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RESEARCH ARTICLE

# When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after *Lubanga*

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This paper explores the scope of activities children may engage in for a defendant to be convicted for using them to participate in hostilities under the Statute of the International Criminal Court (ICC). It analyses the relevant international law provisions and the ICC's decisions in the Lubanga matter. It finds that a broad scope of activities more effectively assists the protection of children from use in hostilities. It also identifies inconsistencies in the relevant international law provisions and proposes a number of factors future ICC Chambers can use to consistently characterise activities in future prosecutions.

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**Keywords:** Lubanga; Children; Active participation; Hostilities; International Criminal Court

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## I. Introduction

The use of children in warfare is disturbing. Around 300,000 children are currently involved in conflicts worldwide as combatants, messengers, porters, cooks, and otherwise.<sup>1</sup> Children have been recruited in the Central African Republic and Syria,<sup>2</sup> and in some cases have been used to execute prisoners.<sup>3</sup> The United Nations (UN) has attempted to prevent the use of children in hostilities.<sup>4</sup> However, a strong international law response against this practice is still needed.<sup>5</sup>

One such response is the release of the International Criminal Court (ICC)'s first ever Appeals Chamber decision on 1 December 2014.<sup>6</sup> The Appeals Chamber upheld the decision of the ICC's Trial Chamber on 14 March 2012 to convict Mr Thomas Lubanga of two war crimes: (a) enlisting and conscripting children

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<sup>1</sup> 'Children of Conflict: Child Soldiers' (*BBC World Service*) <<http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.shtml>> accessed 9 July 2016. See also Jo Becker and Tony Tate, *Stolen Children: Abduction and Recruitment in Northern Uganda* (Human Rights Watch No 15, 2003) <<http://hrw.org/reports/2003/uganda0303>> accessed 9 July 2016.

<sup>2</sup> Patience Chinwada, 'Child Soldiers Numbers "Doubled" in Central African Republic' *BBC News* (London, 18 December 2014) <<http://www.bbc.com/news/world-africa-30540544>> accessed 9 July 2016; UNSC 'Report of the Secretary-General on Children and Armed Conflict in the Syrian Arab Republic' (27 January 2014) UN Doc S/2014/31; Report of the Secretary-General, 'Children and Armed Conflict' (5 June 2015) UN Doc A/69/926-S/2015/409, paras 41, 191–194.

<sup>3</sup> Jessica Stern and JM Berger, 'Raising Tomorrow's Mujahideen': The Horrific World of ISIS's Child Soldiers' *The Guardian* (London, 10 March 2015) <<http://www.theguardian.com/world/2015/mar/10/horror-of-isis-child-soldiers-state-of-terror>> accessed 9 July 2016.

<sup>4</sup> The UN found some success in sanctioning the use of children in hostilities in Côte d'Ivoire, but made very little progress when putting pressure on parties involved in violations against children in the Democratic Republic of Congo. See Security Council Report, *Children and Armed Conflict* (6th edn, 21 February 2014) 38–44 <<http://www.securitycouncilreport.org/cross-cutting-report/children-and-armed-conflict.php>> accessed 9 July 2016. The UN has also launched a campaign along with UNICEF called 'Children, Not Soldiers' to end and prevent the recruitment and use of children by government security forces by the end of 2016, see UN Doc A/69/926-S/2015/409 (n 2) 4–5.

<sup>5</sup> Gus Waschefort, *International Law and Child Soldiers* (Hart Publishing 2015) 5.

<sup>6</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Decision on Appeal Against Conviction) ICC-01/04-01/06 (1 December 2014) (*Lubanga Appeals Decision*).

under the age of 15 years; and (b) using children to participate actively in hostilities.<sup>7</sup> These crimes took place during internal armed conflict in Ituri, in the Democratic Republic of Congo (DRC).<sup>8</sup> During this time, Mr Lubanga was President of the *Union des Patriotes Congolais* (UPC),<sup>9</sup> a breakaway rebel group formerly part of the Congolese Rally for Democracy.<sup>10</sup> Mr Lubanga conscripted and enlisted children into the *Force Patriotique pour la Libération du Congo* (FPLC),<sup>11</sup> the UPC's military wing,<sup>12</sup> and used them to participate actively in hostilities.<sup>13</sup> Both decisions discussed the phrase 'participate actively in hostilities' in Article 8(2)(e)(vii) of the Rome Statute (Statute).<sup>14</sup> Both Chambers characterised the scope of the phrase broadly for the purpose of Article 8(2)(e)(vii). Therefore, Mr Lubanga was liable for using children to participate actively in hostilities.<sup>15</sup>

These decisions raise a number of concerns. Firstly, there is a tension between the broad approach taken by the ICC in *Lubanga* and the prevailing understanding of 'direct' participation in hostilities at international humanitarian law (IHL), which is quite narrow. 'Direct' participation in hostilities at IHL has traditionally related to the protection of civilians from being legitimately targeted during hostilities; that is, parties may not target civilians who are not directly participating in hostilities. Moreover, both 'active' and 'direct' are viewed synonymously at IHL. Accordingly, it is unclear how the ICC's decisions will affect the protection of civilians at IHL. If 'active' denotes a broader scope of activities than previously understood, opposing parties could legitimately attack civilians on the basis that the civilians were 'actively' participating in hostilities.

Secondly, it is not clear how to determine the types of activities falling within the scope of 'active' participation under the Statute's child protection provisions. This uncertainty may lead to inconsistent jurisprudence on these crimes. Accordingly, future ICC Chambers may not effectively penalise the use of children in hostilities. Thus, the Statute's aim 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'<sup>16</sup> would not be realised. A clear law can be more efficiently used to prosecute and deter criminal conduct. As Sainz-Pardo notes, 'a strong basis of judicial practice [is needed] (. . .) to fight impunity against this heinous crime.'<sup>17</sup> In fact, the threat and existence of actual ICC indictments has affected conflicts in the DRC, Colombia and Northern Uganda.<sup>18</sup> Furthermore, a clear law against the use of children in hostilities can help to further stigmatise such conduct in the international community, increasing the sense of accountability for these crimes.<sup>19</sup> As Barstad argues, 'the law [on the protection of children] must be known if it is to be obeyed.'<sup>20</sup>

This paper considers two questions: (a) what do 'direct' and 'active' participation in hostilities mean in the child protection provisions at IHL and in the Statute? and (b) how should future ICC Chambers determine the activities that fall within the scope of these provisions to best protect children and civilians in armed conflicts? I explore the meanings of 'direct' and 'active' participation in hostilities at both IHL and in the Statute. Subsequently, I assess the reasoning of the *Lubanga* Trial and Appeals Chambers in determining the definition and scope of 'active' participation in hostilities under the relevant IHL and Statute provisions. Finally, I propose changes that will help future ICC Chambers to more consistently determine the activities that fall within the scope of the Statute's child protection provisions.

<sup>7</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (*Lubanga Trial Decision*). See also ICC, 'Case Information Sheet: Situation in the Democratic Republic of Congo – *The Prosecutor v Thomas Lubanga Dyilo*' <<https://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>> accessed 10 July 2016.

<sup>8</sup> *Lubanga Trial Decision* (n 7) para 67.

<sup>9</sup> *ibid* para 81.

<sup>10</sup> See UN, 'Union des Patriotes Congolais' <<http://unterm.un.org/UNTERM/display/Record/UNHQ/NA/c305460>> accessed 10 July 2016.

<sup>11</sup> *Lubanga Trial Decision* (n 7) paras 8, 22–36.

<sup>12</sup> Stuart Casey-Maslen (ed), *The War Report: 2012* (OUP 2013) 483.

<sup>13</sup> *Lubanga Trial Decision* (n 7) paras 22–36.

<sup>14</sup> See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 8(2)(e)(vii).

<sup>15</sup> *Lubanga Trial Decision* (n 7) paras 916, 1270–1272, 1351, 1356–1358.

<sup>16</sup> Rome Statute, prmbi; Jan Klabbbers, 'Just Revenge? The Deterrence Argument in International Criminal Law' (2012) 12 *Finnish Yearbook of International Law* 251, quoted in Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *The International Journal of Transitional Justice* 437.

<sup>17</sup> Pillar V Sainz-Pardo, 'Is Child Recruitment as a War Crime Part of Customary International Law?' (2008) 12 *The International Journal of Human Rights* 592.

<sup>18</sup> Nick Grono and Anna de Courcy Wheeler, 'The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders' in Carstehrn Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 1227.

<sup>19</sup> Mariniello has argued that the *Lubanga* Trial Decision can have this effect, see Triestino Mariniello, '*Prosecutor v Thomas Lubanga Dyilo*: The First Judgment of the International Criminal Court's Trial Chamber' (2012) *International Human Rights Law Review* 146.

<sup>20</sup> Kristin Barstad, 'Preventing the Recruitment of Child Soldiers: The ICRC Approach' (2008) 27 *Refugee Survey Quarterly* 148.

## II. Interpreting 'Active' and 'Direct' Participation in Hostilities in IHL and the Statute

### A. What Do 'Active' and 'Direct' Mean at IHL?

#### 1. IHL Generally

IHL governs armed conflicts and only operates when an armed conflict exists.<sup>21</sup> It aims to protect the victims of armed conflict and regulate the conduct of hostilities based on the balance between military necessity and humanity.<sup>22</sup> At its heart is the need to uphold the principle of distinction between armed forces who conduct the hostilities on behalf of parties to an armed conflict and civilians who must be protected against the dangers arising from military operation.<sup>23</sup> IHL exists predominantly as treaty law and has traditionally been attributed to two main sources: the Hague Conventions of 1899 or 1907, and the Geneva Conventions of 1949 and the Additional Protocols to these Conventions.<sup>24</sup>

Interpreting international treaties is complex.<sup>25</sup> There are traditionally three schools of interpretation. The textual school aims to give effect to the ordinary meaning of a text. The intentionalist school, meanwhile, interprets provisions according to their drafters' intentions. Lastly, the teleological school seeks an interpretation that best fulfils the object and purpose of a treaty.<sup>26</sup> Article 31(1) of the Vienna Conventions on the Law of Treaties (VCLT) appears to incorporate elements of all three schools,<sup>27</sup> but prioritises the ordinary meaning of the text.<sup>28</sup> It reads as follows:

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 light of its object and purpose.<sup>29</sup>

There are difficulties in interpreting the relevant provisions according to Article 31(1) of the VCLT. Nevertheless, 'whenever applicers (...) interpret a treaty, they should consider (...) articles 31–33 [of the VCLT] as a starting point'.<sup>30</sup>

#### 2. Interpreting 'Active' and 'Direct' at IHL

At IHL, 'active' and 'direct' have been interpreted synonymously,<sup>31</sup> most frequently according to the principle of distinction between combatants and civilians.<sup>32</sup> This principle can be seen in Common Article 3 to the Geneva Conventions (Common Article 3), which reads as follows:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely (...).<sup>33</sup>

<sup>21</sup> Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 1; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge 2010) 269; Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2008) 45.

