CHILDREN AND THE FIRST VERDICT OF THE INTERNATIONAL CRIMINAL COURT

DIANE MARIE AMANN[*]

Days before she was sworn in as the new Prosecutor, Fatou Bensouda told a New York audience: "In the International Criminal Court, children, including girls, will not be invisible."[1] She affirmed that promise a few months later, pledging on the first-ever International Day of the Girl Child, "I shall continue to include gender crimes and crimes against children in our charges and to bring the full force of the law to bear on those most responsible for them."[2] Bensouda's declarations underscored the degree to which the fate of children in armed conflict has formed a cornerstone of the ICC's early jurisprudence.

This attention to the plight of children marked a notable development in the seven-decade history of international criminal justice. No mention of children appeared in either the 1945 Charter of the International Military Tribunal at Nuremberg or the instrument that set up the subsequent Nuremberg tribunals.[3] The same was true of the Tokyo Tribunal charter and, for that matter, of the Charter of the United Nations.[4] The silence of these post-World War II documents stood in stark contrast

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* Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law. A version of this Article was presented on a panel entitled "The Early Jurisprudence of the Court," at the "International Criminal Court at Ten" symposium, November 12, 2012, sponsored by the Whitney R. Harris World Law Institute at Washington University School of Law, St. Louis. The manuscript was completed before my December 2012 appointment by International Criminal Court Prosecutor Fatou Bensouda as her Special Adviser on Children in and affected by Armed Conflict; this Article is published in my personal capacity and does not purport to set forth any position of the ICC. My thanks to my students Kaitlin M. Ball, Blake Evans, Erika Furlong, Sarah A. Hassan, and Mahdi Abdur-Rahman, who have comprised the Georgia Law Project on Armed Conflict & Children, and to Georgia Law librarians Anne Burnett and T.J. Striepe, for research assistance.

1. Fatou Bensouda, Prosecutor-elect of the Int'l Crim. Ct., June 4, 2012, Keynote Speech before the Eng Aja Eze Foundation in New York: The Incidence of the Female Child Soldier and the International Criminal Court (June 4, 2012), *available at* http://cpcjalliance.org/international-day-african-child/.

2. Press Release, Statement ICC Prosecutor Fatou Bensouda on International Day of the Girl (Oct. 11, 2012), *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-11-10-2012.aspx.

3. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, *Amtsblatt* of the Control Council in Germany, No. 3, 31 Jan. 1946, at 50.

4. *See* U.N. Charter; Charter of the International Military Tribunal for the Far East at Tokyo, § III, Apr. 26, 1946, T.I.A.S. No. 1589.

with the many references to children in the foundational instrument of the post-Cold War permanent international court.[5]

Drafters explained in the preamble of that last instrument, the Rome Statute, that "for the sake of present and future generations," they undertook to establish the ICC "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[6] The statute they produced at the 1998 Rome Diplomatic Conference not only required the Prosecutor to "appoint advisers with legal expertise on specific issues, including . . . violence against children," but also mandated that in composing the ICC bench, states parties "take into account the need to include judges with legal expertise on . . . violence against women or children."[7] At several points, the statute admonished the Prosecutor and other ICC officials to adjust proceedings to accommodate the needs of children.[8] Unlike in the Nuremberg Charter, furthermore, concern for young victims was made explicit in the Rome Statute's enumeration of offenses. Included as one of the five acts that may constitute genocide punishable by the ICC was "[f]orcibly transferring children of" a protected "group to another group."[9] Enslavement, one of eleven acts that may amount to a crime against humanity, was defined in the statute with express reference to the trafficking of children.[10] Finally, the Rome Statute named "[c]onscripting or enlisting children under the age of fifteen years" into an armed force,

5. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICC Statute or Rome Statute], *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

6. *Id.* pmbl.

7. *Id.* arts. 36(8)(b) (setting out qualifications for judges), 43(9) (authorizing advisers to the prosecution).

8. *See id.* art. 54(1)(b) (including "age" among the "personal circumstances of victims and witnesses" to which investigation and prosecution must be adjusted, and further requiring the Prosecutor to "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children"); *id.* art. 68(1) (requiring that in adopting victim or witness-protection measures, "the Court shall have regard to all relevant factors, including age . . . and the nature of the crime, in particular, but not limited to, where the crime involves . . . violence against children"); *id.* art. 68(2) (permitting *in camera* proceedings or "electronic or other special means" of testimony, particularly in case of "a child who is a victim or a witness").

9. *Id.* art. 6(e). The provision's chapeau specifies which groups are protected, stating that enumerated acts are prohibited when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.* art. 6.

10. *Id.* art. 7(2)(c) (stating that this act "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children").

"or using them to participate actively in hostilities," as war crimes within the jurisdiction of the ICC.[11]

It was on those last offenses that early prosecutions focused. The war crimes of recruiting and using child soldiers were charged in multiple cases arising out of the situations in Uganda and in the Democratic Republic of the Congo.[12] The ICC's first trial, *Prosecutor v. Lubanga*, dealt exclusively with those crimes.[13] The experiences of children thus underlay the ICC's first verdict; that is, the conviction, sentencing, and reparations decisions that ICC Trial Chamber I issued in *Lubanga* in 2012.[14] Examining those three decisions, this Article discusses how Trial Chamber I treated both child soldiering and, more broadly, the issue of children in armed conflict. The Article concludes by touching on prospects for the ICC's future treatment of these matters. In recognition, however, of Ambassador Stephen Rapp's description of international criminal justice

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11. With slight variations in wording, the proscription was extended both to international armed conflicts and to non-international armed conflicts. *Id.* arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

12. On Uganda, see descriptions of cases against Joseph Kony and Dominic Ongwen, both fugitives. *Uganda: ICC-02/04-01/05*, INT'L CRIM. CT. (ICC), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx (last visited Aug. 1, 2013). On cases in the Democratic Republic of the Congo, see generally *Democratic Republic of the Congo: ICC-01/04*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx (last visited Aug. 1, 2013); *see also infra* note 13.

13. *See infra* notes 40–108 (analyzing decisions in *Lubanga*). Child-soldiering charges also formed part of the second trial, which proceeded against two other men alleged to have been Congolese militia leaders. *See* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶¶ 246-3 (ICC Pre-Trial Ch. I, Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf (describing these charges). After trial concluded, the cases were severed and one defendant was acquitted. *See* Procureur c. Mathieu Ngudjolo, No. ICC-01/04-02/12, Jugement rendu en application de l'article 74 du Statute (ICC Trial Ch. II, Dec. 18, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1529535.pdf. As of August 2013, the judgment of acquittal had been appealed, and judicial deliberations in the remaining case, *Katanga*, continued. *See* Press Release, Int'l Crim. Ct., ICC Released Mathieu Ngudjolo Chui from Custody Following His Acquittal (Dec. 21, 2012), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr868.aspx (noting Prosecutor's appeal of acquittal); Press Release, Int'l Crim. Ct., ICC Trial Chamber II Acquits Mathieu Ngudjolo Chui (Dec. 18, 2012), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr865.aspx (stating that the verdict in *Katanga* would be released at a later date). Given that the verdict in *Ngudjolo* postdated the presentation described *supra* note ∗, this Article does not analyze it, but rather focuses on the decisions in *Lubanga*.

14. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter *Lubanga* Judgment], http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012) [hereinafter *Lubanga* Sentencing], http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations (Aug. 7, 2012) [hereinafter *Lubanga* Reparations], http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf. At this writing the case remains on appeal.

as a single project whose roots may be found at Nuremberg,[15] this Article first makes a foray into history.

