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**International
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TRIAL CHAMBER VI

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

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

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Mr Dermot Groome

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 8 and 19 of the Rome Statute ('Statute') and Rule 58 of the Rules of Procedure and Evidence ('Rules'), issues this 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'.

I. PROCEDURAL HISTORY

1. On 10 January 2014, the Office of the Prosecutor ('Prosecution') filed the Document Containing the Charges ('DCC'),¹ in which the Prosecution charged Mr Ntaganda with, *inter alia*, '[r]ape of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 6) and '[s]exual slavery of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 9).²
2. From 10 to 14 February 2014, the confirmation hearing took place, during which the defence team for Mr Ntaganda ('Defence') argued that the charges contained in Counts 6 and 9 cannot be confirmed.³ In its written submissions before Pre-Trial Chamber II, the Defence made further submissions on this issue.⁴
3. On 9 June 2014, Pre-Trial Chamber II confirmed charges against Mr Ntaganda ('Confirmation Decision'), including in respect of war crimes of rape and sexual slavery of child soldiers under Article 8(2)(e)(vi) of the Statute in the manner as charged by the Prosecution under Counts 6 and 9.⁵

¹ ICC-01/04-02/06-203-AnxA. An Updated Document Containing the Charges ('Updated DCC') was filed on 16 February 2015 (ICC-01/04-02/06-458-AnxA).

² DCC, ICC-01/04-02/06-203-AnxA, pp. 57-58.

³ Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, p. 27, lines 5-25.

⁴ Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, 14 April 2014, ICC-01/04-02/06-292-Red2, paras 250-263.

⁵ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309.

4. On 1 September 2015, the Defence filed an application before this Chamber challenging the jurisdiction of the Court in respect of Counts 6 and 9 ('Request').⁶
5. On 9 October 2015, having received responses from the Legal Representative of former child soldiers ('LRV')⁷ and the Prosecution⁸ and a reply from the Defence ('Reply'),⁹ the Chamber issued a decision in which it rejected the Request on the basis that it was a matter to be addressed at trial ('Impugned Decision').¹⁰
6. On 19 October 2015, the Defence appealed the Chamber's decision.¹¹
7. On 22 March 2016, the Appeals Chamber held that 'the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature', and remanded the matter to the Chamber to determine in accordance with Article 19 of the Statute ('Appeals Judgment').¹²
8. On 7 April 2016, following the Chamber's invitation of final consolidated submissions on: i) whether the requirements of Article 19(4) have been met, and ii) the merits of the Defence's challenge to subject matter jurisdiction in

⁶ Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06-804.

⁷ Former child soldiers' response to the "Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges", 9 September 2015, ICC-01/04-02/06-814.

⁸ 'Prosecution Response to the "Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges", ICC-01/04-02/06-804', 11 September 2015, ICC-01/04-02/06-818.

⁹ Reply on behalf of Mr Ntaganda to "Prosecution Response to the 'Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges', ICC-01/04-02/06-804", 24 September 2015, ICC-01/04-02/06-863.

¹⁰ Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892.

¹¹ 'Appeal on behalf of Mr Ntaganda against Trial Chamber VI's "*Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9*", ICC-01/04-02/06-892', ICC-01/04-02/06-909.

¹² Judgment on the appeal of Mr Bosco Ntaganda against the "*Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9*", ICC-01/04-02/06-1225, para. 40.

respect to Counts 6 and 9,¹³ the Defence filed its consolidated submissions ('Consolidated Defence Submissions').¹⁴ On 14 April 2016, the Prosecution¹⁵ and LRV¹⁶ filed their responses ('Consolidated Prosecution Response' and 'Consolidated LRV Response', respectively).

9. On 5 December 2016, the Chamber received a request from Mr Dermot Groome for leave to submit *amicus curiae* submissions on the merits of the Request ('*Amicus Curiae* Request').¹⁷ Given the final stage of the deliberations at the time of receipt of this request, the Chamber considers that it would not be assisted by the proposed submissions.

II. ANALYSIS OF THE NATURE OF THE CHALLENGE

10. As a preliminary matter, it is noted that, because in the Impugned Decision the Chamber found the Request not to constitute a jurisdictional challenge, it was not necessary to consider whether it complied with the requirements of Article 19(4) of the Statute. In holding that the Request did concern a jurisdictional challenge and remanding the matter, the Appeals Chamber noted that it is for the Chamber to determine whether the aforementioned requirements are satisfied in the circumstances of the case.¹⁸ The Chamber will therefore first consider these requirements.

¹³ E-mail from Legal Officer of the Chamber to parties and participants of 24 March 2016 at 18:11.

¹⁴ Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges, ICC-01/04-02/06-1256.

¹⁵ Prosecution's response to Mr Ntaganda's "Consolidated submissions challenging jurisdiction" regarding Counts 6 and 9, ICC-01/04-02/06-1278.

¹⁶ Former child soldiers' Response to the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges", ICC-01/04-02/06-1279.

¹⁷ Request for leave to submit *amicus curiae* observations on whether the ICC has jurisdiction over crimes committed against child soldiers by members of the same armed force, ICC-01/04-02/06-1670. On 27 December 2016, the Defence informed the Chamber by e-mail that it did not intend to respond to the aforementioned request (E-mail from the Defence to the Chamber of 27 December 2016 at 16:49).

¹⁸ Appeals Judgment, ICC-01/04-02/06-1225, para. 42.

A. Submissions on the requirements of Article 19(4)

Defence

11. The Defence submits that the requirements of Article 19(4) of the Statute are met, because it has not previously challenged the Court's jurisdiction in respect to Counts 6 and 9, as it objected to the confirmation of these counts during the confirmation hearing and did not present a jurisdictional challenge.¹⁹ The Defence further avers that the Pre-Trial Chamber did not follow the mandatory procedural guarantees for jurisdictional challenges, as set out in Rule 58(2) of the Rules.²⁰ It also submits that the Prosecution acknowledged in its response to the Request that the Defence's submissions at the time of the confirmation did not constitute a jurisdictional challenge.²¹

12. The Defence submits that should the Chamber find that the Defence's submissions during the confirmation proceedings amount to a jurisdictional challenge under Article 19 of the Statute, exceptional circumstances justify a second jurisdictional challenge, because 'the Court's competence over Counts 6 and 9 has not yet received any appellate scrutiny' and the interests of justice favour such scrutiny at the earliest possible stage of proceedings.²² In this regard, the Defence avers that witnesses should not be compelled to testify about traumatic events if there is no legal possibility of a conviction, and, as such, would not be in the witnesses' interest or 'in the interest of a fair and efficient trial'.²³

¹⁹ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 4-6.

²⁰ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 7-8.

²¹ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 9-10.

²² Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 11-12, and 14.

²³ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 13.

