8

The Situation in the Democratic Republic of the Congo

8.1 REFLECTION: THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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INTRODUCTION

This chapter introduces the ICC decisions[1] concerning the *Lubanga* and *Ntaganda* cases delivered in the context of the situation in the DRC, and the reparations order of the *Lubanga* case.[2] It summarises the key facts and outcomes of each of these decisions and then considers how the authors of subsequent contributions have reimagined these ICC decisions from a feminist perspective. How the reimagined judgments depart from the original ICC decisions will be analysed and what makes them 'feminist' will be assessed. Finally, this contribution will conclude by critiquing the importance of the reimagined judgments in the context of 'gender-sensitive' ICC decision-making.

BACKGROUND TO THE CONFLICT

The *Lubanga* case in which Thomas Lubanga was charged with crimes related to child soldiers served as an ICC landmark for more reasons than one, chief among them being that it was the first case ever before the ICC. It was hoped by many

[1] *Prosecutor v. Thomas Dyilo Lubanga* (ICC-01/04-01/06-3129-AnxA), Appeals Chamber, 3 March 2015; Situation in the Democratic Republic of the Congo, *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber, 8 July 2019.

[2] Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with Amended order for reparations, *Prosecutor v. Thomas Dyilo Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber (Annex A) and public annexes 1 and 2, 3 March 2015.

survivors of the DRC conflict and civil society advocates that the case would serve as a reminder that this 'new' system of international criminal justice would hold perpetrators of international crimes to account. The eventual guilty verdict and sentencing only managed to partially satisfy the wishes of the international community, especially those interested in gender justice.[3]

Prior to discussing the details of the cases before the ICC, it is important to set the factual scene against which the conflict associated with the ICC trials in the Democratic Republic of Congo (DRC), including that of Mr Ntaganda, took place. The multi-ethnic Ituri region of the DRC is known for its abundant natural resources, which include coltan, diamonds, gold, and petroleum.[4] However, from 1999 onwards, these resources became a root cause of inter-ethnic tensions in the region.[5] By 2002, Ituri was 'plunged into conflict over land distribution and the ownership of natural resources'.[6]

Prior to 2002, the dominant Hema ethnic group in Ituri coexisted peacefully with other ethnic groups, until DRC politicians whose primary aim was to (illegally) trade in Ituri's abundant natural resources became involved.[7] One of these politicians was Mr Thomas Lubanga Dyilo (hereinafter Mr Lubanga), who formed the Union des Patriotes Congolais (UPC). He also established and became head of a non-state armed group, the UPC's military wing, the Forces Patriotiques pour la Liberation du Congo (FPLC).[8] As the head of FLPC, between July 2002 and December 2003, Mr Lubanga, with other members, 'undertook the large-scale enlistment of children under the age of fifteen years who were trained in the FPLC training camps . . . and who subsequently participated actively in hostilities'.[9] Mr Bosco Ntaganda (hereinafter Mr Ntaganda), was also involved as the Deputy Chief of Staff and commander of the FPLC.[10]

It is important to the context of these cases to also note that the DRC has been recognised as a country with one of the highest rates of sexual violence in the world. There are reports stating that during the conflict, girl soldiers were regularly raped, and boy soldiers were forced to rape and were also raped themselves.[11]

[3] L. Chappell, 'The Politics of Gender Justice at the ICC: Legacies and Legitimacy', EJIL:Talk!, Blog of the European Journal of International Law, 16 December 2016, available at www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/.

[4] Closing Brief of the V02 Group of Victims, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 1 June 2011, § 14.

[5] *Ibid*, § 16.

[6] *Ibid*, § 16.

[7] *Ibid*, §§ 18–19.

[8] *Ibid*, § 19.

[9] *Ibid*, § 21.

[10] For context, see generally: ICC, Case Information Sheet, available at www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf.

[11] B. Inder, 'Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v Thomas Lubanga Dyilo', *International Justice Monitor*, 31 August 2011, available at www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/.

Sexual violence was used as a tool to demonstrate control over the child soldiers by the UPC and conscription of the children by the UPC was clearly not gender-neutral. In the *Lubanga* case, the UN Under-Secretary General for Children and Armed Conflict, Ms Radhika Coomaraswamy, provided testimony as an expert witness.[12] In her testimony, she specifically described the roles girl soldiers are forced to play in conflict situations, including that of cooks, porters, nurses, and translators, together with being sexually exploited.[13] However, while the ICC analysed the child soldiers issue in the *Lubanga* case, the Prosecutor's decision not to prosecute crimes of sexual violence and the failure to disclose exculpatory evidence to the defence stirred controversy among DRC survivors and civil society groups.[14] Further, when the Appeals Chamber reversed the Trial Chamber's decision to modify the legal characterisation of the facts to include the crimes of 'inhuman treatment' and 'sexual slavery', there was significant dissent. Many in the international criminal law community felt that the charges brought against Mr Lubanga were too narrow and did not accurately represent the full breadth of the crimes allegedly committed by him.

SITUATION IN THE DRC

In 2003, when the ICC commenced its work in earnest, it was announced by the then Prosecutor, Mr Luis Moreno Ocampo, that the DRC would be selected as the most urgent situation for investigation. In 2004, President of the DRC, Joseph Kabila, referred the situation to the ICC for all crimes occurring after 1 July 2002.

In June 2004, Prosecutor Luis Moreno Ocampo announced that he found reasonable basis to commence an investigation. Mr Lubanga was accused as a co-perpetrator of the war crime of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. An ICC arrest warrant was issued for Lubanga on 10 February 2006 and the charges were confirmed by Pre-Trial Chamber I on 29 January 2007. On 26 January 2009, the *Lubanga* trial opened before Trial Chamber I.

Mr Ntaganda was charged with thirteen counts of war crimes and five counts of crimes against humanity committed in 2002–2003 in the Ituri district of the DRC. The trial of Ntaganda opened on 2 September 2015 with closing statements from 28 to 30 August 2018. The ICC Prosecutor was Mr Karim A. A. Khan.

[12] Judgment, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Dyilo Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, § 577.

[13] *Ibid.*

[14] K. J. Heller, 'A Problematic Take on the Lubanga Trial', *Opinio Juris*, 17 January 2018, available at http://opiniojuris.org/2018/01/17/a-revisionist-take-on-the-lubanga-trial/.

BACKGROUND TO THE RELEVANT ICC CASES

Lubanga

As stated above, Mr Lubanga was charged and later convicted by the ICC[15] along with his co-perpetrators for agreeing to, and participating in, a common plan to build an army, whose purpose was to establish and maintain control over the Ituri region. Owing to this common plan, children under the age of fifteen were conscripted into the UPC and FPLC between 1 September 2002 and 13 August 2003. The role Lubanga played in the UPC and FPLC, how aware he was of his specific role, his exercise of authority and implementation of UPC/FPLC plans, which included the recruitment of children under the age of fifteen and, most importantly, making them participate in hostilities, led to his charges and subsequent conviction by the ICC. Mr Lubanga was found guilty of the war crime of 'enlisting and conscription of children under the age of 15 years and using them to participate actively in hostilities' on 14 March 2012 and was sentenced on 10 July 2012 to fourteen years' imprisonment. This verdict and sentence was confirmed by the Appeals Chamber[16] of the ICC in December 2014.

In their judgment, the Chamber also found that the Office of the Prosecutor (OTP) should not have delegated its investigative responsibilities to intermediaries. This led to the submission of unreliable evidence and consequently contributed to a delay in the proceedings.[17] The Lubanga case spanned six years from arrest to conviction, largely due to two successive suspensions of proceedings. The length of ICC proceedings has been criticised due to its impact on the rights of the accused, as well as costs. The OTP did not make potentially exculpatory evidence available to the defence in the first instance.[18] Furthermore, in the second instance, the question of impossibility of a fair trial arose when it was found that the defence of the identity of an intermediary (whose veracity had been called into question) was not disclosed by the OTP, in spite of being ordered to do so by the Court.[19] The Appeals Chamber reversed both suspensions in October 2010, citing that sanctions should have been made instead.[20]

[15] Lubanga, Trial Chamber, *supra* note 1.
[16] Lubanga, Appeals Chamber, *supra* note 1.
[17] 'Thomas Lubanga Dyilo', Coalition for the ICC, available at www.coalitionfortheicc.org/cases/thomas-lubanga-dyilo.
[18] Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga* (ICC-01/04-01-06/1401), 13 June 2008.
[19] Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2517 Red), 8 July 2010.
[20] Lubanga, Order for Reparations, *supra* note 2.

Ntaganda

In the *Ntaganda* case, on 15 June 2017, the Appeals Chamber of the ICC handed down the verdict after the defence challenged the jurisdiction of the Court over the war crimes of sexual violence.[21] The scope of the appeal boiled down to whether the Rome Statute's jurisdictional reach extends to members of the same armed forces for the war crime of rape and sexual slavery listed in Article 8(2)(b) in a non-international armed conflict. In 2017, the Trial Chamber ruled that sexual violence crimes where the victims and perpetrators are members of the same fighting force (intra-party war crimes) can amount to war crimes under the ICC Statute.[22] That finding was subsequently upheld on appeal.[23] On 8 July 2019, Trial Chamber VI of the ICC found Ntaganda guilty of five counts of crimes against humanity and thirteen counts of war crimes.[24] On 7 November 2019, Mr Ntaganda was sentenced to a total of thirty years' imprisonment.[25]

On 30 March 2021, the ICC Appeals Chamber confirmed the conviction and the sentence in this case.[26] On 8 March 2021, Trial Chamber VI delivered its Order on Reparations to victims against Ntaganda.[27] On 12 September 2022, the Appeals Chamber issued its judgment outlining its reasoning in this case.[28]

CRITICAL REFLECTION OF THE REIMAGINED CASES

The following section introduces the relevant original ICC decisions in the *Lubanga* and *Ntaganda* cases, while critiquing the reimagined decisions written by Judges Marie Wilmet (Lubanga), Priya Gopalan and Olga Jurasz (Ntaganda); and Isabel Maravall-Buckwater (Ntaganda).

[21] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-1962), Appeals Chamber, 15 June 2017.
[22] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-1707), Trial Chamber VI, 4 January 2017.
[23] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-1962), Appeals Chamber, 15 June 2017.
[24] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019.
[25] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2442), Trial Chamber VI, 7 November 2019.
[26] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2666-Red), Appeals Chamber, 30 March 2021; *ibid*, (ICC-01/04-02/06-2667-Red), Appeals Chamber, 30 March 2021.
[27] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2659), Trial Chamber VI, 8 March 2021.
[28] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2782), Appeals Chamber, 12 September 2022.

Judge Marie Wilmet: Reimagining the 'Reparations for Child Soldiers'

In 2015, the Appeals Chamber issued its decision regarding the reparations order in the case against Mr Lubanga.[29] The Appeals Chamber ruled that Mr Lubanga was not liable for reparations for child soldiers who were alleged victims of sexual violence committed by members of the armed forces under his control. Referring to the sentencing decision, the Appeals Chamber noted that the failure of the Trial Chamber to include sexual violence as an aggravating factor meant that it did not 'establish harm from sexual and gender-based violence resulted from the crime for which Mr Lubanga was convicted'.[30]

At trial, the standard of proof is 'beyond reasonable doubt', and at the reparations stage it is a less exacting standard of a 'balance of probabilities'.[31] Judge Marie Wilmet, in her reimagined decision, reconsiders the trial evidence, applying what she determines is the correct standard of 'balance of probabilities' rather than the 'beyond reasonable doubt' standard originally applied, and determines that, but for the crimes Mr Lubanga was convicted of, the child soldiers would not have experienced the relevant sexual and gender-based harm. With this conclusion, Wilmet allows those victims to qualify for reparations.

Judge Wilmet reimagines the recruitment of child soldier crimes in the *Lubanga* judgment[32] by using Article 21(3) as an interpretative tool. She demonstrates that, while the evidence presented by witnesses was limited to gender-based violence committed against girl soldiers, it is erroneous that boy soldiers be automatically excluded from reparations, since they did suffer from sexual and gender-based violence as a result of their conscription, enlistment, and use in the armed conflict. Wilmet's view that 'anyone – male or female – demonstrating that they suffered from sexual and gender-based violence as a result of the crimes committed by Mr Lubanga is eligible to benefit from reparations' is, in our opinion, a strong case. We found this to be particularly respectful and inclusive, while not losing sight of the factual particularities of the case, and situating it against the backdrop of the DRC's socio-economic conditions. What Judge Wilmet does not do is go beyond this brief reference to boy soldiers' experiences of sexual violence, which she might have chosen to do to better highlight the extent of these experiences. However, girl soldiers, deservingly so in our view, given the extent of the crimes against them, get an in-depth analysis of the harms suffered at the hands of the perpetrators. By doing so, in reimagining the case Judge Wilmet has applied Article 21(3) in a manner that ensures that intersectional and gender-sensitive injuries are at the fore.

[29] Lubanga, Appeals Chamber, *supra* note 1.
[30] Lubanga, Order of Reparations, *supra* note 2.
[31] Decision on Sentence pursuant to Article 76 of the Statute, Lubanga (ICC-01/04-01/06-2901), Trial Chamber I, 10 July 2012, § 67.
[32] Lubanga, Order of Reparations, *supra* note 2.

As ICC Judge Odio Benito stated in her dissenting Trial Chamber opinion in *Lubanga*, the Chamber did in fact receive ample evidence of the conditions, including sexual violence, in which boys and girls were recruited, enlisted, and used in the hostilities and reminded us 'to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls'.[33] Judge Wilmet shows the value in Odio Benito's feminist lens, and in her reimagining rigorously narrates how the original decision failed to consider women's unique circumstances and the existence of power relationships. In her rewritten decision, Judge Wilmet discusses how the seemingly gender-neutral war crime of conscription of children to actively participate in an armed conflict differently impact on girl and boy soldiers.

Critiques of the *Lubanga* case have focused on the constraints surrounding the 'recognition of harms experienced by girl child soldiers and whether gendered experiences and roles were sufficiently reflected'.[34] The route the Trial Chamber took in the original decision was viewed as suppressing the complexity of harms suffered by girls and established a hierarchy of harms; some were for substantive offences while others were categorised as being relevant for sentencing or reparations.[35] In a remarkably succinct paragraph, Judge Wilmet moves away from this approach and highlights the forms of 'physical or mental injury, emotional suffering, economic loss, or substantial impairment of his or her fundamental rights' applicable to this case. This exposition of how each of these forms of injury was suffered by the child soldier victims who were conscripted by the UPC also aids in understanding the gendered experiences of these child soldier victims, especially those to whom the original decision was blind.

Finally, Judge Wilmet, when holding that the child soldier victims qualify for reparations, clarifies that sexual and gender-based violence are also criminal acts which should be prosecuted as such. In doing so, Judge Wilmet's rewritten judgment strongly criticises the former Prosecutor Mr Ocampo's omission of sexual and gender-based crimes in the original charges.

[33] Dissenting Opinion of Judge Odio Benito, Sentencing Decision, §§ 6, 7, 13.

[34] S. Merope, 'Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC' 22 *Criminal Law Forum* (2011) 311–346; N. Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in W. Schabas, N. Hayes, and Y. Mcdermott (eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (London: Routledge, 2013); Y. M. Brunger, E. Irving, and D. Sankey, 'The Prosecutor v. Thomas Lubanga Dyilo' in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (Oxford: Hart, 2019), 409–444, at 413; see also L. Chappell, 'The Politics of Gender Justice at the ICC: Legacies and Legitimacy', EJIL:Talk!, Blog of the *European Journal of International Law*, 16 December 2016, available at www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/.

[35] Brunger, Irving, and Sankey, *supra* note 34, at 415.

Judges Priya Gopalan and Olga Jurasz: Reimagining 'War Crimes within an Armed Group'

In 2017, Trial Chamber VI issued its decision regarding the challenge from the defence to the jurisdiction of the Court in respect to Counts 6 and 9 against Mr Ntaganda.[36] The Trial Chamber confirmed the charges of rape and sexual slavery of child soldiers as a war crime under Article 8(2)(e)(vi) of the Rome Statute, crimes allegedly committed as intra-party crimes. In this rewritten decision, Judges Priya Gopalan and Olga Jurasz confirm this decision. In doing so, they depart from the methods used by the original Chamber, instead, as explained below, situating their analysis in international humanitarian law (IHL) and treaty interpretation while simultaneously questioning the application of bodies of law created in historical contexts. Judges Gopalan and Jurasz also work to amplify the voices of victims, highlighting how nuances in gender relations influenced the commission of these crimes, particularly against female child soldiers.

More particularly, Gopalan and Jurasz's rewritten decision overlays a feminist lens onto the factual circumstances of the crimes. To begin with, they engage in feminist judging when 'asking the woman question',[37] pointing out how the apparently gender-neutral war crime of using children to participate actively in hostilities impacts differently on girl soldiers. Another important feature of feminist judging is the fact-telling process – that is, the contextualisation of women's experiences in the judgments' narrative. Judges Gopalan and Jurasz recognise the reality of girl soldiers' lives by pointing out a flaw in the Pre-Trial Chamber's legal grasp of sexual violence. In the rewritten decision, they bring the previously marginalised experience of girl soldiers to the fore and place the legal issues in a wider social context, taking into account the specificities of women's lives.[38] Finally, Judges Gopalan and Jurasz included specific and explicit references to 'girl soldiers' in their rewritten judgment, which gives a more realistic reading of the circumstances of the case. Yet, at the same time, one could highlight that these references make boy soldiers who suffered from rape invisible in the narrative of the judgment.

In concrete terms, they make a point of capturing the complexity of real-life experiences of girl soldiers, who are victims of the acts of sexual violence and threats thereof in armed conflicts. In doing so, they are drawing attention to the continuing nature of this crime. They concur with the Pre-Trial Chamber that girl soldiers were

[36] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-1707), Trial Chamber VI, 4 January 2017. The Office of the Prosecutor charged Mr Ntaganda with, inter alia, '[r]ape of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 6) and '[s]exual slavery of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 9) (DCC, ICC-01/04-02/06-203-AnxA, pp. 57–58).

[37] K. T. Bartlett, 'Feminist Legal Methods' 103 *Harvard Law Review* (1990) 829–888, at 837.

[38] R. Hunter and E. Rackley, 'Feminist Judgments on the UK Supreme Court' 32 *Canadian Journal of Women and the Law* (2020) 85–113, at 96.

not contemporaneously taking part in hostilities during the time of the commission of the sexual violence and were therefore protected under IHL. They refute the Pre-Trial Chamber's basis for this conclusion, and in particular its focus on the specific and distinct time of the rape. In this context, they opine that the prevalence and frequency of acts of sexual violence experienced by girl soldiers as part of their daily lives and the long-standing impact of rape in both public and private spheres needed to be taken into account.[39]

While paying attention to the continuum of violence experienced by girl soldiers in and outside conflict settings, Judges Gopalan and Jurasz have shown concern for indirect victims such as the relatives of girl soldiers and the transgenerational transmission of trauma. It is telling that, in the Reparations Order in the same case, the ICC Chamber concluded that children who have been born out of rape and sexual slavery may qualify as direct victims, and are therefore entitled to reparations.[40] Judges Gopalan and Jurasz also argue that sexual violence is employed as a tactic of war to assert control over both the civilian population and the members of the same armed group, and that the sexual slavery and the participation in hostilities do not necessarily occur at distinct and different times. They highlight the perpetrators' powers of ownership that are continuously exercised across conflict and non-conflict settings. Furthermore, in their reimagining, these judges shed light on the socio-cultural tenets of the crime of sexual violence, identifying the need to take into account the patriarchal power structures in which sexual slavery is perpetrated in the DRC.

Judges Gopalan and Jurasz draw upon the Statute's reference to the 'established framework of international law' in order to permit recourse to IHL as a source of interpretation. In this context, they point to the evolutionary nature of the relevant treaties, including the Statute, the Geneva Conventions, and their Additional Protocols, in order to reflect the realities of child soldiering, and the protection of child soldiers, who shift regularly between different roles. Then, using Rome Statute Article 21(3) as an interpretive tool to reach their conclusion, they contextualise the gendered aspects of child soldiering and the use of girls for sexual purposes. They apply and interpret Article 21 in a manner that 'surfaces' gendered and intersectional harms. In their rewritten version, they include the experience of girl soldiers in the construction of legal rules and the rules of interpretation in particular.

In their rewritten judgment, Judges Gopalan and Jurasz make the gender issues visible within their feminist retelling of the facts; the complexity and continuity of

[39] R. Grey, 'The Limits and Potential of International Criminal Law' 16(4) *International Feminist Journal of Politics* (2014) 601–621, at 613–614; A. Swaine, 'Beyond Strategic Rape and between the Public and Private: Violence against Women in Armed Conflict' 37(3) *Human Rights Quarterly* (2015) 755–786.

[40] Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations', *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06-2477-Red), Trial Chamber VI, 28 February 2020, § 38.

the sexual violence in armed conflict is clearly underlined. One point that we felt was missing in their judgment was addressing the corrosive political and socio-economic effects of the sexual violence to cover the full spectrum of the temporal analysis of the crime.[41]

Judge Isabel Maravall-Buckwater: Reimagining 'Consent'

In 2019, Trial Chamber VI issued the judgment in the case against Bosco Ntaganda. Convicted of eighteen counts of war crimes and crimes against humanity, the volume of sexual violence, especially against women and girls, was a particular feature of this case.[42] In Judge Isabel Maravall-Buckwater's rewrite, the tension between age-related incapacity and consent is explored. She considers a global interpretation of consent while wanting to acknowledge the sexual agency of individuals, and in doing so uses the voices of victims to recount how the coercive environment within an armed conflict effectively eradicates consent. Through this approach, the reimagined judgment finds that multiple incidents of rape must be confirmed against Mr Ntaganda.

In international criminal law, it is unclear at what age, and in what circumstances, a child is legally capable of consenting to sexual acts. This issue has arisen in multiple cases concerning alleged sexual crimes against female children, including female child soldiers in the *Ntaganda* case. In her rewritten version of the 2019 *Ntaganda* trial judgment, Judge Maravall-Buckwater examines the law regarding age-related incapacity to consent. Age-related incapacity constitutes one of the circumstances which render consent immaterial to the crime of rape. As 'age-related incapacity' remains undefined in both the Statute and Articles 7(1)(g) and 8(2)(e)(vi) of the Elements of Crime, Maravall-Buckwater considers it appropriate to flesh out details on this point. She holds that, under Article 21(3), the absence of age of consent defined in the law is incompatible with international human rights standards. She has further used Article 21 to incorporate findings/reports of the Convention on the Rights of the Child and the Committee on the Elimination of Discrimination against Women to ascertain what should be considered as the minimum age for consent. Using these international standards, she reaches the conclusion that sixteen is an appropriate age of consent.

In her rewritten judgment, Judge Maravall-Buckwater includes distinctive feminist features. First, her feminist judging provides reasoning with reference to the

[41] Report of the Secretary General on Conflict-Related Sexual Violence, S/2022/272, 29 March 2022, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/71/PDF/N2229371.pdf?OpenElement, § 13.

[42] Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019.

actual lived experience of individuals and gives social context to issues.[43] Maravall-Buckwater also provides contextual facts related to the age of the victims of sexual violence, thus enhancing the individual lived experiences of victims. Secondly, her reimagined decision is inclusive in nature. Even though girls are more affected, she does not focus solely on the implications for women; by considering the question of the age of consent, she incorporates the experiences of all victims of sexual violence. On another note, one point that we felt was missing in her reimagined exposition of facts was giving a name to the unnamed girl soldiers who suffer rape.[44] Giving a name is considered important to personify a victim, and to demonstrate empathy with the experience of litigants.

As Cronin has indicated in the New Zealand feminist judgments project, this methodology carves out spaces to 'see cases in ways that we have been blind to and may be continuing to be blind to. In that sense, the feminist project has larger implications, showing us how to engage with facts in a different way, by letting those facts inform the law, rather than disregarding or ignoring them'.[45]

8.2 CHILD SOLDIERS IN LUBANGA REPARATIONS ORDER

Wilmet

In 2015, the Appeals Chamber issued its decision regarding the reparations order in the case against Mr Thomas Lubanga Dyilo.[46] The Appeals Chamber ruled that Mr Lubanga was not liable for reparations for child soldiers who were alleged victims of sexual violence committed by members of the armed forces under the control of Mr Lubanga. Referring to the Sentencing Decision,[47] the Appeals Chamber noted that the failure of the Trial Chamber to include sexual violence as an aggravating factor meant that the Trial Chamber did not 'establish harm from sexual and gender-based violence resulted from the crime for which Mr Lubanga was convicted'.[48]

In this reimagining of the appeal decision, Marie Wilmet begins by highlighting the 'gender injustice cascade' characteristic of the *Lubanga* case at

[43] K. Gooding, 'How Can the Methodology of Feminist Judgment Writing Improve Gender-Sensitivity in International Criminal Law' 5 *London School of Economics Law Review* (2020) 115–151, at 124.

[44] See Hunter and Rackley, *supra* note 38, at 100.

[45] B. Toy Cronin, 'Feminist Judgments of Aotearoa, New Zealand and Te Rino: A Two-Stranded Rope' 1 *New Zealand Women's Law Journal* (2017) 192–199, at 198.

[46] Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015.

[47] Sentence, *Lubanga* (ICC-01/04-01/06-2901), Trial Chamber I, 10 July 2012.

