Children and the International Criminal Court : analysis of the Rome Statute through a children's rights perspective

Chamberlain Bolaños, C.

4 Crimes under the jurisdiction of the ICC and children

4.1 INTRODUCTION

The ICC has jurisdiction over crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[1]

The jurisdiction *rationae temporis* of the ICC extends to crimes committed after the entry into force of the Rome Statute, 1 July 2002. However, for all other States that have become State Parties to the Rome Statute after that date, the ICC has jurisdiction over crimes committed after the entry into force of the Rome Statute for that State.[2] Non-State Parties or new State Parties may make a declaration accepting the jurisdiction of the ICC from an earlier date or for specific crimes, in accordance with Article 12, paragraph 3 of the Rome Statute.

Regarding its territorial jurisdiction, the ICC may exercise its jurisdiction if the crime was committed in the territory of a State Party or in the territory of a State that has accepted the ICC's jurisdiction. Likewise, the ICC has jurisdiction *rationae personae* in relation to crimes committed by a national of a State Party or of a State that has accepted its jurisdiction.[3]

The only exception to these two preconditions for the exercise of the ICC's jurisdiction is the referral of a situation to the Prosecutor by the UNSC, acting under Chapter VII of the UN Charter, in accordance with Article 13(b) of the Rome Statute. In view of this provision, the ICC holds a broader jurisdiction in relation to the situations referred by the UNSC.

This Chapter analyses the definition of particular crimes under the ICC's jurisdiction that affect children. While this Chapter focuses primarily on crimes affecting children exclusively or disproportionately vis-à-vis adults, it is clear that children, as any human being, can be victims of any crime within the jurisdiction of the ICC.

---

1 This section very briefly synthesises the main aspects of the ICC's jurisdiction. However, for further in-depth analysis of the topic, the reader is referred to the following literature: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 129-142 and 539-700; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 101-118 and 273-372.

2 Rome Statute, article 11(2).

3 Rome Statute, article 12.

Although the analysis contained in this Chapter focuses on substantive criminal law, it also has a bearing in the procedural aspects of children's interaction with the ICC analysed throughout this research. A child will be defined as a "victim", pursuant to Rule 85 of the RPE or Article 75 of the Rome Statute, depending on the definition given to the crime he/she suffered and the determination of the harms suffered as a result of that crime. This, since these provisions establish that there must be a causal link between the crimes allegedly committed and the harms suffered by victims.[4]

Moreover, the ICC must protect child victims and witnesses' physical and mental well-being throughout all stages of their involvement with the ICC, pursuant to Article 68(1) of the Rome Statute. Because of their age (in addition to their cultural and socio-economic background and gender), children will suffer the negative consequences of crimes differently from adults and thus, the ICC must address these particular needs of child victims and witnesses. For example, in order to decide on judicial and non-judicial protective and special measures for child victims of crimes, the ICC needs to understand the nature of the crimes committed against these children. Only if ICC staff, including persons working with the VWU, OPCV and the VPRS, among others, understand the harms suffered by children as a consequence of crimes within the jurisdiction of the ICC, will the ICC be able to guarantee a sound judicial environment in which children can participate in proceedings as victims and witnesses pursuant to Rule 86 of the RPE.

As noted above, all crimes within the ICC's jurisdiction are crimes that could affect children either as direct or indirect victims. However, for the purposes of this Chapter, only some underlying acts within the crimes of genocide, crimes against humanity and war crimes will be analysed: namely those in which children are a material element of the crime (child recruitment and forced displacement of children), and those crimes which disproportionately affect children (such as sexual violence and attacks against certain civilian objects such as schools).[5] However, taking into consideration that current armed conflicts predominantly victimise civilians and non-combatants, it is foreseeable that most crimes within the Rome Statute's jurisdiction will significantly affect children, as they represent a considerable part (if not the majority) of the civilian population. However, as noted above, a children's dimension of all crimes within the jurisdiction of the ICC should not be disregarded.

4 Kai Ambos, The first Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues, *International Criminal Law Review*, Vol. 12, No. 2 (2012).

5 Though the crimes in the Rome Statute are categorised under the crimes of genocide, war crimes, crimes against humanity and aggression, this Chapter will not deal with the general elements of these crimes, but only with the conduct affecting children. For example, in the analysis of child recruitment, the contextual elements of armed conflict will not be analysed, but only the elements concerning the conduct of enlistment, conscription and use of children to participate actively in the hostilities.

Children will be affected by crimes within the ICC's jurisdiction differently than adults. Thus, all investigations and trials before the ICC should ideally take into account a "children's dimension" of crimes. When investigating or prosecuting any international crime, investigators, prosecutors, judges and counsel should bear in mind that children are very often affected by international crimes, but may not directly approach the ICC because of their age. Although in the *Lubanga case*, the *Katanga case and the Ngudjolo case*, which encompass crimes committed against children (*i.e.* child recruitment), children have participated as victims and witnesses, in other cases children may not participate at all.[6] However, this does not exempt the ICC from considering the impact these crimes have upon children. What happened to the children of the adult victims of other ICC crimes? This is a question that ICC investigators could pose, but also judges, who pursuant to Article 69(3) of the Rome Statute shall determine the truth.

4.2 WHO ARE THE VICTIMS OF CRIMES COMMITTED AGAINST CHILDREN?

Children, but also their parents and family members, as well as their community, are affected by crimes committed against children. These crimes not only affect their childhood, their youth, and therefore their right to have an adequate development, but also affect their family life and their interaction with their community. Crimes against children affect the communities' future citizens and often deprive an entire generation within a community of their fundamental rights.

Recruitment of children in armed groups is prohibited because it violates children's rights to physical and psychological health, education, and family life, among others. Therefore their recruitment is prohibited, as it destroys childhood, and prematurely enters children into adulthood, along with all the psychological and physical effects this encompasses.[7] Triffterer's Commentary to the Rome Statute supports this argument with the following statement: "(b)esides the risk to their physical well-being, active participation in armed hostilities teaches them the rule and culture of violence, disrupts their education and frequently results in grave traumas, because children are even less capable to deal with the horrors of war than grown adults."[8] In fact, a court expert in the *Lubanga case* at the ICC suggested that children associated with armed groups are exposed to consequences which destroy the valuable child-

6 See for example the case of the Prosecutor v Jean-Pierre Bemba, ICC-01/05 01/08 ("*Bemba* case"), which encompasses crimes of pillage, murder and rape.

7 Ann Davison, 'Child Soldiers: No Longer a Minor Incident' (2004) *Willamette Journal of International Law and Dispute Resolution*, 125.

8 Michael Cottier, "(xxvi) Participation of Children in Hostilities" in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 467.

hood of a person's life, and deprives them of key services such as education and healthcare.[9]

The legal provisions that punish crimes committed against children also protect the parents and other family members of the child victims of these crimes, particularly in what refers to their family life, their ties and overall well-being, which are affected by the commission of a crime against a young family member. In the *Lubanga case*, which exclusively dealt with recruitment of children, Trial Chamber I determined that parents acting on behalf of their children who also claimed to have suffered harm as a result of their child's alleged recruitment could be granted status to participate as victims in the proceedings.[10] The same Chamber determined in fact that the harm to children and their parents is presumed, stating that recruitment of children under the age of 15 to participate actively in the hostilities, *ipso facto,* will have resulted in some form of physical or psychological injury or harm to the child, or his/her parents (or both), regardless of whether specific harm or injury was set out in the victim's application form.[11]

The community where children live could also be considered a victim of crimes committed against its youngest members. Crimes committed against children often disrupt the healthy functioning of the community as a society, in view of the fact that children are the future of the community and how they can contribute to it may be seriously hampered by these crimes. In this sense, the expert witness on children and post-traumatic stress disorder who appeared in the *Lubanga case* stated, regarding child recruitment and its effects on its victims and communities:[12]

> "(The communities) "lose a critical mass of the young people who could be productive agents for future development. You lose them as active agents, as productive people in society."

Although it could be argued that all crimes within the jurisdiction of the ICC affect the communities in which they occur, systematic crimes committed against children and which target children have longer-lasting effects in society, as children are still developing, and thus crimes could have greater impact on them and on their future function as members of society. In fact, the same

9 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, Report of Ms Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 3.

10 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04 01/06-1556-Corr, para. 118.

11 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04 01/06-1556-Corr, para. 120. See also: *Lubanga case* 'Decision on indirect victims'(8 April 2009) ICC-01/04-01/06-1813 para. 50.

12 *Lubanga* case, Transcript of hearing (7 of April 2009) ICC-01/04-01/06-T-166-ENG, 33 lines 8-14.

court expert who appeared in the *Lubanga case* stated that during childhood and adolescence the mind and brain are particularly flexible and therefore stress has the greatest potential to affect cognitive and affective development. She explained that due to the exposure to stress during this developmental period, the brain could develop along a stress-responsive pathway that is associated with increased risk of developing serious medical and psychiatric disorders, for example, intense aggressiveness or fear.[13] It could be foreseeable then, that children who have developed in an environment of massive crimes and armed conflict could have difficulties as adults in recognizing basic moral principles, such as respect to human dignity and to human life. In many developing countries, where children represent more than half of the population, such adverse effects in children could have devastating effects to the future of communities as a whole.[14]

Likewise, in crimes such as child recruitment, the community and civilian population in general is a victim of this crime because children can be fierce soldiers that do not distinguish between right and wrong and between combatants and civilians as adults may do, since they do not necessarily have completed their ethical and moral development.[15] Triffterer's Commentary of the Rome Statute stresses this point of view, stating that social reintegration poses particular problems for children who have never seen anything else but conflict and violence. Also, children's combat behaviour is more erratic; they may more easily shoot indiscriminately at anything that moves. Because their conduct is more difficult to predict, they can present an increased danger for persons protected under humanitarian law, including civilians, humanitarian workers or persons *hors de combat*."[16] This is also echoed by the Special Representative of the Secretary General of the UN for Children and Armed Conflict, Ms Coomaraswamy, who participated as an expert witness in the *Lubanga case* and who stated during her intervention in that trial that children

13 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 17.

14 For example, in the DRC, 44% of the population are between 0-14 years old and the median national age is 17 years. This means that in the DRC, at least 44% of its population was born after the Mobuto era and thus has suffered from the various armed conflicts that have raged the country since 1996. For background information on the First Congo War in 1996 see: Human Rights Watch, *The War <http://www.hrw.org/legacy/reports/1997/zaire/Zaire-05.htm>* accessed 8 August 2013. See also: CIA World Fact Book, *Africa: Congo, Democratic Republic of the <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>* accessed 8 August 2013.

15 Alison Dundes Renteln, 'The Child Soldier: The Challenge of Enforcing International Standards' Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium" (Fall 1999) *Whittier Law Review*, 192.

16 Michael Cottier, "(xxvi) Participation of Children in Hostilities" in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 467.

under 18 years and certainly those under 15 years of age have an underdeveloped notion of death, which makes them fearless in battle, often thinking of it as a game, rushing straight into the line of fire.[17] Abbott also stresses that military groups use children because they consider them "expendable, less demanding and easier to manipulate than adult soldiers".[18] As noted by the author, the tendency to use child soldiers in armed conflicts, coupled with drugs and alcohol, transforms children into valuable and desensitized executioners, assassins and combatants for warring parties.[19] Fujio also notes that children tend to be more easily manipulated and tricked into believing what adults tell them and can be moulded into effective and expendable fighters.[20]

It is thus clear that crimes committed against children affect their entire social structure and very often change ordinary social hierarchies (*i.e.* by giving a child a weapon) that can no longer be reset once the armed conflict or crimes have ceased. It also has a generational effect, since many child victims of armed conflict will have their education and healthcare limited or completely annulled, all of which will have consequences for generations to come.