Prosecution

13. The Prosecution submits that the Defence has previously challenged the Court's jurisdiction over Counts 6 and 9, as the Defence presented arguments during the confirmation hearing on a matter that the Appeals Chamber confirmed to have been jurisdictional in nature, and that these arguments were considered and rejected by the Pre-Trial Chamber.²⁴ According to the Prosecution, the substance and not the form of a challenge ought to be examined in order to determine whether it is jurisdictional.²⁵ The Prosecution contends that although its primary position in responding to the Request was that the Defence's submissions were not jurisdictional, it also 'clearly articulated' that the Defence's challenges made during the confirmation stage and before the Chamber were of the same nature, and that 'the Defence's attempt to distinguish its identical submissions before the Pre-Trial Chamber as non-jurisdictional is unsustainable'.²⁶
14. The Prosecution further submits that the Defence has the burden to show that exceptional circumstances exist to justify a second jurisdictional challenge, but that it has failed to do so.²⁷ It argues that lack of appellate scrutiny is not an exceptional circumstance under Article 19 of the Statute,²⁸ and that the testimony of the witnesses concerned will be relevant to issues material to other counts as well as to sentencing.²⁹

²⁴ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 11-13, and 17.

²⁵ Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 14.

²⁶ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 15-16.

²⁷ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 17-18.

²⁸ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 19-20.

²⁹ Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 21.

LRV

15. The Legal Representative submits that the Defence's arguments raised at the confirmation stage are similar to its current ones.³⁰ In addition, she submits that the requirement for exceptional circumstances imposes a high threshold on the challenging party and that this threshold is not met when a second jurisdictional challenge is raised on the basis of the same arguments considered and dismissed at the pre-trial stage.³¹ According to the LRV, a second challenge is not the proper avenue to review the correctness of decisions taken at that stage.³²

B. Analysis by the Chamber

16. Pursuant to Article 19(4) of the Statute, a challenge to the Court's jurisdiction shall, in the absence of exceptional circumstances, only be made once and made prior to, or at the commencement of, the trial.³³
17. Starting with the first of these two requirements, the timing of the challenge, the Chamber observes that the jurisprudence of the Court establishes the 'commencement of the trial' for the purposes of Article 61(9) of the Statute to occur at the time of the making of opening statements, prior to the calling of the first witness.³⁴ In the present case, the Chamber referred to this same moment

³⁰ Consolidated LRV Response, ICC-01/04-02/06-1279, para. 4.

³¹ Consolidated LRV Response, ICC-01/04-02/06-1279, para. 5.

³² Consolidated LRV Response, ICC-01/04-02/06-1279, para. 5.

³³ Article 19(4) of the Statute reads in relevant part:

[T]he jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

³⁴ See Appeals Chamber, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor's appeal against the "Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 13 December 2013, ICC-01/09-01/11-1123, paras 27-29. Trial Chamber I found in the *Lubanga* case that the reference to the trial having begun (which is used in parallel to the 'commencement of the trial' in Article 61(9) of the Statute) refers to the 'true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses' (*The Prosecutor v*

as the ‘commencement of the trial’ for the purposes of disclosure under Article 64(3)(c) of the Statute.³⁵ The Chamber also considers the start of the hearing during which the Article 64(8)(a) procedure is followed and any opening statements are made to be the appropriate meaning of the phrase ‘commencement of a trial’ for the purposes of Article 19(4) of the Statute.

18. The Chamber recalls that the Defence filed the Request on 1 September 2015, the day before the hearing of 2 September 2015 when the charges were read to Mr Ntaganda, the accused pleaded not guilty to all charges, and the Prosecution commenced its opening statements.³⁶ The Chamber therefore finds that the Request was brought prior to the commencement of the trial in compliance with the second sentence of Article 19(4).
19. As to the next requirement of Article 19(4) of the Statute, namely whether the Defence has sought to challenge jurisdiction in respect of Counts 6 and 9 more than once, the Chamber observes that in its oral arguments before Pre-Trial Chamber II, as well as in its subsequent written submissions, the Defence did challenge Counts 6 and 9 as put forward by the Prosecution, and in doing so explicitly raised questions of jurisdiction.
20. In particular, the Chamber notes that during the hearing on the confirmation of charges, the Defence argued that

crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international

Thomas Lubanga Dyilo, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39; footnote omitted). This interpretation was later endorsed by Trial Chamber V(B) in *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696, para. 10 (see *also* the Partly dissenting opinion of Judge Ozaki (ICC-01/09-02/11-698), at para. 2).

³⁵ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, 9 October 2014, ICC-01/04-02/06-382 (a corrigendum was filed on 28 November 2014: ICC-01/04-02/06-382-Corr). See further the Chamber’s oral ruling on the commencement date of trial of 3 July 2015 (Transcript of Hearing of 3 July 2015, ICC-01/04-02/06-T-22-CONF-ENG, p. 4, line 5 to p. 5, line 20).

³⁶ See Transcript of Hearing of 2 September 2015, ICC-01/04-02/06-T-23-ENG.

humanitarian law nor within international criminal law. [...] International humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. Such crimes come under national law and human rights law. Thus, the charges found in counts 6 and 9 cannot be confirmed in accordance with the principle of legality.³⁷

Moreover, in its written submissions made subsequent to this hearing, the Defence argued the following:

*Si par impossible la Chambre estimait que la présence d'individus de moins de 15 ans dans les FPLC pendant la période des charges a été démontrée, la Défense soumet que les crimes reprochés aux chefs 6 et 9, tels que formulés par le Procureur, ne relèvent pas de la compétence de la Cour, et que l'interprétation extensive proposée par le Procureur est contraire au principe de légalité et aux principes établis par le droit des conflits armés. [...] La réelle question qui se pose en l'espèce n'est donc pas de déterminer quelles protections sont accordées par le [droit international humanitaire] aux enfants dans le cadre des conflits armés, mais de déterminer si les chefs 6 et 9 constituent des crimes relevant de la juridiction de la Cour aux termes de l'Article 8-2-e-vi.*³⁸

21. Pre-Trial Chamber II addressed these submissions in the Confirmation Decision, stating that would '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'.³⁹ With reference to international humanitarian law,⁴⁰

³⁷ Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 15-25. The Defence also submitted that '[t]he way in which the Prosecution has introduced these crimes in the DCC demonstrates that [...] they are trying to expand the application of Article 8(2)(e)(vi) to situations that are analogous, arguing an extensive interpretation of Article 4 of Additional Protocol II to the Geneva Conventions adopted 8 June 1977, yet this provision of the protocol does not allow for such an interpretation [...] [and] in no way can be used to interpret Article 8 to expand the scope thereof to victims who might be part of the same group as the perpetrator of the crime.' (ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 5-14).

³⁸ Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, ICC-01/04-02/06-292-Conf-Exp, 8 April 2014, paras 251 and 254 (footnote omitted; emphasis added).

³⁹ Confirmation Decision, ICC-01/04-02/06-309, para. 76.

⁴⁰ Confirmation Decision, ICC-01/04-02/06-309, paras 77-79.

