Cour Pénale Internationale

International Criminal Court

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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public *with* Public Annex

Prosecution's Response to Ntaganda's "Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9"

Source: **Office of the Prosecutor**

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Introduction

1. The Rome Statute is a treaty codifying the criminal conduct for which a person may be tried, and potentially convicted, at this Court. This was correctly emphasised by the Trial Chamber in the Decision.[1] From this simple fact, and the fundamental principle of legality (which prompted the codification in the first place), it must follow that the drafters *conclusively* determined in the Statute and Elements of Crimes *which crimes* are within the Court's jurisdiction, and *which elements* compose those crimes. To conclude otherwise would be to deprive of all integrity the Statute's regulation of the substantive criminal law to be applied by this Court. Further reference to international law beyond the Statute, although potentially important for numerous subsidiary matters, cannot alter these bedrock characteristics.

2. For these reasons, the Trial Chamber was right to treat Mr Ntaganda's jurisdictional challenge, questioning the *elements* of article 8(2)(e)(vi), as a question of interpretation of the Statute. It used the correct interpretive approach, and reached the correct answer. It could have ruled on this basis alone. Yet, out of an abundance of caution—and perhaps mindful of the Appeals Chamber's previous observation[2]—it *also* further verified that its analysis of the elements of articles 8(2)(b)(xxii) and 8(2)(e)(vi), as provided by the Statute, is consistent with the "established framework of international law". Since the Defence shows no error in these findings, the Appeal should be dismissed, and this Court's jurisdiction affirmed.

Submissions

3. The Defence mischaracterises the Decision as "a substantial and unjustified extension of the scope of war crimes law".[3] To the contrary, the Decision correctly interprets articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute, which are themselves

[1] Decision, para. 35.
[2] Remand Decision, paras. 30-31.
[3] Appeal, para. 2.

consistent with the established framework of international law as it has been for twenty years or more. Already, three Chambers of this Court have so decided.

4. The Defence's challenge—which they now advocate for the fifth and final time—rests on a contentious premise. It contends that international criminal law permits children, once unlawfully recruited into a non-State organised armed group, to be subject to further criminal abuse from members of that group, with no additional sanction, for so long as their bondage endures. In other words, one crime, unlawful enlistment or conscription, thus provides a 'get out of jail free' card for all the subsequent crimes, as far as the Court is concerned.

5. The Defence attempts to justify this claim have neither been wholly consistent in their reasoning and emphasis, nor convincing in overcoming the glaring injustice that such a claim represents. The Defence stresses those parts of article 8 which it considers to favour its position, but ignores the myriad elements which undermine it. The Defence appeals to an elusive, phantom requirement of customary international law for a general 'adverse party' requirement for war crimes, but declines to engage with the defects vitiating the authorities previously advanced. Nor does the Defence adequately or genuinely engage with the substantive treaty framework from which modern customary international humanitarian law springs—and where such a supposedly fundamental principle might be assumed to be obvious. The renewed Defence arguments concerning common article 3 of the Geneva Conventions ("CA3") contain similar flaws.

6. Following this approach, the Appeal itself contains no clearly differentiated grounds of appeal, and alleges no specific errors, but generally disputes the correctness of the entirety of the legal reasoning in the Decision. The Defence analysis is based on a piecemeal analysis of the Decision, and a fragmented approach both to the well-established principles for interpreting the Statute (as originally set

out in the Vienna Convention on the Law of Treaties, "VCLT") and to the established framework of international law.

7. Accordingly, to answer the Appeal fully, and to best assist the Appeals Chamber, the Prosecution will not attempt to follow the order of the Defence arguments, but will instead make the following submissions in response.

8. First, it will show that the Decision correctly interpreted article 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute in concluding that the Prosecution need not prove that victims meet any particular status or activity requirements based on the interpretation of the Statute alone. If the Appeals Chamber agrees on this first point, the Appeal must be dismissed outright.

9. Second, even if the Trial Chamber was obliged to look to the established framework of international law to identify any additional element of the crime governing the status or activities of the victim, although *not* included in the Statute or Elements of Crimes, the Decision correctly concluded that no such element exists for articles 8(2)(b)(xxii) or article 8(2)(e)(vi). If the Appeals Chamber agrees on this second point, the Appeal must likewise be dismissed. In particular:

- The Trial Chamber correctly rejected the notion that the victim and perpetrator of *all* crimes under articles 8(2)(b) and 8(2)(e), and articles 8(2)(b)(xxii) and 8(2)(e)(vi) in particular, must be affiliated to different parties to the conflict. To the contrary, an 'adverse party' requirement applies *only*:

  i.) to crimes under article 8(2)(a), where the victim is a protected person under Geneva Convention III ("GCIII") or Geneva Convention IV ("GCIV"), and

ii.) to specific crimes under article 8(2)(b) and 8(2)(e), not including articles 8(2)(b)(xxii) or 8(2)(e)(vi), where the Statute and Elements of Crimes expressly so require.

- The Trial Chamber correctly rejected the notion that the victim of some or all crimes under articles 8(2)(b) and 8(2)(e), and articles 8(2)(b)(xxii) and 8(2)(e)(vi) in particular, must fall within the protective scope of CA3. Furthermore, even if this was incorrect, the Decision is not materially affected because its disposition remains correct. The Court still retains jurisdiction over the conduct charged in counts 6 and 9, because the Trial Chamber can still lawfully determine that the requirements of CA3 are satisfied, based on proof that the victims were not taking active part in hostilities at the time(s) material to the charges.

10. Conversely, the Defence can *only* prevail in this appeal if it shows that the Trial Chamber misinterpreted article 8 and the unqualified prohibition of rape and sexual slavery; *and* that an 'adverse party' requirement applies to 8(2)(e)(vi) based on a binding rule of international law; *or* that CA3 applies to article 8(2)(e)(vi), *and* that it is a legal impossibility for CA3 to be satisfied on the facts and evidence of this case.

11. The jurisdictional finding in the Decision also remains correct, even if the equivalent charges of rape and sexual slavery are re-characterised from article 8(2)(e)(vi) to article 8(2)(b)(xxii). The Appeal may not succeed, however, if the Defence shows an error *only* in the Trial Chamber's view of article 8(2)(b)(xxii), since such an error would not materially affect the Decision. In this scenario, the Decision must still be affirmed because the Court would still correctly have jurisdiction over the charges as they are *presently* characterised.

I. The Trial Chamber correctly interpreted articles 8(2)(b)(xxii) and 8(2)(e)(vi) to conclude that rape and sexual slavery are unqualified by any status or activity requirement

12. The Trial Chamber rightly agreed with the Prosecution's primary position that its jurisdictional analysis must begin—and could, indeed, end—by interpreting the Statute itself, applying the established canons of interpretation. Doing so, the Chamber correctly found that nothing in the *chapeaux* of articles 8(2)(b) and 8(2)(e), or in the text of articles 8(2)(b)(xxii) or 8(2)(e)(vi)—the offence charged in counts 6 and 9—imposes any limit on the persons protected from rape and sexual violence. Nor is any such limit found in the context of article 8, or in its object and purpose, or in the established framework of international law to which article 8 also refers. To the contrary, the universal prohibition of sexual violence and the special legal protection of children likewise compel the conclusion reached in the Decision—that this Court must have jurisdiction over the conduct charged in counts 6 and 9.

I.A. Conduct punishable under article 8 need not necessarily also be punishable under customary international law, or another treaty

13. Article 8(2)(e)(vi) punishes, among other conduct:

> rape, sexual slavery […], and any other form of sexual violence *also* constituting a serious violation of article 3 common to the four Geneva Conventions.[4]

14. According to the *chapeau*, this offence is an "[o]ther serious violation[] of the laws and customs applicable in armed conflicts […] within the established framework of international law […]".[5]

15. The Trial Chamber correctly found that neither the references to the Geneva Conventions in article 8(2)(b)(xxii) and 8(2)(e)(vi),[6] nor the relevant *chapeaux*,[7] impose

[4] Statute, art. 8(2)(e)(vi) (emphasis added). *See also* art. 8(2)(b)(xxii) ("rape, sexual slavery [...], and any other form of sexual violence *also* constituting a grave breach of the Geneva Conventions", emphasis added).
[5] Statute, art. 8(2)(e). *See also* art. 8(2)(b).
[6] Decision, para. 40.
[7] Decision, paras. 41-44.

an obligation to prove the status or activities of victims of rape and sexual slavery, and dismissed the Defence's jurisdictional challenge. The Chamber considered:

- The ordinary meaning, context and drafting history of the terms of articles 8(2)(b)(xxii) and 8(2)(e)(vi), demonstrating that references to the Geneva Conventions qualify only the *gravity threshold* for the *unenumerated* acts—"any other form of sexual violence". The *unenumerated* conduct must be of *a gravity comparable* to that of a grave breach of the Geneva Conventions or a serious violation of CA3.[8] The Defence does not challenge this conclusion.

- The context provided by the structure of article 8, demonstrating that grave breaches of the Geneva Conventions and serious violations of CA3 are exclusively punished under articles 8(2)(a) and 8(2)(c) respectively; by contrast, articles 8(2)(b) and 8(2)(e) are concerned with "other" serious war crimes committed in armed conflicts within the established framework of international law.[9]

- 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.[10]

16. The Decision is also consistent with prior jurisprudence of this Court. The Trial Chamber in *Bemba* implicitly found no requirement to prove the status or activities of victims when determining that rape as a war crime had been committed,[11] observing that "only the contextual elements differ" between "rape as a war crime and rape as

[8] Decision, paras 41-44. 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).
[9] Decision, para. 41.
[10] Decision, paras. 45-52.
[11] *See Bemba* TJ, paras. 99-109, 631-638.

a crime against humanity".[12] Likewise, the *Katanga* Trial Chamber took a similar approach.[13] 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."[14]

17. The Chamber correctly found that rape and sexual slavery were not intended only as grave breaches and serious violations of CA3:[15] "[u]nderstanding rape and sexual slavery, as included in articles 8(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",[16] which makes no express reference to such requirement. This conclusion was based a proper interpretation of article 8, applying the principles in articles 31-32 of the VCLT. The Defence shows no error in the Chamber's conclusion or reasoning.

18. The Chamber properly observed that "the Statute is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it" [17] and that article 8 is "an expression of the States Parties' desire to criminalise the behaviour concerned."[18] Contrary to the Defence's submission,[19] provisions under article 8(2)(b) and (e) are not limited to the scope of customary international law and behaviour criminalised under the Statute might not "have been subject to prior criminalisation pursuant to a treaty or customary rule of international law"[20]. This is consistent with article 21 requiring the Court to apply "in the first place" the Statute,

[12] *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.
[13] *Katanga* TJ, paras. 962, 974. *See also* paras. 963-972, 975-984.
[14] 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").
[15] Decision, para. 40.
[16] Decision, para. 40 (emphasis added)..
[17] Decision, para. 35.
[18] Decision, para. 35.
[19] Appeal, para. 29.
[20] Decision, para. 35. The Defence acknowledges States are not forbidden from "broadening the requirements of international humanitarian law, or from criminalizing those broader requirements": Appeal, para. 30.

Elements and Rules, and only in case of a lacuna, the "applicable treaties and principles and rules of international law".

19. To reach this conclusion the Chamber properly found that the reference i) to the Geneva Conventions in articles 8(2)(b)(xxii) and (2)(e)(vi)[21] and ii) to the "established framework of international law" in the *chapeaux* of articles 8(2)(b) and (2)(e)[22] should not be read as introducing new elements and restrictions derived from customary international law not expressly provided in the Statute or the Elements.

I.A.1. No status/activity requirement should be derived from reference to the Geneva Conventions in articles 8(2)(e)(vi) or 8(2)(b)(xxii)

20. The Chamber properly found that the reference to the Geneva Conventions in articles 8(2)(b)(xxii) and 8(2)(e)(vi) does not qualify the *enumerated* acts (including rape and sexual slavery) as grave breaches of the Geneva Conventions or serious violations of CA3.[23] Rather, it qualifies only the *unenumerated* acts ("any other form of sexual violence") and only for the purpose of setting "a certain gravity threshold and exclude lesser forms of sexual violence or harassment which would not amount to crimes of the most serious concern to the international community."[24] The scope of *unenumerated* acts might potentially be very broad indeed, including forms of purely verbal assault or harassment. By contrast, there is no such need for the *enumerated* acts, which the drafters specifically determined to fall within the subject-matter jurisdiction of the Court. A number of academic commentators take a similar view.[25]

21. The Chamber reached this conclusion because the word 'also' "is to be regarded as connecting the phrases 'any other form of sexual violence' and 'constituting a

[21] Decision, para. 41.
[22] Decision, para. 40.
[23] Decision, paras. 41-42.
[24] Decision, para. 42. *See also* 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).
[25] *See* Ambos, p. 168; Cottier et al, p. 502 (mn. 738, discussing article 8(2)(b)(xxii), analogous to article 8(2)(e)(vi)).

grave breach of the Geneva Conventions'/'constituting a serious violation of [Common Article 3].'"[26] An analysis of the lack of (or different use of) the word 'also' in other authentic languages supports this conclusion. While some ambiguity as to whether 'also' qualifies *enumerated* acts exists in the English, Arabic and Spanish versions,[27] this reading is not supported by the other equally authentic linguistic versions of the Statute, which qualify only the *unenumerated* acts by reference to grave breaches or serious violations of CA3.[28] The approach taken in the Chinese, French, and Russian versions best reconciles the different linguistic versions of the texts, having regard to the context of articles 8(2)(b)(xxii) and 8(2)(e)(vi) and their object and purpose.[29]

22. The Chamber further noted that this interpretation is consistent with the Elements of Crimes.[30] Article 8(2)(e)(vi)-6, Element 2 states:

> The conduct was of a *gravity comparable* to that of a serious violation of article 3 common to the four Geneva Conventions.[31]

[26] Decision, para. 41. The Chamber noted the Prosecution's submission on the use of the term "also" in other authentic language versions of the Statute: Decision, fn. 90 (referring to Response, paras 37-39).
[27] 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). The same applies to the Arabic and Spanish versions of article 8(2)(b)(xxii).
[28] 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. 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. 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. The same applies to the Chinese, French, and Russian versions of article 8(2)(b)(xxii).
[29] *See* Asset Freezing Appeal Judgment, paras. 61-62; VCLT, arts. 31-33.
[30] Decision, para. 41.
[31] Elements of Crimes, art. 8(2)(e)(vi)-6, Element 2 (emphasis added). The same applies to the analogous article 8(2)(b)(xxii)-6, Element 2 ("The conduct was of a *gravity comparable* to that of a grave breach of the Geneva Conventions", emphasis added). A similar approach is taken for other forms of sexual violence constituting crimes against humanity: *see e.g.* Statute, art. 7(g).

23. As the Chamber properly noted,[32] the Elements of Crimes acknowledge the relevance of grave breaches of the Geneva Conventions and serious violations of CA3 only for the *unenumerated* "other forms of sexual violence". Even in this regard, they do not provide that the legal requirements for grave breaches or serious violations of CA3 are imported into articles 8(2)(b)(xxii) and 8(2)(e)(vi). Rather, they require that the conduct was "of a gravity comparable to that of" a grave breach of the Geneva Conventions[33] or of a serious violation of CA3.[34]

24. Nothing in the Elements of Crimes acknowledges *any* requirement that victims of either the *enumerated* or *unenumerated* acts in articles 8(2)(b)(xxii) and 8(2)(e)(vi) must fall within the protective scope of grave breaches of the Geneva Conventions or serious violations of CA3.[35] This is in striking contrast to the express inclusion of such a requirement for *all* offences punishable under articles 8(2)(a) and 8(2)(c).[36] Likewise, in circumstances where the activities or status of a victim is material to liability under articles 8(2)(b) and 8(2)(e), the Elements of Crimes expressly set out such a requirement.[37]

25. Although auxiliary in nature, the Elements were adopted by a 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,

[32] Decision, paras. 41-42.
[33] *See* Elements of Crimes, art. 8(2)(b)(xxii)-6, Element 2, imposing a *gravity* requirement, but not incorporating the legal elements of grave breaches of the Geneva Conventions.
[34] *See* Elements of Crimes, art. 8(2)(e)(vi)-6, Element 2, imposing a *gravity* requirement, but not incorporating the legal elements of CA3.
[35] *See generally* Elements of Crimes, art. 8(2)(e)(vi)-1 to 8(2)(e)(vi)-6. *See further* ICRC Text on Article 8, Annex III, p.124 (expressly noting, during the drafting of the Elements of Crimes, that article 8(2)(e)(vi) does not include a restriction to those not taking active part in hostilities). On the ICRC role in this process, *see* Von Hebel, pp. 109-111.
[36] *See e.g.* Elements of Crimes, art. 8(2)(a)(i), Element 2 ("Such person or persons were protected under one or more of the Geneva Conventions of 1949"); 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).
[37] *See e.g.* Elements of Crimes, arts. 8(2)(b)(x)-1, Element 4; 8(2)(b)(x)-2, Element 4; 8(2)(e)(ix), Element 5 (requiring that the victim(s) "belonged to an adverse party"); 8(2)(e)(xi)-1, Element 4; 8(2)(e)(xi)-2, Element 4.

although the Elements of Crimes must be "consistent with the Statute",[38] they "*shall* assist the Court in the interpretation and application" of, *inter alia*, article 8.[39]

26. The Defence did not challenge the Chamber's conclusion that reference to the Geneva Conventions in article 8(2)(b)(xxii) and 8(2)(e)(vi) does not impose any status/activity requirement, but only a gravity threshold for the *unenumerated* forms of sexual violence. The only way for the Defence to win this appeal is then to convince the Appeals Chamber that the reference to the "established framework of international law" in the *chapeaux* of articles 8(2)(b) and 8(2)(e) mandates to import from customary international law the status/activity requirement not expressly provided under articles 8(2)(b) and 8(2)(e). However, as the next section will show, the Defence has failed to do so.

I.A.2. No status/activity requirement should be derived from reference to the "established framework of international law" in the chapeaux of articles 8(2)(e) and 8(2)(b)

27. The Chamber correctly found that provisions under articles 8(2)(b) and 8(2)(e) are not limited to the scope of customary international law and that behaviour criminalised under the Statute might not necessarily "have been subject to prior criminalisation pursuant to a treaty or customary rule of international law".[40]

28. The Defence argues instead that the Chamber should have imported additional new elements not expressly included in the Statute, but allegedly required for war crimes under customary international law—such as a status/activity requirement.[41] It submits that provisions under articles 8(2)(b) and 8(2)(e) are "expressly made subject" to customary international law by the reference to "the established framework of international law" contained in their respective *chapeaux*.[42] In the

[38] Statute, art. 9(3).
[39] Statute, art. 9(1) (emphasis added).
[40] Decision, para. 35. As the Defence acknowledged States are not forbidden from "broadening the requirements of international humanitarian law, of from criminalizing those boarder requirements": Appeal, para. 30.
[41] Appeal, para. 29.
[42] Appeal, para. 31.

Defence's submission, the drafters' failure to "replicate" a status/activity requirement in articles 8(2)(b)(xxii) and 8(2)(e)(vi) "does not demonstrate *any intent* to depart from well-established customary law".[43]

29. The Defence has failed to give effect to the VCLT and to provide an interpretation of the ordinary meaning of the terms used (or *not* used) in article 8, taken in context and in light of the Statute's object and purpose.[44] Instead, its speculations on the "intent" of the drafters[45] do not explain why any status/activity requirement should apply even though it is *not* included in the text of articles 8(2)(b)(xxii) and (e)(vi).[46]

30. The Defence's reference to the ICTY Statute and jurisprudence,[47] which does not support the propositions claimed,[48] is in any event misplaced in this regard since the ICTY and ICC legal frameworks diverge precisely on the role of customary international law: while it is the primary source of the ICTY's applicable law, it should be considered at this Court only "in the second place" when there is a lacuna in the Statute.[49] Here no lacuna exists in articles 8(2)(b) and 8(2)(e).

31. The Chamber correctly concluded that the *statutory framework* does not limit criminal liability under articles 8(2)(b)(xxii) and 8(2)(e)(vi) for rape or sexual slavery on the basis of the status or activities of the victims.[50] To the contrary, such conduct is punishable at this Court whether committed against civilians, members of non-State

[43] Appeal, paras. 29, 31.
[44] *DRC* AD, para. 33.
[45] *Contra* Appeal, paras. 29, 31.
[46] And even though including this non-written requirement would render articles 8(2)(b) and (e) a duplication of articles 8(2)(a) and (c). *See below* para. 35.
[47] Appeal, paras. 31-34, 36.
[48] None of the cases cited supports the view that *all* war crimes must at least, and as a matter of principle, meet the requirements of CA3 or contain an 'adverse party'requirement: *contra* Appeal, para. 33 (fns. 53-55).
[49] *Ruto and Sang* AD, para. 105.
[50] Decision, para. 40.

organised armed groups, or members of State armed forces alike, regardless of their activities.[51]

32. As the Chamber properly found, the structure of article 8 reflects the distinction between the different types of war crimes over which this Court has subject-matter jurisdiction:[52] grave breaches of the Geneva Conventions (article 8(2)(a)); other serious violations of the laws and customs applicable in international armed conflict (article 8(2)(b)); serious violations of CA3 (article 8(2)(c)); and other serious violations of the laws and customs applicable in armed conflicts not of an international character (article 8(2)(e)).

33. The Court has jurisdiction to punish "grave breaches of the Geneva Conventions" in international armed conflicts under article 8(2)(a) as well as "serious violations of CA3" in non-international armed conflicts under article 8(2)(c). When such crimes are charged, the Prosecution must prove that the victim was protected, in the sense that he/she was "protected under one or more of the Geneva Conventions"[53] for article 8(2)(a), or that he/she was "either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities" for article 8(2)(c).[54] Additionally and separately, the Court has jurisdiction to punish "*[o]ther* serious violations of the laws and customs" applicable in international (article 8(2)(b)) and non-international (article 8(2)(e)) armed conflicts "within the established framework of international law".[55]

34. As the Defence acknowledged when discussing the differences between crimes under articles 8(2)(a) and 8(2)(b), the grave breaches regime "was imported as a single unit" as "a separate section" under sub-section (2)(a) with no serious dispute

[51] *See also* Sivakumaran, p. 249.
[52] Decision, para. 40.
[53] *See e.g.* Elements of Crimes, art. 8(2)(a)(i), Element 2
[54] *See e.g.* Elements of Crimes, art. 8(2)(c)(i)-1, Element 2.
[55] Axiomatically, these are serious violations "other" than those prohibited by CA3, which are addressed under article 8(2)(c) of the Statute.

about the wording, whereas "the wording of almost every single enumerated crime under sub-section (b) was subject to discussion."[56]

35. Given the structure of article 8, it would make no sense if the *chapeaux* reference to "the established framework of international law" was understood to import the elements of articles 8(2)(a) into article 8(2)(b), and the elements of article 8(2)(c) into article 8(2)(e). This would, perversely, define the scope of crimes which the drafters had *not* drawn from the Geneva Conventions (but rather from the "laws and customs" of war and "international law" more generally) by the requirements of the Geneva Conventions. Precisely because "the wording of almost every single enumerated crime" under articles 8(2)(b) and 8(2)(e) was subject to thorough discussions among the drafters,[57] it would be unreasonable to suggest that some additional unwritten element should be uncritically derived from a "separate section" "reflecting the exact, or near-exact wording in the Geneva Conventions."[58]

36. As the Chamber properly noted, "the crimes [under articles 8(2(b)(xxii) and 8(2)(e)(vi)] would not be distinct from crimes which could be charged under (2)(a) and (c)"[59] and found that the Defence's proposed interpretation would render the operative clause "*other* serious violations" meaningless in the context of articles 8(2)(b)(xxii) and (e)(vi).[60] Such an interpretation would be incorrect, and inconsistent with the Statute, the Elements of Crimes, customary international law, and the common understanding of the constituent treaties of international humanitarian law.

37. The Defence partially disagrees with this conclusion[61] and argues that, even if any status/activity requirement applies to article 8(2)(b)(xxii), there would be no

[56] Appeal, para. 36.
[57] *See* Appeal, para. 36.
[58] Appeal, para. 37.
[59] Decision, para. 40.
[60] Decision, para. 40.
[61] The Defence does not challenge the Chamber's conclusion that by incorporating the status/activity requirement in article (8)(2)(e)(vi) the crimes contained therein would not be distinct from crimes which could

redundancy because there is no "textual overlap" with article 8(2)(a).[62] This overly formalistic approach ignores that, if the said requirement applied to article 8(2)(b)(xxii), the two provisions would cover identical forms of rape and sexual violence, making article 8(2)(b)(xxii) redundant—unless the Defence is suggesting that rape and other forms of sexual violence are not grave breaches of the Geneva Conventions.[63] The same can be said for other crimes enumerated under article 8(2)(b)(xxii), not expressly listed—and yet criminalised as grave breaches—under article 8(2)(a).[64]

38. The Defence further misunderstands the Chamber's reasoning when it argues that in any event the "redundancy argument" is not relevant to "infer the legislative intent".[65] Following the VCLT principles of interpretation the Chamber favoured an interpretation of article 8(2)(b) and (e) that best accords with the ordinary meaning of the terms (that *do not* include any status/activity requirement) and that is not repetitive or inconsistent with the context of article 8 and the Statute in general. It is a basic principle of statutory interpretation that all words of a statute are meaningful and should be given effect if possible.[66] An interpretation that renders a word redundant should be rejected. In other words, contextual interpretations must favour a harmonised reading of the text avoiding redundancies or inconsistencies.[67]

39. In essence, the Defence proposes departing from the ordinary meaning of the text and rendering articles 8(2)(b) and 8(2)(e) meaningless repetitions of articles 8(2)(a) and 8(2)(c). This is the opposite of what article 32 of the VCLT mandates: the Defence approach to supplementary means of interpretation[68] creates—rather than

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be charged under 8(2)(c). *See* Appeal, paras. 37-38 (exclusively addressing the relationship between article (8)(2)(a) and article (8)(2)(b)(xxii)); Decision, para. 40.
[62] Appeal, para. 37.
[63] The same can be said for several other conducts provided under article 8(2)(b)(xxii).
[64] *See* Decision, para. 40. *Contra* Appeal, para. 37
[65] Appeal, para. 39.
[66] This is reflected in the principle "*ut res magis valeat quam pereat"*.
[67] *See below* fn. 182.
[68] *See* Appeal, para. 34.

resolves—a result which is manifestly absurd and unreasonable.[69] The Defence may or may not be correct when stating that other offences overlap in the Statute.[70] However, rather than advancing an interpretation that reduces any existing duplication, the Defence proposes a theory creating *new* duplications.

40. The Defence further argues that "redundancy would be eliminated *if* the 'established framework of international law' under (b) permits a *different* status requirement than is dictated […] under (a)" and that "[t]his *may or may not be the case* depending on the state of the law."[71] This argument is based on an erroneous understanding of what the expression in the *chapeaux* of article 8(2)(b) and (e) ("within the established framework of international law") might import from customary international law.[72]

41. The Defence's submissions appear to be based on the premise that the expression "within the established framework of international law" works as a "blank cheque" circumventing article 21,[73] and allowing customary international law (a secondary source) to be applied even if there is no lacuna in the Statute (a primary source).[74] This unsupported interpretation of the *chapeaux* of article 8(2)(b) and (e) is inconsistent with the principle of legality enshrined in articles 22 and 23 because it defeats the drafters' efforts to strictly define the punishable crimes,[75] and to mandate convictions exclusively in accordance with the Statute.[76]

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[69] *Cf.* VCLT, art. 32 (conditioning recourse to supplementary means of interpretation if the ordinary meaning leads to a result which is "manifestly absurd or unreasonable").
[70] Appeal, para. 39.
[71] Appeal, para. 38.
[72] Appeal, para. 69.
[73] *See* Appeal, paras. 69-73. The Defence states: "do the words 'within the established framework of international law import any general status requirements in respect of the crimes enumerated in parts (b) and (e)? The Chamber did not even attempt to answer this question": Appeal, para. 69. It provides no concrete answer.
[74] *Ruto and Sang* AD, para. 105 ("pursuant to article 21(1) of the Statute, recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules of Procedure and Evidence.").
[75] Statute, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted").
[76] Statute, art. 23 ("A person convicted by the Court may be punished only in accordance with this Statute").

42. Unlike the ICTY and ICTR, the ICC Statute is a treaty that does not merely identify the crimes subject to its jurisdiction and leave the definition of their elements to customary international law. Following a stricter approach to the principle of legality, crimes are defined in the Statute and the Elements, and customary law may play a role only in case of a lacuna.[77] Contrary to the Defence's erroneous premise,[78] when properly read in context, the expression "within the established framework of international law" contained in the *chapeaux* of articles 8(2)(b) and (e) simply reiterates that the acts listed *are* indeed serious violations of laws and customs applicable in international and non-international armed conflicts respectively, in light of the established framework of international law.

43. The reference to the "established framework of international law" is thus meant to guide the *interpretation* of article 8 in its statutorily prescribed elements and *not to introduce additional elements or acts to limit or expand the scope of its application*.[79] It 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".[80]

[77] *Ruto and Sang* AD, para. 105.
[78] Appeal, paras. 38, 69-73.
[79] *Contra* Appeal, para. 29.
[80] *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

44. Article 8(2)(e) thus reads:

> […] 2. For the purpose of this Statute, 'war crimes' means: […] (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*: […][81]

45. The *chapeau* makes clear that only acts included in the list under article 8(2)(e) are punishable ("namely, any of the following acts"). The same applies to the *chapeau* of article 8(2)(b).[82] Rather than leaving to the parties and the Judges to determine which "other serious violations" of the laws and customs applicable in armed conflicts within the established framework of international law should be punishable before this Court, the drafters opted to choose and "strictly construe" the definitions of the violations punishable under the Statute—consistently with the *nullum crimen, nulla poena sine lege* principle under articles 22 and 23.[83]

46. The plain language of the introduction to article 8 in the Elements of Crimes supports this understanding: "[t]he *elements for war crimes under article 8*, paragraph 2, of the Statute *shall be interpreted* within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea."[84] There is nothing suggesting that additional elements—other than those *listed under article 8*—for war crimes should be imported from the established framework of international law. Rather, such framework should merely assist in the interpretation of the crimes and elements as prescribed by the Statute and the Elements. Prior decisions of the Court provide

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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.

