2012
Special Volume: The Lubanga Trial: Lessons Learned

Published by the International Criminal Court Student Network (ICCSN)
Issues in International Criminal Justice

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Editor’s Note
Hope Elizabeth May

By convening a conference on the historic first judgment of the International Criminal Court, and by publishing this companion proceedings volume, the International Criminal Court Student Network demonstrates its commitment to educating students and young professionals about the International Criminal Court’s historic first case, *The Prosecutor v Thomas Lubanga Dyilo*. This type of education is crucially important. At high level diplomatic meetings concerning the ICC, there are numerous discussions about ‘capacity building’, ‘positive complementarity’ and the ‘strengthening of national justice systems’. Notably absent from these discussions, however, is the crucial role played by education in the development of public understanding - an essential component of ‘capacity building’. To realize the vision that Ben Ferencz writes about in a special essay for this volume, we not only need to develop the capacities of domestic criminal justice systems, but we also need to develop the capacities of education and the ‘public understanding’.

The importance of education to the project of international justice is enshrined in the Universal Declaration of Human Rights, which is foundational to the project. The Declaration acknowledges the duty of ‘every individual and society’ to ‘strive by teaching and education to promote respect for these rights and freedoms.’ Article 26(2) of the Declaration states that education ‘shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms...and the maintenance of peace.’

What does such education involve? In his closing remarks at the *Lubanga* trial, Ben Ferencz spoke of the ‘slow awakening of the human conscience’ signaled by the revolution in international law. Crucially, the work in awakening something as majestic (and abstract) as the ‘human conscience’ does not just happen in The Hague. As Eleanor Roosevelt reminds us, unless human dignity means something in the ‘small places’ of the individual - in the ‘factory, farm or office’, finding human dignity in the larger world will be in vain:

*Where, after all, do universal human rights begin? In small places, close to home so close and so small*
Stephen J. Rapp, U.S. Ambassador for Global Criminal Justice, made a similar point when, at our March Conference, he said ‘best to have justice as close to home as you can.’

The emphasis on the particular and the local is of great importance within the Rome Statute system. Part of the genius of this system is that the ICC is complementary to the domestic legal systems of its Member States. Indeed, the Rome Statute System compels States Parties to pay attention to and ‘upgrade’ their own legal systems so that they are able to prosecute the crimes ‘of the most grave concern’. This of course includes a maturation of the Member State’s criminal code, but it also includes a maturation of techniques in evidence gathering, analysis, and adjudication, to name but a few. Ratifying the Rome Statute is one thing, but actually implementing it and ‘performing the upgrade’ is another. As the ICC continues to grow, let us not forget the importance of the local, the domestic, and the particular while contemplating the universal. The latter does not exist without the former. The latter subsists in the former. The project of international justice requires education which enables us to keep the particular and the universal in mind, and this is a very hard thing to do.

Studies on human motivation have demonstrated that when an ‘external motivator’ (a grade, a prize) is introduced into an activity that naturally produces joy for the individual (learning, playing the piano), attention focuses away from the activity to the external, ultimately sapping the natural joy for the once beloved activity. The fact that ‘externals’ can actually pull one away from her joy shows how precarious and fleeting a thing human attention is. As the ICC continues to grow and as more cases are decided, we should be mindful of this research. How easy it is that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
to be pulled into analysis and reflection about the shortcomings of the ICC and ignore what is happening ‘close to home’. Indeed to become a victim of such focus would be a failure of the Rome Statute system. To succeed, the Rome Statute system must steer the public conscience to the neighborhoods in which the Member State consists, so that the needed ‘local upgrades’ can be performed and monitored.

The work of international justice is not just a responsibility for lawyers and judges, but one for all citizens of the world. You have your own part to play in realizing and developing the vision through your own creative genius – whether it is through lawyering, painting, or climbing mountains. In her Nobel Peace Prize acceptance speech, Bertha von Suttner reminds us that Alfred Nobel supported the efforts to cross the North Pole - groundbreaking at the time - because doing so awakened, matured and educated the human conscience so as to prepare it for peace and prosperity. As von Suttner puts it, ‘social changes are brought about slowly, and sometimes by indirect means.’ As the project develops, remember that indirect means are sometimes more effective than direct ones, and that the success of the Rome Statute system consists not in looking away from your nation, but looking at it.
Editor’s Note
Victoria Phan

Four years ago, we celebrated the ten year anniversary of the adoption of the Rome Statute at the 1998 Rome Conference in the inaugural edition of the ICSSN journal, Issues in International Criminal Justice. This year marks another landmark in the history of the International Criminal Court (ICC). In July 2012, we celebrated the 10th Anniversary of the ICC. Ten years ago, on 1 July 2002, the Rome Statute entered into force, creating the world’s first permanent international court to prosecute genocide, war crimes, and crimes against humanity. This momentous occasion was brought into being with the sixty required signatories to the Rome Statute. Since then, that number has doubled and still continues to grow. Yet, this does not come close to marking the end of the development of international criminal law. These events have only signified a blossoming of the field into a new, more permanent state. This historic moment allows us the opportunity to reflect on the past and the present state of international criminal law.

If we delve into the history of international criminal law, we can see some significant developments over the last sixty-seven years. The Nuremberg and Tokyo Tribunals following World War II initiated an ‘international’ response to human atrocities and laid the groundwork for a precedent of accountability. The early 1990s saw a solidification of these ideas in the creation of the ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). To reiterate a point from my opening remarks at the March ICCSN Conference, ‘The Lubanga Trial: Lessons Learned,’ it is through ideas that all things are possible - the particular nature of ideas is that they can create an extraordinary reality from a simple thought. The thought that individuals should be held accountable for the international crimes they commit was truly a significant advancement of international law. We see further developments in the field in the work of the tribunals, such as the development of the idea of joint criminal enterprise at the ICTY and the establishment of rape as a crime of genocide at the ICTR. These ideas have all contributed to the development of what we see today as the ICC.
However, the ICC is still in its infancy. It has made tremendous achievements in the field of international criminal justice over the past ten years, but it is still in the process of developing its jurisprudence, procedure, and standards. As we have seen it pass its first judgment earlier this year, now is the best time to look back into the history of international criminal justice and at the past ten years to examine the lessons learned in order to move forward. Not only has the ICC seen how important reflection is internally, conducting its own ‘lessons learned’ meetings, but it is equally important for those external to the ICC to study and scrutinise the work of the Court over the last decade.

There is a need for continued diligence in examining the work that has been done in the past, its applicability today, and the progress and pitfalls that have transpired. It is only through this retrospective inquiry that we can all learn from those last sixty-seven years and develop the ideas and best practices that can strengthen international criminal justice in the future.

Thus, now more than ever, the need for education is great in order to provide the basis for considered opinions and critiques that will help improve upon the system and add that extra finesse and refinement. Again, recalling my opening remarks from this last ICCSN Conference, it was this idea of debate and education that drew me to the ICCSN from the start. Since my introduction to the ICCSN, the idea has grown significantly into something miraculous. Now, not only do its chapters provide a forum for debate and discussion about these important ideas, but conferences and the continuation of this journal provide an additional platform for new ideas and opinions to be voiced.

This ten year anniversary of the ICC is not only a chance for us to celebrate its achievements, but also to look back to provide the necessary critiques to better the field of international criminal law. Just as our last edition of the journal called for the necessity of critiques, so do I at this monumental stage. Far from all the ‘kinks’ have been worked out of the system and there is still more teething to come, as we can see from the continued development and discussion about issues such as reparations at the ICC. Thus, the continued provision of space for these debates and the development of critiques to later form salient ideas and best practices for the court is ever more significant at this point in its history.
It is from this moment that the continued advancement of international criminal justice will move forward. As has been said in the past, there is room for a widening of the field. You will see this and other ideas set forth in this edition of the journal as we reflect on the past ten years of the court and focus on the lessons that can be learned from the *Lubanga* trial.
Editor’s Note
Caroline Wojtylak

“Justice is a temporary thing that must at last come to an end, but conscience is eternal and will never die.”

– M. Luther¹ (1483–1546)

The past decade has witnessed the International Criminal Court (ICC) grow from a mere conceptual idea to a genuine international institution, which in March 2012 delivered its first historic verdict. In the ten years since the enactment of the Rome Statute, the Court has come a long way. Given the lack of support from many nations, some observers doubted that the Court would get this far, and in such a short period of time. With the realisation that the ICC is now a fully-fledged operational court, investigating and prosecuting those most culpable for international crimes, the Court’s first verdict against Thomas Lubanga Dyilo has been eagerly awaited. The case and its trial has presented the judges with an array of challenges in the interpretation of the Rome Statute – challenges that will now undoubtedly also give rise to opportunities that will shape the legacy of the Court to come.

On 14 March 2012 the three-judge panel unanimously found Thomas Lubanga Dyilo guilty of the war crime of conscripting and enlisting children under the age of 15 to participate actively in hostilities – a milestone for the young institution. However, with the conclusion of the Court’s first trial, many questions remain. Will the sentence be appealed? How will the reparations decision be implemented?

The Rome Statute has for the first time vested in the court powers that have allowed victims to actively participate in the trial and also seek reparations for the harms they have suffered as a direct result of the commission of the crimes charged. Before the drafting of the Statute, advocates had become increasingly aware of the lacuna of victims rights in international criminal law. The Rome Statute’s promise to victims, in the form of participation and reparation, marked a shift away from the strictly retributive model of

¹ Martin Luther, *On Marriage* (1530).
international justice to one that now gives victims a voice. The *Lubanga* trial was the first time the ICC tried to bring to bear these new powers - it was also the first time victim participation was tested, as were all of the ICC's procedures and rules.

This process has not been without setbacks. The trial has been overshadowed by pitfalls arising from two successive suspensions of the proceedings, and the near release of Lubanga from custody. Critics have been vocal on a variety of procedural shortcomings, stemming from the length of the trial, the rights of the accused, victim participation, the disclosure of evidence, and the use of intermediaries in prosecutorial investigations. Even before the trial commenced, both the Prosecutor’s narrow prosecutorial strategy and decision to exclude the broader charges of rape and sexual enslavement against Lubanga, advocated for by victims’ representatives, have been heavily criticised. The near collapse of the trial following the Prosecutor’s refusal to hand over to the Defence information on intermediaries had cast a shadow over the entire conduct of the proceedings.

In spite of this, the case has significantly added to international criminal law jurisprudence. In many respects, it is clear that the precedents that were set in this trial will affect how the ICC administers justice for decades to come. The case has shed light on the scope of victim participation, and the importance of adequate disclosure. If the ICC is to work, the framework of its *ethos* as a modern pillar of international justice has to be solid on all sides. So now is an ideal time to take stock and draw on the lessons to be learnt from the *Lubanga* proceedings. It is also a time to reflect on the importance of achieving a further lasting, as opposed to temporary justice, that addresses the needs of victims and paves the way for a truly meaningful process of reconciliation. It is to be remembered that in trials that come before the ICC, it is not only the victims that are watching, but the conscience of the world.

Given the backdrop of the case, child soldiers were victims as well as perpetrators in a region that is still suffering from the scars of conflict. Hence the implementation of the Court’s reparations decision must be carefully thought out. A difficult balancing act lies ahead for the Court and the Trust Fund for Victims – how to reconcile the needs of the victims with those of the community, which has suffered at the hands of those child soldiers. The Court will have to meet these and other challenges in the months to come. In light of such issues, the question of the measure of the
Court’s success looms large. What standard should the Court’s success be measured against? What legacy will this trial leave behind? This is a test case in which the dispensing of justice will form the path on which the foundations of international justice will be laid – the first steps have been taken, but there is still much work to be done.

The collection of articles in this journal aims to address some of these challenges. The articles are the result of a discourse that has been the focus of an ICCSN conference held in The Hague in March 2012, days before the Lubanga verdict was announced. ‘The Lubanga Trial: Lessons Learned’, gave voices of the future generation an opportunity to debate issues emanating from the trial, both among themselves and with ICC and civil society representatives. This volume is a testimony to the great dialogue that ensued on the shortcomings and successes of the Lubanga trial. The Editorial Board is also honoured to include in this volume a number of the speeches of the conference’s distinguished guest speakers, who have kindly shared some of their insights on the Court’s first trial. With this journal the Board hopes to encourage the discourse on international criminal law, and inform the future work of those committed to ending impunity for the world’s most heinous crimes. Now, more than ever, is a time for reflection. Reflection on both the opportunities, as well as the responsibilities enshrined within the Rome Statute, and how to best achieve them.
THE LEGACY OF A LEGAL VISIONARY

Benjamin B. Ferencz
Chief Prosecutor, Einsatzgruppen Trial (1947-1948), Nuremberg

To understand the legacy of a 92-year old visionary you must be aware of the lessons of history on which your own future may depend. Consider that the great US Constitution denied women the right to vote or own property. There were no female students in my class at high school, college or university. When the 18 judges were elected to the International Criminal Court in 2002, the first 7 were female. Today, slavery and colonialism have all but disappeared. A Harvard man of color has become President of the United States and winner of a Nobel Prize for Peace. I knew Rafael Lemkin who invented the term ‘Genocide.’ I knew Rene Cassin who won a Nobel for his Universal Declaration of Human Rights. When I was a student, there was no such thing as international criminal law or humanitarian law. Today, these subjects are taught at universities around the globe. New juridical tribunals created by the Security Council hold accountable persons responsible for atrocities in Rwanda, Yugoslavia and other parts of the world. They are creating precedents and principles to uphold the rule of law everywhere. People like Gandhi and Mandela, imprisoned as revolutionaries, have later been hailed as heroes. There has been increasing recognition that sovereignty belongs not to a few monarchs or dictators but to the people. None of this would have seemed credible 50 years ago.

No one could have imagined the path of my life. Born in a small village in Transylvania, the tiny infant was not expected to survive. My young parents, fleeing poverty and persecution, bundled me and my two year-old sister, scraped up enough money for steerage on a Polish liner, and in the dead of winter 1920, headed for America - ‘the golden land of promise.’ My exhausted mother had no breast milk for her nursing baby boy. It has been reliably reported that my incessant cries of hunger were so loud and persistent that my weary and exasperated father had to be restrained from throwing me overboard.

On arrival at Ellis Island, we were given temporary shelter by the Hebrew Immigrant Aid Society. My father, who had been apprenticed as a shoemaker, had boasted that he could make a pair of boots from a cow’s hide. No one told him that there weren’t too many cows or even cowboy boots on the sidewalks of New York. Without money, marketable
skills or knowledge of English, the prospects in the promised land were not particularly promising. Papa became ‘Joe the Janitor’ for a row of tenement houses where his family was allowed to live in the cellar. My earliest recollections begin in that cold and dank basement located in a high-density crime area appropriately named ‘Hell’s Kitchen.’ I had few playmates but served as mascot for a variety of gangs of hoodlums. They were mostly Italian and Irish ‘tough guys’ intent on demonstrating that they could beat up any rivals for their self-appointed turfs. At a very tender age, I decided that a life of crime was not for me.

My parents’ marriage had not been made in heaven, but by pre-arrangement of relatives in Hungary. When I was about six years old, my mother and father were amicably divorced and each soon found a more suitable spouse. The two families lived happily thereafter as friends and relatives. We moved to better neighborhoods and in due course, I attended the free College of the City of New York. I was admitted to Harvard Law School where I won a scholarship for my exam on criminal law. To keep from starving I worked as a bus-boy in the nearby cafeteria and as a paid Student Advisor. Since the only career goal I ever had was Crime Prevention, I was lucky to be accepted as a researcher for Professor Sheldon Glueck, a leading criminologist. He was writing a book on war crimes and I soon became very knowledgeable on that esoteric subject.

When World War II erupted, it was difficult to concentrate on legal studies. I tried to enlist wherever I might best serve my country but my short stature was an obstacle. Upon receipt of my law degree in 1943, I was inducted into the US Army as a Private in an anti-aircraft artillery battalion being trained for the invasion of France. On the day after Christmas 1945, I was honorably discharged as a Sergeant of Infantry. I was surprised to be awarded five battle stars. It was explained that it was a decoration for not having been killed or wounded in the five major battles of World War II.

The horrors of war need not be recounted here. After the landings at Normandy beach I witnessed the destruction of whole cities and the incineration of countless inhabitants, including innocent women and children. As we entered Germany, I was transferred to the Headquarters of General George Patton. Germans had been warned that they would be held to account for their crimes. I reported to a Colonel in the Judge Advocate section who told me that my name had been forwarded from Washington. ‘What’s a war crime?’ he asked. My first investigations in-
volved cases where downed allied flyers had been beaten to death by enraged German mobs. It was necessary to dig up nattered American bodies and try to apprehend perpetrators. The most grisly duties began as we liberated such Nazi concentration camps as Buchenwald, Flossenberg, Mauthausen and other sub-camps. We could hardly distinguish between the dead and the living. The stench of burning bodies and the agony of helpless humans have been well documented. My detailed reports became the basis for little-known and best-forgotten trials by US army military commissions set up in the former Nazi camp at Dachau. The desperate need for a more peaceful and humane world governed by the rule of law was seared into my brain.

I never intended to go back to Germany again. Soon after my return home, the War Department offered to make me a full colonel if I would go back into the army to do what essentially I had been doing as a sergeant. I refused. They countered that I could be a civilian employee and quit whenever I wished. That was an offer I could not resist. It enabled me to marry my waiting sweetheart, a girl from Transylvania whom I had met in the Bronx. We intended to go to Europe primarily for a brief honeymoon. We did not anticipate that we would come back about 10 years later with our four children born in Nuremberg.

The widely publicized trial at Nuremberg by the International Military Tribunal (IMT) against Goering and other leading Nazis was led by Robert Jackson, on leave from the Supreme Court of the United States. It was decided in Washington that once the limited IMT trial was ended it would be advisable to have a dozen additional trials to show the broad involvement of various segments of German society in the planning and perpetration of Nazi crimes. Colonel Telford Taylor, a Harvard Law graduate, who had been on Jackson’s staff, was appointed to serve as Chief of Counsel for a dozen subsequent proceedings to be held in the Nuremberg courthouse. He hired me as a member of his staff of newly recruited young lawyers who promptly shipped off for Germany.

My first assignment by Taylor, who was promoted to Brigadier General, was to set up an office in Berlin to search for incriminating evidence against a large array of suspects. My wife soon joined me. One of our researchers uncovered a compilation of top-secret ‘Reports from the Russian Front’ which showed conclusively that special Nazi killing squads innocuously labeled ‘Einsatzgruppen’ had deliberately murdered
in cold blood over a million Jewish men, women and children as well as countless Gypsies and other presumed enemies. I urged the General to put on a new case focused on these mass murderers. But no such trial had been planned or approved by the Pentagon. When I persisted, he asked if I could handle it in addition to my other duties. ‘Sure’, came my prompt response. And so it came to pass that I was designated the Chief Prosecutor in what was undoubtedly the biggest murder trial in human history. The Prosecution rested its case in two days without calling a single witness. The Defense lasted about 5 months but to no avail. Mass murder could not be disguised as patriotism. All 22 defendants, including six SS Generals and many holders of doctor degrees, were convicted of crimes against humanity and war crimes. Thirteen were sentenced to death. I was then 27 years old and it was my first case.

Instead of returning home as planned, we were induced to remain in Germany. A consortium of Jewish charities had been appointed by the US Military Government to restore properties confiscated from victims of persecution. Proceeds from heirless or unclaimed properties were to benefit survivors. We recognized that helping needy victims was as important as prosecuting a handful of their oppressors. I was hired to do the job. With money borrowed from the Military Government, a competent staff of former refugee lawyers was recruited to carry out the contentious restitution mandate that began in 1948. West German Chancellor Konrad Adenauer soon recognized that Germany had a moral obligation to compensate some of the persecuted victims. How that might be done in a truncated country on the verge of starvation posed new challenges. Protracted negotiations ended when a compensation treaty between the West German government, the new State of Israel and the ‘Claims Conference’ was signed in 1952. The victims could not be expected to turn to former Nazi lawyers for help with their complicated German claims. It required a worldwide network of offices to assist the Jewish applicants. It didn’t take long to realize that it would take many years before such claims could be resolved. We did not want our children to start school away from the US. I reluctantly resigned from my various posts but agreed to serve as an advisor for a small retainer. The family sailed home to New York in 1956.

We moved into a small house in the suburbs and looked forward to a normal family life. Since I had no lucrative clients and refused to accept any money from concentration camp survivors, the law firms
I approached for employment were not particularly receptive. I tried private practice for a number of meager years and finally joined a small firm with Telford Taylor. I acquired a reputation as an attorney who would take hopeless cases on a contingent fee. By creative lawyering, frugal living and cautious investments we managed to save enough to put our kids through graduate schools. By the 1970’s the US war in Vietnam was being protested by students refusing to serve in an illegal war. Telford Taylor went off to write books and become a professor at Columbia Law School. I decided to leave the practice of law to devote myself to working for a more peaceful world order. Of course, I had no idea how that could be done.

My new career began with reading and writing. I read widely on the subject of war and peace. I got accredited to the United Nations as a member of various non-profit non-paying non-governmental organizations, which gave me access to UN meetings and libraries. My pen became my weapon for peace. My focus naturally turned to international criminal courts as a potential deterrent to war and international crimes. The UN Charter prohibited the use of armed force except in self-defense or with Security Council approval. In 1946, the first General Assembly had called for the creation of an international tribunal as a follow-up on the Nuremberg precedents. UN Committees were assigned to draft an international criminal code to be enforced by the anticipated new tribunal. But cold-war animosities stymied progress. A convenient excuse for inaction was the non-persuasive argument that aggression had not been defined. I began to write articles and to lobby committee members on that subject. A new definition of aggression was reached by consensus in 1974. The chairman invited me to stand with the full committee when the official commemorative photo was taken. I was the only person in the hall who was not being paid to be there.

In 1975, my book *Defining International Aggression, the Search for World Peace* was published. It was originally intended only as my notebook and included copies of the relevant historical documents. My next two-volume book *An International Court - A Step Toward World Peace* came out in 1980. That was followed by a third compendium *Enforcing International Law - A Way to World Peace*, which appeared in 1983. My other books and countless articles argued that wars might be deterred, at least in part, by new international institutions including clearer laws, an international criminal court and a system of effective enforce-
ment of the rule of law. It was the same theme that I had articulated as a young man in my opening statement of the Einsatzgruppen case which stressed the legal right of all people to live in peace and dignity regardless of race or creed. For many years I served as an Adjunct Professor at Pace Law School where two of our children were enrolled. The only course I was willing to teach was ‘The International Law of Peace’. After many years of frustrating debate by UN committees, it was decided to consider the unresolved ICC issues at a two-week conference of ‘Pleni-potentia ries’ to take place in Rome in 1998. I was invited to address the delegates on the opening day. The most controversial issue of the proposed treaty was whether national leaders could be held to account for planning or perpetrating aggression - which the IMT had denounced as ‘the supreme international crime’. The United States delegation, reinforced by Pentagon and Senate representatives, was adamantly opposed to allowing Americans to be tried by any foreign court. Despite opposition by major powers, on July 17, 1998, the ‘Rome Statute’ was overwhelmingly approved by wild ovation of 120 in favor and only 7 against. The UN Secretary-General called it ‘a gift of hope to future generations.’ The required 60 ratifications were achieved in record time and the Rome Statute for the ICC went into effect on July 1, 2002 - more than half-a-century after Nuremberg. In future, genocide, war crimes and crimes against humanity could be punishable by the ICC if the national state of the perpetrator was unwilling or unable to provide a fair trial. But it was clearly stipulated that the ICC would have no jurisdiction to consider the crime of aggression until an amendment was adopted which defined aggression and guaranteed that Security Council rights would be protected. Aggression was thus pushed to the back burner.

After about 8 years of preparatory work by various ICC committees, a Review Conference to take stock and consider proposed amendments, was convened in Kampala, Uganda in June 2010. I was invited to be a keynote speaker at a gala dinner before the week-long conference opened. I reminded those present that some 50 million people had died in World War II and pleaded with the high-ranking audience to honor their memory by upholding the Nuremberg principles to deter future wars. My pleas were in vain. By the time the conference closed, consensus agreement had been reached on a slightly modified definition of aggression as well as some relatively minor clarifications. But major powers made plain that without consent by the national state, no leader could be held accountable by the ICC for the crime of aggression. As in the Pelopon-
nesian wars, powerful states were unwilling to curb their powers and weak states were unable to do anything about it. As a concession, it was agreed that aggression might be further considered at another review sometime after 2017. Aggression was thus again pushed to the back burner. Powerful states had not learned the lessons of history. They still were not ready to surrender what they considered their sovereign right to wage war whenever their leaders decided to do so. Short-sighted diplomats failed to see clearly that the most effective way to deter crime is to let potential criminals know in advance that they will be brought before the bar of justice. To give possible aggressors notice that the International Criminal Court has no jurisdiction to try them is more likely to encourage the crime than to deter it. That’s where matters now stand.

