Dyilo. The Defence referred to the Limaj judgment, of 30 November 2005 at para 666. http://www.un.org/icty/limaj/trialc/judgement/index.htm

See also the Trial Judgement of 27 September 2006, in Prosecutor v. Krajisnik, "It is evident, however, that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective that makes those persons a group. The persons in a criminal enterprise must be shown to act together or in concert with each other in the implementation of the common objective if they are to share responsibility for the crimes committed through the joint criminal enterprise" at para 884, citing Stakic Appeals Judgement at para 69. http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf

[55] The Defence submits that the notion of opportunistic participants applies equally to the concept of co-perpetration, and that acts of such persons cannot be attributed to others: see Prosecutor v. Limaj, Judgement of 30 November 2005 at para. 668 http://www.un.org/icty/limaj/trialc/judgement/index.htm

[56] See Prosecutor v. Kvocka, Appeals Judgement, 25 February 2005, at para 28. http://www.un.org/icty/kvocka/appeal/judgement/index.htm

See also Prosecutor v. Blagoje Simic, Appeals Judgement of 28 November 2006, at para 22. "[W]hen the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the said term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both."

[57] See Prosecutor v. Blagoje Simic, Appeals Judgment, which reversed the conviction based on JCE, and emphasised that the "defect of the indictment in the present case is not a minor one, but rather lies at the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case against him." At para 74.

[58] Appeals Judgement, Prosecutor v. Gacumbitsi, 7 July 2006, para 172, cited at pp 34-35 of the Transcript.

plead the modes of liability with sufficient clarity and particularity has not materially impaired the preparation of the Defence.[59]

33. In terms of the elements of the modes of liability referred to by the Prosecutor during the confirmation hearing, the Defence did not submit that co-perpetration or indirect perpetration *per se* were not grounded in the Statute. Rather, the Defence observed that the Prosecutor appeared to be relying on the theory of joint control of the crime, as promulgated by Claus Roxin, and that this broad form of liability goes beyond the clear terms of co-perpetration and indirect perpetration set out in the Statute, and is not supported by either customary international law,[60] or general principles of law derived from legal systems of the world.[61]

34. In the latter context, the Defence referred to the fact that the notion of joint control over the crime had been primarily developed by German theorists.[62] In particular, the Defence observes that the theories of Roxin are very much predicated on notions of hierarchy and obedience, and were formulated to address the type of systemic criminality which existed in Germany during World War II (as exemplified in the Eichmann case) and during the communist regime in the GDR. The form of liability thus relies on culturally specific notions[63] to create an inbuilt evidentiary presumption - that by virtue of the person's position, the person necessarily possessed the requisite *mens rea* and can be imputed with the *actus reus* of all 'fungibles' in the enterprise.

35. Such an approach would contravene the fundamental right of the person not to have imposed on him any reversal of the burden of proof or any onus of rebuttal,[64] and the obligation of the Prosecutor to establish the elements of intent under article 30 of the

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[59] See pp 29-30 of Transcript, and Prosecutor v. Blagoje Simic, Appeals Judgement , para 25.

[60] Both the Appeals Chamber and Trial Chamber III rejected Roxin's theories on the basis that they were not supported by customary international law. See Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration dated 22 March 2006 at para 7, http://www.un.org/icty/milutino87/trialc/decision-e/060322.htm and Appellate Judgement in Prosecutor v. Stakic, 22 March 2006 at para 62 http://www.un.org/icty/stakic/appeal/judgement/index.htm. Notably, both the Appeals Chamber and the Trial Chamber emphasised that their decisions were contingent on the manner in which the mode of liability was interpreted and applied, and not the modes of liability themselves

[61] In this regard, the Defence observes that the findings in the Videla judgement, which has been cited in support of the domestic implementation of Roxin's theories, were actually reversed by the Argentinean Supreme Court. The Supreme Court rejected the theory of joint control of the crime on the basis that it was not even accepted in Germany, and would lead to inequitable results. Corte Suprema de Justicia de la Nación, Resolución, Causa 13/84. December 30, 1986. http://www.nuncamas.org/juicios/juicios.htm

[62] P. 44, lines 14-22 Transcript.