[48] Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015, § 198.

the ICC.[49] Recalling the procedural background of the case, the author provides for judicial recognition from the ICC's highest Chamber of the Prosecutor's failure to include sexual and gender-based crimes within the charges and of Judge Odio Benito's gender-just interventions in dissenting opinions. Wilmet reconsiders the trial evidence, applying the correct standard of 'balance of probabilities' rather than the misused 'beyond reasonable doubt' standard originally applied, and determines that but for the crimes Mr Lubanga was convicted of, the child soldiers would not have experienced harms from sexual and gender-based violence. With this conclusion, Wilmet allows those victims to qualify for reparations.

No. ICC-01/04-01/06 A A 2 A 3
Date: 3 March 2015

Original: English

THE APPEALS CHAMBER(B)

Before: Judge Marie WILMET

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE *PROSECUTOR v. THOMAS LUBANGA DYILO*

Judgment

On the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012

Fourth Element: The Order for Reparations Must Define the Harm Caused to Direct and Indirect Victims as a Result of the Crimes for Which the Person Was Convicted, as well as Identify the Appropriate Modalities of Reparations Based on the Circumstances of the Case

Assessing the Harm Suffered by the Victims of Sexual and Gender-Based Violence

BACKGROUND AND RELEVANT PORTION OF THE IMPUGNED DECISION

192. In their victims' applications, 129 victims claim that they have suffered harm as a result of the enlistment or conscription of children under the age of fifteen, or their use to participate actively in the hostilities.[50] Of these victims, eighteen females and twelve males have referred to acts of sexual violence which they suffered or witnessed as part of the enlistment, conscription, or use of children under the age of

[49] L. Chappell, 'The Gender Injustice Cascade: 'Transformative' Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court' 21(9) *International Journal of Human Rights* (2017) 1223–1242.

[50] Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, § 16 (hereafter Article 74 Trial Judgment).

fifteen by the Union des Patriotes Congolais (UPC)/Forces Patriotiques pour la Liberation du Congo (FPLC).[51]

193. On 28 August 2006, the Prosecutor charged Thomas Lubanga Dyilo (Mr Lubanga) with enlisting and conscripting children under the age of fifteen into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(b)(xxvi) and 25(iii)(a) of the Statute.[52] He did not charge Mr Lubanga with sexual and gender-based crimes.[53]

194. In the 29 January 2007 Decision on the confirmation of charges, Pre-Trial Chamber I found that there was sufficient evidence to establish substantial grounds to believe that Mr Lubanga was responsible for the charges of conscription, enlistment, and use of children under the age of fifteen into the UPC/FPLC.[54]

195. On 22 May 2009, the legal representatives of the victims filed a joint application pursuant to Regulation 55 of the Regulations of the Court.[55] They requested the Trial Chamber consider a legal re-characterisation of the facts in view of the large number of witnesses who referred to numerous cases of inhuman and cruel treatment as well as sexual violence before the Chamber.[56]

196. In its 14 July 2009 Decision, Trial Chamber I explained that it appeared 'to the majority of the Chamber that the legal characterisation of facts may be subject to change' in accordance with Regulation 55(2), Judge Fulford dissenting.[57] The majority of the Chamber stated that the defence, the prosecution, and the victims' legal representatives would be given an opportunity to make submissions on the requalification at a later stage of the proceedings.[58] On 8 December 2009, the Appeals Chamber reversed the decision on the grounds that the Trial Chamber erred in law 'when finding that Regulation 55 contained two separate procedures and that it was permissible under Regulation 55 (2) and (3) to include additional facts and circumstances that are not described in the charges'.[59]

[51] *Ibid*.

[52] Decision on the confirmation of charges, *Lubanga* (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber I, 29 January 2007, § 9 (hereafter Confirmation of Charges Decision).

[53] Article 74 Trial Judgment, *supra* note 50, § 629.

[54] Confirmation of Charges Decision, *supra* note 52, at 156–157.

[55] Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, *Lubanga* (ICC-01/04-01/06-1891-tENG), Trial Chamber I, 22 May 2009.

[56] *Ibid*, §§ 15 and 23.

[57] Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, *Lubanga* (ICC-01/04-01/06-2049), Trial Chamber I, 22 May 2009, § 35.

[58] *Ibid*, § 34.

[59] Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', *Lubanga* (ICC-01/04-01/06-2205), Appeals Chamber, 8 December 2009, § 112.

197. On 14 March 2012, Trial Chamber I issued its Judgment pursuant to Article 74 of the Statute and convicted Mr Lubanga of the war crimes of enlisting, conscripting, and using children under the age of fifteen to participate in hostilities. The Chamber recognised it heard evidence from witnesses that girl soldiers were subjected to sexual violence and rape by UPC/FPLC commanders.[60] The majority, however, disagreed with the Prosecutor's argument that the recruitment of girls for sexual purposes and forced marriage was an integral part of the 'active participation in hostilities' of child soldiers,[61] and that sexual abuse was systematic in the training camps.[62] Considering 'the prosecution's failure to include allegations of sexual violence in the charges',[63] the Chamber did not make 'any findings of fact on the issue, particularly as to whether responsibility [was] to be attributed to the accused'.[64] As the relevant facts were not included in the Decision on the Confirmation of Charges, the majority found that 'it would be impermissible for the Chamber to base its Decision . . . on the evidence introduced during the trial'.[65] Judge Odio Benito dissented from the majority, stating that '[a]lthough the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent'.[66] The dissenting judge argued that sexual violence was an intrinsic part of using children to participate actively in the hostilities and could be subsumed under Article 8(2)(b)(xxvi) of the Statute.[67]

198. In its Decision on Sentence pursuant to Article 76 of the Statute of 10 July 2012, the Trial Chamber examined whether rape and other forms of sexual violence could be a relevant factor in the determination of the sentence under Rule 145(1)(c) of the Rules of Procedure and Evidence.[68] The majority found that it could not consider sexual violence as a relevant factor for sentencing, stating:

> On the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence,

[60] Article 74 Trial Judgment, *supra* note 50, §§ 890–896.
[61] Prosecution's Closing Brief, *Lubanga* (ICC-01/04-01/06-2748-Red), Trial Chamber I, 1 June 2011, §§ 139–143.
[62] *Ibid*, §§ 205, 229.
[63] Article 74 Trial Judgment, *supra* note 50, §§ 629, 896.
[64] *Ibid*, §§ 896, 913.
[65] *Ibid*, § 630.
[66] Separate and Dissenting Opinion of Judge Odio Benito, Trial Judgment, § 16.
[67] *Ibid*, § 20.
[68] Decision on Sentence pursuant to Article 76 of the Statute, *Lubanga* (ICC-01/04-01/06-2901), Trial Chamber I, 10 July 2012, § 67 (hereafter Sentencing Decision).

> that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability.[69]

199. Judge Odio Benito dissented from the majority considering that the Chamber received ample evidence during trial of the conditions, including sexual violence, in which boys and girls were recruited, enlisted, and used in the hostilities.[70] She insisted on the importance 'to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls'.[71]

200. In the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 (Impugned Decision), the Trial Chamber identified victims of sexual and gender-based violence as beneficiaries of reparations.[72] It found that 'the Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence'.[73] The Trial Chamber stated that pursuant to Articles 21(3) and 68 of the Statute as well as Rule 86 of the Rules, reparations should be granted to victims without adverse distinction on the grounds of, inter alia, gender and take into account the needs of sexual and gender-based violence victims.[74]

SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

201. Mr Lubanga submits that the Trial Chamber erred in law by finding that victims of sexual violence could benefit from reparations, contradicting the principle according to which the convicted person can only repair harms resulting from crimes he has been convicted of.[75] He argues that the Prosecutor limited the scope of the case to the crimes of recruiting, enlisting, and using children in hostilities, and that the Trial Chamber dismissed the contention that the commission of these crimes would necessarily lead to the perpetration of sexual violence, including at the sentencing stage.[76] Additionally, Mr Lubanga argues that Article 8(2)(e)(vii) of the Statute, the corresponding elements of crimes, and international law do not link the commission of these crimes to sexual violence.[77]

[69] *Ibid*, § 74.
[70] Dissenting Opinion of Judge Odio Benito, Sentencing Decision, §§ 6, 7, 13.
[71] *Ibid*, § 13.
[72] Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2904), Trial Chamber I, 7 August 2012, § 207 (hereafter Impugned Decision).
[73] *Ibid*, § 207.
[74] *Ibid*, §§ 189, 191, 200 (the Trial Chamber recognises that priority may need to be given to certain victims, including victims of sexual and gender-based violence).
[75] Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la '*Decision establishing the principles and procedures to be applied to reparations*', rendue par la Chambre de première instance le 7 août 2012, *Lubanga* (ICC-01/04-01/06-2972), Appeals Chamber, 5 February 2013, §§ 122–137.
[76] *Ibid*, §§ 129–132.
[77] *Ibid*, § 135.

202. The Office of Public Counsel for Victims and the legal representatives of victims V02 submit that 'the recruitment of girls into armed forces is generally recognised as having as primarily aim [sic] their use as sex slaves', justifying the participation of victims of these crimes in the reparations proceedings.[78] They argue that the key consideration is not the nature of the crimes for which the person was convicted, but rather the harm produced as a result of such crimes which must be evaluated following the 'proximate cause' test.[79] In their view, harms of a sexual nature normally result from the crimes of which Mr Lubanga was convicted, thus warranting reparation before the Court.[80] The legal representatives of victims V01 argue that the key issue is the causal link between the crime committed and the harm suffered.[81] They contradict the defence's suggestion that a harm is necessarily an element of a crime and argue that the fact that sexual violence was not sufficiently widespread to be a relevant factor at sentencing does not prevent the harms being considered at the reparations stage.[82]

203. 'The Trust Fund notes that a distinction must be made between the legal qualification of the facts [– meaning the crimes for which Mr Lubanga was convicted] … – [and] the harm … that resulted from these crimes'.[83] It submits that '[t]he standard test is, whether during the course of those facts that are the basis of the charges … acts of sexualised violence were committed that are directly linked to, and are a component of, the acts and facts underlying the charges'.[84] The Trust Fund subsequently argues that sexualised violence is inherently connected to the enlistment, conscription, and use of child soldiers,[85] and that therefore victims are entitled to reparations addressing this specific harm.[86]

Determination of the Chamber

204. As a preliminary matter, the Appeals Chamber notes that pursuant to Article 21(3) of the Statute, the application and interpretation of the Court's legal framework 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7,

[78] Joint Response to the '*Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la "Decision establishing the principles and procedures to be applied to reparations", rendue par la Chambre de première instance le 7 août 2012*', *Lubanga* (ICC-01/04-01/06-3010), Appeals Chamber, 8 April 2013, § 85.

[79] *Ibid*, §§ 86, 96.

[80] *Ibid*, §§ 97, 101.

[81] Réponse au Mémoire de la Défense relatif à l'appel contre la '*Decision establishing the principles and procedures to be applied to reparations*' du 7 août 2012, *Lubanga* (ICC-01/04-01/06-3007), Appeals Chamber, 7 April 2013, §§ 58, 63.

[82] *Ibid*, §§ 61–62.

[83] Observations of the Trust Fund for Victims on the appeals against Trial Chamber I 's 'Decision establishing the principles and procedures to be applied to reparations', *Lubanga* (ICC-01/04-01/06-3009), Appeals Chamber, 8 April 2013, § 151.

[84] *Ibid*, § 153.

[85] *Ibid*, §§ 153–166.

[86] *Ibid*, §§ 158, 166.

paragraph 3'. Article 7(3) defines gender as 'the two sexes, male and female, within the context of society'. The Appeals Chamber also notes that pursuant to Rule 86 of the Rules of Evidence and Procedure, a Chamber 'in making any direction or order . . . shall take into account the need of all victims and witnesses in accordance with Article 68, in particular . . . victims of sexual or gender violence'.

205. The prosecution's failure to charge Mr Lubanga with rape and other forms of sexual and gender-based violence as separate crimes is not determinative of the question of whether the underlying acts are a relevant factor in the determination of the reparations for which the accused is responsible. The Chamber is entitled to consider sexual violence under the fourth principle, according to which 'the order for reparations must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted', established pursuant to Article 75 of the Statute and Rule 85(a) of the Rules of Procedure and Evidence.

206. As indicated by the Trial Chamber, the Court's legal framework determines only in general terms the required causal link between the harm and the crime for which the person was convicted for the purpose of reparations.[87] The Appeals Chamber recalls its earlier finding that, pursuant to Rule 85(a) of the Rules of Procedure and Evidence, '[r]eparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court'[88] and the 'causal link between the crime and the harm for the purpose of reparations is to be determined in light of the specificities of a case'.[89] The Appeals Chamber must therefore decide whether harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga has been convicted. In the present case, the Appeals Chamber considers that it can.