The ICC is functioning and carrying out its difficult tasks pursuant to its Statute. Reciting ICC problems, which are clearly visible to a critical eye, would be counter-productive. It should not be surprising that overwhelming difficulties would confront a new institution which never before existed in human history. I am confident that with time, patience and good will, the problems can be overcome. When I was honored by the Queen of Holland with their Erasmus Prize in 2009, I explained that I was both a Realist and an Optimist: Realist because I see the problems; Optimist because I see the progress. Since time immemorial, wars have been glorified as the path to conquest, fame and fortune. A new institution designed to reduce the hazards of annihilation in a diverse, turbulent and largely ungoverned world should be judged in historical perspective. Viewed from the eyes of a 92 year-old scholar who has spent most of his life in search of peace and justice, I must conclude - even at the risk of being derided as a visionary - that the evolution of international humanitarian law has been fantastic and a greater future lies ahead.

Human survival is increasingly threatened as the capacity to destroy life on earth increases. President Dwight D. Eisenhower warned that the costs of armaments are thefts from the poor and the world must turn to the rule of law to survive. No one nation is entitled to arrogate to itself the role of a super-power policeman of the world. If grievances cannot be resolved by peaceful means, violent means will be inevitable. It is in the interests of all nations to repudiate the existing war ethic which threatens to bankrupt and decimate their populations. We owe it to our brave young people in the armed forces, to our nation, and to the world to do all we can as quickly as we can to change the way people think about
war and peace. New legal institutions to maintain the peace are vital for the security of everyone. The revolutionary new information technology holds out new hopes and promise for worldwide education and informed change. It will be up to young people to change the old way of thinking. Peace-loving countries need not wait for international action which, as we have seen, is difficult and slow in coming. Political leaders of powerful countries seem to cherish obsolete sovereign rights to use armed force rather than international rules of the road that benefit everyone. Young people who must bear the burdens should not accept policies that threaten to bankrupt the nation and decimate the population. They must analyze and repudiate disingenuous justifications for going to war in violation of the UN Charter. No democracy can function unless the people know the truth. It will be up to new generations using new technologies to uncover and proclaim the truth everywhere. They can begin now by insisting, by peaceful and lawful means only, that their governments enact national legislation making aggression a punishable crime. The lame excuse that aggression has not been defined was laid to rest in Kampala by a new consensus definition which can and should be adopted in national codes. Japan, Germany, France and other devastated lands already have such general provisions in their constitutions. As the legal network criminalizing aggression spreads, the deterrent effect will increase.

Let the legal legacy of this visionary be the recognition that the use of armed force in violation of the UN Charter is a crime for which responsible leaders must be held to account in a court of law. Illegal war-making should be condemned in national as well as international codes. Even though aggressors remain immune from being charged by the ICC for the crime of aggression, militant leaders should take note that where their evil deeds inevitably cause the death of large numbers of civilians, they may still be charged by the ICC with Crimes against Humanity. Never lose hope, for it is the engine that drives human endeavor. ‘Law not War’ is the masthead on my website (http://www.benferencz.org). My books, articles and lectures are available free on my website to anyone ready to pick up the torch. The guiding slogan of my life has been ‘Never give up. Try harder!’ We may not succeed in eliminating wars completely but even small progress will surely be worth renewed effort as we move toward a more humane and rational world.
KEYNOTE ADDRESS
Matthew Cannock
Legal Officer, Coalition for the International Criminal Court
Delivered on March 8, 2012

I am delighted and honoured to have been invited to address you this morning. I represent the Coalition for the International Criminal Court, a Coalition of 2,500 civil society organisations in 150 different countries working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide.

It is also a special pleasure to be addressing this conference of the International Criminal Court Student Network. Student activism and students played key roles in ensuring that the Rome Statute came into being, and were present at both the preparatory committee meetings and in Rome at that historic moment. Student activism continues to play a crucial role in building grassroots support for the Court and of course, as the Court enters its second decade and beyond, those of us here will, I am sure, shape the future of the establishment.

Next week, the Court will deliver its first decision in its very first case. This is no small milestone in the history of the International Criminal Court. However, it is equally, if not more important as evidence that after a century of the worst wars in all history, the Rome Statute and the ICC represent a major strengthening of the international legal order – one of the greatest efforts to confront war with peace, law, justice and human rights.

During this conference we will hear from a number of eminent speakers about lessons relating to the Lubanga Trial. It is difficult to be selective as to which lessons to discuss. What is clear though is that regardless of the final decision of the Court, lessons must be learnt. We should not forget though, that this decision does not completely mark the end of the first trial. There will very likely be an appeals phase and possibly reparations proceedings.
It should also not be forgotten that the Court is still very much in its formative and vulnerable period. To be overly critical of the Court at this juncture would be to not recognise that this was the first case before the Court and we must be aware that the Court is breaking new ground in so many respects. In some ways, it is disappointing that the decision has not been made before this conference; a decision from the Chamber would have presented the opportunity for us to discuss concrete findings in relation to a number of legal and procedural issues. But, a number of important lessons which can be learnt from the Lubanga case do not depend on the Chamber’s decision next week:

1. All the lessons and challenges faced in the Lubanga trial show us that there is still so much to do and support needed to ensure a fair, independent and effective Court for the future.

2. The International Criminal Court embodies a system where, above all, any decision is based on a fair trial and the rule of law. This of course must not only be the case, but must also be seen to be the case.

3. Regardless of the decision of the Court, the role and importance of the International Criminal Court to ensure justice for victims of genocide, crimes against humanity and war crimes when national authorities are unable or unwilling to act remains undiminished.

Allow me to recall the words of Benjamin Ferencz who acted as a Prosecutor at the Nuremberg trials and who spoke at the closing arguments in the Lubanga case. In his closing argument on behalf of the prosecution, Mr. Ferencz stated that the verdict of the ICC would speak ‘for the awakened conscience of the world.’1 I have often heard it said that civil society provides the ‘conscience’ in the field of international relations and diplomacy. I do not mean this in a self-righteous way. Of course, many civil society activists do have deep ethical motivations, but I only intend to illustrate that, in my opinion, it is not a coincidence that the most significant advance in international law in the twentieth century

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was and still is accompanied by the united efforts of many individuals and organisations, pulling in the same direction, because of their belief in humanity and concerns for international criminal justice and the need to end impunity for the gravest crimes.

Civil society participated in the Court’s establishment from the early discussions at the UN, through the Rome Conference and the ratification campaign. It is widely recognised by supporters and opponents of the Rome Statute that the Court would not have emerged in the way it did without the crucial participation of global civil society. NGOs were engaged in the very first processes and have stayed engaged in every stage of this historic evolution.

How could it be that NGOs were to play such a key role in the birth of this extraordinary new body, established to deliver justice to the gravest of all crimes? It was because all the actors accepted, encouraged and appreciated the active consultative participation of NGOs in the negotiation process, including the like-minded governments, international and regional organisations, the United Nations system (UN), parliamentarians and the media. In doing so, they endorsed, step by step, sector by sector, the CICC goal to secure a ‘fair, effective and independent ICC.’

At the Rome ICC Treaty conference in 1998, NGOs surprised the government delegations by the significance of their substantive contributions. Around 535 NGO representatives attended the conference in total, usually at least 200 attending throughout the five weeks of negotiations. All but a handful of NGOs worked within the umbrella of the CICC. The strategic acuity and ultimately the influence they had on the conference was arguably unprecedented. At the time of the conference, NGOs, and in particular the CICC, had already become the first source of information on the ICC. NGOs formed teams which worked around the clock to support and influence government delegates on specific issues. Included among these teams was the ‘Children’s Caucus’ which worked hard to ensure that the use of child soldiers was included in the Statute as a war crime.

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NGOs monitored negotiations, produced daily conference reports, issued position papers on contentious issues, and conducted many, many briefings. The CICC secured an agreement that most meetings would remain ‘open’ to NGOs (but not the media or public) instead of closed. But, even for the closed meetings, eager NGO participants waited impatiently outside to debrief exiting diplomats, reporting back to the NGO teams and plenaries, which often revised their strategies on the basis of new information.

Indeed, the CICC newspapers and special reports describing the percentages of government support for various positions were very influential in the final negotiations and instructions from capitals. Meanwhile, others led candlelit marches and a ‘lie-down’ for justice to mobilise public support for the Court. As a result, civil society had a major impact in shaping the Rome Treaty itself.

This activism, of course, led to the historic vote late in the evening of 17 July 1998 and against many odds, in July 2002, the Rome Statute entered into force after achieving 60 ratifications. This was decades faster than expected. It is clear that NGOs’ strategic campaigns and close cooperation with like-minded governments and with the UN proved essential for such a speedy achievement.

What is fascinating about the role of civil society at the Rome Conference is that many of the methods adopted by civil society and the Coalition then, still very much influence the work of civil society today. The CICC remains one of the foremost sources of information on the ICC. The CICC still produces numerous documents on many themes and topics. NGOs still monitor States Parties’ negotiations and meetings, including attending the Assembly of States Parties meetings every year as well as many intercessional meetings of States Parties. Eager NGO participants still wait impatiently outside meetings to debrief exiting diplomats and subsequently report back to NGO teams. And, of course, we also still produce reports and information on different aspects of the ICC system on a daily basis.

Fast-forward 10 years since the entry into force of the Rome Statute and the impact of civil society’s efforts in Rome is clear to see in the Lubanga case. As I have already mentioned, the crime of conscripting and enlisting child soldiers has in no small part been down to the advocacy NGOs. But so many other issues which dominate the work of different civil society
organisations are apparent in the case: the rights of defendants to be accorded a fair trial, the rights of victims to participate in trials, the rights of victims to possibly gain reparations, the list goes on. Members of the CICC, such as Women’s Initiatives for Gender Justice have also sought to contribute to litigious proceedings directly by providing *amicus curiae* briefs on the issue of gender-based violence and with a view to assisting the Court.

However, with all the successes in NGO advocacy described, why are NGOs still involved? As we move ever closer to the conclusion of the ICC’s first case, there is still much to do to ensure a fair, independent and effective Court for the future. The Lubanga case has had a number of positive outcomes. The Lubanga trial has served to highlight the horrors associated with the conscription or enlisting of children under the age of 15 and that this crime can no longer be accompanied by impunity. In relation to cooperation, the Lubanga case has also highlighted the importance of cooperation with the ICC, as demonstrated through the referral of the situation in the Democratic Republic of Congo (DRC) and the subsequent transfer of Thomas Lubanga to the Court. For the first time in international law, victims were able to participate in the trial and involve themselves in issues that affect them directly, thereby providing the participants and the courtroom with a tangible perception of the suffering of victims of war crimes. In January 2010, the Trial Chamber heard from three victims who appeared before the court and recounted their personal suffering to the judges in person. For victims to be able to detail the nature of the crimes and how they were affected was a truly groundbreaking development. The first trial also brought home the genuine importance of protecting victims and witnesses.

However, members of the Coalition have voiced severe concerns including that the Lubanga trial did not include charges of sexual or gender specific crimes committed in the DRC and other concerns including the length of time taken for the case. Furthermore, a number of other suspects (including Bosco Ntaganda in the DRC and Joseph Kony in Uganda) have been issued with arrest warrants for the conscription of child soldiers and so far these have not been carried out. This will require the willing cooperation of States Parties. Civil society and members of the Coalition have been and will continue to be vocal about the need for States Parties to cooperate with the Court. We must remember though that a number of procedural and strategic issues relating to the Lubanga case were to some
extent due to the fact that this was the Court’s first case.

As I said earlier, what is often more important about a lesson is that one uses it as an opportunity to learn - I am sure that the Court will do so. The Coalition and its members are in it for the long haul and will continue to monitor the Court to ensure that lessons are learnt. However, we are not blind cheerleaders for the Court. The CICC will be the most ardent supporter and the most constructive critic of the Rome Statute system.

As we can see, the Lubanga trial provides a chance for reflection, but nonetheless the Lubanga decision should be seen foremost as the first step of an institution with enormous potential but which has not yet passed its formative years and reached maturity. The ICC certainly has not reached its full operational capacity and it will take years, probably at least another decade, for the ICC to reach maturity and it will need the support of every stakeholder, above all States Parties, but also civil society acting in support of the Court. The involvement of civil society will prove essential to meet the challenges currently faced by the ICC in order to advance its long-term effectiveness, credibility, and viability. In order to meet these challenges and for the International Criminal Court to be all that it can be, the Coalition will continue to undertake actions far beyond the Lubanga case, based on the following priorities.

**Priority 1: Building Global Support for Justice**

As the cornerstone of the international justice system, the ICC needs strong support from a range of actors to be most effective and to advance the universality of justice. Coalition activities will include:

- Securing support from a range of governments and institutions for the ICC and Rome Statute system;
- Overseeing national and regional campaigns for ratification and implementation of the Rome Statute;
- Ensuring that states cooperate with the ICC to guarantee timely arrests and prosecutions in order to further enhance and maintain an efficient judicial system as well as the successful conclusions of the first (and all) trials;
- Increasing capacity and support for justice and human rights at the national level by bringing national laws into line with obligations under the Rome Statute; and
**Priority 2: Strengthening the ICC & Rome Statute System**

For the Rome Statute system to provide the access to justice intended by its creation, the organs and structures of the ICC must be independent, accountable and fair.

As a young and evolving system, the ICC requires significant oversight and input from civil society and other experts in the process, particularly as different structures and mechanisms are developed. The judicial activity of the ICC has increased significantly over the past three years, and so more attention and scrutiny has become focused on the system. The Court’s activities test new areas of law (for example, in victims’ participation, witness protection, sentencing and reparations), challenge the current court management system, and bring perception issues to the surface, all of which can undermine the system’s long-term legitimacy and effectiveness. The Coalition addresses challenges by:

- Advocating that the ICC’s operations comply with the highest standards of fairness, effectiveness, and independence;
- Providing the tools for the nomination and election of the most qualified officials within the system;
- Ensuring the ICC’s effectiveness through state cooperation, including the arrest and surrender of the accused;
- Providing substantive input into the work of the Assembly of States Parties (ASP) and facilitating regular consultative meetings between NGOs and the ICC;
- Coordinating civil society’s input to the ICC and its organs on issues related to policies and regulations (including investigations, budget, victims’ rights, defence, field offices, communications and outreach amongst others); and

**Priority 3: Increasing Access to Information & the Visibility of Justice**

The media, some governments, and many other constituencies remain uninformed and/or misinformed about ICC and Rome Statute-related issues. Ultimately, the success of the ICC depends on widespread understanding of the ICC’s role and work, and also on the system being perceived as a fair, effective, and independent method of dealing with grave crimes under the ICC’s jurisdiction. The information gap and misperception issues represent a crucial problem that the Coalition is in a unique position to address. The Coalition thus worked to build awareness,
combat misperceptions and inaccurate information, and strengthen support for international justice from a range of actors. Coalition work on this priority includes:

- Overseeing a comprehensive global communications effort on the Rome Statute, the ICC, and related international justice issues to ensure timely access to information for civil society, governments and intergovernmental bodies, affected communities, the media, and other audiences;
- Working actively with the media to generate balanced and factual press coverage on the Rome Statute and ICC, especially through intensified outreach to local, regional, and global media markets, reflecting the views of civil society on these issues in the media, and
- Working with the ICC to strengthen its own communications outreach strategies and messages.

But for the present, we find ourselves on the eve of the ICC’s first verdict. We all anxiously await the decision of the Chamber. However, we must not forget that the people of the DRC, those most affected by the *Lubanga* case also await the verdict. In the DRC, conservative estimates say that some 5.4 million people have died since August 1998, making the conflict one of the world’s deadliest since World War II. For many years, victims and civil society in the DRC have rightly demanded accountability and justice. We cannot begin to imagine the horrors suffered by the young boys and girls in the DRC. The suffering of parents who saw their children abducted and knew that their children may not return, but would certainly not return as ‘children’ in any real sense of the word. The yearning by those who have suffered the worst crimes for somebody to be held accountable must be unimaginable.

Yet we must not forget that the International Criminal Court embodies a system where, above all, any decision is based on a fair trial. In passing its judgement, the Court will have shown that the rights of the accused are paramount and above all, the decision will emphasise that the rule of law will trump all other considerations. We must remember that the rule of law may not always produce decisions that please us, but it must be respected if peace and stability are our ultimate goals.
It is equally important, to use the old adage, that it is not enough that justice will be done, it must also be seen to be done. It is of course simple to talk of the rule of law and justice in our comfortable surroundings, but we must also appreciate that those affected by the Lubanga decision will likely welcome the Court’s decision or be left bitterly disappointed. That is why it will be all the more important for the Court to enhance its communications activities in the DRC to explain the decision, in particular for victims and affected communities, so that those most affected are aware of the consequences of this decision and possible next steps.

Civil society has long advocated for the Court to raise its public profile. With the completion of the first trial, the need for efficient public information and outreach has become even more striking. NGOs continue to provide direct advice to relevant Court organs and, despite sometime strong opposition from some governments, advocate for states to grant them the necessary funds. In parallel, with the necessary work of the Court, civil society will undertake its own work to disseminate information on the Court’s decision. On the ground in the DRC, our member organisations will undertake numerous communication activities with victims and affected communities, which will be replicated worldwide by the Coalition and its members.

I shall conclude with what I believe is the most vital lesson which can be learnt from the Lubanga decision: regardless of the decision of the Court, the role and importance of the International Criminal Court to ensure justice for victims of genocide, crimes against humanity and war crimes remains undiminished.

I started this brief presentation by quoting from Benjamin Ferencz at the closing of the Lubanga trial. As you will recall, at the closing of the Prosecution's case, Mr. Ferencz made the following speech, which was both moving and electrifying in both measures. I have abridged the speech considerably from its full length:

*The most significant advance I have observed in international law has gone almost unnoticed. It is the slow awakening of the human conscience [...]. The law can no longer be silent but must instead be heard and enforced to protect the fundamental rights of people everywhere [...] once again we present a plea of humanity to law...a call from human beings*
There can be no doubt that the evolution of international justice from the dream of a few to the current ICC we see before us has been astounding. In 2002, the Rome Statute entered into force with 60 ratifications. In 2012, the number of States Parties stands at 120 and very soon 121. This has been in no small part due to the efforts of civil society. Last year saw the largest number of ratifications since 2003. Since its humble beginnings on 10 February 1995 with a handful of interested NGOs, the Coalition now has over 2,500 member organisations in over 150 countries.

Yet, for the Court to meet its full potential it must get the support it needs from States Parties. For example, through cooperation and such agreements and also in terms of providing budgetary support to the Court. It is particularly worrying that at a time that the Court is beginning to achieve some of its potential, a number of influential States Parties are looking to maintain the Court’s budget at a level which is severely restricting its ability to undertake core activities such as outreach and public information activities in situation countries.

In concluding my contribution to this conference, I wish to underscore that, although NGOs have played a unique and significant role in the establishment and development of the Rome Statute system, continuous repetitive efforts remain crucial in universal acceptance of the Court and in ensuring the Court’s long-term effectiveness, credibility and viability. Allow me to illustrate this thought with the words of Gustave Moynier in 1899: ‘A reform such as that which is currently taking place [...] cannot fully succeed unless it receives the support of all the peoples of civilised nations. And it is only through endless repetition that this notion can be instilled in peoples’ minds and that their hearts can be won.’

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3 The Prosecutor v Thomas Lubanga Dyilo, 25 August 2011, Case No. ICC-01/04-01/06, Transcript of proceedings, page 51, line 4 to page 53, line 6.

The importance of the support of organisations such as the International Criminal Court Student Network cannot be overstated, particularly the role it plays in engaging and involving students at an early stage in international criminal law issues. We really are at a stage in the evolution of international criminal law, where we can say, ‘I was there!’ I hope that for you the Lubanga decision serves not only to awaken your conscience in the broadest sense, but also serves to place international justice and the fight against impunity for the worst crimes into your ‘global consciousness.’ That would be the greatest lesson to take from the Lubanga decision.

Civil society is, in its simplest terms, people ‘organising to influence their world.’ As a member of ICCSN and by attending this conference you are already a member of civil society. We look forward to working with you in our efforts for a fair, effective and independent International Criminal Court.

Thank you.

German translation of his pacifist manifesto ‘La proposition du Tsar Nicolas II’ in 1899.

5 See also, M. Glasius, ‘The International Criminal Court: A global civil society achievement’ (Routledge: Abingdon 2006) 5

6 Ibid. at 4
At the core of the International Criminal Court’s mandate is the delivery of justice that is fair, credible, and meaningful. Meaningful justice aims at increasing the court’s impact and relevance in communities most affected by the crimes within the ICC’s jurisdiction. While the court has many important constituencies, affected communities are the first among these constituencies. Several lessons can be drawn from the Lubanga case and the court’s other cases as to what it means in practice for the court’s work to be meaningful.

First, the ICC needs to be present in countries under investigation. This is especially important for outreach - the process of informing affected communities about ICC decisions and proceedings so that justice is not only done, but seen to be done, and also so that victims are informed about their rights to reparation and participation under the Rome Statute. When it comes to outreach, the ICC has learned key lessons over its first years. These include starting outreach early in order to inform expectations about the ICC process and tailoring outreach by addressing actual questions and concerns among affected communities and using the most effective means of transmitting information. In spite of limited resources, the ICC has made significant progress in these areas although there is more that can be done. For the Lubanga case, for example, the court used ‘listening clubs’ in eastern Congo which brought together groups of people to listen to recordings of court proceedings and then to tape questions to be sent back to ICC officials for answers.

Second, the ICC prosecutor’s selection of cases - the specific charges brought against a specific individual - has a strong connection with the ability of the Court to deliver meaningful justice. The selection of cases cannot be formulaic and should emerge from investigations grounded in a deep appreciation of a given situation. But, in general, the ICC should try those most responsible for the most serious crimes on charges representative of the underlying patterns of ICC crime. While the ICC will only ever be able to try a limited number of cases, attention to these factors can help ensure that ICC cases resonate with the concerns
of affected communities. In what may be a response to criticism regarding the narrowness of the charges in the *Lubanga* case - important charges on the use of child soldiers, but charges that did not reflect the full scope of abuses committed by Lubanga’s militia - the Office of the Prosecutor is now committed to the selection of incidents for trial that reflect the main types of victimization. Other gaps in the ICC’s cases remain, including investigation as to whether political and military figures in Congo, Rwanda, and Uganda share responsibility for crimes committed by militias they supported and armed in eastern Congo.

Finally, the ICC’s first years and cases have shown that to deliver meaningful justice, the ICC must be deeply engaged in its country situations. A quick investigation, targeting a single perpetrator, on charges not reflective of underlying patterns of crimes, and without outreach activities, may have less impact. This, in turn, requires time and resources. These resources are now in scarce supply under pressure from some ICC member countries to cut the court’s budgets. While the court needs to ensure the efficient use of its resources, ICC member countries should be increasingly willing to recognize the value of international justice and to fund the ICC accordingly.
KEYNOTE ADDRESS

Stephen J. Rapp
U.S. Ambassador for Global Criminal Justice
Delivered on March 9, 2012
Transcribed by Hope Elizabeth May

Thank you for that wonderful introduction and this great welcome. It is an honor to be here with you and to have a chance to share the optimism that I have for the project of international justice - a project that I joined about 11 years ago.

You just heard about when I was at Nuremberg for the 65th anniversary. For me that was a dream come true. From a young age, and certainly when my country was involved in the Vietnam war, I was drawn to discussions about Nuremberg and the principles that were established there. When I was honored to become a prosecutor in my own country and saw how one could deal with crime and serve victims - the people whose lives were torn apart by the acts of selfish and destructive individuals - through a system of justice, I began to reflect on how this could be done at the international level. I saw in the early 1990s that the world was picking up again on the idea of Nuremberg with the UN Security Council establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, and I dreamed of becoming involved in this process.

I believed that you can achieve justice at the local level, and at the national level, while understanding that the system is never perfect and always requires an effort to strive to make it better and more fair. That kind of system, in my view, in the end, protects victims and allows our lives not to be ‘nasty, brutish and short’ - allows people to live free from the fear of murder and mayhem and rape and other violence. I believed very much that that kind of system taken to the international level could, if broadly applied, begin to reduce the possibility that people would be similarly victimized as they were by the Holocaust or by crimes like those committed in Cambodia, Rwanda and elsewhere.

