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Barefoot, pregnant and in the kitchen: Am I a child soldier too?

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SYNOPSIS

International law protects children from abuse, including sexual abuse, and from discrimination based on gender. It also prohibits the recruitment and use of child soldiers, but these provisions do not distinguish between boys and girls and their different experiences of armed conflict.
International law also protects women from sexual violence or from discrimination based on gender, but does so without age distinction. This does not mean that girls' experiences of armed conflict are entirely precluded. For instance, the Cape Town Principles and Paris Principles single out girls as being specifically used for sexual purposes. However, no concrete international law provision attempts to protect girl child soldiers from sexual violence carried out by a member of the armed group they belong to.
Consequently, an explicit link is missing within these different provisions to ensure that the use of child soldiers is understood widely enough to include sexual abuse against girls.

Introduction

International criminal law prohibits the recruitment and use of children under the age of 15 by military commander and political leaders (ICC Statute (2002), Article 8(2)(b)(xxvi) & Article 8(2)(e)(vii)). International criminal tribunals, such as the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC), have focussed some of their case law on this war crime (AFRC cases, 2007; SCSL, 2004; SCSL, 2007a; SCSL, 2009 March 2; SCSL, 2012). This article focuses particularly on the ICC's Lubanga judgement which found Thomas Lubanga Dyilo guilty of committing, jointly with others, the crime of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the context of an internal armed conflict in violation of article 8 of the ICC Statute (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, decision on sentence pursuant to Article 76 of the Statute, & 10 July, 2012, Section 97). However, as argued by Drumbl (2012) international criminal law has too simplistic a view of child soldiers and does not incorporate the full spectrum of the child soldiering experience.

To acknowledge the experiences of child soldiers is far from straightforward. After all, the circumstances surrounding armed conflicts are exceptional due to the violent nature of war in which economic, social, community and family units are fragmented or broken down. Families are uprooted and forced to flee which increases the chances of dispersion and makes children more vulnerable to recruitment. Children may be forcefully recruited or manipulated into enlistment. Armed forces or groups may benefit from the recruitment and use of children, because they are less likely to call into question adult commanders, eat less and can be paid less. Children may also wilfully choose to become combatants as a survival mechanism to access food or shelter. Once they have been recruited, the roles allocated to child soldiers range from taking an active part in hostilities as fighters, suicide bombers, spies or guards to providing support as human shields, cooks, cleaners or porters. Additionally, many girls are forced into domestic and sexual slavery or suffer other forms of sexual violence. Within this variety of realities, how can the term 'child soldier' be constructively defined to guide policy needs?

International law protects children from abuse, including sexual abuse and from discrimination based on gender. It also prohibits the recruitment and use of child soldiers, but these provisions do not distinguish between boys and girls and their different experiences of armed conflict (United Nations Convention of the Rights of the Child (adopted 20 November, 1989), Articles 34, 2 and 38 and United Nations optional

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protocol to the convention on the rights of the child on the involvement of children in armed conflict (adopted 25 May, 2000)). International law also protects women from sexual violence or from discrimination based on gender, but does so without age distinction. This does not mean that girls' experiences of armed conflict are entirely precluded. For instance, the Cape Town Principles and Paris Principles single out girls as being specifically used for sexual purposes, but no concrete international law provision attempts to protect girl child soldiers from sexual violence carried out by a member of the armed group they belong to (UNICEF, 1997; UNICEF, 2007). Consequently, an explicit link is missing within these different provisions to ensure that the use of child soldiers is understood widely enough to include sexual abuse against girls. Thus the protection international criminal law currently affords girls is insufficient. The Lubanga judgement highlights that international law has only just began to scratch the surface and is not yet able to adopt a comprehensive approach. The Court's narrow interpretation of what child soldiering entails is restrictive. The issue of child soldiering is addressed from a very one-sided and masculine point of view focussing on the use of child soldiers as those who actively participate in armed conflict, whilst overlooking some of the gendered support roles, such as sexual services, which are inherent to the recruitment and use of child soldiers. Despite well-documented harms related to sexual and domestic abuse suffered particularly, but not exclusively by girl child soldiers, the judgement failed to acknowledge the specific harms that girl child soldiers face. International criminal law criminalises rape, sexual slavery, forced pregnancy and other forms of sexual violence as war crimes and crimes against humanity that can serve as a basis for the prosecution of the harms of sexual violence suffered by girls (ICC Statute, 2002, Articles 8(2)(b)(xxii, 8(2)(e)(vi) & 7(1)(g)). However, I suggest that international criminal law should develop a similarly gendered understanding of the war crime to recruit and use child soldiers. One that takes into account the variety of roles performed by children and includes these experiences in the prohibition of the recruitment and use of child soldiers, in order to protect children from the threats posed by the opposing armed groups, but also from within their own armed group.

This article will examine the Lubanga judgement with respect to the gendered acts related to the recruitment and use of child soldiers and suggest that the ICC has fallen short for victims of gender-based crimes. Part 1 will discuss the concept of child soldiers as a multi-faceted issue. Part 2 will focus on the gendered aspects of child soldiers for girls and boys thus far unaddressed by international criminal law. I conclude that to recognise the experiences of girl child soldiers will be a step in the right direction towards achieving better gender parity.

