Cour
Pénale
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International
Criminal
Court

Original: English

No. ICC-01/04-02/06 OA5
Date: 15 June 2017

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public

Judgment
on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" of 4 January 2017 (ICC-01/04-02/06-1707),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" is confirmed.

REASONS

I. KEY FINDINGS

1. If customary or conventional international law stipulates, in respect of a given war crime, an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it. This does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted.

2. Having regard to the established framework of international law, members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group. Nevertheless, it must be established that the conduct in question "took place in the context of and

was associated with an armed conflict" of either international or non-international character. It is this nexus requirement that sufficiently and appropriately delineates war crimes from ordinary crimes.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chamber

3. On 10 January 2014, the Prosecutor filed the "Document Containing the Charges",[1] alleging, *inter alia,* that Mr Bosco Ntaganda ("Mr Ntaganda") was criminally responsible for the rape of *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* ("UPC/FPLC") child soldiers, a war crime, punishable pursuant to article 8 (2) (e) (vi) ("Count 6") and sexual slavery of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8 (2) (e) (vi) ("Count 9").

4. During the confirmation hearing Mr Ntaganda argued, *inter alia*, against the confirmation of the charges under counts 6 and 9 on the basis that "crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law".[2]

5. On 9 June 2014, Pre-Trial Chamber II confirmed the charges against Mr Ntaganda, including in respect of the war crimes of rape and sexual slavery of child soldiers pursuant to article 8 (2) (e) (vi) of the Statute as charged under counts 6 and 9.[3] With reference to international humanitarian law, Pre-Trial Chamber II considered that it was "not barred from exercising jurisdiction" over these crimes.[4]

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[1] ICC-01/04-02/06-203-AnxA, para. 100 *et seq*. An "Updated Document Containing the Charges" was filed on 16 February 2015, ICC-01/04-02/06-458-AnxA, para. 100 *et seq.* ("Updated Document Containing the Charges").
[2] Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-Red-ENG, p.27, lines 15-25.
[3] "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda", ICC-01/04-02/06-309 ("Confirmation Decision").
[4] Confirmation Decision, paras 76-80.

6. On 1 September 2015, Mr Ntaganda challenged the subject-matter jurisdiction of the Court pursuant to article 19 (4) of the Statute before Trial Chamber VI ("Trial Chamber") with respect to counts 6 and 9.[5]

7. On 9 October 2015, the Trial Chamber rejected Mr Ntaganda's challenge[6] ("First Decision"). It concluded that it:

> need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of substantive law are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged.

8. On 19 October 2015, Mr Ntaganda appealed the First Decision,[7] submitting that the issues arising should be "recognized as jurisdictional because they concern the existence of a crime in respect of an entire category of circumstances – i.e. whether the war crimes of rape and sexual slavery pertain to acts committed by members of an armed group against other members of the same armed group".[8]

9. On 22 March 2016, the Appeals Chamber held that "the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature".[9] Accordingly, the Appeals Chamber reversed the First Decision and remanded the matter to the Trial Chamber for it to address Mr Ntaganda's challenge to the jurisdiction of the Court.[10]

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[5] "Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges", 1 September 2015, ICC-01/04-02/06-804.
[6] "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 9 October 2015, ICC-01/04-02/06-892, para. 28.
[7] "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's *'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'*, ICC-01/04-02/06-892", 19 October 2015, ICC-01/04-02/06-909 (OA 2).
[8] "Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's *'Decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9',* ICC-01/04-02/06-892", 2 November 2015, ICC-01/04-02/06-972 (OA 2), para. 24.
[9] "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'", ICC-01/04-02/06-1225 ("*Ntaganda* OA 2 Judgment"), para. 40.
[10] *Ntaganda* OA 2 Judgment, para. 42.

10. On 7 April 2016, Mr Ntaganda filed his consolidated submissions challenging the jurisdiction of the Court with respect to counts 6 and 9 as charged in the Updated Document Containing the Charges ("Mr Ntaganda's Consolidated Submissions").[11]

11. On 4 January 2017, the Trial Chamber rendered its "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9"[12] ("Impugned Decision"). Having determined pursuant to article 19 (4) of the Statute that exceptional circumstances existed to merit adjudication of a second jurisdictional challenge,[13] the Trial Chamber went on to reject the challenge on its merits and held, *inter alia*, that "members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery as listed in Article 8(2)(b)(xxii) and (e)(vi)".[14]

B. Proceedings before the Appeals Chamber

12. On 26 January 2017, following the filing of his notice of appeal against the Impugned Decision,[15] Mr Ntaganda filed the "Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9"[16] ("Document in Support of the Appeal").

13. On 17 February 2017, the Prosecutor filed her response to the Document in Support of the Appeal.[17] On 21 February 2017, a corrigendum was registered as the "Corrected version of 'Prosecution's Response to Ntaganda's "Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in

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[11] "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges", ICC-01/04-02/06-1256. *See also* "Prosecution's response to Mr Ntaganda's 'Consolidated submissions challenging jurisdiction' regarding Counts 6 and 9", 14 April 2016, ICC-01/04-02/06-1278 ("Prosecutor's Consolidated Submissions") and "Former child soldiers' Response to the 'Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges'", 14 April 2016, ICC-01/04-02/06-1279 ("Victims' Consolidated Submissions").
[12] ICC-01/04-02/06-1707.
[13] Impugned Decision, paras 16-26.
[14] Impugned Decision, para. 54.
[15] "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707", 10 January 2017, ICC-01/04-02/06-1710 (OA 5).
[16] ICC-01/04-02/06-1754 (OA 5).
[17] Prosecution's Response to Ntaganda's "Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9, 17 February 2017, ICC-01/04-02/06-1794.

respect of counts 6 and 9", 17 February 2017, ICC-01/04-02/06-1794'"[18] ("Prosecutor's Response to the Document in Support of the Appeal").

14. On 23 February 2017, victims of the group of Former Child Soldiers participating in the proceedings filed the "Former Child Soldiers' observations on the 'Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9'"[19] ("Victims' Response to the Document in Support of the Appeal").

15. On 1 March 2017, Mr Ntaganda filed his response to the Victims' Response to the Document in Support of the Appeal.[20] On 3 March 2017, a corrigendum was registered as the "Corrected version of 'Response to "Former child soldiers' observations on the Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9", ICC-01/04-02/06-1798', ICC-01/04-02/06-1810"[21] ("Mr Ntaganda's Response to the Victims").