<sup>22</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 11.

<sup>23</sup> *ibid*; Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 296.

<sup>24</sup> See Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 81. For the purposes of this paper I will only be addressing IHL stemming from the Geneva Conventions and its Additional Protocols, as the provisions in dispute are located in these documents. The distinction between Hague Law and Geneva Law has been discussed elsewhere but is beyond the scope of this paper. See eg Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *European Journal of International Law* 109.

<sup>25</sup> See Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000) 184–185; Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2010) 5–14; Ian M Sinclair, *The Vienna Convention on the Law of Treaties* (MUP 1973) 69–76.

<sup>26</sup> Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 63; David J Bederman, *The Spirit of International Law* (University of Georgia Press 2006) 71–72; Sinclair (n 25) 70–71.

<sup>27</sup> Boas (n 26) 63.

<sup>28</sup> Jean-Marc Sorel and Valérie Boré Eveno, '1969 Vienna Convention: Article 31 – Interpretation of Treaties' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 804, 817; Sinclair (n 25) 71.

<sup>29</sup> Vienna Conventions on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1). An updated version of the VCLT was opened for signature in 1986, but it does not alter arts 31, 32 or 33. See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15.

<sup>30</sup> Ulf Linderfalk (ed), *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Convention on the Law of Treaties* (Springer 2007) 7. Article 32 of the VCLT allows for recourse to supplementary means of interpretation, such as the preparatory works of the treaty and the circumstances of its conclusion, where an interpretation according to art 31 of the VCLT would leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable. Article 33 of the VCLT gives guidance to interpreting and reconciling the differences between treaties that have been authenticated in two or more languages.

<sup>31</sup> *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 629, cited in Melzer (n 22) 43.

<sup>32</sup> See Melzer (n 22) 12.

<sup>33</sup> Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art 3 (Common Article 3).

In 2009, the International Committee of the Red Cross (ICRC) released an interpretive Guidance on direct participation in hostilities, based on the principle of distinction.<sup>34</sup> The Guidance is not legally binding, nor does it alter customary or treaty IHL.<sup>35</sup> Nevertheless, it provides useful criteria that an act must meet before it is characterised as direct participation in hostilities:<sup>36</sup>

1. *Threshold of harm*: the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack.
2. *Direct causation*: there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.
3. *Belligerent nexus*: the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.<sup>37</sup>

The Guidance distinguishes between 'direct' and 'indirect' participation in hostilities but does not provide further guidance as to what the latter includes.<sup>38</sup>

The Israeli Supreme Court also addressed direct participation in hostilities at IHL for the purposes of distinction between combatants and civilians in the *Targeted Killings* Judgment.<sup>39</sup> The Court assessed whether the State of Israel acted illegally by engaging in preventative strikes against alleged terrorists, strikes which 'at times also harm[ed] innocent civilians'.<sup>40</sup> The Court addressed direct participation in hostilities as grounds for losing the protection against military attack.<sup>41</sup> It interpreted this doctrine broadly,<sup>42</sup> holding that people performing the following actions directly participated in hostilities: collecting intelligence in the army, transporting unlawful combatants to or from the place where the hostilities were taking place, operating weapons used by unlawful combatants, supervising the operation and providing service to unlawful combatants.<sup>43</sup> However, persons selling food or medicine to an unlawful combatant, or aiding unlawful combatants with general strategic analysis or logistical support, would not be directly participating in the hostilities.<sup>44</sup>

This judgment shows 'direct' participation can be interpreted at IHL to determine whether civilians are protected.<sup>45</sup> However, future courts must be cautious when applying its reasoning. Firstly, the judgment was handed down before the Guidance was published. Accordingly, it did not use the Guidance's constitutive elements.<sup>46</sup> Secondly, the desire to justify Israel's policy of targeted killings may have influenced an expansive interpretation of 'taking a direct part in hostilities' to 'expand (. . .) the temporal horizon for lawful

<sup>34</sup> See Melzer (n 22) 20.

<sup>35</sup> *ibid* 9; Damien van der Toorn, 'Direct Participation in Hostilities': A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' (2010) 17 *Australian International Law Journal* 9.

<sup>36</sup> See Clapham and others (n 23) 324–325. There has been significant scholarly debate as to how effective the Guidance is. I proceed on the basis that the Guidance is reliable while acknowledging this debate. For more information on the scholarly debate, see Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *New York University Journal of International Law and Politics* 697; Bill Boothby, 'And for Such Time as: The Time Dimension to Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Politics* 741; W Hays Parks, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *New York University Journal of International Law and Politics* 769; Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Politics* 831.

<sup>37</sup> Melzer, 'Interpretive Guidance' (n 22) 16, 46–64.

<sup>38</sup> *ibid* 43.

<sup>39</sup> *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel and Ors* (2006) HCJ 769/02 (*Targeted Killings Judgment*).

<sup>40</sup> *ibid* 1.

<sup>41</sup> *ibid* para 34.

<sup>42</sup> William J Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities' (2007) 5 *Journal of International Criminal Justice* 336.

<sup>43</sup> *Targeted Killings* (n 39) para 35.

<sup>44</sup> *ibid*.

<sup>45</sup> Fenrick (n 42) 333; Antonio Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) 5 *Journal of International Criminal Justice* 343.

<sup>46</sup> As Keller notes, 'the application of this vague rule [direct participation in hostilities] will become less equivocal once the ICRC releases the final interpretation guidelines.' Helen Keller and Magdalena Forowicz, 'A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' (2008) 21 *Leiden Journal of International Law* 185, 210.

attacks' by Israel.<sup>47</sup> I use this judgment predominantly to illustrate the breadth of opinion relating to direct participation in hostilities at IHL.<sup>48</sup>

### 3. Interpreting 'Direct' and 'Take Part' in the IHL Child Protection Provisions

The ICC addressed three IHL treaty provisions prohibiting the use of children in hostilities (IHL child protection provisions) in *Lubanga*.<sup>49</sup> These are: (a) Article 77(2) of Additional Protocol I to the Geneva Conventions (AP I),<sup>50</sup> (b) Article 4(3)(c) of Additional Protocol II to the Geneva Conventions (AP II),<sup>51</sup> and (c) Article 38(2) of the UN Convention on the Rights of the Child (CRC).<sup>52</sup> The CRC is a 'hybrid' document,<sup>53</sup> combining both IHL and international human rights law (IHRL), which have been treated as different bodies of law.<sup>54</sup> Nevertheless, I analyse Article 38 alongside the Additional Protocols, as it 'traditionally belongs to' IHL.<sup>55</sup>

#### a. Article 77(2) of Additional Protocol I

'Direct' is used in both Article 77(2) of AP I and Article 38(2) of the CRC, which read as follows:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces (. . .).<sup>56</sup>

State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.<sup>57</sup>

These provisions must be interpreted in good faith in accordance with their ordinary meanings, in their contexts and in light of their objects and purposes.<sup>58</sup> Accordingly, 'direct' in Article 77(2) of AP I could be granted a broader interpretation than afforded by the principle of distinction, as the provision's immediate context reveals that children are 'the object[s] of special respect' and are to be 'protected against any form of indecent assault'.<sup>59</sup> Indeed, the Commentary to AP I notes that 'the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict'.<sup>60</sup> This indicates the ICRC's intention to

<sup>47</sup> Kristen E Eichensehr, 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings' (2007) 116 *The Yale Law Journal* 1876. Indeed, President Barak's broad approach in that decision was targeted at the whole chain of command, going 'to the heart of the policy of targeted killing'. See Michelle Leish, 'The Public Committee Against Torture in *Israel v the Government: The Israeli High Court of Justice Targeted Killing Decision*' (2007) 8 *Melbourne Journal of International Law* 1, 12.

<sup>48</sup> For further criticism of the High Court's interpretation of 'take a direct part in hostilities' as overly expansive, see Roy S Schondorf, 'The *Targeted Killings* Judgment' (2007) 5 *Journal of International Criminal Justice* 308.

<sup>49</sup> There are other instruments that were not substantively addressed or analysed by the ICC in *Lubanga*, and accordingly they are beyond the scope of this paper. See the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 2222; ILO Minimum Age Convention (No 138) (adopted 26 June 1973, entered into force 19 June 1976); African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49. See also Jay Williams, 'The International Campaign to Prohibit Child Soldiers: A Critical Evaluation' (2011) 15 *The International Journal of Human Rights* 1072, 1075–1077; Sainz-Pardo (n 17) 556–564; Volker Druba, 'The Problem of Child Soldiers' (2002) 48 *International Review of Education* 271, 274–275.

<sup>50</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 17512 UNTS 3 (AP I) art 77(2).

<sup>51</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 17513 UNTS 609 (AP II) art 4(3)(c).

<sup>52</sup> Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 38(2).

<sup>53</sup> Kearen Bell and David Abrahams, 'The Use of Child Soldiers in Armed Conflict' (2008) 29 *Obiter* 171.

<sup>54</sup> Fiona Ang, 'Article 38 – Children in Armed Conflicts' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2005) 3.

<sup>55</sup> *ibid*; see also David Weissbrodt, Joseph Hansen and Nathaniel Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115. However, there are fundamental differences between these two bodies of law that fall outside the scope of this paper. See Sandesh Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict' (2011) 22 *European Journal of International Law* 240, 240–242.

<sup>56</sup> AP I, art 77(2).

<sup>57</sup> CRC, art 38(2).

<sup>58</sup> VCLT, art 31(1).

<sup>59</sup> AP I, art 77(1).

