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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

Former child soldiers' Response to the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges"

Source: **Office of Public Counsel for Victims (CLR1)**

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

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I. INTRODUCTION

1. The Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9 of the DCC is unfounded and shall be dismissed. The Common legal representative of the former child soldiers (the "Legal Representative") submits that the Defence's approach is flawed for several reasons. First, the Defence seeks to interpret the scope of protection of child soldiers under international humanitarian law ("IHL") exclusively by reference to the Geneva Conventions, and more specifically to common article 3 thereof. Given that the prohibition on the recruitment of children was only recognised for the first time several decades later, in the context of the drafting of the Additional Protocols, the Legal Representative submits that the Geneva Conventions are of limited relevance to the resolution of the issues arising from the Defence's challenge. The thrust of said challenge therefore contravenes basic rules of interpretation, by seeking to infer an intention to exclude child soldiers from the scope of protection under IHL where no such intent could have reasonably existed at the time of the drafting.

2. Second, the "established framework of international law" referred to in article 8(2)(e) of the Rome Statute is clearly not limited or restricted to the Geneva Conventions, but also comprises a plethora of international instruments both in the fields of international humanitarian law and international human rights law. In the context of these proceedings, the Defence cannot exclusively rely on the Geneva Conventions while disregarding or minimising the significance of more recent IHL instruments, such as the Additional Protocols, which established for the first time specific protections for the benefit of children. Third, the Defence's suggestion that IHL does not protect child soldiers against criminal acts perpetrated by members of the armed group which recruited them relies on a false premise, and is inconsistent with and directly contradicted by the criminalisation of the acts of enlistment, conscription and use of child soldiers in hostilities.

3. Lastly, the Defence relies on the jurisprudence of *ad hoc* tribunals and quotes several commentators in support of the proposition that counts 6 and 9 of the Updated Document Containing the Charges (the "DCC") fall outside the jurisdiction of the Court. Despite the considerable number of sources relied upon, none of the material referred to directly supports the Defence's claim that acts of sexual slavery and rape do not constitute war crimes when the victims of these acts are child soldiers below the age of 15.

II. SUBMISSIONS

A. The Requirements of Article 19(4) of the Rome Statute

4. The Legal Representative submits that the Defence previously raised similar arguments with regard to the nature of the crimes in counts 6 and 9 of the DCC at the pre-trial stage.[1] Although the Defence did not frame its arguments in the form of a jurisdictional challenge, the previous arguments are essentially identical to those being raised in the present challenge[2] and must therefore be treated as jurisdictional by the Chamber. Pursuant to article 19(4) of the Rome Statute, a party can raise a jurisdictional challenge twice only on an exceptional basis and upon demonstrating the existence of compelling reasons.

5. The Legal Representative posits that the Chamber should take a strict approach when deciding on the admissibility of the second Defence's challenge. Indeed, the "exceptional circumstances" requirement imposes a particularly high threshold on the challenging party. No exceptional circumstances exist when a party raises a second jurisdictional challenge on the basis of the same arguments considered and dismissed at pre-trial. A second challenge should not be used as an

[1] See the "Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges", No. ICC-01/04-02/06-292-Red2, 14 April 2014, paras. 251-262.
[2] See the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges", No. ICC-01/04-02/06-1256, 7 April 2016, para. 16 (the "Challenge").

avenue to review the propriety or the correctness of previous decisions at pre-trial.[3] Nonetheless, the Legal Representative notes that the Chamber must, in any event, "*satisfy itself that it has jurisdiction in any case brought before it*".[4] It has therefore discretion to decide on the appropriate procedure to be followed and on the timing of its decision on jurisdiction. The Legal Representative therefore leaves it to the discretion of the Chamber to either consider the merits of the Defence's challenge or dismiss it *in limine*.