I. INTERNATIONAL LAW RESPECTING CHILDREN

To say that midtwentieth-century charters made no note of children is by no means to say that the plight of children in World War II went unnoticed. Several thousands were rescued via *Kindertransport*.[16] Other children were combatants. They fought for Germany; they fought for Russia; and they fought in resistance movements in occupied lands.[17] Many, many children suffered. Select children were forcibly made adoptees of German families, in furtherance of Nazi policies.[18] Children endured forced labor and violence, and children perished, in concentration camps.[19] These facts struck me, if I may speak personally, in a barracks in Austria. In a visit to the Mauthausen concentration camp decades after its liberation, the sight of a mountain of small shoes conveyed, with horrid immediacy, the full tragedy of the Holocaust. The only exhibit that has stirred similar emotion was the secret annex in Amsterdam that gave shelter to Anne Frank.[20] Teenagers made up a fifth of the inmates at

15. *See* Stephen J. Rapp, Address at Washington University ICC at 10 Conference (Nov. 2012); *see also* Stephen J. Rapp, Remarks at Opening of the Nuremberg Trials Memoriam (Nov. 21, 2010), *available at* http://www.state.gov/j/gcj/us_releases/remarks/2010/151884.htm (stating that "the legacy of Nuremberg lives in the international courts of the 21st century").

16. *See* JUDITH TYDOR BAUMEL-SCHWARTZ, NEVER LOOK BACK: THE JEWISH REFUGEE CHILDREN IN GREAT BRITAIN, 1938–1945, at 1–2 (2012) (stating that by means of "the Kindertransport Movement," nearly 10,000 children, mostly from Germany, Austria, and Czechoslovakia, "found refuge in Great Britain between December 1938 and September 1939").

17. *See* OLGA KUCHERENKO, LITTLE SOLDIERS: HOW SOVIET CHILDREN WENT TO WAR, 1941–1945 (2011) (reporting on Soviet child combatants during World War II); DAVID M. ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM 22 (2005) ("Children were part of virtually every partisan and resistance movement in World War II."); Philipp Kuwert et al., *Trauma and Post-Traumatic Stress Symptoms in Former German Child Soldiers of World War II*, 20 INT'L PSYCHOGERIATRICS 1014, 1015 (2008) (writing that "[o]ne of the less known historical facts of World War II is the recruitment of approximately 200,000 German children as soldiers by the Nazi government") (citing HANS-DIETRICH NICOLAISEN, DIE FLAKHELFER: LUFTWAFFENHELFER UND MARINEHELFER IM ZWEITEN WELTKRIEG (1981)).

18. *See* Kjersti Ericsson, *Introduction*, *in* CHILDREN OF WORLD WAR II: THE HIDDEN ENEMY LEGACY 4–7 (Kjersti Ericsson & Evan Simonsen eds., 2005) (describing the Nazi *Lebensborn* program that operated in Norway and other occupied states).

19. *See* PATRICIA HEBERER, CHILDREN DURING THE HOLOCAUST 149–90 (2011) (discussing children and concentration camps); *see generally* TARA ZAHRA, LOST CHILDREN: RECONSTRUCTING EUROPE'S FAMILIES AFTER WORLD WAR II (2011) (examining conditions at refugee camps, in which numerous children were concentration camp survivors).

20. *See* Francine Prose, *Introduction*, *in* ANNE FRANK, THE DIARY OF A YOUNG GIRL viii–ix (Otto H. Frank & Mirjam Pressler eds., 2010) (originally published in Dutch as HET ACHTERHUIS (1947)) (describing the Franks' secret annex).

Mauthausen,[21] and Frank was fifteen when, having been found and arrested after two years in hiding, she succumbed to typhus at the Bergen-Belsen camp.[22] That both wrenching memorials centered on young victims attests to the special grip that children have on what Professor Mark Drumbl, in his book on child soldiers, called the "international legal imagination."[23]

Though conducted according to international charters that omitted mention of children, the post-World II accountability process nevertheless helped to train international attention on how war affects young people. The first Nuremberg judgment referred a dozen times to children.[24] For the most part the tribunal simply mentioned children alongside women and men; an example is its quotation of an affidavit in which Otto Ohlendorf, a Nazi who would incur the death penalty in a subsequent trial, stated that his *Einsatzgruppe* had "'liquidated approximately 90,000 men, women and children.'"[25] Three of the judgment's passages went further, illustrating the special vulnerabilities of childhood. The tribunal wrote in one such passage of the Nazi practice of forcing pregnant slave laborers to abort "if the child's parentage would not meet the racial standards . . . ."[26] In another, it relayed a Nazi leader's boast about the forced-adoption program: "'What the nations can offer in the way of good blood of our

21. *See* Bundesministerium für Inneres (Austria), Mauthausen Memorial, *Audio Guide 07: Block 11—Children and Adolescents in Mauthausen*, http://en.mauthausen-memorial.at/db/admin/de/show_article.php?carticle=341&topopup=1 (last visited Aug. 1, 2013).

22. *See* Sylvia P. Iskander, *Anne Frank's Reading: A Retrospective*, *in* ANNE FRANK: REFLECTIONS ON HER LIFE AND LEGACY 100, 106 (Hyman Aaron Enzer & Sandra Solotaroff-Enzer eds., 1999) (writing of "[t]he untimely death of Anne Frank from typhus at Bergen-Belsen concentration camp just two months prior to the end of the war"); Prose, *supra* note 20, at x (stating that after two years in hiding, Frank was arrested, and died from "malnutrition and disease" at the camp).

23. MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 9 (2012) (defining this term, used throughout the book, as the "normative, aspirational, and operational mix of international law, policy, and practice—constituted as it is directly and indirectly by a broad constellation of actors"). Although Drumbl finds scant use of the term in international law, it resonates with the concept of the "imaginary" familiar to social science theorists. *See* CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23 (2004) (describing concept of "social imaginary" in terms similar to Drumbl's use of "imagination").

24. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 235–37, 245, 248, 251–52, 260, 273 (1947) [hereinafter Nuremberg Judgment] (containing principal judgment's references to "children"); *id.* at 362 (containing mention of "children" in dissent by General Iona Nikitchenko, the Soviet judge). The principal judgment, dissenting opinion, and pronouncement of sentences, delivered on Sept. 30 and Oct. 1, 1946, are reprinted in full *id.* at 181–367.

25. *Id.* at 235 (quoting Ohlendorf affidavit). On Ohlendorf's conviction and sentence to death by hanging, see 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 509–12, 590 (1949).

26. Nuremberg Judgment, *supra* note 24, at 260.

type, we will take. If necessary, by kidnapping their children and raising them here with us.'"[27] In a third passage, the tribunal focused on conditions in the concentration camps. "'Children of tender years were invariably exterminated since by reason of their youth they were unable to work,'" a Nazi official had stated in an affidavit, from which the tribunal quoted at length.[28] He had continued: "'Very frequently women would hide their children under their clothes, but of course when we found them we would send the children in to be exterminated.'"[29]

Direct testimony at the Trial of the Major War Criminals likewise had adduced grim evidence of the unique relationship of children to atrocity. In the following examination, the witness Ohlendorf—the same man whose *Einsatzgruppe* affidavit is excerpted above—answered questions put to him by the tribunal's Soviet judge, General Iona Nikitchenko:

> Q: And in what category did you consider the children? For what reason were the children massacred?
>
> A: The order was that the Jewish population should be totally exterminated.
>
> Q: Including the children?
>
> A: Yes.
>
> Q: Were all the Jewish children murdered?
>
> A: Yes.[30]

Discernible both in this battery of questions and in the judgment passages quoted is a perception that the killing of the youngest, most vulnerable, and most innocent persons constitutes an especially grave transgression, one that society must especially endeavor to prevent and punish. But a very different perception also is discernible: in the minds of *génocidaires*, survival of the young and innocent carries promise that a

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27. *Id.* at 237 (quoting October 1943 statement by Nazi leader Heinrich Himmler).