[63] In this connection, a legal academic has commented that it was fundamentally unfair to criminally sanction East German border guards for obeying superior orders because "the German tradition of obedience to the law placed a heavy onus of justification on people who wanted to disobey unjust laws" (p. 159). The authors further elaborates on the German tradition of obeying all persons in authority, and the impact this had on German legal theory (pp. 159-163) G. Moens, 'The German Bordergard Cases: Natural Law and the Duty to Disobey Immoral Laws' Jurisprudence of Liberty (S. Ratnapala and G. Moens eds) Sydney, Butterworths, 1995, 146-164 http://www.usyd.edu.au/lec/subjects/jurisprudence/German%20Borderguard%20Case%20Article.pdf

[64] Article 67(1)(h) of the Statute.

Statute. In addition, this broad form of liability is incompatible with the principle of personal responsibility, as set out in article 25 of the Statute and elaborated under human rights law.[65] It also appears to conflate command responsibility with ordering, and soliciting[66] to create a form of strict liability for commanders.[67]

36. The Defence further submitted that the material facts pleaded in the charging document would not support the necessary *actus reus* or *mens rea* for any of the modes of liability referred to by the Prosecutor. With respect to the *actus reus*, the Defence emphasised that in the case of co-perpetration, the greater the number of 'alleged perpetrators', the greater the likelihood that the *actus reus* of the persons in question would not meet the standard for co-perpetration: that is, that it constitutes the *sine qua non* of the offence.[68] In addition, the more attenuated the relationship between the person and the physical perpetrator, the more the mode of liability would either approximate conspiracy[69] or guilt by association.[70] In terms of *mens rea,* the Defence argued that mere knowledge could not be equated to intent. [71]

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[65] At p. 43, lines 20-23, the Defence cited the ICTR Appeals Chamber decision in Bagilshema, at para 43; At p. 52, lines 8-13, the Defence cited Bassiouni, Crimes Against Humanity in International Law (1992) p. 356 (cited in para 17 of Judge Hunt's separate opinion in Prosecutor v. Ojdanic, 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise' 21 May 2003); At page 52, lines 15-22, the Defence cited Y. Sandoz C. Swinarski and B. Zimmerman *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 949* Geneva, International Committee for the Red Cross, Martinus Nijhoff, 1987, para. 4761 at 1470

[66] Notably, in the aforementioned Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, the Trial Chamber observed that the *mens rea* attributed to the theory of indirect perpetration did not meet the requisite standard for a perpetrator, but appeared to be based on the lower "indirect intent" mental element, which it utilised for "planning", "instigating", and "ordering" in appellate jurisprudence (para 38). http://www.un.org/icty/milutino87/trialc/decision-e/060322.htm

[67] See Trial Judgement in Prosecutor v. Mpambara dated 11 September 2006 at para 39 re the need to distinguish between the duty to prevent others from committing crimes or to punish such persons, and the elements necessary to characterise someone as a perpetrator. The Chamber emphatically criticised the attempt of the Prosecution to rely on the position of the accused and omissions (failure to prevent criminal conduct by others) to ground responsibility as a perpetrator (see paras. 36-39). http://69.94.11.53/default.htm. See also Appeals Judgement in Prosecutor v. Blaskic dated 29 July 2004 ,at paras. 22-47, http://www.un.org/icty/blaskic/appeal/judgement/index.htm

[68] The Defence also observes that according to the theory of co-perpetration – all co-perpetrators bear equal responsibility. As such, unless the Prosecutor charge all persons referred to as co-perpetrators in the charging document, it is arguable that their decision to charge Thomas Lubanga Dyilo is arbitrary and potentially discriminatory. See Prosecutor v. Delalic, Appeals Judgement of 20 February 2001, regarding the obligation of the OTP to respect equality of person in the charging policy and the prohibition on discrimination. http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf See also p. 23 Transcripts 23 November 2006.

[69] In the sense that the person is charged simply on the basis that he possessed the general intent for an offence, irrespective as to whether he can be linked to the actual perpetration of a specific offence. See pp 52-53 Transcript, in which the Defence referred to the ICTY Appeals Chamber's findings in Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise' 21 May 2003, at para 23 and 26 and Kvocka Appeals Judgement 28 February 2005 Para 91.

