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No.: **ICC-01/04-02/06**
Date: **26 January 2017**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
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

Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9

Source: **Defence Team of Mr Bosco Ntaganda**

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Further to Trial Chamber VI ("Chamber")'s Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9,[1] Counsel representing Mr Ntaganda ("Defence") hereby submits this:

Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9

INTRODUCTION

1. The Chamber has decided that it has jurisdiction over the war crimes of rape and sexual slavery of "child soldiers" whom the Prosecution alleges were "members" of the same armed group as the perpetrators. The Chamber held, in particular, that war crimes – at least as defined in Article 8 (2)(b)(xxii) and (e)(vi) and of the ICC Statute – are not circumscribed by any "victim status requirement"[2] and that "the established framework of international law" does not otherwise impose any limits on who may be the victim of rape and sexual slavery as war crimes.[3] This is the case, according to the Chamber, regardless of whether the conflict is international or non-international.[4] The Impugned Decision also declared that even assuming that membership might be an impediment to such jurisdiction, the Chamber nevertheless had a duty to exercise jurisdiction where membership arose from the violation not to enlist or conscript children under the age of 15 into an armed group.[5]

2. The Impugned Decision is a substantial and unjustified extension of the scope of war crimes law. War crimes are now said to encompass not only crimes committed against civilians or members of enemy forces, but also crimes within the same armed force or group. Extending international jurisdiction to such crimes may or may not be good policy, but it does not arise from the

[1] ICC-01/04-02/06-1707 ("Impugned Decision").
[2] Impugned Decision, paras.40-44.
[3] Impugned Decision, paras.45-52.
[4] Impugned Decision, para.34.
[5] Impugned Decision, para.53.

wording of Article 8, nor is it otherwise reflected in State practice. The extension described by the Chamber, even assuming that the current state of the law may be viewed as unsatisfactory, is a matter to be decided by States, not Judges.

PROCEDURAL HISTORY

3. On 1 September 2015, the Defence challenged the Court's jurisdiction over Counts 6 and 9 of the Updated Document Containing the Charges ("Defence Request" [6] and "UDCC"[7], respectively) stating that "child soldiers cannot be victims of rape and sexual slavery as a war crime under the laws and customs of war applicable to armed conflicts not of an international character".[8] The Chamber rejected this request on the basis that the question was not jurisdictional.[9]

4. The Defence appealed the Chamber's First Decision on 19 October 2015,[10] to which the Prosecution responded on 14 November 2015[11] and the Legal Representatives of Victims ("LRV") on 30 November 2015.[12]

5. On 22 March 2016, the Appeals Chamber reversed the Chamber's determination, held that the issue raised was jurisdictional, and remanded the matter to the Chamber for further deliberations.[13]

6. The Chamber scheduled further submissions, requiring the Defence to file its submissions by 7 April 2016, and the Prosecution and LRV to file theirs by 14

[6] ICC-01/04-02/06-804.
[7] ICC-01/04-02/06-458-AnxA
[8] ICC-01/04-02/06-804, para.44.
[9] ICC-01/04-02/06-892.
[10] ICC-01/04-02/06-909.
[11] ICC-01/04-02/06-1034.
[12] ICC-01/04-02/06-1040.
[13] ICC-01/04-02/06-1225, para.40.

April 2016.[14] All parties filed additional submissions according to the schedule prescribed by the Chamber.[15]

7. On 4 January 2017, the Chamber issued the Impugned Decision, affirming the Court's jurisdiction in respect of Counts 6 and 9.[16]

THE NATURE OF THE COUNTS SUSTAINED

8. Counts 6 and 9 of the UDCC[17] allege, respectively, that Bosco Ntaganda is criminally responsible for "[r]ape of UPC/FPLC child soldiers, a war crime", and for "[s]exual slavery of UPC/FPLC child soldiers, a war crime."[18]

> **COUNT 6: RAPE OF UPC/FPLC CHILD SOLDIERS**
>
> Based on the facts and circumstances described in paragraphs 100-106, **Bosco NTAGANDA** is criminally responsible for:
>
> **Count 6**: Rape of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).

> **COUNT 9: SEXUAL SLAVERY OF UPC/FPLC CHILD SOLDIERS**
>
> Based on the facts and circumstances described in paragraphs 100-104 and 106, **Bosco NTAGANDA** is criminally responsible for:
>
> Count 9: Sexual slavery of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).

9. The UDCC elsewhere describes "child soldiers" as those who were "conscripted,"[19] "enlisted"[20] and "recruit[ed]" into the UPC/FPLC.[21] These

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[14] E-mail from Legal Officer of the Chamber to parties and participants of 24 March 2016 at 18:11.
[15] ICC-01/04-02/06-1256 ("Consolidated Submissions"); ICC-01/04-02/06-1278 ("Prosecution's Response to Mr Ntaganda's Consolidated submissions challenging jurisdiction"); ICC-01/04-02/06-1279 ("Former child soldiers' Response to the Consolidated submissions challenging jurisdiction of the Court").
[16] ICC-01/04-02/06-1707.
[17] Updated Document Containing the Charges ("UDCC") 16 February 2015, ICC-01/04-02/06-458-AnxA.
[18] UDCC, pp.61, 62.

child soldiers are described in the UDCC as "part of the UPC/FPLC."[22] The Prosecution has acknowledged in its Pre-Trial Brief[23] and in the course of this litigation, that the alleged victims in Counts 6 and 9 were "members of the UPC/FPLC":

> Counts 6 and 9 alleged that the Accused was criminally responsible for the rape and sexual slavery of children under the age of 15 years *who were members of the UPC/FPLC* ("UPC/FPLC Child Soldiers") pursuant to article 8(2)(e)(vi) of the Statute.[24]

10. The Prosecution in its most recent submissions appears to attempt to resile from the claim that these individuals are alleged to be "members" of the UPC/FPLC.[25] Nonetheless, the allegations of recruitment and enlistment in the UDCC itself, combined with the OTP's frequently stated position that these individuals are alleged to be members of the UPC/FPLC, leave no doubt that the child soldiers are alleged to be members of the UPC/FPLC at the very least in the sense of carrying out a continuous combat function, if not something more formal. The UDCC also asserts that these child soldiers "actively participated in hostilities through combat on the frontlines."[26]

11. The alleged perpetrators are "their own commanders and other UPC/FPLC soldiers."[27]

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[19] UDCC, para.92.
[20] UDCC, paras.93, 94.
[21] UDCC, para.95.
[22] UDCC, para.103.
[23] ICC-01/04-02/06-503-Conf-AnxA ("Pre-Trial Brief"), p.198 ("NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as members of the UPC/FPLC"), para.400 ("[t]roops were deployed and treated equally as soldiers, without regard to age"), paras.416 and 436 (referring to child soldiers "within the ranks of the UPC/FPLC").
[24] "Prosecution Response to the 'Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges', ICC-01/04-02/06-804", 11 September 2015, ICC-01/04-02/06-818 ("First Prosecution Response"), para.6.
[25] ICC-01/04-02/06-1278, para.81.
[26] UDCC, para.98.
[27] UDCC, para.103.