Pre-Trial Chamber II found that it was ‘not barred from exercising jurisdiction over the crimes in counts 6 and 9’.⁴¹

22. On the basis of the foregoing, the Chamber finds that the Defence has already challenged the Court’s jurisdiction in respect of Counts 6 and 9. In order to determine whether the Defence may bring this challenge for a second time, the Chamber will thus have to consider whether exceptional circumstances exist that warrant permitting the Defence to do so.
23. In this regard, the Chamber agrees with the Prosecution and the LRV that the burden to show exceptional circumstances rests with the Defence. The Chamber considers that the Defence failed to demonstrate any exceptional circumstances in its Request or Reply. However, the Defence has put forward further arguments alleging exceptional circumstances in the Consolidated Defence Submissions, which appear to be mainly based on the guidance provided by Appeals Chamber.⁴²
24. With respect to the Defence’s first alleged exceptional circumstance, namely that the question of the Court’s jurisdiction over Counts 6 and 9 has not yet received any appellate scrutiny and such scrutiny should take place at the earliest possible stage of proceedings,⁴³ the Chamber notes that the Defence neither sought leave to appeal the Confirmation Decision on this issue,⁴⁴ nor directly appealed the confirmation of Counts 6 and 9 under Article 82(1)(a) of the Statute.⁴⁵ However, the Chamber also notes the Appeals Chamber’s

⁴¹ Confirmation Decision, ICC-01/04-02/06-309, para. 80.

⁴² See Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 12-14; and Appeals Judgment, ICC-01/04-02/06-1225, para. 41.

⁴³ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 11-12, and 14.

⁴⁴ While the Defence sought leave to appeal the Confirmation Decision on two issues, neither of those issues related to Counts 6 and 9. See Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”, 4 July 2014, ICC-01/04-02/06-322, rejecting the Defence’s request for leave to appeal.

⁴⁵ In this regard, the Chamber notes that the Defence appealed the Impugned Decision directly, relying on Article 82(1)(a) of the Statute. See Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s “*Decision on*

guidance that resolution of the jurisdictional question in respect of these counts 'at an early stage is [...] important in terms of enhancing the efficiency of proceedings'.⁴⁶ Moreover, the Chamber observes that the Request was not overtly jurisdictional in nature and that guidance from the Appeals Chamber was necessary to clarify this part of the Request.

25. With respect to the second exceptional circumstance put forward by the Defence, that witnesses should not be compelled to testify about traumatic events if there is no real possibility of a conviction for the conduct concerned, the Chamber is mindful of the Appeals Chamber's guidance that resolving the jurisdictional issue in respect of Counts 6 and 9 'may be of heightened importance given that former child soldiers may be called as witnesses to provide detailed testimony about traumatic events related to the charges of rape and sexual slavery in circumstances where it may be found that such crimes, even if established, would not amount in law to war crimes prosecutable by the Court'.⁴⁷ The Chamber, however, observes that, as submitted also by the Prosecution, even if the Request were to be granted and Counts 6 and 9 were dismissed, the witnesses concerned would have still been likely to be called to testify on other issues relevant to the remaining charges, and that their testimony in relation to rape and sexual slavery could remain relevant, including for sentencing purposes and in respect of harm suffered.⁴⁸

26. Nonetheless, the Chamber considers that in the specific circumstances of the present challenge, knowledge as to the outcome could facilitate more focused examinations and submissions by the parties and participants during the rest of the trial. The decision as to Court's jurisdiction over the alleged conduct may

the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-892, 19 October 2015, ICC-01/04-02/06-909.

⁴⁶ Appeals Judgment, ICC-01/04-02/06-1225, para. 41.

⁴⁷ Appeals Judgment, ICC-01/04-02/06-1225, para. 41.

⁴⁸ See, for example, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, para. 67.

also have an impact on the scope of the defence case and therefore affect the number of witnesses, if any, the Defence may call. The Chamber is further mindful of the interests of the alleged victims of these crimes, who – due to their age at the time of the alleged crimes contained in Counts 6 and 9 and the gravity of the alleged crimes – may be considered to be particularly vulnerable. The Chamber therefore finds it to be in the interests of judicial economy and justice to rule on the merits of the challenge at this stage, and that exceptional circumstances exist to adjudicate a second jurisdictional challenge on these bases. Having so found, the Chamber will proceed with an assessment of the merits in the present decision.

III. ANALYSIS OF THE MERITS OF THE CHALLENGE

A. Submissions on the merits of the challenge to jurisdiction over Counts 6 and 9

Defence

27. The Defence submits that Counts 6 and 9 do not fall within the subject matter jurisdiction of the Court because: i) Article 8(2)(e)(vi) of the Statute is subject to the established requirements of international law;⁴⁹ ii) according to Article 3 common to the Geneva Conventions of 1949 ('Common Article 3') war crimes may not be committed by members of an armed force against fellow members of the same armed force;⁵⁰ iii) the Prosecution has defined the victims of Counts 6 and 9 as being 'members' of the same armed force as the perpetrators;⁵¹ iv) the notion of 'membership' of an armed force is not

⁴⁹ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 15.

⁵⁰ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 17-22.

⁵¹ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 23-24.

compatible with 'taking no active part in hostilities';⁵² and v) international humanitarian law does not recognise any exception for child soldiers.⁵³

28. The Defence avers that the Prosecution could have brought the conduct listed under Counts 5 and 8, but that the conduct could not be qualified as war crimes.⁵⁴

Prosecution

29. The Prosecution submits that the Court does have jurisdiction over the conduct charged in Counts 6 and 9, because Article 8(2)(e)(vi) of the Statute does not limit criminal liability for rape and sexual slavery on the basis of the status or activities of the victims.⁵⁵ According to the Prosecution, the framework of Article 8 of the Statute shows that the ordinary meaning of terms does not require the enumerated acts of rape and sexual slavery to be qualified as serious violations of Common Article 3.⁵⁶ In its view, the structure confirms that no elements from Common Article 3 are imported into Article 8(2)(e) of the Statute,⁵⁷ but instead only a similar gravity threshold is required.⁵⁸ The Prosecution further relies on the framework of international law more generally, arguing that the established view is that sexual violence in armed conflicts is prohibited without exception.⁵⁹
30. The Prosecution further submits that even if the Chamber were to consider that the victims of a crime under Article 8(2)(e)(vi) of the Statute must fall under the protective regime of Common Article 3, such a requirement is satisfied on the facts charged because the alleged victims were not actively participating in

⁵² Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 26-32.

⁵³ Consolidated Defence Submissions, ICC-01/04-02/06-1256, paras 33-39.

⁵⁴ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 40.

⁵⁵ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 27-32.

⁵⁶ Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 36.

⁵⁷ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 41-45.

⁵⁸ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 48-49.