[70] P. 59 transcript, citing Trial Judgement, Prosecutor v. Kordic and Cerkez, 26 February 2001, at para 219 http://www.un.org/icty/kordic/trialc/judgement/index.htm

[71] The Defence cited the Krstic Appeals Judgement at para 121. http://www.un.org/icty/krstic/Appeal/judgement/index.htm
See also Prosecutor v. Mpambara at para 14 re the requirements of group crimes: "Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal

C – Level of evidence

37. Under Article 67, the Pre-Trial Chamber shall confirm the indictment only if there 'is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'. In the confirmation hearing the Defence submitted its explanation of this standard. [72] In its closing submissions the Prosecution contested this submission, alleging that this translated to a standard that is identical to the standard of conviction "beyond reasonable doubt", the standard that is applicable only at the end of a trial.[73]
38. The Defence firstly notes that the standard must be higher than the standard which the evidence must reach for the Pre-Trial Chamber to issue an arrest warrant under Article 58(1). In its decision on issuing an arrest warrant in this case, the Pre-Trial Chamber explained the standard at that stage as being whether 'the Chamber has an intimate conviction that the "reasonable grounds to believe" standard and the appearance standard required by Article 58(1) of the Statute have been met'.[74] Without doubt therefore the evidence must reach a much higher level when the Pre-Trial Chamber actually has to decide whether or not to confirm the indictment.
39. The Defence submits that the level which the Prosecution's evidence must meet is 'whether there is sufficient evidence to permit a properly instructed judge to convict.' This level is derived from the principle of committal hearings which are a feature of common law jurisdictions.[75] Under this system the examining judges of the Magistrates Court decided whether there is enough evidence for a reasonable jury to convict.[76] If there is, then the person is committed for trial. The Defence submits therefore that where the procedure has been used at the national level, where the judge conducts a thorough review of the evidence, then this is the standard that is used.
40. The Pre-Trial Chamber need not decide that a future Trial Chamber 'would' convict, but merely that it could do so. This interpretation is supported by the standard employed by

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result. The *mens rea* is, in this sense, no different than if the accused committed the crime alone." The Defence further observes the clear text of article 23(3)(d) of the Statute does not extend the common purpose theory to the so called third category of JCE. See in this regard, G Fletcher ,and J Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' Journal of International Criminal Justice, 3, (2005) 539-56 and case law cited therein, at p. 549-550.

[72] 22 November 2006, Transcript page 6, lines 4-14 'if this case goes to trial on this evidence, a Chamber -- a future Trial Chamber – could convict, taking into account the objections to credibility, authenticity, and the Defence evidence that was produced during the hearing. […] Only if it is confident that a future Chamber, if presented with this evidence, could convict, should it confirm the charges brought by the Prosecution.'

[73] 28 November 2006, Transcript, page 8 lines 5-20

[74] See Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-8-US-Corr, rendered public by a Decision of ICC-01/04-01/06-37, at paragraph 14

[75] See United States of America *v.* Ferras; United States of America *v.* Latty, 2006 SCC 33 at http://scc.lexum.umontreal.ca/en/2006/2006scc33/2006scc33.html ;

[76] See Criminal Procedure and Investigations Act 1996, Chapter 25 Schedule 1, paragraph 4 available at http://www.opsi.gov.uk/acts/acts1996/96025--q.htm#sch1

the ad hoc tribunals in interpreting Rule 98Bis.[77] The text of Rule 98Bis states that a Chamber must enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction. This standard has been interpreted as being "whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[78]

41. In contrast to the Rule 98Bis procedure however, the Pre-Trial Chamber must take into consideration Defence evidence and Defence challenges to the credibility and probative value of the Prosecution evidence. Under Article 61(6)(c), the person may challenge the evidence presented by the Prosecutor and also present evidence at the confirmation hearing.[79] This right would be meaningless if the Pre-Trial Chamber was not obliged to take this evidence or challenges to Prosecution evidence into account in deciding on whether to confirm the indictment.

D – Burden of proof

42. The Defence observed explicitly during the hearing that the burden of proof in relation to the evidence lies squarely on the Prosecution.[80] The person is presumed innocent in line with Article 66 of the Statute. The burden is on the Prosecution to prove that there is sufficient evidence in terms of Article 61(7) of the Statute and the person has the right 'not to have imposed on him any reversal of the burden of proof or any onus of rebuttal.'[81] The Defence is under no obligation to disprove allegations by the Prosecution unsupported by sufficient evidence.

43. In this context, the Defence highlights that even when the Defence has not explicitly contested any allegation by the Prosecution contained in the document containing the charges, the Prosecution is still put to strict proof on this allegation. If insufficient evidence is brought by the Prosecution, this element is not proved to the level set out above, even in the absence of positive Defence evidence to the contrary.[82] The Defence therefore contests the characterisation of the Prosecution that the Defence has accepted certain allegations, such as the existence of an armed conflict not of an international

[77] Rule 98Bis at the ICTR and ICTY but Rule 98 at the Special Court for Sierra Leone

[78] See *Prosecutor v. Jelisic*, Case No. IT-95-10-A, "Judgement", 5 July 2001 ("*Jelisic* Appeal Judgement"), at para. 37 http://www.un.org/icty/jelisic/appeal/judgement/jel-aj010705.pdf confirming *Prosecutor v. Delalic*, Case No. IT-96-21-A, "Judgement", 20 February 2001 http://www.un.org/icty/jelisic/appeal/judgement/jel-aj010705.pdf . Rule 98Bis is now an oral procedure but the same principles and standard applies. See *Prosecutor v Oric*, IT-03-068-T, 8 June 2005 Trial Chamber stated that "the last amendment to Rule 98 bis does not in any way change the standard of review to be applied by the Trial Chamber in its Rule 98 bis exercise". http://www.un.org/icty/transe68/050608IT.htm

[79] See also Rule 121(6) which details the procedure for the Defence presentation of evidence

[80] See 22 November 2006 Transcript at page 9 lines 19-20; 28 November, page 90 line 10

[81] Article 67(1)(i)

[82] In this sense the Defence refers to the background of Thomas Lubanga, the existence of an armed conflict, the knowledge of Thomas Lubanga of the existence of the armed conflict. In relation to the existence of an armed conflict for the whole period of the indictment the Defence refers to its submissions of 24 November

character or the background information on Thomas Lubanga.[83] Even if the Defence did not explicitly challenge any allegation put forward by the Prosecution, the burden remains firmly on the Prosecution to prove its allegations and cannot base itself on an alleged agreement from the Defence.

44. In relation to this issue, the Defence further submits that if the Prosecution has alleged that certain documents have proved that the acts of Mr Lubanga should be understood in a certain way, and the Defence has alleged that they should be seen in a different light, the Pre-Trial Chamber should follow the inference that is more favourable to Mr Lubanga.[84]
45. The further consequence of this burden is that the Prosecution is under a duty at this stage to prove the authenticity and reliability of his exhibits. If it has failed to do so by not introducing sufficient evidence of the chain of custody of the documents upon which he wishes to rely, then these documents must be ruled inadmissible.
46. The burden of proof also applies to each element of each crime[85] alleged by the Prosecution and also to each piece of evidence that is tendered to support each element of each crime. [86]
47. In relation to the method of assessing documents the Defence submits that an assessment of whether each document is admissible and the weight to be given to each document can only be conducted in relation to each individual piece of evidence. The later question as to whether the documents cited by the Prosecution in relation to each allegation in the document containing the charges can then be considered together. Indeed the Defence submits that in assessing this evidence in combination, the Pre-Trial Chamber will recognise that the contradictions between the different pieces of evidence must result in the evidence adduced not supporting the charges.

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[83] Transcript, 28 November 2006, page 11 lines 3-11

[84] The Chamber must see if there us 'any reasonable interpretation of the evidence admitted other than the guilt of the Accused. Any ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*.' Prosecutor v Halilovic, IT-01-48-T, Trial Chamber Judgement, 16 November 2005, at paragraph 12, http://www.un.org/icty/halilovic/trialc/judgement/tcj_051116e.pdf citing *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, dated 15 October 1998, filed 16 October 1998, para. 73, holding that: "[…] any doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*"; http://www.un.org/icty/tadic/appeal/ decision-e/81015EV36285.htm and at the ICTR Prosecutor v. Jean-Paul Akayesu *Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998,* para. 319: "[…] the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected." See also R. May & M. Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha*, 37 COLUM. J. TRANSAT'L L. 725, 754 (1999) (citing decisions in the *Flick* case from the Nuremberg International Military Tribunal)

[85] Transcript 22 November 2006, page 7, lines 15-17 'substantial grounds to believe must relate to each and every element of each and every crime that is charged by the Prosecution.'