B. Article 8(2)(e)(vi) of the Rome Statute is subject to the contemporary requirements of international law, not only those in force in 1949

6. The Legal Representative takes no issue with the Defence's submission that the crimes set out in articles 8(2)(e)(vi) are subject to the requirements of international law. This conclusion stems from the plain wording of article 8(2)(e) of the Rome Statute. However, two issues bear emphasis in this respect. First, the Defence contends that the Prosecution's arguments regarding the limited relevance of international humanitarian law standards have been rejected by the Appeals Chamber.[5] This is plainly incorrect. The Defence improperly relies on a citation from the Appeals Chamber's Judgment regarding article 3 Common to the Geneva Conventions and the notion of "protected persons".[6] However, this reference *per se* does not make any definitive finding regarding the relevance of these provisions to the Defence's challenge, since the Appeals Chamber clearly indicated that "*nothing in the present judgment should be interpreted as predetermining this matter*".[7] Thus, it remains for Trial Chamber VI to make its own interpretation of the law applicable to

[3] The Legal Representative cannot but note that the Defence it did not, however, seek leave to appeal the Confirmation Decision with respect to this issue whereas it did request leave to appeal on other grounds. See the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014", No. ICC-01/04-02/06-312, 16 June 2014.
[4] See article 19(1) of the Rome Statute.
[5] See the Challenge, *supra* note 2, para. 16.
[6] *Ibid.*, para. 15.
[7] See the "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" (Appeals Chamber), No. ICC-01/04-02/06-1225 OA2, 22 March 2016, para. 31.

article 8(2)(e)(vi) of the Rome Statute, and may ultimately find merit in the Prosecution's contention that there "*is no reason to limit the fundamental protection against crimes of sexual violence by reference* […] *to international humanitarian law standards*".[8]

7. Second, the Legal Representative notes that the reference in the *chapeau* element of article 8(2)(e) to the "*established framework of international law*", does not imply that the Geneva Conventions are the only relevant legal instruments to the determination of this challenge. The "*established framework of international law*" is indeed a much broader notion, which comprises not only international humanitarian law standards but also international human rights norms. Relevant international human rights instruments include the "Convention on the Rights of the Child",[9] the "Convention on the Worst Forms of Child Labour"[10] and the "African Charter on the Rights and Welfare of the Child".[11] Even the Geneva Conventions alone are not reflective of the full the breadth and depth of international humanitarian law. Since 1949, the Geneva Conventions have been clarified and supplemented by the two Additional Protocols to the Geneva Conventions of 1977 (respectively "Additional Protocol I" and "Additional Protocol II"),[12] which have been ratified by an overwhelming majority of countries. Crucially, the adoption of the Rome Statute and

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[8] See the Challenge, *supra* note 2, para. 16.

[9] UN, Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, available at the following address: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.

[10] ILO, Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour, 17 June 1999, available at the following address: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182

[11] OAU, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 1990, entered into force on 29 November 1999, available at the following address: http://pages.au.int/acerwc/documents/african-charter-rights-and-welfare-child-acrwc.

[12] See the "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts" ("Additional Protocol I"), 8 June 1977, ratified by 174 States and the "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"), 8 June 1977, ratified by 168 States. The two Protocols are available at the following address: https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

the establishment of the International Criminal Court constituted a major step in this evolutionary process.

8. All these factors make it clear that the law of armed conflicts as reflected in the instruments adopted in 1949 does not fully reflect the current legal regime applicable to the present proceedings. The "*established framework of international law*" referred to in the Rome Statute should not be conceived as an immutable body of law. Indeed, particular care must therefore be taken when relying on the Geneva Conventions to determine the scope of protection available under international humanitarian law. This is particularly the case for the protection of "child soldiers", as explained in further details *infra*.

C. The suggestion that war crimes cannot be committed against members of the same group is without merit

i. The argument is inconsistent with the requirements of the war crimes specific to child soldiers, as interpreted by international courts and tribunals

9. The Defence's argument that war crimes do not cover the acts committed by members of the recruiting group against child soldiers is directly contradicted by the approach taken by international courts and tribunals with respect to the crimes specifically applicable to child soldiers. For instance, it is well established that the war crime of using child soldiers to participate actively in hostilities set out in article 8(2)(e)(vii) of the Rome Statute is necessarily perpetrated by members belonging to the recruiting group. In the *Lubanga* case, the accused was convicted for recruiting children into an armed group which was under his authority and control. The judgment's disposition clearly identifies the accused "[guilty] *of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using*

them to participate actively in hostilities".[13] This approach is also confirmed by the jurisprudence of the Special Court for Sierra Leone.[14]

