Sexual Violence against Child Soldiers

THE LIMITS AND POTENTIAL OF INTERNATIONAL CRIMINAL LAW

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Abstract

In addition to participating in hostilities, girl soldiers are often raped, sexually enslaved and used as "bush wives" by their commanders and fellow soldiers. As this issue of sexual violence against girl soldiers has become increasingly visible in recent cases before the International Criminal Court (ICC) and Special Court for Sierra Leone (SCSL), attempts have been made to prosecute this conduct within the established framework of international criminal law. Most recently, this issue has been addressed in the case of *The Prosecutor v Bosco Ntaganda*, one of the six cases that have come before the ICC from the situation in the Democratic Republic of Congo. On 9 June 2014, the Pre-Trial Chamber confirmed the charges in the *Ntaganda* case, and found that the rape and sexual slavery of girl soldiers in Ntaganda's armed group by other members of that group could constitute war crimes under Article 8(2)(e)(vi) of the Rome Statute. This article considers what the *Ntaganda* decision adds to the jurisprudence on sexual violence against child soldiers, and what it demonstrates about the limits of the law.

Keywords

sexual violence, child soldiers, war crimes, International Criminal Court, *Ntaganda* case

Child soldiers are not an undifferentiated group of faultless victims: their experiences of victimization, and of victimizing others, vary greatly (Denov 2010; Drumbl 2012a, 2012b). The situation of female child soldiers is particularly complex. In addition to participating in hostilities, girl soldiers are often raped, sexually enslaved and used as "bush wives" by their commanders and fellow soldiers (Denov 2010, 123–125, 132–133; CSUCS 2008, 9, 11; HRW

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2003, 13–15, 2012, 3, 27, 36; Jørgensen 2012). While the use of child soldiers in hostilities is clearly regulated by instruments of international humanitarian law (IHL) and international criminal law, the use of girl soldiers for sexual purposes is not explicitly addressed in these instruments. This gap in the legal framework reflects Charlesworth and Chinkin's observation that the concerns of women and girls have been "obscured by and within the international legal order" (2000, 1). However, as the issue of sexual violence against girl soldiers by their fellow soldiers has become more visible in recent cases before the International Criminal Court (ICC) and Special Court for Sierra Leone (SCSL), attempts have been made to address this violence within the established legal framework. Most recently, this issue has been addressed in the case of *The Prosecutor v Bosco Ntaganda*, one of the six cases that have come before the ICC from the situation in the Democratic Republic of Congo (DRC).

At the pretrial stage, a contested issue in the case was whether the sexual abuse of girl soldiers by members of the same armed group could constitute war crimes under the Rome Statute, namely rape and sexual slavery under Article 8(2)(e)(vi).[1] While this charging strategy has been contemplated previously in the literature (e.g. Tan 2012, 142), this was the first time it was applied in the ICC. As such, the case presented a timely opportunity to clarify the law regarding the sexual exploitation of child soldiers, primarily girl soldiers, by members of their own armed group. The Prosecutor and victims' legal representatives argued that this conduct could constitute war crimes under Article 8(2)(e)(vi), [2] however the Defense opposed this charging strategy on the grounds that war crimes must involve a violation of IHL, and IHL does not generally regulate the conduct of combatants toward other combatants in the same armed group.[3] On 9 June 2014, the Pre-Trial Chamber unanimously confirmed all of the charges that the ICC Prosecutor had sought to bring against the accused, and found that the rape and sexual slavery of the girl soldiers could constitute war crimes under Article 8(2)(e)(vi) as the Prosecutor and the victims' legal representatives contended.[4]

This article considers what the *Ntaganda* decision adds to the jurisprudence on sexual violence against child soldiers, and what it demonstrates about the limits of the law. The first part of the article describes the legal framework relevant to this decision, and explains how this framework has been applied in the ICC and SCSL to prosecute sexual violence against girl soldiers in the past. The second part examines how this framework was interpreted by the parties and the Pre-Trial Chamber in the *Ntaganda* case. The third part reflects on the significance of this decision, and highlights some broader issues raised by the case.

While the article focuses on the ICC's role in prosecuting sexual violence against child soldiers, two points should be clarified at the outset. First, the ICC acting alone cannot end impunity for sexual violence, or prevent the exploitation of child soldiers. The Court's capacity to bring the perpetrators to justice is limited, due to its resource constraints, its jurisdictional boundaries and its role as a court of last resort. For these reasons, it is imperative that the

sexual violence is also prosecuted at the national level. The ICC's capacity to recognize the victims' experiences is also limited, as international criminal law tends to regard child soldiers as passive victims, incapable of independent criminal conduct, whereas the reality is often more complex (Drumbl 2012a, 2012b). Moreover, prosecutions are simply one of many tools that should be used to combat conflict-related sexual violence and to end the abuse of child soldiers. Such violence must also be addressed through political, economic and cultural interventions. As Drumbl observes, there is "a need to search well beyond the architecture of the courtroom and jailhouse in order to meaningfully dissuade and, ultimately end, child soldiering" (2012a, 19).

