Towards a Gender-Inclusive Definition of Child Soldiers: The Prosecutor v. Thomas Lubanga Dyilo

Kristin M Gallagher, Brooklyn Law School
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I. Introduction

The trial of Thomas Lubanga Dyilo (“Thomas Lubanga”) will set international precedent for crimes related to child soldiers.¹ As it is the first trial before the International Criminal Court (“ICC” or the Court), the Court will be setting a standard for interpreting what it means to conscript, enlist or use child soldiers actively in combat.² While the use of child soldiers has garnered international attention recently due to the charges against Mr. Lubanga,³ the practice is hardly a new phenomenon. Children have been used as warriors throughout history, for example as drummer boys in the American Revolution⁴ and powder monkeys in the War of 1812, the Mexican War and the Civil War.⁵ The Nazis established training camps along with other forms of indoctrination to prepare Hitler Youth for battle,⁶ a process that often began when a child was ten years of age.⁷ During the Iran-Iraq War, Iranian President Ali-Akbar Rafsanjani declared that “all Iranians from 12 to 72 should volunteer for the Holy War.”⁸ Child soldiers who joined the Iranian forces were given keys to keep around their necks for entry into paradise.⁹

¹ See *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 (commenced January 26, 2009) [hereinafter the *Lubanga* case].
² See, infra, Section III.A for a more detailed account of the charges against Mr. Lubanga.
⁵ Powder monkey is the name given to those who carried the gun powder from the magazine to the guns, often done by children because of their speed and agility. ELEANOR C. BISHOP, PONIES, PATRIOTS AND POWDER MONKEYS: A HISTORY OF CHILDREN IN AMERICA’S ARMED FORCES, 1776-1916 (1st ed. 1984).
Today, the Islamic militant group Shabab faces accusations that they are using child soldiers in Somalia. The Shabab are not alone. At least 21 countries or territories reportedly utilized child soldiers in their conflicts between 2004 and 2007. Approximately 300,000 children are currently involved in armed conflict, with upwards of 40% of those children being girls. These historic examples, coupled with current statistics on the usage of child soldiers, reveal that the use of child soldiers is not a rare occurrence; only through the development of international treaties and laws has the international community begun to address the legalities involved with the use of child soldiers.

While there is no definitive answer as to why the use of child soldiers has become an international human rights issue, many point to Graca Machel’s 1996 report as the starting point of inquiry. The increased use of child soldiers and society’s changing perception of when childhood ends have been offered as reasons for the increased attention to the issue, as well as the proliferation of small arms. It has also been suggested that the nature of contemporary war is characterized by systematic atrocities aimed at the civilian population, a lack of delineation between war and peace and the

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15 Children can easily carry and operate small arms. OTTO TRIFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT-OBSERVERS’ NOTES, ARTICLE BY ARTICLE, 467 (2nd ed. 2008).
forced recruitment of soldiers.\textsuperscript{16} In countries where the child population is very large, children are widely recruited into armed forces.\textsuperscript{17} They are often valued by commanders because they are perceived as fearless, easy to control and cheaper to maintain within the ranks.\textsuperscript{18} The effective prosecution of crimes relating to child soldiers before the ICC represents an opportunity to curtail the attractiveness of child soldiers and hold those most responsible for these crimes accountable for their actions.\textsuperscript{19}

This paper argues that the trial of Thomas Lubanga Dyilo\textsuperscript{20} currently before the International Criminal Court represents an opportunity for a precedent-setting decision regarding the use of child soldiers. It also argues for an interpretation of the law that recognizes the changing face of war and the traumatic experiences of child soldiers, regardless of their gender. Gender is an issue within the law concerning child soldiers because the common perception of a child soldier is that of a young boy holding a gun.\textsuperscript{21} This misperception about child soldiers has excluded female child soldiers from protection under the law and from efforts to reintegrate child soldiers post-conflict. The Court should broadly interpret the statutory language of Articles 8(2)(b)(xxvi) and

\textsuperscript{16} Transcript of Record, Testimony of Dr. Elisabeth Schauer, \textit{The Prosecutor v. Thomas Lubanga Dyilo}, ICC-01/04-01/06-T-166-ENG CT WT (rev.dec.1974) 95/102 EA T, 11-12 (April 7, 2009).

\textsuperscript{17} Research indicates that when the youth population is at least 35\% of the total population, the risk of conflict is increased by 150\% over countries that have a youth population of 17\% or lower. Henrik Urdel & Jennifer Dabbs Sciubba, \textit{Demography and Conflict: How Population Pressure and Youth Bulge Affect the Risk of Civil War}, Environmental Change and Security Program, Woodrow Wilson International Center for Scholars, March 5, 2007, available at http://www.wilsoncenter.org/index.cfm?event_id=219250&fuseaction=topics.event_summary&topic_id=1413.

\textsuperscript{18} Testimony of Dr Elisabeth Schauer, \textit{supra} note 16 at 12, 41-43.

\textsuperscript{19} The ICC is a court of last resort and will not seek to assert its jurisdiction provided genuine national judicial proceedings have taken place. In addition, the ICC only prosecutes those accused of the “gravest crimes.” See, http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB.

\textsuperscript{20} See, \textit{The Prosecutor v. Thomas Lubanga Dyilo}, ICC-01/04-01/06 (commenced January 26, 2009).

8(2)(e)(vii) of the Rome Statute,\(^{22}\) the provisions under which Mr. Lubanga is charged for crimes relating to the use of child soldiers. The statutory language as well as the *travaux preparatoires* allow for a broad interpretation, as discussed in greater detail below. Such an interpretation will allow for legal protection of all child soldiers and bring to light the complex and difficult roles that all child soldiers are forced to fulfill during armed conflict.

