The International Criminal Court and Lubanga: the Feminist Critique and Jus Cogens

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ABSTRACT

The Lubanga decision, despite procedural missteps, further anchors the prohibition of child soldiers and child auxiliaries under international law. Feminist criticisms of Lubanga misapprehend the potential of Lubanga to attain the types of legal victories feminists strive for. While one can criticize Lubanga as a matter of procedure, Lubanga methodically strengthens the prohibition of child soldiery. The prohibition of child soldiers, like the prohibition of wartime rape, forced prostitution, and child sex-tourism are or are becoming jus cogens norms. Lubanga contributes to this coherence of jus cogens and sets the stage for extension of its logic into other wrongs committed to children.
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I. INTRODUCTION

Charles Lubanga was tried before the International Criminal Court and found guilty of the war crime of recruiting and using child soldiers. The decision of the International Criminal Court (ICC), though marked and possibly marred by procedural problems, strengthens the global norm against child soldiers and extends the prohibition of child soldiery to cover child auxiliaries. Thus, despite procedural missteps, the Lubanga decision is a step in the right direction. Well-intended feminist criticisms of Lubanga as ignoring sex and gender aspects of the case do not recognize that Lubanga builds out the norm prohibiting child soldiers to cover child auxiliaries, whether in national or international armed conflicts. Because of this "build out" Lubanga can serve as a stepping stone toward prohibition of war time rape and forced prostitution, whether such crimes are a means of genocide or a motivation to soldiery. The Lubanga decision implies that girl soldiers, child prostitutes and compelled "child brides" are, like human shields and "entertainers", prohibited under international law as military auxiliaries, because they are subject to being targeted during national and international armed conflicts. Lubanga is, moreover, another step toward a jus cogens prohibition of child soldiers, child auxiliaries, and child sex workers. The emerging global norm prohibits the use of child soldiers because children cannot give fully informed consent due to their lack of experience and maturity. So, despite well intended feminist and anti-imperialist criticism, the Lubanga decision has garnered praise for preventing the use of child soldiers throughout the world, for example in Nepal. Even critics of deterrence theory

1 The jus cogens norm, like the norm erga omnes, concerns interests of the international legal system qua system. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1964 I.C.J. 6 (July 24) www.worldcourts.com/icc/eng/decisions/1964.07.24_barcelona_traction.htm (erga omnes norms). All states severally share not only an interest in enforcement, but are moreover mutually injured in case of any violation of the jus cogens norm. The prohibition of child prostitution and sex tourism are not yet jus cogens norms, although universally condemned and sanctioned by national and international law, because the concern is several and not mutual and the injury is still (wrongly) seen as to the individual, not to the international system as a whole. See, e.g., Eric Thomas Berkman, Responses To The International Child Sex Tourism Trade 19 B.C. Int'l & Comp. L. Rev. 397, 421 (1996).

2 The anti-imperialist critique argues that the ICC embodies neo-colonialism. Frederic Megret thinks that seeing the ICC as neo-colonialist is somewhat misplaced. Frederic Megret, Cour Penale Internationale Et Colonialisme: Au-Dela Des Evidences (The International Criminal Court and Colonialism: Beyond the Obvious) (February 20, 2013). Available at SSRN: http://ssrn.com/abstract=2221424 or http://dx.doi.org/10.2139/ssrn.2221424


4 "Moreover, the case has had a positive impact on the prevention of the use of child soldiers, and has raised awareness of the impact of such crimes on children. For example, it contributed to the demobilization of thousands of child soldiers in Nepal." Karen L. Corrie International Criminal Law 46 Int'l Law. 145, 148 (2012).

5 "Practitioners and advocates of international criminal law frequently justify this body of law and its institutions on the basis of the deterrent effect that it has on those who might commit mass atrocities. Nevertheless, detailed studies by external critics in the past 20 years of globalised justice have strongly called into question this deterrence rationale as it lacks support in the historical record". Padraig McAuliffe, Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law, 10 N.Z. J. Pub. & Int'l L. 227 (2012).
in criminal law appear compelled to recognize that the Lubanga decision has contributed positively to ending child soldiery\(^6\) by raising awareness of the problem of child soldiers and the impact that being a war child has on one's life\(^7\).

Although the rule of international law prohibiting child soldiery is cogent, it is relatively recent and still emerging. The prohibition of child soldiery, like most norms involving children under international law, is not yet part of jus cogens, i.e. a non-derogable rule of international law\(^8\). I argue that the prohibition of child soldiery will however become a non-derogable rule of international law. Others have also held this position\(^9\). The Lubanga decision is a crystallization of the global norm prohibiting the use of children as soldiers and is another step in the direction of a jus cogens prohibition of child soldiery.

This article first examines the procedural problems in Lubanga (I). Then it exposes and contextualizes the feminist critique of the Lubanga decision (II). It then examines the substantive law of child soldiers under international law (III). It concludes with an argument that prohibitions of child soldiery, like the crime of systematic rape in war, are becoming jus cogens rules of international law (IV).