The ICC needs to consider the multiple effects that crimes committed against children have. Only if the effects of crimes against children are integrally understood, judicial proceedings at the ICC will meet the needs of children pursuant to Rule 86 of the RPE. Likewise, only if there is a comprehensive knowledge of the harms suffered by children, their families and their communities, will reparations be meaningful for all these victims and aim to restore the peace that was affected by the commission of these crimes.[21]

17 *Lubanga case,* Transcript of hearing (7 January 2010) ICC-01/04-01/06-T-223-ENG, 11 lines 22 *et seq.* See also International Bureau for Children's Rights, *Children and Armed Conflict: A Guide for International Humanitarian and Human Rights Law* (Canada 2010) 132-133.

18 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 507.

19 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 510.

20 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 4.

21 The Preamble of the Rome Statute recognized that the crimes within the jurisdiction of the ICC "threaten peace, security and well-being of the world".

4.3 INTERNATIONAL CRIMES IN WHICH CHILDREN ARE A MATERIAL ELEMENT OF THE CRIME

4.3.1 Genocide by forcibly transferring children of the group to another group

4.3.1.1 Brief note on the crime of genocide in general

Article 6 of the Rome Statute defines the crime of genocide as an act "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Article 6 includes as conduct of genocide the following: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

This crime in general has four elements: a) the group (national, ethnical, etc.); b) the intention (to destroy in whole or in part), c) the context (in an emerging pattern of similar conduct directed against that group or that the conduct itself effect destruction); and d) the conduct (killing, rape, etc.).[22]

It is important to highlight several considerations in light of the Elements of Crimes. First of all, according to this legal instrument of the ICC, the crime of genocide is committed when one or more persons are victims of the crime (*i.e.* "the perpetrator killed one or more persons").[23] Thus, the crime of genocide has a group element.

It is also essential to take note of footnote 3 of the Elements of Crimes, which includes as conducts within "causing serious bodily or mental harm", acts such as "torture, rape, sexual violence or inhumane or degrading treatment". Though these conducts are not further defined, the concepts contained in Article 7 of the Rome Statute, relating to crimes against humanity, may be applicable, as this provision defines terms such as enslavement, torture, and forced pregnancy.[24] Crimes of sexual violence committed against children, either in the context of genocide or crimes against humanity, will be analysed further in the following section of this chapter.

Also, in relation to the act of genocide to deliberately inflict conditions of life calculated to bring about physical destruction, it is important to notice that footnote 4 of the Elements of Crimes defines "conditions of life" as "resources indispensable for survival, among others food and medical services,

22 ICC, *Elements of the Crimes* (Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010*)* (Elements of the Crimes) RC/11, article 6, Introduction.

23 Elements of the Crimes, article 6(a).

24 Rome Statute, article 7(2).

or systematic expulsion from homes". This crime could of course have particular effects on children, because they have particular medical, hygienic and nutritional needs, among others, that differ from the adult population. It could also be argued that the threshold for the commission of this crime will be lower when committed against children (particularly young children), as they have more indispensable needs than adults which also have more enduring effects (*i.e.* genocide committed by depriving victims of food could have devastating consequences in the cognitive and physical development of children due to malnutrition).

Another conduct within genocide, that of imposing measures intended to prevent births within a group, could also be considered as affecting children, because it prevents the birth of children within a certain group. However, due to the polemic consequences of any discussion involving unborn children vis-à-vis the right to abortion, this research will focus on crimes in which born children are affected. Notwithstanding the limitations of this research, this could be an interesting topic to consider if these charges are ever brought before the ICC.

Notwithstanding the importance and negative effects that the conducts within the crime of genocide included in Article 6 of the Rome Statute have on children's lives, this section will focus on the crime of "forcible transfer of children", because in this crime children are a material element of the crime as it specifically requires that the crime is inflicted on children under the age of 18 years. However, as will be explained below, age determination in this crime is perhaps not as challenging as in the crime of recruitment, because child victims of this crime will most likely be very young children.

4.3.1.2 The act of genocide of "forcible transfer of children"

Article 6 of the Rome Statute prohibits the act of genocide by forcibly transferring children as follows:[25]

> 'Article 6 Genocide
> For the purpose of this Statute, 'genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
> (…) (e) Forcibly transferring children of the group to another group.
> According to the Elements of Crimes (footnote 5), forcible transfer of children "is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment". On this same line of thought, the judges of the ICTR established that the objective of this provision is not only to "sanction

25 Rome Statute, article 6(e).

> a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another".[26]

The Elements of the Crimes also establish that a "child", for the purposes of Article 6(e) is a person under the age of 18 years. As with the *mens rea* of the crimes of child recruitment analysed above, the Elements of Crime lower the threshold of Article 30 of the Rome Statute, establishing that the perpetrator either "knew or should have known" that the person or persons were under the age of 18 years. Commentators, such as Schabas, have stated that this provision of the elements of crimes is inconsistent with Article 30 and could be considered *ultra vires*. Schabas argues, however, that this is unlikely to have any real consequence, since this crime refers to young children who are transferred from a group to another resulting in a loss of their original identity. This crime is thus improbable to apply in reality to adolescents and thus Schabas argues, the issue of mistake of fact about the age of a teenage child, resulting from a lack of due diligence, would never arise.[27]

Although, as stated by Schabas, this crime could be in reality inapplicable for adolescents, it is still important that such apparent legal contradictions between the Elements of Crimes and the Rome Statute are analysed and reconciled.[28] The same arguments could apply to resolve the friction between Article 30 of the Rome Statute and the Elements of Crimes of Article 8(2), (b)(xxvi) and (e)(vii), which will be further analysed in the following section.

4.3.2 Enlistment, conscription and use of children under the age of fifteen to participate actively in the hostilities

Article 8 of the Rome Statute prohibits recruitment and use of children under the age of 15 as follows:[29]

> 'Article 8 War crimes
> 1. The ICC shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

---

26 ICTR, *Akayesu case,* 'Judgement' (2 September 2008) Case No ICTR-96-4-T, para. 509.

27 Schabas in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 154; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 133.

28 For example Sonja Grover suggests that children, including adolescents forcibly recruited by armed groups, could be considered as victims of the crime of genocide of forcible transfer of children. See Sonja Grover, *Humanity's Children 'ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children'* (Springer 2013) 97-196.

29 Rome Statute, Article 8(2), subparagraphs b(xxvi) and e(vii).

> 2. For the purpose of this Statute, "war crimes" means:
> (…) (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
> (…) (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
> (…)
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
> (…)
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (…)'

To date, there are two cases at the ICC in which charges of enlistment, conscription and use of children have stood trial.[30] However, as will be analysed below, so far only the Trial Chamber I in the *Lubanga case* has made a comprehensive analysis of this crime in the ICC's first-ever conviction. Thus, although the ICC judges have already determined some of the aspects that will be analysed below, these may be upheld or quashed by the Appeals Chamber of the ICC in the appeals proceedings pending in the *Lubanga case.* Moreover, depending on how future charges for these crimes are presented in future cases (*i.e.* in order to include sexual violence within the "facts and circumstances" of the charges) some aspects which were not encompassed in the ICC's first trial, could be of relevance in future ICC cases.

4.3.2.1 Nature of the crimes of enlistment, conscription and use of children to participate actively in the hostilities

These three conducts of, a) enlisting, b) conscripting and c) using children to participate actively in hostilities, all have in common the principle of international humanitarian law that prohibits the participation of children in combat, as it is considered an inhuman practice.[31] In this sense, the crime encompasses the principle of non-recruitment, which prohibits both compulsory and voluntary enlistment of children, as well as their taking part in hostilities. Although the Additional Protocol 1 to the Geneva Conventions and other prior legal instruments use the concept of "recruitment", the Rome Statute contains the words "enlistment" and "conscription". However, as noted by the SCSL case law referred to in the previous Chapter, prohibition of these crimes is not new to the ICC Statute, and is a well-established principle of international

30 *Lubanga* case and *Katanga and Ngudjolo* case.

31 Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) 900.

customary law. Hence, the Rome Statute did not prohibit child recruitment for the first time, but distinctly defined this crime in an international treaty.

In its judgment of 31 May 2004, the Appeals Chamber of the SCSL decided on a preliminary motion by the accused that contented that the principle *nullum crimen sine lege* had been violated because the act of child recruitment was not a crime under international customary law at the time of the alleged commission. The SCSL Appeals Chamber concluded that the crime of child recruitment was crystallised as international customary law, regardless of whether it had been committed in internal or international armed conflict.[32] It is important to note that the SCSL Appeals Chamber found that "States clearly consider themselves to be under a legal obligation not to practice child recruitment".[33] As stated before, in the first-ever conviction before the ICC, the Trial Chamber used the SCSL case law as guidance for the interpretation of the Rome Statute's provisions.[34] The Trial Chamber also referred to the CRC, the Additional Protocol II to the 1949 Geneva Convention, as well as to the CRC Optional Protocol on Involvement of Children in Armed Conflict, and the African Charter on the Rights and Welfare of the Child, thus in a sense acknowledging that the definition of the crime of child recruitment may be found beyond the Rome Statute, in these other international treaties, particularly as neither the Rome Statute nor the Elements of Crimes really define this criminal conduct.[35]

4.3.2.2 Conscription and enlistment and the controversial element of "voluntariness"

Pursuant to Article 21 of the Rome Statute, ICC judges may apply other sources of law in order to define and differentiate the concept of "enlistment" and "conscription". Most importantly, although a general concept of the crime may be possible to achieve, judges will need to take into consideration the facts and circumstances of each case (*i.e.* considering the multiple tasks that children

32 The SCSL Appeals Chamber found that the fact that 187 States were parties to the 1949 Geneva Conventions, and 137 States were parties to Additional Protocol II to the Geneva Conventions, and that all but 2 states had ratified the CRC, and that the African Charter on the Rights and Welfare of the Child had been adopted and prohibited such practice, as well as the widespread prohibition of recruitment or voluntary enlistment of children under the age of 15 in domestic legislations, all lead to the conclusion that the prohibition of child recruitment was crystallised under international customary law, even before the adoption of the Rome Statute in 1998, and at least as early as 1996, when the jurisdiction of the SCSL started. See: The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131, paras 10-24.

33 The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131, para. 51.

34 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 603.

35 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 604.

perform in the efforts of war carried out by adults), in order to define the crime of child recruitment in a given case.

One important aspect of these two conducts is that they are independent of the "use" of children. Thus, the simple recruitment of children, either by force (conscription) or voluntarily (enlistment) encompasses a war crime, regardless of whether children were recruited for active use in hostilities or for other purposes such as domestic labour or sexual slavery.[36]

The Trial Chamber in the *Lubanga case* concluded in fact that conscription, enlistment and use are three alternative and separate offences. Thus, the Chamber determined that a child might be enlisted or conscripted, independently of whether she or he is later used to participate in hostilities. This is particularly significant, because the Chamber rejected the defence's submission that enlistment and conscription had to be done for the purpose of using the child to participate actively in hostilities.[37] This interpretation permits the inclusion within the concepts of "enlistment" and "conscription" the plight of girls who are often abducted by armed groups to act as sexual slaves, cooks or domestic workers. This is also a helpful interpretation which in a sense presumes that any child who joins an armed group, either by force or voluntarily, to serve in the military efforts or to act as domestic servant or sex slave, is equally put at risk by losing his or her protection as a civilian and thus becoming a military target.

