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THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
 Judge Christine Van Den Wyngaert
 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 – with Public Annex

Response to “Former child soldiers’ observations on the Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06-1798

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 the “Former child soldiers’ observations on the Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” submitted on 23 February 2017 (“Observations”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submits this:

Response to “Former child soldiers’ observations on the Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06-1798

INTRODUCTION

1. The Legal Representative of the Child Soldiers (“LRV”) has argued that the Trial Chamber committed no error in finding that: (i) no status requirement arises from the *chapeaux* of Articles 8(2)(b) and (e) of the ICC Statute;² or that (ii) even if such a status requirement does arise, an exception applies in respect of (a) rape and sexual enslavement;³ and/or (b) child soldiers as victims.⁴ The LRV also asserts, though this is not a basis of the Decision, that (c) the perpetration of a criminal act, for as long as it is taking place, is “mutually exclusive” with taking an active part in hostilities.⁵
2. The LRV is right that some situations are “mutually exclusive” under the law of armed conflict – which is precisely the basis of the jurisdictional challenge. Charges alleging that her clients were (i) “members” of an armed group, (ii) enlisted, conscripted and recruited into that armed group, and (iii) actively participating in an armed group, are incompatible with the claim that those persons were simultaneously taking no active part in hostilities within the

¹ ICC-01/04-02/06-1798.

² Observations, paras.23 (“the personal scope of the crimes [...] is left unqualified”); 26-43 (arguing that “within the established framework of international law” imports no status requirements”); Decision, paras.40-41.

³ Observations, paras.24-25, 45-51; Decision, paras.47-49, 50-52.

⁴ Observations, paras.44, 56, 65, 71-84; Decision, para.53.

⁵ Observations, paras.81, 84.

sense of Common Article 3. These categories are, indeed, legally “mutually exclusive.” The LRV’s creative suggestion that a member of an armed group intermittently ceases and re-starts taking an active part in hostilities just for as long as the crime itself is taking place⁶ is based on a misconception of the legal understanding of that concept as it appears in Common Article 3.

3. The LRV incorrectly asserts that the Prosecution’s submissions are irrelevant to the interpretation of the charges in the UDCC;⁷ misstates the Defence submissions on appeal; places undue weight on the purported statutory “overlap” of Article 8(b) and (e) with 8(a) and (c), respectively;⁸ and provides no support from established customary or any other source of international law for the purported exceptions to the status requirements for rape and/or where the victim is under 15.
4. The serious allegation that the Defence submissions have been disrespectful to victims,⁹ and the inflammatory insinuations about the 3rd edition of the late Judge Cassese’s treatise on international criminal law,¹⁰ are unfounded. The Appeals Chamber is requested to address, and expressly reject, these serious and unfounded allegations.

SUBMISSIONS

I. The Prosecution’s Submissions are not irrelevant to the interpretation of the UDCC

5. The LRV concedes that the Prosecution’s submissions in the UDCC¹¹ are relevant to assessing whether Counts 6 and 9 fall within the Court’s

⁶ Observations, para. 84.

⁷ Observations, para.16.

⁸ Observations, para.35, 40.

⁹ Observations, para.48.

¹⁰ Observations, para.53,

¹¹ The LRV refers to the “DCC” whereas the applicable charging instrument is the “Updated Document Containing the Charges”, 16 February 2015, ICC-01/04-02/06-458-AnxA (“UDCC”).

jurisdiction, but claims that *all other* Prosecution submissions are “irrelevant.”¹² Those other submissions, according to the LRV, should not even be considered in analysing the nature of the charges for which jurisdiction was upheld in the Decision.¹³

6. First, even assuming that the LRV’s position is correct, the UDCC itself sufficiently and on its face shows that the “child soldiers” in Counts 6 and 9 are alleged to be members of the UPC/FPLC. The UDCC says that the child soldiers were “part of the UPC/FPLC.”¹⁴ It says that they were not only “recruited,” but also “conscripted”¹⁵ and “enlisted.”¹⁶ These alleged circumstances entail that the “child soldiers” in Counts 6 and 9 were “members” of the UPC/FPLC and, accordingly, were not taking no active part in hostilities within the meaning of Common Article 3. The LRV does not explain or even address how these allegations are not mutually exclusive with taking no active part in hostilities.¹⁷ The mutual exclusivity does not depend on any issue of fact, but from the facts as postulated in the charges.
7. Second, the UDCC cannot be interpreted in isolation from the Confirmation Decision. The *Lubanga* Appeal Chamber explained that it is the Confirmation Decision, not the UDCC, that “defines the parameters of the charges at trial.”¹⁸ The Prosecution submissions justifying the proposed DCC before the Pre-Trial

¹² Observations, para.16.

¹³ Observations, paras.16-17.

¹⁴ UDCC, para.103; Appeal, para.9.

¹⁵ UDCC, para.92; Appeal, para.9.

¹⁶ UDCC, paras.93, 94; Appeal, para.9.

¹⁷ Observations, para.17.

¹⁸ *Lubanga*, Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.124 (stating that the confirmation decision); *Bemba et al.*, Decision on the Submission of Auxiliary Documents, 10 June 2015, para.12 (“[i]t follows from the above that the Statute foresees a shift of authority to define the factual scope of the case: while at the stage of submitting the DCC this authority rests squarely with the Prosecution, at the confirmation stage, such authority passes over to the Pre-Trial Chamber. In other words, at the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the confirmation of charges decision rendered under Article 61(7)(a) of the Statute sets out the charges, which, as such, also binds the Trial Chamber.”) The parties are also, *a fortiori*, “bound” by the Confirmation Decision.

Chamber are, accordingly, plainly relevant to the interpretation of the “material contours”¹⁹ of the charges whose jurisdiction is challenged. The Prosecution pleading in the UDCC that “child soldiers actively participated in hostilities”²⁰ is properly interpreted in light of the Prosecution’s submissions seeking confirmation of those very same charges. Those submissions assert that the child soldiers in Counts 6 and 9 actively participated in hostilities at the material time, but that the Court had jurisdiction nonetheless:

The protections attached to children continue to apply during armed conflict: while soldiers may forfeit protection from attack *by directly participating in hostilities*, this does not impact on their other legal protections. This includes their protection against being subjected to sexual violence – a position ICRC customary IHL study provides that special protections *continue to apply when a child participates in hostilities*.²¹

...

Article 4(3)(d) [of Additional Protocol II] 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*.²²

...

As article 4(3) focuses on ensuring protection for children because they are vulnerable, it is illogical that the existence of article 4(3)(d) should lead to the conclusion that children only retain their special protections if they are captured, but lose those protections if they participate directly in hostilities and *are not captured*.²³

8. The Confirmation Decision expressly adopted this reasoning, asserting that the “child soldiers” could be “members” of an armed force and yet deemed to be not directly or actively participating in hostilities not as a question of fact, but

¹⁹ *Contra* Observations, paras.16-17.

