

War Crimes and the Conduct of Hostilities

Challenges to Adjudication and Investigation

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7. The enlistment, conscription and use of child soldiers as war crimes

Alberto Oddenino

I. INTRODUCTORY REMARKS

The general perception of the need to employ particularly high standards to protect children is contradicted when children are utilized as combatants in the most risky situations and by the related, unabashed exploitation of their erratic combat behavior in the conduct of hostilities¹.

Several features about child soldiers encourage the proliferation of their use in contemporary conflicts. While children have always, to some extent, participated in armed conflicts, their role in such conflicts has changed greatly. In the past adulthood and the ability to bear arms were to a large extent interconnected. Today technological developments have made lightweight automatic weapons available worldwide at relatively cheap prices; children are now able to participate in combat on a more equal footing with adult combatants. Thus the direct participation of children as combatants in armed conflicts is increasing compared to some of their more classical uses such as espionage, communication or de-mining.

Moreover recruits under the age of 18 are exposed to military discipline, hazardous activities, bullying, abuse, forced consumption of drugs and possible deployment to war zones. In spite of the fact that this recruitment process could be described as voluntary, it is noteworthy that in many cases children join the military because doing so is the only means of survival.

Child soldiers are therefore a very complex phenomenon, whose entity strongly depends on the chosen definition. Globally the involvement of children in armed conflicts takes various forms: unlawful recruitment by armed groups, forcible recruitment by government forces, recruitment or

¹ See in general Peter W. Singer, *Children at War* (Pantheon 2005); Matthew Happold, *Child Soldiers in International Law* (Manchester UP 2005); David M. Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (Rutgers UP 2005).

use in militias or other groups associated with armed forces, use as spies and even legal recruitment into armies during peacetime. The intensity and complexity of this issue has always been scrutinized by the UN, which has devoted substantial resources to the problem, perceived as very difficult to eradicate².

Regulating such a complex phenomenon with effective rules is rather challenging. In fact as diverse as the problem is, so is the legal context of reference. An analysis of the different applicable legal regimes reveals that the issue of child soldiers lies at the intersection of human rights law (HRL) protecting youths, international humanitarian law (IHL) protecting children in armed conflicts and international criminal law (ICL) establishing individual responsibility for the war crimes of conscripting, enlisting and using child soldiers.

This chapter mainly focuses on the ICL perspective, which leads to the consideration of up to date issues recently addressed in the long-awaited decisions of the International Criminal Court (ICC) in the *Lubanga* case and of the Special Court for Sierra Leone (SCSL) in the *Taylor* case. The analysis throughout will show that the asserted centrality of the issue of criminalization confronts the necessary and somehow delicate interrelationship with the wider context of protection as provided by international law. Establishing the precise boundaries of the scope of applicability of the crime, without conceding too much by succumbing to tempting policy considerations, is necessary in order to preserve the crimes' force, role and value in the context of international criminal justice.

II. THE LEGAL FRAMEWORK OF PROTECTION IN THE INTER-STATE DIMENSION: HRL AND IHL

The crimes related to child soldiers stem from the more general protection granted to children in armed conflicts. Thus unique to the case of

² The most relevant initiatives have been the establishment of the *UN Secretary-General's Special Representative for Children and Armed Conflicts* (A/RES/51/77 of 12 December 1996), with a significant extension of its mandate (A/RES/63/241 of 24 December 2008); the establishment of the *Security Council Working Group on Children and Armed Conflicts* (CAAC,) with a particular monitoring and reporting mechanism on the perpetration of six grave abuses (S/RES/1539 (2004) of 22 April 2004 and S/Res/1612 (2005) of 26 July 2005); the adoption of the *Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces and Armed Groups* and of the *Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups* of 2007.

child soldiers, protection is granted to a victim who is at the same time a potential perpetrator and is granted also towards the party of the conflict to which the victim belongs. The framework of protection is composed of various legal sources: HRL, IHL and ICL³.

This protection first emerged in an inter-state dimension. Among HRL sources⁴ due consideration should be given to the 1989 Convention on the Rights of the Child, which pays special attention to the protection of children in armed conflicts and to the prohibition against recruiting children (under the age of 15) for direct participation in hostilities⁵. A significant development was provided by the 2000 Optional Protocol (OP) to the Convention, more directly regulating the involvement of children in armed conflicts and raising the standard age for recruitment to 18⁶. More than 120 States have ratified the OP demonstrating an emerging consensus with respect to a new threshold age: however this consensus appears to fall short of universal State practice and thus does still not constitute a rule of general customary law in this sense⁷.

From the labour law perspective, the 1999 Convention on the Worst Forms of Child Labour defines forced or compulsory recruitment of children for use in armed conflicts as constituting the worst forms of child labour⁸.