Part II of this paper introduces the development of international law concerning the use of child soldiers. Part III.A discusses the charges against Mr. Lubanga, which relate to the crime of conscripting and enlisting child soldiers under the age of 15 or using them to participate actively in hostilities.\(^{23}\) Part III.B provides information regarding the *travaux preparatoires* of the Rome Statute. In particular, this section focuses on sources for the interpretation of the statutory language in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) regarding “participate actively” in hostilities and how they apply to the roles of female child soldiers. Part III.C repeats the analysis of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) regarding “conscripting” and “enlisting” and again looks at these terms through a gender lens. Part IV examines the potential impacts of a broad interpretation of these provisions, in particular the reach of disarmament, demobilization and reintegration (“DDR”) programs,\(^{24}\) the deterrent factor the decision could have on armed forces and the general

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\(^{23}\) Mr. Lubanga is charged with the crime of enlisting and conscripting children under the age of fifteen or using them to participate actively in hostilities, punishable under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

\(^{24}\) DDR programs refer to efforts to remove guns from circulation, disband armed forces and return combatants to civilian life. For a more detailed definition of disarmament, demobilization and reintegration, see UNIFEM, *Getting it Right, Doing it Right: Gender and Disarmament, Demobilization and*
recognition of the law as being in place to protect children from exploitation by armed groups. Part V is a conclusion.

II. The Development of International Law Concerning Child Soldiers

The Additional Protocols to the four Geneva Conventions of 1949, introduced in 1977, were the first international legal documents to specifically address the subject of child soldiers (“Protocol I” and “Protocol II”). Protocol I pertains to international conflicts and requires parties to the conflict to take “all feasible measures” to ensure that children under fifteen years of age do not take a direct part in hostilities nor be recruited into the armed forces. Protocol II, which deals with conflicts not of an international nature, provides slightly stricter guidelines for the recruitment of child soldiers. Article 4(3)(c) does not contain the feasibility language of Protocol I, but instead specifically forbids the recruitment of children under the age of fifteen. More than a decade later, members of the international community readdressed the subject of child soldiers with the Convention on the Rights of the Child (“CRC”). Article 38 of the CRC adopts the language of Protocol I, urging States Parties to take “all


26 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 77(2) 8 June 1977, [hereinafter Protocol I].
27 “[C]hildren 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.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts Article 4(3)(c), 8 June 1977 [hereinafter Protocol II].
feasible measures” to keep children under age fifteen from direct participation in armed conflict.\textsuperscript{29} The CRC appears to take a step back from the unequivocal language of Protocol II. While it retains similar language in regard to the recruitment of child soldiers, missing is the language forbidding their participation in hostilities.\textsuperscript{30} Omissions such as these may be one of the reasons why the CRC has been so widely ratified. The CRC currently has 193 States Parties\textsuperscript{31} and has gained more international acceptance than Protocols I and II of the Geneva Conventions.\textsuperscript{32}

In 2002, an Optional Protocol to the Conventions on the Rights of the Child (“Optional Protocol to the CRC”) that affords stronger protection against the use of child soldiers came into effect.\textsuperscript{33} The age for direct participation in hostilities was raised from fifteen to eighteen\textsuperscript{34} and compulsory recruitment of individuals under the age of eighteen is forbidden under the Optional Protocol to the CRC.\textsuperscript{35} States that ratify the Optional Protocol to the CRC may allow voluntary recruits under eighteen years of age but older than fifteen, provided they submit a binding document setting out their voluntary

\textsuperscript{29} While the feasibility language is the same, the CRC puts the responsibility on the States Party, whereas the Additional Protocols of the Geneva Conventions required only the parties of the conflict to be concerned with the age of recruits. \textit{Id.} at Article 38(2).

\textsuperscript{30} Convention on the Rights of the Child, Article 38(3).


\textsuperscript{32} Even though the CRC is more widely ratified, Protocols I and II to the Geneva Conventions enjoyed broad participation by states in the drafting phases. This can be a factor in determining whether or not the contents of the documents have attained the status of customary international law. Customary international law is “the creation of state practice and \textit{opinio juris}… [that] the state practice must have been motivated by a belief that such conduct was legally obligatory.” For a more detailed discussion of the laws concerning the use of child soldiers and customary international law, \textit{see}, Happold, \textit{supra} note 14 at 41.


\textsuperscript{34} \textit{Id.} Article 1.

\textsuperscript{35} \textit{Id.} Article 2.
recruitment policy and employ safeguards against recruiting underage soldiers. Article 4(1) makes the Optional Protocol to the CRC binding on non-government fighting forces. While the Optional Protocol to the CRC appears to afford greater protections to children, it has not been as widely ratified as the CRC and therefore may be limited in its potential impact.

The issue of child soldiers has also been approached as a labor law issue. In 1999, the International Labour Organization (“ILO”) adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (“Convention 182”). Convention 182 lists the use of child soldiers, whether voluntary or through compulsion, as one of the worst forms of child labor which States Parties must take urgent measures to prohibit.

36 Id. Article 3(2).
37 Id. Article 3(3)(a-d).
38 Id. Article 4(1).
39 As of April 18, 2010, the Optional Protocol to the CRC had 132 states parties as compared to the 193 states parties to have ratified the CRC. See, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en. Notably, the United States ratified the document, but submitted a declaration setting forth the delegation’s interpretation of “direct part in hostilities,” which they wrote means: “immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy” and does not mean “indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.” United States Interpretive Declaration to the Optional Protocol to the Convention on the Rights of the Child, A/RES/54/263, para. 2(B)(i) and (ii)(entered into force February 12, 2002).
41 Convention 182, Article 3(a).
42 Convention 182, Article 1.

children.\textsuperscript{47} Broader than binding treaties such as the CRC, the Paris Principles define a child soldier as:

any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.\textsuperscript{48}

This definition explicitly rejects prohibiting only participation in “direct hostilities”. While it does not offer a definition for direct hostilities, the language broadly encompasses a range of combat and support roles in the armed forces that would make a child a soldier. In doing so, the Paris Principles eliminate the ambiguity surrounding who is considered a child soldier and represent a “child rights-based approach” to the law.\textsuperscript{49}