²⁰ UDCC, para.98; Appeal, para.10.

²¹ Prosecution Submissions on Confirmation of Charges, para.188 (italics added).

²² ICC-01/04-02/06-276-Red, para.189 (italics added).

²³ ICC-01/04-02/06-276-Red, para.193.

because of the legal prohibition on the recruitment, enlistment or use of child soldiers:

*mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place.*²⁴

9. The Prosecution then expressly adopted this approach in its Pre-Trial Brief, characterising the child soldiers as “members of the UPC/FPLC.”²⁵ These various submissions are undoubtedly directly relevant to one another, and closely inter-related.
10. The LRV is also wrong that “ancillary documents” are irrelevant to the scope and content of the charges.²⁶ The Appeals Chamber has held, on the contrary, that the details of the charges may be communicated by “auxiliary documents”:

The decision on the confirmation of the charges defines the parameters of the charges at trial. However, this does not necessarily exclude that further details about the charges may, depending on the circumstances, also be contained in other auxiliary documents.²⁷

It follows that “auxiliary documents” are relevant to the “material contours of a case”²⁸ in the context of a jurisdictional challenge especially where, as here, there is such a patent connection between the content of those “auxiliary documents” and the content of specific charges.

11. Third, the LRV implies that the Prosecution can freely change its interpretation of the charges.²⁹ This is incorrect. The charges cannot be changed by the

²⁴ Confirmation Decision, para.78 (italics added).

²⁵ Pre-Trial Brief, p.198 (“viii. NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as members of the UPC/FPLC”), paras.416, 436 (referring to child soldiers “within the ranks of the UPC/FPLC”); Appeal, para.9.

²⁶ Observations, para.17.

²⁷ *Lubanga*, Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.124.

²⁸ Observations, para.17.

²⁹ Observations, para.16.

Prosecution. Even its interpretation of the charges cannot change if doing so prejudices the accused. As the ICTY Appeals Chamber has held, the Prosecution would “ordinarily be estopped from changing its position on appeal” where the change of position prejudices the accused.³⁰ The same principle must apply with even greater force in respect of confirmation submissions and “auxiliary documents” whose function is to safeguard the accused’s right under Article 67(1)(a) to be “informed promptly and in detail of the nature, cause and content of the charge.” Contrary to the LRV’s assertion, this is not merely a question of “case theory,”³¹ but rather the rights of the accused and the content of the charges.

12. Fourth, the LRV contradicts herself by citing the very Prosecution submissions that are said to be irrelevant.³² In particular, the LRV cites the Prosecution’s self-serving assertion in the Response that “the victims were not taking active part in hostilities at the material times.”³³ The LRV does not make clear whether this position should be considered determinative, however, since she then goes on to imply either that the issue is purely one of fact, or – contrary to the Prosecution’s position – that her clients *were* actively participating:

Whether or not the Prosecution regards child soldiers as “‘members’ of the UPC is an issue that goes to the merits of the case, but does not operate as a bar to the Court’s jurisdiction.”³⁴

...

Indeed, all child soldiers recruited by the UPC/FPLC had to undergo a military training for weeks or months before being given a uniform and a weapon, and ultimately deployed. During this initial period, although

³⁰ *Brđjanin*, Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, 5 May 2005, p.4.

³¹ Observations, para.17.

³² Observations, para.72.

³³ Observations, para.72.

³⁴ Observations, para.17.

children were already recruited into the ranks of the UPC/FPLC, they could be considered to have taken active part in hostilities.³⁵

13. The compatibility of these various claims is addressed in a subsequent section; for present purposes, however, the LRV's own submissions contradict its claim that the Prosecution's submissions are "irrelevant"³⁶ to the definition of the counts whose jurisdiction is being challenged.

II. The LRV misstates the Defence's position

14. The LRV purports to reduce the Defence position to nine points.³⁷ Each, except arguably (5) and (7), is exaggerated, inaccurate, removes important qualifications, or is directly contrary to the Defence's position.
15. The Defence has never submitted, for example, that recruitment "automatically" implies membership in an armed force.³⁸ The Defence position, instead, is that the UDCC itself, read in conjunction with the Confirmation Decision and the Prosecution's own submissions, alleges that the "child soldiers" are members of the UPC/FPLC – *i.e.* not taking no active part in hostilities.³⁹ Whether an allegation of recruitment alone in any and all circumstances constitutes membership and active participation in hostilities is not at issue in the present appeal, and is not the Defence position.
16. The Defence has also never asserted that child soldiers "may not qualify as *hors de combat*."⁴⁰ Child soldiers can be *hors de combat* just like any other fighter or combatant. However, just like any other fighter or combatant, the notion of "*hors de combat*" does not arise merely because, and for so long as, a fighter or

³⁵ Observations, para.83. The Defence is unsure whether there should be a "not" in the second sentence of the latter passage, or whether there is some other explanation for this surprising position.

³⁶ Observations, para.16.

³⁷ Observations, para.20.

³⁸ Observations, para.20(1) and (2).

³⁹ Appeal, para.74 ("[t]he notion of 'membership' in an armed force is not compatible with 'taking no active part in hostilities'").

⁴⁰ Observations, para.20(4).

combatant is incapacitated by a criminal act, such as rape or sexual slavery, by a comrade in arms.⁴¹

17. The LRV is likewise incorrect in asserting that the Defence is making a factual claim that a combatant retains his or her status “at all times throughout their recruitment as a result of their ‘continuous combat function.’”⁴² The “continuous combat function” test demonstrates, rather, a *legal* point: that armed groups consist of “members” just as armed forces consist of combatants. This is confirmed, incidentally, by the nomenclature of Article 8 itself, which does not limit the term “combatant” to fighters in the armed forces of a State alone.⁴³ The consequence is that the Prosecution, by invoking the membership of the child soldiers in the UPC/FPLC, cannot simultaneously claim that they were merely civilians directly participating in hostilities in a “revolving door”. This is a legal, not a factual, claim.
18. The Defence has never asserted that rape and sexual slavery against child soldiers “lack the requisite nexus requirements for war crimes.”⁴⁴ The Defence expressly contemplates, to the contrary, that rape and sexual slavery by one soldier against another soldier could satisfy the nexus requirement.⁴⁵
19. The purported “absolute and far-reaching”⁴⁶ nature of these propositions reflects the LRV’s misunderstanding of the Defence’s position.

⁴¹ Appeal, paras.60-62.

⁴² Observations, para.20(3).

⁴³ Article 8(2)(e)(ix) (“[k]illing or wounding a combatant adversary”).

⁴⁴ Observations para.20(9).