Additionally on a regional level, the 1990 African Charter on the Rights and Welfare of the Child requires State parties to take all necessary measures to ensure that no child takes direct part in hostilities and to refrain from recruiting any children into their armed forces⁹.

³ For an overview of the sources, see Edoardo Greppi, 'Children in Armed Conflicts' in Giuseppina Cortese (ed) *Reflections on Children's Right – Marginalized Identities in the Discourse(s) of Justice* (Polimetrica International Scientific Publisher 2011), 71.

⁴ See Geraldine Van Bueren, *The International Law on the Rights of the Child* (Nijhoff 1995); Nevena Vuckovic Sahović, *The Rights of the Child and International Law* (Yugoslav Child Rights Centre 2000).

⁵ Convention on the Rights of the Child, A/RES/44/25 of 2 September 1990, Art 38.

⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/RES/54/263 of 25 May 2000, Arts 2–4.

⁷ See Ananda Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards Universal Ratification' (2010) 18 *Int'l J Children's Rights*, 535.

⁸ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (17 June 1999), Art 3.

⁹ African Charter on the Rights and the Welfare of the Child (11 July 1990), Arts 22 and 25.

Among IHL sources both GC IV and the APs explicitly recognize that children have special needs and deserve special protection¹⁰. More specifically the GC IV concerns several aspects of the protection of children during situations of occupation or armed conflict but does not specifically address the matter of their recruitment. AP I, which applies to international armed conflicts, requires parties to the conflict to take all feasible measures in order to ensure that children under the age of 15 do not take direct part in hostilities and in particular, to refrain from recruiting them into their armed forces¹¹. Similarly AP II, applicable to non-international armed conflicts, provides that children who have not attained the age of 15 shall neither be recruited in the armed forces nor be allowed to take part in hostilities¹². Due to the widespread ratification of these treaties, 15 years of age clearly emerged as the minimum customary law standard for the recruitment of children and for their use in hostilities, at least as far as 'direct' participation is concerned.

The above-mentioned international rules bind States and reveal the international accord to impose effective legal standards restricting the recruitment of children into armed forces and groups and more generally, limiting their participation in hostilities. At this inter-state level, the consequences of a breach would merely result in State responsibility: the inefficacy of such a system is apparent given that in contemporary conflicts non-State actors undertake most of the illegal recruitment of children.

¹⁰ See Denise Plattner, 'La Protection de l'enfant dans le droit International humanitaire' (1984) 66 *IRRC* 148; Lisa Hitch, 'International Humanitarian Law and the Rights of the Child' (1989) 7 *NYLSchJHumanRights* 118; Carolyn Hamilton and Tabatha Abu El-Haj, 'Armed Conflict: The Protection of Children under International Law' (1997) 5 *Int'l J Children's Rights* 1; Stéphane Jeannet and Joël Mermet, 'L'implication des enfants dans les conflits armés' (1998) 80 *IRRC* 105; Matthew Happold 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' (2000) 47 *NIRL* 27.

¹¹ Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, Art 77 (2).

¹² Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, Art 4 (2)(c). The provision appears different from that of AP I inasmuch as it refers to a more broad concept of 'taking part'. On this point see *infra* Section IV.

III. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR ENLISTING, CONSCRIPTING AND USING CHILD SOLDIERS: CUSTOMARY LAW VERSUS TREATY LAW

The search for more effective enforcement resulted in a different approach, somehow complementary to the protection conceived at a merely inter-state level: the assessment of individual international criminal responsibility for the war crimes of conscripting, enlisting and using child soldiers for active participation in hostilities¹³.

The issue involves both customary international law and conventional law through which full criminalization has been achieved. A clear assessment of the relationship between the two sources is crucial, as it deeply affects the application of the strict legality principle in criminal law (*nullum crimen sine lege*)¹⁴.

The ICC Statute characterizes the conscription or enlistment of children under the age of 15 or their use as active participants in hostilities, as war crimes¹⁵. The Statute of the SCSL includes a nearly identical provision¹⁶.

As it is well known, the *chapeau* elements of the ICC Statute provisions refer to the crimes listed 'within the established framework of international law'¹⁷. This is a clear indication of the drafters' intention not to create new relevant criminal conducts, but rather to reflect ICL as existing in 1998.

¹³ See Matthew Happold, 'Child Recruitment as a Crime under the Rome Statute of the International Criminal Court', in Jose Doria, Hans-Peter Gasser, M Cherif Bassiouni (eds) *The Legal Regime of the International Criminal Court* (Nijhoff 2009) 579; Kathryn Howarth, 'The Special Court for Sierra Leone – Fair Trials and Justice for the Accused and Victims' (2008) 8 *IntCLR* 399; Alison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) 2 *JICJ* 1141; Sandesh Sivakumaran, 'War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments' (2010) 8 *JICJ* 1009.

¹⁴ See Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010); Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *LJIL* 925; Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *JICJ* 1007.

¹⁵ Rome Statute of the International Criminal Court (17 July 1988) (ICC Statute), UN doc A/CONF.183/9, Art 8 (2)(b) and at Art 8 (2)(e) for armed conflicts of a non-international character.

¹⁶ Statute of the Special Court of Sierra Leone (4 October 2002) (SCSL Statute), UN doc S/2000/915 Annex, at Art 4 (c).

¹⁷ Art 2 (b) ICC Statute.

This point was also raised in relation to the SCSL Statute and answered in the *Norman Case Decision* regarding jurisdiction¹⁸. In particular, the SCSL stressed that the criminalization of recruitment of child soldiers is mentioned in numerous national legislations, as well in the vast majority of military codes. In order to assess the formation of these crimes as rules of customary international law, the SCSL emphasized the complex nature of such a process and the difficulty in pinpointing a precise event crystalizing the rule's customary status. The SCSL identified as a starting point the new consciousness surrounding the issue of child soldiers that arose in the mid-1980s. The SCSL also noted some further relevant developments regarding the widespread acceptance of key international instruments occurring between 1990 and 1994 and marked the accomplishment of the process of criminalization as between 1994 and 1996, when most States criminalized the prohibited behaviour in their domestic law¹⁹. In conclusion the SCSL held that child recruitment was criminalized before it was explicitly set out as a criminal offence in treaty law and certainly before November 1996, which was the beginning of the relevant time frame for the *Fofana and Kondewa* (CDF) case indictments²⁰.

Additionally the *Norman Case Decision* recognized that the customary rule criminalizes both forced and voluntary recruitment. The SCSL reasoned that during the drafting of the ICC Statute the discussion focused on the codification and effective implementation of *existing* customary norms, rather than on the formation of new ones²¹.

Some doubt the capacity of ICC Statute, at the time of its adoption, to reflect customary international law, especially with regard to the criminalized conduct of child conscription, enlistment and use²². Given the

¹⁸ *Prosecutor v Sam Hinga Norman*, SCSL No SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para 47 (*Norman Case Decision*).

¹⁹ *Norman Case Decision*, paras 50 and 51. The SCSL also states that the process culminated with the final codification of the matter, in the OP, and with the definition of children as persons under the age of 18. In this aspect, the reasoning proves troublesome as it conflates the topic of criminalization with that of the general international law prohibition.

²⁰ *Norman Case Decision*, para 53.

²¹ *Ibid*, para 54.

²² See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN doc S/2000/915, 4 October 2000, where it is clarified that the elements of the crime under the proposed Statute of the SCSL are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is itself a crime under common Art 3; (b) forced recruitment in the most general sense – administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a child combatant. In

uncertain customary nature of the crime as defined in the ICC Statute – criminalizing the conscription or enlistment of children under the age of 15 whether forced or voluntary – Art 4 (c) SCSL Statute was initially stricter, referring only to ‘abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities’²³, in order to better reflect the consolidated rules of customary international law.

It is clear that in this respect the rules do not necessarily overlap: States may well agree on the existence of a general customary rule prohibiting the non-forcible recruitment of children below 15 years of age, but not agree on the criminalization of such a conduct implying individual criminal responsibility.

This critical point and the relevance of the ICC Statute in crystalizing the criminalization of certain rules²⁴, are underlined in the Dissenting Opinion of Justice Robertson in the *Norman Case Decision* where it is affirmed that the crime of non-forcible enlistment was not provided for under ICL until July 1998²⁵. So it appears that the adoption of the ICC Statute was not intended to reflect existing customary rules in their entirety or to fully modify customary law: rather the ICC Statute had the effect of crystallizing the crime²⁶. However as will be demonstrated below, some issues raised in relation to the pinpointing of the rule are still relevant to the scope of its application, especially in relation to its material element.

the Report it is also stated that: ‘[w]hile the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused’.

²³ Only after an express request of the Security Council (UNSC) was Art 4 modified in line with Art 8 (2)(e)(vi) ICC Statute, then perceived as the statement of the law existing in 1996, accepted by the international community. See, to that effect, the Letter of the President of the Security Council addressed to the Secretary-General on 22 December 2000, UN doc S/2000/1234.

²⁴ *Prosecutor v Sam Hinga Norman*, Case No SCSL-2004-14-AR72(E), Dissenting Opinion of Justice Robertson, appended to the Decision of 31 May 2004, paras 38–9: ‘The rule against child recruitment was a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17th July 1998. It is to diminish the achievement of the Rome Treaty and its preparatory work to argue that Article 8 was merely a consolidation of existing customary law’.

²⁵ *Ibid.*, paras 45–7.