⁵⁹ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 55-57.

hostilities.⁶⁰ Moreover, it argues that neither Common Article 3 nor international humanitarian law in general requires a victim and a perpetrator to have different affiliations.⁶¹

31. In addition, the Prosecution submits that children unlawfully recruited into the UPC/FPLC were nonetheless protected by Common Article 3 at the material times, regardless of whether the children are categorised as ‘civilians’ or ‘members of armed forces’.⁶² According to the Prosecution, the specially protected status of children in times of armed conflict endures notwithstanding any participation in hostilities, except to the limited extent required for targeting by the adverse party.⁶³

LRV

32. The LRV submits that the ‘established framework of international law’ as referred to in Article 8(2)(e)(vi) extends beyond Common Article 3 of the Geneva Conventions.⁶⁴ She further submits that war crimes can be committed against members of the same group.⁶⁵ She contends that Common Article 3 is irrelevant in determining the scope of protection for child soldiers.⁶⁶
33. The LRV also argues that the Defence misrepresents Counts 6 and 9, which do not refer to children being ‘members’ of the UPC/FPLC.⁶⁷ Instead, in her view, child soldiers cannot be regarded as regular members of an armed group, because they have a different legal status and are not criminally responsible for their own acts.⁶⁸ However, should the Chamber find that child soldiers are to

⁶⁰ Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 58.

⁶¹ Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 58.

⁶² Consolidated Prosecution Response, ICC-01/04-02/06-1278, para. 79.

⁶³ Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 86-97.

⁶⁴ Consolidated LRV Response, ICC-01/04-02/06-1279, para. 7.

⁶⁵ Consolidated LRV Response, ICC-01/04-02/06-1279, para. 9.

⁶⁶ Consolidated LRV Response, ICC-01/04-02/06-1279, paras 11-13.

⁶⁷ Consolidated LRV Response, ICC-01/04-02/06-1279, paras 21-23.

⁶⁸ Consolidated LRV Response, ICC-01/04-02/06-1279, paras 19-20.

be regarded as ‘members’ of the UPC/FPLC, this does not mean that child soldiers cannot still be regarded as ‘taking no active part in hostilities’,⁶⁹ and even in case of active participation in the hostilities, the established framework of international law unconditionally protects children affected by armed conflict.⁷⁰

B. Chamber’s analysis of the Court’s subject matter jurisdiction in respect to Counts 6 and 9

Applicable law

34. At the outset, the Chamber notes that the parties and LRV only made their submissions with respect to Article 8(2)(c) and (e) of the Statute, dealing with ‘armed conflicts not of an international character’. However, the Chamber recalls that the classification of the conflict could be changed from non-international to international if it were to appear to the Chamber that such a legal re-characterisation would be justified on the basis of the facts before it.⁷¹ In the circumstances of the present case, the Chamber therefore considers it appropriate to analyse the applicable law with respect to both non-international and international armed conflicts.
35. As a preliminary point, the Chamber notes that the Defence, in its present submissions as well as at the confirmation stage, supports its challenge with the argument that the criminalisation of acts committed against members of one’s own forces does not form part of customary law,⁷² and that Counts 6 and 9 violate the principle of legality.⁷³ The Chamber observes that the Statute is first and foremost a multilateral treaty which acts as an international criminal code

⁶⁹ Consolidated LRV Response, ICC-01/04-02/06-1279, paras 24-27.

⁷⁰ Consolidated LRV Response, ICC-01/04-02/06-1279, paras 28-34.

⁷¹ See Regulation 55 of the Regulations of the Court.

⁷² Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 39.

⁷³ Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 24-25.

for the parties to it. The crimes included in Articles 6 to 8 of the Statute are an expression of the States Parties' desire to criminalise the behaviour concerned. As such, the conduct criminalised as a war crime generally will, but need not necessarily, have been subject to prior criminalisation pursuant to a treaty or customary rule of international law.⁷⁴

36. The crimes underlying Counts 6 and 9 are found in Article 8(2)(b)(xxii), for situations of international armed conflict, and Article 8(2)(e)(vi), for non-international armed conflicts. These provisions read in relevant parts:

Article 8 War crimes [...]

2. For the purpose of this Statute, 'war crimes' means:

[...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

[...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization,

⁷⁴ Article 22(1) of the Statute states that '[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'. If certain conduct was, for example, criminalised under the Statute, was committed after the entry into force of the Statute, in a State Party, and by a national of that State, the *nullum crimen sine lege* principle, as incorporated in the aforementioned article, would be satisfied. In this regard, the Chamber also notes that, unlike the majority of the war crimes included in Article 8 of the Statute, the crimes of rape and sexual slavery were not taken directly from any particular prior treaty provision. Michael Cottier, for example, observes that '[t]he establishment of the list of war crimes of sexual violence under the Rome Statute and even more so the drafting of their elements [...] was to some extent a creative legislating exercise, since these forms of violence had not *per se* constituted war crimes in their own right prior to the adoption of the Rome Statute and since relating international humanitarian law rules were not overly precise'. Michael Cottier, 'War crimes', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck Hart Nomos, 2nd ed., 2008), p. 435.

and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

37. The Chamber observes that the Defence focusses its submissions on the scope of Common Article 3. The Defence submits that '[t]he crimes encompassed by Counts 6 and 9 [...] do not [...] fall within the scope of Common Article 3'⁷⁵ and 'the victim of a war crime in a non-international armed conflict must be a protected person within the meaning of Common Article 3'.⁷⁶ It is, however, clear that not all victims of war crimes listed in Article 8(2)(e) need to be protected persons for the purposes of Common Article 3.⁷⁷
38. The Chamber further notes that while Article 8(2)(c) of the Statute lists serious violations of Common Article 3, Article 8(2)(e)(vi) also makes reference to conduct constituting a serious violation of Common Article 3. Similarly, while Article 8(2)(a) of the Statute specifically addresses '[g]rave breaches of the Geneva Conventions of 12 August 1949' and therefore requires the crimes included therein to be committed against protected persons, Article 8(2)(b)(xxii) refers to conduct 'also constituting a grave breach of the Geneva Conventions'.
39. Before turning to the laws and customs of international and non-international armed conflicts, the Chamber therefore considers it appropriate to first have regard to the Court's statutory framework and determine whether rape and

⁷⁵ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 40.

⁷⁶ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 2.