However, in exercising its prosecutorial function, "the ICC has the potential to be an especially powerful vehicle for norm expression" (DeGuzman 2012, 33; see also Ambos 2012a, 312–313). Prosecutions in the ICC may also have a deterrent and restorative function (see DeGuzman 2012, 24–31) and draw attention to crimes that have previously been overlooked (Ambos 2012a, 314). These goals may be best achieved where sexual violence against child soldiers is the focus of a particular case pursuant to a strategy of "thematic prosecutions," that is, a strategy of orienting cases around particular themes of criminality such as sex crimes, or in this instance, the use of child soldiers for sexual and other purposes (DeGuzman 2012, 11; see also Ambos 2012a; Bergsmo and Cheah 2012). Thus, to the extent that prosecuting sexual violence against child soldiers in the ICC can express States' outrage at this violence, deter such violence in future and offer some redress to the victims, it is an important application of the ICC's resources. In addition, by giving visibility to sexual violence against girl soldiers, the ICC may increase awareness of the "varied actual experiences" of child soldiers (see Drumbl 2012a, 11), promote a more gender-sensitive understanding of their exploitation in line with the 2007 Paris Principles[5] and encourage disarmament, demobilization and reintegration programs to better address the specific needs of girl soldiers (see Jørgensen 2012, 664).

The second point to clarify is that although this article concentrates on sexual violence against female child soldiers, as this has been the focus of cases discussed below, the author recognizes that boy soldiers may also be subjected to sexual violence. This includes being raped by their fellow soldiers, and being forced to rape third parties.[6] As such, boy soldiers stand to benefit from legal developments aimed at protecting child soldiers against sexual violence, such as those discussed here.

THE LEGAL FRAMEWORK

While the Rome Statute does not specifically recognize sexual violence against child soldiers as a crime within the jurisdiction of the ICC, such violence may potentially be prosecuted using the sexual violence crimes enumerated in the Statute, or by highlighting the sexual dimensions of the child soldier crimes in

the Statute. Both possibilities are recognized in the ICC Office of the Prosecutor's June 2014 *Policy Paper on Sexual and Gender-Based Crimes*, which notes that the Rome Statute enumerates several specific sexual violence crimes, and that other crimes "including . . . the recruitment of child soldiers, may also contain sexual and/or gender elements" (OTP 2014, 20). The following explains both of these approaches in turn and then briefly discusses their application in previous cases at the ICC and SCSL.

Sexual Violence

Sexual violence has not, historically speaking, been the focus of IHL or international criminal law (Bedont and Hall Martinez 1999; Copelon 2000). However, in the late 1990s States became increasingly concerned with preventing and prosecuting conflict-related sexual violence, due largely to the increased participation of feminist activists in international forums (Chappell 2003). The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were instrumental in making sexual violence visible in international criminal law (Askin 2003; Brammertz and Jarvis 2010; Brady 2012), and the inclusion of a wide range of sexual violence crimes in the Rome Statute built on these developments (Bedont and Hall Martinez 1999; Oosterveld 1999; Steains 1999; Copelon 2000).

The Rome Statute recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and "any other form of sexual violence of a comparable gravity" as crimes against humanity (Article 7(1)(g)), and the same acts are listed as war crimes in international and non-international armed conflicts (Articles 8(2)(b)(xxii); 8(2)(e)(vi)). Like all crimes enumerated in the Statute, these sexual violence crimes must be committed in certain contexts in order to qualify as war crimes or crimes against humanity.

To constitute war crimes, the sexual violence must have taken place "in the context of" and have been "associated with" an armed conflict (Elements of Crimes, Article 8; see also Cassese 2012), and the acts must also constitute a violation of the applicable rules of IHL (Article 8(2)(b); 8(2)(e)). The latter requirement complicates the possibility of prosecuting sexual violence against child soldiers by members of the same armed forces or group as a war crime, because IHL generally protects persons taking no direct part in hostilities (including civilians, wounded soldiers or prisoners of war) from the dangers posed by those on the "other side" of the conflict. In an international armed conflict, the "other side" refers to nationals of the opposing state; in non-international armed conflict, it means persons affiliated with the opposing political force (La Haye 2008, 118–119; Cassese 2012, 1396–1397). IHL does not generally regulate the conduct of combatants toward other combatants on the "same side" of the conflict. It has been assumed

that such conduct will be regulated through other channels, such the group's internal discipline system, although there is no guarantee that this will eventuate.

There are, however, some exceptions to the general rule that violations of IHL, and therefore war crimes, must be committed against those on the "other side" of the conflict. For example, it is a violation of IHL and a war crime within the jurisdiction of the ICC for an "Occupying Power" to transfer parts of its own civilian population into the occupied territory (see Cryer et al. 2010, 308–309). And as detailed below, it is a violation of IHL and a war crime to use a child solider to participate actively in hostilities, even though the child is a member of the perpetrator's own armed forces or group (see Cryer et al. 2010, 309–310). Whether sexual violence against child soldiers by members of the same armed group also constitutes a violation of IHL and a war crime has been the subject of debate in the *Ntaganda* case, as is explained below.

To constitute crimes against humanity, the acts must be committed as a part of a "widespread or systematic attack against any civilian population," pursuant to a "State or organizational policy" (Article 7(1); 7(2)). The requirement that the attack must be directed at a "civilian population," meaning a population which is predominantly civilian,[7] does not easily lend itself to prosecuting sexual violence against child soldiers, particularly those who participate actively in hostilities. This issue has not been explored in the ICC, as sexual violence against child soldiers has not been charged as crime against humanity in the court. Nor has this issue been explored in detail in the SCSL; where the SCSL has considered the issue of sexual violence against children in armed groups, these children have generally not been identified as combatants or child soldiers (see below).