[81] Statute, art. 8(2)(e) (emphasis added).

[82] *See* art. 8(2)(b) ("[…] 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*: […]", emphasis added).

[83] *See also* Cottier et al, p. 354 (mn. 180: "The *chapeau* [of article 8(2)(b)] moreover adds 'within the established framework of international law'. This phrase may have been added to underline that the offen[c]es under article 8 para 2 (b) must be interpreted in line with 'established' IHL, possibly to exclude an all too progressive interpretation of, for instance, offen[c]es derived from [API]"); Schabas, p. 231.

[84] *See* Decision, para. 45 (emphasis added).

examples of what this means in practice—for example, in considering charges under article 8(2)(b)(i), the *Katanga and Ngudjolo* Pre-Trial Chamber affirmed that it would adopt definitions of key terms (not explained in the Statute), such as "'attack', 'civilians' and 'direct part in the hostilities'" consistent with CA3 and API.[85]

47. Contrary to the Defence's submission,[86] the Trial Chamber did address the question "whether such restrictions must be derived from the applicable law, including"[87] the reference to the established framework of international law in the *chapeaux*. It found that crimes contained in articles 8(2)(b)(xxii) and 8(2)(e)(vi) would be indistinguishable from those provided under articles 8(2)(a) and 8(2)(c), if the status/activity requirement applied to all provisions. This interpretation of articles 8(2)(b)(xxii) and 8(2)(e)(vi) and their *chapeaux*, consistent with the broader context of article 8, should be preferred. Such an interpretation supports the view that the *chapeaux* should not be interpreted as allowing the introduction of additional elements or restrictions in the conduct proscribed without qualification in articles 8(2)(b)(xxii) and 8(2)(e)(vi).[88]

I.B. International law supports the absolute prohibition of rape and sexual violence

48. The reference to the "established framework of international law" in articles 8(2)(b) and 8(2)(e) ensures that the crimes and elements provided by the Statute and the Elements are *interpreted* consistently with international law, and international humanitarian law in particular.[89]

49. The Chamber's conclusion that no status/activity requirement applies to the prohibition of rape and sexual slavery[90] was indeed fully consistent with the

[85] *See e.g. Katanga* Confirmation Decision, para. 276.
[86] Appeal, paras 69-73.
[87] Appeal, para. 72 (citing Remand Decision, para. 31).
[88] Decision, para. 40.
[89] Such reference cannot be understood to import any additional requirement or restriction into articles 8(2)(b) and 8(2)(e). *See above* paras. 41-47.
[90] Decision, para. 40.

established framework of international law: "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*".[91] This conclusion was based on bedrock international legal principles including the *jus cogens* status of rape and sexual slavery, the protective rationale of international humanitarian law, and the Martens clause.[92] The Defence fails to show any error in these respects.[93]

50. As the Prosecution had argued, punishing the commission of rape and sexual slavery in armed conflict, no matter the status or activities of the victim(s), is not only consistent with international law but demanded by it. Sexual violence is absolutely prohibited: a "standard of duty owed to all victims of war at all times",[94] manifest in numerous rules of international law, and demanding "consistent and rigorous prosecution".[95] Thus, it is not only prohibited by treaty-based humanitarian law,[96] but also customary humanitarian law[97] and international human rights law,[98] and is recognised to be a *jus cogens* norm[99]—a peremptory norm of such fundamental

[91] Decision, para. 52 (emphasis added).
[92] Decision, paras. 46-51.
[93] Appeal, paras. 47-53.
[94] 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). *See also* UNSC Resolution 1960, p. 1; UNSC Resolution 1888, p. 1; UNSC Resolution 1820, p. 2.
[95] UNSC Resolution 2106, p. 1. *See also* Meron, p. 428.
[96] *See e.g.* GCI, art. 12 (with no 'adverse party' requirement: *see* 2016 Commentary to Geneva Convention I, art. 12, paras. 77-80; *below* paras. 61-63); API, arts. 75-76 (with no 'adverse party' requirement: *see below* para. 67); APII, art. 4 (with no 'adverse party' requirement)
[97] *See e.g.* CIHL Rule 87 (humane treatment of civilians and persons *hors de combat*); CIHL Rule 90 (prohibiting torture, cruel or inhuman treatment and outrages upon personal dignity, recognising rape can constitute this prohibited conduct); CIHL Rule 93 (prohibiting rape and other forms of sexual violence); CIHL Rule 94 (prohibiting all forms of slavery, recognising that sexual slavery is slavery); CIHL Rule 135 (children affected by armed conflict must receive special respect and protection, including "in particular" protection against "all forms of sexual violence"). *See also* Mitchell, pp. 225-226, 234-257; Meron, p. 425 ("Rape by soldiers has of course been prohibited by the law of war for centuries").
[98] *See* ACHPR, art. 5; ACHR, arts. 5(2), 6; CAT, art. 1; ECHR, arts. 3-4; ICCPR, arts. 7-8. These rights are non-derogable: *see e.g.* ACHR, art. 27(2); CAT, art. 2(2); ECHR, art. 15(2); ICCPR, art. 4(2). *See also e.g.* Harris et al, p. 78 ("Cases of rape have been held to involve assaults that fall within Article 3", 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 ("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).
[99] *See e.g.* Mitchell, pp. 225-226; Meron (1989), pp. 31 (the prohibition of murder and torture (which includes rape) in CA3 "have attained the status of *jus cogens*"), 33-34; ILC State Responsibility Commentary, art. 26, p.

significance that it is outside the competence of States to conclude inconsistent treaties,[100] and which creates international obligations *erga omnes*.[101] The *jus cogens* nature of the prohibition of rape was thus potentially a relevant consideration in interpreting the Statute, consistent with article 31(3)(c) of the VCLT, as well as part of the "established framework of international law".

51. The Chamber agreed.[102] But this did not mean, however, that it considered the "jurisdictional prerequisites" to be "defeated by *jus cogens* norms".[103] It did not find any contradiction between its interpretation of the Statute and the established framework of international including the *jus cogens* norm.[104]

52. Likewise, the Chamber correctly found its interpretation of articles 8(2)(b)(xxii) and 8(2)(e)(vi) to be consistent with the "rationale of international humanitarian law" which aims to mitigate the suffering resulting from armed conflict[105]—as opposed to the Defence's interpretation, which would limit the scope of protection against egregious criminal conduct (rape and sexual slavery) that "would never bring any accepted military advantage" nor could ever constitute any kind of "necessity".[106] The Defence criticism of this reasoning is speculative: nothing in the Chamber's correct legal approach evokes the expansion of jurisdiction which he fears,[107] which

85 ("peremptory norms that are clearly accepted and recognized include the prohibitions of […] slavery, […] and torture"); 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"); 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.

[100] *See e.g.* Clapham, pp. 62, 339-346; Shaw, pp. 684-685. *See also e.g.* Mitchell, p. 229.

[101] *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; Sungi, pp. 127-129.

[102] Decision, para. 51.

[103] Appeal, para. 51.

[104] *See e.g.* Decision, para. 51, fn. 128 (Judge Ozaki considered the discussion of *jus cogens* "to be unnecessary to the reasoning"). *Contra* Appeal para. 50 (suggesting that the Chamber found that the proper interpretation of the Statute might be "defeated by *jus cogens* norms").

[105] Decision, para. 48-49. *Contra* Appeal, paras. 49-50.

[106] Decision, paras. 48.

[107] *Contra* Appeal, para. 50.

in any event is solved by a correct application of the nexus requirement, as the Chamber properly recognised.[108]

53. Indeed, it follows from the Chamber's observation concerning the plain lack of any conceivable military advantage underlying rape and sexual slavery that such acts are rightly—and universally—condemned as war crimes: serious violations of international humanitarian law. Nothing in the logic of international humanitarian law justifies or suggests any exception to this condemnation: acts of sexual violence are wholly *inside* the scope of international criminal law, as set out in express terms in the Statute. The object and purpose of the Statute thus favours the interpretation of articles 8(2)(b)(xxii) and 8(2)(e)(vi) which best promotes the effective punishment of these crimes, consistent with the requirements of fairness.

54. The Chamber correctly recalled, moreover, that the "Martens clause […] mandates in situations not covered by specific agreements, [that] '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"—and found its interpretation of article 8(2)(e)(vi) likewise to be consistent with this principle.[109]

55. In so doing, the Chamber did not invoke the Martens clause "to justify novel judicial interpretations of established principles through judicial activism that would delegitimize systems of law whose content and enforcement is based on consensus".[110] Rather, as mandated by the *chapeaux* of articles 8(2)(b) and 8(2)(e),[111] as well as article 31(3)(c) of the VCLT, it considered the Martens clause (among other customary or treaty based dispositions) to ensure that its interpretation of articles

[108] *See below* paras. 88-94.
[109] Decision, para. 47.
[110] *Contra* Appeal, para. 48.
[111] *See above* paras. 42-47.

8(2)(b)(xxi) and 8(2)(e)(vi) is consistent with the established framework of international law.

56. Nor is there any contradiction[112] between the Chamber's description of the Rome Statute as "a criminal code"[113] and its reference to the Martens clause, which regulates "situations not covered by specific agreements."[114] To the contrary, the Chamber interpreted the Statute applying the orthodox principles of the VCLT, as the Appeals Chamber has consistently required. In so doing—which included looking to the established framework of international law, as the Defence itself urged—it would indeed have been an error *not* to consider other relevant aspects of international humanitarian law, including the Martens clause, as a relevant reference for its enquiry. It is rather remarkable for the Defence to claim on the one hand that articles 8(2)(b)(xxi) and 8(2)(e)(vi) should include a non-written element allegedly derived from customary law and yet refuse to consider the Martens clause as a relevant reference for its enquiry.

II. The 'adverse party' requirement pertains only to grave breaches of GCIII and GCIV, punishable under article 8(2)(a), unless otherwise expressly provided

57. The Chamber did not err by failing to identify relevant "status requirements" which may exist in the established framework of international law.[115] To the contrary, it correctly concluded that neither article 8(2)(e)(vi) nor article 8(2)(b)(xxii) requires victims to be protected persons under the Geneva Conventions, or to fall within the protective scope of CA3,[116] and that the established framework of international law does not otherwise suggest any restriction on the victims of such conduct.[117]

[112] *Contra* Appeal, para. 48.
[113] Decision, para. 35.
[114] Decision, para. 47.
[115] *Contra* Appeal, para. 24.
[116] Decision, para. 44.
[117] *See e.g.* Decision, paras. 47-48, 51.

58. Notwithstanding its general criticism of the Decision, the Appeal is conspicuous for its failure to give any concrete basis for the 'adverse party' requirement which it implies the Chamber should have identified. Resort to vague generalisation and assumption is insufficient. Indeed, there is truth in Sivakumaran's observation that "things are not quite as self-evident as the traditional position suggests".[118] Any historic assumption that "a party would take care of its own forces", and that "the aim of international humanitarian law […] was to ensure that the party would also take care of the other side"[119] is long out of date and conceals a more nuanced reality—not only in the context of treaty and customary international humanitarian law themselves but, *a fortiori*, in international criminal law.

59. These submissions will thus address the general approach of treaty and customary international humanitarian law to the scope of war crimes, and place the Defence submissions in this context. This analysis entirely supports the structure of the Statute, and further demonstrates the correctness of the Chamber's conclusion in the Decision that there is no general 'adverse party' requirement which could be relevant to article 8(2)(b)(xxii) or article 8(2)(e)(vi).

II.A. The general 'adverse party' requirement is a creature of the complex legal regimes of GCIII and GCIV

60. The Defence submissions are superficial, and radically oversimplify the architecture of the Geneva Conventions, the Additional Protocols, and customary international law. In particular, they fail to reflect the key distinction between the complex legal regimes of GCIII and GCIV, and the general impetus towards ensuring minimum standards of humane treatment—backed up by individual criminal responsibility—to any person in the 'power' of another. As the Defence grudgingly acknowledges,[120] this progress was reflected in the broad protections

[118] Sivakumaran, p. 247.
[119] Sivakumaran, p. 247.
[120] *See* Appeal, para. 30 ("Some have argued […] that specific rules in [GCI and GCII] concerning wounded and shipwrecked persons are not subject to those status requirements").

provided to all persons *hors de combat* in GCI and GCII, and CA3, and then elaborated and developed in the Additional Protocols, customary international law, and the Statute of this Court. It will be demonstrated that what the Defence regards as the exception—the broad criminalisation of inhumane treatment perpetrated against a person in the power of another—is, in fact, the rule. International humanitarian law now departs from this principle only where necessary, as in GCIII and GCIV.

II.A.1. GCI and GCII afford equal protection to all parties to an international armed conflict

61. GCI (applying to the wounded and sick on land) and GCII (applying to the wounded, sick, and shipwrecked at sea) provide universal, equal protection. Thus, article 12—which is substantially the same in both treaties—provides that relevant persons shall be protected "in all circumstances […] without any adverse distinction", and prohibits any violence against them. Article 13—again, substantially the same for both GCI and GCII—likewise makes no further qualification by reference to affiliation.[121] The absence of any affiliation requirement is further confirmed by article 5 of GCI (unique to that treaty), which makes special protection "[f]or the protected persons who have fallen into the hands of the enemy", thus necessarily implying that *not all* protected persons under GCI will have done so.[122]

62. From the outset, article 12 of GCI was understood to mean that "[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."[123] Likewise, it was said of GCII: "there is nothing now which can justify a belligerent in making any adverse

[121] *See e.g.* 2016 Commentary to GCI, para. 1451 ("Article 13 is distinct from Article 4 of [GCIII] in a subtle but important way: […] it does not require a wounded or sick person to have fallen into enemy hands in order to be protected. This means that [GCI] also applies to wounded and sick members of a Party's own armed forces, in addition to those of the armed forces of the adverse Party").
[122] *See further e.g.* 1952 Commentary to GCI, pp. 64-65.
[123] 1952 Commentary to GCI, p. 135 (emphasis added). *See also* 2016 Commentary to GCI, paras. 544, 1339, 1370; Rodenhäuser, p. 188; Bellal, pp. 758-761 (*especially* p. 761, mns. 15-16). *Cf.* Kalshoven and Zegveld, pp. 45-46; Rowe, p. 17. *But*, concerning Rowe, *see further below* fn. 196.

distinction between wounded, sick or shipwrecked who require attention, *whether they be friend or foe*. They are on a footing of complete equality in the matter of their claims to protection, respect and care."[124] Nor was the equal protection of GCI and GCII unprecedented—rather, it was foreshadowed by the 1864 Convention,[125] the 1906 Convention,[126] and the 1929 Convention.[127] Even these historic instruments "indicated clearly enough at that time that", in protecting the wounded and sick, "no distinction should be drawn between brothers-in-arms, the enemy and allies."[128] The more elaborate 'no adverse distinction' clause in article 12 of GCI and GCII merely sought to reinforce the point.[129] Article 10 of API subsequently re-affirmed this broad protection yet again,[130] as did article 7 of APII;[131] these provisions potentially exceed GCI and GCII only in clarifying that *all* wounded, sick and shipwrecked are entitled