⁷⁷ In this regard, the Chamber refers, for example, to Article 8(2)(e)(ix) and (x) of the Statute, which relate, respectively, to the treacherous killing or wounding of a 'combatant adversary' and the denial of quarter. The Chamber further notes that a number of war crimes regulate conduct, irrespective of the status of those (if any) who are harmed by such conduct (see Article 8(2)(e)(xiii), (xiv), and (xv), relating to the employing of specifically prohibited weapons). This is consistent with the underlying framework of international humanitarian law, which contains two forms of protection: i) protection of specifically defined groups of persons against certain forms of abuse; and ii) protection from the effect of the conduct of hostilities, including by the outlawing of certain means and methods of warfare. See the study on customary international humanitarian law, carried out and updated by the International Committee of the Red Cross ('ICRC'): Jean-Marie Henckaerts and Louise Doswald-Beck, *Study on Customary International Humanitarian Law* (Volumes 1 and 2, Cambridge University Press 2005) ('ICRC Study on Customary IHL'), in particular Rules 46, 64–65, 70, 72–74, 77–80 and 85–86. See also Article 1 of the Chemical Weapons Convention which states that '[e]ach State Party [...] undertakes *never under any circumstances* [...] [t]o use chemical weapons' (Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris, 13 January 1993 (emphasis added)).

sexual slavery under Article 8(2)(b)(xxii) and (e)(vi) are limited to acts constituting grave breaches of the Geneva Conventions of 1949 ('Geneva Conventions') or serious violations of Common Article 3, respectively. The consequence of such a finding would be that the victims of the alleged crimes would have to be persons protected under the Geneva Conventions,⁷⁸ or 'persons taking no active part in 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' ('Status Requirements').⁷⁹

Status Requirements under Article 8 of the Statute

40. The Chamber recalls that Article 8 of the Statute is divided into four categories of crimes: (i) grave breaches of the Geneva Conventions;⁸⁰ (ii) other serious violations of the laws and customs applicable in international armed conflict;⁸¹ (iii) serious violations of Common Article 3;⁸² and (iv) other serious violations of the laws and customs applicable in armed conflicts not of an international character.⁸³ Having regard to the statutory framework, the Chamber does not consider that, in situations of armed conflict, rape and sexual slavery were intended to only be capable of prosecution as grave breaches or serious violations of Common Article 3.⁸⁴ Understanding rape and sexual slavery, as included in paragraphs (2)(b)(xxii) and (e)(vi), as being grave breaches and serious violations of Common Article 3, respectively, and therefore incorporating the Status Requirements, runs contrary to the structure of Article 8. Indeed, if the Status Requirements were to apply to paragraphs (2)(b)(xxii)

⁷⁸ See Articles 50, 51, 130, and 147 of the 1949 Geneva Conventions, respectively.

⁷⁹ See Common Article 3 to the 1949 Geneva Conventions.

⁸⁰ Paragraph (2)(a).

⁸¹ Paragraph (2)(b).

⁸² Paragraph (2)(c).

⁸³ Paragraph (2)(e).

⁸⁴ Rape has previously been recognised as being capable of constituting a grave breach or serious violation of Common Article 3. See, *inter alia*, ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgment, 16 November 1998, paras 943 and 965.

and (e)(vi), the crimes contained therein would not be distinct from crimes which could be charged under (2)(a) and (c).⁸⁵ In such a case, it would also render the word ‘other’ in the *chapeaux* of the latter paragraphs meaningless in the context of (2)(b)(xxii) and (e)(vi). Moreover, while the *chapeaux* of paragraphs (2)(a) and (c) contain reference to specific victim status criteria, the Chamber notes that the *chapeaux* of paragraphs (2)(b) and (e) do not include such criteria.⁸⁶ Only certain crimes listed in these paragraphs include specifications regarding victim and/or perpetrator status.⁸⁷ However, as the Chamber has previously noted,⁸⁸ no particular victim status is explicitly mentioned for the crimes listed under (2)(b)(xxii) and (e)(vi).⁸⁹

41. With respect to the inclusion of ‘also’ in the wording of the crimes listed in (2)(b)(xxii) and (e)(vi),⁹⁰ the Chamber considers that ‘also’ is to be regarded as connecting the phrases ‘any other form of sexual violence’ and ‘constituting a grave breach of the Geneva Conventions’/‘constituting a serious violation of [Common Article 3]’.⁹¹ This understanding is supported by the Elements of Crimes where a distinction is drawn between the enumerated and unenumerated crimes in (2)(b)(xxii) and (e)(vi). The Elements of Crimes for the unenumerated ‘any other form of sexual violence’ contains an additional

⁸⁵ See also Michael Bothe, ‘War Crimes’, in Antonio Cassese *et al* (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Volume I, Oxford University Press 2002), p. 416.

⁸⁶ Instead, the *chapeaux* of these paragraphs each simply refer to the ‘established framework of international law’.

⁸⁷ See Article 8(2)(b)(i), (vi) (x), (xi), (xv), and (xxvi); and (e)(i), (vii), (ix), and (xi).

⁸⁸ Impugned Decision, ICC-01/04-02/06-892, para. 25.

⁸⁹ See also Appeals Judgment, ICC-01/04-02/06-1225, para. 29.

⁹⁰ The Chamber notes the Prosecution’s submissions on the lack of, or different use of, ‘also’ in other authentic language versions of the Statute (Consolidated Prosecution Response, ICC-01/04-02/06-1278, paras 37-39).

⁹¹ While it is possible to read ‘also’ as connecting the enumerated and unenumerated crimes mentioned in these paragraphs, whereby the word ‘also’ would be akin to ‘like’ (i.e. like the enumerated crimes in the Article, the ‘other sexual violence’ constitutes a grave breach or serious violation), the Chamber – in light of the further reasoning provided in the present paragraph – does not consider this to be a reasonable interpretation. Moreover, it is noted that even with this interpretation, such language need only indicate that rape and sexual slavery can be considered as grave breaches and serious violations of Common Article 3 and does not necessarily lead to an incorporation of the Status Requirements into the enumerated crimes. See Michael Cottier, ‘War crimes’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck Hart Nomos, 2nd ed., 2008), p. 453.

element, being that the conduct was ‘of a gravity comparable to that of a [grave breach of the Geneva Conventions/ serious violation of article 3 common to the four Geneva Conventions]’. By contrast, the Elements of Crimes for rape and sexual slavery as war crimes make no mention of such a requirement, or of any particular victim status being required.⁹² By further comparison, the Elements of Crimes for the grave breaches and serious violations of Common Article 3 listed in paragraphs (2)(a) and (c) do specify a victim status requirement.⁹³

42. Furthermore, academic commentary, from experts involved in the drafting process of the Statute and Elements of Crimes, explains that the language adopted in the Statute created considerable debate during the drafting of the Elements of Crimes, but that the aim of the language as adopted was to set a certain gravity threshold⁹⁴ and exclude lesser forms of sexual violence or harassment which would not amount to crimes of the most serious concern to the international community.⁹⁵ The drafting history of paragraphs (2)(b)(xxii) and (e)(vi) does not provide further clarification on whether the drafters intended to require victims of the crimes mentioned in these paragraphs to be subject to the Status Requirements, but it does show that ‘rape [...] and other sexual violence of *comparable gravity*’⁹⁶ were initially proposed to be included under a number of different headings in the Statute, including as examples of

⁹² Elements of Crimes, Article 8(2)(b)(xxii) and (e)(vi).