²⁶ See Happold, *supra* fn 13 at 599.

IV. THE MATERIAL ELEMENT OF THE CRIME

Turning to the analysis of the material element (*actus reus*) of the crime, it is necessary to briefly assess the meaning of three contiguous terms: ‘recruitment’, ‘enlistment’, and ‘conscripting’. ‘Recruiting’ implies some active soliciting that induces enlistment. ‘Enlisting’ suggests a voluntary act, and incorporates both active enrolment on a list and acquiescing to the demands for enlistment. ‘Conscripting’, however, means to compel to military service by force of a national law.

This distinction was confirmed by the ICC in *Lubanga* where, having acknowledged that there is no comprehensive definition of the relevant acts, it concluded that ‘enlisting’ must be defined as ‘enroll[ing] on the list of a military body’ and ‘conscripting’ as ‘enlist[ing] compulsorily’²⁷. The use of both terms (‘conscripting’ and ‘enlisting’) clearly demonstrates the intention to criminalize any form of enrolment of children under the age of 15 whether voluntary, compulsory or forced, into State armed forces and other armed forces or groups. As is often the case for laws protecting children, this crime is not conditioned upon the will of the victim, and implies that obtaining the consent of those children enlisted is not a valid defence²⁸.

The ICC discussed at length the issue of children consenting to recruitment as this was perceived to be the very basis of the distinction between ‘enlisting’ and ‘conscripting’: the ICC similarly concluded that there is no difference between enlisting and conscripting a child because the consent of a child to his recruitment does not provide a valid defence²⁹.

Moreover the strict correlation between the acts of enlisting and conscripting led the ICC to conclude that the two conducts must be treated as continuous, even though they constitute separate offences³⁰. In reaching such a conclusion, reference was made to the positions expressed by the UN Special Representative for Children and Armed Conflict, to the effect that distinguishing between ‘enlisting’ and ‘conscripting’ ‘is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict’³¹.

²⁷ *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Trial Judgement, 14 March 2012 (*Lubanga* Trial Judgement), paras 600 and 608.

²⁸ See Kai Ambos, ‘The First Judgment of the International Criminal Court (Prosecutor v Lubanga): A comprehensive analysis of the legal issues’ (2012) 12 *Int CLR* 115.

²⁹ *Lubanga* Trial Judgement, para 617.

³⁰ *Ibid*, para 618.

³¹ *Ibid*, paras 611–13, with an express reference to children’s inability ‘to give

A further element of the crime, deemed both as an alternative to or an addition to conscription and enlistment, is ‘using them to participate actively in hostilities’. This material element is complementary to the crimes of conscripting or enlisting, meaning that beyond the acts of conscription and enlistment a crime is committed when there is merely a concrete use of children under the age of 15 actively participating in hostilities.

Some problems of interpretation arose based on the concept of ‘using [children] to participate *actively* in hostilities’³² as this does not seem to be synonymous with the IHL standard of taking ‘direct part’ in hostilities³³. Indeed the distinct wording indicates the intent to widen the scope of applicability of this rule and thus, ‘active participation’ should be interpreted as ‘taking *any* part’ in hostilities³⁴. The problem then is assessing precisely the concept of ‘active participation’ and its relationship with IHL instruments, which regulate ‘direct’ participation in hostilities based on stricter standards requiring warlike acts such as firing, bombing or alternatively taking part in combat³⁵.

This expansive approach to the notion of active participation is textually based on an ICC Preparatory Commission’s Draft Statute footnote³⁶ and is confirmed by SCSL case law, which has extended the notion of active participation to support actions³⁷. Initially the ICC also seemed

genuine and informed consent when enlisting in an armed group or force’ at para 613.

³² ICC Statute, Art 8 (2)(e)(vii) (emphasis added).

³³ See eg Art 51 (3) AP I.

³⁴ See Happold, *supra* fn 13, at 592 (emphasis added).

³⁵ See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009); see also Nils Melzer, ‘Keeping The Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’S Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 42 *Int L and Politics* 831.

³⁶ See Happold, *supra* fn 13, at 593. The extensive notion applies to all the direct support functions and only leaves uncovered activities clearly unrelated to the hostilities. The Preparatory Committee made clear in the footnote that ‘[t]he words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.’

³⁷ See *Prosecutor v Brima, Kamara and Kanu*, Case No SCSL-04-16-T, Trial Judgement, 20 June 2007, para 737. On the contrary, in the *Fofana and Kondewa* case, ‘collaborating’ with the government or armed forces did not in itself satisfy the requirement of direct participation in hostilities and a stronger link to hostilities was required. See *Prosecutor v Fofana and Kondewa*, Case No SCSL-04-14-T, Trial Judgement, 2 August 2007, para 135. See also *Prosecutor v Sesay, Kallon, Gbao (RUF case)*, Case No SCSL-04-15-T, Trial Judgement (*RUF* Trial

to favor this expansive approach when confirming the charges against Lubanga³⁸.

