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THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Response to “Former Child Soldiers’ observations on the ‘Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to: (i) the *“Decision on the Prosecutor’s application to dismiss the appeal in limine and directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence”* issued by the Appeals Chamber on 29 October 2015;¹ and (ii) the *“Former Child Soldiers’ observations on the ‘Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”* submitted by the Common Legal Representative of the former child soldiers (“LRV”) on 30 November 2015 (“LRV Submissions”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response to “Former Child Soldiers’ observations on the ‘Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”

INTRODUCTION

1. The LRV offers four arguments in favour of her view that “soldiers”³ and “members of the UPC/FPLC”⁴ can be victims of war crimes alleged to have been perpetrated by “UPC/FPLC commanders and soldiers”:⁵ first, that the prohibition of rape and sexual slavery are “*jus cogens* norms”⁶ subject to “no limitation” as to the “type of victims of the acts of rape and sexual slavery”;⁷ second, that Common Article 3 of the Geneva Conventions does not exclude acts of fellow soldiers;⁸ third, that the term “soldiers” and “members” is not necessarily incompatible with “taking no active part in hostilities” under Common Article 3;⁹ and fourth, that even assuming that the child soldiers

¹ ICC-01/04-02/06-966.

² ICC-01/04-02/06-1040.

³ ICC-01/04-02/06-458-AnxA (“UDCC”), Counts 6, 9.

⁴ Prosecution Response to the “Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges”, ICC-01/04-02/06-804, 11 September 2015, ICC-01/04-02/06-818 (“First Prosecution Response”), para. 6.

⁵ UDCC, para. 100.

⁶ LRV Submissions, para. 17.

⁷ Id. para. 10.

⁸ Id. paras. 11, 13-14.

⁹ Id. para. 18.

were taking an “active part in the hostilities,” this participation does not exclude child soldiers from the scope of Common Article 3.¹⁰

2. None of these arguments has merit. First, the ICC Statute and general introduction of the Elements of Crimes expressly indicate that the elements of individual war crimes are to be assessed within the context of the general limitations and conditions arising from international humanitarian law. Second, the requirement that a victim of a war crime must take no active part in hostilities *does* exclude members of armed groups from the protections of war crimes law except where they “have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.” These conditions contemplate having fallen into the hands of, or being exposed to, an opposing armed force or group, of which a necessary corollary is that war crimes law (barring exceptional circumstances that are not relevant here) does not encompass acts between fellow fighters. Third, membership in an armed force or group, unlike civilians who participate intermittently in hostilities, is incompatible with “taking no active part in the hostilities”. Fourth, the LRV has cited no source or principle suggesting that the “taking no active part” is inapplicable to members of an armed group or force who are under-aged.
3. The LRV also argues that the issues raised are not jurisdictional and that the Appeals Chamber has no discretion to address the merits of the jurisdictional question unless and until the Trial Chamber has done so. Neither claim is correct. The victims of the crimes in Counts 6 and 9, as defined by the Prosecution itself, do not fall within the scope of international humanitarian law. The Appeals Chamber is not prohibited from addressing this issue because the Trial Chamber failed to reach it. On the contrary, the Appeals Chamber has the discretion to address any legal issue before it, and should do so whenever the matter has been fully briefed and does not involve usurping

¹⁰ Id. paras. 15-16, 19-20.

the fact-finding function of the Trial Chamber. A categorical rule to the contrary would obstruct judicial efficiency.

SUBMISSIONS ON THE MERITS

I. LRV's first argument: Crimes of rape and sexual slavery apply without regard to the functions or status of the victim

4. The LRV argues that "no limitation exists as to the type of victims of the acts of rape and sexual slavery" because of the absence of any such express limitation in the Elements of Crimes.¹¹ The LRV also argues that "the prohibition of the acts of rape and sexual slavery are increasingly considered as part of *jus cogens* norms", which should be regarded as implying that "the existence of these war crimes cannot be made dependent on whether or not the victim was actively participating in hostilities."¹²
5. The absence of an express limitation in the Elements of Crimes has no interpretative significance in light of paragraph 6 of its "General introduction":

The requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.