⁴⁵ Appeal, para.27 (“Sexual violence committed by one soldier against another while deployed on mission could, accordingly, satisfy the nexus requirement. Such sexual violence could even colourably fall within the jurisdiction of the Court prior to an international deployment. Further, as a war crime, there is no requirement that the sexual violence be part of any widespread or systematic attack: a single act of sexual violence could fall within the Court’s war crime jurisdiction when committed within the armed forces of a state engaged in international or non-international armed conflict.”)

⁴⁶ Observations, para.21.

III. The structure, wording and drafting history of Article 8 do not imply any abandonment of the traditional Status requirements arising from “the established framework of international law”

20. The LRV supports the Trial Chamber’s position that the absence of an express status requirement in the *chapeaux* of Article 8(2)(b) and (e) (other than the phrase “within the established framework of international law”) implies no status requirement.⁴⁷ The LRV also supports the reasoning of the Decision⁴⁸ that the absence of any general status requirement in the *chapeaux* is further indicated by the presence of status requirements in some of the enumerated crimes within (b) and (e).
21. First, this textual interpretation is not only unsound, but is not even consistently maintained by the LRV. The LRV expressly acknowledges that the phrase “*within the established framework of international law*” encompasses “all conventional and customary rules applicable to armed conflicts.”⁴⁹ The Defence agrees. This necessarily includes that the victim be a “person taking no active part in the hostilities”, which is both a conventional and a customary rule of armed conflict.⁵⁰
22. Second, there is no incompatibility between a default status requirement in the *chapeaux* and different express status requirements within the enumerated crimes themselves. The conduct under Articles 8(2)(e)(ix) and (x)⁵¹ in respect of

⁴⁷ Decision, para.41; Observations, para.3.

⁴⁸ Observations, para.30; Decision, para.40.

⁴⁹ Observations, para.29.

⁵⁰ The LRV refers to the Defence’s submission that Common Article 3 is “‘widely regarded as expressive of customary international law’” in quotation marks as if to signal possible disagreement. Observations, para.28. This is not a proposition on which there can be any controversy. As stated in the ICRC’s Customary IHL study, “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts” ICRC, CIHL, Vol. I, Rule 90. The LRV’s assertion that the *Tadić* Jurisdiction Decision “runs contrary to the Defence’s suggestions that Common Article 3 is the sole criterion for assessing the existence of a violation under the law of non-international armed conflicts” is wrong. Observations, para.31. The requirement of taking no active part in hostilities, as a customary norm, applies to the prohibited conduct enumerated in Common Article 3 *as well as* other prohibitions criminalized through custom.

⁵¹ Observations, para.30.

adversaries only⁵² does not imply that no default status requirement arises “within the established framework of international law.” On the contrary, these status requirements do not overlap at all with a general status requirement that the victim be taking no active part in hostilities.

23. Third, there is no unacceptable overlap between a *chapeaux* status requirement and status requirements mentioned within the individual crimes.⁵³ Words such as “civilians not taking direct part in hostilities” (8(2)(e)(i)) or “civilian population” (8(2)(e)(viii)) do not imply the absence of a general status requirement arising from the *chapeaux*. Indeed, just as many crimes enumerated under sub-sections (b) and (e) can be brought “within the established framework of international law” only by interpreting the *chapeaux* as including a default status requirement. These include, in addition to 8(2)(b)(xxii) and (e)(vi): (b)(xvi) “[p]illaging a town or place, even when taken by assault”; (b)(xxi) “[c]ommitting outrages upon personal dignity, in particular, humiliating and degrading treatment”; and (e)(v) “[p]illaging a town or place, even when taken by assault”. None of these enumerated crimes have individual status requirements, even though the established framework of international law imposes such a requirement.
24. Fourth, the LRV is incorrect that the elimination of the status requirements creates an unacceptable overlap between sub-parts (b) and (e) with (a) and (c).⁵⁴ Not even the LRV can fully support the Trial Chamber’s position in this regard, conceding that the overlap is only to “a large extent” and proscribes only

⁵² “Killing or wounding treacherously a combatant adversary”(8(2)(e)(ix)) and “[d]eclaring that no quarter will be given”(8(2)(e)(x)). The Defence notes that the use of the word “combatant” in this context demonstrates that even though the term “combatant,” strictly speaking in accordance with the usage of the law of armed conflict, applies only to members of armed forces, the term is also often used – as by the Defence in its Appeal submissions – as a short-hand for members of armed groups. Cf. Observations, paras.55-56 (implying that the notion of membership in armed groups does not exist).

⁵³ Observations, para.40.

⁵⁴ Observations, para.35.

“essentially *similar* criminal conduct.”⁵⁵ Reference to the text itself shows that not a single crime listed in sub-parts (b) and (e) is repeated in sub-parts (a) and (c). The fact that the same conduct may be simultaneously covered by different crimes in (a) and (b), or in (c) and (e), (such as for example wilful killing (8(2)(a)(i)) and an intentional attack against a civilian not taking an active part in hostilities (8(2)(b)(i)) no more creates redundancy than does the overlap between extermination and genocide, or persecution with a host of individual crimes that may be charged cumulatively as long as each crime has a materially distinct element from the other.⁵⁶ That standard is met for each and every crime in (b) and (e) even if the same status requirements apply as in respect of (a) and (c).

25. Fifth, the LRV’s cursory dismissal of the ICTY Statute as “unhelpful”⁵⁷ misunderstands its relevance and significance as an international act. As stated in Oppenheim, “[t]he circumstances of a treaty’s conclusion may be invoked to ascertain its meaning, since a treaty is not concluded as an isolated act but as part of a continuing series of international acts which shape and limit the circumstances with which the treaty deals.”⁵⁸ Articles 2 and 3 of the ICTY Statute contain the same bifurcated structure between treaty and customary crimes as is to be found in Article 8. Even the language of “within the established framework of international law” in Article 8(2)(b) and (e), referred

⁵⁵ Observations, para.35.

⁵⁶ *Delalić*, Appeal Judgement, 20 February 2001, para.412 (“multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.”); *Vasiljević*, Appeal Judgement, 25 February 2004 para.145 (“The jurisprudence of the Tribunal on this issue is settled and it holds that it is permissible to convict for a murder under Article 3 of the Statute and persecution by way of murder under Article 5 of the Statute as each of them has a materially distinct element from the other.”); *Kunarać*, Appeal Judgement, 12 June 2002, para.173.

⁵⁷ Observations, para.31.

⁵⁸ Oppenheim, p.1278. *See also* Gardiner, p.323 “Courts and tribunals, national and international appear to have no hesitation over using provisions in treaties other than the one being applied as aids to interpretation where the same, similar, or different term sheds light on the meaning under consideration.”

to in the Elements of crimes as the “the established framework of the international law of armed conflict,” bears a similarity of function, placement and language to the phrase “the laws or customs of war” in Article 3 of the ICTY Statute. Like Articles 8(2)(b) and (e), Article 3 of the ICTY Statute does not refer to any status requirement expressly; yet Article 3 had never been interpreted up until the date of the adoption of the ICC Statute as implying an elimination of the traditional status requirements – not even when international criminal law was extended to non-international armed conflicts through Article 3.⁵⁹

26. The point is not that this interpretation should or must be robotically adopted by Chambers of the ICC, but rather that the terms used in the Rome Statute must be interpreted in the light of a statutory antecedent that undoubtedly influenced the drafting of Article 8. In the language of Oppenheim, the proximity in time, similarity of language and structure, and paucity of other relevant international statutory instruments commends treating Articles 2 and 3 of the ICTY Statute as part of a “continuing series of international acts.”⁶⁰
27. Sixth, the relative gravity of the offences in the different sub-sections of Article 8(2) suggest no policy to eliminate status requirements for the crimes listed in (b) and (e). Generalizations about the gravity of different crimes are, indeed, a fraught and often pointless exercise.⁶¹ Gravity is nevertheless relevant insofar as the Decision posits, along with the LRV,⁶² that the architecture of Article 8 reveals a carefully crafted and deliberate policy to remove long-established status requirements in respect of some crimes, while leaving them in place for others. This explanation does not correspond, however, to the gravity of the crimes supposedly still subject to the status requirements. The crimes listed as

⁵⁹ Appeal, para.33.

⁶⁰ Oppenheim, p.1278.

⁶¹ Observations, para.36.

⁶² Observations, paras.25, 37-38, 48.

Grave breaches in Article 8(2)(a) include those falling consistently at the highest end of gravity, whereas 8(2)(b) includes such crimes as causing disproportionate damage to the environment; improperly seizing enemy property; pillage; and outrages upon personal dignity. The anomaly, which the LRV nevertheless rejects without elaboration as “highly implausible,”⁶³ created by the Trial Chamber’s interpretation is that status requirements are removed for crimes of relatively lesser gravity, but retained for the crimes of wilful killing, torture, wilfully causing great suffering, and extensive destruction. This result is a further indication that the structure of Article 8 does not reflect an unstated legislative intent to adjust the well-established status requirements for war crimes.

28. The Defence’s analysis of the structure, wording and drafting context of Article 8 is not “illogical”⁶⁴ nor are its arguments “unfounded.”⁶⁵ Rather, those arguments show that the Trial Chamber placed undue reliance on a supposed textual distinction between the *chapeau* of Articles 8(2)(a) and (c) on the one hand, and (b) and (e) on the other;⁶⁶ failed to pay adequate regard to the language of “within the established framework of international law” in its proper context;⁶⁷ placed undue and selective reliance on alleged redundancies and overlaps;⁶⁸ failed to cite any drafting history that would support an expansion of war crimes law that is not “within the established framework of international law”;⁶⁹ and ignored drafting history that is contrary to its interpretation.⁷⁰ These are errors of law that led to an erroneous interpretation of the ICC Statute that materially affected its conclusions in a manner than compel reversal of the Decision.

⁶³ Observations, para.36.

⁶⁴ Observations, paras.25, 37, 40,

⁶⁵ Observations, paras.25, 37.

⁶⁶ Appeal, para.28, 42.

⁶⁷ Appeal, para.27, 65.

⁶⁸ Appeal, para.39.

⁶⁹ Appeal, para.34.

⁷⁰ Appeal, para.40-45.

IV. Neither the text nor custom imply any exception to the status requirements for rape and sexual enslavement

29. The LRV asserts in support of the Decision that the drafters in successive drafts of Article 8 “move[d] the acts of rape and other forms of sexual violence under separate headings, as opposed to being just illustrations of grave breaches of the Geneva Conventions or serious violations of Common Article 3.”⁷¹ This purportedly indicates an “intention to expand the jurisdiction of the Court in respect of all sexual offences.”⁷²
30. First, this assertion must be read in light of the general reasons explaining the structure of Article 8 discussed in the previous section. The more evident intention is to group treaty crimes or prohibitions in (a) and (c), and customary crimes in (b) and (e). Hence, Article 8(2)(a) faithfully reproduces only Grave breaches, and Article 8(2)(c) only lists the prohibitions expressly set out in Common Article 3. This rationale also corresponds to the plain language of the *chapeaux* of Article 8(2)(b) and (e), which commence with the words “[o]ther serious violations of the laws and customs applicable” in armed conflict. This language indicates clearly the reason for the structure of Article 8. Limiting these crimes “within the established framework of international law” is a logical concomitant of their customary origin.
31. The LRV supports the view, shared by the Trial Chamber in different language, that the crimes of rape and sexual violence in sub-sections (b) and (e), but for the elimination of the status requirement, would be “purely semantic.”⁷³ The LRV, like the Trial Chamber, does not even articulate which crime in Article 8(2)(a) or (c) supposedly renders the crime of rape redundant or indistinct. “Torture”? “Inhuman treatment”? “Wilfully causing great suffering”? “Causing serious injury to body or health”? Each of those crimes has elements

⁷¹ Observations, para.24.

⁷² Observations, para.24.

⁷³ Observations, para.25; Decision, para.40.

materially distinct from rape and, accordingly, do not create redundancy. The argument not only ignores the plain wording of Article 8, but also ignores the landmark progression of war crimes law reflected in the textual recognition of these as distinct crimes. As explained by two commentators:

Article 8(2)(b)(xxii) gives explicit recognition to crimes of sexual violence [...] With the large-scale commission of serious sexual crimes both in the former Yugoslavia and in Rwanda, there was great sympathy for the inclusion of a separate provision in the definition of war crimes on sexual crimes. The provision was largely developed in the December 1997 session of the Preparatory Committee. Its primary purpose was to recognize explicitly these sexual and gender-based crimes, which as such are already implicitly covered by such more general concepts as torture and inhuman treatment.⁷⁴

32. The LRV argues,⁷⁵ in accordance with the Decision, that the triumvirate of the Martens clause, the rationale of international humanitarian law, and *jus cogens* compel the conclusion that the status requirements do not apply to the specific crimes of sexual violence in the ICC Statute. The LRV claims that the “dictates

⁷⁴ Von Hebel and Robinson, p.117. Cryer, p.292 (“The most important development in this area is the recognition that various forms of sexual violence amount to war crimes. Until recently, international law has done a poor job of dealing with the sexual abuses routinely committed against women. In most military cultures in the past, and in some military cultures today, licence to rape was seen as a reward for troops, an expected occurrence after the taking of a city or village, and a means of terrorizing and demoralizing the enemy. In such a climate, sexual violence has been pervasive in armed conflicts. While IHL has criminalized rape for centuries, this was not always explicit, and it was rarely prosecuted. IHL treaties, negotiated by men, tended to reflect the perspectives and concerns of men, and thus did not explicitly recognize sexual violence as a form of war crime. Article 27 of GC IV stipulated that women should be protected against rape, but did not make rape a grave breach. Sexual violence was mentioned again in the Additional Protocols I and II, but not as a crime. Moreover, it was listed as an example of ‘outrages upon personal dignity’, which treated rape as an attack on ‘honour’, trivializing the nature of the violation. The ICTY Statute did not list rape as a war crime (although it was listed as a crime against humanity). This lacuna triggered the efforts to establish that rape could fall within the definition of grave breaches, such as ‘torture’ or ‘inhuman treatment’. It also reinforced the need to establish that rape is a war crime per se. The ICTR Statute was an improvement, in that its war crimes provision expressly included rape, enforced prostitution and other forms of sexual violence. However, mirroring the language of Additional Protocol II, these were included as ‘outrages upon personal dignity’, thus maintaining the patriarchal perspective of rape as an assault on family honour. The ICC Statute took the further step, explicitly recognizing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other sexual violence as war crimes.”)

