

PROTECTING CHILD SOLDIERS FROM SEXUAL VIOLENCE BY MEMBERS OF THE SAME MILITARY FORCE: A RE- CONCEPTUALISATION OF INTERNATIONAL HUMANITARIAN LAW?

Rosemary Grey



ICD Brief 10
April 2015

ABSTRACT

While international humanitarian law (IHL) clearly prohibits the recruitment and use of children in hostilities,¹ it is less clear to whether, and to what extent, IHL protects child soldiers from the other dangers posed by their own military force. In particular, it is less clear whether, and to what extent, IHL protects child soldiers from being raped, sexually enslaved and/or used as “bush wives” by their commanders and fellow soldiers. These issues have recently been the subject of debate and analysis in the case of *The Prosecutor v Bosco Ntaganda* (“the *Ntaganda case*”), which is currently before the International Criminal Court (ICC).

I. INTRODUCTION

The *Ntaganda* case focuses on crimes allegedly committed by an armed group called the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) in the context of a non-international armed conflict in Ituri, Democratic Republic of Congo, in 2002 and 2003.² Ntaganda was allegedly the key military operations commander of the UPC/FPLC during this conflict.³ He was charged with multiple war crimes and crimes against humanity under the Rome Statute,⁴ including charges for sexual violence crimes perpetrated against child soldiers in the UPC/FPLC by their commanders and fellow soldiers.⁵ On 9 June 2014, Pre-Trial Chamber II confirmed the charges against Ntaganda, including the charges for sexual violence crimes against the child soldiers.⁶ The trial is scheduled to commence on 2 June 2015.⁷

¹ The first Additional Protocol to the 1949 Geneva Conventions, which applies in international armed conflicts, states: “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”. See: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, 1125 UNTS 3 (entry into force 7 December 1978), article 77(2). The second Additional Protocol to the 1949 Geneva Conventions, which applies in non-international armed conflicts, states: “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”. See: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, 1125 UNTS 609 (entry into force 7 December 1978), article 4(3)(c).

² ICC, *The Prosecutor v Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (“Confirmation of charges decision”), [ICC-01/04-02/06-309](#), 9 June 2014, Pre-Trial Chamber II, para 31.

³ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, [ICC-01/04-02/06-203-AnxA](#), 10 January 2014, Pre-Trial Chamber II, para 6.

⁴ *Rome Statute of the International Criminal Court (Rome Statute)*, Rome, 17 July 1998, 2187 UNTS 90 (entry into force 1 July 2002).

⁵ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, Counts 6 and 9; paras 100 to 108.

⁶ ICC, *The Prosecutor v Bosco Ntaganda*, Confirmation of charges decision, above note 2.

⁷ ICC, *The Prosecutor v Bosco Ntaganda*, Corrigendum of 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial', [ICC-01/04-02/06-382-Corr](#), 28 November 2014, Trial Chamber VI.

As the first case before the ICC to include charges for sexual violence crimes against child soldiers by members of the same military force, the *Ntaganda* case represents an important development in the ICC's emerging jurisprudence on sexual violence crimes.⁸ This ICD brief reviews the legal issues raised in relation to these charges at the confirmation of charges stage, and examines the Pre-Trial Chamber's reasoning in this regard. The brief also incorporates some critical commentary on the Pre-Trial Chamber's approach.⁹

II. CONTESTED ISSUES AT THE PRE-TRIAL STAGE

The ICC Prosecutor characterised the acts of sexual violence allegedly committed against the UPC/FPLC child soldiers as war crimes, namely rape and sexual slavery, under article 8(2)(e)(vi) of the Rome Statute.¹⁰ As war crimes must involve a violation of IHL,¹¹ it was necessary to establish that the acts in question constituted violations of IHL. In this respect, the Prosecution observed that child soldiers enjoyed two "levels" of protection under the rules of IHL applicable in non-international armed conflicts.¹²

