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THE APPEALS CHAMBER

Before: **Judge Christine Van Den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmánski
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF *THE PROSECUTOR V. BOSCO NTAGANDA*

Public *with* Public Annex

Prosecution's response to Mr Ntaganda's appeal against the "Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9"

Source: **Office of the Prosecutor**

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Introduction

1. Jurisdictional challenges are a means to exclude the adjudication of matters outside the Court's mandate and its legal competence established in the Rome Statute. Such challenges are liminal in nature; they are not means to obtain rulings on legal or evidentiary matters relevant to liability in a particular case. To address such matters, the Statute provides instead that a trial should be held before a chamber of judges who decide matters of both fact and law, with the benefit of arguments by the Parties and participants, and with the ultimate right of appeal.

2. The Appeal should be dismissed because it ignores these fundamental principles. The UDCC alleges that Mr Ntaganda is responsible not only for unlawfully enlisting or conscripting children under the age of 15 years into the UPC/FPLC (Counts 14 and 15), but also for raping and sexually enslaving children so unlawfully recruited (Counts 6 and 9). The Defence does not challenge the existence of these crimes under the Statute—enlisting and conscripting children, rape, sexual slavery. Instead, they argue that the law and facts do not permit the types of persons allegedly subjected to the conduct charged in Counts 6 and 9 to be recognised by the Trial Chamber as "victims" of the war crimes of rape and sexual slavery. However, as the Chamber correctly determined, this is a matter going to the merits of the case, not to the Chamber's jurisdiction to hear and rule upon it.

3. As previously argued, the Appeal should thus be dismissed *in limine* because it is inadmissible—an issue which is not "jurisdictional" is not properly before the Appeals Chamber under article 82(1)(a) of the Statute.[1] Moreover, even if the Appeal were deemed admissible, only one ground of appeal (the third ground) challenges the *ratio decidendi* of the Decision—whether the Defence's Request was a valid

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[1] *See* Motion to Dismiss *In Limine*, para. 12; Directions Decision, paras. 9-10. *See also Ruto et al* AD, para. 33 (concluding that, where an issue is not properly one "of subject-matter jurisdiction for the purposes of article 19(6) and 82(1)(a) of the Statute", "these issues are not properly before the Appeals Chamber"). For long-form citations of all references, see Annex.

jurisdictional challenge. Accordingly, the first two grounds of appeal should be dismissed *in limine*.

4. In any event, the Appeals Chamber should refrain from ruling on the merits of the issues raised by the Defence, which have not been adjudicated by the Trial Chamber. As the Appeals Chamber has repeatedly held, interlocutory appeals at this Court are not a forum to provide advisory opinions but, rather, a second instance review. Accordingly, having decided the third ground of appeal concerning the nature of the Request, the Appeals Chamber should do no more than either dismiss the Appeal on the appropriate basis, or remand the matter to the Chamber for a full argument on the merits and a fresh determination.

Submissions

5. None of the three appeal grounds shows any error in the Decision. Since only the third ground concerns the *ratio* of the Decision—whether the Request was indeed an invalid jurisdictional challenge—the Prosecution will address the Defence arguments in reverse order.

6. Although the first and second grounds of appeal do not directly challenge the *ratio* of the Decision—and thus should be dismissed *in limine* and not addressed by the Appeals Chamber[2]—the Prosecution will nevertheless respond to them to illustrate further that the arguments contained therein relate to the merits of the charges, and not to the Court's jurisdiction to adjudicate them.

I. The Trial Chamber correctly decided that the Request was not a valid jurisdictional challenge (Third Ground of Appeal)

7. The Appeals Chamber has stated that "[j]urisdiction under article 19 of the Statute denotes competence to deal with a criminal cause or matter under the

[2] *See above* para. 3; *below* para. 58.

Statute".[3] A challenge to jurisdiction questions the Court's *competence* to adjudicate a given matter; it is not a legal or evidentiary filter for particular cases.[4] Nor may it be used as a means to circumvent the trial process and to obtain an abstract ruling whether established offences under the Statute may or may not be satisfied on the basis of assumed facts. Arguments on the "substantive merits" of the case, whether legal or evidentiary, are not jurisdictional.[5]

8. Relying on this jurisprudence,[6] the Chamber correctly determined that the Request was not a valid jurisdictional challenge and refused to rule prematurely on the Defence's arguments concerning the legal classification of the victims of the crimes in Counts 6 and 9.[7] The Defence shows no error in this conclusion. On this basis alone, the Appeal should be dismissed.[8]

9. As the Chamber noted, the Request did not challenge the existence of the war crimes of rape and sexual slavery under article 8(2)(e)(vi).[9] Nor did its claim that convictions may not be entered for these crimes when alleged victims are "child soldiers" amount to a valid jurisdictional challenge. Rather, the Chamber correctly recognised that the arguments in the Request are matters for it to address at the end of the trial.[10] They concern the *application* of the law to the facts of this case, to determine whether the crimes charged under the Statute were indeed committed, and not whether the offences themselves existed.

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[3] *See e.g. Lubanga* AD, para. 24; *Ruto et al* AD, para. 21.

[4] *See e.g. Ruto et al* AD, para. 29 (referring, for example, to "the separate concepts of jurisdiction and the confirmation process" and commenting that "it is the latter that is designed to […] filter unmeritorious cases from progressing to trial").

[5] *See e.g. Ruto et al* AD, para. 30 (concluding, "[e]ven if the Trial Chamber were not to find, in law or on the evidence, that there was an 'organizational policy' this would not mean that the Court did not have jurisdiction over the case but rather that crimes against humanity were not committed").

[6] *See* Decision, para. 24 (citing, *inter alia*, *Ruto et al* AD).

[7] Decision, para. 28. *See also below* paras. 55-57. *Contra* Appeal, paras. 21-27.

[8] *See above* paras. 2-4; *below* paras. 19, 58.

[9] Decision, para. 25. *See also Ruto et al* AD, para. 31 (noting that, in contrast to the ICTY and ICTR, the Court's Statute "sets out in detail the crimes over which this Court has jurisdiction").

[10] Decision, para. 28.

10. Indeed, the Defence does not dispute the Chamber's legal finding—based on appellate jurisprudence—that challenges to "the contours or elements of crimes or modes of liability" are matters for trial and not jurisdictional questions.[11] It agrees that a proper jurisdictional question is "whether a crime or mode of liability exist[s]".[12]

11. The Defence's reference to "pre-conditions for the application" of war crimes does not assist.[13] This fails to show that the description of the victims in Counts 6 and 9 (*i.e.*, "child soldiers") necessarily raises a question as to the *existence* of a valid crime under the Statute.[14] To the contrary, questions about pre-conditions *for the application* of a crime are typically matters pertaining to the "contours or elements" of the crimes charged—in other words, the merits of the case—to be addressed by the Chamber at the end of the trial based on the evidence heard and the Parties' legal and factual arguments. Indeed, this was precisely when such matters were decided in the ICTR case of *Ndindiliyimana*—in the trial judgment. This is the very approach taken by the Chamber in the Decision.

12. It is not the case that legal questions are necessarily, or even ordinarily, jurisdictional.[15] If anything, the opposite is true: questions of substantive law are typically addressed at the end of a trial,[16] and not before its commencement, as the Defence arguments imply. The Appeals Chamber has recognised as much.[17] The general practice of the Court further confirms that the law should not generally be

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[11] Decision, para. 24 (citing, *inter alia*, *Ruto et al* AD; *Muthaura et al* AD).
[12] Appeal, paras. 21-22.
[13] *See e.g.* Appeal, para. 24 (citing *inter alia* ICTR, *Ndindiliyimana* TJ, para. 2129: "the Prosecution must prove, as a threshold matter, the following elements: (1) the existence of a non-international armed conflict at the time of the commission of the alleged breach; (2) the existence of a nexus between the alleged breach and the armed conflict; and (3) that the victims were not direct participants to the armed conflict").
[14] *Contra* Appeal, para. 24.
[15] *Contra* Appeal, para. 25. Nor is the initial application of a particular provision of the Statute to particular circumstances necessarily a *jurisdictional* innovation: *contra* Appeal, para. 26.
[16] *See* Decision, para. 28.
[17] *See e.g. Ruto et al* AD, para. 30 (treating both matters of "law" and "evidence" as issues potentially going to the merits of the case, and not considering matters of law necessarily to be jurisdictional). *See also* para. 27 (in the context of confirmation proceedings, but equally applicable to trial, "at the confirmation hearing a suspect may contest both matters of statutory interpretation and evidential aspects of the Prosecutor's case").

determined in isolation from the facts. Conducting legal analysis in the context of relevant facts, where possible and as circumstances require, not only promotes judicial economy but ensures that the law is firmly anchored in the reality to which it must apply. The Appeals Chamber's consistent emphasis that it does not provide advisory opinions is consistent with such a view.[18]

13. The Appeal is no different from the invalid jurisdictional challenges rejected by the Appeals Chamber in *Ruto et al* and *Muthaura et al*.[19] In particular, the Defence now contests the mixed issue of law and fact[20] whether the victims alleged in Counts 6 and 9 fall within the requirements of article 8(2)(e)(vi) (rape and sexual slavery as a war crime).[21] Just like the challenges brought in *Ruto* and *Muthaura*, the Defence is challenging the Chamber's "interpretation of" a contour or element of a crime—specifically, the nature of any requirements concerning the victims.[22] Yet, as the Appeals Chamber held in *Ruto*, "the interpretation and existence" of such a requirement "relate to the substantive merits of the case as opposed to the issue of whether the Court has subject-matter jurisdiction to consider such questions."[23]

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[18] *See DRC* AD, para. 30 ("the role of an advisory body" is "beyond and outside the scope of [the Appeals Chamber's] authority"); *Katanga* AD, para. 7. *See also Lubanga* Second AD on Request of Registrar, para. 4 ("The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law […] to the parties"). Indeed, the only international criminal court or tribunal which contains even a remotely similar function is the STL. At that court, such a procedure is expressly provided for in the rules, and is not in any event available to the Parties but only to the Pre-Trial Judge for the purpose of ruling on indictments: *see* STL Rules, rules 68(G), 176*bis*.
[19] *Contra* Appeal, para. 23.
[20] *See below* para. 16.
[21] *Contra* Appeal, paras. 11, 14 (suggesting that the term "child soldier" has an intrinsic significance). *But see* Decision, para. 26 (observing "that the term 'child soldier' is not a legal one" but is, rather, "descriptive" and "[t]he question as to which persons can be included in this phrase is to be addressed at trial"). Consistent with its own case, the Prosecution understands the Chamber in this respect to mean that the term "child soldiers" would mean those persons found to have been unlawfully enlisted or conscripted into the UPC/FPLC, as charged in Counts 14 and 15, in the meaning of article 8(2)(e)(vii) of the Statute.
[22] *See e.g. Ruto et al* AD, para. 24; *Muthaura et al* AD, para. 31.
[23] *Ruto et al* AD, para. 30.

14. The ICTY Appeals Chamber likewise rejected arguments similar to those raised in the Appeal as going to "the merits at trial" and not "demonstrat[ing] that the International Tribunal lacks subject-matter jurisdiction over the crimes" charged.[24]

15. Indeed, the only material distinction between the circumstances of the Appeal and *Ruto* is that the Defence in this case neither appealed the Pre-Trial Chamber's jurisdictional determination,[25] nor sought leave to appeal any related issue in the Confirmation Decision[26]—but instead waited until the eve of trial before attempting to resurrect the same challenge.[27] The Appeals Chamber should not allow such a tactic to circumvent its admonition in *Ruto* against using appeals under article 82(1)(a) as a means, in fact, to "assess[] the correctness of the decision to confirm the charges".[28]

16. As explained in greater detail below, the subject matter of the Request and the Appeal only further confirms why the Appeals Chamber's 'bright line' approach in *Ruto* and other cases—that only challenges to the *existence* of a crime or a mode of liability are jurisdictional—make sense. The question of which persons may be victims of rape or sexual enslavement under article 8(2)(e)(vi)—the scope of the contours or elements to be proved—is necessarily multi-faceted. It not only requires an analysis of the meaning of article 8(2)(e)(vi) itself, but also an analysis of the special protections in international humanitarian law from certain harms (sexual violence) and for certain classes of persons (children). It may also draw on highly fact-sensitive issues such as the particular activities of the victims, and this factual

[24] ICTY, *Gotovina* AD, para. 18 (noting that the Defence only "contest[ed] the definition" of the requirement for victims to be protected under common article 3 of the four Geneva Conventions and "argue[d] that […] it should be interpreted narrowly").
[25] *See* Response to Request, para. 26 (citing Additional Defence Confirmation Submissions, para. 251); Confirmation Decision, paras. 7, 76-80.
[26] Although the Defence sought leave to appeal the Confirmation Decision, it did not seek to certify any aspect of Counts 6 and 9: *see e.g.* ALA Decision, paras. 3, 29, 33 (declining to certify issues concerning the Pre-Trial Chamber's reference to "evidence that cannot be reasonably challenged by the Defence" and any need under article 8(2)(e)(viii) for Mr Ntaganda to have given a specific order). *See also* Defence ALA.
[27] *See* Decision, paras. 2-3, 5, 12, 17, 22.
[28] *Ruto et al* AD, para. 29.

analysis may in turn shape which legal considerations are most relevant. This is evident from the two main Defence arguments:

- The Defence contends that article 8(2)(e)(vi) requires proof that the victims were protected under article 3 common to the four Geneva Conventions ("CA3"), and thus not taking "active part" in hostilities.[29] As explained below, the Prosecution does not accept that this is a correct statement of the law.[30] But, even if so, this would merely require the Prosecution to prove on the facts that the victims were not at the material time taking "active part" in hostilities, as the concept should properly be understood.[31] This is a purely factual matter.[32]

- The Defence contends that article 8(2)(e)(vi) requires proof that the victims had a different affiliation to the perpetrators of the crimes against them.[33] Once again, the Prosecution does not accept that this is a correct statement of the law.[34] But, even if so, this would again only require the Prosecution to prove that the victims did indeed have a different affiliation to the perpetrators, in a legally relevant sense.[35] This is a mixed issue of fact and law.

17. In short, the Request, and now the Appeal, are nothing less than an invitation for the respective Trial and Appeals Chambers to enter prematurely into matters which go to the heart of the trial, insofar as it concerns the crimes alleged in Counts 6 and 9. By contrast, a genuine challenge to the subject-matter jurisdiction (*ratione materiae)* of the Court—going to the *existence* of a crime under the Statute—would

[29] *See e.g.* Appeal, paras. 6-7, 9, 16.
[30] *See below* paras. 25-30.
[31] *See below* paras. 36-43. Furthermore, the Prosecution is already conducting the case on this basis: *see e.g.* UDCC para.100 ("These child soldiers were raped routinely when they were not participating in hostilities, such as during military training and after battles had taken place"); Confirmation Decision, para. 79.
[32] *See below* para. 36.
[33] *See e.g.* Appeal, paras. 4-5, 9, 20.
[34] *See below* paras. 32-34.
[35] *See e.g. below* para. 53.

exclude any possibility (or need) for their resolution on the basis of the law and facts argued during the trial.

18. For all these reasons, discussing the merits of such issues in the vacuum of a narrow "jurisdictional" appeal—before the Parties have called relevant evidence and fully addressed the Chamber, and before the Chamber has had the chance to decide based on the law and facts—would not "assist the efficiency of the trial proceedings"[36] but rather would impede, or even reverse, its natural course. The third ground of appeal, and hence the Appeal itself, should be dismissed.

II. The legal classification of the status of the victims can and should be left to the end of trial (Second Ground of Appeal)

19. Neither the second ground of appeal, nor the closely related first ground of appeal,[37] addresses the *ratio* of the Decision. As such, they are irrelevant and should be dismissed *in limine*. They should not, in any event, be decided on their merits by the Appeals Chamber. A decision on the merits would remove the opportunity for both a first and second-instance decision, which is necessary and appropriate in this case.[38]

20. Nevertheless, as the following analysis demonstrates, the second ground of appeal illustrates amply that the Defence arguments, contested by the Prosecution on both the law and facts, go directly to the merits of the trial—and thus are not jurisdictional. This only reaffirms the correctness of the Decision, and the inadmissibility of the Appeal.

21. Thus, the Defence claims generally that "child soldiers", as charged in Counts 6 and 9, may not be victims of rape and sexual enslavement because they are

[36] Appeal, para. 25.
[37] *See below* paras. 55-57.
[38] *See also e.g. Lubanga* First AD on Request of Registrar, para. 6 (noting that "[t]he Appeals Chamber is not invested with original jurisdiction", except in two circumstances expressly provided in the Statute).

"[m]embers of an armed force who are victimized by fellow members of the armed force".[39]

22. As a threshold matter, the Prosecution notes that, in the law of non-international armed conflict, "members" of non-State organised armed groups do not have any kind of 'combatant' status analogous to members of armed forces of States.[40] This basic principle of the law of non-international armed conflict is abundantly clear; it is only the position urged by the Defence which risks ambiguity.[41] The Prosecution thus understands the Defence instead to raise the question whether there is any requirement to show that victims of rape and sexual slavery under article 8(2)(e)(vi) were or were not "actively participating in hostilities", in the meaning of CA3, as well as whether it is necessary to show a different affiliation between the victims and the perpetrators of the crimes against them.

23. As the following paragraphs explain, the Defence arguments must fail for multiple reasons.

- First, article 8(2)(e)(vi), properly interpreted, does not limit criminal liability for rape and sexual slavery on the basis of the status or activities of the victims, consistent with the absolute prohibition in international law of crimes of sexual violence.[42]

- Second, even if *arguendo* article 8(2)(e)(vi) does impose conditions on the status or activities of the victims, that requirement is based on CA3. CA3 does not require that the victim and his or her perpetrator have different

[39] *See e.g.* Appeal, para. 2. *See also* paras. 4-5, 7, 14-15.
[40] *See e.g.* Dutli (following sub-title IV); Dinstein, pp. 219-220; AP Commentary, mn. 4397. *Contra* Appeal, paras. 13-18.
[41] *Contra* Appeal, paras. 18-19.
[42] *See below* paras. 25-30.

affiliations, but instead requires only that the victim is not "actively participating in hostilities". Such participation cannot be determined merely by proof of unlawful enlistment or conscription into a non-State organised group, in the meaning of article 8(2)(e)(vii). Rather, determination of whether any relevant victims were actively participating in hostilities is quintessentially a matter to be resolved at the conclusion of the trial, based on the facts and relevant law.[43]

- Third, in any event, and critically, children are entitled to special protection in international humanitarian law. To give effect to this special protection, no legal effect may be given to their unlawful enlistment or conscription into a non-State organised armed group, except for the very limited purpose of targeting by the adverse party.[44]

24. It is clear on this basis that Counts 6 and 9 are wholly congruent with international humanitarian law.[45] They are further supported by reference to international human rights law, as well as this Court's own responsibility not to give legal effect to actions which unlawfully strip children of protections given to them under international law.

II. 1. Article 8(2)(e)(vi) does not limit criminal liability for rape and sexual slavery on the basis of the status or activities of the victims

25. The Defence incorrectly assumes that article 8(2)(e)(vi) limits the punishment of rape and sexual slavery to persons who fall within the protection of CA3, and thus concludes that the Prosecution must prove that the victims were not actively participating in hostilities.[46] This interpretation of article 8(2)(e)(vi) is incorrect, since it does not give effect to the ordinary meaning of the terms used, in context, and in

[43] *See below* paras. 31-43.
[44] *See below* paras. 44-54.
[45] *Contra* Appeal, para. 19. Nor do they represent any extension of article 8 by analogy: *contra* para. 20.
[46] *Contra* Appeal, paras. 6-7, 9, 16.

light of the Statute's object and purpose.[47] Rather, article 8(2)(e)(vi) does not limit criminal liability for rape or sexual slavery on the basis of the status or activities of the victims. For this reason, any finding concerning the unlawful enlistment or conscription into the UPC/FPLC of the victims of Counts 6 and 9 is irrelevant and not dispositive of whether the crimes could be proved.

26. Article 8(2)(e)(vi)—charged in Counts 6 and 9—punishes in relevant part "rape, sexual slavery […], and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions".[48] These terms, given their ordinary meaning, do not clearly require the enumerated acts to be qualified as serious violations of CA3.[49] To the contrary, the qualification may apply only to the unenumerated acts ("any other form of sexual violence").[50]

27. Further, and in any event, there is reason to believe that the drafters did not intend to import the requirements of CA3 as such into article 8(2)(e)(vi) but merely to demonstrate that the *unenumerated* acts should be of a *gravity* similar to serious violations of CA3.[51] This is expressly suggested by the Elements of Crimes.[52] This interpretation is further supported by the lack of any requirement in the Elements of Crimes for victims of *any* of the crimes punishable under article 8(2)(e)(vi), whether enumerated or otherwise, to be persons protected within the meaning of CA3.[53] This is in contrast to the express inclusion of such a requirement for *all* offences punishable under article 8(2)(c).[54] Indeed, in the course of elucidating the Elements of

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[47] *See e.g. Ruto and Sang* AD, para. 105.
[48] Statute, art. 8(2)(e)(vi).
[49] *Contra* Appeal, para. 7.
[50] *See* Zimmermann, pp. 495-496, mn. 316. Zimmermann's subsequent observation that the enumerated acts in any event *also* constitute CA3 violations does not detract from this textual analysis: *see* p. 496, mn. 317.
[51] *See* Ambos, p. 168; Cottier, pp. 452-454, mn. 212 (discussing article 8(2)(b)(xxii)—which is the provision applying in international armed conflict analogous to article 8(2)(e)(vi)).
[52] *See* Elements of Crimes, art. 8(2)(e)(vi)-6, Element 2 ("The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions").
[53] *See generally* Elements of Crimes, art. 8(2)(e)(vi)-1 to 8(2)(e)(vi)-6.
[54] *See e.g.* Elements of Crimes, art. 8(2)(c)(ii), Element 3 ("Such persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities"). *See also* Dörmann et

Crimes, the ICRC expressly noted that article 8(2)(e)(vi) does not include the restriction in article 4(1) of APII restricting victims to those persons not taking a "direct part" in hostilities.[55]

28. Nor does anything else in the *chapeau* of article 8, or the Elements of Crimes, compel the qualification of the enumerated acts by reference to CA3. These additional requirements—that the conduct is a "serious" violation of the laws and customs applicable to non-international armed conflicts, within the established framework of international law[56]—are equally satisfied by the nature of the enumerated acts themselves. This follows from the absolute nature of the prohibition on sexual violence in international humanitarian law, a "standard of duty owed to all victims of war at all times."[57] La Haye further observes that, in "important distinction" to article 8(2)(c)—which in its entirety reflects CA3—"there are no specific categories of protected person under article 8(2)(e)", except as "governed by the 'established framework of international law'".[58] Byron also draws similar conclusions.[59]

29. The object and purpose of the Statute further supports interpreting article 8(2)(e)(vi) disjunctively. Acts of sexual violence form no part of any legitimate military operation and confer no military advantage; they are wholly outside the framework of acts permitted by international humanitarian law. Conversely, they

al, pp. 118-119 (describing negotiations whether to further define the persons protected by CA3 in the context of article 8(2)(c) only).

[55] ICRC Text on Article 8, Annex III, p. 124 ("According to Art. 4 (1) AP II persons protected against these acts are all those 'who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'. However, this reference is not included in the ICC Statute"). The reference to "direct part" in APII, art. 4(1), is analogous to the reference to "active part" in CA3, and is thus relevant to the protective function of IHL rather than the targeting provisions: *see* AP Commentary, mn. 4515; *also below* paras. 32, 43. On the role of the ICRC in defining war crimes in the Rome Statute, and the Elements of Crimes, *see* Von Hebel, pp. 109-111.

[56] *See also Lubanga* AJ, para. 322.

[57] Sellers and Rosenthal, p. 344. *See also* pp. 365-366 ("The prohibition of rape and other forms of sexual violence […] falls squarely within the duty of a party to an armed conflict to provide humane treatment to protected *and other persons*, regardless of sex, age, or other distinction […] This is an obligation that is owed irrespective of the characterization of the armed conflict, and at all times and in all places", emphasis added).

[58] La Haye, p. 214.

[59] *See* Byron, p. 48.

are wholly *inside* the scope of those acts punishable by international criminal law, as set out in express terms in the Statute. As such, the object and purpose of the Statute favours the interpretation of article 8(2)(e)(vi) which best promotes the effective punishment of these crimes, consistent with the requirements of fairness. There is thus no reason to limit the fundamental protection against crimes of sexual violence by reference even to international humanitarian law standards which, in this limited context, assume little relevance.

30. Moreover, nothing in the particular mandate of the Court—to exercise "jurisdiction over the most serious crimes of concern to the international community as a whole"[60]—requires the interpretation of article 8(2)(e)(vi) to impose conditions on the status or activities of victims of rape and sexual slavery. Other elements of the crime, notably the requirement for proof of a nexus to the armed conflict, suffice to ensure that the Court does not exercise jurisdiction over offences which, although also grave, are more amenable to national jurisdiction.[61]

II. 2. Even if the victims of a crime under article 8(2)(e)(vi) must be protected within CA3, that requirement is satisfied if the victim was not actively participating in hostilities

31. Alternatively, if article 8(2)(e)(vi) must be properly read as requiring that all victims must be protected in the meaning of CA3, that requirement is satisfied by proof that the victim was not actively participating in hostilities. The Defence is incorrect in asserting (a) that CA3 requires the victim not to share the same affiliation to a non-State organised armed group as the perpetrator of the crimes against them;[62] and, (b) that proof of active participation in hostilities may be demonstrated *ipso facto* by proof that a child was unlawfully enlisted or conscripted in the meaning of article 8(2)(e)(vii).[63] Accordingly, proof of the unlawful enlistment or conscription into the

[60] Statute, Preamble.
[61] *See also below* fn. 77 (and accompanying text).
[62] *See below* paras. 32-34.
[63] *See below* paras. 36-43.

UPC/FPLC of the victims of Counts 6 and 9 remains irrelevant, and not dispositive of whether the crimes could be proved.

II. 2. a. CA3 does not require a different affiliation between the victim and the perpetrator

32. CA3 protects all "[p]ersons taking no active part in the hostilities".[64] It thus includes, but is not limited to, members of the armed forces who have laid down their arms or are otherwise *hors de combat* and civilians.[65]

33. Since CA3 provides fundamental protections for categories of persons *beyond* those constituting "protected persons" for the purposes of the four Geneva Conventions,[66] those requirements intrinsic to "protected persons"—such as the 'adverse party' requirement[67]—do not apply to CA3.[68] Both the ICTY and ICTR, and the Appeals Chamber of this Court, have taken a similar approach to construing CA3.[69] Likewise, to the extent the Pre-Trial Chamber in this case may have considered that CA3 and article 4(1) of APII were relevant, it assessed only "whether these persons were taking direct/active part in hostilities at the time they were victims of rape and/or sexual slavery."[70]

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[64] *See* Kleffner (2015), pp. 436-437. *See also* APII, art. 4(1) (applying to all persons "who do not take a direct part or who have ceased to take direct part in hostilities"). APII may be said to develop and supplement CA3, without modifying it: APII, art. 1(1); Dinstein, p. 136; *DPH Interpretive Guidance*, p. 29.
[65] Kleffner (2015), p. 436.
[66] *Compare e.g.* GCIV, art. 3, *with* art. 4.
[67] For this requirement, as interpreted by the ICTY, *see e.g.* ICTY, *Tadić* AJ, para. 166. In the context of this analysis, Tadić was charged under with 'grave breaches' of the Geneva Conventions, which require proof that the victim is a protected person: *see e.g.* para. 163.
[68] *See e.g.* Kleffner (2013), p. 298. CA3 does not, in any event, apply to "members of armed forces' who have not laid down their arms or otherwise become *hors de combat*. As such, CA3 may be more intrusive in the regulation of non-State organised armed groups than armed forces of States. This may be consistent, however, with the reduced likelihood of a functioning criminal justice system in non-State organised armed groups: *cf.* Cassese, p. 67; SCSL, *Sesay* TJ, para. 1453. *See* Kleffner (2013), pp. 300-301 (noting that "[t]he criminal law of the State will, for all practical purposes, be of limited value" at least when "a non-international armed conflict with at least one non-state organised armed group as a party thereto exists").
[69] *See e.g.* ICTY, *Delalić* AJ, para. 420 (CA3 protects "*any* individual not taking part in the hostilities", emphasis supplied); *Tadić* TJ, para. 615; ICTR, *Semanza* TJ, para. 365; *Lubanga* AJ, paras. 323-324.
[70] Confirmation Decision, para. 77. *See also* paras. 79-80.

34. Notwithstanding the distinction between CA3 (assuming, *arguendo*, that it applies to the enumerated crimes in article 8(2)(e)(vi)) and the "protected person" requirement under the Geneva Conventions, the Defence asserts that there is a general requirement that victims of war crimes cannot belong to the same "force" as the perpetrator(s).[71] This is incorrect within the law of non-international armed conflict as governed by the Geneva Conventions, the Additional Protocols, and modern customary international law.[72] The authorities cited in the Appeal tend, if anything, to undermine the Defence position:

- The *Sesay* judgment at the SCSL, as the Defence concedes, refers to an 'adverse party' requirement in *international* armed conflict, even though it was concerned on the facts with a non-international armed conflict.[73] The Defence assertion that the legal analysis in *Sesay* should equally apply to non-international armed conflicts is unconvincing since the *Sesay* Trial Chamber cited only article 4 of GCIII and GCIV respectively.[74] These are the "protected person" provisions of those conventions, which are distinct in their scope and purpose from CA3.[75]

- Cassese and Focarelli both rely on the cases of *Pilz* and *Motosuke*, which were decided before the ratification of the Geneva Conventions,[76] and thus could not have taken account of CA3.

[71] *Contra* Appeal, paras. 5, 20.
[72] *See e.g.* Kleffner (2013), p. 300 ("the current state of the law of non-international armed conflict does not support an exclusion from the entitled of humane treatment of a person who does not participate or no longer directly participates in hostilities on the sole ground that he or she does not belong to the *adverse* party or does not belong to *any* party. The law equally protects those *hors de combat* who are members of armed forces of a party to an armed conflict against mistreatment at the hands of (members of) that same party").
[73] *See* Appeal, para. 5, fn. 9 (citing SCSL, *Sesay* TJ, paras. 1451-1453).
[74] *See* SCSL, *Sesay* TJ, paras. 1452-1453. No mention is made of CA3. *See also* Kleffner (2013), p. 297 (describing the reasoning in *Sesay* as "outright puzzling").
[75] *See above* para. 33.
[76] *See* Appeal, para. 5 (citing Cassese, p. 67), fn. 11 (citing Focarelli, p. 392). *See further* Kleffner (2013), pp. 299-300 (noting that the ICTY Appeals Chamber in *Kvočka* rejected the argument, based on *Pilz* and *Motosuke*, for an adverse party requirement under CA3); ICTY, *Kvočka* AJ, para. 561.

- Gaggioli's observation is premised on the hypothetical of a rape "without […] any link to the armed conflict situation", and therefore appears to concern the *nexus* requirement rather than any general 'adverse party' requirement.[77]

- Schabas' observation concerns "protected persons" under the Geneva Conventions; he makes no reference to any 'adverse party' requirement applicable to CA3.[78]

- Wells' observation, as cited in the Appeal, is directly against the Defence position—she writes: "[t]he initial abduction or recruitment of children into armed groups, as well as any atrocities committed against children who are recruited […] but who do not take an active or direct part in hostilities (for example, girls recruited for sexual enslavement), can and should be prosecuted [under CA3]".[79]

35. The absence of any 'adverse party' requirement, either in CA3 in general or in article 8(2)(e)(vi) in particular, is further confirmed and underlined by reference to the Elements of Crimes. Not only is there no such requirement in the elements of article 8(2)(e)(vi) itself,[80] but even for the offences proscribed by article 8(2)(c)—where, unlike article 8(2)(e)(vi), it is common ground that CA3 applies[81]—there is

[77] *See* Appeal, para. 5, fn. 11 (citing Gaggioli, p. 515). *See further* Gaggioli, pp. 514 (discussing "the requirement of a nexus to distinguish war crimes/other violations of IHL from ordinary crimes that may be committed during an armed conflict but have no link with it exists both under IHL and international criminal law"), 515 (concluding "[w]hile these examples might seem obvious, the nexus with the armed conflict is not always so easy to determine"). On the nexus itself, *see e.g.* ICTY, *Kunarac* AJ, para. 58 ("What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. […] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, the manner in which it was committed or the purpose for which it was committed").
[78] *Contra* Appeal, para. 5, fn. 11 (citing Schabas, p. 210). In fact, the 'adverse party' requirement relating to "protected persons" in the meaning of the Geneva Conventions is discussed on p. 212. For Schabas' discussion of CA3, *see* p. 211.
[79] *See* Appeal, para. 5, fn. 11 (citing Wells, p. 304). The quotation begins at Wells, p. 303.
[80] *See generally* Elements of Crimes, art. 8(2)(e)(vi).
[81] *See above* paras. 25-30.

likewise no requirement for the victim to have a different affiliation than the perpetrator of the crime against them.[82]

II. 2. b. Unlawful enlistment or conscription into a non-State organised group does not establish "active participation in hostilities"

36. The Defence further errs in asserting that children unlawfully enlisted or conscripted into a non-State organised armed group under article 8(2)(e)(vii) must necessarily be considered as taking active part in hostilities, and therefore fall outside the protection of CA3 as a matter of law.[83] This is incorrect. Rather, the question whether a person was taking active part in hostilities is essentially factual, to be determined on the basis of the evidence elicited at trial.

37. The protection of persons in non-international armed conflicts is generally governed by *activities*, not *status*[84]—and the considerations relevant to show "active" participation in hostilities are wholly distinct from those relevant to determine under article 8(2)(e)(vii) that a child has been unlawfully enlisted or recruited.[85] It simply cannot be said that a child who has been unlawfully enlisted or conscripted into a non-State organised armed group *ipso facto* "actively" or "directly" participates in

[82] *See e.g.* Elements of Crimes, art. 8(2)(c)(1)-1, Element 2 (expressing the requirements of CA3 only in the terms that "Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities").
[83] *See* Appeal, paras. 13-15.
[84] *See e.g.* Kleffner (2013), pp. 297-298; Kleffner (2015), pp. 435-436. In particular, in non-international armed conflicts, the only status-based determination applies to members of the armed forces of States (*i.e.* 'government' forces). All other persons are civilians. The approach in non-international armed conflicts contrasts with the general approach applicable to international armed conflicts, which is primarily status-based.
[85] Given the tripartite structure of article 8(2)(e)(vii), it is not necessary to show that a child was used to participate actively in hostilities: *see Lubanga* TJ, para. 609 ("the three alternatives (*viz.* conscription, enlistment and use) are separate offences"); *Lubanga* AJ, para. 267. Moreover, according to the Appeals Chamber, 'active participation' under article 8(2)(e)(vii) of the Statute should not be interpreted "so as to only refer to forms of direct participation in armed hostilities, as understood in the context of the principle of distinction and [CA3]": *Lubanga* AJ, para. 328. Thus, not only does proof of 'active participation' under article 8(2)(e)(vii) fail *ipso facto* to establish direct participation in hostilities for the purpose of CA3, but *a fortiori* direct participation cannot be inferred from proof merely of enlistment or conscription under article 8(2)(e)(vii).

hostilities.[86] Nor, as a matter of law, can such a finding imply any diminution of the special protection of the child,[87] or any alteration of the child's civilian status.[88]

38. The Defence conflates the term "child soldier"—which connotes in this context only a child who has been unlawfully enlisted or conscripted into a non-State organised armed group[89]—with concepts taken from the *DPH Interpretive Guidance* on direct participation in hostilities, to try and establish that "child soldiers" may never be protected by CA3. This is plainly erroneous.[90]

39. First, the *DPH Interpretive Guidance* is no more than an interpretation of international humanitarian law, which cannot "change binding rules of customary or treaty IHL" and "is not and cannot be of […] of a legally binding nature."[91] It does not have customary international law status itself.[92] It is not a source of law applicable before this Court, either under article 8 or 21.

40. Second, the *DPH Interpretive Guidance* is concerned only with the targeting of civilians for the purpose of the conduct of hostilities: it states expressly that it is "not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities".[93] Although the notions of "direct participation" and "active participation" (in the meaning of CA3) may be linked to some extent, the *DPH Interpretive Guidance* has no relevance to Counts 6

[86] The Pre-Trial Chamber came to a similar conclusion, although by different reasoning: *see* Confirmation Decision, para. 78 ("the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law"). This same conclusion could have been reached even more straightforwardly, on the basis of the obvious differences between the tests for enlistment and conscription under article 8(2)(e)(vii) and the test for direct participation in hostilities.
[87] *See below* paras. 44-54.
[88] *See above* para. 22.
[89] *See above* fn. 21.
[90] *Contra* Appeal, para. 15 (quoting *DPH Interpretive Guidance*, pp. 27-28).
[91] *DPH Interpretive Guidance*, pp. 6, 9.
[92] *See e.g.* Kleffner (2015), p. 437.
[93] *DPH Interpretive Guidance*, p. 11.

and 9 if article 8(2)(e)(vi) does not require victims of rape or sexual slavery to be protected under CA3.[94]

41. Third, even if *arguendo* article 8(2)(e)(vi) does require proof that the victim is protected under CA3, the *DPH Interpretive Guidance* remains essentially irrelevant. Consistent with its limited and narrow purpose—an effort to articulate a framework for when civilians in non-international armed conflict may be *targeted* by *the adverse party*[95]—it develops concepts which, although possibly relevant for the conduct of hostilities, have limited or no value for the *protective* function of international humanitarian law.[96] Thus, not only are the facts relevant to analysing "active" participation for the purpose of CA3 distinct from those relevant to analysing enlistment or conscription under article 8(2)(e)(vii),[97] but even the facts relevant to "active" participation for CA3 may be distinct from those relevant to the view of "direct" participation expressed in the *DPH Interpretive Guidance.*[98]

42. The Defence specifically implies that children unlawfully enlisted or conscripted into non-State organised armed groups necessarily have a "continuous combat function" (in the meaning of the *DPH Interpretive Guidance*). This is incorrect. Even if such a concept has any legal meaning beyond the limited question of targeting—which, for all the reasons just set out, cannot be assumed, and is contested by the Prosecution—it still remains a *factual* matter to be decided on the basis of evidence elicited at trial. Nothing in the *DPH Interpretive Guidance* suggests that mere enlistment or conscription, in the meaning of article 8(2)(e)(vii), can operate as a matter of law to establish such a status—especially since the recruitment of children is itself unlawful. Indeed, the logic of the *DPH Interpretive Guidance* is entirely to the opposite effect.

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[94] *See above* paras. 25-30.
[95] *See DPH Interpretive Guidance*, pp. 11-12, 27-28, 33, 36, 71-73.
[96] *See above* para. 40.
[97] *See Lubanga* TJ, para. 618. *See also Lubanga* AJ, paras. 267, 277-282, 300.
[98] *See DPH Interpretive Guidance*, pp. 34-35. For the definition of conduct amounting to direct participation in hostilities, *see e.g.* pp. 44-46, 65.

43. The further Defence argument—that, because the language of CA3 refers to "members of armed forces", a similar concept of 'membership' must apply to non-State organised armed groups as well—simply misreads CA3.[99] CA3 applies to "[p]ersons taking no active part in the hostilities, *including* members of armed forces who have laid down their arms and those placed *hors de combat*" (emphasis added). These examples in CA3 are illustrative, not exhaustive, as demonstrated by the word "including".[100] Consistent with its equal application to all parties to the conflict, the ordinary meaning of the terms of CA3 reflects that "persons taking no active part" *includes* the subset of members of armed forces who laid down their arms or who are *hors de combat* but *is not limited* to those persons. This interpretation is further confirmed by reference to article 4(1) of APII, which in reinforcing the protection of CA3 refers simply to "[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities".

II. 3. Article 8(2)(e)(vi) must in any event be interpreted consistently with the specially protected status of children

44. Further, no matter how article 8(2)(e)(vi) is interpreted, this Court must also give effect to the status of children as a specially protected class in international humanitarian law. This special protection is incorporated into the Statute through the *chapeau* of article 8, through article 21(1)(b), and to the extent necessary to preserve the object and purpose *inter alia* of article 8(2)(e)(vii). The Defence fails adequately to address this principle in the Appeal, which requires that the Court not give legal effect to the consequences of the unlawful recruitment or use of a child, in the meaning of article 8(2)(e)(vii), so as to deprive them of the legal protections to which they would otherwise be entitled. Accordingly, taking into account their status as children, proof of the unlawful enlistment or conscription into the

[99] *Contra* Appeal, para. 16 (CA3 implies "that fighters in rebel forces are not merely civilians directly participating in hostilities").
[100] *See also* Kleffner (2015), p. 436.

UPC/FPLC of the victims of Counts 6 and 9 remains, again, irrelevant and not dispositive of whether the crimes could be proved.

II. 3. a. The special protection of children endures notwithstanding their participation in hostilities

45. Children are a specially protected class under international humanitarian law, corresponding to the "special risk" to which they may be exposed, especially in non-international armed conflicts.[101]

46. The special protection is not limited to the rights to education and to be reunited with family,[102] but is a general rule which "can be found throughout the Fourth Geneva Convention and in Additional Protocol I", as well as Additional Protocol II and customary international law.[103] The Convention on the Rights of the Child, which is near universally ratified, likewise reflects the overriding concern, consistent with the "obligations under international humanitarian law to protect the civilian population in armed conflicts," to "ensure protection and care of children who are affected by an armed conflict."[104]

47. The "special respect and protection due to children affected by armed conflict includes, in particular[] protection against all forms of sexual violence", as well as other measures.[105] "[T]here is no doubt" that this statement "is customary", underpinned by "extensive" State practice supporting "the specific obligations

[101] *See e.g.* UK Manual, p. 402, mn. 15.39.1; AP Commentary, mn. 4544.
[102] *Contra* Appeal, para. 17.
[103] *See* ICRC, *CIHL Study*, rule 135; API, art. 77(1) ("Children shall be the object of special respect *and shall be protected against any form of indecent assault*", emphasis added); APII, art. 4(3)(d) (referring to "the special protection provided by this Article" as a whole). *See also* Heintze and Lülf, pp. 1294-1295 (children are "a distinct protected group of vulnerable people"), 1305 ("State practice establishes the rule that children affected by armed conflict are entitled to special respect and protection. This rule constitutes a norm of CIL, applicable to both types of conflict, international and non-international"), 1306 ("The structure of Article 4 shows how important the authors of APII considered the protection of children during NIACs […] it thereby enables us to maintain that the principle of special protection of children during these conflicts is affirmed").
[104] CRC, art. 38(4). *See also* Preamble, para. 9. The CRC is presently ratified by 196 States, and signed but not ratified by 1 State. No State has failed to sign or ratify the CRC. *See also* Heintze and Lülf, pp. 1303 ("[t]he provisions of IHL on child recruitment must be read in conjunction with IHRL"), 1311 (suggesting that the obligations on CRC, art. 38, mirror those of API, art. 77).
[105] ICRC, *CIHL Study*, rule 135. *See also e.g.* API, art. 77(1).

outlined in the [*CIHL* Study] in both international and non-international armed conflict."[106]

48. The special protection provided to children in non-international armed conflict does not lapse even if they take direct part in hostilities (and so become, temporarily, targetable by the adverse party). This follows from the requirement in article 4(3)(d) of APII that, *even if* children do take direct part in hostilities and are captured, the "special protection provided […] shall remain applicable to them". The Defence misunderstands the significance of this provision.[107] It is relevant because it shows that the special protection accorded to children is not extinguished by their direct participation in hostilities. Even though the special protection of the child may temporarily be qualified for such times—and to such extent only as necessary to make them lawfully targetable—it remains applicable until such time as the child is deemed an adult. Indeed, the logic behind the provision recognises that children who are (unlawfully) recruited into non-State organised armed groups and used to participate actively in hostilities are those most in need of legal protection.[108] This is not reasoning by analogy, but merely the application of established and overwhelmingly accepted law.[109]

49. The special protection assured for children should thus form part of the interpretation, among other provisions, of article 8(2)(e)(vi) of the Statute, as well as (if necessary) CA3 itself, having regard to the acknowledged "overall protective and humanitarian purpose" of this provision.[110]

[106] Breau, p. 200.
[107] *Contra* Appeal, para. 17.
[108] AP Commentary, mn. 4559.
[109] *Contra* Appeal, para. 17.
[110] *See Akayesu* TJ, para. 631. *See also* Mettraux, p. 143.

II. 3. b. No legal effect may be given to the unlawful enlistment or conscription of children, except to the limited extent required for targeting by the adverse party

50. The special protection generally due to children under international humanitarian law finds particular resonance in the absolute prohibition of unlawfully enlisting or conscripting children into non-State organised armed groups. In such circumstances, although international humanitarian law requires that such children may be targetable by the adverse party for such time as they take direct part in hostilities, neither international humanitarian law nor international criminal law should give legal effect to their recruitment—and especially insofar as their protection to treatment outside the conduct of hostilities may be compromised in any way. Giving such effect would make the specially protected status of children wholly redundant.

51. This view is supported by the interplay of the specific protections in article 4 of APII, implemented in the Statute as war crimes. These protections comprise: the express clarification of the prohibition of rape, enforced prostitution, any form of indecent assault, and all forms of slavery, and the (then) novel prohibition on enlisting or conscripting children into armed groups, and using them to participate actively in hostilities.[111] These additional protections are particularly significant in at least two respects.

- First, they demonstrate that the drafters of APII foresaw the need to protect not only women but also children and adolescents from sexual violence in non-international armed conflicts.[112]

- Second, by prohibiting both the enlistment and conscription of children *and* also their "use to participate actively" in hostilities, those same drafters expressly provided not only for war crimes committed against children *outside*

[111] *See* APII, arts. 4(2)(e), 4(2)(f), 4(3)(c).
[112] *See* AP Commentary, mns. 4539-4540.

a non-State organised armed group (enlistment or conscription) but also against such children who had *already been* effectively enlisted or conscripted into the group such that they can be "used" to participate actively in hostilities. In this manner, article 4(3)(c) expressly recognises that children who have been unlawfully recruited into a group may be the victims of war crimes committed against them by other members of the group. If article 4(3)(c) is amenable to such victims, it would be inconsistent to infer that article 4(2), prohibiting *inter alia* sexual violence, is not similarly amenable.

52. Since the protection in articles 4(2)(e) and (f) and 4(3)(c) of APII were given effect in article 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute, the same interpretive logic—accepting that war crimes against children can be committed by 'co-belligerents' and expressing a special concern to prevent sexual violence—should apply before this Court. Furthermore, if the *Lubanga* Trial Chamber was correct that not only the initial enlistment or conscription of a child is unlawful, but also the subsequent daily 'maintenance' of the child's status as an enlisted person or conscript,[113] this Court has already endorsed the view that all *three* crimes in article 8(2)(e)(vii) permit the victimisation of a child by a perpetrator within the same group, and not only the "unlawful use" crime as provided in article 4(3)(c) of APII.

53. Furthermore, article 4(3)(c) of APII, and article 8(2)(e)(vii) of the Statute, also recognise the view—common also to many national jurisdictions—that children under the age of 15 may be incapable of giving informed consent.[114] This is demonstrated, for example, by the prohibition not only of *involuntary* recruitment of children under 15 (conscription) but also *voluntary* recruitment (enlistment). For these same reasons, even if *arguendo* there was an 'adverse party' requirement for

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[113] *See Lubanga* TJ, para. 618 (referring to "conscription and enlistment" under article 8(2)(e)(vii), "[t]hese offences are continuous in nature").
[114] *See e.g. Lubanga* TJ, paras. 613-617. *But see also Lubanga* AJ, paras. 300-302.

war crimes in non-international armed conflict,[115] there is a cogent basis to consider that children who cannot in law consent to join a non-State organised armed group likewise cannot in law hold any 'allegiance' and therefore can never share any legally relevant affiliation with the perpetrator of crimes against them.

54. Viewed overall, if the logic of the Appeal were correct, it would entirely defeat the specially protected status of children under international humanitarian law, including the object and purpose of absolutely prohibiting the recruitment of children into armed groups (for example by article 4(3)(c) of APII and article 8(2)(e)(vii) of the Statute). Rather than *protecting* children from the dangers of hostilities by prohibiting their recruitment or use, such provisions could even potentially *increase* the dangers to them by stripping from them protection from other forms of violent crime which are highly likely to occur. Such an interpretation cannot be correct, and would fail to give effect to the fundamental legal protection for children established by the international community—as well as the moral imperative which it reflects.

III. The Chamber's observation concerning potential victims under article 8(2)(e)(vi) was relevant to its reasoning on the non-jurisdictional nature of the Request, and not a substantive determination (First Ground of Appeal)

55. In reasoning whether the Request was a valid jurisdictional challenge[116]—and guided by the dictum that such challenges address questions concerning the *existence* of a crime, not merely their "contours or elements"[117]—the Chamber noted that Counts 6 and 9 purport to charge offences which are expressly stated in article

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[115] *But see above* paras. 32-34. Indeed, even for in considering whether "protected person" status is established in *international* armed conflict—a much higher test than even applies *arguendo* in non-international conflicts—the ICTY Appeals Chamber has emphasised that courts should examine the "substantial relations" between the perpetrator and victim, not "formal bonds": *Tadić* AJ, para. 166. *See also* Mettraux, pp. 68-69 (referring to the "broad, […] purposive, and ultimately realistic" approach adopted by the ICTY even to "protected person" status).
[116] Decision, paras. 24-28.
[117] Decision, para. 24.

8(2)(e)(vi) of the Statute.[118] It then considered whether article 8(2)(e)(vi) contains such a clear restriction on potential victims that it must necessarily exclude the conduct charged in Counts 6 and 9, which might substantiate a challenge to the *existence* under the Statute of any crime charged in those counts. It found that it did not.[119]

56. In line with its arguments in its second ground of appeal, the Defence misinterprets this aspect of the Decision's reasoning and suggests that the Chamber had discarded "the usual pre-conditions for a 'war crime'" when discussing article 8(2)(e)(vi).[120] This is incorrect, and assumes the faulty premise that the Chamber sought *to define the elements* of the crimes in article 8(2)(e)(vi).[121] The plain words of the Decision demonstrate, however, that this was not the Chamber's intention. It stated:

> The Chamber need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of substantive law are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged.[122]

57. In this light, the Chamber manifestly did not "eliminat[e] the threshold requirement for the existence of a war crime under conventional and customary humanitarian international law."[123] Nor did it conclude that "only such contextual elements as are expressly mentioned in sub-sections (i) through (xv) should be deemed as having been imported into the Rome Statute from the 'established framework of international law'".[124] As noted above, the question of "membership" in a group in this sense enters into complex questions of law and fact, which are

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118 Decision, para. 25.
119 Decision, para. 25.
120 Appeal, para.7.
121 *See* Appeal, paras 8-10.
122 Decision, para. 28.
123 *Contra* Appeal, para. 10.
124 Appeal, para. 8.

inapposite to a jurisdictional challenge or decision. The Decision, in its own terms, does not bind the Chamber on these matters for the remainder of the trial. To the contrary, it decided no more than that the Request was invalid as a jurisdictional challenge.

Conclusion

58. Although characterised as jurisdictional challenges, the Defence raised issues of statutory interpretation before the Chamber. The Chamber properly declined to decide prematurely on such non-jurisdictional matters at the commencement of the trial. Rather than seeking the Chamber's leave to appeal, the Defence instead filed a direct appeal under article 82(1)(a). In essence, the Defence is now asking the Appeals Chamber to determine non-jurisdictional issues that the Chamber has not yet decided.

59. For these reasons, the Appeal should be dismissed *in limine*. The Decision was not "jurisdictional" and the Appeal was not properly filed before the Appeals Chamber under article 82(1)(a) of the Statute.[125] On this sole basis the Appeal should be dismissed.

60. In the alternative, if the Appeal were deemed admissible, only the third ground—whether the Defence's Request was a valid jurisdictional challenge—should be addressed on the merits because it is the only one which addresses the *ratio decidendi* of the Decision. In this case, the Appeals Chamber should thus still dismiss the first and second grounds *in limine* because they are irrelevant.

61. Specifically, the third ground should be dismissed because the Chamber correctly determined that the issues raised were not valid jurisdictional challenges

[125] *See further* Motion to Dismiss *In Limine*.

and properly refused to make findings on the Defence's submissions on Counts 6 and 9.

62. However, even if the Appeals Chamber were to grant the third ground, it should do no more than remand the matter back to the Chamber for its fresh determination on the merits, following full argument by the Parties, which may include also the matters raised in the first and second grounds. In such a ruling, the Appeals Chamber should refrain from providing advisory opinions by deciding issues that have not been adjudicated by the Chamber. Interlocutory appeals are fora to provide second instance review. If the Appeals Chamber were to decide the first and second grounds on their merits, this would remove the opportunity for a first instance decision by the Trial Chamber and second-instance decision by the Appeals Chamber.

Relief Requested

63. For the reasons above:

- The Appeal should be dismissed in *limine* because it is inadmissible under article 82(1)(a) of the Statute.

- In the alternative:

    - The third ground should be dismissed on its merits, or should be remanded to the Trial Chamber for fresh determination; and, in any event,

- The first and second grounds should be dismissed *in limine* because they do not materially affect the *ratio* of the Decision. They should not be adjudicated by the Appeals Chamber before a decision on the merits by the Trial Chamber.

Word count: 10,173[126]

Fatou Bensouda, Prosecutor

Dated this 24th day of November 2015

At The Hague, The Netherlands

[126] The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.