

Opinion

# ENSURING PROTECTION OF CHILD SOLDIERS FROM SEXUAL VIOLENCE: RELEVANCE OF THE NTAGANDA DECISION ON THE CONFIRMATION OF CHARGES IN NARROWING THE GAP

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## ABSTRACT

The protection of child soldiers from sexual violence has been very difficult to ensure in international justice. If child soldiers were considered to be “directly/actively” participating in hostilities, according to the principle of distinction between combatants and civilians, they lost humanitarian protection against attack, including from sexual violence. The *Ntaganda* Decision on the confirmation of charges of 2014 opens the door to get out of this catch-22 situation. It clarified that those subject to sexual violence “cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature.” Thus, this interpretation of the standard “directly/actively” participating in hostilities has the potential to fill the gap and ensure child soldiers protection from sexual violence. This article explains why the *Ntaganda* finding of the Pre-Trial Chamber should be upheld: for its capacity to ensure protection to “all” child soldiers independently of their role, and its coherence with the child protection mandate established in the Rome Statute and in international humanitarian law.

## Introduction

In the confirmation of charges against *Ntaganda*, Witness P-0758, aged 13, declared being abducted and raped by UPC/FPLC members during months of military training, being unable to escape from camps and likened to “guduria,” a large cooking pot, to

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mean that soldiers were free to sleep with her.<sup>1</sup> Witness P-0758 is considered a girl “associated” with an armed force or group, a concept used in human rights jargon to refer to any person below 18 recruited or used by an armed group “in any capacity,” therefore, including in situations like active hostilities or for sexual purposes.<sup>2</sup>

In general, international criminal law has treated situations involving child soldiers under the international crime of “conscripting or enlisting children under the age of fifteen or using them to participate actively in hostilities,”<sup>3</sup> as this specific category seems suitable to punish those who involve children in armed conflict. Paradoxically, despite its purpose to protect children from being involved in warfare, this war crime cannot ensure the protection of child soldiers from sexual violence, including within their own armed group.

According to the principle of distinction central to International Humanitarian Law (IHL), persons considered to “take a direct part in hostilities” are deprived from the humanitarian protection against attack accorded to civilians.<sup>4</sup> This also applies to children. Express IHL provisions establish that children taking (direct) part in hostilities lose humanitarian protection, which they only recover when their participation in hostilities ceases.<sup>5</sup> This catch-22 situation prevents ensuring child soldiers protection against sexual violence if they are considered to be taking part in hostilities.

Recently, in the Ntaganda Decision on the confirmation of charges, Pre-Trial Chamber II considered that sexual violence against child soldiers “which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.”<sup>6</sup> Although this case is still at its initial stage, it may open the door to the use by the International Criminal Court (ICC) of a legal standard that ensures the protection of all child soldiers from sexual violence.

This article answers the question: Does the Ntaganda Decision on the confirmation of charges set an adequate standard to protect child soldiers from sexual violence? This question is answered, first, by analyzing the “active/direct” participation in hostilities approach that has prevailed to deal with situations affecting child soldiers (section I). Then, the approach introduced by the Pre-Trial Chamber in Ntaganda is assessed in its capacity to overcome existing difficulties and to ensure the protection of child soldiers from sexual violence (section II).

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<sup>1</sup> *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ICC-01/04-02/06, PTC II, 9 June 2014, para. 81.

<sup>2</sup> This paper will use the terms “child soldier” and “child associated with armed conflict” as synonyms. See, *The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, p 7..

<sup>3</sup> 1998, Rome Statute of the International Criminal Court, 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15.

article 8(2)(e)(vii). United Nations Security Council, *Statute for the Special Court for Sierra Leone*, 16 January 2002, article 4(c).

<sup>4</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 1125 UNTS 3/ 1991 ATS No 29/ 16 ILM 1391 (1977), article 51..1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609/ [1991] ATS 30/16 ILM 1442 (1977), article 4, R. Kolb & R. Hyde, *An Introduction to International Law of Armed Conflict*, Oxford: Hart Publishing 2008, p. 88.