I am here today representing the United States as I have now for the last two and a half years as President Obama’s Ambassador-at-Large.
This position was, until about two months ago, responsible for the ‘Office of War Crimes Issues,’ but the name has been changed to the ‘Office of Global Criminal Justice’ to reflect the fact that we respond not only to war crimes, but also to genocide and crimes against humanity, and are involved in efforts to establish justice across the globe. This job brought me today to the International Criminal Court (ICC), as it did yesterday to the Special Tribunal for Lebanon (STL), and tonight to see my colleagues from the ICTY. Tomorrow, I go to the borders of Syria in Turkey and Jordan; two weeks ago I was in Sri Lanka. Some days I am involved in situations where tribunals are trying individuals; on others I am involved in situations where there is not yet hope for justice but where we want to send a signal that justice is coming - to make justice possible and by doing so discourage and deter these crimes.

The subject today is the ICC. I know that you have convened this conference to talk about the Lubanga case. I also understand from Hannah Dunphy that one of the first questions that came up was the United States’ position as to the International Criminal Court. Let me first respond by recalling, as we have just heard in the introduction, that the United States has been a leader from the beginning in the field of international justice. We led at Nuremberg where an international tribunal tried the 22 surviving Nazi leaders and in subsequent proceedings like the trial prosecuted by our friend Ben Ferencz. There we laid down the principle that was stated so well by Supreme Court Justice and Chief US Prosecutor, Robert Jackson, in the second paragraph of his opening ‘...that the law shall not stop with petty crimes by little people. It must also reach men who possess themselves of great power and use it to set in motion evils which leave no home in the world untouched.’

At Nuremberg we tried those individuals who were responsible for the atrocities committed by the Nazi regime including their surviving top leaders, among them their number two and number three men behind Hitler. The full group included the surviving Chief of State and the military, political, and other leaders of that regime. Most significantly, it was established that such men could be held to account, that there was ‘individual criminal responsibility.’ There followed twelve further trials, like the one in which Ben Ferencz was involved, that judged the individuals that were responsible for the crimes from every power center of the Nazi state.

But in the 45 years that followed the last of these trials, the world was
not involved in establishing justice for atrocities. This was largely blocked by the Cold War, and to some extent the commission of mass atrocities themselves was constrained by the sort of political structures, for well or ill, that were in effect at the time. But in the 1990s when we had the explosion of violence against civilians in the former Yugoslavia, and the Rwandan genocide, where 800,000 men, women and children were murdered in 100 days, the world again responded, and America helped lead that response. The US pushed for the establishment of the ICTY and ICTR and sent in the temporary personnel that got them up and running. Later other persons, like myself, joined as trial attorneys, or as legal officers or investigators. This continued with the Special Court for Sierra Leone where I was honored to be appointed as Chief Prosecutor.

Over the course of their operations, these temporary tribunals (and their work is not quite done, but close to it) charged more than 250 individuals. These included presidents, prime ministers, military commanders, militia leaders, and media executives like those in the trial that I personally led at the ICTR. This raised expectations across the planet. I saw it when I was in Sierra Leone and received letters that asked, ‘What about our country? Something horrible has happened down here. Why are you not taking a look at this one?’ So the success of the project that was led by America built the expectation that there needs to be justice everywhere when similar crimes have occurred.

The International Criminal Court, of course, came into existence without American leadership. It was a project, generally, of mid-sized democracies. The United States did not support the treaty that emerged from the Rome conference in 1998. At the end of 2000, President Clinton signed it but indicated that he would not submit it for Senate ratification or ask his successor to do so. During the first term of President Bush, legislation was passed that was antagonistic to the ICC. But from 2005 onward the Bush Administration realized that the ICC had a role to play when it made the decision not to veto the referral of the Darfur case to the ICC. Within two or three years, the US became one of the strongest advocates of accountability for Darfur and opposed any kind of effort to defer that prosecution through article 16 of the Rome Statute.

In this Administration we have carried that approach forward by becoming active observers in the ICC Assembly of States Parties. We also studied our laws to determine whether we could assist the ICC. We no-
ticed the provision of the American Service Members’ Protection Act (ASPA) of 2002 that was added by Senator Christopher Dodd, whose father had been the leading deputy to Justice Jackson in the Nuremberg prosecution team. His amendment provided that the law did not prohibit the US from assisting the ICC in a case of a non-citizen such as Saddam Hussein, Slobodan Milosevic or any other person accused of war crimes, crimes against humanity or genocide. So his amendment basically permitted us to assist in every case. However, there is another earlier US law that prohibits us from funding the ICC. These laws were reconciled in a legal opinion within the U.S. government that allows us to help the ICC on a case-by-case basis, even in material ways, as long as it does not involve direct funding.

We have since made it known in the presentations that we have delivered at the ICC Assembly, and in meetings like those I had today with the ICC Prosecutor, Registrar and other court officials, that we are now helping the ICC in all of its cases - with witness protection, with diplomatic support, and also looking for ways that we can share information that will be useful in its trials. A former Legal Advisor in the State Department under the Bush Administration has recently advocated that we be ‘a non-party partner,’ and essentially that is what we have become.

This week I testified in Congress on Wednesday in favor of legislation now proposed by the Administration that would permit rewards for justice to be paid for ICC cases. You may be familiar with the ‘Rewards for Justice Program’ that allows rewards to be paid for persons providing information leading to the arrest of persons wanted for war crimes and other atrocities at the ICTY and ICTR. Since I became War Crimes Ambassador two and a half years ago, I have actively used this program, even going back to earlier cases where people have provided very good and substantial information at great risk to themselves and arrests resulted. I have authorized the payment of 14 rewards involving 12 fugitives for the Yugoslavia and Rwanda tribunals at an average of $400,000 per case, in one case up to $2 million. But this law only applies to fugitives from these tribunals.

The proposed legislation does not focus on the tribunal, but on the crimes – so if it was genocide, war crimes, or crimes against humanity, we could pay a reward if the fugitive was sought by an international court, including the ICC, or any kind of mixed or hybrid court. Interestingly, this legislation is now being sponsored by people across the political spec-
trum in the United States Congress, people from the left to the right. It was Republican Congressman, Ed Royce of California, who chaired this week’s hearing and spoke specifically of the value of paying a reward, up to the statutory maximum of $25,000,000 for information leading to the arrest and transfer alive of Joseph Kony to the ICC. He also quoted US military officers who are involved with Ugandan, Congolese and Central African Republic forces in an advisory mission that is assisting the hunt for Kony, who are excited about the prospect of having such a program and think it could help their operation.

So there are a lot of ways that the US is trying to make sure that the ICC succeeds and we are thrilled that the ICC is now bringing forth its first judgment next Wednesday in the Lubanga case. It is an important milestone in the history of international justice. We are looking forward to other judgments in the near future, in Katanga, Ngudjolo, and Bemba and other cases. We will remain actively involved as I have said in each of the places in which the Court is presently engaged.

The Lubanga case is the subject of this conference and I have seen several of the papers that have been presented. I know that there has been some public criticism, though not from me or the US which we think is not helpful coming from a non-party. I heard some of it at a recent conference in Australia where President Song, Prosecutor-Elect Bensouda and I made presentations. My panel included a good friend, a famous academic who will remain nameless, who started it with a rather negative speech complaining that the ICC had been in operation for 10 years and not yet had one conviction and had spent a lot of money. He spoke about how much the Yugoslavia, Rwanda and other Tribunals have done, how many high-level people they have charged, and how many cases they had completed in periods comparable to the period that the ICC has existed. His speech was not particularly well received.

I am a great believer in open and fair debate, but as I said when I was called to speak after him at the conference, the ad hoc tribunals and the ICC should not be viewed as competitive, but as a single project. One of the reasons why I am involved in the US government, and why people like me and others in the Obama Administration are working so hard to engage with the ICC, is that we want to make it successful, even though there are obstacles to the US actually becoming a member of this court. This is because there needs to be justice in these cases for
the victims. We have helped raise the expectation across the planet that when these crimes are committed there will be the possibility of justice. Of course, we believe, as did the authors of the Rome Statute, that it is always best to have justice as close to home as you can. You should try these individuals at the national level, where there should be international assistance when necessary, even international participation by mixing in international judges and personnel. But sometimes there is not sufficient will to do it at the national level. Having an international court may help strengthen that will, because people to some extent will prefer to try their cases at home if they know there is a danger that their citizens are going to be dragged to trial somewhere else. So the idea of having an international court of last resort is, at the end of the day, critical to the success of the justice project in which I, together with many other Americans, have been involved.

The ICC has obviously taken some time to get up and running but it has a statute that was more complicated than those that we had at the Rwanda tribunal or the Yugoslavia tribunal. Indeed, at the ICTR if I wanted to indict someone, I could prepare a draft with excerpts of witness statements and take it to a judge and within three hours walk out of his Chambers with a confirmed indictment, and then send the arrest warrant off to any country out of 192 in the world and it would be binding on them to arrest the suspect. At the ICC for that same situation, the Prosecutor first has to have the case sent by the Security Council or by a state, or has to go get permission to open an investigation, which can take time. Once the investigation is opened, the Prosecutor must go through a much more extensive process to obtain an arrest warrant. Then the Prosecutor must try to have that arrest warrant enforced without Chapter VII powers and may have the challenge of getting people arrested in states that are not obliged to comply with the order. And then, when the person is finally in custody, the Prosecutor must win a confirmation hearing in order to have an indictment to which the suspect can be required to plead. All these things that I could do in three hours could take months or years at the ICC to go through its multiple steps.

Then we have victim participation in the ICC process and other aspects in which the procedures of the Court are more complex and in some ways more cumbersome than at the ICTY, ICTR or SCSL. However, in fairness, the law and structure of the ICC is more alike than different to the other tribunals. For a while that was not recognized by the ICC, some of whose
judges and officers displayed an attitude of ‘we will take a different approach; we are a permanent court; we are going to do it our way’. They did not readily accept the usefulness of the lessons taught by the tribunals. But I think that this is changing with the election of new judges, four of the five sworn in this morning having had tribunal experience. Fatou Bensouda will soon be sworn in as Prosecutor. She was on my team at the ICTR and was shaped by it as well. I do think that there is a great deal to be learned from this experience that will benefit the International Criminal Court.

Of course the Lubanga case involves the charge of recruiting and using child soldiers. The ICC judgment will not be the first for this crime, as we won the first international convictions at the Special Court for Sierra Leone in June 2007 against all of the three defendants in the AFRC case. We also had to do it without the benefit of a statute written before the crime was committed, first having to win a decision that the crime was part of customary international law in the 1990s, with exactly the same elements as the treaty-based ICC crime. So the law in this area has been established. But for the ICC to reach the point of actually convicting or acquitting an individual for this crime is an extremely important and historic event.

One of the issues that I am sure that you have discussed is whether the Lubanga indictment should have charged other crimes, including those of sexual violence. I think that it probably should have. But the Prosecutor believed he was following a lesson from the tribunals. He had heard about the long and complicated early trials, and wanted to start with one that was charged narrowly, and would not be long and complicated. He wanted to move quickly and be able to get a judgment within a brief period of time; to begin with not too large a meal, so to speak. But I think we always see that when a court is new, it is going take time to complete its first case whether the charges are single or multiple. It would have been useful if sexual violence crimes had been included, and it would have avoided the battle with the victims that caused an extra appeal. But the need to expedite these trials is very real and international prosecutors cannot cover all of the crimes among their charges. The greatest knock on international justice is the length of these trials and often the length of the periods of detention because you cannot be sure that if you release detainees that they will not flee to where there is no lawful authority. And you cannot be sure that you will be able to get them back. So we all need to figure out how to expedite the proceedings.
This is another area where the international tribunals can teach lessons. For instance, the ICTY will soon commence the Mladic trial, only about a year after he was arrested, and the Prosecutor has reduced the crime scenes to include those in only eleven municipalities. The judges are going to require the Prosecutor to present his full case in less than 200 hours. So there are a variety of things that can be done to pare down these cases while including evidence of the emblematic conduct of the accused persons. One does not need evidence of every crime, or from every crime scene. The strongest evidence and the most compelling evidence of the kinds of the crimes that were committed must be presented.

As you can see, the subsequent ICC trials will not be like Lubanga. In the Katanga/Ngudjolo case, multiple counts were filed, including charges of sexual violence. In the most recent arrest warrant, the one against the Minister of Defense of Sudan, I think that there are 41 counts: 21 for Crimes against Humanity and 20 for War Crimes. So the ICC is learning its lessons.

But it will be a great day for this project, like the day that it began at Nuremberg, when the International Criminal Court, a permanent court with 120 member states, announces its judgment in Lubanga. I am so glad to have been here today with you, and to have been at the court this morning to celebrate the progress of this institution. And I hope that in the work that my office is doing and in the assistance that my own government is providing, that we can continue to help make this a successful project in order to fulfill the expectations of victims and in order to establish justice in places where it has not existed before.

Thank you very much for being here and for participating in this project.
KEYNOTE ADDRESS
Nicole Samson
Senior Trial Lawyer, Office of the Prosecutor
International Criminal Court
Delivered on March 9, 2012

It’s a great pleasure for me to be here with you today at a conference devoted to a case and an institution that has been an integral part of my life for the past number of years. Judging by the exceptional list of speakers and topics, you’ve had a full day of thoughtful discussions about the legal and procedural issues at play in the Lubanga case and, more broadly, facing the ICC. Tomorrow promises an equally dynamic series of presentations, conversations, and debates.

Since you’re clearly as thoroughly immersed in this case as I’ve been, I’m forced to adopt Yogi Berra’s famous mantra: ‘If you ask me anything I don’t know, I’m not going to answer.’ This Conference, as its title tells us, is all about the ‘lessons we’ve learned’. Perhaps not surprisingly, within the Office of the Prosecutor we are conducting the same exercise. We are operating under a new and, in many ways, untested Statute even with the passing acknowledgments to other systems. We are striving to enhance the quality of our work. As Steve Jobs famously said, ‘you can’t connect the dots going forward; you can only connect them looking backwards. So you have to trust that the dots will connect in the future’.

It’s critically important that our legal theories, strategies and case results are being discussed and debated as they are in this forum. This is the machine at work and it’s a way for us to connect the dots. It will make the ICC the very best institution that its architects intended it to be. Justice Rosalie Abella of the Supreme Court of Canada acknowledged the necessary and important role of debate and controversy to legal systems when she said:

Controversy has, and should have, a permanent seat at the justice system’s table. If argument or debate is crucial to our intellectual development, controversy properly appreciated, can be an excellent teacher. Through controversy we can learn the views of others and our own. It’s a way to discover in public who we are, what we think and what we believe in […]. True controversy in the legal
This event is of particular importance as it comes on the eve of the Lubanga decision. Our presence here today signifies our collective commitment to the principles of justice, dignity and humanity. We are engaging in a dialogue that will necessarily continue in an effort to enhance our mutual goals.

The Lubanga trial started in January 2009 and now - three years later - the delivery of the final judgment is scheduled for next week. This is a crucial milestone in the evolution of international criminal justice in the last 60 years. I want to focus today on our purpose, our impact and our challenges.

First, the case has been monumental to our purpose of giving victims access to justice and to the impact we hope to achieve because of it. During this lengthy trial with all of its technical rules and procedures, we strived never to lose sight of the ICC’s mission nor of how this legal world looks to those who are most vulnerable. The innocent victims are the people for whom the international community created this elaborate legal universe and we recognize that we must see and judge our work through their eyes.

Second, the trial process has highlighted the challenges we face in achieving results. We broached novel procedural and legal frontiers with each step in the legal process. Every challenge brought a new opportunity: to learn, to discuss, to focus and to refine. Many challenges remain and will continue to affect how we operate such as (i) issues of cooperation and enforcement, (ii) investigations in situations of ongoing conflict, and (iii) witness security and protection.

Let’s consider our purpose. In November 1945, Chief Prosecutor Robert Jackson opened the Nuremberg trials with these powerful words: ‘The wrongs we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated.’

In the years since, we have seen a period of the most sophisticated devel-
opment of international laws, treaties, and conventions the international community has ever known, all stating that human rights abuses will not be tolerated.

Despite the stark warning, such atrocities have continued to be committed. Crimes we thought would never happen again, have happened again and again, before our eyes: genocide, crimes against humanity and war crimes.

We came to recognize what Martin Luther King understood very well when he said: ‘Injustice anywhere is a threat to justice everywhere.’ Indeed, human rights abuses occurring in one part of the world puts the rest of the world in danger. And so, the Rome Statute was designed to both represent and create shared, unifying international values. It added an independent and permanent justice component to the world’s efforts to achieve peace and security. It offers a solution, creating global governance without a global Government but with international law and courts. Accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities and to manage conflicts.

The decision to build an International Criminal Court was not just a matter of principle; it was a matter of realism. The Statute defines our purpose: to put an end to impunity for the most serious crimes of concern to the international community and thus, contribute to the prevention of future crimes.

As Ben Ferencz said in his closing remarks at the Lubanga trial: ‘What makes the ICC so distinctive is its primary goal to deter crimes before they take place by letting wrongdoers know in advance that they will be called to account by an impartial international criminal court. The law can no longer be silent but must instead be heard and enforced to protect the fundamental rights of people everywhere.’ This is our purpose.

If we remember - as we must - to see the world through the eyes of the victims, then this is one of the most important human rights lessons of all. Yet we realize that fair, high quality trials - without doubt essential components - are not enough. The ICC will deal with only a few cases over the years but the impact of its cases and rulings extends to at least the 120 States which are Parties to the Rome Statute and even beyond to reach non-State Parties. This is what we like to call the ‘shadow’ of the
Court, following a thirty year-old article by Mnookin and Kornhauser entitled *Bargaining in the Shadow of the Law*. Used first in the context of family law and divorce cases, the concept of the shadow explains how one court ruling in an individual case can affect a multiplicity of other cases, resulting in agreements being made and disputes being settled without further judicial intervention: they are solved under the ‘shadow of the law’. Such behavioral changes may well be considered as the most important impact of a court.

While the geographical scope of the Court’s shadow is already extensive, how fast and how far it extends depends also on other actors, and on how their efforts can be integrated into a comprehensive strategy in support of international justice. Who are the other actors? Political leaders, the military, diplomats and conflict managers, victims and citizens have a central role to play.

This brings me to one of our biggest challenges: cooperation. The Rome Statute establishes a comprehensive regime to hold accountable those responsible for genocide, crimes against humanity and war crimes. However, while the Court is imbued with all the necessary judicial powers, it does not have an independent mechanism to enforce its decisions. Accordingly, the successful implementation of its work depends on cooperation with the international community, in particular State Parties. And a reality is that our needs often need to be met by states which are not part of the Rome system. Cooperation is most of all needed for the enforcement of warrants of arrest and other Court decisions. This challenge has and will continue its reach beyond the *Lubanga* case.

As a permanent Court, we have to work in situations of ongoing conflict. This is a second challenge. In Ituri, we proceeded as local institutions had entirely collapsed. In some areas we had limited or no access due to security issues. We had to learn how to: approach possible witnesses without exposing them; identify safe sites for interviews; secure discreet transportation for investigators and witnesses; explain to individuals the paramount importance of keeping meeting places, times and content confidential in societies where notions of privacy give way to collective family and community identity.

We had to communicate effectively with witnesses in different languages, some of which have no corresponding words for the legal terminology re-
quired for the interview. We needed to maintain contact with witnesses to ensure their continued safety without exposing their cooperation with us. This challenge, too, is ever-present in each new situation and case.

Thirdly, in the courtroom itself, we are setting the framework for entirely new procedures. Victims have been the drivers and the pushers of the Court. They are participating in many ways and at all stages, with a right to send information to the Prosecutor to form the basis of the opening of an investigation, to present their views and concerns during proceedings; and they will benefit from a comprehensive system of reparations. Some of them accepted to become our witnesses, and their stories are evidence.

Our obligation to protect these witnesses and victims must be balanced against our obligation to disclose relevant information to defendants. This is a key part of a fair trial and one of the challenges we are faced with. We expend constant and considerable effort to ensure witness security at all phases of a case, from investigation through to and after trial. In balancing these often competing obligations, we have been permitted to disclose summaries of witness evidence at the pre-trial stage, to impose limited redactions where warranted, to use alternative evidence or to make admissions of fact in lieu of statement disclosure.

Of course, there can be no anonymity of trial witnesses from the Accused or his defence team, and so other measures have been implemented where necessary and justified. These include referrals to the Victim and Witnesses Unit for assessment and protection, and a range of special in-court measures to protect witnesses from public identification, such as voice and face distortion and the use of a pseudonym.

In the Lubanga case, we had some particularly vulnerable witnesses: children. Our task, and the Court’s, was to ensure that they were heard under the best possible conditions. For instance, as evidence in the Lubanga trial unfolded, particularly after the first former child soldier testified and had initial difficulties, the Court imposed special protective measures which allowed this witness to return and deliver the full account of his recruitment and use as a child soldier. Similar measures were then adopted and used with subsequent vulnerable witnesses. These measures included:

- a limit to the number of persons in the courtroom during testimony;
- the seating of examining lawyers during question-
ing;
• permitting vulnerable witnesses to enter and leave the Courtroom before and after the Accused;
• extending the shield between the Accused and the witness during testimony;
• ensuring the presence of a qualified psychologist during testimony or an assistant who accompanied the witness;
• permitting the witness to provide a free narrative account of his or her experience supplemented by focused questions or focused questions from the outset if this was easier for the witness;
• providing sensitivity for witnesses who are unable to read or write; and
• permitting testimony to be given via video-link.

These measures proved essential to the well-being of vulnerable witnesses.

To conclude, hearing the stories of victims can be unsettling, particularly when we deal with violence against children. Charles Dickens captured this sentiment of unease in *The Old Curiosity Shop* which particularly resonated with me during the trial. He wrote: ‘It always grieves me to contemplate the initiation of children into the ways of life when they are scarcely more than infants. It checks their confidence and simplicity - two of the best qualities that heaven gives them and demands that they share our sorrows before they are capable of entering into our enjoyment’.

This was echoed in the trial testimony of a man who described in his own way, the real-life pain he feels at his son’s recruitment and use as a child soldier:

 [...] *he is my first son. All of my hopes were laid on him. [...] given his age and given that military service degrades someone, the child was ruined. I think that that is something of capital importance. [...] Today he can do nothing in his life. He has abandoned his education. And this is something which affects me greatly.*

Justice is the application of law to life. A solid legal framework is not only about the laws we embrace intellectually, it is also about the judg-
ments we exercise on behalf of victims who seek access to justice.

The *Lubanga* case is of critical importance in our quest to stop the abuse of children, children who are used as weapons of war. It is also critical in our effort to highlight and expose the sexual exploitation of girls by their commanders. The trial against Thomas Lubanga, even before the final decision, has helped trigger debates on child recruitment in countries like Colombia and Sri Lanka, and child soldiers were released in Nepal. The Special Representative of the UN Secretary-General on Children in Armed Conflict immediately factored in such potential and used it as a tool to campaign around the world.

The *Lubanga* judgment will also be an opportunity to focus on how states and other relevant actors can contribute to justice through national education curricula. We see education as one of the fundamental means to maximize the impact of the work of the Court and to contribute to the prevention of future crimes.

I am proud to be part of this justice system. We have a responsibility to never lose sight of who we are, what we are doing and for whom we are doing it so that we can continue to render justice an accessible reality for the highest numbers possible. This is our purpose and our challenge. I will leave you with words of hope from Martin Luther King:

> When our days become dreary with low-hovering clouds of despair, and when our nights become darker than a thousand midnights, let us remember that there is a creative force in this universe, working to pull down the gigantic mountains of evil, a power that is able to make a way out of no way and transform dark yesterdays into bright tomorrows. Let us realize the arc of the moral universe is long but it bends toward justice.

Thank you all very much for your generous attention at the end of a long day.
Equal Liability for all Members of a Joint Criminal Enterprise?
*Lubanga Continues the Deficiencies of the ad hoc Tribunals*

**Hassan Ahmad**

1. **INTRODUCTION**

   In *The Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I (PTC) of the International Criminal Court (ICC, the Court) grappled with the modes of liability enumerated in Article 25 of the Rome Statute (Statute) for joint control over crimes. Utilizing legislation and case law from the *ad hoc* tribunals while simultaneously recognizing the peculiarities of the Statute, which separated the modes of liability (unlike the ICTY and ICTR Statutes), the Court outlined the elements of co-perpetration based on joint control over crimes as follows:

   a) Objective elements
      i. Existence of an agreement or common plan between two or more persons;
      ii. Co-ordinated essential contribution by each co-perpetrator resulting in the realisation of

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1 JD Candidate, Osgoode Hall Law School, Toronto, Ontario, Canada. The author would like to thank the ICCSN and Osgoode Hall for providing the opportunity to present this paper at the ICCSN Conference in March 2012.
4 Article 25(3) of the Rome Statute sets out the various modes of liability. Article 25(3)(a) concerns co-perpetration of a crime, 25(3)(b) concerns ordering, soliciting, or inducing a crime. Article 25(3)(c) concerns aiding or abetting a crime. See *ibid*. Article 25(3)(d), as the Court notes in *Lubanga*, is a residual provision. Specifically, the Court states, ‘article 25(3)(d) provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.’ *Supra* note 2 at para 337.
5 See *supra* note 2 at paras 343-67. The Court applies the theoretical framework to the situation in *Lubanga* at paras 368-409.
the objective elements of the crime;

b) Subjective elements

i. The suspect must fulfill the subjective elements of the crime in question (in *Lubanga*, this particularly concerned Article 8(2));

ii. The suspect and the co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime; and

iii. The suspect must be aware of the factual circumstances enabling him or her to jointly control the crime.

In formulating the above analysis for co-perpetration under Article 25(3)(a), the Court’s starting point was its characterization of co-perpetration. The Court defines co-perpetration as ‘any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.’ The Court did not qualify ‘any person’ but rather opted for a more general characterization of a principal to the crime.

In this paper, I argue that the Court’s interpretation of Article 25(3)(a) in *Lubanga* for joint control over a crime perpetuates a similar deficiency from the jurisprudence of the *ad hoc* tribunals, namely that the Court mistakenly assumes equal liability for all members of a joint criminal enterprise (JCE) irrespective of the accused’s role in that enterprise. Specifically, I will argue that the Court’s inability to define ‘essential

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6 *Supra* note 2 at para 326.

7 Some authors use different terms in order to distinguish between the various approaches to co-perpetration used by the different courts. For instance, Chouliaras utilizes the terms ‘conspiracy’ to refer to the approach taken by the Nuremberg tribunal and ‘joint criminal enterprise’ to refer to the approach taken by the ICTY in *Tadic*. See Athanasios Chouliaras, ‘From “Conspiracy” to “Joint Criminal Enterprise” in Search of the Organizational Parameter’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (Asser Press: The Hague 2010). Similarly, the Court in *Lubanga* refers to the approach in *Tadic* as one relying on the doctrine of joint criminal enterprise whereas the Court utilizes the ‘joint control over the crime’ approach to distinguish its approach from *Tadic*. See *supra* note 2.
contribution” as part of the objective elements of joint control establishes a low bar for liability, especially on members that had a perfunctory role in the enterprise despite the fact that they may have been able to frustrate the crime’s realisation. Secondly, I will posit that the ‘mutual awareness and mutual acceptance’ test within the subjective elements fails to account for hierarchical power structures within joint criminal enterprises in which subordinates, despite their awareness and acceptance of the common plan, do not have the ability to reject the plan or remove themselves from the enterprise. In the final analysis, the Court would be well advised to apply a narrower interpretation of co-perpetration that recognizes varying qualitative roles of employment within a joint criminal enterprise in which liability also varies with each role.

2. PRE-ICC CONCEPTIONS OF JOINT CRIMINAL ENTERPRISE

The most recent and pertinent JCE formulation adopted by international courts was stated by the ICTY Appeals Chamber in Tadic. The ICTY in Tadic and subsequent cases, as well as the ICTR, used as its starting point the concept of ‘conspiracy’ developed in post-World War II case law. Although not explicitly mentioned in the ICTY or ICTR statutes, the Appeals Chamber in Tadic dealt with the issue of whether the criminal responsibility for participating in a common criminal purpose falls within

8 Supra note 2 at paras 346-48. The Court notes that in Stakic, the second objective requirement for co-perpetration is divided into two-sub criteria: i) co-ordinated co-perpetration, and ii) joint control over criminal conduct, The Prosecutor v Milomir Stakic, 31 July 2003, Case No. IT-97-24-T, Trial Judgment, at paras 478-91.

9 See supra note 2 at paras 361-65. The Court here utilizes the precedent set in Stakic, ibid. at para 496.

10 The Prosecutor v Tadic, Judgment, 15 July 1999, Case No. IT-94-1-A, A.Ch. Chouliaras notes that the JCE doctrine was first touched upon pursuant to the heading of ‘aiding and abetting’ in The Prosecutor v Furundzija, Judgment, 10 December 1998, Case No. IT-95-17/1-T, T.Ch. II, at paras 210-16. See Chouliaras, supra note 7 at 561.

11 See Chouliaras, ibid. at 550-60 for a concise summary of the concepts of conspiracy and criminal organizations in the International Military Tribunal of Nuremberg.

the ambit of Article 7(1) of the [ICTY] Statute. The Court identified three JCE categories: 1) where all of the accused act pursuant to a common design and possess the same criminal intention; 2) the ‘concentration camp’ cases, which require i) an organized system of ill-treatment in which the alleged crimes were committed, ii) the accused’s awareness of the nature of the system, and iii) the accused’s active participation in the system, and; 3) cases ‘involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.’ Van Sliedregt notes that the JCE categories can essentially be spoken of as two categories: one in which the subsequent crimes are perpetrated within the context of a common plan and the other in which they are committed beyond the common plan.

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13 Tadic, supra note 10 at paras 187-89. Specifically, Article 7(1) provides that ‘a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, perpetration or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.’ See ICTY Statute, ibid. at Article 7(1).

14 See generally Tadic, supra note 10 at paras 202-230. The Appeals Chamber also referred to various national legislations and jurisprudence to illustrate that JCE has roots in many national judicial systems. See Tadic, supra note 10 at 224-25. See also Chouliaras, supra note 7 at 562 footnote 132.

15 This has also been called the ‘systemic variant’ and covers participation in a repressive system in the context of which multiple crimes are committed on a structural basis. See Harmen van der Wilt, ‘Joint Criminal Enterprise and Function Perpetration’ in Andre Nollkaemper and Harmen van der Wilt (eds), System Criminality in International Law (Cambridge University Press: Cambrigde, UK 2009) 158. Its application is in the concentration camp cases during World War II in which there were three requirements to find this mode of liability: i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged, ii) the accused’s awareness of the nature of the system, and iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided and abetted, or in any case participated in the realization of the common criminal design. See Tadic, supra note 10 at para 202. See also, Chouliaras, supra note 7 at 561-62.

16 Tadic, ibid. at para 204.

Although the Court stated that the objective elements in all three categories are the same, namely i) a plurality of persons, ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and iii) participation of the accused in the common design, the subjective elements in each JCE category differ. For our purposes, and in relation to Lubanga, Category 3 requires that the individual should have ‘the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.’ Furthermore, the accused can be responsible for the commission of crimes not covered in the common plan under the condition that i) it was foreseeable, and ii) the accused willingly took that risk.

The most salient revision of the Tadic JCE formulation came in the Brdanin case in which the ICTY Appeals Chamber rejected the Trial Chamber’s findings that conviction pursuant to a JCE requires an agreement between the principal perpetrator and other participants and, furthermore, that

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18 For a fuller discussion on the objective elements in Tadic, see Chouliaras, supra note 7 at 560-68.
19 Tadic, supra note 10 at para 228. According to the Appeals Chamber, the ‘participation’ in the third element ‘may take the form of assistance in, or contribution to, the execution of the common plan or purpose’ and ‘need not involve the commission of a specific crime.’ See Tadic, ibid. at para 227.
20 Chouliaras, supra note 7 at 563. For Category 1 the individual must have the ‘intent to perpetrate a certain crime.’ In Category 2 ‘personal knowledge of the system of ill-treatment is required as well as the intent to further this common concerted system of ill-treatment.’ Tadic, supra note 10 at para 228.
21 Tadic, ibid. at para 228.
22 Tadic, ibid. In this case, dolus eventualis is required. The Court in Lubanga considered the role of dolus eventualis, but in the first subjective category required that the suspect must fulfil the subjective elements of the crime in question. The Court stated that the cumulative reference to intent and knowledge in Article 30 of the Statute requires there to be a volition element. Although not adopted in Lubanga, the Court noted that the ad hoc tribunals have adopted a type of volition as liability, which encompasses situations in which the suspect a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and b) accepts such an outcome by reconciling himself or herself with it or consenting to it. See Tadic, ibid. at paras 350-53.
the definition of JCE only applies to small-scale enterprises.\textsuperscript{24} The Appeals Chamber made three points. Firstly, the principal perpetrator does not have to be a JCE member. In this regard, the Court said that ‘[w]hat matters is […] not whether the person who carried out the \textit{actus reus} of a particular crime is a member of the JCE but whether the crime in question forms part of the common purpose.’\textsuperscript{25} The Court also found that, as long as the JCE member with the requisite intent utilized non-members as tools to carry out the \textit{actus reus}, the third category of JCE could be triggered. Secondly, the Court found that the tribunal’s jurisprudence did not require an agreement between the principal perpetrator and the accused. The Court held that such an agreement was superfluous in the first category of JCE in which proof of a common \textit{mens rea} is required.\textsuperscript{26} Thirdly, the Appeals Chamber did not support the Trial Chamber’s opinion that the JCE only applies to small-scale enterprises. The Court referred to the ICTR case of \textit{Rwamakuba} in which the Appeals Chamber pointed to the fact that ‘[an] accused’s liability under a ‘common purpose’ mode of commission may be as narrow or as broad as the plan in which he willingly participated.’\textsuperscript{27}

Van Sliedregt makes some observations from both \textit{Tadic} and \textit{Brdanin} concerning JCE. He notes that while in \textit{Tadic}, JCE was applied as a small-scale group crime concept, \textit{Brdanin} applies JCE as ‘hegemony-over-the-act,’ a concept developed by Roxin,\textsuperscript{28} and provides for the liability of indirect senior perpetrators for crimes committed by direct perpetrators used as tools for crimes planned and instigated by the senior leaders. He also notes that there has been a link loosening between JCE participants at the indirect and direct perpetration levels, which subsequently has

\textsuperscript{24} Elies Van Sliedregt, ‘System Criminality at the ICTY’ in Nollkaemper and van der Wilt, \textit{supra} note 15 at 195.
\textsuperscript{25} \textit{Brdanin}, \textit{supra} note 23 at para 410.
\textsuperscript{26} See van Sliedregt, \textit{ibid.} at 195-96.
\textsuperscript{27} \textit{The Prosecutor v Rwamakuba}, decision on the interlocutory appeal regarding application of JCE to the crime of genocide, 22 October 2004, ICTR-98-44-AR72.4 at paras 24-25. \textit{Brdanin}, \textit{supra} note 23 at para 423. In \textit{Karemera}, the ICTR Appeals Chamber held that it is established in customary international law that during the Rwandan war in 1994 JCE liability may apply to a campaign of a vast scale. See \textit{The Prosecutor v Karemera}, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, ICTR-98-44-AR72-5;ICTR-98-44-AR-AR72.6 at para 16.
increased the possibility of guilt by association— a similar argument made in this paper after the decision in Lubanga since subsidiary JCE members, although they may have perpetrated the physical acts of the crime, neither had the ability to frustrate nor had the ability to reject the commission of the crimes despite being mutually aware and accepting their role in the joint enterprise.

Although not scrutinized to the same extent as in the ICTY, the ICTR case law has also dealt with the concept of JCE. ICTR Statute Article 6(1) uses identical wording as ICTY Statute Article 7(1) and does not explicitly provide for any JCE mode of liability. The unique feature confronting the ICTR has been that the alleged crimes were committed in the context of an armed conflict. The ICTR Trial Chamber in Ntakirutimana held that JCE liability is implicit within Article 6(1) based on customary international criminal law for armed conflicts. Using Tadic as its reference, the Trial Chamber stated that ‘the gravity of the participation in a joint criminal enterprise cannot depend on the nature of the conflict.’ Similarly, the ICTR grappled with whether it had subject matter jurisdiction over an accused charged with genocide pursuant to the concept of JCE. While the defence argued that such a mode of liability was not recognized for crimes of genocide in customary international law, the Appeals Chamber recognized genocide through a JCE pursuant to post-World War II cases in which genocide was subsumed under the concept of crimes against humanity. In Karemera, the Appeals Chamber confirmed its acceptance of JCE Category 3 suggesting that there is no jurisprudence from tribunal appeals chambers stating otherwise. In Simba, the ICTR Trial Chamber

29 Van Sliedregt, supra note 15 at 197. See also Brdanin, supra note 23 at para 428.
30 See ICTR Statute, supra note 12. Article 6(1) of the Statute specifically states, ‘A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.’ See ibid. at Article 6(1).
32 Ibid. at paras 32-38, 36.
33 Rwamakuba, supra note 27 at paras 6-7.
34 See generally, ibid. at paras 9-31.
35 Karemera, supra note 27 at paras 16-17. Chouliaras notes that the issue of whether mens rea elements pursuant to JCE Category 3 are compatible with the specific intent required for genocide was first raised in Stakic by the ICTY where the Trial Chamber
rendered its first judgment based on the JCE doctrine in which it found the accused guilty of genocide and extermination pursuant to a crime against humanity. In issuing its judgments, the Court applied JCE Category 1.36

3. JOINT CRIMINAL ENTERPRISE IN LUBANGA

In Lubanga, the Court, in its characterization of co-perpetration, made efforts to distinguish the Rome Statute from the statutes and jurisprudence of the ad hoc tribunals, which relied on an implicit interpretation of the JCE doctrine from the Statute’s text.37 The Court first made a distinction between principals and accessories stating that ‘only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime.’38 The Court also noted that the ad hoc Tribunals utilized a strictly subjective approach to place liability, which emphasized the ‘state of mind in which the contribution was made’39 rather than the actual perpetration of the physical acts. As a result, shared intent of the accused was sufficient to deem him or her a principal to the crime, ‘regardless of the level of their contribution to its commission.’40

The Court, with the tribunals’ interpretation in mind, presented a third approach to co-perpetration under Article 25(3)(a), which involved both an objective and subjective element. This approach is best characterized through the Court’s statement that ‘principals to a crime are not limited to those who, in spite of being removed from the scene of the crime, control

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37 The Prosecutor v Simba, Judgment, 13 December 2005, Case No. ICTR-01-76-T, T.Ch. I.
38 Lubanga, ibid. at para 328.
39 Lubanga, ibid. at para 329.
40 Lubanga, ibid.
or mastermind its commission because they decide whether and how the offence will be committed.’\textsuperscript{41} This approach, best entitled the ‘control over the crime’ concept, despite attempting to remedy the deficiency of the \textit{ad hoc} tribunals, which relied on a purely subjective approach thereby vulnerable to misplacing liability, left the door open to similarly misplacing liability to those who have minimal, though some, control over the crime. Such an approach, as I argue below, not only places greater liability than warranted in certain cases but also thwarts the ICC’s mandate.

4. THE OVERBREADTH OF ‘ESSENTIAL CONTRIBUTION’

The ICC indeed limited the scope of misplaced liability from that of the \textit{ad hoc} tribunals by requiring that a principal carry out the physical elements of the crime rather than merely possessing the requisite state of mind. However, by requiring a ‘co-ordinated essential contribution by each co-perpetrator’\textsuperscript{42} and by not defining ‘essential contribution,’ the Court invited possible misplaced liability as well as frivolous prosecution that lies outside of the ICC’s mandate.\textsuperscript{43} The Court defines principals having joint control over the crime as those to whom essential tasks have been assigned and who have the power to frustrate the crime by not performing those tasks.\textsuperscript{44} A myriad of employment roles can be played by individuals who have been assigned essential tasks and the ability to frustrate the crime but who still do not perpetrate the core crimes with the jurisdiction of the Statute, such as crimes against humanity or genocide.

Smeulers has developed a typology distinguishing ten types of perpetrators.\textsuperscript{45} This typology ranges from criminal masterminds, who are

\begin{enumerate}
\item \textit{Lubanga, ibid} at para 330.
\item \textit{Lubanga, ibid}.
\item \textit{Rome Statute, supra} note 3 at Article 1.
\item \textit{Lubanga, supra} note 2 at para 347.
\item The full list of the ten types of perpetrators is: i) the criminal mastermind, ii) the careerist, iii) the fanatic, iv) the devoted warrior, v) the professional, vi) the profiteer, vii) the conformist and follower, viii) the criminal, ix) the sadist, and x) the compromised perpetrator. Alette Smeulers, ‘Perpetrators of international crimes: towards a typology’ in A. Smeulers and R. Haveman (eds), \textit{Supranational Criminology: Towards a criminology of international crimes} (Intersentia: Antwerp 2008) 233-65. As Smeulers and Hola note, this typology of perpetrators of international crimes is not fixed: it is a theoretical model with ideal types. See Alette Smeulers and Barbora Hola, ‘ICTY and the Culpability of Different
usually (but not necessarily) heads of state or political or military leaders that envision a destructive ideology and promote, accept, or condone the use of violence,\textsuperscript{46} to merely the profiteer, conformist, or compromised perpetrator. The latter categories include those who are primarily opportunists seeking personal gain (the profiteer), those who simply do as they’re told (the conformist), or those who commit crimes pursuant to some duress or coercion (the compromised perpetrator). Admittedly, there is not a likely concern that the ICC will misplace liability on the profiteer because that person would likely not be considered as a principal to the crime since he or she would not have carried out its physical elements. But the conformist, the compromised perpetrator, or another typology defined by Smeulers as the ‘devoted warrior,’ who is ‘strongly driven by an urge to fit in and is usually very strongly attached to a certain morality,’\textsuperscript{47} can fall within the \textit{Lubanga} definition of a principal having joint control over a crime and providing an essential contribution because he or she had the ability to frustrate the crime. This author agrees with Smeulers’ and Hola’s argument that ‘those who are instrumental in creating [a social reality in which international crimes are acceptable, incited, endorsed, and promoted] should be blamed the most [and] [t]hose who merely follow the destructive policies and often personally commit crimes are much less culpable than their leaders.’\textsuperscript{48} The court’s characterization of ‘essential contribution’ in having joint control over the crime does not necessarily take it back into the JCE jurisprudence of the \textit{ad hoc} tribunals that merely required a subjective element to find liability, but it does hinder the Court’s progression in placing liability specifically upon masterminds and leaders of international crimes who were most responsible for the crimes’ commission. The ‘essential contribution’ characterization essentially contradicts the Statute’s Preamble that specifies that the ICC is a court that is complimentary to national criminal jurisdictions, which are in place to prosecute lower level criminals falling within the majority of Smeulers’ typologies. Furthermore, prosecuting lower level members having joint control over the crime obviates the Court’s intention of prosecuting

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\textsuperscript{46} Smeulers and Hola, \textit{ibid.} at 180.

\textsuperscript{47} \textit{Ibid.} at 183.

\textsuperscript{48} \textit{Ibid.} at 179.
‘persons for the most serious crimes of international concern’ according to the modes of liability set out in Article 25.\(^{50}\)

In Lubanga’s specific circumstance, it seems appropriate that he would be considered a ‘mastermind’ within Smeulers’ typology and deemed to have made an ‘essential contribution’ in the joint commission of crimes under the Statute. The Court’s decision on the confirmation of charges re-iterated that Lubanga ‘had de facto ultimate control over the adoption and implementation of UPC/RP policies’\(^ {51}\) and that he ‘used to make most of the decisions himself without consulting with the members of the movement’s executive and was running the movement like a dictator and was against any dialogue within the movement.’\(^ {52} \) Lubanga clearly had the ability to frustrate the recruitment and training of child soldiers and made an essential contribution to the perpetration of these crimes.

However, a practical aspect of this paper’s argument is that individuals such as Chief Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, and Bosco Ntaganda who, according to the Court, participated in the common plan and had ‘direct responsibility for carrying out several aspects of the implementation of the plan,’\(^ {53} \) could also be considered as principals to the crimes. These members, although high level but still subordinate to Lubanga, could then be prosecuted by the ICC pursuant to their essential contribution even though Thomas Lubanga had the ultimate authority and control over the crimes. The Court’s characterization of the objective elements of joint control over the crimes gives the Office of the Prosecutor a precedent by which to prosecute future high and low level leaders who nonetheless were subordinate to an ultimate authority, such as Lubanga in this case. Clearly, Saba, Kisembo, and Ntaganda had the ability to frustrate

\(^{49}\) Rome Statute, supra note 3 at Article 1.
\(^{50}\) The Court has said in *Mbarushimana* that ‘the modes of liability listed in article 25(3) of the Statute are arranged in accordance with “a value oriented hierarchy of participation in a crime under international law” where the control over the crime decreases as one moves down the sub-paragraphs.’ *The Prosecutor v Callixte Mbarushimana*, 16 December 2011, ICC-01/04 –01/10, Decision on the confirmation of charges at para 279.
\(^{51}\) *Lubanga*, supra note 2 at para 368(iii). The Court notes in footnote 447 that a witness, Kristine Peduto, testified that not only did the UPC recognize Lubanga as its leader, but the UPC was also widely perceived as being under his control.
\(^{52}\) *Lubanga*, *ibid.* at para 402.
\(^{53}\) *Lubanga*, *ibid.* at para 383.
the crimes since they had direct contact with and authority over the child soldiers. These individuals provided the child soldiers with military uniforms and personal firearms and ordered them into combat in parts of the Democratic Republic of the Congo in 2002 and 2003. The ICC’s purpose and resources, however, are not intended to prosecute such individuals and the ‘essential contribution’ characterization of joint control over crimes may very well thwart the Court’s original objective.

5. THE OVERBREADTH OF THE ‘MUTUAL ACCEPTANCE AND AWARENESS’ TEST

Regarding the subjective elements of co-perpetration based on joint control over crimes, the Court specifies that ‘[t]he suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime.’ The Court determines that the accused’s mutual acceptance and awareness of the objective elements of the crimes resulting through their actions ‘justifies a) that the contributions made by the others may be attributed to each of them, including the [accused], and b) that [each person having joint control] be held criminally responsible as criminals to the whole crime.’ Such a characterization risks not only placing a disproportionate amount of liability upon lower level or perfunctory members of the joint enterprise, it misunderstands the dynamics within such an enterprise in which lower level operatives, despite being mutually aware and accepting the possible result of their actions, neither have the final authority to make decisions nor are given much flexibility in altering the plan formulated by the higher level members or individual mastermind. Furthermore, due to the power dynamics within such enterprises, it is rarely, if ever, possible for such members to remove themselves from the enterprise if a disagreement arises between themselves and the criminal mastermind. In this light, the Court in Lubanga, although still requiring that a member carry out the physical acts of the crime to be considered a principal, somewhat retreated back to the ICTY Appeal Chamber’s analysis in Tadic. As Ohlin notes, the ICTY’s analysis in Tadic pursuant to the JCE doctrine assumed equal culpability for all members of a joint enterprise. ‘Culpability must

54 Lubanga, ibid. at para 379(viii).
55 Lubanga, ibid. at para 360.
56 Lubanga, ibid. at para 362.
be relative to the contribution involved. A defendant who makes a small contribution is not as guilty as someone who makes a large contribution.”

As Ohlin rightly advocates, the guilt of the minor participant, even though he or she may be characterized as a principal according to the definition espoused in *Lubanga*, is different from the guilt of the chief conspirator. It is not simply their sentences that should differ. As well, placing equal culpability on all members of the joint enterprise, as Ohlin states, tends to view the group as a single entity thereby ignoring its internal structure that is subject to nuanced power dynamics and interpersonal relations that cannot be simplified through varying penal sentences. Smeulers’ typology of possible membership roles in a joint enterprise is salient to this analysis because it presents the various stakeholders within a joint enterprise who often times carry out the crime’s objective elements but are within an environment in which they are subverted by the criminal mastermind. The very nature of a joint criminal enterprise presents a hierarchy of roles in which subordinates carry out the orders of one or many criminal masterminds without exerting much independent thought concerning the objective elements of the crime.

The Court in *Lubanga* concluded that there was sufficient evidence to believe that Lubanga as well as Chief Kahwa, Rafiki Saba, Floribett Kisembo and others were both mutually aware and mutually accepted the

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57 Jens David Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 J Int Crim Jus 69, 85. Ohlin notes that the concept that culpability must be relative to the contribution involved is a principle that both *Tadic* and the Rome Statute claim to uphold.