⁷⁵ Observations, paras.45-51.

of public conscience” and “humanity”⁷⁶ compel the non-application of the status requirements to the specific crimes of rape and sexual enslavement. The purported *jus cogens* status of these two crimes reinforces these “dictates” as being “fundamental to defining its ambit.”⁷⁷

33. This argument means that Common Article 3, which imposes the status requirements as a precondition for jurisdiction, violates the “dictates of public conscience”, “humanity” and *jus cogens* obligations. It means that the ICTY, ICTR, SCSL, ICRC, and any other international institution that has applied those status requirements to the crimes of rape and sexual enslavement have likewise violated their *jus cogens* obligations. It means that States that have incorporated or applied Common Article 3 without having removed the status requirement in respect of rape and sexual enslavement have violated their *jus cogens* obligations. Indeed, even the drafters of the ICC Statute, according to this reasoning, have violated *jus cogens* norms to the extent that any of the crimes listed in Articles 8(2)(a) and 8(2)(c) also have *jus cogens* status and yet are still expressly subject to the status requirements. This reasoning is manifestly unacceptable and would put the ICC at odds with all other international actors interpreting IHL, and even at odds with its own drafters. This cannot be consistent with the phrase “within the established framework of international law.”
34. The LRV has not even succeeded in demonstrating that those States that have adopted counterparts of Article 8 into their ICC implementing legislation or other instruments of national law⁷⁸ interpret sub-sections (b) and (e) as dispensing with the well-established status requirements arising from Common Article 3.

⁷⁶ Observations, para.47.

⁷⁷ Observations, para.49.

⁷⁸ Observations, paras.42-43.

35. The LRV does not offer any support at all, either in practice or elsewhere, for the view that the purported *jus cogens* or peremptory status of the crimes of rape and sexual enslavement eliminate status requirements for these crimes.⁷⁹ The quotation from Bassiouni does not support this view.⁸⁰ The LRV offers no answer to the problem that the Martens/rationale/*jus cogens* argument, if valid, sweeps away other jurisdictional elements as well: how, if the argument is correct, can the nexus requirement be permitted to preclude liability for rape in any circumstance, no matter how tenuously related to an armed conflict? LRV offers no criterion or explanation for distinguishing between eliminating some jurisdictional

V. The examples demonstrating the potentially wide scope of war crimes law in the absence of a status requirement are in no way “blatantly disrespectful” of any victim

36. The LRV alleges that the Defence’s arguments are “blatantly disrespectful for the victims recruited for sexual purposes in the UPC/FPLC.”⁸¹

37. The hypothetical examples provided by the Defence⁸² were neither disrespectful nor incorrect. Rather, they demonstrate two errors in the Trial Chamber’s reasoning: first, that the logic of “military advantage” or lack thereof posited by the Trial Chamber is not a relevant yardstick by which to determine jurisdiction;⁸³ second, that the nexus standard is too flexible, and too radical a departure from the “established principles of international law,” to constitute an acceptable jurisdictional threshold.⁸⁴ Applying a nexus standard only would open the door to international criminal jurisdiction in respect of

⁷⁹ Observations, paras.49-50.

⁸⁰ Observations, para.50.

⁸¹ Observations, para.48.

⁸² Appeal, para.50.

⁸³ Decision, paras.48-49; Appeal, para.50 (“[t]he objection to extending liability to this form of conduct is not that such conduct could ever be justified, but that it falls outside of the well-accepted jurisdictional scope of war crimes law.”)

⁸⁴ Decision, para.52.

crimes that have traditionally been understood to be the exclusive province of domestic law.

38. The nexus requirement as articulated in the ICC Elements of Crimes requires only that the conduct “took place in the context of and was associated with an international armed conflict.”⁸⁵ A classic definition of the minimum threshold is that “the perpetrator acted in furtherance of or under the guise of the armed conflict.”⁸⁶ Merely taking advantage of a coercive environment may, depending on the circumstances, satisfy the requirement.⁸⁷ The perpetrator need not necessarily be a combatant; the crime need not have taken place during combat; and the crime need not be physically proximate to fighting and can occur anywhere on the territory of the State or States in which the armed conflict is taking place.⁸⁸ Even crimes by a civilian against another civilian might satisfy the nexus requirement, again, depending upon whether the crime is committed within the context of a coercive environment or a particular pattern of offences.⁸⁹ This possibility has been explored by the late Judge Cassese through hypothetical examples without, presumably, being disrespectful to victims.⁹⁰

⁸⁵ Element of Crimes, p.13.

⁸⁶ *Kunarać*, Appeal Judgement, 12 June 2002, para.58.

⁸⁷ Triffterer, p.316.

⁸⁸ Triffterer, p.315; *Stakić*, Appeal Judgment, 22 March 2006, para.342; *Kunarać*, Appeal Judgment, 12 June 2002, para.58; *Hadžihasanović*, Trial Judgment, 15 March 2006, para.16; *Mrkšić*, Trial Judgment, 27 September 2007, para.423.

⁸⁹ Cassese, *The Nexus Requirement for War Crimes*, 2012, p.1413 (“However, if the perpetrator is a civilian, then it must be shown that the armed conflict created the situation and opportunity for the offence by, e.g. showing that the offence was carried out in accordance with the goals of the military campaign.”); Cassese, Gaeta and Jones, p.388 (“The requirement becomes problematic in particular in cases where civilians commit acts of brutality against other civilians. If, during an armed conflict, a person kills another person in a strictly private interpersonal conflict, this is an act which is not ‘associated’ in any way with the armed conflict. But if a party to a conflict establishes camps where civilians acting on behalf or with the encouragement of this party commits acts of brutality against inmates belonging to another group which is considered hostile to that party, these acts are indeed associated with the armed conflict.”).

