

# ANNEX A

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v THOMAS LUBANGA DYILO***

**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**

**I. INTRODUCTION**

1. Radhika Coomaraswamy, United Nations Special Representative of the Secretary-General on Children and Armed Conflict (hereinafter “the Special Representative”) respectfully submits this *amicus curiae* brief pursuant to Decision Inviting Observations from the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, of Trial Chamber I of the International Criminal Court (hereinafter “the ICC” or “the Court”) dated 18 February 2008, which granted her leave to submit written observations on “a) the definition of ‘conscripting or enlisting’ children, and, bearing in mind a child’s potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; and b) the interpretation, focusing specifically on the role of girls in armed forces, of the term ‘using them to participate actively in hostilities.’”<sup>1</sup> That decision was made in response to the Special Representative’s application for leave to submit written observations in the form of an *amicus curiae* brief, contained in Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence and submitted to the Court on 4 January 2008.<sup>2</sup>
  
2. The mandate of the Special Representative originates in General Assembly resolution 51/77 of 12 December 1996. According to this mandate, the role of the Special Representative encompasses advocacy to raise awareness about the plight of children in armed conflict. The mandate also specifies that the Special Representative will work closely with competent international bodies to ensure protection of children in situations of armed conflict. This original mandate has been extended by the General Assembly in several subsequent resolutions. In three of these, resolutions 54/149, 57/190 and 60/231, the General Assembly recognizes the role of the International Criminal Court in ending impunity for perpetrators of crimes against children. The mandate of the Special Representative therefore authorizes and compels her to assist the Court as *amicus curiae* in cases such as the one brought against Thomas Lubanga, given the nature of the charges against him, both as an independent representative of

<sup>1</sup> Prosecutor v. Thomas Lubanga Dyilo, No. 01/04-01/06-1175, Decision Inviting Observations from the Special Representative of the Secretary General of the Nations for Children and Armed Conflict, ¶ 11 (Trial Chamber I, February 18, 2008).

<sup>2</sup> Prosecutor v. Thomas Lubanga Dyilo, No. 01/04-01/06-1105-Conf, Submission by the Registrar of Correspondence Received Within the Context of Rule 103 of the Rules of Procedure and Evidence (Trial Chamber I, January 4, 2008).

the children harmed in armed conflict, and through the presentation of relevant expertise gained through the performance of her mandate.

3. In relation to the charges laid against Thomas Lubanga, the Special Representative offers observations on the following issues in this *amicus curiae* brief: a) the definition of “conscripting or enlisting” children, and, bearing in mind a child’s potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; and b) the interpretation, focusing specifically on the role of girls in armed forces, of the term “using them to participate actively in hostilities.”

## II. DEFINITION OF “CONSCRIPTING OR ENLISTING”

4. The war crimes established by the Rome Statute are limited to the conscription and enlistment of children under the age of fifteen years. The conscription and enlistment acts are two forms of recruitment. According to written commentary following the Rome Conference, the terms may be defined by their “ordinary signification[s]”: “Conscription refers to the compulsory entry into the armed forces. Enlistment...refers to the generally voluntary act of joining armed forces by enrolment, typically on the ‘list’ of a military body or by engagement indicating membership and incorporation in the forces.”<sup>3</sup>

### **A. There Is a High Likelihood That Children Under the Age Of 15 Will Be Conscripted Or Enlisted When Minors Are Recruited In Modern Conflict.**

5. In the interest of ensuring the greatest protection to conflict-affected children, the Court should recognize that enlistment, recruitment and use of children under the age of 15 is a highly predictable consequence of a purpose or plan to recruit minors, but not necessarily children under 15 years of age.
6. The Special Representative is of the view that the risk or likelihood of the realization of the crimes of conscripting or enlisting children under the age of 15 years into the national armed forces, is inevitably high due to the nature of some contemporary armed conflicts. In this permissible environment, children are extremely vulnerable to military recruitment and being manipulated or enticed into joining armed groups.
7. The risk of conscripting or enlisting children under the age of 15 is never low. In armed conflict zones, the impunity of the perpetrators, the need for more numbers in the ranks, and the vulnerability of children who are often orphaned, displaced,

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<sup>3</sup> COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 261 (Otto Triffterer ed., 1999). The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict differentiates between state actors and non-state actors in this regard, and specifically recognizes the duties of non-state armed groups. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. DOC.A/54/RES/263 (May 25, 2000) [hereinafter Optional Protocol].

without family and community protection and fighting for survival, are amongst the aggravating factors that increase this risk.