Also unique to the Paris Principles is the special recognition given to the situation of female child soldiers.\textsuperscript{50} Among the many gender provisions included, the Paris Principles address the recruitment of girl soldiers,\textsuperscript{51} the sexual based violence they experience,\textsuperscript{52} and the particular problems and stigmas that female child soldiers face when they are released from armed groups.\textsuperscript{53} The special attention paid to female child soldiers in the Paris Principles is significant because commonly the idea of a child soldier conjures up the image of a young boy. This becomes problematic because girl soldiers are then overlooked under the law and in demobilization, disarmament and reintegration (“DDR”) programs. By specifically discussing the situation of female child soldiers, the

\textsuperscript{47} Paris Principles ¶1.10-1.12.  
\textsuperscript{48} Paris Principles ¶ 2.1.  
\textsuperscript{49} Paris Principles ¶1.5.  
\textsuperscript{50} Paris Principles ¶1.0, 4.0-4.3, 6.28-6.30.3, 7.23-7.24.5, 7.59-7.67, 7.72.  
\textsuperscript{51} Paris Principles ¶ 6.28-6.30.  
\textsuperscript{52} Paris Principles ¶1.0.  
\textsuperscript{53} Paris Principles ¶ 7.23-7.24.5.
Paris Principles serve as an important example of what the international community can aspire to in terms of protecting all child soldiers. However, because the Paris Principles are not binding, the international community must work within the confines of current international law to prosecute crimes involving the use of child soldiers.

III. The Prosecutor v. Thomas Lubanga Dyilo

The Rome Statute of the ICC does not define a child soldier in the same manner as aspirational documents such as the Paris Principles, but rather adheres more closely to earlier documents such as the CRC. The following section discusses the statutory language of the Rome Statute and the charges against Mr. Lubanga and offers suggestions on how the language should be interpreted.

A. An Introduction to the Case against Thomas Lubanga

Since 1998, the Democratic Republic of Congo (“DRC”) has been embroiled in a conflict that has claimed the lives of over 5.5 million people. The conflict resulted from a combination of political unrest, land disputes and the appropriation of natural resources. Complex and complicated, it has involved a number of armed groups that have brutalized the civilian population and earned the DRC the “rape capital of the world” title. The conflict caused the Prosecutor of the International Criminal Court to

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56 The conflict in the DRC is deserving of many pages of writing but is outside the scope of this paper. For a more detailed history and background, see, KARL R. DEROUEN & UK HEO, CIVIL WARS OF THE WORLD: MAJOR CONFLICTS SINCE WORLD WAR II, VOLUME 2, 291-310 (2007).
begin investigating crimes committed in the Ituri district of the DRC in July of 2004.\textsuperscript{58}

As a result of the investigation, an arrest warrant was issued for the arrest of Thomas Lubanga Dyilo on February 10, 2006.\textsuperscript{59}

Thomas Lubanga Dyilo is the alleged founder and president of the \textit{Union des patriotes congolais} ("UPC") as well as the alleged Commander-in-Chief of its military wing, the \textit{Forces patriotiques pour la liberation du Congo} ("FPLC").\textsuperscript{60} Mr. Lubanga is currently on trial for crimes he allegedly committed between July 1, 2002 and December 31, 2003 in his capacity as president of the UPC and Commander-in-Chief of the FPLC.\textsuperscript{61} He is charged with the crime of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities, punishable under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).\textsuperscript{62}

Because \textit{The Prosecutor v. Thomas Lubanga Dyilo} ("the Lubanga case") is the first to be tried before the International Criminal Court, there is no ICC case precedent upon which to rely for statutory interpretation.\textsuperscript{63} Therefore, the Court should look beyond the statutory language to the \textit{travaux préparatoires} for insight as to the meaning

\begin{footnotesize}
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\item[58] Case Information Sheet, Situation in the Democratic Republic of Congo, \textit{supra} note 55.
\item[59] Situation in the Democratic Republic of Congo, Warrant of Arrest, ICC-01/04-01/06, February 10, 2006.
\item[60] Case Information Sheet, Situation in the Democratic Republic of Congo, \textit{supra} note 55.
\item[62] \textit{Id.} The difference between the two Articles is that Article 8(2)(b)(xxvi) proscribes the acts in the context of an international armed conflict, whereas Article 8(2)(e)(vii) prohibits the acts in the context of an armed conflict not of an international character. The Court found that the conflict in the Democratic Republic of Congo was of an international character from July 2002-June 2003 and not of an international character from June 2003-December 2003.
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of the crimes for which Lubanga has been charged. In addition, the *travaux préparatoires* and interpretations of preceding international instruments such as the Additional Protocols to the Geneva Conventions and judgments of other international tribunals such as the Special Court for Sierra Leone may help shed some light on the meanings of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii). The following sections discuss the statutory language of these articles and how it may be interpreted in the context of gender, first concentrating on “participate actively in hostilities” and then turning to the “conscripting” and “enlisting” language.

**B. Interpreting the Statutory Language “Participate Actively in Hostilities”**

The Preparatory Committee on the Establishment of an International Criminal Court (“PrepCom”) was the group in charge of drafting the statute that would eventually become the Rome Statute of the International Criminal Court. When the Court in the *Lubanga* case decides whether the defendant is criminally responsible for using children under the age of fifteen to “actively participate in hostilities,” it will look to the PrepCom draft statute for guidance due to the fact that the phrase is not further defined in the Rome Statute. In the draft statute, the members of PrepCom listed four options for how to

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64 Treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31. Supplementary interpretation may be conducted via examination of the preparatory work. *Id.*, Article 32.