28. *Id*. at 251–52 (quoting affidavit by Rudolf Höss, the first commandant of the Auschwitz concentration camp).

29. *Id*. at 252 (quoting Höss). The Tokyo Tribunal's verdict of November 13, 1948, contained three references to offenses against "men, women and children," one to a massacre of "women and children," and one to Japan's inculcation of "schoolchildren" with "ultra-nationalism." I THE TOKYO JUDGMENT 96, 388–89, 396, 399 (B.V.A. Röling & C.F. Rüter eds., 1977).

30. 4 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 337–38 (1947) (setting forth trial proceedings on Jan. 3, 1946). For ease of reading, this Article uses "Q" and "A" in lieu of the original's use of "OHLENDORF" and "THE TRIBUNAL (Gen. Nikitchenko)."

group will endure, and thus poses an especial threat to the perpetrators' genocidal project. Given Nuremberg's exposure of this clash of views, it is perhaps not surprising that, even as trials continued, states inserted in postwar legal instruments expressions of particular concern for the fate of children.

Signaling this development were two documents that the U.N. General Assembly adopted in December 1948: the Convention Against Genocide, which first articulated the ban on forcible transfer of children that would be reaffirmed a half century later in the Rome Statute;[31] and the Universal Declaration of Human Rights, which accorded "special care and assistance" to "childhood," and extended "social protection" to all children.[32] Less than a year later, states adopted the Geneva Conventions on the laws and customs of war, the fourth of which set out a host of requirements intended to assure the identification, education, health, and well-being of children, during conflict and under occupation.[33] The 1977 Additional Protocols to those conventions prohibited the recruitment of children under fifteen into armed forces,[34] and further insisted that captured child soldiers, no less than other children caught up in armed

31. Convention on the Prevention and Punishment of the Crime of Genocide art. II(e), Dec. 9, 1948, 78 U.N.T.S. 277. In its list of underlying acts and its statement of contextual elements, Article II of the Genocide Convention is identical to the ICC Statute, *supra* note 5, art. 6, *quoted supra* note 9 and accompanying text.

32. Universal Declaration of Human Rights art. 25(2), G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) (proclaiming in full that "[m]otherhood and childhood are entitled to special care and assistance" and that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection"); *see id*., art. 26(1) (mandating free education "at least in the elementary and fundamental stages").

33. Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War arts. 14, 17, 23, 24, 38(5), 50, 82, 89, 94, 132, Aug. 12, 1949, 75 U.N.T.S. 287. The extent of these protections becomes evident on comparison with the single reference to "children" in the first codification of the laws and customs of war. Known as the Lieber Code in recognition of its drafter, it provided that commanders should "inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences." Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Lieber Code) art. 19 (U.S. War Dept. Apr. 24, 1863). In contrast with contemporary codifications, the same article of this Civil War-era code continued: "But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity." *Id.*

34. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 77(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (providing that "Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities" and specifying that such parties "shall refrain from recruiting" children under fifteen "into their armed forces"); Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 3(c), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (stating that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities").

conflict, must receive special protections.[35] The 1989 Convention on the Rights of the Child affirmed those norms.[36] In the ensuing decade, the issuance of Graça Machel's milestone U.N. report on children and armed conflict,[37] coupled with media coverage of child soldiers,[38] laid the groundwork for the prohibition on recruiting and using young children that is entrenched in the 1998 Rome Statute of the ICC.[39]

Thus it was that in March 2006, Luis Moreno-Ocampo, then the ICC Prosecutor, announced that militia leader Thomas Lubanga Dyilo was in custody at The Hague, accused of conscripting, enlisting, and using children under fifteen in 2002 and 2003, amid a protracted armed conflict in the Ituri region of the Democratic Republic of the Congo.[40] In apparent explanation of his choice to charge only offenses related to child soldiers, the Prosecutor declared: "These are extremely serious crimes. Forcing

35. *See* Additional Protocol I, *supra* note 34, arts. 70(1), 77, 78; Additional Protocol II, *supra* note 34, arts. 4(3), 6(4); *see also* Howard Mann, *International Law and the Child Soldier*, 36 INT'L & COMP. L.Q. 32, 32–50 (1987) (describing context within which the protocol provisions were adopted).

36. Convention on the Rights of the Child art. 38, Nov. 20, 1577 U.N.T.S. 3.

37. U.N. Secretary-General, *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General: Ms. Graça Machel*, ¶ 34, U.N. Doc. A/51/306 (Aug. 26, 1996), *available at* http://www.unicef.org/graca/a51-306_en.pdf. Given space constraints, this Article omits discussion of the many other international initiatives related to this issue.

38. *E.g.*, Joel Brinkley, *Uprising by Arabs Losing Momentum,* N.Y. TIMES, June 12, 1991, at A5, *available at* http://www.nytimes.com/1991/06/12/world/uprising-by-arabs-losing-momentum.html (quoting Palestinian professor's call for excluding children from participation in anti-Israel "revolt"); John Darnton, *Civil War of Nearly Two Decades Exhausts Resource-Rich Angola*, N.Y. TIMES, May 9, 1994, at A1, *available at* http://www.nytimes.com/1994/05/09/world/civil-war-of-nearly-two-decades-exhausts-resource-rich-angola.html?pagewanted=all&src=pm (reporting that Angolan rebels "carried off young boys to turn them into child soldiers"); Jeffrey Goldberg, *A War Without Purpose in a Country Without Identity*, N.Y. TIMES MAG., Jan. 22, 1995, § 1, at 37, *available at* http://www.nytimes.com/1995/01/22/magazine/a-war-without-purpose-in-a-country-without-identity.html (relating interviews with child soldiers in Liberia); Bill Keller, *In Mozambique and Other Lands, Children Fight the Wars*, N.Y. TIMES, Nov. 9, 1994, at A14, *available at* http://www.nytimes.com/1994/11/09/world/in-mozambique-and-other-lands-children-fight-the-wars.html (writing of child combatants not only in Mozambique, but also "Sudan and Liberia, Angola and Rwanda, Afghanistan, Cambodia and the Middle East").

39. ICC Statute, *supra* note 5, arts. 8(2)(b)(xxvi), 8(2)(e)(vii); *see also supra* text accompanying note 11. An analogous proscription proved central to prosecutions in the later-established Special Court for Sierra Leone. *See* DRUMBL, *supra* note 23, at 122–24, 144–49 (describing the Special Court's structure and jurisprudence); Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167 (2001) [hereinafter Amann, *Children*] (examining initial plan to prosecute child combatants). Reasons of space prevent analysis of the work of that court.