10. Acceptance of the Defence's argument as reflective of a general principle of international humanitarian law can only lead to unsound and irrational consequences. Applying the Defence's argument to the crime of using children under the age of 15 to participate actively in hostilities set out in article 8(2)(e)(vii) of the Rome Statute, would mean that the Court would have no jurisdiction over said crime when committed by the members of the UPC/FPLC. Rather the Court would only be able to exercise its jurisdiction in cases where the perpetrators recruit children below the age of 15 and train them to fight in the ranks of the opposing armed group(s). Such a position is plainly absurd.

ii. *The irrelevance of common article 3 of the Geneva Conventions to the determination of the scope of protection for child soldiers*

11. At the time of the adoption of the Geneva Conventions, the prohibition on the recruitment and use of children by armed groups did not exist. International humanitarian law did not criminalise these acts, nor was there any specific legal protection for children affected by an armed conflict. The very notion of "child soldier" did not have a legal existence. Children affected by armed conflicts were only protected under the general regime applicable to the civilian population.[15] Under this rudimentary legal regime, it was possible to suggest that children, when recruited into an armed group, become "members" of that group, and would receive the same treatment afforded to adult members on the basis of their status as

[13] See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, para. 1358 (emphasis added).
[14] See for instance STSL, *Sesay* et al., SCSL-04-15-T, Judgement, 2 March 2009; *Charles Taylor*, SCSL-03-01-T, 18 May 2012.
[15] See PLATTNER (D.), "Protection of Children in International Humanitarian Law", *International Review of the Red Cross*, 30 June 1984, No. 240, available at the following address: https://www.icrc.org/eng/resources/documents/article/other/57jmat.htm.

combatants. By the same token, children could only qualify as "protected persons" if the criteria specified in common article 3 of the Geneva Conventions were met.

12. This situation changed radically with the adoption of the Additional Protocols to the Geneva Conventions, which introduced for the first time measures specifically designed to protect children.[16] Most importantly, these Protocols ban the recruitment of children under the age of fifteen.[17] Ever since, even if recruited as combatants into an armed group, children became the subject of a specific protection under international humanitarian law.[18] The prohibition relating to the recruitment of child soldiers and the fact that they must not be allowed to take part in hostilities constitutes norms of customary international law applicable in both international and non-international armed conflicts.[19] These measures were not only designed to protect children against opposing armed groups, but also against the recruiting group. Moreover, the protective measures specified in Additional Protocol II are listed in an open-ended fashion, as evidenced by the wording used in the *chapeau* of article 4(3).[20] By acknowledging their special status as a vulnerable group, the Additional Protocols unequivocally recognised that the conditions for the protection

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[16] The Appeals Chamber in the *Lubanga* case recognised that the provisions in international humanitarian law which deal specifically with children are found in the Additional Protocols and not in the Geneva Conventions. See the "Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber"), No. ICC-01/04-01/06-3121-Red, 1 December 2014, paras. 324-325.

[17] See Additional Protocol I, article 77(2) which read as follows: "*The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest*" and Additional Protocol II, article 4(3)(c) which read as follows: "*Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities*".

[18] See Additional Protocol I, article 77(3) and Additional Protocol II, article 4(3)(d).

[19] See HENCKAERTS (J-M.) and DOSWALD-BECK (L.), *Customary International Humanitarian Law*, Vol. 1, Rules, ICRC, Cambridge University Press, 2005, pp. 479-489 (Rules 135, 136 and 137). Also available at the following address: https://www.icrc.org/customary-ihl/eng/docs/v1_rul.