12. Furthermore, Counts 6 and 9 may be contrasted with Counts 5 and 8 which allege, respectively, "[r]ape of civilians, a war crime" and "[s]exual slavery of civilians, a war crime."[28]

13. The contrast between the war crimes charges in Counts 6 and 9 and those in Counts 5 and 8 shows that the Prosecution has not pleaded that the child soldiers retained their status as "civilians". If the Prosecution had wished to allege that the "child soldiers" were merely civilians who were used in combat intermittently, then there would have been no need for Counts 6 and 9. Indeed, international humanitarian law has expressly accommodated the idea that civilians, whether in international or non-international armed conflict, may "directly participate in hostilities." For such time as they directly participate, they are deprived of their civilian status and its protections; when they are not so participating, that status and those protections are recovered.

14. The Prosecution chose, however, not to categorize the child soldiers as civilians. Instead, the Prosecution chose to allege that these child soldiers were enlisted, recruited, conscripted into – *i.e.* becoming members of – the UPC/FPLC. This pleading may have been viewed as necessary or tactically useful to prove Counts 14 and 15, namely, "[c]onscription of children under the age of 15, a war crime" and "[e]nlistment of children under the age of 15, a war crime."[29]

15. This pleading was not, however, necessary for criminal liability under 8(2)(e)(vii) of the Statute. The Prosecution could have alleged that the child soldiers were not members who had been recruited and enlisted into the UPC/FPLC, but that they were civilians directly participating in hostilities. This would not be legally incompatible with alleging "use" of children in hostilities under Article 8(2)(b)(xxvi) and (2)(e)(vii), in which case rape and

[28] UDCC, pp.61-62.
[29] UDCC, p.64.

sexual slavery against such persons could have been brought under Counts 5 and 8.[30] The Prosecution chose not to adopt this approach.

16. The consequence is that Counts 6 and 9 charge as war crimes acts committed by members of an armed group against other members of the same armed group. This, accordingly, eliminates the well-established requirement of the law of armed conflict – at least in respect of that body of law protecting individuals known as the "law of Geneva"[31] – that the victim either be a "protected person" (in international armed conflict) or be "taking no active part in hostilities" (in non-international armed conflict). The Impugned Decision concludes that Article 8(2)(b) and (e) has dispensed with these requirements and affirms that war crimes include crimes between combatants in the same force, including rape and sexual slavery. Hence, the Chamber determined that the membership of the victims of the crimes alleged in Counts 6 and 9 was irrelevant to its jurisdiction.[32]

17. The UDCC further alleges that these crimes were committed in non-international armed conflict and has, accordingly, charged the crime under Article 8(2)(e)(vii). The Impugned Decision foresees the possibility that it might recharacterize the nature of the armed conflict under Regulation 55 and, accordingly, determines that the Court also had jurisdiction over the crimes charged in Counts 6 and 9 under Article 8(2)(b)(xxii).

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[30] The Chamber stated that the Defence's position was that "the Prosecution could have brought the conduct listed under Counts 5 and 8, but that the conduct could not be qualified as a war crime." The Defence submitted to the Trial Chamber, on the contrary, that "such crimes could possibly be war crimes as long as the victims were not 'members' of the armed forces" and that "the Prosecution could have sought to bring these crimes within Counts 5 and 8, thus entailing a factual claim that the child soldiers were 'civilians.'" Consolidated Submissions, paras.40-41.

[31] See Triffterer 3rd ed, pp. 319-321; Cryer, p.268 ("Since then, there have been many treaties developing international humanitarian law (IHL). These are sometimes divided into 'Geneva law', which primarily focuses on protecting civilians and others who are not active combatants (such as the wounded, sick, ship- wrecked and prisoners of war), and 'Hague law', which regulates specific means and methods of warfare, with a view to reducing unnecessary destruction and suffering.").

[32] Impugned Decision, para.53.

THE STRUCTURE OF THE CHAMBER'S REASONING

18. The Chamber's reasoning is structured around three conclusions, each of which might be understood as sufficient to affirm the Court's jurisdiction over Counts 6 and 9: (i) Article 8(2)(b) and 8(2)(e) contain no requirement that the victim of those crimes be, respectively, a protected person or taking no active part in hostilities;[33] (ii) the crimes of rape and sexual slavery are, in any event, excepted from this requirement;[34] and (iii) even if those crimes are not excepted from this requirement, it should not apply or be a bar to asserting jurisdiction when the victims are unlawfully conscripted children.[35] Each of these sets of reasons is addressed in turn.

19. The Chamber's reasons in respect of conclusions (i) and (ii) overlap to a degree that requires that they be addressed together. In particular, as discussed below, the Chamber did not clearly state that conclusions (i) and (ii) were independent and sufficient conclusions.

SUBMISSIONS

I. <u>The Chamber erred in finding that the crimes defined in sub-sections (b)(xxii) and (e)(vi) of Article 8(2) are not subject to any status requirements</u>

(i) The Reasoning of the Chamber

20. The Chamber noted Article 8(2)(b), unlike Article 8(2)(a), is not subject to any express requirement that the prohibited acts be "against persons or property protected under the provisions of the relevant Geneva Convention"; and that Article 8(2)(e), unlike Article 8(2)(c), contains no express requirement that the acts be "against persons taking no active part in hostilities."[36]

[33] Impugned Decision, paras.36-44.
[34] Impugned Decision, paras.45-53.
[35] Impugned Decision, para.53.
[36] Impugned Decision, paras.38, 40.

21. The Chamber also noted that: (i) some of the crimes enumerated in Article (b) and (e), but not the provisions therein concerning rape and sexual slavery, required an express victim status; (ii) the Elements of Crimes "make no mention of such a requirement, or of any particular victim status being required";[37] and (iii) imposing the status requirements to the crimes of rape and sexual slavery prescribed in sub-parts (b) and (e) would render those provisions redundant because "the crimes contained therein would not be distinct from crimes which could be charged under (2)(a) and (c)."[38]

22. The Chamber supplemented this primarily textual analysis with two elements of purported drafting history: (i) that the primary concern during the drafting of the Elements of Crimes of the Rome Statute was to "set a certain gravity threshold and exclude lesser forms of sexual violence";[39] and (ii) that rape and sexual violence were considered for inclusion under the rubric of the grave breach of "wilfully causing great suffering or serious injury" and under the Common Article 3 offence of outrages upon person dignity, but were ultimately enumerated as separate crimes under 2(b) and 2(e) instead.

23. The Chamber concluded on the basis of this analysis that "the Court's statutory framework does not require the victims of the crimes contained in Article 8(2)(b)(xxii) and (e)(vi) to be protected persons in the (limited) sense of grave breaches or Common Article 3."[40]

24. The Chamber did not expressly state whether it considered this analysis to mean that there were no other status requirements generally applicable to the crimes under Article 8(2)(b) or (2)(e) arising from the words "within the established framework of international law." The Chamber instead proceeded

[37] Impugned Decision, para.41.
[38] Impugned Decision, para.40.
[39] Impugned Decision, para.42.
[40] Impugned Decision, para.44.

to analyse whether those words imposed any victim role or identity requirements in respect of rape and sexual slavery specifically.

25. The Chamber relied on non-textual sources, including caselaw of international tribunals and commentaries, to observe that although:

> most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict, the Chamber does not consider these explicit protections to exhaustively define, or indeed limit the scope of the protection against such conduct.[41]

26. The Chamber also relied on the Martens clause,[42] the "rationale of international humanitarian law, which aims to mitigate suffering",[43] the *jus cogens* status of the prohibition against rape and sexual slavery,[44] and the 2016 ICRC Commentary[45] to conclude that rape and sexual slavery as defined in Article 8(2)(b) and (e) were not subject to any status requirements whatsoever. In other words, the victim of rape or sexual slavery need not be taking no active part in hostilities for the act to qualify as a war crime under sub-parts (b) and (e) of Article 8(2). The Chamber did not address whether there was any general status requirement "within the established framework of international law" that applies to other enumerated crimes in sub-parts (b) and (e). The implication of the Chamber's reasoning, however, is that there is no status requirement arising from the phrase "within the established framework of international law."

27. The Impugned Decision does acknowledge that, to qualify as a war crime, the offences prescribed by Article 8(2)(b)(xxii) and (e)(vi) would still need to take "place in the context of and [be] associated with an international or non-

[41] Impugned Decision, para.47.
[42] Impugned Decision, para.47.
[43] Impugned Decision, para.48.
[44] Impugned Decision, paras.51-52.
[45] Impugned Decision, para.49.

international armed conflict."[46] This nexus requirement, as the Chamber appears to have recognized, requires only that the perpetrator have "acted in furtherance of or under the guise of the armed conflict."[47] Sexual violence committed by one soldier against another while deployed on mission could, accordingly, satisfy the nexus requirement. Such sexual violence could even colourably fall within the jurisdiction of the Court prior to an international deployment. Further, as a war crime, there is no requirement that the sexual violence be part of any widespread or systematic attack: a single act of sexual violence could fall within the Court's war crime jurisdiction when committed within the armed forces of a state engaged in international or non-international armed conflict.

(ii) The Chamber Ignores that the "Established Framework of International Law" Includes Status Requirements

28. The Chamber places particular reliance on the absence of express reference to the status requirements in the chapeau of sub-parts (b) and (e) for its conclusion that neither the status requirements defined in sub-parts (a) and (c), nor any other status requirements, apply to the crimes enumerated in sub-parts (b) and (e).

29. This reasoning fails to address, however, status requirements that arise from the expression "within the established framework of international law." In particular, Common Article 3 is widely regarded as expressive of customary international law.[48] The protections recognized in Common Article 3 in non-international armed conflict, according to that provision, are applicable only to persons taking "no active part in hostilities." Basic textbooks and courses on war crimes law routinely incorporate the "victim or object of the crime" as

[46] Impugned Decision, para.52.
[47] Kunarac AJ, para.58 cited in Impugned Decision, fn.130.
[48] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 218.

a required element for jurisdiction.[49] Even the Prosecution concedes in its previous submissions that "it is true that State practice has not, hitherto, provided ready illustrations for the application of CA3 to a party to a conflict's own forces."[50]

30. This does not mean that States are forbidden from broadening the requirements of international humanitarian law, or from criminalizing those broader requirements. Some have argued, for example, that specific rules in Geneva Conventions I and II concerning wounded and shipwrecked persons are not subject to those status requirements.[51] Any such departure from the standard rules expressed in Common Article 3, which reflects customary law, would need to be evinced by clear State practice or treaty language.

31. The failure to replicate the exact status requirements set out in Article 8(2)(a) ("persons protected") and Article 8(2)(c) ("taking no active part in hostilities") in Article 8(2)(b) and 8(2)(e) does not demonstrate any intent to depart from the well-established and customary language of Common Article 3. On the contrary, each of these provisions is expressly made subject to "the established framework of the international law of armed conflict."

32. The textual interpretation of Articles 2 and 3 of the ICTY Statute provides useful guidance in this respect. Sub-articles (2)(b) and (e) bear a relationship to sub-articles 2(a) and 2(c) that is similar to the relationship between Articles 3 and Article 2 of the ICTY Statute. Article 2 confers jurisdiction, as does sub-article (2)(b), only for grave breaches; Article 3, however, confers jurisdiction "to prosecute persons violating the laws or customs of war." Article 3, which is prefaced by the phrase "[s]uch violations shall include, but not be limited

[49] Cryer, p.287 ("12.2.6 The victim or object of the crime").
[50] Prosecution's Response to Mr Ntaganda's Consolidated submissions challenging jurisdiction, para.72.
[51] *See* Prosecution's Response to Mr Ntaganda's Consolidated submissions challenging jurisdiction, paras.61, 63.

to", then enumerates five specific such crimes. This Article, in the years immediately preceding the conclusion of the Rome Statute, was interpreted in the seminal *Tadić* Jurisdiction Decision as conferring jurisdiction over, *inter alia*:

> (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts […].[52]

33. Despite Article 3 of the ICTY Statute containing no express limitation and the victims being *hors de combat* or in some other way deemed a protected person, it is well understood that these conditions apply.[53] This has been held to be the case both in respect of crimes falling within Common Article 3,[54] and those not falling within Common Article 3.[55] The absence of express reference

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[52] Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.89 ("Tadić Jurisdiction Decision").

[53] Tadić TJ, paras.615-616 ("the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3. It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time. […] Even if they were members of the armed forces of the Government of the Republic of Bosnia and Herzegovina or otherwise engaging in hostile acts prior to capture, such persons would be considered "members of armed forces" who are "placed *hors de combat* by detention". Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts, as contained in Article 3 of the Statute.")

[54] Blaškić TJ, paras.177, 209; Kordić TJ,para.233 ; Hadžihasanović TJ, para.19 ; Aleksovski TJ, para.48.

[55] Čelibići TJ, paras.587 ("international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party"), 590 ("the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory"); Kunarac, Decision on Motion for Acquittal, 3 July 2000, para.14 (in respect of Serb defendants, the Trial Chamber noted that the "there must be theft involving a more extensive group of persons or a pattern of thefts over some identifiable area such as, for example, the *Muslim section of a village or town* or even a detention centre. The *Čelibići* Judgment held that plunder included unjustified appropriations both by individual soldiers for their private gain and by the organized seizures within the framework of a systematic exploitation of *enemy property*" (italics added); Krnojelac TJ, para.359 (presupposing that the victims of the non-Common Article 3 offence of enslavement were "protected persons" or were "civilians").

to such status requirements in Article 3 of the ICTY Statute has never been interpreted as dispensing with those requirements.

34. Professor Dörmann 's commentary makes it abundantly clear that the drafters of the Elements of Crimes, if not of the Rome Statute itself, would have been keenly aware of these early ICTY interpretations and developments at the time of the drafting of the Rome Statute.[56] There is no indication, as discussed in section (iv) below, that the drafters of the Rome Statute intended that the absence of any express reference to status requirements in the chapeau of Articles 8(2)(b) and (e) be interpreted any differently than Article 3 of the ICTY Statute.

(iii) Retaining The Status Requirements Creates No Redundancy With Sub-Sections (a) and (c) of Article 8(2)

35. The Chamber also purports to fortify its textual analysis with a redundancy argument:

> Understanding rape and sexual slavery, as included in paragraphs (2)(b)(xxii) and (e)(vi), as being grave breaches and serious violations of Common Article 3, respectively, and therefore incorporating the Status Requirements, runs contrary to the structure of Article 8. Indeed, if the Status Requirements were to apply to paragraphs (2)(b)(xxii) and (e)(vi), the crimes contained therein would not be distinct from crimes which could be charged under (2)(a) and (c).[57]

The Chamber's assertion ignores the substantial differences in the text of each sub-section, as well as their historical origins.

36. Sub-section (a) exists as a separate section limited to the grave breaches regime because "[a]lready in 1996, the grave breaches provisions of the four 1949 Geneva Conventions were broadly considered part of customary international law," whereas agreement on the inclusion of other international

[56] Dörmann, pp. 18-19, 23-33, 132-134, 332-343.
[57] Impugned Decision, para.40.

armed conflict crimes "emerged at a later stage."[58] The drafts of Article 8(2) demonstrate that there was no serious dispute about the wording of sub-section (a), whereas the wording of almost every single enumerated crime under sub-section (b) was subject to discussion.[59] The grave breaches regime, in short, was relatively uncontroversial and, for that reason, was imported as a single unit just as was the case with Article 2 of the ICTY Statute. Sub-section (b), just as Article 3 of the ICTY Statute has been described, "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[60]

37. This origin explains the substantial difference in the number and content of the crimes enumerated under (a) and (b): the former contains only eight crimes reflecting the exact, or near-exact wording in the Geneva Conventions; the latter consists of 26 crimes. Some of these crimes may overlap, but for the most part the lists proscribe distinct conduct. In particular, there is no textual overlap between Article 8(2)(b)(xxii) – criminalizing rape and sexual slavery – and any provision of Article 8(2)(a). It is therefore neither textually nor historically correct to interpret the purpose of Article 8(2)(b) as being to define a set of war crimes in international armed conflict that are not subject to any status requirements. Indeed, if the Chamber reasoning were correct, it would mean that States negotiating the Rome Statute intended to retain the limited scope of application of the most serious war crimes (Grave Breaches), while reducing limits on relatively less grave crimes (as set out in sub-section (b)). Such an intent is unlikely, illogical, and not reflected in any secondary sources.

[58] Cottier, p.309.
[59] Bassiouni, pp.84-94.
[60] Tadić Jurisdiction Decision, para.91.

38. The Chamber also overlooks that the redundancy would be eliminated if the "established framework of international law" under (b) permits a *different* status requirement than is dictated by the grave breaches regime under (a). For example, the law of international armed conflict may, for certain crimes, permit a somewhat lower standard, such as that enshrined in Common Article 3. This may or may not be the case depending on the state of the law or the particular crime in question; either way, applying such a status requirement does not, as the Chamber asserts, render section 2(a) redundant.

39. Finally, the redundancy argument should not be given undue weight given the reality that "multilateral political compromises […]do not always add as much clarity and coherence as desired, as was to be expected with over 100 states from different legal systems participating in the negotiations."[61] This has led, at least in the field of war crimes defined under Article 8, to the creation of "several offenses [that] overlap with or are even largely identical to another offence."[62] Any potential redundancy of sub-parts (b) and (e) with sub-parts (a) and (c) is therefore not an appropriate basis on which to infer a legislative intent, let alone discern a textual meaning, to exclude any status requirements from the chapeau of the former provisions.

(iv) Neither Drafting History Nor Academic Commentary Supports the Chamber's Textual Interpretation

40. The Chamber asserts that commentators and drafting history support its textual interpretation that the preambles of sub-parts (b) and (e) impose no status requirements in respect of the crimes enumerated at Article 8(2)(b)(xxii) and 8(2)(e)(vii).[63]

[61] Triffterer 3rd ed., p. 311.
[62] Triffterer 3rd ed., p.317.
[63] Dörmann, p.42.

41. The Chamber asserts that Dörmann has explained that the debates concerning Article 8(2)(b)(xxii) focused primarily on gravity,[64] as if to imply that there was no intent to impose any status requirements in Article 8(2)(b), or that such status requirements were viewed as unnecessary. Dörmann, in the passage relied on by the Chamber, is not discussing rape or sexual slavery – whose gravity cannot have been doubted – but rather the crime of "sexual violence." Commentators do mention discussions about whether rape and other crimes of sexual violence should have been categorized as a grave breach, but there is no indication by any commentator that the purpose of "separat[ing] sexual violence from the more general categories and creat[ing] a separate, unbracketed category of war crimes in its own right" was for the purpose of eliminating any status requirements.[65]

42. If the Chamber's interpretation is correct, it is inconceivable that commentators who were present during the negotations would not have commented on the fundamental innovation in the law of armed conflict being engineered. However, three well-respected commentators who were involved in the negotiation of the Rome Statute or the Elements of Crimes in respect of Article 8 – Cottier, Dormann and Robinson – make no mention that this change was intended by way of the chapeau language of (b) and (e).[66] Schabas, as the Prosecution submits, does comment that "[u]nder article 8(2)(c), victims must be persons who play no active part in hostilities, whereas under article 8(2)(e), victims may also be combatants."[67] This is undoubtedly true, in so far as some of the enumerated crimes – such as those concerning "wounding treacherously a combatant adversary" (8(2)(e)(ix)) and "declaring that no quarter will be given" (8(2)(e)(x) – can without doubt apply only to combatants. However, as the text of these provisions necessarily implies,

[64] Impugned Decision, para.42.
[65] Triffterer 3rd edition, p. 481.
[66] Triffterer 3rd edition, p.354; Dörmann, pp. 9-16, 128, 439-440; Cryer, pp.287-295.
[67] Schabas, p.205.

these are combatants of the *opposing* party. Schabas does not say that the intent underlying the difference of language in the chapeau of 8(2)(c) and 8(2)(e) was to eliminate the general status requirements of victims under the international law of armed conflict.

43. The United Kingdom's declaration in respect of the Rome Statute clearly evinces the view that the phrase "within the established framework of international law", as used in the chapeau of 8(2)(c) and (e) was intended to ensure that these provisions were interpreted in accordance with customary international law:

> The United Kingdom understands the term 'the established framework of international law", used in Article 8(2)(b) and (e), to include customary international law as established by State practice and *opinio juris*. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, inter alia, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Genera Conventions of 12th August 1949, and relating ot the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977.[68]

44. Indeed, far from intending to engineer a revolutionary expansion of the law of armed conflict, the precise enumeration of crimes reflects the intention of States to constrain judicial activism as much as possible. As stated by an author who was present during the negotiations:

> Some States, such as the United States, which had been quite content to impose an open-ended list upon others (Nuremberg, ICTY, ICTR) had a notable change of heart when confronted with a permanent court that could potentially apply to their own forces. There may also have been a concern to avoid the initiatives of judge-made law within the ad hoc Tribunals. In any event, despite the seeming double standards, an exhaustive list is certainly more consistent with criminal law principles, particularly the principle *nullum crimen sine lege*.[69]

45. Neither the text, nor the text considered in light of the available information considering the drafting history of Article 8, provide any support for the view

[68] Schabas, p.510.
[69] Cryer, p.275.

that Article 8(2)(b) and (e) were written to dispense with the status requirements usually applicable to "law of Geneva" war crimes. There is no indication of any intention to depart from the customary requirements set out in Common Article 3 that the victim be taking no active part in hostilities. Even if there are any such indications that can be culled from the writings of activist commentators, nothing comes close to the standard required for recognition as part of the "established framework of the international law of armed conflict." The Trial Chamber's interpretation must therefore be rejected as unsound both textually and contextually.

(v) None of the Sources Cited By The Chamber Demonstrate that Article 8(2)(b)(xxii) or (e)(vii) Crimes Are Exempted from Status Requirements

46. The Chamber acknowledged – without identifying any exceptions whatsoever – that "[w]hile most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct."[70] The Chamber then proceeded to cite three grounds for asserting that the usual status requirements should not apply in respect of rape and sexual slavery: (i) the Martens clause; (ii) the "rationale of international humanitarian law […] to mitigate suffering",[71] and (iii) the *jus cogens* prohibition of rape and sexual slavery.[72]

47. The Chamber's reliance on the Martens clause, if anything, illustrates the dearth of sources justifying such a departure from established principles. The principle, as first enunciated in the preamble of the 1899 Hague Convention on the Laws and Customs of War on Land, declares that:

[70] Impugned Decision, para.47.
[71] Impugned Decision, para.48.
[72] Impugned Decision, paras.51-52.

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.[73]

48. The invocation of the Martens clause is incongruous in light of the Chamber's description of the Rome Statute as "a criminal code."[74] The scope of application of this supplementary provision diminishes to the extent that States have addressed the issue through State practice or treaty-making. Invoking the Martens clause to justify novel judicial interpretations of established principles through judicial activism would delegitimize systems of law whose content and enforcement is based on consensus. Indeed, as stated by Dörmann , the purpose of the requirement that 8(2)(b) and 8(2)(e) crimes be interpreted "within the established framework of international law" is precisely to "exclude an all too progressive interpretation of, for instance, offenses derived from Add. Prot. I."[75]

49. Second, the Chamber invoked the rationale of war crimes law to extend jurisdiction to intra-force rape and sexual slavery and, presumably, sexual violence:

> limiting the scope of protection in the manner proposed by the Defence is contrary to the rationale of international humanitarian law, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or undermining their ability to carry out effective military operations [….] Raping and sexually enslaving children under the age of 15 years, or indeed any persons would never bring any accepted military advantage, nor can there ever be a necessity to engage in such conduct.[76]

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[73] Meron, p.79.
[74] Impugned Decision, para.35.
[75] Triffterer 3rd ed., p.354.
[76] Impugned Decision, para.48.

50. The objection to extending liability to this form of conduct is not that such conduct could ever be justified, but that it falls outside of the well-accepted jurisdictional scope of war crimes law. A soldier murdering his wife when he comes home from international armed conflict using his service weapon, or assassinating the President of his country using his service sniper rifle because of anger over a foreign war, would likewise never bring any military advantage nor be necessary, and yet there can be little doubt that these acts are outside of the jurisdictional scope of war crimes law.

51. The Chamber attempts to establish, third, that as a peremptory and *jus cogens* norm, rape "is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status."[77] This may be true,[78] but is again irrelevant to determining the circumstances in which this conduct is a war crime. If jurisdictional prerequisites are defeated by *jus cogens* norms, then this would mean that even the nexus requirement would be eliminated in such cases, and that any rape anywhere involving anyone is an international crime. This is evidently not the case.

52. Cassese (who presided over one of the most seminal and innovative decisions concerning the international law of armed conflict)[79] explains the distinction between gravity and jurisdiction in the specific context of rape and other crimes:

> [T]he following two requirements must be met for an offence to be considered a war crime. The offence must have been i) perpetrated against persons who do not take direct party in hostilities; and ii) it must have been committed to pursue the aims of the conflict or, alternatively, it must have been carried out with a view to somehow contributing to attaining the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign. These two

[77] Impugned Decision, para.52.
[78] The Impugned Decision was not unanimous in respect of this particular proposition. *See* Impugned Decision, para.51.
[79] Tadić Jurisdiction Decision. Judge Cassese was the presiding judge of the Appeals Chamber that rendered this decision.

> requirements are consonant with the rationale behind the punishment of war crimes, i.e. that all those who, during an armed conflict, seriously contravene rules of IHL against persons protected by such rules should be personally accountable for such breaches [….] The two conditions must exist cumulatively. Thus, an offence (murder, torture, rape, etc.) committed by a combatant against a civilian of the opposing party, or an offence against an enemy combatant (e.g. by using unlawful weapons) in breach of a rule of IHL is generally classified as a war crime: such an offence has been perpetrated to (wrongly) pursue the purpose of war. By the same token, an offence (theft, murder, rape, etc.) committed by a combatant against another combatant belonging to the same belligerent (e.g. the rape of a member of an army by a fellow officer or private), is not a war crime, although the armed conflict may have been the occasion for the offence.[80]

53. The Chamber's invocation of the Martens clause, the supposed purpose of war crimes law, and the *jus cogens* status of rape and sexual slavery do not provide any support for the proposition that Articles 8(2)(b)(xxii) and (e)(vii) are exempt from the usual jurisdictional requirements of war crimes law, including the usual status requirement that the victim be taking no active part in hostilities or is otherwise a protected person.

(vi) The 2016 ICRC Commentary Relies Principally on the Ntaganda Case Itself

54. The 2016 ICRC Commentary to Common Article 3 contains the following paragraph, which was relied on by the Chamber in considering whether the "established framework of international law" encompasses intra-force crimes:

> Another issue is whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party. Examples would include members of armed forces who are tried for alleged crimes – such as war crimes or ordinary crimes in the context of the armed conflict – by their own Party and members of armed forces who are sexually or otherwise abused by their own Party. The fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized as a 'minimum

[80] Cassese, p.78.

> yardstick' in all armed conflicts and as a reflection of 'elementary considerations of humanity'.[81]

55. The only "examples" are set out in the following footnote:

> See ICC, *Ntaganda* Decision on the Confirmation of Charges, 2014, paras 76–82, confirming charges of rape and sexual slavery of child soldiers as war crimes allegedly committed against them by their own Party to the conflict; see also *Katanga* Decision on the Confirmation of Charges, 2008, para. 248, noting that the use of child soldiers in hostilities 'can be committed by a perpetrator against individuals in his own party to the conflict'. But see SCSL, *Sesay* Trial Judgment, 2009, paras 1451–1457, holding that 'the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces'.[82]

56. Of the three examples, one is the object of the present litigation; one concerns the "unusual war crime"[83] in respect of the use of child soldiers; and one is directly contrary to the Commentary's position. This paragraph, once again, does not come close to establishing that intra-force crimes are "within the established framework of the international law of armed conflict."

57. The contrary authority, the *Sesay* Trial Judgement, stated that:

> The Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces.[...]
>
> The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate reconceptualization of a fundamental principle of international humanitarian law.[84]

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[81] ICRC Commentary of 2016 Article 3, para. 547.

[82] ICRC Commentary of 2016 Article 3, fn 293.

[83] Triffterer 3rd ed., p.523. *See* Katanga, para.248.

[84] Sesay TJ, paras.1451-1453 (Even if the judgement refers to "international armed conflict", the accused were charged of war crimes committed in the context of a non-international armed conflict, *see ibid*, para.977. Those excerpts should therefore be understood to apply to war crimes committed in non-international armed conflicts.).

58. The criminalization of the "use" of child soldiers who are already part of an armed force of group does create the prospect of an intra-force crime, expressly defined by the terms of the enumerated crime itself. As Cottier has explained, however, this is an "unusual war crime".[85] Nothing in Article 8(2)(e)(vii) suggests that States intended this exception to overthrow the general principle that the status requirements are a prerequisite of war crimes. Indeed, States expressed the contrary intention in Article 22(2) of the Statute by stating that the "definition of a crime shall be strictly construed and shall not be extended by analogy."

59. Cassese[86] and many other commentators[87] agree.[88] ICTR cases have described the characterization of the identity of the victim as a "threshold requirement".[89] Even one of the most ardent supporters of this innovation concedes that "[c]learly there is no evidence of states treating intra-forces sexual abuse as an international criminal offence."[90] The Prosecution itself has acknowledged that it is "generally the case that IHL regulates conduct directed towards those external to the military force rather than those internal to the military force, this general proposition does not constitute an

[85] Triffterer 3rd ed., p.523; Katanga, para.248.
[86] Cassese, p.67 ("crimes committed by combatants of one party to the conflict against members of their own armed forces do not constitute war crimes.").
[87] Focarelli, p.392 ("[o]ffences committed by servicemen against their own military, whatever their nationality, do not qualify as war crimes"); G. Gaggioli, p.515 ("In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment – as he may have done already in peacetime – without this act having any link to the armed conflict situation, IHL would not apply to the act. This rape would/should however be prohibited under domestic law. It also constitutes a human rights violation if the military commander committed the rape in his official capacity (i.e. by using his position of authority and the means of his function); Schabas, p.210 (affirming the same principle in respect of international armed conflicts).
[88] *See* Prosecution Submissions on Confirmation of Charges, para.187 (The Prosecution's claim that Article 8(2)(e)(vii) – which itself criminalizes the enlistment or conscription of child soldiers – is an "exception" to this principle that somehow demonstrates the demise of the principle is unfounded. First, when the crime is committed it is committed against a civilian, not a member of the armed force. Second, even assuming that it does constitute an exception, it is precisely the type of narrowly-delimited exception that proves the rule, rather than destroying it.)
[89] *See e.g.* Ndindiliyimana TJ, para.2129; ICTR, Bagosora TJ, para.2229; ICTR, Semanza TJ, para. 512.
[90] Byron, p.39.

irrebuttable presumption."[91] Yet no State practice is invoked by the Chamber establishing that there is an exception to that presumption in respect of Article 8(2)(b)(xxii) or (2)(e)(vii) crimes, let alone any State practice or other sources of law that would come close to satisfying the requirement of being "within the established framework of the international law of armed conflict."

60. Common Article 3 itself reflects this general principle, requiring that the victim be "[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*.'"[92] As Melzer explains, Common Article 3, "therefore implies, *a contrario*, that members of the armed forces are not regarded as 'taking no active part in the hostilities' and, therefore, are not entitled to protection *until they have laid down their arms or are placed* hors de combat."[93] Kleffner likewise affirms that:

> The fact that they are members of the armed forces justifies that they enjoy the protection of Common Article 3 only if and when they have laid down their arms or are *hors de combat*, but that they are otherwise not protected from direct attack because they may be presumed to engage in acts that fulfill the three constitutive criteria for active participation in the hostilities referred to above.[94]

61. The expressions "laying down arms" and being "*hors de combat*" are terms of art in international humanitarian law that presuppose surrender, or being exposed to, an enemy force:

> While the wording of Common Article 3 is open to different constructions, it is understood that the laying down of arms by an individual member triggers his or her protection. It is not necessary for the armed forces as a whole to have done so. In the legal sense, the "laying down of arms" means that the person concerned *is surrendering to the enemy armed forces*. However, the process of surrendering is not effectuated by the mere act of laying down arms,

[91] Prosecution Submissions of Confirmation of Charges, para. 187.
[92] Geneva Conventions, Art. 3. *See also* Additional Protocol II, Art. 4(1) (conferring protections on "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities").
[93] Melzer 2014, pp.296, 308 (italics added).
[94] Kleffner 2015, p.441.

> for example, putting one's weapon on the ground while loading a truck. Rather, in order to be protected by Common Article 3, the person concerned must clearly express an intention to surrender. Common expressions that indicate such an intention are the waving of a white flag, or placing one's hands on one's head.[95]

62. Rule 47 of the ICRC Rules of Customary IHL defines *hors de combat*, without any distinction in respect of international and non-international armed conflict, as follows:

> Rule 47. Attacks against Persons *Hors de Combat*
>
> Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person hors de combat is:
>
> (a) anyone who is in the power of an adverse party;
>
> (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
>
> (c) anyone who clearly expresses an intention to surrender;
>
> provided he or she abstains from any hostile act and does not attempt to escape.[96]

The notion of *hors de combat*, with the arguable exception of the narrow circumstances defined in Rule 47(b) of the ICRC Rules of Customary IHL,[97] concerns falling into "the power of and adverse party" or expressing "an intention to surrender" – which also necessarily involves surrender to an adverse party.

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[95] Kleffner 2015, p.441 (italics added).

[96] ICRC, CIHL, Vol. I, Rule 47, p. 164.

[97] The Prosecution cites an article by Kleffner criticizing the *Sesay* Trial Judgement's statement that war crimes law excludes acts by comrades in arms against one another. *See* Second Prosecution Response, para.34, fn.72. In this article, Kleffner criticizes the lack of reasoning in the *Sesay* Trial Judgement and the absolutism of the statement. In particular, Kleffner cites circumstances in which war crimes law might apply to acts by members of armed forces *vis-à-vis* other members of the same forces. The extremely narrow circumstances cited in Kleffner's article correspond to those specified in Rule 47(b) of the ICRC Rules of Customary International Humanitarian Law. *See* Kleffner 2013. The narrowness of the circumstances encompassed by Rule 47(b) has no application to the circumstances set out in the UDCC. Indeed, the narrowness of the circumstances mentioned in Rule 47(b) underscores that the general rule is that the protections of Common Article 3 apply to members of armed forces "only if and when they have laid down their arms or are hors de combat, but that they are otherwise not protected from direct attack because they may be presumed to engage in acts that fulfill the three constitutive criteria for active participation in the hostilities referred to above." Kleffner 2015, p.439.

63. This is not to say that States cannot decide to create exceptions to this general rule; but neither any such exceptions, nor the prohibition of certain methods of warfare under "the law of The Hague," diminishes the fundamental nature of the customary requirement, recognized in Common Article 3, that the victim (at the least) be taking no active part in hostilities to be the victim of a war crime. Nothing in the language or drafting history of Article, nor any State practice, evinces any intention to change the law in this regard.

(vii) The Unlawfulness of the Conscription Does Not Confer Jurisdiction

64. The Chamber asserts that "there is a duty not to recognise situations created by certain serious breaches of international law" and that "one cannot benefit from one's own unlawful conduct."[98] In consequence, "it cannot be the case" that jurisdiction that would otherwise apply if they had not been enlisted or conscripted into the armed force "would cease as a result of the prior unlawful conduct."[99]

65. The principles cited by the Chamber arose in a strikingly different context, and certainly not from "the established framework of the international law of armed conflict." The consequence of the Chamber's proposed solution would be that a person is, at one and the same time, treated as a combatant for the purposes of targeting, but as a civilian for the purposes of (some) war crimes law. The UK Joint Service Manual of the Law of Armed Conflict declares, to the contrary, that "[a]n individual who belongs to one class is not permitted at the same time to enjoy the privileges of the other class."[100] Further, whether someone belongs to one class or the other does not depend on legality, but on objective reality. According dual status to one and the same person at the same time would risk fragmenting and complicating an area of law whose

[98] Impugned Decision, para.53.
[99] Impugned Decision, para.53.
[100] UK Manual.

very existence depends on its coherence, unity and clarity,[101] and is not "within the established framework of international law."

66. The Chamber also refers to Article 4(3) of Additional Protocol II[102] that "[c]hildren shall be provided with the care and aid they require, and in particular: […] (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) *and are captured*."[103]

67. None of these provisions create any exception to the general principles of International Humanitarian Law ("IHL"). The United Kingdom's Joint Service Manual of the Law of Armed Conflict explains that this provision applies only once the conditions of Common Article 3 are satisfied – i.e. that "[i]f captured, under-aged members of the armed forces are entitled to be treated as prisoners of war, but are also entitled to the special protection afforded to children."[104] Those "special protections" do not include retention of civilian status, let alone dual civilian and combatant status, but rather the protections expressly set out in Article 4(3)(a) and (b) – namely, entitlements to receive education and that all appropriate steps be taken to facilitate return to their families. Even the Prosecution has acknowledged in its previous submissions that Article 4(3)(d) is "contingent upon the capture of the child."[105] The

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[101] *See* "Foreword by Dr. Yves Sandoz" to ICRC, CIHL, Vol. I, p.xxiii ("coherence is indispensable to international humanitarian law's credibility.")
[102] Impugned Decision, fn.131.
[103] Additional Protocol II, Art. 4 (3)(d) (emphasis added).
[104] UK Manual. *See also* C. Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), para.4507 (Part II, entitled 'Humane Treatment' "is aimed at protecting persons who do not, or no longer, participate in hostilities against abuses of power and against inhuman and cruel treatment which may be inflicted upon them by the military or civilian authorities *into whose hands they have fallen*. As the Protocol does not provide for different categories of persons who enjoy a special status, such as prisoners of war in international armed conflicts, the rules laid down here apply equally to all persons affected by the armed conflict *who are in the power of the enemy* (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians.") (emphasis added)
[105] Prosecution Submissions on Confirmation of Charges, para.190 (emphasis added).

Prosecution's only basis for arguing that the provisions should be given wider application is the contention that this provision reflects an alleged statutory "motivation"[106] that should be extended *by analogy* to other situations.

68. Strong policy considerations run contrary to this "motivation", however. Most importantly, the distinction between civilians and members of armed forces/groups in armed conflict should be maintained and reinforced by the clearest rules possible. Creating a "hybrid" or "dual-status" solution is one that can be supplied only by States, not judicial activism. In particular, the potential consequences and scope of such an approach is a matter that should be decided only as a matter of policy, and only on the basis of established consensus.

(viii) The Chamber Failed to Address How It Should Determine the "Established Framework of International Law," Or Even Whether This Phrase Imports Any General Status Requirements In Respect of Articles 8(2)(b) and (e)

69. The Chamber found (i) that the express status requirements of Article 8(2)(a) and 8(2)(c) did not apply directly to sub-articles (b) and (e), respectively; and (ii) that there were no status requirements for the specific crimes enumerated at Article 8(2)(b)(xxii) and (e)(vi). There is an important lacuna between these two conclusions: do the words "*within the established framework of international law*" import any general status requirements in respect of the crimes enumerated in parts (b) and (e)? The Chamber did not even attempt to answer this question.

70. The Trial Chamber also failed to define any methodology for ascertaining the "established framework of international law." A good starting point would have been to invoke the conventional definition of customary international

[106] Prosecution Submissions on Confirmation of Charges, para.190.

law, as being not only consistent acts that "amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[107] In any event, the phrase makes clear that a Chamber must go beyond the text of Article 8 itself.

71. The Chamber, however, prefaced its interpretation of these provisions with the assertion that the Rome Statute is "first and foremost a multilateral treaty which acts as a criminal code."[108] This approach may, and apparently did, curtail the scope of inquiry required by the expression "established framework of international law." Indeed, the Chamber did not establish – or even attempt to establish – whether the customary status requirements that are reflected in Common Article 3 have ever *not* been applied in respect of other serious violations of the laws or customs applicable in armed conflict.

72. The Chamber's failure is particularly noteworthy in light of the Appeals Chamber's express and specific guidance that this issue was to be addressed. The Appeals Chamber instructed the Chamber to consider whether the status requirements might be imported by the phrase "within the established framework of international law":

> the Appeals Chamber considers that, while article 8(2)(e)(vi) of the Statute does not contain any explicit restriction on the categories of persons who may be victims of the war crimes of rape and sexual slavery, the questions arises as to whether such restrictions must be derived from the applicable law, including the above-mentioned references.[109]

73. The Chamber's failure to articulate any precedent in treaty law or State practice suggests, in itself, that the elimination of these well-established status requirements is not "within the established framework of international law."

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[107] North Sea Continental Shelf cases, para.77.
[108] Impugned Decision, para.35.
[109] ICC-01/04-02/06-1225, para.31.

II. The notion of "membership" in an armed force is not compatible with "taking no active part in hostilities"

74. The Prosecution may be expected to argue that Counts 6 and 9 as charged do not preclude a finding that the victims were taking no active part in the hostilities at the time of the offence. This argument should not be accepted.

75. Common Article 3 creates two mutually exclusive categories: (i) members of an armed force on the one hand, who are not "persons taking no active part in the hostilities"; and (ii) civilians who may, for as long as they are not directly participating, are "persons taking no active part in hostilities." The Prosecution has attempted to challenge this basic distinction by arguing that: (i) rebel groups do not have "members" in the sense of Common Article 3 because the reference to "members of armed forces" in Common Article 3 is limited to State armed forces;[110] and that (ii) whether members of the latter are "taking no active part in hostilities" is "essentially factual, to be determined on the basis of the evidence elicited at trial."[111]

76. As explained by the ICRC[112] and Kleffner[113]: (i) the reference to "members" in Common Article 3 applies to non-State armed forces as well as State armed forces; and (ii) that for as long as a person is a member of such a force, they cannot be viewed as "taking no active part in the hostilities" under Common Article 3, unless or until they lay down their weapons or are *hors de combat*.

77. According to the ICRC Interpretative Guidance:

> While it is generally recognized that members of state armed forces in non-international armed conflict do not qualify as civilians, treaty law,

[110] Second Prosecution Response, para.43.
[111] Second Prosecution Response, para.36.
[112] ICRC Interpretive Guidance, p.28 ("both State and non-State parties to the conflict have armed forces distinct from the civilian population.")
[113] Kleffner 2007, p.324.

> state practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-state parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably *because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population*. *As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict*.[114]

78. Kleffner confirms that a "member" of an armed force is not considered to be taking no active part in hostilities unless and until the member lays down his/her arms or is placed *hors de combat*:

> It is submitted that the better view on the temporal scope of the loss of protection *is to distinguish between those who are not and those who are members of the armed forces of a party to a NIAC*. Those who are not members of the armed forces of a party to a NIAC, i.e. civilians, should be presumed not to take an active part in hostilities. Accordingly, the rule is that they enjoy the protection of Common Article 3, with the exception of active participation in the hostilities. In other words, civilians would be entitled to protection from direct attack unless and for such time as they take an active part hostilities. […] The reverse logic may reasonably be applied *vis-à-vis* those who have been reliably determined to be members of the armed forces of a party to a NIAC. The fact that they are members of the armed forces justifies that they enjoy the protection of Common Article 3 only if and when they have laid down their arms or are *hors de combat*, but that they are otherwise not protected from direct attack *because they may be presumed to engage in acts that fulfil the three constitutive criteria for active participation in the hostilities referred to above*.[115]
>
> […]

[114] ICRC Interpretive Guidance, pp.27-28 (emphasis added, footnotes omitted).
[115] Kleffner 2015, p.439 (italics added).

> As far as irregular armed forces of both state and non-state parties to a NIAC are concerned, the end of a person's membership has to be determined by drawing on functional criteria. Accordingly, a person is to be considered to have ceased to be a member of such armed forces if and when that person can reliably be determined to have ceased to assume the function as a member of the armed forces.[116]

79. This approach reflects State practice:

> However, even a cursory glance at almost any non-international armed conflict – be it in South East Asia in the 1960s and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Uganda, Chechnya or the Sudan today – is sufficient to conclude that governmental armed forces do not hesitate to attack insurgents even while they are not engaged in a particular military operation. In practice, such attacks generally are neither denied by the operating state nor internationally condemned as long as they do not cause excessive incidental harm to protected persons or objects.[117]

80. The consequence of the Prosecution's claim that the victims of Counts 6 and 9 were "members" of an armed force or group,[118] accordingly, is to remove from the realm of fact-finding whether the victims were "taking no active part in the hostilities." As "members," they could not have been "taking no active part in the hostilities" unless and until they: (i) ceased to be members; (ii) had laid down their arms; or (iii) were *hors de combat*. The latter two conditions, as described above, entail falling into the hands or into the power of the enemy. The issue is not "essentially factual," as the Prosecution has argued,[119] because its own definition of the victims categorically determines that they cannot be "taking no active part in the hostilities."

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[116] Kleffner 2015, p.441.

[117] Melzer 2014, pp.296, 312.

[118] First Prosecution Response, para.6 (explaining that the "child soldiers" described in Counts 6 and 9 "*were members of the UPC/FPLC")*; Pre-Trial Brief, p.198 ("NTAGANDA recruited, trained, and used children and other persons to participate in hostilities as members of the UPC/FPLC"), para.400 ("Troops were deployed and treated equally as soldiers, without regard to age"), paras.416 and 436 (referring to child soldiers "within the ranks of the UPC/FPLC").

[119] Second Prosecution Response, paras.36, 41 ("it still remains a factual matter to be decided on the basis of evidence elicited at trial.")

81. As stated above, the Prosecution could have charged the crimes alleged in Counts 6 and 9 under Counts 5 and 8, which would require defining the victims as civilians. A civilian who is not a member of an armed force may directly participate intermittently in hostilities.[120] A "continuous combat function" test can be applied to determine whether a person's participation is so continuous that they must be treated as having become a "member" of an armed force. The Prosecution, for reasons that may or may not be related to Counts 14, 15 and 16, has chosen not to characterize the victims of Counts 6 and 9 as civilians, but rather as "*members* of the UPC/FPLC." A member of an armed force is, by definition, not "taking no active part in the hostilities" and can regain the protections of Common Article 3 for as long as they are a member of an armed force only by laying down arms or being placed *hors de combat*, both of which contemplate falling into the hands of the enemy force.

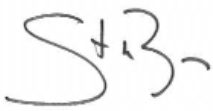
CONCLUSION AND RELIEF REQUESTED

82. The Chamber erred in finding that it possesses jurisdiction over the crimes charged in Counts 6 and 9 of the UDCC. The Chamber's textual interpretation of sub-parts (b) and (e) of Article 8(2) is deficient and incorrect; its analysis of "the established framework of the international law of armed conflict" is focused too narrowly on the egregiousness of the crimes without addressing the fundamental jurisdictional prerequisites; and its deployment of an estoppel argument, though creative, does not comply with established methods of restrained judicial interpretation, in particular in a criminal trial. The result is a decision that discards well-established prerequisites of war crimes jurisdiction and, in consequence, discovers that intra-force violence of an undefined scope constitutes war crimes.

[120] ICRC Interpretive Guidance, p.69 ("[u]nder customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of state armed forces or organized armed groups belonging to a party to an armed conflict.")

83. The Appeals Chamber is requested to reverse the Impugned Decision and declare that the Chamber has no jurisdiction over Counts 6 and 9 of the UDCC or, in the alternative, to remand the issue to the Chamber for further findings in accordance with appropriate guidance.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF JANUARY 2017



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