

Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber

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Abstract

On 14 March 2012, the Trial Chamber I of the International Criminal Court (ICC) delivered its first judgment in the first completed trial in the case against Thomas Lubanga Dyilo. Lubanga was found guilty as a co-perpetrator in the conscription and enlistment of children under the age of fifteen years and of using them to participate actively in hostilities. This article comments on the significance of the ICC judgment in the *Lubanga* case. It argues that the judgment contributes to the development and improvement of the normative value of international criminal law. It is also argued that the *Lubanga* judgment may offer interesting insights on the socio-pedagogical role of international criminal justice. Indeed, it is observed that it contributes to strengthening the sense of accountability for recruiting and using child soldiers, by stigmatising such acts as contrary to the fundamental values of the international community.

Keywords

Thomas Lubanga Dyilo; International Criminal Court (ICC); international criminal law; war crimes; non-international armed conflict; recruitment and use of child soldiers

1. Introduction

On 14 March 2012, the Trial Chamber of the International Criminal Court (ICC) handed down the judgment of over 600 pages (including the separate opinions) in its first completed trial, in the case against Thomas Lubanga Dyilo.¹ Thomas Lubanga, founder of the *Union des patriots congolais* (UPC) and commander-in-chief of its military wing, the *Forces patriotiques pour la liberation du Congo* (FPLC), was convicted of the war crime of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in conflicts not of an international character, as set out in Article 8(2)(e)(vii) of

¹ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC, 14 March 2012 (hereinafter 'Judgment'), available at: <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

the Rome Statute of the ICC (Rome Statute). This first judgment in a completed trial was concluded nearly after ten years of activity of the ICC.

Following three years of hearings, the three-judge panel unanimously found Lubanga guilty of war crimes committed in the Democratic Republic of Congo (DRC). More specifically, Lubanga was held responsible as co-perpetrator in the conscription and enlistment of children under the age of fifteen years into the FPLC and of using them to participate actively in hostilities. Between early September 2002 and 13 August 2003, the UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the *Armée Populaire Congolaise* and other militias, as the *Force de Résistance Patriotique* in north-eastern Ituri region.

Lubanga is the first international proceeding involving only child-soldiering crimes, and as such it offered a first interpretation of the main features characterising these crimes. Beyond shedding light on the conscription, enlistment, and use of child soldiers—widespread and often underestimated criminal phenomena—it more generally provided early clarifications on both procedural and substantive legal issues relevant to the international criminal justice system established by the Rome Statute. For instance, since the decision on the confirmation of charges,² *Lubanga* offered also theoretical guidelines by which to delimit the different forms of participation under Article 25(3), particularly in distinguishing between principal and accessorial liability.

2. The Tortuous Path of the Lubanga Case

Despite its central relevance in developing and improving the normative value of international criminal law, this case has been subjected to several criticisms, particularly in relation to its length, as Lubanga spent seven years under detention before being convicted. In this respect, the verdict concludes a long and troubled judicial *iter*, characterised by strong tensions between the judges and the prosecutor, as demonstrated by two stays of proceedings imposed by the Trial Chamber. Judges were concerned of potential violations upon the right to fair trial as a result of both disclosure issues and the prosecution's refusal to honour a Chamber's order.

The trial was suspended the first time from 13 June to 18 November 2008, since the Prosecutor had not revealed all the exculpatory information, relying on confidentiality agreements with third organisations pursuant to

² *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, PTC, 29 January 2007 (hereinafter 'Decision on the Confirmation of Charges').

Article 54(3)(e) of the Statute.³ In this way, the prosecution prevented the judges from assessing whether and how the rights of the accused had been violated. The second stay of proceedings was imposed by the Trial Chamber between 8 July and 25 October 2010, as the Office of the Prosecutor (OTP) had not complied with an order of the judges to disclose to the defence the identity of an intermediary who had assisted the prosecutor in contacting witnesses.⁴

Even the 2012 judgment reflects such frictions between the judges and the prosecution. Indeed, the Trial Chamber did not miss the opportunity to criticise the prosecutor's approach of delegating its investigative responsibilities to intermediaries who contacted a series of unreliable witnesses.⁵ This had a negative impact on the expeditiousness of the proceedings. Indeed, due to the lack of a proper supervision by the main (three) intermediaries, the Trial Chamber spent a long time in assessing the 'inaccurate or dishonest' evidence submitted by a large number of individuals. According to the Trial Chamber, 'the prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court'.⁶ Without intending to be exhaustive, this brief comment aims to offer a general overview of the main substantive issues arising from the judgment in question.