⁹⁰ Cassese, *The Nexus Requirement for War Crimes*, 2012, pp.1413-1414 (“courts have struggled with hypothetical offences involving a civilian perpetrator and a civilian victim, e.g. where country A invades country B and civilian national of country B (civilian B) kills his neighbour. It is worth pausing on this example to provide greater clarification because whether or not the offence is characterized as a war crime will depend on the specific facts of the case. If civilian B’s neighbour is not a protected person, then at the start, there is no war crime. However, if the neighbour is a citizen

VI. The relative weight to be accorded to General Commentaries, including that of Judge Cassese, and specialist articles

39. The LRV implies that the opinion cited from the Third Edition of Judge Cassese's *International Criminal Law* is, in fact, not that of Judge Cassese himself because the 3rd edition of his book was published "two years after the death of Antonio Cassese."⁹¹

40. As stated in the preface to the 3rd edition, written by Professor Paola Gaeta:

Antonio Cassese passed away on 22 October 2011, while the third edition of *International Criminal Law* was in the final stages of preparation [...]. When he passed away, he had completed the updating and revision of his own chapters and revised those of the other contributors.⁹²

41. The Table of Contents confirms that Chapter 4, "War Crimes", is one of the chapters revised by Judge Cassese himself, rather than by one of the other revisers.⁹³

42. The LRV's insinuations to the contrary⁹⁴ are particularly inappropriate given that the 3rd edition is perfectly consistent with the views expressed by Judge Cassese in the 2nd edition:

War crimes may be perpetrated by *military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians* (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.⁹⁵

of country A and a protected person (civilian A), the court must determine whether there is a link between the offence and the armed conflict. The opportunity to commit the murder due to lawlessness during the armed conflict is not sufficient. The armed conflict must also have created the 'situation'. In this example, if civilians from country A are being persecuted in country B because they are associated with the enemy or opposing party of the armed conflict, the situational requirement may be met. Civilian B may have decided to kill civilian A for a number of reasons, but if the objective criteria are met, those reasons are irrelevant.").

⁹¹ Observations, para.53.

⁹² Cassese, p.xi.

⁹³ Cassese, p.vi.

⁹⁴ Observations, para.53.

⁹⁵ Cassese 2nd ed, p.82.

43. This confirms – unless the LRV alleges that Judge Cassese did not write the 2nd edition either – that the views expressed in the 3rd edition are those of Judge Cassese himself.
44. The LRV’s belittlement of this opinion as nothing more than a summary of ancient caselaw⁹⁶ ignores Judge Cassese’s stature, the generality of the language used in the text, and the nature of the text in which the statement appears. The assertion that the Defence’s “reading” of Judge Cassese is “selective and biased”⁹⁷ is unsupported and unsupportable.
45. Professor Byron’s views have not been misrepresented by the Defence, as the LRV claims.⁹⁸ The Defence expressly prefaced the passage quoted in the Appeal with the acknowledgement that Professor Byron stands out as “one of the most ardent supporters” of the position adopted by the Trial Chamber.⁹⁹ The purpose of the quotation, as is clear from the Appeal submissions, is to show that even a strong proponent of the innovation by the Trial Chamber candidly acknowledges that State practice offers no support for the claimed extension of war crimes law.
46. Professor Byron also candidly acknowledges that her chapter addresses a “problem”¹⁰⁰ to be overcome, and that she is presenting “lines of argument”¹⁰¹ to overcome that problem. She thus asserts, after noting the absence of express status requirements in Article 8(2)(b), that this “*suggests* that these Articles *may* have been intended to apply to all victims of sexual abuse within the territory of the States parties, or at least that the ICC *could* find that the Articles do so

⁹⁶ Observations, para.53.

⁹⁷ Observations, para.53.

⁹⁸ Observations, para.53.

⁹⁹ Appeal, para.59 (“Even one of the most ardent supporters of this innovation concedes that ‘[c]learly there is no evidence of states treating intra-forces sexual abuse as an international criminal offence.’”).

¹⁰⁰ Byron, p.32.

¹⁰¹ Byron, p.42.

apply.”¹⁰² She offers no analysis – and does not even note¹⁰³ – the phrase “within the established framework of international law.”

47. Interestingly, Professor Byron offers contrasting views of the position in international versus non-international armed conflict:

Therefore, it is submitted that in an international armed conflict, those who sexually abuse either child soldiers or camp followers can be individually criminally responsible for such abuse; but it would seem from the discussion above that in a non-international armed conflict only those who abuse camp followers or children without a continuous combat function could have individual criminal liability. This suggests that in a non-international armed conflict a soldier can sexually abuse child soldiers in his unit with impunity under international law. It is submitted that this is not in fact the case, or at the least, should not be the case before the ICC.¹⁰⁴

Professor Byron then asserts that Article 8(2)(e) could be used to reach such acts because, unlike Article 8(2)(c), it contains no express status requirement. However, Professor Byron, once again, does not even attempt to address the meaning of “within the established framework of international law.”

48. The LRV is, accordingly, wrong to assert that the Defence use of the term “activist commentators” reflects no more than self-serving bias.¹⁰⁵ A generalist treatise by an eminent judge and scholar has more value in determining the law as it is than a specialist article designed, as candidly acknowledged by the author, to move the law in a particular direction. Each form of scholarship is valuable and highly important, but not necessarily of equal utility in determining the state of the law as it is, rather than as it should perhaps be.

¹⁰² Byron, p.40.

¹⁰³ Byron, pp.37-43.

¹⁰⁴ Byron, para.47.

¹⁰⁵ Observations, para.53.

VII. The “use” of child soldiers is an “unusual war crime”

49. Cottier, writing in Triffterer, characterises the recruitment, enlistment and use of children in armed forces or groups as “[a]n unusual war crime.”¹⁰⁶ The LRV’s disagreement with this view¹⁰⁷ is unsupported by source, citation or argument.
50. Cottier’s characterization is correct and significant. The degree to which it is “unusual” underscores that the architecture of this crime is not to be casually extended to other war crimes: in fact, it stands in contrast to other war crimes to such a degree as to be “unusual.”
51. Undeterred by Cottier’s observation, the LRV persists that “there is no reason why such exceptions cannot also apply to other acts against committed against child soldiers, including rape and sexual slavery.”¹⁰⁸ There is such a reason: the war crime of use applies intra-force by the necessarily implications of the wording of the crime, whereas there is no such necessary implication in respect of the crimes of rape or sexual enslavement, or any other war crime, for that matter.
52. The LRV is wrong that it is “plainly false”¹⁰⁹ that the crimes of enlistment and conscription are committed against civilians. The crime – which by its very nature involve the transition from civilian to combatant status – is a crime that is characteristically committed against civilians. Cottier’s explanation that the provision applies to “*children belonging to another party to the conflict* or indeed of *any other child*”¹¹⁰ refers to allegiance or nationality, not those who are enemy combatants. “Re-recruitment” is nothing more than a new act of recruitment against a person who has regained civilian status.

¹⁰⁶ Triffterer, p.523; Appeal, paras.56, 58.

¹⁰⁷ Observations, para.65.

¹⁰⁸ Observations, para.65.