First, the Prosecution argued that child soldiers enjoy "general protections" against sexual violence pursuant to common article 3 of the 1949 Geneva Conventions¹³ and article 4 of the second

⁸ The former ICC Prosecutor also brought evidence of such crimes in the case of *The Prosecutor v Thomas Lubanga Dyilo* ("the Lubanga case"), where the accused was charged with the war crimes of "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" pursuant to article 8(2)(e)(vii) of the Rome Statute. However, in that case, the evidence of sexual violence was not part of the charges, as described by the former Prosecutor in the document containing the charges. See: ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, Trial Chamber I, para 630. In a separate and dissenting opinion, Judge Odio Benito held that "[s]exual violence is an intrinsic element of the criminal conduct of 'use to participate actively in the hostilities'" (para 20) and that "[t]he use of young girls and boys [sic] bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused" (para 21, emphasis added). See: ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute: Separate and dissenting opinion of Judge Odio Benito, ICC-01/04-01/06-2842, 14 March 2012, Trial Chamber I.

⁹ This critical commentary builds on the author's previous writing on this topic. See: R. Grey, 'Sexual violence against child soldiers: the limits and potential of international criminal law', *International Feminist Journal of Politics*, 2014, Vol. 16(4), pages 601-621; R. Grey, 'The Ntaganda confirmation of charges decision: A victory for gender justice?', *Beyond The Hague*, 12 June 2014 (<http://beyondthehague.com/2014/06/12/the-ntaganda-confirmation-of-charges-decision-a-victory-for-gender-justice/>); R. Grey, 'Emerging Voices: Sexual Violence As War Crime: Controversial Issues in the International Criminal Court', *Opinio Juris*, 28 July 2014 (<http://opiniojuris.org/2014/07/28/emerging-voices-sexual-violence-war-crime-controversial-issues-international-criminal-court/>). The author thanks the reviewers and editors of these publications for their input.

¹⁰ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, Counts 6 and 9. See also: ICC, *The Prosecutor v Bosco Ntaganda*, Updated Document Containing the Charges, [ICC-01/04-02/06-458-AnxA](http://www.iccnij.org/2015/02/16/ICC-01/04-02/06-458-AnxA), 16 February 2015, Pre-Trial Chamber II, Counts 6 and 9.

¹¹ A. Cassese, *Cassese's International Criminal Law (3rd edition, revised by A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting)* (Oxford University Press, Oxford, 2013), pages 65 to 66; R. Cryer, H. Friman; D. Robinson and E. Wilmshurst, *An introduction to international criminal law and procedure (3rd edition)* (Cambridge University Press, Leiden, 2014), pages 268 to 270.

¹² ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, para 107; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, [ICC-01/04-02/06-T-10-Red-ENG](http://www.iccnij.org/2014/02/13/ICC-01/04-02/06-T-10-Red-ENG), 13 February 2014, Trial Chamber II, page 61 line 17 to page 62 line 11.

¹³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Geneva, 12 August 1949, 75 UNTS 31 (entry into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Geneva, 12 August 1949, 75 UNTS 85 (entry into force 21 October 1950);

Additional Protocol to the Geneva Conventions (Protocol II).¹⁴ Common article 3 of the Geneva Conventions states that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ ... shall in all circumstances be treated humanely”. In particular, common article 3 specifies that such persons must not be subjected “violence to life and person” or “outrages on personal dignity”—violations which can include sexual violence.¹⁵ Building on this protection, article 4(1) of Protocol II states that “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities ... shall in all circumstances be treated humanely”, and article 4(2)(e) specifies that such persons shall not be subjected to “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”¹⁶ These protections against sexual violence may be described as “general protections” because they apply regardless of the person’s age.

Second, the Prosecution argued that child soldiers enjoy “special protections because of their vulnerability as children”.¹⁷ In support of this argument, the Prosecution referred to article 4(3) of Protocol II, which states:

3. Children shall be provided with the care and aid they require, and in particular:

... (c) 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;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.