The element that differentiates "conscription" from an "enlistment" is how recruitment occurs, either with the consent of the child (enlistment) or by force (conscription). Three interpretations are possible regarding consent, that offer three diverse levels of protection for children: a) consent of the child is a valid defence; b) consent of the child is not a valid defence but is legally relevant; and c) consent of a child under the age of 15 is legally irrelevant. It is important to study and analyse these three levels of protection in order to identify which interpretation is applicable to the Rome Statute, in accordance to the definition of enlistment, conscription and use provided for in Article 8 of the Rome Statute, but also in accordance with Article 21(3) of the Rome Statute that subjects the interpretation and application of the applicable law to internationally recognised human rights law.

In the *Lubanga case*, the Trial Chamber concluded that although "it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force", it still analysed whether the valid and informed consent of a child

36 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*.

37 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 609.

under 15 years of age is a valid defence.[38] Thus, the Chamber accepted the possibility that some children below the age of 15 could give consent to enlist. As will be noted further below, it appears that the Majority of Trial Chamber I also accepted that consent is legally relevant as regards the sentence to be imposed to the convicted person.

a. Consent as a valid defence

One could declare that consent of a child to join an armed group is a valid defence, although as will be analysed below, under the Rome Statute this would be incompatible with its object and purpose and also irreconcilable with internationally recognised human rights. However, at least theoretically, the aspect of consent as a valid defence is still worthy of evaluation, particularly considering that recently there are commentators questioning whether child soldiers are all "vulnerable victims" that should be protected. Drumbl for example states that most child soldiers are neither abducted nor forcibly recruited, and at the time children exercise considerable initiative in joining an armed group. The author in fact states that the "international legal imagination" has predetermined that no child has the capacity to volunteer to consent to serve in an armed group.[39] In fact the author points out that just as Article 5 of the CRC recognises the "evolving capacities" of children, the term of "childhood" should not cover all underage fighters and a more refined appreciation of interstitial developmental categories would enhance the dexterity of international law in addressing young adults.[40] Although these affirmations may be the reality for some children joining armed groups (particularly adolescents), it is important to focus on the legal framework of the ICC, which prohibits, without exception, the recruitment of children, either voluntarily or compulsorily in armed groups or forces, in both international and non-international armed conflicts.

While the Rome Statute could be part of this "legal imagination", its provisions are clear and thus interpretations as those made by Drumbl, although applicable perhaps for purposes of reparations (that should not be seen to benefit victims of child recruitment vis-à-vis their communities), cannot be used to exclude children from participating as victims in ICC proceedings pursuant to Rule 85 of the RPE or to lead to impunity of these crimes enshrined in Article 8 of the Rome Statute as war crimes (*i.e.* this is also the case in the crime of statutory rape in many domestic jurisdictions, where there is a presumption of lack of consent due to the child's age). In accordance with Article

38 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 613-614.

39 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 13.

40 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 48-49.

31 of the Vienna Convention on the Law of the Treaties from 1969, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" (emphasis added). Given that the Rome Statute declares in its Preamble that it is "determined to end impunity for perpetrators", an interpretation of this sort would be against the object and purpose of the Rome Statute, which criminalised the conduct of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities.

b. Consent is not a valid defence but is legally relevant

Article 8 of the Rome Statute can also be interpreted as providing a certain level of protection, recognising that consent of a child to enlist is possible, although it is not considered a valid defence that would justify the criminal conduct on behalf of the perpetrator. This in fact appears logical since the Rome Statute clearly differentiates three conducts: a) enlistment – which includes voluntary recruitment, b) conscription – which includes recruitment by force, and c) use of children to participate (either by force or voluntarily). It can thus be argued that Article 8 of the Rome Statute foresees that children may consent to join an armed group and/or to participate in hostilities.

The Pre-Trial Chamber in the *Lubanga case* interpreted Article 8 as such and concluded that a child's consent is not a valid defence.[41] Trial Chamber I in the conviction of Mr Lubanga adopted this same interpretation as regards the "defence". Moreover, the Trial Chamber in the *Lubanga case* concluded that crimes of conscription and enlistment are continuous in nature and thus only end when the child reaches 15 years of age or when he or she leaves the armed group or force.[42]

In the *Lubanga case*, the majority of the Trial Chamber appears to have accepted that consent of children under the age of 15 is possible and is legally relevant, at least in relation to the sentence to be imposed to the convicted person. In that case, the majority of the Trial Chamber concluded that the crime of conscription, which has an "added element of compulsion", warranted 13 years of imprisonment, while enlistment warranted 12 years of imprisonment.[43] Judge Odio Benito, in her dissenting opinion, concluded that crimes of enlistment, conscription and use, although distinct crimes pursuant to the Rome Statute, result in damage to the victims and their families, "regardless of the nature of their initial recruitment" (voluntary or compulsory). She also stated that all three crimes (enlistment, conscription and use) "put young

41 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04-01/06-803-tEN, para. 247.

42 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 616-618.

43 *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, paras 37 and 98.

children under the age of 15 at risk of severe physical and emotional harm and death", and therefore she concluded that the sentence to be imposed to the convicted person for all three crimes was to be the same and not differentiated, as the majority decided.[44] Indeed, Judge Odio Benito's dissent focuses not on the origin of the crime (with or without consent), but emphasises on the result (harms suffered by the victims) which expectedly would be the same, regardless of whether the child originally "consented" to the commission of the crime.

A similar interpretation has been applied by the SCSL, which has accepted that children do have voluntariness, although rejecting it as a possible defence for the accused.[45] For example, the Trial Chamber in the *RUF case* at the SCSL made an interesting interpretation of "conscription", which defined two manners in which this conduct may take place. It stated that this practice to compel a child to join an armed group may be done a) by "legal" means (*i.e.* by State law); or b) illegally (through use of force or by abduction).[46] The first manner, the "legal" way, gives leeway to an interpretation by ICC judges that could include other "legal" manners of conscription, (such as propaganda or pressure to parents) that could have an impact on the child's "consent" to join the armed group.

However, not all the criteria adopted by the SCSL are applicable to the ICC's legal framework and thus should be used with caution, because it could either have a more restrictive or broader approach than the Rome Statute and its Elements of Crimes. For example, in the *AFRC case*, the SCSL Trial Chamber defined conscription as encompassing acts of coercion by an armed group against children, committed for the purpose of using them to participate actively in hostilities.[47] This concept seems to add an extra element to the crime, which is not included in the elements of crimes, that is the "purpose" of using children to participate in hostilities. This interpretation, however, is clearly contrary to the criteria applied by Trial Chamber I in the *Lubanga case* already analysed above. Another example can be found in the *RUF Case*, in which the Trial Chamber noted that since many of the children abducted were subsequently forcibly trained, it would be impermissible for the Chamber to treat these practices as separate bases for findings of conscription.[48] This interpretation by the SCSL, which could have been applicable to the case at hand, may not be applicable to cases before the ICC, where children could very well be conscripted within an armed group and not necessarily receive military training (*i.e.* if they are to be used for other purposes, such as being

44 *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, para. 51.
45 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 735.
46 *RUF case 'Judgment'* (2 March 2009) SCSL04-15-1234, para. 186.
47 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 734.
48 *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, para. 1695.

messengers, porters or sexual slaves). This concept of conscription, which links it to military training would very often leave many children associated with armed groups unprotected and therefore should not be adopted as a "general principle" but applied on a case-by-case basis.

Likewise, regarding the concept of "enlistment", the SCSL Appeals Chamber established that enlistment in the broad sense includes any conduct in which a child is accepted as part of the militia, thus coming in fact close to a crime by omission (of not stopping the child from joining the armed group). In the view of the Appeals Chamber of the SCSL, by simply not stopping or not preventing a child from joining an armed group the crime of "voluntary enlistment" is committed.[49] This however, could be complicated to apply in the ICC framework, because Article 25 of the Rome Statute does not foresee criminal responsibility by omission.

It can thus be concluded that although a child's consent is not a valid defence, the Rome Statute appears to accept that children can legally "consent" to either join an armed group or to participate actively in the hostilities. However, additional elements such as the purpose of the enlistment or conscription, which are not required by the ICC provisions, should be disregarded as they may lead to impunity against these crimes and may leave many children unprotected, particularly those who are recruited by armed groups but not clearly to fulfil a military purpose within the group.

Notwithstanding the fact that the ICC case law so far has accepted that consent may be possible, although not a valid defence, the following subsection will analyse one more interpretation, which disregards consent of children under the age of 15 to form part of an armed group and/or to participate in hostilities and consequently makes it legally irrelevant (including for sentencing and reparations purposes).

c. Consent is impossible and legally irrelevant

The highest level of protection for children is the interpretation that children under the age of 15 cannot legally give consent to join an armed group.[50] As mentioned before, this interpretation seems to go one step beyond the level of protection provided for in Article 8 of the Rome Statute, which foresees the crime of "enlistment" and thus the voluntary recruitment of children (involving some kind of consent). One could thus argue that although consent is practically impossible, it is legally foreseen under ICC standards.

However, if the crime of enlistment, conscription and use is considered on a case-by-case basis, taking into consideration the environment of violence in which child victims could be immersed, one could conclude that consent

49 *CDF case 'Judgment'* (28 May 2008) SCSL-04-14-829, para. 144.

50 Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' in Sara Dillon (ed), *International Children's Rights* (Carolina Academic Press 2010) 727.

is not legally possible, as children under 15, even if they appear to consent, do not necessarily fully understand the negative consequences of their enlistment (*i.e.* danger to their lives, punishments, sexual violence, etc.) or do not have the possibility to do so freely (*i.e.* hunger, domestic violence, civilian insecurity, etc.).[51] One could also argue that although there is consent at the beginning of the crime (when the child is enlisted), the child will later not have the possibility to stop the crime (*i.e.* by leaving the armed group and enrolling in a school to study). Furthermore, as noted by Judge Odio Benito in her dissenting opinion referred to above, no matter how the crime of recruitment is initiated (by force or "voluntarily"), children indistinctly suffer harm as a result of their involvement with the armed group or force.

Accordingly, although consent of children under the age of fifteen is foreseen in the Rome Statute, it may be difficult to determine, because many of the "voluntary" child soldiers who decide to join the armed groups face some kind of physical, psychological or socio-economic circumstances that force them towards the armed group: violence, starvation, revenge for the killing or abuses committed against the child or his or her family, etc.[52] Likewise, though not strictly "compelling" children to enlist, some governments

51 For example Abbott states that children often join armed groups as a consequence of a culture of violence, desperation for food, the need for security or the drive to avenge the deaths of family members. The author also notes that children often "volunteer" to fulfil their basic needs or merely to survive. This commentator concludes that in a war-torn context, it is difficult to establish whether the child did indeed have freedom of choice in his or her decision to volunteer and may lack the capacity to determine his or her best interests, to independently form opinions or to analyse competing ideologies. Fujio also mentions that poverty, ethnic marginalisation, lack of education and spread of war and disease are some of the "root causes" of the use of children in armed conflict as children who enlist have not freely chosen this lifestyle; rather they were drawn into it by forces beyond their control. See: Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 516-518; Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of excombatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 2 and 5.