6. Dormann explains:

Paragraph 6 is one of the most crucial in the introduction. The content is not easy to understand without referring to the negotiation history of the EOC. The term "unlawful" does not refer to grounds for excluding criminal responsibility under the Statute. *It was instead intended as a reference to relevant provisions of international humanitarian law defining the unlawfulness of particular conduct.* For example, deportation (Art. 8(2)(a)(vii)) can be a war crime only if it is undertaken in ways or in situations contrary to Art. 49(2) and (3) of the Fourth Geneva Convention, which describe lawful evacuations. The war crime of "destruction and appropriation" as set out in Art. 8(2)(a)(iv) must be read in conjunction with the provisions on what is allowed or prohibited in relation to property under the Geneva

¹¹ LRV Submissions, para. 10.

¹² Id. para. 17.

Conventions and other instruments of international humanitarian law. The term “unlawful” serves more or less the same purpose as the terms “in violation of the relevant provisions of this Protocol” in Art. 85(3) and (4) of Additional Protocol I. *In the context of war crimes under the Statute, therefore, “unlawful” means “in violation of international humanitarian law.”*¹³

7. The LRV has also failed to address the express wording of Art 8(2)(e)(vi) which requires that the enumerated crimes be assessed “within the established framework of international law,” and has not otherwise addressed paragraphs 7 and 9 of the Defence’s submissions on appeal.¹⁴ The unavoidable textual and contextual indications are that Art. 8(2)(e) was in no way intended to erase, eviscerate, eliminate or reduce any applicable customary international humanitarian law conditions for the application of the crimes enumerated thereunder.
8. The fact that the prohibition of sexual slavery and rape is a *jus cogens* norm, assuming that to be the case, does not mean that the customary international law requirements for war crimes are no longer applicable. Many other war crimes may likewise reflect *jus cogens* norms, but this does not mean that the usual requirements of war crimes should be deemed vitiated on the basis that the substantive norms which they reflect have *jus cogens* status. Indeed, if accepted, this argument would imply that other preconditions of war crimes, such as the existence of an armed conflict, have also been eliminated. The claim has no legal support and would lead to manifestly absurd and inappropriate consequences.

II. LRV’s second argument: War crimes law encompasses acts of fellow soldiers against one another

9. The LRV, adopting arguments and sources cited by the Prosecution, asserts that the “Defence arguments that war crimes do not encompass acts

¹³ K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, (Cambridge: Cambridge UP, 2002), p. 13 (italics added).

¹⁴ ICC-01/04-02/06-972 OA2, 2 November 2015, paras. 7, 9.

committed by a member of an armed group against another member of the same group is entirely misconceived.”¹⁵ The portions of the Prosecution’s submissions specifically adopted by the LRV¹⁶ assert that the only condition imposed by Common Article 3 is that the person “take no active part in the hostilities,” which includes “members of the armed forces who have laid down their arms or are otherwise *hors de combat*.”¹⁷ The Prosecution characterizes the Defence argument as seeking to impose a separate or independent “general requirement that victims of war crimes cannot belong to the same ‘force’ as the perpetrator(s).”¹⁸ The Prosecution then examines a number of sources and comes to the conclusion that no such separate “general requirement” is justified as a matter of customary international humanitarian law.

10. The reasoning of the LRV and the Prosecution is flawed. The general principle that war crimes cannot be committed by fellow soldiers is a necessary corollary of the language of Common Article 3. That language restricts the scope of war crimes to crimes committed against those who “take no active part in the hostilities”. The signal example of taking no active part in hostilities is “members of the armed forces who have laid down their arms or are otherwise *hors de combat*.” This language has three necessary implications: (i) that there are “armed forces” even in non-international armed conflicts; (ii) that there are “members” of these armed forces; and (iii) that these “members” may nevertheless be victims of war crimes if they have “laid down their arms or are otherwise *hors de combat*.”
11. The terms “laying down arms” and being “*hors de combat*” are terms of art in international humanitarian law that presuppose surrender, or being exposed

¹⁵ LRV Submissions, para. 14.