<sup>60</sup> Yves Sandoz, Christopher Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) para 3187 (Commentary on the Additional Protocols); Ang (54) 38.

apply a broader interpretation.<sup>61</sup> Moreover, the obligation to refrain from recruiting children under the age of fifteen suggests that both direct and indirect participation may be prohibited.<sup>62</sup>

However, relevant rules of international law applicable to relations between relevant parties must also be taken into account when interpreting this provision.<sup>63</sup> Article 51(3) of AP I uses 'direct' in the context of principle of distinction,<sup>64</sup> which could be a relevant rule of international law. Accordingly, some argue that a similar, narrow interpretation should apply to 'direct' in Article 77(2) of AP I.<sup>65</sup> The Commentary on AP I itself bases its reasoning that the provision prohibits a broader range of activities on the fact that the drafters did not include 'direct'.<sup>66</sup> However, it does not explore why the term was eventually included.

Therefore, Article 77(2) of AP I appears to have contradictory purposes. It aims to protect children but restricts the scope of activities parties are forbidden to use children for by including 'direct'. Whether 'indirect' participation was prohibited under this provision was not clear from the provision's text or its Commentary. As Happold notes, however, a narrow interpretation of 'direct' is unlikely to provide children under fifteen with 'effective protection from (. . .) an adverse party'.<sup>67</sup>

#### *b. Article 38(2) of the UN Convention on the Rights of the Child*

The CRC's drafters also included 'direct' in Article 38(2), despite several States indicating support for a blanket ban against the participation of children below the age of fifteen years in hostilities.<sup>68</sup> The CRC's preparatory works indicate that 'direct' in Article 38(2) is based on the principle of distinction.<sup>69</sup> Accordingly, it appears to 'allow (. . .) children under the age of 15 years to take (. . .) an 'indirect part' in hostilities'.<sup>70</sup> Nevertheless, the preparatory works do not show a clear policy reason for inserting 'direct' into the provision, beyond the fact that consensus could not be reached on it.<sup>71</sup> Ang attempts to explain this decision in her commentary on the provision:

Many delegations belonging to the Working Groups drafting this article had expressed to be in favour of the deletion of the word 'direct', but in the end, the adoption of the third paragraph was considered to render the prevention of 15- to 18-year olds taking *any* part in hostilities while they could be legitimately recruited, unrealistic.<sup>72</sup>

The third paragraph prevents the recruitment of children under the age of 15 into the armed forces and also requires States to give priority to the oldest children between 15 and 18 years of age when recruiting them.<sup>73</sup> However, it is unclear how the unrealistic nature of preventing 15 to 18 year olds taking any part in hostilities necessitates the removal of a blanket ban on the participation of children *under* 15 years of age.

Moreover, it was felt that the provision could undermine IHL because it was inconsistent with the level of protection offered in Article 4(3)(c) of AP II.<sup>74</sup> This issue was not resolved. According to one observer, it was regrettable that paragraph 2 had been adopted in light of such 'extensive opposition'.<sup>75</sup> Another observer

<sup>61</sup> Noëlle Quénivet, 'Girl Soldiers and Participation in Hostilities' (2008) 16 *African Journal of International and Comparative Law* 228.

<sup>62</sup> Bell and Abrahams (n 53) 173.

<sup>63</sup> VCLT, art 31(3)(c).

<sup>64</sup> Which reads: 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.'

<sup>65</sup> Matthew Happold, 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' (2000) 47 *Netherlands International Law Review* 27, 36, quoting Fritz Kalshoven, *Constraints on the Waging of War* (International Committee of the Red Cross 1987) 91. Kalshoven comments that 'to take a direct part in hostilities' in art 51(3) of AP I 'must be interpreted to mean that the person in question performs warlike acts which by their nature or purpose are designed to strike enemy combatants or materiel; acts, therefore, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war materiel, and so on.'

<sup>66</sup> Sandoz, Swinarski and Zimmerman (n 60) para 3187.

<sup>67</sup> Happold (n 65) 36.

<sup>68</sup> UNCHR 'Considerations 1989 Working Group' (2 March 1989) UN Doc E/CN.4/1989/48, para 602; Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff 1992) 515; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 654.

<sup>69</sup> UN Doc E/CN.4/1989/48 (n 68) para 602; Ang (n 54) 37.

<sup>70</sup> Ang (n 54) 37.

<sup>71</sup> UN Doc E/CN.4/1989/48 (n 68) paras 609–610; Detrick, *Travaux Préparatoires* (n 68) 514; Detrick, *A Commentary* (n 68) 655.

<sup>72</sup> Ang (n 54) 37.

<sup>73</sup> CRC, art 38(3).

<sup>74</sup> UN Doc E/CN.4/1989/48 (n 68) para 612; Detrick, *Travaux Préparatoires* (n 68) 513; Detrick, *A Commentary* (n 68) 655–656. Article 4(3)(c) will be discussed in Part II(A)(3)(c).

<sup>75</sup> UN Doc E/CN.4/1989/48 (n 68) para 615; Detrick, *Travaux Préparatoires* (n 68) 513; Detrick, *A Commentary* (n 68) 656.

noted that a blanket ban would have 'improve[d] the protection of the child in armed conflicts, which was necessary if there was a will to provide special protection for children.'<sup>76</sup> I submit that 'direct' should not have been included in this provision because it allows children to be used to indirectly participate in hostilities.

### *c. Article 4(3)(c) of Additional Protocol II*

Had Article 38(2) of the CRC not included 'direct', it would have mirrored Article 4(3)(c) of AP II, which also prohibits the use of children in military operations and reads as follows:<sup>77</sup>

Children shall be provided with the care and aid they require, and in particular (. . .) 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.<sup>78</sup>

AP II addresses non-international armed conflict and AP I addresses international armed conflict. Accordingly, there appears to be a broader range of activities in which children are not to participate in non-international armed conflict than in international armed conflict,<sup>79</sup> as Article 4(3)(c) imposes 'a near-absolute prohibition' and a 'blanket ban' on the participation of children in hostilities.<sup>80</sup> However, the degree of this difference is unclear given the lack of certainty of the scope of activities covered by 'direct' in Article 77(2) of AP I.<sup>81</sup> Schabas dismisses this as a drafting inconsistency rather than a normative dispute.<sup>82</sup> However, I show in Part II(B) that this inconsistency has significant effects on the interpretation of similar provisions in the Statute.

## 4. Conclusion

Traditionally, 'active' and 'direct' were interpreted synonymously at IHL according to the principle of distinction. Commentators recognise that persons will not lose their status as protected civilians if they 'indirectly' participate in hostilities.

However, the scope of activities constituting 'direct' participation in Article 77(2) of AP I is unclear, as the provision aims to prevent children from participating in hostilities both directly and indirectly. Article 38(2) of the CRC, which also uses 'direct' to qualify participation in hostilities, has a similar purpose, despite its apparent allowance for children to indirectly participate in hostilities. Therefore, there is a tension between a broad interpretation of the phrase and the more traditional, narrow interpretation. Article 4(3)(c) of AP II, moreover, comprehensively prohibits *all* use of children under fifteen years of age in non-international armed conflict. This differs from the prohibition on 'direct' participation in Article 77(2) of AP I and Article 38(2) of the CRC.

## ***B. What Does 'Active' Mean in the Statute's Child Protection Provisions?***

### **1. The relationship between ICL, IHL and the Statute**

ICL aims to deter and prohibit certain categories of conduct and impose criminal liability on individuals in retribution for such conduct.<sup>83</sup> It serves to create a 'universal legal consciousness' in relation to criminal acts at international level.<sup>84</sup> It is drawn from primary sources (*e.g.* treaties like the Statute and customary international law), secondary sources (*e.g.* Security Council Resolutions establishing an international

<sup>76</sup> UN Doc E/CN.4/1989/48 (n 68) para 74; Detrick, *Travaux Préparatoires* (n 68) 509.

<sup>77</sup> Sandoz, Swinarski and Zimmerman (n 60) para 4555.

<sup>78</sup> AP II, art 4(3)(c).

<sup>79</sup> In this provision, to 'take part in hostilities' includes 'participating in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.' See Sandoz, Swinarski and Zimmerman (n 60) para 4557.

<sup>80</sup> Waschefort (n 5) 72–73; David M Rosen, 'Child Soldiers, International Humanitarian Law, and the Globalization of Childhood' (2007) 109 *American Anthropologist* 296, 301; Happold (n 65) 35–36; Bell and Abrahams (n 53) 174; Andraž Zidar, 'The ICC and Its First Judgment in the Lubanga Case: One Giant Leap for Mankind, One Small Step for the Court?' in Andraž Zidar and Olympia Bekou (eds), *Contemporary Challenges for the International Criminal Court* (The British Institute of International and Comparative Law 2014) 205.

<sup>81</sup> See Part II(A)(3)(a).

<sup>82</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 252.

<sup>83</sup> Cassese, *International Criminal Law* (n 24) 3; Kai Ambos, *Treatise on International Criminal Law: Foundations and General Part*, Vol 1 (OUP 2013) 69; see *The Prosecutor v Delalić et al.*, (Judgment) IT-96–21-A (20 February 2001) paras 800–801.

<sup>84</sup> Ambos (n 83) 73.

criminal tribunal), and general principles of law.<sup>85</sup> Article 21(1) of the Statute codifies the order in which these sources may be used.<sup>86</sup>

ICL also draws from IHL and IHRL.<sup>87</sup> The Statute criminalises war crimes,<sup>88</sup> which are serious violations of IHL that entail the individual criminal responsibility of the individuals breaching the rules under either customary international law or international treaty law.<sup>89</sup> When determining whether certain violations of IHL entailed individual criminal responsibility, the International Criminal Tribunal for the Former Yugoslavia (ICTY) upheld the International Military Tribunal's use of the following criteria:

The clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishments of violations by national courts and military tribunals.<sup>90</sup>

While AP II regulates conduct in non-international armed conflicts at IHL, it does not punish war crimes committed in such conflicts.<sup>91</sup> Accordingly, it was widely accepted prior to the 1990s that there was no international criminal responsibility for war crimes committed during internal armed conflicts.<sup>92</sup> In the 1990s, however, the Statute of the International Criminal Tribunal for Rwanda<sup>93</sup> and the jurisprudence of the ICTY<sup>94</sup> extended international criminal responsibility to these crimes. Eventually, Article 8 prohibited war crimes both in international and non-international armed conflict.<sup>95</sup>

## 2. The Statute's Child Protection Provisions

The Statute's prohibitions against the use of children in hostilities read as follows:

Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities [in a conflict of a non-international character].<sup>96</sup>

Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities [in a conflict of an international character].<sup>97</sup>

### a. Introduction to the Provisions

Both of these provisions are based on the IHL provisions described above.<sup>98</sup> They provide 'compulsorily penal sanctions' for using children in hostilities, which neither the APs nor the CRC provide.<sup>99</sup> Moreover,

<sup>85</sup> Cassese, *International Criminal Law* (n 24) 14.