52 See the Paris Principles: Principle 6.0 states that children become associated with armed forces or armed groups for numerous reasons. Many are forcibly recruited; others "volunteer" because of their circumstances. While war itself is a major determinant, children may view enlistment as their best option for survival for themselves, their families or communities in contexts of extreme poverty, violence, social inequality or injustice. Gender inequalities, discrimination and violence are frequently exacerbated in times of armed conflict. Girls and boys may be seeking to escape gender-based violence or other forms of discrimination. See also Principle 6.29, which states that girls' "voluntariness" may be the route to escape other crimes committed against them, such as sexual and gender-based violence and early marriage. See as regards girls: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 60-61, which observes that although both boys and girls are "pushed" by circumstances to join an armed group, girls are pushed by additional gender-specific factors, such as domestic physical and sexual violence.

or rebel armed groups use propaganda to convince children to join in hostilities, thus in a sense, predetermining their will to enlist and fight.[53]

In the context of the *Lubanga case*, a psychological expert witness called by the Trial Chamber declared that from a psychological point of view children cannot give informed consent to join an armed group due to the fact that they have none or limited access to information concerning the consequences of their choice and they neither control nor fully comprehend the structures and forces they are dealing with. She stated that children do not have full knowledge and understanding of the mind and ignore long-term consequences of their actions.[54]

From a legal point of view, the Special Representative of the UN Secretary General for Children and Armed Conflict in her observations submitted to the Trial Chamber in the same case stated that '(a)ll "voluntary" acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant'.[55] She stated that consent is not a defence since it is absolutely agreed universally that children under 15 years cannot reasonably give consent to their own abuse and exploitation and any line between voluntary and forced recruitment is not only legally irrelevant but also practically superficial in the context of children in armed conflict.[56]

However, one could argue that Article 8 of the Rome Statute clearly includes the crime of "enlistment" and foresees voluntary recruitment and this is legally relevant under ICC standards, which clearly differentiates between "conscription" and "enlistment". Nevertheless, prosecution policy in the future could shift and bring charges against the accused only for the conduct of conscription and use, thus leaving out the conduct of enlistment and eventually making it obsolete. Likewise, in cases such as the current ones before the ICC, in which the crime of enlistment is charged, victims participating in the case could bring the factors that lead to their recruitment to the attention of the Chamber. This could give the Chamber the basis to refer to lack of consent of victims (*i.e.* extreme hunger, violence, loss of parents, displacement, etc.) and thus re-characterise the charges so as to only include conscription and

53 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 516.

54 *Lubanga case,* Transcript of hearing (7 of April 2009) ICC-01/04 01/06-T-166-ENG, 13 and 90; Elisabeth Schauer, *The Psychological Impact of Child Soldiering* (Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 7-8.

55 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04-01/06-1229-AnxA para. 10.

56 Lubanga Case 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 14.

use. Another option would be, not to drop the charges of enlistment, but make a determination in the sense that although enlistment occurs when the child seems to accept his or her recruitment (in the origins of the commission of the crime), this consent is only temporary (and apparent), as the crime is continuous in nature and children under the age of 15 in armed conflict situations could not possibly consent to the harms suffered as a consequence of these crimes.

The bottom line is that although the reality in the field is that many children "consent" to enlist in order to have food or obtain what in their view is safety, this should not be legally relevant, particularly considering that the ICC sets international standards that are often followed by other international and national jurisdictions. The ICC will need to acknowledge that regardless of how the recruitment of a child is initiated (with or without consent, either real or apparent, with or without physical force or other means of coercion) harm suffered by the child will be equally serious and devastating for his or her childhood and his or her future life as an adult.[57] As mentioned by the Special Representative of the Secretary General of the UN for Children and Armed Conflict, there is no "best interests of the child defence" and recruitment *per se* is against the best interests of the child.[58]

Therefore, any difference between "conscription" and "enlistment", namely "voluntariness", should be made only to satisfy legal requirements under Article 8 of the Rome Statute (*i.e.* indictment against the accused), but should certainly not serve as a legal basis to justify the perpetrator's conduct, or to diminish his or her sentence, or to diminish the victim's rights for reparation. Likewise, as has been the experience in the *Lubanga case*, Chambers should adopt the practice of calling expert witnesses that will describe to the Chamber the realities of the armed conflict context and the forces that drive children

57 For example, as expert witness Elisabeth Schauer stated in the Lubanga case before the ICC, the effect of cumulative exposure to violence makes ex combatants a highly vulnerable group as they are exposed to a high number and outstanding diversity of traumatic stressors that can even go beyond the child's generation and pass on to future generations (his or her eventual children), Elisabeth Schauer, The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx1 (25 of February 2009) 15 and 25. This is also shared by Abbott, who considers that children's participation in warfare "violates their innocence, exploits their particular vulnerability and destroys their future and, therefore, the future of their society". Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 518.

58 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 11.

to join armed groups and adults (often including their own parents) to recruit them.[59]

4.3.2.3 *The concept of use of children under the age of 15 to participate actively in hostilities*

Regarding the concept of "use" there are three main criteria that offer three distinct levels of protection for children that in one way or another are associated with armed groups or armed forces. The first one, the most limited, requires that children take *direct* part in hostilities. The second criterion requires that children take *active* part in hostilities, although not necessarily direct, thereby excluding children used by armed groups for domestic or sexual purposes. A third criterion, the one that provides most protection for children, includes within the concept of "use" all children that are associated with armed groups and therefore seen as a military target by warring factions. The following subsection will examine these three criteria and also examine the interpretation of "use" adopted by Trial Chamber I in the *Lubanga case*'s verdict.

a. Use as "direct participation"

The prohibition to use children in hostilities was first codified in the Additional Protocols of 1977, and was differently formulated, depending on whether the armed conflict was international or non-international.[60] Article 77(2) of Additional Protocol I refers to "measures so children who have not attained the age of fifteen years do not take a *direct* part in hostilities", and thus applies the most restrictive criteria. Additional Protocol I thus prohibits the use of children for functions of a combatant, as defined by international humanitarian law, and therefore leaves unprotected children involved in other indirect activities, such as those that work as messengers, transporting ammunition, etc. This narrow concept was also adopted by the ICTR Trial Chamber in the *Akayesu* judgment, which found that "to participate actively in hostilities" is synonymous of taking "direct part in the hostilities" as used in Additional Protocol I.[61]

---

59 Judges could call not only children's rights experts, but particularly experts in other fields that are not necessarily legal, for example, psychologists, sociologists, military experts, etc. In the *Lubanga case* there were two experts called. One is a clinical psychologist with specialisation in post-traumatic stress disorder who has worked extensively with demobilised children, particularly in Africa. The other expert is the UN Special Representative on Children and Armed Conflict, who as part of her work visits different areas of the world in which there is armed conflict and investigates on the situation of children therein. The *curriculum vitae* of Ms. Radhika Coomaraswamy is provided for in: *Lubanga case* 'Annex A: Submission by the Registrar of the Curriculum Vitae of Chamber expert Mrs Radhika Coomaraswamy' (3 June 2010) ICC-01/04-01/06-2464-AnxA.

60 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*, 1145.

61 ICTR, *Akayesu case*, 'Judgement' (2 September 2008) Case No ICTR-96-4-T, para. 629.

Article 38 of the CRC, which refers to child combatants, also applies the standard of "direct part in hostilities" and thus paradoxically offers the lowest level of protection for children who are involved in armed conflict. In fact, given the quasi universality of the CRC, one could argue that this is an internationally recognised (low) standard which is again repeated in the Optional Protocol to the CRC, in which, although the standard is raised to 18 years of age, still refers to children taking "direct part in hostilities".

However, this low standard of CRC can be overcome by using Article 41 of the same Convention, which states that nothing in it (and its Protocols) shall affect any provisions that are more conducive to the realization of the rights of the child. In a sense, Article 41 of the CRC acknowledges that higher standards of protection of children may exist at national or international level, and thus these should prevail over the CRC. Consequently, higher levels of protection contained in other legal provisions in the following subsections b) and c) should be applied, as they provide more protection to children in armed conflict.

b. Use as direct and indirect participation but excluding use for other purposes (namely domestic work and sexual violence)

Article 4(3)(c) of Additional Protocol II states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to *take part in hostilities*", and thus protects children from direct and indirect participation in hostilities. In fact, the International Committee of the Red Cross Commentary to Protocol I concludes that since the intention of the drafters was to keep children under fifteen outside of armed conflict, the lower criteria in Protocol I should be interpreted as including both direct and indirect participation in hostilities in light of the higher standard contained in Protocol II.[62]

The Rome Statute seems to apply this higher standard, as it uses the term "actively participate in hostilities", and thus appears to include both direct and indirect participation insofar as it is "active". However, the question then arises as to what is "active participation".

The case law of the SCSL sheds some light on the notion of "active participation", as well as some preparatory documents to the Rome Statute, which could identify the drafters' intention in this regard. In the SCSL, the Trial Chamber in the *AFRC case* opted for a definition of the concept of active participation that encompasses any conduct that places the lives of children directly at risk and thus did not limit the term solely to "participation in combat". The Chamber stated that any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. In the *AFRC case*, in the Chamber's view, carrying loads for the fighting action,

62 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*, 1145.

finding or acquiring food, ammunition or equipment, acting as a decoy, messenger, making trails or finding routes, working at checkpoints or acting as a human shield, are all some of the examples of active participation.[63] In fact, if one reads the criteria applied by the Trial Chamber in the *AFRC case*, most children associated with armed groups, including girls who are forcibly abducted for sexual purposes, also fulfil one or more of the above tasks (*i.e.* acquiring food) and could be included in this broad term of children "used to actively participate in hostilities".

The Trial Chamber in the *RUF case* adopted a concept of "active participation" that clearly departs from a focus on the "tasks" performed by the children, and instead concentrates on the fact that children lose their civilian status and thus become a military target.[64] However, in spite of the above criteria, the same Trial Chamber unfortunately determined that abducted girls of less than 15 years of age, who had been forced into sexual partnership with fighters and used to perform domestic chores for commanders, did not *per se* participate actively in hostilities, as these activities were not related to the hostilities and did not directly support the military operations of the armed groups.[65] Thus, it appears that the Trial Chamber in the *RUF Case* contradicted its own criteria, as clearly girls used for sexual and domestic purposes by armed groups will lose their civilian status vis-à-vis the enemy, regardless of whether their activities are related to military operations.

The Zutphen Draft of the Rome Statute has also been referred to by ICC Chambers, as it may be considered as a document that reflects the drafters' intention as to the meaning of the words 'using' and 'participate'. The Zutphen Draft states in its footnotes that these cover both direct participation in combat and 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. The draft excludes activities which are described as clearly unrelated to hostilities, such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation.[66] It is clear that the Zutphen Draft, as the SCSL case law above, did not include many of the tasks

63 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 736-737.

64 The Chamber is mindful that an overly expansive definition of active participation in hostilities would be appropriate as its consequence would be that children associated with armed groups lose their protected status as *hors de combat* under the law of armed conflict. (…) The Chamber considers this interpretation necessary to ensure that children are protected from any engagement in violent functions of the armed conflict that directly support its conflict against the adversary and in which the child combatant would be a legitimate military target for the opposing armed group or groups. See: *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, para. 1723.

65 *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, paras 1622 and 1730. See also *Taylor case* 'Judgment' (18 May 2012) SCSL-03-01-1281, para. 1411.

66 PrepCom, *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands* (4 February 1998) A/AC.249/1998/L.13, Article 20(E), at 23 n. 12.

usually performed by girls (although not exclusively), such as domestic work and sexual slavery, within the concept of "use".