The Prosecution argued that both levels of protection under IHL – the “general” and the “special” – enabled the Chamber to recognise the child soldiers as victims of the war crimes of rape and sexual slavery for the purposes of Article 8(2)(e)(vi) of the Rome Statute.¹⁸

Geneva Convention (III) relative to the Treatment of Prisoners of War (Geneva Convention III), Geneva, 12 August 1949, 75 UNTS 135 (entry into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Geneva 12 August 2012, 75 UNTS 287 (entry into force 21 October 2013).

¹⁴ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, para 107.

¹⁵ See: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law vol 1: Rules* (Cambridge University Press, Cambridge and New York, 2005), Rule 93, page 323.

¹⁶ Protocol II, article 4(2)(e).

¹⁷ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, para 107.

¹⁸ ICC, *The Prosecutor v Bosco Ntaganda*, Document Containing the Charges, above note 3, para 107; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 61 line 17 to page 62 line 11.

The Defence raised two key legal objections in relation to the charges for sexual violence crimes against the child soldiers. First, it argued that these charges violated the principles of legality (*nullum crimen sine lege*), as enshrined in Article 22 of the Rome Statute, because the special protections under Article 4(3) of Protocol II did not protect child soldiers from crimes committed by soldiers from the “same group”.¹⁹ Second, the Defence argued that “crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law.”²⁰ The following discussion is structured around these two objections raised by the Defence.

Special protections for child soldiers

The Prosecution acknowledged that under IHL, children – like all persons – may lawfully be targeted by the opposing forces if they take a direct part in hostilities, for such time that such participation in hostilities lasts.²¹ However, the Prosecution argued that children do not lose their *other* protections by directly participating in hostilities, including the protection against sexual violence crimes by members of the forces into which they have been recruited.²²

In support of this argument, the Prosecution cited the International Committee of the Red Cross (ICRC) study of customary IHL, which notes that children continue to enjoy special protections against sexual violence, *inter alia*, if they take part in hostilities.²³ In addition, the Prosecution argued that treaty law provides continuing protections for children in non-international armed conflicts. Specifically, the Prosecution referred to article 4(3) of Protocol II, which states that “[c]hildren shall be provided with the care and aid they require”, and article 4(3)(d), which (the Prosecution contended) “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”.²⁴ The Prosecution argued that as a result of these protections, the child soldiers *continued* to enjoy

¹⁹ Ibid, page 26 line 24 to page 27 line 14. See also: See: ICC, *The Prosecutor v Bosco Ntaganda*, Version publique expurgée: Conclusions écrites de la Défense de Bosco Ntaganda suite à l’Audience de confirmation des charges (Written conclusions of the Defence in relation to the confirmation of charges hearing), [ICC-01/04-02/06-292-Red2](#), 14 April 2014, Pre-Trial Chamber II, paras 252 to 256.

²⁰ ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 27 line 15 to 17. See also: ICC, *The Prosecutor v Bosco Ntaganda*, Written conclusions of the Defence in relation to the confirmation of charges hearing, note 19, paras 257 to 261.

²¹ ICC, *The Prosecutor v Bosco Ntaganda*, Public Redacted Version of Prosecution’s submissions on issues that were raised during the confirmation of charges hearing (Prosecution’s submissions on issues that were raised during the confirmation of charges hearing), 7 March 2014, ICC-01/04-02/06-276-Conf, [ICC-01/04-02/06-276-Red](#), 24 March 2014, Pre-Trial Chamber II, para 188; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 62 lines 17 to 20.

²² ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution’s submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 188; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 62 line 21 to page 63 line 3.

²³ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution’s submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 188; Henckaerts and Doswald-Beck, above note 15, Rule 137, page 487.

