

PROSECUTOR V. NTAGANDA—THE
INTERNATIONAL CRIMINAL COURT’S
DANGEROUS FORAY INTO THE SHADES OF
LOCHNER

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In a 2017 Judgment by the Appeals Chamber of the International Criminal Court (ICC), the ICC interpretively expanded the scope of “war crimes” under its jurisdiction—part of Article 8 of the Rome Statute—to include such crimes as committed against one’s own military forces. The ICC’s decision to expand the war crimes regime into intra-force concerns, which are ordinarily the subject of domestic law, is “unprecedented”—an acknowledgment found in the Judgment itself. This decision, reached in *Prosecutor v. Ntaganda*, constitutes one of the clearest examples of judicial activism by the ICC since its formation; and such activism, should it continue, threatens the ICC’s long-term legitimacy amongst the 123 sovereign nations who have voluntarily agreed to its jurisdictional authority.

This article looks critically at the judicial activism that took place in the *Ntaganda* decision. Invoking the infamous case of *Lochner v. New York* (of early twentieth-century U.S. Supreme Court lore), comparisons are drawn between *Ntaganda* and *Lochner* as a method of highlighting, and hopefully warning against, further *Lochner*-esque type decision-making by the ICC should it wish to retain its appeal amongst current members of the Rome Statute. Ultimately, the article concludes that the ICC failed to abide by the strict constructionist mandates found both directly and indirectly in Articles 8, 21, and 22 of the Rome Statute.

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I. INTRODUCTION

In 1905, the U.S. Supreme Court penned the now—“reviled” decision of *Lochner v. New York*.² The dispute involved was rather unspectacular: should a state legislature be allowed to enact laws placing a cap on the maximum hours worked per week?³ It was *how* the Court reached its result—invalidating the law as an unconstitutional exercise of state police power under the Fourteenth Amendment’s controversial “substantive due process” doctrine—that now lives on in infamy.⁴ One recent appellate decision called *Lochner* the “foremost reproach to the activist impulse in federal judges . . . widely disparate for its mobilization of personal judicial preference.”⁵ Indeed, in a dissenting opinion by Justice Holmes, the following was said of the majority’s opinion in *Lochner*:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws

2. See *Lochner v. New York*, 198 U.S. 45 (1905); see also David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (suggesting *Lochner* is in contention for being the most “reviled decision of the last hundred years”).

3. *Lochner*, 198 U.S. at 52.

4. *Id.* at 58–59. The late Justice Scalia—a long-time critic of the U.S. Supreme Court’s perceived habit of engaging in judicial policy-making—has likened the Substantive Due Process doctrine to a method of achieving legally incomprehensible results that the Court “really likes.” See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting). In fact, this concern about judicial policy-making transcends Justice Scalia and has a history spanning decades, as shown in *Griswold* for example, where the Court cautioned: “[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); see also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

5. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 890 (4th Cir. 1999).

may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁶

In the international sphere, the Rome Statute has been likened to a sort of constitution of the International Criminal Court (ICC).⁷ As such, it is the purpose of this article to highlight a recent decision by the ICC that amounts to the same type of methodological affront as was exhibited in *Lochner*: the decision of the Appeals Chamber in *Prosecutor v. Ntaganda*.⁸ There, the ICC took the self-admitted “unprecedented” step to recognize war crimes (as defined by Article 8 of the Rome Statute) as occurring between an accused and a victim *of the same military force*⁹—a decision previously rejected by the Special Court for Sierra Leone (SCSL), that concluded

6. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

7. See Leila Nadya Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot*, 27 LEIDEN J. INT’L L. 755, 759 (2014) [hereinafter Sadat & Jolly]. “[L]ike the constitutive treaties of other international organizations, the Rome Statute takes the form of an international treaty, but many provisions have constitutional status.” *Id.*

8. *Prosecutor v. Ntaganda*, ICC-01/04-02/06, <https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf>.

9. See *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment on the appeal of Mr Ntaganda against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9,” ¶¶ 63, 67 (June 15, 2017) [hereinafter Appellate Judgment II].