[124] Commentary to GCII, p. 91; *see also* p. 96.
[125] 1864 Convention, art. 6 ("Wounded or sick combatants, *to whatever nation they belong*, shall be collected and cared for", emphasis added). The 1864 Convention was ratified by 57 States Parties, including Brazil, China, Congo, France, Germany, Japan, Korea, the Russian Federation, South Africa, Sweden, Turkey, the United Kingdom, and the United States.
[126] 1906 Convention, art. 1 ("Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, *without distinction of nationality*, by the belligerent in whose power they are", emphasis added). The 1906 Convention was ratified by 52 States Parties, including Brazil, Congo, Egypt, France, Germany, Japan and Korea, the Russian Federation, Sweden, Turkey, the United Kingdom and the United States.
[127] 1929 Convention, art. 1 ("Officers and soldiers and other persons officially attacked to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically, *without distinction of nationality*, by the belligerent in whose power they may be", emphasis added). The 1929 Convention was ratified by 60 States Parties, including Australia, Brazil, Canada, China, Egypt, Ethiopia, France, Germany, Iraq, Israel, Japan, New Zealand, Pakistan, Russian Federation, South Africa, Sweden, Turkey, the United Kingdom, and the United States. *See also* Commentary to 1929 Geneva Convention, pp. 13-14.
[128] 1952 Commentary to GCI, p. 55. *See also* Sivakumaran, p. 248 ("what is clear is that states were not assumed to look after their own forces leaving only their treatment of the other side in need of regulation. After all, the 1864 Geneva Convention was a direct response to the Battle of Solferino, at which wounded soldiers of *both sides* were left to die", emphasis added).
[129] 1952 Commentary to GCI, p. 55; 2016 Commentary to GCI, para. 1392.
[130] API, art. 10 ("*[a]ll* the wounded, sick, and shipwrecked, *to whichever Party they belong*, shall be respected and protected" (emphasis added), with "no distinction among them founded on any grounds other than medical ones"). *See also* AP Commentary, p. 146 (mn. 445: "this paragraph concerns all the wounded, sick and shipwrecked in the sense given to these terms in the Protocol. 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 ship-wrecked*—which may seem self-evident, though it is perhaps a useful reminder—and above all, that the wounded, sick and shipwrecked of the adverse Party are entitled to the same treatment", emphasis added); Rodenhäuser, p. 188.
[131] *See also* AP Commentary, p. 1410 (mn. 4642: "No distinction is made […] according to whether they belong to the one party or the other concerned; the obligation to respect and protect is general and absolute").

to protection, even if they are not combatants at all.[132] Customary international law takes the same approach.[133]

63. Furthermore, the broad definitions of protected person in GCI and GCII are closely associated with the criminal law prohibitions, which flow from the same provisions. Thus, the specific acts prohibited by article 12 of both treaties (murder, violence to persons, torture, etc.—including sexual violence[134]) have been expressly recognised as the foundation of the treaties' grave breach regimes.[135] Such conduct is correspondingly punishable at this Court under article 8(2)(a). Accordingly, it has always been clear that this Court has jurisdiction, at least in this respect, over war crimes committed against victims with the *same* affiliation as the perpetrator—even within international armed conflict, and potentially between members of State armed forces. Wilfully killing a wounded comrade; wilfully failing to take all reasonable measures to search for and collect shipwrecked sailors no matter their affiliation[136]—there is nothing controversial in recognising this conduct, in principle, as a potential war crime.[137]

II.A.2. GCIII and GCIV are exceptional, and apply an 'adverse party' requirement as a consequence of their unique object and purpose

64. In contrast to GCI and GCII, the protections against grave breaches of GCIII and GCIV are limited to relevant persons who have "fallen into the power of the

[132] *See* AP Commentary, pp. 146 (mn. 444), 1410 (mn. 4642). This is consistent with the other advances in API: *see below* para. 67.
[133] *See* CIHL Rule 87; CIHL Rule 88; CIHL Rule 110; CIHL Rule 111.
[134] *See* 2016 Commentary to GCI, paras. 1399-1400.
[135] *See* Commentary to GCII, p. 91 (including n. 1); 2016 Commentary to GCI, paras. 1326, 2927; 1952 Commentary to GCI, p. 371.
[136] *See e.g.* Statute, art. 8(2)(a)(1). *See further* GCI, arts. 12-13; GCII, arts. 12-13, 18; *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"); Commentary to GCII, p. 267; 2016 Commentary to GCI, para. 2954; 1952 Commentary to GCI, p. 371.
[137] In such contexts, however, the Prosecution also notes the potential application of article 31 of the Statute.

enemy",[138] or who are "in the hands" of a party "of which they are not nationals".[139] Yet these tighter restrictions followed from the specialised functions of these treaties.

65. Thus, building upon the Hague Regulations and the 1929 POW Convention, GCIII aimed to protect a particular class—*combatants* in enemy hands, or prisoners of war.[140] In such a context, an adverse party requirement was not only common sense, but represented the very particular harm to be assuaged. The same was true of GCIV which, notwithstanding its "sweeping title", was intended to be of much more "limited scope"[141]—again, primarily, to protect *civilians* in enemy hands.[142]

66. Even the narrower scope of GCIII and GCIV was thus sufficient to ensure that the four Geneva Conventions provided seamless protection for persons in the hands of the adverse party[143]—but the common aspiration of the four conventions, as demonstrated by the content of CA3,[144] went still further: to guarantee minimum

[138] GCIII, art. 4. *See also* art. 5.
[139] GCIV, art. 4. *See also* art. 4(2) (other exceptions); Commentary to GCIV, pp. 48-49.
[140] *See e.g.* Commentary to GCIII, pp. 4, 45-46, 50. The relevance of the adverse party requirement in this context appears to have been considered self-evident, meriting no discussion at all.
[141] Kalshoven and Zegveld, p. 47.
[142] This is achieved in Part III of GCIV, which guarantees the "status and treatment" of protected persons defined in article 4, such as enemy aliens and persons in occupied territory: *see* Commentary to GCIV, p. 45. This was motivated *in part* by concern not to intrude into the sovereign governance by States of their own nationals: Commentary to GCIV, p. 46. However, subsequently, GCIV has been authoritatively interpreted to place far greater emphasis on the object and purpose of GCIV (protecting civilians in 'enemy' hands, however defined), rather than the "legal bond of nationality": *Tadić* AJ, paras. 165-166. The Preparatory Commission specifically left this interpretation open for the Court to follow: *see* Dörmann, p. 29. The Court has done so: *Katanga* Confirmation Decision, para. 291. *See also e.g.* AP Convention, p. 867 (mn. 3013). By contrast to Part III of GCIV, Part II—to which article 4 does not apply—provides specific limited measures for the benefit of the "whole of the populations of the countries in conflict, without any adverse distinction based", *inter alia*, on "nationality". *See* GCIV, arts. 4(3), 13-26; Kalshoven and Zegveld, pp. 58-60. *See further* Commentary to GCIV, p. 50 (Part II "really infringes to a slight extent the general rules according to which the purpose of the Convention is to protect individual men and women against arbitrary action on the part of the enemy. It could have formed a special Convention on its own").
[143] *See e.g.* Commentary to GCIV, p. 51 (referring to "a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by [GCIII], a civilian covered by [GCIV], or again, a member of the medical personnel or the armed forces who is covered by [GCI]. *There is no* intermediate status; nobody in enemy hands can be outside the law", emphasis supplied).
[144] *See e.g.* 1952 Commentary to GCI, p. 39 (CA3 reflects the principle of "respect for human personality", which is "not a product of the [Geneva] Conventions" but rather "is older than they are and independent of them. Until 1949 it only found expression in the Conventions in its application to military personnel. But it was not applied to them because of their military status: *it is concerned with persons, not as soldiers but as human beings, without regard to their uniform, their allegiance, their race or their religious or other beliefs,* without regard even to any obligations the authority on which they depend may have assumed in their name or on their behalf", emphasis added); Commentary to GCIV, p. 14 (the minimum requirement of humane treatment in CA3,

standards of humane treatment for *all*. Although only GCI and GCII *initially* implemented protections to realise this aspiration for sick, wounded, and shipwrecked combatants, more comprehensive protections subsequently crystallised in customary international law, building upon the developments in API and APII—and this was recognised, among other places, in the Rome Statute. Consequently, the narrower protected person regime of GCIII and GCIV now represents a limited *exception* to the prohibition of inhumane treatment in the established framework of international law, not the rule.

67. This progression of international humanitarian law towards a comprehensive criminal prohibition of inhumane treatment of persons in the 'power' of another was marked by the following milestones. In this context, the absence *arguendo* of a body of international prosecutions (so far) of "intra-forces sexual abuse" is immaterial.[145]

- In 1949, for *non-international* armed conflicts, the four Geneva Conventions established a minimum standard of humane treatment in CA3 for *all* persons not taking active part in hostilities, regardless of their affiliation.[146]

- In 1977, for *international* armed conflicts, article 75 of API—together with articles 76 (protection of women)[147] and 77 (protection of children)[148]—established a minimum standard of humane treatment for *all* persons "in the power of a Party to the conflict".[149] It was well understood that article 75

applicable "in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built"). *See further* 1952 Commentary to GCI, pp. 23, 48, 52; Commentary to GCII, pp. 23, 33-34; Commentary to GCIII, pp. 16, 28, 38; Commentary to GCIV, p. 38; 2016 Commentary to GCI, para. 547.

[145] *Contra* Appeal, para. 59 (quoting Byron, p. 39). *See also below* para. 78.

[146] *See further below* paras. 69-81.

[147] *See further* AP Commentary, p. 892 (mn. 3151: "The rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict, following the example of Part II of [GCIV]").

[148] *See further* AP Commentary, p. 900 (mn. 3181: "The first sentence is very similar to paragraph 1 of Article 76 […] Like women, children are entitled to special respect and must be protected against any form of indecent assault").

[149] Article 75(2) prohibits "at any time and in any place whatsoever", *inter alia*, murder, torture, outrages upon personal dignity, and "any form of indecent assault". Although API has been ratified by significantly fewer States (174 States Parties) than GCIV (196 States Parties), even States which are not party to API, such as the

imposed no adverse party requirement[150]—although, at this time, violations were only a matter of *State* responsibility. Violations did not constitute a grave breach of API,[151] which generally related instead to the conduct of hostilities.[152]

- In 1986, the ICJ recognised, with "no doubt", that CA3 represents the "minimum yardstick" of humane treatment and reflects "elementary considerations of humanity"—consequently, it held that, as a matter of customary international law, CA3 standards also apply in *international* armed conflicts.[153]

United States, have nonetheless agreed with much of its content and indeed recognised that it reflects customary international law in significant respects. These include, notably for the present purposes, articles 10-11, and 75: *see* Bellinger; Levie, at 339; Meron (1989), pp. 65, 68; Matheson, at 420, 423, 427-428; Sofaer, at 461-462, 470-471.

[150] AP Commentary, pp. 866 (mn. 3010, n. 8, cross-referring to pp. 837-838, *especially* mns. 2912-2915, which say of the phrase 'in the power of': "In our view, the expression covers not only persons who have fallen into the hands of a Party to the conflict, but also those over whom it exercises, or would be able to exercise, authority, for the sole reason that they live in territory under its control. If this interpretation is accepted, *the nationals of the Party to the conflict concerned may also invoke the provisions of this Section*, though some ambiguity remains on this point and the discussions during the Diplomatic Conference, particularly in Committee III, were long and difficult […] No doubt this led the Finnish Government to make the following declaration when it ratified the Protocol on 7 August 1980: 'With reference to [Article 75] of the Protocol, the Finnish Government declare their understanding that under Article 72, *the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article*, as well as the nationals of neutral or other States not Parties to the conflict […]'. *This declaration removes any remaining doubt*: the Finnish government commits itself to its own population explicitly and binds itself vis-à-vis the other Contracting States from which it expects a similar attitude. *In general, it must be conceded that the provisions of this Section apply to a Party to the conflict's own nationals, except where the article itself indicates otherwise*", emphasis added), 867-869 (mns. 3015-3021). *See also* Cryer et al (Third Edition), p. 283, fn. 142; Byron, pp. 38-39.

[151] *See* API, art. 85(2)-(4); AP Commentary, pp. 992-993 (mn. 3469: "Several delegations would have preferred also to mention Article 75 […], which applies to *all persons* 'affected by a situation referred to in Article 1' in the power of a Party to the conflict who do not benefit from more favourable treatment under the Conventions or the Protocol. They abandoned this idea in a spirit of compromise in the face of opposition from those who were afraid of extending the concept of grave breaches—subject to universal jurisdiction—to *breaches committed by a Party to the conflict against its own nationals*", emphasis added).

[152] *See* API, art. 85(3)-(4). *See also* Garraway, p. 388 ("it was a conscious decision at Rome not to include grave breaches of [API] in a separate section as was done with the grave breaches of the four Geneva Conventions themselves, because it was not considered that *all* had gained customary law status", emphasis added); Schabas, pp. 222, 224; Bothe, p. 395. Only article 11, which was primarily intended to develop protections against unlawful medical procedures, may import much of the content of articles 75-77 into the API grave breach regime—and this only applies where the relevant conduct is perpetrated by the adverse party: *see e.g.* API, art. 11 (providing that the "physical or mental health and integrity" of such persons "shall not be endangered"); AP Commentary, pp. 150 (mn. 455), 151 (mn. 459).

[153] *Nicaragua v. United States of America*, para. 218 (emphasis added). *See further* paras. 219 ("Because the minimum rules applicable to international and non-international armed conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict"), 255 ("general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not").