²⁴ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution’s submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 189.

protections against sexual violence while they were in the UPC/FPLC, and did not forfeit these protections by directly participating in hostilities.²⁵

The Defence challenged the Prosecution's interpretation of Protocol II. It argued that "the protection under article 4 applies only once a child soldier is captured *by the opposing party*".²⁶ As such, the Defence contended, this provision did not protect the UPC/FPLC child soldiers from sexual violence crimes committed by members of that same group. The Defence asserted that in accordance with the principle of legality, "Article 4(3) [of Protocol II] in no way can be used to interpret Article 8 [of the Rome Statute] to *expand* the scope thereof to victims who might be part of the same group as the perpetrator of the crime."²⁷

The Prosecution argued that the Defence's interpretation of article 4(3) was "excessively narrow" and inconsistent with the purpose of the provision.²⁸ The Prosecution reasoned: "[t]hrough article 4(3)(d) stipulates that the special protections are contingent on the capture of the child, the motivation for this provision – the protection of children as a vulnerable group – is clear."²⁹ In support of this statement about the "motivation" for the provision, the Prosecution referred to the commentary on article 4(3)(d) of Protocol II, which states:

It should be recalled that the aim of the provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will continue to enjoy privileged rights in case the age limit of fifteen years laid down in subparagraph (c) is not respected. In this case making provision for the consequences of any possible violation tends to strengthen the protection.³⁰

Taking that purpose into account, the Prosecution argued that the Defence's interpretation of article 4(3), which would mean that children are *only* entitled to special protection if they are captured, but are *not* entitled to such protection if they participate directly in hostilities and are *not* captured, would "undermine the purpose of the special protections for children under article 4(3) and under IHL more generally".³¹ For these reasons, the Prosecution argued that:

²⁵ Ibid, para 188; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 62 line 9 to page 63 line 3.

²⁶ Ibid, page 27 lines 10 to 11 (emphasis added).

²⁷ Ibid, page 27 lines 12 to 14 (emphasis added).

²⁸ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 189.

²⁹ Ibid, para 190.

³⁰ Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva, 1987), para 4559.

³¹ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 193.

Contrary to the Defence contention, the Prosecution's interpretation entails no infringement of article 22(2) [of the Rome Statute]. Rather, it is the result of a *purposive or teleological* interpretation of article 8(2)(e)(vi) [of the Rome Statute], consistent with the protective rules applicable to children during warfare under international humanitarian law.³²

A literal interpretation of Protocol II arguably supports the same conclusion. As noted above, article 4(3)(d) of Protocol II states that "the special protection provided by this Article to children who have not attained the age of fifteen years shall *remain* applicable to them if they take a direct part in hostilities ... and are captured" (emphasis added). The term "remain", when given its ordinary meaning,³³ suggests that the special protection does not *start* when the child takes direct part in hostilities and is captured; rather, it starts at the outbreak of a non-international armed conflict, as defined in Article 1 of Protocol II. Children "continue"³⁴ to be the object of special protection if they take a direct part in hostilities and are captured, but this protection applies before those events occur.³⁵

The victims' legal representative also challenged the Defence's claim that "[t]he protection under Article 4 [of Protocol II] applies only if a child soldier is captured by the opposing party".³⁶ She noted that article 4(3) provides a general protection to children, as well as a list of illustrative examples which are not intended to be exhaustive.³⁷ Drawing on the commentary on Protocol II, the victims' legal representative argued that as well as referring to the special protection of children who have been "captured", article 4(3) provides special protection for *all* children because, due to their particular vulnerability, they require privileged treatment compared to the rest of the civilian population.³⁸ She reasoned that the fact that article 4(3)(d) addresses the specific issue of children who have been "captured" does not provide a reason to limit the scope of Article 4 to that particular

³² Ibid, para 183 (emphasis added).

³³ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, 1155 UNTS 33 (entry into force 27 January 1980), Art 31(1).

³⁴ Sandoz, Swinarski and Zimmermann, above note 30, para 4558.