40. Statement by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Press Conference in Relation With the Surrender to the Court of Mr Thomas Lubanga Dyilo, The Hague (Mar. 18, 2006) [hereinafter Moreno-Ocampo statement], http://www.icc-cpi.int/NR/rdonlyres/699D1671-4841-4AAC-BFF4-1F1BF3F9DFEC/143842/LMO_20060318_En1.pdf; *see Lubanga* Judgment, *supra* note 14, ¶ 1 (stating 2002–2003 time period covered by the charges); *see also* Diane Marie Amann, *International Decision: Prosecutor v. Lubanga*, 106 AM. J. INT'L L. 809 (2012) [hereinafter Amann, *Lubanga*] (summarizing conflict).

children to be killers jeopardises the future of mankind. We are committed to putting an end to these crimes—it's our special duty pursuant to the Rome Statute."[41] On March 14, 2012, a few months before the end of Moreno-Ocampo's term in office, Trial Chamber I found Lubanga guilty of all three child-soldiering crimes.[42] It is to evaluation of that judgment, as well as subsequent rulings on sentencing and reparations,[43] that this Article now turns.

II. *LUBANGA* TRILOGY

The first decision in the 2012 *Lubanga* trilogy was the judgment issued in accordance with Article 74 of the Rome Statute.[44] Over the course of nearly 600 pages, Trial Chamber I detailed its reasons for convicting the defendant Lubanga, who in 2000 had become the President of *Union des patriotes congolais* and *Forces patriotiques pour la libération du Congo*, an Ituri-based political organization and its militia.[45] The chamber—composed of Presiding Judge Adrian Fulford of Britain, along with Judges René Blattmann of Bolivia and Elisabeth Odio Benito of Costa Rica—chose not to begin with a statement of "special duty" toward children along the lines of the Prosecutor's proclamation six years earlier.[46] Quite to the contrary, an initial portion of the judgment was devoted to a lengthy recitation of the trial's starts and stops.[47] Trial Chamber I twice had stayed proceedings on account of prosecutorial nondisclosure: first, of exculpatory evidence; and second, of the name of a Congolese intermediary through whom the prosecution had kept in contact with

41. Moreno-Ocampo statement, *supra* note 40, at 2 (original's separation of sentences into distinct paragraphs, and boldfacing of certain passages, omitted).

42. *Lubanga* Judgment, *supra* note 14. Moreno-Ocampo's term ended on June 15, 2012, the date on which Fatou Bensouda was sworn in as the new Prosecutor. *See* Press Release, Int'l Crim. Ct., Ceremony for the Solemn Undertaking of the ICC Prosecutor, Fatou Bensouda (June 15, 2012), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr811.aspx (reporting on swearing-in ceremony in press release); *see also* Fatou Bensouda, Prosecutor Elect of the International Criminal Court, Statement at the Ceremony for the solemn undertaking of the Prosecutor of the International Criminal Court, at 2 (June 15, 2012), http://www.icc-cpi.int/NR/rdonlyres/561C232F-3C4F-47AC-91CB-8F78DCC6C3FD/0/15062012FBSolemnUndertaking.pdf (describing evolution of Office of the Prosecutor since Moreno-Ocampo took office in 2003).

43. *Lubanga* Sentencing, *supra* note 14; *Lubanga* Reparations, *supra* note 14.

44. *Lubanga* Judgment, *supra* note 14; *see* ICC Statute, *supra* note 5, art. 74 (setting forth requirements with regard to the conduct of trial and post-trial deliberations, the proper basis of the verdict, the contents of the written judgment, and the open-court delivery of the verdict).

45. *Lubanga* Judgment, *supra* note 14, ¶¶ 67–81 (describing the accused and his militia).

46. *See* Moreno-Ocampo statement, *supra* note 40.

47. *See Lubanga* Judgment, *supra* note 14, ¶¶ 178–484.

witnesses in the field.[48] The judgment in *Lubanga* reviewed the use of such go-betweens—some of whom were paid, and one of whom was affiliated with the Congolese intelligence service—and made clear the chamber's position that "the prosecution should not have delegated its investigative responsibilities to the intermediaries" to the degree that it had.[49]

Trial Chamber I further determined that three intermediaries may have induced false testimony, and for this it exacted significant costs. Not only did the chamber order investigations of the three intermediaries, but it also stripped four persons with whom those intermediaries had worked of the privilege of taking part in any post-trial reparations.[50] And it excluded, on ground of unreliability, the direct testimony of multiple witnesses who said they had served as underage child soldiers in defendant's militia.[51]

Having thus winnowed the evidence on which it would rely, Trial Chamber I addressed the substance of the allegations. Prosecutors had charged the accused under the Rome Statute provision pertaining to a person who commits an offense within the jurisdiction of the ICC, "whether as an individual, jointly with or through another person, regardless of whether that other person is criminally responsible . . . ."[52] To apply the provision in the case at hand, Trial Chamber I used a five-part test for individual criminal liability, made up of both mental and objective elements, which a Pre-Trial Chamber had developed earlier in the litigation.[53]

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48. *Id*. ¶ 10.

49. *Id*. ¶¶ 198–205, 302, 482.

50. *Id*. ¶¶ 483–84.

51. *Id*. ¶¶ 479–83.

52. ICC Statute, *supra* note 5, art. 25(3)(a); *see Lubanga* Judgment, *supra* note 14, ¶¶ 917–1018 (fixing the meaning of this provision).

53. "[T]he prosecution must prove in relation to each charge," the chamber wrote, that:

> (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
>
> (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
>
> (iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences "will occur in the ordinary course of events";
>
> (iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and
>
> (v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

Lubanga Judgment, *supra* note 14, ¶ 1018; *see id.* ¶¶ 918–33 (describing test in context of prior ruling). Judge Fulford made clear his preference that a more lenient test be applied in future cases.

A chamber majority concluded that the Prosecutor had proved the existence in Ituri of an internal, but not of an international, armed conflict.[54] Thus it construed only the criminal prohibition related to the former type of conflict; specifically, the Rome Statute proscription against "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."[55] That provision was held to consist of three discrete acts: conscription, enlistment, and use.[56] The trial chamber distinguished the first two acts by ruling that conscription entails coercion, while enlistment connotes voluntary joinder.[57] This proved a distinction without a difference, however. Finding in the Rome Statute a purpose of "protecting vulnerable children, including when they lack information or alternatives," the chamber unanimously refused to entertain any contention that a person under fifteen years old had consented to join.[58] To admit a child in this age group into an armed force, "with or without compulsion," thus was held to constitute an ICC crime.[59]

That collapsing of two acts into one stood in tension with an ancient canon—*Verba aliquid operari debent, verba cum effectu sunt accipienda*—by which each term in a statute ought to be accorded a separate meaning.[60] Professor Drumbl has taken aim at the judicial conflation of enlistment and conscription on the additional ground that it

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Lubanga Judgment, *supra* note 14 (Separate Opinion of Judge Adrian Fulford), ¶¶ 14–20. One member of the chamber that acquitted a defendant in the second ICC trial, see *supra* note 15, voiced her agreement with Judge Fulford's view. *See* Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Dec. 18, 2012), *available at* http://www.icc-cpi.int/iccdocs/docs/doc1529537.pdf. For commentary on this issue, see Amann, *Lubanga*, *supra* note 40, at 811, 815–16; Kai Ambos, *The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 INT'L CRIM. L. REV. 115, 138–51 (2012).

54. *Compare Lubanga* Judgment, *supra* note 14, ¶¶ 568–69 (reasoning supported by Judges Fulford and Blattmann), *with id.* (Separate and Dissenting Opinion of Judge Odio Benito), ¶¶ 9–14 [hereinafter Odio Benito dissent/*Lubanga* Judgment] (contending that an international conflict also had been proved). *See* Amann, *Lubanga*, *supra* note 40, at 810–11 (describing the nature-of-conflict issue in more detail); Ambos, *supra* note 53, at 128–31 (2012) (same).