¹⁶ LRV Submissions, fn. 15.

¹⁷ ICC-01/04-02/06-1034 (“Second Prosecution Response”), para. 32.

¹⁸ Id. para. 34.

to, the enemy force. According to Kleffner, an author relied on extensively by the Prosecution in its submissions adopted by the LRV:

While the wording of Common Article 3 is open to different constructions, it is understood that the laying down of arms by an individual member triggers his or her protection. It is not necessary for the armed forces as a whole to have done so. In the legal sense, the “laying down of arms” means that the person concerned *is surrendering to the enemy armed forces*. However, the process of surrendering is not effectuated by the mere act of laying down arms, for example, putting one’s weapon on the ground while loading a truck. Rather, in order to be protected by Common Article 3, the person concerned must clearly express an intention to surrender. Common expressions that indicate such an intention are the waving of a white flag, or placing one’s hands on one’s head.¹⁹

12. The concept of “*hors de combat*” is a term of art in both the law of international armed conflict and non-international armed conflict. Rule 47 of the ICRC Rules of Customary IHL defines the term, without any distinction in respect of international and non-international armed conflict, as follows:

Rule 47. Attacks against Persons *Hors de Combat*

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person hors de combat is:

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape.²⁰

The notion of *hors de combat*, with the arguable exception of the narrow circumstances defined in Rule 47(b) of the ICRC’s Rules of Customary

¹⁹ J. Kleffner, “The beneficiaries of the rights stemming from Common Article 3”, in Clapham *et al.* (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford UP, 2015) (“Kleffner 2015”), p. 441 (italics added).

²⁰ https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47.

International Law,²¹ concerns falling into “the power of and adverse party” or expressing “an intention to surrender” – which also necessarily involves surrender to an adverse party.

13. “Laying down arms” and being “*hors de combat*” are the quintessential circumstances in which a person who is a “member” of armed forces or armed groups²² can nevertheless be entitled to the protection of Common Article 3. Although the use of the word “including” opens the possibility of other circumstances arising in which Common Article 3 could apply, the express example provided in the text must be accorded substantial weight in understanding the scope of those circumstances. Indeed, Kleffner uses the word “only” in referring to the two circumstances in which a member of an armed force could fall within the protections of Common Article 3.²³

²¹ The Prosecution cites, in a paragraph adopted by the LRV, an article by Kleffner criticizing the Sesay Trial Judgement’s statement that war crimes law excludes acts by comrades in arms against one another. See Prosecution Second Response, para. 34, fn. 72. In this article, Kleffner criticizes the lack of reasoning in the Sesay Trial Judgement and the absolutism of the statement. In particular, Kleffner cites circumstances in which war crimes law might apply to acts by members of armed forces *vis-à-vis* other members of the same forces. The extremely narrow circumstances cited in Kleffner’s article correspond to those specified in Rule 47(b) of the ICRC Rules of Customary International Humanitarian Law. See J. Kleffner, “Friend or foe? On the protective reach of the law of armed conflict”, in Matthee *et al.* (eds.), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: T.M.C. Asser Press, 2013). The narrowness of the circumstances encompassed by Rule 47(b) has no application to the circumstances set out in the UDCC. Indeed, the narrowness of the circumstances mentioned in Rule 47(b) underscore that the general rule is that the protections of Common Article 3 apply to members of armed forces “only if and when they have laid down their arms or are *hors de combat*, but that they are otherwise not protected from direct attack because they may be presumed to engage in acts that fulfill the three constitutive criteria for active participation in the hostilities referred to above.” Kleffner 2015, p. 439

²² For the equal application of the scope of these words to “armed forces” and “armed groups” in non-international armed, see *infra* section III.