³⁵ This interpretation of Article 4(3)(d) of Protocol II is analogous with the argument made by Patricia Viseur Sellers, Special Adviser to the ICC Prosecutor on International Criminal Law Prosecution Strategies, in regard to Article 77 of Protocol I (which applies in international armed conflicts). Article 77(1) states: "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault", and article 77(3) states that children shall "continue" to benefit from this special protection if they "take a direct part in hostilities and fall into the power of an adverse Party". Sellers notes that the term "continues" means that the special protection started *before* the child falls into the hands of the adverse Party, which begs the question "where did it begin"? Sellers suggest that it began when the children were with the party that represented their "own side" of the conflict. See: Sellers, Patricia. 'Child soldiers - protected beyond gender? An international criminal law perspective'. 26 November 2013, Changing Character of War Programme, University of Oxford. Available at: <http://podcasts.ox.ac.uk/child-soldiers-protected-beyond-gender-international-criminal-law-perspective-0>.

³⁶ ICC, *The Prosecutor v Bosco Ntaganda*, Observations finales au nom des anciens enfants-soldats (Concluding remarks on behalf of the former child soldiers), [ICC-01/04-02/06-273](https://www.iccnij.org/Case%20Documents/ICC-01/04-02/06-273), 7 March 2014, Pre-Trial Chamber II, para 74.

³⁷ Ibid, para 75.

³⁸ Ibid, citing: Sandoz, Swinarski and Zimmermann, above note 30, para 4544.

situation: as the commentary explains, the purpose of article 4(3)(d) is to “strengthen”, rather than limit, the protections afforded to children in conflict situations.³⁹

The victims’ legal representative further argued that for the purposes of the fundamental guarantees found in article 4 of Protocol II, it was irrelevant whether the child belonged to a party to the conflict: article 4 states that these fundamental guarantees apply to “*all persons* who do not take a direct part or who have ceased to take part in hostilities”.⁴⁰ As the victim’s legal representative noted, the commentary states that this protection covers “*all persons* affected by armed conflicts... when they do not, or no longer, participate directly in hostilities.”⁴¹ She observed that article 4 does not make a person’s protection dependent on which side of the conflict that person “belongs” to, and argued that to apply such an arbitrary test would be discriminatory.⁴² For these reasons, the victims’ legal representative agreed with the Prosecution that the sexual violence crimes allegedly committed against the UPC/FPLC child soldiers constituted war crimes, regardless of the children’s role in that group.⁴³

Goals of international humanitarian law

As well as making submissions about the scope of article 4(3) of Protocol II, the Defence raised a broader issue about the goals of IHL. It argued that the sexual violence crimes allegedly perpetrated against the UPC/FPLC child soldiers by members of that same group could not constitute violations of IHL because “international humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. Such crimes come under national law and human rights law”.⁴⁴ This argument echoed the view of the Trial Chamber of the Special Court for Sierra Leone in the *RUF* case, which stated:

[T]he law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law ... a different approach would constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law.⁴⁵

³⁹ Ibid, para 76, citing: Sandoz, Swinarski and Zimmermann, above note 30, para 4559.

⁴⁰ ICC, *The Prosecutor v Bosco Ntaganda*, Concluding remarks on behalf of the former child soldiers, above note 36, paras 77 to 78.

⁴¹ Ibid, citing: Sandoz, Swinarski and Zimmermann, above note 30, para 4520.

⁴² Ibid, para 79.

⁴³ Ibid, para 80.

⁴⁴ ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 27 lines 22 to 24.

⁴⁵ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case)*, Trial judgment, SCSL-04-15-T, 2 March 2009, Trial Chamber I, para 1453; discussed in S. Sivakumaran, *Non-International Armed Conflict (1st edition)* (Oxford University Press, Oxford, 2012), page 247; Sellers, above note 35. See also: Cassese, above note 11, page 67 (“crimes committed by combatants of one party to the conflict against members of their own armed forced do not constitute war crimes”).