Children and armed conflict — complex issues and gendered perceptions

The use of the expression 'child soldier' raises a number of issues, not least because it captures the essence of some narratives, in particular that of western humanitarian organisations of 'child soldiers' as inextricably linked to postcolonial wars in which child soldiers, are perceived as solely vulnerable and exploited (War child; Child soldiers; Invisible children). Such a narrative has influenced the manner in which international criminal law understands and defines child soldiers to the detriment of the more specific gendered experiences, in particular of girl child soldiers.

Defining child soldiers

It is difficult to give a current and up-to-date figure of child soldiers engaged in armed conflict. UNICEF estimates that 300,000 soldiers under the age of 18 are fighting in conflicts around the world. Governmental armed groups and rebel forces have recruited children in conflicts occurring in parts of Latin America, Asia, Europe and the Middle East, in countries such as Afghanistan, Burma (Myanmar), Chad, Colombia, India, Iraq, Occupied Palestinian Territories, Philippines, Sri Lanka, Sudan and Thailand (Annual Report of the Secretary General (2012)).

Historical accounts of wars inform us that children have played a variety of roles to assist the war effort, but not necessarily in the manner in which children were used in armed conflicts of Sierra Leone and DRC. In the past, children did not necessarily actively participate in hostilities. In some cases, children were trained to prepare them as adult soldiers. In Africa, Shaka, the warrior king and founder of the Zulu nation introduced a military organisation that included six-year old boys as apprentice soldiers (Knight, 2006). In other cases, children were used in supporting roles. During the Crusades, children from the age of twelve were used as military aids at the service of the crusaders (Wise, 1978, p. 5). However, at times children did participate in hostilities. During the American Civil War, children were actively involved in the conflict (Gates & Reich, 2009, p. 93). Johnny Clem was ten-years old when he ran away from home to become a drummer boy in the second Michigan regiment. He became famous for exchanging his drum for a gun to shoot a confederate colonel during the battle of Shiloh (Arlington National Cemetery Website). Particularly towards the end of the Second World War, Japan, Russia and Nazi Germany used child soldiers in their fight against each other when their manpower was dwindling. For instance, as the war went on, boys drafted into the Hitler Youth Brigades participated actively in combat (Fass, 2013, p. 151). History therefore suggests that children, more specifically boys, take part in war. They have fulfilled multiple roles in aid of the war effort, a fact which was accepted in most societies until relatively recently. It is therefore not the case that children's participation only occurs in the more recent conflicts (Rosen, 2005, pp. 9–11). However, a distinguishing factor is that children's participation in modern conflict is extremely violent and destructive and that children are used to fragment communities and carry out atrocities, as illustrated by the examples of Sierra Leone and DRC.

From the beginning of Sierra Leone's civil war in 1991 children were forced to contribute to the war effort by both sides to the conflict: the rebel force Revolutionary United Front (RUF) and the pro-government militia, Kamajors. The SCSL has charged all nine of its original defendants with the war crime of recruiting and using child soldiers and so far five accused have been convicted of this crime (AFRC cases, 2007; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, decision on sentence pursuant to Article 76 of the Statute, & 10 July, 2012; SCSL, 2007a; SCSL, 2009 March 2). The Court found, in particular, that the former Liberian president Charles Taylor, who

was never on the battlefield of Sierra Leone, had used Liberian military capabilities to strengthen the RUF operating in Sierra Leone and encourage rebels in their campaign of terror, including the use of children younger than 15 as soldiers (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, decision on sentence pursuant to Article 76 of the Statute, & 10 July, 2012, § 150). The *Charles Taylor* judgement highlights that the recruitment of children in Sierra Leone served a dual purpose. It was a way of pursuing a policy of criminal campaign against Sierra Leonean civilians, victimising children and their entire families. In turn, the children, once associated with the armed groups, were used as instruments to commit atrocities and further this policy.

Similarly, in the Democratic Republic of Congo (DRC), all armed parties to the conflict count children in their ranks. Thomas Lubanga was the leader of the Union of Congolese Patriots, a rebel group. He encouraged children, including children under the age of 15 years, to join the army. To advance the cause of the Hema ethnic group to gain control over land and resources in the gold-rich Ituri region situated in northeast DRC, girls and boys were forced to carry arms, kill and maim, burn down villages, and to submit to sexual slavery or other forms of abuse. In the *Lubanga* judgement, the ICC took into account the position of authority held by Thomas Lubanga within the Union of Congolese Patriots (UCP) and the Forces Patriotiques de Libération du Congo (FPLC) and his essential contribution to the common plan that resulted in these crimes against children (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, & 10 July, 2012, Section 97). The ICC found Thomas Lubanga guilty of recruiting children under the age of 15 as child soldiers and using them to participate actively in hostilities between 2002–2003 (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, & 10 July, 2012, Section 97).