Accordingly a clearer and more definitive interpretation of the concept was much anticipated and finally delivered in the *Lubanga* Trial Judgement. The ICC relied on SCSL case law and acknowledged that the expression 'to participate actively in hostilities' must be interpreted more widely than the expression 'direct participation'. In this regard the Trial Chamber clearly recognized that children face potential dangers when participating actively in hostilities, even if their involvement falls short of direct participation. Thus according to the ICC, the standard for assessing 'active participation' is 'whether the support provided by the child to the combatants exposed him or her to real danger as a potential target'³⁹. The central element of evaluation is therefore the risk of the child being targeted, including the risk that originates from the very group to which the child belongs.

Stressing the element of risk means adopting a human rights oriented approach to active participation, which emphasizes the general duty to protect children. This HRL perspective thus obliterates some classical yardsticks of IHL particularly, the belligerent nexus requirement⁴⁰. Moreover this approach encouraged the ICC to adhere to the traditional 'case by case' basis for evaluating what constitutes active participation, leaving open many questions related to the temporal scope of active participation such as potentially broadening this scope in order to cover activities in the training or pre-deployment stage⁴¹.

This 'case by case' approach underlies the Dissenting Opinion of Judge Odio Benito, which argues for the establishment of a common and comprehensive interpretation as well as a more general and systematic

Judgement), 2 March 2009, para 1743, referring to the guarding of diamond mines as sufficient for the notion of 'active participation'.

³⁸ See *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I (*Lubanga* Confirmation Decision), 29 January 2007, para 261. On this point see also Juan Carlos Ochoa, 'The ICC'S Pre-Trial Chamber I Confirmation of Charges Decision in the Case of *Prosecutor v Thomas Lubanga Dyilo*: Between Application and Development of International Criminal Law', (2008) 16 *EurJ Crime CrLCrJ* 39.

³⁹ *Lubanga* Trial Judgement, para 627.

⁴⁰ The belligerent nexus element requires that there is an integral relationship between the acts at issue and the hostilities or that such acts were designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of the other party.

⁴¹ See *Lubanga* Trial Judgement, para 628. See also Ambos, *supra* fn 28, para 4.2.

approach for defining the category of ‘active participation’, as distinguished from ‘direct participation’⁴². Yet the rationale behind Judge Odio Benito’s approach seems much more delicate as evidenced by her effort to stretch the category of active participation in order to include conducts which are very far from it, specifically sexual violence⁴³. Sexual violence is, as acknowledged by Judge Odio Benito herself, covered by distinct and separate crimes in the Statute⁴⁴ and therefore her dissenting opinion seems more inspired by policy arguments than by strict legal reasoning *de lege lata*⁴⁵. This problem, of course, arose from Prosecution’s failure to include charges of rape and sexual enslavement in the indictment at the relevant procedural stage. This dissenting opinion, though intending to overcome a risk of concrete discrimination with respect to the protection of girl soldiers⁴⁶, therefore entails a concrete risk of ‘neo-punitivism’ which, through an excessively policy-oriented interpretation, disregards the principle of *nullum crimen sine lege*.

Furthermore the *Taylor* case, recently decided by the SCSL, examined the scope of ‘active participation’ with regard to the use of children up to 15 years by the warring factions in the conflict in Sierra Leone⁴⁷. The judgement attempted to assess all the various relevant conducts susceptible to being qualified as active participation: ‘children in combat’, ‘children carrying arms and ammunitions’, ‘children as bodyguards for commanders’, ‘children sent on food-finding missions’, ‘children guarding mines’ and ‘children engaged in domestic chores’. This approach, although less aimed at establishing a ‘catch-all’ definition of active participation in comparison with *Lubanga*, is equally based on the evaluation of the risk

⁴² *Lubanga* Trial Judgement, Dissenting Opinion of Judge Odio Benito, para 7.

⁴³ *Lubanga* Trial Judgement, Dissenting Opinion of Judge Odio Benito, para 20, where it is affirmed, rather bluntly, that ‘[s]exual violence is an intrinsic element of the criminal conduct of “use to participate actively in the hostilities”’.

⁴⁴ ICC Statute, see Art 7 (1)(g), Art 8 (2)(b) (xxii) and Art 8 (2)(e)(vi).

⁴⁵ See Mohamed Shahabuddeen, ‘Policy-oriented Law in the International Criminal Tribunal for the Former Yugoslavia’ in Lal Chand Vohrah, Fausto Pocar *et al* (eds) *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (Kluwer 2003).