55. ICC Statute, *supra* note 5, art. 8(2)(e)(vii).

56. *See Lubanga* Judgment, *supra* note 14, ¶ 600.

57. *Id*. ¶ 609; *see* Ambos, *supra* note 53, at 134 (noting that this ruling conformed to "settled" doctrine).

58. *Lubanga* Judgment, *supra* note 14, ¶ 617; *see id.* ¶¶ 607–17 (describing expert testimony and other sources on which the chamber relied).

59. *Id*. ¶ 618.

60. *See* JAMES ARTHUR BALLENTINE, A LAW DICTIONARY 513 (1916) (setting forth the Latinism); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (stating, in contemporary English, that the canon counsels judges to give effect whenever possible to "every word and every provision").

artificially deprives enlistees of what social theorists call "agency"; that is, of free will to consent to join a militia.[61] His complaint warrants close consideration with respect to instruments that define any militia member under age eighteen as a child soldier, and thus would deny volition to older teens.[62] But the Rome Statute is not among those instruments. Putting to one side the contradictory canon of construction,[63] there is merit in the adoption in *Lubanga* of a bright-line rule deeming consent impossible within the age group at issue in the Rome Statute: children fourteen and under.

The precise words of the third prohibited act, "using them to participate actively in hostilities,"[64] invited the judges in *Lubanga* to consider a range of interpretations. At its narrowest, the provision could be said to ban only the deployment of children as weapons-carrying, front-line combatants. At its broadest, it could be construed to comprehend any placement of children in service to the militia, at base camps as well as on the front lines. Judge Odio Benito argued for the broadest construction; calling for "a comprehensive legal definition," she articulated a "duty" to include within the definition of use not only combat-related harms, but also "the sexual violence and other ill-treatment suffered by girls and boys," even if far from the zone of combat.[65] But her two colleagues disagreed. Opting for a middle path, the chamber majority ruled that if children had been "exposed . . . to real danger as a potential target," even outside of "the

61. *See* DRUMBL, *supra* note 23, at 13–15 (writing that negation of adolescents' "volunteerism" stands in tension with empirically derived understandings of juvenile autonomy); *see also* Ambos, *supra* note 53, at 136 (making similar point).

62. *E.g.*, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000) (calling on states parties to raise to eighteen the minimum permissible age for participation in armed conflict); International Labour Organization Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 2–3, June 17, 1999, 2133 U.N.T.S. 161 (defining "child" as anyone under eighteen, and declaring "forced or compulsory recruitment of children for use in armed conflict").

63. That is not to say that this is a concern without merit. *See* Ambos, *supra* note 53, at 135 (laying bare the logical impossibility of conjoining the two statutory terms). The interpretive problem would not have arisen if drafters of the Rome Statute had followed the lead of the Additional Protocols to the Geneva Convention, *quoted supra* note 34, and so proscribed recruitment, singly, rather than bifurcating that term into disjunctive acts of conscription or enlistment. *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 253–54 (2010) (discussing drafting history that led to this provision).

64. ICC Statute, *supra* note 5, art. 8(2)(e)(vii), *quoted in supra* text accompanying note 55.

65. Odio Benito dissent/*Lubanga* Judgment, *supra* note 54, ¶¶ 7–8, 14–21. *But see* Ambos, *supra* note 53, at 137–38 n.156 (contending that Odio Benito's interpretation "violates the strict construction requirement" of ICC Statute, *supra* note 5, art. 22(2)).

immediate scene of the hostilities," those children had been used in a manner that violated the Rome Statute.[66]

Trial Chamber I held that the prosecution had demonstrated beyond a reasonable doubt the defendant's responsibility both for the forcible and nonforcible recruitment of children into his militia and for the use of those children in an array of forbidden roles.[67] Essential to that conclusion were videotapes. Footage showed the defendant surrounded by very young children who were serving as his bodyguards.[68] In one video, the defendant led a rally at a training camp, in the presence of "recruits who were clearly under the age of 15."[69] As that phrasing indicates, the chamber determined whether the militia included underage children simply by looking at the images on the videos in evidence. The chamber derived further support for its judgment of conviction from pre-arrest statements of the defendant, from evidence of his status as a leader, and from testimony of aid workers who had talked with former child soldiers.[70] Finally, the chamber discussed at length its reliance on the testimony of expert witnesses like Elisabeth Schauer, a trauma specialist, and Radhika Coomaraswamy, at the time of trial the United Nations' Special Representative of the Secretary-General on Children and Armed Conflict.[71]

Four months after the delivery of the verdict in *Lubanga*, Trial Chamber I cited these items of evidence as grounds for imposing a concurrent sentence of fourteen years.[72] Specifically, the chamber wrote, the evidence showed: first, that the "widespread recruitment and

66. *Lubanga* Judgment, *supra* note 14, ¶ 628.

67. *Id*. ¶¶ 632–916.

68. *Id*. ¶¶ 858–62.

69. *Id*. ¶ 792; *see id*. ¶¶ 15, 793, 858, 861–62, 869.

70. *See id*. ¶¶ 1023–1357.

71. *See id*. ¶ 11 n.29 (noting that the chamber had called four witnesses, among them Schauer and Coomaraswamy). Schauer, whose title and affiliation were not set forth in the principal opinion, was discussed in *id*. ¶¶ 478, 606 n.1772, 610. Judge Odio Benito described Schauer as an "expert witness on the topic of children with trauma, particularly post-traumatic stress disorder." Odio Benito dissent/*Lubanga* Judgment, *supra* note 54, ¶ 30. Coomaraswamy's title was stated at *Lubanga* Judgment, *supra* note 14, ¶ 577; she was discussed *id*. ¶¶ 592, 598, 606, 607 n.1775, 611, 615, 626 n.1799, 630 n.1811. Her written comments may be found at Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1229-AnxA, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence (Mar. 18, 2008), *available at* http://childrenandarmedconflict.un.org/documents/AmicuscuriaeICCLubanga.pdf.

72. *See Lubanga* Sentencing, *supra* note 14, ¶¶ 39–43, 49, 97–99; *id*. (Dissenting Opinion of Judge Odio Benito), ¶ 26 [hereinafter Odio Benito dissent/*Lubanga* Sentencing] (arguing for a fifteen-year sentence on each count); *see also* Amann, *Lubanga*, *supra* note 40, at 813–14 (treating sentencing decision at greater length).

significant use of child soldiers" had carried serious consequences; second, that the accused was an "intelligent and well-educated man," who "was simultaneously the Commander-in-Chief of the army and its political leader," who "would have understood the seriousness of the crimes"; and third, that the accused had made an "essential contribution" to their commission.[73]

The chamber's exclusion of much eyewitness testimony did not put an end to the prosecution in *Lubanga*. Yet exclusion did sap strength from the prosecution's case, for it tended to put distance between the actual experiences of children in the militia and the credited evidence of those experiences.[74] Compounding this effect were the adoption of a complex test for liability and of a middle-path interpretation of "using" children "to participate actively in hostilities."[75] By way of example, the Prosecutor had adduced evidence that the defendant's militia had subjected some children to whippings, canings, and other harsh punishments.[76] Viewing the evidence "as part of the context in which children under the age of 15 were conscripted, enlisted and used," the majority did not expressly hold the accused responsible for such punishments.[77] The application of the middle-path interpretation also seemed to have the effect of treating experiences of girls differently from those of boys.[78] Evidence at trial also had shown that girls in the militia—some of them as young as twelve—

73. *Lubanga* Sentencing, *supra* note 14, ¶¶ 52, 56, 97 (internal quotation marks and citation to *Lubanga* Judgment, *supra* note 14, omitted).

