

INTERNATIONAL CRIMINAL COURT PROSECUTOR V. BOSCO NTAGANDA PRELIMINARY RULING

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Introduction

Bosco Ntaganda, also nicknamed “the Terminator,” is Africa’s most wanted man. Ntaganda is a Congolese militia leader currently in the custody of International Criminal Court (“ICC” or “the Court”) awaiting trial. Ntaganda faces charges of multiple war crimes and crimes against humanity, including: sexual violence against civilians, acts of rape, and sexual slavery against child soldiers. Ntaganda is the first-ever accused to voluntarily turn himself in to the ICC¹ after the Hague issued two warrants for his arrest.²

The international community considers the Terminator’s decision to surrender a success for the ICC, which – mainly due to lack of enforcement mechanisms – is facing increasing criticism for slow, expensive trials and failed prosecutions.³ On the other hand, the real reasons underlying the Terminator’s decision to surrender remain unknown. He allegedly possesses sensitive information harmful to the Rwandan government. Most likely, Ntaganda no longer felt safe in either Rwanda or the Democratic Republic of the Congo (“DRC”). He knew that his days in Central Africa were numbered and handed himself over to the ICC to save his own life.⁴

Regardless, Ntaganda’s upcoming trial will send a powerful message to those responsible for human rights abuses in the DRC. It signifies that justice will be upheld even among high-ranking officials.⁵

¹ *DR Congo's Bosco Ntaganda in ICC custody*, BBC NEWS (March 22, 2013), <http://www.bbc.com/news/world-africa-21899626>.

² Warranted dated August 22, 2006 (last visited January 1, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>; Warranted dated July 13, 2012 (last visited January 1, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf>.

³ Daniel Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, INTERNATIONAL POLICY DIGEST (March 23, 2012), <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>.

⁴ Max Fisher, *Why did infamous war criminal Bosco Ntaganda just surrender at a U.S. embassy?*, THE WASHINGTON POST (March 18, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/03/18/why-did-infamous-war-criminal-bosco-ntaganda-just-surrender-at-a-u-s-embassy/>.

⁵ *ICC: Congolese warlord to go to trial*, HUMAN RIGHTS WATCH (June 9, 2014), <http://www.hrw.org/news/2014/06/09/icc-congolese-warlord-go-trial>.

This long-awaited judgment against a most-wanted Congolese warlord will begin to address and compensate for the suffering of victims and survivors of gender and sexual-based crimes.

The case is significant for the DRC and other African countries seeking justice as well as for the entire international community, for at least two reasons. Firstly, even though the United States is not a party to the Rome Statute or a participant of the ICC, Ntaganda surrendered at the American embassy. The American embassy's transfer of Ntaganda to the Hague represents the most remarkable act of cooperation between the United States and the ICC in the Court's history.⁶ Secondly, in rendering a decision, the ICC will have to deal with the controversial issue of sexual violence against child female soldiers by members of the same military group. Usually, charges of sexual violence are brought against soldiers by civilians rather than members of their own military group.⁷ Human rights organizations anticipate a milestone decision in Ntaganda's case granting broader protection of child soldiers subject to acts of sexual violence by members of their own group.⁸ The following analysis will focus on controversies regarding legal basis to grant such soldiers more favorable treatment.

I. Background

In recent years, the DRC has seen horrific human rights abuses, outbreaks of diseases, widespread malnutrition, and the inhuman treatment of millions.⁹ Two civil wars (starting in 1996 and 1998 respectively) that began with the 1994 Rwandan genocide are believed to be the deadliest conflicts since the World War II, killing more than 5.4 million people in the past fifteen years.¹⁰ Several of the main problems in the region are rampant sexual and gender-based violence ("SGBV") as well as rape being used as a weapon in war.¹¹

⁶ Marlise Simons, *U.S. grows more helpful to International Criminal Court, a body it first scorned*, THE NEW YORK TIMES (April 2, 2013), <http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html>

⁷ *ICC Commencement of the Confirmation of Charges Hearing: The Prosecutor vs. Bosco Ntaganda*, ICC WOMEN (February 10, 2014), <http://www.iccwomen.org/documents/Ntaganda-Press-Statement-February-2014.pdf>.

⁸ *Background Information on Sexual Violence used as a Tool of War*, UNITED NATIONS (last visited December 12, 2014), <http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml>.

⁹ Adam Jones, *Gender and genocide in Rwanda*, JOURNAL OF GENOCIDE RESEARCH (2002); *Genocide in Rwanda*, UNITED HUMAN RIGHTS COUNCIL (2014), http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm.

¹⁰ *Genocide in Rwanda*, *supra* note 9.

¹¹ Françoise Duroch, Melissa McRae and Rebecca F Grais, *Description and consequences of sexual violence in Ituri province, Democratic Republic of Congo*, BMC

Bosco Ntaganda, a Congolese rebel, is a key figure responsible for human rights violations in DR Congo.¹² Ntaganda has actively participated in various armed groups in eastern Congo since the late 1990s. Eventually, he became a key military leader in the Democratic Republic of the Congo and maintained his power for over ten years.¹³ Forces under his command have repeatedly committed war crimes and crimes against humanity in the form of torture, rape, and ethnic massacres, and have recruited and actively used child soldiers as young as seven years old.¹⁴

In 2002 Ntaganda joined the Union of Congolese Patriots, a rebel group led by Thomas Lubanga, who was convicted by the ICC last year. Ntaganda commanded the military wing of the party as Deputy Chief of the General Staff for about three years.¹⁵ Later on, he became part of another rebel movement known as National Congress for the Defense of the People (“CNDP”). In 2008, the CNDP incorporated into the regular armed forces of the Democratic Republic of the Congo and Ntaganda was promoted by Congolese president, Joseph Kabila, to the rank of General, despite being wanted by the ICC for alleged war crimes.¹⁶ In 2012, Ntaganda became a leader of a newly formed anti-governmental group named M23 (also known as the March 23 Movement),¹⁷ consisting principally of former members of the CNDP.¹⁸ Right before his surrender to the U.S. Embassy, the group split forcing him and about 700 other soldiers to flee across the border into Rwanda.¹⁹

INTERNATIONAL HEALTH AND HUMAN RIGHTS (April 19, 2011), <http://www.biomedcentral.com/1472-698X/11/5>.

¹² *Hague hears DR Congo's Bosco Ntaganda 'ordered killings'*, BBC NEWS (February 10, 2014), <http://www.bbc.com/news/world-africa-26114895>.

¹³ *Q&A: Hearing to Confirm the charges against Bosco Ntaganda at the International Criminal Court*, HUMAN RIGHTS WATCH (February 6, 2014), <http://www.hrw.org/news/2014/02/06/qa-hearing-confirm-charges-against-bosco-ntaganda-international-criminal-court>.

¹⁴ *DR Congo: Bosco Ntaganda recruits children by force*, HUMAN RIGHTS WATCH (May 16, 2012), <http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force>.

¹⁵ *Situation in Democratic Republic of the Congo*, THE HAGUE JUSTICE PORTAL (2014), <http://www.haguejusticeportal.net/index.php?id=6174>.

¹⁶ Penny Dale, *Profile: Bosco Ntaganda the Congolese 'Terminator'*, BBC NEWS (March 18, 2013), <http://www.bbc.com/news/world-africa-17689131>.

¹⁷ Michelle Nichols, *Credible reports of Congo's defeated M23 rebels regrouping: U.N.*, REUTERS (January 13, 2014), <http://www.reuters.com/article/2014/01/13/us-congo-democratic-un-idUSBREA0C1DC20140113>.

¹⁸ *Q&A: DR Congo's M23 rebels*, BBC NEWS (November 5, 2013), <http://www.bbc.com/news/world-africa-20438531>.

¹⁹ Jonny Hogg, *Congolese rebels surrender, flee after defeat by rivals*, REUTERS (March 16, 2013), <http://www.reuters.com/article/2013/03/16/us-congo-democratic-rebels-idUSBRE92F03Z20130316>.

Human rights abuses under the Terminator's command over many years have affected tens of thousands of civilians in eastern Congo.²⁰ Ntaganda has gained a reputation not only as a brutal commander, but also as a rich warlord;²¹ he allegedly owned a luxury hotel, a bar, a flour factory, and a cattle ranch.²² According to a United Nations report, he has built his lucrative business empire from illicit activities including smuggling minerals, selling fake gold, and extorting local businessmen.²³ Recently, the Pre-Trial Chamber found substantial grounds to believe that Ntaganda bears individual criminal responsibility pursuant to different theories of liability, namely: direct perpetration; indirect co-perpetration (Article 25(3)(a) of the Rome Statute); ordering; inducing (Article 25(3)(b)); any other contribution to the commission or attempted commission of crimes (Article 25(3)(d)); and as a military commander, for crimes committed by his subordinates (Article 28(a)).²⁴

II. Legal Framework

International armed conflicts in the Democratic Republic of the Congo are governed by a legal regime set out in the Geneva Conventions of 1949 (ratified in 1961) and the First Protocol Additional to the International Armed Conflicts (known as Protocol I), ratified in 1982.²⁵ Internal conflicts fall within a scope of Common Article 3 to the Geneva Conventions, which applies to armed conflicts “not of an international character.”

Within its subject matter jurisdiction, the ICC may exercise the power to prosecute individuals only for crimes listed in the Rome Statute, such as: genocide (Article 7); crimes against humanity (Article 8); crimes of aggression (Article 8); and war crimes (Article 9).²⁶ War crimes must

²⁰ *Joint NGO Letter to UK Foreign Secretary William Hague on Bosco Ntaganda*, HUMAN RIGHTS WATCH (May 3, 2012), <http://www.hrw.org/news/2012/05/03/joint-ngo-letter-uk-foreign-secretary-william-hague-bosco-ntaganda>.

²¹ David Smith, *Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on*, THE GUARDIAN (February 5, 2010), <http://www.theguardian.com/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>.

²² Penny Dale, *Profile: Bosco Ntaganda the Congolese 'Terminator'*, BBC NEWS (March 18, 2013), <http://www.bbc.com/news/world-africa-17689131>.

²³ Marlise Simons, *Congolese rebel commander tells war crimes court he was just a 'soldier'*, THE NEW YORK TIMES (March 26, 2013), http://www.nytimes.com/2013/03/27/world/africa/war-crimes-suspect-bosco-ntaganda-tells-court-he-was-just-a-soldier.html?_r=0.

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01-06, Judgment, (March 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

²⁵ *The war within the war. Sexual violence against women and girls in Eastern Congo*, HUMAN RIGHTS WATCH (2014), <http://www.hrw.org/reports/2002/drc/Congo0602.pdf>.

²⁶ Matthew H. Charity, *Defying gravity: the development of standards in the international prosecution of international atrocity crimes*, IND. INT'L & COMP. L. REV., 2013.

necessarily constitute a violation of international humanitarian law, codified primarily in the four Geneva Conventions of 1949.

Under the jurisdiction of the ICC in Congo, the Prosecutor has charged six military leaders with responsibility for violations in the region. In 2012, military leader, Thomas Lubanga, was found guilty of “war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities” and sentenced to 14 years imprisonment.²⁷ In 2014, Germain Katanga was sentenced to a total of 12 years imprisonment for complicity in murders and attacks on civilians.²⁸ Currently, Ntaganda stands trial for the same violations as his compatriots, as well as for sexual and gender-based offenses against child soldiers.

Sexual and gender-based offences are the most vulnerable category of crimes brought before the ICC. Charges are often withdrawn prior to trial, at the confirmation stage, because the Prosecution lacks sufficient evidence or because witnesses are not adequately protected.²⁹ Accordingly, offenders charged with sexual and gender-based offenses are rarely convicted. However, in the last two decades, the Court has taken such offenses much more seriously.³⁰ Rape and other forms of sexual violence are no longer treated as an unfortunate side-effect of war.³¹ They are now recognized as war crimes and crimes against humanity, regardless of the scale and association with overarching policy.³²

III. Procedural History

²⁷ *Germain Katanga sentenced to 12 years' imprisonment*, ICC (May 23, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1008.aspx.

²⁸ *Id.*

²⁹ Susana SaCouto, *Perspectives on crimes of sexual violence in international law*, 19 ILSA J. INT'L & COMP. L. 263, Spring 2013; Susana SaCouto, Katherine Cleary, *Importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court*, AM. U. J. GENDER SOC. POL'Y & L., (2009), available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=jgspl>.

³⁰ Brook Sari Moshan, *Women, war, and words: the gender component in the permanent International Criminal Court's definition of crimes against humanity*, FORDHAM INT'L L. J., (1998); Dianne Luping, *Investigation and prosecution of sexual and gender-based crimes before the international Criminal Court*, AM. U. J. GENDER SOC. POL'Y & L., 2009; *Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2012*, ICC WOMEN, 103 (2012), <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>.

³¹ UN Special Representative on Sexual Violence in Conflict, Ms. Zainab Hawa Bangura said that "sexual violence in conflict needs to be treated as the war crime that it is; it can no longer be treated as an unfortunate collateral damage of war." Available at: http://www.huffingtonpost.co.uk/rita-pal/rape-in-kashmir_b_3372513.html.

³² *War within the War*, *supra* note 25, at 87.

On August 7, 2006, the Pre-Trial Chamber I of International Criminal Court issued an arrest warrant indicting Bosco Ntaganda for “committing war crimes and crimes against humanity in northeastern Congo in 2002 and 2003, including recruiting and using child soldiers, murder, rape and sexual slavery, and persecution.”³³ On April 11, 2012, the president of the Democratic Republic of the Congo, Joseph Kabila, held emergency meetings with top army officials and called for Ntaganda's arrest.³⁴ Subsequently, on July 13, 2012, Pre-Trial Chamber II issued a second arrest warrant, adding four more counts of war crimes and three more counts of crimes against humanity to the charges listed in the first warrant six years prior.³⁵ On March 18, 2013, Ntaganda walked into a U.S. Embassy in Kigali, Rwanda and voluntarily surrendered, asking to be transferred to the International Criminal Court in the Hague. Although Ntaganda's reasons for surrender are unknown, he did so presumably to avoid being killed.

On June 9, 2014, three pre-trial judges of the Court confirmed charges against Ntaganda and found substantial grounds to believe that military groups under Ntaganda's command committed war crimes in the eastern Democratic Republic of the Congo from 2002-2003. The 13 charges against Ntaganda include, inter alia: murder, attacking civilians, rape, sexual slavery of civilians and child soldiers under the age of fifteen years and using them to participate actively in hostilities, and five counts of crimes against humanity. The judges decided to set trial for June 2, 2015. Until then, the Congolese warlord will remain in the ICC custody.³⁶

On March 26, 2013, Ntaganda first appeared before the ICC in the Hague.³⁷ After confirming his name, age, and that he had been informed of the charges, he pled innocent.

IV. The Pre-trial Judgment

³³Max Fisher, *Why did infamous war criminal Bosco Ntaganda just surrender at a U.S. embassy?*, THE WASHINGTON POST (March 18, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/03/18/why-did-infamous-war-criminal-bosco-ntaganda-just-surrender-at-a-u-s-embassy/>; Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest, (August 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>.

³⁴*DR Congo: Arrest Bosco Ntaganda for ICC Trial*, HUMAN RIGHTS WATCH (April 13, 2012), <http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial>.

³⁵Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest, (July 13, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf>.

³⁶*Congolese warlord Bosco Ntaganda in custody at International Criminal Court*, THE GUARDIAN (March 22, 2013), <http://www.theguardian.com/world/2013/mar/22/congolese-warlord-bosco-ntaganda-hague>.

³⁷*Id.*

In addition to the already confirmed charges against Ntaganda, the Prosecutor has accused him of committing war crimes in form of rape and sexual slavery of child soldiers under Article 8(2)(e)(vi) of the Rome Statute.³⁸ Article 8(2)(e)(vi) states that “committing rape, sexual slavery, enforced prostitution, forced pregnancy, (...) enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions” is a war crime. The idea to prosecute commanders for sexually abusing child soldiers under the above quoted provision is not new. The issue has been unsuccessfully raised before the Court when Lubanga was convicted in 2012. However, because the charges were presented too late in the proceedings, the Court did not have an opportunity to consider whether Article 8(2)(e)(vi) would apply.

When presenting charges against Ntaganda, the Prosecution argued for two levels of protection of child soldiers against sexual violence.³⁹ First, general protection of persons affected by non-international armed conflicts from sexual violence under International Humanitarian Law provided under common Article 3 of the Geneva Conventions, Article 4(1) and 4(2) of the Additional Protocol II, and Article 8(2)(e)(vii) of the Rome Statute. Common Article 3 provides that: “persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely.” Article 4(1) and (2) of Additional Protocol II, state that: “all 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 that “acts of humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” against these people are prohibited at any time and in any place whatsoever. Moreover, they are granted special protection because of their vulnerability under Article 4(3)(c) of the Additional Protocol. This protection cannot be infringed even if they become combatants pursuant to section (d) which provides 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 despite the provisions of sub-paragraph (c) and are captured.” Article 8(2)(e)(vii) of the Rome Statute, prohibits recruitment and usage of children under the age of 15 years for use in hostilities.

On the contrary, Ntaganda’s defense lawyers claim that child soldiers under the age of 15, who have been recruited for military

³⁸ Peter Dixon, *The Ntaganda confirmation of charges decision: A victory for gender justice?*, BEYOND THE HAGUE (June 12, 2014), <http://beyondthehague.com/2014/06/12/the-ntaganda-confirmation-of-charges-decision-a-victory-for-gender-justice/>.

³⁹ Rosemary Grey, *Emerging Voices: Sexual Violence As War Crime: Controversial Issues in the International Criminal Court*, OPINIO JURIS (July 28, 2014), <http://opiniojuris.org/2014/07/28/emerging-voices-sexual-violence-war-crime-controversial-issues-international-criminal-court/>.

purposes and actively participate in hostilities, are not provided the general protections under international humanitarian law (“IHL”) because IHL provisions apply exclusively to civilians. Ultimately, according to the defense, IHL does not protect child soldiers who take part in hostilities from crimes committed by “other persons taking part in hostilities on the same side of the armed conflict.”⁴⁰ Moreover, Ntaganda’s lawyers argue that Article 4(3)(d) of the Additional Protocol only protects child soldiers who are being abused by members of the opposing side of the conflict, not by members of their own group. Referring to special protection, the defense lawyers claimed that there is no sufficient evidence to show that acts of sexual violence committed under Ntaganda’s command constituted war crimes under the Article 8(2)(e)(vi) of the Rome Statute.

In the pre-trial judgment, the judges focused on the status of the child soldiers at the time the acts of sexual violence took place. The Chamber ruled that children under the age of 15 years “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 ...” Therefore, they continue to enjoy protection under international humanitarian law and Article 8(2)(e)(vi) of the Rome Statute can will apply.⁴¹

V. Discussion

Child soldiers’ forcible recruitment is in itself a war crime; thus, not only shall the minors not be held criminally responsible for their acts but also they shall continue to enjoy protection.⁴² The argument that Article 4(3)(d) does not apply if the perpetrators are soldiers from the same military group is extremely narrow. Obviously, the policy behind the law is to keep children safe, regardless of who their oppressor is. The ICC’s decision in Ntaganda’s case challenges a belief that war crimes must be committed against those on the “other side” of the armed conflict.⁴³ Although the ICC seems to be looking for a legal basis to grant broader protection to child soldiers to include against acts committed by members of their own military group, it remains unwilling to establish a general rule that children under the age of 15 continue to enjoy protection

⁴⁰Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Pre-trial Chamber II Judgment (June 9, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1783301.pdf>.

⁴¹*Id.*

⁴² Vesselin Popovski, Karin Arts, *International criminal accountability and children’s rights*, UNITED NATIONS UNIVERSITY (2006), <http://archive.unu.edu/publications/briefs/policy-briefs/2006/PB4-06.pdf>.

⁴³ Rosemary Grey, *Emerging Voices: Sexual Violence As War Crime: Controversial Issues in the International Criminal Court*, OPINIO JURIS (July 28, 2014), <http://opiniojuris.org/2014/07/28/emerging-voices-sexual-violence-war-crime-controversial-issues-international-criminal-court/>.

under international humanitarian law even while taking direct part in hostilities.

All the same, while rendering its' final decision, the Court must comply with the principle *nullum crimen sine lege*, expressly listed in the Rome Statute under Article 22(2), which states "the definition of a crime shall be strictly construed [...] In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

The legal basis for prosecuting Ntaganda for sexual violence crimes against child soldiers and women committed under his command can be found in Judge Odio Benito dissenting opinion in the Lubanga case.⁴⁴ Judge Benito suggests expanding the definition of sexual violence to fall within the legal concept of "use of child soldiers to participate actively in hostilities," thus broadening the scope of Article 8(2)(e)(vii). She also asserts that not only are child soldiers at risk for being a potential target to the "enemy," but also to acts of violence by members of their own group that infringe these children's fundamental rights. The risk is embedded in the war crime of enlisting, conscripting, and the use of children under the age of 15 in hostilities. According to Judge Benito, the court may not discriminate when there is a "clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys. The use of young girls and boys bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused."

Ntaganda's conviction for war crimes in the form of acts of sexual violence against child soldiers based their non-direct participation in hostilities at the time when they are being abused is a short-sighted solution. A decision based on the concept of specific characteristics of SGBV crimes would limit the Court's power to convict perpetrators for other types of crimes, the ones that do not include elements of special intimate contact between the victims and violators. Ultimately, Benito's solution of widening the scope of Article 8(2)(e)(vii) to include sexual violence against child soldiers as a use of child soldiers to participate actively in hostilities seems to be too far-fetched. Typically, to convict for such atrocities as war crimes, the legal basis has to be found either in customary or treaty-based IHL. However, due to the lack of customary law on this subject, this might be the ICC's only option.

In any event, the Court will also have to balance the scope of protection of child soldiers and limits of their criminal liability. Granting too broad protection could ironically make child soldiers an even more

⁴⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, (March 3, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1379838-O.pdf>.

vulnerable group as the commanders would be using them more frequently to commit crimes, knowing they would not be prosecuted for their actions.

Conclusion

Ntaganda's trial is scheduled to begin June 2, 2015.⁴⁵ According to the ICC notice, the court's Registry has received 2,000 applications from victims who expressed interest in participating in the trial, out of which 1,120 applicants have already been granted participating status.⁴⁶ After the trial, the three-judge chamber will have to decide whether it has been established "beyond reasonable doubt" that the Congolese warlord is guilty of the crimes he has been charged with. The decision will be made separately for each count listed in a pre-trial judgment and it may only be based on evidence presented before the Court during the trial.

Provided that Ntaganda is found guilty, the victims will be able to seek reparations and compensations for their trauma and losses. Victims can be compensated in two ways. First, they may be compensated through case-based recovery under Article 75 of the Rome Statute, according to which the Court can award reparations once it has determined the "scope and extent of damage, loss and injury caused."⁴⁷ On the other hand, the ICC may order reparations through the Trust Fund for Victims ("TFV") if the Judges believe that this form of recovery will be more appropriate.

The Ntaganda case already contributes to the jurisprudence on sexual and gender-based crimes as it is the first ICC case in which the Court unanimously confirmed all SGBV charges brought by Prosecution. In the final decision, the Court will have to establish the limits of the law while determining the status of child soldiers who are victims of sexual abuses when actively taking part in hostilities. Additionally, the Court will have to decide whether or not child soldiers should still enjoy protection under international humanitarian law. The judges will also be challenged when determining whether the scope of protection should depend on who the perpetrator is. The rationale underlying the protection afforded to such children against recruitment and use in hostilities speaks in favor of victims, but the Court must find legal basis to convict those responsible for violations.

⁴⁵ Wairagala Wakabi, *Ntaganda's Trial at ICC to Open in June 2015*, INTERNATIONAL JUSTICE MONITOR (October 10, 2014), <http://www.ijmonitor.org/2014/10/ntagandas-trial-at-icc-to-open-in-june-2015/>.

⁴⁶ *Lubanga Victims Must Apply to Participate in Ntaganda Proceedings*, INTERNATIONAL JUSTICE MONITOR (August 21, 2013), <http://www.ijmonitor.org/2013/08/lubanga-victims-must-apply-to-participate-in-ntaganda-proceedings/>.

⁴⁷ Rome Statute of the International Criminal Court, art. 75(1), July 17, 1998, A/CONF.183/9.