[20] The *Chapeau* of article 4(3) reads as follows: "*Children shall be provided with the care and aid they require, and* in particular […]" (emphasis added).

of children are not limited to the scenarios specified in common article 3 of the Geneva Convention.[21]

13. Thus, the Defence's hefty reliance on common article 3 of the Geneva Conventions and rule 47 of the ICRC Rules of Customary IHL is misplaced. Incidentally, the Legal Representative notes that the Defence is privy to said Rules but rules 135, 136 and 137 thereof seem to have escaped its reading.[22] As outlined *supra*, suggesting that children are only entitled to the protection available under common article 3 of the Geneva Convention while disregarding other international legal instruments dealing specifically with the rights of children simply contravenes most elementary rules of interpretation. First, the Defence fails to explain how the drafters of the Geneva Conventions could have intended to exclude child soldiers from the scope of protection afforded under IHL at a time when the very notion of "child soldiers" did not exist. Second, the Defence fails to demonstrate how contemporary IHL could be interpreted so as to enable the treatment of "child soldiers" as regular "members" of the armed group despite the clear customary prohibition on the recruitment/use of child soldiers. Third, the Defence does not explain why the Chamber should exclusively rely on common article 3 of the Geneva Conventions and not on the remaining body of international law.

iii. IHL protects child soldiers against all acts committed by the recruiting armed group in breach of its duties of "care" or "aid"

14. As demonstrated *supra*, IHL – at least since the adoption of the Additional Protocols – provides a framework for the protection of child soldiers not only against crimes committed by opposing armed groups, but also against all acts perpetrated by

[21] The complementary nature of these two provisions was implicitly recognised in the UN Secretary-General Report on the establishment of a Special Court for Sierra Leone: "*Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law*". See UN Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, para. 14.

[22] See *supra* note 19 and accompanying text. See also *infra*, para. 16.

the recruiting group. The legal basis for such protection is not, as argued by the Defence,[23] common article 3 of the Geneva Conventions which deals with the protection of civilians in general or forces *hors combat*, without addressing the specific situation of children. For the purposes of the present discussion, it is therefore not only irrelevant but also unnecessary to delve into the details of the requirements for protection under common article 3 (*i.e.* the conditions for being *hors combat* or the definition of "laying down their arms").

15. Rather, the protection afforded to child soldiers stems from article 4(3) of Additional Protocol II[24] which makes it clear that the protection attaches to their status as "children", irrespective of their involvement in the conflict or of the identity of the recruiting group. The prohibition on the recruitment/use of children provided for in article 4(3)(c) of Additional Protocol II is an unambiguous indication that IHL applies to acts committed by the recruiting group against child soldiers. Moreover, the *chapeau* of article 4(3) establishes a general framework for the protection of children affected by a non-international armed conflict: "[c]*hildren* shall *be provided with the care and aid they require* […]".[25] These mandatory requirements for "care" and "aid" clearly protect children against acts of rape and sexual slavery, whether committed by the recruiting group or any other armed group. Thus, any crime committed by the recruiting group against children in breach of its duties of "care" and "aid" would qualify as a violation of the "fundamental guarantees" enshrined in article 4 of Additional Protocol II.

16. This approach is consistent with and reflects the current state practice to protect all children affected by an armed conflict from all forms of sexual violence. Rule 135 of the ICRC rules of customary international humanitarian law clarifies that:

[23] See the Challenge, *supra* note 2, paras. 17-22.
[24] For the purpose of the present discussion, article 77(3) of Additional Protocol I will not be commented upon since it concerns international armed conflict.
[25] Emphasis added.

> *"Practice indicates that the special respect and protection due to children affected by armed conflict includes, in particular:*
> • ***protection against all forms of sexual violence*** *(see also Rule 93);*
> • *separation from adults while deprived of liberty, unless they are members of the same family (see also Rule 20);*
> • *access to education, food and health care (see also Rules 55, 118 and 131);*
> • *evacuation from areas of combat for safety reasons (see also Rule 129);*
> • *reunification of unaccompanied children with their families (see also Rules 105 and 131).*"[26]

17. Moreover, the UN Secretary-General Report on the establishment of a Special Court for Sierra Leone identifies all acts of sexual violence and sexual slavery as grave breaches of customary international law, without setting any restriction on the categories of persons who may be victims of these war crimes:

> "*The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular* nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated,* are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime".[27]