58 Ohlin, *ibid.* at 88.

59 Ibid.

60 An example of this is the devoted warrior, who as Smeulers and Hola note, ‘considers obedience, conformity, loyalty and self-sacrifice as important values and gets involved in international crimes precisely because he completely submits himself to a criminal mastermind and obeys, conforms and is very loyal. Devoted warriors commit their crimes out of obedience, loyalty and a sincere belief in a certain ideology or because they zealously follow their leader.’ As well, the compromised perpetrator is someone ‘in a vulnerable position and their vulnerability is abused by a criminal system. They are forced to commit international crimes under threat, duress or in some other way and their personal agency and autonomy while committing the crimes is very limited.’ Smeulers and Hola, *supra* note 45 at 183, 188.
consequences of implementing their common plan.\footnote{Lubanga, supra note 2 at para 408(iii).} Thus, considering that all of the members within the common plan carried out the physical elements thereby making them principals to the crime, and assuming that they would possess the relevant subjective elements, they could all be potentially prosecuted as co-perpetrating crimes under Article 25(3)(a). As with the Court’s skewed definition of ‘essential contribution’ in the objective elements, the ‘mutual awareness and acceptance’ test would leave open the door for unnecessary prosecutions of lower level members, a result that would again be contrary to the initial purposes of the Court as illustrated through the Rome Statute.\footnote{See Rome Statute, supra note 3 at Preamble, Article 1.}

6. CONCLUSION

This paper has argued that the Court’s interpretation of Article 25(3)(a) in its decision on the confirmation of charges in \textit{Lubanga} for joint control over a crime has receded back to the ICTY’s interpretation in \textit{Tadic} in which the court mistakenly placed equal liability for all members of the joint criminal enterprise.

Various national systems have also struggled with the proper approach to applying liability to JCE members. For instance, in Germany the courts previously utilized the strictly subjective approach for finding liability. However, jurists today prefer classifying JCE principals as those who control the perpetration of the crime, whether that is done by controlling ‘the action itself (\textit{Handlungsherrschaft}), by controlling the will of another person (\textit{Willensherrschaft}), or by exercising functional control (\textit{funktionale Tatherrschaft}).’\footnote{Kai Hamdorf, ‘The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law’ (2007) 5 J Int Crim Jus 208, 210.} In England, the courts have adopted a bright line test to distinguish between JCE principals and accessories. The person whose act is the immediate cause of the \textit{actus reus} is considered as the principal and all others participating in the offence’s commission are accessories. This approach similarly applies where two or more individuals jointly commit a crime. The main exception to this characterization of principals and accessories in English law is when the perpetrator commits a crime through another person who is innocent, for instance, due to infancy,
insanity, or duress. Similarly, where the doctrine of innocent agency applies, two or more individuals can be considered joint principals even though they may not have been present during the crime.\textsuperscript{64} National courts are present to prosecute not only criminal masterminds who may have had ultimate control over the crimes but also lower level principals and mere cogs within the joint enterprise. Prosecuting all JCE members who may have participated in the crime, at any level, is the precise function of domestic jurisdictions. The approaches taken in Germany and England do not include any ‘essential contribution’ characterization nor do those courts specify that principals are only those that can frustrate the crime’s commission. Rightfully so, this gives the national courts greater scope in their prosecutorial powers. On the other hand, the ICC is a court of last resort and functions as a compliment to national systems pursuant to the unwillingness or inability of national systems to prosecute alleged criminals.\textsuperscript{65} However, in addition to its complimentary role, the Court’s mandate of prosecuting persons for the most serious international crimes\textsuperscript{66} must be at the forefront of its concern in order to avoid ill-advised prosecutions of lower level JCE officials.

Undoubtedly, as the ICC’s first decided case, \textit{Lubanga} is a monumental achievement in which global governance can be achieved without a global government.\textsuperscript{67} In subsequent cases involving allegations of co-perpetration, the Court must further clarify its position and define concepts such as ‘essential contribution’ as well as engaging in a more detailed analysis about the power dynamics at work within a JCE. Such improvements will ensure that the Court prosecutes and convicts only those who were truly responsible for controlling the crimes under the Court’s jurisdiction. It will also honor the Court’s mandate and ensure that its purpose, outlined

\textsuperscript{64} Hamdorf, \textit{ibid.} at 219.

\textsuperscript{65} The Rome Statute specifically states, ‘the Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.’ See Rome Statute, \textit{supra} note 3 at Article 17(1)(a). The Statute also states that, ‘[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.’ \textit{Ibid.} at Article 17(3).

\textsuperscript{66} Rome Statute, \textit{ibid.} at Article 1.

\textsuperscript{67} Luis Moreno-Ocampo, ‘Foreword’ (2008) 1 Issues in Int Crim Jus, 8.
in the Preamble and Article 1, is more aptly fulfilled.
Child Soldiers: An Exception in International Law?

Elena Batchelder¹

1. INTRODUCTION

This paper examines the unique status, experience and legal responsibility of those known as ‘child soldiers’. There are an estimated 300,000 children in the world today who are actively engaged in hostilities,² either through government forces or rebel groups. ‘Child soldier’ refers to ‘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, spies or for sexual purposes.’³ In general, international law views these child soldiers as victims, yet the plethora of issues surrounding child soldiers complicates such a view. The horrific circumstances created by conflict, both national and international, that lead to the enlistment, conscription and use of children are a growing concern, not only morally but legally. These soldiers, recruited from as young as five years old,⁴ are subjected (among other things) to violence, rape, and murder, but then they themselves become perpetrators of the aforementioned crimes. How ought the international legal community deal with this? Should they be protected as victims or punished as perpetrators? This paper will explore this issue in international law and the unique status of the child soldier with the aim of determining whether it is best to protect these individuals as victims or punish them as perpetrators, or whether the child soldier

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comprises an ‘exceptional’ status.

2. CURRENT INTERNATIONAL LAW

Most of the current international law regarding child soldiers focuses on those individuals who commit war crimes by recruiting children. This is indicative of the widespread view that child soldiers are victims rather than perpetrators of all the crimes surrounding them. Whilst 18 is considered the universal age of adulthood pursuant to Article 1 of the Convention of the Rights of the Child (CRC),\(^5\) most international law only specifies the illegality of recruiting, enlisting, or conscripting children under the age of 15. The use of child soldiers under 15 years-old is prohibited as a war crime under the International Criminal Court (ICC) Statute, and the Special Court for Sierra Leone (SCSL) Statute.\(^6\) Prior to these statutes, conscripting children for use in armed conflicts was already a well-established prohibition,\(^7\) and the SCSL held that this provision later recognised in the SCSL Statute Article 4(c) was already customary international law. Further to these sources of law, in 2000 the Optional Protocol to the Convention on the Rights of the Child (OP) raised the age limit to 18 for child soldiers. However, this age limit is currently only treaty law, not customary law, and certainly not customary criminal law.\(^8\) It is notable nevertheless that the ICC has no jurisdiction over persons


\(^8\) Robert Cryer et al., An Introduction to International Criminal Law and Procedure (Cambridge University Press 2007) 311.
who were under the age of 18 at the time of the alleged crime. There is an anomaly in this: that the restriction on recruiting children is under 15 years, yet there is apparently no criminal jurisdiction for those who are aged 15 - 17 that take part in hostilities. This could have the adverse effect of encouraging the recruitment of children between the ages of 15 and 17.

For the children who are recruited and then commit crimes, there is currently no applicable international age of criminal responsibility. The age of criminal responsibility varies widely in each nation; in Australia, for example, children under 10 cannot be charged with a criminal offence. Between the ages of 10 - 14, the principle of doli incapax exists; a (rebuttable) presumption of no mens rea, and it is only upon achieving the age of 18 that a person may be tried in an adult court. A controversial case in the late 20th Century of two 10-year-old British boys who were charged with abducting and murdering two-year-old James Bulger received much criticism, as the boys were tried in a full adult court. In 1999, the European Court of Human Rights ruled that as the boys had been tried in public in an adult court, it had not been a fair trial. The guilty verdict and assertion by lawyers that the two boys knew the difference between right and wrong also highlights the issue of guilt in crimes committed by children - with such premeditated crimes (the doli incapax presumption was successfully rebutted and it was proved that the boys knew the difference between right and wrong), what should the age of criminal responsibility be? There have been many calls for a uniform age of criminal responsibility however the ICC avoided confronting the issues of criminal responsibility of child soldiers when constructing the ICC Statute. Article 40(3)(a) of the CRC provides that state parties to the Convention ought to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, however

12. Reg. v Secretary of State for the Home Department, Ex parte V. and Reg. v Secretary of State for the Home Department, Ex parte T., The Times, 13 June 1997 (HL).
the CRC fails to stipulate what age this should be.\footnote{Matthew Happold, ‘Child Soldiers: Victims or Perpetrators?’ (2008) 29 University of La Verne Law Review 56, 75.}

Most recently, in a landmark case for child soldiers, Congolese warlord Thomas Lubanga Dyilo was convicted of a war crime under § 8(2)(e)(vii) of the ICC Statute for recruiting, enlisting and conscripting children under 15 years of age for use in a national armed conflict.\footnote{The Prosecutor v Lubanga (Judgment), Trial Chamber I, 14 March 2012, Case No ICC-01/04-01/06.} This is significant as it is the first international case focusing solely on child soldiers, and the successful verdict against Lubanga is a precedent for punishing those who use children in armed conflict.

3. VICTIMS OR PERPETRATORS?

As aforementioned, most rhetoric focuses on child soldiers as victims, evidenced by the fact that international law does not really recognise child soldiers as perpetrators – there are very few laws applicable to child soldiers’ own conduct. The CRC, the OP and the African Charter on the Rights and Welfare of the Child seem to provide that children have a right to not be recruited in breach of international law, and that those who are illegally recruited have thus had their rights violated, and are victims.\footnote{Happold, above note 15 at 67.} This is in part due to the presumption that children under 15 lack the mental capacity to be able to judge sufficiently what becoming involved in military service truly involves. Happold writes that this is a welfare right attached to children under 15, due to the fact that any sort of military service (even voluntary) will always be contrary to their best interests.\footnote{Ibid.}

For children of 15 - 17 years, voluntary enrolment into national armed forces (but not rebel ones)\footnote{David Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’ (2007) 109(2) American Anthropologist 296, 302.} is seen to be within their capacity to choose. A corollary issue is that for these child soldiers, the previously mentioned ‘impunity gap’ exists; they will not be held accountable under international law until they reach the age of 18, and then only if they continue to commit crimes under international criminal law.
Reasons for the current widespread use of children in war have been attributed to the fact that they are ‘more easily guided and suggestible than adults’, and can be easily abducted and then ‘moulded’. Small weapons are easy for children to wield, and the expendability of an abducted child is desirable for those wanting to fill ranks. In the history of international criminal law, children have not traditionally been held accountable for crimes they committed as child soldiers. For child soldiers to be held accountable, the mens rea as well as the actus reus ought to be shown, and for this reason most tribunals have not pursued prosecution of child soldiers. As the ICC has no jurisdiction over children, they are unlikely to be prosecuted in an international setting, although a few cases of children being prosecuted as victims have occurred. Although the SCSL was the first international source of law that allowed for prosecution of children charged with international crimes, the Court’s mandate that it would prosecute only those who ‘bore the greatest responsibility for crimes committed in Sierra Leone’ did not extend to child soldiers, and in fact the Prosecutor stated that he would not pursue child soldiers for crimes they had committed. Instead, there was a rather successful rehabilitation program. The question of the mens rea in child soldiers raises the question of whether children so young are capable of committing evil and knowing the difference between right and wrong, especially when subjected to such harsh conditions and what many have described as brainwashing. An interesting contrast is the previously mentioned case of the two 10-year-old boys who murdered two-year-old James Bulger; they certainly were not brainwashed or forced to kill, yet did so out of their own volition, raising the question of the age at which children know the difference between right and wrong.

The idea of child soldiers as perpetrators is less popular. Rosen writes that in some cases children ought to be held responsible as perpetrators of the crimes they commit, and that overly paternalistic protective laws override and restrict local understandings of the childhood and adulthood divide. Rosen aims to view child soldiers and the crimes surrounding them from a political, social and cultural context. Based upon that premise he claims that the ‘extreme protectionist’ international law perspective in regards to

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20 Morini, supra note 2 at 188.
21 Freeland, supra note 10 at 304.
22 Morini, supra note 2 at 201.
23 Rosen, supra note 19 at 297.
child soldiers fails to take into account the ‘multiplicity of childhoods’ that exist in different cultures.  

His criticism of the stance towards child soldiers includes his belief that the laws concerning them were not developed with involvement of children, or with any anthropological concern. Consequently, he believes that the humanitarian rhetoric categorising child soldiers as victims is normative and incomplete. Furthermore, Rosen argues that the ‘real-world experience’ of victims of child soldiers conflicts with the supposition that all child soldiers lack the mens rea for the crimes they commit. Where is the line between adulthood and childhood and at what age do children suddenly obtain legal agency, or the knowledge between right and wrong? Rosen convincingly assures us that there is no such thing, and that in many cultures military life is an inherent part of childhood and maturation, only after which and as a result of which, they become adults.  

He also controversially states that the vast majority of child soldiers are not forcibly recruited or abducted, but rather join willingly. To support this, Rosen quotes Krijn Peters and Paul Richards, who write that ‘many under-age combatants choose to fight with their eyes open, and defend their choice, sometimes proudly.’  

Another criticism mentioned for the international legal discourse regarding child soldiers is that humanitarian and political concerns are entangled. For example, while international law prohibits rebel groups from recruiting child soldiers, it allows state parties to do so. Voluntarily enlisting into military service children of 15 – 17 years old is permissible for state parties, but still illegal for rebel groups. Such double standards (no doubt based upon the somewhat unrealistic ideal that state parties are ‘good’ and will treat children with dignity) seems primarily to be a provision designed to placate states who rely on child soldiers. This is confirmed by the fact that states cannot be found to have committed crimes by recruiting, enlisting, and conscripting children; any criminal

24 Ibid.
25 Ibid.
26 Ibid. at 299.
27 Ibid.
29 Happold, supra note 15 at 69.
30 Peter Malanczuk, and Michael Barton Akehurst, Akehurst’s modern introduction to international law (Routledge 1997) 333.
responsibility regarding child soldiers can only lie with individuals, thereby protecting states and perhaps individuals who are potentially able to claim immunity (although the defence of personal immunity was not successful in Charles Taylor’s case).

The question of whether child soldiers are victims or perpetrators of crimes is often viewed differently in varying contexts. A Rwandan Save the Children Federation study found that the majority of public opinion supported the view that child soldiers ought to be brought to account for their actions during the 1994 genocide. The desire for justice against child soldiers was strong, particularly from those who had fallen victim to child soldiers and consequently believed that children were certainly ‘able to discriminate between two ethnic groups … and carry out murder in that way’. This led to a widespread view in favour of prosecuting child soldiers as perpetrators in Rwanda.

Despite the complexity of varying cultural, societal and political norms around the world, it is undoubtable that international criminal law must create a divide between adulthood and childhood, and establish an age of criminal responsibility. As hard as it may be to decide where that line lies, or who should be held responsible for the many crimes surrounding child soldiers, law depends upon certainty, and with certainty people are increasingly likely to abide by that law. For this reason the Lubanga judgment was a milestone case, in that it prosecuted one of the world’s greatest instigators and users of child soldiers, paving the way for justice where child soldiers are concerned.

4. A UNIQUE STATUS?

As can be seen from conflicts around the world, it is evident that child soldiers are victims, yet also perpetrators of crimes. As such, they may be described as an ‘exception’ in the realm of international criminal law. Psychology professor Michael Wessells confirms this view by describing how upon being abducted or conscripted, children go through a process...
of ‘splitting’ or ‘dissociation,’ and cut themselves off from their past lives by constructing a new identity that is more in keeping with the disastrous situation in which they find themselves.\textsuperscript{35} It is from within this new identity that they are able to commit the atrocities they are ordered to, becoming increasingly like their oppressors.

Of considerable interest is the case of Dominic Ongwen, who was only 10-years-old when he was abducted by the Lord's Resistance Army (LRA) in Uganda, yet excelled in his new life as a child soldier, ultimately becoming one of the LRA's key leaders. He has since been indicted by the ICC for crimes against humanity and war crimes.\textsuperscript{36} If brought before the ICC, he would be the first person to be charged with crimes that were initially committed against him. Although the ICC does not have jurisdiction over persons for crimes they committed when less than 18 years old, the ICC can prosecute these individuals the moment they turn 18 and continue to commit those crimes. Again, the question of guilt and knowledge of right and wrong arises – if Dominic Ongwen was only 10 when abducted, and then consequently brainwashed and taught a new way of life, what is the difference between prosecuting him now, or if he was captured when he was only 17? International criminal law suggests that although he did not have the \textit{mens rea} while committing crimes as a child soldier, somehow he grew into legal capacity as he aged. How much responsibility should Dominic Ongwen hold for his crimes, when he was indoctrinated as a mere 10-year-old child to live in such a manner? If it is true, as McCarney suggests, that as a result of child soldiers’ age and trauma they are unable to distinguish between right and wrong, how are they to then gain such a distinction without being removed from the said trauma? This brings to mind notions of natural law; and one must question whether natural law as espoused by the likes of Aquinas (that of moral precepts ‘flow[ing] from a dictate of natural reason’\textsuperscript{37}) has any presence in the ICC’s indictment of Dominic Ongwen; otherwise, growing up as a child in such conditions,


how was he to discriminate between right and wrong? Of course, it is hardly surprising that the ICC desires to render justice, particularly to those bearing the greatest responsibility for the worst crimes (pursuant to which Dominic Ongwen came to be within the LRA); yet the distinction between the indictment of Dominic Ongwen and the ICC’s refusal to prosecute child soldiers under 18 seems lacking, remaining an anomaly in international criminal law. It seems that if Ongwen comes to trial before the ICC, the burden of proof to find the requisite *mens rea* for the crimes he has committed may be difficult to discharge, particularly as he was indoctrinated from such a young age.

5. **THE FUTURE**

So how should the international legal community approach this complex issue of child soldiers? As Freeland states, the real solution to this issue lies in the ‘abatement of armed conflict’ on a broad scale, however despite the desirability of this solution, it seems highly unlikely. Given the complexity of child soldiers’ situations, which reveals a lacuna in international criminal law, the answer will not be easy. Although perpetrators of terrible crimes, child soldiers are firstly and primarily victims and hence ought to be protected. Punishment should lie in the form of rehabilitation. As Rosen rightly mentions, international law ought to work alongside anthropologists and psychologists to better understand child soldiers. Undoubtedly victims, of not only the horrendous war crime of being recruited, enlisted, conscripted and used, but also of numerous other crimes including rape, torture, and being forced to kill, child soldiers are brainwashed and coerced through fear, indoctrination and threat.

While it is not impossible for children to do evil of their own accord (see the previously mentioned case of the abduction and murder of James Bulger), the reality is that most child soldiers do not exist because of their own desire to perpetrate crimes, but rather have been coerced or forced into such a situation, either by abduction or by the lack of a better choice - even the claim that some children ‘volunteer’ is a ‘complete misnomer’. It is only in the gravest of situations that a child voluntarily joins such a group. Consequently, the defence of ‘superior orders’ ought to indemnify

38 Freeland, *supra* note 10 at 306.
39 Aptel, *supra* note 36 at 27.
40 Freeland, *supra* note 10 at 305.
them, were they ever to be brought to trial.

There are indeed considerations that support prosecuting child soldiers, such as justice for victims who suffered at the hands of child soldiers and the fact that it is not necessarily in a child’s best interest to be completely absolved of responsibility for the crimes he/she committed. However even if it remains an option, prosecution should not be given priority. To date, the best alternative to prosecution of child soldiers was that undertaken in Sierra Leone at the end of its civil war: a Truth and Reconciliation Commission (TRC), during which children were protected and their statements were confidential. Through this medium, children were able to be open about their experiences, while still experiencing protection. The Paris Principles also provide that any children involved in such a mechanism are to be treated equally as victims or witnesses. While the SCSL was given jurisdiction to try children between the ages of 15 and 18 at the time of the alleged crime, these children were to be tried as ‘juvenile offenders’, and given the presumption of rehabilitation and reintegration into society, while immunised from imprisonment. However, due to the SCSL’s mandate to only prosecute those most responsible for the worst crimes, there was no prosecution of child soldiers. As for the success of rehabilitation, research shows that former child soldiers who are provided rehabilitative services and accepted back into their communities are able to become responsible adults. A research study of former child soldiers in Mozambique over a period of 16 years found that while none of the child soldiers were entirely free from the psychological effects of their past, most of them became ‘productive, capable and caring adults’ as a result of rehabilitation.

6. CONCLUSION

Child soldiers are sui generis in the realm of international criminal law, and ought to be treated as such. Holding a unique status somewhere between

41 Morini, supra note 2 at 206.
44 Ibid. at 88.
victim and perpetrator, child soldiers ought to be primarily protected, and understood as a product of the horrific circumstances into which they have been unwillingly dragged. The Bulger case highlights the need for the establishment of an international age of criminal responsibility. International legal discourse ought to work with other disciplines such as anthropology and psychology to determine what the best situation is in every context; yet with the mandate that although other forms of responsibility may be taken, prosecution ought to be a last resort. Instead, as indeed is the case, international criminal law should focus on the leaders who instigate these situations and abduct children to be child soldiers; for this reason the guilty verdict of Thomas Lubanga Dyilo is laudable. Consideration under international criminal law ought to be given for those individuals (such as Ongwen) who begin as involuntary child soldiers yet then become significant leaders and perpetrators of war crimes and crimes against humanity, carrying out against others the very crimes that were first carried out against them.

The international community should support rehabilitation programs to reintegrate former child soldiers into society, and encourage demobilisation programs to stop child soldiers, such as the Coalition to Stop the Use of Child Soldiers. Only through protection, understanding, rehabilitation and preventative laws aimed at those who recruit, enlist and conscript child soldiers, can we help to reduce and eventually eliminate this ‘exception’ in international law.

45 Ibid. at 87.
The Participation of Victims at ICC Proceedings: Brief Reflections on the Question of the Right ‘to’ Trial

Francesca Maria Benvenuto

1. INTRODUCTION

It is widely known that the practice of the International Criminal Court (ICC) significantly diverges from that of previous international criminal courts. The extremely innovative nature of the emerging criminal court is not merely a question limited to jurisdictional issues such as complementarity\(^1\) and permanence.\(^2\) The ICC also has some purely procedural peculiarities.\(^3\) Among these is the increasing attention afforded to victims. In the ICC system, victims are allowed a form of participation in the legal process totally unknown in the ad hoc tribunals, where they can only play the marginal role of witnesses. The ICC has shown greater consideration for victims, guaranteeing them certain rights to participate in its proceedings and at trial.\(^4\)

\(^{1}\) The rule of complementarity is in opposition to that of ‘primacy’, which characterises ad hoc Tribunals. The Court may therefore act only when the State, which has jurisdiction over the case, refuses or is unable, to initiate proceedings: these are the ‘preconditions’ of Article 17 of the Rome Statute.

\(^{2}\) The Court judges all international crimes committed since the Rome Statute came into force, in opposition to the jurisdiction of the criminal courts for Rwanda and for the former Yugoslavia which, in contrast, have temporally limited (albeit extendable) jurisdiction.

\(^{3}\) It is widely known that the breaks with the past also regard the principle of legality. In fact, the experience of the Court has gradually led to an evolution of the principle of retroactivity, the latter extending from substantial law (ex Article 24 of the Rome Statute), to jurisdiction and competence (ex Article 11 of the Rome Statute) envisaging a ‘double’ non-retroactivity. See S. Manacorda, *Imputazione collettiva e responsabilità personale – Uno studio dei paradigmi ascrittivi nel diritto penale internazionale* (Turin 2008) 121 and seq.

\(^{4}\) In the Preamble to the Rome Statute, the victim already seems to have a prominent role. It is in fact the subject of the first ‘reminder’ that the Rome Statute addresses to States, ‘States [...], conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’.
This innovative feature of the ICC arises from a gradually changing conception of modern international criminal law and, consequently, of public international law. International law is undergoing a shift away from the past internationalist system, where the state was the main protagonist, towards an anthropocentric approach: a reversal of the international system, which enriches the legal sphere of the individual with new rights (and new duties) and, above all, new forms of protection. The International Criminal Court is moving, therefore, towards a new equilibrium, going beyond the Westphalian model, accepting the individual (and thus also the victim) as one of the focal points of its own system.\(^5\)

Despite the many issues relating to this subject, I intend to focus on just one hermeneutical question: we shall enquire whether the explicit recognition of victim's rights ‘at’ trial (i.e. a general right to participate) has automatically implied a recognition of a victim's right ‘to’ the trial within the ICC system. In attempting to answer this question, it will be necessary, first of all, to identify in the Rome Statute (Statute), the legal basis for victims’ participation and briefly describe the conditions governing the application, its time limits and its essential content.