[t]he law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the [domestic] criminal law of the State of the armed group concerned and human rights law. . . . [A] different approach would constitute an inappropriate reconceptualisation of a fundamental principle of international humanitarian law.¹⁰

In showing how the ICC's decision in *Ntaganda* runs afoul of the very sort of judicial activism found in *Lochner*, this article is divided into two parts: Part I provides a background of the *Ntaganda* case—setting out the factual background, and explaining how both the Trial Chamber and Appellate Chamber reached their respective results regarding the scope of Article 8 of the Rome Statute. Part II then focuses on how the ICC's conduct in *Ntaganda* was, in fact, activist in nature given particular limiting provisions of the Rome Statute (e.g. Articles 8, 21, and 22), with remarks on what judicial activism is generally, how it might be identified in a given scenario, and why *Lochner* should serve as a stark warning to the ICC. Finally, this Article concludes with concise comments about why the ICC ought to avoid the allure of judicial activism in order to achieve the laudable, but ultimately result-oriented, goal of “end[ing] impunity.”¹¹

II. PROSECUTOR V. NTAGANDA: BACKGROUND AND FINDINGS

A. Factual Background and an Overview of the Charges Against Bosco Ntaganda

Mr. Bosco Ntaganda (“Ntaganda”) was allegedly the former Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC), an armed component of the *Union des Patriotes*

10. Prosecutor v. Sesay, SCSL-04-15-T, Judgment, ¶ 1453 (Mar. 2, 2009) (an opinion not dissimilar, thematically-speaking, to that of Justice Holmes in *Lochner*).

11. Sadat & Jolly, *supra* note 7, at 768.

Congolais (UPC).¹² For its part, the UPC was a political group situated in Ituri (a northeastern province of the Democratic Republic of Congo (DRC) bordering both Uganda and Sudan) having its headquarters in the

city of Bunia.¹³ Ituri is home to two ethnic groups: the pastoralist Hema and the agriculturist Lendu.¹⁴ The UPC was formed in September 2000 by Thomas Lubanga Dyilo¹⁵ (recently sentenced to fourteen years in prison by the ICC)¹⁶ to further the interests of the Hema; whereas, a competing group—the *Nationalist and Integrationist Front* (FNI)—represents the interests of the Lendu.¹⁷ The UPC and FNI came into armed conflict in 1999 (called the “Ituri Conflict”), which lasted until

12. Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 15 (June 9, 2014) [hereinafter Confirmation of Charges].

13. *Id.* ¶ 14; see also “Democratic Republic of the Congo Map.” HUMAN RIGHTS WATCH, ITURI: “COVERED IN BLOOD” ETHNICALLY TARGETED VIOLENCE IN NORTHEASTERN DR CONGO (Vol. 15, No. 11 (A), July 2003), <https://www.hrw.org/reports/2003/ituri0703/DRC0703.pdf> [hereinafter HRW ITURI].

14. See generally HRW ITURI, *supra* note 13. The Ituri region is part of the much larger Orientale Province, having a population somewhere near 4.5 million people. *Id.* at 18. Other ethnic groups within the area—beyond the Hema and Lendu—include the Alur, the Ngiti, the Bira, and the Ndo-Okebo. However, it was mostly the Hema and Lendu who began clashing as early as May 1999, each group attempting to displace the other under policies of “ethnic cleansing.” *Id.* In truth, both had a history of tension (spanning decades) primarily involving disputes over land ownership. At the close of the Second Congo War in 2003, whereby Uganda was forced to withdraw from the Ituri region under the demands of the Security Council, a vacuum was created facilitating intense, unchecked conflict between the Hema and Lendu. *Id.* at 5. Without a dominant military force to police the area, militias from both the Hema and Lendu moved to take control of the city of Bunia and surrounding geographic resources. *Id.* at 19–21.

15. *Ntaganda*, ICC-01/04-02/06, Confirmation of Charges, ¶¶ 14–15.

16. See Prosecutor v. Dyilo, ICC-01/04-02/06, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 1 (July 10, 2012). Lubanga was found guilty of the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate in hostilities—the same group of victims that would also implicate Ntaganda. *Id.*

17. *Ntaganda*, ICC-01/04-02/06, Confirmation of Charges, ¶¶ 29–30.