III. MERITS

A. Introduction and standard of review

16. The principal issue arising in this appeal[22] is whether the Trial Chamber erred in law when it held that victims of the war crimes of rape and sexual slavery listed in article 8(2)(b) and (e) do not have to be "protected persons" in the sense of the Geneva Conventions of 1949 ("Geneva Conventions") or "[p]ersons taking no active part in the hostilities" in the sense of Common Article 3 to the 1949 Geneva Conventions ("Common Article 3")[23] (so-called "Status Requirements").[24] Further, Mr Ntaganda argues that, as a matter of law, the notion of being a member of an armed force is incompatible with "taking no active part in the hostilities" and that, for

[18] ICC-01/04-02/06-1794-Corr (OA 5).
[19] ICC-01/04-02/06-1798 (OA 5).
[20] ICC-01/04-02/06-1810 (OA 5).
[21] ICC-01/04-02/06-1810-Corr (OA 5).
[22] Document in Support of the Appeal, paras 20-73.
[23] Impugned Decision, paras 37, 44 and 47.
[24] Impugned Decision, para. 39.

that reason, children who have been recruited into an armed force cannot be said to fulfil the Status Requirement.[25]

17. Thus, the appeal alleges errors of law. The Appeals Chamber recalls that it will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law; if the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[26]

B. Applicable law

18. The Appeals Chamber considers it appropriate to set out the provisions of the Statute relevant to the issues raised on appeal. Article 8 ("War crimes") provides, in relevant part, as follows:

> 2. For the purpose of this Statute, "war crimes" means:
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> (a) Grave breaches of the Geneva Conventions […], namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> […]
>
> (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:
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> […]
>
> (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

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[25] Document in Support of the Appeal, paras 74-81.

[26] Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA2), para. 20; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 21 May 2014, ICC-01/11-01/11-547-Red (OA4), para. 49; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red (A5) ("Lubanga Appeal Judgment"), para. 18; *S. Gbagbo* Admissibility Judgment, para. 40; *Kenyatta* OA5 Judgment, para. 23.

[…]

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions […], namely, any of the following acts committed against 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:

[…]

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

[…]

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

[…]

19. Article 21 ("Applicable law") provides, in relevant part, as follows:

1. The Court shall apply

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. […]

3. […]

20. Article 22 ("*Nullum crimen sine lege*") provides as follows:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

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.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

C. Relevant part of the Impugned Decision

21. In the Impugned Decision, the Trial Chamber determined that the Court's statutory framework does not require that the victims of the war crimes of rape and sexual slavery pursuant to article 8 (2) (b) (xxii) and (e) (vi) of the Statute be "protected persons" in terms of the Geneva Conventions or "persons taking no active part in the hostilities" in terms of Common Article 3.[27] The Trial Chamber reached this conclusion in view of the division of article 8 into four categories of crimes. It considered that understanding rape and sexual slavery as necessarily being grave breaches or serious violations of Common Article 3 and thereby incorporating the Status Requirements would run contrary to the structure of article 8 and would distort the distinction between the crimes that could be charged under each category.[28]

22. The Trial Chamber considered that the reference to the Geneva Conventions in article 8 (2) (b) (xxii) and (e) (vi) of the Statute qualified only the crime of "any other form of sexual violence", but not the other, enumerated forms of sexual violence, including "rape" and "sexual slavery".[29] Referring to academic commentary from individuals involved in the drafting process of the Statute and the Elements of Crimes, the Trial Chamber found that the purpose of the qualification was to set 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".[30] The Trial Chamber also noted that the drafting history of article 8 (2) (b) (xxii) and (e) (vi) does not indicate that the drafters intended that the Status Requirements applied to the crimes of rape and sexual slavery; while the crimes of rape and other forms of sexual violence were initially considered for inclusion under different headings, including as examples of the grave breach of "wilfully causing great suffering or serious injury" or the Common Article 3 offence of "outrages upon

[27] Impugned Decision, para. 44.
[28] Impugned Decision, para. 40.
[29] Impugned Decision, para. 41.
[30] Impugned Decision, para. 41.

personal dignity", they ultimately were set out as distinct war crimes pursuant to article 8 (2) (b) and (e) of the Statute.[31]

23. Having concluded that the Statute did not stipulate a Status Requirement, the Trial Chamber proceeded to consider "whether such limitations arise from the broader international legal framework".[32] The Trial Chamber had regard, *inter alia*, to the Lieber Code,[33] the 1949 Geneva Conventions,[34] the 1977 Additional Protocols thereto,[35] jurisprudence from the ICTY,[36] customary international law, the Martens clause,[37] the rationale of international humanitarian law,[38] commentary from the ICRC,[39] *jus cogens* norms,[40] general principles of law[41] and academic works.[42] The Trial Chamber also noted the requirement that, in order to qualify as a war crime, the conduct must have a nexus to an armed conflict, as a result of which not "any rape or instance of sexual slavery occurring during an armed conflict constitutes a war crime".[43]

24. Having concluded that "the protection against sexual violence under international law is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians not directly participating in the hostilities", the Trial Chamber considered it unnecessary to determine whether "child soldiers" must be considered members of the UPC/FPLC.[44] It noted, however, "as a general principle of

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[31] Impugned Decision, para. 42.
[32] Impugned Decision, para. 44.
[33] Impugned Decision, para. 46.
[34] Impugned Decision, para. 46.
[35] Impugned Decision, para. 46 *referring to* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 United Nations Treaty Series 17512 ("Additional Protocol I") and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 United Nations Treaty Series 17513.
[36] Impugned Decision, para. 46.
[37] Impugned Decision, para. 47.
[38] Impugned Decision, paras 48-49.
[39] Impugned Decision, para. 50.
[40] Impugned Decision, paras 51-52.
[41] Impugned Decision, para. 53.
[42] Impugned Decision, fns 113, 121, 129.
[43] Impugned Decision, para. 52.
[44] Impugned Decision, para. 53.

law, there is a duty not to recognise situations created by certain serious breaches of international law" and that "one cannot benefit from one's own unlawful conduct".[45]

25. The Trial Chamber concluded that it had jurisdiction over the conduct charged under Counts 6 and 9 and accordingly rejected the jurisdictional challenge.[46]

D. Mr Ntaganda's Submissions

26. Mr Ntaganda challenges the Trial Chamber's finding that applying the Status Requirements to article 8 (2) (b) (xxii) and (e) (vi) of the Statute would distort the distinction between the crimes set out in these provisions and the crimes that could be charged pursuant to article 8 (2) (a) and (c).[47] In his view, applying Status Requirements to the former would not create redundancy with the latter, given the absence of any "textual overlap" between the provisions.[48] Furthermore, he argues that the Trial Chamber overlooked that any redundancy could be eliminated if the "established framework of international law" were found to contain a "*different* status requirement" from that prescribed by the grave breaches regime pursuant to article 8 (2) (a) of the Statute.[49] In addition, Mr Ntaganda notes that, given the general overlap between the offences listed pursuant to article 8 of the Statute, any potential redundancy between sub-paragraphs (b) and (e) and sub-paragraphs (a) and (c) of article 8 (2) is "not an appropriate basis on which to infer a legislative intent" to exclude any Status Requirements from article 8 (2) (b) (xxii) and (e) (vi).[50] Mr Ntaganda submits that the drafting history of article 8 of the Statute does not reflect any intent to depart from the generally accepted Status Requirements usually applicable to war crimes under the law of Geneva.[51]

27. As to the established framework of international law, Mr Ntaganda argues that a clear intention to depart from the customary requirements of Common Article 3 is absent; and even if they could be "culled from the writings of activist commentators",

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[45] Impugned Decision, para. 53.
[46] Impugned Decision, para. 54.
[47] Document in Support of the Appeal, paras 35-39.
[48] Document in Support of the Appeal, para. 37.
[49] Document in Support of the Appeal, para. 38.
[50] Document in Support of the Appeal, para. 39.
[51] Document in Support of the Appeal, para. 45.

they would not be recognised as "part of the 'established framework of the international law of armed conflict'".[52]

28. Mr Ntaganda further notes that the Trial Chamber "did not expressly state" whether it considered the analysis of the statutory framework to mean that there were no other Status Requirements arising from the phrase "within the established framework of international law".[53] Mr Ntaganda submits that the Trial Chamber failed to address whether the phrase "established framework of international law" prefacing the two sub-paragraphs meant that the specific crimes listed thereunder were subject to a Status Requirement.[54]

29. Mr Ntaganda asserts that the Trial Chamber failed to "define any methodology for ascertaining"[55] the established framework of international law, thereby "curtail[ing] the scope of inquiry required".[56] He adds that the Trial Chamber's failure to "articulate" any precedent in treaty law or State practice in this regard "suggests, in itself" that these requirements cannot be "eliminat[ed]".[57] Mr Ntaganda notes that this failure is "particularly noteworthy" in light of the Appeals Chamber's "express and specific guidance" on the matter.[58]

30. In conclusion, Mr Ntaganda requests that the Trial Chamber's interpretation be rejected as "unsound both textually and contextually".[59]

31. Mr Ntaganda submits further that any argument by the Prosecutor that the factual allegations under Counts 6 and 9 do not preclude a finding that the victims at the relevant time were not actively participating in hostilities should be rejected.[60] He argues that, under Counts 6 and 9 it is alleged that the victims were members of the UPC/FPLC, and that membership in an armed group is incompatible with the notion of not taking active part in the hostilities.[61] In his submission, a member of an armed

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[52] Document in Support of the Appeal, para. 45.
[53] Document in Support of the Appeal, para. 24.
[54] Document in Support of the Appeal, para.69. *See also supra*, para. 26.
[55] Document in Support of the Appeal, para. 70.
[56] Document in Support of the Appeal, para. 71.
[57] Document in Support of the Appeal, para. 73.
[58] Document in Support of the Appeal, para. 72 *citing* *Ntaganda* OA2 Judgment, para. 31.
[59] Document in Support of the Appeal, para. 45.
[60] Document in Support of the Appeal, para. 74.
[61] Document in Support of the Appeal, para. 80.

force or group attains that status only when ceasing to be a member of that force or group, laying down arms, or being placed *hors de combat.*[62]

32. Mr Ntaganda requests the Appeals Chamber to reverse the Impugned Decision and declare that the Court has no jurisdiction over Counts 6 and 9; in the alternative, he requests the Appeals Chamber to remand the matter to the Trial Chamber for a new decision.[63]

E. Prosecutor's Submissions

33. The Prosecutor submits that the Trial Chamber was correct in finding that rape and sexual slavery were "not intended only as grave breaches and serious violations of [Common Article 3]". In her view, this finding was based on a "proper interpretation" of article 8 of the Statute and Mr Ntaganda shows no error in the Trial Chamber's conclusion or reasoning.[64]

34. In addition, the Prosecutor avers that the Trial Chamber correctly found that "the structure of article 8 reflects the distinction between the different types of war crimes over which this Court has subject-matter jurisdiction".[65] As to Mr Ntaganda's argument that there is no redundancy between article 8 (2) (b) (xxii) and article 8 (2) (a) of the Statute because there is no textual overlap between these provisions, the Prosecutor submits that this is an "overly formalistic approach" which ignores that, if the Status Requirements applied, article 8 (2) (b) (xxii) and (a) "would cover identical forms of rape and sexual violence, making article 8 (2) (b) (xxii) redundant".[66] In her view, Mr Ntaganda's arguments propose "departing from the ordinary meaning of the text and rendering articles 8(2)(b) and 8(2)(e) meaningless repetitions of article 8(2)(a) and 8(2)(c)".[67]

35. Regarding the established framework of international law, the Prosecutor responds that the Trial Chamber was correct in finding that conduct listed under article 8 (2) (b) and (2) (e) of the Statute need not have been subject to prior

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[62] Document in Support of the Appeal, para. 80.
[63] Document in Support of the Appeal, para. 83.
[64] Prosecutor's Response to the Document in Support of the Appeal, para. 17.
[65] Prosecutor's Response to the Document in Support of the Appeal, para. 32.
[66] Prosecutor's Response to the Document in Support of the Appeal, para. 37.
[67] Prosecutor's Response to the Document in Support of the Appeal, para. 39.

criminalisation pursuant to a treaty or customary rule of international law.[68] She emphasises that the acts listed under these provisions, simply by virtue of being listed thereunder, are already understood to be serious violations of laws and customs within the established framework of international law.[69] The Prosecutor argues that importing elements from article 8 (2) (a) and (2) (c) into article 8 (2) (b) and (2) (e), respectively, would, "perversely, define the scope of crimes which the drafters had *not* drawn from the Geneva Conventions".[70]

36. The Prosecutor argues that reference to the "established framework of international law" in the *chapeaux* of article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute must not be read as introducing new elements and restrictions not expressly provided in the Statute or the Elements of Crimes.[71] The Prosecutor adds that the established framework of international law should "merely assist" in the interpretation of the crimes in question.[72] The Prosecutor argues that introducing additional requirements in this way would allow a secondary source such as customary international law to be applied even if there were no *lacuna* in the Statute.[73] In her view, this would amount to circumventing article 21 and would be inconsistent with the principle of legality in articles 22 and 23 of the Statute.[74]

37. In respect of the issue concerning membership, the Prosecutor argues that there are three distinct principles concerning the present subject-matter i.e. "prohibition on unlawfully recruiting children […]; 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".[75] She notes that "all three concepts may coincide" resulting in a situation where a child may be unlawfully recruited, considered to take a continuous combat function based on their specific conduct and therefore, liable to be targeted at any time, but regardless of which, the said children may still be

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[68] Prosecutor's Response to the Document in Support of the Appeal, para. 27.
[69] Prosecutor's Response to the Document in Support of the Appeal, paras 33, 42.
[70] Prosecutor's Response to the Document in Support of the Appeal, para. 35.
[71] Prosecutor's Response to the Document in Support of the Appeal, paras 19, 27-47.
[72] Prosecutor's Response to the Document in Support of the Appeal, para. 46.
[73] Prosecutor's Response to the Document in Support of the Appeal, para. 41.
[74] Prosecutor's Response to the Document in Support of the Appeal, para. 41.
[75] Prosecutor's Response to the Document in Support of the Appeal, para. 114.

simultaneously protected against inhumane treatment by persons who have power over them.[76]

38. The Prosecutor contends that by "[p]roving that a person was the victim of unlawful enlistment or conscription under article 8(2) (e) (vii) does not automatically exclude them from Common Article 3's protection at all material times"[77] and further that any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis.[78] She adds that whether the child soldiers should be considered as taking no active part in the hostilities, is a question of fact that should be settled at the conclusion of the trial[79] as it still remains for her to prove that "even members of armed forces [that] were not taking active part in hostilities at the times material to the conduct charged in counts 6 and 9" enjoy protection under Common Article 3.[80]

F. Victims' Submissions

39. The Victims submit that the Trial Chamber was correct in not only noting the absence of any specific reference in article 8 (2) (b) and (e) of the Statute to Status Requirements but also in taking into account the drafters' decision to list rape and sexual slavery as distinct war crimes as opposed to mere illustrations of grave breaches of the Geneva Conventions or violations of Common Article 3.[81] In their view, this demonstrates that the drafters had no intention to specifically exclude child soldiers from the scope of these crimes.[82]

40. The Victims aver that applying Status Requirements to the provisions on rape and sexual slavery would result in considerable overlap between the different categories of crimes pursuant to article 8 (2) of the Statute.[83] Moreover, any interpretation of the "expression established framework of international law as necessarily transposing the requirements of Common Article 3 would lead to a

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[76] Prosecutor's Response to the Document in Support of the Appeal, para. 114.
[77] Prosecutor's Response to the Document in Support of the Appeal, para. 99.
[78] Prosecutor's Response to the Document in Support of the Appeal, para. 112.
[79] Prosecutor's Response to the Document in Support of the Appeal, para. 109.
[80] Prosecutor's Response to the Document in Support of the Appeal, para. 102.
[81] Victims' Response to the Document in Support of the Appeal, para. 24.
[82] Victims' Response to the Document in Support of the Appeal, para. 24.
[83] Victims' Response to the Document in Support of the Appeal, para. 35.

multifaceted redundancy".[84] The Victims submit that, if the *chapeau* of article 8 (2) (e) were to be construed as including the Status Requirements, this would result in the repetition of many of the elements of the crimes enumerated under article 8 (2) (e).[85]

41. The Victims argue further that the specific requirements of Common Article 3 do not automatically apply because of the reference to the "established framework of international law".[86] In their view, other sources of law must be considered, such as conventional and customary rules applicable to armed conflict as well as human rights instruments.[87] The Victims also refer to state practice,[88] international practice,[89] the principle of legality,[90] as well as the general principles of international humanitarian law,[91] the Martens clause,[92] the "rational [*sic*] of international humanitarian law"[93] and *jus cogens*.[94]

42. In respect of the issue of membership, the Victims contend that even if the child soldiers are considered to be members of the armed group, they are still protected under the Geneva Conventions at the time of the rape and sexual slavery as "they [did] not take active part in [the] hostilities".[95] Highlighting the factual scenarios where such child soldiers may claim protection,[96] the Victims add that it is "illogical to suggest" that one can "assume a military role or an active involvement in hostilities" and be subject to rape and sexual slavery at the same time;[97] the children with military roles are nevertheless protected since they are placed *hors de combat* by

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[84] Victims' Response to the Document in Support of the Appeal, para. 39.
[85] Victims' Response to the Document in Support of the Appeal, para. 39.
[86] Victims' Response to the Document in Support of the Appeal, paras 28-31.
[87] Victims' Response to the Document in Support of the Appeal, para. 30.
[88] Victims' Response to the Document in Support of the Appeal, paras 41-43
[89] Victims' Response to the Document in Support of the Appeal, paras 60-67.
[90] Victims' Response to the Document in Support of the Appeal, paras 57-59.
[91] Victims' Response to the Document in Support of the Appeal, paras 45-56.
[92] Victims' Response to the Document in Support of the Appeal, paras 46-47.
[93] Victims' Response to the Document in Support of the Appeal, para. 48.
[94] Victims' Response to the Document in Support of the Appeal, paras 49-51.
[95] Victims' Response to the Document in Support of the Appeal, para. 81.
[96] Victims' Response to the Document in Support of the Appeal, para. 83.
[97] Victims' Response to the Document in Support of the Appeal, para. 84.

detention or by "any other reason" when they are being subjected to acts of rape and sexual slavery.[98]