<sup>86</sup> *ibid* 15. Article 21(1) reads as follows:

The Court shall apply (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

<sup>87</sup> Cassese, *International Criminal Law* (n 24) 6.

<sup>88</sup> Cryer and others (n 21) 271; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) para 1056; Hortensiz DT Gutierrez Posse, 'The Relationship between International Humanitarian Law and the International Criminal Tribunals' (2006) 88 *International Review of the Red Cross* 85.

<sup>89</sup> *The Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 94; Cassese, *International Criminal Law* (n 24) 81.

<sup>90</sup> *Tadić* (n 89) para 128, citing the *Judgment of the Nuremberg International Military Tribunal* (1946) paras 445, 467.

<sup>91</sup> See Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 *Melbourne Journal of International Law* 203.

<sup>92</sup> Schabas (n 82) 53.

<sup>93</sup> UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex (*Statute of the International Tribunal for Rwanda*).

<sup>94</sup> See *Tadić* (n 89).

<sup>95</sup> See Schabas (n 82) 54.

<sup>96</sup> Rome Statute, art 8(2)(e)(vii).

<sup>97</sup> *ibid* art 8(2)(b)(xxxvi).

<sup>98</sup> Article 8(2)(e)(vii) was based on art 4(3)(c) of AP II, while art 8(2)(b)(xxxvi) was based on art 77(2) of AP I. See Werle and Jeßberger (n 88) para 1247; Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (ICRC 2003) 376, 471.

<sup>99</sup> Ang (n 54) 39; see Alex Obote-Odora, 'Legal Problems with Protection of Children in Armed Conflict' (1999) 6 *Murdoch University Electronic Journal of Law* 1, para 45.

the different types of conflicts (non-international or international) these provisions address do not mean that different levels of participation are prohibited<sup>100</sup> or that there are any differences in the constituent elements of the crimes.<sup>101</sup> Accordingly, under the Statute, children in non-international armed conflict enjoy a degree of protection 'largely comparable' to that experienced by individuals in international armed conflict.<sup>102</sup>

This contrasts with the difference in the requisite level of participation between Article 77(2) of AP I and Article 4(3)(c) of AP II.<sup>103</sup> Article 8(2)(e)(vii) was derived from Article 4(3)(c) of AP II.<sup>104</sup> However, the former's use of the word 'actively' indicates a higher level of participation that is required for activities to fall within its scope, as opposed to the blanket prohibition on participation in the latter.<sup>105</sup> Accordingly, parties in non-international armed conflicts could use children to participate in hostilities in a way that is prohibited by the blanket ban in Article 4(3)(c) of AP II but not by the prohibition of 'active' participation in Article 8(2)(e)(vii).

In light of this, 'active' should be removed from the Statute's child protection provisions. This would ensure that the widest range of child use in hostilities is punished under the Statute. For further consistency, Article 77(2) of AP I should be amended to remove the word 'direct', creating a consistent blanket ban on the use of children in hostilities at IHL and ICL for both international and non-international armed conflict. However, amending either the Statute or AP I would be a fairly complex process.<sup>106</sup> In light of such difficulties, I focus on how the Statute's child protection provisions have been and should be interpreted to protect children from use in hostilities.

### *b. Interpreting 'Active' and 'Direct' in the Provisions*

There is some uncertainty as to how the Statute should be interpreted.<sup>107</sup> The Statute, as a treaty, is subject to the VCLT.<sup>108</sup> Accordingly, the Statute's provisions must be interpreted in good faith in accordance with their ordinary meanings, in their contexts and in the light of their objects and purposes.<sup>109</sup> However, Article 22(2) of the Statute adopts a stricter approach to interpretation.<sup>110</sup> How these approaches should be balanced is unclear.<sup>111</sup> However, 'the judges of the Court will have to resolve this [tension] without any substantial assistance from the Statute.'<sup>112</sup>

Moreover, the exact scope of 'active' in the Statute's child protection provisions was unclear prior to the *Lubanga* Trial Decision. The Elements of Crimes of both Articles 8(2)(e)(vii) and 8(2)(b)(xxvi) do not provide relevant guidance.<sup>113</sup> As Ang notes, the ICC needed to 'determine the exact meaning of [these] provisions and [their] relation to other related provisions in the Additional Protocols and the CRC.'<sup>114</sup>

<sup>100</sup> *Lubanga Appeals Decision* (n 6) para 327.

<sup>101</sup> Dörmann (n 98) 471.

<sup>102</sup> Werle and Jeßberger (n 88) para 1071.

<sup>103</sup> See Part II(A)(3)(c).

<sup>104</sup> Dörmann (n 98) 471.

<sup>105</sup> See Sivakumaran (n 55) 239.

<sup>106</sup> Under art 24(1) of AP II, a High Contracting Party would need to propose the amendment to AP II. The text would be communicated to the depositary, which would decide, after consultation with the ICRC and the High Contracting Parties, whether a conference should be convened to consider this amendment. The result of the conference would then determine whether the amendment was passed. Under art 121(1) of the Rome Statute, the text of a proposed amendment would need to be submitted to the Secretary-General of the United Nations. Under art 121(2) of the Rome Statute, the Assembly of States Parties must decide whether to take up an amendment proposal and deal with it directly or via the convening of a Review Conference. Under art 121(5) of the Rome Statute, any amendment to articles 5, 6, 7 or 8 would also not affect any state which did not accept it: 'the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.'

<sup>107</sup> Schabas (n 82) 93.

<sup>108</sup> *id.*

<sup>109</sup> VCLT, art 31(1); Bederman (n 26) 72.

<sup>110</sup> Article 22 of the Rome Statute reads as follows: '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

<sup>111</sup> See eg Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 557.

<sup>112</sup> Schabas (n 82) 95.

<sup>113</sup> ICC, *Elements of Crimes* (ICC 2011) 31, 39 (*Elements of Crimes*). For example, the first element of the crime under art 8(2)(e)(vii) is that 'the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.' The remaining elements deal with the age of the person (element 2), the *mens rea* of the perpetrator (element 3), the context of the conflict (element 4) and the perpetrator's awareness of the factual circumstances establishing the existence of the conflict (element 5).

<sup>114</sup> Ang (n 54) 40.

However, the Special Court for Sierra Leone (SCSL) provided relevant commentary in the *AFRC* judgment.<sup>115</sup> It concluded that active participation in hostilities in Article 4(c) of the SCSL Statute – which is extremely similar to the child protection provisions in the Rome Statute<sup>116</sup> – was 'not limited to participation in combat'.<sup>117</sup> Rather, it included 'any labour or support that gives effect to, or helps maintain, operations in a conflict (. . .) [like] carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields'.<sup>118</sup> The SCSL also concluded that 'an armed force requires logistical support to maintain its operations (. . .) any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation'.<sup>119</sup> These interpretations both exceeded the usual scope of active/direct participation in hostilities according to the principle of distinction.<sup>120</sup> It remained to be seen whether the ICC in *Lubanga* would adopt a similar approach.

### 3. The *Lubanga* Trial Decision

The Trial Chamber found that the relevant conflict in *Lubanga* was non-international in nature. Accordingly, it considered charges against Mr Lubanga under Article 8(2)(e)(vii) of the Statute.<sup>121</sup> The Trial Chamber acknowledged the need to strictly construe the definitions of crimes under Article 22(2) of the Statute.<sup>122</sup> However, it then stated that the interpretation of the Statute was governed by the VCLT.<sup>123</sup> It did not comment further on how the two approaches related to one another.

The Trial Chamber juxtaposed 'participate actively in hostilities' in Article 8(2)(e)(vii) of the Statute with 'direct participation' in Article 77(2) of AP I.<sup>124</sup> According to the Trial Chamber, to participate actively in hostilities 'was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities'.<sup>125</sup> Therefore, it found that children were used to participate actively in hostilities by the UPC/FPLC:<sup>126</sup> they had participated in combat,<sup>127</sup> worked as bodyguards and escorts of UPC/FPLC main staff and commanders,<sup>128</sup> and had been part of a special unit of approximately 45 child soldiers.<sup>129</sup> Girls were also assigned domestic household tasks like cooking in addition to their combat, patrol and bodyguard duties.<sup>130</sup>

#### a. Criticism of the *Lubanga* Trial Chamber's Delineation between 'Active' and 'Direct' Participation

The Trial Chamber's decision was met with acclaim as the ICC's first guilty verdict.<sup>131</sup> However, it was criticised for delineating between 'active' and 'direct' participation in hostilities.

<sup>115</sup> *The Prosecutor v Brima, Kamara and Kanu (The AFRC Accused)* (Judgment) SCSL-04-16-T (20 June 2007) (*AFRC Judgment*).

<sup>116</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137, Annex (SCSL Statute) art 4(c). This provision prohibits 'conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.'

<sup>117</sup> *AFRC Judgment* (n 115) para 737.

<sup>118</sup> *id.*

<sup>119</sup> *ibid* para 1267; Charles Jalloh and Simon M Meisenberg (eds), *The Law Reports of the Special Court for Sierra Leone Volume I: Prosecutor v Brima, Kamara and Kanu* (Brill 2012) 1533.

<sup>120</sup> Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 185.

<sup>121</sup> *Lubanga Trial Decision* (n 7) paras 543–567.

<sup>122</sup> *ibid* para 600.

<sup>123</sup> *ibid* para 601, citing *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04 (13 July 2006) para 33.

<sup>124</sup> *ibid* para 627.

<sup>125</sup> *id.*

<sup>126</sup> *ibid* para 916.

<sup>127</sup> *ibid* paras 821–834.

<sup>128</sup> *ibid* paras 839–869.

<sup>129</sup> *ibid* paras 870–877.

<sup>130</sup> *ibid* paras 878–882.