74. In the justice systems of some common-law states, evidentiary rules call for the exclusion of much hearsay evidence. *See, e.g.*, FED. R. EVID. 801–07. That is not the case at the ICC, however; the Rome Statute permits judges to rely on such evidence, "taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness." ICC Statute, *supra* note 5, art. 69(4).

75. ICC Statute, *supra* note 5, art. 8(2)(e)(vii); *see supra* text accompanying notes 64–66 (describing this interpretation).

76. *Lubanga* Judgment, *supra* note 14, ¶¶ 883–89, 913.

77. *Id*. ¶ 889; *see infra* text accompanying notes 86–88 (describing chamber's refusal to accept these allegations in aggravation of sentence). One commentator has contended that expanding the meaning of "use" beyond direct participation also may expand the scope of children who, in accordance with principles of international humanitarian law, could be deemed subject to targeting by enemy forces. Roman Graf, *The International Criminal Court and Child Soldiers: An Appraisal of the* Lubanga *Judgment*, 10 J. INT'L CRIM. J. 1, 16–21 (2012).

78. Judge Odio Benito decried this differentiation. *See* Odio Benito dissent/*Lubanga* Judgment, *supra* note 54, ¶ 21 ("It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys."); Odio Benito dissent/*Lubanga* Sentencing, *supra* note 72, ¶ 13 (deeming it "essential to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls"). On the complexity of female membership in militias, see MEGAN H. MACKENZIE, FEMALE SOLDIERS IN SIERRA LEONE: SEX, SECURITY, AND POST-CONFLICT DEVELOPMENT 51–62 (2012).

were sexually abused by militia commanders and others.[79] The chamber recalled that one witness, a former soldier in the defendant's militia, had testified that

> Commander Abelanga had a particular girl with him for a considerable period of time, in Mongbwalu and in Bunia. It was commonly known and commented on that this girl was Commander Abelanga's "wife." She prepared the commander's food and notwithstanding her saying "I don't want to," her cries were heard at night.[80]

In the paragraph immediately following, the judgment stated:

> In the view of the Majority, given the prosecution's failure to include allegations of sexual violence in the charges, as discussed above, this evidence is irrelevant for the purposes of the Article 74 Decision save as regards providing context. Therefore, the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.[81]

In effect, the paragraph turned a deaf ear to the night-time cries of a girl who had been forced into a so-called marriage before she had reached her fifteenth birthday.[82] The statement that "this evidence is irrelevant" prompted the question why the judgment mentioned the tragic story of this girl at all. The finding of irrelevance hinged in part on the majority's decision to construe use to preclude consideration of some experiences that children endured in the militia.[83] Yet the majority did not make this linkage explicit; rather, it indicated that such evidence was "irrelevant" for

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79. *Lubanga* Judgment, *supra* note 14, ¶¶ 890–95. A witness who met many of these girls through her work in a U.N. child protection program testified that "all the girls she met at the demobilisation centres, except for a few who had been protected by certain women in the camps," said "they had been sexually abused, most frequently by their commanders but also by other soldiers. Some fell pregnant, resulting in abortions," she testified, adding "that the psychological and physical state of some of these young girls was catastrophic." *Id*. ¶ 890; *see id*. ¶ 645 (describing the witness, denominated "P-0046" in the judgment).

80. *Id*. ¶ 896 (footnote citations to trial record omitted).

81. *Id*. ¶ 896; *see also id*. ¶ 340 (using the acronym for the defendant's militia in describing the witness, denominated throughout the judgment as "P-0038," as "an alleged former UPC soldier").

82. *See id*. ¶ 895 (reciting the same witness's testimony that "Commander Abelanga kept a girl under 15 years old," in an apparent reference to the girl described in the quotation *supra* text accompanying note 80). For a comprehensive analysis of the phenomenon of forced marriage, see, for example, Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. DAVIS J. INT'L L. & POL'Y 197 (2001).

83. *See supra* text accompanying notes 64–66.

the sole reason that the Prosecutor had not charged sexual offenses as a stand-alone offense.[84]

The same majority reprised that stance in the *Lubanga* sentencing decision rendered in July 2012, after Bensouda had succeeded Moreno-Ocampo.[85] The majority stressed that "the former Prosecutor" had not introduced sexual violence evidence in the sentencing phase, and further determined that the evidence at trial did not establish that the defendant was responsible for "sufficiently widespread" violence of this nature; therefore, it declined to consider sexual and gender-based violence as a factor in aggravation of sentence.[86] It likewise found insufficient proof either that the whippings, canings, and harsh punishments had occurred "in the ordinary course," or that the accused had "ordered or encouraged" such mistreatment.[87] Judge Odio Benito again dissented, arguing that the punishments and sexual abuse had been proved and should have been taken into account in imposition of sentence.[88]

No disagreement surfaced in the chamber's last decision, its August 2012 statement of principles and procedures to be followed in awarding "reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation," pursuant to the Rome Statute.[89] The reparations system established by the statute, Trial Chamber I wrote, "reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims."[90] The defendant could choose to contribute to this process through an apology, but in the view of the chamber, he could not be ordered to apologize; nor could he be ordered to pay monetary reparations, for he had been found indigent.[91] The Trust

84. That decision rankled elsewhere, too. *E.g.*, Mark A. Drumbl, *International Decisions: Prosecutor v. Thomas Lubanga Dyilo*, 101 AM. J. INT'L L. 841, 846–47 (2007) (describing a "disconnect" between the expressive potential of the child-soldiering prosecution and the reported anger of many Congolese because "'the ICC has not charged Lubanga with more serious crimes,'" such as "'mass murder, rape, mutilation, and torture'") (quoting Phil Clark, *In the Shadow of the Volcano: Democracy and Justice in Congo*, 54 DISSENT 29, 34 (2007)).

85. With regard to Bensouda's swearing-in on June 15, 2012, see *supra* note 42 and authorities cited.

86. *Lubanga* Sentencing, *supra* note 14, ¶¶ 60–76.

87. *Id.* ¶¶ 57–59.

88. *See* Odio Benito dissent/*Lubanga* Sentencing, *supra* note 72, ¶¶ 4–26. Cooling the fervor of her dissent was her assessment that these added offenses warranted, *in toto*, just one additional year in prison. *See id.* ¶ 26.

89. ICC Statute, *supra* note 5, art. 75; *see generally Lubanga* Reparations, *supra* note 14.

90. *Lubanga* Reparations, *supra* note 14, ¶ 177.

91. *Id.* ¶¶ 179, 241, 269.