¹⁰⁹ Observations, para.64.

¹¹⁰ Triffterer, p.523.

VIII. No support is provided for the “jurisdictional estoppel” concept

53. The LRV asserts that the jurisdictional estoppel principle relied on by the Trial Chamber¹¹¹ is “confirmed by relevant international practice.”¹¹² Despite the purported existence of this “relevant international practice”, none was apparently found by the LRV. The LRV is, incidentally, wrong to assert that “recruitment establishes the nexus to [...] the armed conflict,”¹¹³ since recruitment can occur without the existence of any armed conflict at all.
54. The assertions in paragraphs 75 and 76 of the Observations are declarative, conclusory and, as demonstrated by the failure to cite any sources, unsupported by law or argument.

IX. There is no third category between civilians and combatants

55. The LRV asserts that the binary distinction between civilians and combatants is “debatable.”¹¹⁴ This is not only false, but dangerous, as is reflected in the misconceived and ultimately discredited attempt to create a legal vacuum under the phantom rubric of “unlawful combatancy” for prisoners at Guantanamo Bay. IHL defines only two mutually exclusive legal regimes for civilians and combatants:

The undisputed cornerstone of IHL is the principle of distinction between civilians and combatants, which obliges belligerents to distinguish at all times between persons who may be lawfully attacked, and persons who must be spared and protected from the effects of hostilities. In order to avoid such ambiguity, these two categories of persons must be mutually exclusive and absolutely complementary. In other words, in a situation of armed conflict, every

¹¹¹ Decision, para.53.

¹¹² Observations, para.74.

¹¹³ Observations, para.75.

¹¹⁴ Observations, para.78.

person is either a legitimate target (military objective) or a protected person—*tertium non datur*.¹¹⁵

56. The LRV also, confusingly, argues that “it would be unreasonable to suggest that adult members of an armed group may lawfully attack children recruited by the same group under IHL.”¹¹⁶ The Defence does not assert that an armed group may lawfully attack its own soldiers under international law, only that the opposing force may lawfully attack those soldiers.
57. The source of this confusion may be the LRV’s apparent view that the armed force that engages in the recruitment may be characterized as “the enemy” of the child soldier within the meaning of the UK Joint Service Manual.¹¹⁷ This means that any perpetrator is “the enemy.” This is a terminological abuse that has no support in law, and is certainly not compatible with the UK Joint Service Manual.¹¹⁸
58. The LRV proposes that one and the same person could be a combatant *vis-à-vis* the enemy, but “not combatant (sic) *vis-à-vis* the recruiting armed group.”¹¹⁹ The argument is obscure in meaning, but incorrect if the LRV is suggesting that a person can be a combatant for so-called “targeting purposes”, but not a

¹¹⁵ Melzer, pp.296-297. See also Cameron, p.587; *Targeted Killings* case, paras.28, 31; ICRC, CIHL, Vol. I, pp.3-8 (where only two possible statuses are discussed); Dörmann, p.46 (discussing statuses other than civilians and combatants being absent from the legal framework of IHL).

¹¹⁶ Observations, para.79.

¹¹⁷ Observations, para.44.

¹¹⁸ Appeal, para.65, 67; UK Joint Service Manual, paras.4.11-4.12 (“If 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. It is not for officers and soldiers to concern themselves with the status of captured enemy personnel. In all cases of doubt as to the status of a captured person who has taken, or is believed to have taken, part in hostilities, that person must be treated as a prisoner of war until a properly constituted tribunal has determined his proper status.”), and thereby put at risk the successful completion of the military mission and/or the safety of other personnel’); Clapham, Gaeta and Sassòli, *The 1949 Geneva Conventions: A Commentary* p.1073 (“[I]n order to be protected under CG IV, a person needs to be ‘in the hands’ of a party to the conflict of which he or she is not a national (article 4 paragraph 1 CG IV). If ‘in the hands’ is understood to mean ‘subject to the jurisdictional authority of’ then, according to the traditional philosophy that animates international law, a civilian would be in the hands of a party either when he or she is in the party’s own territory or military occupation.”)

¹¹⁹ Observations, para.70.

combatant for so-called “protection purposes.” Common Article 3 suggests no such distinction. The provision applies only to “[p]ersons taking no active part in hostilities.” Acts are prohibited only “with respect to the above-mentioned persons.” The prohibited acts, which are confined to “the above-mentioned persons” are not limited only to unlawful targeting, but also “outrages upon personal dignity, in particular humiliating and degrading treatment” and “taking of hostages”. The two purposes of “targeting” and “protection” are unified in the text of Common Article 3. There is no textual support in Common Article 3 for the proposition that its protections are to apply beyond “[p]ersons taking no active part in hostilities” are that this phrase is be interpreted differently depending on whether the violation concerns “targeting” or “protection.”

X. The LRV misunderstands the significance of continuous combat function, and incorrectly asserts that a soldier ceases to take an active part in hostilities for the duration of a crime against them

59. The LRV asserts that the Defence position is that the continuous combat function somehow means that “adult members of an armed group may lawfully attack children recruited by the same group under IHL.”¹²⁰
60. The “continuous combat function”¹²¹ is simply a test for determining whether a person is a member of an armed group and, accordingly, is taking an active part in hostilities in a non-intermittent way, similar to the status of a combatant in an armed force. If this is the case, then the person may be lawfully targeted by the opposing force even when not immediately involved in combat. A crime by a soldier against a fellow soldier in the same force is not “legitimise[d]”¹²² by the continuous combat function; rather, the crime does not fall within the scope of war crimes law because the person is not at the material time “taking no active part in hostilities.”

¹²⁰ Observations, para.79.

¹²¹ Observations, para.79.

¹²² Observations, para.79.

61. The LRV appears to assert that a member of an armed group or even a fully-fledged combatant in an armed force ceases to be taking an active part in hostilities for the duration of any crime being committed against them by a fellow soldier.¹²³ This argument – which is not referred to or relied upon in the Decision – is incompatible with the notion of combatancy/membership. A person who is a combatant or a member of an armed group does not drift and out of that status depending on what they are doing, or what is being done to them. The LRV's position would mean all intra-force crimes are subject to the jurisdiction of IHL because, at the relevant time, all the victims thereof were civilians.¹²⁴ No State practice nor any commentary supports this view, and none is cited by the LRV.
62. The LRV appears to question whether non-state armed forces can even have members at all, rather than just consisting of an agglomeration of civilians directly participating from time to time.¹²⁵ This is not correct, as is abundantly illustrated not only by Melzer and other sources, but also by the use of the term “combatant” in Article 8(2)(e)(ix) in respect of non-international armed conflict without limitation to armed forces. This terminology reflects the equal applicability, and symmetry, of the concept of “combatant” and membership in respect both of State armed forces and non-State armed groups in non-international armed conflict.