The symbolic value of the SCSL and ICC judgements expresses a firm international commitment that wherever possible those most responsible for committing this war crime will be prosecuted. The SCSL's prosecutor Brenda Hollis stated when she commented on the conviction for recruiting and using child soldiers:

> "Children were taken from their families, and not only used to fight, but also to commit crimes against their fellow Sierra Leoneans. This robbed these children of their childhood, and the judges have sent a clear message that this will never be tolerated".
>
> [SCSL Press Release SCSL (2012)]

'Child soldiers' is the term commonly used to describe children involved in recent modern armed conflicts. The term 'child soldier' however is problematic. In the first instance, it assumes that a child soldier can be loosely defined as any child involved in a regular army, a rebel armed force or group regardless of whether their involvement is through conscription, is forced or voluntary, and regardless of motivations, geography, cultures and ideologies. But the realities of child soldiers are more complex. What being a child soldier entails will vary from conflict to conflict, from armed force to armed force and from child to child, as illustrated by the armed conflicts in Sierra Leone and the DRC.

In addition, the term 'child soldier' generates a paradox by combining the vulnerable and innocent child with the extreme violence associated with armed conflict and armed forces. As questioned by Honwana (2007), p. 33 & p. 69, how can one be at the same time a child and a soldier? Childhood tends to suggest innocence and defenselessness. The term "soldiers", on the other hand, broadly refers to members of an organised armed group taking active part in hostilities and is suggestive of violence. The two terms together leave us with a narrative in which children's vulnerability and the need for protection is linked to extreme violence. The UNICEF (2007) suggests using the alternative terminology to 'child soldiers'. Instead it refers to 'children associated with armed forces and armed groups' (UNICEF, 2007). Although quite a mouthful, this expression denotes a better understanding of the variety of experiences of children involved in armed groups. Even though the Paris Principles are a non-binding instrument, it has considerable influence, is cited by international criminal tribunals and may in time become international law and thus strengthen the protection of children from armed conflict.

Western humanitarian organisations in particular, whilst raising awareness about children affected by armed conflict, specifically emphasise the innocence and victimhood of children participating in armed conflict and the extreme violence to which they are exposed. Of course, western notions of the nature of childhood, not least concerning spoilt innocence, can be critiqued. This simplifies our understandings of child soldiers in that children are only seen through the lens of victimhood and never as active agents or even successful resisters. Similar narratives can be found in court proceedings. In the opening statement of the Prosecutor in the *Lubanga* trial children were presented as defenceless:

> "They cannot forget the beatings they suffered, they cannot forget the terror they felt and the terror they inflicted; they cannot forget the sounds of their machine guns; they cannot forget that they killed; they cannot forget that they raped and that they were raped".
>
> [Moreno-Ocampo (2009)]

To emphasise the vulnerability of children in this manner can be explained by the need to secure a conviction and an account of the dire conditions that these child soldiers find themselves in, particularly since demobilisation, will assist. However, such a portrayal can also work to the detriment of child soldiers called as witnesses. Their youth, vulnerability and trauma can lead to questioning the veracity of their testimony and hamper agency.

Furthermore, each child exists within a set of individual varied realities, such as age, gender, geography and culture. This makes it difficult to determine the age at which an individual ceases to be a child and becomes an adult. As seen in the judgements of the SCSL and the ICC, the Statutes provide that it is a war crime for military commanders and political leaders to recruit and use persons below the age of 15 (ICC Statute, 2002, Article 8(2)(b)(xxvi), (e)(vii) and SCSL Statute, 2002, Article 4). In contrast human rights instruments, such as the United Nations Convention of the Rights of the Child (adopted 20 November (1989)), define a child as "any human being below the age of 18 years" (Article 1). Likewise the United Nations optional protocol to the

convention on the rights of the child on the involvement of children in armed conflict (adopted 25 May (2000)) makes it unlawful to recruit individuals under the age of 18. However, for the purpose of children's participation in armed conflict it is important to make a distinction between prohibition as contained in human rights instruments and international criminal sanction as implemented by international criminal courts. The decision to set the age limit to 15 is controversial and pressure is exercised, in particular by humanitarian organisations, to extend the war crime to include persons below the age of 18. Some countries resisted such a move. For instance, the US, the Netherlands and France still permit the voluntary recruitment of minors into national armed forces, albeit under strict legal conditions. The UK only recently raised the military age of recruitment from sixteen to eighteen and had sent soldiers under the age of 18 to the first Gulf War (Armed Forces Act, 2006). It is therefore no surprise that it has proven so difficult to stop the practice or simply to agree a universal age limit for conscription. However, as Coomaraswamy indicated, recruitment into armed forces or groups is against the best interests of a child (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, decision on sentence pursuant to Article 76 of the Statute, & 10 July, 2012). For the purpose of consistency and effective enforcement, both the unlawfulness and criminal sanction must apply to the recruitment and use of children under the age of 18. In addition, and as will now be discussed, the definition and understanding of child soldiers adopted by the ICC do not recognise girls' experiences of armed conflict as features of child soldiering.