2003 when the European Union (EU) began “Operation Artemis.”¹⁸ The EU-led operation (the first of its kind outside of Europe) resulted in peacekeeping forces wresting control of Bunia away from the UPC.¹⁹ Eventually, in December 2003, the UPC fractured into multiple smaller factions which, though this did not cause the end of armed conflict entirely, resulted in a significantly reduced concentration of armed hostilities, although conflict continues today.²⁰

Ntaganda was primarily implicated for his involvement between 2002 and 2003.²¹ Ntaganda was alleged to have used his militant force, the FPLC, to conduct “widespread” and “systematic” attacks against civilian populations in and around Ituri, primarily directed against Lendu people, but also the Bira and Nande ethnic groups.²² More specifically, the UPC/FPLC allegedly adopted an organizational policy sometime in mid-2002 to “attack civilians perceived to be non-Hema.”²³ The general message handed down by UPC/FPLC leadership was to attack *all* Lendu people, since “the war was between the Lendu and Hema,” regardless of any particular person’s individual status as either a combatant or civilian.²⁴ Before commencing military operations, the UPC/FPLC issued warnings to the Hema population to leave the area; anyone remaining, regardless of combatant status, would be considered an enemy and would be attacked on sight.²⁵ During attacks on the civilian population, it is

18. See *ARTEMIS/DRC*, EUR. EXTERNAL ACTION SERV., http://www.eeas.europa.eu/archives/csdp/missions-and-operations/artemis-drc/index_en.htm (last visited Mar. 3, 2018); see also, HRW ITURI, *supra* note 13, at 48.

19. U.S. INST. OF PEACE, TWENTY-FIRST-CENTURY PEACE OPERATIONS 284 (William J. Durch ed., 2006).

20. See *The UPC-Kisembo (UPC-K)*, TERRORISM RES. & ANALYSIS CONSORTIUM, <https://www.trackingterrorism.org/group/upc-kisembo-upc-k> (last visited Nov. 20, 2018); see also *Who's who in Ituri – militia organisations, leaders*, IRIN, <http://www.irinnews.org/report/53981/drc-whos-who-ituri-militia-organisations-leaders> (last visited Nov. 20, 2018).

21. *Ntaganda*, ICC-01/04-02/06, Confirmation of Charges, ¶ 31.

22. *Id.* ¶¶ 12, 19, 24.

23. *Id.* ¶ 19.

24. *Id.* ¶ 21.

25. *Id.*

further alleged that UPC/FPLC soldiers would rape, pillage, and even engage in cannibalism.²⁶

As a result of the actions by the UPC/FPLC in 2002 and 2003, and because of Ntaganda's leadership over the UPC/FPLC during this time (in fact, he was coined the "Terminator" for his direct involvement in military atrocities), Ntaganda was charged with thirteen counts of war crimes and five counts of crimes against humanity.²⁷ The thirteen war crime counts include: murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying enemy property; and rape, sexual slavery, enlistment, and conscription of child soldiers who were used in active hostilities. The five crimes against humanity counts include: murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of populations.²⁸

Two particular counts are of special interest in this Article: (1) Count 6—alleging Ntaganda was criminally liable for the rape of UPC/FPLC child soldiers as a war crime punishable under Article 8(2)(e)(vi) of the Rome Statute, and (2) Count 9—alleging Ntaganda was criminally liable for sexual slavery of UPC/FPLC child soldiers as a war crime punishable under Article 8(2)(e)(vi) of the Rome Statute.²⁹ These two counts are particularly fascinating because, as will be discussed and analyzed at length in this article, they constitute the first time the ICC has extended the concept of "war crimes" to include such crimes committed against members of one's own military force.³⁰

B. Bosco Ntaganda's Challenge of Count 6 and Count 9: The ICC's Decision on Whether "War Crimes" Should be Extended to Included Such Crimes Against One's Own Military Force

Ntaganda challenged Count 6 and Count 9 on two occasions in the Trial Chamber, both times arguing the ICC did not have jurisdiction over

26. *Id.* ¶ 28.

27. *Id.* ¶¶ 12, 31, 36, 74, 97.

28. *Id.*

29. *Id.* ¶¶ 76–82.