G. Mr Ntaganda's response to the Victims

43. In response to the Victims' submissions, Mr Ntaganda contends that there "is no unacceptable overlap between a *chapeaux* status requirement and status requirements mentioned within individual crimes".[99] In his view, words such as "civilians not taking direct part in hostilities" or "civilian population" do not imply the absence of a general status requirement arising from the *chapeaux*.[100] He argues that only by interpreting the *chapeaux* as including default Status Requirements can certain crimes enumerated under sub-sections (b) and (e) of article 8 (2) of the Statute be brought "within the established framework of international law".[101] By way of example, Mr Ntaganda cites, *inter alia*, article 8 (2) (b) (xxii) and (e) (vi) as well as (b) (xvi) and (e) (v), noting that "[n]one of these enumerated crimes have individual status requirements, even though the established framework of international law imposes such a requirement".[102]

44. Furthermore, Mr Ntaganda argues that the fact that the same conduct may be simultaneously covered by different crimes in sub-paragraphs (a) and (b) or in (c) and (e) of article 8 (2) of the Statute "no more creates redundancy than does the overlap between extermination and genocide […] as long as each crime has a materially distinct element from the other".[103] He avers that this standard is "met for each crime under (b) and (e) even if the status requirements apply as in respect of (a) and (c)".[104]

45. In respect of membership, Mr Ntaganda argues that the criteria for establishing membership in an armed group are well established and they are not affected by age or the unlawfulness of the recruitment.[105] He reiterates that as members of an armed force, child soldiers cannot be "taking no active part in hostilities".[106] Mr Ntaganda

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[98] Victims' Response to the Document in Support of the Appeal, para. 84.
[99] Mr Ntaganda's Response to the Victims, para. 23.
[100] Mr Ntaganda's Response to the Victims, para. 23.
[101] Mr Ntaganda's Response to the Victims, para. 23.
[102] Mr Ntaganda's Response to the Victims, para. 23.
[103] Mr Ntaganda's Response to the Victims, para. 24.
[104] Mr Ntaganda's Response to the Victims, para. 24.
[105] Mr Ntaganda's Response to the Victims, para. 64.
[106] Mr Ntaganda's Response to the Victims, para. 15.

further responds that whether the child soldiers are actively participating in hostilities or not is not merely a question of fact that should be decided on at the end of the trial since the charges include two characterisations that are incompatible with one another.[107]

H. Determination of the Appeals Chamber

1. *The ordinary meaning, context and drafting history of the provisions*

46. The Appeals Chamber notes that article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute does not expressly provide that the victims of rape or sexual slavery must be "protected persons" in terms of the Geneva Conventions or "persons taking no active part in the hostilities" in terms of Common Article 3, nor do the *chapeaux* of article 8 (2) (b) or (e) stipulate such a requirement.[108] This contrasts with the *chapeaux* of article 8 (2) (a) and (c), which make explicit reference to Status Requirements. Furthermore, certain crimes enumerated under article 8 (2) (b) and (e) expressly circumscribe the group of potential victims or objects, while others do not.[109]

47. The Trial Chamber concluded on this basis that to construe article 8 (2) (b) (xxii) and (e) (vi) as including the Status Requirements would not only "run contrary to the structure of article 8", but would lead to redundancy as the crimes contained therein would cover identical forms of rape and sexual slavery that could be charged pursuant to article 8 (2) (a) and (c); moreover, it took the view that such an interpretation would effectively render the word "other" in the *chapeaux* of article 8 (2) (b) and (2) (e) meaningless.[110]

48. In the view of the Appeals Chamber, while the potential overlap between provisions may be of relevance to their interpretation, little weight should be attached

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[107] Mr Ntaganda's Response to the Victims, para. 69.
[108] Impugned Decision, para. 40.
[109] *See for example* article 8 (2) (b): (xii) Declaring that no quarter will be given; (xvi) Pillaging a town or place, even when taken by assault; and article 8 (2) (e): (v) Pillaging a town or place, even when taken by assault; (x) Declaring that no quarter will be given. *See further* article 8 (2) (b): (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; and article 8 (2) (e): (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.
[110] Impugned Decision, para. 40.

to this argument in the interpretation of article 8 (2) of the Statute. When the provisions on war crimes were negotiated, there was a desire to "define the specific content or constituent elements of the violations in question".[111] States were concerned, in particular, with providing certainty as to the specific conduct that would give rise to criminal liability and in upholding the principle of legality.[112] As the Trial Chamber noted, while the drafting history is silent as to whether the drafters intended the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (e) (vi) to be subject to the Status Requirements, it is clear that the drafters intended these crimes to be "distinct war crimes", as opposed to merely illustrations of grave breaches of the Geneva Conventions or violations of Common Article 3.[113] Nevertheless, States were aware of the potential overlap between the categories of crimes listed in the various sub-paragraphs of article 8 (2) of the Statute.[114] There is no indication that the States intended to avoid such overlap. In addition, it must be underlined that, even if no Status Requirements were to apply to the crimes pursuant to article 8 (2) (b) (xxii) and (e) (vi) of the Statute, there would in all probability be much overlap with the war crimes listed under article 8 (2) (a) or (c). This is because in practice it is likely that in many cases the victims of rape or sexual slavery would actually be "protected persons" or "persons not actively participating in hostilities", thereby potentially fulfilling the elements of article 8 (2) (a) or (c) of the Statute, in addition to those of article 8 (2) (b) (xxii) and (e) (vi).

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[111] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records - Fiftieth Session Supplement No. 22, A/50/22, paras 57, 76.
[112] "Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996", 8 May 1996, A/AC-249/1, p. 9: "There was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality."
[113] Impugned Decision, para. 42. *See further* M. Cottier, "War Crimes", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck *et al.*, 3rd ed., 2016), p. 503.
[114] *See for example* "Informal Inter-Sessional Meeting of the Preparatory Commission for the International Criminal Court, on Elements of Crimes, held in Siracusa, Italy, from 31 January to 6 February 2000", 10 March 2000, PCNICC/2000/WGEC/INF/1, para. 9: "The question of overlap of crimes (concours d'infractions) was considered. Some participants were of the view that this issue would be difficult to resolve, and in any event should not be addressed in the Elements of Crimes. Some other participants felt that the issue was one of serious concern on which they would reflect further, and noted that they might introduce a proposal on the subject in the future for inclusion in the Rules of Procedure and Evidence." *See also* Elements of Crime, General introduction, para. 9 and Informal note on concurrence of offences.