207. The Appeals Chamber finds that the Trial Chamber has correctly applied the 'but/for' standard of causation to the relationship between the harm suffered and the crime for which the person was convicted for the purpose of reparations.[90] The crimes must be the 'proximate cause' of the harm for which the reparations are sought, meaning that the liability of the person is limited to the causes that are closely connected to the result of the act they were convicted of.[91] The Appeals Chamber emphasises that the causal nexus must be 'determined in light of the particular circumstances' of this case.[92]

208. In line with the previous jurisprudence, the Chamber adopts the standard of proof of a 'balance of probabilities' as appropriate for the reparations proceedings.[93]

[87] Impugned Decision, *supra* note 72, § 248.
[88] *Ibid*, § 79.
[89] *Ibid*, § 80.
[90] *Ibid*, § 82.
[91] *Ibid*, §§ 82, 129; *Black's Law Dictionary* (8th ed., St Paul, MN: Thomson/West, 2004), at 662.
[92] Impugned Decision, *supra* note 72, § 80.
[93] *Ibid*, §§ 83–84, 136.

The applicant must therefore show that it is more probable than not that the harm suffered is a consequence of the crimes of which Mr Lubanga was convicted.

209. The Appeals Chamber will now analyse the significance of Trial Chamber I's sentencing decision for the present determination. The Trial Chamber considered whether the evidence of sexual violence presented at trial could constitute a factor relevant to sentencing under Rule 145(1)(c) of the Rules as part of '(i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed'.[94] On the basis of the evidence introduced during the trial, the majority found that because the link between Mr Lubanga and the sexual violence against the children who were recruited had not been established beyond reasonable doubt, this factor could not be taken into account for the purpose of sentencing.[95]

210. Concurring with Judge Odio Benito's Dissenting Opinion, the Appeals Chamber finds that the Trial Chamber disregarded the harm suffered by the victims and considered 'as relevant factors only: (a) the large-scale and widespread nature of the crimes committed; (b) the degree of participation and intent of the convicted person; and (c) the individual circumstances of the convicted person'.[96] As such, the Appeals Chamber does not consider that the Trial Chamber's considerations on sentence limit its assessment of the causal relationship between sexual violence and the crimes of which Mr Lubanga was convicted.

211. Additionally, the Appeals Chamber confirms the Trial Chamber's finding that reparation proceedings are fundamentally different from proceedings at trial.[97] While the standard of proof at trial is 'beyond reasonable doubt',[98] at the reparations stage the standard is a 'balance of probabilities'. In the sentencing decision, the Trial Chamber considered the evidence introduced at trial in light of the 'beyond reasonable doubt' standard.[99] As the standard is less exacting at the reparations stage, the Appeals Chamber is of the view that it must now reconsider the trial evidence. It will determine whether, on a balance of probabilities, but for the crimes of which Mr Lubanga was convicted, the child soldiers *in the particular circumstances of this case* would have suffered from sexual violence.

212. In their victims' applications, thirty victims have referred to acts of sexual violence which they have suffered or witnessed as part of their enlistment, conscription, or use by the UPC/FPLC.[100] Eight witnesses have provided evidence on the treatment of girl soldiers by commanders in training camps.[101] According to P-0046

[94] Sentencing Decision, *supra* note 68, § 67.
[95] *Ibid*, §§ 69, 74–75.
[96] *Ibid*, Dissenting Opinion of Judge Odio Benito, § 5.
[97] Impugned Decision, *supra* note 72, § 251.
[98] Sentencing Decision, *supra* note 68, § 33.
[99] *Ibid*, § 33.
[100] Article 74 Trial Judgment, *supra* note 50, § 16.
[101] Witnesses P-0007, P-0008, P-0213, and P-0298 were child soldiers who gave direct evidence during the trial stage. However, the Trial Chamber ruled that their testimonies were unreliable.

and P-0031, sexual violence against young girls was prevalent and systematic in the training camps.[102] P-0046 explained that 'all the young girls stated they had been sexually abused by their commanders most often, or by – by soldiers', including girls as young as twelve.[103] Several witnesses testified that this conduct took place once they were stationed with commanders as bodyguards.[104] P-0016 explained that girl soldiers were used as domestic servants by their commanders, forced to perform domestic chores, and to have sexual relations.[105] The sexual violence was committed during an extended period as the commanders took the girls as 'wives' or 'concubines'.[106] P-0089, for example, testified that commanders in the Mandro training centre would take girl soldiers 'as women [and] [t]hey would get them pregnant',[107] including girls who were under fifteen years old.[108]

213. The sexual violence had significant effects on the lives of girl soldiers. P-0031 and P-0046 testified that many girls suffered physical consequences from the sexual violence, including in the form of sexually transmitted diseases.[109] As a result of the sexual violence, several experienced early childbearing, and the obligation to raise children born of rape.[110] Others had to undergo abortions (voluntary or forced) to end the pregnancy.[111] Additionally, P-0046 referred to the mental difficulties experienced by the girl soldiers as a result of the sexual violence.[112] Expert witness Dr Elisabeth Schauer testified that the child soldier victims of rape had higher exposure to traumatic stressors, leading to a higher likeliness to develop post-traumatic stress disorder.[113] Additionally, Dr Schauer noted the increased risk to

Consequently, the Appeals Chamber could not use their testimonies for the purpose of assessing the harms resulting from the crimes of which Mr. Lubanga was convicted. See Article 74 Trial Judgment, *supra* note 50, §§ 246–247, 406, 441.

[102] T-207, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_04179.PDF, at 30–31, 35–39 (hereafter T-207); T-202, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_04160.PDF, at 10 (hereafter T202).

[103] T-207, *supra* note 102, at 30, 31, 35.

[104] T-114, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_05383.PDF, at 23–24, 39 (hereafter T-114); T-154, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_06441.PDF, at 82–83; T-122, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_05102.PDF, at 26 (hereafter T-122).

[105] T-191, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_03907.PDF, at 17. Although infrequently, T-178, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_04490.PDF, at 78–79.

[106] T-114, *supra* note 104, at 25–27; T-122, *supra* note 104, at 26; T-207, *supra* note 102, at 31.

[107] T-196, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2012_05152.PDF, at 8.

[108] *Ibid*, at 7–8.

[109] *Ibid*, at 31; T-202, *supra* note 102, at 10, 17.

[110] T-202, *supra* note 102, at 10; T-207, *supra* note 102, at 36–37.

[111] T-207, *supra* note 102, at 31, 36-38.

[112] *Ibid*, at 31.

[113] T-166, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2010_00121.PDF, at 48–49; see also Expert Report of Dr Schauer, 'The Psychological Impact of Child Soldiering' (ICC-01/04-01/06-1729-Anx1), available at www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_01399.PDF, at 10, 12 (hereafter Schauer Report).

develop psychiatric disorder due to the proximity between the perpetrator of rape and the child solder.[114] The reintegration of the girls into their original communities was very difficult as they were stigmatised, especially in the event they had children.[115]

214. The Appeals Chamber recalls that following the Court's jurisprudence, harm denotes 'hurt, injury and damage',[116] in the form of 'physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights'.[117] Child soldiers who were victims of sexual and gender-based crimes during their conscription, enlistment, and use in the hostilities suffered physical, mental, social, and *sui generis* harms. They have suffered physical harm from the act of rape, sexually transmitted diseases, forced pregnancy, and forced abortions. Moreover, they have suffered mental harm through the development of psychiatric disorders and, amongst other, post-traumatic stress disorder. By forcing them to perform domestic chores, the victims have suffered social harms by being reduced to their social identities as defined by the perpetrators.[118] Due to their difficult reintegration in their original communities and the need to care for children born as a result of the sexual violence, the child soldiers have also suffered *sui generis* harms. These harms include the loss of socio-economic opportunities, of standard of living, but also of their familial development that would have been possible under normal circumstances.

215. Finally, the Appeals Chamber finds that the child soldiers suffered a substantial impairment to their fundamental rights to physical and mental integrity as well as sexual and reproductive autonomy, in the case of forced pregnancy and forced abortion.[119]

216. Mr Lubanga was found guilty as a co-perpetrator of committing the war crimes of enlisting and conscripting children under the age of fifteen into the FPLC as well as using them to participate in hostilities.[120] The Trial Chamber held that, as

[114] T-166, *supra* note 113, at 58–49.

[115] T-207, *supra* note 102, at 39; T-202, *supra* note 102, at 10.

[116] Impugned Decision, *supra* note 72, § 228. See also Decision on victims' participation, Lubanga (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008, § 35 (hereafter Decision on victims' participation); Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, § 31; Schauer Report, *supra* note 113, at 28.

[117] Decision on victims' participation, *supra* note 116, §§ 35, 92.

[118] K. Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' 1 *International Journal of Transitional Justice* (2007) 411–432, at 429; F. Ni Aolain, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' 35 *Queen's Law Journal* (2009) 219–244, at 234.

[119] Universal Declaration of Human Rights, Article 25; Charter of Fundamental Rights of the European Union, Article 3; Convention on the Elimination of All Forms of Discrimination against Women, Article 16; Convention of the Rights of the Child, Article 24; International Covenant on Civil and Political Rights, Article 17.

[120] Article 74 Trial Judgment, *supra* note 50, § 1358.

part of the enlistment and conscription, children were sent to training camps where they endured a harsh training regime and were subjected to a variety of severe punishments.[121] It considered that using children under the age of fifteen as bodyguards, a common practice among commanders of the UPC/FPLC – including Mr Lubanga himself – fell within the scope of Article 8(2)(e)(vii).[122] The Chamber also found that in addition to the other tasks they carried out as UPC/FPLC soldiers, such as acting as bodyguards, 'a significant number of girls under the age of fifteen were used for domestic work'.[123] According to the Trial Chamber, as President of the UPC/FPLC, Mr Lubanga was inter alia closely involved in making decisions on recruitment policy and 'personally used children below the age of fifteen amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of fifteen'.[124]

217. The Chamber recalls the Trial Chamber's conclusion that due to their vulnerability, children need to be afforded particular protection, as recognised in various international treaties.[125] It concurs that '[t]his includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including . . . exposing them to an environment of violence and fear'.[126]

218. In light of the above, the Appeals Chamber finds that *in the particular circumstances of this case* from the evidence presented at trial, the presence of child soldiers at training camp exposed them to an environment of violence and fear which made them vulnerable to sexual violence. Their close contact with commanders during an extended period of time exposed child soldiers, and especially girl soldiers, to danger by becoming potential targets of sexual violence. Indeed, this prolonged exposure in the homes of the commanders, and their assignation to domestic chores, made them defenceless and susceptible of being taken as 'wives' by their superiors.

219. The Appeals Chamber considers it is clear from the evidence presented at trial that, had they not been enlisted, conscripted, or used by the UPC/FPLC, particularly as bodyguards to commanders, the girl soldiers would not have suffered the sexual violence harms described above.[127] As required by the 'proximate cause'

[121] *Ibid*, §§ 911–914.
[122] *Ibid*, §§ 915, 1247.
[123] *Ibid*, § 882.
[124] *Ibid*, § 1356.
[125] Sentencing Decision, *supra* note 68, § 37; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 77(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(3)(c); Convention on the Rights of the Child, Article 38; African Charter on the Rights and Welfare of the Child, Article 22(2).
[126] Sentencing Decision, *supra* note 68, § 38.
[127] *Ibid*, § 19.

standard, the sexual and gender-based violence is closely connected to the crimes of conscription, enlistment, and use of children in hostilities.

220. The Appeals Chamber therefore finds that it is more probable than not that the sexual and gender-based violence suffered by child soldiers resulted from the crimes of which Mr Lubanga was convicted, satisfying the standard of proof of a balance of probabilities applicable to the reparations stage.

221. The evidence presented by witnesses at trial focused on the sexual and gender-based violence committed against girl soldiers. Nevertheless, the Appeals Chamber considers that this fact does not in any way exclude boy soldiers who suffered from sexual and gender-based violence as a result of their conscription, enlistment and use, from receiving reparations. The Chamber recalls that under Article 21(3) of the Statute the application and interpretation of the Statute must 'be without any adverse distinction founded on grounds such as gender'. As such, the Appeals Chamber finds that anyone – male or female – demonstrating that they suffered from sexual and gender-based violence as a result of the crimes committed by Mr Lubanga is eligible to benefit from reparations.

222. Consequently, the Appeals Chamber considers that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted. Child soldier victims of sexual and gender-based violence can therefore benefit from reparations. The Appeals Chamber clarifies that this conclusion should not be interpreted to mean that sexual and gender-based violence do not constitute criminal acts which should be prosecuted as such. The Chamber concurs with the Trial Chamber and 'strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence' and his omission of sexual and gender-based crimes in the original charges.[128]

Judge Marie Wilmet

8.3 WAR CRIMES WITHIN AN ARMED GROUP IN NTAGANDA JURISDICTION ORDER

Priya Gopalan and Olga Jurasz

In 2017, Trial Chamber VI issued its decision regarding the challenge from the defence to the jurisdiction of the Court in respect to Counts 6 and 9 against Mr Bosco Ntaganda.[129] The Trial Chamber confirmed the charges of rape and sexual slavery of child soldiers as a war crime under Article 8(2)(e)(vi) of the Rome Statute, crimes allegedly committed as intra-party crimes.

[128] Article 74 Trial Judgment, *supra* note 50, § 60.

[129] Second decision on the defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *Ntaganda* (ICC-01/04-02/06-1707), Trial Chamber VI, 4 January 2017.

In this reimagining, Priya Gopalan and Olga Jurasz confirm this decision. In doing so, they depart from the methods used by the original Chamber, instead situating their analysis in international humanitarian law and treaty interpretation while simultaneously questioning the application of bodies of law created in historical contexts. Gopalan and Jurasz also work to amplify the voices of victims, highlighting the particular nuances of gender that influenced the committal of these crimes, particularly against female child soldiers.

No.: ICC-01/04-02/06
Date: 4 January 2017

Original: English

TRIAL CHAMBER VI(B)

Before: Judge Priya GOPALAN
Judge Olga JURASZ

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE *PROSECUTOR v. BOSCO NTAGANDA*

Public

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

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

Counts 6 and 9 were based on evidence that:

> UPC/FPLC commanders and soldiers raped and sexually enslaved their soldiers without regard to age, including child soldiers under the age of 15 . . . UPC/FPLC [Union des Patriotes Congolais/Forces Patriotiques pour la Liberation du Congo] commanders and soldiers referred to child soldiers (and other girls and women in the UPC/FPLC above the age of 15) as *guduria*, a large cooking pot, to mean that they could be used for sex whenever the soldiers wanted them for that purpose.[130]

The crimes underlying Counts 6 and 9 are found in Article 8(2)(e)(vi) for non-international armed conflicts. The provision reads in relevant parts:

[130] Document Containing the Charges, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber 1, 10 January 2014, § 100.

APPLICABLE LAW

Article 8 War Crimes

1. 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: . . .
   (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilisation, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.

ANALYSIS OF THE MERITS OF THE CHALLENGE

Submissions on the Merits of the Challenge to Jurisdiction over Counts 6 and 9

2. The defence submits that Counts 6 and 9 do not fall within the subject matter jurisdiction of the Court because:[131]

(i) Article 8(2)(e)(vi) of the Statute is subject to the established requirements of international law;[132]
(ii) according to Article 3 common to the Geneva Conventions of 1949 (Common Article 3), war crimes may not be committed by members of an armed force against fellow members of the same armed force;[133]
(iii) the prosecution has defined the victims of Counts 6 and 9 as being 'members' of the same armed force as the perpetrators;[134]
(iv) the notion of 'membership' of an armed force is not compatible with 'taking no active part in hostilities';[135] and
(v) international humanitarian law does not recognise any exception for child soldiers.[136]

[131] Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges, *Ntaganda* (ICC-01/04-02/06-1256), Trial Chamber VI, 7 April 2016, § 27.
[132] *Ibid*, § 15.
[133] *Ibid*, §§ 17–22.
[134] *Ibid*, §§ 23–24.
[135] *Ibid*, §§ 26–32.
[136] *Ibid*, §§ 33–39.

Chamber's Analysis of the Court's Subject Matter Jurisdiction in Respect to Counts 6 and 9

Applicable Law

STATUS REQUIREMENTS UNDER ARTICLE 8 OF THE STATUTE

3. Common Article 3 refers to 'persons taking no active part in the hostilities'. Additional Protocol II, which applies in non-international armed conflicts, states that children 'shall be provided with the care and aid they require'.[137]

4. The Pre-Trial Chamber held that individuals only lose their protection for such time as they are actively participating in hostilities, and that those who were raped and subjected to sexual violence were clearly not participating in hostilities at that time.[138] It found that children lose their protection when they take direct part in hostilities, for the duration of their participation in the hostilities.[139]

5. On this basis, the Pre-Trial Chamber determined that sexual violence committed against child soldiers constituted war crimes under Article 8(2)(e)(vi) of the Rome Statute because children were protected by international humanitarian law (IHL) during the commission of the sexual violence.[140] The Pre-Trial Chamber determined that whether the girl soldiers in question assumed the role of combatants in the same armed group as the perpetrator was irrelevant to this finding.[141]

6. This Chamber concurs with the conclusion of the Pre-Trial Chamber that child soldiers are protected under IHL but respectfully disagrees with the Pre-Trial Chamber's basis for this conclusion, namely that the girl soldiers in question could not logically have been taking a direct/active part in hostilities at the precise time sexual violence was being perpetrated against them.[142]

[137] Article 4(3) specifies that 'in particular … children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities' (Article 4(3)(c)) and 'the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured' (Article 4(3)(d).

[138] Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, *Ntaganda* (ICC-01/04-02/06-309), Pre-Trial Chamber II, 9 June 2014, § 79 (hereafter Decision pursuant to Article 61(7)(a) and (b)).

[139] *Ibid*.

[140] *Ibid*.

[141] *Ibid*, § 80.

[142] *Ibid*, § 79. The Pre-Trial Chamber observed that the Special Court for Sierra Leone (SCSL) undertook a similar assessment, in the case of *Prosecutor v. Charles Ghankay Taylor*, For a similar assessment, see Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, §§ 1179, 1206(vii), 1207, 1451. The Trial Chamber found that sexual violence against Akiatu Tholley (a girl soldier who was raped by a member of her own group) was the war crime of 'outrages on personal dignity', under Article3(e) of the SCSL Statute. In finding that Tholley was a victim of a war crime, the Trial Chamber did not specifically discuss her role in the same armed group as the perpetrator. The Trial Chamber explained that in relation to this charge, 'each of the victims was not taking an active part in the hostilities at the time of the sexual

7. The Chamber observes that this interpretation does not represent the full spectrum of the lived experiences of girl soldiers in conflict. The focus on the specific time of the rape to find that a victim could not have been taking a direct or active part in hostilities while being raped appears to presume that rape occurred infrequently and in limited circumstances. The Chamber finds this to be a rigid and unrealistic assessment of the nature, frequency, and consequences of sexual violence experienced by girl soldiers. It is also an approach that marginalises the lived experiences of girl soldiers. The trial record contains substantial evidence of the widespread and systematic perpetration of rape and other forms of sexual violence against child soldiers, particularly girls, by adult UPC/FPLC commanders.[143] Given the prevalence and frequency of sexual violence in this case, a temporal analysis that focuses on single acts does not reflect the multiplicity of acts of sexual violence experienced by girl soldiers as part of their daily lives as well as multiple and intertwined types of abuse perpetrated against them.

8. In addition, the Chamber notes that a narrow focus on the act or acts of rape precludes any considerations of the long-standing impact of rape – in particular, the psychological trauma resulting from rape, which is a defining feature of this crime and other forms of sexual violence: sexual and gender-based violence causes grave and long-lasting physical, psychological and social effects at multiple levels. Individuals, families and communities are affected whether before, during or after the conflict in the DRC, both in public and private spheres'.[144] Finally, this approach does not recognise the strategic function wielded by sexual violence.

9. Considering the strategic purpose of sexual violence, the Chamber notes the dual manner in which violence, sexual violence, and threats thereof can be used to obtain military advantage. Firstly, this is externally facing and directed at terrorising and instilling fear in the civilian population, as recognised by and captured in the

violence': Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, § 1207. See also R. Grey, 'Sexual Violence against Child Soldiers: The Limits and Potential of International Criminal Law' 16(4) *International Feminist Journal of Politics* (2014) 601–621, at 612.

[143] Decision pursuant to Article 61(7)(a) and (b), *supra* note 138, § 82. The Chamber recalls evidence that 'Abelanga, a UPC/FPLC soldier, raped a girl under the age of 15 years who was his bodyguard from November 2002 until at least March–May 2003. Around mid-August–beginning of September 2002, young girls, including under the age of 15 years, were raped in Mandro camp. They were "domestic servants" and they "combined cooking and love services". Another girl, aged 13 years, was recruited by the UPC/FPLC and continuously raped by Kisembo, a UPC/FPLC soldier, until he was killed in Mongbwalu'.

[144] See e.g. Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo* (2009), available at www.hrw.org/report/2009/07/16/soldiers-who-rape-commanders-who-condone/sexual-violence-and-military-reform; United Nations Population Fund, 'Secretary General Calls Attention to Scourge of Sexual Violence in DRC' (1 March 2009), available at www.unfpa.org/news/secretary-general-calls-attention-scourge-sexual-violence-drc; Médecins Sans Frontières, *'I Have No Joy, No Peace of Mind': Medical Psychological and Socio-Economic Consequences of Sexual Violence in Eastern DRC* (2004), available at www.msf.org.za/sites/default/files/publications/sexual_violence_no_joy_no_peace_of_mind.pdf.

jurisprudence of the Special Court for Sierra Leone.[145] Secondly, it is internally directed against members of the same armed group in order to exercise power and control over members of that armed group. This is not uncommon practice, especially in the context of recruiting and using children to participate in hostilities – an international crime that has been examined at length and prosecuted by this Court.[146] The Chamber finds that rape and sexual slavery committed against members of the same armed force or group – specifically children who were recruited and used to participate in hostilities – in this case are examples of the latter. The deployment of sexual violence in this context is a tool of exercising power and control over the victims and, as noted by the ICC Office of the Prosecutor, 'in conflict situations, acts of sexual and gender-based crimes rarely occur in isolation from other crimes'.[147] The Chamber recalls terminology such as 'strategic rape' or 'rape as a weapon of war' which has been used to describe the strategic purpose for which sexual violence is deployed in conflict.[148]

10. Turning to the crime of sexual slavery, the Chamber observes that a defining feature of the crime of sexual slavery is that the perpetrator exercises rights of ownership over the victim or imposes on the victim a similar deprivation of liberty, and forces the victim to engage in sexual acts.[149] In the context of girl soldiers, a common-sense interpretation of this crime is that sexual slavery continues so long as the perpetrator exercises rights of ownership over the victim or similarly deprives the victim of her liberty, and on at least one occasion forces the victim to engage in a sexual act. Within this interpretation, the crime continues even while the victim is actively or directly participating in hostilities, cooking, engaging as a porter, laying mines, spying, and/or manning checkpoints. The presumption underlying

[145] Judgment, *Sesay, Kallon & Gbao* (SCSL-04-15-T), Trial Chamber I, 2 March 2009, §§ 1348–1351.

[146] Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012; A. Honwana, *Child Soldiers in Africa* (Pittsburg: University of Pennsylvania Press, 2006); N. Quénivet, 'Girl Soldiers and Participation in Hostilities' 16(2) *African Journal of International and Comparative Law* (2008) 219–235; M. A. Drumbl, *Reimagining Child Soldiers* (Oxford: Oxford University Press, 2012).

[147] ICC, Policy Paper on Sexual and Gender-Based Crimes (2014), available at www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes–June-2014.pdf, § 59.

[148] See e.g. Dr. Dennis Mukwege Foundation, 'Sexual Violence as a Weapon War' (undated), available at www.mukwegefoundation.org/the-problem/rape-as-a-weapon-of-war/; M. Eriksson Baaz and M. Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond* (London: Zed Books, 2013); A. Swaine, 'Beyond Strategic Rape and between the Public and Private: Violence against Women in Armed Conflict' 37(3) *Human Rights Quarterly* (2015) 755–786.

[149] Article 8(2)(b)(xxii)-2; Article 8(2)(e)(vi)-2, Elements of Crimes, available at www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes–June-2014.pdf.

the Pre-Trial Chamber's finding appears to be that that the sexual slavery and the participation in hostilities occur at distinct and different times.[150]

11. The Chamber finds additional support for the continuing nature of this crime in the socio-cultural tenets underpinned by the systemic gender inequalities of patriarchal power structures in the Democratic Republic of Congo (DRC). The Chamber observes that it was in this context that sexual slavery was perpetrated. Up to 52 per cent of women in DRC are survivors of domestic violence and 39 per cent report having been threatened or injured. Reports indicate that 27 per cent of women in DRC are victims of harmful traditional practices. In 2007 early marriages affected 39 per cent of women in their early twenties who were married or in a union before the age of eighteen.[151]

12. The Chamber recalls that according to the Paris Principles, '[g]ender inequalities, discrimination and violence are frequently exacerbated in times of armed conflict'.[152] Sexual and gender-based violence has been a hallmark of the conflict in the DRC, with Margot Wallström, the UN Secretary General's Special Representative on Sexual Violence in Conflict, declaring that the DRC was the 'rape capital of the world' in 2010.[153] Decades of armed conflict have led to the deaths of over 2 million civilians and estimates suggest over 1 million women have been raped.[154]

13. The Chamber observes that in this context, once a girl becomes associated with an armed group and is used sexually, she becomes identified socially as a 'military wife'.[155] If a girl has sexual contact with a man – whether voluntarily, by rape, or by assumption due to being taken by an armed group – outside of marriage and dowry, she is considered to 'no longer have any value' in society.[156] In certain communities in the DRC, a traditional justice approach to cases of rape or sexual relations outside of marriage is to force the perpetrator to pay a dowry/compensation to the family and marry the girl.[157]

14. As such, there is a strong socio-cultural conception that a girl has to remain with a sexual partner, whether that relationship originated with or without her consent, including where this may be rape, thus entrenching the continuous nature of this violation.[158] Many girls simply do not see leaving their 'military husband' or

[150] Grey, *supra* note 1422, at 611–612.
[151] UN Women, 'Democratic Republic of Congo' (undated), available at https://africa.unwomen.org/en/where-we-are/west-and-central-africa/democratic-republic-of-congo (hereafter UN Women).
[152] The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 (hereafter The Paris Principles), § 6.0.
[153] BBC News, 'UN official calls DR Congo rape capital of the world' (28 April 2010), available at http://news.bbc.co.uk/2/hi/africa/8650112.stm.
[154] UN Women, *supra* note 151.
[155] B. Verhey, *Reaching the Girls, Study on Girls Associated with Armed Forces and Groups Save the Children – UK and the NGO Group: CARE, IFESH and IRC* (November 2004), available at https://resource-centre-uploads.s3.amazonaws.com/uploads/2600.pdf, at 2.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.

'enslaver' as a choice, which reinforces the continuing nature of the crime of sexual slavery.[159]

15. The Chamber will now analyse whether the 'established framework of international law' applicable in non-international armed conflicts protects members of the same armed force from crimes committed by other members of the same armed force, with the result that the acts of sexual violence constituted war crimes under Article 8(2)(e)(vi) of the Rome Statute.

The 'Established Framework of International Law' Applicable in International and Non-international Armed Conflicts

16. Article 8(2)(e) refers to 'other serious violations of the laws and customs applicable in non-international armed conflicts, *within the established framework of international law*'. Similarly, the 'Introduction' to the Elements of Crimes for Article 8 provides that the war crimes under paragraph 2 'shall be interpreted within the established framework of the international law of armed conflict' as expressed in IHL.

17. The question of whether acts of rape and sexual slavery committed against members of an armed force or group by members of the same armed force or group must be considered not only in the context of the principles of IHL and international criminal law (ICL) (specifically, the Statute), but also positioned within the broader principles of international law.

PRINCIPLES OF INTERNATIONAL LAW: TREATY INTERPRETATION

18. This issue goes to the heart of the object and purpose of treaties – here, the Statute, the Geneva Conventions, and their Additional Protocols – as well as a matter of treaty interpretation. The body of IHL was created in the late nineteenth and mid-twentieth century, with Additional Protocol II being adopted over forty years ago. Since then, the nature, typology, and duration of armed conflicts has changed dramatically and so has the international community's knowledge about the lived experiences of modern armed conflicts. This includes the growing ICL jurisprudence on sexual and gender-based crimes which has advanced (i) the knowledge of international courts on how sexual violence is used in conflict and (ii) practice in successful prosecutions of such crimes. Furthermore, whilst children's participation in armed conflicts is not a novel issue in the realm of IHL, the past two decades have been instrumental in conceptualising and advancing the understanding of child soldiering in contemporary armed conflicts.[160] Therefore,

[159] *Ibid.*

[160] Optional Protocol to the UN Convention on the Rights of the Child 1989 on the involvement of children in armed conflict (2000); Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012; *Sesay, Kallon & Gbao*, *supra* note 145.

the Chamber considers that an evolutionary approach to treaty interpretation[161] (which treats them as 'living instruments') is required in light of the above developments as well as the rapidly changing nature of violations of IHL and ICL, that better reflect the realities of child soldiering.

19. The Chamber observes that in the context of the changing nature of conflict around the world, including in African countries such as the DRC, and the increasingly asymmetrical nature of such conflicts, the bright-line rule that was drawn in traditional or formal armed forces between those on the front line and those playing supportive roles in rear bases is no longer clear or tenable. This opacity is evident when it comes to the protection of child soldiers who shift regularly between different roles, whether as active fighters, guards, porters, cooks, bush wives, or sex slaves.

20. The Chamber recalls that the object and purpose of Article 8 of the Statute is to punish criminal acts committed 'in the context of and associated with' an armed conflict of either international or non-international character.[162] This criterion ultimately differentiates war crimes from other crimes. The Chamber views acts referred to in Counts 6 and 9 as satisfying this criterion and notes that 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)(e)(vi) of the Statute when these acts are committed by members of the same armed force or group.

21. Furthermore, the Chamber notes that the non-exhaustive nature of the protections provided under IHL is recognised in the Preamble to the Additional Protocol II. Echoing the Martens clause,[163] the Preamble states that 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'.[164] Whilst Additional Protocol II, at the time of drafting, has not explicitly captured victimisation, exploitation, and violence directed by members of an armed force or group against members of the same armed force or group as a war crime, it has not explicitly excluded it either.

22. The Chamber notes that the scope of Article 8 of the Statute, whilst drawing upon the principles of IHL, is not a verbatim reproduction of the relevant IHL provisions. In fact, Article 8 differs in scope and phraseology from IHL provisions.

[161] See, for example, E. Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014).

[162] Article 8, ICC Statute.

[163] Preamble to Hague Convention IV. The so-called Martens clause reads: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'.

[164] Preamble to the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), of 8 June 1977.

Considering the substance of the defence's challenge, specifically with regard to status requirements, the Chamber emphasises that crimes listed under paragraphs 2 (b)(xxii) and (e)(vi) do not identify a requirement for a particular victim status. This is in contrast with paragraphs 2(a) and (c) which stipulate specific victim status criteria.

23. The Chamber additionally observes that, whilst Additional Protocol II extends protection to those not taking or no longer taking part in hostilities, it remains silent on the issue of which side of the conflict these persons belong to. Additionally, the Chamber notes that ICL (including the jurisprudence of this Court[165]) and IHL both recognise the act of enlisting and conscripting children under the age of fifteen to participate in hostilities as a war crime.[166] This crime has not only been recognised as one of a continuous nature[167] for purposes of international criminal law but – in essence – constitutes a crime committed against members of the same armed group. Critically, these war crimes can only be perpetrated by members of a military force against victims who are from the same military force.

24. The Chamber observes that although in general IHL regulates conduct directed towards those external to a military force rather than to those internal to a military force, this general proposition does not constitute an irrebuttable presumption.

25. IHL accepts that the parties' objective to overcome the opposing side will result in certain suffering, damage, and harm, but specifically determines that such consequences ought only to follow from actions that are militarily necessary or that will result in a definite military advantage.[168] Yet sexual violence, including rape and sexual slavery, is increasingly being deployed by armed groups in an attempt to gain political and/or military advantage. In this regard, the Chamber notes the jurisprudence of the Special Court for Sierra Leone, which established that sexual violence can be, and was, deployed by armed groups with the specific intent to terrorise the civilian population and – therefore – commit acts of terror[169] contrary to Articles 4(2)(d) and 13(2) of Additional Protocol II.

26. This Chamber considers that acts of sexual violence, especially rape and enslavement, including sexual slavery, cannot under any circumstances be

[165] Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012.

[166] Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) ICC Statute; Article 77 of Additional Protocol I; Article 4 of Additional Protocol II.

[167] Judgment, *Brima et al.* (SCSL-04-16-T), Trial Chamber II, 20 June 2007, §§ 39–41; Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, §§ 118–119; Decision on the confirmation of charges, *Lubanga* (ICC-01/04-01/06-803-tEN) (translation notified 14 May 2007), Pre-Trial Chamber I, 29 January 2007, § 248.

[168] ICRC, Customary International Law Database, Rule 14: Proportionality of Attack, available at https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14; Article 51(5)(b) of the 1977 Additional Protocol I; Article 85(3)(b) of the 1977 Additional Protocol I.

[169] Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, § 2035; Judgment, *Sesay, Kallon & Gbao* (SCSL-04-15-T), Trial Chamber I, 2 March 2009, §§ 1348–1351, upheld on appeal: Judgment, *Sesay, Kallon & Gbao* (SCSL-04-15-A), Appeals Chamber, 26 October 2009, § 990.

considered as legitimate acts in pursuance of military necessity or military advantage. Raping and sexually enslaving children under the age of fifteen,[170] or indeed any persons, would never bring any accepted military advantage, nor can there ever be a necessity to engage in such conduct. To do so would not only be in violation of the principle of legality but also in violation of customary international humanitarian law and the principle of *jus cogens*.

27. While most of the express prohibitions of rape and sexual slavery under IHL appear in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct. The Chamber finds that rape and other forms of sexual violence have long been prohibited by IHL. The prohibition against rape and sexual slavery is a peremptory norm and 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.[171]

Article 21(3) as an Interpretive Tool

28. In concluding sexual violence committed against child soldiers constituted war crimes under Article 8(2)(e)(vi) of the Rome Statute because the children were protected by IHL during the commission of the sexual violence, the Chamber also relies on Article 21(3) of the Statute, which compels it to interpret and apply the law in accordance with internationally recognised human rights,[172] without adverse distinction founded on grounds such as gender and age. In order to apply and interpret the law in this manner, this Chamber seeks to surface the gendered aspects of child soldiering as an intentional process of legal reasoning that is grounded in the realities of the conflict and lived experiences of child soldiers.

29. The Chamber recalls the UN Guidelines for the Demobilisation of Child Soldiers which emphasise that 'children, and girls in particular, perform numerous combat and non-combat functions that are essential to the functioning of the armed

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

[171] See, for example, the Martens Clause, Article 1(2) of Additional Protocol I and the Preamble of Additional Protocol II. See also International Court of Justice, Legality of the threat or use of nuclear weapons, Advisory Opinion, 8 July 1996, §§ 78 and 87; Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, §137; Judgment, *Krupp et al.* (Case No. 214), United States Military Tribunal in Nuremberg, 31 July 1948; K. D. Askin, *War Crimes against Women: Prosecutions in International War Crimes Tribunals* (Leiden: Martinus Nijhoff, 1997) at 242; D. S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' 15 *Duke Journal of Comparative Law & International Law* (2005) 219–257.

[172] Dissenting Opinion of Judge Odio Benito, Judgment, *Lubanga* (ICC-01/04–01/06), Trial Chamber I, 14 March 2012, § 6.

force or group'.[173] In her report, Dr Schauer highlights that girls' participation is central to sustaining a force because of their productive and reproductive labour.[174] The UN Special Representative of the Secretary-General on Children in Armed Conflict has stressed that 'during war, the use of children in particular includes sexual violence'.[175] The Chamber recalls that the Cape Town Principles include 'girls recruited for sexual purposes and forced marriage' in the definition of child soldiers[176] and that the Paris Principles reinforce this approach, acknowledging that 'girls are frequently used for sexual purposes'.[177]

30. The Chamber also recognises in this context the extensive scholarly critique[178] concerning the language of IHL, specifically where it concerns sexual violence, as well as the scope of protection afforded to women and girls. Although the use of girls for sexual purposes is well documented, the Chamber recalls that neither IHL nor ICL clearly regulate this conduct. As noted by Judge Odio-Benito in *Lubanga*, 'invisibility of sexual violence is the legal concept that leads to discrimination against victims of enlistment, conscription and use who systematically suffer this crime as an intrinsic part of the involvement with the armed group'.[179] Therefore, in light of the nature of the crimes in Counts 6 and 9, as well as the identities of the victims, a gender-competent and intersectional interpretation of the law is a positive obligation imposed on the Chamber under Article 21(3).

31. Article 21 calls for the law to be applied and interpreted in a manner that surfaces gendered and intersectional harms. Understanding the range of harms including sexual violence leads to a non-discriminatory analysis of sexual crimes, which in this context predominantly affected girl soldiers.[180] The Chamber observes the continuous nature of the violation of being recruited or enlisted as a child

[173] United Nations, 'Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards' (1 August 2006) at 218, available at https://peacekeeping.un.org/sites/default/files/operational-guide-rev-2010-web.pdf; United Nations, *Report of the Secretary General 'Disarmament, Demobilisation and Reintegration'* (UN Doc A/60/705), 2 March 2006.

[174] Expert Report of Dr Schauer (EVD-CHM-0001), 'The Psychological Impact of Child Soldiering' (ICC-01/04-01/06-1729-Anx1), available at www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_01399.PDF, at 27–28.

[175] Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, March 2008.

[176] UNICEF, *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into Armed Forces and on Demobilization and Social Reintegration of Child Soldier in Africa* (April 1997) at 1.

[177] The Paris Principles, *supra* note 152, § 1.0. See also § 2.1.

[178] E.g. H. Durham and K. O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' 92(877) *International Review of the Red Cross* (2010) 31–52; J. Gardam, 'The Neglected Aspect of Women and Armed Conflict: Progressive Development of the Law' 52(2) *Netherlands International Law Review* (2005) 197–219.

[179] Dissenting Opinion of Judge Odio Benito, Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, § 16.

[180] *Ibid*, § 6.

soldier, and the significance of contextualising these violations within societal norms, values, and attitudes to fully ventilate the harms arising from their multiple roles, including experiencing sexual violence committed by their own side. Accordingly, this Chamber makes plain the link between the *jus cogens* nature of the prohibition against rape and sexual slavery and its application to the girl soldiers.

32. Although the foregoing analysis centres on the experiences of girl soldiers, the Chamber notes that a gender-competent intersectional interpretative approach towards the law and offences pursuant to Article 21(3) is also the standard to be applied to the experiences of boy soldiers. Such an approach enables the recognition and unpacking of the experiences of child soldiering and permits a shift away from essentialist narratives that further the binary of the female victim and male perpetrator. Girl soldiers and boy soldiers experience conflict differently due to the gendered elements that underlie the perpetration of the crime of child soldiering. Article 21(3) permits the surfacing of these gendered and intersecting violations without adverse distinction.

The Special Protection Afforded to Children

33. The Chamber observes that the prohibition on conscripting or enlisting child soldiers or allowing children to directly participate in hostilities is an exception to the general proposition precisely in order to provide non-derogable protections for children as a particularly vulnerable group. The notion of vulnerability – traditionally determined through one's non-combatant status, be it civilian or *hors de combat* – underpins IHL provisions affording protection to selected persons/groups deemed specifically vulnerable.[181] Rape and sexual slavery committed against child soldiers by members of the same armed force or group heightens their vulnerability – first, resulting from recruitment and, second, as victims of sexual violence. This induced vulnerability is exploited by armed groups as an effective method of controlling child soldiers and is used to manipulate and subjugate the victims. The essence and motivations behind the acts underpinning crimes of rape and sexual slavery stand not only against the principles of customary international law, IHL, and ICL but also against key principles of humanity.

34. The Chamber recalls the legal basis for Counts 6 and 9, as explained in the document containing the charges, which stated that the rape and sexual enslavement of child soldiers by the UPC/FPLC commanders and soldiers constitute war crimes.[182] Child soldiers are afforded general protections against sexual violence under the fundamental guarantees afforded to persons affected by non-international armed conflicts under Article 4 of the Additional Protocol II and Common

[181] See, for example, the Fourth Geneva Convention of 1949.
[182] Document Containing the Charges, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber 1, 10 January 2014, § 100.

Article 3 of the 1949 Geneva Conventions.[183] They also have special protections because of their vulnerability as children under Article 4(3) of the Additional Protocol II.[184] The Chamber thus finds that the protection offered by these provisions supports the recognition of child soldiers as victims of sexual violence for the purposes of charges under Article 8(2)(e)(vi) of the Rome Statute.[185]

35. The Chamber thus concludes that sexual violence is used strategically in contemporary armed conflicts to exert power, influence, and control, irrespective of the status of its victims. [However, this is not accepted within the confines of the principles of military necessity and military advantage under IHL.] Having found that the protection against sexual violence under IHL is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians not directly participating in hostilities, the Chamber does not need to address whether or not the persons alleged to have been 'child soldiers' in the facts and circumstances underlying Counts 6 and 9, or any persons alleged to have been held in sexual slavery by the UPC/FPLC, are to be considered as 'members' of this armed force at the relevant time.

Conclusion

36. Based on the foregoing analysis, the Chamber finds that members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(e)(vi), based on the principles of treaty interpretation, the framework of international law including the *jus cogens* prohibition on sexual violence and the special protection afforded to children under IHL. Without prejudice to whether such acts have taken place, the Chamber therefore finds that it has jurisdiction over the conduct charged pursuant to Counts 6 and 9.

Judge Priya Gopalan and Judge Olga Jurasz

8.4 CONSENT AND SEXUAL CRIMES IN THE NTAGANDA JUDGMENT

Isabel Maravall-Buckwalter

In 2019, Trial Chamber VI issued the judgment in the case against Mr Bosco Ntaganda.[186] Convicted of eighteen counts of war crimes and crimes against humanity, the volume of sexual violence, especially against women and girls, was a particular feature of this case.

[183] *Ibid*, § 107.
[184] *Ibid*.
[185] *Ibid*.
[186] Judgment, *Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019.

In Isabel Maravall-Buckwalter's rewrite,[187] age-related incapacity, as a circumstance defining the crime of rape, is explored. In *Ntaganda*, age was only considered as a circumstance sufficient to find rape in the case of a nine-year-old girl called Nadège. In the case of victims over the age of nine, additional circumstances were necessary for a finding of rape. Without diminishing the sexual agency of victims, the rewritten judgment argues against this standard and, by providing an interpretation in accordance with international human rights law and international humanitarian law, raises the age of consent to the acceptable standard in international law.

No.: ICC-01/04-01/06
Date: 8 July 2010

Original: English

TRIAL CHAMBER VI(B)

Before: Judge Isabel MARAVALL-BUCKWALTER

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE *PROSECUTOR v. BOSCO NTAGANDA*

Public

with public Annexes A, B, and C
Judgment

This case relates to events alleged to have occurred from on or about 6 August 2002 to on or about 31 December 2003, in Ituri, in the Democratic Republic of Congo (DRC). Mr Bosco Ntaganda is charged with thirteen counts of war crimes and five counts of crimes against humanity, of which specifically rape as a crime against humanity and as a war crime (Counts 4, 5, and 6) pursuant to Articles 7(1)(g) and 8(2)(e)(vi) of the Rome Statute (the Statute).

FACTUAL FINDINGS

Sexual Violence against Female Recruits and Soldiers

1. The Union des Patriotes Congolais (UPC)/Forces Patriotiques pour la Liberation du Congo (FPLC) extensively recruited individuals of all ages, from

[187] In accordance with the feminist judgment methodology, the reimagined judgment which follows draws on the materials that were available to, and cited in, the original judgment: Judgment, *Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019. Wherever possible, the primary materials have been referenced in footnotes in the reimagined judgment. However, some of the primary materials that were referred to in the original judgment and relied on in the reimagined judgment are not publicly available (as referenced in footnotes 189–212).

June 2002.[188] Female members of the UPC/FPLC were regularly raped and subjected to sexual violence at the camps by male UPC/FPLC soldiers.[189] Sexual violence was committed against girls of all ages, including girls under the age of fifteen.[190] A number of these female members of the UPC/FPLC became pregnant during their time in the UPC/FPLC.[191] The Chamber has heard relevant evidence of sexual violence committed against girls over the age of fifteen, however it does not fall within the scope of the charges.[192]

2. P-0883 was under fifteen years old at the relevant time.[193] During her time at Bule camp she was raped by 'many soldiers'.[194] She was not able to state how often she was raped, and indicated that 'whether you were sitting down or sleeping, anyone who wanted to do so could rape you'.[195] Soldiers would come and take her and other girls 'whenever they wanted', whether they were inside or at the place of work of the soldier, sometimes saying that they would shoot them if they did not agree.[196] Later, after having been injured during a battle, P-0883 was sent to Camp Baudouin for treatment, where she found out that she was pregnant, without knowing 'who was responsible for that pregnancy'.[197]

3. A girl named Nadège, who was around nine years old at the time, and who was taken to training at Lingo camp, was raped; P-0758 explained that there was pus coming out of Nadège's vagina and that, as a result, she died.[198]

[188] The Chamber recalls its finding that both P-0883 and P-0898 were under fifteen when they joined the UPC/FPLC. In addition, the Chamber bases this finding on the presence of individuals under fifteen years of age in UPC/FPLC training camps, according to the evidence.

[189] P-0901: T-29, 57–58; P-0907: T-89, 61–64.

[190] In addition to the specific examples discussed here, the Chamber also heard other evidence about rape of PMFs under fifteen by UPC/FPLC soldiers or commanders: P-0031 reported that he was in contact with some young girls between thirteen and fourteen who reported having been raped within the UPC/FPLC; some of them had contracted sexually transmitted illnesses and others had a child (T-174, 27–29; DRC-OTP-2054–3760, 3778–3782; DRC-OTP-2054–3939, 3947–3948; and DRC-OTP-2054–4308, 4317–4318). P-0046 recalled having interviewed girls, including some under fifteen, who were sexually abused and taken as wives of the commanders and other soldiers (T-101, 68–69). P-0017 stated that he was told that Abelanga raped two bodyguards who were 12–13 years old (T-58, 51–52). The witness provided a reasonable explanation for his age assessment, referring to the girls' 'physiognomy', 'their sizes', and the fact that they played, and that 'they looked more like young boys because they didn't have any breasts'.

[191] P-0010: T-47, 34; P-0055: T-71, 94–96; P-0883: see below; and P-0901: T-29, 57. See also P-0031: DRC-OTP-2054–3760, at 3782; P-0046: T-101, 68.

[192] See testimony of P-0758 and P-0010.

[193] See credibility assessment of P-0883.

[194] P-0883: T-168, 31–32.

[195] P-0883: T-168, 32.

[196] P-0883: T-168, 32. See also P-0010: 36; and P-0907: T-89, 64.

[197] P-0883: T-168, 34, 36–37, and 42–44.

[198] P-0758: T-160, 89. In light of the details provided by P-0758 and having considered related findings on the conditions in the camps, the Chamber finds that the only reasonable conclusion to be drawn is that Nadège suffered a forceful vaginal penetration.

4. A girl by the name Mave, who was under fifteen years of age, was raped by many different soldiers on a regular basis. P-0887 testified that many soldiers 'slept with' Mave, 'treated her as a . . . soldier's woman', had sexual relations with her. The witness said she knew this because soldiers were talking about it amongst themselves, and she also spoke to Mave.[199] P-0907 testified as well that it was 'common knowledge' that Mave had been raped several times by soldiers and she began to suffer from fistula, and that he was present when Kisembo gave a speech to a gathering of soldiers in March 2003, where he told the soldiers that Mave had a fistula and prohibited the further rape of Mave.[200]

The Operations Involving the UPC/FPLC

5. During and in the immediate aftermath of the assault on Mongbwalu, UPC/FPLC soldiers forced women and girls to have sexual intercourse with them. P-0892, thirteen years old at the time, was taken to a house by UPC/FPLC soldiers.[201] Upon arrival, a UPC/FPLC commander named Saidi ordered the soldiers to undress the girl; the soldiers then violently ripped off her skirt and underwear and threw her onto the bed.[202] Saidi then penetrated the girl with his fingers, saying that she was a minor who had not 'known a man', after which he got on top of her and penetrated her vagina with his penis.[203] The girl started screaming, after which Saidi put a cloth over her mouth and continued.[204] After he finished, he said that she now was a 'woman', after which one of UPC/FPLC soldiers got on top of the girl and also penetrated her.[205]

6. P-0892 and P-0912 testified[206] that other women and girls were also taken away by UPC/FPLC soldiers and raped. One girl, who was approximately fourteen years old at the time, told her that she was forced to enter a bedroom, asked to lie down, and as she refused, the soldiers started hitting her. Subsequently, two people 'raped' her;[207] P-0912 testified that she overheard that the fourteen-year-old girl had been taken from the same house by soldiers who mentioned that they were taking girls to prepare food at the military camp. This girl later told P-0912 that she had been 'raped' and injured.[208] P-0887 testified that the UPC/FPLC soldiers committed 'rapes' and abductions of girls in Mongwalu and referred to one particular instance

[199] P-0887: T-93, 39–41, and 50.
[200] P-0887: T-93, 39–41, and 50; P-0907: T-89, 52, 55–57, and 63–64.
[201] P-0912: T-148, 32, and 60–62; and P-0892: T-85, 5–8.
[202] P-0912: T-148, 63–64; and T-149, 7–8; see also P-0892: T-85, 5 and 7.
[203] P-0912: T-148, 64–65. See also P-0892: T-85, 7.
[204] P-0912: T-148, 65.
[205] P-0912: T-148, 65–66. See also P-0892: T-85, 7.
[206] P-0912: T-148, 47.
[207] P-0892: T-85, 10–12.
[208] P-0912: T-148, 69–71.

in which he saw a girl from the neighbourhood being chased and pushed by a UPC/FPLC soldier with a gun, and who then spent a night with the soldier.[209] P-0888 also testified that he personally saw soldiers and commanders who raped 'little girls', although he could not provide their names.[210]

7. While in Kobu, UPC/FPLC soldiers detained several women and girls, in some instances for hours, in others over the course of several days; during these periods, UPC/FPLC soldiers raped them and otherwise subjected them to sexual violence on one or more occasion.[211] This included an eleven-year-old captured by Commander Simba during a mop-up operation in Kobu whom he brought with him to Bunia where she stayed until the Bunia operation and forced her to sleep with him; according to P-0017, she was forced to have 'sexual relationships' with Simba to save her life.[212]

APPLICABLE LAW

8. The crime against humanity of rape is laid down in Article 7(1)(g) of the Statute. The war crime of rape is laid down in Article 8(2)(e)(vi) of the Statute.[213]

9. The legal elements of the crime against humanity of rape as defined in Article 7 (1)(g)1 of the Elements of Crimes:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[209] P-0887: T-93, 19, and 22–25.
[210] P-0888: T-105, 81.
[211] P-0790: T-54, 32.
[212] P-0017: T-60, 28–29.
[213] Parts of this section have been taken from I. Maravall-Buckwalter, 'The Inconsistencies of Age-Related Incapacity Thresholds in International Law: Child Rape Victims at a Disadvantage' 22 (2) *Human Rights Law Review* (2022) 18–20.

10. The legal elements of the war crime of rape are as defined in Article 8(2)(b)(xxii)1 of the Elements of Crimes:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

11. As to the second element of the crime of rape as a crime against humanity and as a war crime, the fourth possible circumstance to be considered under the Statute is that an invasion of the body of the victim or the perpetrator may also constitute rape when committed 'against a person incapable of giving genuine consent'. The Elements of Crimes specifies that '[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced, or age-related incapacity'.[214] Neither the Elements of Crimes nor the Statute establishes when a person is of age-related incapacity. Regarding this requirement, the Court's jurisprudence has stated that it is necessary that 'the Prosecution will only have to prove that the victim's capacity to give genuine consent was affected by natural, induced, or age-related incapacity'.[215] In 2014, in the *Prosecutor v. Germain Katanga* the ICC's Trial Chamber noted that, 'save the very specific situation of a person whose "incapacity" was "tak[en] advantage of", the Elements of Crimes do not refer to the victim's lack of consent, and therefore this need not be proven'.[216]

12. According to the Court's jurisprudence, 'at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape'.[217]

13. Considering that age-related incapacity constitutes one of the circumstances which render consent immaterial to the crime of rape, the Chamber considers

[214] Article 7(1)(g)-1, Elements of Crimes; Article 8(2)(e)(vi)-1, Elements of Crimes.
[215] Judgment, *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III, 21 March 2016, § 107 (hereafter Bemba Trial Judgment).
[216] Judgment, *Prosecutor v. Germain Katanga* (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, § 965.
[217] *Ibid*. See also Bemba Trial Judgment, *supra* note 215, §§ 105–106.

pertinent to give content to this circumstance, as it has been left undefined in the Statute and in the Elements of Crimes.

14. Article 21 of the Statute provides judges with the tools to interpret when the Court's primary sources, the Statute or the Elements of Crimes, fail to resolve an issue and there is a remaining lacuna in the law. First, according to Article 21.1(b), by resorting to the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Second, Article 21.1(c) establishes that if these also fail to resolve the issue, the Court may apply general principles of law derived from the national laws of the states that would normally exercise jurisdiction over the crime, provided they are consistent with international law. Article 21(2) allows the Court to apply principles and rules of law interpreted in its previous decisions and provides in Article 21(3) that the application and interpretation of law is consistent with international human rights law.

15. Judges must therefore ensure according to Article 21(3) of the Statute that the interpretation and application of the law is consistent with internationally recognised human rights. This obligation means that the law must not only be interpreted, but also applied in accordance with internationally recognised human rights law.[218] This requires that interpretation, resulting from Article 21(1) or Articles 31 and 32 of the Vienna Convention on the Law of Treaties will always have to produce a result which is compatible with international human rights law.[219]

16. Not having an age of consent defined in the law or adopting a threshold which is too low is not compatible with international human rights law standards. The Committee on the Rights of the Child (CRC) has noted, in General Comment No. 4 on the Right to Health of Adolescents, that 'States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent',[220] and in General Comment No. 20 on the implementation of the rights of the child during adolescence that 'States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity'.[221] The CRC has also

[218] *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006 (ICC-01/04-01/06-772), 14 December 2006, § 37.

[219] G. Bitti, 'Part IV: The ICC and Its Applicable Law: Article 21 and the hierarchy or Sources of Law before the ICC' in C. Stahn (ed.), *The Law and Practice of the International Criminal Law* (Oxford: Oxford University Press, 2022) at 437.

[220] CRC, General Comment No. 4: *Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (CRC/GC/2003/4), 1 July 2003, § 5.

[221] CRC, General Comment No. 20: *On the Implementation of the Rights of the Child during Adolescence* (CRC/C/GC/20), 6 December 2016, § 40.

disapproved states' lack of clarity in setting a legal minimum age of sexual consent or its absence from legislation in its concluding observations to state parties.[222]

17. Both the CRC and the Committee on the Elimination of all Forms of Discrimination Against women (CEDAW) have stressed in their concluding observations that when the age of sexual consent is undefined or set too low, it fails to protect the child from sexual exploitation and health-related risks. In order to protect children from such risks, both the CRC and the CEDAW have signalled the ages of twelve and thirteen as being too low.[223] The CRC has also shown concern 'at the rather low age for sexual consent (14 years), which may not provide adequate protection for children older than 14 years against sexual exploitation'[224] and has welcomed the adoption of legislative measures by states in raising the age of sexual consent to sixteen years.[225]

18. The recognition of sixteen as an acceptable age of consent is consistent with the CEDAW's and the CRC's Joint General Recommendation 31 which has highlighted in relation to child marriage that, 'as a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age … without deference to culture or tradition'.[226]

19. These recommendations are in line with research showing that early sexual activity is correlated with negative psychosocial consequences for the child.[227] These range from unintended pregnancies, sexually transmitted infections, mental health risks, substance abuse, weaker attachments to conventional institutions, lower

[222] See for example Concluding Observations of the Committee on the Rights of the Child, Benin (CRC/C/BEN/CO/2), 2006, § 69; Concluding Observations of the Committee on the Rights of the Child, Madagascar (CRC/C/MDG/CO/3–4), 2012, § 45; Concluding Observations of the Committee on the Rights of the Child, Ukraine (CRC/C/UKR/3–4), 2011, § 26.

[223] Concluding Observations on the Combined Seventh And Eighth Periodic Reports of the Philippines (CEDAW/C/PHL/CO/7–8), 25 July 2016, § 26; Concluding Observations, Philippines (CRC/C/15/Add.259), 21 September 2005, § 85; Concluding Observations Indonesia (CRC/C/15/Add.223), § 81; Report of the Committee on the Elimination of Discrimination against Women, Thirty-second session (10–28 January 2005)/Thirty-third session (A/60/38) 5–22 July 2005, § 305; Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Japan (CEDAW/C/JPN/CO/7–8), 7 March 2016, § 22.

[224] Concluding Observations of the Committee on the Rights of the Child, Iceland (CRC/C/15/Add.203), § 38.

[225] Concluding Observations of the Committee on the Rights of the Child, Lithuania (CRC/C/LTU/CO/3–4), 2013, § 3 c; Concluding Observations on the Combined Third to Fifth Periodic Reports of Malawi (CRC/C/MWI/CO/3–5), 6 March 2017, § 22.

[226] Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices (CEDAW/C/GC/31-CRC/C/GC/18), 14 November 2014, § 20.

[227] A. S. Madkour et al., 'Early Adolescent Sexual Initiation as a Problem Behavior: A Comparative Study of Five Nations' 47(4) *Journal of Adolescent Health* (2010) 389–398, at 390 and 395–397.

academic achievement and aspirations, and poorer mental health.[228] Researchers have asserted that these negative psychosocial consequences 'tend to be concentrated among early initiators – those less than age 16 at sexual debut – or among girls'.[229] The maternal health consequences associated with early child marriage corroborate these findings in non-Western countries, where early sexual relations as a consequence of early child marriage entail a greater risk for maternal morbidity and mortality.[230]

20. This Chamber observes that the suggested age of sixteen is also compatible with the subsidiary sources embedded in Article 21(1)(b) and (c) of the Statute. Firstly, international humanitarian law prohibits in absolute terms the infliction of sexual violence against children. The special protection afforded children from any form of sexual violence can be found in Article 77(1) of Additional Protocol I,[231] which recognises the obligation of state parties to award children special respect and to protect them against any form of indecent assault,[232] and Article 4(2)(e) of Additional Protocol II,[233] which prohibits at any time and any place whatsoever outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.[234] This prohibition is recognised in customary international law.[235] This protection against *any* form of sexual violence[236] covers *all* children, even those children who have not attained the

[228] However, early sexual initiation is less convincingly associated with parental communication and inversely related to school attachment. *Ibid*, at 395–397.

[229] *Ibid*. See also A. L. Spriggs and C. T. Halpern, 'Sexual Debut Timing and Depressive Symptoms in Emerging Adulthood' 37(9) *Journal of Youth and Adolescence* (2008) 1085–1096, at 1085–1088 and 1091–1094; A. M. Meier, 'Adolescent First Sex and Subsequent Mental Health' 112(6) *American Journal of Sociology* (2007) 1811–1847, at 1814 ('Moreover, the risks of physical effects of sex (sexually transmitted diseases and pregnancy) disproportionately accrue to girls. This heightened threat may further induce psychological effects for girls who have sex early').

[230] A. Nove et al., 'Maternal Mortality in Adolescents Compared with Women of Other Ages: Evidence from 144 Countries' 2(3) *The Lancet Global Health* (2014) 155–164, at 163; N. M. Nour, 'Health Consequences of Child Marriage in Africa' 12(11) *Emerging Infectious Diseases* (2006) 1644–1649, at 1646–1647.

[231] International Committee of the Red Cross (ICRC), 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 UNTS 3.

[232] On a detailed analysis of the concept of 'indecent assault' see P. V. Sellers and I. Rosenthal, 'Chapter 17. Rape and Other Sexual Violence' in A. Clapham et al. (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), at 355–357.

[233] International Committee of the Red Cross (ICRC), 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 UNTS 609.

[234] On a detailed analysis of this legal framework see Sellers and Rosenthal, *supra* note 233.

[235] Rule 93: Rape and other forms of sexual violence are prohibited. J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (Cambridge: Cambridge University Press, 2005), at 323.

[236] 'According to customary law, the expressions "outrages upon personal dignity" and "any form of indecent assault" refer to any form of sexual violence', *ibid*, at 324.

age of fifteen years and take a direct part in hostilities or fall into the power of an adverse party.[237] This legal framework 'is continuous and not diminished by the fighter status or the civilian status of the child, even while in the hands of their own party'.[238] Articles 77(3) and 4(3)(d) do not set a higher age threshold for the provision of this privileged treatment; they only require that parties continue to protect children, including those under the age of fifteen, when they take up arms or are detained.[239]

21. Secondly, having satisfied Article 21(1)(b), it is not required that the Chamber apply 21(1)(c), which, in any case, were there to exist a recognised general principle on this subject matter, would still have to be consistent with the Statute and with international law and internationally recognised norms and standards, according to Article 21(1)(c). These, as mentioned earlier, agree on setting the age of consent at sixteen.

22. This Chamber therefore concludes that, considering the undefined age of capacity in the Statute and Articles 7(1)(g) and 8(2)(e)(vi) of the Elements of Crimes, an application of Article 21 of the Statute allows this Chamber to conclude that an interpretation which is compatible with the sources therein recognises the age of sixteen as the acceptable age of consent.

FINDINGS OF THE CHAMBER

23. Turning to the second legal element of the crime of rape, the Chamber notes that, in many instances, the perpetrators used force and threats of force and took advantage of a coercive environment to have sexual intercourse with girls or women.

24. The Chamber also considers that at the camps, UPC/FPLC soldiers repeatedly raped P-0883, a girl under fifteen years of age, at Camp Bule,[240] a girl named Nadège, approximately nine years old, at the Lingo training camp,[241] and a girl named Mave, who was under the age of fifteen.[242] Additionally, the Chamber notes

[237] Article 77(3) of API states: 'If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they *shall continue* to benefit from the special protection accorded by this Article, whether or not they are prisoners of war; Article 4.3 (d) of APII in very similar terms indicates that the special protection provided by this Article to children who have not attained the age of fifteen years *shall remain applicable* to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.'

[238] P. Sellers, 'Ntaganda: Re-alignment of a Paradigm' in F. Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (Milan: International Institute of Humanitarian Law and Franco Angeli, 2018), available at https://iihl.org/wp-content/uploads/2022/07/The-Additional-Protocols-40-Years-Later-New-Conflicts-New-Actors-New-Perspectives_2.pdf, at 130.

[239] Sellers and Rosenthal, *supra* note 232, at 356.

[240] See § 3.

[241] See § 4.

[242] See § 5.

that during the immediate aftermath of the assault on Mongbwalu, Witness P-0892 was thirteen years old at the time when she was raped[243] and witness P-0892 and P-0912 testified that another girl was fourteen years old.[244] In Kobu, UPC/FPLC soldiers detained several women and girls for hours, even days, and raped them during this time.[245] One of the girls was eleven years old.[246] The Chamber therefore is satisfied that perpetrators invaded the bodies of victims who were under the age of sixteen, and therefore under the acceptable age of consent.

25. Accordingly, the Chamber concludes that at least one, often more, of the coercive circumstances or conditions set out in the second legal element of the crime against humanity and of the war crime of rape is proven for all incidents listed.

Judge Isabel Maravall-Buckwalter

[243] See § 6.
[244] See § 7.
[245] See § 8.
[246] *Ibid.*