### **B. Conscription and Enlistment are Forms of Recruitment.**

8. In the Confirmation of Charges Decision, the Pre-Trial Chamber distinguished the terms simply as forced recruitment (conscription) versus voluntary recruitment (enlistment).<sup>4</sup> The Special Court for Sierra Leone (“SCSL”) Trial Chamber II offered additional guidance in its June 2007 judgment of guilt against the AFRC Accused for child soldiering crimes: “[T]he Trial Chamber adopts an interpretation of ‘conscription’ which encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities. ‘Enlistment’ entails accepting and enrolling individuals when they volunteer to join an armed force or group.”<sup>5</sup>
9. The SCSL Trial Chamber’s definition of conscription reflects its recognition of the changed nature of modern warfare. “While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may not be associated with, or acting on behalf of, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict ‘conscription’ to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations.”<sup>6</sup> Similarly, the Trial Chamber’s definition of enlistment reaches beyond the traditional implication that enlistment involves an actual list of new recruits but also encompasses children enrolled by more informal means.
10. Consent of the child is not a valid defense to any of the three child soldiering war crimes.<sup>7</sup> The line between lawful recruitment and unlawful recruitment is drawn based solely on age, under the Rome Statute as elaborated upon by the Elements of the Crimes, not on any act of the child.<sup>8</sup> All “voluntary” acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant. The fieldwork of our office makes apparent the invalidity of a child’s consent to any of the three crimes of child soldiering. Abou was a child soldier demobilized in Sierra Leone. When he returned home, he had difficulty with his parents and was ostracized by the community. He then disappeared only to reappear as a child soldier in Côte d’Ivoire. Soldiering is all he knew. Though he “voluntarily” joined the rebels in Côte d’Ivoire, to accept consent as a defense would be to negate the whole policy behind such prohibitions.

<sup>4</sup> Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 246 (Pre-Trial Chamber I January 29, 2007) [hereinafter Confirmation of Charges Decision].

<sup>5</sup> Prosecutor v. Brima, Kamara, Kanu (AFRC Accused), Case No. SCSL-2004-16-T, ¶¶ 734-35 (June 20, 2007).

<sup>6</sup> *Id.* at ¶ 734.

<sup>7</sup> Confirmation of Charges Decision, *supra* note 4, at ¶ 247.

<sup>8</sup> *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* 5, 7 (February 2007) available at [http://www.child-soldiers.org/childsoldiers/Paris\\_Principles\\_February\\_2007.pdf](http://www.child-soldiers.org/childsoldiers/Paris_Principles_February_2007.pdf) [hereinafter *Paris Principles*].

11. There is no best interest of the child defense. Recruitment is per se against the best interest of the child. The Rome Statute codifies this understanding in its prohibition without exception of conscripting, enlisting, and using child soldiers.

**C. The Court Should Approach the Distinction Between Conscription And Enlistment On a Case-By-Case Basis.**

12. Children recruited into armed forces are broadly covered by the conscription and enlistment crimes. The determination of which crime applies will require a case-by-case inquiry into the way the child was made a soldier.
13. The recruitment of individual child soldiers by armed groups may often be characterized by elements of compulsion and voluntariness, rendering the task of categorizing child soldiers under one or the other recruiting crime difficult.<sup>9</sup> Based on a recent visit to the DRC, the Special Representative has stated: “The recruitment and enlisting of children in DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomach. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community.”
14. In most conditions of child recruitment even the most “voluntary” of acts are taken in a desperate attempt to survive by children with a limited number of options. Children who “voluntarily” join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict. Many “volunteer” recruits soon become disillusioned, but are not able to leave due to fear of being killed. Many children who try to escape are executed in order to serve as an example to the other children. The line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict. In the DRC,

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<sup>9</sup> The task is further complicated according to the August 2007 SCSL decision in the case of the CDF Accused where the trial chamber advances the idea that acts of enlistment may be voluntary or forced: “Both in everyday language, and in the commentary quoted above, it is clear that voluntary enlistment is but one type of enlistment. The Chamber therefore finds that the term ‘enlistment’ could encompass both *voluntary* enlistment and *forced* enlistment into armed forces or groups, forced enlistment being the aggravated form of the crime. In the Chamber’s opinion, however, the distinction between the two categories is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is, in the Chamber’s view, of questionable merit. Nonetheless, for the purposes of the Indictment, where ‘enlistment’ alone is alleged, the Accused is put on notice that both voluntary and forced enlistment are charged.” Prosecutor v. Fafana & Kondewa (CDF Accused), Case No. SCSL-04-14-T, ¶ 192 (August 2, 2007). While the Special Representative does not disagree with the SCSL Trial Chamber’s point – and particularly finds its statement that the categories are contrived to resonate here – this foray into multiple types of enlistment is unnecessary here where the Indictment against Thomas Lubanga properly alleges the conscription crime in addition to the enlistment crime.

coercion of children by varying elements are so pervasive and children become associated with armed forces in so many informal ways that evidence of voluntariness will commonly be outweighed by evidence of compulsion. The Special Representative met Laurent from a Tutsi tribe. His parents felt it was a matter of duty for him to join a Tutsi militia leader, even though he was still a child. They convinced him that he was doing the right thing. He was going to protect the tribe.