<sup>131</sup> See 'In Landmark Ruling, ICC finds Congolese Warlord Guilty of Recruiting Child Soldiers' (*UN News Centre*, 14 March 2012) <<http://www.un.org/apps/news/story.asp?NewsID=41537#.VeqmBtOqqko>> accessed 10 July 2016; Peter Biles, 'Analysis' in 'ICC Finds Congo Warlord Thomas Lubanga Guilty' *BBC News* (London, 14 March 2012) <<http://www.bbc.com/news/world-africa-17364988>> accessed 10 July 2016; Matthew Kane and Anjie Zheng, 'The Lubanga Verdict: A Milestone for International Criminal Law in Central Africa and around the World' (2012) 41 *ABA International Law News* 28.

### i. The Linguistic Inconsistency of the Delineation

Firstly, some argue that 'active' in the Statute's child protection provisions should be interpreted synonymously with 'direct' at IHL because the words are viewed synonymously at IHL.<sup>132</sup> Two sub-arguments are used to support this notion: (a) the consistent use of the same phrase in the equally authentic French versions of Common Article 3 and other IHL instruments; and (b) the fact that Common Article 3 is codified in the Statute.

In relation to (a), the same French phrase (*participent directement*) is used in the equally authentic French versions of the Geneva Conventions and the Additional Protocols, despite the use of 'active' and 'direct' in the English versions. Because 'active' and 'direct' are interpreted primarily according to the principle of distinction at IHL, the argument is that 'active' in the Statute must be interpreted narrowly as well.<sup>133</sup>

However, '*participent directement*' is not used in the French version of the Statute. Rather, Article 8(2)(e)(vii) uses '*participer activement*'.<sup>134</sup> If one can argue that the use of the same phrase for different English words in the IHL instruments means there is no difference in meaning between the words, one can also argue that the Statute's drafters intended for a meaning to be applied in the child protection provisions that is different from the meaning attributed to 'direct' at IHL according to the principle of distinction. Therefore, the use of the same phrase in the French IHL provisions does not conclusively demonstrate that the Statute's drafters intended the meaning of 'direct' to be transposed to the meaning of 'active' in the Statute.

In relation to (b), Urban argues that because Common Article 3 is codified in Article 8(2)(c) of the Statute, the interpretation of 'active' according to the principle of distinction must be applied when interpreting 'active' in other parts of the Statute like Article 8(2)(e)(vii).<sup>135</sup> Nevertheless, 'active' in the Statute's child protection provisions should be interpreted more broadly than 'direct' as defined by the principle of distinction, as these provisions aim to protect all children from use in hostilities.<sup>136</sup> Accordingly, the existence of Article 8(2)(c) does not preclude the broad interpretation of 'active' in the child protection provisions according to their purposes.

### ii. The Consequences of the Delineation

The Trial Chamber's reasoning was also criticised for making child soldiers more targetable. This is because the scope of persons who may be legitimately targeted by an adverse party with impunity will increase as more people are categorised as participating directly in hostilities.<sup>137</sup> However, the use of different principles to interpret the different IHL and Statute provisions addresses these concerns. The principle of distinction should be used to interpret provisions like Common Article 3, and the purpose of protecting children used to interpret provisions like Article 8(2)(e)(vii).<sup>138</sup>

Accordingly, a broader interpretation of 'active' in the Statute's child protection provisions protects the interests of children without affecting the protection of civilians under IHL provisions according to the principle of distinction. It would not involve 'giving with one hand while taking with the other' because the two standards of 'active' are located at different levels.<sup>139</sup> The Statute itself indicates that the interpretation of a provision in the Statute will not limit or prejudice existing or developing rules of international law for

<sup>132</sup> Melzer, 'Interpretive Guidance' (n 22) 43, 45; *Akayesu* (n 31) para 629; Natalie Wagner, 'A Critical Assessment of Using Children to Participate Actively in Hostilities in *Lubanga*: Child Soldiers and Direct Participation' (2013) 24 Criminal Law Forum 181.

<sup>133</sup> Chris Jenks, 'Law as Shield, Law as Sword: The ICC's *Lubanga* Decision, Child Soldiers and the Perverse Mutualism of Direct Participation in Hostilities' (2013) 3 University of Miami National Security and Armed Conflict Law Review 106, 121; Melzer, 'Interpretive Guidance' (n 22) 43–44; Waschefort (n 5) 63.

<sup>134</sup> Rome Statute, art 8(2)(e)(vii) (French translation).

<sup>135</sup> See Nicole Urban, 'Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's decision in *Lubanga*' (*EJIL:Talk!*, 11 April 2012) <<http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/>> accessed 10 July 2016.

<sup>136</sup> Cryer and others (n 21) 269; Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009) 168–169; Roman Graf, 'The International Criminal Court and Child Soldiers' (2012) 10 Journal of International Criminal Justice 964.

<sup>137</sup> See Jenks (n 133) 118–119, 122; Wagner (n 132) 174–179; Matthew Happold, 'The Protection of Children Against Recruitment and Participation in Hostilities: International Humanitarian Law and Human Rights Law as Complementary Legal Frameworks' (2014) 44 *Collegium* 99, 105; Terry D Gill and others (eds), *Yearbook of International Humanitarian Law*, Vol 15 (TMC Asser Press 2014) 78; Urban (n 135); Cecile Aptel, 'Lubanga Decision Roundtable: The Participation of Children in Hostilities' (*Opinio Juris*, 18 March 2012) <<http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities/>> accessed 10 July 2016.

<sup>138</sup> See Waschefort (n 5) 65.

<sup>139</sup> Graf (n 136) 964.

other purposes.<sup>140</sup> Therefore, the interpretation of 'active' for the purpose of protecting children is likely not to affect the interpretation of 'active' or 'direct' for the purpose of distinguishing between combatants and civilians.

A narrow interpretation of 'active' in the Statute's child protection provisions could also lead to individuals like Mr Lubanga being acquitted even though the evidence demonstrates that they have used children to participate actively in hostilities. A broad approach is necessary to cover as wide a range of activities as possible within the meaning of 'active', and in doing so remove any justification for using children in hostilities.

iii. The Effect of the Trial Chamber's Approach on the Interpretation of 'Direct' in Article 77(2) of AP I While the Trial Chamber appropriately interpreted 'active' in Article 8(2)(e)(vii) of the Statute, its delineation between 'active' in that provision and 'direct' in Article 77(2) of AP I further adds to the confusion surrounding the interpretation of 'direct' in the latter provision, given that it also aims to protect children from use in hostilities.<sup>141</sup> The Trial Chamber used Article 4(3)(c) of AP II and Article 38(2) of the CRC as support for the broad interpretation, noting that the main objective underlying these provisions was to 'protect children under the age of 15 from the risks (. . .) associated with armed conflict (. . .) [and to] secur[e] (. . .) their physical and psychological wellbeing.'<sup>142</sup>

Nevertheless, this reasoning is troublesome. The Trial Chamber implied that the absence of the word 'direct' in Article 4(3)(c) of AP II indicated a broader standard of participation than in Article 77(2) of AP I.<sup>143</sup> However, it also used Article 38(2) of the CRC to support a broader standard of participation, not mentioning that this provision *does include* the word 'direct' and appears extremely similar in purpose and wording to Article 77(2) of AP I.<sup>144</sup> Accordingly, if Article 38(2) of the CRC was used to support a broad interpretation based on the purpose to protect children, the Trial Chamber should not have made the distinction between the levels of participation in Article 4(3)(c) of AP II and Article 77(2) of AP I.

The Trial Chamber's reasoning would also have affected the interpretation of 'active' in Article 8(2)(b)(xxxvi), which was derived from both Article 77(2) of AP I and Article 38(2) of the CRC:<sup>145</sup> if the latter's qualifier on participation ('direct') was interpreted narrowly, should the equivalent qualifier in the Statute ('active') in Article 8(2)(b)(xxxvi) be interpreted narrowly as well? The Trial Chamber did not resolve this question, leaving the scope of activities prohibited by Article 8(2)(b)(xxxvi) in international armed conflict unclear. This highlights the need for consistency in the terminology between related IHL and ICL provisions. A mere drafting inconsistency at IHL,<sup>146</sup> while minor, can have extremely significant consequences in the application of ICL.

#### 4. The *Lubanga* Appeals Decision

The Appeals Chamber affirmed Mr Lubanga's conviction more than two years after the Trial Decision.<sup>147</sup> In his appeal, Mr Lubanga argued that the Trial Chamber misinterpreted the scope of the crime in Article 8(2)(e)(vii) and that 'use to participate actively' should be interpreted according to the principle of distinction undergirding Common Article 3 because there was no difference between 'active' and 'direct' participation at IHL.<sup>148</sup> However, the Appeals Chamber disagreed with Mr Lubanga, finding that:

(. . .) the interpretation given to Common Article 3 (. . .) in the context of the principle of distinction cannot simply be transposed to that of article 8(2)(e)(vii) of the Statute. Rather, the term 'participate actively in hostilities' must be given an interpretation that bears in mind that provision's purpose.<sup>149</sup>

The Appeals Chamber also commented that Article 77(2) of AP I should be interpreted based on its purpose to protect children, rather than the principle of distinction between combatants and civilians.<sup>150</sup> Accordingly,

<sup>140</sup> Art 10 of the Rome Statute reads as follows: '[n]othing in this Part shall be interpreted as limited or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.' See also Graf (n 136) 969.

<sup>141</sup> See Part II(A)(3)(c).

<sup>142</sup> *Lubanga Trial Decision* (n 7) para 605.

<sup>143</sup> *ibid* para 627.

<sup>144</sup> See Dörmann (n 98) 376.

<sup>145</sup> *ibid*; Sainz-Pardo (n 17) 567.

<sup>146</sup> Schabas (n 82) 252.

<sup>147</sup> *Lubanga Appeals Decision* (n 6) 6.

<sup>148</sup> *ibid* para 317.

<sup>149</sup> *ibid* para 324.

<sup>150</sup> *ibid* para 327.

I submit that 'direct' in both Article 77(2) of AP I and Article 38(2) of the CRC should be interpreted broadly according to the purpose to protect children from use in hostilities, without reference to the principle of distinction. However, this reasoning still did not resolve the inconsistency between the levels of participation prohibited in Article 77(2) of AP I and Article 4(3)(c) of AP II; 'direct' in the former, even if interpreted broadly, may still cover a narrower scope of activities than 'take part in hostilities' in the latter.