66 In fact, the Court did note the PrepCom language in the Confirmation of Charges Decision for the *Lubanga* case and used it to form the opinion that a child can be considered to actively participate in hostilities unless the activity in question is “clearly unrelated to hostilities.” Confirmation of Charges ¶ 261-262.
proscribe children’s involvement in armed conflict. These options contained a footnote, which read:

The words “using” and “participating” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of [sic] the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

When PrepCom ultimately chose the option that became the language of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, the delegates did not further debate the meaning of these articles because they considered the footnote to be part of the travaux preparatoires and therefore an appropriate point of guidance for the meaning. This language has been used in other international tribunals for interpreting their statutes. In Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the “AFRC case”), the Special Court for Sierra Leone (“SCSL”) utilized the footnote in determining that the use of children to actively participate in hostilities is not confined to children actually taking up arms. The court noted:

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. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, mailing trails or finding routes, manning checkpoints or

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67 PrepCom Report, supra note 65 at 21.
68 Id.
70 The Special Court for Sierra Leone (“SCSL”) was granted jurisdiction to prosecute those with the greatest responsibility who were alleged to have committed crimes against humanity, serious crimes under international law, violations of Article 3 of the Geneva Conventions and some national laws of Sierra Leone in the territory of Sierra Leone since November 30, 1996. Statute of the Special Court for Sierra Leone, 2178 U.N.T.S. 145 (January 16, 2002).
71 Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, the Special Court for Sierra Leone, SCSL-04-16-T, June 20, 2007, ¶ 734 (hereinafter AFRC case).
acting as human shields are some examples of active participation as much as actual fighting and combat.  

Noting their reliance on the PrepCom documents, the SCSL ultimately found all of the defendants in the AFRC case criminally responsible for “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”

While the PrepCom materials provide some insight as to the meaning of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, the documents provides no additional insight as to what the term “hostilities” encompasses. However, the International Committee of the Red Cross Commentary on the Additional Protocols to the Geneva Convention discusses hostilities as “an inherently flexible term whose precise meaning could vary from conflict to conflict and possibly even from situation to situation within a conflict.” Keeping the flexible nature of “hostilities” in mind, it becomes clear why the acts that constitute using children under age fifteen to actively participate in hostilities must also be flexible and examined within the context of the particular hostility. In any given situation of conflict, it is also important to remember the statutory purpose of such provisions and why they became part of the Rome Statute. Ultimately, this and previous international documents have set up these provisions to protect children and convey the

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72 Id. ¶ 737.
73 Id. ¶ 736.
74 Statute of the Special Court for Sierra Leone, Article 4(c). In addition, the SCSL in a separate case found the same provision to be a part of customary international law. Prosecutor v. Sam Hinga Norman, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72(E) (May 31, 2004).
notion that “their blood should not be spilled during armed conflict.”\textsuperscript{76} In order to reach the goal of protecting children, international treaties and laws should be interpreted in a manner to serve this purpose.

1. Statutory Interpretation and its Implications for Female Child Soldiers

It has been conjectured, due to PrepCom’s broad interpretation of the words “using” and “participate,” that there are other contexts under which a child could be construed to be actively participating in hostilities. For example, utilizing a child to carry weapons could be considered “using” under the statute.\textsuperscript{77} When defined broadly in this manner, other acts could be included in the definition of “participate actively.” This becomes particularly important in the case of female child soldiers, whose roles in armed conflict are misunderstood. They are often considered to be only “wives” of combatants, a conclusion that leads to a lack of understanding about girls’ centrality to armed forces\textsuperscript{78} and causes girl soldiers to be excluded from reintegration efforts post-conflict.\textsuperscript{79} In order to ensure girl soldiers adequate recognition under the law so that they will no longer be invisible, the Court must closely examine the role of female child soldiers in armed conflict.

It is not uncommon for one to think of boys as embodying the role of child soldier. However, a careful examination of armed conflict reveals that the dynamic and multidimensional role of children in armed forces requires a broader interpretation of

\textsuperscript{76} Id. at 48.
\textsuperscript{77} TRIFFTERER, supra note 15 at 471.
\textsuperscript{79} \textit{The Prosecutor v. Thomas Lubanga Dyilo}, Written Submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, ICC-04/04-01/06-1229-AnxA, ¶ 26 (March 18, 2008).
Kristin Gallagher  
Brooklyn Law School  
617.953.1655  
gallagkr@gmail.com

who is a child soldier. In particular, female child soldiers are often overlooked because they are often not thought of as fighters. However, research has demonstrated that this is a misconception and that girls are routinely used as combatants in armed conflicts throughout the world.\(^{80}\) In addition, witness testimony in the *Lubanga* case reveals that girls were routinely used as fighters and often received the same military training as male child soldiers.\(^{81}\) Female child soldiers not only participate in armed conflict as fighters, but they are also unfortunately compelled to fulfill other gendered support roles such as cooks, “wives” to commanders and sex slaves. As the Special Representative of the Secretary-General on Children and Armed Conflict testified,

[Children] are forced to play multiple roles. They will play a role where they will be combatants one minute. They may be, especially girls, sex slaves another minute...[t]hough some are mainly combatants, others may be mainly sex slaves...but those who are sex slaves will also at some point do some military work.

In essence, female child soldiers’ experience in armed conflict is varied and multidimensional. It is not that they are only sex slaves or domestic laborers; because of their gender they are not only expected to fight as soldiers but are also required to take on these additional burdens\(^{82}\) and suffer related harms.\(^{83}\) It is important that the Court remember the broad meaning of the phrase “use to actively participate in hostilities”

\(^{80}\) See, e.g., Coutler, *supra* note 78. See also, Myriam Denov, *Girls in Fighting Forces: Moving Beyond Victimhood*, Canadian International Development Agency (2007).


\(^{82}\) Transcript of Record, ICC-01/04-01/06-T-166-ENG CT WT (rev.dec.1974) 95/102 EA T, (April 7, 2009).

\(^{83}\) Female child soldiers who are sexually assaulted or enslaved deal with a special set of problems related to this abuse, such as Sexually Transmitted Infections (“STIs”), pregnancy, abortion, mutilation, etc. See, *i.e.* Denov, *supra* note 80.
when examining the role of girls in armed forces. This definition allows for the recognition of activities that are linked to hostilities but do not necessarily entail the holding or firing of a firearm. Therefore, the Court could reasonably conclude that the duties relegated to female child soldiers such as “wife” or sex slave fall into the definition of “using” or “participating.”

The Court should, however, refrain from setting rigid categories of prohibited activities in evaluating whether a child has actively participated in hostilities. To do so would go against the broad nature of the footnote included in the PrepCom draft statute. Nothing in the footnote language suggests that the listed activities are all-inclusive; rather, the language indicates that any activities sufficiently tied to hostilities could be included in the determination that a child is being used to actively participate. Such a determination should involve a case-by-case analysis.

Given the abundance of witness testimony about sexual exploitation of female child soldiers and the documentation of such occurrences, the Court should consider the role of sex slave or “wife” as part of the determination of whether a child has been used

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84 Gender and sexual based violence require special attention not only because of the specific harms associated with such acts, but also because these types of acts are destructive of societies and can be considered in charges of genocide. They can also constitute torture. See, Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, ¶597, 690 (September 2, 1998). Rape and sexual violence are used in conflict for purposes of “intimidation, degradation, humiliation, discrimination, punishment, control or destruction” Akayesu, ICTR-96-4-T, ¶597. Gender and sexual based violence also violate fundamental rights, such as the right to physical integrity, reproductive health, freedom of association and right to safety. Dyan Mazurana, Women in Armed Opposition Groups in Africa and the Promotion of International Humanitarian Law and Human Rights, Program for the Study of International Organization(s), 28-29 (2005), available at http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6WEJRW/Sfile/genevacall-africa-gender-nov05.pdf?openelement.
85 PrepCom Report, supra note 65 at 21.
86 Written Submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, supra note 79 at para. 12.
to actively participate in hostilities. For example, the Court may decide that forcing female child soldiers to act as “wives” to commanders for the commanders’ military success establishes a sufficient link to combat so as to make the determination that the girl was used to participate actively in hostilities.\(^{89}\) In addition, the Court should consider whether the taking of “wives” was incidental to being a child soldier or instead represented a practice associated with the use of child soldiers, much like combat training or other forms of indoctrination. Court records reveal that this practice was very often forced upon female child soldiers.\(^{90}\) In reality, becoming a “wife” was just as much a part of a female child soldier’s duties as combat or cooking and cleaning.\(^{91}\) While the role of “wife” is one that does not appear voluntary,\(^{92}\) it is one that often changes a female child soldier’s standing within the ranks and can afford her some protection against sexual

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\(^{89}\) Reports from other conflicts reveal that it is not uncommon for girls to be given to commanders in this manner. In Sierra Leone, 25% of male fighters in the Revolutionary United Force reported receiving “wives” as a reward post-combat. In Uganda, female child soldiers were frequently given as “wives” following military operations, sometimes in rituals where soldiers would throw their shirts in a pile and force girls to pick out a shirt and become the “wife” of the man whose shirt she selected. Plan UK, *Because I am a Girl: The State of the World’s Girls 2008: Special Focus in the Shadow of War*, 59-60 available at http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-7FZHJS/$file/Plan-Jun2008.pdf?openelement

\(^{90}\) See, i.e., Transcript of Record at 65-66, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-138-ENG (February 27, 2009); Transcript of Record at 10, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-202-ENG; *The Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891, ¶ 33-34 (May 22, 2009). See also, Transcript of Record at 21, Expert Testimony of Kristine Peduto, ICC-01/04-01/06-T-207-ENG (July 9, 2009) (noting, “the accounts of the boys and the girls made it clear that this was a systematic conduct. The girls had to systematically spend the night in a separate area, and they were forced to spend the night with the officers.”).

\(^{91}\) Transcript of Record at 65-66, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-138-ENG (February 27, 2009); Transcript of Record at 10, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-202-ENG; Transcript of Record at 21, Expert Testimony of Kristine Peduto, ICC-01/04-01/06-T-207-ENG (July 9, 2009).

\(^{92}\) See, i.e., “There were very little girls... as soon as the girl’s breasts started to grow, Thomas Lubanga's commanders could select them as their forced wife. ‘Wife’ is the wrong word.” Transcript of Record at 12, Submissions by Prosecutor Luis Moreno O’Campo, *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-T-107-ENG ET WT (January 26, 2009).
violence from other members of the armed group.\textsuperscript{93} It is also a role that can have a devastating psychological impact on female child soldiers.\textsuperscript{94} In light of the systematic giving of female child soldiers as “wives”, the Court will need to consider the practice in determining whether girls were used to participate actively in hostilities. This is not to say that the practice of taking “wives” is a decisive factor in determining whether children were used to actively participate in hostilities, but rather that it should not be automatically discounted as not having a sufficient link to combat.

While it could be argued that practices such as sexual enslavement and forced pregnancy are separate crimes covered by the Rome Statute and therefore should not be considered as factors in determining the usage of child soldiers, to do so would result in an inadequate recognition of the harms suffered by female child soldiers.\textsuperscript{95} While sexual enslavement and forced pregnancy are punishable on their own,\textsuperscript{96} these acts may also be looked at in the context of armed conflict to determine whether a child under fifteen years of age was used to participate actively in hostilities.\textsuperscript{97} As one expert testified in the \textit{Lubanga} case, “girls’ participation is central in sustaining a force because of their productive and reproductive labour. Sex labour in the DRC conflict was an integral part

\textsuperscript{93} Plan UK, \textit{supra} note 89 at 59-60.
\textsuperscript{94} Expert Witness Kristine Peduto testified that many young girls did not realize the “marriages” were not legitimate until they were passed on to another commander to become his “wife” and that consequently, “their psychological and physical state…was quite catastrophic.” Expert Testimony of Kristine Peduto, \textit{supra} note 91 at 31.
\textsuperscript{95} Telephone Interview with Max Marcus, formerly with the Office of the Prosecutor at the Special Court for Sierra Leone, March 18, 2010.
\textsuperscript{96} The Rome Statute, Article 7(1)(g), 8(2)(b)(xxii).
\textsuperscript{97} This becomes particularly important in the \textit{Lubanga} case, as the charges against him are limited to using/conscripting/enlisting child soldiers. \textit{The Prosecutor v Thomas Lubanga Dyilo}, N. ICC-01/04-01/06-803, Decision on the Confirmation of Charges (January 29, 2007).
to the function of girl soldiers.” 98 If the Court can make the determination that these
gendered roles were sufficiently tied to combat, there is no reason for the Court to omit
this from their analysis in determining whether a child was used to participate actively in
hostilities.