<sup>5</sup> Protocol I, supra note 4, article 77(3). Protocol II, supra note 4, article 4(3)(d). Note that article 77 (3) of Protocol I refers to children under fifteen who take a “direct” part in hostilities; while article 4(3) of Protocol II only refers to children under fifteen who “take part” in hostilities. Also, note that article 8(2)(e)(vii) of the Rome Statute uses the expression “to *participate actively in hostilities*.”

<sup>6</sup> *Prosecutor v. Bosco Ntaganda*, supra note 1, para 79 (emphasis added).

## I. The Illusion of Protecting Child Soldiers from Sexual Violence Under the “Direct/Active” Participation in Hostilities Approach

Article 8 of the Rome Statute criminalizes “Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”<sup>7</sup> Yet, the concept “active” participation in hostilities is far from being a clear-cut category when applied to child soldiers (section A). In addition to its legal uncertainty, this category is detrimental for child soldiers in that it accords them a different treatment (section B).

### A. “Active” Participation of Child Soldiers in Hostilities: An Uncertain Category

The border lines of the concept “active” participation in hostilities are a mooted topic in international criminal law. At times this term has been interpreted as meaning “direct” participation in hostilities; on other occasions, it has been interpreted more broadly as “indirect” participation in hostilities. These approaches have a clear impact on the protection of child soldiers: the broader the notion of “participation” in hostilities, the narrower their humanitarian protection, as IHL considers persons with this status as military objectives, thus unprotected against attack.<sup>8</sup>

#### i. Active Participation in Hostilities As “Direct” Participation

One meaning attributed to the concept “active” participation in hostilities is “direct” participation. “Direct” participation is the standard used by IHL to designate persons who “unless and for such time as they take a direct part in hostilities” lose the general protection against attack afforded to civilians.<sup>9</sup> Both human rights law and IHL (in international armed conflicts) address armed forces the specific prohibition to use children “directly” in hostilities. However, in non-international armed conflicts, IHL establishes a more general prohibition not to allow children to “take part in hostilities,” thus, enlarging the potential number of cases where children can be considered to perform a combat function and, consequently, to lose humanitarian protection.<sup>10</sup>

The notion “direct” participation in hostilities has been used by international jurisprudence in different contexts. The International Criminal Tribunal for Rwanda (ICTR) used the term “direct” participation to determine who are victims or persons protected in armed conflict based on the fact that (they) “do not take direct part in hostilities or have ceased to take part in hostilities.”<sup>11</sup> In a context dealing with child soldiers, in the Lubanga case before the ICC, the defense relied on the standard “direct”

<sup>7</sup> Rome Statute, supra note 3, article 8(2)(e)(vii).

<sup>8</sup> See supra note 4. Also, see article 48 of Protocol I, supra note 4.

<sup>9</sup> Idem, article 51 (3). Protocol II, supra note 4, article 4(1)(2). Note that, in the case of non-international armed conflicts, article 4(3) of Protocol II prohibits that children younger than fifteen “take part” in hostilities; thus it offers a broader protection to children against hostilities than international armed conflicts, where it is prohibited that they “take a direct part” in hostilities (Protocol I, supra note 4, article 77(3)).

<sup>10</sup> Ibid. Protocol II, supra note 4, article 4(3).

2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, U.N. Doc. A/54/49 (2000). Note that the purpose of the Optional Protocol, as part of human rights law, is to extend the prohibition that children participate in hostilities from 15 to 18 years-old (article 1). Differently, IHL and international criminal law set the standard at fifteen years-old.

<sup>11</sup> *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* Judgment and Sentence, ICTR-96-3-T, 6 December 1999, para. 99. *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, TC I, 2 September 1998, para. 629.

participation supported by jurisprudence from the International Criminal Tribunal from the Former Yugoslavia (ICTY) and the ICTR. The defense argued that the war crime of using children to “actively participate in hostilities” under the Statute should be interpreted narrowly, as “direct” participation: “the concept of “actively participating in hostilities” should be interpreted as being synonymous with “direct participation” which, it is argued, equates to “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>12</sup>

Similarly, the International Committee of the Red Cross (ICRC) relies on the notion “direct” participation in hostilities, requiring three cumulative criteria for an act to meet the “direct” participation test: 1) a threshold of harm: an act likely to affect the military operations or capacity of a party to an armed conflict; 2) a direct link: between the act and the harm; and 3) a belligerent nexus: an act designed to directly cause the required threshold of harm in support to a party to the conflict.<sup>13</sup>

Accordingly, implications of applying the standard “direct” participation in hostilities for the protection of child soldiers from sexual violence would be: i) children in a position likely to cause harm/be harmed during military operations –those assuming an active combat function- would lose humanitarian protection and, thus, remain unprotected from sexual abuse; on the contrary, ii) other children associated with the armed conflict but not in a position likely to cause harm would remain protected by IHL, including from sexual violence; for instance, cooks, porters, messengers, spies, bush wives, and so forth.

#### ii. Active Participation in Hostilities as “Indirect” Participation

On other occasions, a broader interpretation of active participation in hostilities has been endorsed by international jurisprudence to encompass both “direct” and “indirect” participation. The Special Tribunal for Sierra Leone (SCSL) used the “at risk” test to interpret the scope of child soldiers who actively participate in hostilities. In the AFRC case, the SCSL stressed that active participation involves all acts that put children’s lives “directly at risk” during combat, including “any labour or support that gives effect to, or helps maintain, operations in a conflict.”<sup>14</sup> According to the SCSL Trial Chamber, roles such as: “carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routs, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.”<sup>15</sup>

The ICC has also backed a notion of active participation in hostilities larger than “direct” participation. In Lubanga, the Trial Chamber came close to the SCSL considering that:

“Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.”<sup>16</sup>

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<sup>12</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06, TC I, 14 March 2012, paras. 582, 584.

<sup>13</sup> N. Melzer, *Interpretative Guidance to the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, ICRC, 2009, p. 46.

<sup>14</sup> *Prosecutor v. Brima, Kamara and Kanu* (“AFRC” case), Judgment, STSL-04-16-T, TC II, 20 June 2007, paras. 736, 737.

<sup>15</sup> *Idem*, para. 737.

<sup>16</sup> *Prosecutor v. Thomas Dyilo*, supra note 12, para. 628.

According to the ICC Trial Chamber, the decisive factors to determine if an “indirect” role constitutes active participation are: i) support by the child to combatants, and ii) that this support exposes him or her to “real danger as a potential target;” including situations not in the scene of immediate hostilities but where the child is actively involved in hostilities.<sup>17</sup>

The ICC Appeals Chamber has corrected the Lubanga Judgment decision. It considered that the Trial Chamber had erred in establishing the “potential target” test as the decisive factor of active participation. According to Appeals Chamber, to determine whether an act or role of a child constitutes “active” participation in hostilities (a crime under article 8(2)(e)(vii) of the Statute) “it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged.” Children deployed as soldiers, participating in combat, used as military guards and bodyguards would belong to this category.<sup>18</sup> The Appeals Chamber’s requirement of a “link” between the role of the child and hostilities is aligned with the travaux préparatoires of the Rome Statute which declare that: “the words “using” and “participate” have been adopted in order to cover both participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage (...)” but would not cover activities unrelated to hostilities.<sup>19</sup>

The ICC’s interpretation of the standard “active” participation in hostilities (as including roles directly and indirectly linked to combat) results in a broader interpretation of the war crime of using children “to participate actively in hostilities” than the mere “direct” participation standard.<sup>20</sup> From the viewpoint of punishing individuals who recruit and use children in hostilities enlarging the scope of this standard is positive. However, it has the downside of including more children under the “taking part in hostilities” status than “direct” participation, thus depriving more children of humanitarian protection – also from sexual violence. Whereas children acting as messengers, guards, at military checkpoints or deployed as soldiers, would not take part in hostilities according to the “direct” participation standard and, thus, remain protected from sexual violence; according to the “active” participation standard, these same children could be viewed as “actively” participating in hostilities and, consequently, unprotected.

### **B. Detrimental Impact of Applying the “Direct/Active” Participation in Hostilities Status to Situations Where Child Soldiers are Victims of Sexual Violence**

Applying the legal standard “active” and (to a lesser extent) “direct” participation in hostilities to persons victims sexual violence prevents the prosecution of this crime and the protection of victims – many of them children- required by the Rome Statute. <sup>21</sup> Its detrimental effects include: i) the deprivation of children from humanitarian protection; ii) the lack of legal certainty as to the limits of the “active” participation in hostilities status; and iii) the resulting discrimination among child soldiers victims of sexual violence.

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<sup>17</sup> Ibid.

<sup>18</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute,” AC, ICC-01/04-01/06 A 4 A6, 1 December 2014, para. 340, (emphasis added).

<sup>19</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN. Doc. A/CONF. 183/2/Add.1, 14 April 1998, p.21 at footnote 12.

<sup>20</sup> Rome Statute, supra note 3, article 8(2)(e)(vii).

<sup>21</sup> Idem, articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

### i. Deprivation of Humanitarian Protection to Child Soldiers

The war crime of recruiting and using children under fifteen to “actively” participate in hostilities, provided by article 8(2)(e)(vii) of the Rome Statute, is intended to prosecute the persons responsible for involving children in armed conflicts. Paradoxically, considering that child soldiers could be actively participating in hostilities and, at the same time, be victims of a crime of sexual violence is not an option because the “active” participation status deprives persons of humanitarian protection. As a result, sexual violence as a war crime cannot be prosecuted, despite its criminalization under 8(2)(e)(vi) of the Statute. It follows that, applying to child soldiers victims of sexual violence the “actively” participating in hostilities status leads to a catch-22 situation which precludes their protection and encourages the commission of this grave crime.

Briefly, if the “combatant” status of the child is put before any other considerations, the aspirations of IHL and international criminal law to protect children from sexual violence—especially the most vulnerable because of their involvement in armed conflict—cannot be achieved.

### ii. Lack of Legal Certainty as to the “Active” Participation in Hostilities Status

In the Lubanga Judgment decision, the Trial Chamber concluded that active participation should be decided on a case-by-case basis given the variety of possible roles involving children and “regardless whether sexual violence may be properly included within the scope of using to participate actively in hostilities.”<sup>22</sup> Yet, the determination whether children supporting armed groups were actively participating in hostilities at the time of their sexual abused seems very difficult to prove beyond reasonable doubt:<sup>23</sup> one child may fulfil various roles within an armed group during the same day; in addition, after years have elapsed between the facts and the proceedings before the Court, the perspective of ascertaining the bordering differences between “active” and non-active participation would be very elusive for the Prosecutor.

Applying the standard “active” participation in hostilities to situations where child soldiers are subjected to sexual violence presents other risks. It generates uncertainty as to the right of both victims and perpetrators to know the scope of the crimes under the jurisdiction of the Court (principle of legal security) given the lack of clarity as to whether child soldiers involved in combat would be protected from sexual violence;<sup>24</sup> and, from a criminological perspective, the “active” participation in hostilities status would—despite difficulties to ascertain it—override the mandate of the Rome Statute to investigate and prosecute sexual violence as war crime and as a crime against humanity

### iii. Discrimination Among Child Soldiers Victims of Sexual Violence

Child soldiers have a different treatment under international law depending on whether they are considered to participate “actively” in hostilities (deprived of humanitarian protection) or not (granted humanitarian protection). Their role or function within the armed group determines their entitlement to protection. Accordingly, the status “active” participation in hostilities necessarily draws a line between children who are protected and those unprotected from sexual violence, depending on the kind of support they provide to the armed group. One may ask if this differentiation between children is justified.

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<sup>22</sup> *Prosecutor v. Thomas Lubanga Dyilo*, supra note 12, para. 630.

<sup>23</sup> Article 66 of the Rome Statute requires for the conviction of the accused to prove his or her guilt “beyond” reasonable doubt. See Rome Statute, supra note 3.

<sup>24</sup> *Idem*, article 22 establishes the principle of legality.

When applied to sexual violence, establishing different status of protection could be considered discriminatory. According to the universally ratified Convention on the Rights of the Child, States have concurrent obligations such as: ensuring the protection of children during armed conflict (article 38) and protecting children from all forms of sexual abuse (article 34) without distinction based on status (article 2).<sup>25</sup> Given that sexual violence constitutes a form of inhuman and degrading treatment, protection against this crime must not be derogated during armed conflict.<sup>26</sup> The ICC's interpretation of "active" participation in hostilities in a way that precludes the protection of children from sexual violence could be considered a breach of article 21 of the Rome Statute that requires an interpretation of the crimes under the jurisdiction of the Court in a manner consistent with internationally recognized human rights.<sup>27</sup>

Thus assessing as the first stage of the legal reasoning whether a situation of "active" participation in hostilities exists when child soldiers are victims of sexual violence gives rise to multiple dilemmas: can IHL fulfil its protective function regarding child soldiers victims of sexual violence? can the ICC realistically pretend to prosecute sexual violence as a war crime when child soldiers are affected? Ensuring the prosecution of both sexual violence against child soldiers and of using children to actively participate in hostilities should not be mutually excluding goals but complementary. Both are key values to be protected according to the Rome Statute.

## II. Protecting Child Soldiers from Sexual Violence at all Times During Armed Conflict

A breakthrough in the protection of child soldiers from sexual violence may be underway. Pre-Trial Chamber II, in the Decision on the confirmation of charges against Ntaganda, interpreted the concept "direct/active" participation in hostilities in specific situations of sexual violence committed against child soldiers. The Chamber, while reaffirming the principle that "children under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities," added:

"The Chamber clarifies 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, 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."<sup>28</sup>

According to the Pre-Trial Chamber, child soldiers – independently of their role or function within the armed group- cannot be considered under the status "direct/active" participation in hostilities at the precise time of their sexual abuse. Therefore, the Chamber concluded that children fighting for the UPC/FPLC who had been sexually

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<sup>25</sup> 1989 Convention on the Rights of the Child (CRC), 1577 UNTS 3 (1990).

<sup>26</sup> 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1967), articles 4 and 7.

<sup>27</sup> Rome Statute, *supra* note 3.

<sup>28</sup> *Prosecutor v. Bosco Ntaganda*, *supra* note 1, para 79 (emphasis added).

abused remained under the protection of IHL and, consequently, it could exercise jurisdiction over those crimes.<sup>29</sup>

Despite this finding has taken place at a pre-trial stage (the decision was under appeal at the time of writing) it could have major consequences to improve the thorny issue of protecting child soldiers from sexual violence. Indeed, the standard set by the Pre-Trial Chamber has the potential not only to ensure child soldiers protection from sexual violence (A) but, also, to protect them in the broadest sense (B).

#### **A. Ensuring the Protection of Child Soldiers Victims of Sexual Violence Under the Rome Statute**

What is relevant in the Ntaganda Decision on the confirmation of charges is that the Pre-Trial Chamber changed the logic applied to situations where child soldiers are victims of two particular crimes under the Rome Statute: using children under fifteen to “actively” participate in hostilities (article 8(2)(e)(vii)) and committing crimes of sexual violence against them (articles 7(1)(g),8(2)(b)(xxii),8(2)(e)(vi)). A logic traditionally applied to determine if a person is entitled to humanitarian protection has departed from the consideration whether that person is “directly/actively” participating in hostilities; in the affirmative, that very status would prevent that person to enjoy humanitarian protection. Yet, according to this reasoning, sexual violence would be unpunished and victims denied access to justice in those situations.

Breaking this logic, the Ntaganda approach brings sexual violence to the front and elevates acts of sexual violence as an independent variable of the legal analysis. The Pre-Trial Chamber acknowledges the criminalization of sexual violence under the Rome Statute and the need to prosecute this crime. Also, the finding could be considered sensitive to a “gender analysis,” a strategic priority of the Office of the Prosecutor, which “examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships (...) and in what ways, crimes, including sexual and gender-based crimes are related to gender norms and inequalities.”<sup>30</sup>

By incorporating a gender analysis that gives visibility to sexual violence, the prosecution of sexual crimes could be no longer dependent on the status of child soldiers and it could be prosecuted in equal conditions as other crimes. A more efficient application of the Rome Statute regarding the protection of children can be achieved if cumulative charges are brought for various crimes committed against them: sexual violence (article 8(2)(e)(vi)) and using children to actively participate in hostilities (article 8(2)(e)(vii)). Applying this logic, the Pre-Trial Chamber charged Ntaganda cumulatively with these – and other – crimes.<sup>31</sup>

The Pre-Trial Chamber’s decision in Ntaganda has similarities with a precedent established by the Special Tribunal for Sierra Leone (STSL) in the Taylor Judgment decision. In Taylor, the Trial Chamber decided that Tholley, a girl under fifteen who had been abducted, conscripted by the AFRC, trained, and used as sexual slave, had been a

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<sup>29</sup> *Idem*, para. 80.

<sup>30</sup> The Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, pp. 4, 13.

<sup>31</sup> *Prosecutor v. Bosco Ntaganda*, supra note 1, p. 63



victim of two crimes: a) rape and sexual slavery, and b) conscription by armed groups. Accordingly, Taylor was convicted cumulatively of these two, and other crimes.<sup>32</sup>

In Ntaganda, the Pre-Trial Chamber decision went further in the protection of child soldiers than the STSL. In Taylor the Trial Chamber declared itself “satisfied that for all of the aforementioned acts of sexual violence in Freetown and the Western Area (...) each of the victims was not taking an active part in the hostilities at the time of the sexual violence.”<sup>33</sup> Yet, this statement is open to interpretation: was the Trial Chamber satisfied that the victims were not actively engaged in hostilities because they had not been assuming a combat role that put them at “risk”? This could be an explanation considering that in the “AFRC” case the STSL had endorsed the “directly at risk” test to interpret “active” participation in hostilities.<sup>34</sup> We cannot be sure if the STSL would have adopted the same decision if, right before or after their sexual abuse, the victims had performed combat-related functions such as fighting, escorting, guarding, spying, being deployed in hostilities and so forth.

In this sense, the Ntaganda Decision on the confirmation of charges is crystal clear: the statement “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”<sup>35</sup> implies that “all” children, including those assuming military activities linked to combat, are protected from sexual violence. Thus, the Ntaganda finding, which clarifies and goes beyond the STSL precedent, opens the door to a categorical protection of child soldiers from sexual violence, in the broadest sense.

## **B. Protecting of Child Soldiers Victims of Sexual Violence in the Broadest Sense**

Two praiseworthy consequences of the Ntaganda Decision on the confirmation of charges are: ensuring universal protection to children against sexual violence (i) and its coherence with humanitarian purposes (ii).

### **i) Protecting All Child Soldiers from Sexual Violence**

The Rome Statute protects “any” person from sexual violence as a war crime or a crime against humanity when the perpetrator committed or caused a person to engage in an act of a sexual nature by: force, threat of force or coercion, taking advantage of a coercive environment, or incapacity to give genuine consent.<sup>36</sup> Therefore, protection from sexual violence under the Statute has universal reach in that it is granted to all persons independently of their age or status. For this reason, the recognition by the Pre-Trial Chamber in Ntaganda that child soldiers must be protected from sexual violence ensures their protection in the broadest sense. First, it ensures protection to all children under eighteen, in line with a human rights approach<sup>37</sup> and renders unnecessary the barrier of

<sup>32</sup>*Prosecutor v. Charles Ghankay Taylor*, Judgment, STSL-03-01-T, TC II, 18 May 2012, paras. 1179 and 1453.

<sup>33</sup> *Idem*, para 1207 (emphasis added).

<sup>34</sup> *AFRC* case supra note 14, paras. 736,737

<sup>35</sup> *Prosecutor v. Bosco Ntaganda*, supra note 1, para 79 (emphasis added).

<sup>36</sup> ICC, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), ASP, New York, 3-10 September 2002, articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi).

<sup>37</sup> Optional Protocol on the Involvement of Children in Armed Conflict, supra note 10.

fifteen years-old applicable to the recruitment and use of children in hostilities.<sup>38</sup> And, secondly, protection from crimes of sexual violence covers all child soldiers independently of their status, without discrimination, rendering inapplicable the distinction between children who participate “actively/directly” in hostilities and those who do not. The “soldieri” of children becomes irrelevant concerning their protection against sexual violence.