⁴⁶ *Lubanga* Trial Judgement, Dissenting Opinion of Judge Odio Benito, para 20: ‘[g]irls who are used as sex slaves or “wives” of commanders or other members of the armed group provide essential support to the armed group’; and para 21: ‘[i]t is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys.’

⁴⁷ See *Prosecutor v Taylor*, Case No SCSL-03-01-T, Trial Judgement, 18 May 2012 (*Taylor* Trial Judgement), paras 1457 ff and in particular para 1596.

to which children are exposed. This element is described as ‘sufficient risk’ and is considered strictly related to the mere bearing of arms⁴⁸. In comparison with some previous case law, particularly the *RUF* case in which food-finding missions by children without concrete use of arms were not considered as active participation in hostilities even if they generally supported the armed group⁴⁹, this new standard extensively affects the notion of active participation and its potential underlying acts⁵⁰.

In conclusion the tendency of recent case law to broaden the notion of active participation, and thereby the scope of application of the relevant crime, illustrates that the logic of criminalization does not perfectly overlap with HRL protections. Stretching the scope of application of a crime can entail a violation of the strict legality principle (*nullum crimen sine lege*) thus hindering the legitimacy of the decisions of the international criminal tribunals.

More precisely the generic reference to the risk element as constitutive of the notion of active participation strays far from the strict construction requirement. Moreover and from a different perspective, it should also be noted that widening the notion of ‘active participation’ without clearly defining the boundaries between this concept and that of ‘direct participation’, could lead to the paradoxical consequence of making children actively participating in hostilities legitimate targets, thus exposing them to greater risks.

A further element affecting the applicability of the crime is its reference to national armed forces within international conflicts and to armed groups for conflicts of non-international character.

The specific question arose in *Lubanga* as to whether the concept of national armed forces could be given a wide interpretation, not limited to the armed forces of a State and thus including the Union Patriotique Congolèse (UPC/FPLC)⁵¹. The Trial Chamber preferred not to directly address the issue since the armed conflict at issue was qualified as non-international⁵². This choice is troublesome as the ICC itself acknowledges

⁴⁸ As a consequence the only conduct that is clearly excluded from the scope of the rule is that of ‘engagement in domestic chores’. See *Taylor* Trial Judgement, para 1477.

⁴⁹ See *RUF* Trial Judgement, para 1743; in a different sense see *Taylor* Trial Judgement, paras 1478-1480.

⁵⁰ See *Taylor* Trial Judgement para 1478, for the guarding of mines and para 1486, for the use as bodyguards.

⁵¹ This extensive approach was proper for the Pre-Trial Chamber, which had also opted for a sequenced international/non international conflict qualification: see *Lubanga* Confirmation Decision, paras 268–85.

⁵² See *Lubanga* Trial Judgement, paras 523 ff.

the presence of some factual elements of an international character that will likely lead to an appeal on the issue⁵³. The qualification as a non-international armed conflict could in fact be challenged in order to affirm, as a consequence, the impossibility of considering UPC/FLPC to constitute a 'national armed force'.

This point was stressed by Judge Odio Benito in her dissent, where she argued that 'the concept of enlistment, conscription and use in both Art 8 (2)(b)(xxvi) and Art 8 (2)(e)(vii) Rome Statute should be understood as encompassing any type of armed group or force, regardless of the nature of the armed conflict in which it occurs'⁵⁴. This aspect of the dissent appears again to be strongly policy-oriented, suggesting rather bluntly that the textual difference between the regimes of international and non-international conflicts, which is maintained in the ICC Statute to represent a conceptual difference, should be overridden⁵⁵.

A more rigorous and at the same time courageous solution would have been for the ICC to acknowledge that in international armed conflicts the expression 'national armed forces' could be given a scope of application wider than 'state armed forces', thus encompassing armed forces like UPC/FLPC.

V. THE MENTAL ELEMENT OF THE CRIME AND THE MODES OF RESPONSIBILITY

In the crimes of conscripting, enlisting and using child soldiers, the subjective element of the crimes (*mens rea*) is of pivotal importance since it also has a bearing on the modes of responsibility, with particular reference to co-perpetration, command responsibility and aiding and abetting.

The ICC Statute provides that 'unless otherwise provided a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with knowledge and intent'⁵⁶. However, the Elements of Crimes (EoC) contain a 'knew or should have known' clause, which opens up the possibility of applying the hypothetical knowledge standard⁵⁷. This discrepancy could

⁵³ Ibid, paras 543 ff.

⁵⁴ Ibid, Dissenting Opinion of Judge Odio Benito, paras 12–14.

⁵⁵ See Happold, *supra* fn 13, at 589.

⁵⁶ Art 30 (I). See Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *CrimLF* 473.

