

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2013

Law as Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Direct Participation in Hostilities

Chris Jenks
Southern Methodist University, Dedman School of Law

Recommended Citation

Chris Jenks, Law as a Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities, 3 NAT'L SEC. & ARMED CONFLICT L. REV. 106 (2013-2014)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ARTICLE

Law as Shield, Law as Sword: The ICC's *Lubanga* Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities

Chris Jenks*

The International Criminal Court's Lubanga decision has been hailed as a landmark ruling heralding an end to impunity for those who recruit and employ children in armed conflict and a pivotal victory for the protection of children. Overlooked amidst this self-congratulation is that the ICC incorrectly applied the law governing civilian participation in hostilities which perversely places child soldiers at greater risk of being attacked. The Court created a false distinction between active and direct participation in hostilities. Expanding the kinds and types of behaviors that constitute children actively participating in hostilities expanded Lubanga's liability. But under the law of armed conflict active and direct refer to the same quantum of participation. And when a civilian, including a child soldier, directly participates in hostilities, they lose a pivotal protection - the protection from being made the lawful object of attack. The ICC's first verdict confuses an already opaque area of the law. Worse, the ICC now provides the international legal imprimatur for the permissible targeting of child soldiers under a wider range of circumstances than previously recognized.

Table of Contents

I. INTRODUCTION.....	107
II. BACKGROUND.....	109
III. CHILD SOLDIERS.....	113
A. Age of A Child Soldier Under International Law.....	113
B. Age of of the Child Soldiers in the UPC/FPLC.....	115
C. Activities Lubanga's Child Soldiers Performed.....	116
D. Parties' Views on Active Participation.....	117

IV. CIVILIANS UNDER THE LAW OF ARMED CONFLICT.....	119
A. <i>Active vs. Direct Participation</i>	120
V. THE LUBANGA DECISION’S RISK TO CHILD SOLDIERS.....	122
VI. CONCLUSION.....	124

I. INTRODUCTION

On March 14, 2012, the International Criminal Court announced its first ever verdict, finding a Congolese rebel militia leader guilty of conscripting and enlisting child soldiers under the age of fifteen into armed groups and using them to actively participate in hostilities,¹ which are war crimes under the Rome Statute.² The Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v. Thomas Lubanga Dyilo* focused on offenses committed in northeastern Democratic Republic of the Congo (DRC) between 2002 and 2003. This case marked a series of firsts for the International Criminal Court (ICC); the trial flowed from the court’s first formal investigation,³ Lubanga

¹ The term child soldiers, while used in this article, is often, and incorrectly, conceptualized as the barefoot boy carrying an AK-47 assault rifle half his size; *See generally* MARK DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2011) (discussing how, contrary to popular conceptions, there are almost as many girl child soldiers as boy child soldiers, how child soldiers perform more support type functions than carry and use weapons, and how there are more child soldiers in south Asia than Africa). The more contemporary, albeit wordy, term is children associated with armed forces and armed groups. UNICEF, *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, ¶ 2.1 (Feb. 2007), <http://www.unhcr.org/refworld/docid/465198442.html>, *see generally* The Secretary-General, Report of the Expert of the Secretary-General: Impact of Armed Conflict on Children, delivered to the General Assembly, U.N. Doc. A/51/306 (Aug. 26, 1996).

² *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Mar. 14 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [hereinafter *Lubanga Judgment*]. The court subsequently sentenced Lubanga to fourteen years in prison. Marlise Simons, *International Criminal Court Issues First Sentence*, N.Y. TIMES, July 10, 2012, *available at* <http://www.nytimes.com/2012/07/11/world/europe/international-criminal-court-issues-first-sentence.html>.

³ *Lubanga Case*, COAL. FOR THE INT’L CRIM. CT., <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited Mar. 13, 2013). The conflicts in the DRC are sometimes referred to as the First and Second Congo Wars or as Africa’s first world war. The conflicts, however styled, have claimed the lives of over five million people and displaced several million more. The conflicts have involved at least 8 African countries and more than twenty armed groups with varying, and alternating, allegiances and backing; *See generally* Q&A: *DR Congo Conflict*, BBC, <http://www.bbc.co.uk/news/world-africa-11108589> (last updated Nov. 20, 2012). The Second Congo War technically ended in 2003, but the November 2012 fighting in and around the eastern DRC city of Goma stems in large part from unresolved issues in the earlier conflicts. *See* Jeffrey Gettleman, *Congo Slips Into Chaos Again As Rebels Gain*, N.Y. TIMES, Nov. 26, 2012, *available at* <http://www.nytimes.com/2012/11/26/world/africa/as-rebels-gain-congo-again-slips-into-chaos.html>.

was the first person the ICC detained,⁴ and Lubanga's trial also marked the first time in international criminal justice that victims were formally recognized as participants in the proceedings and not just as prosecution witnesses.⁵

However, the proceedings were not without controversy. The use of confidentiality agreements, the role of third party intermediaries in witness interviews, and the disclosure (or lack) of exculpatory evidence to the defense are examples of controversial practices adopted by the court.⁶ As a result, the trial chamber directed Lubanga's release on two different occasions, of which both decisions were appealed and eventually reversed.⁷ Victims, availing themselves of their role as participants, unsuccessfully petitioned the court to supplement the charges against Lubanga to include sexual slavery and cruel/inhumane treatment, and then unsuccessfully appealed the denial.⁸

The *Lubanga* decision has been hailed as a landmark ruling which, according to the United Nations Secretary-General's Special Representative for Children and Armed Conflict, heralds an end to impunity for Lubanga and "those who recruit and use children in armed conflict."⁹ The head of the United Nations

⁴ Press Release, International Criminal Court, First Arrest for the International Criminal Court (Mar. 17 2006), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2006/Pages/first%20arrest%20for%20the%20international%20criminal%20court.aspx.