⁹³ For example, the elements related to Article 8(2)(a)(i) (War crime of wilful killing) require that ‘[t]he perpetrator killed one or more persons’ and that ‘[s]uch person or persons were protected under one or more of the Geneva Conventions of 1949’. The elements for Article 8(2)(c)(i) (War crime of murder) require that ‘[t]he perpetrator killed one or more persons’ and subsequently track the language of Common Article 3, when stating that ‘[s]uch person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities’.

⁹⁴ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2002), p. 332. Dörmann explains that the approach in the Elements of Crimes constituted a compromise designed to reconcile the statutory language with its aim, being the inclusion of a gravity threshold. He reports that certain delegations argued for an interpretation which simply acknowledges that sexual violence crimes could already be prosecuted as grave breaches, while others suggested that the crime required a grave breach to have occurred in addition to violent acts of a sexual nature. See also Gerhard Werle, *Principles of International Criminal Law* (2nd edition, T.M.C. Asser Press 2009), p. 393, para. 1063-1066.

⁹⁵ Michael Cottier, ‘War crimes’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck Hart Nomos, 2nd ed., 2008), p. 454.

⁹⁶ Emphasis added.

the grave breach of ‘wilfully causing great suffering or serious injury’⁹⁷ and the serious violation of Common Article 3 of outrages upon personal dignity.⁹⁸ However, sexual offences were subsequently put forward as distinct war crimes, with proposed language similar to that ultimately adopted, under the headings of other serious violations of the laws applicable in international and non-international armed conflicts, respectively.⁹⁹

43. In addition, the Chamber notes that – although the issue was not specifically litigated in previous cases – the Court’s case law has not required the Status Requirements to be proven when analysing rape as a war crime under Article 8(2)(b)(xxii) and (e)(vi).¹⁰⁰ Instead, it was noted by Trial Chamber III that only the contextual elements differ between rape as a war crime and as a crime against humanity.¹⁰¹
44. On the basis of the foregoing, the Chamber considers that the Court’s statutory framework does not require the victims of the crimes contained in Article 8(2)(b)(xxii) and (e)(vi) to be protected persons in the (limited) sense of grave breaches or Common Article 3. The Chamber will now analyse whether such limitations arise from the broader international legal framework.

⁹⁷ Preparatory Committee on the Establishment of an International Criminal Court (‘Preparatory Committee’), War Crimes (Draft Consolidated Text), 20 February 1997, A/AC.249/1997/WG.1/CRP.2 (‘Draft Text on War Crimes’), p. 1.

⁹⁸ Draft Text on War Crimes, p. 7; see also Preparatory Committee, War Crimes (Preliminary Text), 20 February 1997, Rev.1 (‘Preliminary Text on War Crimes’), p. 4. The Chamber notes, however, that it was also proposed as an example of the crime of ‘outrages upon personal dignity’, listed as falling under ‘Other serious violations of international humanitarian law’ (Draft Text on War Crimes, p. 7) and subsequently as under the heading ‘Other war crimes in violation of the laws and customs applicable in international armed conflict within the established framework of international law’ (Preliminary Text on War Crimes).

⁹⁹ Michael Cottier, ‘War crimes’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck Hart Nomos, 2nd ed., 2008), p. 452. See also Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997, A/AC.249/1997/L.9/Rev.1, 18 December 1997, pp. 9 and 11.

¹⁰⁰ See, *inter alia*, Trial Chamber II, *The Prosecutor v Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tEng, paras 962-984.

¹⁰¹ Trial Chamber III, *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (‘Bemba Trial Judgment’), paras 98-109.

The 'established framework of international law' applicable in international and non-international armed conflicts

45. As noted above, the *chapeaux* of paragraphs (2)(b) and (e) refer to other serious violations of the laws and customs applicable in international and non-international armed conflicts, 'within the established framework of international law'. Similarly, the 'Introduction' to the Elements of Crimes for Article 8 provides that the war crimes under paragraph 2 'shall be interpreted within the established framework of the international law of armed conflict', which is generally referred to as the law of armed conflict or international humanitarian law.
46. Rape and other forms of sexual violence have long been prohibited by international humanitarian law. The 1863 Lieber Code, generally regarded as the first (national) codification of the customary laws of war as applicable at the time, already stated that 'all rape' against persons in the invaded country is prohibited.¹⁰² The 1949 Geneva Conventions and 1977 Additional Protocols expressly prohibit rape in certain provisions,¹⁰³ as well as behaviour that would include sexual violence.¹⁰⁴ Moreover, the fundamental guarantees contained in Article 75 of Additional Protocol I, for any person in the power of a Party to the conflict, include the prohibition of 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'. In addition, various chambers of the International Criminal Tribunal for the former Yugoslavia ('ICTY') have held that rape or other forms of sexual assault are prohibited under customary international law

¹⁰² Article 44 of the Instructions for the Government of Armies of the United States in the Field of 24 April 1863.

¹⁰³ See Article 27 of the Fourth Geneva Convention of 1949; Article 76 of Additional Protocol I; and Article 4(2)(e) of Additional Protocol II.

¹⁰⁴ See Article 12 of the First Geneva Convention of 1949; Article 12 of the Second Geneva Convention of 1949; Article 14 of the Third Geneva Convention of 1949; Articles 75 and 77 of Additional Protocol I; and Common Article 3 (prohibiting 'violence to life and person', including cruel treatment, torture, and 'outrages upon personal dignity').

at all times, and in times of armed conflict constitute serious violations of international humanitarian law, thus qualifying as war crimes.¹⁰⁵ With respect to slavery, the Chamber recalls that it is prohibited in all forms under Additional Protocol II,¹⁰⁶ which therefore includes sexual slavery. Sexual slavery can also be considered to fall within the general prohibitions on indecent assault and attacks against honour as applicable to rape, as well as enforced prostitution.¹⁰⁷ Moreover, the prohibitions on rape and (sexual) slavery also form part of customary international humanitarian law, applicable both in times of international and non-international armed conflicts.¹⁰⁸

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

¹⁰⁵ The ICTY recalled in the *Furundžija* case that ‘rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949, Additional Protocol I of 1977 and Additional Protocol II of 1977. Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties.’ ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Judgment, 10 December 1998, para. 165. Footnotes omitted. See also ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998, para. 13 (‘[t]he argument that “torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute” is a misinterpretation of the Statute. Such acts are prohibited under customary international law at all times. [...] [I]n times of armed conflict, they also amount to violations of the laws or customs of war, which include the prohibitions in the Hague Conventions of 1907 and Common Article 3’); ICTY, *Prosecutor v. Delalić et al.* (, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, para. 476. Prior to these judgments, Meron noted that ‘[r]ape by soldiers has of course been prohibited by the law of war for centuries’. (Theodor Meron, ‘Rape As A Crime Under International Humanitarian Law’, 87 (1993) *American Journal of International Law*, p. 425). See also M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Kluwer, 2nd revised ed., 1999), p. 348, who submits that ‘[r]ape has long been considered a war crime under customary international law’.

¹⁰⁶ Article 4(2)(f) of Additional Protocol II.

¹⁰⁷ The concept of enforced prostitution as prohibited by Article 27 of the Fourth Geneva Convention of 1949 did not require a ‘pecuniary or other advantage’, as is the case for the elements of the war crime of enforced prostitution as included in the Statute, and therefore encompasses conduct that now might be more appropriately charged as sexual slavery (see Jean Pictet *et al.*, *Commentary to the Fourth Geneva Convention of 1949* (ICRC 1958), p. 205).

¹⁰⁸ As an expression thereof, see Rules 93 and 94 and the underlying practice of the ICRC Study on Customary IHL.

recalls the Martens clause,¹⁰⁹ which mandates that in situations not covered by specific agreements, ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.¹¹⁰ The Chamber additionally notes that the fundamental guarantees provisions refer to acts that ‘are and shall remain prohibited at any time and in any place whatsoever’ and as such apply to, and protect, all persons in the power of a Party to the conflict.¹¹¹

48. The Chamber further considers that limiting the scope of protection in the manner proposed by the Defence is contrary to the rationale of international humanitarian law, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or undermining their ability to carry out effective military operations. In doing so, international humanitarian law accepts that the parties’ objective to overcome the opposition will result in certain suffering, damage and harm, but specifically determines that such consequences ought only to follow from actions that are militarily necessary or that will result in a definite military advantage. Raping and sexually enslaving children under the age of 15 years,¹¹²

¹⁰⁹ The Martens Clause was first included in the preamble to the 1899 Hague Convention on the Laws and Customs of War on Land, and has since been restated in the 1949 Geneva Conventions and 1977 Additional Protocols (see the common article on denunciation in the 1949 Geneva Conventions (i.e. Articles 63, 62, 142, and 158, respectively); and more specifically Article 1(2) of Additional Protocol I and the Preamble of Additional Protocol II). See also International Court of Justice, *Legality of the threat or use of nuclear weapons*, Advisory Opinion, 8 July 1996, paras 78 and 87; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Judgment, 10 December 1998, para. 137; and United States Military Tribunal in Nuremberg, *Krupp et al.*, Case No. 214, Judgment of 31 July 1948.

¹¹⁰ The scope (and working) of the Martens Clause as set out by the International Law Commission, in the *United Nations Report of the International Law Commission on the Work of its Forty-sixth Session*, 1994, GAOR A/49/10, p. 317.

¹¹¹ Article 75 of Additional Protocol I refers to ‘a Party to the conflict’ (emphasis added) and therefore does not limit the fundamental guarantees to persons in the power of the opposing party.

¹¹² The Chamber recalls here that international humanitarian law contains specific rules aimed at protecting children from the effects of armed conflicts. See Article 50 of the Fourth Geneva Convention of 1949; Article 77 of Additional Protocol I; and Article 4(3) of Additional Protocol II.

or indeed any persons would never bring any accepted military advantage, nor can there ever be a necessity to engage in such conduct.¹¹³

49. While international humanitarian law allows combatants to participate directly in hostilities,¹¹⁴ and as part of this participation, to target combatant members of the opposing forces as well as civilians directly participating in hostilities, and further provides for certain justifications for conduct that results in damage to property¹¹⁵ or the death of persons that may not be legitimately targeted,¹¹⁶ there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.¹¹⁷
50. The Chamber further considers it noteworthy that the ICRC, in its updated commentary to the First Geneva Convention of 1949, addresses the question of ‘whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party’.¹¹⁸ When considering the ‘example’ of ‘members of armed forces who are sexually or otherwise abused by their own Party’, the ICRC explains that:

[t]he fact that [...] the abuse [is] committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This

¹¹³ Sivakumaran suggests that ‘[s]exual violence is prohibited, whether against civilians, members of the armed forces, or the armed group’. Sandesh Sivakumaran, *The law of non-international armed conflict* (Oxford University Press, 2012), p. 249.

¹¹⁴ See Article 43(2) of Additional Protocol I.

¹¹⁵ See, *inter alia*, Article 23(g) of the Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907.

¹¹⁶ See, for example, Articles 51(5)(b) and 57(2)(b) of Additional Protocol I, which allow for a certain amount of incidental (or collateral) damage, so long as it is not excessive in relation to the concrete and direct military advantage anticipated. The principle of proportionality is part of customary international humanitarian law and also applies to the conduct of hostilities in non-international armed conflict. See, *inter alia*, Rule 14 and the underlying practice of the ICRC Study on Customary IHL.

¹¹⁷ In this regard, the Chamber stresses that it is analysing whether the protection of rape and sexual slavery is limited so as to not include members of one’s own forces (in particular, children under 15 years of age) and does not need to address whether a person is protected by international humanitarian law against being killed by members of his or her own force.

¹¹⁸ ICRC, *Commentary to the First Geneva Convention of 1949* (ICRC 2016), para. 547, which forms part of a section entitled ‘The applicability of common Article 3 to all civilians and to a Party’s own armed forces’.

is supported by the fundamental character of common Article 3 which has been recognized as a ‘minimum yardstick’ in all armed conflicts and as a reflection of ‘elementary considerations of humanity’.¹¹⁹

This approach is consistent with the ICRC’s previous commentaries, in which it explains that due to the humanitarian principles underlying it, the categorisations of protected persons as adopted for the first two Geneva Conventions of 1949 were not intended to limit protection.¹²⁰

51. The Chamber finds additional support for the interpretation that the scope of protection against sexual violence under international humanitarian law is not to be understood as being limited to only certain categories of persons,¹²¹ in the fact that sexual slavery has been recognised as constituting a particular form of slavery.¹²² In this regard, the Chamber recalls that the first element of the Elements of Crimes of the war crime of sexual slavery is identical to the Statute’s definition of ‘enslavement’, as set out in Article 7(2)(c),¹²³ and is based

¹¹⁹ ICRC, *Commentary to the First Geneva Convention of 1949* (ICRC 2016), para. 547, referring to International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 1986, paras 218–219.

¹²⁰ See Jean Pictet *et al.* *Commentary to the First Geneva Convention of 1949*, (ICRC 1952), pp 145-146; and Jean Pictet *et al.* *Commentary to the Second Geneva Convention of 1949*, (ICRC 1960), pp 95-96. See similarly the treatment of the wounded and sick in international humanitarian law, for which no distinction may be made between people, regardless of status, except on medical grounds (Jean Pictet *et al.* *Commentary to the First Geneva Convention of 1949*, (ICRC 1952), p. 135 ([t]he wounded are to be respected just as much *when they are with their own army* or in no man’s land as when they have fallen into the hands of the enemy’)); Rule 110 of the ICRC Study on Customary IHL.