18. Lastly, the Defence's reliance to the RUF Trial Judgment is misplaced.[28] First, the findings made therein focus on the specific situation of international armed conflicts, whereas the present case concerns a non-international armed conflict. Second, the Judgement referred to by the Defence is of limited relevance since it does not address the specific acts of rape and sexual violence committed against child soldiers forcibly recruited into the ranks of an armed group. Indeed, the specific

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[26] See HENCKAERTS (J-M.) and DOSWALD-BECK (L.), *op.cit. supra* note 19, p. 481 (emphasis added). Also available at: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule135.
[27] See UN Security Council, "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone", *supra* note 21, para. 12 (emphasis added).
[28] See the Challenge, *supra* note 2, para. 21.

findings cited by the Defence relate to the killing (as opposed to rape/sexual slavery) of a regular soldier (as opposed to child soldier), who was a *hors de combat* member of the AFRC fighting alongside the RUF.[29] A cautious approach is therefore warranted given the different nature of the conflict, the distinct status of the victims and the different nature of the war crimes alleged.

iv. In any event, child soldiers cannot be regarded as regular "members" of an armed group

19. Child soldiers have a different legal status than regular members of an armed group. Not only do they benefit from specific protective measures under international law, but they are also not criminally responsible for their own acts. All the obligations and duties set out in the Geneva Conventions, including those mentioned in common article 3, are addressed to members who have the ability to distinguish between a military and non-military objective and who can identify protected persons such as civilians, soldiers who have laid down their arms or are otherwise *hors combat*. Put simply, the international law of armed conflict is not intended to regulate the conduct of child soldiers, but is rather designed to protect children from the consequences of the conflict. In fact, the very acts of recruitment and use of children to participate in hotilities are criminalised.[30] To recognise them as "members" of the armed group would thus be inconsistent with the purpose of protection of children and the criminalisation of their recruitment.

20. In line with this approach, the UN Secretary-General Report on the establishment of a Special Court for Sierra Leone establishes a clear distinction between child soldiers and other adult members of the recruiting group:

> "*The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child*

[29] See STSL, *Sesay* et al., SCSL-04-15-T, Judgement, 2 March 2009, paras. 1451-1454.
[30] See *supra* paras. 12 to 15.

> *combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.*
> *The solution to this terrible dilemma with respect to the Special Court could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice*".[31]

D. The Defence misrepresents counts 6 and 9 of the Updated DCC

21. The Defence incorrectly relies on the Prosecution previous submissions, including the Pre-Trial Brief, to suggest that the Prosecution refers to child soldiers as "members" of the same armed group. Whether the Prosecution properly used or misused the term "members" to describe UPC/FPLC child soldiers is immaterial to the resolution of the jurisdictional challenge.

22. For the purposes of the present proceedings, the subject of the Chamber's assessment is whether the charges and the underlying facts and circumstances, as confirmed by the Pre-Trial Chamber and reflected in the Updated DCC, fall within the subject-matter jurisdiction of the Court. The aim of the present proceedings is clearly not to assess the correctness of the factual submissions of parties and participants concerning the merits of the case,[32] but rather to determine whether "*the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute cannot, as a*

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[31] See UN Security Council, "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone", *supra* note 21, paras. 31-32.
[32] In this sense, see the "Former child soldiers' 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'", No. ICC-01/04-02/06-814, 9 September 2015, para. 11.

matter of law, cover rape and sexual slavery of child soldiers".[33] This approach is also in line with the guidelines set out the *Pre-Trial Practice Manual*, which underline the need to distinguish "*between the charges and the Prosecutor's submissions in support of the charges*".[34] The *Manual* clarifies that the scope and contours of the case are defined in "*the charges as confirmed by the Pre-Trial Chamber*".[35] Those charges are distinguishable from other "subsidiary facts", which are "*relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally 'evidence'*".[36]

23. The Updated DCC does not contain any reference to children as being "members" of the UPC/FPLC. The Defence's attempt to rely on other submissions and subsidiary facts presented by the Prosecution cannot form a proper basis for its jurisdictional challenge. Moreover, the Appeals Chamber's observation that the membership of the child soldiers in the UPC/FPLC is "*undisputed for the purpose of this appeal*"[37] does not make this particular fact part of the charges, nor does it imply that any undisputed fact would be binding on the Trial Chamber. Indeed, any agreement as to evidence in this case must adhere to the procedures laid out in rule 69 of the Rules of Procedure and Evidence.[38] Only after the parties have formally notified their agreement can the Trial Chamber "*consider such alleged fact as being proven*", or otherwise authorise "*a more complete presentation of the alleged facts* […] *in the interests of justice, in particular the interests of the victims*".

