Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **7 April 2016**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges

Source: **Defence Team of Mr Bosco Ntaganda**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence
Me Stéphane Bourgon
Mr Christopher Gosnell
Me William St-Michel
Mlle Margaux Portier
Me Isabelle Martineau

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Further to Trial Chamber VI ("Chamber")'s instructions of 24 March 2016,[1] Counsel representing Mr Ntaganda ("Defence") hereby submit these:

Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges

"Defence Consolidated Submissions"

INTRODUCTION

1. Counts 6 and 9 of the Updated Document containing the charges ("UDCC")[2] allege that Bosco Ntaganda is criminally responsible for the rape and sexual enslavement of "child soldiers in the UPC/FPLC"[3] by "UPC/FPLC commanders and soldiers."[4] The victims are described in the UDCC as "part of the UPC/FPLC," and the alleged perpetrators as "their own commanders and other UPC/FPLC soldiers."[5] The Prosecution has acknowledged in this litigation,[6] and its Pre-Trial Brief,[7] that the alleged victims in Counts 6 and 9 are to be understood as "members of the UPC/FPLC."

2. Not all crimes are war crimes. The victim of a war crime in a non-international conflict must be a protected person within the meaning of Common Article 3 to the 1949 Geneva Conventions. That definition, in accordance with well-established principles of international humanitarian law, excludes crimes committed by commanders and soldiers against fellow "members" of the same armed group. Neither customary nor treaty law

[1] Email from a Legal Officer of the Chamber to the parties and participants, 24 March 2016, 18h11.
[2] "Updated Document Containing the Charges", 16 February 2015, ICC-01/04-02/06-458-AnxA.
[3] UDCC, para.101.
[4] UDCC, para.100
[5] UDCC, para.103.
[6] "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.
[7] "Prosecution's Pre-Trial Brief", ICC-01/04-02/06-503-Conf-AnxA ("Pre-Trial Brief"), 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").

supports the Prosecution's argument that there is "an exception" to this "general proposition"[8] for fellow members who are under the age of fifteen. Counts 6 and 9, accordingly, do not fall within the subject-matter jurisdiction of the Rome Statute.

3. The present application, as now confirmed by the Appeals Chamber, properly raises a question of jurisdiction pursuant to Article 19 of the Statute.[9] This is the first and only such challenge. The legal arguments made by the Defence during the confirmation hearing were not framed as a jurisdictional challenge under Article 19;[10] the Pre-Trial Chamber did not treat those arguments as a jurisdictional challenge; and even the Prosecution's assertion that the Defence did not "seek leave to appeal"[11] that aspect of the confirmation decision reflects an understanding that this was not a jurisdictional challenge for which an appeal lies as of right. Even assuming that the present litigation does constitute a second jurisdictional challenge, "exceptional circumstances" warrant its consideration.

SUBMISSIONS

I. The requirements of Article 19(4) are met

4. Article 19(1) states that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it." Article 19(4) provides:

> The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a

[8] "Prosecution's submissions on issues that were raised during the confirmation hearing", 7 March 2014, ICC-01/04-02/06-276-Conf ("Prosecution Submissions (Confirmation of Charges)"), para.187.
[9] "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'", 22 March 2016, ICC-01/04-02/06-1225 ("22 March 2016 Appeal Judgment"), para.42.
[10] "Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges", 14 April 2014, ICC-01/04-02/06-292-Red2 ("Defence Submissions (Confirmation of Charges)"), paras.251-262.
[11] First Prosecution Response, paras.3, 29.

> challenge to be brought more than once or at a time later than the commencement of the trial.

5. The Prosecution has argued[12] that the present litigation is not the first challenge to jurisdiction because the Defence previously challenged the legality of these counts during the confirmation hearing.

6. The Prosecution argument should be rejected. The oral submissions during the confirmation hearing objected to Counts 6 and 9 on the basis that they impermissibly "expand the application of Article 8(2)(e)(vi) to situations that are analogous"; that "crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law"; and that, accordingly, these counts "cannot be confirmed in accordance with the principle of legality."[13] Neither in these oral submissions nor in the eleven paragraphs out of a 447-paragraph post-hearing submissions[14] did the Defence signal that a formal jurisdictional challenge was being presented, or that these crimes fell beyond the competence of the Pre-Trial Chamber. The claim was simply that these counts should not be confirmed.