Fund for Victims thus was instructed to work with persons in the affected Ituri communities in order to develop—for eventual approval by Trial Chamber I—a "broad and flexible," "gender-inclusive," and "community-based" approach.[92] Collective reparations, to entities like schools and nonprofit organizations as well as to persons, were to be the focus, although especially vulnerable persons, such as those subjected to sexual violence or infected with HIV, might receive individual awards.[93] Victims could be included even if they had not taken part in the trial.[94] The term "victim" was held to encompass "direct victims" of illegal conscription, enlistment, or use of child soldiers, as well as "indirect victims," such as family members or persons who had been injured in attempts to help the children.[95] The chamber ruled that claimants must show by a balance of probabilities that "the crimes for which Mr Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought."[96]

Embedded in that but/for test[97] is a dilemma that permeates many aspects of the child-soldier phenomenon: as participants in an armed conflict, children simultaneously may do harm and be harmed.[98] The Rome Statute exempts them from prosecution;[99] indeed, on conviction of their adult commander, it makes them eligible for reparations. The

92. *Id*. ¶¶ 161, 180, 202, 260–88 (specifying, too, that different judges would compose the chamber). "[F]or the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims," the Rome Statute required the ICC Assembly of States Parties to establish such a fund. ICC Statute, *supra* note 5, art. 79(1). The Assembly did so in 2002. *See About Us*, TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/about-us (last visited Aug. 1, 2013).

93. *Lubanga* Reparations, *supra* note 14, ¶¶ 180, 194–202, 207–09, 217–22, 254, 274, 288. With regard to the potential size of the reparations pool, see *Financial Info*, TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/financial-info (last visited Aug. 1, 2013) ("The TFV Board approved € 1.9 million in project extensions (2013–2014) in DRC and Uganda, in addition to € 1 million previously approved resources for on-going projects in DRC and Uganda and the planned programme in Central African Republic (CAR; € 607,000).").

94. *Lubanga* Reparations, *supra* note 14, ¶¶ 154, 187.

95. *Id*. ¶¶ 194–96. *See* Ambos, *supra* note 53, at 117 (calling for "a comprehensive strategy" that constrains "the number of indirect victims-participants in a reasonable way" and writing that Trial Chamber I "makes no attempt to develop" one).

96. *Lubanga* Reparations, *supra* note 14, ¶ 250.

97. *Id*. ¶ 250 (describing the test, in same sentence as the phrasing *quoted supra* text accompanying note 96, as "a 'but/for' relationship between the crime and the harm").

98. *See* Amann, *Children*, *supra* note 39, at 168 (referring to child soldiers' "dual status as perpetrators and as victims of atrocities"); Diane Marie Amann, *Message As Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237, 243 (2001) (recounting the challenge posed by, on the one hand, "the desire of the people of Sierra Leone to call war criminals to account regardless of age and," on the other hand, "the concern of human rights organizations that prosecution would undercut rehabilitation"); *see also* DRUMBL, *supra* note 23, at 80–82 (examining conditions under which children commit atrocities in combat).

99. *See* ICC Statute, *supra* note 5, art. 26 (stating that the ICC "shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime").

reparations standard in *Lubanga*, that the claimant was harmed because of the illegal recruitment and use of child soldiers, would seem to mean that the victims most likely to benefit are the victims most likely also to have contributed to harm; specifically, the victims who were under fifteen when they fought in combat or were otherwise "exposed . . . to real danger as a potential target."[100] Priority of course also would be given to any civilian who was injured, or who lost a loved one, or a home, at the hands of underage combatants. Yet the proximate cause standard, if interpreted strictly, would seem daunting to satisfy. Other victims of the conflict might receive little or no compensation; civilians whose harms were less proximate to child soldiering, for example, as well as children in the militia targeted not by the enemy, in combat, but by their commanders and comrades, in camps.[101]

Auguring the exclusion of this last group of children was the majority's determination that away-from-the-battlefield abuses do not amount to uses of children punishable by the ICC. At first blush one might regard that construction as moderate, given that it lies midway between opposite interpretive poles. Yet examination of all three *Lubanga* decisions in full leaves a reader to wonder whether the provision might have been interpreted to take into account more of the harms that girls and boys experienced in the militia, were it not for the chamber's expressed intention to lay blame at the court's first Prosecutor, Moreno-Ocampo.

Reprimand reached Moreno-Ocampo's decision not to include sexual violence charges; what is more, it extended to the evidence that the Prosecutor introduced as proof of the defendant's responsibility for offenses that the Prosecutor did charge. Consider the prosecution's first witness in *Lubanga*. Asked about his prior account of life as a child soldier, he blurted, "'It's not true.'"[102] The testimony of this witness, then about eighteen years old, was suspended for more than a week; on return to the stand, he said, "'I am going to tell you the truth,'" and spoke of having been kidnapped at age eleven and forced to serve in the defendant's militia.[103] But in the judgment that Trial Chamber I issued, the testimony

100. *Lubanga* Judgment, *supra* note 14, ¶ 628, *quoted supra* text accompanying note 66.

101. In any given situation the ICC can prosecute only a handful of persons, for offenses representing a fraction of the overall violence; this fact, coupled with the length of the investigation, trial, and appeal process, would seem to recommend reconsidering whether reparations ought to be contingent on conviction. *See* Amann, *Lubanga*, *supra* note 42, at 816 (making this point).

102. Rachel Irwin, *Lubanga Trial, Week 1: Prosecutors Stumble out of the Gate*, LUBANGA TRIAL (Jan. 30, 2009), http://www.lubangatrial.org/2009/01/30/lubanga-trial-week-1-prosecutors-stumble-out-of-the-gate/ (quoting witness).

103. Rachel Irwin, *Child Soldier: "If You Screamed, They Beat You Harder,"* LUBANGA TRIAL (Feb. 10, 2009), http://www.lubangatrial.org/2009/02/10/child-soldier-%E2%80%9Cif-you-screamed-

of all witnesses who said that they had been child soldiers was rejected. The chamber thus entered convictions without reliance on the direct testimony of underage members of the defendant's militia.[104] That fact might startle. But it also may bear promise, at least for persons concerned about the ordeal of the child who is made to fly thousands of miles to The Hague, to relate wartime experiences in a courtroom where the only familiar face may be the commander against whom she or he is testifying.[105] The judgment evinced the view of Trial Chamber I that conviction need not depend on the testimony of children; rather, conviction for child soldiering may be secured on the testimony of others, coupled with certain documents—most importantly in *Lubanga*, videotapes of the defendant surrounded by bodyguards whose very young age was evident even without the benefit of birth certificates or grade-school rosters.

The dearth of such vital records, like the absence of direct testimony, nevertheless diminished the expressive impact of the *Lubanga* trilogy.[106] It is to be hoped, therefore, that a richer trove of creditable evidence will be adduced in subsequent international prosecutions. The same also must be said of the chamber's presentation. Even taken as a whole, the three decisions in *Lubanga* omitted many contextual details, such as the birthdate and other background about the defendant, the socioeconomic

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they-beat-you-harder%E2%80%9D/ (quoting same witness, nicknamed "Dieumerci").

104. *See supra* text accompanying notes 47–51.

105. *See* Diane Marie Amann, *A Janus Look at International Criminal Justice*, 11 NW. J. INT'L H. RTS. 5, 14 (2013) (citing distances between sites of conflict and international criminal justice forums). The courtroom loomed especially foreboding to such witnesses on account of the severe circumscription in the ICC of what there is called "witness proofing"—a term that includes practices of witness preparation that attorneys in the United States would consider themselves ethically bound to perform. *See* Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 706 n.98 (2010) (citing ICC decisions limiting such witness preparation and noting that a lawyer's position on the ethical question tends to depend on whether she was trained in an accusatorial or an inquisitorial system). Recently, ICC Trial Chamber V relaxed these restrictions, allowing the prosecution greater leeway in witness preparation. *See* Prosecutor v. Ruto and Sang, Case No. ICC-1/09-01/11, Decision on Witness Preparation (Jan. 2, 2013), *available in two parts at* http://www.internationallawbureau.com/wp-content/uploads/2013/01/524-13.01.02-Decision-on-Witness-Preparation_2IN14.pdf and http://www.internationallawbureau.com/wp-content/uploads/2013/01/524-13.01.02-Decision-on-Witness-Preparation_2IN15.pdf; Annex to Decision: Witness Preparation Protocol, ICC-01/09-01/11-524 (Mar. 1, 2013), *available at* http://www.internationallawbureau.com/wp-content/uploads/2013/01/524-13.01.02-Decision-on-Witness-Preparation-Anx-Protocol-11.pdf.