Pre-Trial Chamber I of the ICC defined the concept "participate actively" following the Zutphen Draft and thus excluding conducts such as the delivery of food and the domestic help in an officer's married accommodation, as these activities were considered to have no connection to the hostilities. However, the Chamber included conducts such as guarding military objects and acting as a bodyguard within the concept, thus expanding the notion slightly further.[67] The Pre-Trial Chamber also determined that in order for these activities to be related to hostilities the following two requirements are necessary: a) the military commanders are in a position to take all necessary decisions regarding the conduct of hostilities; and b) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.[68]

The criteria adopted by the SCSL and the ICC Pre-Trial Chamber (relying on the Zutphen Draft) thus adopted a higher standard, in order to include both direct and indirect participation. However, these criteria did not include other dimensions of child recruitment, namely the work performed by girls who are used for domestic and sexual purposes. In principle, the criteria adopted by the SCSL and the ICC Pre-Trial Chamber focuses on the nature of the tasks and the link between these tasks and the military objectives of the armed group or force. As will be noted below, a criterion that focuses on the risk and the fact that children lose their civilian status, offers greater protection to these children.

c. Use as "associated with an armed group"

Although one could argue that the Rome Statute does not include within the concept of "use" the plight of children serving as domestic servants or sexual slaves (as the aforesaid criteria of the Pre-Trial Chamber), it is also possible to interpret and apply the law in order to adopt a more comprehensive definition that encompasses other activities connected with hostilities and that are part of today's armed conflicts.

A broader notion of "use" should not only focus on the tasks performed by children within the armed group, but also on how other warring factions in armed conflict see that child who is associated with the armed group. Therefore, focus should not only be given to the internal tasks children perform within the armed group, but also on external considerations, namely that the child will be perceived as a combatant, regardless of the nature of the task he or she performs within the armed group. In summary, all children asso-

67 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 267.

68 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 263.

ciated with armed groups are seen as military targets by outsiders and thus are equally unprotected and vulnerable. In fact, one could even argue that children who are used for "non-military" purposes such as domestic or sexual servants, are even more vulnerable as they are not necessarily armed. Likewise, as noted by Fujio, girls suffering goes beyond their recruitment, as they often face new obstacles and prejudices as they attempt to reintegrate into society, having been exposed to sexual violence and its accompanying "twin dangers": unwanted pregnancies and sexually transmitted diseases.[69] The author also states that children who are associated with an armed group and witness atrocities can be equally harmed as those being forced to take part in combat and commit atrocities.[70] Clearly, a definition of child recruitment that ignores this reality seems incomplete, as it ignores the gender-specific harms suffered by children as a result of the crime of child recruitment. A broader concept would thus satisfy the main object of the prohibition of child recruitment, which is to keep children safe from violence, abuse and exploitation, taking into account risks for their physical and psychological well-being resulting from such involvement with an armed group, regardless of whether this involvement occurred in the battlefield or in the armed group's kitchen or sleeping quarters.

If one considers that the criminalisation of child recruitment aims to limit the exposure of children to violent acts, any child associated with an armed group could thus be seen as a combatant by the enemy, and lose *de facto* the protective status of civilian and become a legitimate military target under the Geneva Conventions and their Additional Protocols, regardless of whether that child is a boy soldier or a girl "married" to a commander.

In fact, the Special Representative of the Secretary General for Children and Armed Conflict, who testified as an expert in the ICC *Lubanga case,* rejected any definition that excludes a great number of children in current armed conflicts that are some way or another associated with armed groups.[71] The Special Representative suggested that the ICC should adopt a case-by-case approach, in which children's participation is analysed on the basis of whether it served a support function to the armed force or group during the period of conflict. The Special Representative identified within such roles, activities

69 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 10.

70 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 6. The State of the World's Girls has observed that in fact, conscription of girls is often accompanied by rape and sexual violence and most (if not all) girls who have been associated with armed groups have been raped. See: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 65.

71 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 20.

such as acting as cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual purposes.[72]

However, the ICC needs a legal basis to justify such a broad concept, particularly in light of Article 22 of the Rome Statute, containing the principle of legality. A plain reading of Article 8 of the Rome Statute does not limit the concept of "use", as adopted by the Pre-Trial Chamber. However, the Zutphen Draft clearly reflects drafters' rejection to include this broader concept. Although the Zutphen Draft is not applicable law *per se*, it does provide some guidance as to the intention of the drafters of the Rome Statute. However, the changing nature of armed conflicts and the Rome Statute's purpose and objective, which is to put and end to impunity to crimes committed against children, women and men (Preamble of the Rome Statute), should also be taken into consideration. In fact, the Zutphen Draft referred to activities carried out by children "in the frontline". The concept of "frontline" in current armed conflicts is a grey zone and one could consider that any child who is related to an armed group is within this frontline, whether the child is a girl who is "married" to a commander or is the bodyguard to a commander. They all suffer the same risks of physical and mental damage due to their relation with the armed group.

The ICC could rely on more than the Zutphen Draft for its interpretation of the concept of "use", for example using as guidance the Paris Principles, which refer to a broader concept of "children associated with armed forces or armed groups" including girls recruited for sexual purposes. In fact, looking closer at the criteria of the Pre-Trial Chamber, one could even argue that domestic and sexual activities carried out by children associated with armed groups are activities in which: a) commanders are in a position to take all necessary decisions regarding these activities; and b) these activities have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.[73] To ignore the "support" given by child sexual slaves to military commanders in battle is to ignore the patriarchal aspect of armed

72 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 23. The same multiple roles of girls associated with armed groups are identified by "The State of the World's Girls", which identified within reasons why armed groups recruit girls, not only to serve as fighters, but also to give sexual services and play different roles in the armed conflict. See: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 59.

73 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 263.

conflict, which requires that men receive not only weapons, but also food and sexual pleasure before and after battle.[74]

d. "Use" according to the Trial Chamber in the Lubanga case

In the *Lubanga case*, the majority of the Trial Chamber, Judge Odio Benito dissenting, adopted an approach to "use" of children which is not based on the specific task carried out by the child, but on the risk to which the child is exposed, namely to the fact that the child becomes a target (and thus similar to the concept applied on section c) above).[75] The Trial Chamber adopted

74 Although in the *Lubanga case*, the victims' legal representatives failed in their attempt to include crimes of sexual violence within a case of child recruitment, some of the criteria applied by the judges in that case could actually be of use for future cases. In summary, the legal representatives of the victims filed a joint application pertaining to a procedure under Regulation 55 of the RoC, submitting that victims had suffered, additionally to their recruitment, inhumane and/or cruel treatment, and that young girls had been subjected to various acts of sexual violence and were reduced to sexual slavery, as a widespread and systematic practice, within the scope of the charges against the accused. The Trial Chamber, by majority, decided that the submissions of the legal representatives of victims and the evidence heard during the course of the trial had persuaded them that such a possibility (changing the legal characterisation of the facts) could exist. Accordingly, the parties and participants received notice that the legal characterisation of the charges could change in order to include sexual violence and inhumane treatment. The majority decision was however reversed in appeal since in the view of the Appeals Chamber, this interpretation of Regulation 55 would also result in a conflict with the Rome Statute because new facts and circumstances not described in the charges would be added to the case. See: *Lubanga case* 'Demand conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Court' (22 May 2009) ICC-01/04-01/06-1891 para. 11; *Lubanga case* 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' (14 July 2009) ICC-01/04-01/06-2049, para. 33; *Lubanga case* 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the "Decision of Trial chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"' (8 December 2009) ICC-01/04-01/06-2205, para. 94. During a later status conference in the same case, a legal representative of the victims raised the issue again. The Trial Chamber issued a decision in which it stated that the factual allegations of the legal representatives supporting different crimes such as those involving inhumane and cruel treatment did not support the legal "elements of crimes" with which the accused was charged, and the factual allegations supporting sexual slavery had not been referred to at any stage in the decision on the Confirmation of the Charges and therefore did not support any element of the crimes constituting the charges confirmed against the accused." See: *Lubanga case* 'Decision on the Legal Representatives' Joint submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court'(8 January 2010) ICC-01/04-01/06-2223 paras 33-36.

75 The concept of target should not be interpreted as "lawful target" of international humanitarian law, meaning that the child has lost his or her protection as a civilian. However, *de facto*, children may lose this protection. See Roman Graf 'The International Criminal Court and Child Soldiers, An Appraisal of the Lubanga Judgment' *Journal of International Criminal Justice* (2012) 963.

a criterion which allows for the inclusion of children "involved with the armed groups", regardless of whether their participation is directly or indirectly associated with hostilities. Thus, the Trial Chamber distanced itself from the Zutphen Draft and consequently the Pre-Trial Chamber's approach.[76] In the view of Trial Chamber I two factors need to be taken into consideration: a) the support provided by the child to the combatants; and b) the level of risk. As noted by Lieflander, the Trial Chamber thus defined the notion of "participation in hostilities" as "exposure to danger".[77] The Trial Chamber determined that "although absent from the immediate scene of the hostilities, the individual (child) was nonetheless actively involved in them". The Chamber finally concluded that given the "myriad of roles" carried out by children, the determination of whether a particular activity is to be considered as "active participation", can only be made on a case-by-case basis (as in fact had been recommended by Rhadika Coomaraswamy in that case).[78] Finally, regarding sexual violence, the Trial Chamber neither excluded nor included it as an activity within the concept of "use". This seems logical since it determined that this has to be done on a case-by-case basis. However it accepted that this may be taken into account for sentencing and reparations purposes.[79] It is to be noted however, that although the Trial Chamber did not make any finding as to the individual criminal responsibility of Mr Lubanga regarding sexual violence suffered by recruited children, it did refer in its Article 74 Judgment to the evidence that children, in particular girls, had been subject to sexual violence.[80]

Judge Odio Benito dissented with the majority of the Chamber. While the majority of the Chamber adopted a definition of "use" that is ultimately fact-dependent, as it needs to be determined on a case-by-case basis, Judge Odio Benito chose to adopt a legal concept that is independent of the evaluation of the evidence.[81] She thus concluded that the majority's decision not to include sexual violence within the legal concept of "use" could ultimately result in the invisibility of this intrinsic part of the involvement of children with an armed group.[82] Judge Odio Benito also disapproved of the concept of "target"

---

76 *Lubanga case 'Judgment* pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 628.

77 Thomas Lieflander, The Lubanga Judgment of the ICC, *Cambridge Journal of International and Comparative Law* (2012) 202.

78 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842.

79 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 630-631.

80 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 890-896.

81 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, paras 5-7 and 15.

82 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 16.

adopted by the majority, because she considered that children who are used by armed groups often suffer harm by the same armed group that recruited them and not only from the "enemy" that sees them as a military target.[83]

The criteria adopted by both the majority of Trial Chamber I and Judge Odio Benito in her dissent, appear to grant greater protection to children associated with armed groups, as they focus not only on the tasks performed by children to define the concept of "use to actively participate in hostilities" pursuant to the Rome Statute. Although, as noted by Judge Odio Benito, the notion of "target" focuses on the outsider "enemy", very often, the "enemy" is within the same armed group, who rapes, tortures and subjects child recruits to inhumane and degrading treatment. Thus, a concept of "risk", either vis-à-vis enemies that consider the child as a combatant, but also vis-à-vis military commanders, is more comprehensive of the situation of children who are recruited by armed groups or forces. However, a too broad definition could be contrary to Article 22 of the Rome Statute, and thus, the case-by-case approach adopted by the majority of the Trial Chamber could be more favourable, as it would be bound by the "facts and circumstances" of the charges, and thus respectful of the principle of legality but also the right of the accused to have complete knowledge of his/her charges.

4.3.2.4 Age determination

A material element of the crime of child recruitment is that of the victim's age, which necessarily has to be below 15 at the time of the events. In this sense, the ICC's jurisdiction is limited and a crime under the Rome Statute will only occur insofar as the child being enlisted, conscripted or used is younger than 15 at the time of the events. This material element is also closely linked to the mental element, or *mens rea* of the crime, particularly in what refers to the knowledge and intention of the perpetrator of the crime of the child's age at the time of the commission.