7. Second, the Pre-Trial Chamber did not follow any of the mandatory procedural guarantees prescribed by Rule 58(2) for jurisdictional challenges:

> When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, *and in this circumstance shall hear and decide on the challenge or question first*.

8. The Pre-Trial Chamber did not "hear and decide on the challenge or question first," nor take any other measures in compliance with Rule 58(2).

---

[12] First Prosecution Response, paras.3, 9, 26-27.
[13] ICC-01/04-02/06-T-10-Red-ENG, p.27, ll.6-7, 15-17, 25.
[14] Defence Submissions (Confirmation of Charges), paras.251-262.

9. Third, if the Defence's post-hearing submissions had been a jurisdictional challenge, there would have been an automatic right of appeal pursuant to Articles 19(6) and Article 82(1)(a). Not only did the Defence not appeal, but the Prosecution asserts that "the Defence had an opportunity to seek leave to appeal the PTC's findings under Counts 6 and 9 and did not do so."[15] This constitutes a tacit acknowledgement that the Defence's confirmation submissions concerning Counts 6 and 9 were not jurisdictional challenges within the meaning of Article 19.

10. Arguments challenging the legal propriety of a count are not necessarily jurisdictional in the sense of challenging judicial competence pursuant to Article 19. Indeed, the Prosecution has argued forcefully – albeit erroneously – that even the present challenge is not jurisdictional in character and merely "raises an issue of statutory interpretation."[16] This is an apt description of the Defence's confirmation submissions.

11. Accordingly, the Defence's confirmation submissions were not a jurisdictional challenge under Article 19. Even assuming that they were, "exceptional circumstances" justify permitting a second jurisdictional challenge.

12. First, the Court's competence over Counts 6 and 9 has not yet received any appellate scrutiny. This raises the prospect – which the Appeals Chamber stated should be avoided – that "potentially valid questions as to the Court's jurisdiction could be left unresolved until the end of the trial without any possibility for appellate intervention."[17] The Appeals Chamber has emphasized that "it is important to preserve appellate scrutiny of such decisions and that this approach is consonant with the spirit of the Statute as described above."[18] The lack of appellate scrutiny should be a source of

[15] First Prosecution Response, para.29. *See also* First Prosecution Response, para.3 ("[t]he Defence did not seek leave to appeal that decision on this issue").
[16] First Prosecution Response, para.23.
[17] 22 March 2016 Appeal Judgment, para.19.
[18] 22 March 2016 Appeal Judgment, para.19.

particular concern given the understandably cursory treatment of the issue by the Pre-Trial Chamber – understandable given that the arguments were not accorded the full procedural attention prescribed by Rule 58.

13. Second, witnesses should not be compelled to testify about traumatic events unless there is a legal possibility of conviction. Summoning such witnesses to give testimony in respect of charges that are later found to fall outside of the Court's jurisdiction would be neither in their interest, nor in the interests of a fair and efficient trial.

14. The requirements of Article 19(4) are, accordingly, satisfied. As the Appeals Chamber has indicated, the interests of justice favour appellate scrutiny of jurisdictional issues at the earliest possible stage of proceedings. Whereas "exceptional circumstances" should perhaps be stringently applied in respect of challenges that have already received appellate scrutiny, this logic should not apply where there has been no such appellate review.

II. Counts 6 and 9 do not fall within the subject-matter jurisdiction of the Rome Statute

A. Article 8(2)(e)(vi) is subject to the established requirements of international law

15. The Appeals Chamber has affirmed that the war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence in Article 8(2)(e)(vi) are subject to the requirements generally applicable for war crimes:

> Nonetheless, the Appeals Chamber notes that the chapeau of article 8 (2) (e) of the Statute specifies that the crimes listed therein are "serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*" (emphasis added), while the introduction to article 8 in the Elements of Crimes requires the Court to interpret the elements for war crimes "within the established framework of the international law of armed conflict [...]". In addition, article 8 (2) (e) (vi) of the Statute refers to "any other form of sexual violence *also* constituting a serious violation of article 3 common to the four Geneva Conventions" (emphasis added). Article 3 common to the Geneva

> Conventions provides protection to specified persons – namely those "taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause". Accordingly, the Appeals Chamber considers that, while article 8 (2) (e) (vi) of the Statute does not contain any explicit restriction on the categories of persons who may be victims of the war crimes of rape and sexual slavery, the question arises as to whether such restrictions must be derived from the applicable law, including the above-mentioned references.[19]

16. The Prosecution has previously argued that there is "no reason to limit the fundamental protection against crimes of sexual violence by reference even to international humanitarian law standards which, in this limited context, assume little relevance."[20] This argument has now been rejected by the Appeals Chamber.

B. War crimes may not be committed by members of an armed force against fellow members of the same armed force

17. The Prosecution has recognized that it is "generally the case" that "IHL regulates conduct directed towards those external to a military force rather than to those internal to a military force."[21] This general principle is reflected in Common Article 3 of the Geneva Conventions, which prohibits, specifically and solely, acts committed in non-international armed conflict against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*.'"[22]

---

[19] 22 March 2016 Appeal Judgment, paras.30-31.

[20] "Prosecution's response to Mr Ntaganda's appeal against the 'Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9", 24 November 2015, ICC-01/04-02/06-1034 ("Second Prosecution Response"), para. 29.

[21] Prosecution Submissions (Confirmation of Charges), para. 187.

[22] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Filed, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 ("Geneva Conventions"), Art. 3. *See also* Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"), Art. 4(1) (conferring protections on "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities").

18. The one example provided in Common Article 3 of "taking no active part in hostilities" is the case of "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 be victims of war crimes, but only if they have "laid down their arms or are otherwise *hors de combat*." Common Article 3, as explained by Melzer, "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."[23] Kleffner, an author relied on extensively by the Prosecution, likewise affirms that:

> 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.[24]

19. The expressions "laying down arms" and being "*hors de combat*" are terms of art in international humanitarian law that presuppose surrender, or being exposed to, an enemy force:

> 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.

[23] 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) ("Melzer 2014"), pp.296, 308 (italics added).

[24] 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.

> Common expressions that indicate such an intention are the waving of a white flag, or placing one's hands on one's head.[25]

20. Rule 47 of the ICRC Rules of Customary IHL defines *hors de combat*, 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.[26]

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 International Law,[27] concerns falling into "the power of and adverse party" or expressing "an intention to surrender" – which also necessarily involves surrender to an adverse party.

---

[25] Kleffner 2015, p.441 (italics added).

[26] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47.

[27] The Prosecution cites 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* Second Prosecution 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.

21. This is the reasoning that underpins numerous statements, including by the ICC Prosecutor, that international humanitarian law is concerned with "conduct directed towards those external to a military force."[28] As stated in the *RUF Trial Judgement*:

> The Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces.[...]
>
> The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate reconceptualization of a fundamental principle of international humanitarian law.[29]

22. Cassese[30] and many other commentators[31] agree.[32] ICTR cases have described the characterization of the identity of the victim as a "threshold requirement."[33]

---

[28] Prosecution Submissions (Confirmation of Charges), para. 187.

[29] SCSL, *Sesay et al.* case, SCSL-04-15-T, Judgement, 2 March 2009 ("RUF Trial Judgement" or "RUF TJ"), paras.1451-1453 (Even if the judgement refers to "international armed conflict", the accused were charged of war crimes committed in the context of a non-international armed conflict, see *ibid*, para.977. Those excerpts should therefore be understood to apply to war crimes committed in non-international armed conflicts.).

[30] A. Cassese, *International Criminal Law* (Oxford: Oxford UP, 2013), p.67 ("crimes committed by combatants of one party to the conflict against members of their own armed forces do not constitute war crimes.").

[31] C. Focarelli, International Law as Social Construct: The Struggle for Global Justice (Oxford: Oxford UP, 2012), p.392 ("[o]ffences committed by servicemen against their own military, whatever their nationality, do not qualify as war crimes"); G. Gaggioli, "Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law" (2014) 96 *IRRC* 503, p.515 ("In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment – as he may have done already in peacetime – without this act having any link to the armed conflict situation, IHL would not apply to the act. This rape would/should however be prohibited under domestic law. It also constitutes a human rights violation if the military commander committed the rape in his official capacity (i.e. by using his position of authority and the means of his function); W. A. Schabas, The International Criminal Court, A commentary on the Rome Statute, p.210 (affirming the same principle in respect of international armed conflicts).

[32] *See* Prosecution Submissions (Confirmation of charges), para.187 (The Prosecution's claim that Article 8(2)(e)(vii) – which itself criminalizes the enlistment or conscription of child soldiers – is an "exception" to this principle that somehow demonstrates the demise of the principle is unfounded. First, when the crime is committed it is committed against a civilian, not a member of the armed force. Second, even assuming that it does constitute an exception, it is precisely the type of narrowly-delimited exception that proves the rule, rather than destroying it.)

C. The Prosecution has defined the victims of Counts 6 and 9 as being "members" of the same armed force as the perpetrators

23. The Prosecution could have alleged that child soldiers were the victims of the crimes defined in Counts 5 and 8 of the UDCC. The Prosecution instead decided to create two separate counts specifically addressed to those same crimes against child soldiers:

> **COUNT 6: RAPE OF UPC/FPLC CHILD SOLDIERS**
>
> Based on the facts and circumstances described in paragraphs 100-106, **Bosco NTAGANDA** is criminally responsible for:
>
> **Count 6**: Rape of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).
>
> **COUNT 9: SEXUAL SLAVERY OF UPC/FPLC CHILD SOLDIERS**
>
> Based on the facts and circumstances described in paragraphs 100-104 and 106, **Bosco NTAGANDA** is criminally responsible for:
>
> Count 9: Sexual slavery of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).

24. The Prosecution went on in its Pre-Trial Brief[34] and in previous submissions in response to this litigation to define child soldiers as "members of he UPC/FPLC":

> Counts 6 and 9 alleged that the Accused was criminally responsible for the rape and sexual slavery of children under the age of 15 years *who were members of the UPC/FPLC* ("UPC/FPLC Child Soldiers") pursuant to article 8(2)(e)(vi) of the Statute.[35]

25. The Appeals Chamber has noted that:

> The scope of the group intended by the Prosecution to fall within the description "child soldiers" is clearly specified to be "children under

---

[33] *See e.g.* ICTR, *Ndindiliyimana et al.* case, ICTR-00-56-T, "Judgement and Sentence", 17 May 2011, para.2129; ICTR, *Bagosora et al.* case, ICTR-98-41-T, "Judgement and Sentence", 18 December 2008 para.2229; ICTR, *Semanza* case, ICTR-97-20-T, "Judgement and Sentence", 15 May 2003, para. 512.

[34] Pre-Trial Brief, 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").

[35] First Prosecution Response, para.6.

> the age of 15 years who were members of the UPC/FPLC" and this allegation is undisputed for the purposes of the present appeal.[36]

D. The notion of "membership" in an armed force is not compatible with "taking no active part in hostilities"

26. Common Article 3 creates two mutually exclusive categories: (i) members of an armed force on the one hand, who are not "persons taking no active part in the hostilities"; and (ii) civilians who may, for as long as they are not directly participating, are "persons taking no active part in hostilities." The Prosecution has attempted to challenge this basic distinction by arguing that: (i) rebel groups do not have "members" in the sense of Common Article 3 because the reference to "members of armed forces" in Common Article 3 is limited to State armed forces;[37] and that (ii) whether members of the latter are "taking no active part in hostilities" is "essentially factual, to be determined on the basis of the evidence elicited at trial."[38]

27. As explained by the ICRC[39] and Kleffner[40]: (i) the reference to "members" in Common Article 3 applies to non-State armed forces as well as State armed forces; and (ii) that for as long as a person is a member of such a force, they cannot be viewed as "taking no active part in the hostilities" under Common Article 3, unless or until they lay down their weapons or are *hors de combat*.

28. According to the ICRC Interpretative Guidance:

> While it is generally recognized that members of state armed forces in non-international armed conflict do not qualify as civilians, treaty law, state practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed

---

[36] 22 March 2016 Appeal Judgment, para.37.
[37] Second Prosecution Response, para.43.
[38] Second Prosecution Response, para.36.
[39] International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, 2009) ("ICRC Interpretive Guidance"), p.28 ("both State and non-State parties to the conflict have armed forces distinct from the civilian population.")
[40] J. Kleffner, *From Belligerents to Fighers 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*, NILR 2007, p.324.

> groups (i.e. the armed forces of non-state parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably *because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population*. *As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict*.[41]

29. Kleffner confirms that a "member" of an armed force is not considered to be taking no active part in hostilities unless and until the member lays down his/her arms or is placed *hors de combat*:

> 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*.[42]
>
> […]
>
> 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

[41] ICRC Interpretive Guidance, pp.27-28 (emphasis added, footnotes omitted).
[42] Kleffner 2015, p.439 (italics added).

> 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.[43]

30. This approach 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.[44]

31. The consequence of the Prosecution's claim that the victims of Counts 6 and 9 were "members" of an armed force or group,[45] accordingly, is to remove from the realm of fact-finding whether the victims were "taking no active part in the hostilities." As "members," they could not have been "taking no active part in the hostilities" unless and until they: (i) ceased to be members; (ii) had laid down their arms; or (iii) were *hors de combat*. The latter two conditions, as described above, entail falling into the hands or into the power of the enemy. The issue is not "essentially factual," as the Prosecution has argued,[46] because its own definition of the victims categorically determines that they cannot be "taking no active part in the hostilities."

32. The Prosecution could have charged the crimes alleged in Counts 6 and 9 under Counts 5 and 8, which would require defining the victims as civilians. A civilian who is not a member of an armed force may directly participate

---

[43] Kleffner 2015, p.441.

[44] Melzer 2014, pp.296, 312.

[45] 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, 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").

[46] Second Prosecution Response, paras.36, 41 ("it still remains a factual matter to be decided on the basis of evidence elicited at trial.")

intermittently in hostilities.[47] A "continuous combat function" test can be applied to determine whether a person's participation is so continuous that they must be treated as having become a "member" of an armed force. The Prosecution, for reasons that may or may not be related to Counts 14, 15 and 16, has chosen not to characterize the victims of Counts 6 and 9 as civilians, but rather as "*members* of the UPC/FPLC." A member of an armed force is, by definition, not "taking no active part in the hostilities" and can regain the protections of Common Article 3 for as long as they are a member of an armed force only by laying down arms or being placed *hors de combat*, both of which contemplate falling into the hands of the enemy force.

E. International humanitarian law does not recognize any exception for child soldiers

33. The Prosecution has argued that even though "IHL regulates conduct directed towards those external to a military force", there "is an exception to the general proposition precisely in order to provide non-derogable protections for children as a particularly vulnerable group."[48] Reliance has been placed[49] on Article 4(3) of Additional Protocol II that "[c]hildren shall be provided with the care and aid they require, and in particular: […] (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) *and are captured*."[50]

---

[47] ICRC Interpretive Guidance, p.69 ("[u]nder customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of state armed forces or organized armed groups belonging to a party to an armed conflict.")

[48] Prosecution Submissions (Confirmation of Charges), para.187.

[49] Prosecution Submissions (Confirmation of Charges), para.189 ("Treaty law also provides continuing protections for children. Article 4(3) of Additional Protocol II applicable in non-international armed conflict provides that '[c]hildren shall be provided with the care and aid they require'. Article 4(3)(d) provides continuing protections for children even when the prohibition on recruiting child soldiers in article 4(3)(c) is breached and children actively participate in hostilities.")

[50] Additional Protocol II, Art. 4 (3)(d) (emphasis added).

34. None of these provisions reflect any exception to the general principles of IHL described above. The United Kingdom's Joint Service Manual of the Law of Armed Conflict explains that this provision applies only once the conditions of Common Article 3 are satisfied – i.e. that "[i]f captured, under-aged members of the armed forces are entitled to be treated as prisoners of war, but are also entitled to the special protection afforded to children."[51] Those "special protections" do not include retention of civilian status, let alone dual civilian and combatant status, but rather the protections expressly set out in Article 4(3)(a) and (b) – namely, entitlements to receive education and that all appropriate steps be taken to facilitate return to their families. Even the Prosecution has acknowledged in its previous submissions that Article 4(3)(d) is "contingent upon the capture of the child."[52] The Prosecution's only basis for arguing that the provisions should be given wider application is the contention that this provision reflects an alleged statutory "motivation"[53] that should be extended *by analogy* to other situations.

35. Strong policy considerations run contrary to this "motivation", however. Most importantly, the distinction between civilians and members of armed forces/groups in armed conflict should be maintained and reinforced by the clearest rules possible. Those considerations are, if anything, even stronger in the context of non-international armed conflict.

---

[51] United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, (2004), s. 4.10.4. *See also* C. Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), para.4507 (Part II, entitled 'Humane Treatment' "is aimed at protecting persons who do not, or no longer, participate in hostilities against abuses of power and against inhuman and cruel treatment which may be inflicted upon them by the military or civilian authorities *into whose hands they have fallen*. As the Protocol does not provide for different categories of persons who enjoy a special status, such as prisoners of war in international armed conflicts, the rules laid down here apply equally to all persons affected by the armed conflict *who are in the power of the enemy* (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians.") (emphasis added)

[52] Prosecution Submissions (Confirmation of Charges), para.190 (emphasis added).

[53] Prosecution Submissions (Confirmation of Charges), para.190.

36. The Pre-Trial Chamber has also implied,[54] and the Legal Representative for the alleged former child soldiers has argued,[55] that the enumerated war crime of recruitment, enlistment and use of child soldiers is part of a broader exception extending international humanitarian law to any war crime committed against children by fellow members of the same armed force.

37. The argument is unsound. Recruitment and enlistment is, in the first instance, a crime committed against a civilian. The crime as formulated reflects no incompatibility with, or exception to, the requirement of Common Article 3 that the victim take no active part in hostilities at the time the crime is committed. "Use", however, does seem to imply criminal conduct against a person while actively participating in hostilities and, therefore, does constitute an exception to the general principle enunciated in Common Article 3. Cottier has underscored the exceptional nature of this provision, describing it as an "unusual war crime."[56] Nothing in Article 8(2)(e)(vii) suggests that States intended this exception to go beyond the expressly defined crime. Indeed, States expressed the contrary intention in Article 22(2) of the Statute by stating that the "definition of a crime shall be strictly construed and shall not be extended by analogy."

38. The Prosecution has advanced the view that the interpretation of Common Article 3 in respect of targeting by opposition forces should be separated entirely from the interpretation of Common Article 3 in respect of the scope of its protections.[57] There is no basis for such an interpretation of Common

---

[54] "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda", 9 June 2014, ICC-01/04-02/06-309, para.78.
[55] "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'", 30 November 2015, ICC-01/04-02/06-1040, paras. 14-15.
[56] M. Cottier and J. Grignon, "26. Paragraph 2(b)(xxvi): Conscription or enlistment of children and their participation in hostilities" in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed, (Oxford: Hart Publishing, 2016), p.523. *See Katanga* case, "Decision on the confirmation of the charges", 30 September 2008, ICC-01/04-01/07-717, para.248.
[57] Second Prosecution Response, para.42.

Article 3, which would risk fragmenting and complicating an area of law whose very existence depends on its coherence, unity and clarity.[58]

39. Result-oriented academic commentary is an insufficient basis on which to find such an exception. 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."[59] Claims of "doubtful customary nature"[60] must be rejected. "State practice," as one ICTY Appeals Chamber Judge has explained, "has to be virtually uniform, extensive and representative."[61] Nothing close to this kind of state practice exists to permit an exception to Common Article 3 in respect of members of armed forces who are under fifteen years of age.

CONCLUSION

40. The crimes encompassed by Counts 6 and 9 are grave and worthy of criminalization, but do not, as pleaded, fall within the scope of Common Article 3 of the Geneva Conventions. The Prosecution could have sought to bring these crimes within Counts 5 and 8, thus entailing a factual claim that the child soldiers were "civilians." Instead, the Prosecution defined the victims as "members" of the UPC/FPLC, possibly for reasons related to Counts 13, 14 and 15. Regardless of the motivation, the manner in which the charges are pleaded and defined is not compatible with the requirement of Common Article 3 that the victim of a war crime in non-international armed conflict be "taking no active part in the hostilities."

---

[58] *See* "Foreword by Dr. Yves Sandoz" to J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge: CUP, 2005), p.xxiii ("coherence is indispensable to international humanitarian law's credibility.")

[59] ICJ, *North Sea Continental Shelf* cases, "Judgement", 20 February 1969, para. 77.

[60] 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.

[61] ICTY, *Dragomir Milošević* case, 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).

41. This does not necessarily mean that such crimes are beyond the scope of criminal law, even international criminal law. First, such crimes might, in certain circumstances, constitute crimes against humanity. Second, such crimes could possibly be war crimes as long as the victims are not "members" of the armed forces. Third, such crimes could be criminalized and punished domestically, as with all other crimes committed by soldiers against fellow members of the same force. These, however, are primarily policy issues that should not affect the established contours of international humanitarian law.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

FIND that Counts 6 and 9 do not fall within the subject-matter jurisdiction of the Court; and **DECLARE** that it will not exercise jurisdiction over Counts 6 and 9.

RESPECTFULLY SUBMITTED ON THIS 7TH DAY OF APRIL 2016

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands