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Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public *with* Public Annex

Prosecution's response to Mr Ntaganda's "Consolidated submissions challenging jurisdiction" regarding Counts 6 and 9

Source: **Office of the Prosecutor**

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Introduction

1. The Defence suggests that the prohibition of rape and sexual slavery in the Rome Statute is conditional upon the victims' activities and/or status[1]—and hence that the Court lacks subject-matter jurisdiction to consider the confirmed charges of rape and sexual slavery in this case.

2. The Defence position defies not only the plain terms of the Statute itself, but fundamental principles of international law recognised by the international community as a whole. The "prohibition on *all* forms of sexual violence" in armed conflict,[2] reiterated by the UN Security Council, demands "consistent and rigorous prosecution", including to "challeng[e] the myth[] that sexual violence in armed conflict is […] an inevitable consequence of war".[3]

3. The victims of the charges in Counts 6 and 9, the Prosecution contends, were victimised twice over. Not only were they unlawfully recruited into the UPC/FPLC (and so rendered vulnerable to attack by opposing forces, among other harms), but they were then raped and sexually enslaved by UPC/FPLC members, almost as a matter of course. If the Defence is right, the Statute and international law would virtually abandon such victims of unlawful recruitment, doing nothing to deter and punish their further mistreatment unless it was committed as part of a widespread and systematic attack against a civilian population pursuant to a State or organisational policy. Indeed, it would positively *encourage* would-be perpetrators of

[1] *See e.g.* Application, paras. 2, 40-41. For long citation of all references, *see* glossary in Annex. The Prosecution notes that, notwithstanding proper formatting compliant with regulation 36 of the Regulations of the Court, the number of words in this response is consistent with approximately 60 pages. However, since the Prosecution is entitled to a response of up to 100 pages, under regulation 38(1)(c), this response does not exceed the length permitted. In such circumstances, including additional page breaks purely as a formality is superfluous.

[2] UNSC Resolution 1960, p. 1 ("Reiterating the necessity for all States and non-State parties to conflicts to comply fully with their obligations under applicable international law, including the prohibition on *all forms of sexual violence*", emphasis added). *See also* UNSC Resolution 1888, p. 1 (recalling its "repeated condemnation of violence against women and children including *all forms of sexual violence in armed conflict*", emphasis added); UNSC Resolution 1820, p. 2.

[3] UNSC Resolution 2106, p. 1. *See also* Meron, p. 428 ("Meaningful progress in combating rape can only be made by more vigorous enforcement of the law").

violent crime first to "recruit" their victims in order to shield themselves from prosecution under international law. This cannot be correct, neither in light of the special legal protection afforded to children nor the general protective function of international humanitarian law. Indeed, the Defence position subverts the very object of international humanitarian law, in the name of upholding it.

4. This Court's analysis of its jurisdiction must of course begin—and, in this particular case, can and should *end*—with an analysis of the Statute itself. The Appeals Chamber has observed that jurisdictional analysis "cannot be confined exclusively to an examination of whether the Prosecutor has successfully *recited* the elements of a crime listed under […] the Statute."[4] But it remains true that a proper reading of the Statute applying the established canons of interpretation will, almost always, resolve jurisdictional questions. This is such a case. Nothing in the *chapeau* of article 8(2)(e) or in the text of article 8(2)(e)(vi) itself—the offence charged in Counts 6 and 9—imposes any limit on the persons who are protected from rape and sexual violence. Nor is any such limit found in the established framework of international law. To the contrary, the universal prohibition of sexual violence and the special legal protection of the child compel the opposite conclusion.

5. Furthermore, as these submissions explain in detail, the Court's jurisdiction over the conduct charged in Counts 6 and 9 is entirely *consistent* with the framework of international humanitarian law, as established since the ratification of the Geneva Conventions in 1949. The Defence raises nothing more than a phantom concern, which vanishes when subject to light and scrutiny.

6. The Trial Chamber should thus reject the Defence's renewed jurisdictional challenge, and affirm that the Court has subject-matter jurisdiction to hear cases alleging the conduct charged in Counts 6 and 9.

[4] Appeal Judgment, para. 39 (emphasis added).

Submissions

7. The Defence fails to show exceptional circumstances under article 19(4) justifying the resurrection of its argument that the Court lacks jurisdiction to punish the conduct charged in Counts 6 and 9—an argument which has already been rejected by the Pre-Trial Chamber, without apparent complaint by the Defence.

8. In any event, the Statute conclusively establishes that the Court has subject-matter jurisdiction to punish rape and sexual violence, no matter the status or activities of the victim. This conclusion follows from the terms of article 8(2)(e)(vi) itself, and is supported by the *chapeau* of article 8(2)(e) read in context with the other provisions of article 8(2) and the established framework of international law. The Elements of Crimes support the same conclusion.

9. The Court's subject-matter jurisdiction over the conduct charged in Counts 6 and 9 is also supported, if necessary, by the broad protective scope of article 3 common to the four Geneva Conventions ("CA3") and the special legal protection for children established by international humanitarian law. Yet since this analysis is immaterial to the Court's jurisdiction under article 8(2)(e)(vi), properly interpreted, the Trial Chamber need not issue a mere advisory opinion on this area of the law.

I. Mr Ntaganda has not shown "exceptional circumstances" justifying a second jurisdictional challenge

10. The Application should be rejected because the same jurisdictional question was heard and rejected by the Pre-Trial Chamber at the confirmation stage. The Defence has not demonstrated exceptional circumstances justifying a second challenge to the Court's jurisdiction, as required by article 19(4) of the Statute.

I. 1. This is the second jurisdictional challenge concerning Counts 6 and 9

11. Contrary to the Defence's submission,[5] this is the second time it has advanced the same jurisdictional challenge. At confirmation, the Defence argued that the Pre-Trial Chamber should decline to confirm the charges under Count 6 and 9 because "*ne relèvent pas de la compétence de la Cour*".[6] The Defence insisted that the real question ("*La reélle question*") before the Pre-Trial Chamber was whether "*les chefs 6 et 9 constituent des crimes relevant de la jurisdiction de la Cour aux termes de l'Article 8-2-e-vi.*"[7] To now suggest that these submissions did not "signal that a formal jurisdictional challenge was being presented, or that these crimes fell beyond the competence of the Pre-Trial Chamber"[8] is simply not correct.

12. In fact, the Pre-Trial Chamber dealt expressly with the Defence's jurisdictional challenge as a preliminary matter before considering the evidence underlying Counts 6 and 9.[9] It found that "[t]he Chamber *shall first consider whether, as a matter of law, the Court may exercise jurisdiction* over alleged acts of rape and/or sexual slavery committed by members of the UPC/FPLC against UPC/FPLC child soldiers under the age of 15 years".[10] The Court concluded, as a matter of law, that it is "not barred from *exercising jurisdiction* over the crimes in counts 6 and 9".[11] This approach is entirely consistent with rule 58 of the Rules of Procedure and Evidence.[12]

13. Similarly, when recently presented with the same question—"whether there are restrictions on the categories of persons who may be victims of the war crimes of

[5] Application, para. 3.
[6] Additional Defence Confirmation Submissions, para. 251.
[7] Additional Defence Confirmation Submissions, para. 254 (emphasis added).
[8] Application, para. 6.
[9] *Contra* Application, paras. 7-8.
[10] Confirmation Decision, para. 76 (emphasis added).
[11] Confirmation Decision, para. 80 (emphasis added).
[12] *See especially* rule 58(2) (Chambers have discretion to determine the procedure applicable to jurisdictional challenges, may join such challenges to "a confirmation […] proceeding", and "in this circumstance shall hear and decide on the challenge […] first").

rape and sexual slavery"—the Appeals Chamber confirmed that it is jurisdictional in nature.[13]

14. Thus, although the Defence did not explicitly ground its arguments before the Pre-Trial Chamber on article 19,[14] its submissions were inescapably jurisdictional in nature,[15] and were understood as such. Examination of the substance, not form, of a jurisdictional challenge is the correct approach.[16] Consistent with article 19(4), the jurisdiction of the Court can be challenged "only once" unless exceptional circumstances justify a second challenge. A party cannot escape this express limitation simply by refraining from claiming the mantle of article 19, if the objective substance of their argument is indeed a challenge to jurisdiction. Such an approach would defeat the purpose of article 19(4).

15. The Defence's decision not to directly appeal the Pre-Trial Chamber's jurisdictional determination under article 82(1)(a) is irrelevant to the question whether the Defence had advanced a valid jurisdictional challenge at the confirmation stage.[17] Further, contrary to the Defence's submission, the Prosecution did not give its "*tacit* acknowledgement"[18] that the Defence's confirmation submissions were not jurisdictional. Rather, the Prosecution explicitly argued that "[i]f the Defence Application [before the Trial Chamber] is a jurisdictional challenge, so was its request for dismissal of Counts 6 and 9 at confirmation".[19]

[13] Appeal Judgment, para. 40
[14] *See* Application, paras. 2, 6.
[15] *See* Appeal Judgment, para. 3 (defining jurisdictional challenges as those "which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor").
[16] *See e.g. Lubanga* Jurisdiction AD, para. 24 (concluding that the Defence application did "not raise a challenge to the jurisdiction of the Court within the compass of article 19(2) of the Statute" notwithstanding its form, based on the Appeals Chamber's assessment of "[i]ts true characterization").
[17] *Contra* Application, para. 9.
[18] *Contra* Application. para. 9 (emphasis added)
[19] Response to Request, para. 28.

16. The Prosecution's primary position was that the Defence's submissions were not jurisdictional.[20] However, it also clearly articulated that the Defence's challenges before the Pre-Trial Chamber and the Trial Chamber are of the same nature and should be treated equally.[21] The Prosecution maintains this position today: in light of the Appeals Chamber's determination that the issue at hand *is* jurisdictional,[22] the Defence's attempt to distinguish its identical submissions before the Pre-Trial Chamber as *non*-jurisdictional is unsustainable. The Defence may not pick and choose when to apply the Appeals Chamber's determination that the matter at hand is jurisdictional.

17. The Defence arguments were duly considered[23] and rejected[24] at confirmation. The Appeals Chamber found that the issue raised is a jurisdictional challenge. The Defence thus bears the burden of demonstrating "exceptional circumstances" justifying leave for it to make the same jurisdictional challenge for a second time.

I. 2. No exceptional circumstance justifies a second challenge in this case

18. The two circumstances advanced by the Defence are not exceptional for the purpose of article 19.[25]

19. Contrary to the Defence argument, lack of appellate scrutiny is not an exceptional circumstance under article 19.[26] Having decided not to appeal the Pre-Trial Chamber's decision, either as part of their application for leave under article 82(1)(d) or otherwise under article 82(1)(a), the Defence cannot now claim that "[t]he lack of appellate scrutiny should be a source of particular concern",[27] justifying an exceptional second challenge before the Trial Chamber. Indeed, such a view would

[20] Response to Request, paras. 2-3. *See* Application, para. 10.
[21] Response to Request, paras. 25-28.
[22] Appeal Judgment, para. 40
[23] Confirmation Decision, para. 76.
[24] Confirmation Decision, para. 80.
[25] *See* Application, paras. 12, 13.
[26] Application, para. 12.
[27] Application, para. 12.

incentivise Parties not to appeal adverse decisions in order to bring a second jurisdictional challenge before a different chamber, and *still* thence maintain a right of appeal under article 82(1)(a). Rather than exceptional, this would become a common practice, conferring an obvious tactical advantage.

20. Moreover, contrary to the Defence's understanding,[28] nothing in the Appeal Judgment suggested that lack of appellate scrutiny should be seen as an exceptional circumstance under article 19. Quite the contrary, the Appeals Chamber found it important to preserve the "*possibility*"[29] of appellate scrutiny of "decisions rejecting challenges on the grounds that they are not proper jurisdictional challenges".[30] The Appeals Chamber's finding thus concerned a very specific—and different—situation.[31] Yet nothing suggested any intention to reward second jurisdictional challenges which the moving party had previously *declined* to appeal.