49. As to the reference to the Geneva Conventions in article 8 (2) (b) (xxii) and (e) (vi), the Trial Chamber held that it qualifies only the crime of "any other form of sexual violence" and only for the purpose of setting "a certain gravity threshold and [to] exclude lesser forms of sexual violence or harassment which would not amount to crimes of the most serious concern to the international community".[115] The Appeals Chamber finds no error in the Trial Chamber's conclusion. The respective Elements of Crimes and the drafting history[116] indicate that "other form[s] of sexual violence" should only give rise to criminal liability if the conduct in question was of a "gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3".[117] However, the same does not apply for rape and sexual slavery, in relation to which the Elements of Crimes do not stipulate such a requirement. In the Appeals Chamber's view, this is because rape and sexual slavery are by definition crimes of a gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3.

50. The Appeals Chamber notes that Mr Ntaganda argues that "[n]either the text, nor the text considered in light of the available information considering the drafting history of article 8, provide any support for the view that article 8 (2) (b) and (e) were written to dispense with the status requirements usually applicable to 'law of Geneva' war crimes".[118] While this may be true, in the sense that much of the debate during the drafting of what would become article 8 (2) (b) (xxii) and (e) (vi) centred on the need for special protection of children during armed conflict in respect of the crimes of conscription and enlistment, and, to a more limited extent, on the sexual exploitation of children and women during armed conflict,[119] the Appeals Chamber is not aware of

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[115] Impugned Decision, para. 42.
[116] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2002), p. 332; *see* Impugned Decision, fn. 94.
[117] *See* Elements of the Crimes, article 8(2) (b) (xxii)-6, element 2.
[118] Document in Support of the Appeal, para. 45.
[119] *For example* 2nd plenary meeting Monday, 15 June 1998, at 3.10 p.m., President: Mr. Conso (Italy) Mr. Axworthy (Canada); "Rape, sexual slavery and other forms of sexual violence must be recognized as war crimes in the Statute, reflecting the landmark decision made at the United Nations Conference on Women. Children were often doubly victimized, as civilian victims of war and as child soldiers. The Court should have a mandate to prosecute those who recruited children under the age of 15 into armies", para. 65; Ms. Boenders (Observer for the Children's Caucus International), "Despite the Geneva Conventions of 1949 and the Additional Protocols of 1977 and the Convention on the Rights of the Child of 1989, children under the age of 15 were found in national armies and, more commonly, in armed rebel groups. They might also be sexually abused. The definition of war crimes must consider the full range of children's participation and not be limited by the words 'direct' or 'active'. She

any debate on whether protection under this provision should be *limited* to victims who are "protected persons" under the Geneva Conventions or "persons taking no active part in hostilities" in terms of Common Article 3.

51. In sum, the Appeals Chamber finds no error in the Trial Chamber's finding that, based on the ordinary meaning, context and drafting history of article 8 (2) (b) (xxii) and (e) (vi), the victims of the war crimes of rape and sexual slavery need not be "protected persons in the (limited) sense of the grave breaches or Common Article 3".[120]

2. *The "established framework of international law"*

52. The mainstay of Mr Ntaganda's appeal rests on the assertion that the provisions pursuant to article 8 (2) (b) and (e) are "expressly made subject" to customary international law by reference to the "established framework of international law", such that "[t]he protections recognized in Common Article 3 in non-international armed conflict, according to that provision, are applicable only to persons taking 'no active part in hostilities'".[121] Consequently, the Appeals Chamber's first enquiry is whether the expression "established framework of international law" permits, in

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strongly recommended the inclusion in the Statute of a ban on recruiting and allowing children under the age of 15 to take part in hostilities", para. 119, 11 November 1998, A/CONF.183/SR.2.
3rd plenary meeting Tuesday, 16 June 1998, at 10.10 a.m. President: Mr. Conso (Italy), "Ms. Nagel Berger (Costa Rica), speaking as a woman and as Minister of Justice of her country, stressed the need to give the International Criminal Court full powers to deal with all crimes in which the dignity of women was violated. The Statute must therefore include the crimes of rape, sexual slavery, prostitution and forced sterilization, as well as the recruitment of minors into the armed forces", para. 72.
Mr. Al Kulaib (Kuwait), "His delegation endorsed the views of the speakers who had called for the inclusion of sexual violence, including acts of aggression against women in the course of war crimes, rape, sexual slavery and paedophilia in the Court's terms of reference", para. 97, 21 November 1998, A/CONF.183/SR.3.
4th plenary meeting Tuesday, 16 June 1998, at 3.10 p.nx President: Mr. Conso (Italy)
Mr. Matos Fernandes (Portugal), "The crimes defined should include sexual abuse, particularly of women, and the use of children as soldiers. Portugal remained flexible with respect to extending the list of violations covered by the Court's jurisdiction, in accordance with established review mechanisms and experience gained, to include other crimes which seriously undermined the fundamental values of humankind", 21 November 1998, A/CONF.183/SR.4, para. 28.
7th plenary meeting Thursday, 18 June 1998, at 10.05 a m President: Mr. Conso (Italy) Agenda item 11 (continued) Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONE 183/2/Add 1 and Corr.l),
Mr. Gonzalez Galvez (Mexico), "Initially, the jurisdiction of the Court should be limited to genocide, crimes against humanity and war crimes, which should include crimes against women and children, especially those involving sexual assault", 17 July 1998, A/CONF.183/13 (Vol.II), para. 23.

[120] Impugned Decision, para. 44.

[121] Document in Support of the Appeal, paras 29, 31.

principle, the introduction of additional elements to the crimes listed in article 8 (2) (b) and (e).

53. The Appeals Chamber recalls that article 21 of the Statute requires the Court to apply "in the first place" its Statute, Elements of Crimes and Rules of Procedure and Evidence. Recourse to other sources of law is possible only if there is a lacuna in these constituent instruments.[122] However, the Appeals Chamber has also found that the expression "the established framework of international law" in the *chapeaux* of article 8 (2) (b) and (2) (e) as well as in the Introduction to the Elements of Crimes for article 8 of the Statute, when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is "consistent with international law, and international humanitarian law in particular".[123] Thus, the specific reference to the "established framework of international law" within article 8 (2) (b) and (e) of the Statute permits recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law.