C. Statutory Interpretation of “Conscripting” and “Enlisting”

While Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) prohibit the “[c]onscripting or
enlisting children under the age of fifteen years,” neither the Rome Statute nor other
international law provides a definition of the terms conscripting or enlisting. 99 However,
some of the PrepCom materials and expert commentary provide insight as to the meaning
of these terms. In the original PrepCom draft statute, the term “recruiting” was used but
was later replaced with the current terminology of “conscripting or enlisting.” 100 In
comparison to recruiting, the adopted terms suggest that the statute seeks to prohibit more
passive acts than what recruiting typically denotes. 101 The threshold for determining
criminal responsibility for conscripting or enlisting would therefore be lower than that of
recruiting, since recruiting implies actively seeking new members.

Enlisting need not require any force or action on the part of the armed forces. The
act of enlisting can be as simple as putting someone on the “list” of an armed group. 102
In fact, looking at the elements of the crime as defined in Articles 8(2)(b)(xxvi) and
8(2)(e)(vii) of the Rome Statute, the mens rea requirement makes it a crime to fail to

98 Testimony of Dr Elisabeth Schauer, supra note 16 at 96. The sexual labor of female child soldiers is
violative of the girls’ reproductive rights. Traditional beliefs about childbirth and marriage in the DRC
would be widely known and in fact were likely part of the armed forces intent to destroy the society.
99 TRIFFTERER, supra note 15 at 472.
100 PrepCom Report, supra note 65 at 21.
102 TRIFFTERER, supra note 15 at 472.
prevent a child under the age of fifteen years from voluntarily enlisting if the accused knew or should have known that the child was under age. 103 The SCSL made a similar determination as to the nature of enlistment, concluding that it “entails accepting and enrolling individuals when they volunteer to join an armed force or group.” 104 This is especially important because even when children “volunteer” for the armed forces, their choice cannot be said to be truly voluntary, as they are often forced by a myriad of reasons, among them being economic necessity, dire poverty, immense pressure from the community to join armed groups, an underdeveloped understanding of the implications of participation in hostilities, and the glorification of violence by members of the armed forces. 105 Because children are incapable of giving informed consent to become a member of armed forces, it makes sense that the burden is on the armed forces to verify that a child is not underage. 106

Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute also prohibit conscripting, the more coercive form of obtaining soldiers that embodies the compulsory entry into armed forces. 107 International jurisprudence offers further explanation of what conscription means. For example, the SCSL adopted an interpretation of the term which

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104 AFRC case, Special Court for Sierra Leone, SCSL-04-16-T, June 20, 2007, ¶ 735.
105 Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, supra note 13, para. 38-43; Written Submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, supra note 79 at ¶ 13-14.
106 This argument is bolstered by the fact that the ICC has established that the consent of a child is not a valid defense to the crimes relating to child soldiers. The Prosecutor v Thomas Lubanga Dyilo, N. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 247.
107 TRIFFTERER, supra note 15 at 472.
“encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children.” 108

The question as to when a child is considered conscripted is still debated, although commentators have said that conscripting and enlisting refer to “the moment of formal enrolment or incorporation into the armed forces, that is, of joining the armed forces whether or not the child genuinely consents to it.” 109 This is important for several reasons. First, it would be nearly impossible to determine whether a child is conscripted or enlisted based on the role they fill on any given day. In addition, the commentators’ interpretation adequately conveys an understanding of the law’s primary purpose in protecting children from participating in armed conflict 110 and recognizes that children are incapable of consenting to becoming a soldier. 111 The law thereby necessitates a complete absence of children under fifteen from participating in armed conflict and provides a bright-line rule against their presence. The Lubanga court has recognized that conscription and enlistment are to be interpreted in this manner, referring to the crime of conscripting and enlisting as “an offense of a continuous nature,” 112 meaning that the crime continues to be committed until the child turns fifteen years of age or they leave the armed group. 113 This interpretation thus allows for the strongest adherence to the

108 *AFRC case*, Special Court for Sierra Leone, SCSL-04-16-T, June 20, 2007, ¶ 734.
109 *TRIFFTERER, supra* note 15 at 472.
110 Such an interpretation prevents armed forces from keeping children among their ranks but claiming to keep them out of active participation in hostilities. This protects children who would be in the ranks from being forced into combat when commanders feel it is to their military advantage or necessity. Mann, *supra* note 75.
111 *Id.*
112 *The Prosecutor v Thomas Lubanga Dyilo*, N. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 248.
113 *Id.*
statutory purpose of protecting children from armed conflict and should be applied in the judgment of the *Lubanga* case.

### 1. Statutory Interpretation and its Implications for Female Child Soldiers

There are several ways the Court may utilize the above interpretation of the terms “conscripting” and “enlisting” to best protect all child soldiers. The Court’s analysis should look at how the child was separated from their family and community, how the child was enrolled into the armed forces and what acts the child is required to perform while with the armed group.\(^{114}\) Looking at these facts provides a context under which the Court may determine whether a child was in fact conscripted or enlisted into an armed group. Gender-specific acts are especially important in determining whether a girl has been conscripted or enlisted. Some advocacy groups have argued that rape and other sexual crimes were in fact an “integral component of the process of enlistment and conscription for girls” in the DRC.\(^{115}\) This argument pushes for the recognition that female child soldiers fulfill multiple roles in armed forces and that they should not be excluded from the category of child soldiers merely because their roles may be sexual in nature. In other words, crimes of a sexual nature against female child soldiers in the DRC were so engrained in the conscription and enlistment procedures that evidence of sexual violence against a girl in the armed forces could actually bolster the claim that she is a child soldier.

\(^{114}\) Written Submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, *supra* note 79 at ¶ 16.

\(^{115}\) “Based on our documentation and analysis…rape and other forms of sexual violence were an integral component of the process of enlistment and conscription for girls, particularly during the initial abduction phase and period of military training by the UPC.” The Women’s Initiatives for Gender Justice, ICC Women’s Voices March 2010, *available at* http://www.iccwomen.org/Womens-Voices-3-10/WomVoices3-10.html.
While this may appear to some to be an assertion lacking precedent, it should be remembered when interpreting the language of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) that the lack of gender-specific language in the PrepCom Report should not be taken to mean that a discussion of gender is not warranted. In fact, international law has only gradually developed and enforced the recognition of gender in the law. At one time, gender and sexual based crimes were thought of as a natural result of conflict.\textsuperscript{116} When the Geneva Conventions of 1949 and Protocols I and II were implemented, none contained separate provisions for sexual based crimes but rather included them as outrages against personal dignity.\textsuperscript{117} However, rape was prosecuted as a crime in both the German and Japanese tribunals following World War II.\textsuperscript{118} Progress was made in the time leading up to the Rome Statute, as the statutes of the International Criminal Tribunal for Rwanda (“ICTR”)\textsuperscript{119} and the International Criminal Tribunal for Former Yugoslavia (“ICTY”)\textsuperscript{120} list rape as a crime against humanity.\textsuperscript{121} However, as recently as 1998, the ICTR noted

\begin{footnotesize}
\textsuperscript{117} Geneva Convention of 1949; Protocol I, Article 75(2); Protocol II, Article 4(2)(e).
\textsuperscript{118} While the Charter of International Military Tribunal for the Far East (“IMTFE”) did not contain the term “rape,” the act of rape was discussed in the IMTFE Judgment, particularly in relation to the events during the “Rape of Nanking.” International Military Tribunal for the Far East, Judgment, Chapter VII Atrocities, available at http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html (1947). For the German statute, which did include rape, see, Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes and Crimes Against Humanity for Germany (1945).
\textsuperscript{119} See http://www.ictr.org/
\textsuperscript{120} See http://www.icty.org/
\end{footnotesize}
that it would have to construct a definition for rape because, “there is no commonly
accepted definition of [rape] in international law.”

When looked at in the historical context, the Rome Statute is a milestone as the first
treaty to recognize a variety of sexual and gender based crimes including “[r]ape, sexual
slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form
of sexual violence of comparable gravity” as belonging to the category of the most
serious crimes under international law. However, the inclusion of such crimes did not
happen without a fight, as the PrepCom draft statute did not contain any gender or sexual
based crimes. Outside influence and pressure from advocacy groups such as the
Women’s Caucus was instrumental in advocating for the inclusion of these crimes during
PrepCom. Therefore, given the gradual recognition and enforcement of gender and
sexual based crimes, a decision in the Lubanga case that recognizes the unique
circumstances of female child soldiers and aims to protect all child soldiers is
representative of a trend in the direction of gender-sensitive international law rather than
an anomaly.

IV. The Potential Impact of Broad Statutory Interpretation

1. How Does Armed Conflict Affect Female Child Soldiers?

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122 Akayesu, ICTR-96-4-T, ¶ 596.
123 The Rome Statute, Article 7(1)(g), Article 8(2)(b)(xxii).
124 PrepCom Report, supra note 65.
125 Women’s Initiatives for Gender Justice, About the Women’s Caucus,
http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm; Association for Women’s
Rights in Development (AWID), Gender Justice and the ICC: Turning a Miracle into Reality (April 19,
In the Democratic Republic of Congo, an estimated 30,000 children awaited demobilization at the end of 2003 when the hostilities officially ended. However, no DDR programs were implemented until 2005. In the two years it took to enact DDR programs, many child soldiers escaped or were abandoned and did not go through formal demobilization. Of the children who were formally demobilized, only 12% were girls, even though it is estimated that 40% of the child soldiers involved in the conflict were girls. This means that the majority of female child soldiers did not receive services from DDR programs and are likely going without access to healthcare, remunerations, psychiatric care or professional help reintegrating into their communities. As one expert aptly put it, “girl combatants are often invisible…they either slip away or are not brought forward for DDR programs.” This is especially troubling given the gender specific violations and complications that female child soldiers experience while in armed conflict.

For example, female child soldiers often face intense stigmatization upon returning to their communities post-conflict. They will therefore avoid returning to

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126 Coalition to Stop the Use of Child Soldiers, *supra*, note 11 at 107.
127 *Id.*
128 *Id.*
129 *Id.* at 110. Another study that took place in the Eastern DRC reported that only 23 out of the 1718 child soldiers who were demobilized in the period between December 2003 and September 2004 were girls. Save the Children, *Reaching the Girls Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of Congo*, 6 (2004) [hereinafter Reaching the Girls Study].
130 Written Submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, *supra* note 79 at ¶ 26.
131 There are many socio-cultural factors that comprise stigmatization. See, generally, e.g., Nathalie de Watteville, *Addressing Gender Issues in Demobilization and Reintegration Programs* (2002). See also, *Reaching the Girls Study, supra* note 129 at 14-16.
their communities for fear for rejection, as is often the case in DRC.\textsuperscript{133} The situation becomes even more complicated and the concerns about stigmatization are greater if a girl returns with a child\textsuperscript{134} or if the girl was a victim of sexual violence\textsuperscript{135} because of cultural beliefs and ideas surrounding the ability of these girls to marry.\textsuperscript{136} Girls returning from combat can experience homelessness and domestic violence as a result of their capture into the armed forces.\textsuperscript{137} As female child soldiers in the DRC were commonly used as sex slaves and “wives” of commanders in addition to the other duties of child soldiers,\textsuperscript{138} this means that many young girls face intense stigmatization and rejection from their communities and are therefore often without any means of support.