106. On the relation of expressive purposes of law to international criminal justice, see, for example, Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 95–96, 113–32 (2002); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 270–71, 312–20 (2012); Mark A. Drumbl, *Collective Violence and Individual Punishment: the Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 561, 592–95 (2005).

geography of Ituri, the nature of the conflict there, and the numbers of children and other victims involved in that conflict. In contrast with certain passages in the first Nuremberg judgment,[107] this first ICC judgment seldom conveyed with precision what victims endured, or why. Perhaps the most concrete description was that of the girl subjected to a forced marriage—and that narrative was deemed irrelevant to the chamber's ultimate decision. The judgment of conviction in *Lubanga* was "a full and reasoned statement," to quote the Rome Statute; however, it fell short of the "fully reliable record," published "so that future generations can remember and be made fully cognisant of what happened," to which Judge Antonio Cassese once said that international jurists must aspire.[108]

III. A GLANCE TOWARD THE ICC'S SECOND DECADE

The March 2012 child-soldiering conviction in *Lubanga*, of an ex-leader of an Ituri-based militia, fortified the international legal norm that outlaws the recruitment or use of young children in armed conflict; nonetheless, subsequent events made clear the continued challenge of instilling that norm in the larger society. Two weeks after that first ICC judgment, *The New York Times* published a report from South Kivu, like Ituri a province in the eastern portion of the Democratic Republic of the Congo.[109] Accompanying the story were two photos of children: one depicted a very young boy wrapped in bandages covering wounds he incurred when his hut was burned; the other showed young, knife-

107. *See supra* text accompanying notes 24–29.

108. ICC Statute, *supra* note 5, art. 74(5); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998) (emphasis omitted); *see* Amann, *Lubanga*, *supra* note 40, at 817 (iterating this contention). Also addressing draftsmanship was Professor Ambos, who wrote with approval, on the one hand, of the chamber's "transparency":

> Everybody who has worked or works as a judge knows by own experience that the combination of evidence and facts rarely produces a clear-cut picture of what has really happened. Thus, judges are always riddled with doubts. It is the merit of the Chamber to have shared this insecurity with the reader . . . .

Ambos, *supra* note 53, at 152. But on the other hand, he faulted the chamber's "poor referencing standard," and fretted that "formal inaccuracy may reflect inaccuracy in substance." *Id.* at 152–53.

109. Stephen Castle, *In Congo, Self-Defense Can Offer Its Own Risk*, N.Y. TIMES, Mar. 29, 2012, at A4, *available at* http://www.nytimes.com/2012/03/29/world/africa/in-congo-self-defense-can-offer-its-own-risk.html?pagewanted=all&_r=0; *see* Marlise Simons, *Congolese Rebel Convicted of Using Child Soldiers*, N.Y. TIMES, Mar. 15, 2012, at A12, *available at* http://www.nytimes.com/2012/03/15/world/africa/congo-thomas-lubanga-convicted-war-crimes-child-soldiers.html.

brandishing members of what were labeled "self-defense militias."[110] Despite the recency of the widely reported judgment in *Lubanga*, the *Times* account said nothing of the ban on child soldiering.[111] In the months that followed, the Congolese armed conflict erupted once again: by year's end, rebels said to be under the command of Lubanga's fugitive codefendant, Bosco Ntaganda, had seized the capital of North Kivu, neighboring province to Ituri.[112] These developments exposed numerous shortfalls of international criminal justice. Brought to the fore, to be sure, was a violent consequence of the failure to arrest an at-large indictee.[113] Even after the March 2013 surrender of that fugitive to the ICC,[114] there was evident need to add new chapters to the world's record—first established at Nuremberg—of the costs of armed conflict. Now, as then, those costs were generational, for it was alleged that youngsters again were among those fighting in eastern Congo.[115]

The new Prosecutor, Bensouda, has pledged to construct a record of the experiences of children in the conflicts that come within the ICC's jurisdiction. "As I have repeatedly said," she told her New York audience shortly before she was sworn in, "the crimes committed towards female child soldiers need to be analyzed specifically. Our focus should shift from 'children with arms' to 'children who are affected by the arms' in the context of the crime of enlisting and conscripting child soldiers."[116] Such a

110. *See* Castle, *supra* note 109; *cf. Lubanga* Judgment, *supra* note 14, ¶¶ 897–908 (noting the presence of "self-defence forces" during the period under review, but finding insufficient proof that the accused's own militia was responsible for the presence of children in those forces).

111. *See* Castle, *supra* note 109.

112. *See* Jeffrey Gettleman, *Rebels Exit City in Congo, Leaving Trail Of Concern*, N.Y. TIMES, Dec. 2, 2012, at A20 (describing attack on the North Kivu capital, Goma); David Smith, *Hunting the Terminator: Congo continues search for Bosco Ntaganda*, GUARDIAN (LONDON), Nov. 28, 2012, at 27, *available at* http://www.guardian.co.uk/world/2012/nov/28/terminator-search-bosco-ntaganda-congo (reporting on allegations, albeit disputed, of Ntaganda's involvement).

113. *See* Amann, *Lubanga*, *supra* note 40, at 816.

114. *See* Jeffrey Gettleman, *Wanted Congolese Rebel Leader Surrenders*, N.Y. Times, Mar. 19, 2013, at A4, *available at* http://www.nytimes.com/2013/03/19/world/africa/wanted-congolese-rebel-leader-turns-himself-in.html?_r=0.

115. *See Children Paying High Price of DR Congo Fighting: UN*, AGENCE-FR. PRESSE, July 13, 2013, *available at* Westlaw, 7/26/13 Agence Fr.-Presse 20:13:41 (quoting UNICEF official's assertion that upwards of 2,000 children were being used as child soldiers); *DR Congo: Bosco Ntaganda Recruits Children by Force*, HUMAN RIGHTS WATCH (May 16, 2012), http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force (stating that Ntaganda had "forcibly recruited at least 149 boys and young men into his forces since April 19"); Saleh Mwanamilongo, *UN Attack Helicopters Target Rebels in Eastern Congo, Says Local Official*, CAN. PRESS, Nov. 12, 2012, *available at* Westlaw, 11/17/12 Can. Press 00:00:00 (writing that another rebel leader also had been accused of coercing children to join the rebellion). On the post-World War II record, see *supra* text accompanying notes 16–30.

116. Bensouda statement, *supra* note 1.

shift would serve the purposes underlying not only the ban on child soldiering, but also other concerns about children made explicit in the text of the Rome Statute.[117] Such a shift could deepen understanding of what war does to girls and boys, to their families, and to their communities. In turn, that understanding could reveal new ways to pursue basic goals of international criminal justice: bringing perpetrators to account, providing redress for victims, and preventing future conflicts. The ICC can advance all three goals—as it tried to do in its early years—through careful and consistent emphasis on the fate of children caught up in armed conflict.

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117. *See supra* text accompanying notes 6–11 (discussing pertinent provisions of the ICC Statute, *supra* note 5).