Moreover, the Appeals Chamber did not address whether 'active' and 'direct' denote different standards. Waschefort presents an argument that the language indicates different standards: 'direct' would speak to the proximity of one's contribution to the conduct in question, whereas active would speak to the intensity of one's participation in the conduct in question.<sup>151</sup> While this analysis appears to give voice to the meanings of 'active' and 'direct', they should not be delineated so arbitrarily; a child's proximity to a conflict is likely to have at least some correlation to the intensity of their involvement. For instance, children working as bodyguards in *Lubanga* – a high-intensity form of 'indirect' participation – were extremely close to the conflict. As a witness in the Trial Decision explained, they saw two child bodyguards appear to run from their positions because shells were falling very close by them.<sup>152</sup>

Accordingly, 'direct', were it to be used in the Statute's child protection provisions, is likely to have the same meaning as 'active'. Nevertheless, the meaning of either 'direct' or 'active' participation in hostilities should be interpreted according to the purpose of the provision in which the phrase is located.

### **C. Conclusion and Further Developments since the *Lubanga* Decisions**

The Statute's child protection provisions prohibit the use of children to 'participate actively in hostilities' and are based on Article 77(2) of AP I and Article 4(3)(c) of AP II. However, this prohibition differs from the blanket prohibition on all participation in hostilities in Article 4(3)(c) of AP II for non-international armed conflict. 'Active' and 'direct' in the Statute's child protection provisions and Article 77(2) of AP II should be amended to prohibit any participation of children whatsoever. In light of the difficulties in amending these provisions, I evaluated the interpretation of these provisions in *Lubanga*.

The debates since the *Lubanga* Trial Decision reveal concerns that the broad approach taken by the ICC deviates from the current interpretation of 'direct' at IHL, which aims to protect civilians from being targeted in armed conflicts. Many fear that broadening 'active' participation in hostilities under the child protection provisions will cause civilians who indirectly participate in hostilities to be legitimately targeted. The Appeals Chamber appeared to address this concern by interpreting 'active' in civilian protection provisions like Common Article 3 differently to 'active' in the Statute's child protection provisions, also commenting that IHL child protection provisions should be interpreted broadly according to their purposes.

I support this approach. Defendants who use children to participate in hostilities will be more successfully prosecuted if 'active' is interpreted to include a broader scope of activities in the child protection provisions. Moreover, if 'active' also connotes a narrow definition in the civilian protection provisions like Common Article 3, armed groups will not be justified in targeting civilians who do not meet the high threshold for direct participation outlined in the Guidance. This approach still does not address the different standards of participation prohibited at non-international armed conflict in Article 4(3)(c) of AP II and Article 8(2)(e)(vii) of the Statute. However, it is preferable when considering the potential difficulty of successfully amending the latter provision.

Nevertheless, future Chambers may not follow this reasoning. For instance, the ICC Pre-Trial Chamber in the *Ntaganda Confirmation of Charges Decision* noted that it needed to assess whether children were taking a direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery in order to determine whether they were entitled to protection from these acts.<sup>153</sup> Despite the *Lubanga* Appeals Chamber's reasoning, the *Ntaganda* Pre-Trial Chamber used Article 4(3)(c) of AP II as reflected in Article 8(2)(e)(vii) of the Statute to assess the direct/active participation in hostilities of children in the facts before them and appeared to equate direct/active participation under these provisions with a loss of protection under IHL.<sup>154</sup>

This is problematic on two levels. Firstly, the Pre-Trial Chamber did not recognise that Article 4(3)(c) of AP II does not introduce a 'direct' or 'active' qualifier to participation in hostilities: rather, it is a blanket

<sup>151</sup> Waschefort (n 5) 63.

<sup>152</sup> *Lubanga Trial Decision* (n 7) para 841.

<sup>153</sup> *The Prosecutor v Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014) paras 77–78 (*Ntaganda Confirmation of Charges Decision*).

<sup>154</sup> *ibid* paras 78–79.

prohibition on such participation. Therefore, that provision can arguably only be used to determine what 'participation in hostilities' means, rather than what 'participate *actively* in hostilities' means. Secondly, the Pre-Trial Chamber appears to assume that the interpretation of a provision drafted to protect children from use in hostilities can affect the interpretation of the same word in a provision drafted to distinguish between civilians and combatants. If this is so, future ICC Chambers may be more hesitant to interpret 'active' and 'direct' in the child protection provisions broadly because of fears that the scope of protection available to civilians may be narrowed. However, I have so far demonstrated that the scope of protection is not likely to be narrowed. Accordingly, the approach of the *Lubanga* Trial and Appeals Chambers should be preferred to the *Ntaganda* Pre-Trial Chamber's interpretation in future ICC decisions, as the former gives voice to the purposes of both the child and civilian protection provisions in the Statute and at IHL.

### III. Determining the Scope of 'Active' Participation in Hostilities in the Statute's Child Protection Provisions: Evaluating the Approaches of the *Lubanga* Trial and Appeals Chambers

I have shown that it is reasonable to interpret 'active' in the IHL and Statute child protection provisions more broadly according to the purposes of these provisions rather than according to the principle of distinction. However, a consistent method for future Chambers to determine what kinds of activities fall within this broader scope is needed. The *Lubanga* Trial and Appeals Chambers used different methods to make this determination.

#### A. The Trial Chamber's Risk-Based Approach to 'Active' Participation in Article 8(2)(e)(vii) of the Statute

##### 1. The Success of the Trial Chamber's Approach

Because the Trial Chamber interpreted 'active' in Article 8(2)(e)(vii) of the Statute broadly, it needed to determine whether the relevant children in *Lubanga* performed activities falling within the scope of this broader interpretation. To this end, the Trial Chamber noted that a child's exposure to real danger as a potential target is decisive when determining whether they are actively participating in hostilities by performing an 'indirect' role.<sup>155</sup> The SCSL has similarly concluded that children guarding mines met the threshold under the SCSL Statute due to the constant risk of attack they faced.<sup>156</sup>

This approach prioritises the safety and protection of children while ensuring that defendants are prosecuted fully for putting children in danger by using them in hostilities.<sup>157</sup> Moreover, it grants the ICC 'the necessary flexibility when ruling on a specific case',<sup>158</sup> rather than being constrained by an excessively structured definition of active participation.

##### 2. Deficiencies in the Trial Chamber's Approach

Nevertheless, this approach extends 'participate actively' beyond its scope. While the Trial Chamber correctly used the purposive approach of interpretation, the purpose of the Statute should not be extended too far.<sup>159</sup> The 'strict construction' approach in Article 22(2) of the Statute still applies, and acts as a safeguard to prevent an interpretation that 'yield[s] a new crime not contemplated by States Parties [to the Statute].'<sup>160</sup>

According to the consequential risk analysis, a child within an army base may be continually at risk of attack by an enemy, but may only perform mundane cleaning chores, not doing anything to suggest that they are actively involved in the conflict.<sup>161</sup> A defendant charged under the Statute's child protection provisions may be found to have used such a child to participate actively in hostilities, when in fact the phrase 'participate actively in hostilities', on an ordinary construction,<sup>162</sup> implies a higher degree of participation. Accordingly, the threshold may be lowered too far if risk is the main factor in characterising activities under the Statute's child protection provisions, and the defendant may be convicted of a crime for which he is not

<sup>155</sup> *Lubanga Trial Decision* (n 7) para 628.

<sup>156</sup> *The Prosecutor v Charles Taylor* (Judgment) SCSL-03-01-T (18 May 2012) para 1479.

<sup>157</sup> Kai Ambos, 'The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues' (2012) 12 *International Criminal Law Review* 137.

<sup>158</sup> Michael E Kurth, 'The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity' (2013) 5 *Goettingen Journal of International Law* 440.

<sup>159</sup> See Bederman (n 26) 71.

<sup>160</sup> Grover (n 111) 555.

<sup>161</sup> See Wagner (n 132) 182.

<sup>162</sup> The Oxford Dictionary defines the word 'active' as 'participating or engaged in a particular sphere or activity.' See Oxford Dictionary, 'active' (*Oxford Dictionary*) <<http://www.oxforddictionaries.com/definition/english/active>> accessed 10 July 2016.

liable.<sup>163</sup> Any interpretation of the phrase must consider both the purpose of the provision and the actual meaning of the word.

For example, Judge Odio Benito, in her dissenting opinion in the Trial Chamber's judgment, argued that children actively participated in hostilities if they experienced sexual violence at the hands of members of armed groups that enlisted them.<sup>164</sup> However, this analysis goes 'clearly beyond the ordinary meaning of the wording'<sup>165</sup> and violates the strict construction requirement in Article 22(2) of the Statute.<sup>166</sup> Accordingly, being a victim of sexual violence cannot be viewed as 'actively' participation in the hostilities.<sup>167</sup> This does not mean that the provisions cannot be interpreted according to their purposes. The purposive approach taken by the ICC in *Lubanga* allows for broad interpretations *within* the reasonable parameters of a word's ordinary meaning, rather than extending a word or phrase beyond this meaning.

These deficiencies make consequential risk an unsuitable test by itself for future Chambers to use to determine whether activities fall within the scope of 'active' participation in the Statute's child protection provisions. Nevertheless, I argue in Part IV that consequential risk retains value as one of the factors to consider in making this determination.

### ***B. The Appeals Chamber's Link-Based Approach to 'Active' Participation in Hostilities under Article 8(2)(e)(vii) of the Statute***

In the Appeals Chamber, Mr Lubanga challenged the Trial Chamber's consequential risk analysis as 'wholly unfounded in international law or internationally recognised principles and rules.'<sup>168</sup> The Appeals Chamber agreed with Mr Lubanga; neither the ICL provisions nor their IHL equivalents referred to risk as a criterion to determine active participation in the Statute's child protection provisions.<sup>169</sup> Instead, a link between the hostilities and the activity in which the child was engaged was necessary for this determination.<sup>170</sup> While the extent to which a child was exposed to risk because of the activity could indicate a sufficiently close relationship between the activity and the hostilities, this risk could not replace an assessment of the relationship itself.<sup>171</sup>

The Appeals Chamber did not provide further guidance on the parameters of active participation in hostilities under Article 8(2)(e)(vii) of the Statute,<sup>172</sup> beyond lists of activities in the Commentary on the Additional Protocols<sup>173</sup> and the Report of the Preparatory Committee on the Establishment of the ICC.<sup>174</sup> Rather, any determination as to whether a particular activity fell within the scope of the crime should be made on a case-by-case basis.<sup>175</sup> This was due to 'the complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world.'<sup>176</sup> The lists referenced by the Appeals Chamber read as follows:

[Commentary on article 77(2) of AP I:] [Indirect acts of participation] include in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc (. . .).<sup>177</sup>

[Commentary on article 4(3)(c) of AP II:] Military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage (. . .).<sup>178</sup>

<sup>163</sup> Under art 67(1) of the Rome Statute, the accused has the right to a fair hearing conducted impartially. Under art 66(3), the Court must be convinced of the accused's guilt for that particular crime beyond reasonable doubt. See Grover (n 111) 554.

<sup>164</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Separate and Dissenting Opinion of Judge Odio Benito) ICC-01/04-01/06 (14 March 2012) paras 15–21.

<sup>165</sup> Kurth (n 158) 442.

<sup>166</sup> Zidar (n 80) 207.

<sup>167</sup> Quéniwet (n 61) 233. However, whether sexual violence should be included in the definition of active participation is a matter of debate that beyond the scope of this paper. For more information, see Chandni Dhingra, *Childproofing War: Prosecuting Sexual Violence against Child Soldiers* (Bachelor of Laws honours thesis, Monash University 2015); Rosemary Grey, 'Sexual Violence against Child Soldiers: The Limits and Potential of International Criminal Law' (2014) 16 *International Feminist Journal of Politics* 601.

<sup>168</sup> *Lubanga Appeals Decision* (n 6) para 319.

<sup>169</sup> *ibid* para 333.

<sup>170</sup> *ibid* paras 333, 340.

<sup>171</sup> *ibid* para 333.

<sup>172</sup> *ibid* para 335.

<sup>173</sup> Sandoz, Swinarski and Zimmerman (n 60) para 3187.

<sup>174</sup> 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1 (*Preparatory Committee's Report*) 21 nn 12.

<sup>175</sup> *id.*

<sup>176</sup> *Lubanga Appeals Decision* (n 6) para 335.

<sup>177</sup> Sandoz, Swinarski and Zimmerman (n 60) para 3187.

<sup>178</sup> *ibid* para 4557.

[Preparatory Committee's Report:] Active participation in military activities linked to combat (. . .) [includes] scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearer to take supplies to the front line, or activities on the front line itself, would be included within the terminology.<sup>179</sup>

On the whole, the Appeals Chamber took a more faithful interpretation of the text in Article 8(2)(e)(vii) – and by extension Article 8(2)(b)(xxxvi) – by avoiding the use of 'risk' as the central factor determining whether a child had actively participated in hostilities. Using the examples in the above lists to determine whether an activity constitutes 'active' participation under the Statute's child protection provisions allows judges to flexibly analyse the facts before them in various prosecutions for these crimes, 'as well as accounting for the great disparity between conflicts and the differing nature of roles within them.'<sup>180</sup>

Nevertheless, these lists are deficient because they use undefined, inconsistent terminology and standards. For instance, the Commentary on Article 4(3)(c) of AP II prohibits a child's participation in 'military operations' but the Commentary on Article 77(2) of AP I appears to prohibit 'indirect' participation in hostilities and the Preparatory Committee's Report covers active participation in 'military activities linked to combat'. Furthermore, 'direct support function' in the Preparatory Committee's Report appears to require a child to be proximate to the front line, but does not specify the object of the child's support (whether an individual like Mr Lubanga or the conflicting party in general). These phrases are undefined and there is no listed example of these activities that crosses all three lists, which would allow the common ground between them to be determined.

Additionally, the examples in the Commentary to Article 4(3)(c) of AP II likely cannot be accurately applied to Article 8(2)(e)(vii). This is because the Commentary to Article 4(3)(c) gives examples of taking 'part' in hostilities but Article 8(2)(e)(vii) prohibits taking an 'active' part in hostilities. However, the Appeals Chamber did not consider this difference and applied the Commentary on both Additional Protocols equally as guidance. Therefore, the degree to which the Commentary on Article 4(3)(c) can be relied upon to interpret 'active' participation in Article 8(2)(e)(vii) is uncertain.

These lists do not appear to form a clear threshold for an activity to qualify as 'active' participation in hostilities. Accordingly, future ICC Chambers may apply them inconsistently to the various situations that come before them. As McBride notes, 'the prohibition on child recruitment will not be effective if its basic concepts are unclear or contradictory',<sup>181</sup> and 'active' participation is a basic concept of the prohibition. Therefore, determining the scope of activities it covers should be a clear and consistent process.

### C. Conclusion

The Appeals Chamber's link-based approach to determining whether a child has actively participated in hostilities under the Statute's child protection provisions is a more effective, faithful approach to the text of these provisions than the Trial Chamber's risk-based approach. However, the Appeals Chamber did not provide sufficient, consistent guidance for future Chambers to determine this link. Accordingly, the case-by-case determination of activities as falling within the scope of active participation in the child protection provisions is likely to produce inconsistent jurisprudence on certain activities. Further clarification is needed to ensure consistent prosecution of those who use children in hostilities under these provisions.

## IV. An Update to the Guidance: Assistance for the Interpretation of 'Active' and 'Direct' Participation in Hostilities under the Child Protection Provisions

The child protection provisions in the Statute and AP II should be amended to prohibit all participation in hostilities.<sup>182</sup> In light of the difficulties of amending these instruments, I propose that the Guidance should be updated with factors that future ICC Chambers may consider in determining whether children actively participated in hostilities under the IHL and Statute child protection provisions.

<sup>179</sup> See UN Doc A/CONF.183/2/Add.1 (n 174).

<sup>180</sup> Julie McBride, *The War Crime of Child Soldier Recruitment* (Springer 2014) 61.

<sup>181</sup> *ibid* 211.

<sup>182</sup> See Part II(B)(2)(a).

### **A. Benefits of an Updated Guidance**

An updated Guidance provides a number of benefits. Firstly, it would clarify the nature of the crime under the Statute. It would clearly delineate between the different purposes of the relevant provisions while ensuring that parties are aware of their rights and obligations at both IHL and ICL in relation to the use of children in hostilities.

Secondly, it would give the ICC a more comprehensive outline of active participation in the child protection provisions, ensuring that its decision-making is consistent when assessing the link between the activity and the hostilities. This link would be the main factor in attributing liability to an individual under these provisions.<sup>183</sup> As the ICC is not bound by its previous decisions,<sup>184</sup> future ICC Chambers will be able to depart from the lists the Appeals Chamber used to assess the link between the activity and the hostilities. There are two factors to determine: (a) the type of hostilities that exist; and (b) whether the activity a child performs is sufficiently linked to these hostilities.

### **B. Factors to Consider in an Updated Guidance**

#### **1. The Type of Hostilities that Exist**

Because the Statute's child protection provisions require the existence of a link between the activity and the hostilities, the existence of hostilities must be confirmed. If there is doubt about whether hostilities exist, defendants could argue that their use of children for activities does not make them liable under these provisions.

The Elements of Crimes of the Statute's child protection provisions require that the conduct took place in the context of and was associated with an armed conflict.<sup>185</sup> An armed conflict exists:

(. . .) whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State (. . .) until a general conclusion of peace is reached (. . .) or, in the case of internal armed conflicts, a peaceful settlement is achieved.<sup>186</sup>

The violence of any armed conflict must be more than sporadic in the case of a non-international armed conflict.<sup>187</sup> The *Lubanga* Trial Chamber endorsed the ICTY's approach to determining whether a conflict was an armed conflict or not:<sup>188</sup> the intensity of the conflict should be used 'solely as a way to distinguish an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.'<sup>189</sup> The intensity of an armed conflict is determined by the following:

(. . .) the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the UN Security Council, and if so, whether any resolutions on the matter have been passed.<sup>190</sup>

These principles should be adopted by future Chambers when assessing whether hostilities existed at the time a defendant is alleged to have used children to participate actively in them.

<sup>183</sup> As opposed to the Guidance's reliance on the threshold of harm, direct causation and belligerent nexus. See Part II(A)(2); Melzer, *Guidance* (n 22) 16, 46–64.

<sup>184</sup> Rome Statute, art 21(2); Mikaela Heikkilä, 'Article 21(2)' (*Case Matrix Network*) <<https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>> accessed 10 July 2016; Aldo Borda, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals' (2013) 14 *Melbourne Journal of International Law* 7.

<sup>185</sup> ICC, *Elements of Crimes* (n 113) 39.

<sup>186</sup> *Tadić* (89) para 70; see *Lubanga Trial Decision* (n 7) para 533.

<sup>187</sup> Rome Statute, art 8(2)(f).

<sup>188</sup> *Lubanga Trial Decision* (n 7) para 538.

<sup>189</sup> *The Prosecutor v Dordević* (Public Judgment with Confidential Annex—Volume I of II) IT-05-87/1-T (23 February 2011) para 1522.

<sup>190</sup> *The Prosecutor v Mrkšić et al.* (Judgment) IT-95-13/1-T (27 September 2007) para 407.

## 2. The Link between the Activity and the Hostilities

Once the Chamber has determined that hostilities do exist, it must assess whether an activity is sufficiently linked to these hostilities. There are a number of elements to assist this assessment and which could be included in an updated Guidance:

1. The risk or danger to the child as a result of performing the activities;
2. The impact of the activities on the hostilities;
3. The degree to which the activities will prepare children to participate in the hostilities.

### *a. Risk or Danger to the Child as a Result of Performing the Activities*

Consequential risk is a useful factor to determine the link between the activity and the hostilities.<sup>191</sup> Including it in the analysis keeps future Chambers focused on the child's safety and liberty. As Ang comments, 'there is a real risk that any participation of some children in hostilities casts suspicion on and creates danger for all children.'<sup>192</sup> In Syria, Uganda, India and Nigeria, children have reportedly been used as human shields.<sup>193</sup> Armed forces in South Sudan have also used children to guard high-ranking officials,<sup>194</sup> and insurgent groups in Iraq have even used children plant explosive devices.<sup>195</sup> In 2013, moreover, children in the Philippines were reported to be 'injured and killed in hostilities as an immediate result of their association with [the military wing of the New People's Army]'.<sup>196</sup> The number of verified cases of child recruitment for conflict in the Philippines has decreased since 2013, but armed groups have continued to successfully recruit children.<sup>197</sup>

These situations show the significant risk a child is placed in as a result of the activities they perform in support of combatants. Accordingly, this risk should be used as a factor to determine whether the child's activities are sufficiently linked to the hostilities under the child protection provisions.

### *b. The Impact of the Activities on the Hostilities*

The more significant the impact of a child's actions on a conflict, the likelier it is that they will be participating actively in hostilities under the child protection provisions. In some instances, a child's actions may clearly constitute active participation in hostilities and have a significant impact on a conflict. For example, the Tamil Tigers in Sri Lanka used Thenmozhi Rajaratnam, believed to have been under 18 years old at the time, to assassinate former Indian Prime Minister Rajiv Gandhi.<sup>198</sup>

However, a child's actions may still have a sizeable impact on the conflict without being as obvious as in Ms Rajaratnam's case. Accordingly, this impact can help courts determine whether the child was actively participating in the hostilities under the child protection provisions. An example of indirect yet active participation in hostilities is the use of children by insurgent groups in Iraq to videotape attacks for propaganda purposes:<sup>199</sup> while they may not be directly participating in the conflict, the effect of the propaganda on the conflict may be extremely significant.<sup>200</sup>

A distinction must be made, however, between the use of children to participate in hostilities and other purposes. The effect of a child's actions on the hostilities is useful when making this distinction, because a

<sup>191</sup> *Lubanga Appeals Decision* (n 6) para 333.

<sup>192</sup> Ang (n 54) 37.

<sup>193</sup> UN Doc S/2014/31 (n 2) 5; UNSC 'Report of the Secretary-General on the Situation of Children and Armed Conflict Affected by the Lord's Resistance Army' (25 May 2012) UN Doc S/2012/365, para 17; UN Doc A/69/926-S/2015/409 (n 2) paras 195, 229, 232.

<sup>194</sup> UNSC 'Report of the Secretary-General on Children and Armed Conflict in South Sudan' (11 December 2014) UN Doc S/2014/884, para 20.

<sup>195</sup> UNSC 'Report of the Secretary-General on Children and Armed Conflict in Iraq' (15 June 2011) UN Doc S/2011/366, para 19.

<sup>196</sup> UNSC 'Report of the Secretary-General on Children and Armed Conflict in the Philippines' (12 July 2013) UN Doc S/2013/419, para 16.

<sup>197</sup> UN Doc A/69/926-S/2015/409 (n 2) para 247.

<sup>198</sup> Waschefort (n 5) 41. See Charles Scaliger, 'Turning Away from Trouble: The United States Could Learn a Lot from the Small Country of Sri Lanka about Terror Campaigns and the Results of Governmental Restrictions on Personal Restrictions' (2015) 23 *The New American* 1; Kathy Laster and Edna Erez, 'Sisters in Terrorism? Exploding Stereotypes' (2015) 25 *Women & Criminal Justice* 88; S V Raghavan and V Balasubramanian, 'Evolving Role of Women in Terror Groups: Progression or Regression?' (2014) 15 *Journal of International Women's Studies* 197, 198–199; Swati Parashar, 'Feminist International Relations and Women Militants: Case Studies from Sri Lanka and Kashmir' (2009) 22 *Cambridge Review of International Affairs* 235, 240.

<sup>199</sup> UN Doc S/2011/366 (n 195) para 19.

<sup>200</sup> For an analysis of how terrorist groups may use modern media and political marketing methods to recruit supporters, see Paul R Baines and others, 'The Dark Side of Political Marketing; Islamist Propaganda, Reversal Theory and British Muslims' (2010) 44 *European Journal of Marketing* 478.

child may not be actively participating in hostilities if their actions have no effect on the hostilities themselves. For instance, children in Mali enforced the Islamic dress code for women and conducted inspections of contraband items.<sup>201</sup> While such use may be suspect, there does not appear to be a link between these activities and the hostilities occurring.

*c. The Degree to which the Activities Will Prepare the Children to Participate Actively in Hostilities* Many children are indoctrinated and equipped to participate in hostilities.<sup>202</sup> Such training does not fall within the current definition of active participation in the child protection provisions.<sup>203</sup> As Okebukola argues, 'use' and 'participate' are present-tense verbs, and preparation for any such activities does not constitute the performance of the activities themselves.<sup>204</sup>

Nevertheless, if the child protection provisions aim to prevent children from being used in hostilities, any work preparing them to be used in hostilities should be prevented as well.<sup>205</sup> A distinction must therefore be made between *general* training of children and training of children for *specific hostilities*.<sup>206</sup> Future defendants on trial for these crimes may argue that they were merely training children *generally*, rather than for use in a specific armed conflict. The criteria provided by the ICTY, endorsed by the ICC's Trial Chamber,<sup>207</sup> are reliable for determining whether an armed conflict existed. From that determination a Chamber could decide whether or not the training was for use in such a conflict. The Chamber could consider the following factors, among others: (a) had children been sent into this conflict before? (b) what kind of activities were the children being trained to do? (c) how close was the conflict to the training? (d) is there documentary evidence detailing plans to send children into this conflict?

Only the training of children for specific hostilities would fall under 'active' participation in hostilities in the child protection provisions, as there would be a link between the training and the hostilities.<sup>208</sup> In Somalia, for example, children have been trained both in basic arms techniques and assassination, intelligence collection, the use of improvised explosive devices and suicide missions.<sup>209</sup> The forced recruitment of children has been connected with the upsurge in fighting in the Somali civil war.<sup>210</sup> Accordingly, it would be open to future ICC Chambers to find that the training was sufficiently linked to these hostilities to fall under the Statute's child protection provisions.

## V. Conclusion

The *Lubanga* decisions show that the ICC is ready, willing and able to prosecute the use of children in hostilities. In convicting Mr Lubanga and upholding this decision on appeal, the ICC demonstrated that it has the potential to be an effective weapon against this practice as a deterrent against potential offenders by justly and rigorously punishing those who do engage in it. In *Lubanga*, the ICC interpreted 'active' in the Statute's child protection provisions more broadly than 'active' in the civilian protection provisions. This approach best gives voice to the protective purpose of the child protection provisions by criminalising a wider range of conduct that children could perform, deterring individuals and groups from using them in hostilities. It also ensures that the interpretation of 'active' and 'direct' in the child protection provisions does not affect the protection of civilians from becoming legitimate targets at IHL. Moreover, while the Trial Chamber used 'risk' as the main element to determine whether a child participates actively in hostilities, the Appeals Chamber concluded that a link between the activity and the hostilities is the central requirement for this determination. The Appeals Chamber's approach is more faithful to the text of the Statute's child protection provisions. Accordingly, it should be adopted in future child soldier matters before the ICC.

<sup>201</sup> UNSC 'Report of the Secretary-General on Children and Armed Conflict in Mali' (14 April 2014) UN Doc S/2014/267, para 42.

<sup>202</sup> Elijah O Okebukola, 'Training Children for Armed Conflict – Where Does the Law Stand?' (2014) 14 International Criminal Law Review 593.

<sup>203</sup> *ibid* 589.

<sup>204</sup> *ibid* 596.

<sup>205</sup> See Melzer, 'Interpretive Guidance' (n 22) 65–66.

<sup>206</sup> For example, the Guidance identifies 'general recruitment and training' that does not qualify as direct participation in hostilities under the doctrine for the principle of distinction. See *ibid* 66.

<sup>207</sup> See Part IV(A)(1).

<sup>208</sup> According to the Guidance, such training, 'if carried out with a view to the execution of a specific hostile act (. . .) would almost certainly constitute preparatory measures amounting to direct participation in hostilities'. See Melzer, 'Interpretive Guidance' (n 22) 66.

<sup>209</sup> UNSC 'Report of the Secretary-General on Children and Armed Conflict in Somalia' (9 November 2010) UN Doc S/2010/577, para 21.

<sup>210</sup> Laetitia Bader, Zama Coursen-Neff and Tirana Hassan, *No Place for Children: Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia* (HRW 2012) 19.

These judgments raise a number of unresolved issues, however. Firstly, Article 4(3)(c) of AP II imposes a blanket prohibition on the use of children in non-international armed conflict at IHL, which is not reflected by either Article 77(2) of AP I or the Statute's child protection provisions. The Statute's child protection provisions and Article 77(2) of AP I should be amended to reflect this prohibition, ensuring that any use of children in hostilities is both prohibited at IHL and criminalised at ICL. However, amending these instruments is difficult.

Secondly, the ICC Pre-Trial Chamber in *Ntaganda* has not adopted the purposive approach taken in *Lubanga*. Instead, it appeared to conflate 'active' participation in child protection provisions with the loss of immunity from being legitimately targeted at IHL. If future Chambers follow the Pre-Trial Chamber's reasoning, they may not interpret 'active' in the child protection provisions broadly according to their purposes, for fear of narrowing the scope of protection available to civilians. Accordingly, the ICC may not effectively prosecute those who *do* use children to participate in roles that do not qualify as 'active' or 'direct' participation in the narrow sense. I argued that the ICC's reasoning in *Lubanga* should be followed in future decisions to give voice to the protective purposes of the Statute's child protection provisions.

Thirdly, the lists the Appeals Chamber provided to assess the link between a child's activity and the hostilities under the child protection provisions are insufficient, inconsistent with one another and contain undefined phrases. This may lead to inconsistent prosecution of individuals for using children in hostilities. Accordingly, the provisions will not fulfil their purposes to protect children from use in hostilities.

To help future courts address the inconsistencies in these lists and ensure that their own approaches to matters involving the use of children in hostilities, I suggested that the ICRC's Guidance should be updated, providing information to help future Chambers and parties determine whether, in any given situation, a conflict existed, and whether a child's activities were sufficiently linked to that conflict. I proposed three criteria to be included in the updated Guidance to assist Chambers in assessing this link: (a) the risk a child faces as a result of the activity; (b) the impact of the child's activity on the hostilities; and (c) the degree to which the activity prepares the child for participation in the hostilities.

Future Chambers are likelier to interpret the relevant provisions consistently if they use these criteria to assess the link between a child's activity and the relevant hostilities. Over time, it is hoped that the increased consistency in the ICC's jurisprudence will work to deter individuals and groups who would otherwise use children in hostilities. As massive numbers of children are being recruited to participate in hostilities around the world, the ICC's practice must be geared towards the effective prosecution of individuals and groups who commit these crimes. Clear, consistent guidelines and properly defined terms will help the ICC to streamline its decision-making processes, increasing the threat of successful prosecution facing parties who recruit children for use in hostilities.

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The author declares that they have no competing interests.

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