Between a rock and a hard place — girls amongst child soldiers

There is very little data available to accurately assess the historical and current roles that girls fulfil in armed conflicts. Nevertheless, girls are also recruited and used by commanders of armed groups and account for 40% of child recruits (Save the Children Report, 2005). The lack of available data may be partly due to a gendered perception that girls do not or cannot fight and thus girls' participation in armed conflict has not been monitored until recently. However, it is important to understand the roles girls fulfil within armed groups in order to provide girl child soldiers with appropriate legal responses. Indeed many of the harms suffered by girl child soldiers are included in the ICC Statute, 2002. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other forms of sexual violence are separate war crimes (Articles 8(2)(b)(xxii) & 8(2)(e)(vi)) and separate crimes against humanity (Article 7(1)(g)). However, this category of gender-based crimes is still under-investigated and under-prosecuted (Mouthaan, 2011). The ICC still lacks a consistent approach towards the prosecution of gender-based crimes. For instance, as will be examined, in the *Lubanga* trial, the prosecutor, in exercising his prosecutorial discretion, decided not to include charges of crimes of sexual violence. As a consequence, the harms suffered by girl child soldiers, including sexual slavery, rape and other sexual crimes, were overlooked.

An alternative approach is to understand sexual violence as part and parcel of the child soldering experience to be addressed within the war crime of recruitment and use of child soldiers, rather than be prosecuted as a separate war crime of sexual slavery or other form of sexual violence. As argued by Askin (2005, p. 143), Bus (2002, p. 6)and Oosterveld (2013, p. 70) more generally, the dual basis of targeting within the crime needs to be recognised. Girls are targets of the war crime to recruit and use child soldiers. In addition girls are also targeted for sexual abuse on the basis of their gender. The Prosecutor in the *Lubanga* case could have resorted to a dual basis for the prosecution of the crime and the underlying gendered nature of the crime. The Court would then have been able to address whether there were different ways in which girls and boys were used, thus addressing underlying gendered aspects of the crime.

For, although there are similarities between the experiences of boy and girl child soldiers, girl child soldiers also present distinctive gendered characteristics. Similarly to the recruitment of boys, there are a variety of reasons for girls to join, voluntarily or not, an armed force or group. Socio-economic circumstances, political ideology, poverty or breakdown of family and community structures, social, economic and political emancipation may encourage girls to join an armed force or group in order to acquire protection, healthcare, food and shelter. Child soldier recruitment of both boys and girls also presents a set of gender-specific features. Girls may join an armed force or group to seek personal protection from domestic mistreatment or sexual violence (Denov, 2007). Girls are also more likely to be abducted for domestic and sexual purposes.

More importantly, similarly to boy child soldiers, girls may perform a variety of roles within armed groups. Girls may be used as active combatants or for other military purposes (Thomas, 2008). Boys and girls alike may be used indirectly in support roles as human shields, messengers, spies, cooks, porters and mine clearers. In addition, pre-existing gender inequality may be replicated, even exacerbated, within the organisation of the armed group with girls being used to perform socially constructed gendered roles such as carrying out domestic tasks, including cooking and washing clothes, providing medical care and run camps. In addition, the older girls are more vulnerable than the boys to grave violations of their human rights through sexual violence, sexual exploitation, forced marriage, and increased exposure to sexually transmitted diseases such as HIV/AIDS (Human Rights Watch Report, 2003). As Coomaraswamy stated, for girls, recruitment is a "particularly horrendous experience" (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04–01/06–2842T-223-ENG, judgement pursuant to Article 74 of the Statute, & 14 March, 2012, pp. 30–31). Girl child soldiers are much more likely than boys to experience sexual abuse (Sivakumaran, 2013, p. 19). In Sierra Leone, recruited young girls were used to fulfil the role of "wife" to rebel commanders; and as a consequence of related sexual activity many became pregnant and faced higher risks of exposure to sexually transmitted diseases (Denov, 2007, p. 20). Moreover, the boys' experiences of recruitment and use also contain gendered aspects. They may suffer sexual violence or may learn to be sexually violent towards civilians or colleagues.

The aftermath of participation in armed conflict is also not without its own specific challenging gendered issues. In Sierra Leone, girls were expected to re-adhere to traditional gender-specific roles (Denov, 2007, p. 21). Many girl child soldiers, often with their own children, faced rejection and social stigma due to cultural practices and beliefs for the roles they were expected to perform as child soldiers (Denov, 2007, p. 163).

Therefore, child soldiering denotes a huge variety of experiences, including the manner of recruitment, the violence before, during and after joining an armed force or group, as well as the reasons for joining. Drumbl (2012) warns against an all too simplistic understanding, because this affects international responses to the issue of child soldiers, in particular the definition of child soldiers.

Thus far, international criminal law has given little thought to the role and perspectives of girl child soldiers (Quénivet, 2008). It assumes that some of the roles of a sexual and domestic nature that girls fulfil within armed forces and groups fall outside the scope of military support and thus are excluded from the crime to recruit and use children in armed conflict. This is not surprising as in most societies women are seen to play a gendered role as a care giver and not as a fighter, whereas norms of masculinity motivate men to fight. The army is seen as a male-centred entity to which women have restricted access. Although there are examples of women taking part in combat ranging from Russia, the UK and Eritrea, in general frontline face-to-face combat is precluded from women's remit, because they are perceived to be too feminine, lacking the necessary physical and psychological abilities. As such, military roles are an extension of everyday gender roles in which women's roles are similarly undervalued.