Child Soldiers

The 1977 Additional Protocols to the 1949 Geneva Conventions[8] were the first instruments of IHL to regulate the use of child soldiers in explicit terms. Additional Protocol I (AP I), which applies in international armed conflicts, requires States Parties to take all feasible measures to prevent children under 15 from taking direct part in hostilities, and to refrain from recruiting these children into the armed forces (Article 77(2)). The commentary to the Protocol explains that this provision was included because "recent conflicts have all too often shown the harrowing spectacle of *boys*, who have barely left childhood behind them, brandishing rifles and machine-guns and ready to shoot indiscriminately at anything that moves" (Sandoz, Swinarski, and Zimmerman 1987, para. 3183, emphasis added). However, the commentary makes no reference to girl soldiers, or to the sexual exploitation of children within the armed forces, suggesting that these considerations were not at the forefront of the drafters' minds. While the commentary is not legally binding, it illustrates the invisibility of girl soldiers in the development of

IHL, and helps to explain the current difficulties with using this legal framework for their protection.

AP I also states that children who take direct part in hostilities continue to be the object of special protection, if they "fall into the power of an adverse Party, whether or not they are prisoners of war" (Article 77(1); 77(3)). However, it does not specify that children who take direct part in hostilities remain protected against sexual violence while under the control of their own national armed forces.

Additional Protocol II (AP II), which applies in non-international armed conflicts, states that children "shall be provided with the care and aid they require" (Article 4(3)), and specifies that "in particular . . . 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" (Article 4(3)(c)). The commentary explains that "tak[ing] part in hostilities" includes participation in military operations such as gathering information or transmitting orders, but is silent on the use of children for sexual purposes (Sandoz, Swinarski, and Zimmerman 1987, para. 4557). Article 4(3)(d) of AP II specifies that children under fifteen continue to benefit from "special protection" if they "take a direct part in hostilities . . . and are captured." As such, Article 4(3)(d) creates an exception to the general protections against sexual violence and other mistreatment contained in Article 4(2) of AP II, which apply only to "persons who do not take a direct part or who have ceased to take part in hostilities."

Building on these rules of IHL, in 1998 the Rome Statute became the first instrument of international criminal law to regulate the use of child soldiers.[9] Article 8(2)(b)(xxvi) of the Statute recognizes "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" as war crimes in an international armed conflict; and Article 8(2)(e)(vii) recognizes "conscripting or enlisting children under the age of fifteen years into the armed forces or groups or using them to participate actively in hostilities" as war crimes in a non-international armed conflict. The Statute of the SCSL, adopted in 2000, contains an almost identical provision (SCSL Statute, Article 4(c)).

Previous Applications of the Legal Framework

The ICC first heard evidence of sexual violence against girl soldiers by members of the same armed group in the *Lubanga* case, where the accused was charged with the war crimes of conscripting or enlisting children under 15, and using them to participate actively in hostilities.[10] While the (then) Prosecutor, Luis Moreno Ocampo, did not present any evidence of sexual violence against girl soldiers when he applied for confirmation of the charges in November 2006,[11] he highlighted this issue on the first day of trial in January 2009.[12] In its closing brief, the Prosecution argued that such sexual violence was part of "using [children] to participate actively in hostilities"[13]

and at the end of the trial, Prosecutor Moreno Ocampo elaborated on that submission[14] and suggested that the sexual violence was also captured by the charge of conscription.[15]

While the Trial Chamber convicted Lubanga of conscripting or enlisting children under 15, and using them to participate actively in hostilities, the majority declined to decide whether the charges could include the use of girl soldiers for sexual purposes, because the Prosecutor had not introduced the evidence of sexual violence at the appropriate stage of proceedings.[16] However, it held that in determining whether a child had been used for "active participation in hostilities," the critical factor was whether the support provided by the child "exposed him or her to real danger as a potential target."[17] This test, which focuses on the dangers posed by the "other side," would probably exclude sexual violence perpetrated against child soldiers by members of their own group (see Jørgensen 2012, 670–671).

In a dissenting opinion, Judge Odio Benito found that "sexual violence is an intrinsic element of the criminal conduct of "use to participate actively in the hostilities.'"[18] As part of her reasoning, Judge Odio Benito observed that "it is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys."[19] This consideration of discrimination is consistent with Article 21(3) of the Rome Statute, which requires the ICC to interpret and apply that Statute and all other sources of law in accordance with "internationally recognised human rights" and without "adverse distinction" on certain grounds, including gender.

While Judge Odio Benito was satisfied that "using [children] to participate actively in hostilities" could include using girl soldiers for sexual purposes, many scholars argue that the definition of the crime does not extend that far (e.g. Jacobs 2012; Jørgensen 2012, 679–684; Tan 2012, 138–139). In particular, some scholars have expressed concerns that interpreting this crime to include the use of child soldiers for sexual purposes would violate the principle of legality as enshrined in Article 22 of the Rome Statute (Ambos 2012b, 137; Tan 2012, 142–145). Article 22 bars the ICC from holding individuals criminally responsible for conduct which did not constitute a crime within the jurisdiction of the Court at the time it was committed, and further specifies that "the definition of a crime shall be strictly construed" and "in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

It has also been argued that if "using [children] to participate actively in hostilities" includes the use of child soldiers for sexual purposes, this might ultimately undermine the protection of some girls in armed groups. That is because under IHL, persons who participate actively in hostilities lose their protection against attack from the opposing party. As a result, girls who are forced to provide sexual services to members of an armed group, but do not otherwise engage in military activities, may be adversely affected by a finding that these sexual services constitute active participation in hostilities (Tan 2012, 141).