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[33] See the "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'" (Appeals Judgment), No. ICC-01/04-02/06-1225 OA2, 22 March 2016, para. 40.

[34] See ICC, *Pre-Trial Practice Manual*, September 2015, p. 11. The Manual is available at the following address: https://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf.

[35] *Ibid.*, p. 15: "*In terms of the factual parameters of the charges, article 74(2) provides that the article 74 decision 'shall not exceed the facts and circumstances described in the charges'. The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial*".

[36] *Idem.*, p. 12.

[37] See the "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" (Appeals Judgment), No. ICC-01/04-02/06-1225 OA2, 22 March 2016, para. 37.

[38] As well as the procedure established by the Chamber in the Decision on the conduct of proceedings. See the "Decision on the conduct of proceedings", No. ICC-01/04-02/06-619, 2 June 2015, para. 54.

E. Assuming arguendo *that child soldiers are* "members" *of the UPC, the notion of membership is still compatible with* "taking no active part in hostilities"

24. As demonstrated *supra*, the Legal Representative takes issue with the Defence's submissions regarding (1) the relevance of common article 3 of the Geneva Conventions and (2) the notion of "membership" in an armed group. Notwithstanding this disagreement, the Legal Representative submits that even if, by extraordinary, the Chamber were to adopt the position advocated by the Defence on these two issues, UPC/FPLC child soldiers would still be protected under the Geneva Conventions as "*they do not take active part in hostilities*".

25. The Defence's argument that the expression "*taking no active part in hostilities*" should be interpreted in light of the principle of distinction has previously been rejected by the Appeals Chamber in the *Lubanga* case.[39] In rejecting this argument, the Appeals Chamber indicated that while "*common article 3 of the Geneva Conventions* […] *establishes,* inter alia*, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities* […] *article 8 (2) (e) (vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to 'participate actively in armed hostilities' and the concomitant risks to their lives and well-being*".[40] The Appeals Chamber further clarified that the terms "*participate actively in hostilities*", when referring to the conduct of child soldiers, must be given a purposive interpretation.[41]

26. The Defence's invocation of the "continuous combat function"[42] not only contravenes the principle of purposive interpretation embraced by the Appeals Chamber, but also contradicts the basic facts of the case. 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

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[39] See the "Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", *supra* note 16, paras. 323 e*t seq.*
[40] *Ibid.*, para. 324.
[41] *Idem*.
[42] See the Challenge, *supra* note 2, para. 32.

initial period, although children were already recruited into the ranks of the UPC/FPLC, they cannot be considered to have taken active part in the hostilities. Some child soldiers, especially girls, were never deployed and were stationed in the UPC/FPLC camps where they were subject to the worst forms of sexual slavery and rape.

27. Moreover, it would be illogical to suggest that at the time child soldiers were raped and subjected to sexual slavery, they continued to assume a military role or an active involvement in hostilities. The two categories of acts are mutually exclusive and could not have taken place concomitantly. Moreover, for those having a military role, they would still be protected against acts of rape/sexual slavery under common article 3 as they are placed *hors de combat* by detention or "*any other reason*" (*i.e.* coercion). In this regard, the Legal Representative takes note of the Defence's admission that the notion of *hors de combat* is not necessarily limited to cases of surrender to an adverse party.[43]

F. Assuming arguendo *that child soldiers are* "members" *and* "taking active part in the hostilities", *the* "established framework of international law" *provides unconditional protection to children affected by an armed conflict*

28. As demonstrated *supra*, children unlawfully recruited by the UPC/FPLC continued to benefit from the protection provided for in Additional Protocol II. Parties to the conflict also continue to be bound by their obligations to provide "*aid*" and "*care*".[44] This is irrespective of the children's membership in an armed group or the degree of involvement in the armed conflict. As is clear from the scope of application of Additional Protocol II, protective measures apply to all "children" who are "*affected by an armed conflict*".[45]

[43] *Ibid.*, para. 20.
[44] See *supra* paras. 14 and 15.
[45] See articles 2 (1) and 4(3) of Additional Protocol II.