21. The Defence further argues that its second jurisdictional challenge should be allowed in order to ensure that witnesses will not be called to testify "in respect of charges that are later found to fall outside of the Court's jurisdiction."[32] This argument is misconceived and does not show exceptional circumstances under article 19. First, it is misconceived because, contrary to the Defence's representation,[33] there is "a legal possibility of conviction"[34] since the Pre-Trial Chamber has already decided that the Court is "not barred from exercising jurisdiction".[35] Second, evidence of these witnesses will be relevant to establish a variety of other issues material to the other counts charged. Furthermore, the same facts charged under Counts 6 and 9 may also constitute aggravating factors, for the purpose of

[28] *Contra* Application, para. 12.
[29] Appeal Judgment, para. 19 (emphasis added).
[30] Appeal Judgment, para. 19.
[31] Specifically, whether a direct jurisdictional appeal is possible against decisions rejecting challenges on the grounds that they were not proper jurisdictional challenges.
[32] *Contra* Application, para. 13.
[33] Application, para. 13.
[34] *Contra* Application, para. 13.
[35] Confirmation Decision, para. 80.

sentencing, with respect to any relevant convictions under *article 8(2)(e)(vii)* (unlawfully enlisting or recruiting children under the age of 15 years) if separate convictions are not entered.[36] Accordingly, no matter the disposition of the jurisdictional challenge, the witnesses' testimony about the same traumatic events will remain relevant for sentencing purposes.

22. In any event, far from being an exception, Parties who disagree with a jurisdictional decision and seek to mount a second challenge will almost always be able to argue that witnesses will be called to testify on counts over which, in their view, the Court has no jurisdiction. Such circumstances cannot be "exceptional".

23. For these reasons alone, the Application should be dismissed.

II. The Court has jurisdiction over the conduct charged in Counts 6 and 9

24. The Court is manifestly competent to address the conduct charged in Counts 6 and 9. This results from the ordinary meaning of the terms of article 8(2)(e)(vi), viewed in context and in light of the object and purpose of the Statute. It is also supported by a correct analysis of the established framework of international law. In particular:

- The *chapeau* of article 8(2)(e) and the text of article 8(2)(e)(vi), properly interpreted, do not limit criminal liability for rape and sexual slavery on the basis of the status or activities of the victims, consistent with the absolute prohibition in international law of crimes of sexual violence. Article 8(2)(e) does not form part of those provisions giving effect to the Geneva Conventions. Rather, it reflects an independent head of liability ("[o]ther

[36] *See e.g. Lubanga* TJ, para. 67.

serious violations" of the laws and customs applicable in non-international armed conflicts within the established framework of international law).[37]

- Even if *arguendo* a victim of the conduct charged in article 8(2)(e)(vi) did have to fall within the protective framework of the Geneva Conventions, the applicable provision—CA3—does not formally require a difference of affiliation between victim and perpetrator, but only that the victim is taking "no active part in hostilities". Regardless whether the victim is a civilian or a member of armed forces, they are equally eligible for CA3's protection if they meet this criterion.[38] This is an essentially factual question, whose resolution cannot be inferred from or determined by the sole proof of unlawful enlistment or conscription into a non-State organised group, in the meaning of article 8(2)(e)(vii).[39]

- Finally, children are also entitled to special protection in international humanitarian law. To give effect to this special protection, no legal effect should be given by this Court to the unlawful enlistment or conscription of children into a non-State organised armed group, except for the very limited purpose justifying the adverse party in targeting them.[40]

25. For all these reasons, the Court's jurisdiction over the conduct charged in Counts 6 and 9 is wholly congruent with the Statute. It is undeniable, consistent with the established approach to statutory interpretation. It is further supported, if necessary, by reference to international humanitarian law and to international human rights law, as well as this Court's own responsibility not to give legal effect

[37] *See below* paras. 27-57.
[38] For civilians, simply, it must be proved they are not taking "active part in hostilities" at the material time. For members of armed forces, it must be proved that they had "laid down their arms" or were "*hors de combat*" at the material time.
[39] *See below* paras. 58-85.
[40] *See below* paras. 86-97.

for the purpose of its proceedings to actions which unlawfully strip children of protections given to them under international law.

26. By contrast, the Defence's jurisdictional challenge is based on a very broad proposition for which it offers scant authority—that the victims of *all* war crimes in non-international armed conflict "must be […] protected person[s] within the meaning of CA3".[41] Yet such a view is wholly inconsistent with the Statute, the Elements of Crimes, and both international humanitarian and international criminal law.

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

27. The Defence incorrectly assumes that article 8(2)(e)(vi) limits the punishment of rape and sexual slavery to persons who fall within the protection of CA3, and thus concludes that the Prosecution must prove that the victims were not actively participating in hostilities.[42] This interpretation is incorrect. It fails to give effect to the ordinary meaning of the terms used, in context, and in light of the Statute's object and purpose.[43]

28. Read properly, nothing in the Statute limits criminal liability under article 8(2)(e)(vi) for rape or sexual slavery on the basis of the status or activities of the victims. To the contrary, such conduct is punishable at this Court whether committed against civilians, members of non-State organized armed groups, or members of State armed forces alike, regardless of their activities.[44] For this reason, any ultimate factual finding in this case concerning the unlawful enlistment or conscription into the UPC/FPLC of the victims, and any finding concerning their

[41] Application, para. 2.
[42] *Contra e.g.* Application, paras. 2, 15, 17, 40.
[43] *See e.g. Ruto and Sang* AD, para. 105; *DRC* AD, para. 33.
[44] *See also* Sivakumaran, p. 249.

participation in hostilities, is irrelevant to whether they may be determined to be victims of rape or sexual slavery.

29. Article 8(2)(e)(vi)—charged in Counts 6 and 9—punishes in relevant part:

> rape, sexual slavery […], and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.[45]

30. Furthermore, the *chapeau* of article 8(2)(e) qualifies the offence in article 8(2)(e)(vi), *inter alia*, as:

> Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law […].[46]

31. If the Trial Chamber agrees that neither article 8(2)(e)(vi), nor the *chapeau*, nor both in combination, imposes an obligation to prove the status or activities of victims of rape and sexual slavery, the jurisdictional challenge must be dismissed outright.

32. The Trial Chamber should reach the above conclusion, which is compelled by:

- the ordinary meaning of the terms of article 8(2)(e)(vi), qualifying only the unenumerated acts—"any other form of sexual violence"—by reference to CA3;

- the context of article 8 as a whole, demonstrating that violations of CA3 are punishable exclusively under article 8(2)(c); by contrast, article 8(2)(e) is

[45] Statute, art. 8(2)(e)(vi).
[46] Statute, art. 8(2)(e).

concerned with "other" serious war crimes committed in non-international armed conflicts within the established framework of international law;

- the context and drafting history of article 8(2)(e)(vi), demonstrating that the reference to CA3 in article 8(2)(e)(vi) constitutes a requirement for punishable conduct only to be of similar *gravity* to the conduct punishable by CA3 rather than incorporating its legal requirements; and

- the object and purpose of article 8 and the Statute, informed by the established framework of international law, demonstrating that sexual violence in armed conflicts is absolutely prohibited, without exception.

33. Nor is there any controversy in the interpretation which these factors compel. Less than a month ago, the Trial Chamber in *Bemba* found no requirement to prove the status or activities of victims when determining that rape as a war crime had been committed.[47] The *Bemba* Trial Chamber expressly observed that "only the contextual elements differ" between "rape as a war crime and rape as a crime against humanity".[48] Likewise, in *Katanga*, the Trial Chamber took a similar approach.[49] Notably in this regard, although crimes against humanity require proof of a widespread or systematic attack against a civilian population pursuant to a State or organisational policy, there is no requirement to prove the status of individual victims, who may be combatants, persons *hors de combat*, or civilians.[50]

[47] *See Bemba* TJ, paras. 99-109, 631-638.
[48] *Bemba* TJ, para. 98. The *Bemba* Trial Chamber's view is consistent with the Elements of Crimes: *see* Elements of Crimes, arts. 7(1)(g)-1, 8(2)(b)(xii)-1, 8(2)(e)(vi)-1.
[49] *Katanga* TJ, paras. 962, 974. *See also* paras. 963-972, 975-984.
[50] *See e.g.* ICTY, *Mrkšić* AJ, paras. 29-32 ("whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement […] that an attack be directed against a 'civilian population' is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be 'civilians'"); ICTY, *Martić* AJ, para. 307. *See also* Application, para. 41 (acknowledging that the conduct charged in Counts 6 and 9 "might, in certain circumstances, constitute crimes against humanity").

34. Moreover, the Defence fails even to put these factors convincingly in issue. The only basis advanced for the contention that article 8(2)(e)(vi) is "subject to the requirements generally applicable for war crimes"[51]—by which, presumably, the Defence means the protective scope of CA3[52]—is the Appeals Chamber's recent reference to the *chapeau* of article 8(2)(e) and the text of article 8(2)(e)(vi) itself.[53] Yet, at the very end of the passage quoted, the Appeals Chamber states only that, "the *question* arises […] whether such restrictions must be derived from the applicable law, including the above-mentioned reference"[54]—but it expressly refrains from attempting to *answer* such a question or predetermining the analysis now before the Trial Chamber.[55]

35. In such circumstances, the Defence is wrong to say that the Appeals Chamber has "rejected" the argument that article 8(2)(e)(vi) is unqualified by the requirements of the Geneva Conventions, including CA3.[56] To the contrary, this is the primary issue which the Trial Chamber must now address.

I. 1. a. Only the unenumerated acts in article 8(2)(e)(vi) are qualified by reference to CA3

36. The terms of article 8(2)(e)(vi), given their ordinary meaning, do not require the enumerated acts (including rape and sexual slavery) to be qualified as serious violations of CA3. To the contrary, the reference to CA3 qualifies only the *unenumerated* acts ("any other form of sexual violence").[57]

[51] Application, para. 15.
[52] *See e.g.* Application, paras. 2, 17, 40.
[53] Application, para. 15 (quoting Appeal Judgment, paras. 30-31).
[54] Appeal Judgment, para. 31.
[55] Appeal Judgment, para. 31. In the sentence immediately following the passage quoted by the Defence: "For the reasons set out in paragraphs 22 to 24 above, *the Appeals Chamber does not consider it appropriate to address this question on the merits* and *nothing in the present judgment should be interpreted as predetermining this matter*" (emphasis added).
[56] *Contra* Application, para. 16.
[57] *See* Zimmermann, pp. 495-496, mn. 316. Zimmermann's subsequent observation that the enumerated acts in any event *also* constitute CA3 violations does not detract from this textual analysis: *see* p. 496, mn. 317.

37. The Prosecution recognises that the inclusion and placement of the word "also" in the English version of article 8(2)(e)(vi) might be taken to imply that the enumerated acts likewise constitute serious violations of CA3.[58] A similar ambiguity may exist in the Arabic and Spanish versions.[59] However, this reading is not supported by the other equally authentic linguistic versions of the Statute, which qualify only the *unenumerated* acts by reference to CA3. Thus:

- The Chinese version of article 8(2)(e)(vi) reads: "强奸、性奴役、强迫卖淫、第七条第二款第 6 项所界定的强迫怀孕、强迫绝育以及构成严重违反四项«日内瓦公约»共同第三条的任何其他形式的性暴力", which does not include an analogous word to "also". The enumerated acts (including rape and sexual slavery) are not qualified by reference to CA3.

- The French version of article 8(2)(e)(vi) reads, in relevant part: "*ou toute autre forme de violence sexuelle constituant une violation grave de l'article 3 commun aux quatre Conventions de Genève*", which does not include an analogous word to "also". The enumerated acts (including rape and sexual slavery) are not qualified by reference to CA3.

- The Russian version of article 8(2)(e)(vi) reads: "и любые другие виды сексуального насилия, также представляющие собой грубое нарушение статьи 3, общей для четырех Женевских конвенций", which includes an analogous word to "also" (in Russian, "также"). However, this particular usage is understood to qualify only the last clause (the unenumerated acts), and not the enumerated acts.

[58] *See* Appeal Judgment, paras. 30-31.
[59] The Arabic version of article 8(2)(e)(vi) includes an analogous word to "also" (in Arabic: "أيضا"), in a grammatical structure analogous to that in English. The Spanish version of article 8(2)(e)(vi) reads, in relevant part: "*o cualquier otra forma de violencia sexual que constituya también una violación grave del artículo 3 común a los cuatro Convenios de Ginebra*" (emphasis added).

38. The approach taken in the Chinese, French, and Russian versions of article 8(2)(e)(vi) best reconciles the different linguistic versions of the texts, having regard to the context of article 8(2)(e)(vi) and its object and purpose,[60] as explained in the following paragraphs. It should thus be preferred. Applying the accepted principles for the interpretation of the Statute, drawn from the Vienna Convention, this is not inconsistent with article 22(2).[61] Rather, application of such principles may often, even if not always, ensure that there is no "ambiguity" in the Statute which needs to be "interpreted in favour of the person being […] prosecuted".

39. Furthermore, the approach of the Chinese, French, and Russian versions of the Statute is also supported by the Elements of Crimes. Although auxiliary in nature, the Elements were adopted by two-thirds majority of the Assembly of States Parties, and thus may provide a significant insight into the intentions of the drafters of the Statute. Indeed, article 9(1) provides that, although the Elements of Crimes must be "consistent with the Statute",[62] they "*shall* assist the Court in the interpretation and application" of, *inter alia*, article 8.[63]

40. Critically for this jurisdictional challenge, and as explained in more detail subsequently, the Elements of Crimes acknowledge no qualification of the enumerated acts in article 8(2)(e)(vi) by reference to CA3.[64] Rather, they acknowledge such a qualification only in respect of the *unenumerated* acts.[65]

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[60] *See* Asset Freezing Appeal Judgment, paras. 61-62; VCLT, arts. 31-33.
[61] *See DRC AD*, para. 33 (stating, without equivocation, that "the Rome Statute is no exception" to the principle that treaties should be interpreted consistent with the approach of the VCLT). *See also Lubanga* AJ, para. 277 (applying the VCLT approach to substantive provisions of the Statute). *Cf. Bemba* TJ, Separate Opinion of Judge Ozaki, para. 11.
[62] Statute, art. 9(3).
[63] Statute, art. 9(1) (emphasis added).
[64] *See* Elements of Crimes, arts. 8(2)(e)(vi)-1, 8(2)(e)(vi)-2, 8(2)(e)(vi)-3, 8(2)(e)(vi)-4, 8(2)(e)(vi)-5.
[65] *See* Elements of Crimes, art. 8(2)(e)(vi)-6, Element 2. Furthermore, this reference imposes a *gravity* requirement, but does not incorporate the legal elements of CA3: *see further below* paras. 47-50.

I. 1. b. The structure of article 8 further confirms that the requirements of CA3 are not imported into article 8(2)(e)

41. The structure of article 8 as a whole illustrates the fundamental distinction between the different types of war crimes for which this Court has subject-matter jurisdiction. This militates against any view that the provisions of CA3 apply to article 8(2)(e).

42. For non-international armed conflicts, the Court has jurisdiction to punish "serious violations of article 3 common to the four Geneva Conventions" under article 8(2)(c). When such crimes are charged, the Prosecution must prove that the victim was protected by CA3, in the sense that they were "either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities".[66] *Additionally and separately*, the Court has jurisdiction to punish "*[o]ther* serious violations of the laws and customs" of non-international armed conflicts, "within the established framework of international law", under article 8(2)(e).[67] There is thus no requirement to prove any of the elements applicable to crimes under article 8(2)(c) for crimes under article 8(2)(e), nor does the Defence identify such a requirement. Indeed, Schabas observes that, "[u]nder article 8(2)(c), victims must be persons who play no active part in the hostilities, whereas under article 8(2)(e), victims may also be combatants."[68]

43. This same distinction between provisions implementing the core prohibitions of the Geneva Conventions and international humanitarian law more widely is paralleled for international armed conflicts. Article 8(2)(a) punishes "[g]rave breaches of the Geneva Conventions", and requires proof that the victim is a person

[66] *See e.g.* Elements of Crimes, art. 8(2)(c)(i)-1, Element 2.
[67] Axiomatically, these are serious violations "other" than those prohibited by CA3, which are addressed under article 8(2)(c) of the Statute.
[68] Schabas, p. 205. *See also* Sivakumaran, p. 249 (noting that, where necessary the Statute expressly lays out which offences "require a specific victim-perpetrator relationship").

"protected under one or more of the Geneva Conventions".[69] By contrast, article 8(2)(b) punishes "*[o]ther* serious violations of the laws and customs" of international armed conflicts, "within the established framework of international law", and imposes no requirement to prove any of the elements applicable to crimes under article 8(2)(a), including "protected person" status.

44. Given the structure of article 8, it would make little sense if the reference in the *chapeaux* of both articles 8(2)(b) and 8(2)(e) to "the established framework of international law" was understood to apply the requirements of articles 8(2)(a) also to article 8(2)(b) and the requirements of article 8(2)(c) also to article 8(2)(e). This would circumscribe crimes which the drafters of the Statute did not draw from the Geneva Conventions (but rather from the "laws and customs" of war and "international law" more generally) by the specific requirements of the Geneva Conventions. It would also render nugatory the operative clause "*other* serious violations", by rendering certain provisions the same. This is incorrect, and inconsistent not only with the Statute but also with the Elements of Crimes, customary international law, and the commonly understood meaning of the constituent treaties of international humanitarian law.[70]

45. In any event, Counts 6 and 9 may be read consistently with the "established framework of international law" as required by *chapeau* of article 8(2)(e) and the reference to CA3 in article 8(2)(e)(vi) itself.[71]

46. Accordingly, in such circumstances, the interpretation of article 8(2)(e)(vi) and its *chapeau* consistent with the broader context of article 8 should be preferred, and the interpretation which is inconsistent with the broader context of article 8 rejected.

[69] *See e.g.* Elements of Crimes, art. 8(2)(a)(i), Element 2.
[70] *Contra* Application, para. 2 ("The victim of a war crime in a non-international armed conflict must be a protected person within the meaning of [CA3]"). The Defence appears to admit no further qualification of this principle, but for a limited exception with respect to article 8(2)(e)(vii): *see* Application, para. 37.
[71] *See below* paras. 47-57.

Such an interpretation supports the view that there is no requirement to prove the status or activities of victims of the conduct proscribed by article 8(2)(e)(vi).

I. 1. c. The reference to CA3 in article 8(2)(e)(vi), in any event, requires only a similar gravity threshold, and does not import the elements of CA3 itself

47. The meaning of the reference to CA3 in article 8(2)(e)(vi) is, in any event, unlocked by recourse to the Elements of Crimes and the drafting history of the Statute. Moreover, this meaning is consistent with the implication of the broader structure of article 8, described above.

48. As previously noted, the Elements of Crimes only acknowledge the relevance of CA3 to the *unenumerated* acts proscribed by article 8(2)(e)(vi).[72] And even in this respect, they do not provide that the legal requirements of CA3 are incorporated into article 8(2)(e)(vi), but rather that:

> The conduct was of a *gravity comparable* to that of a serious violation of article 3 common to the four Geneva Conventions.[73]

49. The same approach is paralleled for international armed conflict, for example in article 8(2)(b)(xxii).[74] A number of academic commentators take a similar view. [75]

50. Furthermore, the very structure of article 8(2)(e)(vi) is consistent with the view that reference to CA3 can only be properly understood as a requirement for the unenumerated acts—the scope of which might potentially be very broad indeed, including forms of purely verbal assault or harassment—to meet a specific gravity

[72] *See above* para. 40.
[73] Elements of Crimes, art. 8(2)(e)(vi)-6, Element 2 (emphasis added). *See also* Element 3. A similar approach is taken for other forms of sexual violence constituting crimes against humanity: *see e.g.* Statute, art. 7(g).
[74] *See* Elements of Crimes, art. 8(2)(b)(xxii)-1, 8(2)(b)(xxii)-2, 8(2)(b)(xxii)-3, 8(2)(b)(xxii)-4, 8(2)(b)(xxii)-5, 8(2)(b)(xxii)-6.
[75] *See* Ambos, p. 168; Cottier, pp. 452-454, mn. 212 (discussing article 8(2)(b)(xxii)—which is the provision applying in international armed conflict analogous to article 8(2)(e)(vi)).

threshold. By contrast, there is no such need for the enumerated acts, which the drafters specifically determined to be sufficiently grave *per se* that they would fall within the subject-matter jurisdiction of the Court.

51. Conversely, and relevant to the specific claims of the Defence in this jurisdictional challenge, nothing in the Elements of Crimes acknowledges *any* requirement that victims of either the enumerated or unenumerated acts in article 8(2)(e)(vi) must fall within the protective scope of CA3.[76] This is in striking contrast to the express inclusion of such a requirement for *all* offences punishable under article 8(2)(c).[77] The same distinction is apparent when comparing the elements applicable to articles 8(2)(a) and 8(2)(b).[78] Indeed, in the course of elucidating the Elements of Crimes, the ICRC expressly noted that article 8(2)(e)(vi) does not include the restriction in article 4(1) of Additional Protocol II (and which in turn reflects the general approach of CA3 and article 8(2)(c) of the Statute) restricting victims to those persons not taking a "direct part" in hostilities.[79]

52. Likewise, in such circumstances where the activities or status of the victim is material to liability under article 8(2)(e), such as for the crime of perfidy, the Elements of Crimes expressly set out such a requirement.[80]

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[76] *See generally* Elements of Crimes, art. 8(2)(e)(vi)-1 to 8(2)(e)(vi)-6.
[77] *See e.g.* Elements of Crimes, art. 8(2)(c)(ii), Element 3 ("Such persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities"). *See also* Dörmann et al, pp. 118-119 (describing negotiations whether to further define the persons protected by CA3 in the context of article 8(2)(c) only).
[78] *Compare e.g.* Elements of Crimes, art. 8(2)(a)(i), Element 2 ("Such persons were protected under one or more of the Geneva Conventions of 1949"), *with* arts. 8(2)(b)(1) to 8(2)(b)(xxvi) (requiring no proof that persons were protected under the Geneva Conventions).
[79] ICRC Text on Article 8, Annex III, p. 124 ("According to Art. 4 (1) AP II persons protected against these acts are all those 'who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'. However, this reference is not included in the ICC Statute"). The reference to "direct part" in Additional Protocol II, art. 4(1), is analogous to the reference to "active part" in CA3, and is thus relevant to the protective function of IHL rather than the targeting provisions: *see* Commentary to Additional Protocols, mn. 4515. On the role of the ICRC in defining war crimes in the Rome Statute, and the Elements of Crimes, *see* Von Hebel, pp. 109-111.
[80] *See e.g.* Elements of Crimes, arts. 8(2)(e)(ix), Element 5 (requiring that the victim(s) "belonged to an adverse party"). *See also* Elements of Crimes, arts. 8(2)(b)(x)-1, Element 4; 8(2)(b)(x)-2, Element 4; 8(2)(e)(xi)-1, Element 4; 8(2)(e)(xi)-2, Element 4.

I. 1. d. The established framework of international law compels the view that sexual violence in armed conflicts is absolutely prohibited, without exception

53. Further consistent with the preceding analysis, academic commentators have observed that, unlike article 8(2)(c), "there are no specific categories of protected person under article 8(2)(e)", except as "governed by the 'established framework of international law'".[81]

54. For the reasons previously stated, the reference to the "established framework of international law" in articles 8(2)(b) and 8(2)(e) cannot be understood to import the particular protective requirements of the Geneva Conventions, as required in articles 8(2)(a) and 8(2)(c).[82] Rather, reference to the "established framework of international law" should be understood as ensuring more generally that the crimes based on the "laws and customs" of war are interpreted consistently "with international law, and international humanitarian law in particular".[83]

55. Punishing the commission of rape and sexual slavery in non-international armed conflict, without regard to the status or activities of the victims, is wholly consistent with the established framework of international law and international

[81] La Haye, p. 214. *See also* Byron, p. 48.
[82] *See above* para. 44.
[83] *Lubanga* AJ, para. 322. The reference to the "established framework of international law", in the context of *international* armed conflict, appears to have been proposed as optional text by the Preparatory Committee at its session held 11-21 February 1997, and to have been accepted as the recommended text for the provisions that would ultimately become article 8(2)(b) and 8(2)(e) by the Preparatory Committee at its session held 1-12 December 1997: *see* Bassiouni, pp. 76, 81, 84. It might be inferred that the original stimulus for the proposal of the Preparatory Committee in February 1997 was the discussion before the *Ad Hoc* Committee concerning the sources of the law to be applied in giving the Court jurisdiction over war crimes, and the possibilities for a 'dynamic' interpretive approach: *see e.g.* Bassiouni, pp. 93-94. Ultimately, however, the option to enumerate specific offences in article 8 may be seen as reducing the relevance or significance of the more general reference to the "established" framework of the law: *see e.g.* Von Hebel and Robinson, pp. 79 (negotiations on the definitions of offences in articles 5-10 of the Statute "proved to be one of the most sensitive aspects of the negotiations at the Conference in Rome"), 122 ("In elaborating the definitions, one of the major guiding principles was that the definitions should be reflective of customary international law. It was understood that the Court should operate only for crimes that are of concern to the international community as a whole, which meant the inclusion only of crimes which are universally recognized […] This endeavo[u]r […] was not without its dangers. States may easily disagree on which norms laid down in specific instruments now would fall under customary international law. Indeed, this was amply demonstrated in the discussions on the definition of war crimes"), 124-126. This compromise was offset by the inclusion of what would become article 10 to "make clear that the inclusion or non-inclusion in the Statute of certain norms would not prejudice the positions of States on the customary law status of such norms": Von Hebel and Robinson, p. 88.

humanitarian law. Indeed, it is demanded by it. This follows from the absolute nature of the prohibition on sexual violence in international humanitarian law, a "standard of duty owed to all victims of war at all times",[84] manifest in numerous rules of international law.[85] For example:

- It is reflected in treaty-based international humanitarian law, *inter alia*, by:
    - article 12 of Geneva Convention I (applying to persons protected under that Convention, but with no 'adverse party' requirement);[86]
    - article 75 of Additional Protocol I (applying to persons in the power of a party to an international armed conflict, who do not benefit from more favourable treatment);[87]
    - article 76 of Additional Protocol I (protecting in particular women in international armed conflict from "rape, forced prostitution and all forms of indecent assault");
    - article 4 of Additional Protocol II (applying in non-international armed conflict to all persons not taking "direct part" in hostilities, at any time and in any place whatsoever).

- It is reflected in customary international humanitarian law, illustrated *inter alia* by rules 87,[88] 90,[89] 93,[90] 94,[91] and 135[92] of the ICRC's *Customary International Humanitarian Law* study, and the writings of numerous commentators.[93]

[84] Sellers and Rosenthal, p. 344. *See also* pp. 365-366 ("The prohibition of rape and other forms of sexual violence […] falls squarely within the duty of a party to an armed conflict to provide humane treatment to protected *and other persons*, regardless of sex, age, or other distinction […] This is an obligation that is owed irrespective of the characterization of the armed conflict, and at all times and in all places", emphasis added).
[85] *See also above* para. 2.
[86] *See* 2016 Commentary to Geneva Convention I, art. 12, paras. 77-80. *See also below* fn. 116.
[87] *See also* Meron (1989), pp. 65, 68 (noting the United States' view that article 75 of Additional Protocol I, *inter alia*, embodies customary international law).
[88] *CIHL Study*, rule 87 (requiring humane treatment of civilians and persons *hors de combat* in both international and non-international armed conflicts).

- It is reflected in international human rights law, which recognises the guarantee against rape and all forms of sexual violence within the framework of the freedoms from torture and inhuman treatment,[94] and from slavery,[95] individual fundamental rights from which States are permitted no derogation.[96]

- It is reflected in public international law, which recognises the prohibition to be *jus cogens*,[97] a peremptory norm of such fundamental significance that, *inter*

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[89] *CIHL Study*, rule 90 (prohibiting torture, cruel or inhuman treatment and outrages upon personal dignity in both international and non-international armed conflicts, and recognising practice suggesting rape can constitute this prohibited conduct).
[90] *CIHL Study*, rule 93 (prohibiting rape and other forms of sexual violence in both international and non-international armed conflicts).
[91] *CIHL Study*, rule 94 (prohibiting all forms of slavery in both international and non-international armed conflicts, and noting practice confirming that sexual slavery is slavery).
[92] *CIHL Study*, rule 135 (requiring children affected by armed conflict to receive special respect and protection, and recognising practice that the special respect and protection due to children includes "in particular" protection against all forms of sexual violence").
[93] *See e.g.* Mitchell, pp. 225-226 (arguing "that the prohibition of sexual violence in humanitarian law has emerged as one of the most fundamental standards of the international community as a norm of *jus cogens*", and noting that "[i]t is hard to imagine a situation where an ordinary rule of international law would permit rape under any circumstances" which "by this logic" alone "evinces the non-derogable character necessary"), 234-257. *See also* Meron, p. 425 ("Rape by soldiers has of course been prohibited by the law of war for centuries and violators have been subjected to capital punishment under national military codes […] In many cases, however, rape has been given license, either as an encouragement for soldiers or as an instrument of policy"); Sungi, pp. 115 ("rape is a norm of *ius cogens* and has created an obligation upon States to define and prosecute rape under international criminal law standards"), 125-127.
[94] *See* ACHPR, art. 5; ACHR, art. 5(2); CAT, art. 1; ECHR, art. 3; ICCPR, art. 7. *See especially e.g.* Harris et al, p. 78 ("Cases of rape have been held to involve assaults that fall within Article 3. […] A single act of rape may also involve inhuman and degrading treatment, if not torture. *There would be a breach of Article 3 in a case of rape both where the rapist was a state agent and when the act by a private individual was not a crime under national law or the law was not properly enforced against that individual*", emphasis added, citing ECmHR, *Cyprus v. Turkey*; ECtHR, *Aydin v. Turkey*; ECtHR, *MC v. Bulgaria*); CAT, *C.T. and K.M. v. Sweden*, para. 7.5 (recognising rape as torture); CAT, *V.L. v. Switzerland*, para. 8.10 ("[t]he acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes […] Therefore, the Committee believes that the sexual abuse […[in this case constitutes torture"). *See also* Inter-American Convention on Violence against Women, arts. 2-3 (32 States Parties; entered into force 6 September 1994).
[95] *See* ACHPR, art. 5; ACHR, art. 6; ECHR, art. 4; ICCPR, art. 8.
[96] *See e.g.* ACHR, art. 27(2); CAT, art. 2(2); ECHR, art. 15(2); ICCPR, art. 4(2).
[97] *See e.g.* Mitchell, pp. 225-226. This has arisen especially in the context of the prohibitions of torture and inhuman treatment, which encompass the prohibition of rape (*see above* fn. 94): *see e.g.* Meron (1989), pp. 31 (the prohibition of murder and torture in CA3 "have attained the status of *jus cogens*"), 33-34 ("the logic of the law requires that certain basic humanitarian principles (as well as an essential and non-derogable core of human rights) should be applicable in all situations involving violence of high intensity […] the norms stated in [CA3](1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law […] This is also true for the obligation to treat humanely persons who are *hors de combat*"); ILC State Responsibility Commentary, art. 26, p. 85 ("peremptory norms that are clearly accepted and recognized include the prohibitions

alia, it is outside the competence of States to conclude inconsistent treaties,[98] and creates international obligations *erga omnes*.[99]

56. Acts of sexual violence form no part of any legitimate military operation and confer no military advantage; they are wholly outside the framework of acts permitted by international humanitarian law and are rightly—and universally—condemned as war crimes: serious violations of international humanitarian law. Nothing in the logic of international humanitarian law justifies, explains, or even suggests any exception to this condemnation. Consequently, acts of sexual violence are wholly *inside* the scope of those acts punishable by international criminal law, as set out in express terms in the Statute. As such, the object and purpose of the Statute favours the interpretation of article 8(2)(e)(vi) which best promotes the effective punishment of these crimes, consistent with the requirements of fairness. There is thus no reason to limit the fundamental protection against crimes of sexual violence by reference to particular categories of persons protected in international humanitarian law—standards which, in this limited context, assume little relevance.

57. Likewise, nothing in the particular mandate of the Court or the object and purpose of the Statute—to exercise "jurisdiction over the most serious crimes of concern to the international community as a whole"[100]—requires the interpretation of article 8(2)(e)(vi) to impose conditions on the status or activities of victims of rape and sexual slavery. Other elements of the crime, notably the requirement for proof of a nexus to the armed conflict, suffice to ensure that the Court does not exercise

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of aggression, genocide, *slavery*, racial discrimination, crimes against humanity and *torture*, and the right to self-determination", emphasis added); Shaw, pp. 88-89; Special Rapporteur on Slavery Report, para. 30 ("[i]n all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm").

[98] *See e.g.* Clapham, pp. 62, 339-346; Shaw, pp. 684-685. *See also e.g.* Mitchell, p. 229 ("a peremptory norm permits no derogation and 'supersedes the principle of national sovereignty', thereby creating a deterrent effect against contrary state practice that shapes and limits the legislative powers of sovereign nation-states with respect to the given principle").

[99] *See e.g.* Clapham, p. 251, fn. 115 (quoting Goodwin-Gill, p. 220); Shaw, p. 489; Meron (1989), pp. 194-195. *See also e.g.* Mitchell, p. 230 ("obligations of an absolute character 'flowing to all' states not to allow impunity for such crimes and evok[ing] an international duty to prosecute or extradite alleged offenders"); Sungi, pp. 127-129.

[100] Statute, Preamble.

jurisdiction over offences which, although also grave, are more amenable to regulation by domestic law.[101]

II. 2. Even if the victims of a crime under article 8(2)(e)(vi) must be protected within CA3, that requirement is satisfied on the facts charged

58. In any event, even if article 8(2)(e)(vi) were to require that victims of rape and sexual slavery must be protected in the meaning of CA3—which the Prosecution contests—that requirement is satisfied by proof that the victim was not taking active part in hostilities, no matter whether they are a civilian or a member of armed forces.[102] CA3 does not require that the victim and perpetrator have different affiliations, nor does the Defence present anything new supporting this claim beyond the assertion that it is implicit in the notion of "laying down arms" and being "*hors de combat*".[103] To the contrary, both the Statute and the general body of international humanitarian law demonstrate that this is incorrect.

59. For the following reasons, the Defence is incorrect to assert (a) that CA3 requires the victim not to share the same affiliation as the perpetrator;[104] and (b) that the victim must be considered to be taking an active part in hostilities (and thus lose the protection of CA3) if it is shown that they were unlawfully enlisted or conscripted within the meaning of article 8(2)(e)(vii).[105]

[101] *See also below* fn. 152 (and accompanying text).
[102] *See above* fn. 38; *below* para. 84 (for members of armed forces, proof that they were *hors de combat* establishes that they were taking no active part in hostilities).
[103] *Contra* Application, paras. 17-22, *especially* para. 19 (arguing that these "terms of art […] presuppose surrender, or being exposed to, an enemy force"). In addition, the Defence relies on some of the authors it previously cited in litigation, and on certain comments made by the Prosecution, taken out of context. *See further below* paras. 73, 81.
[104] *See below* paras. 60-78.
[105] *See below* paras. 79-85.

II. 2. a. CA3 does not require a different affiliation between the victim and the perpetrator, nor is any such requirement a general principle of international humanitarian law

60. CA3 provides fundamental protections to all persons not taking active part in hostilities in non-international armed conflicts, irrespective of their affiliation.[106] CA3 is not exceptional in this respect, nor is such an approach inconsistent with the protective scheme of international humanitarian law more generally.[107] In particular, the Defence is incorrect to assert that, with the limited exception of articles 8(2)(b)(xxvi) and 8(2)(e)(vii), victims of war crimes generally cannot belong to the same "force" as the perpetrator(s), and that the treatment by a party to an armed conflict of its own members is beyond the scope of international humanitarian law and hence the subject-matter jurisdiction of this Court.[108]

61. One obvious flaw in the Defence position is demonstrated by a comparison of Geneva Conventions I and II with III and IV. In particular, while an 'adverse party' requirement is embodied in the definition of "protected persons" under Geneva Conventions III and IV,[109] applying to prisoners of war and civilians respectively, there is no such limitation in Geneva Conventions I and II applying to the protection of persons who are rendered *hors de combat* by reason of their injury, sickness, or shipwreck. This fatally undermines the Defence's suggestion that the 'adverse party' requirement is one of "the established contours of international humanitarian

[106] *See e.g.* Kleffner (2013), pp. 298, 300 ("the current state of the law of non-international armed conflict does not support an exclusion from the entitlement of humane treatment of a person who does not participate or no longer directly participates in hostilities on the sole ground that he or she does not belong to the *adverse* party or does not belong to *any* party. The law equally protects those *hors de combat* who are members of armed forces of a party to an armed conflict against mistreatment at the hands of (members of) that same party"); Rodenhäuser, p. 191.
[107] *Contra* Application, paras. 17, 21. The Defence agrees that CA3 is consistent with the protective scheme of international humanitarian law, but considers that CA3 *contains* an 'adverse party' requirement.
[108] *Contra* Application, paras. 17-21, 37.
[109] For this requirement, as interpreted by the ICTY, *see e.g.* ICTY, *Tadić* AJ, para. 166. In the context of this analysis, Tadić was charged under with 'grave breaches' of the Geneva Conventions, which require proof that the victim is a protected person: *see e.g.* para. 163. *See also below* fn. 198.

law".[110] To the contrary, "things are not quite as self-evident as the traditional position suggests".[111]

62. Both Geneva Conventions III and IV specifically define the persons protected by their provisions as having "fallen into the power of the enemy" or "in the hands" or a party or power "of which they are not nationals".[112] Yet the narrower scope of these protections in Geneva Conventions III and IV follows from the specific purposes of these individual treaty regimes. It was never conceived that the narrower scope of the protected person requirement in Geneva Conventions III and IV should be taken to limit more generally the broader protective provisions of international humanitarian law, such as those in Geneva Conventions I and II.[113]

63. By contrast, Geneva Conventions I (applying to the wounded and sick on land) and II (applying to the wounded, sick and shipwrecked at sea) provide universal protection to members of armed forces, irrespective of their affiliation. "Protected persons" under article 13 of both Geneva Conventions I and II, cumulatively, include *all* persons who are wounded, sick or shipwrecked, not only those affiliated to the adverse party.[114] This is confirmed by article 10 of Additional Protocol I requiring

[110] *Contra* Application, para. 41.
[111] Sivakumaran, p. 247.
[112] Geneva Convention III, art. 4; Geneva Convention IV, art. 4. *But see also below* fns. 150, 198 (concerning the 'allegiance' test).
[113] *See e.g.* 2016 Commentary to Geneva Convention I, art. 13, para. 19 ("At the Diplomatic Conference in 1949, it was emphasized that 'it is of course clearly understood that those not included in this enumeration [of Article 13] still remain protected, *either by other Conventions*, or simply by the general principles of International Law'. Thus, *Article 13 cannot in any way entitle a Party to a conflict to fail to respect a wounded person*, or to deny the requisite treatment, even where the person does not belong to one of the categories specified in it", emphasis added). The 2016 Commentary further notes that the Drafting Committee had recommended including an express statement to this effect in article 4 of Geneva Convention III, but this was rejected only due to "problems with translation regarding the proposed text": para. 19, fn. 37. Moreover, some States, such as the United Kingdom, now consider that even the protected person definition in article 13 of Geneva Convention I does not, for example, exhaust a yet broader legal requirement to protect the sick and wounded, including sick and wounded civilians: para. 20, fn. 39 (citing UK Manual, pp. 122-123, mns. 7.3, 7.3.2: "The wounded and sick are to be protected and respected. They may not be attacked. They must be treated humanely. They must be provided with medical care. They may not wilfully be left without medical assistance […] Paragraph 7.3. applies to all wounded and sick, whether United Kingdom, allied or enemy, military or civilian"). *See also* 2016 Commentary to Geneva Convention I, art. 12, para. 59; Geneva Convention IV, art. 16; Additional Protocol II, arts. 7-8; *CIHL* Study, rules 109-111.
[114] *See e.g.* 2016 Commentary to Geneva Convention I, art. 13, para. 9 ("Article 13 [of Geneva Convention I] is distinct from Article 4 of the [Geneva Convention III] in a subtle but important way: as noted above, it does not

that "[a]ll the wounded, sick and shipwrecked, *to whichever Party they belong*, shall be respected and protected."[115]

64. The broad protections of Geneva Conventions I and II are given further effect by punishing grave breaches of these treaties as war crimes. Thus, article 12(2) of Geneva Convention I states expressly that the wounded and sick "shall not be murdered", among other crimes,[116] and the ICRC has confirmed that "*[i]t does not matter* to which Party to a conflict the person belongs."[117] Likewise, article 12(2) of Geneva Convention II gives the same protection to the shipwrecked.[118] Such grave breaches are punishable at this Court under article 8(2)(a) as war crimes occurring in international armed conflicts, and thus may be committed against persons sharing the affiliation of the perpetrator.[119] For example:

- In an international armed conflict, a soldier who finds a wounded comrade, and shoots him dead, commits a war crime punishable under article 8(2)(a)(i). The comrade, although a member of the same armed force and affiliated to

require a wounded or sick person to have fallen into enemy hands in order to be protected. *This means that [Geneva Convention I] also applies to the wounded and sick members of a Party's own armed forces*, in addition to the those of the armed forces of the adverse Party. This is the way in which the obligations now enshrined in the First Convention have been understood since their adoption in 1864", citing Commentary to 1929 Geneva Convention, pp. 13-14); 2016 Commentary to Geneva Convention I, art. 50, para. 22 ("persons protected" for the purpose of the grave breach regime, given effect in article 8(2)(a) of the Statute, include those "listed in Article 13 (the wounded and sick)". *See also* 1952 Commentary to Geneva Convention I, art. 13, p. 145; Commentary to Geneva Convention II, art. 13, pp. 96, 102-103; Bellal, pp. 758-761, *especially* p. 761 (mns. 15-16); Sivakumaran, pp. 247-248; Rodenhäuser, p. 188.

[115] *See also* Commentary to Additional Protocols, p. 146, mn. 445 ("Committee II considered that it was appropriate to add the expression 'to whichever Party they belong' to the text of the 1973 draft in order to emphasize this point. In this way it is clearly stated that every Party to the conflict must respect and protect its own wounded, sick and shipwrecked—which may seem self-evident, though it is perhaps a useful reminder").

[116] Geneva Convention I, art. 12(2). *See also* 2016 Commentary to Geneva Convention I, art. 50, para. 45 (noting that there is no difference between "wilful killing" in article 50 and "the notion of 'murder' as prohibited under Article 12"); 2016 Commentary to Geneva Convention I, art. 12, paras. 55 (noting that "[o]ther forms of ill-treatment not explicitly listed in Article 12, but mentioned in Article 50, such as wilfully causing great suffering, are also prohibited"), 77-80 (article 12(2) prohibits any form of violence against the wounded and sick, including other conduct constituting grave breaches and sexual violence and outrages upon personal dignity), 81-84 ("so-called 'mercy killings', i.e. to put wounded or sick combatants 'out of their misery' are in contravention of Article 12 and amount to the grave breach of wilful killing"), 99 (wilfully leaving the wounded and sick without medical assistance may constitute a grave breach by omission).

[117] 2016 Commentary to Geneva Convention I, art. 12, para. 17 (emphasis added, continuing: "Article 12 applies to *a State's own wounded and sick personnel* as well as to the wounded and sick of an adverse Party or co-belligerent").

[118] Geneva Convention II, art. 12(2).

[119] *See above e.g.* fns. 116-117.

the same party to the conflict, is a protected person under article 13(1) of Geneva Convention I.

- In an international armed conflict, the captain of a ship who wilfully fails, at the conclusion of a naval engagement, to take all possible measures to search for and collect shipwrecked sailors in a timely fashion,[120] causing the death and/or great suffering of those sailors, commits war crimes punishable under article 8(2)(a)(i) and/or (iii). The shipwrecked sailors are protected persons under article 13(1) of Geneva Convention II, irrespective of the party to the conflict to which they are affiliated.

65. There is nothing controversial in either of these propositions. Indeed, it would shock the public conscience now to suggest that either conduct does *not* constitute a war crime.

66. Likewise, as discussed subsequently, this Court has already recognised that the war crimes of enlisting, conscripting, and using children under the age of 15 years to participate actively in hostilities, whether committed in international or non-international armed conflict, may be committed against persons affiliated to the same party to the conflict.[121]

67. Consistent with the broad scope of Geneva Conventions I and II, reflecting a concern to protect persons *hors de combat* in international armed conflicts, irrespective of their affiliation, CA3—integral to *all four* Geneva Conventions—likewise does not impose an 'adverse party' requirement. Rather, it protects without exception *all* persons:

[120] *See* Geneva Convention II, art. 18. *See also Bemba* TJ, Separate Opinion of Judge Ozaki, para. 7, fn. 4 (noting that "[i]t has been posited that, with one exception, each of the modes of liability reflected in Article 25(3) of the Statute are capable of being fulfilled by way of omission").
[121] *See below* para. 94.

> 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.[122]

68. CA3 thus protects persons *beyond* those constituting "protected persons" for the specific purposes of Geneva Conventions III and IV.[123] Both the ICTY and ICTR, and the Appeals Chamber of this Court, have taken a similar approach to construing CA3.[124] Likewise, to the extent the Pre-Trial Chamber in this case may have considered that CA3 and article 4(1) of Additional Protocol II were relevant, it assessed only "whether these persons were taking direct/active part in hostilities at the time they were victims of rape and/or sexual slavery."[125]

69. The ICRC's (March 2016) *Commentary to the First Geneva Convention* expressly affirms the broad scope of CA3, requiring that "all Parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on common Article 3".[126] It elaborated:

> The wording of [CA3] indicates that it applies to all persons taking no active part in the hostilities, "without any adverse distinction". It contains no limitation requiring a person taking no active part in hostilities to be in the power of the *enemy* in order to be protected under the article.[127]

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[122] CA3. *See* Kleffner (2015), pp. 436-437; Sivakumaran, p. 248. *See also* Additional Protocol II, art. 4(1) (applying to all persons "who do not take a direct part or who have ceased to take direct part in hostilities"). Additional Protocol II may be said to develop and supplement CA3, without modifying it: Additional Protocol II, art. 1(1); Dinstein, p. 136; *DPH Interpretive Guidance*, p. 29.
[123] *Compare* CA3 *with* Geneva Convention III, art. 4; Geneva Convention IV, art. 4.
[124] *See e.g.* ICTY, *Delalić* AJ, para. 420 (CA3 protects "*any* individual not taking part in the hostilities", emphasis supplied); ICTY, *Tadić* TJ, para. 615; ICTR, *Semanza* TJ, para. 365.
[125] Confirmation Decision, para. 77. *See also* paras. 79-80.
[126] 2016 Commentary to Geneva Convention I, art. 3, para. 199. As the ICRC explains, the updated commentary "seeks to reflect the practice that has developed in applying and interpreting the Conventions and Protocols during the decades since their adoption, while preserving those elements of the original Commentaries that are still relevant": 2016 Commentary to Geneva Convention I, Introduction, para. 5.
[127] 2016 Commentary to Geneva Convention I, art. 3, para. 195 (emphasis supplied).

70. To the extent that a victim is a civilian, the ICRC's commentary further concludes that limiting protection under CA3 "to persons affiliated or perceived to be affiliated with the opposing Party is […] difficult to reconcile with the protective purpose of CA3". Moreover, practically, it will "often" be "impossible" to "determine whether members of the general population not actively participating in hostilities are affiliated with one or other Party to the conflict".[128] In other words, it will frequently be a misnomer to suggest that civilians have any meaningful affiliation at all to one or other party in a non-international armed conflict.