⁵⁷ See EoC (ICC-ASP/1/3 part II-B) which provides: 'the perpetrator knew or

be overcome in favor of the wider standard only if the EoC can derogate from the ICC Statute (Art 30) or if the standard was considered a subsequent practice to the application of the ICC Statute, but neither approach is necessarily consistent with the strict legality principle.

There are of course several good arguments in favor of a wide interpretation of the scope of applicability of the crime. This would entail subtracting it from the general mental element regime and construing it either as a crime of strict liability or as a crime to which the hypothetical knowledge standard applies⁵⁸. From the standpoint of the rights of the accused however, the issue remains delicate since there are equally good reasons to affirm that the ICC Statute should prevail, especially since the EoC are not binding. In this sense, the *favor rei* interpretation under Art 22 (2) is likely to play a crucial role.

This issue is very sensitive, which is probably why the ICC in *Lubanga* preferred not to address it directly⁵⁹ and did not fully apply the subjective requirement of ‘awareness’ to the age element⁶⁰. *Lubanga* was in fact found guilty of child recruitment as a co-perpetrator, pursuant to Art 25 (3)(a) ICC Statute, with regard to the second alternative, being the crime committed not jointly but ‘through’ another person. The ICC, by confirming the decision of the Pre-Trial Chamber, found the existence of a ‘common plan’ directed by the accused to build an army for the purpose of establishing and maintaining political and military control over Ituri. Such a plan resulted in the conscription and enlistment of boys and girls under the age of 15, and in their use to actively participate in hostilities⁶¹. The ICC therefore found that the accused acted with the intent and knowledge necessary within the meaning of Art 30 as the commission of the crime occurred as a consequence of the plan ‘in the ordinary course of the events’⁶². At the ICC the ‘overall plan’ requirement in co-perpetration

should have known that such person or persons were under the age of 15 years’. On the point see also Tomas Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’ (2008) 6 *JICJ*, 471.

⁵⁸ See Happold, *supra* fn 13, at 597; Weigend, *supra* fn 57, at 482.

⁵⁹ See *Lubanga* Trial Judgement, para 1015.

⁶⁰ The element of awareness is mentioned but ultimately set aside. See *Lubanga* Trial Judgement, para 1013: ‘they were aware that in implementing their common plan this consequence will occur in the ordinary course of events’. On this point see Ambos, *supra* fn 28, Section 5.2. and Weigend, *supra* fn 57, at 485, referring critically to the Pre-Trial Decision.

⁶¹ See *Lubanga* Trial Judgement, paras 1351-1356: evidence of *Lubanga*’s overall coordinating role and involvement in the recruitment decision and in the use of children among his bodyguards.

⁶² *Ibid*, paras 1351-7.

has therefore absorbed the general mental element and the always-tricky burden of proving ‘intent and knowledge’.

Co-perpetration was held as the mode of responsibility on the basis of the collective ‘control over the crime’ theory⁶³. For co-perpetration the contribution to the plan must be ‘essential’ and the Court clarified that the threshold for what is ‘essential’ must be rather high in order to reflect the systemic difference between Art 25 (3)(a), which refers to a primary mode of commission that is hierarchically superior, and accessory participation under Art 25 (3)(b)–(d)⁶⁴.

The ICC also clarified that the coordinated or collective commission entails a mutual attribution of the respective contributions: a co-perpetrator need not personally and directly participate in the execution of the crime, nor be physically present⁶⁵.

Thus the choice was to apply Art 30 to the mode of co-perpetration by attenuating the requirement of concrete knowledge and surrogating it with the standard that a ‘consequence will occur in the ordinary course of events’⁶⁶, which very much resembles categories such as ‘*dolus eventualis*’ and ‘hypothetical knowledge’ not directly evoked in the decision. This choice is particularly problematic in relation to the element of the perpetrator’s awareness of the child’s age. Affirming the fulfilment of the mental element of the crime because the implementation of the plan will lead, in the ordinary course of the events, to the commission of the crime of recruiting children of under the age of 15, results in the age of the recruit being treated not as a direct element of the crime (and as such, as a circumstance of direct knowledge which must be proven) but rather as a consequence in the sense of Art 30 (2)(b), which is clearly a misconception⁶⁷.

⁶³ *Ibid*, para 994. Furthermore, the ICC also invoked a combined reading of Arts 25 (3) and 30 ICC Statute, in order to support the conclusion that committing the crime in question does not need to be the overarching goal of the co-perpetrators. The mental element is thus satisfied simply if the co-perpetrators knew that in the ordinary course of events implementing the plan, it will result in the commission of the crime (*ibid*, paras 985–6). See also Ambos, *supra* fn 28, Section 5.