15. Notably, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified by the DRC on 14 February 2004, does not make this distinction in its proscription of recruitment. Article 4 states: “Armed groups...should not, *under any circumstances*, recruit...persons under the age of 18 years (emphasis added).”<sup>10</sup> The phrase “under any circumstances” signals the common understanding that whether recruitment was a matter of (forced) conscription or of (voluntary) enlistment is irrelevant to the prohibition. The Special Representative urges the Court to keep this in mind as it parses facts into one category of recruitment or the other and ultimately determines sentences proportionate to these crimes.
16. The case-by-case determination of which kind of recruitment will be relevant in a particular case will require evidence that focuses on the acts children are required to perform, the circumstances on how the child was enrolled and the circumstances surrounding the child’s separation from family and community. In the DRC, the Special Representative met Mary, who had been on her way to school when she was waylaid by an armed group and forced to return with them to the camp. In the beginning she was a domestic aide and sexually abused, but she soon became familiar with how a gun works and soon thereafter she was joining the others in their attacks on villages. Whatever may have been her initial activities – in the end it is clear that she had been conscripted.

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<sup>10</sup> Optional Protocol, *supra* note 3, at art. 4.

### III. INTERPRETATION OF “USING THEM TO PARTICIPATE ACTIVELY IN HOSTILITIES”

17. The “using” crime creates a broad category for criminal liability. It proscribes the acceptance of a child’s participation to support conflict.<sup>11</sup> Children’s participation takes numerous and varied forms and includes tasks and roles that are typically fulfilled by girls.

#### A. The “Participate Actively” Standard Covers Combatant And Non-combatant Children And the Court Should Interpret the Standard Broadly.

18. Participation by combatant and non-combatant children are covered equally.<sup>12</sup> The “participate actively” language of the Rome Statute is broader than the “take a direct part in hostilities” language used in international humanitarian law (“IHL”).<sup>13</sup> This interpretation is supported in the Pre-Trial Chamber’s Confirmation of Charges Decision. It is also consistent with United Nations policy for disarmament, demobilization, and reintegration (“DDR”): “No distinction should be made between combatants and non-combatants when [DDR] eligibility criteria are determined, as these roles are blurred in armed forces and groups, where children, and girls in particular, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group.”<sup>14</sup>

19. In the Confirmation of Charges Decision, the Pre-Trial Chamber placed an outer limit on the “participate actively” standard, stating that it does not apply when the contribution in question is “manifestly without connection to the hostilities.”<sup>15</sup> The Chamber provided the examples of food delivery and domestic help in an officer’s married accommodation as activities without connection, in contrast to related activities such as guarding military objects or acting as a bodyguard.<sup>16</sup> The Pre-Trial Chamber’s examples are reminiscent of the oft-cited footnote in the Zutphen draft of the Rome Statute (“Zutphen text”): “The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as porters to take supplies to the

<sup>11</sup> COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 3.

<sup>12</sup> The terms “combatant” and non-combatant” are used as defined in the four Geneva Conventions and their Additional Protocols. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>13</sup> *See* Confirmation of Charges Decision, *supra* note 4, at ¶ 261.

<sup>14</sup> UNITED NATIONS, OPERATIONAL GUIDE TO THE INTEGRATED DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION STANDARDS, § 5.30, 218 (August 1, 2006), *available at* [http://www.unddr.org/iddrs/iddrs\\_guide.php](http://www.unddr.org/iddrs/iddrs_guide.php) [hereinafter OPERATIONAL GUIDE].

<sup>15</sup> Confirmation of Charges Decision, *supra* note 4, at ¶ 262.