- In 1995, the ICTY Appeals Chamber confirmed that there is individual criminal responsibility for breaches of international humanitarian law *beyond* the Hague Regulations or the 'Geneva' grave breach regime.[154] It further agreed with the ICJ that, "at least with respect to the minimum rules in [CA3], the character of the conflict is irrelevant",[155] and affirmed that individual criminal responsibility attaches to serious breaches of these minimum rules.[156] This reasoning was rapidly digested and accepted by the international community,[157] and subsequently reiterated by the Appeals Chambers both of the ICTY and SCSL.[158]

- In 1998, the drafters of the Rome Statute further acknowledged the significance of articles 75-77 of API in universally prohibiting inhumane treatment of a person in the 'power' of another. They thus elected to incorporate conduct proscribed by these provisions as specific war crimes, both under article 8(2)(b) and (e): outrages upon personal dignity,[159] crimes of sexual violence,[160] and crimes against children.[161] Significantly, the Court—

[154] *See e.g. Tadić* Jurisdiction AD, paras. 92 ("When it decided to establish the International Tribunal, the Security Council did so to put a stop to *all* serious violations of international humanitarian law […] and not only special classes of them, namely 'grave breaches' of the Geneva Conventions or violations of the 'Hague law'", emphasis added), 93-94. *See also* Dörmann, p. 128 ("not all war crimes are in fact grave breaches, which are specifically listed in the Geneva Conventions and in API"). The Defence overstates, however, when apparently implying that article 8(2)(b) may be analogised to article 3 of the ICTY Statute, and operates as "a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction" of the Court: *contra* Appeal, para. 36. To the contrary, the drafters of the Rome Statute expressly delimited the offences over which this Court may exercise jurisdiction. *Cf.* Appeal, para. 44.
[155] *Tadić* Jurisdiction AD, para. 102. *See also* para. 137. *See further e.g.* Guilfoyle, p. 199; Garraway, p. 388.
[156] *Tadić* Jurisdiction AD, para. 134. The Defence seems to agree with this proposition: Appeal, para. 29.
[157] Cryer et al (Third Edition), p. 273.
[158] *Delalić* AJ, paras. 147, 150 ("It is both legally and morally untenable that the rules contained in [CA3], which constitute mandatory minimum rules applicable to internal armed conflicts [...] would not be applicable to conflicts of an international character. [...] It is logical that this minimum be applicable to international conflicts as *the substance of these core rules is identical*", emphasis added); *Fofana* Jurisdiction AD, para. 25 (the crimes in article 3 of the SCSL Statute ("Violations of [CA3] and [APII]") "are prohibited in *all* conflicts", emphasis added).
[159] Statute, art. 8(2)(b)(xxi). *Compare* API, art. 75(2)(b); *also* APII, art. 4(2)(e); CA3(c). *See further* Dörmann, pp. 315-316; Cottier et al, pp. 470-471 (mns. 616-618); La Haye (outrages), p. 183; Schabas, p. 249; Bothe, p. 414.
[160] Statute, art. 8(2)(b)(xxii). *Compare* API, arts. 75(2)(b), 76(1) ; *also* APII, art. 4(2)(e); GCIV, art. 27(2). *See further* Dörmann, pp. 332-333; Cottier et al, pp. 480 (mn. 658), 481 (mn. 662); La Haye (rape), p. 187; Bothe, p. 415

> and the Defence—have already acknowledged that crimes against children under article 8(2)(b)(xxii) indeed has no 'adverse party' requirement.[162]

68. Quite apart from its significance as this Court's primary source of law, the very structure of the Statute thus illustrates the general progression of international law, supplementing the narrower protections afforded by the 'grave breach' provisions under article 8(2)(a) with the broader approach of article 75 of API, among others, under article 8(2)(b). Since article 75 has no adverse party requirement, it is wholly unsurprising that its three chief descendants in article 8(2)(b) have none either. This broader protection afforded against rape by article 75, in comparison to the Geneva Conventions, also explains why it was implemented in the Statute under article 8(2)(b), and not article 8(2)(a).[163]

II.C. CA3 cannot properly be interpreted to contain an 'adverse party' requirement

69. As previously noted, CA3 is integral to *all four* Geneva Conventions, and not only gives a crucial insight into their underlying object and purpose[164] but also inspired key successor provisions such as article 75 of API and article 4 of APII.[165] It is thus highly significant that CA3, again, never qualified its protection against inhumane treatment based on a person's affiliation, but instead required proof only that they were not taking active part in hostilities at the material time.[166] This latter notion was an early way of conceptualising what it means to be in the 'power' of another person, as it was later expressed in article 75 of API.

70. CA3 protects without exception *all* persons

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[161] Statute, art. 8(2)(b)(xxvi). *Compare* API, arts. 75(2)(b), 77(1)-(3) ; *also* APII, arts. 4(2)(e), 4(3)(c)-(d); CRC, art. 38(2)-(3). *See further* Dörmann, pp. 376-377; Cottier et al, pp. 520-521 (mns. 798-800); Garraway (2001), p. 205; Schabas, pp. 285-286; Bothe, p. 416.
[162] *See Katanga* Confirmation Decision, para. 248 (concluding that this crime "can be committed by a perpetrator against individuals in his own party to the conflict"); Appeal, para. 58. *See also* Cryer et al (Third Edition), p. 283, fn. 142.
[163] *Contra* Appeal, para. 41.
[164] *See above* fn. 144.
[165] AP Commentary, pp. 871-872 (mn. 3037).
[166] The Prosecution agrees that CA3 imposes this requirement: *see e.g.* Appeal, paras. 29, 45, 60.

> *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 […] without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[167]

71. This "very wide"[168] scope was consciously linked to the equal protection afforded to *all* wounded and sick in GCI and GCII. "[I]n order to leave no possible loophole", and "to make sure that nothing was overlooked", the drafters further included the 'no adverse distinction' clause (later adopted also in article 75 of API and article 4(1) of APII), which was deliberately left as an open list.[169] Likewise, the identical formulation of CA3 in each of the four 1949 conventions was a deliberate indication of "the indivisible and inviolable nature of the principle proclaimed", applicable whatever the legal context.[170]

72. In 1977, CA3 was developed and supplemented by article 4(1) of APII, without modifying its existing conditions of application.[171] Again, article 4(1) protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities", "without any adverse distinction".[172] Again, nothing in this provision restricts its application to persons in the power of the adverse party, nor would this be consistent with its context or object and purpose.[173]

73. CA3 thus undoubtedly protects persons *beyond* those constituting 'protected persons' for the specific purposes of GCIII and GCIV. The Defence observation that

[167] CA3 (emphasis added).
[168] Commentary to GCII, p. 36.
[169] 1952 Commentary to GCI, p. 55.
[170] 1952 Commentary to GCI, pp. 52-53.
[171] APII, art. 1(1); Dinstein, p. 136. *See* AP Commentary, pp. 1366 (mn. 4514), 1368-1369 (mn. 4515).
[172] APII, art. 4(1).
[173] The Prosecution notes the passing observation in an earlier passage of the Commentary that this Part of APII generally applies "equally to all persons affected by the armed conflict who are in the *power of the enemy* (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians": AP Commentary, p. 1365 (mn. 4507, emphasis added). However, this observation is inconsistent not only with the plain wording of this Part of APII, and article 4 in particular (which includes no such limitation), but also the approach of CA3 and article 75 of API (*see above* fns. 150, 151), to which article 4 is very closely related. Moreover, subsequently, the Commentary itself expressly says of article 4 of APII: "*Ratione personae* it covers *all persons* affected by armed conflict within the meaning of Article 2 […] when they do not, or no longer, participate directly in hostilities": AP Commentary, pp. 1369-1370 (mn. 4520, emphasis added).

"[a]ny […] departure from the standard rules expressed in [CA3] […] would need to be evinced by clear State practice or treaty language" misses the point entirely[174]—CA3 itself is evidence, like GCI and GCII and API and APII, that there is no general 'adverse party' requirement in the established framework of international law. It is not a departure from the general rule; it *is* the general rule, subject to limited exceptions.

74. Indeed, both the ICTY and ICTR have taken a similarly broad approach to construing CA3.[175] Likewise, to the extent the Pre-Trial Chamber in this case considered CA3 and article 4(1) of APII 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."[176]

75. Most recently, the ICRC's updated 2016 commentary to GCI has expressly affirmed 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 [CA3]".[177] It explained:

> 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.[178]

76. To the extent that a victim is a civilian, the ICRC 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

[174] *Contra* Appeal, para. 30.
[175] *See e.g. Delalić* AJ, para. 420 (CA3 protects "*any* civilian not taking part in the hostilities", emphasis supplied); *Kvočka* AJ, para. 561 (ethnic background of a murder victim was irrelevant, since the victim was "detained" and thus "belonged to the group of persons protected by [CA3]"); *Tadić* TJ, para. 615; *Semanza* TJ, para. 365.
[176] Confirmation Decision, para. 77. *See also* paras. 79-80.
[177] 2016 Commentary to GCI, para. 549.
[178] 2016 Commentary to GCI, para. 545.

members of the general population not actively participating in hostilities" in a non-international armed conflict "are affiliated with one or other Party".[179] In other words, it may frequently be a misnomer to suggest that civilians necessarily have a meaningful affiliation for one side or the other.

77. Likewise, even if a particular victim is a member of an armed force or group party to the non-international armed conflict (thus where an affiliation might be objectively determined), the ICRC has 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 recognised as a 'minimum yardstick' in all armed conflicts and […] a reflection of 'elementary considerations of humanity'."[180]

78. Although it is true that State practice has not, hitherto, provided ready illustrations of the application of CA3 by a party to the conflict to its own forces, this is unsurprising given the various incentives upon States to treat their own forces properly.[181] Yet this does not make the interpretation of CA3—a binding and pre-existing *treaty* commitment—incorrect. Indeed, State practice is not decisive in interpreting the meaning of a treaty provision (even if that provision has also become customary law).[182] Moreover, it is not inconsistent with the overall purpose

[179] 2016 Commentary to GCI, para. 546.
[180] 2016 Commentary to GCI, para. 547. *See also above* fn. 153.
[181] 2016 Commentary to GCI, para. 548 (explaining that "a Party to a conflict will feel under a natural obligation to do so" or "will do so out of self-interest" or, "at least in the case of a State Party, domestic law and international human rights law require treatment at least equivalent to that of humane treatment in the sense of [CA3]"); Rodenhäuser, p. 190 ("State practice on this particular point is rare, which may not be surprising because states are in any case bound to respect minimum humanitarian guarantees against their own troops under international human rights law").
[182] First, as is well established, article 31(1) of the VCLT requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". None of these elements is necessarily dispositive. Second, "together with the context", article 31(3)(b) of the VCLT requires account to be taken of "subsequent practice in the application of the treaty *which establishes the agreement of the parties regarding its interpretation*" (emphasis added). Although such practice can be a "most important element in the interpretation of any treaty", it necessarily depends upon the identification of practice which establishes the Parties' views as to its proper interpretation—such practice may not necessarily exist, depending on all the particular circumstances. Where it is sought to rely upon an *absence* of certain conduct by States, that absence will most likely only be relevant if it cannot be explained by other factors. Moreover, the interplay of other relevant rules of international law—for example, international human

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.[183] 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.[184] For at least some kinds of non-State organised armed groups—and those most usually of particular concern for international criminal law—it may well be futile to expect the "domestic criminal law of the relevant belligerent" to effectively take the place of CA3.[185]

79. The Defence engages with almost none of this law. Rather, it criticises the ICRC's approach in the updated commentary to GCI, principally for the content of one footnote.[186] It asserts that the three "examples" described by the ICRC do "not come close to establishing that intra-force crimes are 'within the established framework of the international law of armed conflict'".[187] Yet this statement mistakes not only the purpose of the footnote in question, but also the ICRC's method in updating the commentary, and the legal arguments material to any supposed 'adverse party' requirement.

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rights law—may also be relevant in this respect, and indeed may themselves also be taken into account under article 31(3)(c) of the VCLT. *See generally* Aust, pp. 208, 214-217; Gardiner, pp. 162, 222, 262-267, 269-272, 288.

[183] This is not to say, however, that non-State organised armed groups are necessarily *unable* to provide adequate criminal justice—and, indeed, such groups are equally subject to the legal requirements not to pass sentences without judgment of a regularly constituted court and a fair trial, and to prevent and to punish breaches of international humanitarian law. *See e.g.* Sivakumaran (2009), *especially* pp. 495-498. *See also* Rodenhäuser, p/ 190.

[184] *See e.g.* Prosecution Pre-Trial Brief, paras. 534, 548, 556, 584.

[185] *Cf.* Cassese, p. 67; *Sesay* TJ, para. 1453. *See* Kleffner (2013), pp. 300-301 ("a potential loophole in respect of members of a party's own armed forces cannot be fulfilled satisfactorily by 'the criminal law of the State of the armed group concerned and human rights law', especially not in non-international armed conflicts. The criminal law of the State will, for all practical purposes, be of limited value. This is clearly epitomized by the very fact that a non-international armed conflict […] exists"). *See also* Rowe, p. 24 ("A recognition by states that they may have to consider obligations under international law owed to their own soldiers will be more likely to lead to their protection than an assumption that any protection can only be granted by national law or by parliamentary procedures").

[186] Appeal, paras. 54-56 (citing 2016 Commentary to GCI, para. 547, fn. 293).

[187] Appeal, para. 56.

- First, the footnote correctly cites the Confirmation Decision in this case,[188] the confirmation decision in *Katanga*,[189] and the adverse reasoning in *Sesay*—which, for the reasons subsequently explained, is wrong and should not be followed.[190] Accordingly, nothing in this footnote is legally incorrect, nor was the ICRC wrong in identifying these decisions as pertinent to its analysis.

- Second, the ICRC did not merely deduce its interpretation of CA3, and its broad scope, from these examples. To the contrary, as the ICRC itself explains, a rigorous and legally correct approach was taken to the interpretation of GCI itself.[191] The Defence entirely neglects this overall scheme.

- Third, the Defence is also wrong to imply that the legal justification for jurisdiction over the conduct charged in counts 6 and 9 amounts to no more than the updated ICRC commentary, and the examples cited in a single footnote. To the contrary, the updated commentary is just *one* part of the analysis of the scope of CA3. And the content of CA3 is, moreover, just one part of the analysis of the established framework of international law.

80. Moreover, the ICRC's understanding of CA3—which is consistent in its essentials with the previous commentaries, and indeed the text and drafting history of CA3 itself—finds further agreement in academic commentary. For example, Kleffner,[192] Sivakumaran,[193] Rodenhäuser,[194] Wells,[195] and Rowe[196] have all

[188] Confirmation Decision, paras. 76-82.
[189] *Katanga* Confirmation Decision, para. 248. *See also above* para. 68.
[190] *See below* para. 84.
[191] *See* 2016 Commentary to GCI, paras. 4 (noting the original commentaries were primarily based on drafting history of the 1949 conventions), 5 (noting the genuine need to take account of the subsequent practice in applying the 1949 conventions, and subsequent developments such as the 1977 protocols), 8-10 (basis for the ICRC's own interpretation), 11-14 (methodology by which the updated commentary was prepared), 16-35 (VCLT method of treaty interpretation applied), 36-50 (noting the relevance of subsequent practice and other relevant rules of international law).
[192] Kleffner (2015), p. 436 (mn. 6: recalling the 'no adverse distinction' language of CA3, which "militates against the view that that the extent of the notion of 'persons taking no active part in the hostilities' is limited in any way"). *See also* Kleffner (2013), pp. 297-300.
[193] Sivakumaran, p. 248 (CA3 "does not contain any limitation to one side or another. On the contrary, it provides for humane treatment 'in all circumstances'").

independently expressed views consistent with the ICRC's interpretation. Likewise, the views of other commentators are compatible with this natural reading of CA3, which they simply don't address.[197] Clear statements to the contrary are rare, and unelaborated.[198]

81. Finally, CA3 is notable for considering the existence of any 'adverse party' requirement because—consistent with its intention to provide a bedrock, universal guarantee of humane treatment—it expressly and deliberately rejected any requirement of reciprocity.[199] Resort to this notion can thus neither justify nor explain any supposed 'adverse party' requirement applying to CA3—or indeed related

[194] Rodenhäuser, at 189 (CA3 "does not exclude persons belonging to the party that is bound by the provision", and its object and purpose "would weigh in favour of a broad interpretation of its protective scope"). Rodenhäuser likewise points out that the reference in CA3(2) to "the absolute obligation to respect and to protect the wounded and sick" forms "part of the provision's context and suggests that [CA3] may entail obligations of parties vis-à-vis their own troops". *See above* para. 71. Rodenhäuser also considers that "[d]istinguishing between persons based on their membership in a party to a conflict would go against the cardinal principle of non-discrimination": Rodenhäuser, at 190.