However, the prohibition of recruitment and use of child soldiers are one thing, but for this prohibition to be meaningful, international criminal law must capture the essence of what it means to be a child soldier. Child soldiers do not necessarily engage in direct combat. They perform a variety of roles. It is therefore essential to understand girl's experiences of armed conflict as part and parcel of child soldiering. The presence of girls and the multiple roles within fighting forces is not insignificant. Thus girls' experiences and perspectives should be considered as central to the prohibition to recruit and use child soldiers and not regarded as peripheral or unwittingly or wittingly rendered invisible.

In contrast to international criminal law, international human rights law provisions already aim at protecting children from the recruitment and use of child soldiers, but also from discrimination and sexual violence, whilst acknowledging the variety of uses of child soldiers, in particular the gendered aspects. This would also be in accordance with the definition of a child soldier in the UNICEF, 2007 that more accurately reflect the reality lived by children recruited into and used in armed conflict. According to the UNICEF, 2007 this includes:

> "Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".

The Principles explicitly mention the sexual roles that children may be required to perform, but also explicitly exclude the requirement of active participation. It thus more accurately identifies what the prohibition seeks to achieve: the protection of all children from recruitment and use by armed groups and forces in combat roles as well as supporting roles. "In other words, the UNICEF (2007) offer a more holistic understanding of the variety of experiences involved, including sexual violence and the targeting of girls amongst children, and this is in direct contrast to the male- and combat-oriented understanding of the Lubanga judgement".

Child soldiers — law and the invisible gender dimension in the *Lubanga* judgement

The *Lubanga* judgement does not offer a comprehensive legal definition of the concept of 'use to participate actively in hostilities'. Instead the Court leaves it to a case-by-case analysis whether some activities fall within the remit of the crime. As a consequence, sexual violence suffered by girl child soldiers under the command of Thomas Lubanga would have to be prosecuted as a separate crime. However, the Prosecutor did not include separate charges of crimes of sexual violence.

'Use to actively participate' and gendered aspects of the crime

International criminal tribunals have addressed the responsibility of commanders who recruit and use child soldiers. However, whereas the SCSL adopted a broad interpretation of 'active participation' to include the many roles performed by children in armed forces and groups, including domestic and sexual slavery and other non-combat roles, the ICC did not go this far, thus illustrating how international criminal law all too often ignores the gendered aspects of crimes.

The ICC Statute (2002) prohibits the recruitment and use of children within the narrow confines of military purposes (Article 8(2)(b)(xxvi), (e)(vii)). In other words, the Court assesses whether the role performed by children constitutes active participation in armed conflict and whether activities put them at risk from being targeted by the opposition.

The judges, in the *Lubanga* case, adopted a narrow understanding of the requirement that the child soldier be used to participate actively in hostilities. They concluded that the requirement that the acts performed by the child soldiers must actively participate in the armed conflict was understood as either direct participation in combat or activities that engage the person in or contributes to combat duties, such as spying, sabotage and the use of children as decoys, couriers or at military checkpoints, as bearers to take supplies to the front line. The SCSL, on the other hand, has interpreted the term 'use to participate actively in hostilities' more broadly to include the many support roles performed by children associated with armed groups and forces. For instance, the SCSL decided that sexual slavery was included in the crime. The ICC also decided that this did not just cover combat activities. However, the support activities covered are those that might expose the child to danger as a potential target (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04–01/06–2842T-223-ENG, judgement pursuant to Article 74 of the Statute, & 14 March, 2012, Section 628). This is broader than the international humanitarian law requirement that the participation is direct. The Court decided that "the potential dangers faced by a child soldier would often be unrelated to the precise nature of the role he or she is given" (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04–01/06–2842T-223-ENG, judgement pursuant to Article 74 of the Statute, & 14 March, 2012). All may be potential targets. "Those who participate actively in hostilities include a wide range of individuals, from those on the front line who participate directly through to the boys or girls who are involved in a

myriad of roles that support the combatant. The decisive factor "is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target" (Prosecutor v. Lubanga, decision on judgement, Section 628). Activities that are not related to combat or expose the child soldier to danger as a potential target are excluded. Active participation requires a link to the risks the child soldier is exposed to, such as exists when children are used as bodyguards or guards of military objects. Each specific activity performed by child soldiers will be assessed on a case-by-case basis. However, this has meant that activities of a sexual nature that girl child soldiers were forced to perform were excluded. The judges concluded that active participation did not stretch to include gendered aspects such as sexual violence or domestic slavery. Thus, sexual violence was not addressed as an act demonstrating the gravity of the crime or as an aggravating factor for the purpose of sentencing and instead should be left to the sentencing and reparation phase of the judgement.

As I argued above, this denotes a limited view of what is involved in child soldiering and works to the detriment of girls and the roles that they may be required to perform. If a girl child soldier has been briefed by her 'husband' to wash his clothes and prepare a meal and is expected to perform sexual duties at bedtime, she does not engage in or contribute to combat operations that cause harm to the enemy and/or enemy equipment. Similarly, domestic and sexual services may not necessarily expose a girl child soldier to danger as a potential target, since such activities are carried out behind the frontlines. The opposition armed force or group will not differentiate when attacking. Does this make her less of a child soldier in need of protecting? Is protection only afforded to those children exposed to attacks from members of the opposition, but not from members of their own armed forces?

Judge Odio-Benito in her separate and dissenting opinion suggested that sexual violence should be included in the legal definition of 'use to actively participate in the hostilities'. She argues that the prohibition of the recruitment and use seeks to protect children from "all the activities and risks children are exposed to in the context of armed conflict" (Separate and dissenting opinion, Section 6). This would enable condemnation of military and political commanders for not having stopped the practice, in particular in armed conflicts where this is a widespread occurrence. It would indeed have been an opportunity for the Trial Chamber to take a position on whether sexual violence against child soldiers can constitute active participation in the hostilities. I argue that international criminal law can achieve this by adopting a more holistic approach focusing on the prohibition of, but more importantly the protection from, recruitment and use of child soldiers whether they fulfil a combat and/or non-combat role.

The Paris Principles include a greater variety of roles from which children in armed groups must be protected. However, there may be at least two obstacles to adopting a similar approach in international criminal law. The first one is that the UNICEF (2007) is not legally binding. They are, however, an indication of how human rights protection of child soldiers may develop. The fact that the SCSL referred to the Paris Principles to include sexual slavery as a prohibited use of children in armed groups suggests that this may obtain the status of customary international law. Secondly, the category of war crimes has a strong link to international humanitarian law in which the degree of participation plays an important role to determine whether a person is protected or not by international humanitarian law. However, in the past, international criminal law tribunals have used human rights principles to determine the content of a particular war crime. Meron (2011, p. 190) gives the example of torture for which "international tribunals have resorted to human rights instruments and jurisprudence to determine when an act constitutes torture in the particular context of international humanitarian law". Similarly, for the war crimes of recruitment and use of child soldiers, the human rights perspective could come into play in order to take away the focus from 'participation in hostilities' in purely international humanitarian law terms. Instead, the purpose of the war crime of recruitment and use of child soldiers shifts in that the overall objective should be as extensive a protection as possible of children from (a) the enlistment, conscription and use of children and (b) the protection of children from the activities related to child soldiering, including from domestic and sexual violence, regardless of whether this is from members of their own group or the opposing group. To emphasise protection of children from recruitment and use by armed groups will have as a corollary that children remain a protected group and will never become legitimate targets of recruitment and use in armed conflict. It will further emphasise that the experiences of girls are equally recognised. If protection is not the aim of the prohibition than it is unlikely that those accused of using children to participate in hostilities can be successfully prosecuted for obliging girls to take part in the conflict unless these girls were almost exclusively "used" for activities closely related to military operations whilst exposing them to danger. Hence, the war crime of recruitment and use to actively participate in armed conflict, instead of a military focus must aim to protect all recruited children from use in armed conflict.

As it stands, the ICC in its Lubanga judgement does not reach the core of the issue, which is that children are a category of people to be protected from the crime of recruitment and use of child soldiers. The judges in the *Lubanga* case further contributed to ignoring gendered aspects of the prohibition to recruit and use child soldiers and thus perpetuate gender inequality. As a consequence some of the more specific sexual and domestic experiences that were suffered mainly by girls have been left unacknowledged. Girls under the age of 15 who were subject to sexual violence as a result of their recruitment were discriminated against because the harms suffered did not expose the girls to danger as a potential target from the opposing armed group or force, and thus their harm is outside the scope of the crime. Thus, the protection of girls against the recruitment and use of child soldiers is hindered by gendered understandings of soldiers and armed conflict, which in turn reinforces further gender inequalities. Instead, such experiences would have to be prosecuted as separate crimes of sexual violence, such as sexual slavery or forced prostitution, but this is not without difficulties either as it relies on the exercise of prosecutorial discretion to include charges of crimes of sexual violence.

Prosecutorial discretion

The *Lubanga* judgement further illustrates how prosecutorial discretion can work to the detriment of the prosecution of

both gender-based crimes and the gendered aspects of child soldiering. The prosecution limited the crimes charged to the conscription, enlistment and use of child soldiers and did not include other separate but similarly serious charges, such as murder, sexual violence or sexual slavery nor did the Prosecutor propose an understanding of the crime of recruitment and use of child soldiers to include the gendered aspects specific to girls and sexual violence.

The prosecutor assesses the various degrees of seriousness for each crime and the available evidence for each crime and ultimately whether the evidence is likely to achieve a conviction. The discretion exercised by the Prosecutor in favour of prosecuting the offence of child soldiers rather than, say, ethnic massacres or rapes may therefore be explained less by the relative seriousness of the offence and more by the availability of evidence and the possibility of securing a conviction (De Guzman, 2012, p. 314). However, the Prosecutor based his decision not to include other serious crimes on the premise that the conviction for conscription, enlistment and use of child soldiers would be relatively simple. But the simplicity of a conviction is not a valid guiding principle, because the contexts in which these types of crimes occur are never simple.

The main issue is that so far prosecutorial discretion is not guided by a set of objective standards. However, recently, the Office of the Prosecutor published a ICC (2014). This Policy Paper together with the Office of the Prosecutor's strategic commitment to pay particular attention to sexual and gender-based crimes and crimes against children may channel the Office of the Prosecutor's efforts to prosecute effectively gender based crimes and gendered aspects of other crimes under its jurisdiction, such as child soldiering (ICC, 2014b).

Indeed, in deciding what situation or who to investigate and what charges to include in the indictment, the Prosecutor is required to act independently by exercising his or her prosecutorial discretion. This prosecutorial discretion is an important feature of international criminal justice (Schabas, 2008). The ICC maintains this tradition and promotes an appealing vision of a strong independent Prosecutor. Ideally, prosecutorial decision-making will not be influenced by political or other factors. Prosecutorial discretion gives the Prosecutor substantial leeway to determine the factors to take into consideration in prosecutorial decision-making. To ensure that prosecutorial decision-making is not arbitrary, the Office of the Prosecutor published a ICC (2007) and has adopted a set of regulations to guide prosecutorial decision-making and the exercise of prosecutorial discretion (ICC, 2009).

However, the concept of prosecutorial discretion at the ICC has raised a number of concerns, in particular that prosecutorial decision-making may in fact be arbitrary, discriminatory or politically motivated. Schabas (2008) argues that, under Article 17 of the ICC Statute, the "central criterion in the Prosecutor's selection of cases has become 'gravity' to justify further action by the court and [the Prosecutor] will, on the basis of Article 53 (1) (c) of the ICC Statute, decline to proceed with an investigation or prosecution when 'it would not be in the interest of justice'". These two criteria may lead to the Prosecutor acting in accordance with the wishes of the State parties, in particular the more influential ones. It has thus been suggested that objective standards should be determined to guide the exercise of prosecutorial discretion (Hall, 2003; Marston Danner, 2003; McDonald & Haveman, 2003).

During the *Lubanga* trial, despite frequent references to sexual violence during the trial, and the insistent demands by the legal representatives of the victims that charges of crimes of sexual violence be added to the indictment, this never occurred, partly because the prosecution opposed it on the basis of fairness to the accused (ICC, 2009). The Prosecutor received a serious rebuke from the judges for his failure to include sexual violence and sexual slavery as separate crimes at any stage of the proceedings, including the initial charges. This remained a contentious issue throughout the trial. Harsh terms were used referring to the Prosecutor as 'the former Prosecutor' and his 'failure' to include crimes of sexual violence (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, decision on sentence pursuant to Article 76 of the Statute, & 10 July, 2012, Section 60).

In her separate dissenting opinion, Judge Odio-Benito reiterated her concerns about the failure of the prosecution to charge Lubanga for the crimes of sexual violence committed against some of the child-soldiers, but also considers the possibility of addressing sexual violence against girl child soldiers as 'embedded' in the crime of recruitment and use of child soldiers:

> "I deem that the Majority of the Chamber address only one purpose of the ICC trial proceedings: to decide on the guilt or innocence of an accused person. However, ICC trial proceedings should also attend to the harm suffered by the victims as a result of the crimes within the jurisdiction of the Court. It becomes irrelevant, therefore, if the prosecutor submitted the charges as separate crimes or rightfully including them as embedded in the crimes of which Mr. Lubanga is accused. The harm suffered by victims is not only reserved for reparations proceedings, but should be a fundamental aspect of the Chamber's evaluation of the crimes committed."
>
> [Separate et al. (2012, Section 8)]

However, Judge Odio-Benito seems to grant the ICC an important and extensive restorative role that trumps prosecutorial discretion and would enable judges to alter the charges. Whilst the ICC has contributions to make to the restorative process, the ICC Statute does not provide a basis for this to be done by allowing judges to override prosecutorial decisions concerning charges. Nonetheless, prosecutorial discretion cannot be absolute and a set of objective standards must guide the Prosecutor when determining what situation to investigate, who to indict and prosecute and for which charges. The determination of this set of objective standards must acknowledge the specific duties of the Prosecutor as set out in Article 54 of the ICC Statute (2002). In particular, the Statute requires the Prosecutor "take into account the nature of the crime where it involves sexual violence, gender violence or violence against children" (Article 54(b)). The requirements in Article 54 of the ICC Statute have recently been strengthened. The Office of the Prosecutor has six strategic goals, one of which reiterates the need to "enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender based crimes and crimes against children". Furthermore, the Policy Paper on Sexual and Gender-based Violence lays down the principles of more successful investigations into these specific crimes.

Indeed, the Prosecutor's general policy will be to "pay particular attention to the commission of sexual and gender-based crimes," and "enhance the integration of a gender perspective and analysis at all stages of its work." In identifying these particular factors, the ICC sets itself a specific goal to tackle crimes of sexual violence, gender-based violence or of violence against children. However, the inclusion of crimes of sexual violence or gender-based crimes amongst the charges will still depend on whether the gravity threshold is met and whether it is in the interest of justice. Still, the mere fact of making the investigation of sexual violence and gender-based crimes a serious priority will amount to progress. Thus, when the investigation of a situation and available evidence highlights the commission on a large scale of these particular categories of crimes, prosecutorial discretion should be guided by the goal to prosecute such crimes that the Office of the Prosecutor set for itself.