⁵ Along with that recognition, under the Rome Statute, victims are allowed to present their views and observations to the court. Again, for the first time in international criminal justice, the ICC trial chamber in *Lubanga* ordered reparations for the victims; See also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decisions Establishing the Principles and Procedures to be Applied to Reparations (Aug. 7, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>, see generally *Victims and Witnesses*, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx (last visited Mar. 24, 2013); *Thomas Lubanga Trial: Timeline of Victims' Engagement*, REDRESS, <http://www.redress.org/downloads/ThomasLubangavictimstimeline-140312.pdf> (last visited Mar. 24, 2013); *Lubanga Case - Q & A on ICC Landmark Decision on Reparations for Victims*, REDRESS (Aug. 14, 2012), http://www.vrwg.org/home/home/post/36-lubanga-case---q--a-on-icc-landmark-decision-on-reparations-for-victims#_ftn1.

⁶ See *Lubanga Case*, *supra* note 3. For example, there were 54 status conferences before the trial started. *Lubanga Judgment*, *supra* note 2, at ¶ 10. The presentation of evidence took place from January 2009 until May 2011. *Id.* at ¶ 11.

⁷ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecutions appeal against trial chambers' oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect (July 2, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc909257.pdf>.

⁸ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (May 22, 2009).

⁹ In landmark ruling, ICC finds Congolese warlord guilty of recruiting child soldiers, UN NEWS CENTRE (Mar. 14, 2012), available at <http://www.un.org/apps/news/story.asp?NewsID=41537&Cr=ICC&Cr1#.UNGGgYletK>.

Childrens Fund called the decision a “pivotal victory for the protection of children in conflict.”¹⁰ Overlooked amidst this self-congratulation is that the ICC’s first case incorrectly applied the law governing civilian participation in hostilities. Worse, the *Lubanga* Court’s overbroad interpretation of the criminal prohibition against employing children in hostilities leads to child soldiers losing, not gaining, protection under the law of armed conflict.

The criminal prohibition against employing children in hostilities is undoubtedly intended to protect child soldiers. Expanding the kinds and types of behaviors that constitute children actively participating in hostilities expanded the scope of Lubanga’s liability. But, while there is a protective aspect in that expansion, there is a retributive one as well, which is not directed at the Lubangas of the world. When a civilian, including a child, directly participates in hostilities, they lose a pivotal legal protection—the protection from being made the object of attack.

If the question of what constitutes direct participation is asked from a retributive perspective, as in when someone may be targeted, the range of qualifying activities is narrowly subscribed. While the perspective, retributive or protective, shapes the scope of the attendant answer, there is an unavoidable duality. This article explores the perverse mutualism of participation in hostilities, which the *Lubanga* court seemingly ignored.

The first section will review the conflicts in eastern DRC in which Lubanga utilized child soldiers. The next section discusses the lack on international consensus on the age of majority as a backdrop for the difficulties the ICC faced. From there, the article details the types of activities the ICC found UPC/FPLC child soldiers engaged in and the parties’ arguments as whether those activities constituted active participation in hostilities. The focus of the article then illustrates how the court incorrectly parsed active from direct participation. The article concludes that the *Lubanga* Court unfortunately further confused an already opaque area of the law. In the process, the ICC provides the international legal imprimatur for the permissible targeting of child soldiers under a wider range of circumstances than previously recognized.

II. BACKGROUND

Against the backdrop of “a series of political upheavals and rapidly shifting military alliances” in northeastern DRC that created a humanitarian situation the United Nations called “close to catastrophic”, Lubanga co-founded the Union des Patriotes Congolais (UPC) on September 15, 2000.¹¹ The UPC then

¹⁰ *Id.*

¹¹ Lubanga Judgment, *supra* note 2, at ¶¶ 79–81 (noting that Lubanga served as the “President” of the UPC).

became a rebel movement that vied for military control of the Ituri district, a mineral rich region of the DRC bordering Uganda.¹² To enable and foster that control, Lubanga mandated that every family in the area “contribute to the war effort by providing a cow, money, or a child” to the UPC.¹³

The UPC took over the city of Bunia, the capital of the Ituri district, on August 9, 2002.¹⁴ This proved to be a turning point in the conflict because the “nature of the violence against the civilian population reached unprecedented extremes.”¹⁵ To better facilitate this violence, Lubanga created the military wing of the UPC, the Forces Patriotiques pour la Libération du Congo (FPLC), for which he served as commander in chief.¹⁶ With that:

[t]he need for a more substantial army led to increased recruitment of young people—regardless of age—by targeting schools and the general public, and through coercive campaigns in the villages. . . . this inevitably led to the conscription, enlistment and use of children below 15 years of age

Furthermore, no attempt was made to check the ages of the recruits.¹⁷

Around this time, Lubanga claimed to have an army of some 15,000 troops.¹⁸ But the UPC/FPLC has been described as an army of children.¹⁹ Estimates are that roughly 40% of the UPC were under the age of eighteen,

¹² *Id.* at ¶¶ 22, 67, 81. The Ituri is “fertile and rich in resources such as gold, diamonds, oil, [and] timber.” *Id.* at ¶ 71. The Ituri also has one of the world’s largest concentrations of coltan, a mineral used in cell phone and laptop batteries. See *Q&A: DR Congo Conflict*, *supra* note 3. Resources form much of the basis for conflict in the DRC, ethnic tensions, exacerbated by colonial rule and arbitrarily set borders, the rest. The DRC has close to 450 different ethnic groups, with 18 different groups in the Ituri alone. Lubanga Judgment, *supra* note 2, ¶ 73.

¹³ *DRC: MONUC Denounces Recruitment of Child Soldiers by Lubanga’s UPC/RP*, IRIN HUMANITARIAN NEWS AND ANALYSIS AFRICA (Feb. 7 2003), <http://ablefromwww.irinnews.org/Report/41492/DRC-MONUC-denounces-recruitment-of-child-soldiers-by-Lubanga-s-UPC-RP> [hereinafter MONUC].

¹⁴ Lubanga Judgment, *supra* note 2, at ¶ 1084. The DRC national government formed the Ituri Interim Administration in 2003, which recognized Bunia as its capital.

¹⁵ *Id.* at ¶ 543.

¹⁶ *Id.* at ¶¶ 27–28.

¹⁷ *Id.* at ¶ 26, 29. Lubanga orchestrated campaigns to recruit soldiers of all ages, including those below the age of 15 years, who were trained and sent to the front line.

¹⁸ Human Rights Watch, *Ituri: “Covered in Blood,” Ethnically Targeted Violence in Northeastern DR Congo* 46 (July 2003) [hereinafter Human Rights Watch], available at <http://www.hrw.org/reports/2003/ituri0703/DRC0703full.pdf>.

¹⁹ *Id.* at 46–47. Lubanga at one point claimed that the United Nations “never notified us that we should not recruit children.” MONUC, *supra* note 13. In an interview with Human Rights Watch, Lubanga stated that “the UPC does not have many children under eighteen....we sometimes find children. We don’t force anyone. It is just those who come freely.” Human Rights Watch, *supra* note 18, at 46–47. Another UPC commander stated that the “underage children were all orphans and that the UPC was looking after them.” *Id.*

with some as young as seven-years-old.²⁰ Observers reported UPC/FPL utilized child soldiers still wearing school uniforms, forcibly “recruiting” the entire 5th grade of a school in one town and surrounding a neighborhood and abducting the children in another.²¹

From September 2002 until August 2003, Lubanga directed his forces to complete the conquest of the Ituri.²² Under Lubanga’s leadership, the UPC massacred, tortured, mutilated and raped civilians in the northeast DRC.²³ In April of 2003, Uganda withdrew its 7000 troops stationed in the Ituri, leaving a little more than 800 UN peacekeepers from Uruguay to protect the region.²⁴ While the presence of the Ugandan soldiers in the DRC was itself controversial, their absence created a power vacuum which the UPC/FPLC and other armed groups were quick to fill. The resulting violence in and around Bunia was nightmarish, at times male child soldiers, wearing wigs and ball gowns, hacked civilians to death with machetes and then cut out and ate their hearts.²⁵

The violence was so extreme that on May 30, 2003, the United Nations Security Council adopted Resolution 1484, authorizing the deployment of an emergency force to Bunia.²⁶ France led the force, which began deploying to Bunia in mid June 2003.²⁷ France’s efforts, called “Operation Artemis”, succeeded in stabilizing Bunia and facilitated the transition to a more robust United Nations force by the end of the summer.²⁸

Lubanga’s hold on the region lessened considerably, and he left eastern DRC for the capital, Kinshasa. There he purportedly awaited promotion to General in the FARDC, the Congolese Army, a reward promised to militia leaders who disarmed their groups (which the UPC/FPLC hadn’t done) and incorporated them into the FARDC, but the UPC continued fighting in the Ituri.²⁹ In late February 2005, Lubanga’s forces were involved in the murder of

²⁰ *Id.* at 1

²¹ *Id.*

²² Lubanga Judgment, *supra* note 2, at ¶ 67. By the fall of 2002, the UPC/FPLC was in sufficient control that Lubanga wrote the government of the DRC seeking national recognition and autonomy for the Ituri District. *Id.* at ¶ 25.

²³ Human Rights Watch, *supra* note 18.

²⁴ *Id.* at 52.

²⁵ BRYAN MEALER, ALL THINGS MUST FIGHT TO LIVE: STORIES OF WAR AND DELIVERANCE IN THE CONGO (2008) (explaining that the mystical belief that wearing the gown and wigs either gave the wearer invulnerability or protected the underlying child soldier in the event of harm).

²⁶ S.C. Res. 1484, ¶¶ 3, 7, U.N. Doc. S/RES/1484 (May 30, 2003).

²⁷ *Operation Artemis: The Lessons of the Interim Emergency Multinational Force*, UNITED NATIONS LOGISTICS BASE (Oct. 2004), <http://pbpu.unlb.org/PBPS/Library/Artemis.pdf>.

²⁸ *See id.*

²⁹ Press Release, Department of Public Information, Attacks Against UN Personnel Continued Unabated Throughout 2005, UN Staff Union Says, U.N. Press Release ORG/1457 (May 1, 2006), <http://www.un.org/News/Press/docs/2006/org1457.doc.htm>.

nine Bangladeshi United Nations troops near the town of Kafe.³⁰ The ambush of the peacekeepers was the deadliest single day for the UN in its operations in the DRC.³¹ The United Nations Security Council publically condemned the attack.³² A week later, United Nations forces in northeastern DRC conducted a combined air and ground assault on the UPC and other militia groups involved in the ambush, killing over 60.³³ In mid march, 2005, the DRC arrested Lubanga in Kinshasa for alleged violations of the DRC military criminal code, including murder, genocide, crimes against humanity and illegal detention.³⁴

However, in April, 2004, the DRC had requested that the ICC prosecutor investigate “the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.”³⁵ In June, 2004, the ICC prosecutor announced he was opening an investigation of grave crimes allegedly committed in the DRC.³⁶ In March 2006, the ICC unsealed its indictment of Lubanga and he was immediately transferred to The Hague.³⁷ The charges

³⁰ *Id.* (describing how the UN troops had been protecting a camp of internally displaced persons from militias, like the UPC, which had been looting belongings from the camp and forcing its occupants to pay taxes).

³¹ *Id.*

³² Press Release, Security Council, Security Council Condemns Murder of Nine UN peacekeepers in Democratic Republic of Congo, U.N. Press Release SC/8327/Rev.1* (Feb. 3, 2005), <http://www.un.org/News/Press/docs/2005/sc8327.doc.htm>.

³³ *U.N. Forces Kill 60 Congo Militia*, CNN INT'L (Mar. 4 2005), <http://edition.cnn.com/2005/WORLD/africa/03/02/congo.deaths>.

³⁴ *Thomas Lubanga and the ICC*, INT'L CTR. FOR TRANSITIONAL JUST. (2008), http://humansecuritygateway.com/documents/ICTJ_DRC_Luganda_Factsheet.pdf.

³⁵ Press Release, Int'l Criminal Court, Prosecution Receives Referral of the Situation in the Democratic Republic of Congo (2004), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx. The DRC's self-referral was one step ahead of the ICC initiating an investigation under its own authority. In July, 2003, the ICC prosecutor announced he was “closely follow[ing] the situation in the DRC” after having received communications from a wide range of individuals and non-government organizations on events in the Ituri District. *Id.* By August, 2003, “the Prosecutor informed the Assembly of States Parties that he would be prepared to seek authorization from a Pre-Trial Chamber to start an investigation under his proprio motu powers, but that a referral and active support from the DRC would facilitate the work of the Office of the Prosecutor.” *Id.*

³⁶ Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx [hereinafter Investigation Press Release].

³⁷ *Democratic Republic of Congo: Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/s

were confirmed and followed by a trial. In announcing its investigation into the DRC, the ICC stated that:

[m]illions of civilians have died as a result of conflict in the DRC since the 1990's.... States, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers.³⁸

It was Lubanga's recruitment, forcible and otherwise, and use, of child soldiers, which became the basis of the charges against him. Specifically, the ICC prosecuted Lubanga on charges that he, as a co-perpetrator, enlisted and conscripted children under the age of fifteen years into the FPLC and used them to participate actively in hostilities within the meaning of article 8(2)(e)(vii) of the Statute from early September 2002 to 2 June 2003.³⁹

These charges required the prosecutor to prove, among other elements, that (1) children under the age of fifteen (2) actively participated in hostilities.

III. CHILD SOLDIERS

A. *Age of A Child Soldier Under International Law*

The Rome Statute's fifteen-year age threshold for criminalizing the enlistment, conscription, and active use in hostilities is unambiguous. But a brief survey of the lack of consensus on the age of majority as applied to service in the military underscores some of the difficulties the Lubanga Court faced. Additional Protocol I (AP I) to the Geneva Conventions states a qualified limitation that "[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities"⁴⁰ The commentary to that section of AP I makes clear that the age limitation is aspirational and that child soldiers under the age of 15

ituation%20index.aspx (last visited Mar. 24, 2013).

³⁸ Investigation Press Release, *supra* note 38.

³⁹ See *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIM. CT. (Jan. 29, 2007), <http://www.iccpi.int/iccdocs/doc/doc266175.PDF>; Rome Statute of the International Criminal Court, art. 8(2)(e)(vii), July, 1, 2002, U.N. Doc. A/CONF.183/9* (prohibiting "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities," not of an international character).

Lubanga was also charged with violating article 25(3)(a) of the Rome Statute, which deals with modes of liability, specifically individual criminal responsibility. Rome Statute of the International Criminal Court, art. 25(3)(a), July, 1, 2002, U.N. Doc. A/CONF.183/9*.

⁴⁰ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77(2), 1125 U.N.T.S. 17512 [hereinafter AP 1].

were still, reluctantly, if not accepted then expected.

Participation of children and adolescents in combat is an inhumane practice and the ICRC considered that it should come to an end because it entails mortal danger for the children themselves. Nevertheless, the ICRC proposals encountered some opposition, as on this point governments did not wish to undertake unconditional obligations. In fact, the ICRC had suggested that the Parties to the conflict should "take all necessary measures", which became in the final text, "take all feasible measures." Although the obligation to refrain from recruiting children under the age of fifteen remains, the one of refusing their voluntary enrolment is no longer explicitly mentioned. In fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen.⁴¹

Additional Protocol II (AP II) to the Geneva Conventions speaks more definitively, that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."⁴²

The 1990 Convention on the Rights of the Child replicates AP I, requiring feasible measures to prevent persons under the age of fifteen from participating in hostilities.⁴³ The 2002 subsequent Optional Protocol, which specifically addressed the involvement of children in armed conflict, while using the same feasible measures language, increased the age persons under eighteen.⁴⁴

Under the 1997 Cape Town Principles, the term child soldier means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced

⁴¹ AP I, *supra* note 42, at cmt. 3183-84.

⁴² Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 4(3)(c), 1125 U.N.T.S. 17513 [hereinafter AP II].

⁴³ Convention on the Rights of the Child, art. 38(2), Nov. 20, 1989, 28 I.L.M. 1448 ("States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."), *see also* Jo de Berry, *Child Soldiers and the Convention on the Rights of the Child*, 575 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 92, 92-105 (2001).

⁴⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263, art. 1(May 25, 2005) ("States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."), *available at* <http://www.unhcr.org/refworld/docid/47fdfb180.html>.

marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.⁴⁵

Ten years later, the 2007 Paris Principles shifted to the term “child associated with an armed forces or armed group,” which was defined as any person below eighteen 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.”⁴⁶

As the commentary to AP II aptly summarized “[t]he moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world. Depending on the culture, the age may vary between about fifteen and eighteen years.”⁴⁷ While the Rome Statute’s use of fifteen years as the child soldier threshold is seemingly unambiguous, determining age of child soldiers is anything but.

B. *Age of the Child Soldiers in the UPC/FPLC*

It was tragically self-evident that children serving in the UPC/FPLC at the time. Witnesses testified about how the child soldiers would play childhood games, and about how the female child soldiers would braid grass “as if they [were] braiding the hair of a doll.”⁴⁸ In fact, the lack of adult attitudes and demands were some of the perceived advantages of using child soldiers. They were not very demanding, they were not asking for money to buy what they wanted, they didn’t have a girlfriend, they couldn’t drink, whereas older young soldiers had other troubles as well. A child—as long as he can wash and eat, that’s all he needs, while adults, elder soldiers, want more than that.⁴⁹

Determining the age of the child soldiers in the UPC/FPLC proved challenging for the court. The court explained that “[g]iven the undoubted differences in personal perception as regards estimates of age and, most particularly in the context of this case, the difficulties in distinguishing between young people who are relatively close to the age of fifteen (whether above or below), the Chamber has exercised caution when considering this evidence.”⁵⁰

⁴⁵ UNICEF, Cape Town Principles and Best Practices (Feb. 1997), [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf).

⁴⁶ UNICEF, The Paris Principles, Principles and Guidelines on Children Associated With Armed Forces and Armed Groups, ¶ 2.1 (Feb. 2007), <http://www.unhcr.org/refworld/docid/465198442.html> (stating that while a number of countries have signed the Paris Principles, the signatories include some of the worst child soldier offenders, Sudan, Chad, Uganda and the Democratic Republic of Congo).

⁴⁷ AP II, *supra* note 44, at cmt. 4549.

⁴⁸ Lubanga Judgment, *supra* note 2, at ¶ 807.

⁴⁹ *Id.* at ¶ 845.

⁵⁰ *Id.* at ¶ 643.

The court considered witnesses from international and non-governmental organizations, both prosecution and defense witnesses, and also video evidence.⁵¹

While agreeing with the defense that it is difficult to distinguish between a twelve or thirteen-year-old and a fifteen or sixteen-year-old, the court found that photographic and video extracts depicted children “who are clearly under the age of 15.”⁵² Even a defense witness affirmatively declined to testify that the UPC did not utilize child soldiers, stating “one can’t exclude that some might have got through the net. When you go fishing, you can have a certain net and some fish can get through”⁵³ Ultimately, the trial chamber held that even allowing for a wide margin of error in assessing an individual’s age, ...it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15. Furthermore, the sheer volume of credible evidence relating to the presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC army.⁵⁴

C. *Activities Lubanga’s Child Soldiers Performed*

Having established that Lubanga and the UPC/FPLC utilized children under the age of the fifteen, willing and unwilling, the next inquiry is whether the activities the children performed constituted active participation in hostilities. The trial chamber found that Lubanga recruited and utilized child soldiers as young as eight-years-old⁵⁵ for a variety of functions⁵⁶ including fighting in battles, serving as bodyguards,⁵⁷ military guards,⁵⁸ escorting high ranking UPC/FPLC officials⁵⁹ and performing domestic work.⁶⁰ Under Lubanga’s leadership, the UPC/FPLC even formed a specific unit of small children, or

⁵¹ *Id.* at ¶ 643. The evidence included logbooks from demobilization centers and logbooks, correspondence and reports from the UPC/FPLC. *Id.* at ¶¶ 733, 741, 749, and 753.

⁵² *Id.* at ¶ 644. The defense claimed it was “impossible to reliably distinguish “ between children whose ages were 1-2 years on either side of the 15 year threshold.

⁵³ *Id.* at ¶ 768.

⁵⁴ *Id.* at ¶ 643.

⁵⁵ *Id.* at ¶ 765. The UPC recruited 8 year olds in 2000, which is prior to the Rome Statute entering force. The youngest age of a UPC child soldier during the timeframe at issue, 2002 to 2003, was 9. *Id.* at ¶ 713.

⁵⁶ Lubanga and the UPC/FPLC’s actions regarding child soldiers were, tragically, hardly unique. Throughout the conflicts which ravaged the DRC beginning in 1996, “the use of child soldiers in armed groups was the rule, not the exception.” *Id.* at ¶ 62.

⁵⁷ *Id.* at ¶ 821.

⁵⁸ *Id.* at ¶ 835.

⁵⁹ *Id.* at ¶ 839.

⁶⁰ *Id.* at ¶ 878.

“kados”⁶¹, with “slightly fewer than 45 members.”⁶²

The international criminal culpability threshold though is whether those functions constitute active participation in hostilities, the language from article 8 of the Rome Statute. Not surprisingly, the views of the parties in Lubanga on this issue diverged.