[195] Wells, at 303-304 ("atrocities committed against children who are recruited into armed groups but who do not take an active or direct part in hostilities (for instance, girls recruited for sexual enslavement) can and should be prosecuted as serious violations of the laws of war under article 3" of the SCSL Statute, which grants jurisdiction over violations of CA3 and APII).

[196] Rowe, p. 16 (citing CA3 to support his view that "[d]uring a non-international armed conflict a state will clearly owe international obligations to certain categories of individuals (although most are likely to be *its own citizens*)", emphasis added). *See also* p. 17. Rowe also contemplates the possibility that similar obligations may extend towards the State's own armed forces, although does not seem to contemplate the application of CA3 on this point: pp. 18-19 However, he observes that the reference to the "established framework of international law" in article 8(2)(b) of the Statute would not "prevent an international obligation" of this kind "being owed by a state to its own nationals". Like the Trial Chamber (*see above* paras. 54-56), Rowe draws support from the Martens clause, noting that "[b]oth 'humanity' and the 'public conscience' may demand that a state owe obligations under international humanitarian law to its own soldiers": p. 18.

[197] *See e.g.* Dinstein, p. 134 (not commenting on any 'adverse party' issue either way, but not finding it necessary to entertain or consider such a notion).

[198] *See* Kolb, p. 44 (suggesting that CA3 applies only to persons "who find themselves in the control of the adverse party", but without directly relating this comment to the text or context of CA3). Kolb subsequently also acknowledges that this view of CA3 would depart both from APII and customary international law (which "benefit 'the human person' in general"), thus raising doubts over this interpretation of CA3).

[199] *See e.g.* 1952 Commentary to GCI, p. 51 ("Each of the Parties will thus be required to apply [CA3] by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party. *The obligation is absolute for each of the Parties, and independent of the obligation on the other Party. The reciprocity clause has been omitted intentionally.* It had already been omitted in the Stockholm draft, in spite of the fact that the latter provided for the application of the Convention as a whole to cases of non-international conflict; for *it was considered that the First and Second Conventions, unlike the Third and Fourth, set no difficult problems and implied no complicated material obligations. There was even less reason for including such a clause now that the obligation resting on the Parties was limited to the observance of the principles underlying the Conventions and of a few essential rules*", emphasis added); Commentary to GCII, p. 34; Commentary to GCIII, p. 37; Commentary to GCIV, p. 37. *See also* 2016 Commentary to GCI, paras. 503-508, 562. *See also* Dinstein, p. 133.

provisions such as article 75 of API and article 4 of APII.[200] Moreover, and conversely, considerations of reciprocity may help to explain *why* complex treaties such as GCIII and GCIV *do* apply an adverse party requirement—because of the multifaceted rights and obligations set up for protected persons thereunder, which far exceed simple protection against criminal inhumane treatment. Yet, for the very same reasons, if the 'adverse party' requirement results from the need for reciprocity, it will generally not be applicable to most war crimes based on violations of the fundamental principle of humane treatment (such as violations of CA3 or article 75), where no such need applies.

II.B. Claims of a broad general 'adverse party' requirement in international humanitarian law are wrong and unsubstantiated

82. The Appeal is notable for its superficial engagement with much of the established framework of international law. It engages in little or no close analysis of the Geneva Conventions, the Additional Protocols, CA3, or customary international law. It summarises the "law of Geneva" as requiring that "the victim either be a 'protected person' […] or be 'taking no active part in hostilities'",[201] but provides no support for its view that such requirements must apply to *all* war crimes which are not concerned with the conduct of hostilities, and hence must apply to all crimes

[200] *Contra* Appeal, para. 29 (fn. 49: citing Cryer et al (Second Edition), p. 287: "Because IHL originally developed as a series of reciprocal promises between parties to a conflict, most of IHL regulates conduct towards those affiliated with the 'enemy'. For this reason, many war crimes require that the victim be 'in the hands of' or 'in the power of' an adverse party"). In a footnote to this statement, it is acknowledged that "*[a]s the emphasis has shifted to the duty of any party towards victims of conflict, the role of reciprocity is diminishing in IHL*, although it is still significant" (emphasis added). Yet the academic work cited for this proposition, however, expressly acknowledges CA3 (and indeed article 75 of API and all of APII) as an "internal" obligation in which reciprocity has a negligible role: Provost, pp. 128, 147, 150, 156-157, 160-161, 198-199. Accordingly, although reciprocity may continue to play a significant role in some aspects of general international humanitarian law, there is no authority suggesting that it does so with regard to 'core' war crimes such as those in CA3 and article 75—indeed, Cryer et al also expressly recognise article 75 of API, along with "child soldier" offences as counter-examples. Furthermore, the *subsequent* edition of this work now also cites Sivakumaran as supporting the view that "many IHL provisions now protect persons on the 'same side'": Cryer et al (Third Edition), p. 283, fn. 142.

[201] Appeal, para. 16.

under article 8(2)(b) and (e) of the Statute.[202] Indeed, the Appeal is rather more tentative in this respect than the Defence's previous legal submissions.

83. Contrary to the Defence's claim, the established framework of international law and the plain terms of article 8 of the Statute of this Court support the *same* conclusion. An adverse party requirement applies systematically *only* to offences under article 8(2)(a), *if* the victim is charged as a protected person under GCIII or GCIV. Otherwise, it applies only where the elements of the particular crime expressly require—and, in such instances, it does not reflect a general adverse party requirement, but rather emanates from the abuse of a particular perpetrator-victim relationship that the specific crime is intended to punish.[203] Examples include perfidy,[204] mutilation or unjustified medical procedures,[205] and destruction or seizure of property.[206] Conversely, such requirements do *not* apply where they are not supported by the Statute and the Elements of Crimes, as the Trial Chamber properly ruled in *Katanga*.[207] Likewise, where CA3 applies (even though it imposes no adverse party requirement), again the Statute and the Elements of Crimes make this plain for the offences under article 8(2)(c).[208]

84. Nothing in the various authorities cited by the Defence throughout this litigation shows anything different. Thus:

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

[202] Appeal, para. 45.
[203] *See e.g.* Sivakumaran, p. 249.
[204] *See* Statute, arts. 8(2)(b)(xi), 8(2)(e)(ix). The Elements of Crimes expressly impose an adverse party requirement: Elements of Crimes, art. 8(2)(b)(xi), Element 5; Elements of Crimes, art. 8(2)(e)(ix), Element 5.
[205] *See* Statute, arts. 8(2)(b)(x), 8(2)(e)(xi). The Elements of Crimes expressly impose an adverse party requirement: Elements of Crimes, art. 8(2)(b)(x)-1, Element 4, art. 8(2)(b)(x)-2, Element 4; Elements of Crimes, art. 8(2)(e)(xi)-1, Element 4, art. 8(2)(e)(xi)-2, Element 4.
[206] *See* Statute, arts. 8(2)(b)(xiii), 8(2)(e)(xii). The Elements of Crimes expressly impose an adverse party requirement: Elements of Crimes, art. 8(2)(b)(xiii), Element 2; Elements of Crimes, art. 8(2)(e)(xii), Element 2.
[207] *See e.g. Katanga* TJ, para. 907 (rejecting similar arguments concerning the constituent elements of pillaging because they were unsupported by the Statute or Elements of Crimes).
[208] *See e.g.* Elements of Crimes, art. 8(2)(c)(1)-1, Element 2 (requiring that the victim was "either *hors de combat*, or […] civilian[], medical personnel, or religious personnel taking no active part in the hostilities").

was concerned on the facts with a *non*-international armed conflict.[209] The Defence's assertion that the legal analysis in *Sesay* should apply equally to non-international armed conflicts is unconvincing because the *Sesay* Trial Chamber cited only article 4 of GCIII and GCIV respectively.[210] As previously explained, these are the "protected person" provisions of those conventions,[211] which are narrower in their scope and purpose than GCI, GCII, CA3 and international humanitarian law more generally.[212] The Defence has declined to contest these significant distinctions further.[213]

- Cassese's view that "crimes committed by combatants of one party to the conflict against members of their own armed forces do not constitute war crimes"[214] is based on two mid-twentieth century cases: *Pilz* and *Motosuke*.[215] Neither was decided in the context of the 1949 Geneva conventions, or any of the subsequent 60 years' legal development and clarification. They were rejected by the ICTY Appeals Chamber as any basis for showing the existence of an adverse party requirement under CA3.[216] The Defence has declined to contest these significant distinctions.[217]

    - *Pilz* was a decision of the Dutch Court of Cassation in 1950. The case concerned the legality under the 1929 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, resulting in his death. The Dutch court concluded that the 1929

[209] Appeal, para. 57, fn. 84 (citing *Sesay* TJ, paras. 1451-1453).
[210] *Sesay* TJ, paras. 1452-1453. No mention is made of CA3 at all. *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").
[211] *See above* paras. 64-65.
[212] *See above* paras. 66-67.
[213] *Compare* Appeal, para. 57, *with* Response, para. 74.
[214] Appeal, para. 59 (fn. 86: citing Cassese, p. 67).
[215] Cassese, p. 67 (fn. 7).
[216] Kleffner (2013), pp. 299-300; *Kvočka* AJ, para. 561.
[217] *Compare* Appeal, para. 59, *with* Response, para. 74.

Convention protected only "members of the enemy forces".[218] Given the views of the ICRC concerning the 1929 Convention, as early as 1952, this case appears to have been wrongly decided on this point.[219] Yet, in any event, the case takes no account of the subsequent regime under GCI, or any of the developments thereafter. The case would almost certainly be decided differently today.[220]

- *Motosuke* was a decision of the Netherlands Temporary Court-Martial (Amboina) in 1948. The case concerned the execution by the Japanese army, among others, of a Dutch national who was a member of the Japanese army. The court considered that the victim had lost his Dutch nationality by joining the Japanese army, and hence that a war crimes conviction was jurisdictionally barred.[221] Since it was thus not decided on the basis of substantive international law, this case is not directly on point for the present discussion. Moreover, the court did convict instead under domestic law (the Netherlands East Indies Penal Code)—and this was still contingent upon the view that the Japanese

[218] *See* Bellal, p. 760 (mn. 13); Cassese, p. 67 (fn. 7); Sluiter, p. 872.
[219] *See above* para. 62.
[220] *See above* paras. 61-63.
[221] The court's jurisdiction to punish war crimes was circumscribed by the applicable legislation to "subjects of the United Nations". Its 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 UN War Crimes Commission ("UNWCC") further observed, commenting on the case, that the court 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". Yet, by 1944, it had been 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". *See Motosuke*, pp. 127-129; Nilsson, pp. 816-817. Other post-Second World War proceedings were granted a different, and in some ways broader, jurisdiction: McCormack, pp. 83-84, 101 (noting that the Australian *Rabaul R5* and *Rabaul R6* cases saw the exercise of jurisdiction over crimes against "Catholic missionaries of German nationality" by Japanese forces, whereas (as a matter of prosecutorial discretion) the *Hong Kong HK1* trial did not proceed on the basis of crimes committed against persons allied to the perpetrators).

army was obliged to afford *its own members* a fair trial (albeit in the context of occupied territory).[222]

- Focarelli's view that "[o]ffences committed by servicemen against their own military, whatever their nationality, do not qualify as war crimes" is likewise based on *Pilz* and *Motosuke*,[223] and suffers from the same defects as Cassese's analysis. The Defence has declined to contest these significant distinctions.[224]

- Gaggioli's observation is expressly premised on the hypothetical example of a rape committed "*without* […] any link to the armed conflict situation".[225] Accordingly, she does not squarely challenge the possibility of prosecuting sexual violence where the perpetrator and victim are affiliated to the same party to the conflict,[226] but only (correctly) requires proof of the nexus requirement.[227] The Defence has declined to contest these significant distinctions.[228]

- Schabas' observation—which is explained by the Defence only as "affirming this same principle in respect of international armed conflicts"—appears to concern only the "protected person" requirement under the Geneva Conventions and article 8(2)(a).[229] He does not refer to any 'adverse party'

[222] *See Motosuke*, pp. 128, 130; Nilsson, pp. 816-817.
[223] Appeal, para. 59 (fn. 87: citing Focarelli, p. 392).
[224] *Compare* Appeal, para. 59, *with* Response, para. 74.
[225] Appeal, para. 59 (fn. 87: citing Gaggioli, p. 515: "In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks *as a form of punishment—as he may done already in peacetime—without this act having any link to the armed conflict situation*, IHL would not apply to the act", emphasis added)..
[226] *See* Gaggioli, p. 515 ("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", emphasis added).
[227] *See below* paras. 88-93.
[228] *Compare* Appeal, para. 59, *with* Response, para. 74.
[229] Appeal, para. 59 (fn. 87: citing Schabas (First Edition), p. 210). In fact, the 'adverse party' requirement in this context is discussed on p. 212. *See also* Schabas, pp. 239-241.

requirement applicable to CA3.[230] The Defence has declined to contest these significant distinctions.[231]

- Decisions of ICTR Trial Chambers in *Ndindiliyimana*, *Bagosora*, and *Semanza* do not assist the Defence, since they require only the well-established proposition that victims of crimes under CA3 or APII must not take active or direct part in the hostilities at the material times.[232] None of these authorities refers to a relevant 'adverse party' requirement. The Defence has declined to contest these significant distinctions.[233]

85. Although some of these authorities do indeed support the principle that *some* war crimes may be subject to "status requirements", none of them supports the proposition that *all* war crimes are so conditioned.[234]

86. Nor is the Defence assisted by the assertion that the criminal prohibitions concerning child soldiers in articles 8(2)(b)(xxvi) and 8(2)(e)(vii) are an "unusual war crime".[235] As previously stated, these crimes share a common legal heritage with the criminal prohibitions of sexual violence and outrages upon personal dignity, all emanating primarily from articles 75-77 of API, and article 4 of APII—so, to the extent the Defence admits one to be unusual, why would the other offences with the same origin not also be?[236]

87. Yet in any event, the inference drawn by the Defence from the example of the child soldiers offences is unsupportable. A genuine contextual interpretation of

[230] Schabas (First Edition), pp. 205, 211.
[231] *Compare* Appeal, para. 59, *with* Response, para. 74.
[232] *Contra* Appeal, para. 59 ("ICTR cases have described the characterization of the identity of the victim as a 'threshold requirement'"). *See Ndindiliyimana* TJ, para. 2129 (requiring that "the victims were not direct participants to the armed conflict"); *Bagosora* TJ, para. 2229 (requiring that "the victims were not directly taking part in the hostilities at the time of the alleged violation"); *Semanza* TJ, para. 512 (requiring that "the victims were not taking part in the hostilities at the time of the alleged violation").
[233] *Compare* Appeal, para. 59, *with* Response, para. 76.
[234] *Contra* Appeal, paras. 58-59.
[235] Appeal, paras. 56, 58.
[236] *See above* para. 68.

article 8 cannot be sustained by the view that one offence is mysteriously exempt from a supposed general requirement allegedly applying to all the others—especially in the absence of any express wording to this effect in the alleged exception. To the contrary, the only inference which might properly be drawn from this example is the same inference shown both by a correct interpretation of article 8 as a whole, as well as the established framework of international law—that an adverse party requirement only applies in articles 8(2)(b) and 8(2)(e) when expressly required by the Statute and the Elements of Crimes.[237]

II.D War crimes jurisdiction is distinguished and delimited not by any 'adverse party' requirement, but by proof of a nexus to a material armed conflict

88. The Defence implies, wrongly, that a general 'adverse party' requirement is necessary in order to ensure that jurisdiction over war crimes does not escape its proper confines.[238] Yet the Chamber correctly rejected this concern because:

> the nexus requirement of the contextual elements of war crimes, namely that the alleged conduct took place in the context of and was associated with an international or non-international armed conflict, will have to be satisfied in all cases, which is a factual assessment which will be conducted by the Chamber in analysing the evidence in the case.[239]

89. If the nexus requirement is properly applied, then the Defence concerns do not arise.[240] Indeed, the Defence argument rests on the assumption that the nexus would be applied in a faulty way—while it is true (and indeed the basis of this case) that rape by one soldier of another, on mission, *could* satisfy the nexus requirement,[241] this

[237] *See above* para. 83
[238] Appeal, paras. 27, 50. The Defence also seems to confuse the Chamber's reasoning concerning the correct interpretation of the statutory crimes with its separate correct statement of the law on nexus: Appeal, para. 50 (asserting that certain acts "would likewise never bring any military advantage nor be necessary, and yet there can be little doubt that these acts are outside the jurisdictional scope of war crimes law").
[239] Decision, para. 52. *See also* Appeal, para. 27.
[240] At least one recent commentator also appears to overlook this point: *see e.g.* McDermott. This blogpost makes no reference to the effect of the nexus requirement which, properly applied, would clearly exclude 'domestic' crimes and violations of human rights. The Decision is thus "limited" in the appropriate way.
[241] Appeal, para. 27 (emphasis added). This is because the conflict, in this scenario, may have enabled the crime. *See also e.g.* Byron, p. 51.

is improbable if the crime were committed on home soil *before* deployment[242] or if a soldier murdered their spouse *after* deployment.[243] The example of a presidential assassination is so elaborate that the Prosecution will not take a view in the abstract, although it notes that the perpetrator's motive may not necessarily satisfy the nexus.[244]

90. To the extent that the nexus *is* established on the particular facts of the case, however, such that the relevant conduct *is* shown to have occurred in the context of a relevant armed conflict, then the Defence does not explain the principled nature of any objection to treating such a 'crime in war' as a 'war crime'.

91. The Prosecution further recalls in this context the additional admissibility requirement that all cases before the Court are of "sufficient gravity.[245] It will be very rare for conduct of the kind described in many of the Defence's examples, committed wholly in isolation, to meet this requirement.

92. Relying on the nexus requirement to serve as one of the various 'jurisdictional brakes' on the Court is, moreover, consistent with the drafting history of the Geneva Conventions and the Additional Protocols. Thus, for example, it was possible to adopt article 75 of API by consensus because its protection was still limited to the extent that relevant persons "are affected by a situation referred to in Article 1"[246] (*i.e.* a situation of international armed conflict as defined by article 2 of the Geneva Conventions or other conflicts defined by article 1(4) of API). The application of CA3

[242] *Contra* Appeal, para. 27 (emphasis added). Nothing in this scenario illustrates how the crime occurred in the context of the conflict, and thus how the nexus could be properly established.
[243] *Contra* Appeal, para. 50. Although the weapon in this scenario is derived from the military service, this detail appears largely incidental to the 'domestic' nature of the crime itself--the particular weapon used was hardly crucial to the crime.
[244] *Cf.* Appeal, para. 50.
[245] Statute, art. 17(1)(d).
[246] AP Commentary, p. 868 (mn. 3019).

is, likewise, limited to the extent "a specific situation has a nexus to a non-international armed conflict".[247]

93. Academic commentators agree. Indeed, the proper role of the nexus in distinguishing "war crimes and 'ordinary' criminal conduct" is so well-established that it verges on the trite. The fact-sensitive nature of this test enables the Court—perhaps especially at the article 61 stage—to ensure that the right cases come to trial. Within this factual matrix, the question of the affiliations of the perpetrator and victim may well be relevant—but a shared affiliation still does not necessarily deprive the Court of jurisdiction. Thus:

> [The nexus] applies in particular to offences committed by civilians against other civilians or against combatants, although courts have also required the link, or nexus, with an armed conflict in the case of crimes perpetrated by members of the armed forces. In addition, it should be noted that identifying a nexus between a criminal offence and an armed conflict is relatively easy in the case of an *international* armed conflict: there, normally two or more states face each other, and offences committed by combatants or civilians from one party to the conflict against combatants and civilians from the opposing party will usually be considered as 'linked' to the armed conflict. In contrast, things are less clear in a *non-international* armed conflict, in particular with respect to crimes committed by civilians not taking part in hostilities against other civilians not taking part in hostilities. Here the question of identifying whether the criminal conduct was related to the armed conflict might prove to be particularly challenging […].[248]

94. The Defence's observation that war crimes do not have the *chapeau* requirements of crimes against humanity shows no error in the Decision.[249] It would indeed be wholly incorrect to alter the legal analysis of war crimes purely because they are *not* crimes against humanity.

[247] 2016 Commentary to GCI, para. 549.
[248] Gaeta, p. 750. *See also* p. 751; Bothe, pp. 388-389; Gaggioli, p. 515; Rodenhäuser, p. 192; *Kunarac* AJ, para. 58.
[249] *Contra* Appeal, para. 27.

III. Even if CA3 does apply to article 8(2)(e)(vi), the requirement is satisfied on the facts charged

95. Since the Trial Chamber correctly concluded 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 [sic] participating in hostilities", it did not need to address whether the alleged victims of counts 6 and 9 could lawfully be found at the conclusion of the trial to be protected by CA3.[250]

96. However, even if *arguendo* a victim of the conduct charged in article 8(2)(e)(vi) must be protected by CA3, this does not require a difference of affiliation between victim and perpetrator, but only that the victim is taking "no active part in hostilities".[251] Whether the victim was a civilian or a member of armed forces, they are equally eligible for CA3's protection if they meet this criterion.

97. At the conclusion of the trial, the Chamber may lawfully determine on the facts that children unlawfully recruited into the UPC/FPLC were *nonetheless protected* by CA3 (if necessary) at the material times—irrespective of whether those children should be regarded either as 'civilians' or 'members of armed forces'. The Defence shows nothing to the contrary. Its attempts to exploit the manner in which the charges were presented are artificial and unconvincing. It misapplies the law concerning the conduct of hostilities to try and sub-divide CA3's universal protection, and thereby to obscure the fact-sensitive nature of the Chamber's analysis in determining whether a person is protected by CA3 at any given time. These arguments must fail.

98. Accordingly, even if the Trial Chamber was incorrect *arguendo* not to address these matters, the Defence has not shown that the Decision was materially affected.

[250] Decision, para. 53.
[251] *See above* para. 69.

The outcome would have been the same, and thus the Appeal must still be dismissed.

III.A. The way Counts 6 and 9 were charged does not preclude proof that the victims were protected under CA3

99. The Defence is incorrect to suggest that there is a fundamental and irresolvable contradiction in charging, under counts 6 and 9, that children unlawfully recruited into the UPC/FPLC were raped and sexually enslaved contrary to article 8(2)(e)(vi). Proving that a person was the victim of unlawful enlistment or conscription under article 8(2)(e)(vii) does not automatically exclude them from CA3's protection at all material times.[252]

100. First, by the way in which it pleaded counts 6 and 9, the Prosecution never characterised the victims as "members of armed forces" in the particular meaning of CA3, but only that the victims were persons whom the Trial Chamber could determine were unlawfully recruited into the UPC/FPLC.[253] Indeed, since the Prosecution's primary position is that CA3's requirements do not apply to article 8(2)(e)(vi), the Prosecution did not consider it necessary especially to plead that the victims were not taking active part in the hostilities at the material times—although it nevertheless maintains that this is so, should it be required.

101. The Defence mistakes the distinction between counts 5 and 8, and counts 6 and 9. Simply, in order to ensure the clearest notice of the Prosecution case, the charges distinguished between rapes and sexual slavery allegedly perpetrated by the UPC/FPLC against civilians who were *not* unlawfully recruited contrary to article 8(2)(e)(xii), and those that were. The former victims were covered in counts 5 and 8; the latter victims were covered in counts 6 and 9. The Defence's attempt to reframe these charges does not avail it, and is plainly contradicted by the Confirmation

[252] *Contra* Appeal, para. 74.
[253] *Contra* Appeal, para. 10.

Decision.[254] Nothing in the structure of the charges suggests that the Prosecution agrees that the victims charged in counts 6 and 9 did not have civilian status, to the detriment of CA3 protection.[255] Indeed, this is inconsistent with established law.[256]

102. Furthermore, and in any event, since CA3 equally protects members of armed forces, the Defence's arguments also fail. It remains possible for the Prosecution to prove that even members of armed forces were not taking active part in hostilities at the times material to the conduct charged in counts 6 and 9.[257] As the Defence itself concedes, the Prosecution could prove such a requirement by demonstrating, for example, that the persons in question had laid down their arms or were *hors de combat*.[258] Nor are these necessarily the only ways in which it can be shown that a person—and even *arguendo* a "member" of a non-State organised armed group—was not taking active part in hostilities.[259] The basis for the Defence view that this is not an "essentially factual" question is obscure.[260]

III.B. 'Members' of non-state organised armed groups receive equal protection under CA3

103. It is uncontested that CA3 applies to:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause […]

[254] *Compare e.g.* Confirmation Decision, paras. 49-57 (under counts 5 and 8, describing charged rapes and sexual slavery committed by the UPC/FPLC during the takeover of Mongbwalu and Sayp, during the attack on Kilo, and during the attacks on Lipri, Kobu, and Bambu, and rapes committed on various other occasions in Sangi, Buli, Kobu, and thereabouts), *with* paras. 81-82 (under counts 6 and 9, describing charged rapes and sexual slavery committed by the UPC/FPLC against women and girls who were abducted or recruited by the UPC/FPLC and underwent training in their camps, or who were present in their camps, or served as bodyguards or domestic servants in UPC/FPLC camps).
[255] *Contra* Appeal, paras. 13-15.
[256] *See below* paras. 103-111.
[257] *See below* paras. 112-117.
[258] *See* Appeal, para. 80.
[259] *See below* para. 115.
[260] *Contra* Appeal, para. 80.

104. The term "members of armed forces" has recently been said to mean "the armed forces of both the State and non-State Parties to the conflict":[261] in other words, for a non-State party, this could include members of dissident State armed forces or members of non-State organised armed groups.[262] The Prosecution acknowledged this recent view in its submissions before the Trial Chamber but, for the reasons that follow, does not consider that this alters the material assessment under CA3.[263]

105. The Defence is wrong to imply that any notion of 'membership' of non-State organised armed groups in CA3 means that 'members' are disadvantaged for the purpose of their protection against inhumane treatment. To the contrary, CA3 does not "create two mutually exclusive categories" for the purpose of *protection*.[264] Such an interpretation would contradict well-established principles of international humanitarian law.

106. First, there are only ever two types of status in international humanitarian law ('combatant' and 'civilian').[265] Second, and crucially, 'combatant' status as such does not exist in non-international armed conflict for members of non-State organised armed groups.[266] This means that fighters of such groups are not entitled to

[261] 2016 Commentary to GCI, para. 530; *DPH Interpretive Guidance*, p. 28.
[262] *DPH Interpretive Guidance*, p. 29.
[263] *Contra* Appeal, para. 75. *See* Response, para. 85, fn. 176.
[264] *Contra* Appeal, para. 75. Although Melzer uses very similar language in the context of CA3, this is for the purpose of discussing the *principle of distinction*: *see e.g.* Melzer, pp. 296-297 ("in a situation of armed conflict, every person is either a legitimate military target […] or a protected person"). It should be emphasized that CA3 does not strictly govern targeting, but rather protection from inhumane treatment: *see below* para. 110.
[265] *See e.g.* Kolb, pp. 126-127 ("modern IHL knows only of two mutually exclusive legal categories of persons. There are combatants on the one hand and civilians on the other. *Tertium non datur*. […] There is legally no other category and neither is there a gap. The completeness of the system is crucial: it secures that there is no legal black hole and that each person is under some protective regime of IHL").
[266] *See e.g.* Kolb, pp. 124, 142-143 ("In NIAC, there are no combatants under IHL. Thus, strictly speaking, there remain only different categories of civilians […] There are thus two categories of civilians: the ones participating directly in hostilities; and the others, remaining peaceful (including those who participate indirectly in hostilities or in the war effort. The legal regime of both is not identical, since the former may at certain moments be targeted while the latter may never be the object of a direct attack"); Crawford (2016), p. 131 ("There is no combatant status for non-state participants in non-international armed conflicts"); Crawford, pp. 69 ("Combatant status and the attendant POW rights are categorically denied to non-State participants in non-international armed conflicts. This goes to the heart of the IHL system"), 79 ("It is true that neither APII nor CA3 contains any

'combatant immunity' or 'combatant's privilege'—and hence may not be considered as prisoners of war and may be subject to domestic criminal proceedings for their part in the conflict. It also means that their protection against inhumane treatment under CA3 is not adversely qualified, whether or not they are considered "members of armed forces".[267]

107. The Defence's view of CA3, introducing some form of combatant status distinct from civilian status, is thus fundamentally incompatible with these principles of international humanitarian law, and finds no support in the Geneva Conventions, the Additional Protocols, or customary international law.[268] Indeed, this view is supported neither by the ICRC,[269] nor Kleffner,[270] and appears to follow entirely from a confusion between the scope of application of CA3 and the targeting rules in non-international armed conflicts.[271]

108. If any further confirmation were needed, the non-existence of a combatant status for members of non-State organised armed groups is moreover demanded by the fourth paragraph of CA3 itself, which guarantees that application of CA3 "*shall not affect the legal status of the Parties to the conflict*" (emphasis added).[272] This condition—which is an "essential" part of CA3[273]—both ensures the right of the State party to a non-international armed conflict "to prosecute, try and sentence its

provision for 'lawful' combatancy. There is also nothing in the customary international law that replicates combatant status and combatant immunity for persons who participate in non-international armed conflicts").
[267] *See e.g.* Kolb, pp. 31, 37, 127; Crawford, p. 53. *See also below* para. 116.
[268] *Contra* Appeal, para. 75.
[269] *Contra* Appeal, paras. 75-76 (*especially* fn. 112, citing *DPH Interpretive Guidance*, p. 28). First, the views in the *DPH Interpretive Guidance* must be read in accord with the other views of the ICRC, such as in the 2016 Commentary to GCI. Second, the passage quoted by the Defence applies not to CA3 *per se* but rather to the question of armed forces in non-international armed conflicts for the distinct purpose of *targeting*: *see below* paras. 110, 114.
[270] *Contra* Appeal, paras. 65-76 (*especially* fn. 113, citing Kleffner (2007), at 324). To the contrary, in this paper, Kleffner again restates the established principle that "the formal status of 'combatant' does not apply in non-international armed conflicts", and that this is "one of the areas in which customary international humanitarian law has *not* evolved beyond the dichotomy of international and non-international armed conflicts": Kleffner (2007), at 321 (emphasis supplied). In the subsequent discussion, which the Defence cites, Kleffner (like the *DPH Interpretive Guidance*) addresses the "principle of distinction in non-international armed conflicts": *see e.g.* Kleffner (2007), p. 323.
[271] *See below* paras. 110, 114.
[272] *See also* 2016 Commentary to GCI, para. 531.
[273] *See e.g.* 1952 Commentary to GCI, p. 60.

adversaries […] according to its own laws", and correspondingly precludes the non-State party from obtaining "any right to special protection or any immunity".[274] In other words, CA3 precludes applying any notion of combatant status for the purpose of protection against inhumane treatment—because doing so would grant the group a legal status which CA3 expressly precludes.

109. Consistent with these principles, the analysis to determine the scope of CA3 remains necessarily "*conduct*-based", as opposed to the inapposite "status-based" protections of the Geneva Conventions applicable in international armed conflicts.[275] The question whether a person is or is not a "member" of a non-State organised armed group is thus, strictly, beside the point for the purpose of the protection against inhumane treatment in CA3—the material question is simply whether they may be said to be taking "active part in the hostilities" or *hors de combat*, such that they can genuinely considered to be in the 'power' of the perpetrator of the crime. This is a question of fact, to be settled at the conclusion of the trial.[276]

110. Although CA3 does not govern the conduct of hostilities in non-international armed conflicts,[277] its wording (particularly, the reference to "taking no active part in the hostilities") has meant that the scope of its application risks becoming entwined with aspects of the principle of distinction in targeting (allowing the targeting of civilians "taking direct part in hostilities").[278] The Defence apparently makes this mistake, misinterpreting the significance of the *DPH Interpretive Guidance*.

[274] 1952 Commentary to GCI, p. 61.
[275] Kleffner (2015), p. 435 (mn. 5, emphasis added).
[276] *See below* paras. 112-117.
[277] *See* 2016 Commentary to GCI, para. 540 ("The substantive protections in [CA3] themselves […] envision a certain level of control over the persons concerned: they are in the power of a Party to the conflict. This includes civilians living in areas under the control of a Party to the conflict but not with respect to actions by Parties governed by the rules on the conduct of hostilities").
[278] *See* 2016 Commentary to GCI, para. 525 ("It has become widely accepted that 'active' participation in hostilities in [CA3] and 'direct' participation in hostilities in the Additional Protocols refer to the same concept"); *Lubanga* AJ, para. 323.

- First, it must be acknowledged that the *DPH Interpretive Guidance* "is not and cannot be a text of a legally binding nature", but rather "an interpretation of the notion of direct participation in hostilities within existing legal parameters".[279] Not only is this question "one of the most difficult, but as yet unresolved issues of international humanitarian law",[280] but the ICRC itself continues to acknowledge that the "scope and application of the notion of direct participation in hostilities is the subject of debate".[281]

- Second, the *DPH Interpretive Guidance* expressly "emphasize[s]" that it gives guidance on "the concept of direct participation in hostilities *only for the purpose of the conduct of hostilities*".[282] In case of any doubt, it adds that "[i]ts conclusions are *not intended* to serve as a basis for interpreting IHL *regulating the status, rights and protections of persons outside the conduct of hostilities*, such as those deprived of their liberty" or (it must be presumed) otherwise *hors de combat*.[283] It follows from this express caveat that, although the concepts of 'direct' and 'active' participation in hostilities may well be related,[284] the *effects* of that characterisation still differs between the 'targeting' and 'protective' regimes. Specifically, if a person is characterised as taking direct participation in hostilities so that they become targetable for the purpose of the conduct of hostilities, this does not mean that they *ipso facto* lose the protections associated with their status *outside* the conduct of hostilities. In other words, a person may be targetable by the adverse party (who does *not* have 'power' over them) while simultaneously being protected from violations of CA3 *vis-à-vis* those (different) persons who *do* have 'power' over them. This appears to

[279] *DPH Interpretive Guidance*, p. 6. *See also* p. 9 (the *DPH Interpretive Guidance* "does not necessarily reflect a unanimous view or majority opinion of the experts").
[280] *DPH Interpretive Guidance*, p. 6.
[281] 2016 Commentary to GCI, para. 526. *See also e.g.* Kleffner (2015), p. 437 (mn. 8: "the Guidance has proved to be controversial in a number of respects" but "has an undeniable value as a reference point"); Byron, p. 44 ("some of [the] guidance is controversial").
[282] *DPH Interpretive Guidance*, p. 11 (emphasis added).
[283] *DPH Interpretive Guidance*, p. 11.
[284] *See above* fn. 278.

be the only way to reconcile the views of the ICRC in the *DPH Interpretive Guidance* and the subsequently updated commentary to GCI.

- Third, the *DPH Interpretive Guidance* itself confirms this approach. In introducing the concept of the "continuous combat function"—which is an objective means of determining whether a person may be treated as a 'member of armed forces', thus considered to be directly participating in hostilities at *all* times, and thus targetable at all times by the adverse party[285]—it is at pains to stress that "the concept of organized armed group refers to non-State armed forces in a strictly functional sense", and that its analysis is conducted "[f]or the practical purposes of the principle of distinction".[286] In particular, it states, even proof of a "[c]ontinuous combat function does not imply *de jure* entitlement to combatant privilege".[287] In other words, the *DPH Interpretive Guidance* thus expressly disclaims any sense that it creates a combatant status in non-international armed conflict for the purpose of the protective regimes of IHL.[288] The passing observation that CA3 reveals "civilians, armed forces and organized armed groups" to be "mutually exclusive categories" has to be read in this context, as applying to conduct of

[285] *See e.g. DPH Interpretive Guidance*, pp. 32-33 ("Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. […] [T]here may be various degrees of affiliation with such groups that do not necessarily amount to 'membership' within the meaning of IHL […] [M]embership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, […] the decisive criterion for individual membership is whether a person assumes a continuous combat function for the group involving his or her direct participation in hostilities (hereafter: 'continuous combat function')"). *See further* pp. 34-36.
[286] *DPH Interpretive Guidance*, p. 33.
[287] *DPH Interpretive Guidance*, p. 33.
[288] *Contra* Byron, p. 44 (concluding that persons with a continuous combat function are "not civilians").

hostilities and the principle of distinction only.[289] The Defence overlooks this important distinction.[290]

111. It follows that even the *DPH Interpretive Guidance* does not support the view that, for the protective purpose of CA3, members of non-State organised armed groups assume any kind of "combatant" status diminishing their protection against inhumane treatment when they are in the 'power' of another. Whether a person is taking active part in hostilities at the material time, irrespective whether the concept of the "continuous combat function" from the *DPH Interpretive Guidance* applies, remains a question of fact.

III.C. The Trial Chamber may lawfully determine on the facts that the victims of Counts 6 and 9 were not taking active part in hostilities

112. This Court has previously held, correctly, that "any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis."[291] The ICTY Appeals Chamber has affirmed the same principle.[292] This logic necessarily also determines whether a person is taking active part in hostilities, and thus falls within the protective scope of CA3.

113. Accordingly, even if the Prosecution must prove that the victims of rape or sexual slavery under counts 6 and 9 were not taking active part in hostilities at the material time(s), in the meaning of CA3, the Trial Chamber may lawfully reach this conclusion on the evidence.

114. The Defence incorrectly blurs the lines between three distinct issues: the prohibition on unlawfully recruiting children, and the test for determining whether

[289] *DPH Interpretive Guidance*, p. 28. This is further supported by the immediately preceding sentence which refers to "the conceptual integrity of the categories of persons *underlying the principle of distinction*" (emphasis added).
[290] *Contra* Appeal, para. 77.
[291] *Abu Garda* Confirmation Decision, para. 83.
[292] *Strugar* AJ, para. 178.

they have been enlisted or conscripted;[293] the right of a civilian not taking direct part in hostilities not to be made the direct object of attack; and the fundamental and universal protection against inhumane treatment provided to all persons not taking active part in hostilities by CA3. In particular, it confuses academic discussion concerning liability for targeting by the adverse party with the protective scope of CA3.[294] Although the terminology is similar, and some of these concepts may be related,[295] it is important to keep sight of their distinct objects and purposes. Depending on the facts, all three concepts *may* coincide—a child may be unlawfully recruited; they may be considered *arguendo* to take a continuous combat function (if the *DPH Interpretive Guidance* is accepted), based on their specific conduct, and hence to be liable to targeting at all times by the adverse party; and they may simultaneously be protected against inhumane treatment by the persons who have "power" over them. Conversely, none of these questions is dispositive of the answer to any of the others. Nor indeed do these different legal questions amount to an impermissible "dual status"[296]—to the contrary, consistent with the principles explained above, the status of the victim remains the same (civilian), but this is distinct in this context both from their liability to targeting by the adverse party (a conduct of hostilities question) and their protection under CA3.

115. CA3 supports this analysis. The Defence is wrong to suggest that, if a victim of the conduct of counts 6 and 9 is established to have a continuous combat function, they are necessarily excluded from the protection of CA3 at all times until they surrender or in some way 'leave' the non-State organised armed group.[297] First, this omits the categories of 'detained persons' or those unable to defend themselves[298]—

[293] *See also Lubanga* TJ, paras. 609, 618; *Lubanga* AJ, paras. 267, 328; Rodenhäuser, pp. 180-181.
[294] Appeal, paras. 60-61.
[295] *See above* para. 110.
[296] *Contra* Appeal, paras. 65, 68.
[297] *Contra* Appeal, paras. 60-62, 77-78, 80-81; Byron, pp. 46, 48. *See also above* paras. 103-111.
[298] *See e.g.* CA3; API, art. 41(2); CIHL Rule 47; 2016 Commentary to GCI, paras. 535-539, *especially* para. 539 (noting that "otherwise being in the power of a Party to the conflict" could establish that a person is *hors de combat* "even if the situation may not yet be regarded as amounting to detention"). The effect of these provisions

this may well be said of children unlawfully recruited into a non-State organised armed group, who cannot give lawful consent to their recruitment,[299] and who are subject to persistent abuse in that context. Second, as the updated commentary to GCI makes clear, it is in any event inappropriate to take a narrow or formalistic approach in assessing whether a member of armed forces is *hors de combat*.[300] The means by which a person may become *hors de combat*, triggering their protection by CA3, are not exhaustively enumerated. This is underlined by CA3 itself, which expressly recognises the possibility of such a person becoming *hors de combat* for "any other cause". For all these reasons, the allegations in this case surrounding the mistreatment and abuse of the victims of counts 6 and 9 are such that the victims may be established to have been rendered *hors de combat*.

116. Furthermore, the protective logic of CA3 is that equal protection against inhumane treatment applies to any person not taking active part in hostilities, with no lesser protection afforded because a person may be deemed a "member of armed forces". The reference to being "*hors de combat*" can thus be considered "ill-placed" in CA3.[301] Significantly, it was dropped altogether in article 4(2) of APII, reaffirming that the material inquiry for the purpose of protection against inhumane treatment concerns the activities of the person at the relevant time, and not any view of their 'status'.

117. Nor was the Trial Chamber incorrect, in the context of this factual analysis and as an *obiter dictum*,[302] to note the unconscionability of refusing to take account of the fact that the 'activities' of the victims of counts 6 and 9 were in large part a

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is to make clear that a person is also *hors de combat* if, by any aspect of their condition, they require humane treatment.

[299] This follows from the prohibition not only of *involuntary* recruitment (conscription) but also *voluntary* recruitment (enlistment).

[300] 2016 Commentary to GCI, para. 539 (the reference in CA3 to "'any other cause' indicates that the notion of 'hors de combat' in common Article 3 should not be interpreted in a narrow sense").

[301] Rodenhäuser, p. 191.

[302] *Contra* Appeal, para. 64. In any event, from the location of this observation in the Decision, it appears to relate more to the question of the application of CA3, if that were required, rather than jurisdiction.

consequence of the commission of a previous crime (unlawful recruitment) committed by the same perpetrators.[303] The special protection given to children under international humanitarian law militates to the same effect;[304] it is not *limited* solely to children "captured" by the adverse party,[305] nor is it permanently extinguished if the child directly participates in hostilities (although it may be temporarily qualified insofar as the child becomes liable to direct attack by the adverse party). Indeed, read as a whole, the logic behind article 77 of API and article 4(3) of APII is that children who are (unlawfully) recruited into non-State organised armed groups, and/or used to participate actively in hostilities, are those who are in need of protection the most.

IV. The Court retains jurisdiction over the conduct charged in Counts 6 and 9 even if the legal characterisation of the charged conflict is subject to change

118. In the Decision, the Chamber noted that "the classification of the conflict could be changed from non-international to international", *if* this appeared to be justified based on the evidence elicited at trial. Accordingly, it analysed the prohibition of rape and sexual violence under article 8(2)(b)(xxii) (international armed conflict), as well as the currently charged provision: article 8(2)(e)(vi).[306]

119. Should the Chamber determine that the relevant conflict is international, and thus consider whether Mr Ntaganda bears responsibility under article 8(2)(b)(xxii), the jurisdictional analysis remains the same. For the same reasons as those given under article 8(2)(e)(vi), article 8(2)(b)(xxii) must be interpreted to prohibit rape and sexual slavery without qualification based on the status or activity of the victim.

120. But, even if this was wrong *arguendo*, article 8(2)(b)(xxii) was not criminalised as part of the 'grave breach' regime, but instead to give effect to the guarantee of

[303] Decision, para. 53.
[304] *See generally* AP Commentary, p. 1377 (mn. 4544); UK Manual, p. 402 (mn. 15.39.1); CIHL Rule 135; API, art. 77(1); APII, art. 4(3)(d); CRC, Preamble, and art. 38(4); Heintze and Lūlf, pp. 1294-1295, 1303, 1305, 1311.
[305] *Contra* Appeal, paras. 66-67.
[306] Decision, para. 34.

humane treatment in article 75 of API–which again does not require proof of the status or affiliation of the victim. If not article 75, then article 8(2)(b)(xxii) can only give effect to CA3—which also proscribes rape[307]—and which applies equally to *international* armed conflicts.[308] Again, this has no status requirement, but only an activity requirement. The end result is therefore the same. If it is incorrect *arguendo* to determine that articles 8(2)(b)(xxii) and 8(2)(e)(vi) prohibit rape without qualification of the victim, then the Prosecution is obliged at most to prove that the victim was not taking active part in hostilities at the material time(s), consistent with CA3. This is a question of fact, which does not deprive this Court of jurisdiction.

Conclusion

121. For all the reasons above, the Appeal should be dismissed.

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Fatou Bensouda, Prosecutor

Dated this 17th day of February 2017[309]

At The Hague, The Netherlands

[307] *See e.g.* Decision, para. 40, fn. 84 (recalling that "[r]ape has previously been recognised as being capable of constituting a grave breach or serious violation of [CA3]", citing *Delalić* TJ, paras. 943, 965).
[308] *See above* para. 67.
[309] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.