71. Likewise, even to the extent that a particular victim is a member of an armed force party to the non-international conflict (where an affiliation might be objectively determined), the ICRC affirmed that whether the "abuse [is] committed by their own Party should not be a ground to deny such persons the protection of [CA3]." This conclusion follows from:

> the fundamental character of [CA3] which has been recognized as a 'minimum yardstick' in all armed conflicts and […] a reflection of 'elementary considerations of humanity'.[129]

72. Although 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, this is unsurprising given the various incentives upon States to treat their own forces properly.[130] Yet this does not make the interpretation of CA3—a binding and pre-

[128] 2016 Commentary to Geneva Convention I, art. 3, para. 196. The ICRC further stated: "It is logical that civilians should enjoy the protection of [CA3] regardless of whose power they are in. […] Unlike usually in international armed conflict, objective criteria such as nationality cannot be resorted to [in non-international armed conflict]".
[129] 2016 Commentary to Geneva Convention I, art. 3, para. 197.
[130] 2016 Commentary to Geneva Convention I, art. 3, para. 198 ("In many cases, of course, recourse to [CA3] may not be necessary to make a Party to a conflict treat its own armed forces humanely, be it because a Party to a conflict will feel under a natural obligation to do so, because it will do so out of self-interest, or because, at least in the case of a State Party, domestic law and international human rights law require treatment at least equivalent" to CA3). *See also* Rodenhäuser, p. 190.

existing treaty commitment—incorrect. Moreover, it is not inconsistent with the overall purpose of international humanitarian law if CA3 may sometimes be more intrusive in regulating non-State organised armed groups than the armed forces of States. This reflects the reduced likelihood of a functioning criminal justice system in many non-State organised armed groups.[131] The climate of impunity in the UPC/FPLC, which the Prosecution alleges to have been permitted and encouraged by Mr Ntaganda, is a case in point.[132]

73. Notwithstanding the legal principles just elaborated, the Defence claims that international humanitarian law is *almost exclusively* "concerned with 'conduct directed towards those external to a military force'".[133] In this regard, the Defence places emphasis on the reference in CA3 to members of armed forces who are *hors de combat*. However, this fails to interpret CA3 correctly. Consistent with the practice of the Court, treaty terms must be interpreted on the basis of their ordinary meaning, in context and in light of the object and purpose of the treaty.[134] The Defence approach fails all these tests.[135]

- First, the term "*hors de combat*"—literally "out of combat"—makes no express reference to surrender or exposure to an 'enemy' force, but is generally understood to refer to a member of armed forces being removed

[131] *Cf.* Cassese, p. 67; SCSL, *Sesay* TJ, para. 1453. *See* Kleffner (2013), pp. 300-301 (noting that "[t]he criminal law of the State will, for all practical purposes, be of limited value" at least when "a non-international armed conflict with at least one non-state organised armed group as a party thereto exists").
[132] *See e.g.* Prosecution Pre-Trial Brief, paras. 534, 548, 556, 584.
[133] *Contra* Application, para. 21. The Defence recognises an exception only in article 8(2)(e)(vii): Application, para. 37. The Defence is also incorrect to imply that the Prosecution ever endorsed such a position: *contra* Application, paras. 17, 21 (citing Prosecution Confirmation Submissions, para. 187). The Prosecution stated before the Pre-Trial Chamber that it may "generally" be "the case that IHL regulates conduct directed towards those external to a military force rather than to those internal to a military force", but it made this submission without citation in the course of a single sentence introducing its arguments concerning the special legal protection afforded to children. Such a position cannot prejudice the detailed analysis now presented, developing this position.
[134] *See also e.g.* 2016 Commentary to Geneva Convention I, Introduction, paras. 28-36.
[135] *See also* Rodenhäuser, p. 189 ("The wording of [CA3] does not exclude persons belonging to the party that is bound by the provision").

from their *combatant function*.[136] Yet this does not compel the more general conclusion that the protection of CA3 applies only *vis-à-vis* the adverse party, in other words that it protects only those victims who are in conflict with the perpetrator. In any event, even if the term "*hors de combat*" is regarded somewhat "ill-placed" in CA3,[137] this is exactly the reason why treaties are interpreted not only on the basis of the ordinary meaning of their plain terms, but also in context and in light of the treaty's object and purpose.

- Second, and in any event, the Defence ignores the context of the term "*hors de combat*" in CA3 in two significant respects.

  - CA3 qualifies its application to "members of armed force who have laid down their arms and those placed *hors de combat* by *sickness, wounds, detention, or any other cause*".[138] It is thus apparent that the notion of *hors de combat* is much wider than that described by the Defence. It is also non-exhaustive (illustrated by the reference to "any other cause").

  - Rule 47 of the *CIHL Study*, upon which the Defence relies to define the term *hors de combat*, is based relevantly on article 41(2) of Additional Protocol I.[139] Yet both rule 47 and article 41(2) acknowledge that a person is *hors de combat* not only if they surrender or are captured but also if they are rendered unconscious, or are otherwise incapacitated, by wounds or sickness, making them

[136] Given the particular nature of armed forces, the test for whether such persons should be protected by CA3 is more specific than the test for civilians (whether, at the material time, they take active part in hostilities).
[137] *See also* Rodenhäuser, p. 191. It may be noteworthy that article 4(2) of Additional Protocol II omits the term, and simply requires the humane treatment of all persons not taking direct part in hostilities.
[138] CA3 (emphasis added).
[139] *See CIHL Study*, rule 47, fn. 20.

incapable of defending themselves.[140] This provision is linked to article 10 of Additional Protocol I, which requires the humane treatment of all wounded, sick, and shipwrecked, to whatever party they belong,[141] and in turn relates to Geneva Conventions I and II.[142] Accordingly, the ordinary meaning of the term "*hors de combat*" includes not only persons who surrender, or are captured by the adverse party, but also persons of any affiliation who by their condition require humane treatment. The Defence entirely fails to address this aspect of notion of *hors de combat*.

- Third, the object and purpose of CA3 is to provide a minimum guarantee of humane treatment for persons affected by non-international armed conflicts. Precisely because its obligations constitute a "'minimum yardstick' in all armed conflicts" and reflect "'elementary considerations of humanity'",[143] there is no need to inject notions of affiliation into CA3 which might, for example, regulate aspects of the conduct of hostilities. Such an approach would, indeed, be contrary to CA3's object and purpose.[144]

74. Nor do the authorities cited by the Defence assist them in attempting to discern an 'adverse party' requirement in CA3.

- The *Sesay* judgment at the SCSL, as the Defence concedes, refers to an 'adverse party' requirement in *international* armed conflict, even though it

[140] *See* Additional Protocol I, art. 41(2) ("A person is *hors de combat* if […] (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself").
[141] *See* Commentary to Additional Protocols, pp. 487-488, mn. 1620.
[142] *See above* paras. 61-65.
[143] *See* 2016 Commentary to Geneva Convention I, art. 3, para. 197. *See also* ICJ, *Nicaragua v. United States of America*, para. 218.
[144] *See also* Rodenhäuser, p. 189.

was concerned on the facts with a non-international armed conflict.[145] The Defence assertion that the legal analysis in *Sesay* should equally apply to non-international armed conflicts is unconvincing since the *Sesay* Trial Chamber cited only article 4 of GCIII and GCIV respectively.[146] These are the "protected person" provisions of those conventions, which are narrower in their scope and purpose than CA3 and international humanitarian law more generally.[147]

- Cassese and Focarelli both rely on the cases of *Pilz* and *Motosuke* (again, arising in international armed conflicts), which were decided before the ratification of the Geneva Conventions,[148] and thus could have taken account neither of CA3 nor the general development of international humanitarian law over the last half century and more. Indeed, the legal question under the 1929 Geneva Convention arising in *Pilz* has since been settled by Geneva Convention I.[149] Likewise, in *Motosuke*, the bar to conviction was primarily jurisdictional.[150] Moreover, Kleffner explains how

[145] *See* Application, para. 21, fn. 29 (citing SCSL, *Sesay* TJ, paras. 1451-1453).
[146] *See* SCSL, *Sesay* TJ, paras. 1452-1453. No mention is made of CA3. *See also* Kleffner (2013), p. 297 (describing the reasoning in *Sesay* as "outright puzzling"); Rodenhäuser, p. 189 ("the SCSL's categorical finding that IHL does not protect against intra-party violence is incomplete").
[147] *See above* paras. 61-62.
[148] *See* Application, para. 22, fns. 30 (citing Cassese, p. 67), 31 (citing Focarelli, p. 392).
[149] *Pilz* concerned the legality under the 1929 Geneva Convention of a refusal by a German army doctor to provide medical care to a wounded member of the German army (albeit of Dutch nationality) who had attempted to flee: *see* Bellal, p. 760 (mn. 13); Cassese, p. 67, fn. 7; Sluiter, p. 872. Were these facts to be repeated today, the defendant could potentially be convicted under article 8(2)(a)(iii) of wilfully causing great suffering of a person protected under article 13(1) of Geneva Convention I: *see above* para. 64.
[150] *Motosuke* concerned the execution, among others, of a member of the Japanese army (albeit of Dutch nationality). The Court-Martial concluded that the victim had lost his Dutch nationality by joining the Japanese army, and that its jurisdiction to punish war crimes was circumscribed by the applicable legislation to "subjects of the United Nations". (The Court-Martial's apparent observation that "it could hardly be alleged that the act committed […] was contrary to the laws and customs of war" must be understood in this light.) The Court-Martial convicted instead under the Netherlands East Indies Penal Code. The UN War Crimes Commission ("UNWCC") observed, in commenting on the case, that the Court-Martial had reached its view on jurisdiction based on the UNWCC's "terms of reference as they were originally determined in the first stages of its existence", and that the UNWCC's conclusion in 1943 that "the concept of war crimes applied only to victims of *Allied* nationality" (emphasis added) was reached by "majority". By 1944, it was proposed to the UNWCC that "the concept of war crimes should be applied irrespective of the nationality of the victims […] as such offences were also deserving of punishment". A compromise was reached, foreshadowing *Tadić* to some extent, that the 1943 principle should be maintained, "but the concept of 'Allied' nationals […] interpreted in a wider sense". Furthermore, the UNWCC explained that even the conviction of the accused under the *national* penal code was

the ICTY Appeals Chamber rejected the idea of an adverse party requirement under CA3 based on these two early cases.[151]

- Gaggioli's observation, when discussing "'conflict-related' sexual violence", is premised on the hypothetical example of a rape committed "without […] any link to the armed conflict situation", and thus concerns the *nexus* requirement rather than any general 'adverse party' requirement.[152]

- Schabas' observation appears to concern only "protected persons" under Geneva Convention IV; he makes no reference to any 'adverse party' requirement applicable to CA3.[153] Indeed, not only does his clearest remark suggest the opposite conclusion, but he also takes care to confine it only to article 8(2)(c) of the Statute and not to article 8(2)(e).[154]

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contingent upon the Court-Martial's view that the Japanese army was obliged even to afford *its own members* a fair trial, albeit in the context of occupied territory. *See Motosuke*, pp. 126-130; Nilsson, pp. 816-817.

[151] Kleffner (2013), pp. 299-300 (citing ICTY, *Kvočka* AJ, para. 561).

[152] *See* Application, para. 22, fn. 31 (citing Gaggioli, p. 515). Gaggioli states: "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. […] On the other hand, in the same armed conflict, if the military commander rapes a person detained for reasons *connected to the armed conflict*, such an act clearly constitutes a violation of IHL […]. The nexus derives from a number of elements here: the identity of the perpetrator (a military commander), the identity of the victim (a person detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power)" (emphasis added). *See also* Gaggioli, pp. 514 (discussing "the requirement of a nexus to distinguish war crimes/other violations of IHL from ordinary crimes that may be committed during an armed conflict but have no link with it" which "exists both under IHL and international criminal law"), 515 (concluding "[w]hile these examples might seem obvious, the nexus with the armed conflict is not always so easy to determine"); 2016 Commentary to Geneva Convention I, art. 3, para. 199 (noting that CA3 should apply irrespective of affiliation, "insofar as a specific situation has a nexus to a non-international armed conflict"); Rodenhäuser, p. 192. On the nexus itself, *see e.g.* ICTY, *Kunarac* AJ, para. 58 ("What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. […] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, the manner in which it was committed or the purpose for which it was committed").

[153] *Contra* Application, para. 22, fn. 31 (citing Schabas, p. 210). In fact, the 'adverse party' requirement relating to "protected persons" in the meaning of the Geneva Conventions is discussed on p. 212. For Schabas' discussion of CA3, *see* pp. 205, 211.

[154] *See above* para. 42, fn. 68.