54. As to the Prosecutor's argument that the "established framework of international law" should "merely assist in the interpretation of the crimes and elements as prescribed by the Statute and the Elements", without introducing additional elements,[124] the Appeals Chamber considers that clearly distinguishing between interpreting the existing elements on the one hand and introducing additional elements on the other when examining the "established framework of international law" may not always be possible. If customary or conventional international law stipulates in respect of a given war crime set out in article 8 (2) (b) or (e) of the Statute an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular

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[122] "Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 9 October 2014, ICC-01/09-01/11-1598 (OA 7 OA 8), para. 105; *see* Prosecutor's Response to the Document in Support of the Appeal, fn. 74.
[123] *See* "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 322.
[124] Prosecutor's Response to the Document in Support of the Appeal, para. 46.

interpretation or reading an additional element into it. In the view of the Appeals Chamber, this does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted.

55. Thus, the expression "established framework of international law" permits, in principle, the introduction of additional elements to the crimes listed in article 8 (2) (b) and (e). The Appeals Chamber will now consider the question of whether the "established framework of international law" introduces as an additional element Status Requirements to the war crimes of rape and sexual slavery pursuant to article 8 (2) (b) (xxii) and (e) (vi).

3. *Existence of Status Requirements under the "established framework of international law"*

56. In the view of the Appeals Chamber, Mr Ntaganda's argument that the "established framework of international law" introduces Status Requirements could only succeed if it were established that either international humanitarian law generally limits protection to persons protected under the Geneva Conventions or 'persons not taking active part in hostilities' under Common Article 3 to the exclusion of members of armed forces or groups against whom crimes are committed by members of the same armed force or group, or that such exclusion exists at least as far as the crimes of rape and sexual slavery are concerned.

57. As to the first issue, the Appeals Chamber considers that international humanitarian law not only governs actions of parties to the conflict in relation to each other but also concerns itself with protecting vulnerable persons during armed conflict and assuring fundamental guarantees to persons not taking active part in the hostilities. Protection is required in particular against harm suffered from the enemy forces since violence – and potential abuses – during armed conflict are typically directed against, or inflicted on, enemy combatants or enemy civilians.

58. This is reflected, in particular, in Geneva Conventions III and IV. Geneva Convention III protects prisoners of war, who are defined in article 4 (A) of that instrument as members of armed forces or militias or volunteer corps "who have

fallen into the power of the enemy". Similarly, article 4 (1) of Geneva Convention IV defines persons protected under this convention as those "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". Consequently, the protections against grave breaches of Geneva Conventions III and IV are narrow in scope, owing to the nature of their respective subject-matter.

59. In contrast, Geneva Conventions I and II, which protect the wounded and sick on land and the wounded, sick and shipwrecked at sea respectively, provide protection "in all circumstances [...] without any adverse distinction founded on sex, race, nationality" and prohibit violence against them.[125] Importantly, such protected status is not limited to persons belonging to enemy armed forces, but includes wounded, sick or shipwrecked members of a party's own armed forces, a rule that corresponds to the understanding of the scope of protection since the first Geneva Convention was adopted in 1864.[126] It follows from the above that the notion of grave breaches under Geneva Conventions I and II[127] includes violations committed against the wounded, sick or shipwrecked committed by members of their own armed force.

60. Notwithstanding the fact that the provisions of Geneva Conventions I and II extend protection irrespective of affiliation, the Appeals Chamber is not aware of any case in which the grave breaches regime has been applied to situations in which victims belonged to the same armed force as the perpetrators.[128] However, the Appeals Chamber is unconvinced that this, in and of itself, reflects the fact that Status Requirements exist as a general rule of international humanitarian law. In this regard, and as noted by the Prosecutor, Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation, requiring only that the persons were taking no active part in hostilities at the material time.[129]

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[125] Geneva Convention I and Geneva Convention II, Article 12.
[126] ICRC, "Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016", 9 May 2016, accessed at https://ihl-databases.icrc.org/ihl/full/GCI-commentary, article 13, margin number 1451, referring to Geneva Convention 1864 that reads: "Article 6. Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for. […]"
[127] *See* Geneva Convention I, article 50; Geneva Convention II, article 51.
[128] *See* infra, paras 61-62.
[129] Prosecutor's Response to the Document in Support of the Appeal, para. 69.

61. The Appeals Chamber recalls in this regard that the Trial Chamber considered it "noteworthy" that the updated commentary of the International Committee of the Red Cross ("ICRC") specifically observed that Common Article 3 protects members of armed forces against violations committed by the armed force to which they belong.[130] The Appeals Chamber is not persuaded by Mr Ntaganda's argument that the Trial Chamber erred by relying on this commentary.[131] While it is correct that the references on which the commentary relies are limited and include a decision of the Pre-Trial Chamber in this very case, and while the decision of the Trial Chamber of the Special Court for Sierra Leone ("SCSL") reached a contrary finding, this, in and of itself, is not an indication that the ICRC's conclusion was incorrect. Notably, the Appeals Chamber finds the decision of the SCSL Trial Chamber that "[t]he law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another" to be unpersuasive, not least because it is apparently based solely on an analysis of Geneva Convention III relating to the protection of prisoners of war and the consideration that "an armed group cannot hold its own members as prisoners of war".[132] As noted above, while this is true as far as Geneva Convention III is concerned, it is the result of the specific subject-matter of the convention and not an expression of a general rule.

62. Moreover, the Appeals Chamber finds that Mr Ntaganda's reliance on an academic reference, which cites two mid-twentieth century cases, namely, *Pilz*[133] and *Motosuke*[134] in support of his argument that *intra-force* crimes do not constitute war crimes is unpersuasive. In this regard, the Appeals Chamber notes that in *Pilz*, the Dutch Court of Cassation decided in 1950 that the killing by members of the German occupying army in The Netherlands of a Dutch national who had joined that army did not amount to a war crime because neither article 46 of the 1907 Hague

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[130] Impugned Decision, para. 50.
[131] *See* Document in Support of the Appeal, paras 54 *et seq*.
[132] SCSL, Trial Chamber, *Prosecutor. v. Augustine Gbao et al.*, "Judgment", 2 March 2009, SCSL-04-15, para. 1453.
[133] Special Court of Cassation, *In re Pilz*, Judgment, 5 July 1950, International Law Reports, volume 17, p. 391 ("*Pilz* case").
[134] Law Reports of Trial of War Criminals, selected and prepared by The United Nations War Crimes Commission, Volume XIII, 1949, Trial of Susuki Motosuke, Case no. 77, 28 January 1948, ("*Motosuke* case"), p. 126 *et seq*.