²³ Kleffner 2015, p. 439 (“The fact that they are members of the armed forces justifies that they enjoy the protection of Common Article 3 only if and when they have laid down their arms or are *hors de combat*, but that they are otherwise not protected from direct attack because they may be presumed to engage in acts that fulfill the three constitutive criteria for active participation in the hostilities referred to above.”) See N. Melzer, “The Principle of Distinction Between Civilians and Combatants,” in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford UP, 2014, 296, 308 (“Common Article 3 therefore implies, *a contrario*, that members of the armed forces are not regarded as ‘taking no active part in the hostilities’ and, therefore, are not entitled to protection until they have laid down their arms or are placed *hors de combat*.”))

14. The notion that war crimes must, barring the exceptional and narrow circumstances specified in Rule 47(b) of the ICRC's Rules of Customary International Law, be committed by members of opposing forces is therefore simply a necessary corollary of the terminology of "laying down arms" and being "*hors de combat*". The argument that no such distinct principle is to be found as a matter of customary international humanitarian law reflects a lack of understanding of the meaning of the terms of art used in Common Article 3.
15. Academic commentary defining narrow exceptions to this principle²⁴ provide no basis for departing from these settled and well-established customary principles. Proof of customary international law requires not only consistent acts that "amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."²⁵ Claims of "doubtful customary nature"²⁶ must be rejected. One ICTY Appeals Chamber Judge has stated in relation to criminal law that "state practice has to be virtually uniform, extensive and representative."²⁷ In addition, international criminal law is also subject to the principle *nullem crimen sine lege*. The interpretation and evolution of international criminal law, even more so than other areas of international law, must be orthodox, narrow and conservative.
16. The only sound interpretation of Common Article 3 within this methodological framework is that war crimes do not encompass crimes committed by members of armed groups against their comrades in arms, with the arguable exception of the circumstances set out in Rule 47(b) of the ICRC's Rules of Customary International Law.

²⁴ LRV Submissions, fn. 15; Second Prosecution Response, para. 34.

²⁵ ICJ, *North Sea Continental Shelf Cases*, Judgement, 20 February 1969, para. 77.

²⁶ U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, paras. 12 and 18.

²⁷ ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 6 (partly dissenting opinion, but not on this point).

17. A contrary interpretation of Common Article 3 and, in turn, Articles 8(2)(c) and 8(2)(e) of the ICC Statute, would constitute an unprecedented extension of international humanitarian law and the ICC's jurisdiction. Any of the enumerated non-international armed conflict crimes committed by one soldier against a fellow soldier belonging to the same armed force would, according to the LRV's interpretation of Common Article 3, be subject to the jurisdiction of the ICC as long as the victim was not engaged in combat at the moment of the crime. This does not accurately reflect international humanitarian law and ignores that crimes among fellow soldiers ordinarily are a matter of internal discipline and domestic criminal law. There is no textual or contextual indication that the State Parties, in fashioning Article 8(2)(e), intended to radically alter this well-established understanding of the scope of international humanitarian law.

III. LRV's third argument: The terms "soldier" and "member" of an armed group does not necessarily exclude the possibility that the alleged victims were "taking no active part in the hostilities" under Common Article 3

18. The LRV argues that the "mere recruitment of child soldiers into a non-State organised group does not constitute *per se* 'active participation in hostilities.'"²⁸ In particular, the LRV asserts that even assuming that the child is deemed a "member" of the armed group, this does not necessarily imply a "continuous combat function" which is asserted by the Prosecution to be the test for determining whether the person is "taking no active part in the hostilities."²⁹ The Prosecution also asserts – again a position apparently adopted by the LRV – that the ICRC's DPH Interpretive Guidance should be considered irrelevant or of no persuasive value.
19. The LRV misconceives the relationship between "membership" and "continuous combat function." The latter is a test – but by no means the only test – for determining "membership." Outside of the context of civilians

²⁸ LRV Submissions, para. 18.