In many countries, particularly those currently under scrutiny by the ICC, children have no documentation and birth registries are rare or inexistent in some areas. In the *Lubanga case*, for example, a former prosecution investigator testified that the DRC civil administration was limited and thus it was not easy to establish a child's age. The prosecution in the *Lubanga case* attempted to prove witnesses' ages based on their statements, civil status documents (where available) and forensic evidence (namely wrist and dental x-rays to establish physical development). However, in its judgment, the Trial Chamber found that the prosecution had failed to verify the children's age with their parents or communities and with existing civil registries in the DRC. Finally, the Trial

83 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, paras 18-19.

Chamber concluded that forensic evidence was based on a model that was not meant to determine age, and particularly not of Sub-Saharan Africans.[84]

The Trial Chamber ultimately determined age relying on video footage in which children clearly under the age of 15 appeared either in training camps or being used as combatants,[85] the testimony of several witnesses and the comments that some witnesses made to video footage,[86] as well as documentary evidence.[87] These criteria, however, have the limitation of relying on a subjective appreciation of the physical appearance or manners in which a child acts, which, ultimately, could lead to mistakes. However, it can also be argued that if video footage and testimonies corroborate each other, along with the entire body of evidence in a trial, then this means of proof could be useful in a case where civil registries and birth certificates are inexistent.

In the SCSL, the Trial Chamber in the *Taylor case* considered several reports and expert evidence in order to determine age. It relied on an expert that submitted a report based on research into a database of some two thousand children who were abducted during the armed conflict when they were under the age of 15 between 1996-2002 (although interestingly the charges were from 1998 to 1999 only).[88] Most importantly, the Trial Chamber in the *Taylor case* recognised that although documentary evidence is more reliable evidence as to the age of a child, since this is not available in many parts of Sierra Leone, it had to rely on the testimony of witnesses who observed children under the age of 15. The Trial Chamber of the SCSL however acknowledged that these were estimations of age based on appearance, height, physical development and the witnesses' personal experience, rather than objective proof of age.[89] For example, the SCSL relied on the evidence of a former child soldier witness, who testified "he was very small" and "did not have facial hair at the time of his capture". Although the witness could not state when he was born, he testified that his father used to tell him he was 14 years old. The same witness presented a birth certificate and a national identification card that indeed appeared to be contradictory with regard to his exact age. Notwithstanding these inconsistencies, the Trial Chamber in the *Taylor case* concluded that he "was about 13" at the time of the events.[90]

---

84 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 169-177.

85 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 779, 792-793.

86 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 255-257, 268, 644, 711-718 and 760-769.

87 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 741-748.

88 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, paras 1359-1360.

89 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 1361.

90 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, paras 1383-1393.

The approach of the Trial Chamber in the *Taylor case* is without a doubt more flexible than the one adopted by the Trial Chamber in the *Lubanga case* (in which similar inconsistencies rendered child soldier witnesses unreliable). The downside of this more flexible approach adopted by the SCSL is that although it can lead to a conviction, it could also be contrary to the evidentiary threshold of "beyond reasonable doubt" required to convict an individual under the Rome Statute. Visibly, judges dealing with these crimes will need to be extremely cautious in order to achieve a balance between the need to fight impunity on the one hand, and the need to guarantee the rights of the accused person on the other.

However, lack of State civil registry infrastructure in Situation countries should not lead to impunity for international crimes. A high standard of knowledge and consent could lead to practically the impossibility to prosecute and convict someone for the crime of child recruitment. In fact, during the PrepComs there were two main views regarding the knowledge of the perpetrator of the victim's age.[91] Some States argued that no mental element was required, and if the victim was under 15, there would be criminal responsibility, even if the perpetrator ignored this. On the other hand, another group of delegations thought that, in strict application of Article 30(3) of the Rome Statute, full knowledge of the victim's age was required.[92] Finally a consensus was reached, and the Elements of Crimes establish that the "perpetrator knew or should have known" that the victim was under the age of 15.[93]

At a first glance it could appear that this element of the crime is contrary to the Rome Statute, and concretely to Article 30 of the Rome Statute that defines the mental elements of crimes under the jurisdiction of the ICC, requiring intent and knowledge. However, the "General Introduction" to the Elements of the Crimes provides in its paragraph 2 the following:

> 'As stated in Article 30, *unless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in Article 30 applies. *Exceptions to the Article 30 standard*, based on the Rome Statute, including applicable law under its relevant provisions, are indicated below.' (Emphasis added)

Herman von Hebel, who chaired the working group on the Elements of Crimes, believes that the above paragraph (adopted by two-thirds majority

91 Knut Dormann, *Elements of War Crimes Under the Rome Statute of the ICC* (International Committee of the Red Cross, 2003) 375.

92 Article 30(3) of the Rome Statute states that "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

93 William Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) 126.

of State Parties to the Rome Statute in September 2002, while celebrating its first-ever ASP), reflects the consensus of the international community to lower the standard of Article 30 of the Rome Statute so as to make viable the prosecution of crimes of child recruitment.[94] The author also states that while the elements are not binding *per se*, they have persuasive force as they reflect the consensus view of the international community.[95]

One could also apply Article 21(3) of the Rome Statute, which requires that the law under the Rome Statute shall be interpreted and applied in accordance with internationally recognised human rights. Considering that a strict interpretation under Article 30 of the Rome Statute could leave most (if not all) crimes of child recruitment unpunished, the interpretation that the "*lex specialis*" of the Elements of Crimes applies over the "*lex generalis*" of Article 30 would grant a greater scope of protection to the victims of this crime. Finally, in accordance with Article 31 of the Vienna Convention on the Law of the Treaties from 1969, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" (emphasis added). Given that the Rome Statute declares in its Preamble that it is "determined to end impunity for the perpetrators", a strict application of the *mens rea* requirements of Article 30 of the Rome Statute would defeat the object and purpose of this international treaty, leaving virtually all crimes of child recruitment unpunished.

Although this could have been an issue to be dealt with by the Trial Chamber in the *Lubanga case*, the Chamber concluded that since the prosecution had not invited a conviction based on this lesser mental element of "should have known", the Chamber based its findings on the "knew" mental element of Article 30 of the Rome Statute.[96]

Albeit the reluctance of the Trial Chamber in the *Lubanga case* to make a determination as to this mental element of "should have known", Chambers in future cases could adopt an approach in which Article 30(3) of the Rome Statute does not apply for the crimes of enlistment, conscription and use of children and therefore what applies are the specific elements of this crime, which require that the perpetrator either knew the age of the child, or else he or she consciously took no notice on the child's age, even if it were possible that the child was under fifteen (*i.e.* due to the child's physical appearance). Consequently, the perpetrator could be criminally responsible if he or she acted

94 Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001).

95 Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001). .

96 Regrettably, the Chamber simply noted that this lesser mental element raises a number of issues. See: *Lubanga case 'Judgment* pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para 1015.

recklessly, not taking the necessary measures to assure him or herself of the child's age.

4.4 International crimes in which children are disproportionately or more seriously affected

4.4.1 Sexual violence

Article 7 of the Rome Statute prohibits the following acts of sexual violence as crimes against humanity:

> 'Article 7 Crimes against humanity
> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (…)
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (…)
> 2. For the purpose of paragraph 1:
> (…)
> (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
> (…)
> (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
> (…)
> 3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'

Article 8 of the Rome Statute prohibits the following acts of sexual violence as war crimes:

> '(…) 2. For the purpose of this Statute, "war crimes" means:
> (…) (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (…)
> (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

> (…) (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (…)
> (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.'

Although the criminal conduct identified in Articles 7 and 8 of the Rome Statute refer specifically to crimes against humanity and war crimes, they could also be useful in the interpretation of acts of sexual violence as genocide under Article 6(b) of the Rome Statute, as "causing serious bodily or mental harm to members of the group". This in fact is stipulated in the Elements of Crimes of Article 6(b), which in footnote 3 state that this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhumane or degrading treatment. Likewise, acts of sexual violence could be equally considered torture or inhumane or degrading treatment, for example when family members are forced to watch their relatives getting raped.[97]

It is also important to consider the previous analysis on the crime of conscription, enlistment and use of children, and the fact that sexual violence is very often an intrinsic element of the crime of child recruitment. Very often girls and boys who are recruited by armed groups suffer from sexual violence. Thus, crimes of sexual violence could also be brought as separate charges against perpetrators of crimes of child recruitment. As pointed out by Judge Odio Benito in her dissenting opinion in the *Lubanga case* judgment, although sexual violence is an intrinsic element of the concept of "use of children under the age of 15 to participate in the hostilities", crimes of sexual violence are also distinct and separate crimes that could be evaluated separately if they are presented as separate charges by the Prosecutor.[98]

For the purpose of this research, each criminal conduct that is common to the crimes of sexual violence under crimes against humanity and war crimes will be individually yet succinctly described. Although this research will focus on the Elements of Crimes, it is vital to acknowledge that landmark judgments of the ad-hoc tribunals could be useful for the interpretation of the concepts of sexual violence included in the Rome Statute.[99] After all, the crimes included in the Rome Statute are the result of the case law developed by the

---

97 See for example *Bemba case* 'Amicus curiae observations of the Women's Initiative for Gender Justice pursuant to Rule 103 of the RPE' (31 July 2009) ICC-01/05 01/08-466.

98 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 20.

99 See for example: ICTY, The Prosecutor v Zdravko Mucic et al, 'Judgment' (16 November 1998) Case No IT 96-21-T; ICTR, *Akayesu case,* 'Judgement' (2 September 2008) Case No ICTR-96-4-T; ICTY, The Prosecutor v Anto Furundžija 'Judgment' (10 December 1998) Case No IT 95-17/1-A; The Prosecutor v Milorad Krnojelac 'Judgment' (15 March 2002) Case No IT 97-25-T.

ad-hoc tribunals. Finally, this Chapter will refer to the developing ICC case law, since there are several cases involving sexual violence before the ICC.[100] However, a conviction for these crimes is yet to be seen.

4.4.1.1 The underlying acts of sexual violence

A fundamental element in crimes of sexual violence is the use of force or lack of consent, which includes not only physical force, but also threat of force or coercion.[101] The Elements of Crimes include a broad range of forceful

100 Four cases are pending in the trial and appeal stage. *The Katanga case and Ngudjolo case,* which involves crimes of rape and sexual violence as war crimes and crimes against humanity, among other charges, is in its final phase, with Mr Ngudjolo having been acquitted and released (final appeal is pending), while Mr Katanga is awaiting the Chamber's judgement under Article 74 of the Rome Statute. The *Bemba case,* which involves crimes of rape as crimes against humanity and war crimes, is in the presentation of the defence case. Moreover, in the Kenya Situation, the Pre-Trial Chamber confirmed charges of rape and declined to confirm charges of "other forms of sexual violence" in the *Kenyatta case.* The trial in this case is yet to commence. In other cases before the ICC, arrest warrants on crimes of sexual violence have been issued, but the suspects remain at large. The first case is the *Prosecutor v. Joseph Kony et al.* in Situation Uganda, which deals with rape and sexual slavery as war crimes and crimes against humanity. Other two cases are those of the *Prosecutor v. Al Bashir* (rape as crime against humanity) and the *Prosecutor v. Abd Al-Rahman and Harun* (rape as war crimes and crimes against humanity) in Situation Darfur. An arrest warrant has also been issued in Situation DRC against Sylvestre Mudacumura, for mutilation (including genital mutilation) and rape as a war crime. The confirmation of charges in the *Ntaganda case*, for rape and sexual slavery as crimes against humanity and war crimes, among other crimes, is expected to start in February 2014, after the suspect surrendered voluntarily to the ICC. In Situation Cote d'Ivoire, former President, Laurent Gbagbo is currently awaiting the confirmation of charges in his case, which involves, among others, crimes of rape and sexual violence. Finally, in the Case of the *Prosecutor v. Callixte Mbarushimana*, the charges included crimes with a wide variety of conducts of sexual violence allegedly committed in Kivu, DRC, The Pre-Trial Chamber however did not confirm these crimes and the Appeals Chamber dismissed the prosecution's appeal to the confirmation of charges decision. See: *Katanga and Ngudjolo case* 'Mandat d'arrêt à l'encontre de Germain Katanga' (18 October 2007) ICC-01/04-01/07-1; 'Mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chu' (7 February 2008) ICC-01/04 02/07-260. Mr Ndgujolo Chui was acquitted of all charges on 18 December 2013 (Jugement rendu en application de l'article 74 du Statut, ICC-01/04-02/12-3) ; *Kenyatta and Muthaura case* 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'(23 January 2012) ICC-01/09-02/11-382-Red paras 254-266; The Prosecutor v Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (*Al Bashir case)* and The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (*Ahmad Harun and Ali Kushayb case*) ICC-02/05-01/07; The Prosecutor v Sylvestre Mudacumura (*Mudacumura case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04-01/12-1-Red; The Prosecutor v Sylvestre Mudacumura (*Mudacumura case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04-01/12-1-Red; The Prosecutor v Bosco Ntaganda (*Ntaganda case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04 02/06-36-Red; *Ntaganda case*, Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, ICC-01/04-02/06-73; *Gbagbo case* 'Warrant of Arrest for Laurent Koudou Gbagbo' (30 November 2012) ICC02/11 01/11-1; The Prosecutor

situations, such as fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. It is important to also note that in footnote 16, the Elements of Crimes clarify that a person may be incapable of giving genuine consent if affected by natural, induced or *age-related* capacity. This undoubtedly relates to children and the cases of statutory rape, in which there is a presumption of lack of consent due to the child's age.