[86] Transcript 28 November 2006, page 9 line 23 to page 10 line 3 'the evaluation of the evidence to determine whether there are substantial grounds or not -- that basis is the totality of the evidence, the complete universe of the evidence -- and, I repeat, the complete universe of the evidence -- and not, as the Defence suggest, the individualised pieces of evidence'.

48. However, the Defence submits that assessing the weight to be given to the evidence must only be assessed after a ruling on the admissibility of that evidence under Article 69(4). Therefore the pending issue of the admissibility of documents obtained in violation of article 69(7)[87] must be resolved before the evidence is assessed by the Pre-Trial Chamber.

E – Admissibility and probative value of evidence

49. As the Defence stressed during the hearing, the Pre-Trial Chamber permitted the use of summaries in its decision of 15 September 2006.[88] The Defence is also aware of the text of Article 61(5) which states that the 'Prosecutor may rely on documentary or summary evidence'. However, the Defence submits that this does not regulate the question of whether they carry sufficient weight as evidence to support the charges alleged by the Prosecution. The Pre-Trial Chamber would be perfectly within its rights and would not be contradicting itself if it were to decide that the summaries carried little or insufficient weight.

50. The Chamber offered the Prosecution various options for how to present evidence, namely the possibility of contacting the witnesses to see if they would consent to their identities and statements being disclosed in full to the Defence.[89] The Prosecution chose to rely on summaries for all these witness statements.[90] It was therefore a choice by the Prosecution and they must live with the consequences of that choice. The Defence is entitled to challenge the credibility of the authors of the statements and the probative value of the summaries.

51. In relation to the admissibility of documents into the confirmation hearing, the Defence refers to its original motion,[91] oral submissions on this issue[92] and request to reply to the Prosecution.[93] The Defence does wish to highlight that the Court of Appeal decision of Kisangani is a final decision in a criminal trial as no appeal was launched by the Accused within the necessary time limit.[94] The actual issue of the illegal search and seizure was

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[87] ICC-01/04-01/06-674-Conf

[88] See First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 15 September 2006, ICC-01/04-01/06-437. This Decision is currently on appeal. See Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 10 October 2006, ICC-01/04-01/06-546

[89] See page 10 of the decision where the Prosecution was given the option of either (i) withdrawing the statements and associated materials from the Prosecution list of evidence; (ii) assuring the Chamber that the witnesses had given their consent to their unredacted statements being disclosed to the Defence; or (iii) seek authorisation to rely on summaries of these witness statements.

[90] See Prosecutor's Request for Extension of Time, 22 September 2006, ICC-01/04-01/06-458 at paragraph 5 'The Prosecution has decided to provide summary evidence in respect of all witness statements'.

[91] Request to exclude evidence obtained in violation of article 69(7) of the Statute**,** 7 November 2006, ICC-01/04-01/06-674-Conf

[92] See especially, 10 November 2006, Transcript pages 22-26

[93] Request for Leave to Reply to Prosecution's Further Response, 24 November 2006 ICC-01/04-01/06-729

[94] Article 69 of the decree of 6 August 1959 recognises the right of the victim to join to the criminal prosecution to protect its interests but this offence must be established before any reparation can be awarded. The decision of

irrelevant to the 'partie civile' and he has no right to delay the application of the decision as he is not a principal party in the criminal proceedings.[95] In any event the Defence submits that no evidence has been brought that the decision was not notified to the 'partie civile' and as such the illegal seizure must result in the documents being declared inadmissible.

52. In relation to authenticity, the Defence draws attention to its submissions that the Chamber should declare inadmissible for the confirmation hearing any material for which no information pertaining to the chain of custody has been provided.[96]

III – Relief sought

53. The Defence therefore respectfully requests the Pre-Trial Chamber to refuse to confirm the charges brought against Thomas Lubanga Dyilo and to order his immediate and unconditional release.

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Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 7th day of December, 2006

At The Hague

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the Court of Appeal of Kisangani of 16 March 2006 became definitive when no appeal was launched within 3 months by the 'Ministere Public' (Article 47(2) of the law number 82-017 of 30 March 1982), nor within 40 days by the accused (Article 47(1) of the same law).

[95] See Article 102(2) of the decree of 6 August 1959 on criminal procedure

[96] See 22 November 2006, Transcript page 11 lines 8-11