Thus while Judge Odio Benito's dissenting opinion in *Lubanga* indicates that the war crime of "using [children] to participate actively in hostilities" can include the use of girls for sexual purposes, and the majority opinion does not rule out this possibility, the legal and practical challenges associated with this argument suggest that it is not the most effective way to prosecute sexual violence against girl soldiers by members of their own armed forces or group.

An alternative approach, which the SCSL prosecutors have used in multiple cases, is to bring one set of charges for the conscription, enlistment and use of child soldiers, and another set of charges for the sexual violence and forced marriage of girls in armed groups (Jørgensen 2012, 659, 686). For example, in the case concerning former Liberian President Charles Taylor, the accused was charged with (and convicted of) eleven crimes under the SCSL Statute.[20] These included the war crimes of conscripting, enlisting or using child soldiers,[21] as well as three charges of sexual violence, namely rape as a crime against humanity,[22] sexual slavery as a crime against humanity[23] and "outrages upon personal dignity" as a war crime.[24] The charges of conscripting, enlisting and using child soldiers were not based on evidence of sexual violence,[25] whereas the charges of rape, sexual slavery and "outrages on personal dignity" were based, in part, on evidence of sexual violence against girls abducted by armed groups.[26]

It has been observed that the prosecutorial approach used in the SCSL "was deliberate in order to allow a complete picture of the fate of child soldiers, especially girl soldiers, to emerge" (Jørgensen 2012, 659) and that "[t]he SCSL did not need to expand the definition of the child-solider-related offenses in this respect because violence against women and girls was captured under various charges including sexual slavery and the inhumane act of forced marriage" (Jørgensen 2012, 686). In that sense, this approach represents a successful application of the existing legal framework to prosecute sexual violence against girl soldiers by members of the same armed groups.

On the other hand, the approach used in the SCSL has not specifically highlighted the issue of sexual violence against girl soldiers, as such. Rather, the victims of sexual violence are identified primarily as "civilians," "women and girls" or "bush wives," rather than as child soldiers, combatants or members of armed groups. For example in *Taylor*, the Prosecutor's closing brief states:

> Throughout the war in Sierra Leone, [the perpetrators] engaged in widespread sexual violence against women and girls. . . . These widespread and systematic acts of sexual violence against civilian women and girls typically began with an armed attack against a civilian village, town or city and/or as part of operations. After taking control of all or part of the village, town or city, the attackers would exercise control over that area and against the women and girls by raping them, often repeatedly, many of whom they later abducted and used as "bush wives."[27]

Similarly, the judgment does not draw attention to the issue of sexual violence against child soldiers, rather it addresses the issue of sexual violence against women and girls, civilian and combatants, together in one section.[28] This is not to suggest that the judgment *never* identifies specific victims of sexual violence as child soldiers. For example, it refers to a girl named Akiatu Tholley, who was recruited into an armed group when she was less than 14 years old,[29] and took direct part in hostilities on one occasion.[30] In addition, Tholley was raped and used as a sex slave by a member of her own armed group.[31] However overall, the issue of sexual violence against child soldiers is not highly visible in the judgment.

THE *NTAGANDA* CASE

The *Ntaganda* case draws on both approaches discussed above: it highlights the issue of sexual violence against girl soldiers, as the former ICC Prosecutor did in *Lubanga*, while using specific sexual violence crimes to prosecute this conduct, as has been the practice in the SCSL. The case focuses on the same armed group that was the subject of the *Lubanga* case, namely the *Union des Patriotes Congolais-Forces Patriotiques pour la libération du Congo* (UPC-FPLC), which from 2002 to 2003 was a party to a non-international armed conflict in the DRC.[32] The case began on 12 January 2006, when Prosecutor Moreno Ocampo applied to the Pre-Trial Chamber for an arrest warrant in respect of Bosco Ntaganda, one of UPC-FPLC's most high-ranking commanders,[33] on the grounds that he was criminally responsible for the war crimes of conscripting or enlisting child soldiers, or using them to participate actively in hostilities.[34] The warrant was issued on 7 August 2006,[35] and unsealed (made public) on 28 April 2008.[36]

Six years later, with the suspect still at large, Prosecutor Moreno Ocampo applied for a second warrant in respect of Ntaganda. This second application alleged that Ntaganda was responsible for an additional four crimes against humanity and five war crimes, including rape and sexual slavery.[37] The victims of rape and sexual slavery were identified as "women,"[38] "women and men,"[39] "men and boys,"[40] "female civilians,"[41] "civilians,"[42] but there was no specific reference to sexual violence against child soldiers in UPC-FPLC. The Pre-Trial Chamber issued the second arrest warrant on 13 July 2012,[43] however in March 2013, Ntaganda voluntarily surrendered himself to the ICC (Dixon 2014). This unexpected development allowed Fatou Bensouda, the current ICC Prosecutor, to apply to the Pre-Trial Chamber for confirmation of the charges.