²⁹ *Id.* para. 42.

participating directly in hostilities, it is “membership” that is generally determinative of whether a person is protected by Common Article 3. As Kleffner, who is so heavily relied on by the Prosecution in its submissions, explains:

From a conceptual point of view, the strength of the membership approach consists of its accommodating most clearly the notion that an armed conflict involves at least two parties with their own armed forces, which are equal before the laws of armed conflict. Members of armed groups do not act as atomised individuals, but as part of a structured collective whose very purpose it is to use armed force and inflict death and injury and damage to objects of such an intensity so as to reach the threshold of a non-international armed conflict. To be part of the fighting force of a party to an armed conflict is fundamentally different from persons, who participate in hostilities independently from the parties. Furthermore, the membership approach upholds the fundamental precept that the parties to an armed conflict are equal before the laws of armed conflict as it makes members of both state armed forces and non-state organised armed groups permanently targetable. In contrast, the specific acts approach would result in more restraints for governmental armed forces (who, as noted earlier, are not considered civilians) when targeting members of armed groups than in the reverse situation in which the latter target the former. In fact, it would make it virtually impossible for state armed forces to employ force offensively rather than defensively, except when the person deploys to directly participate in hostilities.³⁰

...

If an entity assumes the function of the armed forces of a party to such a NIAC, regardless of whether that party is a state or non-state armed group, it should be regarded as an ‘armed force’ for the purposes of Common Article 3.³¹

20. Kleffner proceeds to explain that where a person can be said to be a “member” of an armed force or armed group, they are not considered to be taking no active part in hostilities unless and until the member lays down their arms or is placed *hors de combat*:

³⁰ J. Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference, Netherlands International Law Review, LIV (2007), 315, 344.

³¹ Kleffner 2015, p. 440.

It is submitted that the better view on the temporal scope of the loss of protection *is to distinguish between those who are not and those who are members of the armed forces of a party to a NIAC*. Those who are not members of the armed forces of a party to a NIAC, i.e. civilians, should be presumed not to take an active part in hostilities. Accordingly, the rule is that they enjoy the protection of Common Article 3, with the exception of active participation in the hostilities. In other words, civilians would be entitled to protection from direct attack unless and for such time as they take an active part hostilities. [...] The reverse logic may reasonably be applied *vis-à-vis* those who have been reliably determined to be members of the armed forces of a party to a NIAC. The fact that they are members of the armed forces justifies that they enjoy the protection of Common Article 3 only if and when they have laid down their arms or are *hors de combat*, but that they are otherwise not protected from direct attack *because they may be presumed to engage in acts that fulfil the three constitutive criteria for active participation in the hostilities referred to above*.³²

...

As far as irregular armed forces of both state and non-state parties to a NIAC are concerned, the end of a person's membership has to be determined by drawing on functional criteria. Accordingly, a person is to be considered to have ceased to be a member of such armed forces if and when that person can reliably be determined to have ceased to assume the function as a member of the armed forces.³³

21. The membership approach, as Melzer explains, undoubtedly reflects State practice:

However, even a cursory glance at almost any non-international armed conflict – be it in South East Asia in the 1960s and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Uganda, Chechnya or the Sudan today – is sufficient to conclude that governmental armed forces do not hesitate to attack insurgents even while they are not engaged in a particular military operation. In practice, such attacks generally are neither denied by the operating state nor internationally condemned as long as they do not cause excessive incidental harm to protected persons or objects.³⁴

³² Kleffner 2015, p. 439 (italics added).

³³ Kleffner 2015, p. 441.

³⁴ N. Melzer, "The Principle of Distinction Between Civilians and Combatants," in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford UP, 2014), 296, 312.

22. Whether a person is, or is not, a “member” of an armed force or group could in some circumstances be a “factual matter to be decided on the basis of evidence elicited at trial.”³⁵ The Prosecution, however, has taken this issue off the table by expressly asserting that the victims in Counts 6 and 9 were “members” of an armed force or group.³⁶ As pleaded, the Prosecution case is incompatible with the jurisdictional pre-condition that the victims of war crimes “take no active part in the hostilities” and, given that the perpetrators are alleged to be fellow members of the armed group, neither the requirements of “laying down arms” nor being “*hors de combat*” can apply. The Prosecution’s allegations, according to its own definition, fall outside of the scope of war crimes as defined under customary international law.
23. The LRV’s adoption³⁷ of the Prosecution’s “continuous combat function” criterion is misplaced in light of the Prosecution’s conclusion that the “child soldiers” were “members” of the armed group. The continuous combat function test is itself designed to ensure that those who are members of either party to a NIAC are treated according to roughly the same test. In short, the “continuous combat function” test is simply a means by which to determine membership in organizations whose criteria of membership may be less formal than in the case of a State’s armed forces.³⁸ The ICRC’s Interpretive Guidance repeatedly refers to the determination of “membership” as being

³⁵ Second Prosecution Response, para. 42, as adopted in the LRV Submissions, para. 18, fn. 26.

³⁶ First Prosecution Response, para. 6 (explaining that the “child soldiers” described in Counts 6 and 9 “were members of the UPC/FPLC”); Pre-Trial Brief, ICC-01/04-02/06-503-Conf-AnxA, p. 198 (“NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as members of the UPC/FPLC”), para. 400 (“Troops were deployed and treated equally as soldiers, without regard to age”), paras. 416 and 436 (referring to child soldiers “within the ranks of the UPC/FPLC”).

³⁷ LRV Submissions, para. 18, fn. 26.

³⁸ G Corn, C. Jenks, “Two Sides of the Combatant Coin : Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts”, 33 (2) U. Pa. J. Int’l L. 313, 337 (“Thus, while conduct is the key analytical indicator of status, this does not equate to conduct-based targeting authority – the type of authority utilized to respond to a genuine DPH situation. This conduct based status determination is the true significance of the CCF [continuous combat function] concept endorsed in the DPH Study when applied in the NIAC context. In essence, in NIAC, CCF is a methodology to assess belligerent status and thereby trigger status-based targeting authority.”)

the goal or the purpose of the “continuous combat function” test.³⁹ The Prosecution’s acknowledgement that the “child soldiers” referred to Counts 6 and 9 “were members of the UPC/FPLC”⁴⁰ renders the “continuous combat function” test redundant.

24. The LRV’s criticism that the Defence has improperly equated “child soldiers” with being “members” of an armed group⁴¹ has no merit. The claim that “child soldiers” were “members” of an armed group is the definition given by the Prosecution itself.⁴²
25. The Prosecution’s claim, adopted by the LRV,⁴³ that the ICRC’s *DPH Interpretive Guidance* has no persuasive value in ascertaining customary international law⁴⁴ has no merit. The *DPH Interpretive Guidance* is widely cited and relied upon, is transparently and thoroughly researched, and was produced by a well-respected interpreter of customary and treaty international humanitarian law. Its value in explaining existing customary international and treaty law is self-evident.
26. No support has been given for the assertion that the Common Article 3 should be given two independent interpretations depending on whether the discussion concerns “targeting” as opposed to its “protective function.”⁴⁵ Indeed, the attempt to introduce this distinction into Common Article 3 illustrates the destructive consequences for the integrity and coherence of

³⁹ ICRC Direct Participation, p. 33-34 (“[c]ontinuous combat function [...] distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.”)

⁴⁰ First Prosecution Response, para. 6

⁴¹ LRV Submissions, para. 19.

⁴² First Prosecution Response, para. 6 (explaining that the “child soldiers” described in Counts 6 and 9 “were members of the UPC/FPLC”); Pre-Trial Brief, ICC-01/04-02/06-503-Conf-AnxA, p. 198 (“NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as members of the UPC/FPLC”), para. 400 (“Troops were deployed and treated equally as soldiers, without regard to age”), paras. 416 and 436 (referring to child soldiers “within the ranks of the UPC/FPLC”).

⁴³ LRV Submissions, para. 18, fn. 26.

⁴⁴ Second Prosecution Response, para. 39.

⁴⁵ LRV Submissions, para. 18, fn. 26; Second Prosecution Response, paras. 40-42.

international humanitarian law arising from the positions adopted by the LRV. The scope of persons protected by Common Article 3 cannot be coherently distinguished according to an unsubstantiated and undefined distinction between its “targeting” and “protective” purposes.

IV. LRV’s fourth argument: Child soldiers are exempt from the requirement that they take no active part in the hostilities.

27. The LRV argues that Article 8(2)(e)(vii), which criminalizes “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities,” demonstrates that the usual requirements of war crimes do not apply in respect of children.⁴⁶ According to the LRV, since Article 8(2)(e)(vii) presupposes the “prior recruitment of the victims into the armed group”, the only possible inference is that war crimes can be committed by members of an armed group against other members of the same group – at least when the latter are children.⁴⁷ The LRV also adopts by reference the Prosecution argument that children simply cannot lose their protected status even if they are members of any armed group and even if they do directly participate in hostilities.⁴⁸
28. The inference drawn by the LRV is unwarranted and unsound. Article 8(2)(e)(vii) is, in the first instance, a crime that is committed and complete upon “conscription” or “enlistment”. The victim, at the moment of the crime, is necessarily a civilian taking no active part in the hostilities. The crime is complete upon the “conscription” or “enlistment.” Accordingly, the crime does not contemplate that the victim is a member of the armed group or force at the time it is committed. The notion of “use”, likewise, seems to invoke the notion of direct participation of civilians in activities, but without becoming a member of any armed group or force. Both of these interpretations reconcile Article 8(2)(e)(vii) with the established framework of Common Article 3 and

⁴⁶ LRV Submissions, para. 14.

⁴⁷ LRV Submissions, para. 15.

⁴⁸ LRV Submissions, para. 18, fn. 26; Second Prosecution Response, para. 37.

customary international law that war crimes may not be committed against members of an armed force or group unless they lay down their weapons or are *hors de combat*. This provision implies no rupture of this well-established framework.

SUBMISSIONS ON JURISDICTION

29. The issue is manifestly jurisdictional. The crimes, as defined by the Prosecution itself, are not cognizable under international humanitarian law. The extent to which this question involves a matter of “statutory interpretation”⁴⁹ in no way diminishes its jurisdictional nature; on the contrary, it is unlikely that any jurisdictional issue would not involve “statutory interpretation”.
30. The contrasting language between Counts 6 and 9 and Counts 5 and 8 is not merely a question of whether “counts are properly worded”.⁵⁰ The Prosecution could have encompassed the crimes against the alleged child soldiers within Counts 5 and 8 on the understanding that this charge required proof that the victims were civilians or otherwise taking no active part in the hostilities. The Prosecution could have referred to “child soldiers” within these counts and made clear – if this was its intention – that this term did not imply *membership* in armed forces or groups. The Prosecution chose instead to fashion separate counts in apparent contradistinction to Counts 5 and 8, thus suggesting that the victims were not civilians, and then to expressly define “UPC/FPLC Child Soldiers” as “members of the UPC/FPLC.”⁵¹ The apparent contradistinction is confirmed by other Prosecution submissions that, indeed, the term “child soldiers” was to be defined as “children under the age of 15 years *who were members of the UPC/FPLC.*”⁵²

⁴⁹ LRV Submissions, para. 6.

⁵⁰ LRV Submissions, para. 6.

⁵¹ First Prosecution Response, para. 6.

⁵² First Prosecution Response, para. 6. *See* Pre-Trial Brief, ICC-01/04-02/06-503-Conf-AnxA, p. 198 (“NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as

31. The Appeals Chamber has the discretion to either address the merits of the appeal now, or to remand the issue for further consideration to the Trial Chamber. Judicial economy, given the submissions that have now been received by the Appeals Chamber from the parties and the participating victims, favours immediate appellate resolution. The issues do not involve any facts or evidence whose appreciation might best be left to the Trial Chamber.

RESPECTFULLY SUBMITTED ON THIS 7TH DAY OF DECEMBER 2015



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members of the UPC/FPLC"), para. 400 ("Troops were deployed and treated equally as soldiers, without regard to age"), paras. 416 and 436 (referring to child soldiers "within the ranks of the UPC/FPLC").