30. *Id.* ¶¶ 76, 79–80.

these counts.³¹ Conceptually speaking, Ntaganda's challenge was two-fold. First, on a more technical front, Ntaganda asserted that Article 8(2)(e)(vi) of the Rome Statute, which specifically references Article 3 of the 1949 Geneva Conventions (colloquially referred to as "Common Article 3"), does not include crimes of "rape" (Count 6) and "sexual slavery" (Count 9) against child soldiers.³² According to Ntaganda, Common Article 3 applies only to persons "taking no active part in hostilities," to include civilians, adversaries who have surrendered, and adversaries who are *hors de combat*.³³ Concordantly, in Ntaganda's view, child soldiers would not fit within the definition of Common Article 3. Moreover, though only briefly referenced by the Pre-Trial Chamber in its Confirmation Decision, Ntaganda insisted the Second Additional Protocol to the 1949 Geneva Convention ("Additional Protocol II") does not cover child soldiers belonging to the same armed group as the alleged perpetrator.³⁴ This first line of argument would become known as the "status requirement" issue.³⁵

Second, and more broadly, Ntaganda argued Article 22 of the Rome Statute—codifying the principle of legality—is necessarily "exhaustive" on the Court's subject-matter jurisdiction.³⁶ In principle, Ntaganda attacked the Court's ability to expand its own jurisdictional reach on first-impression issues.³⁷ This particular challenge, while also invoking concerns about whether war crimes can include crimes committed by a perpetrator in the same armed group, had a much broader scope in that it criticized the Court's ability to engage in what has been likened to a form

31. See *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Oct. 9, 2015) [hereinafter Trial Decision I]; see also *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Second decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Jan. 4, 2017) [hereinafter Trial Decision II].

32. *Ntaganda*, ICC-01/04-02/06, Trial Decision I, ¶ 12.

33. *Id.*

34. *Id.*

35. See *infra* note 49.

36. *Ntaganda*, ICC-01/04-02/06, Trial Decision I, ¶ 12.

37. *Id.*

of judicial activism.³⁸ This second line of argument concerned, more broadly, the ability of the ICC to engage in activist methodologies in light of the express strict constructionist regime of Article 22(2).³⁹

Briefly discussing the underlying procedural posture of this case, Ntaganda's first challenge (the "status requirement" line of argumentation) was rejected by the Trial Chamber on the grounds that Ntaganda was, in fact, not arguing jurisdictional concerns at all. Citing two prior Appellate Chamber decisions (*The Prosecutor v. Williams Samoei Ruto, et al.* and *The Prosecutor v. Francis Kirimi Muthaura, et al.*), the Trial Chamber distinguished *jurisdictional challenges*, which attack "whether a crime or mode of liability existed under customary international law," from *substantive challenges*, which "relat[e] to the contours or elements of crimes"—the latter being addressable at trial and, thus, not an issue for pre-trial motion practice (the Trial Chamber's ultimate reason for denying Ntaganda's "status requirement" argument as premature).⁴⁰ The Appellate Chamber disagreed, finding Ntaganda's challenges were, in fact, "jurisdictional in nature" and, therefore, must be decided immediately to prevent open "questions as to the Court's jurisdiction [that would otherwise] be left unresolved until the end of trial."⁴¹ Thus, the issues were remanded to the Trial Chamber with

38. See *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶¶ 52–55 (June 15, 2017); See also, e.g., Alex Obote Odora, *Prosecution of War Crimes by the International Criminal Tribunal for Rwanda*, 10 U. MIAMI INT'L & COMP. L. REV. 43, 44 (2002) (discussing the "principles of legality" in context of both "judicial activism," promoting a liberal and flexible reading of statutes, and "judicial restraint," insisting upon a conservative and strict reading of statutes).

39. See Rome Statute of the International Criminal Court, A/CONF.183/9, art. 22(2) (2002).

40. *Ntaganda*, ICC-01/04-02/06, Trial Decision I, ¶¶ 24, 25–26. "The Chamber need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of *substantive law* are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged." *Id.* ¶ 28 (emphasis added).