Regulations[135] nor the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in the Armies in the Field[136] applied as these instruments did not protect members of the occupying forces.[137] However, the Appeals Chamber agrees with the Prosecutor that, given the unconditional nature of the protection guaranteed to the wounded and sick in the field as far back as 1864[138] this case "appears to have been wrongly decided on this point".[139] With respect to *Motosuke*, which concerned a member of the Japanese Intelligence Service who was charged with a war crime for having ordered the execution of a member of the Japanese Army, the Netherlands Temporary Court-Martial at Amboina decided in January 1948 that the act in question did not amount to a war crime because that notion was limited to cases involving victims of Allied nationality.[140] It appears, however, that this finding was reached primarily because the intention after the Second World War had been to prosecute war crimes committed against Allied nationals.[141] Thus, it does not represent strong precedent that the notion of war crimes is generally limited to cases where victims are nationals of the opposing party. Indeed, as seen above, Geneva Conventions I and II, adopted in 1949, contain no such limitation.

63. Upon closer examination of the principles and the cases, the Appeals Chamber is persuaded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group. For this reason, the Appeals

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[135] *Pilz* case, p. 391 *referring to* Hague Regulations, article 46: "Military Authority over the Territory of the Hostile State […] Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

[136] *Pilz* case, pp. 391-392 *referring to* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929.

[137] *Pilz* case, pp. 391-392.

[138] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864, Article 6; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, Article 1: "Officers and soldiers and other persons officially attached 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. Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment."

[139] Prosecutor's Response to the Document in Support of the Appeal, para. 84.

[140] *Motosuke* case, p. 127.

[141] The court referred to the official "Explanation of the Legislation drafted with regard to War Crimes" no. 15031 of 1946 released as a supplement to the Netherlands East Indies Decrees. The court observed that as *per* the explanation, the intention of the United Nations War Commission for the Investigation of War Crimes was to undertake investigation of war crimes committed against the subjects of the United Nations. *See further*, *Motosuke* case, p. 127.

Chamber also rejects Mr Ntaganda's argument as to the Impugned Decision's reference to the Martens clause[142] and the rationale of international humanitarian law.[143]

64. With regard to the second issue – namely whether Status Requirements exist in international humanitarian law specifically for the war crimes of rape and sexual slavery – the Appeals Chamber observes that the prohibitions of rape and sexual slavery in armed conflict are without a doubt well established under international humanitarian law.[144] As noted by the Trial Chamber, protection under international humanitarian law against such conduct generally "appear[s] in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict".[145] In this regard, the question arising before the Appeals Chamber is whether such explicit protection under international humanitarian law suggests any limits on who may be victims of such conduct. In the view of the Appeals Chamber, there is no conceivable reason for reaching such a conclusion.

65. The Appeals Chamber agrees with the Trial Chamber's finding that "there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law".[146] Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force,[147] there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery.

66. In conclusion, the Appeals Chamber finds no reason to introduce Status Requirements to article 8 (2) (b) (xxii) and (e) (vi) of the Statute on the basis of the "established framework of international law".

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[142] Document in Support of the Appeal, paras 47-48.
[143] Document in Support of the Appeal, paras 49 *et seq*.
[144] *See* Impugned Decision, para. 46. *See also* ICRC Customary International Humanitarian Law Rules, Rule 93 at pp. 323-327; Rule 94 at pp. 327-330. *See further* J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. II (ICRC and Cambridge University Press, 2009), Rule 93 at pp. 2190-2225; Rule 94 at pp. 2225-2262 for related practice.
[145] Impugned Decision, para. 47.
[146] Impugned Decision, para. 49.
[147] *See supra,* para.63.

67. The Appeals Chamber appreciates the seemingly unprecedented nature of this conclusion. The Appeals Chamber is also mindful of Mr Ntaganda's apprehension that this conclusion seems to result from a "wider application"[148] of the Rome Statute through "judicial activism"[149] or amounts to a "substantial and unjustified extension of the scope of war crimes law".[150] However, as reasoned above, the conclusion is not only permissible under article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute, but is also aligned with the established framework of international law.

68. The Appeals Chamber emphasises in this context that the Elements of Crime for each war crime contain an express nexus requirement which must be established in each particular instance. Thus, it must be established that the conduct in question "took place in the context of and was associated with an armed conflict" of either international or non-international character. In the view of the Appeals Chamber, it is this nexus requirement, and not the purported Status Requirement, that sufficiently and appropriately delineates war crimes from ordinary crimes.[151] To that end, as rightly observed in the Impugned Decision with reference to the judgment of the ICTY Appeals Chamber in *Kunarac*,[152] the Trial Chamber may have regard, *inter alia*, to "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties."[153] The Appeals Chamber considers that any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement.

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[148] Document in Support of the Appeal, para. 67.
[149] Document in Support of the Appeal, para. 68.
[150] Document in Support of the Appeal, para. 2.
[151] The Appeals Chamber notes in this context that the reference to G. Gaggioli, upon which Mr Ntaganda relies at footnote 87 of his Document in Support of the Appeal, specifically notes that "if a military commander rapes a subordinate soldier in a military barracks as a form of punishment […] *without this having a link to the armed conflict situation*, IHL would not apply to the act" (emphasis added). Thus, it appears that, according to this author, it is the missing nexus, and not the absence of Status Requirements, that leads to the conclusion that rape would not qualify as a war crime in these circumstances.
[152] Impugned Decision, para. 130.
[153] ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al*, "Judgement", 12 June 2002, IT-96-23 & IT-96-23/1-A, para. 59.

69. The Appeals Chamber notes that Mr Ntaganda has raised a number of additional arguments seeking to counter arguments he expected the Prosecutor to make as to how the child soldiers' membership in an armed group would not preclude a finding that they were nevertheless, at the relevant time, not actively participating in hostilities.[154] These arguments, which are premised on the existence of Status Requirements for the war crimes of rape and sexual slavery, are moot in light of the Appeals Chamber's above finding that such Status Requirements do not exist.

70. In sum, the Appeals Chamber rejects Mr Ntaganda's grounds of appeal.

IV. APPROPRIATE RELIEF

71. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision because no legal error has been identified that would materially affect the Trial Chamber's conclusion that the Court has jurisdiction over Counts 6 and 9.

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

Judge Sanji Mmasenono Monageng

Presiding Judge

Dated this 15th day of June 2016

At The Hague, The Netherlands

[154] Document in Support of the Appeal, paras 74 *et seq*.