**II. PROCEDURAL PROBLEMS IN LUBANGA**

The International Criminal Court (ICC) seeks to end impunity for grave breaches of the most serious rules of international criminal law\(^10\). The ICC is a hybrid of common law and civil law\(^11\). This hybridization and the novel nature of the court explain why the first trial\(^12\) concluded at the ICC was characterized by procedural problems\(^13\). Despite the

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\(^6\) "At the Lubanga trial in 2010, the United Nations Special Envoy on Child Soldiers, Radhika Coomaraswamy, testified as an *amicus curiae* that the willingness of the ICC to prosecute cases of child soldier recruitment led armed groups to negotiate 14 action plans for the release of children who might otherwise have been pressed into military action, including 3000 children in Nepal. Perhaps more tenuously, it has been suggested that the indictment of members of the Lord's Resistance Army 'cannot be discounted as one of the possible factors' motivating its willingness to negotiate with the Ugandan government from July 2006." Padraig McAuliffe, *Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law*, 10 N.Z. J. Pub. & Int'l L. 227, 258 (2012).


\(^13\) "The case was not without difficulties. For example, Trial Chamber I stayed the proceedings for approximately five months after it concluded in June 2008 that the Prosecution had not disclosed to the
obstacles, the *Lubanga* decision demonstrates the capacity of the International Criminal Court to adjudicate international crimes. The procedural problems at *Lubanga* can be organized legally around the idea of the rights of the accused and practically in terms of the order in which they arose. The various procedural problems as part of one trial are however all interrelated. They are discussed here in their logical order of appearance.

**A. Prosecutor Discretion**

In a good number of criminal justice systems, the prosecutor is vested with at least some degree of discretion as to which crimes s/he wishes to prosecute. At the ICC, the "prosecutor ... has the ability to determine which charges he wishes to prosecute with the limited supervision of the Pre-Trial Chamber of the ICC." In *Lubanga*, the prosecutor decided not to bring charges for e.g. rape and forced sexual servitude. That decision has been criticized by feminists even if it was within the prosecutor's discretion. Similarly, the prosecutor had discretion to choose to charge the defendant for a violation of the law of international armed conflict, national armed conflict or both.

**B. Discovery and Disclosure**

The most evident procedural problem in *Lubanga* involved the right to discovery of confidential 'lead' evidence and the prosecution's duty of disclosure of potentially exculpatory evidence. That is, a conflict between prosecutorial power and the rights of the accused. "None of the statutes or rules of ICC tribunals provide clear guidance on how this conflict is to be resolved or articulate remedies when it cannot be." A related problem is the question of whether and to what extent the prosecution before the ICC may "outsource" evidence gathering to third-parties. Third party investigators are at higher risk of reprisals than state or international officials because they are not directly backed by state-power, although they have the advantage of being "locals" and un-uniformed and thus are better able to ferret out the facts. However, the existence of such dangers and even the threat of reprisal are not unique to the ICC, nor are these insurmountable problems. *Lubanga* determined, *simplicissimus*, that while the

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Defense over 200 documents which contained potentially exculpatory information or which were material to the Defense's preparation, based on an incorrect use of article 54(3)(e) of the Rome Statute. In another example, the Prosecution's first trial witness initially retracted his claim that he had served as a child soldier in the FPLC and said that an unnamed NGO told him what to say." Karen L. Corrie *International Criminal Law* 46 Int'l Law. 145, 147-148 (2012).

14 L. Corrie, *ibidem*.

15 O. Smith, *ibidem*.

16 ICC Article 54(3)(e), (Rome Statute).

17 ICC Article 67(2), (Rome Statute).


20 "The security concerns outlined above [regarding investigation and intimidation] are not new to the ICC. Investigators from other international criminal tribunals have had to carry out investigations in difficult and volatile circumstances. This particularly holds true for the ICTY investigators, who had to operate while the war was still ongoing in parts of the former Yugoslavia. Neither their limited numbers,
prosecution has a right to seek information and a duty to protect witnesses, it also has a duty to the accused to disclose evidence which would tend to exonerate the accused.

C. Witness Participation

Another problematic point in Lubanga was the participation of victims, whether as witnesses or observers\textsuperscript{21}. Essentially, the multiplicity of participants resulted in a "layered judiciary" which complicated the proceedings\textsuperscript{22}. The problem was not merely due to the failings of the prosecutor. It was also due to the participation of a great number of persons whether as witnesses, observers, or active participants in the prosecution\textsuperscript{23}: "too many cooks spoil the broth", so to speak. The trial became encumbered by too many participants with little relevance to the actual charged crime.

Victim participation is seen as a part of therapeutic jurisprudence. Therapeutic jurisprudence is the idea that the victim has a legitimate interest in a court proceeding which allows them to process their pain and move on from it, and that courts should take this fact into account alongside prevention and punishment as legitimate concerns of criminal law. Although the great number of participants bogged the trial down, feminists (\textit{infra}) criticized the lack, in their eyes, of adequate witness participation\textsuperscript{24} to serve the therapeutic function.

D. Witness Protection

Witness participation also raised the problem of their protection, which was related to the problems of confidentiality (of witnesses) and disclosure of exculpatory evidence by

\begin{itemize}
\item nor fears for themselves or potential witnesses stopped the ICTY investigators from conducting efficient investigations. Investigators gathered thousands of pages of documentary, forensic, and testimonial evidence. The ICTY was also successful in that all its suspects from all warring parties have eventually been surrendered to it. The ICTR was similarly successful in managing to try most indictees (although on many other fronts, the ICTR is not exemplary)." Dr. Caroline Buisman \textit{Delegating Investigations: Lessons To Be Learned From The Lubanga Judgment} 11 \textit{Nw. U. J. Int'l Hum. Rts.} 30, 147 (2013).
\item "The tendency of this layered judiciary to complicate proceedings" Diane Marie Amann, \textit{Prosecutor v. Lubanga. Case No. Icc-01/04-01/06. Judgment, Decision On Sentence, Decision On Reparations} 106 \textit{Am. J. Int'l L.} 809, 816 (2012).
\item "The trial chamber laid the blame for the shortcomings of Lubanga squarely at the foot of the man to whom it pointedly referred as 'the former Prosecutor.' Most national criminal justice systems invite active participation by the prosecution, defense, and trial bench. Some also permit a measure of victim participation; in contrast, the Rome Statute has been interpreted to afford an active role to multiple teams of victims' lawyers who, in Lubanga, disagreed at times on litigation strategy. Adding more sides to the model were the pretrial judges, who ordered the presentation of evidence of an international armed conflict that prosecutors had argued could not be proved, and an appeals chamber called upon to decide an interlocutory matter." Diane Marie Amann, \textit{Prosecutor v. Lubanga. Case No. Icc-01/04-01/06. Judgment, Decision On Sentence, Decision On Reparations} 106 \textit{Am. J. Int'l L.} 809, 816 (2012).
\end{itemize}
the prosecution. The right to confront one's accusers is recognized in common law under the rubric of "the right to confrontation" of one's accuser and in French law as one of the "droits de la défense". The right to confrontation is a basic criminal procedural right of self defense - how, after all, can one defend themself properly without knowing their accuser? Yet, how are the accuser and witnesses to be protected against reprisals? This of course requires a "balancing" i.e. a comparison, of the right of the accused to know their accuser and the right of the accuser and witnesses not to face (illegal, out of court) reprisals, i.e. revenge.

E. Prosecutorial Abuse: Non-Disclosure and Temporary Stay of Proceedings

The existence of prosecutorial discretion creates the possibility of abuse of that discretion. In the Lubanga trial the key procedural problem was an abuse of prosecutorial power: namely, the non-disclosure of exculpatory evidence. Whether at common law or civil law the prosecutor must disclose evidence to the court and/or defense which exculpates the defendant, generally speaking. If otherwise, wrongful convictions would result. However, the prosecution in Lubanga wished to keep much information such as the identities of accusers and informants secrets, tainting the trial.

This taint led to the unusual step of a stay in proceedings and the (ultimately, temporary) release of Lubanga during the court's suspension of proceedings. The desire to protect witnesses is understandable, but must be balanced against the right of the defendant to confront their accusers and certainly does not justifify the non-disclosure to the court of exculpatory evidence. As a result of this clear abuse, the ICC took the extremely unusual step of staying the proceedings and the (ultimately, temporary) release of Lubanga during the court's suspension of proceedings. Ultimately however, the trial resumed after the procedural problem was resolved to the satisfaction of the court. This was the most serious procedural misstep but ultimately did not stop the just adjudication of the case.

III. THE FEMINIST CRITIQUE OF THE LUBANGA DECISION

Given the procedural missteps, criticism of Lubanga is understandable, although, in my opinion, is misplaced. Interestingly, the most strident criticism of Lubanga comes from feminist quarters. That criticism is understandable, because the prosecutor in Lubanga did not charge gender or sex related crimes and was cautious, perhaps overly cautious,

26 Ambos, ibidem.
27 "A recurring question in international criminal procedure is how to ensure that prosecutors are held accountable for their errors and misconduct. When International Criminal Court (ICC) judges encountered the first serious error by the prosecution in Prosecutor v. Lubanga, they opted for an absolutist approach to remedies: the judges stayed the proceedings and ordered the release of the defendant. Although termination of the case was avoided through the intervention of the Appeals Chamber" Jenia Iontcheva Turner Policing International Prosecutors 45 N.Y.U. J. Int'l L. & Pol. 175, 175 (2012).
28 "although Lubanga was not charged with sexual or gender-based crimes, four legal representatives of victims specifically referred to sexual and gender-based violence suffered by girl soldiers during their opening statements. ... Lubanga was charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict. Despite strong advocacy by women's rights
in that regard. Thus, the *Lubanga* court tended to gloss over the sex and gender aspects of the systematic abuse of children in the DRC. Here is a fairly typical example of the feminist critique of the *Lubanga* decision:

Unfortunately, in the *Lubanga* trial the Court chose not to develop gender-based crimes, including the gendered aspects of child soldiering, further. It may be argued that the prosecutor's decision to charge Lubanga with the war crime of recruitment and use of child soldiers was guided by the wish to develop this particular norm. However, the Court should consistently prioritize particular crimes that have so far been undervalued, such as crimes of sexual violence. With regard to the Court establishing and advancing global norms, victim participation could complement and assist the Court in establishing the truth.

A. Therapeutic Jurisprudence

Part of the logic of hearing claims about wartime rape and sex slavery is therapeutic. “By bringing about appropriate charges, the victims are more apt to deal with the physical violation.” From a therapeutic perspective, too few victims were allowed to testify, but from a procedural perspective too many were allowed to testify about facts which were legally irrelevant to the crimes charged. Again, this is a balancing of competing interests, but this one likely cannot be perfectly resolved.

B. Correct Legal Method

Given the activist criticisms of *Lubanga*, I wish to expose correct legal method, so that activist posturing will be effective at attaining concrete results in practice prior to addressing the substantive *lex lata* and *lex ferenda* in the field of child soldiers. International law is often criticized, rightly, for being ambiguous (contradictory general principles) and uncertain (customs rise and fall) and for lacking a central enforcement groups and others, the prosecutor did not specifically charge the accused with any sexual or gender-based crimes. Nevertheless, legal representatives of female child soldiers spoke at length during their opening statements not only about the fact that girl soldiers had been subjected to various forms of sexual and gender-based violence, but also about the broader context and the long-term effects of such violence."


"these crimes are seen as a 'detour, a deviation, or the acts of renegade soldiers . . . pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law.' Therefore, despite the enumerated list of sexually-based crimes in the Rome Statute, the prosecutor likely adopted the historical view of the crimes and refused to include them in an indictment”K'Shaani O. Smith, *Prosecutor V. Lubanga: How The International Criminal Court Failed The Women And Girls Of The Congo* 54 Howard L.J. 467, 479 (2011).


mechanism\(^{33}\). Domestically, the state may seem all-powerful, but internationally it is otherwise. But international society is anarchical\(^{34}\) and prone to crises. Given the shaky state of international law, ever changing and uncertain, I argue that the best activist strategy is to work within existing recognized international legal categories, to narrow, broaden, or extend them as appropriate: to expose and extirpate ambiguity and contradiction to attain the rule of law and substantive justice rather than to try to generate exotic novel claims on the basis of wild theories, which just about inevitably fail. There are pragmatic reasons I recommend an incremental approach such as we see in *Lubanga*. First, why reinvent the wheel? Progress in science occurs by testing and refining hypotheses, not by throwing them out at any time to generate new (untested) hypotheses. Second, doubtful claims fail in the face of the burden of proof. A novel theory might seem exciting but will it lead anywhere? In contrast, systematic methodology, built out from given irrefutable rules to better and more refined rules, as the *Lubanga* decision exemplifies, seems to be a more certain way to achieve justice and the rule of law than by gambling on radical grand theories which generally fail to be taken up in practice, despite (or because of) their novelty. Attractive norms persuade more often than they compel, and people are more easily persuaded to adapt what they know rather than to adopt what they do not know. It's a question of effective advocacy, of what actually works in the real world, not the ivory tower or the barracks.

IV. **Substance: Child Soldiers in International Law**

*Lubanga* is procedurally a negative example: *ad astra per aspera*. A success, but rather in spite of itself. Despite this, *Lubanga* is substantively a positive example. The decision did not appear to go as far as feminists would have liked. However, in fact, *Lubanga* represents a strengthening of the norm against child soldiers and sets the stage for the types of legal victories feminists rightly strive for.

The international norm prohibiting child soldiers may seem a self-evident legal proposition. Nevertheless, the prohibition of child soldiers as a rule of international law dates only from the 1977 Additional Protocol to the Geneva Conventions. Yet the norm, though recent, has taken the world by storm. It quickly found resonance and replication in other international instruments. In fact, the African Charter on the Rights and Welfare of the Child (1990) requires State parties to "take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child"\(^{35}\). The Rome Statute\(^{36}\) of the ICC (1998) likewise criminalizes child soldiery. Echoing the two prohibitions of the Geneva Additional Protocols, the Rome Statute prohibits child soldiery both in internal armed conflicts and in international armed conflicts. The rule outlawing child soldiery was echoed again in an Additional Protocol to the U.N. Convention on the Rights of the Child (CRC) in

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33 Eric Engle, *U.N. Packing the State's Reputation? A Response to Professor Brewster's 'Unpacking the State's Reputation'* 114 Penn Statim 34.htm 114 Penn Statim 34 (2010). Available at: http://lexnet.co.cc/international/114 PennStatim34.htm
Child soldiery is also prohibited in the domestic laws of many countries, often with extraterritorial effect. The legal prohibition of child soldiery has become nearly universal. Because of such widespread adhesion of States to these treaties and because of the number of these treaties, a customary international norm prohibiting the recruitment or use of child soldiers in armed conflicts, whether national or international, has formed. Moreover, because child soldiering is an obvious violation of basic human dignity, the right to life, and the right to development its prohibition should be seen as a *jus cogens* norm, along with the prohibition of child sex-tourism. Child soldiers are positively associated with child prostitutes, wartime rape, mercenaries and terrorists and all of these are of concern to the international system as a system, not merely to individual States severally which also justifies seeing these as violations of jus cogens.

### C. Structuring Public International Law: The Law of War, International Human Rights Law, and International Criminal Law

We can divide public international law into at least these branches: the law of war (also known as international humanitarian law, consisting of *jus ad bellum* and *jus in bello*), international human rights law, and international criminal law.

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Child soldiery is an example of an area where the laws of war (international humanitarian law - IHL) international human rights law (IRHL) and international criminal law (ICL) overlap and in my opinion are complementary, not conflicting. However, Adil Ahmad Haque argues that IHL and ICL are structurally inadequate. Haque states:

> there is a gap between the international humanitarian law of Geneva and the international criminal law of Rome, a gap between the law we have and the law we need if we are to ensure respect for and protection of the civilian population caught in the midst of armed conflict. The Rome Statute of the International Criminal Court fails to fully enforce four core principles of humanitarian law designed to protect civilians: distinction, discrimination, necessity, and proportionality. As a result, it is possible for a combatant with a culpable mental state, without justification or excuse, and in violation of humanitarian law, to kill civilians, yet escape criminal liability under the Rome Statute. The Rome Statute also ignores or misapplies three fundamental criminal law distinctions: between conduct offenses and result offenses, between material elements and mental elements, as well as between offenses and defenses.\(^{43}\)

I don't regard Haque's claim as entirely well founded, because ICL is intended only to inculpate the gravest and most serious offenses: systematic intentional crimes committed by "leaders" (demagogues, really) - the "big fish". The "small fish" are meant to be held liable in national law. This is because wars involve literally millions of people. No international court could hope to litigate each and every case. But what the ICC can and tries to do is to catch "the big fish" to set an example, and to provide guidance for national courts to emulate. Haque correctly recognizes the different perspectives of IHL and ICL (ex ante and ex post, respectively)\(^{44}\). However, that difference in perspective is not a contradiction or a gap in legal regulation. The difference in perspective between IHL and ICL is due to the fact that IHL is primarily about coordinating State's actions and interactions (ex ante), whereas ICL is primarily about inculpating individuals who commit serious breaches of international law in a grave and systematic manner (ex post). What Haque describes as "a gap" is actually an overlap. IHL and ICL have different objects and purposes, but sometimes they overlap due to the transformation of

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\(^{44}\) "Civilians are protected during armed conflict by two bodies of law that differ from one another both in their institutional function and in their conceptual structure. International humanitarian law, particularly as embodied in Additional Protocol I to the 1949 Geneva Conventions, is designed to guide the prospective conduct of military commanders and soldiers on the battlefield. Armed forces are first to distinguish between civilians and enemy combatants; then to direct attacks only at enemy combatants and not at civilians; then to plan and carry out attacks in a manner that avoids or at least minimizes harm to civilians; and finally to refrain from attacks that would cause disproportionate harm to civilians in relation to the military advantage the attacks would achieve. By contrast, international criminal law, particularly as embodied in the Rome Statute of the International Criminal Court, is designed to guide the retrospective evaluation of past offenses by courts. Courts are first to establish the commission of a criminal offense by the defendant; then to consider any justifications, excuses, or other defenses the defendant may assert with respect to that offense; then to acquit or convict the defendant; and finally to impose an appropriate punishment." Adil Ahmad Haque *Protecting And Respecting Civilians: Correcting The Substantive And Structural Defects Of The Rome Statute* 14 New Crim. L. Rev. 519, 520 (2011).
international law in the post-Westphalian era from "states, only, with absolute rights" to "states and non-state actors, with relativized rights". If there were a "gap" here, IHRL would be the bridge between duties of individuals and rights of states.

With this teleological understanding of the norm and an understanding of the structure of international law (IHL, IHRL, ICL) we can now try to address the four refinements of the norm against child soldiers.

**D. Structuring International Humanitarian Law: The Domestic/International and Public/Private Splits**

Just like we structure public international law into at least the three branches of IHL, IHRL, and ICL, we also structure international law generally using the domestic/international and public/private splits.

As can be seen from the treaties cited, the prohibition of child soldiery is a "bifurcated" norm. Child soldiery is prohibited in all four quadrants, (public/private; state/non-state actor). Child soldiery is absolutely prohibited under international law, whether the soldiers are recruited or conscripted, whether by public or private actors and whether in domestic or international conflicts. The fact that all actors in all conflicts are forbidden to recruit or conscript or use child soldiers is evidence that the international law against child soldiery is a universal and non-derogable rule of international law (jus cogens). The use or recruitment of child soldiers a) in domestic armed conflicts and b) in international armed conflicts by i) State Parties and ii) Non-State Actors is prohibited under international law.

The "public/private" and "national/international" splits structure law and hopefully enable legal certainty and justice to be attained. However, they also create a risk of fragmentation. The norm, which seems so straight forward and self evident at first glance, becomes more complex as we consider it in finer detail. However, we have to understand each of these four strands of the norm are expressions of one common core-concept which seeks attain the substantive goal of the law. These are four refined emanations of one common idea.

To understand the contours of the norm against child soldiers we must understand these splits. Historically, jus in bello and jus ad bellum were largely if not exclusively coordinating rules directed to state actors and their agents. The main conflicts of the 19th Century and even most conflicts of the 20th Century were international armed conflicts between States. That is no longer the case. In recent decades, conflicts increasingly involve non-state actors and are often purely internal domestic insurrections rather than wars between States. Even inter-state conflicts often involve non-state actor combatants, whether as revolutionaries (targeting the state, seeking state power) or terrorists (targeting civilians and not necessarily seeking to seize state power) or proxies. The rise of non-state actors and national armed conflicts explains why four refinements on one idea are necessary in order to subdue and minimize violent human conflicts.
Non-state actors such as insurgents and terrorists with belligerent rights and legal duties under international law are a post-Westphalian legal phenomenon. However, the question facing the post-Westphalian law of war is the same as faced in the Westphalian system (1684-1945/1989): how to prevent and limit violence. The answer is also nearly the same: war is to be prevented and concluded primarily through state power and state responsibility.

However, international law has become more than merely a coordinating mechanism between states. As well as coordinating state interactions, international law now also guaranties certain limited individual human rights to non-state actors. Such rights include the right not to be made a sex slave or a child soldier. International human rights law (IHRL) is the primary international guaranty of basic human rights, although secondarily there are human rights aspects of the law of war (IHL).

E. Armed Conflicts: National, International, or Mixed

We just saw that we can divide public international law into at least IHL, IHRL, and ICL. We now examine the division within IHL between domestic armed conflict (internal armed conflicts) and conflicts between States (international armed conflicts). This structural split between two branches of IHL is reflected in both Additional Protocols to the Geneva Conventions and the Rome Statute, which distinguish international from national armed conflicts, prohibiting the recruitment (i.e. conscripting or enlisting) or active use of child soldiers in armed conflicts, at least by state parties. How did this bifurcation play out in Lubanga?

In the Lubanga trial, the prosecution only charged a violation of the law of non-international armed conflict. However, this was then unilaterally recharacterized by the court under Article 61(7)(c)(ii) of the Rome Statute to charge a violation of the law of international armed conflict. The pre-trial chamber (PTC) then found that "for the most part the armed conflict in question (between July 2002 and 2 June 2003) was one of an international character, due to the presence of the Ugandan army as an occupying power in parts of Ituri", and thus governed by Article 8(2)(b) of the Rome Statute.

45 For example, in the Lubanga decision, "Although it ruled that conscription typically carries an element of compulsion while enlistment is voluntary, it reasoned that children under fifteen were not entitled to choose to fight, so that enrollment of a child under fifteen in an armed force was illegal with or without compulsion• (id., para. 618). As for use, a majority of the chamber construed the phrase 'to participate actively in hostilities'• to include a child's support to combatants, if it 'exposed him or her to real danger as a potential target'• (id., para. 628). The construction expanded the proscription to use beyond 'the immediate scene of the hostilities'• (id.), yet appeared to exclude children victimized not by the enemy but, rather, by the militia that had recruited them.


46 Rome Statute of the International Criminal Court, Art. 8(2)(b) "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:" available at: <http://untreaty.un.org/cod/icc/statute/romefra.htm>

The question facing the court was whether the conflict in the Democratic Republic of the Congo (DRC) was domestic, international, or mixed. The Pre-Trial chamber "opted for a sequenced international/non-international solution, arguing that the conflict was international as long as the Ituri region was occupied by the Ugandan army (until 2 June 2003) but then changed to a non-international one (until end of December 2003)." At the PTC national armed forces were determined to be not limited to the military forces of the state and thus could include proxy soldiers or state sponsored terrorists.

The Trial Chamber in contrast "relied on a relational concept of armed conflict by focusing on the status of the two parties to the conflict" and started from the assumption, "that parallel conflicts of a different (legal) nature may take place at the same time in a single territory." The Trial Chamber then characterized the armed conflict as non-international, invoking Regulation 55 of the Regulations of the Court. The armed groups contending in the DRC were found not to be proxies for conflicts between Uganda, Rwanda or the DRC because State actors did not in fact exercise "overall control" over non-state actor combatants. Since the conflict was found to be internal not international, the relevant rule to apply was Article 8(2)(e) of the Rome Statute of Rome, Article 8(2) provides "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

... (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." (emphasis added).

48 ICC Statute of Rome, Article 8(2)(b) provides "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

... (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." (emphasis added).


50 Kai, Ambos, *ibidem*


53 Kai, Ambos *ibidem*

54 ICC, Regulations of The Court Adopted 26 May 2004 As amended 14 June and 14 November 2007 (amendments entering into force 18 December 2007) "the Chamber may change the legal characterization of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.". Available at: http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBDD010207ENG.pdf

55 Kai, Ambos, *ibidem*

56 (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
Statute (other serious violations of the laws and customs of war not of an international character) and not 8(2)(b)57.

F. The Public (State Actor) and Private (Non-State Actor) Split: Non-State Actors and International Humanitarian Law

The problem of non-state actors involving themselves directly as agents of political violence, whether independently or with state sponsorship (proxy wars and state sponsored terrorists) is an important contemporary issue. Non-state actors do use child soldiers. In fact: "Much illegal recruitment of children is undertaken by non-State actors such as armed opposition groups"58. According to the Lubanga decision, an armed conflict involving non-state actors can also be an international armed conflict where the non-state actor acts as a proxy for one state on the territory of another. The non-state actor must be subject to the "overall control" of the sponsoring state to be considered a proxy. Whether "overall control" exists is a question of fact, though I would argue a proof of state funding or supplying weapons or ammunition to a controlled group would suffice to meet the standard, and should put the burden of proof on the party pleading that no overall control existed. Where the non-state actor is not acting as a proxy for a state actor and operates only on the territory of one state there is no international armed conflict. Lubanga also held that international armed conflict includes military occupation59.

G. Child Auxiliaries in Lubanga

The international rule prohibiting child soldiers specifically prohibits the "active participation" of children. This raises the question of what "active" or "direct" participation is. "The plausible interpretations of the 'active participation' requirement range from a very restrictive reading limiting the participation to exclusively combat-related activities to a broader reading, including any supporting activity or role"60. The

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57 "as a consequence of the Chamber’s move to a non-international armed conflict, the war crime of Article 8(2)(b)(xxvi) is no longer applicable and thus the tricky issue whether paramilitary-like armed groups like the UPC can be equated to ‘national armed forces’, unconvincingly affirmed by the PTC,124 is no longer relevant. Indeed, the applicable war crime for the non-international armed conflict, Article 8(2)(e)(vii), more broadly covers the recruitment (‘conscripting or enlisting’) of children under fifteen into armed forces or groups’, i.e., it clearly extends to any armed group within the meaning of international humanitarian law.”


60 Kai, Ambos, ibidem
better interpretation is the interpretation which the Lubanga decision took up: the international norm prohibiting child soldiers also prohibits child auxiliaries. Auxiliaries do not primarily engage in direct combat activities but are active participants by supplying, servicing, and supporting soldiers.

Auxiliaries are not combatants, they are combat support personnel. The ghastly examples are human shields and human land-mine removers. The seemingly benign versions are camp cooks, transport drivers, and "entertainers" -- where "entertainer" is often a euphemism for "camp prostitute" or "forced war bride". According to Lubanga, and I think rightly, the prohibition of the use of child soldiers also applies to child auxiliaries where the child auxiliary is likely to be targeted by enemy combatants. The prohibition of child auxiliaries is logical because auxiliaries are often targeted and may be forced by the circumstances of war to take up arms in self defense. Interpreting the norm to prohibit child auxiliaries is also justified by the fact that such an interpretation of "active participation" is consistent with the CRC's "best interests of the child" standard. Finally, prohibiting child auxiliaries is justified because the "combatant"/"non-combatant" distinction is another victim of modern warfare, as any "ethnic cleansing" or mass bombardment shows. Contemporary conflicts usually sweep up civilians into the bloodshed, regardless of the civilian’s own wishes. Finally, prohibiting child auxiliaries also prevents illusory claims that child soldiers were really only auxiliaries and makes clear that the prohibition on child soldiery is absolute, universal, and becoming a part of jus cogens. Albeit, some child-soldiers may themselves be war-criminals, which is less likely to be the case among auxiliaries.

IV. The Prohibition of Child Soldiery as Jus Cogens

The prohibition of child soldiery, like the prohibition of wartime rape and child-sex tourism, is becoming a non-derogable jus cogens rule of international law. Jus cogens norms are formed by near universal adhesion and agreement, not only that the norm is

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61 "the Chamber distinguished the notion of active participation in hostilities from the more common international humanitarian law notion of direct participation, a move that has already given rise to criticism. The Chamber stated that: Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors—the child’s support and this level of consequential risk—mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them."


62 http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module5.htm


binding but also that the norm is non-derogable, of mutual, not merely several, concern and thus subject to universal jurisdiction. Ordinary customary international laws may be avoided by states that affirmatively and persistently object to the formation of the custom *ab initio*. However, *jus cogens* is non-derogable. So, for example, South Africa could not argue that its apartheid regime was a persistent objector to the *jus cogens* prohibition of state sponsored segregation (apartheid). *Jus cogens* norms are rules of conduct which are not only of concern to all states individually but also are of concern to the international system as a whole. That is, a violation of a *jus cogens* norm is an injury to every state. This explains why each *jus cogens* norm admits of universal jurisdiction. No state may violate *jus cogens* rules and any state may enforce *jus cogens*. The theoretical basis of *jus cogens* is a late modern recurrence of natural law. *Jus cogens* literally means compelling right, i.e. the right of good conscience (cogens is etymologically related to cogent, for the cogent thought is compelled to coherence). Certain legal rules are inevitable because they are in themselves good and fair and thus attract adhesion and replication and tend to become universal in space and time. The naturalistic fallacy is to confuse that which occurs in nature for that which ought to occur in nature. People who criticize all natural law reasoning as flawed by the naturalistic fallacy generally have a simplistic view of natural law, one that regards natural law as an emanation of religious law, "God's own law" (Gottesrecht). A more refined critique invoking the naturalist fallacy would attack natural law as self-contradictory epistemic dualism that ignores scientific materialism. However, there are several schools of natural law. Not all schools of natural law argue for the law of nature as "God's own law". Some advocates of natural law theory do present pre-scientific or outright unscientific ideas that confuse that which appears in nature for that which ought to be done by man. However, when we recognize natural law as the law of reason and nature as teleology then these valid criticisms of religious natural law fall away. Aristotelian teleology regards nature not as a static unchanging incomprehensible force. To Aristotle, nature is a dynamic process of self-development. Aristotle's teleology is naturalist in the sense that it describes what happens when everything goes rightly. The nature of the acorn, its teleology, is to become a tree. In the best of circumstances a mighty oak springs forth from an acorn. Not all acorns become trees. Likewise, the nature of a boy, that is the boy's teleology, is to become a strong, intelligent, wise and just man. Obviously not all boys become that, nor do all boys even survive childhood. Aristotle's naturalist teleology does not suffer from the naturalist fallacy. Moreover, Aristotle's naturalism does not suffer from epistemic dualism, unlike Plato. Aristotle is

monist and materialist. That is the correct theoretical basis of jus cogens as “natural law”\textsuperscript{70}. The prohibition of war crimes such as the use of child soldiers or of rape and prostitution as means to wage genocide and war is so fundamental to the international system that it should be seen by all states as a prohibited practice to any state. These war crimes are in fact dangerous to the international system as a system and so are of mutual and not merely several concern. Such a violation anywhere is in fact an injury to every state because the conduct creates unpredictable instability (private and/or terrorist violence). In addition, the conduct is utterly reprehensible and universally condemned both in national and international law and is already subject to extraterritorial enforcement under national law. Moreover, the child soldiers may be more likely to become international terrorist than the ordinary children, thus the problem is of global concern. Thus, they are of global concern.

\textbf{H. Child Soldiers as Slaves}

Others have also argued that child prostitutes\textsuperscript{71} ("prostitots") and child soldiers are forms of slave labor and therefore prohibited by international law as jus cogens\textsuperscript{72}. The argument seems somewhat forced yet also has some merit. The essence of slavery is a complete lack of autonomy. Forced prostitution is fairly obviously a form of slavery. However, not all child soldiers are in fact conscripts, some are volunteers. Yet, children have limited capacity for autonomy and thus even the "voluntary" child soldier can be seen like the slave as having no real autonomy and is a victim of labor extraction. Although an interesting theory, the argument that child soldierly is a form of slave labor and thus a jus cogens violation does not appear to have been pursued in the \textit{Lubanga} decision. It is however a possible path to the determination that recruiting, enlistment or use of child soldiers is a violation of jus cogens.

\textbf{V. Conclusion}

In conclusion, \textit{Lubanga} only appears to ignore gender. In fact, by building a more solid and broader foundation for the prohibition of child soldiers to include auxiliaries, \textit{Lubanga} sets the stage for an extension of jus cogens to prohibit child soldierly, forced prostitution, and wartime rape. Methodical certain progress is the way ahead to a brighter future. Feminist critiques of \textit{Lubanga}, while understandable, well intended, and directed to desirable goals are somewhat misplaced for failing to see \textit{Lubanga} as a systematic construction and strengthening of the international rule of law. Rather than a denial of justice for women, \textit{Lubanga} sets the stage for future feminist legal victories. The prohibition of wartime rape, forced prostitution, and child soldierly will further cohere into jus cogens prohibitions because these intertwined evils foster international


\textsuperscript{71} Berkman, Eric Thomas, \textit{Responses To The International Child Sex Tourism Trade} 19 B.C. Int'l & Comp. L. Rev. 397, 421 (1996) ("Sexual exploitation of children is not classified among these crimes of a 'universal concern,' but perhaps it might be considered a form of slave trade, which is covered by the universality principle.")

war and terrorism and thus are of mutual and not merely several concern of states as threats to the international system as a whole.