The Prosecution disputed this argument about the goals of IHL. It observed that while IHL does not *generally* regulate conduct directed against those within one's own military force, this general rule did not create an "irrebuttable presumption".⁴⁶ For example, the Prosecution highlighted the war crimes of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.⁴⁷ As the Prosecution observed, this conduct constitutes a violation of IHL and a war crime even though the perpetrators and victims are members of the same military force.⁴⁸ Indeed, as Pre-Trial Chamber I held in the *Katanga and Ngudjolo Chui* case, the war crime of using children in hostilities "can be committed by a perpetrator against individuals in his own party to the conflict."⁴⁹ The Prosecution argued that the prohibition on the use of children in hostilities exists in order to protect children as a vulnerable group and demonstrates that the IHL does, in some circumstances, regulate conduct directed towards members of one's own military force.⁵⁰

The Prosecution's argument reflects the observation by some scholars that, if IHL was ever concerned exclusively with conduct directed at those on the "other side" of an armed conflict, this is no longer the case. For example, Cryer et al. note that "[b]ecause IHL originally developed as a series of reciprocal promises between parties to a conflict, *most* IHL regulates conduct towards those affiliated with the enemy",⁵¹ however, "[t]here are some exceptions".⁵² Cryer et al. identify the prohibition on the use of child soldiers in hostilities as one such exception.⁵³ Similarly, Sivakumaran identifies several rules of IHL which provide "intra-party protection" in both international and non-international armed conflicts,⁵⁴ including the prohibition on the use of child soldiers⁵⁵ and the protection against sexual violence.⁵⁶

⁴⁶ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 187.

⁴⁷ See Rome Statute, Articles 8(2)(b)(xxvi); 8(2)(e)(vii).

⁴⁸ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 187; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 63 lines 4 to 11.

⁴⁹ ICC, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, [ICC-01/04-01/07-717](#), 30 September 2008, Pre-Trial Chamber I, para 248. Note: as the Defence in *Ntaganda* observed, the French translation of this decision states "La Chambre fait observer que le présent crime est *le seul* crime de guerre inclus dans le Document modifié de notification des charges qui peut être commis par un auteur contre des personnes appartenant à son propre camp dans le conflit" (emphasis added). See: ICC, *The Prosecutor v Bosco Ntaganda*, Written conclusions of the Defence in relation to the confirmation of charges hearing, above note 19, para 259, citing: ICC, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Version publique expurgée: Décision relative à la confirmation des charges, [ICC-01/04-01/07-717-tFRA](#), 30 September 2008, Pre-Trial Chamber I, para 248. The English version of the decision is authoritative.

⁵⁰ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's submissions on issues that were raised during the confirmation of charges hearing, above note 21, para 187; ICC, *The Prosecutor v Bosco Ntaganda*, Transcript, above note 12, page 63 lines 12 to 15.

⁵¹ Cryer et al., above note 11, page 283 (emphasis added).

⁵² *Ibid.*, page 283, footnote 142.

⁵³ *Ibid.*, page 283, footnote 142; pages 302; 303.

⁵⁴ Sivakumaran, above note 45, pages 246-249.

⁵⁵ *Ibid.*, page 248.

⁵⁶ *Ibid.*, page 249.

III. THE PRE-TRIAL CHAMBER'S APPROACH

As noted above, the Pre-Trial Chamber confirmed all the charges against Ntaganda, including the charges of sexual violence crimes against the UPC/FPLC child soldiers.⁵⁷ The Chamber decided the matter on the basis of the “general protections” afforded to persons affected by non-international armed conflicts pursuant to common article 3 of the Geneva Conventions and articles 4(1) and 4(2) of Protocol II (see Part 2, above). The Chamber considered that these general protections did not apply for such time that the person took direct part in hostilities, stating:

[I]n order to determine whether UPC/FPLC child soldiers under the age of 15 years are entitled to protection against acts of rape and sexual slavery by other members of the UPC/FPLC, the Chamber must assess whether these persons were taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery.⁵⁸