The consequences of the two approaches to deal with child soldiers sexually abused are blatantly different: the “direct/active” participation in hostilities approach only protects children under fifteen years-old and it deprives of humanitarian protection children considered to be participating “actively” in hostilities; on the contrary, the Ntaganda approach, by considering that sexual violence is incompatible with a combatant status, enables the protection of all children until eighteen years-old<sup>39</sup> regardless their function within the armed group. The finding ensures equal protection from sexual violence to all child soldiers, in a manner coherent with humanitarian values.

## ii) Coherence with Humanitarian Purposes

IHL seeks to fulfil concrete purposes concerning children in armed conflicts. These include: i) protecting persons under fifteen years-old from being recruited and used in hostilities, and ii) ensuring children a humane treatment and special protection at all times, including from outrages upon their personal dignity or indecent assault.<sup>40</sup> Sexual violence belongs to this last category. The problem with the “direct/active” participation in hostilities approach is that, by depriving of humanitarian protection to persons under this status, child soldiers cannot be protected from the outrage of sexual violence. As a result, IHL cannot fulfil one of its purposes.

The Ntaganda decision, by precluding the status “direct/active” participation in hostilities during the specific time of sexual violence, overcomes this hurdle, enabling a full implementation of humanitarian purposes regarding children.

First, it enables the protection of children from being used to participate actively in hostilities, as this act can always be charged under article 8(2)(e)(vii) of the Rome Statute, cumulatively, with other crimes against child soldiers. Normally, this crime will be charged when child soldiers are concerned, as children are necessarily enlisted, conscripted or used in hostilities by an armed group. Secondly, the Ntaganda approach also enables the humanitarian purpose of protecting child soldiers from outrages upon their dignity as it ensures that – no matter their role- sexual violence precludes their status “direct/active” participation in hostilities.

The purpose of ensuring full humanitarian protection to child soldiers during hostilities is implicit in the Ntaganda decision where the Pre-Trial Chamber interpreted the law in a way that makes it possible to prosecute both sexual violence against children and their use to participate actively in hostilities. As expressed by Pre-Trial Chamber:

“Indeed, to hold that children under the age of 15 years lose the protection afforded to them by IHL (...) would

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<sup>38</sup> Protocol I, supra note 4, article 77(2); Protocol II, supra note 4, article 4(3); Rome Statute supra note 3, articles 8(2)(b)(xxvi), and 8(2)(e) (vii).

<sup>39</sup>“Child” is defined in article 1 of the Convention on the Rights of the Child as: “a human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” See, Convention on the Rights of the Child, supra note 25.

<sup>40</sup> Protocol I, supra note 4, articles 48, 77 (1-3); Protocol II, supra note 4, article 4(1),(3)(c).

contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities. Nonetheless, in the view of the Chamber, children under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities (...) 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.”<sup>41</sup>

The Ntaganda finding opens the door to protecting child soldiers from various harmful effects of armed conflict. Its interpretation of the “direct/active” participation standard is coherent with humanitarian purposes towards children. These, in the view of the Pre-Trial Chamber considered, should be covered by the Rome Statute.<sup>42</sup>

### III. Conclusion

The Ntaganda Decision on the confirmation has the potential to fill the gap in protecting child soldiers from sexual violence. Contrary to the traditional “direct/active” participation in hostilities approach, that deprives child soldiers of protection from sexual violence if their role is linked to combat, the approach adopted by the Pre-Trial Chamber in Ntaganda brings protection and coherence.

Protection, in the broadest sense, as the decision enables the prosecution of sexual violence committed against all child soldiers independently of their role and age.

Coherence as it encourages a more effective implementation of the Rome Statute that protects child soldiers both from sexual violence and from being used to participate actively in hostilities; an interpretation in line with the rationale of IHL that seeks to protect children from the crudest effects of hostilities. These reasons may be sufficient to uphold the finding of the Pre-Trial Chamber.

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<sup>41</sup> *Prosecutor v. Bosco Ntaganda*, supra note 1, paras. 78, 79.

<sup>42</sup> Rome Statute, supra note 3, articles 8(2)(b)(xxii), 8(2)(e)(vi) and 8(2)(e)(vii).