Second, we have to consider the nature of the victims’ interest in participation. It will, in fact, be necessary to understand whether they are spurred to participate purely to obtain reparations, or if there is some further interest: namely, an interest in the holding and conduct of the criminal trial itself, regardless of any request for compensation relating to the harm suffered.

Finally, we shall try to understand whether, in light of what has been said above, the (potential) recognition of the interest of victims in holding the trial constitutes a real right (we can call it a right ‘to’ trial). If so, the trial would no longer be understood purely as a ‘means’ to exercise the right to reparation, but as the autonomous subject of a right in itself.

2. BRIEF NOTES ON PARTICIPATION: THE CONDITIONS

The provision that explicitly recognises the victim’s right to take part in

a trial of the International Criminal Court is Article 68(3) of the Statute, which states that if a victim’s ‘personal interests’ are involved, he/she may directly submit an application to the Registrar of the Court, expressing his/her ‘views’ and ‘concerns.’ Even if the Statute does not include victims in the rigid pairing of parties (prosecution and defence), it acknowledges that victims have the right to interact actively in a trial which affects their interests, directly involving them in the development and the conduct of the proceedings.

The notion of ‘victim’ contained in the Rules of Procedure and Evidence (Rules) is not different from what is nowadays established in public international law.\(^6\) Victims include individuals and entities that have suffered harm as the result of the commission of any crime within the jurisdiction of the Court. Organisations are therefore entitled to apply to participate, as are legal persons who have suffered direct harm from the crime.\(^7\) The conditions securing participation will therefore be: the existence of harm (the notion is not merely limited to institutional damage, but extends also to physical and psychological harm);\(^8\) the commission of a crime that falls within the jurisdiction of the Court (therefore within its \textit{ratione materiae, loci personae} and \textit{temporis competence}); and a causal link between the harm suffered and the crime.

Victims may participate ‘at stages of the proceedings determined to be

\(^6\) Principle 8 of the \textit{UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power} defines victims as ‘persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.

\(^7\) Rule 85, Rules of Procedure and Evidence: ‘organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’

\(^8\) For further clarification on the concept of ‘harm’, see Trial Chamber, \textit{The Prosecutor v Thomas Lubanga Dyilo}, 18 January 2008, ICC-01/04-01/06-1119, Decision on Victims’ participation.
appropriate by the Court, even in the investigation stage, as explained by the Pre-Trial Chamber during the Lubanga trial. In fact, on 14 June 2005, in the wake of the situation of the Democratic Republic of the Congo, six victims - through the Fédération Internationale des ligues des droits de l’homme - made an application under Article 68(3) of the Statute. In deciding on the admissibility of the application, the Pre-Trial Chamber, in the decision of 17 January 2006, allowed the victims to be involved in the investigation, despite the firm opposition of the Prosecutor. The Chamber also stated that recognising such a large time-frame for the application was teleologically compliant with the new view and new consideration that international criminal law has of the individual, and, therefore, of the victims themselves.

There is a further precondition to exercising the right to participate, which is mainly a matter of content. Although from reading Article 68(3) of the Statute the content of the application may seem wide, because the Statute says nothing on the substantive core of the ‘views and concerns,’ the Court will actually have to consider whether the intervention may be in conflict with the rights of the accused and the principle of fair trial.

Finally, the victim will be considered entitled to participate only if his/her ‘personal interests’ are directly involved. And actually the most common hermeneutical disputes on victim participation at the ICC arise from the reasons that lead a victim to participate in an international criminal trial. So, in order to look further into the issue, it is necessary to identify the real goals the victim pursues in participating in the ICC proceedings.

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9 Rome Statute, Article 68(3).
11 Ibid. para 50 and seq.
12 For an example see V.A., ‘Article 68’ in O. Triffterer (eds), The Commentary on the Rome Statute of the International Criminal Court - Observers’ notes, article by article (Baden 2008) 1289: ‘[…] the judges could not allow a certain intervention of the victims’ representative when its content consists in arguments already integrally presented by the Prosecutor: fairness and expeditiousness of the proceedings would be at risk of prejudice.’
3. THE INTERESTS OF VICTIMS: ‘PERSONAL’ AND ‘REPRESSIVE’

Victims may, of course, take part in the trial in order to obtain reparations if, at the end of the proceedings, the guilt of the accused is established. However, in the Court’s system, application under Article 68(3) and application for reparations (under Article 75 of the Statute) are wholly independent, both from the formal and substantive points of view. Victims may in fact decide to submit an application under Article 68 of the Statute without making any reference to damages, thus expressing only their ‘views and concerns’, or they may present only an application for reparation to the Court under Article 75 of the Statute. Limiting the purpose of victims’ participation only to obtaining damages would be extremely restrictive. In fact, we may note that other provisions of the Statute, as well as some of the norms of the Rules, recognise that victims may have an interest beyond reparations: an interest in the conduct of the trial itself.

First, this further interest is considered explicitly in Article 65 of the Statute, which, by recognising that the accused may admit guilt, thus bringing the trial to an end, restricts the closure of the proceedings to certain conditions. The Trial Chamber is not only charged with determining whether any admission of guilt is supported by appropriate evidence, but it is also empowered to ascertain whether the proceedings require a more complete reconstruction of the facts ‘in the interests of justice and in particular in the interests of the victims’ (Article 65(4)).

Second, this further interest is also (implicitly) stated in Rule 92 of the Rules. In fact, Rule 92(2) obliges the Court to notify the victims of the Prosecutor’s decisions to refrain from either an investigation or, following an investigation, from a prosecution, pursuant to Article 53 of the Statute. These provisions of the Rules enable victims to participate precisely so they

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can confer regarding any Prosecutor’s negative determinations. In this way, participation is sought to allow victims to prevent the trial from being closed at a time they might consider premature. Moreover, Rule 92(3) states another part of the obligation of notification. In fact, the Court is obliged to notify victims regarding its decision to set the hearing for the confirmation of the charges, so as to encourage them to participate in a key stage of the proceedings which determines whether or not to proceed with a trial.

Lastly, Article 15(3) of the Statute provides that in the event of a proprio motu investigation by the Prosecutor, the Pre-Trial Chamber must, before authorising the prosecution, inform the victims and hear any representations that could possibly convince the Court to grant such permission. Both the Statute and the Rules suggest that the victims are both potential ‘driver’ and ‘brake’ of the ICC proceedings (both during the investigation and the trial itself), demonstrating their actual interest in the conduct and the holding of the international criminal trial itself, regardless of any request for redress. Moreover, many Court decisions, particularly in the Lubanga case, help to corroborate the existence of the multi-faceted aims behind victim participation. In Lubanga, the Pre-Trial Chamber, recognising the victim status of six persons (in the investigation stage) stated that ‘[...] article 68-3 du Statut confère également aux victimes le droit à la lutte contre l’impunité,’ (Article 68 also acknowledges victims the right to participate in the fight against impunity) admitting that they may, therefore, intervene in the proceedings not only to obtain adequate redress, but also to ‘[...] obtenir une clarification des faits et la punition des coupables [...]’ (obtain a clarification of the facts and to see the perpetrators punished).

15 V. S. Vasiliev, ‘Article 68 (3) and personal interests of victims in the emerging practice of the ICC’ in Carsten Stahn, Göran Sluiter (eds), The emerging practice of the International Criminal Court (BRILL 2009) 641 and seq.
Moreover, on the occasion of an *incidenter tantum*\(^\text{18}\) appeal, Judge Song wrote in his separate opinion annexed to the Chamber’s decision, that he acknowledged the dual purpose of the victim’s participation: the purpose to obtain compensation, and above all, a ‘repressive’ purpose regarding the crimes and the potential perpetrators. The victim participates in the trial ‘so that justice may be done’ by ascertaining the facts of the crime and establishing the criminal responsibility of the offenders, participating, therefore, in the ‘fight against impunity’: ‘[...] [t]he victim of a crime has a particular interest that the person allegedly responsible for his or her suffering be brought to justice’.\(^\text{19}\) And the same concept is stated in the *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*, where the Chamber, in clarifying the purpose of participation (in this case during the hearing of the confirmation of the charges), said that the victims intervene in the proceedings in order to assist the Prosecutor in ascertaining responsibility and, ‘where relevant,’ to obtain redress.\(^\text{20}\)

The Court, therefore, applied a broad interpretation of ‘the personal interest’ of the victims. The vagueness of the statutory terms and expressions led the Court to extend the concepts rather than restrict them, opting for an extension of the content of the ‘first cause’ of victim participation.\(^\text{21}\)

It is necessary, lastly, to take another hermeneutical step, which is, however, obligatory according to Article 21(3) of the Statute. This, in fact, states that the Statute must necessarily be interpreted and applied in the light of international standards on human rights. It is therefore necessary at this point to wonder whether the main international human rights protection bodies have stated that victim participation in criminal trials involves a further interest beyond reparation. In effect, not only have both the Inter-American Commission on Human Rights and the European Court of

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\(^{18}\) Appeal Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA8 13/06/2007, Decision on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the Directions and Decision of the Appeals Chamber.

\(^{19}\) *Ibid.* para 13, Separate opinion of Judge Song.


\(^{21}\) On this subject see also, R. Cairo ‘Les droits des victimes devant la Cour pénale internationale’ in *Actualité Juridique (Pénal)* (June 2007) 261 and seq.
Human Rights acknowledged to victims the ‘repressive’ interest that the ICC itself has adopted in its own system, but they have also translated this interest into a real right: the right to an ‘effective prosecution’. States Parties, in fact, according to some judgments of the human rights courts, would be guilty of violating, respectively, Article 25 of the Inter-American Convention (duly read in conjunction with Article 8 and Article 1.1) and Article 13 of the European Convention on Human Rights,\textsuperscript{22} when there has been a refusal to undertake the investigation or to prosecute and conduct the ensuing trial, when there is a clear lack of impartiality among the judges or the investigative body, or when there are obvious irregularities or delays in conducting investigations or the trial itself.\textsuperscript{23}

So, both the International Criminal Court and the various international human rights organisations (and courts) have repeatedly demonstrated full awareness of the existence of a dual purpose to victim participation, a two-fold interest which cannot, therefore, be denied. The victim becomes involved in a criminal trial not only to obtain compensation, but also to be heard. He/she breaks away from the formal and constraining role of the witness and takes on an active role in the investigations and reconstruction of the facts in (and by means of) the trial and establishing the guilt of the alleged offender, overcoming the frustration caused by the procedural limitations of previous international criminal tribunals.\textsuperscript{24}

4. THE RIGHT ‘TO’ TRIAL: CRITICAL PROFILES

Given the provisions of the Statute, and in the light of what has been established by the ICC and by regional human rights organisations, the question arises, then, of whether we can distinguish and see in victims’ ‘repressive’ interest an actual right to the international criminal trial. If so, the trial, characterised by a therapeutical-healing goal, would be considered


\textsuperscript{24} D. Donat-Cattin, ‘The role of victims in the ICC proceedings’ in Flavia Lattanzi (eds), The International Criminal Court, Comments on the Draft Statute, (Napoli 1998) 256 and seq.
the culmination of the gradual de-victimisation of the injured party.\textsuperscript{25} The victim would become the agent of a real ‘private prosecution’\textsuperscript{26} and would have the right to finalise his/her ‘views and concerns’ to ascertaining the criminal liability of the accused, not only with a view to compensation, but also ‘to see that the culprits receive reasonable retribution for their crimes.’\textsuperscript{27}

However, we have to review the terms of our discourse, briefly retracing the salient points of the discussion. While it is indisputable that victim participation is driven not only by the desire for redress, but also by the aim of ‘repression’, it is not so undisputed and undoubted that, in the ICC system, a true ‘right’ to trial can be derived automatically from a simple interest.

First of all, no provision of the Statute (or of the Rules) sets this out explicitly. Even if the Court system seems to be well aware of the ‘further interest’ of the victims, it has consciously opted for a model of participation that rejects the characteristics of the so-called ‘private prosecution.’\textsuperscript{28} The victim cannot make a referral;\textsuperscript{29} he/she can, at best, provide the Prosecutor


\textsuperscript{27} \textit{Ibid.} at 275 and seq.

\textsuperscript{28} It should also be noted that national systems which envisage the system of ‘private prosecution’ (such as the French institution of the \textit{citation directe} or the Argentinian equivalent), allow ‘private prosecution’ by the victim only for crimes of lesser importance or less public concern, such as, for example, defamation, slander, and certain offences relating to family relationships between the injured party and the accused.

\textsuperscript{29} Article 13 of the Statute, in fact, narrows the circle of those entitled to bring a case to the ICC, to States Parties, the UN Security Council and the Prosecutor. For further clarification on the \textit{trigger mechanism} see G. Della Morte, ‘Le potestà giurisdizionali della Corte penale internazionale’, in Vivarium (eds), \textit{La Corte penale internazionale – Problemi e prospettive} (Napoli 2003) 31 and seq.; V.A. ‘Article 13’ in O. Triffterer (eds),
with information, under Article 15 of the Statute, in order to have an investigation opened. However, the Prosecution is not obliged to act and to initiate it. In the ICC system, the decision to proceed, therefore, remains the sole prerogative of the Prosecutor.

If, then, the Statute recognised the victim’s right ‘to’ a trial (even implicitly), it would also have to automatically confer to the victim the powers needed to actually exercise the right itself. Yet these are powers which, at the moment, the Statute does not acknowledge. Although, in fact, the victims enjoy a wider participatory role, the investigation and the decision to proceed remain the exclusive prerogative of the Prosecutor.

Moreover, the victim has no opportunity to object to any ‘inaction’ by the Prosecution. Under Article 53 of the Statute, the Pre-Trial Chamber assesses, *ex officio* or upon the request of the State which made the referral, or upon the request of the Security Council, the Prosecutor’s decision not to prosecute, and there is no reference to the ‘interests of victims’, who have only the right to information under Rule 92(2) and (3), as mentioned above.

Neither can the disagreement of the victim to closing the proceedings following a guilty plea by the accused (under Article 65 of the Statute) bind the decision of the Court, which always has the last word in any case.\(^{30}\) It should be observed, however, that the victim is not subject, at this stage, to any type of evidence, as there is no provision in this regard in Article 65 of the Statute, and the Court itself, to date, has not yet ruled on whether victims can give evidence against the admission of guilt.\(^{31}\)

Second, the Court’s decisions on this matter offer no insights on how to bridge the gaps in the Statute. It has never affirmed the existence of such a law and, while recognising that victims have ample opportunity to participate, it has never approved any ‘private prosecution’ nor has


it affirmed that the victim may be officially recognised as one who can provide the Prosecutor with formal assistance. The 2006 decision on victims’ participation reaffirmed the total independence of the victim’s role in the trial from that of the Prosecution. The injured party may not necessarily be regarded as an ally of the Prosecutor, as their roles and aims are quite distinct.

However, some clarification is needed on what the Inter-American Commission and the European Court of Human Rights have said, granting, unlike the ICC, the victims a real right to an ‘effective prosecution.’ While it is true that the provisions of the Statute should be applied and interpreted in accordance with international standards of human rights and, therefore, the case law of its organs, it does not seem to be equally true that, again by virtue of Article 21(3) of the Statute, the rules and the judicial practice of the human rights courts are automatically incorporated.

Finally, it should be recalled that acknowledging that the trial is the last stage of the ‘healing process’ for the victim, would create a dangerously symbolic vision of the international criminal trial. Any interpretation to this effect might seem to be an ‘emotional reading’ of the victim’s involvement (an emotion brought about, of course, by the violent impact that international crimes have on the collective consciousness). A hermeneutic error of this kind would lead to confusing an internationally recognised right of access to justice for victims with a (very different) right ‘to obtain justice,’ transforming an obligation of means (the state obligation, in cases of grave violations of human rights, to conduct

32 The subject of private prosecution is well refuted by the court. In the separate opinion in the decision at appeal in 2007, ruling that it is not the prerogative of the victim ‘to reinforce the prosecution or dispute the defense.’ And furthermore, in the Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, (Pre-Trial Chamber I, The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-06 22/09/06), though the dual purpose of the victim’s participation exist, the ‘may’ is very clear when it comes to providing assistance in the prosecution’s activities, excluding a priori a formal and recognised assisting role.


34 V. S. Vasiliev, ‘Article 68 (3) and personal interests of victims in the emerging practice of the ICC’ in Carsten Stahn and Göran Sluiter (eds), The emerging practice of the International Criminal Court (BRILL 2009) 674.
effective investigations and a fair trial) into a resultant obligation, with no international legal basis.

5. CONCLUSIONS

It does not seem possible to say that the ICC truly grants the victim the right ‘to’ a trial. Of course there is no doubt as to the (unusual) attribution to the victim of a more important and more active role than the ad hoc tribunals envisaged, insofar as the Court recognises a right to effective access to justice in accordance with the legal guidelines of the above-mentioned human rights courts. It should be noted, in fact, that although the Statute does not recognise that the victim has the right to an ‘effective private prosecution,’ he/she is, however, guaranteed a significant position in the work of the Court and, therefore, in the mechanism of the ICC system.

The International Criminal Court can judge a crime falling within its jurisdiction only where the state with jurisdiction is inactive, or, secondly, where the state, although active, shows unwillingness or inability to conduct investigations or genuinely to prosecute. In setting out the contents of the concept of ‘unwillingness,’ the Statute refers to canons wholly similar to those used by the human rights courts to describe when and how a state can violate the right to access to justice for the victims: a) the proceedings have been undertaken or the trial has been conducted for the purpose of shielding the accused from his/her criminal responsibility (this would be the case if states refuse to prosecute by adopting amnesty laws, such as the cases decided by the Inter-American Court of Human Rights); and b) there has been an unreasonable delay in the investigation or in the conduct of the trial itself; or c) the proceedings and the trial have not been conducted independently or impartially.

All this goes to show that the experience of the Court is not to be considered as the end of the road, but as a starting point for effective international justice for victims. This new criminal procedure grants them the right to take an active part in the ‘fight against impunity’ and give voice to their ‘views and concerns,’ allowing them to put behind them the depersonalisation that the crime originally inflicted on them.

35 Rome Statute, Article 17
‘Justice Limited by Law?’
Exploring the Place of Socio-Economic Rights in International Criminal Justice through the Lubanga Trial

Sarah-Jane Koulen

1. INTRODUCTION

‘Justice limited by law?’ The title of this article is inspired by Kamari Clarke’s 2010 article ‘Rethinking Africa through its Exclusions: The Politics of Naming Criminal Responsibility’. In it, she argues that institutions in which those who have been socially marginalised may seek justice have been shaped by liberal values that privilege ‘the law’, rather than ‘justice’ as the end objective. Referring to the law of the International Criminal Court (ICC), for instance, she argues that the crimes that came to be classified as being ‘the most serious crimes of concern to the international community’ are those that involve mass death and widespread killing. Thus, the crimes that came to occupy the moral and legal concerns of the Court were those that involved explicit forms of mass violence. This focus on the explicit violence of genocide, or the atrocities child soldiers undergo and are forced to commit, as well as the international drive to identify and punish those individuals most responsible, has precluded an ability to similarly address the systemic forms of violence and injustice which may underlie and enable the outbreak of manifest violence in the first place. Clarke argues that ‘by focusing on political and civil rights, the neoliberal rule of law project has produced conditions for securing rights in the contemporary arena in a way that has left unaddressed a way to make sense of economic, social and cultural rights […]’.
The current author proposes that at the very same moment that significant advances are being made in the enforcement of civil and political human rights, socio-economic rights risk being left behind and once again being considered subsidiary in the international ‘rule of law’ project. This article wishes to use the *Lubanga* case - the first case before the International Criminal Court - as a point of reflection to engage in an analysis of this question. The author wishes to explore how, if at all, issues of a socio-economic nature can be addressed through the international criminal process. The enquiry will be threefold. First, the paper will reflect on whether and how a socio-economic context played a role during the trial or was explicitly acknowledged. Second, the paper will explore how violations of socio-economic rights may be redressed, for instance through the reparations mandate of the Court or the Trust Fund for Victims (TFV). Finally, the paper asks if international criminal law is mainly concerned with physical violence, and thus with adjudicating serious violations of civil and political rights, what does this mean for the effective enforcement of socio-economic rights? What does this teach us about the international moral agenda and the types of violence that are explicitly to be condemned through international criminal justice and those that are patently not?

The question of how international criminal justice - and transitional justice as a field - may have elevated crimes of physical violence as being the most egregious crimes of concern to humanity over less visible, more structural injustices is not a new one, though it remains pertinent. In 1993, in a particularly strong statement, the Human Rights Commission stated:

*The international community as a whole continues to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.*

The notion of a hierarchy of rights, where socio-economic rights are

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considered subsidiary to civil and political rights has fed into international criminal justice and transitional justice. Though some instances of appropriation and destruction of property, deliberate starvation and the denial of medical attention may fall within its remit, international criminal law is primarily occupied with instances of physical, direct violence. Louise Arbour, as High Commissioner for Human Rights, identified a general resistance to the judicial enforcement of economic, social and cultural rights and the lack of consideration of these rights by transitional justice mechanisms. In a seminal essay in 2007, she called on the ‘international community to make greater use of existing statutes to adjudicate economic, social and cultural rights violations’ and recommended that ‘the possibility of expanding the current scope of international criminal law to encompass and ensure the redress of other gross violations of economic, social and cultural rights […] be considered.’

In a 2006 report reflecting on the issue, the Human Rights Council argues that ‘[e]conomic, social and cultural rights have been comparatively neglected in strategies aimed at restoring peace and ensuring accountability in conflict and post-conflict settings.’ The Council concludes, ‘strategies to protect and realise these rights should be further explored, so as to ensure true protection to victims of conflicts and comprehensively address complex post-conflict realities, as part of the transition to a sustainable, peaceful society based on the rule of law.’ Both Arbour and the Human Rights Council couched their arguments in the continuum

10 Ibid. at 16.
12 Ibid.
between socio-economic rights and violations of civil and political rights, arguing that violations of the former may cause violations of the latter, and vice versa. In addition, both Arbour and the Council have argued that conflict prevention requires attention to socio-economic rights in transitional justice, pointing to the large body of research indicating that collective violence tends to emerge ‘in societies in which social injustice, marginalisation and unrestrained exploitation thrive.’ Thus, the relative disregard for socio-economic rights in transitional justice mechanisms, such as the ICC, risks undermining the contribution such institutions are capable of making to a sustainable peace.

This discussion has not been limited to policy-making circles at the United Nations. In 2008, the International Journal for Transitional Justice dedicated an entire issue to the nexus between transitional justice and development. Scholars, such as Makau Mutua, have called for a reappraisal of the narrow normative basis of the field of transitional justice. He argues that socio-economic rights are of special importance when it comes to the African context and points out that if international criminal tribunals continue to focus on civil and political rights, they will end up dealing with ‘symptoms, leaving the underlying fundamentals untouched.’ Lisa Laplante argues that if ‘old’ socio-economic grievances are not addressed by transitional justice mechanisms, they have the potential to become new ones, sparking new cycles of violence. Miller advances a similar argument, stating:

*By removing economic questions from transitional justice, the literature and institutions make invisible both the*

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economic causes of conflict and the effects of the post-conflict economic situation on the possibility for renewed violence related to past grievances or current experiences of maldistribution.\(^\text{17}\)

Ignoring socio-economic rights is not only problematic from a legal or normative point of view, but the narrow focus of international criminal tribunals also raises serious questions with regards to their effectiveness and the legitimacy of the ‘truth’ that the court records convey. As Zinaida Miller puts it:

*The mandate of a commission or the list of crimes to be tried at a court means that, to some degree, the decision about what story to tell is predetermined, as is the manner of addressing the conflict (and sustainably resolving it for the future). Although a government may separately pursue development options, the redistribution of land or other plans for economic change, the argument here is that the divorce of those strategies from transitional justice mechanisms allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialise the past does not require the narration of past economic oppression.*\(^\text{18}\)

Transitional justice thus tells a very specific story, and ‘serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity.’\(^\text{19}\) Generally, the transitional justice project has failed to pay due regard to the importance of structural violence.\(^\text{20}\)

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17 Ibid. at 287.
19 Ibid.
20 Ibid. at 267. Transitional justice can be defined as ‘that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.’ See: N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty - First Century: Beyond Truth versus Justice* (Cambridge University
Continuing briefly on this notion of transitional justice institutions as telling a certain story, the work of Lawrence Douglas is also highly instructive in this regard. In his book *The Memory of Judgment* (2001), he challenges the view that rendering justice through determining guilt is the sole purpose of a criminal trial by illustrating how war crimes trials have also served didactic purposes, such as teaching history and defining collective memory.\(^{21}\) Mark Drumbl has similarly argued that ‘expressivism’, i.e. the ‘crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public’ is one of the key functions of international criminal tribunals.\(^{22}\) If one accepts that international criminal trials also contribute to a historical record and have a pedagogical function, then it is problematic, to say the least, that the international crimes over which the ICC has jurisdiction - and as such, the parameters of the story to be told - have such a narrow normative basis.

The tension has started to become apparent in the field of international criminal justice. In a 2011 population-based survey into perceptions of the Extraordinary Chambers in the Courts of Cambodia (ECCC), 98% of respondents indicated that though accountability of perpetrators remained important, basic and daily socio-economic needs, such as jobs, health and food were considered priorities.\(^{23}\) During a recent, off-the-

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\(^{23}\) P.N. Pham, P. Vinck, M. Balthazard, S. Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California: Berkeley 2011).
record presentation, counsel representing victims in a case before the ICC reflected that their clients often expressed and even prioritised ‘non-judicial’ needs and concerns, related to livelihoods, housing, education and healthcare, and simply, the daily challenge of making ends meet.

A response to these issues could be to dismiss them as falling outside the scope of international criminal justice, and that the ICC ‘cannot be all things to all people’. Still, the ICC operates - and sets lofty ambitions for itself - in realities with extreme economic disparity and endemic poverty. Indeed, the Democratic Republic of the Congo (DRC) - the setting for the first ever case before the ICC - scored the lowest of all 187 ranked countries in the 2011 UNDP Human Development Index. There is a significant amount of literature demonstrating that economic disparity and struggle for access to economic assets such as land, water and mineral resources between certain groups are an important root cause for civil conflict. It has also been demonstrated that struggles and competition for land and mineral resources played a significant role in fuelling violence in the DRC. As was introduced above, international criminal justice tells a particular story. The remainder of this article will explore what that story has been in the case of The Prosecutor v Thomas Lubanga Dyilo and what the role or position of socio-economic rights has been therein.

2. THE PROSECUTOR V THOMAS LUBANGA DYILO: THE MORALE OF THE STORY

There seem to be two key narratives at play in the case of The Prosecutor v Thomas Lubanga Dyilo, the first ever case to be heard by the International Criminal Court.

The first narrative centres on whether or not Mr. Lubanga Dyilo can be held criminally responsible for the enlistment, conscription and use of

child soldiers under the age of 15 in the military movement Union des Patriotes Congolais (UPC) and the armed militia Forces Patriotiques pour la libération du Congo (FPLC) over which Mr. Lubanga Dyilo allegedly exercised command responsibility. During the trial, the strategy of the Office of the Prosecutor (OTP) was to demonstrate through witness testimony of alleged former child soldiers, forensic evidence and video excerpts, that there were children under the age of 15 present in the FPLC and UPC who took active part in hostilities. The issue of whether or not the children joined voluntarily - a key element in the strategy of the Defence - was rejected from the outset, with the argument that regardless of how the children came to be part of the military group, accepting children into military service constitutes criminal conduct. The Prosecutor’s aim was to prove beyond reasonable doubt that Mr. Lubanga Dyilo systematically recruited children into his political military movement between 1 September 2002 and 13 August 2003.27 The Defence, in its opening statements, questioned why Thomas Lubanga Dyilo was being made a scapegoat for this conflict, while there were those more responsible for the atrocities that had taken place who walked free. The Defence questioned why Mr. Lubanga Dyilo was being made an ‘emblematic criminal’ of events that were not of his making.28 Throughout the trial, the Defence accused the Prosecution of falling short of its disclosure obligations, questioned the methodology of investigations and argued that all Prosecution witnesses lied about their identities as child soldiers. The Defence also accused two witnesses of identity theft.29 In addition, defence counsel argued that Mr. Lubanga Dyilo only played a role in political activities, was not in charge of military policy, and that he had taken every effort to demobilise child soldiers once he became aware of their presence.30


The second key narrative at play in the case was the manner in which the case was framed as a key moment in the struggle against impunity. As the Defence argued in its opening statement, this was the moment in which the International Criminal Court was to demonstrate that it was fulfilling its mandate of prosecuting those with the greatest responsibility for the worst crimes of concern to the international community. Most importantly, the trial was heralded by the Prosecution as the moment in which the international community emerged victorious in this fight against impunity. Prosecutor Luis Moreno-Ocampo, in his opening statement, chastised Mr. Lubanga Dyilo for ‘trying to play with […]’, and later, for ‘trying to mislead the international community.’ The message was clear: despite his best efforts, the international community had caught up with Thomas Lubanga Dyilo after all.

The closing statement by the special counsel to the OTP and former-Chief Prosecutor at one of the Nuremberg trials, Benjamin Ferencz, is telling. Instead of reiterating how the evidence presented by the OTP proved beyond a reasonable doubt that Thomas Lubanga Dyilo bears individual criminal responsibility for the enlistment and conscription of child soldiers, Ferencz chose to highlight the historic and symbolic importance of the trial and of the ICC as an institution. He proclaimed that this first trial before the ICC, and further the development of international criminal justice, represented ‘new rules for the protection of humanity’, the dawn of a ‘more humane world, governed by the rule of law’ and a ‘slow awakening of the human conscience.’ This was a particularly striking moment during the trial, and it seemed to reiterate the argument advanced by Martti Koskenniemi, that a criminal trial is a performance which enables ‘the community ritually to affirm its guiding principles and thus to become a

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workable ‘moral community’.  

The discussion above described two key narratives in the case. It is proposed here that another narrative was conspicuously absent. Certainly in the Prosecution’s case there was little mention of the dire socio-economic background and endemic poverty in the Democratic Republic of the Congo, with more than 70% of its population living below the poverty line and an average life expectancy of less than 48 years old. The manner in which international demand for mineral resources has played a central role in fuelling the conflict, as well as the continued trade in light weaponry and small arms to the region were also considered to be of little judicial relevance to the charges brought against Thomas Lubanga Dyilo.

The collective effects of the two dominant narratives in the Lubanga case have effectively been to abstract the trial from the context that made such collective violence possible - the socio-economic context to the conflict was of little judicial relevance. There simply seems to be no place for collective or structural violence in international criminal justice. The object of analysis is the individual. As Clarke, Drumbl and others have demonstrated, international criminal justice produces a ‘truth’ that is heavily imbued with liberalist notions. The replacing of the collective by the individual at the centre of analysis is one of the key tenets of liberalism. Shielding from analysis the way in which structural dispossession may

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constitute violence and a violation of certain human rights is another.

The selective process of drafting the Rome Statute, defining and selecting the crimes over which the ICC was to have jurisdiction, as well as the development of the notion of individual criminal responsibility expressed through modes of liability such as command responsibility, have worked to place the socio-economic context beyond judicial enquiry. There are some exceptions. The International Criminal Tribunal for the former Yugoslavia (ICTY) considered that the comprehensive destruction of homes and property may constitute the crime of persecution and could thus be considered crimes against humanity. Overall however, it seems the main concern of international criminal law is to protect individuals from threats to physical security and direct violence - socio-economic rights remain subsidiary to and outside the conceptual boundaries of international crimes. The Rome Statute, which in Article 5(1) asserts that the ICC has ‘jurisdiction over the most serious crimes of concern to the international community as a whole’ thus sends the troubling and pervasive message that violations of socio-economic rights are somehow considered less egregious and less worthy of remedy through judicial process. The remainder of this article reflects how socio-economic rights may be given more regard in the reparations regime of the ICC as well as the work of the Trust Fund for Victims (TFV).

3. THE STORY CONTINUES: REPARATIONS & THE TFV

Former High Commissioner for Human Rights, Louise Arbour, when calling for a widening of the scope of international criminal justice, identified the area of reparations as offering significant opportunities. Article 75 of the Rome Statute regarding reparations to victims obligates the Court to establish principles relating to reparations and lists restitution,


compensation and rehabilitation as ways to provide reparation.\textsuperscript{42} The Rules of Procedure and Evidence state that reparations may take the form of individual awards, collective rewards and rewards for reparations through the TFV to an intergovernmental, international or national institution.\textsuperscript{43}

Though it remains to be seen if and how exactly the ICC will fulfill its reparations mandate, what does seem clear is that reparations claimed from the convicted individual and issued to victims must remedy the harm caused by the charges for which that individual was convicted. In other words, the harm for which victims claim reparations must be directly related to the charges. Though this is simply an extension of the principle of individual criminal responsibility, this principle clearly reduces the potential for reparations to redress grievance of a socio-economic nature. Clearly, within a criminal justice context, an individual cannot be obligated to pay reparation for harm beyond that for which he or she was found individually responsible.

The TFV was established by Article 79 of the Rome Statute, stating that the Court may order money and other property collected through fines and forfeiture to be transferred, by order of the Court, to the Trust Fund.\textsuperscript{44} The TFV has a dual mandate. Besides issuing and administering court-ordered reparations, the Fund may also provide general assistance to affected communities through voluntary contributions from donors. No reparations orders have been issued to date, but the Fund has been working to provide general assistance through partners in situation countries since 2007. In the Democratic Republic of the Congo, the projects financed by the Trust Fund have involved physical rehabilitation, psychological rehabilitation and material support.\textsuperscript{45} Projects supported by the TFV and implemented through its partners have also aimed to foster

\textsuperscript{44} Ibid.
inter-community dialogue to create a shared understanding of the root causes of the conflict.\textsuperscript{46}

It seems the TFV takes a broad approach to its general assistance mandate, and the projects geared at material support, vocational training and education, for instance, seem to demonstrate an awareness of both the dire socio-economic context and tense political situation in which they operate. At the same time, however, the TFV identifies beneficiaries as ‘victims of crimes under the jurisdiction of the Court’ and the reparation processes seem tailored to remedy ‘the four most regularly committed crimes (massacres, sexual violence, enrollment of children in armed groups or armed forces, torture) […]’, illustrating that categories such as ‘victim’ and ‘suffering’ are also limited by the same preoccupation with physical violence, as opposed to structural violence.\textsuperscript{47}

It will prove interesting to see how the TFV will continue to operationalise its two-pronged mandate. Overall, it is crucial that it take socio-economic and structural disparities between groups or members of a given community into account, perhaps employ broader categories of ‘victim’ and ‘suffering’ and embed its work in the broader socio-economic context. Otherwise, its work could potentially aggravate (perceptions of) disparities between groups, leading to further tensions in the region.

4. CONCLUSIONS

This article has attempted to demonstrate that while achieving significant advances in the enforcement of some human rights and prevention of violations thereof, the international justice project, heavily influenced by liberalist ideology, has largely neglected the subsidiary category of socio-economic rights.

As such, there may be a ‘troubling imbalance or injustice’ present in the very pursuit of justice.\textsuperscript{48} The 1966 International Covenant on Economic, Social and Cultural Rights, engages states parties committed

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Rami Mani as quoted in Mark A. Drumbl, \textit{Atrocity, Punishment and International Law} (Cambridge University Press 2007) 123.
to the progressive realisation of the rights formulated therein.49 But if the project of international (criminal) justice - a significant step forward in the enforcement of human rights - does not recognise violations of socio-economic rights as worthy of judicial remedy, are we not, in some regards, moving backwards instead of forwards?

The aim of this paper has been to explore and illustrate that certain choices in the international justice project influenced by dominant ideologies have fundamentally shaped international criminal justice – bringing into sharp relief the presumed neutral and objective application of the law, and potentially undermining the transformative and emancipatory effect that international criminal justice could have. Rather, to echo the words of Clarke, what we are left with is a form of justice that has been severely limited by the law.

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Investigating Rape at the International Criminal Court:
The Impact of Trauma

Ellie Smith¹

1. INTRODUCTION: SEXUAL VIOLENCE AND THE UPC

The conflict in the Democratic Republic of the Congo (DRC) has been characterised by the widespread and systematic perpetration of rape and other forms of sexual violence. Rape has been committed by all actors in the conflict, including those operating in the Ituri region of the country, and the use of rape by Lubanga’s Union des Patriotes Congolais (UPC) in particular has been widely reported and documented by the UN and NGOs alike.² Despite this, however, no charges of sexual violence were included in the indictment issued by the International Criminal Court (ICC) against Lubanga. Moreover, a subsequent attempt to introduce sexual violence charges during the trial was unsuccessful.³

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³ On 22 May 2009, in response to repeated testimony of rape during the trial, victims’ representatives sought the recharacterisation of charges to include sexual slavery and inhuman treatment. The request was granted by the Trial Chamber, 14 July 2009, ICC-01/04-01/06-2049, but subsequently reversed by the Appeals Chamber, 8 December 2009, ICC-01/04-01/06-2205.
Sexual violence charges have been included in subsequent Court indictments, although these remain highly vulnerable, with over half being dismissed before the trial stage. While, therefore, there have been improvements in how the ICC investigates and prosecutes crimes of sexual violence, it is clear that there is still progress to be made.

This article provides an overview of socio-cultural barriers to disclosing rape before going on to consider practical factors relating to the rape itself which inhibit either recall or disclosure. The author will then examine the clinical impact of trauma resulting from war rape on disclosure and credibility assessment, before addressing the more specific difficulties involved in the medical documentation of rape and other forms of sexual violence for the purpose of proving the offence. The paper will conclude with some thoughts on the next steps needed to address the problems posed by the clinical consequences of rape.

2. THE ADEQUACY OF ICC PROVISIONS FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE

The provisions of the Rome Statute (Statute) have been hailed as the most progressive and far-reaching of any international court for the prosecution of sexual violence. Rape, sexual slavery, forced pregnancy,

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4 The majority of cases before the ICC now include charges of sexual violence or rape. The case of The Prosecutor v Jean-Pierre Bemba Gombo for example includes charges of rape as both a war crime and as a crime against humanity, ICC-01/05-01/08, and charges of genocide, including acts of rape, are incorporated into the second arrest warrant of Sudanese President, Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 6.


7 See Institute of War and Peace Reporting (IWPR), ‘ICC Still Facing Rape Case Challenges’ (8 August 2011).


9 See M. Ellis, ‘Breaking the Silence: Rape as an International Crime,’(2007) 38
enforced sterilisation and other forms of sexual violence are expressly recognised as crimes against humanity or war crimes, depending upon the circumstances of their perpetration.\textsuperscript{10} The Statute provides that rape may constitute genocide when it is directed towards the destruction of a national, racial, ethnic or religious group,\textsuperscript{11} while the inclusion of a reference to ‘other forms of sexual violence’ as a residual clause would potentially facilitate the exercise of jurisdiction over other, un-enumerated offences of comparable gravity to those listed, such as sexual mutilation.\textsuperscript{12}

In addition, the drafters of the Statute appear to have intended that crimes of sexual violence should receive specific attention at the investigation stage. Article 54(1)(b), for example, requires the Prosecutor to take appropriate measures for the effective investigation of crimes within the Statute, including the need to ‘take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children’. Similarly, Articles 44(1) and (2) require the Prosecutor to have particular regard to legal expertise in violence against women when appointing investigators, and Article 42(9) mandates the Prosecutor to appoint ‘advisers with legal expertise on…sexual and gender violence’\textsuperscript{13}

Finally, there is recognition in the Statute that crimes of sexual violence may be committed in a private setting or otherwise in the absence of witnesses. Rule 63(4) of the ICC Rules of Procedure and Evidence provides that

\begin{thebibliography}{9}
\bibitem{10} Articles 7(1), 8(2)(b), and 8(2)(e).
\bibitem{11} Elements of Crimes, Article 6(b)(1), which notes that although rape is not listed as a form of genocide under Article 6 of the Rome Statute, acts of genocide committed by the infliction of ‘serious bodily or mental harm’ might include ‘acts of torture, rape, sexual violence or inhuman or degrading treatment’, Doc. PCNICC/2000/1/Add.2 (2000).
\end{thebibliography}
corroborations is not mandatory, particularly in cases of sexual violence.\footnote{Rule 63(4) states that ‘…a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.’ Adopted by the Assembly of States Parties, 3 -10 September 2002, ICC-ASP/1/3.}

Whilst the provisions of the Statute appear adequate, difficulties arise in their execution, and failures to collect the necessary evidence has meant that the ICC is choosing not to pursue charges of rape and other forms of sexual violence in favour of more straightforward offences.\footnote{See IWPR, ‘International Justice Failing Rape Victims’ (15 February 2010); IWPR 2011, see note 7.} It is therefore appropriate to consider the difficulties in investigating and proving rape.

3. DIFFICULTIES IN INVESTIGATING AND PROVING RAPE: DISCLOSURE TO INVESTIGATORS

A number of factors operate either to inhibit survivors of sexual violence from disclosing their experiences or to impact upon the quality of evidence which they are able to provide. These factors can arise as a result of practical aspects of the rape itself, external barriers subsequent to the rape and the clinical consequences of rape-related trauma on recall. These factors are outlined in turn below.

3.1 Factors inhibiting disclosure: practical barriers specific to the rape

Forms of sensory deprivation, such as blindfolding, attack during darkness and lapses of consciousness may affect a survivor’s ability to produce a coherent account of a rape, and the problem is exacerbated by disorientation and extreme stress experienced during the episode. For women who were held by rebel forces as sex slaves, factors such as drugging, and repeated or similar abuse experiences involving multiple perpetrators will also affect their ability to accurately recount events.\footnote{J. Herlihy, P. Scragg, and S. Turner, ‘Discrepancies in autobiographical memories - implications for the assessment of asylum seekers: repeated interviews study’(2002) 324 British Medical Journal.} Head injury inflicted as a result of accompanying violence, together with issues such as starvation or vitamin deficiency in cases where individuals
were held for a lengthy period, may impair neuro-psychiatric memory.\textsuperscript{17}

3.2 Factors inhibiting disclosure: external barriers subsequent to the rape

\begin{enumerate}
\item Social, cultural and familial barriers to justice-seeking: the impact of shame:
\end{enumerate}

In many societies sex remains a taboo subject. Disclosure of sexual violence may have devastating consequences for a survivor’s marriage, leading to ostracism from the family, destitution and impoverishment, as well as social exclusion within the survivor’s community.\textsuperscript{18} In cases of unmarried rape survivors, sexual violence may reduce a survivor’s prospects of marriage.

Clinical research with survivors of trauma shows that those with a history of sexual violence experience greater levels of shame when compared with survivors of non-sexual violence,\textsuperscript{19} and there is evidence of a link between shame and the non-disclosure of both experiences of rape and resulting clinical symptoms. Notably, whilst shame operates as a limiting factor on disclosure in both cases, participants in the study in question identified shame as the principal reason for non-disclosure of symptoms more frequently than of experiences.\textsuperscript{20} This is likely to be significant in establishing appropriate reparations awards for victims of rape and other forms of sexual violence.

\begin{itemize}
\item \textsuperscript{17} International Rehabilitation Council for Torture Victims (IRCT), \emph{Psychological Evaluations of Torture Allegations: A Practical Guide to the Istanbul Protocol – for psychologists} (2007).
\item \textsuperscript{18} See United Nations, \emph{Gender-Based Persecution}, 1997, EGM/GBP/1997/Report.
\item \textsuperscript{19} Assessed by reference to a 25-item scale investigating characterological, behavioural and bodily shame, and considering experiential, cognitive and behavioural components of shame within each of the three identified domains; B. Andrews, M. Qian and J. Valentine, ‘Predicting depressive symptoms with a new measure of shame: the Experience of Shame Scale’ British Journal of Clinical Psychology, 29 – 42, 41, reported in D. Bogner, J. Herlihy and C. Brewin, \emph{Impact of sexual violence on disclosure during Home Office interviews} (2007) 191 British Journal of Psychiatry 75 – 81; See also J. Herlihy, and S. Turner, ‘Should discrepant accounts given by asylum seekers be taken as proof of deceit?’ (2006) 16(2) Torture.
\end{itemize}
Difficulties for investigators are exacerbated where social ostracism or cultural isolation heighten the trauma response of the survivor. According to the Istanbul Protocol, the UN-endorsed manual for the effective investigation and documentation of torture, ‘psychological consequences [...] occur in the context of personal attribution of meaning, personality development, and social, political and cultural factors’. Issues such as social ostracism or cultural isolation may exacerbate survivor reactions to trauma, and the trauma response will in turn influence the ability of a survivor of sexual violence to speak about her experiences.

(ii) Trust and the existential dilemma:

Survivors of war rape are at an increased risk of emotional difficulties, including what has been termed the ‘existential dilemma’, by which a survivor’s core beliefs about the world as a just place have been challenged. As a result, survivors may experience difficulties in trusting others, particularly those who are asking them to relate painful experiences.

If investigators are working through an interpreter, difficulties in disclosure may be compounded where the interpreter is from the same community as the survivor and there is a fear of a lack of confidentiality. In such circumstances, survivors will be extremely reluctant to divulge their experiences of sexual violence.

3.3 Factors inhibiting disclosure: the clinical impact of trauma on recall

(i) Avoidance:

Avoidance strategies can include not only voluntary tactics, such as trying not to think about past experiences or avoiding places or events that might trigger painful memories, but also involuntary responses

21 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OHCHR, 1999.
22 Para 234.
23 IRCT, note 17 at 24.
including psychogenic amnesia. Avoidance itself forms a central part of the post-traumatic stress disorder (PTSD) response to a deeply traumatic event. Moreover, clinical studies have shown that avoidance symptoms are significantly more evident in survivors of rape and other forms of sexual violence than in survivors of non-sexual trauma.

(ii) **Dissociation:**

Dissociation is understood as ‘a disruption in the usually integrated functions of consciousness, identity, memory and perception.’ Dissociation can occur at the time of the traumatic event itself (peritraumatically), producing a subsequent psychogenic amnesia for some or all of the traumatic event. In addition, dissociation may recur with memories of the event and during times of high arousal, such as when a survivor is questioned about her experiences. This in turn can affect the ability of the individual to construct a coherent narrative of the event.

Clinical research with survivors of sexual violence has identified ‘more dissociation symptoms and greater difficulty in disclosure’ in the study population when compared to survivors of non-sexual trauma, hence exacerbating the problem of memory retrieval and evidence gathering for investigators.

(iii) **Impact of PTSD on recall:**

Symptoms of PTSD can affect the ability of a survivor of gross

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25 Ibid.
31 Ibid.
violations to recall an important aspect of the trauma or to construct a coherent account of events. In addition, research has identified ‘a trend for sexual torture…to be associated with a higher PTSD symptom count’, indicating a higher risk of the subsequent PTSD development,\(^\text{32}\) again increasing the difficulty for survivors of rape in recounting their experiences to ICC investigators.

(iv) Autobiographical memory impairment:

Autobiographical (otherwise declarative or explicit) memory refers to the ability to recall events in our own lives. These memories are recorded and stored chronologically, can be retrieved voluntarily, and it is possible to construct a chronological and coherent narrative of them.\(^\text{33}\) A critical feature of autobiographical memory is an accompanying awareness that the events concerned occurred in the past.\(^\text{34}\)

There is a growing consensus that traumatic memories are of a different character.\(^\text{35}\) During deeply traumatic events, it is believed that greatly heightened emotional arousal interferes with the processing and storage of information in explicit memory, and the process fails. As a result, autobiographical memory of the event is fragmentary or non-existent. Herlihy and Turner observe that ‘when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmented type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative exists.’\(^\text{36}\) While explicit memory fails, however, non-declarative (implicit) memory, which includes emotional responses, habits and reflexive actions, appears

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unaffected by trauma. As a result, while a survivor of trauma may not be able to access a coherent memory of the event, he/she may be aware of sensory perceptions and behavioural reenactments emanating from it.\textsuperscript{37} These may in turn be experienced as images, smells, sensations or emotional states.\textsuperscript{38} Such memories are accessed through qualitatively different ‘pathways’, and rather than arising voluntarily or consciously in the survivor, respond to triggers or reminders of the event. Because these memories are subject to triggers, different aspects may arise depending upon the questions posed by the investigator, and where survivors are able to retrieve memories, these are often not chronological and are fragmented.

Significantly, implicit memories are not perceived by the survivor as occurring in the past.\textsuperscript{39} During an investigation, survivors will experience these memories as happening in the present, which will be highly distressing for the interviewee and potentially problematic for the investigator.

4. CLINICAL FACTORS IMPACTING UPON PERCEIVED CREDIBILITY

In addition to clinical issues which impact upon a survivor’s ability to recall and relate her story, a number of factors arising as a result of trauma may affect the way in which investigators assess the credibility of survivor testimony.


4.1 Central v. Peripheral Detail

Essential to the legal understanding of credibility is the idea that details which are central to an event might be constructed by reference to historical and public data, whereas specific details cannot, and so recall of the latter is considered to be indicative of credibility. The ability of a survivor of gross violations, including rape and other forms of sexual violence, to recall peripheral details of an event is therefore often seen as a way of distinguishing between credible, accurate recollection and reconstruction based on historical or schematic knowledge.\(^{40}\)

This approach, however, is not supported by clinical literature, and research has shown that traumatic memories tend to focus on central events rather than peripheral details. Depression has been shown to have a direct, negative impact on the ability to recall specific or peripheral detail, and for individuals with high levels of post-traumatic stress in particular, discrepancies in accounts arise in peripheral detail with the increase of time between interviews or length of court processes.\(^{41}\)

4.2 Emotional Numbing

Emotional numbing associated with avoidance results in a survivor having no access or emotional connection to her experiences. This lack of any range of affect impacts upon a survivor’s demeanour when giving testimony, leading to perceptions of ‘coldness’. This in turn fails to accord with lay assumptions of how a survivor of sexual violence is expected to behave, and can be interpreted negatively to impugn credibility.\(^{42}\)

5. DIFFICULTIES IN INVESTIGATING AND PROVING RAPE: MEDICAL DOCUMENTATION


\(^{41}\) J. Herlihy, P. Scragg and S. Turner, 2002 see note 16.

In a recent interview concerning the investigation and prosecution of sexual violence at the ICC, an adviser to the Court’s Office of the Prosecutor (OTP) stated that ‘[t]he greatest difficulty is that most of the victims do not get checked by a doctor after the rape therefore there is no medical record of the rape’. Access to clinical services may be highly problematic for women during periods of ongoing conflict and insecurity, and a lack of access to healthcare for survivors of sexual violence in the Ituri region of the DRC in particular has been documented.

Notwithstanding the availability of healthcare services, medical documentation of rape is problematic. Somnier observes that most physical signs of torture rapidly disappear, and this is particularly true in many cases of penile rape. Clarke, for example, notes that it is exceptional to find scars in the genital area following penile rape, and even where a woman is examined within 24 hours of rape, the most that one might expect to find are bruises or abrasions, which heal quickly without leaving a scar. According to the Istanbul Protocol, a medical examiner is unlikely to see specific signs of rape in a survivor after seven days.

This does not mean, however, that clinical documentation is impossible where there has been a significant lapse of time between the attack(s) and clinical assessment. Where scars and other long term damage (such as mutilations or damage to the pelvic structures such as the bladder and rectum) have occurred, these can be documented by a clinician. Notably, however, these may not effectively ‘testify’ to the survivor’s full experience of sexual violence. In cases of rape with extreme violence or rape using a sharp implement, fistula or other forms of damage to reproductive organs might be clinically documented a long time after the rape occurred, and the UNFPA (UN Population Fund) has reported the incidence of fistula

43 IWPR, 2011 see note 7.
44 There are a number of other reasons why women who have survived sexual violence do not seek rehabilitative care, See E. Smith and J. Boyles note 42.
47 At para 223.
48 See E. Smith and J. Boyles note 42.
amongst thousands of women in eastern Congo, caused by ‘systematic, violent gang rape’.\textsuperscript{49}

In addition, a survivor can be asked about the immediate and longer-term physical effects which she experienced, including abdominal pain, vaginal discharge, STD or HIV infection, pregnancy and miscarriage. These symptoms can be assessed for their consistency with the survivor’s account of her rape and medical evidence produced accordingly.\textsuperscript{50}

Finally, the statement of the OTP adviser focuses on the availability of physical evidence of rape, without reference to the psychological sequelae of sexual violence. The International Rehabilitation Council for Torture Victims notes that ‘[c]ontrary to the physical effect of torture, the psychological consequences of torture are often more persistent and troublesome than physical disability’.\textsuperscript{51} Given the short timeframe for the physical documentation of many of the clinical signs of rape, recourse to psychological evidence is essential to the successful prosecution of the offence. Ongoing psychological impact of rape can be recorded, and while psychological symptoms are unlikely to be ‘diagnostic’ of rape, their consistency or otherwise with the survivor’s account of rape can be assessed by an expert clinician.

6. SOME CONCLUDING THOUGHTS AND AREAS FOR FURTHER INVESTIGATION

It is clear from the above that the evidence of survivors of rape and other forms of sexual violence can appear disjointed, incomplete and incoherent. Memories may be fragmented, non-chronological and lacking in peripheral detail. This runs counter to legal approaches for the assessment of evidence and testimony, and poses a significant problem for Court investigators in the collection of evidence to substantiate rape allegations.

\textsuperscript{49} \textit{Campaign to end Fistula}, UNFPA website. Fistula can also be caused by FGM or obstructed labour, see E. Smith and J. Boyles note 42.


\textsuperscript{51} In IRCT, note 17 at 6.
It has been argued that far from suggesting that a survivor’s account lacks credibility, the difficult and fragmented nature of evidence may in fact be supportive of a claim to have been raped.\(^52\) While such an approach may be correct in the broadest sense, it should be treated with caution, particularly in so far as it might impact upon the ability of the defendant to challenge the legitimacy of evidence before the Court. Much of the literature on the clinical impact of trauma relates to disclosure within the therapeutic environment. Further work is therefore required to assess the direct relationship between individual sequelae and difficulties experienced in the collection of evidence for criminal prosecution. Such work would require expert clinical assessment and documentation of symptoms in order to relate sequelae to evidential difficulties and to consider the degree of consistency between the symptoms recorded and the evidential difficulties encountered. Such an approach would also require consideration of how the Court currently engages expert witnesses.

Use of fragmented testimony in Court proceedings would also require significant Court engagement with issues of trauma. Some, albeit limited, progress has already been made in this regard in the International Criminal Tribunals for the former Yugoslavia and Rwanda, the former of which has concluded that PTSD would not necessarily affect the credibility of a victim/witness.\(^53\) Statements to date, however, have been limited to PTSD diagnoses as opposed to symptomology, or otherwise make vague reference to ‘trauma’, without consideration of specific sequelae.\(^54\) While, therefore,
there has been some progress in the investigation of crimes of sexual violence, there is still room for improvement, and particular attention to issues emanating from the clinical impact of rape-related trauma may provide an opportunity for the improved collection of credible evidence to support sexual violence charges at the International Criminal Court.
Regulation of Mistake of Law and the Mental Element in the Rome Statute and the *Lubanga* Case

Sabina Zgaga

1. INTRODUCTION

The *Lubanga* case has dealt with many interesting issues in substantive international criminal law, one being the regulation and application of mistake of law.¹ The Defence argued that Lubanga was unaware that ‘voluntarily or forcibly recruiting children under the age of fifteen years and using them to participate actively in hostilities entailed his criminal responsibility under the Statute.’² The Defence therefore invoked mistake of law as a defence. The Pre-Trial Chamber’s decision on this defence introduces a much broader question about the relevance of a mistake of law in the Rome Statute³ (Statute) and in international criminal law more generally.

The focus of this paper centres on the regulation and relevance of a mistake of law in the Rome Statute. This depends on the regulation of the mental element, mistake of law, mistake of fact, superior orders and also of requirements for criminal acts, prescribed by the Elements of Crimes. This is discussed in the central part of this paper. At the end of the paper, I discuss the relevance of mistake of law in the *Lubanga* case.

2. THE MENTAL ELEMENT IN THE ROME STATUTE

A short analysis of the mental element in the Rome Statute must be made, since it directly influences the regulation and application of a mistake of law. The mental element of a criminal act (*subjektive Tatbestandsmerkmale*

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or *Schuld* in German) under the jurisdiction of the International Criminal Court (ICC) is regulated in Article 30 of the Statute. This Article can also be understood as part of general substantive international criminal law. A criminal act in the Statute consists of two types of elements: material or ‘objective’, on the one hand, and mental or ‘subjective’, on the other. Put differently, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC only if the material elements are committed with intent and knowledge. This is contrary to continental criminal law under the influence of German criminal law,\(^4\) where the general definition of a criminal act usually consists of three elements (definition of a criminal act, illegality and guilt).\(^5\)

In attempting to bring together the system of continental criminal law and the hybrid nature of international criminal law to be able to compare them, elements of the general definition of a criminal act from both legal systems have to be equalised. We can do this by considering the mental element from the Statute as the element of guilt from the continental legal system. In this approach, Article 30 of the Statute defines guilt and also its main form: direct intent (*dolus directus*). Unless otherwise provided, the perpetrator must possess the direct intent to commit the relevant act deemed criminal by the Statute.\(^6\) According to Article 30, then, intent consists of two elements:

i) awareness: the perpetrator is aware that a circumstance exists or a consequence will occur in the ordinary course of events;

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5. *Handlung, Tatbestandmäßigkeit, Rechtswidrigkeit* and *Schuld* in German.

ii) volition: the perpetrator means to engage in the conduct\(^8\) and means to cause that consequence or is aware that it will occur in the ordinary course of events.\(^9\)

This definition of ‘intent’ in the Statute corresponds to the definition of ‘intent’ in a continental theory of substantive criminal law, according to which intent is ‘knowing and wanting the realisation of the definition of the criminal act’ (Vorsatz ist das Wissen und Wollen der Tatbestandsverwirklichung).\(^10\)

There are also some differences between the two approaches, however. Note that within the Statute, conduct only requires volition (the perpetrator means to engage in the conduct) and does not include awareness of the conduct. Awareness, rather, only applies to circumstances or consequences. Moreover, regarding the consequence, both elements are required (awareness that a circumstance exists or a consequence will occur in the ordinary course of events and that the person means to cause that consequence). The latter is more logical, since, in my opinion, the perpetrator cannot mean to engage in the conduct without being aware of it.

The approach taken by continental theory, on the other hand, conceptualises volition and awareness as elements of both the conduct and the consequence. Furthermore, according to continental theory, intent is not co-existent with guilt. This is because intent is only a form of guilt. Thus, in continental theory, guilt is broader than intent. This is another departure from the Statute. Article 30 namely states only one element of guilt - the (direct) intent. Thus, in the Statute, intent is co-existent with guilt and hence the Statute employs a narrower conception of guilt. Such a simplistic definition of guilt raises some relevant questions, especially with regard to the other components of guilt which the continental theory posits. For example, according to the definition of intent from Article

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7 Also (incorrectly) ‘intent’ in the terminology of Article 30 of the Rome Statute.  
8 Perhaps better: act.  
9 Rome Statute, Articles 30(2) and 30(3). An act, relevant for criminal law, consists of the act itself (‘conduct’ in the Rome Statute’s terminology), its consequence and causation between the two of them. See Jescheck and Weigend, Lehrbuch, 218 note 4.  
awareness of the illegality of an act (Bewusstsein der Rechtswidrigkeit) is not a part of intent. Therefore, the older continental theory of intent, according to which the awareness of illegality is a part of intent, cannot be applied. A conception of guilt in which the awareness of illegality is an independent element of guilt (and not intent) could be relevant. However, the definition of guilt in Article 30 does not leave any room for the awareness of illegality as an independent element of guilt. The only element of guilt is namely its form: the (direct) intent. An amendment which places the awareness of illegality either among the elements of intent or the elements of guilt (the latter being better, in my opinion), would also broaden the scope of a mistake of law.

3. ARE MISTAKES RELEVANT ACCORDING TO THE ROME STATUTE?

Mistakes as grounds for the exclusion of criminal responsibility are regulated separately in Article 32. This article regulates both mistake of fact and mistake of law. Mistake of fact can only affect the existence of a criminal act when it negates the mental element required by a criminal act. When read in conjunction with Article 30, this means that it must exclude intent or another relevant form of guilt. Considering the definition of intent, a mistake of fact is actually only relevant when it excludes awareness or volition or both. These conditions are only fulfilled in a case of mistake of fact in the stricter sense (Tatbestandsirrtum). In this case, the perpetrator is mistaken about the facts that represent elements of the definition of a criminal act and has no intent.

11 See note 4 at 452.
12 Ibid. at 453.
13 Namely, in a continental theory of substantive criminal law, mistake of law is equalised to the absence of a perpetrator’s awareness of the illegality of the act and vice versa.
14 Rome Statute, Article 32(1).
15 See note 4 at 305.
16 Vasilka Sancin, Dominika Švarc and Matjaž Ambrož, Mednarodno pravo oboroženih spopadov (Ljubljana: Poveljstvo za doktrino, razvoj, izobraževanje 2009) 444; Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, Cambridge 2004); Gerhard Werle, Völkerstrafrecht
There are two ways in which mistake of law can preclude criminal responsibility. The first establishes a mistake of law as an independent excuse, the second (pursuant to Article 33) relates to a superior orders defence.

Mistake of law is regulated even more strictly than mistake of fact. According to Article 32, a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the ICC shall not be a ground for excluding criminal responsibility. According to the Statute, a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required for a criminal act, or as provided for in Article 33.

It is disputed how extensive the legal basis is for mistake of law. There have been two different interpretations. According to the first interpretation, Article 32(2) does not include a mistake of law. The fact that the perpetrator is not aware of the illegality of his act is simply irrelevant to his/her liability. On this reading, the first sentence of Article 32(2) establishes the irrelevance of a mistake of law. Quoting from the Statute, ‘a mistake of law as to whether a particular type of conduct is a criminal act within the jurisdiction of the ICC shall not be a ground for excluding criminal responsibility.’ But if we render this as making mistake of law irrelevant, then how should we render the rest of Article 32(2)? The second sentence of this Article reads, ‘[a] mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.’ In my opinion, we should reject the aforementioned narrow reading of Article 32(2) as it


17 Rome Statute, Article 32(2).
18 The author herself uses the term criminal act, but leaves the term crime as a synonym, when the Rome Statute uses it.
19 Rome Statute, Article 32(1).
20 Rome Statute, Article 32(2).
21 Ibid.
would make the second sentence of this Article superfluous.

According to the second, and, in my opinion, correct interpretation, the first sentence of Article 32(2) refers only to a **mistake of the perpetrator about whether a certain criminal act is under the jurisdiction of the ICC**. Such a mistake is not relevant. However, mistake of law is relevant when it excludes the mental element.

According to this second interpretation, a mistake of law transforms itself into a mistake of normative elements. The perpetrator is mistaken about the content of an element of the definition of a criminal act. This element is normative because of its special nature. Namely, its content cannot be recognised at first sight, but only through (legal) evaluation. If such a normative element refers only to one element of the definition of a criminal act, the mistake of the content of such an element transforms itself further into a mistake of fact in the stricter sense (Tatbestandsirrtum), and excludes intent and the mental element as defined by Article 30.

An additional argument for the relevance of mistake of law could be the theory of intent. Perhaps we could broaden the notion of intent to include mistake of law? On this view, to be acting with intent, the perpetrator must be aware not only of the facts, which are elements of the definition of a criminal act, but also of the illegality of his act. Thus, if the perpetrator is not aware of the illegality, he has no intent. However, the plain meaning of Article 30 seems to preclude awareness of the illegality of the act as a part of intent. Therefore, I have to agree with those authors who claim that Article 30 does not demand the awareness of illegality as a part of intent.

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22 Claus Kreß, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2000) Israel Yearbook on Human Rights 146, 147; Werle, Völkerstrafrecht, 137; Clark, ‘Subjektive Merkmale’ 386; Satzger, Strafrecht, 265; Cassese et al., Commentary, 943; Ambos, Der Allgemeine Teil, 817; Otto Triffterer et al., Commentary on the Rome Statute of the International Criminal Court: Observers’Notes, Article by Article (C H Beck: Munich 2008) 908, 909.

23 Such a normative element is, for example, protected persons according to the Geneva Conventions, Article 8 on war crimes. See for example part III of the Convention.

24 Ambrož, Vrednostne prvine, 54, see note 16.

25 Ibid. at 138.

26 Cassese et al., Commentary, 919, 910; Triffterer et al., Commentary, 513, see note 22.
In the Rome Statute system, the theory of intent cannot widen the scope of a mistake of law and it remains relevant only as a mistake of normative elements.

However, there are limitations even to this, according to the Elements of Crimes.\textsuperscript{27} If the perpetrator is aware of the factual circumstances of the normative element, there is no requirement for a legal evaluation by the perpetrator as to the existence of a normative element.\textsuperscript{28} For example, regarding the normative element of a protected person, the perpetrator needs to be aware of the factual circumstances that establish this protected status,\textsuperscript{29} but does not have to be aware of the legal definition of a protected person according to the Geneva Convention nor that the Geneva Convention gives certain persons such status. This causes an additional limitation to mistake of law. Mistake of law is completely irrelevant, since according to the Elements of Crimes, legal evaluation is not needed for criminal responsibility at all.

There is another limitation to rendering mistake of law as a mistake of normative elements. According to a continental theory of criminal law, a mistake of normative elements transforms into a mistake of fact in the stricter sense (\textit{stricto senso}) and is, as such, relevant according to Article 32(2) when the normative element refers only to one element of the definition of a criminal act and not, when the normative element refers to the whole definition of a criminal act. The latter is a classic case of mistake of law,\textsuperscript{30} which brings the interpretation back to the beginning.

4. APPLICATION OF MISTAKE OF LAW IN LUBANGA

When the Pre-Trial Chamber was deliberating upon the confirmation of charges,\textsuperscript{31} the Defence argued that ‘the principle of legality demands that the defendant is aware of the existence of the criminal act at the time of its perpetration and whether he could foresee that the conduct in question was criminal in nature and could therefore entail his criminal responsibility.’\textsuperscript{32}

\begin{itemize}
  \item[27] See Rome Statute, Article 9.
  \item[28] Werle and Jessberger, \textit{Das Völkerstrafgesetzbuch}, 42.
  \item[29] For example that the person is a civilian.
  \item[30] Ambrož, \textit{Vrednostne prvine}, 55, see note 16.
  \item[31] The Confirmation hearing was held from 9 to 28 November 2006.
  \item[32] \textit{The Prosecutor v Thomas Lubanga Dyilo}, Decision on Confirmation of Charges,
The Defence connected this objection with Article 65 of Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, according to which penal provisions enacted by the Occupying Power (in this case the Rome Statute) shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The Defence also claimed that this condition was not fulfilled, since ‘neither Uganda nor the Democratic Republic of the Congo brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified and that conscripting and enlisting child soldiers entailed individual criminal responsibility’ (the principle of foreseeability or lex certa).

I agree with the Prosecutor and the Chamber that the Defence mingled the principle of legality and mistake of law. The principle of legality is in this case unquestionable. It is strongly emphasised in the Statute, but not problematic in the Lubanga case, since the Rome Statute entered into force on 1 July 2002, but the DRC ratified it on 11 April 2002 and Uganda on 14 June 2002 and the criminal acts were committed between July 2002 and July 2003.

However, the Pre-Trial Chamber also correctly assumed that the Defence was relying on the possibility of excluding criminal responsibility due to mistake of law in force, but did not challenge that child recruitment is a violation of international humanitarian law as such. The Defence namely argued that the defendant was unaware that child recruitment ‘entailed his criminal responsibility under the statute’. The Defence therefore referred to the first sentence of Article 32(2), according to which mistake of law as to whether a particular type of conduct is a crime within the jurisdiction

29 January 2007, Case No. ICC-01/04-01/06, para 294.
33 Rome Statute, Article 65.
34 Note 32, para 296.
36 Ibid. para 301.
37 Rome Statute, Articles 22-24.
39 Decision on Confirmation of Charges, para 9.
40 Ibid. para 301.
41 Ibid. para 308.
42 Ibid. para 304.
of the ICC shall not be a ground for excluding criminal responsibility. Accordingly, such mistake cannot be relevant.\textsuperscript{43}

The Pre-Trial Chamber also elaborated on the scope of mistake of law and stated that a mistake of law shall only be grounds for excluding criminal responsibility if it negates the mental element required by the criminal act or it falls within the scope of the superior orders or prescription of a defence under Article 33.\textsuperscript{44} As there are no facts for the application of a superior order defence in this case, the Chamber concluded that mistake of law would only be relevant if the defendant was unaware of ‘a normative objective element of the criminal act as a result of not realising its social significance (its everyday meaning).’\textsuperscript{45} With this reasoning the Chamber joined the majority of authors, according to whom mistake of law is limited to the mistake of normative elements and according to whom it suffices that the perpetrator is aware of the every day meaning of the act to be criminally responsible. For awareness of illegality it therefore suffices that he is aware that his act is forbidden by law (not necessarily by criminal law) and that he is aware of its illegality in the ‘usual and customary’ way (its everyday meaning according to the Chamber).\textsuperscript{46}

In my opinion, the Chamber correctly applied the rule on mistake of law, but it also confirmed that the scope of mistake of law in the Statute is very narrow and is relevant only as a mistake of normative elements or superior order defence. The Chamber also hinted at the content of awareness of the illegality of the act (usual and customary or everyday awareness). What remains to be seen, however, is how the ICC would assess whether the mistake of law is excusable with regard to a certain criminal act. The Chamber has not done this in the \textit{Lubanga} case, since it believed that the defendant was aware of the illegality of his act and of the fact that the Statute had entered into force.\textsuperscript{47}

As aforementioned, the criminal act in question in the \textit{Lubanga} case was the war crime of conscripting and enlisting child soldiers. The Elements of Crimes defines this crime as follows:

\begin{flushright}
\begin{tabular}{ll}
43 & \textit{Ibid.} para 297. \\
44 & \textit{Ibid.} para 315. \\
45 & \textit{Ibid.} para 316. \\
46 & Jescheck and Weigend, \textit{Lehrbuch}, see note 4 at 453, 454. \\
\end{tabular}
\end{flushright}
1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.\(^\text{48}\)

Elements three and five are closely linked to the issue of mistake and guilt. Namely, element three demands that the perpetrator knew or should have known that such person or persons were under the age of 15 years. This element is relevant for mistake of fact. The age of a child soldier is an element of a definition of the criminal act. If the perpetrator is mistaken about the age of a soldier, he is mistaken about a fact that represents an element of the definition of the criminal act and has no guilt. However, this element of the war crime also sets a lower standard of guilt, since it suffices that the perpetrator should have known the soldier’s age or that he was under the age of 15. This is done in accordance with Article 30(1), according to which the Statute could prescribe a lower threshold for guilt. This means that for this criminal act, unconscious negligence with a lower awareness standard suffices and it is not necessary to prove intent towards this element of a definition of the criminal act.

The fifth element is also relevant. This element requires the perpetrator’s awareness of the factual circumstances that established the existence of an armed conflict. International or non-international armed conflict represents a normative element of a definition of this war crime. Namely, what is an international or non-international armed conflict cannot be recognised immediately, but only through a legal assessment. The nature of armed conflict is defined in international humanitarian law, especially in the Geneva Conventions. As stated earlier, this is the exact case where mistake of law could be relevant in the framework of the Rome Statute. If the normative element in question (in our case whether the armed conflict is international or non-international) refers to the whole definition of a criminal act, we are dealing with a mistake of law, which is irrelevant.

\(^{48}\) Elements of Crimes, Article 8(2)(b)(xxvi)
and has no significance in the Statute. However, such is not the case here. The normative element in question namely refers to one element of a definition of a criminal act only and therefore changes into mistake of fact. The latter presents a possibility for a mistake of law to be relevant. However, the fifth element of this war crime lowers the guilt standard and only demands that the perpetrator was aware of factual circumstances that established the existence of an armed conflict, and does not demand that the perpetrator was aware of the legal nature of the armed conflict. This means that it is irrelevant, whether the perpetrator was aware of the legal nature (international/non-international) of the armed conflict to be held criminally responsible. Such regulation thereby nullifies the significance of mistake of law.

4. CONCLUSION

Only if the Elements of Crimes demanded that the perpetrator must be aware of the legal nature of the element of a definition of a criminal act (in our case of the armed conflict), mistake of law could be relevant in this narrow range, as a mistake of a normative element, which refers only to a certain element of a definition of a criminal act. However, this is not the case here. With conscripting and enlisting child soldiers the Statute and the Elements of Crimes use the established practice of lowering the threshold for guilt by not demanding that the perpetrator is aware of the legal nature of the element of a criminal act to be criminally responsible. It suffices that he is aware of the factual circumstances of a normative element. This nullifies the relevance of mistake of law.
Notes