This still leaves us with the unresolved issue of the plight of girl child soldiers and international criminal law. Girls form a substantial part of the overall number of child soldiers and girl child soldiers present a unique problem in their own right. Yet, so far, girls' experiences have not been adequately addressed by international law. As Taefi argues, girls are on the outer edges of international law provisions protecting children and women. Their views and experiences contribute to forming a better picture of child soldiers so that the prohibition to recruit and use child soldiers can be enforced in a more meaningful manner by international tribunals. When addressing the issue of child soldiers, international law needs to take a more holistic approach that takes gender into account and assess who is targeted, the different acts related to the crime of using child soldiers and crucially the consequences. In this the ICC has a significant role to play, in particular to redress a balance that so far has been lacking (Mouthaan, 2011). I would argue that when children suffer sexual violence, this duty becomes even more compelling.

This is where the Policy Paper on Sexual and Gender-based Violence may contribute more substantially: in its pledge to examine the gendered consequences of crimes. The Policy Paper makes clear that in order to address the "specific challenges" of investigating sexual and gender-based crimes, such as the stigmatisation of victims, evidentiary deficiencies, and under- or non-reporting of such crimes, the application of a gender perspective and analysis to all crimes falling within its jurisdiction will aid the Office of the Prosecutor in examining the relationship between sexual and gender-based crimes and the inequalities between men and women. One of the failings of the Lubanga judgement as argued by Judge Odio-Benito is the fact that sexual violence suffered by girl child soldiers was not perceived to be included in the prohibition to use child soldiers. She argued on the basis of Article 21(3) of the Rome Statute, "it is discriminatory to exclude sexual violence which shows a clear differential impact from being a bodyguard or a porter which is mainly a task given to boys" (Separate et al., 2012, Section 21). International criminal law still has some way to go in developing a gendered understanding of international crimes. Thus, although the ICC missed an opportunity to address the issue whether girls were potential targets for specific use in their own armed group or force, this may be addressed in future cases so that the aim of the crime will also include the protection of girls from gender-based violence within the crime of recruitment and use of child soldiers.

Conclusion: a judgement worth waiting for?

The Lubanga trial has been criticised, in particular for focussing on the issue of child soldiers because the rebel forces of the UPC had been involved in ethnic massacres, torture and rape in Ituri, one of the worst affected areas of Congo's wars (Coleman, 2007, p. 780). It is difficult to justify the prosecution of one type of crime to the detriment of other similarly significant crimes, particularly if civilians have been killed. Nevertheless, despite criticisms, the conviction of Thomas Lubanga is also a legal milestone. The judgement was worth waiting for as it provided the backdrop for applying the existing international law provisions that prohibit the use of child soldiers and as a result the ICC performs an important task by contributing to what De Guzman (2012, p. 270) refers to as the 'expression of global norms'. The judgement expresses a firm commitment that the international community will not tolerate these crimes.

The international provisions and emerging case law of the SCSL and the ICC are in itself not enough to protect children from military recruitment. Whilst there is evidence that governmental armed groups rely less on child soldiers to wage their war, rebel armed forces still recruit and use child soldiers (United Nations Report of the UN Secretary General, 2012). The responsibility to implement the child soldier provisions is primarily that of the States. As a consequence, governments must have a political will to implement the prohibition. In the DRC for instance, the justice system does not have the resources and capability to address child recruitment. Prosecutions for such crimes are rare and concerns remain over the independence of the judiciary. Some former armed group leaders have been indicted and prosecuted for human rights violations, including child recruitment and use, but remain at large. Similarly in Sierra Leone, many direct perpetrators and former field commanders have not been charged due to a lack of effective justice institutions and political will in Liberia and Sierra Leone. Whilst the Lubanga judgement conveys a necessary message that the crime prosecuted is one of the most serious war crimes of concern to the international community as a whole, its transformative effect remains to be seen, because it relies heavily on cooperation. Such judgements encourage national prosecutions by raising the issue of recruitment and use of child soldiers. In the words of Patricia O'Brien:

> "Ensuring accountability for serious international crimes is neither cheap nor fast. These cases are complex. Their integrity and credibility depend on the highest standards of justice and fairness. In addition, the success of international criminal justice depends upon the co-operation of states: in funding; in providing evidence and facilitating witnesses; in surrendering suspects; and in providing prisons. Thus, in as far as it depends on the political will of states, the system of international criminal justice remains fragile".
>
> [O'Brien (2012)]

The *Lubanga* case also demonstrates that international criminal law is still a developing area of law, but also one

besets by inherent tensions and shortcomings. Not in the least that crimes of sexual violence remain secondary offences, which do not merit the same institutional response as other war crimes. Eastern DRC has been highlighted as one of the most dangerous places for women in terms of sexual violence. Not to have addressed crimes of sexual violence suffered by girl child soldiers and indeed at the hand of armed groups operating in the Ituri region is counterproductive.

The role played by girl child soldiers must be acknowledged to enable them equally to be part of such justice mechanisms, because this will highlight underlying discriminatory gender constructions in need of remedy. The expression of a commitment to the elimination of gender inequality at the international level should prompt efforts towards achieving parity on a national level. Similarly, recognition of the sexual abuse suffered by girl child soldiers within these processes may help girls to reintegrate into their families and communities. For the moment, girl child soldiers are caught between a rock and a hard place, especially since the gendered aspects of child soldiers do not fit the legal framework prohibiting the recruitment and use of child soldiers.

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