The Chamber was silent on the scope of article 4(3)(d) of Protocol II, a provision which had been the subject of much debate during the confirmation of charges proceedings. However, the Chamber took note of article 4(3)(c) of Protocol II, which prohibits the recruitment and use in hostilities of children under the age of fifteen. It held that this provision was relevant to a determination of *when* a child has can be regarded as having taken a “direct/active” part in hostilities (and therefore having lost the protections against sexual violence and other ill-treatment found in common article 3 of the Geneva Conventions and articles 4(1) and 4(2) of Protocol II).⁵⁹ Guided by that approach, the Chamber held that children under the age of fifteen do not lose these protections “merely by joining an armed group, whether as a result of coercion or other circumstances.”⁶⁰ Rather, they “lose the protection afforded by IHL *only during* their direct/active participation in hostilities.”⁶¹ The Chamber did not explain how this differs from the position of civilians of all ages who take a direct part in hostilities.⁶²

⁵⁷ ICC, *The Prosecutor v Bosco Ntaganda*, Confirmation of charges decision, above note 2.

⁵⁸ *Ibid.*, para 77.

⁵⁹ *Ibid.*, para 78.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para 79 (emphasis added).

⁶² As Schmitt states, “[s]cholars and practitioners universally accept the normative premise that although civilians generally enjoy protection from attack under international humanitarian law (IHL), they lose such protection while directly participating in the hostilities”: M. Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, *NYU Journal of International Law and Politics*, 2010, Vol. 42, pages 697 to 739 at 699. Similarly, Rule 6 of the ICRC study into customary IHL (“[c]ivilians are protected against attack, unless and for such time that they take a direct part in hostilities”): Henckaerts and Doswald-Beck, above note 15, page 19, cited in: Supreme Court of Israel, *Public Committee v. Government of Israel* (“*Targeted Killings*” case), Judgment, HCJ 769/02, 13 December 2006, paras 23; 29-30; W. J. Fenrick, ‘The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities’, *Journal of International Criminal Justice*, 2007, Vol. 5, pages 332-338 at 335. See also: Article 13(3) of Protocol II: (“civilians shall enjoy the protection afforded by this Part [namely, they shall not be the objects of attack], unless and for such time as they take a direct part in hostilities”).

Applying this test, the Chamber found that the UPC/FPLC child soldiers could not have been taking an active or direct part in hostilities at the precise time that the alleged sexual violence crimes took place. In the Chamber's words:

[T]hose subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the *specific time* when they were subject to acts of sexual nature, including rape, as defined in the relevant Elements of Crimes. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.⁶³

For that reason, the Chamber found that the child soldiers continued to enjoy protection against sexual violence under IHL at the time the alleged sexual violence crimes took place. It therefore concluded that these acts, if proven, would constitute war crimes under article 8(2)(e)(vi) of the Rome Statute.⁶⁴ The Defence sought leave to appeal the Pre-Trial Chamber's decision, but did not challenge the Chamber's findings regarding the sexual crimes against the child soldiers.⁶⁵ This application for leave to appeal was rejected.⁶⁶

IV. COMMENTARY

By recognising that sexual violence crimes committed against child soldiers by members of their own military force can constitute war crimes under the Rome Statute, the Pre-Trial Chamber's decision contributed to accountability for sexual violence crimes under international criminal law. More immediately, the decision ensured that the sexual violence crimes allegedly perpetrated against the UPC/FPLC child soldiers will be tried before the ICC – an important development, given that these crimes were not regarded as part of the charges in the *Lubanga* case.⁶⁷ While these are laudable outcomes from the perspective of those seeking to end impunity for sexual violence crimes, the Pre-Trial Chamber's approach also warrants some critical commentary.