D. *Parties’ Views on Active Participation*

As the Lubanga Court noted, active participation is “not defined in the [Rome] Statute, the Rules or the Elements of Crimes.”⁶³ The prosecution and the legal representative for the victims adopted the meaning used by the pre-trial chamber in Lubanga that “active participation in hostilities means not only direct participation in hostilities but covers active participation in combat related activities such as scouting, spying, sabotage, and the use of children as decoys, couriers or at military check points.”⁶⁴

The defense argued that active participation in hostilities equates to “acts of war, which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁶⁵ Not unreasonably, the court looked to the Special Court for Sierra Leone (SCSL), the first international tribunal to consider child soldier offenses.⁶⁶ In terms of child soldier offenses, the statute for the SCSL is identical to the Rome Statute.⁶⁷ In mapping the contours of active participation in hostilities, the SCSL noted that an armed force requires logistical support to maintain its operations. Any labor 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,

⁶¹ As one prosecution witness testified, “in the UPC and Ugandan armies, indeed in Africa generally, small children from about the age of 13 up to the age of 16 are called kados” *Id.* at ¶ 636.

⁶² *Id.* at ¶ 871.

⁶³ *Id.* at ¶ 600.

⁶⁴ *Id.* at ¶ 591 (referring to confirmation of charges para 261). One difference between the views of the prosecutor and the victims representative was on whether active participation included girls recruited into the armed forces for sexual purposes. The victims representative argued it did, an argument the prosecutor did not make, and, as a result, one the court did not address. *Id.* at ¶ 598.

⁶⁵ *Id.* at ¶ 584.

⁶⁶ See Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T, Judgment, (June 20, 2007), <http://www.unhcr.org/refworld/pdfid/467fba742.pdf> [hereinafter Brima Judgment].

⁶⁷ See UN Security Council, Statute of the Special Court for Sierra Leone art. 4(c) (Jan. 16, 2002), <http://www.unhcr.org/refworld/type,INTINSTRUMENT,,,3dda29f94,0.html> (listing “conscripting or enlisting children under the age of 15 into the armed forces or groups or using them to participate actively in hostilities” as a serious violation of international humanitarian law).

carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.⁶⁸

The SCSL held that active participation is “not restricted to children directly involved in combat”⁶⁹ but “encompasses the use of children in functions other than as front line troops [] including support roles within military operations.”⁷⁰ But to constitute active participation, the support roles would need to put the child soldiers’ lives “directly at risk in combat.”⁷¹

The pretrial chamber in Lubanga elaborated, explaining that activities like serving as a bodyguard would need “to have a direct impact on the level of logistic resources and on the organization of operations required by the other party to the conflict”.⁷² Conversely, “children who were engaged in activities ‘clearly unrelated to hostilities’... do not actively participate in hostilities.”⁷³ Both the pretrial and trial chambers in Lubanga rely on a draft version of the Rome Statute, which, in a footnote stated that the words “using” and “participate” 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 or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.⁷⁴

Both chambers’ reliance is misplaced—in distinguishing between direct and active participation the footnote misstates the law. The *Lubanga* Court, in misapplying the misstatement, compounds the error. The result, while expanding the scope of Lubanga’s liability, decreased the scope of protection from attack international humanitarian law would otherwise afford to child

⁶⁸ Lubanga Judgment, *supra* note 2, at ¶ 624 (quoting Brima Judgment, *supra* note 68, at ¶ 737). The *Lubanga* Court’s analysis is largely based on, and follows, that of the SCSL. That the SCSL broadly defined active participation is also problematic and for the same reasons. But at least the SCSL issued its decisions before the ICRC issued the interpretative guidance on direct participation in hostilities. The ICC however issued the Lubanga decision over 3 years after the ICC published the interpretative guidance.

⁶⁹ Lubanga Judgment, *supra* note 2, at ¶ 624 (referring to Brima Judgment, *supra* note 68).

⁷⁰ Lubanga Judgment, *supra* note 2, at ¶ 625.

⁷¹ Lubanga Judgment, *supra* note 2, at ¶ 626 (quoting Brima Judgment, *supra* note 68, at ¶ 736).

⁷² Lubanga Judgment, *supra* note 2, at ¶ 624.

⁷³ *Id.* at ¶ 623 (quoting Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29 2007) at ¶ 262).

⁷⁴ Lubanga Judgment, *supra* note 2, at ¶ 621.

soldiers like those in the UPC/FPLC. Those protections are qualified by how the term civilian is defined and whether their actions amount to direct participation in hostilities.

IV. CIVILIANS UNDER THE LAW OF ARMED CONFLICT

It is axiomatic that the law of armed conflict protects civilians from being the object of direct attack or “targeted.”⁷⁵ At first blush, child soldiers in the UPC/FPLC may not seem the “civilians” the law envisioned. But nowhere in the law of armed conflict is the term civilian positively defined. Despite the 1949 Fourth Geneva Convention’s focus on the protection of civilian persons in time of war, it doesn’t define who exactly is—and isn’t—a civilian.⁷⁶ Additional Protocol I does define the term civilian, but does so negatively in article 50. It states that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A(1); (2), (3) and (6) of the Third Geneva Convention and in Article 43 of [Additional Protocol].”⁷⁷ The definition concludes with “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”⁷⁸

The references to Article 4 of the Third Geneva Convention, and to article 43 of AP I, are to persons who qualify for status as a prisoner of war. This includes:

- (1) Members of the armed forces of a Party to the conflict as well as members of militia or volunteer corps forming part of such armed forces;

⁷⁵ Additional Protocol I to the 1949 Geneva Conventions codifies the basic protections the law of armed conflict affords civilians from the application of force. These include that: “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations....The civilian population as such, as well as individual civilians shall not be the object of attack. Acts of threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

AP I, *supra* note 42, art. 51.

⁷⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 76 U.N.T.S. 287.

⁷⁷ AP I, *supra* note 42, art. 50. The International Committee of the Red Cross, in its commentary to article 50, further explains that this definition has the great advantage of being “*ne varietur*.” Its negative character is justified by the fact the concepts of the civilian population and the armed forces are only conceived in opposition to each other, that the later constitutes a category of persons which is now clearly defined in international law and determined in an indisputably manner by the laws and regulations of States. Therefore it was worth taking advantage of this possibility. It is clear that a negative definition of the civilian population implies that the meaning given to “armed forced” must be pointed out. ICRC Commentary to AP I, *supra* note 42, art. 50, sec. 1914.

⁷⁸ AP I, *supra* note 42, art. 50 (1). See Prosecutor v. Blaskic, Case No. IT-95-T, Judgment, ¶ 180 (Mar. 3 2000) (defining civilians as “persons who are not, or no longer, members of the armed forces.”).

- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory;
- (3) Members of regular armed forces who profess allegiance to a government of authority not recognized by the Detaining Power
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having time to form themselves into regular armed units.⁷⁹

The UPC/FPLC does not fit in any of the categories.⁸⁰ Thus under the law of armed conflict's negative definition, its members, child or adult, are considered civilians. Having articulated, albeit indirectly, the definition of civilian, article 50 then qualifies the protections the law of armed conflict affords this class of individuals. "Civilians shall enjoy the protection afforded by this Section [of not being the target of the application of force] unless and for such time as they take a direct part in hostilities."⁸¹

The meaning and temporal limitations of the direct participation in hostilities qualification to the norm that civilians may not be targeted are among the most contentious areas of the law of armed conflict. But rather than add clarity to what does and does not constitute direct participation in hostilities, the *Lubunga* decision further muddled the field, further increasing the risk to child soldiers in the process.

A. *Active vs. Direct Participation*

Simply put, the *Lubunga* Court separates active from direct participation,

⁷⁹ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 4, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. This obviously skips over two categories, (4) and (5). Four is "persons who accompany the armed forces without actually being members thereof, such a civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces...." Five is "members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit from by more favourable treatment under any other provisions of international law." *Id.* art. 4. Since these two categories are excepted from AP I's negative definition of civilian, these individuals are considered civilians. Finally, reference to art. 43 of AP I is to "the armed forces of a Party to a conflict....", which would qualify such individuals as prisoners of war and thus not as civilians. AP I, *supra* note 42, Art. 43.

⁸⁰ To qualify for prisoner of war status, and the attendant combatant immunity, the UPC/FPLC would also to fulfill the following conditions of Article 4(2): (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

Third Geneva Convention, *supra* note 81, art. 4(2). At a minimum, the UPC/FPLC did not follow the laws of armed conflict and thus does not qualify.

⁸¹ AP I, *supra* note 42, Art. 51(3).

but the law recognizes no such distinction. The International Committee of the Red Cross (ICRC), in its Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, stated that although the English texts of the Geneva Conventions and Additional Protocols use the words “active” and “direct”, respectively, the consistent use of the phrase “participant directement” in the equally authentic French texts demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.⁸²

Flowing from, or perhaps causing, the flawed attempt to disaggregate participation in hostilities, the *Lubanga* Court overstates the differences in the legal regimes applicable to international vs non-international conflict. Additional Protocol I to the Geneva Conventions, which governs international armed conflict, uses the term “participate directly”.⁸³ Additional Protocol II to the Geneva Conventions, which governs non-international armed conflicts, utilizes “to participate actively.”⁸⁴ The *Lubanga* Court claimed that [t]he use of the expression “to participate actively in hostilities”, as opposed to the expression “direct participation” (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities.⁸⁵

In attempting to explain a distinction that doesn’t exist, the Court blithely noted that the participation in hostilities language of AP II “does not include the word “direct”.” That superficial analysis is literally true—but substantively false. The ICRC, in explaining the absence of the very distinction the *Lubanga* Court relied on, stated that “taking a direct part in hostilities is used synonymously in the Additional Protocols I and II, it should be interpreted in the same manner in international and non-international armed conflict.”⁸⁶

Applying its flawed conception of direct vs active participation, the *Lubanga* Court concluded 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

⁸² Nils Melzer, Int’l Comm. Of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Law*, 90 INT’L REV. OF THE RED CROSS 991, 1013–14 (2009) (adopted by the assembly of the international committee of the Red Cross on February 26, 2009) [hereinafter ICRC Interpretive Guidelines].

⁸³ AP I, *supra* note 42, art. 43(2).

⁸⁴ AP II, *supra* note 44, art. (3)(c).

⁸⁵ *Lubanga* Judgment, *supra* note 2, ¶ 627.

⁸⁶ ICRC Interpretative Guidance, *supra* note 83, at 1014 (emphasis added). Moreover, that view is not just that of the ICRC but was the prevailing view of the legal experts who worked with the ICRC in developing the Interpretative Guidance.

participation, have an underlying common feature: the child concerned is, at the very least, a potential target.⁸⁷ Having failed to recognize that active and direct refer to the same level of participation, the court reaches the oxymoronic position of determining when indirect participation constitutes active participation. Essentially, the court is asking when indirect participation constitutes direct participation. It does not, it cannot.

The test the court develops for this inherently contradictory inquiry is that “[t]he 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.”⁸⁸ Not explaining the meaning of any of the substantive portions of this “decisive factor,”⁸⁹ the Court then expanded, without defining, the temporal nexus holding that 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.”⁹⁰

V. THE LUBANGA DECISION’S RISK TO CHILD SOLDIERS

The harm the *Lubanga* decision poses to child soldiers flows from attempting to distinguish active from direct participation in hostilities and then broadly defining what constitutes active participation. The result is an increased range of activities constituting direct participation. This renders child soldiers performing the actions targetable in the process.

Child soldiers who carry weapons and fight are directly participating and thus targetable. But as previously discussed, most child soldiers do not carry or use weapons, they provide a range of logistics or support functions. These functions constitute the almost limitless expansion of harm the Lubanga decision created for child soldiers.

In creating a space between direct and active participation, the court claimed that “[t]he travaux préparatoires of the [Rome] Statute suggests that although direct participation is not necessary, a link with combat is nonetheless required.”⁹¹ But as the ICRC observed, “[s]tandards such as “indirect causation of harm” are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large

⁸⁷ Lubanga Judgment, *supra* note 2, ¶ 628.

⁸⁸ *Id.* ¶ 628.

⁸⁹ For example, the words “expose”, “potential” and “target” all warrant definition. And the use of “real danger” is particularly unhelpful. As opposed to what kind of danger?

⁹⁰ *Id.*

⁹¹ *Id.* ¶ 621.

parts of the civilian population of their protection against direct attack.”⁹² The ICC’s test for indirect active participation, whether the child soldier’s activities exposed him or her to “real danger,” is equally problematic. Under this test, unarmed child soldier activities related to hostilities, which have a direct impact on logistic resources constitute active participation. Finding, carrying, and providing food for example, could all qualify.

By way of comparison, the ICRC concluded that there are three constitutive elements to direct participation in hostilities:

- (1) The harm likely to result from the act must attain a certain threshold;
- (2) There must be a direct causal link between the act and the harm likely to result;
- (3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.⁹³

These elements exclude conduct (and thus preclude targeting) which the *Lubanga* Court would include. Returning to logistics resources, the ICRC recognized that providing food to the armed forces is “indispensable.”⁹⁴ But providing food is not directly causal to the infliction of harm and as a result does not constitute DPH.⁹⁵

Even the *Lubanga* Court’s limits on active participation are problematic. The court mentions that “food deliveries to an airbase or the use of domestic staff in married officer’s quarters” do not constitute active participation.⁹⁶ The qualifications on the limitations are troubling. It is not that food deliveries per se do not qualify, but that food deliveries to an airbase do not.⁹⁷ The implication is that food delivery to the front line of hostilities might, as the unarmed child doing so would be exposed to risk. Similarly, the court could have but did not say domestic work per se does not amount to active participation. Similar to food delivery, the court qualified the limitation, here to married officer’s quarters. One can envision child soldiers performing domestic work closer to the scene of hostilities than married officer’s spouses and quarters would be located. Again, under the *Lubanga* decision, where the domestic work exposed the child to “real danger”, the work presumably qualifies as

⁹² ICRC Interpretative Guidance, *supra* note 83.

⁹³ *Id.* The defense in *Lubanga* argued for the court to use the three factors and a narrow definition of participation. *Lubanga* Judgment, *supra* note 2, ¶ 585.

⁹⁴ ICRC Interpretative Guidance, *supra* note 83.

⁹⁵ *Id.*

⁹⁶ *Lubanga* Judgment, *supra* note 2, ¶ 623.

⁹⁷ The airbase reference is itself odd as the organized armed groups, which employ child soldiers, do not possess air power. An example with a never occurring predicate is not particularly illuminating.

active participation. This expansive view of participation may prove more retributive than protective of child soldiers.

To maintain balance between the mutual aspects of participation, the court should limit active participation to those activities that constitute DPH under the ICRC's interpretative guidance. This would also eliminate what is an otherwise glaring and problematic discrepancy between how the ICRC and the ICC define participation in hostilities. To ensure that the use of child soldiers in all its forms is criminalized, the Assembly of States Parties to the Rome Statute could modify the statute to include indirect participation.⁹⁸

Any retributive legacy from the Lubanga case probably will not directly arise in the child soldier context. Rather a defendant before the ICC or other international tribunal who is charged with wrongful killing may utilize the *Lubanga* Court's analysis in a way neither the prosecutor nor the court probably ever envisioned and certainly never intended. The defendant will argue that the victims' logistic or support roles constitute direct participation in hostilities and thus targeting them was permissible under the law of armed conflict.⁹⁹ While such an argument may well fall short, international criminal justice deserved to be able to rely on and not have to distinguish if not disavow the ICC's first case.

VI. CONCLUSION

In Lubanga, the prosecutor argued for a broader definition of participation in hostilities "in order to afford wider protection to child soldiers."¹⁰⁰ The attendant methodological compromises and contradictions increased one defendant's liability, but eroded that very protection in the process.



⁹⁸ The statute could incorporate the Lubanga court's point about risk to the child soldier in differing penalties for direct and indirect participation in hostilities.

⁹⁹ Such a defendant could argue that the victims' deaths per se prove the other component of the test the *Lubanga* Court developed—that they were in real danger.

¹⁰⁰ Lubanga Judgment, *supra* note 2, ¶ 578.