Pre-Trial Chamber II in the *Bemba case* determined that "coercion" does not require physical force, and "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence".[102] Also in the *Bemba case*, when the defence challenged at the confirmation stage that some of the alleged victims had entered into sexual relations with soldiers on a voluntary basis, the Pre-Trial Chamber rejected the defence's challenge, stating that this apparently concerned a small number of women.[103]

In the SCSL, the Trial Chamber in the *AFRC case* determined that consent can only be granted freely and must be determined in light of the surrounding circumstances. The SCSL found that although force or threat of force is indicative of lack of consent, they are not *per se* elements of rape. The SCSL stated that other factors that might render the act non-consensual or non-voluntary should be considered and that in cases of armed conflict or detention, coercion is almost universal. In regards to children, the SCSL also explained that children

---

v Callixte Mbarushimana (*Mbarushimana case)*'Decision on the confirmation of charges' (16 December 2011) ICC-01/04-01/10-465-Red; 'Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges"'(30 May 2012) ICC-01/0401/10-514.

101 After extensive lobbying from women's rights organisations and two female judges of ICTY (Judges Odio Benito and McDonald), the judges of ICTY adopted Rule 96 of the Rules of Procedure and Evidence, which were also later included in the ICTR Rules. Rule 96 of ICTY and ICTR, and its successor Rule 70 of ICC's RPE, provide that no corroboration of the victim's testimony is required, that consent shall not be allowed as a defence, except in limited circumstances, and that no evidence on prior sexual conduct of the victim may be introduced. Rules 70, 71 and 72 of the RPE are the minimum safeguards to the well-being and dignity of victims and witnesses of sexual violence that should be taken into consideration by the ICC. See: Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

102 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, para. 162.

103 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, paras 167-168.

under the age of 14 could not give consent.[104] The SCSL concluded that given the attacks suffered by the victims (murders of their relatives, the context of violence, threats, abductions and subsequent confinements) it was clear that the victims could not have consented to the repeated acts of sexual intercourse. Also, the SCSL determined that these same factors indicate that the perpetrators could not have thought that these victims had consented to their acts.[105]

In the *Taylor case*, the Trial Chamber concluded that a person may be incapable of granting genuine consent "if affected by natural, induced or age related incapacity". The SCSL further determined that the circumstances of an armed conflict, where rape occurs on a large scale, coupled with the social stigma that is borne by its victims, "render the restrictive test" set out in the elements of the crime difficult to satisfy. The Chamber therefore concluded that circumstantial evidence might be used to demonstrate the *actus reus* of rape.[106]

As for the specific crimes of sexual violence, in particular *rape*, it is important to note that the Elements of Crimes clearly establish the gender-neutral nature of this crime, as it can be committed and suffered equally by men or women.[107] In fact, in the *Bemba case*, the Pre-Trial Chamber referred to a case of rape of a male victim in its confirmation of charges decision.[108]

As for the crime of *sexual slavery* the Elements of Crimes require firstly that the perpetrator exercised any or all of the powers attached to the right of ownership over one or more persons, such as by purchasing, selling, lending or battering such person or persons or by imposing on them a similar deprivation of liberty.[109] As regards the element of force or coercion for this crime, the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict has pointed out that the mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery and that in all cases

104 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 694-695.
105 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 966-1068.
106 *Taylor case* 'Judgment' (18 May 2012) SCSL 03-01-1281, para. 155.
107 The first element, which is "penetration", may involve not only the vagina but also the anus, and penetration can be committed with body parts but also with objects.
108 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, paras 171-172.
109 As stated by Boot, although sexual slavery is listed as a separate offence, it should be considered as a particular form of the general crime of slavery, which also includes trafficking in persons, in particular women and children. See: Boot and Hall in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 211; Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

a subjective gender-conscious analysis should be applied.[110] It could be added that in cases of children, an age-conscious analysis should also be applied when interpreting whether the victim had reasonable fear of harm or perceived coercion. In this sense, the Trial Chamber in the *Taylor case* determined that the element of "deprivation of liberty" of slavery is fulfilled when the victim is not physically confined, but is "otherwise unable to leave the perpetrator's custody as they would have nowhere else to go and feared for their lives".[111]

The "sexual" nature of the slavery requires that the perpetrator caused the victim(s) to engage in one or more acts of a sexual nature. As noted by the Special Rapporteur, sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour that ultimately involved forced sexual activity as well as "enforced prostitution".[112] Since "enforced prostitution" is defined as a separate crime under Article 7 of the Statute, it will ultimately depend on the prosecutorial strategy whether charges are brought against individuals for either crimes of "sexual slavery", "enforced prostitution" or even "forced marriage" or the general crime of "other forms of sexual violence". The pre-trial chambers could also request an amendment of charges so that they reflect one of these crimes, and ultimately the trial chambers could consider reclassification of charges under Regulation 55 of the RoC if they deem that such conduct falls within one or another sexual crime.

The Elements of Crimes of *enforced prostitution* requires, as an additional element, that the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature. This crime, however, does not require "exercise of any or all the powers attaching to the right of ownership over one or more persons", which is an element of the crime of sexual slavery. Thus, it could be argued that charges for the crime of enforced prostitution could be helpful to prosecute cases in which this element of sexual slavery is not easily proven or for "slavery like" situations.[113] However, as pointed out by the Special Rapporteur, most cases of forced prostitution also amount to sexual slavery and could more appropriately be characterised as such.[114]

---

110 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, para. 28.

111 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 420.

112 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, paras 30 and 31.

113 Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

114 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, para. 33.

Article 7(2)(f) and the Elements of Crimes state that the term *enforced pregnancy* means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.[115]

The Elements of Crimes define *enforced sterilization* as the deprivation of one or more victims of their biological reproductive capacity with permanent effects (excluding non-permanent birth-control measures). The only defences admissible for this crime are when the conduct was justified by the medical or hospital treatment of the person(s) concerned or when this was carried out with the person's consent.[116]

The last conduct of sexual violence provided for in Article 7(1)(g) is "*any other form of sexual violence of comparable gravity*", which could arguably be a "blank cheque" for the prosecution of an array of conducts not necessarily falling within the elements of either of the crimes of sexual violence identified above. The common element it shares with other crimes of sexual violence is that of force, threat of force or coercion. The Elements of Crimes only provide that the conduct shall be "of a gravity comparable to other offences" of sexual violence, and, as stated by Schabas, these "other forms of sexual violence" could also be prosecuted as "other inhumane acts".[117] The SCSL has defined "other forms of sexual violence" as a residual category of sexual crimes that may include an unlimited number of acts insofar as they are of a sexual nature and are inflicted upon the victim by means of coercion, threat of force or intimidation.[118]

A clear example of "other forms of sexual violence" that affects girls in particular is the customary practice in some countries to commit female genital mutilation. Also forms of sexual violence committed against men and boys could be included within this rather general provision.[119] Regretfully though, in the case of The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai

115 The Elements of Crimes clarify that this definition shall not in any way be interpreted as affecting national laws relating to pregnancy. This clarification, which was inserted in the Rome Statute as a result of the insistent pressure of some religious groups, responds to political views against abortion and domestic laws penalising abortion. See: William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 173. The author states that this component was most controversial since it raised the issue of abortion.

116 Boot argues, however, that the exception excluding temporary methods of birth control could be inconsistent with international law, namely human rights law. See: Boot and Hall in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 214.

117 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 175.

118 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 720.

119 Sandesh Sivakumaran "Prosecuting Sexual Violence against Men and Boys" in Anne-Marie De Brouwer and others (ed.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia (2011), 79-97.

Kenyatta *(Muthaura and Kenyatta case)*, the Pre-Trial Chamber declined to confirm the charges of sexual violence in the form of penile mutilation. In the view of the Pre-Trial Chamber the "sexual" element was missing. The Pre-Trial Chamber rejected the prosecution's submission "that these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities within their society and were designed to destroy their masculinity". In the Pre-Trial Chamber's view, "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence". It therefore concluded that these acts were "severe physical injuries" that "were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other".[120] However, considering that the penis is perhaps the most sexualised body part of any man, one could argue that its mutilation has an inherent and undeniable sexual nature, as means of attacking the victims' sexual identity and self-worth. In the end, it is through an attack to the male victims' sexuality that the "cultural superiority of one tribe over the other", as stated by the Pre-Trial Chamber, could be attained. Notwithstanding the Pre-Trial Chamber's determination, as stated above, trial in the *Kenyatta case* is yet to begin, and the facts could be recharacterised under Regulation 55 of the RoC in order to include the criminal conduct of "other forms of sexual violence" committed against male victims in this case.[121]

4.4.1.2 Charges of sexual violence and cumulative charging and duplicity of charges

An important aspect that should be taken into consideration when analysing crimes of sexual violence is whether charges brought against individuals for multiple types of sexual violence are valid, particularly whether they are not duplicating charges on the basis of the same criminal conduct and thus erring in the use of cumulative charging. In fact this issue was at stake in the Trial Chamber's judgment in the *AFRC case* at the SCSL and was also an issue in the confirmation of charges in the *Bemba case* at the ICC.

In the *AFRC case*, the SCSL Trial Chamber dismissed the prosecution's charges of "other forms of sexual violence" since it deemed this violated the rule against duplicity of charges. The Trial Chamber found that the SCSL Statute "encapsulates five distinct categories of sexual offences, each of which is comprised of separate and distinct elements" and held that count 7 charged the appellant with two distinct crimes against humanity in one count, namely

120 *Kenyatta and Muthaura case*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (23 January 2012) ICC-01/09-02/11-382-Red, paras 264-266.

121 Charges against Mr Muthaura were dropped on 11 March 2013. See: *Kenyatta and Muthaura case* 'Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura' (11 March 2013) ICC-01/09-02/11-687.