⁶⁴ *Lubanga* Trial Judgement, paras 998–9. On this point Judge Fulford appended a Dissenting Opinion to the judgement, affirming the irrelevance of establishing a clear dividing line between the various forms of liability under Art 25 (3)(a)–(d), see paras 15–16. For a critique, see Ambos, *supra* fn 28 Section 5.1.

⁶⁵ *Lubanga* Trial Judgement, paras 1003–5.

⁶⁶ *Ibid*, para 1007.

⁶⁷ The same escapist attitude towards the mental element is found in *Taylor*. See *Taylor* Trial Judgement, paras 6947 ff. in particular, with respect to the mode of responsibility for ‘aiding and abetting’, no evidence of the direct knowledge of the age of the recruits was required but only the awareness of the ‘essential elements’ of the crimes committed and of the ‘state of mind of the perpetrators’, para 6951.

VI. CONCLUSIONS: CONSIDERING AND APPLYING THE CRIME IN A WIDER CONTEXT

The issue of child soldiers reveals how posing legal standards and fixing thresholds is a delicate process. Childhood is a human construct, not a natural phenomenon; the meaning of childhood has changed throughout history, both with respect to different historical periods and various social environments. Thus an understanding of childhood is necessarily associated with cultural, traditional and social structures, as the threshold between childhood and adult age varies over time and space.

This key problem is somehow mirrored in the difficulty of fixing precise thresholds for the application of the various relevant legal provisions. The problem is particularly acute in relation to the crimes of conscription, enlistment and use of child soldiers, for which and as previously discussed, recent case law provides some definitions and implies critical analysis of their relationship within the wider context of HRL, IHL and other ICL provisions.

There is undoubtedly a tendency to cross-fertilize among these legal frameworks and among the different levels of protection granted to children in armed conflicts. This tendency is coupled with a more general tendency of hybridization of legal categories such as those of 'direct', 'active' and 'indirect' participation. In this sense, the blurring of the mental element of 'knowledge' and the progressive obliteration of a precise distinction between international and non-international armed conflicts could be seen as indicators of an increasingly human rights-oriented interpretation of these crimes.

Nonetheless this tendency bears relevant risks, particularly as far as the strict legality principle and the *favor rei* principles are concerned. Policy-oriented decisions are susceptible of jeopardizing the very function of international criminal justice and tainting it with suggestions of punitivism. Moreover, the pervasiveness of the extensive scope of application of the crime can lead to the paradoxical consequence of depriving children of their protection in the wider context of IHL.

A different approach could be that of considering the crime in a wider context with the intent of tracing its precise boundaries. In this respect gaining a better perception of the entire range of protective instruments and of their respective scope of application, could induce prosecutors not to focus solely on the recruitment and use of child soldiers, but also on other crimes committed against children⁶⁸.

⁶⁸ The risk of stigmatising child soldiers, ignoring wider abuses experienced by them, is evident. To this respect the exclusive child soldiers focus in the ICC's

In particular with respect to enslavement as a crime against humanity⁶⁹, the recruitment on a widespread and systematic scale by forcible or coercive means as well as the use of children in the hostilities for degrading purposes are underlying acts that may constitute enslavement⁷⁰. The same conducts could therefore result in multiple convictions, pursuant to the rule on cumulative convictions⁷¹ and the crime of enslavement could also act as a catch-all provision allowing for the prosecution of conducts such as sexual slavery that could hardly be considered to fall under the ambit of conscription, enlistment and, in particular, use for active participation in the hostilities.

In conclusion considering the crimes of conscription, enlistment and use of children in a wider context should serve more as a tool for distinguishing the roles, functions, relevant thresholds and goals of the various provisions, rather than as a process encouraging conflation through excessive cross-fertilization. Striking this balance is the only way of avoiding paradoxical consequences such as the increased classification of child soldiers as legitimate targets, which is entailed from an expansive interpretation of the notion of 'active' participation in hostilities compared to the IHL standard of 'direct' participation in hostilities. This seems to be the best way to safeguard the crime from possible misuses and grant to it centrality within the international criminal justice system while, at the same time, assuring a proper relationship with IHL and the principle of distinction.

charges against Lubanga is questionable and it is not fortuitous that a broader range of charges has been chosen to ground the subsequent indictments of two other Congolese suspects, Katanga and Chui.

⁶⁹ Art 7 (I)(c) ICC Statute.

⁷⁰ In particular the EoC for the crime against humanity of enslavement recall some elements, such as the victim's position of vulnerability, psychological oppression, socio-economic conditions, exploitation, compulsory labor or service or sex, which reproduce the usual treatment of child soldiers. In this sense see Happold, *supra* fn 13, at 604, where the crime of conscription and enlistment is characterized as a sub-set of the crime against humanity of enslavement, deeming the latter as capable of better reflecting both the systemic nature of the offence and its gravity.

⁷¹ See *infra* Chapter 15 by Julinda Beqiraj.