<sup>16</sup> *Id.* at ¶ 263.

front line, or activities at the front line itself would be included within the terminology.”<sup>17</sup>

20. The Zutphen text and the Confirmation of Charges Decision purport to establish a bright-line rule to determine which activities qualify under the “participate actively” standard. The Special Representative submits that this effort is ill-conceived and threatens to exclude a great number of child soldiers – particularly girl soldiers – from coverage under the using crime.
21. The “participate actively” inquiry requires a case-by-case approach. The relevant question for the Court in each case is whether the child’s participation served an essential support function to the armed force or armed group during the period of conflict.<sup>18</sup> This standard is developed from the UN Integrated Disarmament, Demobilization, and Reintegration Standards (“IDDRS”) regarding women’s and girls’ eligibility for reintegration assistance. Much like the Rome Statute and Zutphen text, this standard deliberately moves away from a rigid definition of child soldiers as exclusively armed combatants and recognizes all children “participating in and associated with armed groups and forces” as victims of these crimes. It also comports with the definition used by the SCSL Trial Chamber in its June 2007 decision in the AFRC case: “‘Using’ children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat...[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”<sup>19</sup>
22. A case-by-case approach is particularly apt and critical in the context of modern conflicts in which the nature of warfare differs from group to group and the children used in hostilities play multiple and changing roles. When the Special Representative spoke to girl combatants in the eastern DRC, they spoke of being fighters one minute, a “wife” or “sex slave” the next, and domestic aides and food providers at another time. Children are forced to play multiple roles, asked to kill and defend, carry heavy burdens, spy on villages and transmit messages. They are asked to perform many other functions and their use differs from group to group. Eva was a young girl whom the Special Representative met in the DRC. She was only twelve when she was abducted on her way to school. Initially, Eva was kept in a situation of forced nudity and subject to sexual abuse. She worked in the camp cooking, cleaning and being a sexual slave, and was often taken along for armed attacks on the villages to be a “porter” to carry the looted goods.

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<sup>17</sup> *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, Preparatory Committee on the Establishment of an International Criminal Court, article 20[E]*, at 23 n.12, U.N. Doc. A/AC.249/1998/L.13 (1998).

<sup>18</sup> See UNITED NATIONS, INTEGRATED DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION STANDARDS § 5.20, 527 (August 1, 2006), available at <http://www.unndr.org/iddrs/>.

<sup>19</sup> *Prosecutor v. Brima, Kamara, Kanu (AFRC Accused)*, Case No. SCSL-2004-16-T, ¶¶ 736-37 (June 20, 2007).

23. As a matter of guidance, children who serve essential support functions for armed forces and armed groups during the period of hostilities may function in any of the following roles over the course of their use, including but not limited to: cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual exploitation.<sup>20</sup>

**B. The Court Must Reject Any Interpretation Of the “Participate Actively” Standard That Excludes Girls.**

24. The exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus. The definition of child soldier auxiliary to the Cape Town Principles recognized that “child soldier” includes “girls recruited for sexual purposes and for forced marriage.”<sup>21</sup> The Special Representative notes that African regional human rights instruments also recognize and interpret, consistent with the Cape Town Principles, that girls are included within the meaning of child soldiers. Notably, the African Union’s Protocol to the Charter on Human and Peoples’ Rights on the Rights of Women in Africa pronounces that “State Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age ... is recruited as a soldier.”<sup>22</sup> The recent Paris Principles, reviewing the Cape Town Principles memorialized nearly ten years prior, renewed the status of child soldier for all children used for sexual purposes.<sup>23</sup>
25. The Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the “using” crime. The Special Representative underscores that during war, the use of girl children in particular includes sexual violence. In this regard the Special Representative refers to the African Union’s Solemn Declaration on Gender Equality, wherein it was “[h]ereby agree[d] to: (3) [l]aunch, within the next one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves.”<sup>24</sup> The AU thus reiterated its disdain of the illicit sexual abuse conduct inflicted upon girl children when they are child soldiers.
26. The Special Representative explains that girl combatants are often invisible: “Because they are also wives and domestic aides, they either slip away or are not brought forward for DDR programs. Commanders prefer to ‘keep their women,’ who often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable. They are

<sup>20</sup> See OPERATIONAL GUIDE, *supra* note 14, at 47, 194, 214 (citing Cape Town Principles).

<sup>21</sup> *Cape Town Principles and Best Practices* 7 (April 30, 1997), available at [www.unicef.org/engage/files/Cape\\_Town\\_Principles\(1\).pdf](http://www.unicef.org/engage/files/Cape_Town_Principles(1).pdf).

<sup>22</sup> African Comm. Hum. & Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 11 (July 11, 2003) available at [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html).

<sup>23</sup> *Paris Principles*, *supra* note 8, at 7.

<sup>24</sup> *Solemn Declaration on Gender Equality in Africa* (Addis Ababa, July 6-8, 2004), available at <http://www.chr.up.ac.za/about/2007/AfricaSolemnDec04.pdf>.

recruited as child soldiers and sex slaves but are invisible when it comes to the counting.” As the above case illustrates, the actual experience of children in the DRC conflicts requires a more inclusive interpretation.

Dated this 17th day of March, 2008

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