Prosecutor Bensouda applied for confirmation of the charges on 10 January 2014. In addition to charging Ntaganda with war crimes in the form of rape and sexual slavery against "civilians" (Counts 5 and 8),[44] the Prosecutor charged him for war crimes in the form of rape and sexual slavery of

"UPC-FPLC child soldiers" (Counts 6 and 9).[45] Counts 6 and 9 were based on evidence that:

> UPC/FPLC commanders and soldiers raped and sexually enslaved their soldiers without regard to age, including child soldiers under the age of 15 ... UPC/FPLC commanders and soldiers referred to child soldiers (and other girls and women in the UPC/FPLC above the age of 15) as *guduria*, a large cooking pot, to mean that they could be used for sex whenever the soldiers wanted them for that purpose.[46]

The legal basis for Counts 6 and 9 was explained in the Document Containing the Charges, which stated:

> The rape and sexual enslavement of child soldiers by the UPC-FPLC commanders and soldiers constitute war crimes. Child soldiers are afforded general protections against sexual violence under the fundamental guarantees afforded to persons affected by non-international armed conflicts [AP II, Article 4; Common Article 3 of the 1949 Geneva Conventions]. They also have special protections because of their vulnerability as children [AP II, Article 4(3)]. Both of these levels of protection support the recognition of child soldiers as victims of sexual violence for the purposes of charges under article 8(2)(e)(vi) [of the Rome Statute].[47]

The Defense argued that the principle of legality prevented these acts of sexual violence from being charged as a war crimes because "[i]nternational humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. These crimes come under national law and human rights law."[48] The Defense submissions focused on Article 4(3)(d) of AP II, which, as noted above, states that children continue to enjoy special protection in non-international armed conflicts if they "take a direct part in hostilities ... and are captured." The Defense argued that this provision only protects child soldiers who have been captured *by the opposing party*, and could not be used to expand the definition of war crimes under Article 8 of the Rome Statute to include crimes committed by combatants against members of the same armed group.[49]

In support of its position, the Defense cited the French version of the confirmation decision in the *Katanga* case, also from the ICC, where the Pre-Trial Chamber stated that the war crime of using children to participate actively in hostilities was "*le seul*" (the only) war crime charged in that case that could be committed by an individual on one's own side of the conflict (the other war crimes charged included rape and sexual slavery per Article 8(2)(e)(vi) of the Rome Statute).[50] However, the same sentence in the English version of the decision simply states that "this war crime [using children to participate actively in hostilities] can be committed by a perpetrator against individuals in his own party to the conflict"[51] – it does not suggest that that war crime is exceptional in that regard. This discrepancy is an example of

the definitional and interpretive challenges that can arise in a multilingual court.

In response, the Prosecution argued that charging the acts of sexual violence against the girl soldiers as war crimes under Article 8(2)(e)(vi) did not violate the principle of legality: the charges did not involve the creation of a new crime, or the extension of an existing crime by analogy.[52] Rather, the Prosecution explained, it was legitimately advancing a "teleological" (purposive) interpretation of Article 8(2)(e)(vi) and AP II.[53] This teleological interpretation included three key propositions. First, although IHL does not generally protect combatants from harm by members of the same group, this is not an "irrebuttable presumption."[54] To illustrate this point, the Prosecution referred to the prohibition on the recruitment and use of child soldiers, noting that this prohibition exists in order to protect children as a vulnerable group.[55] Second, that while children may lose their protection against attack when they take part in hostilities, they remain entitled to other special protections under IHL, including a protection against sexual violence.[56] Third, the Prosecution contested the Defense's interpretation of Article 4(3)(d) of AP II, which states that children continue to enjoy special protection when they "take a direct part in hostilities . . . and are captured." The Defense had argued that this provision only applied to children captured *by the opposing party*; however the Prosecution argued that this interpretation was "excessively narrow" and at odds with the purpose of the provision as reflected in the commentary to API II, namely to protect children as a vulnerable group. [57]

The Pre-Trial Chamber did not adopt the Prosecutor's submission that although children may lose their protections against attack when they take direct part in hostilities, they retain their other special protections under IHL. Rather, it found that children *do* lose protection when they take direct participation in hostilities, for so long as such participation in hostilities lasts.[58] However, the Pre-Trial Chamber reasoned that the girl soldiers in question could not logically have been taking a direct/active part in hostilities at the precise time that the sexual violence took place. In the Pre-Trial 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.[59]

Accordingly, the Pre-Trial Chamber found that the child soldiers were protected under IHL when the sexual violence took place, with the result that the acts of sexual violence constituted war crimes under Article 8(2)(e)(vi) of the Rome Statute.[60] Whether the girls assumed the role of combatants in the same armed group as the perpetrator was irrelevant to the

Pre-Chamber's determination. In a footnote, the Pre-Trial Chamber observed that the SCSL presented a "similar assessment" in the *Taylor* decision,[61] referring to the SCSL Trial Chamber's finding that the sexual violence against Akiatu Tholley (the girl soldier who was raped by a member of her own group) constituted "outrages on personal dignity," a war crime under Article 3(e) of the SCSL Statute.[62] In characterizing this sexual violence as a war crime, the SCSL Trial Chamber did not specifically discuss the relevance of Tholley's role in the same armed group as the perpetrator. However it clarified, in relation to this charge, that "each of the victims was not taking an active part in the hostilities at the time of the sexual violence." [63] The Pre-Trial Chamber's reasoning in *Ntaganda* was consistent with this approach.

SIGNIFICANCE OF THE DECISION

Strengthening Accountability for Sexual Violence

The Pre-Trial Chamber's finding that the rape and sexual slavery of UPC-FPLC girl soldiers by other members of the same armed group could constitute war crimes under Article 8(2)(e)(vi) of the Rome Statute is an important jurisprudential development. As noted above, the SCSL had used similar reasoning to find that sexual violence against a number of women and girls, including some girl soldiers, constituted a war crime under Article 3(e) of the SCSL Statute. However, the *Ntaganda* decision was the first to apply this reasoning to interpret 8(2)(e)(vi) of the Rome Statute, and the first to specifically apply this reasoning to prosecute sexual violence against child soldiers by members of their own group.

A key question is how far the Pre-Trial Chamber's reasoning extends. While the Chamber's reasoning was limited to the war crimes of rape and sexual slavery under Article 8(2)(e)(vi) of the Rome Statute, the same reasoning arguably applies to all of the sexual violence crimes listed in Article 8(2)(e)(vi), as well as those listed in Article 8(2)(b)(xxii), which applies in international armed conflicts. Read even more broadly, the Chamber's reasoning suggests that the rape and sexual slavery of combatants of *any age* by members of the same armed forces or group could constitute war crimes under Article 8(2)(e)(vi) or 8(2)(xxii), because "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." If that is the case, the decision significantly enhances the protection of soldiers of any age, who may be vulnerable to sexual abuse by their fellow soldiers due, inter alia, to their sex, their sexual orientation or their failure to conform to socially constructed gender norms.

However, even if the decision indicates only that the rape and sexual slavery of child soldiers by their fellow soldiers can constitute war crimes under Article 8(2)(e)(vi) of the Rome Statute, it represents a positive development. It ensures that the sexual violence against the UPC-FPLC girl soldiers will be prosecuted

in the ICC – an important outcome given the lost opportunities in *Lubanga*, where the Prosecution's attempt to prosecute acts of sexual violence against these girl soldiers using the war crimes of conscripting, enlisting or using child soldiers was unsuccessful, for the reasons described above. Looking further ahead, the decision may extend the options for prosecuting sexual violence against child soldiers by members of the same armed group where the contextual elements of crimes against humanity cannot be satisfied, namely that the acts must be committed as a part of a "widespread or systematic attack against any civilian population," pursuant to a "State or organizational policy."

Recognizing Girls' Multiple Roles in Armed Conflict

In her expert witness testimony in the *Lubanga* case, the United Nations Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, emphasized that girls in armed conflict "play multiple roles, sometimes involving conflict – combat, scouting and portering, but also including and being forced into sexual slavery or bush wives."[64] However, popular representations of girls in armed conflict do not always reflect all of these roles. Rather, girls in armed groups are often represented as passive victims, whose identity is defined only through their experiences of sexual violence. As Denov observes:

> [W]hen girls within armed groups are discussed, whether within the realms of academia, policy or the media, there has been a tendency for them to be portrayed predominantly as silent victims, particularly as "wives," and as victims of sexual slavery. While these gendered portrayals undoubtedly represent the experiences of some war-affected girls, to characterize girls *solely* as victims of sexual violence presents a skewed picture of their lived realities. . . . (A) danger is that girls become personified as voiceless victims, often devoid of agency. (2010, 13)

The *Ntaganda* decision challenges this misleading and disempowering narrative of girls' roles in armed groups, by recognizing the girls in question as child soldiers *and* as victims of sexual violence. Furthermore, by highlighting the sexual violence against these girls without losing sight of their identity as child soldiers, the decision underscores the pressing need for policy initiatives addressing the specific needs of girl soldiers, particularly given that girl soldiers are "poorly served by extant programming that under-appreciates the specific gender-based reintegrative challenges they face, such as recovery from abhorrent sexual violence" (Drumbl 2012b, 96; see also comments by Prosecutor Moreno Ocampo cited in Jørgensen 2012, 664).

Recognizing the Complexity of Sexual Violence

While the *Ntaganda* decision clearly strengthens accountability for sexual violence against child soldiers and recognizes the multiple roles that girls play in

armed groups, it arguably oversimplifies some of the complexities of sexual violence. As explained above, the Pre-Trial Chamber reasoned that "those 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."[65] This logic may hold true for sexual violence crimes that happen in a relatively short space of time (although the effects may last a lifetime). For example, it may be logical to say that a victim could not have been taking an active part in hostilities at the precise time that he or she was subjected to rape.

However, the logic is more ambiguous in relation to the crime of sexual slavery, which is defined by the fact that the perpetrator exercises rights of ownership over the victim or imposes on the victim a similar deprivation of liberty, and forces the victim to engage in sexual acts (Elements of Crimes Article 8(2)(b)(xxii)-2; Article 8(2)(e)(vi)-2). This could be interpreted to mean that sexual slavery occurs only in the specific moment that the perpetrator, who exercises rights of ownership over the victim, forces the victim to take part in a sexual act. However, such an interpretation may be too simplistic, given the reality of the context. A more appropriate interpretation is that the sexual slavery continues so long as the perpetrator exercises rights of ownership over the victim or similarly deprives the victim of his or her liberty, and on at least one occasion forces the victim to engage in a sexual act. If sexual slavery is understood in this way, it becomes possible to imagine that the crime continues even while the victim is actively or directly participating in hostilities, which includes tasks such as manning checkpoints, guarding or carrying messages, as well as taking part in combat (see Jørgensen 2012, 669). This raises some important legal questions, namely when does sexual slavery begin and end, and can the victim take direct part in hostilities at the same time that he or she is subjected to sexual slavery? The *Ntaganda* decision, which assumes that the sexual slavery and the participation in hostilities occur at separate times, falls short of engaging with these complex questions.

CONCLUSION

The issue of sexual violence against child soldiers, particularly girl soldiers, has only recently emerged as a key issue in international criminal law. The *Ntaganda* case, which has now been committed to trial, is the latest of several recent cases in the ICC and SCSL addressing this critical issue. As a result of the Prosecutor's charging strategy, this case has sparked a timely debate on an important legal question, namely whether sexual violence against child soldiers by members of their own armed group can constitute war crimes under Article 8(2)(e)(vi) of the Rome Statute.

The Pre-Trial Chamber's finding that such sexual violence can indeed constitute war crimes under Article 8(2)(e)(vi) has positive implications, both legally and politically. While the decision makes some potentially problematic

assumptions about the nature and the duration of sexual violence, it strengthens the prospect for accountability for sexual violence against child soldiers (and possibly other soldiers) by members of their own armed groups. It also ensures, as the previous Prosecutor stated on the first day of the *Lubanga* trial, that "in this International Criminal Court, the girl soldiers will not be invisible."[66] Of course, there remains a need for broader political and legal efforts to prevent and redress sexual violence against child soldiers, particularly girl soldiers, by members of their own armed groups. The *Ntaganda* decision puts the ICC in a strong position to support, complement and build on these efforts.

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Notes

1 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc A/CONF.183/9 ("Rome Statute").

2 ICC, *The Prosecutor v. Bosco Ntaganda* ("*Ntaganda*"), Document Containing the Charges, ICC-01/04-02/06-203-AnxA, 10 January 2014, Pre-Trial Chamber I, [107]; *Ntaganda*, Transcript, ICC-01/04-02/06-T-10-Red-ENG, 13 February 2014; see also *Ntaganda*, Observations finales au nom des anciens enfants-soldats, ICC-01/04-02/06-273, Pre-Trial Chamber II, [73]–[80]. As an English version of this filing was not available at the time of writing, the author is unable to comment further on the victims' views.

3 *Ntaganda*, Transcript ICC-01/04-02/06-T-10-Red-ENG, 13 February 2014, Pre-Trial Chamber II, 27, lines 22–25.

4 *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, Pre-Trial Chamber II, [76]–[80].

5 The Paris Principles were developed by "States (both affected countries and donor governments), human rights actors, humanitarian actors, development actors, military and security actors (state and non-state), associated organisations including UN organisations, other inter-governmental actors, national and international organisations and community based organisations" at a conference in Paris in 2007, hosted by the French Government with support from UNICEF (Paris Principles, 1.10). The purpose of the Principles is "to guide interventions for the protection and well-being of [children associated with armed forces or groups] and to

assist in making policy and programming decisions" (Paris Principles, 1.11). The Principles explain that "a child associated with an armed force or armed group" means "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities" (Paris Principles, 2.1). The Principles are not binding on the ICC. However, they evince an increasing commitment by a broad range of actors, including States, to address boys' and girls' experiences in armed forces or groups, including their experience of sexual violence (see Denov 2010, 4–5; Drumbl 2012a, 3–4, 2012b, 9–91).

6 For example, on the first day of trial in the *Lubanga* case, Prosecutor Moreno Ocampo stated: "child soldiers were exposed to the sexual violence perpetrated by Thomas Lubanga's men in unspeakable ways . . . young boys were instructed to rape.": ICC, *The Prosecutor v Thomas Lubanga Dyilo* ("*Lubanga*"), Transcript, ICC-01/04-01/06-T-107-ENG, 26 January 2009, Trial Chamber I, 11, lines 21–23. During the trial, Witness 8 (a former boy soldier) stated that the commanders had instructed the boy soldiers to rape civilian women, and confessed that he followed these instructions once: *Lubanga*, Transcript, ICC-01/04-01/06-T-135-Red2-ENG, 25 February 2009, Trial Chamber I, 37, line 18 to 38 line 18. The author's view is that where child soldiers are forced or coerced to commit rape, this may potentially constitute "active participation in hostilities" (see Jørgensen 2012, 671), but may also be regarded as sexual violence against the child soldier himself or herself. This violence to the child soldier would not satisfy the ICC's definition of rape, because it does not involve the penetration of the body of the victim (the child soldier) or the perpetrator (Elements of Crimes, Article 7(1)(g)-1, Element 1; 8(2)(b)(xxii)-1, Element 1; 8(2)(e)(vi)-1, Element 1). However, it may be prosecutable as "any other form of sexual violence," per Articles 7(1)(g), 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute.

7 See SCSL, *The Prosecutor v Charles Ghankay Taylor* ("*Taylor*"), Trial Judgment, SCSL-03-01-T, 18 May 2012, Trial Chamber II, [508].

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ("AP I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ("AP II").

9 According to the Appeals Chamber of the SCSL, the conscription and enlistment of child soldiers, and the use of children to participate actively in hostilities, has been criminalized under customary international law since at least 1996: *The Prosecutor v Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, 31 May 2004, Appeals Chamber, [50]–[53].

10 *Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, Pre-Trial Chamber I.

11 *Lubanga*, Public Redacted Version, Document Containing the Charges, ICC-01/04-01/06-356-Anx2, 28 August 2008, Pre-Trial Chamber I.
12 *Lubanga*, Transcript ICC-01/04-01/06-T-107-ENG, 26 January 2009, Trial Chamber I, 11, line 21 to 12, line 4.
13 *Lubanga*, Prosecution's closing brief, ICC-01/04-01/06-2748-Red, 21 July 2011, Trial Chamber I, [139 – 143].
14 *Lubanga*, Transcript ICC-01/04-01/06-T-356-ENG, 15 August 2011, Trial Chamber I, 55, lines 15 – 21.
15 Ibid., 54, lines 8 – 22.
16 *Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, Trial Chamber, [630]
17 Ibid, [628].
18 *Lubanga*, 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, [20].
19 Ibid., [21].
20 *Taylor*, Trial Judgment, SCSL-03-01-T, Trial Chamber II, 18 May 2012; Appeal Judgment, SCSL-03-01-A, 26 September 2013, Appeals Chamber.
21 *Taylor*, Trial Judgment, SCSL-03-01-T, 18 May 2012, Trial Chamber II, Count 9.
22 Ibid., Count 4.
23 Ibid., Count 5.
24 Ibid., Count 6.
25 Ibid., [1355] – [1607].
26 Ibid., [871] – [1207].
27 Ibid., [871].
28 Ibid., [871] – [1207]; for a similar approach see SCSL, *The Prosecutor v Brima et al.* ("*AFRC case*") Trial Judgment, SCSL-04-16-T, 20 June 2007, Trial Chamber II, [966] – [1188]; *AFRC case*, Appeal Judgment, SCSL-04-16-A, 22 February 2008, [175] – [203], in particular [190].
29 Ibid., [1453 – 1456].
30 Ibid., [1507]; [1509].
31 Ibid., [1007]; [1006(vii)]; [1179]; [1206(vii)].
32 *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, Pre-Trial Chamber II, [15], [31].
33 The arrest warrant identifies Ntaganda as "Deputy Chief of General Staff for Military Operations, ranked third in the hierarchy of the [UPC]-FPLC": *Ntaganda*, Warrant of Arrest, ICC-01/04-02/06-2-Anx-tENG, 22 August 2006, Pre-Trial Chamber I, 3. The confirmation of charges decision identifies him as "Deputy Chief of Staff in charge of operations": *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, Pre-Trial Chamber II, [15].
34 *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's appeal against the decision of the Pre-trial Chamber entitled Decision on the Pro-

secutor's Application for Warrants of Arrest, Article 58, ICC-01/04-169, Appeals Chamber, 13 July 2006, [5].

35 Ibid.

36 *Ntaganda*, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, ICC-01/04-02/06-18, 28 April 2008, Pre-Trial Chamber I.

37 *Ntaganda*, Public Redacted Version of Prosecutor's Application under Article 58 filed on 14 May 2012, ICC-01/04-611-Red, 14 May 2012, Pre-Trial Chamber I.

38 Ibid., [10], [13], [93], [97], [100], [102], [104], [105], [106], [107], [109], [111].

39 Ibid., [53].

40 Ibid., [53], [113].

41 Ibid., [13], [100].

42 Ibid., [51], [83], [105], [112], [120].

43 *Ntaganda*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06-36-Red, 13 July 2012, Pre-Trial Chamber II.

44 *Ntaganda*, Document Containing the Charges, above note 3, 57–58.

45 Ibid.

46 Ibid., [100].

47 *Ntaganda*, Document Containing the Charges, above note 3, [107].

48 *Ntaganda*, Transcript ICC-01/04-02/06-T-10-Red-ENG, 13 February 2014, Pre-Trial Chamber II, 27, lines 22–25.

49 Ibid., 27, lines 10–14; see also the Defense's written submissions on this issue, which at the time of writing were not available in English: *Ntaganda*, Version publique expurgée Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, ICC-01/04-02/06-292-Red2, 14 April 2014, Pre-Trial Chamber II [250]–[263].

50 Ibid., [259]; citing ICC, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (*Katanga*) Décision relative à la confirmation des charges, ICC-01/04-01/07-717-tFRA, 30 September 2008, Pre-Trial Chamber I [248].

51 *Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, Pre-Trial Chamber I [248].

52 *Ntaganda*, Public Redacted Version of Prosecution's submissions on issues that were raised during the confirmation of charges hearing, ICC-01/04-02/06-276-Red, 24 March 2014, Pre-Trial Chamber II, [186].

53 Ibid., [183]–[185].

54 Ibid., [187].

55 Ibid., [187].

56 Ibid., [188].

57 Ibid., [189]

58 *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, Pre-Trial Chamber II, [79].

59 Ibid., [79].

60 Ibid., [80].

61 Ibid., [79], note 318.

62 *Taylor*, Trial Judgment, SCSL-03-01-T, 18 May 2012, Trial Chamber II, [1206(vii)].

63 Ibid., [1207].
64 *Lubanga*, Transcript, ICC-01/04-01/06-T-223-ENG, 7 January 2010, Trial Chamber I, 14 lines 12–14.
65 *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, Pre-Trial Chamber II, [79].
66 *Lubanga*, Transcript, ICC-01/04-01/06-T-107-ENG, 26 January 2009, Trial Chamber I, 13 lines 7–8.

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