Without support from their communities or the services from DDR programs, female child soldiers are often forced to cope with severe physical and psychological injuries caused by the acts they are forced to commit as child soldiers. For example, female child soldiers suffer from gynecological infections, sexually transmitted diseases including HIV, complications from abortions and other ailments.\textsuperscript{139} In addition they may experience the psychological effects from their experiences, including flashbacks, persistent fears, harm caused by being forced to bear and raise children born out of rape by members of the armed forces and drug addiction.\textsuperscript{140} They may also suffer from Post

\textsuperscript{133} Coulter, \textit{supra} note 78 at 27.
\textsuperscript{134} McKay & Mazurana, \textit{supra} note 132 at 34-35.
\textsuperscript{135} Denov, \textit{supra} note 80 at 22.
\textsuperscript{136} Testimony of Dr Elisabeth Schauer, \textit{supra} note 16 at 51.
\textsuperscript{137} Elisabeth Schauer, \textit{The Psychological Impact of Child Soldiering}, vivo (e.V.) 28-29 (2009).
\textsuperscript{138} See, e.g., “Based on our documentation and analysis, we advocate the position that rape and other forms of sexual violence were an integral component of the process of enlistment and conscription for girls, particularly during the initial abduction phase and period of military training by the UPC.” Women’s Voices, March 2010, \textit{supra} note 115.
\textsuperscript{139} Denov, \textit{supra} note 80 at 21.
\textsuperscript{140} \textit{Id}. at 20.
Traumatic Stress Disorder ("PTSD") or depression. Unfortunately, it is the norm that health or psychological services are unavailable to female child soldiers. 

Lack of access to education and traditional gender roles are also barriers to reintegration of female child soldiers. Female child soldiers have difficulty accessing DDR programs and employment because they are generally less educated than male combatants and are often illiterate. Girls not only have to overcome the stigmatization that comes with being a female child soldier but are also working within patriarchal societies where they are treated as less than men. For this reason, former female child soldiers are less able to relocate to areas where opportunities and programs exist, presenting another barrier to accessing services.

2. Why are Female Child Soldiers Excluded from Disarmament, Demobilization, and Reintegration Programs when there is an Obvious Need?

As noted above, there are significant barriers to services for female child soldiers. Several studies have looked at why girls are systematically excluded from DDR programs. In one study of several African countries, it was found that the majority of females were excluded from DDR programs because they had not been identified as

141 Theresa S. Betancourt, et al, Past horrors, present struggles: The role of stigma in the association between war experiences and psychosocial adjustment among former child soldiers in Sierra Leone, SOCIAL SCIENCE & MEDICINE, 70, 71 (2010). The article was based on a study of former child soldiers in Sierra Leone and contained rich information about the particular psychological effects of rape on victims and the relationship between rape and anxiety, depression and hostility.
142 Id.
143 Watteville, supra note 131 at 12.
144 "The reality in the DRC and in Africa in general is that women and girls are second-class citizens. They are subordinate to men...” Transcript of Record, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-107-ENG ET WT, 54 (January 26, 2006); See also, Watteville, supra note 131 at 14.
145 Watteville, supra note 131 at 14.
combatants. Another study completed in Angola found that girls needed to be formally recognized as combatants in order to participate in the DDR programs. This societal reluctance to recognize girls as combatants is a contributing factor keeping female child soldiers out of DDR programs.

Girls are also excluded from DDR programs in the Democratic Republic of Congo because of the belief that one must surrender a weapon in order to be eligible for participation in a program. Although this is not true in the DRC, it is not unheard of for this to be a requirement of DDR programs. In Sierra Leone, researchers reported that half of the girls they interviewed wanted to disarm but they couldn’t—22% of those women said they couldn’t disarm because they did not have access to a weapon, a requirement for the DDR programs in that country.

Another issue that prevents girls from accessing DDR programs is the chronic misunderstanding of girls’ multifunctional roles in combat and the perpetuation of this misunderstanding by armed groups. Because girls are commonly thought of only as sex slaves or “wives” of commanders, they are often overlooked when DDR programs are offered. This suits the needs of armed groups, as commanders see girls as their possessions and claim them as “wives,” resisting their participation in DDR programs.

An ICC decision to the contrary that recognizes the role of “wife” as being one of many

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146 McKay & Mazurana, supra note 132 at 11.
148 Reaching the Girls Study, supra note 129 at 12.
149 Id. at 13.
150 Another study placed this percentage even higher at 46%. Coulter, supra note 78 at 22.
151 It is not uncommon in the traditional communities within the DRC for the assumption to be that once girls are associated with armed forces they are identified as a military “wife.” Reaching the Girls Study, supra note 129 at 12.
152 Id. at 12.
roles that female child soldiers fulfill will help to destroy the myth that girls are only “wives” and may force leaders of armed groups to allow girls to participate in DDR programs. A concrete holding set forth by the ICC that a child soldier may fulfill the role of “wife” and still be considered a child soldier will eliminate the ability of armed groups to use the excuse that girls are wives and therefore need not participate in DDR programs.

**Part V Conclusion**

The case against Thomas Lubanga marks an important opportunity to set international precedent regarding the use of child soldiers. Because the Rome Statute sets the minimum age of conscripting, enlisting or using child soldiers to participate actively in hostilities at fifteen years of age, the ICC decision will not reach the level of protection called for in aspirational documents such as the Paris Principles. Nor will the decision reflect upon all of the harms inflicted upon the people of the Democratic Republic of Congo. This means the Court’s decision will inevitably fall short of the expectations of some advocates. While this may be the case, the charges against Thomas Lubanga nevertheless represent an important opportunity in international jurisprudence. The Court has the opportunity to interpret Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) broadly, as necessitated by the statutory language and the *travaux preparatoires*. In doing so, child soldiers will be afforded the protection under the law that underlies the purpose of including such provisions in the Rome Statute. A broad reading will also allow for the protection of all child soldiers, especially females who suffer particular harms because of their gender but are all too often overlooked in their roles as child soldiers.