"sexual slavery" and "any other form of sexual violence".[122] The Trial Chamber therefore found that count 7 prejudiced the accused's rights and dismissed the count in its entirety. The Trial Chamber also dismissed the charges of sexual violence as "other inhumane acts". It considered that given the exhaustive list of sexual crimes covered under the SCSL Statute "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," "other inhumane acts" must only cover acts of a non sexual nature that constitute an affront to human dignity.[123] The Trial Chamber held, by a majority, that the evidence presented by the prosecution was subsumed in its entirety by the crime of sexual slavery and that there was no *lacuna* in the law that would justify a separate crime of forced marriage as another inhumane act. Thus, the Trial Chamber dismissed count 8 which charged the accused with inhumane acts.[124] Judge Doherty, in her dissenting opinion, concluded that forced marriage is a different crime from sexual slavery due to the conjugal status forced on these women and the social stigma that is associated with being a "bush wife" or "rebel wife" which causes mental suffering.[125]

In the AFRC Appeals Judgment, the Appeals Chamber, agreeing with the Trial Chamber, determined that the prosecution had effectively violated the rule against duplicity by charging two offences in the same count as regards sexual slavery and other forms of sexual violence.[126] However, referring to "other inhumane acts", the Appeals Chamber concluded that the Trial Chamber erred in finding that Article 2.1 of the SCSL Statute on "other inhumane acts" excludes sexual crimes. The Appeals Chamber noted that international jurisprudence has shown that a wide range of criminal acts, including sexual crimes, have been recognised under this residual provision of "other inhumane acts".[127] The Appeals Chamber stated that a determination on whether a conduct falls within this category should be made "on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health and physical, mental and moral affects of the perpetrator's conduct upon the victims".[128] The Appeals Chamber saw no reason why crimes that have a sexual or gender component should not be considered part of this crime against humanity.[129] Regarding the nature of the crime of "forced marriage", the Appeals Chamber quashed the Trial Chamber's findings although it decided not to enter a conviction on this charge. The Appeals Chamber con-

122 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 94.
123 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 697.
124 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 711-714
125 *AFRC case* 'Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 ('forced marriages')' (19 June 2007)SCSL 04-16-624 para. 49.
126 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 102.
127 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, paras 183-184.
128 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 184.
129 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 186.

cluded that "no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery". Among the reasons it gave to justify its conclusions, the Appeals Chamber referred to the conjugal forced nature of the crime and the particular serious harms it causes on the victim. The Appeals Chamber also stated that unlike sexual slavery, the crime of forced marriage implies a relationship of exclusivity with consequences for the victim if this "marriage" is breached. The Appeals Chamber also determined that forced marriage goes beyond the sexual element, and encompasses another conduct (*i.e.* forced domestic labour).[130] The Appeals Chamber finally decided that the notion of "other inhumane acts" forms part of customary international law and is a "residual category designed to punish acts or omissions not specifically listed as crimes against humanity" and thus "forced marriage" can be included within this crime.[131]

More recently, in the *Taylor case*, the SCSL Trial Chamber stated that the concept of "forced marriage" is a misnomer for the forced conjugal association that was imposed on women and girls in circumstances of armed conflict, and which involves: a) sexual slavery; and b) forced domestic work.[132] The SCSL also emphasised that the word "marriage" and "husband" in the context of such a crime was inappropriate and unhelpful.[133] The SCSL Trial Chamber though adopted the concept of "conjugal slavery", as it considered it more appropriate than "forced marriage". That Chamber further stated that this "conjugal slavery" is more than sexual slavery, as it involves also a forced conjugal relationship and forced domestic work.[134]

At the ICC, the prosecution charged Jean-Pierre Bemba with crimes against humanity and war crimes of rape, torture, murder, pillage and outrages upon personal dignity.[135] However, the Pre-Trial Chamber did not confirm all the charges and dismissed the charges of torture and outrages upon personal dignity as it concluded that these charges incorrectly used the principle of cumulative charging. In the opinion of the Pre-Trial Chamber, the acts of torture and outrages upon personal dignity included in the charges (namely family members watching relatives getting raped) did not encompass a distinct

130 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, paras 195-196.
131 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 198.
132 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 425.
133 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 426.
134 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 428. The conduct of forced marriage is further analysed below in the section below on duplicity of charges.
135 *Bemba case*, 'Prosecution's submission of Amended Document Containing the Charges and Amended List of Evidence pursuant to the Third Decision on the Prosecutor's Requests for redactions and related request for the Regulation of Contacts of Jean-Pierre Bemba Gombo'(19 November 2008) ICC-01/05 01/08-264; 'Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence'(30 March 2009) ICC-01/05-01/08-395.

element from the crime of rape and should be subsumed in the charge of rape.[136] The prosecution requested leave to appeal the Pre-Trial Chamber's decision and the Women's Initiative for Gender Justice was granted leave to present an *amicus curiae* brief on the prosecution's request for leave to appeal. In its brief, the Women's Initiative for Gender Justice stated the following:[137]

> '(…) infliction of humiliating and degrading conduct is a stand-alone crime. The elements of rape do not require humiliation, degradation, or otherwise violation of dignity as part of the act. The Amicus recognizes that the intra-family nature of public rapes were humiliating, degrading and an infliction upon dignity; however, the description of the outrages upon the personal dignity element should not be conflated to satisfy the element of force or coercion of the crime of rape.'

Most importantly, the *amicus curiae* brief submitted that such a narrow interpretation contravened internationally recognised human rights, namely the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the CRC, and the principle of non-discrimination on grounds of gender. However, the Pre-Trial Chamber denied leave to appeal and the issue thus remains unconfirmed by the Appeals Chamber.[138] As noted by Oosterveld, given the Pre-Trial Chamber's reasoning, and the lack of Appeals Chamber guidance, there is a risk that underlying acts such as the crime against humanity of rape charged alongside other crimes (such as persecution), might be rejected for being "cumulative" in future ICC cases.[139]

4.4.2 Intentional attacks against schools and other civilian objects and humanitarian objects

Article 8 of the Rome Statute, which defines war crimes under the jurisdiction of the ICC, includes several crimes on attacks to objects protected by international humanitarian law. Article 8(2)(b)(ii) prohibits attacks to civilian objects. Likewise, Article 8(2)(b)(iii) and 8(2)(e)(iii) prohibit attacks to humanitarian personnel and objects. Article 8(2)(b)(v) prohibits attacks to undefended civilian places, such as towns, villages or buildings that are not military objectives.

---

136 *Bemba case*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424.

137 *Bemba case*, 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence' (31 July 2009) ICC-01/05-01/08-466 para. 29.

138 'Decision on Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"'(18 September 2009) ICC-01/05-01/08-532.

139 Valerie Oosterveld, "Prosecuting Gender-Based Persecution as an International Crime" in Anne-Marie De Brouwer and others (ed.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia (2011), 75.

Articles 8(2)(b)(ix) and 8(2)(e)(iv) prohibit attacks to protected objects for reasons of religion, education, art, science and charitable purposes, historic monuments and public health places.

All these crimes, although intended to protect civilian persons and objects in general, may have disproportionate effects upon children, not only because they represent a significant part of the civilian population in current armed conflicts, but also because very often they use these specially protected objects, such as schools, day-care centres, community centres, and other public health and welfare objects.

In fact, in 2008, the CRC Committee hosted a day of discussion on education in emergency situations and in its final recommendations urged State Parties to the CRC to fulfil their obligation to ensure that schools are zones of peace and places where intellectual curiosity and respect for universal human rights is fostered; and to ensure that schools are protected from military attacks or seizure by militants; or use as centres for recruitment.[140] Following this same line, the UNGA adopted in July 2010 a Resolution on the right to education in emergency situations and urged all parties to armed conflicts to fulfil their obligations under international law to refrain from attacking civilian objects and persons, particularly students and schools.[141]

Likewise, it is important to analyse the crime of intentional attacks to schools or other civilian objects in relation to other crimes committed against children, particularly the crime of child recruitment. Very often, military groups attack schools, boarding schools or other buildings used by children, in order to carry out recruitment campaigns in which children under the age of 15 are either conscripted or enlisted. Therefore, this crime could very often be included in the charges brought against perpetrators of crimes of enlistment, conscription and use of children under the age of 15 to actively participate in hostilities. For example, in the warrant of arrest against Joseph Kony, the Pre-Trial Chamber stated that the Lord Resistance Army had allegedly attacked villages and internally displaced camps (IDP camps) in order to recruit children.[142] Consequently, the charges in this case not only include the crime of enlistment, conscription and use of children under 15, but also crimes such as intentional attacks against civilian population, particularly IDP camps. In the *Lubanga case*, for example, the three victims who came to testify in court referred to an alleged attack to a school, where individuals were beaten and children were allegedly recruited.[143] Although no charges of intentional

140 CRC Committee, *The Right of the Child to Education in Emergency Situations: Recommendations* (49th Session, Day of General Discussion on 19 September 2008) para. 35.

141 UNGA, *The Right to Education in Emergency Situations: Resolution Adopted by the General Assembly* (27 July 2010) A/RES/64/290.

142 *Kony and others case,* 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/04 01/05-53, 6.

143 *Lubanga case*, Transcript of hearing (12 January 2010) ICC-01/04-01/06-T-225-Red-ENG WT.

attacks to schools were brought against the accused in that case, considering the testimony of these victims, this could have been possible.

4.5 CONCLUSIONS

Children suffer from international crimes in a differentiated manner, and thus the requirements under the Elements of the Crimes within the ICC jurisdiction may be met distinctively if the crime is committed against a child. Thus, a children's rights perspective is important to achieve successful investigations and prosecutions of crimes within the ICC's jurisdiction committed against children. However, the analysis of the Elements of the Crimes and the concepts adopted by Chambers to define these crimes should always adhere to the principle of legality, as a fundamental right of the accused person and a cornerstone of the ICC's jurisdiction.

Depending on the definition given to the crimes committed against children, pursuant to the Rome Statute, the Elements of the Crimes, but also in light of other applicable law in accordance with Article 21 of the Rome Statute, children and their families may be granted status to participate in proceedings pursuant to Article 68(3) of the Rome Statute. Thus, the broader the concept adopted by ICC Chambers (although limited to the principle of legality), the more access victims of these crimes will have to ICC proceedings. The same applies for victims who may benefit from reparations. At the end, depending on how ICC judges define these crimes (either broader or stricter) so will be the concept of "beneficiaries" of eventual reparations orders.

Although in this chapter those crimes that mostly affect children are analysed, children may be victims of any crime within the ICC's jurisdiction. Hence, while children may seldom appear before the ICC in cases in which they are not a material element of the crime (*i.e.* child recruitment), ICC cases for other crimes could still include a children's rights perspective. In such cases, advocates of victims could play an important role in order to express through their "views and concerns" the harms suffered by children as a consequence of these other crimes. In a sense, all international crimes, even if committed exclusively against adults, will have a lasting effect on children. For example, persecution of men of an ethnic group may have as a consequence the displacement of entire villages, families, and ultimately children who grow up far away from their birthplaces and receive limited or no healthcare and education. Thus, although child victims of these "other cases" may not come in person to participate as victims or testify as witnesses before the ICC, they could, for example, benefit from reparations, if the harms they suffered are taken into account.

However, it is ultimately within the Prosecutor's hands (his/her discretion and policy) to include the children's dimension of crimes being investigated and prosecuted by the OTP. The Prosecutor should continue the policy adopted

so far that recognises that crimes committed against children should be regarded as "most serious crimes" within the ICC's jurisdiction.[144] However, also as regards cases for "other crimes", the effects that these crimes have on children could also be included in the charges brought against accused persons, so that they are considered in eventual convictions, sentencing and ultimately reparations orders.

144 ICC Office of the Prosecutor, *Prosecutorial Strategy 2009-2012* (1 February 2010) paras 20-30<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> accessed 8 August 2013.