First, the Pre-Trial Chamber left unanswered some the larger questions raised by the Prosecution, Defence and victims' legal representative at the confirmation of charges stage. That is, it did not determine whether the special protections for children outlined in article 4(3) of Protocol II are contingent on capture by the opposing party; nor did it resolve the broader debate about whether

⁶³ ICC, *The Prosecutor v Bosco Ntaganda*, Confirmation of charges decision, above note 2, para 79.

⁶⁴ *Ibid*, para 80.

⁶⁵ ICC, *The Prosecutor v Bosco Ntaganda*, Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014, [ICC-01/04-02/06-312](#), 16 June 2014, Pre-Trial Chamber II.

⁶⁶ ICC, *The Prosecutor v Bosco Ntaganda*, Decision on the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014", [ICC-01/04-02/06-322](#), 4 July 2014, Pre-Trial Chamber II.

⁶⁷ See note 8, above.

IHL regulates the conduct of combatants towards other members of the same military force. As such, these important legal issues remain unresolved.

Second, the Pre-Trial Chamber's conclusion that the sexual violence crimes allegedly perpetrated against the child soldiers constituted war crimes under article 8(2)(e)(vi) was based on a finding that the "the sexual character of these crimes [rape and sexual slavery], which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time."⁶⁸ The Chamber did not explain *why* a person cannot participate actively in hostilities at the same time that the elements of force, coercion or ownership continue. This question is particularly relevant to the crime of sexual slavery, as defined in the ICC Elements of Crimes.⁶⁹ It can be argued that sexual slavery places the victim under ongoing psychological distress and deprives him or her of physical and sexual autonomy for such time that the perpetrator continues to exercise rights of ownership, outside the specific moments that the victim is forced to engage in acts of a sexual nature. If that view is accepted, it is appropriate that this crime be regarded as a "continuous crime", as the Prosecution has contended.⁷⁰

However, the Pre-Trial Chamber's reasoning may create difficulties for the recognition of sexual slavery as a continuous crime. The Chamber's reasoning suggests that, for such time that a child takes an active or direct part in hostilities, he or she cannot *also* be subject to sexual slavery. This suggestion is difficult to reconcile with a view of sexual slavery as a continuous crime. Conversely, if one takes the view that sexual slavery *is* a continuous crime, the Chamber's reasoning suggests that this crime does not constitute a violation of IHL (and therefore, does not constitute a war crime) for such time that the victim is forced to take an active or direct part in hostilities. This would seem inconsistent with the special protections afforded to child soldiers under IHL. The Chamber's decision does not address these issues.

V. CONCLUSION

The ICC Prosecutor's decision to characterise the acts of sexual violence allegedly committed against the UPC/FPLC child soldiers as war crimes under Article 8(2)(e)(vi) of the Rome Statute presented an opportunity to clarify the protections available to child soldiers under IHL and develop

⁶⁸ ICC, *The Prosecutor v Bosco Ntaganda*, Confirmation of charges decision, above note 2, para 79.

⁶⁹ The first two elements of the war crime of sexual slavery are as follows: first, "[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty"; second, "[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature." See: Elements of Crimes, articles 8(2)(b)(xxii)-2; 8(2)(e)(vi)-2.

⁷⁰ ICC, *The Prosecutor v Bosco Ntaganda*, Prosecution's Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges, [ICC-01/04-02/06-403](#), 21 November 2014, Trial Chamber VI, paras 19; 23; 75. The author wishes to acknowledge the contributions of Dr Sarah Williams, Truman Biro, Louisa Bonaventura, Henry Cornwell, Pearce McManus and Harjeevan Narulla, whose views on continuous crimes have informed the author's views.

the ICC's emerging jurisprudence on sexual violence crimes. While the Pre-Trial Chamber's decision addresses some of the issues raised in relation to these charges at the confirmation of charges stage, it does not resolve key questions about the special protections afforded to child soldiers in non-international armed conflicts or IHL's capacity to protect child soldiers (and potentially, other vulnerable persons) from sexual violence crimes by members of the same military force. However, the arguments advanced by the parties and participants in this case provide useful perspectives on these important legal questions.