75. The Defence has declined to cite or to distinguish Wells' opinion before the Trial Chamber, upon which they relied before the Appeals Chamber.[155] Wells is directly against the Defence position—she writes:

> The initial abduction or recruitment of children into armed groups, as well as any atrocities committed against children who are recruited […] but who do not take an active or direct part in hostilities (for example, girls recruited for sexual enslavement), can and should be prosecuted [under CA3].[156]

76. Nor do the cited ICTR authorities assist the Defence, since they require only the well-established proposition that victims of crimes under CA3 or Additional Protocol II did not take active or direct part in the hostilities.[157]

77. The absence of any 'adverse party' requirement, either in CA3 in general or in article 8(2)(e)(vi) in particular, is further confirmed and underlined by reference to the Elements of Crimes. Not only is there no such requirement in the elements of article 8(2)(e)(vi) itself,[158] but even for the offences proscribed by article 8(2)(c)—where, unlike article 8(2)(e)(vi),[159] it must be proven that CA3 applies—there is likewise no requirement for the victim to have a different affiliation than the perpetrator of the crime against them.[160] Conversely, where an adverse party requirement applies—for example, to the crime of perfidy—the Elements of Crimes make this plain.[161] The *Katanga* Trial Chamber rejected similar arguments concerning

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[155] *See* Appeal, para. 5, fn. 11 (citing Wells, p. 304). *Compare* Application, para. 22.
[156] Wells, pp. 303-304.
[157] *Contra* Application, para. 22, fn. 33. *See* ICTR, *Ndindiliyimana* TJ, para. 2129 (requiring that "the victims were not direct participants to the armed conflict"); ICTR, *Bagosora* TJ, para. 2229 (requiring that "the victims were not directly taking part in the hostilities at the time of the alleged violation"); ICTR, *Semanza* TJ, para. 512 (requiring that "the victims were not taking part in the hostilities at the time of the alleged violation").
[158] *See generally* Elements of Crimes, art. 8(2)(e)(vi).
[159] *See above* paras. 27-57.
[160] *See e.g.* Elements of Crimes, art. 8(2)(c)(1)-1, Element 2 (expressing the requirements of CA3 only in the terms that "Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities").
[161] *See above* fn. 80.

the constituent elements of pillaging because they were unsupported by either article 8(2)(e)(v) of the Statute or the Elements of Crimes.[162]

78. In the present case, children unlawfully enlisted or conscripted into the UPC/FPLC were protected under CA3 to the extent that, at the material times, they were not taking active part to the hostilities (or, if considered members of armed forces, were *hors de combat*). Thus, even if article 8(2)(e)(vi) requires victims of rape and sexual slavery to fall within the protection of CA3, this Court continues to have jurisdiction over Counts 6 and 9 because such persons are protected under CA3.

II. 2. b. Unlawful enlistment or conscription into a non-State organised group does not determine whether the person is protected by CA3 at any particular time

79. Further contrary to the Defence claim, and even if CA3 is applicable to Counts 6 and 9 (which the Prosecution contests), the Trial Chamber may also determine at the conclusion of the trial, on the facts, that children unlawfully recruited into the UPC/FPLC were *nonetheless protected* by CA3 at the material times—irrespective of whether those children should be regarded either as "civilians" or "members of armed forces." For this reason again, the jurisdictional challenge must be rejected. The Defence assumption that persons found to be victims of article 8(2)(e)(vii) crimes *cannot as a matter of law* also be protected at certain times by CA3 is unsupported and incorrect.[163]

80. The faulty assumption of the Defence comes from eliding the test under article 8(2)(e)(vii)—whether a child was unlawfully recruited—with the test to determine the protective scope of CA3.[164] This is incorrect for two reasons.

[162] *See e.g. Katanga* TJ, para. 907.
[163] *Contra* Application, paras. 18, 23-32 (asserting that "The Prosecution has defined the victims of Counts 6 and 9 as being 'members' of the same armed force as the perpetrators").
[164] *See e.g.* Application, para. 31 ("The consequence of the Prosecution's claim that the victims of Counts 6 and 9 were 'members' of an armed force or group, accordingly, is to remove from the realm of fact-finding whether the victims were 'taking no active part in the hostilities'").

81. First, by the way it pleaded Counts 6 and 9, the Prosecution never characterised the victims as "members of armed forces" in the meaning of CA3, but only that the counts referred to those persons whom the Trial Chamber might determine to have been unlawfully enlisted or conscripted into the UPC/FPLC. Indeed, the Prosecution never considered it necessary at all to plead that the "crimes encompassed by Counts 6 and 9 […] fall within the scope of [CA3]",[165] although it nevertheless maintains that the relevant victims are protected by CA3 should this be required.[166]

82. Second, the Defence approach is plainly erroneous from the language of article 8(2)(e)(vii) itself, which recognises that children may be unlawfully recruited not only into "armed forces" but also other armed "groups".[167] Moreover, there is no justification for blurring the line between the prohibition of recruiting children, the notion of "active" participation, and the minimum protections afforded in non-international armed conflicts—to the contrary, this confuses distinct factual questions notwithstanding the apparent similarity of some terminology.[168] The distinctive nature of these issues is further borne out by the distinction between the legal basis for prohibiting unlawful recruitment of children (originating from Additional Protocol II) and the legal basis for imposing minimum standards of protection applicable in non-international armed conflicts (originating from CA3 in

[165] *Contra* Application, para. 40.
[166] *See below* paras. 83-84.
[167] *See* Statute, art. 8(2)(e)(vii). Dörmann explains that this wording was originally employed to indicate that the offences in article 8(2)(e)(vii) applied to "the rebel side" as well as government armed forces: Dörmann, pp. 470-471. Even if the term "armed forces" may now be understood as including at least some non-State organised armed groups (on which, *see below* fn. 176), the conclusion remains that the drafters did not consider membership of an "armed force" to be the necessary consequence of a child's unlawful recruitment.
[168] Given the three separate offences contained in article 8(2)(e)(vii), it is not necessary to show that a child was used to participate actively in hostilities: *see Lubanga* TJ, para. 609 ("the three alternatives (*viz.* conscription, enlistment and use) are separate offences"); *Lubanga* AJ, para. 267. Moreover, according to the Appeals Chamber, 'active participation' under article 8(2)(e)(vii) of the Statute should not be interpreted "so as to only refer to forms of direct participation in armed hostilities, as understood in the context of the principle of distinction and [CA3]": *Lubanga* AJ, para. 328. *See also* Rodenhäuser, pp. 180-181. Thus, not only does proof of 'active participation' under article 8(2)(e)(vii) fail *ipso facto* to establish direct participation in hostilities for the purpose of CA3, but *a fortiori* direct participation cannot be inferred from proof merely of enlistment or conscription under article 8(2)(e)(vii). *See also Lubanga* TJ, para. 618.

the Geneva Conventions).[169] Such an approach, moreover, enables effect to be given to the special legal protection afforded to children under international humanitarian law.[170]

83. Accordingly, if children unlawfully enlisted or conscripted into the UPC/FPLC do *not* constitute "members of [an] armed force" for the purpose of CA3,[171] they necessarily remain civilians for the purpose of CA3. As such, they are protected by CA3 except for such times as they take active part in hostilities.[172] As the Prosecution has previously asserted—and the Defence does not now seem to contest—this is an essentially factual question which must be determined on the basis of the evidence elicited at trial. As a result, plainly, it is legally possible for the Trial Chamber to conclude that children were unlawfully recruited into the UPC/FPLC but not taking active part in hostilities at the time(s) material to the charges in Counts 6 and 9.

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[169] The Pre-Trial Chamber came to a similar conclusion, although by different reasoning: *see* Confirmation Decision, para. 78 ("the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law"). This same conclusion could have been reached even more straightforwardly, on the basis of the obvious differences between the tests for enlistment and conscription under article 8(2)(e)(vii) and the test for direct participation in hostilities.

[170] *See below* paras. 86-97.

[171] *See also below* paras. 92-97.

[172] The Defence does not directly address this test in the Application, although it makes passing reference to the *DPH Interpretive Guidance*: *see* Application, para. 32. As the Prosecution has previously stated, the *DPH Interpretive Guidance* is no more than an interpretation of international humanitarian law, which is concerned solely with the targeting of civilians for the purpose of the conduct of hostilities. It states expressly that it is "not intended to serve as a basis for interpreting IHL regulating the status, rights, and protections of persons outside the conduct of hostilities". *See DPH Interpretive Guidance*, pp. 6, 9, 11; Kleffner (2015), p. 437 (concluding that the *DPH Interpretive Guidance* has value as a "reference point"). Thus, although the notions of "direct participation in hostilities" (for the purpose of targeting) and "active part in hostilities" (for the purpose of CA3) may be linked to some extent, it is by no means established that any concept of "continuous combat function" for the purpose of targeting has any relevance to assessing whether a civilian is "taking active part in hostilities" for the purpose of their protection under CA3. *See also Lubanga* AJ, paras. 323-324. This is supported by the ICRC's most recent commentary, which notes that it is "widely accepted" that "direct" and "active" participation are "the same concept", but recognises that the "scope and application of the notion of direct participation in hostilities is the subject of debate" and that "[t]he notion of active participation in hostilities is not defined in [CA3], nor is it contained in any other provision of the 1949 Geneva Conventions or earlier treaties": 2016 Commentary to Geneva Convention I, art. 3, paras. 174-176. Moreover, even if *arguendo* the *DPH Interpretive Guidance* has some legal relevance, whether the victims had a "continuous combat function" still remains a *factual* matter to be decided on the basis of evidence elicited at trial and cannot be inferred *ipso facto* from the unlawful enlistment or conscription. Nothing in the *DPH Interpretive Guidance* suggests that mere enlistment or conscription, in the meaning of article 8(2)(e)(vii), can operate as a matter of law to establish such a status—especially since the recruitment of children is itself unlawful. Indeed, the logic of the *DPH Interpretive Guidance* is entirely to the opposite effect.

84. Alternatively, even if children unlawfully enlisted or conscripted into the UPC/FPLC were considered "members of [an] armed force" for the purpose of CA3, they are nonetheless protected by CA3 for such times as they are *hors de combat*. This too is a factual question which must be determined on the basis of the evidence elicited at trial. In particular, a person is *hors de combat* if they are in "detention" or an analogous situation, or if they have been rendered "unconscious or […] otherwise incapacitated […] and therefore […] incapable of defending [the]mself".[173] The Defence addresses neither of these of these scenarios, even though one is directly stated in rule 47 of the *CIHL Study (*upon which they rely) and the other is stated in CA3 itself.[174] Manifestly, a person may not be considered *hors de combat* on the basis simply that they are the victim of the conduct proscribed by CA3—such logic would be circular, and would defeat the purpose of the *chapeau* of CA3. Yet the allegations in this case surrounding the circumstances of mistreatment and abuse of the victims of Counts 6 and 9 are such that the victims may well have been rendered *hors de combat*.[175] Again, therefore, it is legally possible for the Trial Chamber to conclude that children were unlawfully recruited into the UPC/FPLC but were *hors de combat* at the time(s) material to the charges in Counts 6 and 9.

85. The Prosecution considers that, in the ultimate analysis, the better view—both in fact and law—is that children recruited into the UPC/FPLC retain *civilian* status for the purpose of CA3.[176] Yet in any event this matter, which can only be decided on

[173] *See e.g.* 2016 Commentary to Geneva Convention I, art. 3, paras. 186-189.
[174] Application, para. 20 (quoting *CIHL Study*, rule 47). *See also* CA3.
[175] This interpretation is confirmed by reference to article 4(1) of Additional Protocol II, which in reinforcing the protection of CA3 refers simply to "[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities", and does not refer to the notion of *hors de combat*. *See also* 2016 Commentary to Geneva Convention I, art. 3, para. 189 ("The addition of 'any other cause' [in CA3] indications that the notion of '*hors de combat*' in [CA3] should not be interpreted in a narrow sense"); Rodenhäuser, pp. 191-192.
[176] *See below* paras. *92*-97. *Cf.* Rodenhäuser, pp. 182-186. The Defence also points out that the Prosecution had previously doubted whether it was even possible, as a matter of law, to regard non-State organised armed groups as "armed forces" for the purpose of CA3: Application, para. 26. This was a consequence of the traditional view in IHL that the protection of persons in *non-international armed conflict* is generally subject to conditions only on the basis of their *activities*, and not their status. Only members of *State* armed forces traditionally constituted an exception to that rule. *See e.g.* Kleffner (2013), pp. 297-298; Kleffner (2015), pp. 435-436; Pejić, p. 233. Although the ICRC has very recently suggested that "the term 'armed forces' refers to the armed forces of both the State and non-State Parties to the conflict", including non-State organised armed groups, it is unclear whether

the facts, need not be decided at this time in order to resolve the jurisdictional challenge, nor should it be. It remains a question for ultimate deliberation in this trial.

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

86. Further, no matter how article 8(2)(e)(vi) is interpreted, this Court must also give effect to the status of children as a specially protected class in international humanitarian law. This special protection is incorporated into the Statute through the *chapeau* of article 8, through article 21(1)(b), and to the extent necessary to preserve the object and purpose *inter alia* of article 8(2)(e)(vii). The Defence fails adequately to address this principle, which requires that the Court not give legal effect to the consequences of the unlawful recruitment or use of a child, in the meaning of article 8(2)(e)(vii), so as to deprive them of the legal protections to which they are nevertheless entitled. Accordingly, taking into account their status as children, proof of the unlawful enlistment or conscription into the UPC/FPLC of the victims of Counts 6 and 9 remains, again, irrelevant. It does not make it legally impossible to prove the crimes charged.[177]

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this conclusion is a necessary one. *See* 2016 Commentary to Geneva Convention 1, art. 3, paras. 180, 184. *But see* para. 179 (noting that "[t]he term 'members of armed forces' is not defined in either [CA3] or in the Geneva Conventions more generally"). In particular, the balance of obligations reflected by CA3 would seem to remain intact even if the only "armed force" recognised by CA3 were the State armed force. Civilians associated with non-State organised armed groups would remain protected by CA3 for all such times they were not taking active part in hostilities, and members of the (State) armed force would be protected for all such times they were *hors de combat*. Nor in any event has an authoritative view been given as to how the ICRC's view should be implemented—in particular, there is no clear authority for the legal test applicable to determine when a civilian's engagement with a non-State organised armed group reaches the threshold for them to be considered a "member of armed forces" for the purpose of CA3. Although some concepts in the *DPH Interpretive Guidance* might, at first glance, appear relevant, the *DPH Interpretive Guidance* is concerned only with the conduct of hostilities (*see below* fn.172) whereas CA3 has been considered "not [to] address the conduct of hostilities": 2016 Commentary to Geneva Convention I, art. 3, paras. 190-193.

[177] *Contra* Application, para. 33.

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

87. Children are a specially protected class under international humanitarian law, corresponding to the "special risk" to which they may be exposed, especially in non-international armed conflicts.[178]

88. The special protection is not limited to the rights to education and to be reunited with family,[179] but applies generally and "can be found throughout the Fourth Geneva Convention and in Additional Protocol I", as well as in Additional Protocol II and customary international law.[180] The Convention on the Rights of the Child, which is near universally ratified, likewise reflects the overriding concern, consistent with the "obligations under international humanitarian law to protect the civilian population in armed conflicts," to "ensure protection and care of children who are affected by an armed conflict."[181]

89. The "special respect and protection due to children affected by armed conflict includes, in particular[] protection against all forms of sexual violence", as well as other measures.[182] "[T]here is no doubt" that this statement "is customary", underpinned by "extensive" State practice supporting "the specific obligations outlined in the [*CIHL* Study] in both international and non-international armed

[178] *See e.g.* UK Manual, p. 402, mn. 15.39.1; Commentary to Additional Protocols, mn. 4544.
[179] *Contra* Application, para. 34.
[180] *See* ICRC, *CIHL Study*, rule 135; Additional Protocol I, art. 77(1) ("Children shall be the object of special respect *and shall be protected against any form of indecent assault*", emphasis added); Additional Protocol II, art. 4(3)(d) (referring to "the special protection provided by this Article" as a whole). *See also* Heintze and Lülf, pp. 1294-1295 (children are "a distinct protected group of vulnerable people"), 1305 ("State practice establishes the rule that children affected by armed conflict are entitled to special respect and protection. This rule constitutes a norm of CIL, applicable to both types of conflict, international and non-international"), 1306 ("The structure of Article 4 shows how important the authors of Additional Protocol II considered the protection of children during NIACs […] it thereby enables us to maintain that the principle of special protection of children during these conflicts is affirmed").
[181] CRC, art. 38(4). *See also* Preamble, para. 9. The CRC is presently ratified by 196 States, and signed but not ratified by 1 State. No State has failed to sign or ratify the CRC. *See also* Heintze and Lülf, pp. 1303 ("[t]he provisions of IHL on child recruitment must be read in conjunction with IHRL"), 1311 (suggesting that the obligations on CRC, art. 38, mirror those of Additional Protocol II, art. 77).
[182] ICRC, *CIHL Study*, rule 135. *See also e.g.* Additional Protocol I, art. 77(1).

conflict."[183] These fundamental legal principles are thus deep rooted both in treaty and customary international law.[184]

90. The special protection provided to children in non-international armed conflict does not lapse even if they take direct part in hostilities (and so become, temporarily, targetable by the adverse party). This proposition follows from the requirement in article 4(3)(d) of Additional Protocol II that, *even if* children do take direct part in hostilities and are captured, the "special protection provided […] shall remain applicable to them". The Defence misunderstands the significance of this provision, which is illustrative of the nature of the special protection and not itself alone the basis of the relevant obligation.[185] The provision is relevant because it confirms that the special protection accorded to children is not extinguished even by their direct participation in hostilities. Even though the special protection of the child may *temporarily* be qualified—to the minimum extent that the child becomes lawfully *targetable by the opposing party*—the special legal regime remains applicable until such time as the child is deemed an adult.[186] Indeed, the logic behind article 4(3)(d) recognises that children who are (unlawfully) recruited into non-State organised armed groups and used to participate actively in hostilities are those most in need of special legal protection.[187] This is not reasoning by analogy, but rather constitutes the ordinary application of established and overwhelmingly accepted law.[188] In this regard, the Defence reliance on mere "policy considerations" cannot avail it.[189] Nor in any event does the special legal protection of the child blur in any way the

[183] Breau, p. 200.
[184] *Contra* Application, para. 39.
[185] *Contra* Application, paras. 33-34. Accordingly, the Prosecution does not take issue with the Defence assertion that article 4(3)(d) of Additional Protocol II applies only to children who "are captured"—as indeed the Prosecution has previously acknowledged. *See e.g.* Prosecution Confirmation Submissions, para. 190. The Prosecution further notes that article 4(3) of Additional Protocol II lists non-exhaustive examples of the "care and aid" which must be provided to children, as illustrated by the term "in particular".
[186] In the analogous context, for these purposes, of international armed conflict : *see* Dutli (text accompanying fns. 12-13).
[187] Commentary to Additional Protocols, mn. 4559; Rodenhäuser, p. 186 ("It contradicts humanitarian principles and considerations of military necessity to argue that when becoming member of an armed group, children also lose their special protection *vis-à-vis* those who are responsible for their unlawful recruitment").
[188] *Contra* Application, para. 34.
[189] *Contra* Application, para. 35.

distinction between civilians and members of armed forces,[190] or diminish the coherence of international humanitarian law.[191]

91. The special protection assured for children should thus form part of the interpretation, among other provisions, of the *chapeau* of article 8(2)(e) of the Statute (the "established framework of international law"), as well as (if necessary) CA3 itself, having regard to the acknowledged "overall protective and humanitarian purpose" of this provision.[192]

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

92. The special protection generally due to children under international humanitarian law finds particular resonance in the absolute prohibition of unlawfully enlisting or conscripting children into armed forces and groups. In such circumstances, although international humanitarian law allows that such children may be targetable by the adverse party for such time as they take direct part in hostilities, neither international humanitarian law nor international criminal law justifies or requires this Court to give perverse legal effect to their recruitment for the purpose of these proceedings, compromising their protection *outside the conduct of hostilities*. Such an approach would render the specially protected status of children essentially meaningless.

93. This view is supported by the interplay of the specific protections in article 4 of Additional Protocol II, implemented in the Statute as war crimes. These protections comprise: the express clarification of the prohibition of rape, enforced prostitution, any form of indecent assault, and all forms of slavery, and the (then) novel prohibition on enlisting or conscripting children into armed groups, and using them

[190] *Contra* Application, para. 35.
[191] *Contra* Application, para. 38.
[192] *See Akayesu* TJ, para. 631. *See also* Mettraux, p. 143.

to participate actively in hostilities.[193] These additional protections are particularly significant in at least two respects.

- First, they demonstrate that the drafters of Additional Protocol II foresaw the need to protect not only women but also children and adolescents from sexual violence in non-international armed conflicts.[194]

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

94. Since the protection in articles 4(2)(e) and (f) and 4(3)(c) of Additional Protocol II were given effect in articles 8(2)(e)(vi) and 8(2)(e)(vii) of the Statute, the same interpretive logic—accepting that war crimes against children can be committed by 'co-belligerents' and expressing a special concern to prevent sexual violence—should apply before this Court. Furthermore, if the *Lubanga* Trial Chamber was correct that not only the initial enlistment or conscription of a child is unlawful, but also the subsequent daily 'maintenance' of the child's status as an enlisted person or

[193] *See* Additional Protocol II, arts. 4(2)(e), 4(2)(f), 4(3)(c).
[194] *See* Commentary to Additional Protocols, mns. 4539-4540.

conscript,[195] then this Court has already endorsed the view that all *three* crimes in article 8(2)(e)(vii) recognise the victimisation of a child by a perpetrator within the same armed group, and not only the "unlawful use" crime as provided in article 4(3)(c) of Additional Protocol II.[196]

95. Furthermore, article 4(3)(c) of Additional Protocol II, and article 8(2)(e)(vii) of the Statute, also recognise the view—common also to many national jurisdictions—that children under the age of 15 are incapable of giving informed consent, including to their recruitment into armed forces or groups.[197] This is demonstrated, for example, by the prohibition not only of *involuntary* recruitment of children under 15 (conscription) but also *voluntary* recruitment (enlistment). For these same reasons, even if *arguendo* there was an 'adverse party' requirement for war crimes in non-international armed conflict,[198] there is a cogent basis to consider that children who cannot in law consent to join a non-State organised armed group likewise cannot in law hold any 'allegiance' and therefore can never share any legally relevant affiliation with the perpetrator of crimes against them.

96. Viewed overall, if the logic of the Defence were correct, it would entirely defeat the specially protected status of children under international humanitarian law, including the object and purpose of absolutely prohibiting the recruitment of children into armed groups. Rather than *protecting* children from the dangers of hostilities by prohibiting their recruitment or use, such provisions could even potentially *increase* the dangers to them by stripping them of protection from other

[195] *See Lubanga* TJ, para. 618 (referring to "conscription and enlistment" under article 8(2)(e)(vii), "[t]hese offences are continuous in nature").
[196] *Contra* Application, para. 37. Rodenhäuser also appears to make a mistake in this regard: Rodenhäuser, p. 190. It is uncontested that the "unlawful use" offence "can be committed by a perpetrator against individuals in his own party to the conflict": *Katanga and Ngudjolo* CD, para. 248.
[197] *See e.g. Lubanga* TJ, paras. 613-617.
[198] *But see above* paras. 60-78. Indeed, even in considering whether "protected person" status under Geneva Convention IV is established in *international* armed conflict, the ICTY Appeals Chamber has emphasised that courts should examine the "substantial relations" between the perpetrator and victim, not "formal bonds": ICTY, *Tadić* AJ, para. 166. *See also* Mettraux, pp. 68-69 (referring to the "broad, […] purposive, and ultimately realistic" approach adopted by the ICTY even to "protected person" status); ECCC, *Case 001* TJ, paras. 419, 426; ECCC, *Case 002* Closing Order, para. 1482.

forms of violent crime which are highly likely to occur. Simply put, a soldier intending to rape a child in the context of an armed conflict (a war crime) would be encouraged first to unlawfully conscript the child (another war crime), in order to escape international liability for the rape.[199]

97. The perverse implications of the interpretation of the Statute advanced by the Defence thus demonstrate the flaws in the Defence position. Such a reading would be inconsistent with the very object and purpose of the Statute, which is notable among other respects for its comprehensive approach to the prohibition of sexual violence and to the protection of children in armed conflict. It would, moreover, fail to give effect to the fundamental legal protection for children recognised near-universally by the international community—as well as the moral imperative which that special legal protection reflects.

Conclusion

98. For the reasons above, the Trial Chamber should dismiss the Application, and affirm that the Court has jurisdiction over the conduct charged in Counts 6 and 9.

Fatou Bensouda
Prosecutor

Dated this 14th day of April 2016

At The Hague, The Netherlands

[199] *See also* Rodenhäuser, p. 186 ("It is barely conceivable that a *bona fide* interpretation of the law can lead to a situation in which an armed group violates the law by recruiting a child but thereby circumvents the various protections IHL foresees for children").