29. This approach is consistent with the accepted practice and other relevant rules of international law. The ICRC Rules of Customary International Humanitarian Law underline the continuous and unconditional nature of the protection applicable to children affected by armed conflicts:

> "*Lastly, it should be noted that Additional Protocol I provides that children who do take a direct part in hostilities and fall into the power of an adverse party shall continue to benefit from the special protection to which they are entitled, whether they are prisoners of war or not. None of the rules which identify such special protection, such as the prohibition of sexual violence (see Rule 93) and the obligation to separate children from adults in detention (see Rule 120) provide for an exception in the event that children have taken part in hostilities. In addition, none of the practice supporting the prohibition of the participation of children in hostilities provides that they should be deprived of their special protection if they do participate in hostilities*".[46]

30. Likewise, Security Council resolution 1261 of 25 August 1999 urged "*all parties to armed conflicts to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance*".[47] The resolution calls on all parties to an armed conflict to protect children from sexual violence without distinction as to their participation or membership in a particular armed group.

31. The UN Committee on the Rights of the Child also recalled the essential for the realisation of the rights of children affected by armed conflict include*: "protection of children within the family environment; ensuring the provision of essential care and assistance; access to food, health care and education;* prohibition of torture, abuse or neglect*; prohibition of the death penalty; preservation of the child's cultural environment;*

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[46] See HENCKAERTS (J-M.) and DOSWALD-BECK (L.), *op. cit. supra* note 19, p. 487. Although this analysis was made in reference to Additional Protocol I, the same reasoning applies to non-international armed conflicts covered under Additional Protocol II.

[47] UN Security Council, Resolution 1261, adopted by the Security Council at its 4037th meeting, on 25 August 1999, UN Doc. S/RES/1261, para. 10. The resolution was adopted unanimously. The Resolution is available at the following address: https://daccess-ods.un.org/TMP/1255771.36874199.html.

protection in situations of deprivation of liberty; and ensuring humanitarian assistance and relief and humanitarian access to children in armed conflict".[48]

32. Article 3 of the ILO Convention on the prohibition and elimination of the worst forms of child labour imposes a general prohibition on all forms of slavery aimed at or targeting children :

> "[f]*or the purposes of this Convention, the term "the worst forms of child labour" comprises:*
> *(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict* […]"[49]

33. Article 27 of the African Charter on the Rights and Welfare of the Child imposes a general prohibition on all forms of sexual exploitation of children, regardless of the context:

> "*States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:*
> *(a) the inducement, coercion or encouragement of a child to engage in any sexual activity;*
> *(b) the use of children in prostitution or other sexual practices;*
> *(c) the use of children in pornographic activities, performances and materials* […]".[50]

34. Lastly, article 22 of the African Charter clarifies that the duty of "protection" and "care" applies to all children affected by an armed conflict, without distinction:

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[48] UN Committee on the Rights of the Child, Report on the Second Session, UN Doc. CRC/C/10, 19 October 1992, para. 73 (emphasis added).
[49] See *supra* note 10.
[50] See *supra* note 11, article 15.

> *"1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.*
> *2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.*
> *3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife".*[51]

35. The Legal Representative submits that the aforementioned references are all relevant to the interpretation of the scope of protection available to child soldiers. They provide an accurate depiction of the prevailing practices and thus reflect the state of international law during the period of the charges, *i.e.* 2002-2003. They also directly address the specific issue of protection of children affected by armed conflicts, as opposed to the more general question of protection of civilians. Lastly, they confirm the unconditional nature of the protection and the irrelevance of the identity of the perpetrator or the recruiting armed group.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to reject the Defence's challenge.

Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 14th Day of April 2016

At The Hague, The Netherlands

[51] *Ibid.*, article 22.