XI. The “membership” of the child soldiers is not a question of fact

63. The LRV adopts two different positions, one general and one specific, in relation to whether the “child soldiers” were members/not taking no active part in the hostilities. The general position – relying on submissions of the Prosecution – is that the “child soldiers,” regardless of whether they can be described as members of the UPC, were “taking no active part in the

¹²³ Observations, para.84.

¹²⁴ Observations, para.84.

¹²⁵ Observations, paras.54-56.

hostilities” nonetheless.¹²⁶ The more specific position is that the child soldiers could not be taking an active part in the hostilities at the specific moment of the crimes of rape and sexual enslavement and, accordingly, were at those precise moments, “persons taking no active part in hostilities.”¹²⁷ The LRV also posits that child soldiers cannot, as a matter of law, be members of an armed group¹²⁸ and that the issue is purely one of fact and, therefore, cannot be jurisdictional.¹²⁹

64. The LRV’s assertion that child soldiers cannot be members of an armed group¹³⁰ is wrong. Individuals, regardless of age, can become a combatant or a member of an armed group even if their recruitment, enlistment and/or conscription was unlawful.¹³¹ The criteria for establishing such membership is well-established and children may be lawfully targeted on the basis of such membership.¹³²
65. The general version of the argument that the child soldiers were not taking an active part in hostilities is contrary to the Prosecution’s position in the Confirmation Submissions;¹³³ the view of the Pre-Trial Chamber in the

¹²⁶ Observations, para.72.

¹²⁷ Observations, paras.81, 84

¹²⁸ Observations, para.72.

¹²⁹ Observations, para.17.

¹³⁰ Observations, para.70.

¹³¹ Bosch, p.338 (“AP I article 77 affords captured child soldiers POW status, and that this can only occur ‘if they have previously attained the primary status of combatants by being unlawfully recruited into the armed forces of one of the parties to the conflict’. This confirms that in principle there is no obstacle to awarding children combatant status”. See also Smith, p. 262: ““Despite the illegality of child recruitment, once a child has been conscripted or enlisted or is being used to participate actively in hostilities, that child becomes a combatant for the purposes of international humanitarian law.”)

¹³² *Sesay*, Trial Judgement, 2 March 2009, para.1721 (“The Chamber finds that these acts, by their purpose, were directly linked to combat by the fact that they typically occurred while the children were armed and in the company of adult fighters and Commanders. In these circumstances, and emphasising the prevailing context of guerilla warfare, the children would constitute legitimate military targets for ECOMOG or Kamajor forces as they would be perceived as actively participating in hostilities”); See also Bosch, p.341 (“The legal consequence of a decision to participate in hostilities, can result in the loss of their ‘inviolability as non-combatants’, and can make child soldiers a legitimate military target.”)

¹³³ Prosecution Submissions on Confirmation of Charges, paras.188-189, 193.

Confirmation Decision;¹³⁴ and the position adopted in the Pre-Trial Brief expressly referring to the child soldiers as members of the UPC/FPLC and the description of their functions in the UDCC and the Pre-Trial Brief.¹³⁵ The LRV should not be permitted to rely on a substantial change of position as to the basis on which the charges were confirmed and subsequently elaborated.¹³⁶

66. The general version of the argument is, in any event, not legally viable. The assertion that the child soldiers are members in the UPC, as described in the Prosecution submissions, but also taking no active part in hostilities, is simply not compatible with the established framework of international law, in particular, the law of armed conflict.¹³⁷ Saying otherwise does not make it so. The LRV herself recognizes that concepts under IHL are not infinitely malleable, and that some categorizations are legally “mutually exclusive.”¹³⁸ The Defence agrees with this general principle, and asserts that being a member of the UPC is mutually exclusive with taking no part in hostilities unless and until the person becomes *hors de combat*.
67. A person who is a combatant or member of an armed group does not intermittently move in and out of that status depending on what they are doing at any particularly moment, still less just for the time that they are being victimized. This proposition, if accepted, would imply that all intra-force crimes are within the jurisdiction of the law of armed conflict. The absence of any State practice whatsoever in support of this approach – as reflected in the lack of even a single citation in the LRV’s submissions – speaks for itself. It would also imply that combatancy and membership in a force or group would be shifting constantly in a manner that would undermine the clarity of the

¹³⁴ Confirmation Decision, para.78.

¹³⁵ Pre-Trial Brief, paras.198, 413, 436.

¹³⁶ Observations, para.17.

¹³⁷ Appeal, paras.9-10, 13-16.

¹³⁸ Observations, para.84.

distinction between civilians and combatants that is the cornerstone of the law of armed conflict.

68. The Trial Chamber, in any event, correctly did not try to avoid the issue by characterizing it as one of fact. Instead, the Decision found that active participation and membership were no bar to jurisdiction.¹³⁹ The Chamber's approach is unsurprising given the strenuous efforts of the LRV and the Prosecution to show that the Status Requirements do not apply to the child soldiers described in Counts 6 and 9 and that it make no difference whether they were taking an active part in hostilities within the meaning of Common Article 3. It is difficult to understand why these voluminous submissions are necessary if the true position is that the child soldiers were, after all, simply civilians.
69. The issue of whether the children are members and actively participating is not, as claimed by the LRV,¹⁴⁰ purely a question of fact to be deferred until the end of trial. The law of armed conflict prescribes a framework in which some characterizations are incompatible with others. A person cannot at one and the same time be a civilian and a combatant. The UDCC and auxiliary documents, expressly and by necessary implication, describe the child soldiers within Counts 6 and 9 as being members of the UPC/FPLC not taking no active part in hostilities.¹⁴¹ This is a jurisdictional issue and not a question of fact.

¹³⁹ Decision, para.53 ("to the extent that these persons could be considered as having been conscripted or enlisted into the UPC/FPLC, the Chamber considers it appropriate to stress that, as a general principle of law, there is a duty not to recognize situations created by certain serious breaches of international law [...] the Chamber finds that members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery.")

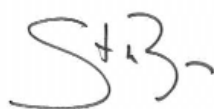
¹⁴⁰ Observations, para.17.

¹⁴¹ Appeal, paras.10-17.

CONCLUSION

70. Counts 6 and 9, as pleaded, do not fall within the Court's jurisdiction. This implies no disrespect to victims. On the contrary, the ICC exists above all else to vindicate the rule of law without regard to any particular outcome. Indeed, adherence to the rule of law can be an appropriate engine of change where results are considered unacceptable. An excessively flexible elucidation of the law and legal concepts can, on the other hand, lead to a fragmentation of not only the concepts of the law of armed conflict, but also the unanimity of various international institutions and States whose agreement is absolutely vital to the purchase of law in war. The doctrinal and institutional integrity of the law of armed conflict is too high a price to pay even when the goal is to criminalize apparently reprehensible conduct, especially when the same conduct could have been reached within the established framework of the law of armed conflict.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF MARCH 2017

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands