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Original: **English**

No.: **ICC-01/04-02/06**
Date: **23 February 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
Former Child Soldiers' observations on the "Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"

Source: **Office of Public Counsel for Victims (CLR1)**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the "Legal Representative") hereby files her response to the "Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (the "Document in Support of the Appeal").[1]

2. The Trial Chamber's conclusions in the Impugned Decision were properly reasoned, adequately supported and clearly articulated. In its Document in Support of the Appeal, the Defence fails to identify any clear or discernible errors that may have tainted the finding that counts 6 and 9 fall within the jurisdiction of the Court.

3. The Defence's assertions made in respect of the Impugned Decision are based on (1) selective and incomplete references to academic commentary; (2) a misconception of the text, context and drafting history of the Rome Statute; (3) an improper and biased consideration of the legal instruments on international humanitarian law; (4) a misapprehension of the "status requirements" and other various elements of the law on armed conflict; (5) an erroneous interpretation of the expression "*established framework of international law*" and (6) an undue reliance on the Prosecution pleadings made in the course of litigation.

4. These errors and misapprehensions can only lead to the unreasonable and inherently incongruous position that rape and sexual slavery are irreprehensible acts, and may go unpunished, under international humanitarian law when committed intra-force against child soldiers. As detailed *infra*, the arguments and submissions put forward by the Defence are untenable and do not undermine the legal findings made in the Impugned Decision.

[1] See the "Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", No. ICC-01/04-02/06-1754 OA 5, 26 January 2017.

II. PROCEDURAL HISTORY

5. On 1 September 2015, the Defence filed 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".[2]

6. On 9 October 2015, Trial Chamber VI (the "Trial Chamber") issued the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", in which it rejected the challenge on the basis that it was not jurisdictional.[3]

7. On 22 March 2016, the Appeals Chamber reversed the Trial Chamber's determination, holding that the issue raised was jurisdictional, and remanded the matter to the Trial Chamber for further review.[4]

8. On 4 January 2017, the Trial Chamber issued the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" whereby it dismissed the Defence's jurisdictional challenge (the "Impugned Decision").[5]

9. On 10 January 2017, the Defence filed the "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Second decision on the Defence's challenge to the

[2] See 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", No. ICC-01/04-02/06-804, 1 September 2015.
[3] See the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (Trial Chamber VI), No. ICC-01/04-02/06-892, 9 October 2015.
[4] See the "Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"(Appeals Chamber), No. ICC-01/04-02/06-1225 OA2, 22 March 2016, para. 40.
[5] See the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"(Trial Chamber VI), No. ICC-01/04-02/06-1707, 4 January 2017 (the "Impugned Decision").

jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707" (the "Appeal").[6]

10. On 17 January 2017, the Defence filed the "Application on behalf of Mr Ntaganda for variation of time limit for the filing of the document in support of the Appeal".[7] The Prosecution and the Legal Representative opposed the request.[8] On 23 January 2016, this request was rejected by the Chamber.[9]

11. On 25 January 2017, the Appeals Chamber issued the "Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence"[10] specifying that "*victims* […] *may submit observations on Mr Ntaganda's document in support of the appeal and on the response thereto within five days of notification of the response*".[11]

12. On 26 January 2017, the Defence filed the Document in Support of the Appeal.[12]

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[6] See the "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707", No. ICC-01/04-02/06-1710 OA5, 10 January 2017.

[7] See the "Application on behalf of Mr Ntaganda for variation of time limit for the filing of the document in support of the Appeal", No. ICC-01/04-02/06-1720 OA5, 17 January 2017.

[8] See the "Prosecution's response to Mr Ntaganda's application for variation of time limit for the filing of the document in support of the Appeal", No. ICC-01/04-02/06-1734 OA5, 19 January 2017; the "Former Child Soldiers' response to the 'Application on behalf of Mr Ntaganda for variation of time limit for the filing of the document in support of the Appeal'", No. ICC-01/04-02/06-1735 OA5, 20 January 2017.

[9] See the "Decision on the 'Corrected version of 'Application on behalf of Mr Ntaganda for variation of time limit for the filing of the document in support of the Appeal', 17 January 2017, ICC-01/04-02/06-1720'" (Appeals Chamber), No. ICC-01/04-02/06-1738 OA5, 23 January 2017.

[10] See the "Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/04-02/06-1753 OA5, 25 January 2017.

[11] *Idem*, p. 3.

[12] See the Document in Support of the Appeal, *supra* note 1.

13. On 17 February 2017, the Prosecution filed its "Response to Ntaganda's 'Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9'" (the "Prosecution's Response").[13]

III. OBSERVATIONS

A. Scope of appellate review

14. The question remanded to the Trial Chamber, and which constitutes the subject-matter of the Impugned Decision giving rise to the present Appeal, is whether "*article 8 (2) (e) (vi) of the Statute cannot, as a matter of law, cover rape and sexual slavery of child soldiers in the same armed group as the perpetrator*".[14] In other words, it concerns whether "*8 (2) (e) (vi) of the Statute* per se *excludes from its ambit the acts of rape and sexual slavery against child soldiers as charged in this case*".[15]

15. The Defence appears to place particular emphasis on the Prosecutor's submissions and pleadings as a basis for arguing that counts 6 and 9 fall outside the jurisdictional ambit of the International Criminal Court (the "ICC" or the "Court"). In particular, the Defence refers to the Prosecutor's pleadings in various parts of the Appeals in support of its contentions that (1) child soldiers should be regarded as "members" of the UPC;[16] (2) that they did not retain the "civilian" status after their

[13] See the "Prosecution's Response to Ntaganda's 'Appeal from the Second Decision on the Defence's Challenge to the Jusrisdiction of the Court in respect of Counts 6 and 9", No. ICC-01/04-02/06-1794 OA5, 17 February 2017 (the "Prosecution's Response"). See also the "Corrected version of 'Prosecution's Response to Ntaganda's 'Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9'', 17 February 2017, ICC-01/04-02/06-1794", No. ICC-01/04-02/06-1794-Corr OA5, 22 February 2017.

[14] See the "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'" (Appeals Chamber), No. ICC-01/04-02/06-1225 OA2, 22 March 2016, para. 40.

[15] *Idem*.

[16] See the Document in support of the Appeal, *supra* note 1, paras. 1, 9 and 80-81.

recruitment;[17] and (3) that "*international humanitarian law regulates conduct directed towards those external to the military force*".[18]

16. The submissions made in those pleadings, with the exception of those explicitly contained in the Document containing the charges (the "DCC"), are irrelevant to the present jurisdictional assessment. The main issue is not whether the Prosecutor's theory of the case falls within the jurisdiction of the Court but rather, whether counts 6 and 9 of the DCC constitute war crimes falling within the jurisdiction of the ICC. Thus, the assessment should focus on the nature and specificities of the criminal conduct and not on the way it is described or referred to in ancillary pleadings. This is particularly the case given that the Trial Chamber may find it necessary, at any appropriate stage of trial proceedings, to amend the legal characterisation of certain facts in accordance with regulation 55 of the Regulations of the Court. It is significant that the Trial Chamber explicitly alluded to this possibility in the Impugned Decision in respect of the legal characterisation of the armed conflict.[19] For this reason, there is no basis, at this stage, to exclude a possible finding by the Trial Chamber that former child soldiers were not regular members of the UPC/FPLC, either in the legal sense or based on the facts.

17. Moreover, the material contours of a case before the ICC are defined in the charging document, *i.e.* the DCC, as subsequently amended and refined by the Pre-Trial and Trial Chambers. Ancillary documents and submissions, however important they may be for the understanding of the "case theory", do not as such alter, extend or reduce the material scope of the case. Whether or not the Prosecution regards child soldiers as "members" of the UPC is an issue that goes to the merits of the case, but does not operate as a bar to the Court's jurisdiction.[20]

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[17] *Idem*, paras. 13-14.
[18] *Ibid.*, para. 59.
[19] *Ibid.*, para. 13.
[20] The Prosecution also generally agrees that the manner in which the charges are formulated or presented has no bearing on the Court's jurisdiction. See the Prosecution's Response, *supra* note 13, paras. 97 and 99-102.

B. Standard of appellate review and burden of proof

18. The Defence essentially alleges legal errors in respect of the Chamber's holding that counts 6 and 9 of the DCC qualify as war crimes punishable under the Rome Statute. The Defence bears the burden to sufficiently substantiate these claims and must demonstrate that the alleged error(s) would have materially affected the Impugned Decision. Failure to do so should result in the dismissal of the Appeal.

19. This is consistent with the Chamber's previous judgments, whereby it held that "*in appeals pursuant to article 82 (1) of the Statute, the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance*".[21] With respect to legal errors, the appellant "*has to substantiate that the Trial Chamber's interpretation of the law was incorrect"* and not simply that it could have reached a different conclusion.[22] Moreover, a decision is materially affected when it "*would have been substantially different, had it not been for the error*".[23]

C. Defence's position

20. In the Document in Support of the Appeal, the Defence put forward the following arguments: (1) child soldiers automatically qualify as "members" of the armed group into which they have been recruited,[24] irrespective of their identity, age or circumstances of recruitment; (2) once recruited, child soldiers can only have one status under international humanitarian law, *i.e.* that of "combatant";[25] (3) child soldiers retain this "combatant status" *vis-à-vis* any party to the conflict, including in

[21] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 30.
[22] *Idem*, para. 31.
[23] *Ibid.*
[24] See the Document in Support of the Appeal, *supra* note 1, para. 10. See also para. 9, referring to various Prosecution submissions.
[25] *Idem*, paras. 65, 68 and 77.

respect of other members of the same armed group, at all times throughout their recruitment as a result of their "continuous combat function";[26] (4) as "members" of an armed group, child soldiers automatically fall within the category of persons who "actively participate in hostilities"[27] and may not qualify as *hors de combat*,[28] even at the specific times when they are subjected to rape/sexual slavery; (5) war crimes cannot be perpetrated by members of the same armed group because of the "status requirements",[29] with the only exception of the war crime of "use" of child soldiers which is described as an "unusual war crime";[30] (6) with the exception of the "use" of child soldiers to participate actively in hostilities, children are not exempt from the status requirements of Article 3, common to the four Geneva Conventions (the "Common Article 3"), notwithstanding the special protections set out in the Additional Protocols;[31] (7) the fact that the combatant status is the product of an unlawful recruitment, which is *per se* a war crime, does not confer the Court jurisdiction with respect to other acts committed against child soldiers;[32] (8) the unconditional prohibition of rape and sexual slavery under international law is irrelevant to the present jurisdictional assessment;[33] and (9) rape and sexual slavery committed against child soldiers of the same armed group lack the requisite nexus requirements for war crimes.[34]

21. These absolute and far-reaching suggestions are said to be a correct interpretation of the various provisions of the Rome Statute and an accurate reflection of the current state of international law, including international humanitarian law. As explained *infra*, each of these elements of the Defence's position is either plainly incorrect or, at the very least, inaccurate.

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[26] *Ibid.*, paras. 10 and 78-79.
[27] *Ibid.*, paras. 74-76 and 81.
[28] *Ibid.*, paras. 78 and 80.
[29] *Ibid.*, paras. 28-45 and 63.
[30] *Ibid.*, para. 58.
[31] *Ibid.*, paras. 64-68.
[32] *Ibid.*, para. 64.
[33] *Ibid.*, para. 51.
[34] *Ibid.*, paras. 50-51.

D. The Trial Chamber reasonably concluded that article 8(2)(b) and 8(2)(e) of the Rome Statute contain no status requirements

(i) Absence of express reference to any status requirements in article 8(2)(b) and (e) of the Rome Statute

22. The Defence alleges that the Trial Chamber erred in holding that article 8(2)(b) and 8(2)(e) of the Rome Statute contain no status requirements, *i.e.* that victims of these crimes be either protected persons under the Geneva Conventions or taking no active part in hostilities.

23. At the outset, the Defence appears to agree that the aforementioned provisions contain no express status requirements as opposed to crimes under sub-parts (b) and (e) of article 8(2) of the Rome Statute.[35] The Chamber was therefore both reasonable and correct in pointing out the differences in formulation between the *chapeau* elements of sub-parts (b) and (e) and those of sub-parts (a) and (c). Indeed, under the latter, there is an express specification of the categories of victims to whom the crimes apply: sub-part (a) refers to "*persons or property protected under the provisions of the relevant Geneva Convention*" and sub-part (c) mentions "*persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause*". Conversely, the personal scope of the crimes set out in sub-parts (b) and (e), under which counts 6 and 9 may fall, is left unqualified but subject to the "established principles of international law".

(ii) ***The Chamber's findings are supported by the drafting history of the Rome Statute***

24. Moreover, the Legal Representative submits that the Chamber appropriately considered the drafting history of the Rome Statute and reasonably concluded that there is no indication that the drafters intended to impose specific status

[35] *Ibid.*, para. 28.

requirements for the crimes contained in article 8 (2)(b)(xxii) and (e)(vi) thereof.[36] Not only did the Trial Chamber take note of the absence of any specific reference to such status requirements, but it also properly took into account the drafters' decisions to move the acts of rape and other forms of sexual violence under separate headings, as opposed to being just illustrations of grave breaches of the Geneva Conventions or serious violations of Common Article 3.[37] This amendment to the initial structure of article 8 of the Rome Statute, combined with the separate inclusion of gender crimes and the absence of any reference to express status requirements demonstrate the reasonableness and the propriety of the Chamber's conclusion. It establishes, at the very least, that the drafters had no intention to specifically exclude child soldiers from the scope of these crimes. Rather, these developments are to be reasonably interpreted as reflecting the intention to expand the jurisdiction of the Court in respect of all sexual offences to the extent that they meet the "gravity threshold". In this regard, the Trial Chamber's remark concerning the requirement that "*other forms of sexual violence*" be of "*comparable gravity*" is relevant and appropriate,[38] as it demonstrates that the drafters had only envisioned "gravity" to act as a limitation on the Court's intervention, but certainly not on the basis of the status of the victims of the crimes.

25. The Defence also illogically asserts that the removal of sexual offences from the "grave breaches" section and its inclusion in an "*independent, unbracketed*" category of war crimes has no effect on the applicable status requirements.[39] This argument is not only unsubstantiated, but it would render the amendments made to the initial version of the provision purely semantic, as it would mean that sexual offences continue to be subject to the same requirements as those prevailing before the relevant amendment. The Defence's unfounded arguments fail however to provide any alternative explanation, or at least a different meaningful interpretation,

[36] See the Impugned Decision, *supra* note 5, para. 42.
[37] *Idem*.
[38] *Ibid*.
[39] See the Document in Support of the Appeal, para. 41.

of the amendments made in respect of sexual offences in the drafting history of the Rome Statute.

26. Moreover, despite the Trial Chamber's detailed analysis of the drafting history of article 8(2)(b) and (e) of the Rome Statute, only cursory reference is made to this issue in the Document in Support of the Appeal.[40] The Defence makes a general and unsupported assertion according to which "*the drafters of the Elements* [of the crimes,] *if not of the Rome Statute itself, would have been keenly aware of* [the] *ICTY interpretations and developments*".[41] This assertion is irrelevant to the extent that : (1) the language of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") Statute is markedly different from that of the ICC in respect of sexual offences as war crimes; (2) the question of protection of child soldiers under International Humanitarian Law (the "IHL") is not addressed in the ICTY Statute or jurisprudence; and (3) there was a clear intention to particularise in greater detail the prohibition against sexual acts as war crimes under the Rome Statute, as could be reasonably inferred from the various amendments made to the language and structure of the relevant provisions.

27. Therefore, the Defence fails to show that the Trial Chamber's consideration of the *travaux préparatoires* was in any way improper, or that the conclusions drawn were incorrect or otherwise unreasonable. Consequently, the Defence's failure to identify an error in the Trial Chamber's analysis demonstrates that the purported existence of status requirements does not find support in the drafting history of the Rome Statute.

[40] *Idem*, para. 22.
[41] *Ibid.*, para. 34.

(iii) The expression "**established framework of international law**" *does not automatically and necessarily call for the application of the specific requirements of Common Article 3*

28. Despite the lack of express limitations, the Defence suggests that there is still an implied restriction on the personal scope of the crimes contained in article 8(2)(b) and (e) of the Rome Statute arising from the inclusion of the expression "*within the established framework of international law*".[42] The Defence understands this expression to essentially import the requirements of Common Article 3 into the Geneva Conventions, which it contends are "*widely regarded as expressive of customary international law*".[43] The resulting effect of this interpretation would be to subject the crimes under article 8(2)(b) and (e) to similar conditions as those contain in article 8(2)(c) and (a) of the Rome Statute without an express textual basis.

29. Despite the lack of definition of the terms used in article 8 of the Rome Statute, including with regard to the terms "*the established framework of international law*",[44] the Defence's proposed interpretation is flawed on many levels. First, it would be entirely wrong to limit the meaning and breadth of "*established framework of international law*" to a single provision, namely Common Article 3. The ordinary meaning of the terms would imply that it includes not only all conventional and customary rules applicable to armed conflicts,[45] but also other legal instruments such as international human rights treaties. For the purpose of the present proceedings and pursuant to article 21 of the Rome Statute, it seems even more appropriate to consider the international legal norms dealing specifically with the rights of children and women. It is therefore clear that the Court is required to consider and give effect to the full range of IHL norms and is not limited in its analysis to a particular provision, including Common Article 3.

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[42] *Ibid.*, para. 29.
[43] *Ibid.*
[44] See ROWE (P.), "War Crimes", in McGOLDRICK (D.), ROWE (P.J.) and DONNELLY (E.) (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, 2004, p. 219.
[45] *Idem.*

30. Second, the Trial Chamber did not commit any error in finding that certain war crimes listed in article 8(2)(e) of the Rome Statute are not, by nature, committed against protected persons as defined in Common Article 3.[46] The Trial Chamber rightly referred to article 8(2)(e)(ix) and (x) of the Rome Statute which clearly applies to combatants. This is a relevant illustration of how the Defence's hefty reliance on Common Article 3, as the sole provision mirroring the requirements of the "*established framework of international law*",[47] is misplaced. The Defence's assertion that a status requirement necessarily arises from the expression "*within the established framework of international law*" is therefore incorrect and contradicts the plain language of article 8(2)(e)(ix) and (x) of the Rome Statute.

31. Third, the Defence's reference to the ICTY Statute and jurisprudence is unhelpful, and does not provide support to the assertion according to which article 8(2)(b) and (e) of the Rome Statute is subject to the general requirements that the victims be *hors de combat* or otherwise be deemed a protected person under Common Article 3.[48] The reference to the *Tadić* Jurisdiction Decision clearly demonstrates that the acts punishable under the ICTY Statute include not only the "*violations of common Article 3*", but also other violations of "*customary rules on internal conflicts*".[49] If anything, this decision demonstrates that a criminal conduct may be punishable under the ICTY Statute as a war crime not only when it constitutes a violation of Common Article 3, but also when it contravenes other customary rules. Consequently, the reasoning runs contrary to the Defence's suggestions that Common Article 3 is the sole criterion for assessing the existence of a violation under the law of non-international armed conflicts.[50]

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[46] See the Impugned Decision, *supra* note 5, para. 37.
[47] See the Document in Support of the Appeal, *supra* note 1, para. 29.
[48] *Idem*, para. 33.
[49] *Ibid*., para. 32; quoting ICTY, *The Prosecuctor v. Dusko Tadić a.k.a. Dule*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 89.
[50] As noted by the Prosecutor, the ICTY and the ICC legal frameworks diverge on the role of customary international law which should be considered by the Court only where a lacuna exists. See the Prosecution's Response *supra* note 13, para 42.

(iv) The Chamber correctly found that the inclusion of status requirements would generate textual redundancy

32. One of the most widely recognised canons of interpretations, both in national legal systems and in international law, is the requirement against redundancy.[51] It entails that when a given interpretation of a statutory provision is likely to render the provision in question redundant of other provisions, then such interpretation should be discounted, or at least disfavoured.[52] This requirement is closely related to the principle of effectiveness "*which requires that in the event of two possible but different interpretations, the interpretation that enables the provision to have an effective interpretation* […] *to be chosen*".[53]

33. In this regard, Judge Oboe-Osuji previously opined that "*ICC judges must still interpret the Rome Statute in a manner that makes an integrated sense of its provisions, with the aim of achieving the objects and purposes of the Statute. One principle that guides that interpretation is the rule against redundancy of statutory words and phrases and provision, effectively captured in the maxim* ut res magis valeat quam pereat. *Legislatures must be presumed not to use words in vain*".[54]

34. The Defence does not appear to challenge the rule against redundancy, but submits that the inclusion of a general status requirements in respect of the crimes under article 8(2)(b) and 8(2)(e) would not create any redundancy with the crimes under article 8(2)(a) and (c) of the Rome Statute.

35. The Defence's claims are, however, incorrect. The proposition put forward in the Document in Support of the Appeal, namely that sub-sections (b) and (e) of

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[51] LINDERFALK (U.), *On The Interpretation of Treaties The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, 2007, p. 110.
[52] CROSS (F.B.), *The Theory and Practice of Statutory Interpretation*, Stanford University Press, 2009, p. 51.
[53] ÖZBEK (D.), "Article 35(c) Straites of the UN Law of the Sea Convention", in CARON (D.D.) and ORAL (N.) (Eds.), *Navigating Straits: Challenges for International Law*, Brill, Nijhoff, 2014, p. 187.
[54] See "Dissenting Opinion of Judge Eboe-Osuji", No. ICC-01/09-02/11-863-Anx-Corr, 27 November 2013 (dated 26 November 2013), footnote 57.

article 8 of the Rome Statute would serve "*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*",[55] runs contrary to imposing a general status requirement on these provisions. In this regard, the Trial Chamber was correct in holding that "*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)*".[56] Indeed, if the Court were to recognise such a limitation, the crimes in question would overlap to a large extent with those in sub-sections (a) and (c). Contrary to the Defence's suggestion, this would entail that an essentially similar criminal conduct is proscribed under different provisions of the Statute.[57] If this was true, the crimes under sections (b) and (e) would simply constitute illustrative examples of those listed in other sections relating to "grave breaches". For instance, the acts underlying the crimes of rape and sexual slavery would be entirely captured in the provisions of sub-section (a) and (c). Thus, the difference in language in the *chapeau* elements of each of the sections of article 8 can only be reasonably interpreted as suggesting a fundamentally different approach to each set of crimes. The status requirements could not have been the same.

36. Moreover, the explanation provided by the Defence concerning the conceptual differences between the "*grave breaches*" of the Geneva Conventions and other serious violations of the laws and customs of wars is highly implausible.[58] It mainly assumes that other serious violations of the laws and customs of wars are of "*lesser gravity*".[59] The Defence does not however clarify or explain how the drafters would have regarded the "sexual slavery" and "rape" as lesser important offences than those proscribed in sub-section (a).

[55] See the Document in Support of the Appeal, *supra* note 1, para. 36; quoting ICTY, *The Prosecutor v. Dusko Tadić a.k.a. "Dule"*, *supra* note 49, para. 91.
[56] See the Impugned Decision, *supra* note 5, para. 40.
[57] See the Document in Support of the Appeal, *supra* note 1, para. 37.
[58] *Idem*, para. 36.
[59] *Ibid.*, para. 37.

37. The Defence's contention that the Trial Chamber's interpretation of the drafters' intent is "unlikely" and "illogical", as 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))*" is also unfounded. Indeed, if the crimes set out in sub-section (b) were intended to act as a "residual clause", as the Defence suggests,[60] then it is neither illogical nor unlikely that the negotiating States would have intended to loosen the requirements of these category of crimes so as to capture any serious violation of international humanitarian law not already covered by other provisions of the Rome Statute.

38. The Defence further contradicts itself by stating that the "*established framework of international law*" under (b) and (c) may be interpreted as imposing "*a different status requirement than is dictated by the grave breaches regime under (a)*".[61] In the Defence's view, the applicable status requirements would depend on the "*particular crime*" and the "*state of the law*".[62] This argument is inconsistent with the Defence's claim that the terms "*established framework of international law*" should be construed as necessarily importing the requirements of Common Article 3,[63] which it asserts reflects customary international law.[64]

39. Interpreting the expression "*established framework of international law*" as necessarily transposing the requirements of Common Article 3 would lead to a multifaceted redundancy. The first, inter-sections, was noted by the Trial Chamber in the Impugned Decision between sub-sections (b) and (e) on the one hand, and (a) and (c) of article 8(2) of the Rome Statute on the other. But there is still another risk of

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[60] *Ibid.*, para. 36.
[61] *Ibid.*, para. 38.
[62] *Ibid.*, para. 38.
[63] *Ibid.*, para. 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*".
[64] *Ibid.*, para. 29. In the following paragraph, the Defence admits very limited exceptions to this norm, when supported by "*clear State practice or treaty language*".

internal, intra-sections, redundancy within the sub-sections of article 8(2) of the Rome Statute. For instance, if the *chapeau* of article 8(2)(e) were to be construed as including the exigency that the victim be a protected person under Common Article 3, this would repeat many of the elements of the crimes enumerated in the same sub-section. This is, for example, the case for the crime under article 8(2)(e)(i) of the Rome Statute, which requires "*intentional attacks*" to be directed against "*the civilian population*" or "*against individual civilians not taking direct part in hostilities*".

40. Furthermore, although the Defence may be correct in suggesting that there exists a possibility of overlap between several of the war crimes laid out in the Rome Statute, said overlap should not, however, be presumed. This is particularly the case when the redundancy arises between whole categories of crimes, such as between sub-sections (a) and (c), and (b) and (e). The degree and extent of overlap resulting from the Defence's interpretation is so significant as to make it highly improbable and illogical.

41. Moreover, the Defence's contention that the expression "*established framework of international law*" necessarily calls for the application of Common Article 3 does not find support in State practice, including in the domestic systems of the ICC States Parties. Several States establish a clear distinction between the violations of Common Article 3 and other types of breaches punishable under the "*established framework of international law*". This clearly demonstrates that the reach of the law on non-international armed conflict, as reflected in the Rome Statute, extends beyond the mere violations of Common Article 3.[65]

42. For instance, Burundi's Law on Genocide, Crimes against Humanity and War Crimes (2003) clearly distinguishes between two categories of violations: (1) "C. … *serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949*"and (2) "*D. Other serious violations of the laws and customs applicable in armed*

[65] See also the Prosecution's Response, *supra* note 13, para. 33 and footnote 55.

conflicts not of an international character, within the established framework of international law".[66] This same distinction is replicated in Burundi's Penal Code of 2009.[67] A similar distinction between both set of crimes can also found in the laws of the Republic of the Congo,[68] New Zealand,[69] Uganda,[70] South Africa[71] and Senegal.[72] It is thus well-accepted, in the laws of the countries adopting a formulation similar to that of the Rome Statute, that war crimes in non- international armed conflicts are not limited to the violations of Common Article 3, but also include *other* violations of customary and conventional rules.

43. On the international level, the United Nations Transitional Administration in East Timor's Regulation on the establishment of panels with exclusive jurisdiction over serious criminal offences establishes a clear distinction between the violations of Common Article 3 and "[o]*ther serious violations of the laws and customs applicable in armed conflicts*".[73]

44. These various developments contradict the Defence's view that war crimes only exist where a violation of Common Article 3 is established. Moreover, the Defence's reliance on the United Kingdom's Joint Service Manual of the Law of Armed Conflict to support the view that children are only protected "*once the conditions of Common Article 3 are satisfied*" is misplaced.[74] The Manual only addresses the case where children have fallen into the hands of an "enemy", which is of limited relevance to the situation of child soldiers. Indeed, in the specific situation of child

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[66] See ICRC, Practice Relating to Rule 156. Definition of War Crimes, Burundi, *Law on Genocide, Crimes against Humanity and War Crimes*, 2003, article 4.
[67] *Idem.*, Burundi, *Penal Code*, 2009, article 198(1)-(6).
[68] *Ibid.*, Congo, *Genocide, War Crimes and Crimes against Humanity Act*, 1998, article 4.
[69] *Ibid.*, New Zealand, *International Crimes and International Criminal Court Act*, 2000, Schedule, article 8.
[70] *Ibid.*, Uganda, *The International Criminal Court Act*, 2010, section 9.
[71] *Ibid.*, South Africa, *Implementation of the Rome Statute of the International Criminal Court Act*, 2002, Part 3.
[72] *Ibid.*, Senegal, *Penal Code*, 1965, as amended in 2007, article 431-3(a)-(d).
[73] See United Nations Transitional Administration in East Timor, *Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences*, UNTAET/REG/2000/15, 6 June 2000, section 6(1).
[74] See the Document in Support of the Appeal, *supra* note 1, para. 67.

soldiers the term "enemy" is ambiguous given the non-voluntary nature of the recruitment and the impossibility to seek consent. The Manual is silent on whether other forms of protection apply to children regardless of their membership or link to a specific party to the conflict. In any event, it does not explicitly exclude some forms of protection to children who take part in hostilities.

(v) The Trial Chamber's conclusion that the crimes in article 8(2)(b)(xxii) or (e)(vii) are exempt from status requirements is adequately supported by general principles of IHL

45. The Trial Chamber was correct in holding 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*."[75] The Trial Chamber's reliance, in the Impugned Decision, on (i) the Martens clause; (ii) the "*rationale of international humanitarian law*"; and (iii) the notion of *jus cogens*, to support its findings are both appropriate and reasonable.

46. No errors arise from the Trial Chamber's reference to the Martens clause, as it continues to be a guiding principle in the interpretation and application of international norms on armed conflicts. Not only did the clause first appear in the 1899 Hague Convention, but its relevance and significance was reaffirmed throughout the twentieth century, including during the 1977 Diplomatic Conference which led to the adoption of the Additional Protocols.[76] Far from losing its relevance, the advisory opinion of the International Court of Justice on the legality of the threat

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[75] See the Impugned Decision, *supra* note 5, para. 48.

[76] See TICEHURST (R.), "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, No. 317, 30 April 1997.
See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 1, para. 2: "*In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*".

or use of nuclear weapons, issued on 8 July 1996, makes it clear that the Martens clause "*has proved to be an effective means of addressing the rapid evolution of military technology*".[77] Likewise, the International Law Commission clarified that the clause "*provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*".[78]

47. Thus, the Trial Chamber's invocation of the Martens clause does not create any "novel" approach, nor does it involve any "*judicial activism*".[79] Rather, it constitutes a proper use of canons of interpretation as a mean for defining the terms of the Rome Statute. In any event, the Defence does not demonstrate, nor even argues, that the Martens clause does not form part of the "*established framework of international law*". The reference to its components, namely the "*dictates of public conscience*" and "*humanity*", is even more pertinent given the broad language employed in the *chapeau* elements of article 8(2)(b) and 8(2)(e) of the Rome Statute.[80]

48. Moreover, the reference in the Impugned Decision to the "*rational of international humanitarian law*" is equally reasonable, as it is well-established that a body of law should be interpreted in light of its overall object and purpose.[81] The Defence however challenges the Trial Chamber's invocation of the "*rationale of war crimes law to extend jurisdiction to intra-force rape and sexual slavery and, presumably,*

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[77] See ICJ, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996", *I. C.J. Reports 1996*, para. 78.
[78] See the "Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May-22 July 1994, Official Records of the General Assembly of the United Nations", Doc. A/49/10, *Yearbook of the International Law Commission*, 1994, vol. II(2), p. 131.
[79] See the Document in Support of the Appeal, *supra* note 1, para. 48.
[80] In addition, as pointed out by the Prosecutor out, the Defence cannot ask that a non-written element derived from customary law be applied to the articles 8(2)(b)(xxi) and 8(2)(e)(vi)and at the same time reject the reference to the Martens clause. See the Prosecution Response, *supra* note 13, para 56.
[81] See article 31(1) of the Vienna Convention on the Law of Treaties: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

sexual violence".[82] In support of its contention, the Defence provides an illustration which clearly reveals the apparent flaw in its position.[83] Although it is true that the killing by a soldier of his wife using a service weapon would normally fall outside the scope of war crimes, this conclusion would be based on the lack of nexus with the contextual elements of war crimes, *i.e.* the absence of a link to the armed conflict. This is markedly different from the rape and sexual slavery of child soldiers, whose very recruitment is designed to support a war effort, and in respect of whom the connection with the armed conflict is self-evident. All the same, the Legal Representative cannot but note that said example is blatantly disrespectful for the victims recruited for sexual purposes in the UPC/FPLC despite the novel attempt to explain the contrary, recognising elsewhere that "[the] *gravity* [of rape or sexual slavery] *cannot* [be] *doubted*".[84]

49. Likewise, the Trial Chamber's reliance on the notion of *jus cogens* is correct and proper.[85] The Defence suggests that the peremptory character of the prohibition of rape and sexual slavery is irrelevant to the determination of the jurisdictional scope of war crimes law.[86] The categorisation of this prohibition as forming part of *jus cogens* norms is nevertheless fundamental to defining its ambit. As the Trial Chamber rightly noted, such categorisation renders the acts of rape and sexual slavery reprehensible under IHL, "*both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status*".[87]

50. This position finds also support in legal doctrine. In this respect, Cherif Bassiouni expressed the following view:

> "*To this writer, the implications of* jus cogens *are those of a duty and not of optional rights; otherwise* jus cogens *would not constitute a*

[82] See the Document in Support of the Appeal, *supra* note 1, para. 49.
[83] *Idem*, para. 50.
[84] *Ibid.*, para. 41
[85] See the Impugned Decision, *supra* note 5, para. 52.
[86] See the Document in Support of the Appeal, *supra* note 1, para. 51.
[87] See the Impugned Decision, *supra* note 5, para. 52.

> *peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as* jus cogens *carries with it the duty to prosecute or extradite, the non- applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as* jus cogens *places upon states the obligation* erga omnes *not to grant impunity to the violators of such crimes*".[88]

51. The Defence further misrepresents the Trial Chamber's findings in asserting that "*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*".[89] This argument ignores the Trial Chamber's indication in the Impugned Decision that "*the nexus requirement of the contextual elements of war crimes, namely that the alleged conduct took place in the context of and was associated with an international or non-international armed conflict, will have to be satisfied in all cases, which is a factual assessment which will be conducted by the Chamber in analysing the evidence in the case*".[90] This clearly confirms the Trial Chamber's understanding that the acts of rape and sexual slavery are subject to the same nexus requirements as those applicable to other war crimes under the Rome Statute.

52. Moreover, the Defence's reliance on Cassese's remarks is misplaced and, to a large extent, taken out of their specific factual context.[91] While it is true that certain offences committed between "combatants" belonging to the same belligerent may not qualify as war crimes, this is not the case for the acts of rape and sexual slavery perpetrated against child soldiers.

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[88] BASSIOUNI (C.), "International crimes: *jus cogens* and *obligatio erga omnes*", *Law and Contemporary Problems*, Vol. 59, No. 4, 1997, pp. 65-66 (footnote omitted).
[89] See the Document in Support of the Appeal, *supra* note 1, para. 51.
[90] See the Impugned Decision, *supra* note 5, para. 52.
[91] See the Document in Support of the Appeal, *supra* note 1, para. 51.

53. Notwithstanding, the Defence seems to arbitrarily select whose doctrine to rely on, relegating authors who do not support its theory to "*activist commentators*".[92] In the present instance, the extract quoted to support its contentions was included in 2013, hence two years after the death of Antonio Cassese.[93] In the first and second editions of the *International Criminal Law* the rape example was not mentioned and the relevant passage merely stated "[c]*onversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes*".[94] This view appears to be based on a very specific jurisprudence of the Dutch Special Court of Cassation dated 5 July 1950 concerning a German doctor serving in the German army in occupied Netherlands and who was charged with a war crime or alternately a crime against humanity for having denied medical assistance to a wounded person and for having subsequently ordered a subordinate to shoot the wounded person.[95] Last but not least, Cassese is not the only scholar to suffer from a very selective and biased reading by the Defence.[96] For instance, Christine Byron is quoted as having stated that "[c]*learly there is no evidence of states treating intra-forces sexual abuse as an international criminal offence*".[97] But the Defence omits from the citation the second part of the very same sentence which necessarily forms part of the author's view: "*but it is submitted that it would be open for the ICC to prosecute perpetrators of such abuse on two grounds*"[98]. The author even states beforehand that "*both treaty and customary international humanitarian law prohibit sexual abuse of child soldiers and camp followers by their own forces*".[99]

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[92] *Idem*, para. 45.
[93] See CASSESE (A.) and GAETA (P.), BAIG (L.), FAN (M.), GOSNELL (C.) and WHITING (A.) (Rev.), *Cassese's International Criminal Law*, 3rd Edition, Oxford University Press, 2013, p. 78.
[94] See CASSESE (A.), *International Criminal Law*, 1st Edition, Oxford University Press, 2003, p. 48 and CASSESE (A.), *International Criminal Law*, 2nd Edition, Oxford University Press, 2008, p. 82.
[95] Dutch Special Court of Cassation, *Pilz*, 5 July 1950, *NederJ* (1950), No. 681 (in Dutch).
[96] See also the Prosecution's Response, *supra* note 13, para. 84.
[97] See BYRON (C.), "Legal redress for children on the front line: the invisibility of female child", in BAILLIET (C.M.) (Ed.), *Non State Actors, Soft Law and Protective Regimes: From the Margins*, Cambridge University Press, 2013, p. 39.
[98] *Idem*.
[99] *Ibid.*

54. Indeed, child soldiers have a clearly defined legal status under the Rome Statute and the Additional Protocols,[100] and do benefit from a wide range of protective measures. This, as such, distinguishes them from other regular "combatants" who do not benefit from the specific protections applicable to children in hostilities. Moreover, as explained *infra*, it is difficult to categorise children unlawfully recruited into armed groups as belonging to an "opposing" or "non-opposing" party to a conflict, particularly when such recruitment is carried out by means of coercion and, in any event, without proper will or informed consent. Unlike adult members of an armed group, children cannot be considered to have adequately consented to their recruitment or taking part in hostilities. This would appear factually implausible and is, in any event, legally impermissible.

55. Moreover, the difficulty of determining the legal criteria for membership in irregular armed groups was emphasised by Nils Melzer as follows:

> "*Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict*".[101]

56. This position assumes the absence of a legal regime governing membership in non-state armed forces. It nevertheless contradicts the Defence's position that membership should be determined on the basis of "*objective reality*".[102] Moreover, while the absence of a legal regime governing membership may be true for adult members, it is certainly not the case for children below the age of 15 in respect of whom there are clear and unambiguous rules prohibiting recruitment. Membership must therefore be determined in line with applicable international norms and must not be inconsistent with the established prohibitions.

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[100] See also the Prosecution's Response, *supra* note 13, paras. 115-116.
[101] MELZER (N.), *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, ICRC, 2009, p. 25.
[102] See the Document in Support of the Appeal, *supra* note 1, para. 65.

(vi) The Impugned Decision is consistent with the principle of legality

57. The Impugned Decision is consistent with the principle of legality and does not engage in any prohibited analogy. Contrary to the Defence's contentions, it neither involves a "*revolutionary*" approach, nor a "*judicial activism*".[103] It is a feature of international criminal law that the definition of a crime be narrowly construed and its scope not extended through means of analogy or unwarranted interpretation.[104] This does not mean, however, that criminal offences must be exhaustively and statically defined *ab initio*. The European Court of Human Rights (the "ECtHR") reasoned that:

> "*However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention states, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7* [...] *of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*".[105]

58. The international *ad hoc* tribunals have adopted this reasoning, holding that the principle of legality does not preclude the evolution of the elements of a crime through a process of interpretation and clarification.[106] Accordingly, the approach of the judges of the *ad hoc* tribunals was to examine whether particular circumstances

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[103] See the Impugned Decision, *supra* note 5, para. 44.
[104] See for instance, article 22(2) of the Rome Statute: "*The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted*".
[105] See ECtHR, *SW v. the United Kingdom*, "Judgment", App No. 20166/92, 22 November 1995, *ECHR Series A* (1995), para. 36.
[106] See the ICTY, *The Prosecutor v. Aleksovski*, "Appeal Judgment", Case No IT-95-14/1-A, 24 March 2000, para. 127.

fall reasonably within the scope of the law, rather than searching for specific precedents which illustrate that a particular act has been established to be criminal.[107]

59. In the same vein, the Defence's contention that the *2016 ICRC Commentary* should not be relied upon by the Chamber is without merit.[108] It indeed provides an independent and well-informed opinion on the issues at stake. Contrary to other academic commentary cited by the Defence, the *2016 ICRC Commentary* constitutes the most relevant and up-to-date analysis of the matters specifically arising from the proceedings in this case. It is also the only reference which postdates the first decision on jurisdiction in this case. The fact that the ICRC commentary relies, in addition to a rigorous approach of the IHL, on the facts of the *Ntaganda* case does not affect its value, given the novelty of the legal issues presented and the absence of any showing of lack of neutrality or bias.[109]

(vii) The Trial Chamber's conclusion that the crimes in article 8(2)(b)(xxii) and (e)(vii) of the Rome Statute are exempt from the status requirements of Common Article 3 is consistent with international practice

60. In addition to its analysis of the relevant legal provisions and the negotiating history of the Rome Statute, the Trial Chamber reinforced its finding that no status requirements apply to the crimes listed in article 8(2)(b)(xxii) or (e)(vii) of the Rome Statute by referring to the ICC jurisprudence.

61. In this regard, the Trial Chamber was correct in holding that "*although the issue was not specifically litigated in previous cases – the Court's case law has not required the*

[107] See for instance ICTY, *The Prosecutor v. Hadžihasanović & Kubura*, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", Case No IT-01-47-AR72, 16 July 2003, para. 12. See also ICTR, *The Prosecutor v. Karemera* et al., "Decision on Jurisdictional Appeals: Joint Criminal Enterprise", Case No ICTR-98-44-AR72.5, 12 April 2006, para. 15; *The Prosecutor v. Karemera* et al., "Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise", Case No ICTR-98-44-T, 11 May 2004, paras. 15, 37 and 43-44.

[108] See the Document in Support of the Appeal, *supra* note 1, paras. 54-63.

[109] See also the Prosecution's Response, *supra* note 13, para 79 and footnote 191.

Status Requirements to be proven when analysing rape as a war crime under Article 8(2)(b)(xxii) and (e)(vi)".[110] Likewise, it was equally correct to rely on Trial Chamber III's finding "*that only the contextual elements differ between rape as a war crime and as a crime against humanity*".[111]

62. Moreover, the Defence's reliance to the RUF Trial Judgment is misplaced.[112] The Judgement referred to by the Defence is of limited relevance since it does not address the specific acts of rape and sexual violence committed against child soldiers forcibly recruited into the ranks of an armed group. The specific facts of the case relate to the killing (as opposed to rape/sexual slavery) of a regular soldier (as opposed to child soldier), who was an *hors de combat* member of the AFRC fighting alongside the RUF.[113] Despite the broad statement concerning the acts committed intra-forces, a cautious approach is warranted given the markedly different context of the case, and the dissimilarities concerning the status of the victims and the nature of the war crimes alleged.

63. The Defence does not identify any error in this respect. Rather, it admits that no status requirements apply to the specific crime of "use" of child soldiers in hostilities, which it describes as an "*unusual war crime*".[114] In doing so, it seeks to minimise the importance of said crime as a counter-example to the claim that war crimes only apply to acts committed against combatants of the "opposing" party or to members of the civilian population.

64. The Defence further attempts to support this argument by a series of plainly false assertions, which contradict the well-established principles derived from the Court's practice. For instance, it contends that the enlistment or conscription of child

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[110] See the Impugned Decision, *supra* note 5, para. 43.
[111] *Idem*, para. 43.
[112] See the Document in Support of the Appeal, *supra* note 1, para. 57 and ft. 97.
[113] See STSL, *Sesay* et al., "Judgement", Case SCSL-04-15-T, 2 March 2009, paras. 1451-1454.
[114] See the Document in Support of the Appeal, *supra* note 1, paras. 56 and 58.

soldiers can only be committed "*against a civilian, not a member of the armed force*".[115] This is plainly false. Indeed, after their initial recruitment into an armed group, child soldiers may be re-recruited by other armed groups and, at that stage, may not be necessarily members of the civilian population in the Defence's view[116]. No Chamber of this Court, nor the Special Court for Sierra Leone, went on to examine whether children had the "civilian" status at the time of recruitment for the purpose of ascertaining the existence of the war crime. Thus, the assertion finds no basis in the Rome Statute, IHL customary and conventional law, or in the practice of international tribunals.

65. Contrary to the Defence's claim,[117] the use of children to participate actively in hostilities is not an "*unusual crime*". If the enlistment, conscription and use of child soldiers are "*narrowly delimited exception*[s] *that prove* […] *the rule*",[118] then there is no reason why such exceptions cannot also apply to other acts committed against child soldiers, including rape and sexual slavery. There is no doubt that these specifically crafted "exceptions" were designed to protect children from the effects of hostilities. There is no evidence that the level or scope of protection diminishes as a result of the recruitment into an armed group, especially *vis-à-vis* the recruiting group.[119] To the contrary, Additional Protocol I enshrines the special protection for children as follows: "*Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason*".[120] Protection against "*indecent assaults*" is not predicated on the nature or the relationship to the conflict, or

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[115] *Idem*, footnote 88.
[116] *Ibid.*, para. 81.
[117] *Ibid.*, para. 56.
[118] *Ibid.*, footnote 88.
[119] See ICRC, "Legal Protection of Children in Armed Conflict", Advisory Service on International Humanitarian Law, 2003: "*Given the particular vulnerability of children, the Geneva Conventions of 1949 (hereafter GCIII and GCIV) and their Additional Protocols of 1977 (API and APII) lay down a series of rules according them special protection. Children who take direct part in hostilities do not lose that special protection. The Additional Protocols, the 1989 Convention on the rights of the child and its recent Optional Protocol, in particular, also set limits on children's participation in hostilities*".
[120] See article 77 of the Protocol I, *supra* note 76.

on the status of children being either that of a combatant or a civilian.[121] This provision reflects the general principle that children continue to benefit from specific protective measures, even when associated with armed groups, as a result of their age. Likewise, there is nothing that indicates that this unqualified protection would not equally apply in the situation of non-international armed conflicts.

66. Furthermore, the Legal Representative agrees with the Prosecution's submissions according to which there is no general requirement that the war crimes under article 8(2)(b) and 8(2)(e) of the Rome Statute be committed against an "*adverse party*".[122]

67. In any event, the Defence fails to articulate any alternative explanation as to why the war crimes specifically applicable to children, including those charged in the present case, do not impose any explicit status requirements in respect of the victims of those acts.

E. Even if the Chamber would have erred in holding that there was no status requirements applicable to article 8(2)(b) and (e) of the Rome Status, the error would have not materially affected the Impugned Decision

68. The Defence must not only establish that the Trial Chamber erred in its findings, but that the error(s) in question materially affected the Impugned Decision.

69. In this regard, it is not sufficient for the Defence to argue that the Trial Chamber erred in holding that article 8 (2)(b)(xxii) or (e)(vii) of the Rome Statute are not subject to the status requirements of Common Article 3, but it is also required to demonstrate that the victims of the war crimes charged do not satisfy those requirements. In other words, the Defence must establish that child soldiers do not

[121] See also the Prosecution's Response, *supra* note 13, para. 67.
[122] *Idem*, paras. 57 *et seq*.

meet the conditions for protection laid out in Common Article 3, namely that they are not protected persons or that they are "actively participating in hostilities".

70. The Legal Representative submits that child soldiers (i) cannot be regarded as regular members of the recruiting armed group; (ii) are not combatant *vis-à-vis* the recruiting armed group; and (iii) are protected against rape and sexual slavery as they cannot be considered as "taking active part in the hostilities" at the time of the commission of said crimes.

(i) Child soldiers have a unique status and are not "members" of the recruiting armed group

71. The Defence places particular reliance on the status of children as combatants. However, under IHL, child soldiers have a different treatment from that apply to other regular members of an armed group. Not only do they benefit from specific protective measures under international law, including those specifically provided for under the Additional Protocols,[123] but they are also not criminally responsible for their own acts.

72. All the obligations and duties set out in the Geneva Conventions, including those mentioned in Common Article 3, are addressed to members who have the legal capacity to distinguish between military and non-military objectives, and who are capable of identifying protected persons such as civilians, soldiers who have laid down their arms or are otherwise *hors combat*. Put simply, the international law of armed conflict is not intended to regulate the conduct of child soldiers, but is rather designed to protect children from the consequences of the conflict. The very recruitment and use of children to participate in hostilities is in and of itself a criminalised conduct. To recognise them as "members" of the armed group would

[123] See article 77(1) of the Protocol I, *supra* note 76 and article 4(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

thus be inconsistent with the purpose of protection of children and the criminalisation of their recruitment. The Prosecution itself insists on the fact that it "*never characterised the victims as 'members of armed forces' in the particular meaning of CA3, but only that the victims were persons whom the Trial Chamber could determine were unlawfully recruited into the UPC/FPLC*".[124] Indeed Prosecution maintains that "*the victims were not taking active part in hostilities at the material times*".[125]

73. In line with this approach, the UN Secretary-General Report on the establishment of a Special Court for Sierra Leone created a clear distinction between child soldiers and other adult members of the recruiting group:

> "*The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.*
>
> *The solution to this terrible dilemma with respect to the Special Court could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice*".[126]

74. Although the Trial Chamber took no position on the "membership" of child soldiers, it nevertheless rightly noted that "*as a general principle of law, there is a duty*

[124] See the Prosecution's Response, *supra* note 13, para. 100.
[125] *Idem*.
[126] See United Nations Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, paras. 32-33.

not to recognise situations created by certain serious breaches of international law […] *It therefore cannot be the case that by committing a serious violation of international humanitarian law by incorporating, as alleged by the Prosecution, children under the age of 15 into an armed group, the protection of those children under that same body of law against sexual violence by members of that same armed group would cease as a result of the prior unlawful conduct*".[127] This remark is not only confirmed by relevant international practice, but also contributes to a coherent and consistent interpretation of the various provisions of the Rome Statute and other norms of IHL. Moreover, it is consistent with the general rule of interpretation that a treaty "*be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[128] It is also in line with the principle of effectiveness, which requires the Court to "*dismiss any solution that could result in the violation or nullity of any of its other provisions*".[129]

75. The Defence's claim that the "*unlawfulness of the conscription does not confer jurisdiction*" is without merit.[130] First, the unlawfulness of the recruitment establishes the nexus to the contextual elements of the war crimes of rape and sexual slavery, *i.e.* the armed conflict. Second, it invalidates the characterisation of child soldiers as being "members" of the armed group. Third, if the "objective reality" were to be favoured as a determinative factor for assessing the status of child soldiers under IHL,[131] then due regard must be given to the circumstances of such recruitment and whether "membership" requires that children could give their informed consent. Fourth, the unlawful character of the recruitment blurs the conventional distinctions between "civilians" and "combatants", and between "opposing" and "non-opposing" party, while placing particular emphasis on the protected status of

[127] See the Impugned Decision, *supra* note 5, para. 53.
[128] See article 31(1) of the Vienna Convention on the Law of Treaties, *supra* note 81.
[129] See the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 46.
[130] See the Document in Support of the Appeal, *supra* note 1, para. 64.
[131] *Idem*, para. 65.

children in armed conflicts. All these factors are crucial to assessing the existence and the scope of war crimes.

76. The assertion that the recognition of a special status for children under IHL "*would risk fragmenting and complicating an area of law whose very existence depends on its coherence, unity and clarity*" is equally unfounded.[132] Contrary to the Defence's contention, the risk of fragmentation is more likely to arise in cases where protection of child soldiers is understood to extend only to a particular category of acts, *i.e.* conscription, enlistment and use of child soldiers, but not to other types of criminal conduct. The purported "unity" and "clarity" of IHL would be diluted in respect of children if the scope of the protection were to be construed in the manner suggested by the Defence, so as to only apply in relation to specific crimes and in respect of arbitrarily defined groups of perpetrators or victims.

(ii) Child soldiers should not be regarded as "combatants" vis-à-vis *the recruiting armed group*

77. Throughout the Document in Support of the Appeal, the Defence contends that child soldiers should be regarded as having only one status under IHL, namely that of "combatant".[133] Citing the UK Joint Service Manual of the Law of Armed Conflict, it argues that "[a]*n individual who belongs to one class is not permitted at the same time to enjoy the privileges of the other class*".[134] However, the Defence contradicts itself by suggesting that the "*Prosecution could have alleged that the child soldiers were not members* […] *the UPC/FPLC, but that they were civilians directly participating in hostilities*".[135]

78. The Updated DCC makes no mention of UPC child soldiers as being either "civilians" or "combatants". Whether and under what circumstances they may fall

[132] *Ibid.*, para. 65.
[133] See for instance, *ibid.*, paras. 65, 68 and 77.
[134] *Ibid.*, para. 65.
[135] *Ibid.*, para. 15.

under one category or another is debatable. This is especially the case given the lack of consensus in respect of the criteria and contours of each category or group, particularly in non-international armed conflicts.[136] Nowadays, this binary distinction is itself called into question, as one commentator rightly points out:

> "*The idea that there are only two distinct classes of participants in warfare faces a number of significant definitional challenges. Terms such as 'belligerent', 'non-combatant', 'illegal combatant', 'enemy combatant', 'unprivileged belligerent' and 'unlawful belligerent' are found throughout the legal literature. Their relevance is often impacted by changes in historical usage and reflects the difficulty that has arisen in attempting to categorize various persons found on the battlefield*".[137]

79. The notion of "*continuous combat function*" is mainly used to assess the legality and scope of protection against a direct attack and is closely linked to taking direct part in hostilities.[138] It does not therefore apply to acts committed by individuals between whom there are no active hostilities, such as between child soldiers and their recruiters. Moreover, even assuming that such a continuous function exists, it would be unreasonable to suggest that adult members of an armed group may lawfully attack children recruited by the same group under IHL. No valid military objective could possibly justify such action and the purported "*continuous combat function*" does not necessarily legitimise any attack. It does not, in any event, justify the acts of rape and sexual slavery committed against children, whether they are combatants or civilians.

80. Thus, while the status of child soldiers as "combatant" is debatable, ill-defined and subject to diverging practice, it is nevertheless undisputed that child soldiers

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[136] See HENCKAERTS (J-M.) and DOSWALD-BECK (L.), *Customary International Humanitarian Law*, Vol. 1, Rules, ICRC, Cambridge University Press, 2005, Rules 3 and 5.

[137] WATKIN (K.W.), "Combatants, unprivileged belligerents and conflicts in the 21st century", *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law*, Cambridge, 27-29January 2003, p. 4.

[138] MELZER (N.), *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, ICRC, 2009, p. 70 *et seq.*

retain their status as "children" throughout the duration of the armed conflict under IHL.

(iii) For the purpose of rape/sexual slavery, child soldiers cannot be regarded as "taking active part in the hostilities"

81. The Legal Representative submits that even if the Chamber were to adopt the position advocated by the Defence on these two issues, UPC/FPLC child soldiers would still be protected under the Geneva Conventions as "*they do not take active part in hostilities*" at the time they suffer from rape and/or sexual slavery.

82. The Defence's argument that the expression "*taking no active part in hostilities*" should be interpreted in light of the principle of distinction was previously rejected by the Appeals Chamber in the *Lubanga* case.[139] In rejecting this argument, the Appeals Chamber indicated that while "*common article 3 of the Geneva Conventions* […] *establishes,* inter alia*, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities* […] *article 8 (2) (e) (vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to 'participate actively in armed hostilities' and the concomitant risks to their lives and well-being*".[140] The Appeals Chamber further clarified that the terms "*participate actively in hostilities*", when referring to the conduct of child soldiers, must be given a purposive interpretation.[141]

83. The Defence's invocation of the "*continuous combat function*"[142] not only contravenes the principle of purposive interpretation embraced by the Appeals Chamber, but also contradicts the basic facts of the case. Indeed, all child soldiers recruited by the UPC/FPLC had to undergo a military training for weeks or months before being given a uniform and a weapon, and ultimately deployed. During this

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[139] See the "Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber"), No. ICC-01/04-01/06-3121-Red, 1 December 2014, paras. 323 *et seq.*
[140] *Idem*., para. 324.
[141] *Ibid*.
[142] See the Document in Support of the Appeal, *supra* note 1, paras. 10 and 78-79.

initial period, although children were already recruited into the ranks of the UPC/FPLC, they could be considered to have taken active part in the hostilities. Some child soldiers, especially girls, were never deployed and were stationed in the UPC/FPLC camps where they were subject to the worst forms of sexual slavery and rape.

84. Moreover, it would be illogical to suggest that at the time child soldiers were subjected to rape and sexual slavery, they continued to assume a military role or an active involvement in hostilities. The two categories of acts are mutually exclusive and could not have taken place concomitantly. Moreover, for those having a military role, they would still be protected against acts of rape/sexual slavery under Common Article 3 as they are placed *hors de combat* by detention or by "*any other reason*" (*i.e.* coercion). The Defence appears to suggest that there is an exhaustive and predefined list of situations which may qualify the requirements of *hors de combat*.[143] It cites Rule 47 the ICRC Rules of Customary IHL and argues that it provides for "narrow exceptions".[144] In doing so, the Defence overlooks the clear language of Common Article 3, which leaves no doubt that a person may be placed "*hors de combat"* due to *"any other cause"* other than those situations specifically enumerated in the Geneva Conventions. Hence, there is nothing in conventional law that would support the Defence assertion that children would not qualify as *hors de combat vis-à-vis* the recruiting group, particularly when subjected to the acts of rape and sexual slavery.

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85. In conclusion, the Legal Representative submits that the Defence failed to identify or establish any error in the Impugned Decision. The Trial Chamber was correct in finding that no status requirements apply to the crimes charged in counts 6

[143] *Idem*, para. 62.
[144] *Ibid.*

and 9 of the DCC. The findings contained in the Impugned Decision (1) are founded on a reasonable interpretation of the various sources of international law; (2) are supported by academic commentaries and (3) are not contradicted by State practice.

86. Assuming *arguendo* that the Trial Chamber had erred in holding that the requirements of Common Article 3 do not apply to the crimes in counts 6 and 9, such error would not have affected the Impugned Decision as child soldiers would still be protected under IHL.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to dismiss the Appeal in its entirety.

Sarah Pellet
Common Legal Representative of the Former
Child soldiers

Dated this 23rd Day of February 2017
At The Hague, The Netherlands