3. The Legal Recharacterization of the Armed Conflict in Ituri

It should be noted that Article 8 of the Rome Statute of the ICC sets out different lists of war crimes depending on whether an armed conflict is international or non-international. The Trial Chamber found that there was, beyond any reasonable doubt, a *nexus* between the acts committed by Lubanga and a non-international armed conflict.

In confirming the charges, the Pre-Trial Chamber I (PTCI) had found that there were substantial grounds to believe that the UPC/FLPC was involved in an international armed conflict in the Ituri region between July 2002 and

³) *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, TC, 13 June 2008.

⁴) *Prosecutor v Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, TC, 8 July 2012.

⁵) Judgment, *supra* n. 1 at 482.

⁶) *Ibid.*

2 June 2003,⁷ and in a non-international armed conflict between 2 June and December 2003.⁸ Referring to the International Court of Justice, in the *Democratic Republic of Congo v Uganda* Judgment (19 December 2005),⁹ the PTCI had qualified the relevant armed conflict only in part as international on the basis of the direct involvement of the Uganda People's Defence Force (UPDF) in the hostilities.¹⁰ It is worth reminding that since the 1990s the Ituri region and surrounding areas were scourged by an armed conflict between governmental and rebel forces, and among rebel forces *inter se*, with the involvement of third countries, such as Uganda and Rwanda.

Relying on regulation 55 of the Regulations of the Court, the Trial Chamber departed from the assessment of the PTCI by affirming that during the relevant period the conflict was non-international in nature.¹¹ This provision allows the Trial Chamber to change the legal characterization of the facts underlying the charges, 'without exceeding the facts and circumstances described in the charges and any amendments to the charges'.

According to the Trial Chamber, two or more armed conflicts with a different legal nature may in principle coexist in the same situation under investigation by the prosecutor.¹² Where this happens, one must identify the conflict to which the accused's act is linked and the manner in which this conflict must be qualified. With regard to the armed conflict in Ituri, the crux was to examine whether the presence of Ugandan or Rwandese forces on DRC territory internationalised the relevant conflict in which the UPC/FPLC was involved. In so doing, the Trial Chamber assessed whether the UPC/FPLC and other armed groups involved in the same hostilities were used as agents or 'proxies' for fighting between two or more States, particularly Uganda, Rwanda, or the DRC.¹³

The Trial Chamber did not exclude the possibility that there was a concurrent international armed conflict between Uganda and the DRC at the time of the events. This is demonstrated by the presence of Ugandan forces in the Ituri region, which had occupied some areas of Bunia, including the airport.¹⁴ However, for the purpose of deciding on the charges against the accused, the Court found that the hostilities between the UPC/FPLC and other armed groups 'did not result in two States opposing each other, whether directly or

⁷) Decision on the Confirmation of Charges, *supra* n. 2 at 205-226.

⁸) *Ibid.* at 227-236.

⁹) *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 175.

¹⁰) *Ibid.* at 212-217.

¹¹) Judgment, *supra* n. 1 at 567.

¹²) *Ibid.* at 540.

¹³) *Ibid.* at 552.

¹⁴) *Ibid.* at 565.

indirectly, during the time period relevant to the charges'.¹⁵ Therefore, according to the Trial Chamber, despite the existence of an international conflict, the Lubanga armed group,¹⁶ which was not acting on behalf of any State, was fighting in a protracted environment of violence where multiple *non-state armed groups* were involved.¹⁷ In order to establish when a non-governmental armed group acts on behalf of a State, consistently with the PTCI's legal reasoning, the Trial Chamber adopted the so-called 'overall control' test.¹⁸ This means that a State exercises the required degree of control when it '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'.¹⁹

With regard to the requirements of a non-international armed conflict, the Trial Chamber confirmed the approach followed by the PTCI. Indeed, pursuant to Article 8(2)(f), the Trial Chamber provided that these requirements are met when there is a 'protracted' armed conflict between 'organised armed groups'.²⁰ These groups must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence. Therefore, unlike article 1(1) of the 1977 Additional Protocol II of the 1949 Geneva Conventions, it is not necessary that the organised armed groups involved in the conflict are 'under responsible command', nor that they 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.²¹

4. The Questionable Selection of Crimes

As to the specific conduct of Lubanga, the Prosecutor's choice to confine the charges against him to the enlistment, recruitment, and use of child soldiers has been criticised by scholars and commentators. They rightly contented that the armed group under the accused's command had allegedly committed other serious crimes in Ituri, including mass murder, rape, mutilation, and torture.²²

¹⁵ Ibid.

¹⁶ Ibid. at 553, 561.

¹⁷ Ibid. at 563.

¹⁸ Ibid. at 540.

¹⁹ Ibid. at 541.

²⁰ Ibid. at 536.

²¹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

²² See *inter alia*, P. Clark, 'In the Shadow of the Volcano: Democracy and Justice in Congo', (*Dissent*, Winter 2007) 29, at 31, available at: <<http://dissentmagazine.org/article/?article=724>> accessed 30 April 2012.

On 8 December 2009, the Appeals Chamber (AC) reversed the Trial Chamber's decision,²³ which, relying on regulation 55, had taken into account the possibility of re-characterizing the facts, in order to include also charges of inhumane treatment and/or cruel treatment and sexual slavery.²⁴ According to the AC, 'article 74(2) of the Statute confines the scope of regulation 55 to the facts and circumstances described in the charges and any amendment thereto'.²⁵ In line with the AC, the majority (Judge Odio Benito dissenting) in the *Lubanga* verdict decided that 'the Trial Chamber's Article 74 Decision shall not exceed the facts and circumstances described in the charges and amendments to them'.²⁶ Therefore, the Trial Chamber excluded that a decision pursuant to Article 74 can cover factual allegations potentially supporting sexual slavery, since they had not been included in the decision on the confirmation of charges.²⁷

By contrast, in her dissenting opinion, Judge Odio-Benito, pointed out that the majority 'seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent'.²⁸ In so doing, she proposed the inclusion of sexual violence within the legal concept of using child soldiers to participate actively in the hostilities, 'regardless of the impediment of the Chamber to base its decision pursuant to article 74(2) of the Statute'.²⁹ According to the dissenting Judge, 'sexual violence is an intrinsic element of the criminal conduct associated with forcing someone to actively participate in hostilities'.³⁰

Beyond the reasons provided by the majority, it may be observed how the approach followed by the dissenting Opinion would create a strong tension with the legality principle and the accused's rights. Even adopting an extensive interpretation, it appears difficult to encompass sexual violence within the explicit or implicit meaning of the provision in question. The dissenting Opinion in *Lubanga*, by applying a criminal norm beyond its literal sense, appears to provide a paradigm characterized by a creative role of the judge.

²³ *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205, AC, 8 December 2009.

²⁴ See *Prosecutor v Thomas Lubanga Dyilo*, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, TC, 14 July 2009.

²⁵ See *Prosecutor v Thomas Lubanga Dyilo*, supra. n. 23, at 93.

²⁶ Judgment, supra. n. 1 at 630.

²⁷ Ibid.

²⁸ Separate and Dissenting Opinion of Judge Odio Benito, attached to the Judgment, 16.

²⁹ Ibid. at 17.

³⁰ Ibid. at 20.

However, such a role would be inconsistent with Article 23(2) of the Statute, which explicitly establishes that ‘the definition of a crime shall be *strictly construed* and shall *not be extended by analogy*. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted (emphasis added).’ Notwithstanding the fact that the application of the legality principle differs in its international dimension from that recognised in domestic justice systems, the Statute reduces this gap by both establishing the different expressions of the legality principle³¹ and by striving to define as precisely as possible the conduct that may constitute international crimes.³²

5. Conscripting or Enlisting Children under the Age of Fifteen Years into Armed Forces or Using them to Participate Actively in Hostilities

With regard to the legal elements of child-soldiering, Article 8(2)(e)(vii) criminalises the conduct of ‘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)’. An absolute prohibition of the recruitment and use of children under the age of 15 in hostilities was already enshrined in Article 4(3)(c) of the Additional Protocol II to the 1949 Geneva Convention. The Trial Chamber ruled that Article 8(2)(e)(vii) in question establishes three different offences, which constitute war crimes if they take place in the context of, or are associated to, a non-international armed conflict.³³ For the purposes of the conscription and enlisting, it does not assume any relevance if subsequently the child actively participates, or not, in hostilities. Thus, the Trial Chamber rejected the defence’s submission that this conduct requires the integration of the child as a soldier to participate actively in hostilities.³⁴

Consistent with the approach followed by the PTCI, the Trial Chamber distinguished between conscription and enlistment on the basis of the child’s consent. Indeed, both of these, according to the Trial Chamber, are forms of recruitment, but while conscription constitutes a coercive recruitment, enlistment is of a voluntary nature.³⁵ These offences are committed at the moment a child under the age of 15 is enrolled in, or joins an armed group, with or without compulsion. In addition, they are continuous crimes, meaning that they

³¹ See Articles 22, 23 and 24 of the Statute.

³² H Olasolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’ (2007) 18 (3-4) *Criminal Law Forum* 301, at 310.

³³ Judgment, supra n. 1 at 609.

³⁴ *Ibid.*

³⁵ *Ibid.* at 608.

only end when the child reaches 15 years of age or leaves the force or group.³⁶ The Trial Chamber also dismissed the notion that the consent of a child to his or her recruitment provides the accused with a valid defence, but it may assume relevance only in relation to the determination of sentences or victim reparation. This is due to the fact that a girl or a boy under 15 years of age is unable to provide ‘genuine and informed consent when enlisting in an armed group or force.’³⁷

With regard to the conduct of *using* child soldiers to participate actively in hostilities, the Trial Chamber held that the reference to the expression ‘to participate actively’ covers a wider range of activities and roles than the expression ‘direct participation’ used by Additional Protocol I to the Geneva Conventions.³⁸ It follows that such an act includes both direct and indirect participation. According to the Trial Chamber, a key element in establishing if an indirect role falls within the scope of article 8(2)(e)(vii) is constituted by whether the support provided by the child to the combatants exposed him or her to real danger.³⁹ In this regard, the child’s support and the level of consequential risk represent the criteria which must be used on a case-by-case basis to assess whether the child had an active participation in hostilities.

6. Principal versus Accessorial Liability: the Theory of ‘Control over the Crime’

Turning to the assessment of individual criminal responsibility, Lubanga was held guilty as *direct co-perpetrator* pursuant to Article 25(3)(a) having committed war crimes *jointly* with other individuals. This provision provides the modes of liability of direct participation, co-perpetration, and indirect perpetration. Confirming the approach followed by the PTC, the majority (Judge Fulford dissenting) applied the ‘control over the crime’ theory, in order to distinguish the commission of a crime as a principal under Article 25(3)(a), from accessorial liability under Article 25(3)(b)(c)(d).⁴⁰ Unlike the Ad-Hoc Tribunals’ Statutes—which adopted a unitarian concept of perpetration—article 25(3) establishes a differentiated system, providing different forms of participation. In this way, the Statute seeks to establish a fairer criminal justice system able to satisfy the requirements of the principles of culpability and legality.⁴¹

³⁶ Ibid. at 618, 759.

³⁷ Ibid. at 613.

³⁸ Ibid. at 627-628.

³⁹ Ibid.

⁴⁰ Ibid. at 976-1018; Decision on the Confirmation of Charges, *supra* n. 3 at 326-338.

⁴¹ See *inter alia*, S Manacorda and C Meloni, ‘Indirect Perpetration *versus* Joint Criminal Enterprise’ (2011) 9(1) *Journal of International Criminal Justice* 159, 167; K Ambos, ‘The First

Beyond the possibility to draw a borderline between principals and accessories to the crime, this theory allows one to extend principal liability to those individuals who, in spite of their absence from the scene of the crime, control or mastermind its commission, since they decide whether and how the offence will be committed. In order to prove that an individual is responsible as co-perpetrator, the prosecutor has to demonstrate the existence of an agreement or common plan between two or more persons, and the essential contribution made by each co-perpetrator to the crime.⁴² As for the subjective elements, beyond the *mens rea* of the relevant crime, it is required that all co-perpetrators are mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realization of the objective elements of the crime.⁴³

In other words, the conduct of one co-perpetrator may be imputed to other co-perpetrators, even if he or she is not physically present at the scene of crime and does not actively partake in the execution of the crime. This is possible when the coordinated or collective commission of the crime is based on a common plan or agreement. While the ICTY case law requires that the contribution by every single perpetrator to the joint criminal enterprise (JCE) must be *substantial*, the Trial Chamber in *Lubanga* provided a higher threshold, ruling out that the contribution to the commission of the crime must be *essential*. This means that ‘co-perpetrators share control since each of them could ‘frustrate the commission of the crime by not carrying out his or her task’.⁴⁴

7. Concluding Remarks

Although much will be written on the *Lubanga* case in the coming years, it will be nonetheless arduous to determine the extent to which this decision can effectively contribute to the prevention, recruitment and use of child soldiers. In the DRC, children are still systematically abducted and conscripted by armed groups, such as the Lord’s Resistance Army or the Democratic Forces for the Liberation of Rwanda.⁴⁵ Bosco Ntaganda, subject to an ICC arrest warrant since 22 August 2006 on charges of recruiting and using child soldiers in Ituri,

Judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive Analysis of the Legal Issues’ 35, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030751> accessed 29 April 2012.

⁴² Judgment, supra n. 1 at 1006.

⁴³ Ibid. at 1007–1008.

⁴⁴ Decision on the Confirmation of Charges, supra n. 2 at 342.

⁴⁵ Human Rights Watch, ‘ICC: Landmark Verdict a Warning to Rights Abusers’ (14 March 2012), available at: <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> accessed 30 April 2012.

has not been surrendered to the ICC by the local authorities and moreover has been appointed General of the national army.⁴⁶ The minimal probabilities to realise the threat of punishment as a consequence of the lack of coercive power by the ICC jeopardize its deterrent effect. Following Damaska's reasoning 'it would thus bear more than a whiff of paradox for courts to regard as paramount a goal the attainment of which escapes their endogenous powers, and depends entirely on outside agents over whom they have no control, and whose support may or may not be forthcoming'.⁴⁷

Nevertheless, *Lubanga*, as well as the case law of the Special Court for Sierra Leone (SCSL),⁴⁸ including the recently delivered judgement against Charles Taylor,⁴⁹ may offer interesting insights on the socio-pedagogical role of international criminal justice.⁵⁰ They may contribute to strengthening the sense of accountability for recruiting and using child soldiers, by stigmatising these conducts as contrary to the fundamental values of the international community. Moreover, by defining and denouncing the criminal nature of heinous conduct, such as the conscription, enlistment, and use of child soldiers, these cases enhance the normative scope of international criminal law. Therefore, beyond the actual effect of the ICC's decision on potential criminals, it is expected that the *Lubanga* judgment serves—toward the entire collectivity of States—an important pedagogical goal of social acknowledgment of the values protected by international criminal justice.

It is significant to note that the *Lubanga* judgment reinforces the enforcement of international human right law, in particular the protection of the rights of the child. In this respect, it is pertinent to note that the Convention on the Rights of the Child (CRC),⁵¹ ratified by 193 States, requires State parties to 'take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities'.⁵² In addition, States parties to the CRC are obliged to 'refrain from recruiting any person who has not

⁴⁶ Human Rights, Watch, 'DR Congo: Arrest Bosco Ntaganda for ICC Trial' (13 April 2012), available at: <http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial> accessed 29 April 2012.

⁴⁷ M Damaška, 'What is the Point of International Criminal Justice?' (2008) 83(1) *Chicago-Kent Law Review* 329, at 345.

⁴⁸ SCSL, *Prosecutor v Fofana and Kondewa*, Judgment, AC, 28 May 2008; SCSL, *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Judgment, AC, 22 February 2008; SCSL, *Prosecutor v Charles Taylor*, Judgment, TC, 26 April 2012.

⁴⁹ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-1-T, 26 April 2012, Judgment Summary is available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=86ronQUtKo8%3d&tabid=53>.

⁵⁰ MA Drumbl, 'Prosecutor v. Thomas Lubanga Dyilo. Decision sur la Confirmation des Charges. Case no. ICC-01/04-01/06' (2007) 101 (4) *American Journal of International Law* 841 at 846.

⁵¹ UN Doc. A/44/49 (1989), entered into force 2 September 1990.

⁵² *Ibid.* Article 38(2).

attained the age of fifteen years into their armed forces' in all kinds of armed conflict ('armed conflicts which are relevant to the child').⁵³

Although Article 8(2)(e)(vii) of the Rome Statute and Article 38 of the CRC belong to different legal fields, they share a common rationale: 'children are particularly vulnerable and require privileged treatment in comparison with the rest of the civilian population'.⁵⁴ They need, therefore, to be protected from the risks associated with armed conflicts in order to ensure their physical and psychological well-being, which may be affected by fatal or non-fatal injuries as well as by the trauma deriving from the recruitment activity. In defining and elaborating upon the crime of enlistment, conscription, and use of child soldiers, the *Lubanga* case notably contributes to the clarification of the normative content of those human rights provisions protecting children below 15 years from taking a direct part in hostilities. This process of cross-fertilisation between international criminal law and human rights law responds to a logic whereby the different areas of international law are closely intertwined and as such, should be coherently interpreted as parts of a whole.⁵⁵

In sum, it is hoped that the message sent by the *Lubanga* judgment is now very clear: 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'⁵⁶ constitutes a gross violation of human rights. It is a war crime of concern to the international community as a whole even if this takes place in a non-international armed conflict. As such, it 'must not go unpunished'.⁵⁷

⁵³ Ibid. Article 38(3).

⁵⁴ ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), 1377 at marginal note 4544.

⁵⁵ G Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of *Kononov v. Latvia*, (2008) 6 (5) *Journal of International Criminal Justice* 1043, at 1046.

⁵⁶ Rome Statute, Article 8(2)(e)(vii).

⁵⁷ Ibid. preamble, para. 4.