¹²¹ The Chamber notes that the Defence, in submitting that the scope of protection or criminalisation of violations are limited in such a way as to not include members of the same armed force, focusses on the international humanitarian law framework. However, the Chamber recalls that the crimes of rape and sexual slavery, as incorporated in Article 8 of the Statute, were not taken directly from any particular prior treaty provision (see, for example, Michael Cottier, ‘War crimes’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck Hart Nomos, 2nd ed., 2008), p. 435). The Chamber therefore considers it appropriate to also assess these crimes within the broader international legal framework.

¹²² See, for example, Pre-Trial Chamber I, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008. ICC-01/04-01/07-717, paras 430-431; and ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, 12 June 2002, paras 117-124.

¹²³ The first element of the war crime of sexual slavery requires that ‘[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons’. Pursuant to Article 7(2)(c) of the Statute, “[e]nslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person [...].’

on the definition of slavery as included in the Slavery Convention of 1926.¹²⁴ As the prohibition of slavery has *jus cogens* status under international law,¹²⁵ the prohibition of sexual slavery has the same status,¹²⁶ and as such, no derogation is permissible.¹²⁷ The Chamber further notes that rape can constitute an underlying act of torture or of genocide and that the prohibitions of torture and genocide are indisputably *jus cogens* norms. It has further been argued, and the majority of the Chamber accepts,¹²⁸ that the prohibition on rape itself has similarly attained *jus cogens* status under international law.¹²⁹

52. As a consequence of the prohibition against rape and sexual slavery being peremptory norms, such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status. However, this does not mean that any rape or instance of sexual slavery occurring during an armed conflict constitutes a war crime. In respect of the Defence's argument that rape and sexual slavery may constitute 'ordinary' crimes or crimes against humanity, but not war crimes, the Chamber recalls that the nexus requirement of the contextual elements of war crimes,

¹²⁴ The Slavery Convention defines slavery in Article 1(1) as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2002), p. 328.

¹²⁵ See, for example, International Court of Justice, *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment, 5 February 1970, paras 33-34.

¹²⁶ Special Court for Sierra Leone, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber II, 20 June 2007, para. 705 ('slavery for the purpose of sexual abuse is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour.');

Final report submitted by Special Rapporteur Gay J. McDougall, *Contemporary Forms of Slavery - Systematic rape, sexual slavery and slavery like practices during armed conflict*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fiftieth session, E/CN.4/Sub.2/1998/13, 22 June 1998, para. 30, stating that '[i]n all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm'.

¹²⁷ See Article 53 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 18232, 23 May 1969. Indeed, in the *Krnjelac* case, the ICTY noted that 'the prohibition against slavery in situations of armed conflict is an inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law' (ICTY, *Prosecutor v. Krnjelac*, Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para. 353).

¹²⁸ Judge Ozaki considers this statement to be unnecessary to the reasoning and that it could be misleading, and reserves her views on this accordingly.

¹²⁹ See, for example, Kelly Dawn Askin, *War Crimes against Women: Prosecutions in International War Crimes Tribunals* (Martinus Nijhoff Publishers 1997), p. 242. David S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine', 15 (2005) *Duke Journal of Comparative Law & International Law*, pp 219-257.

namely that the alleged conduct took place in the context of and was associated with an international or non-international armed conflict, will have to be satisfied in all cases, which is a factual assessment which will be conducted by the Chamber in analysing the evidence in the case.¹³⁰

53. Having found that the protection against sexual violence under international humanitarian law is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians not directly participating in hostilities, the Chamber does not need to address whether or not the persons alleged to have been ‘child soldiers’ in the facts and circumstances underlying Counts 6 and 9, or any persons alleged to have been held in sexual slavery by the UPC/FPLC, are to be considered as ‘members’ of this armed force at the relevant time. However, to the extent these persons could be considered as having been conscripted or enlisted into the UPC/FPLC, the Chamber considers it appropriate to stress that, as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law.¹³¹ It is further a recognised principle that one cannot benefit from one’s own

¹³⁰ This is reflected in the Court’s legal framework in the requirement that ‘the conduct took place in the context of and was associated with an [international armed conflict/conflict not of an international character]’. The leading test, as set out by the ICTY Appeals Chamber in its judgment in *Kunarac et al.*, explains that ‘[t]he 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 perpetrators’ ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed’. The ICTY Appeals Chamber further held that war crimes can be temporally removed from the fighting or occur in areas far away from the fighting. However, the incidents would need to be ‘closely related to the hostilities occurring in the other parts of the territories’; ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23-A, 23/1-A, Appeals Judgment, 12 June 2002, paras 57-59. See also *Bemba* Trial Judgment, ICC-01/05-01/08-3343, para. 142.

¹³¹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras 155-159 (‘[g]iven the character and importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall [...] [t]hey are also under an obligation not to render assistance in maintaining the situation created by such construction’); International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, 21 June 1971, p. 16; Article 41(2) of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (GA/56/83 (2001), Annex). International humanitarian law also specifically recognises the dangers of permitting a party to alter the status of certain protected persons, whether unilaterally or by agreement (see, for example, in the case of prisoners of war, Articles 6 and 7 of the Third Geneva Convention of 1949, providing that no agreement may adversely affect the situation of prisoners of war or restrict the rights conferred on them by the Convention, even where the prisoner ‘renounces’ such rights; see also Additional Protocol II, Article 4(3)(d), specifically in relation to children under 15 years of age who are captured following direct participation in hostilities).

unlawful conduct.¹³² It therefore cannot be the case that by committing a serious violation of international humanitarian law by incorporating, as alleged by the Prosecution, children under the age of 15 into an armed group, the protection of those children under that same body of law against sexual violence by members of that same armed group would cease as a result of the prior unlawful conduct.¹³³

C. Conclusion

54. Based on the foregoing analysis, the Chamber finds that members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally. Without prejudice to whether such acts have taken place, the Chamber therefore finds that it has jurisdiction over the conduct charged pursuant to Counts 6 and 9.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

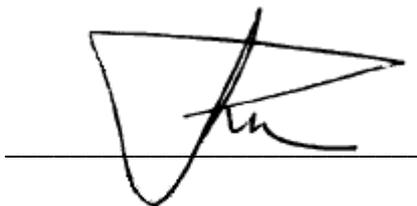
REJECTS the *Amicus Curiae* Request; and

FINDS that it has jurisdiction over the conduct described in Counts 6 and 9.

¹³² See International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, 25 September 1997, para. 110, referring to the Permanent Court of International Justice, *Case concerning the Factory of Chorzow (Claim for indemnity)*, Jurisdiction, 16 July 1927.

¹³³ See similarly, Confirmation Decision, ICC-01/04-02/06-309, para. 78.

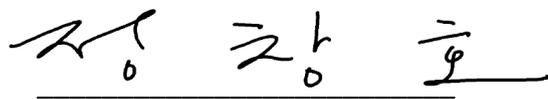
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'remr', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated 4 January 2017

At The Hague, The Netherlands