41. *Prosecutor v. Ntaganda*, ICC-01/04-02/06 OA 2, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9," ¶¶ 17–20, 40–41 (Mar. 22, 2016) [hereinafter Appellate Judgment I].

instruction to address whether it actually had jurisdiction over Count 6 and Count 9.⁴²

On remand, the Trial Chamber turned to the merits of Ntaganda's challenges and found that Article 22—and more specifically, the “principle of legality”—did not bar, *per se*, the criminalizing of conduct that had not “been subject to prior criminalisation pursuant to a treaty or customary rule of international law.”⁴³ According to the Trial Chamber, a basis for the crimes underlying both Count 6 and Count 9 could be found in the Rome Statute under Article 8(2)(b)(xxii) for international armed conflict (IAC) situations and Article 8(2)(e)(vi) for non-international armed conflict (NIAC) situations.⁴⁴ Indeed, invoking the introductory paragraphs of Articles 8(2)(b) and 8(2)(e) of the Rome Statute, which require their specific provisions to be interpreted “within the established framework of international law” (i.e. the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL)),⁴⁵ the Trial Chamber stated rape and other forms of sexual violence have long been prohibited by IHL principles and noted that, in fact, the International Committee of the Red Cross (ICRC) Commentary recently found Common Article 3 should apply to abuses committed by perpetrators against their own armed group.⁴⁶ Resolved that the established framework of international law supported a finding that the war crimes regime could be extended to include such crimes as committed against one's own military force, the Trial Chamber concluded it had jurisdiction over Count 6 and Count 9 pursuant to Article 8(2)(e)(vi) of the Rome Statute, as well as Article 8(2)(b)(xxii) should the conflict evolve into an IAC situation.⁴⁷

On appeal once again, the Appellate Chamber agreed, in sum, with the Trial Chamber. The Appellate Chamber first noted:

42. *Id.* ¶ 42.

43. Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Decision II, ¶ 35 (Jan. 4, 2017).

44. *Id.* ¶ 36.

45. *Id.* ¶ 45.

46. *Id.* ¶¶ 46, 50.

47. *Id.* ¶ 54.

When the provisions on war crimes were negotiated, there was a desire to “define the specific content or constituent elements of the violations in question” [because] [s]tates were concerned, in particular, with providing certainty as to the specific conduct that would give rise to criminal liability and in upholding the principle of legality [codified under Article 22].⁴⁸

Nonetheless, in disposing of Ntaganda’s “status requirement” argument, the Appellate Chamber began its analysis by prefacing that it was “not aware of any debate on whether protection under [Articles 8(2)(b)(xxii) and 8(2)(e)(vi)] should be *limited* to victims who are ‘protected persons’ under the Geneva Conventions or ‘persons taking no active part in hostilities’ in terms of Common Article 3.”⁴⁹ According to the Appellate Chamber, it was clear that “the drafters [of these Articles] intended [them] to be ‘distinct war crimes,’ as opposed to merely illustrations of grave breaches of the Geneva Conventions or violations

48. Prosecutor v. Ntaganda, ICC-01/04-02/06, Appellate Judgment II, ¶ 48 (June 15, 2017).

49. *Id.* ¶ 50 (emphasis added). The Appellate Chamber noted neither article 8(2)(b)(xxii) nor 8(2)(e)(vi) expressly provide that victims of rape and/or sexual slavery must be “protected persons” under the Geneva Conventions or “persons taking no active part in the hostilities” under Common Article 3; this is in contrast to articles 8(2)(a) and 8(2)(c), both of which contain explicit status requirement limitations in their preamble paragraphs—article 8(2)(a) applying only to those persons “protected under the provisions of the relevant Geneva Conventions” and article 8(2)(c) applying only to those who are “taking no active part in the hostilities, including . . . those placed *hors de combat* by sickness, wounds, [or] detention.” See *id.* ¶¶ 46–47; see also Rome Statute of the International Criminal Court, A/CONF.183/9, art. 8 (2002). Thus, on this basis, the Trial Chamber concluded that to read into articles 8(2)(b) and 8(2)(e) any sort of status requirement would erroneously “lead to redundancy as to the crimes contained therein” since articles 8(2)(a) and 8(2)(c) would cover “identical forms of rape and sexual slavery.” *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 47. The Appellate Chamber acknowledged this apparent redundancy, but ultimately disagreed with the Trial Chamber’s logic, finding that “while the potential overlap between provisions [of article 8(2)] may be of relevance to their interpretation, little weight should be attached to this argument . . . [since] [s]tates were aware of the potential overlap between the categories of crimes listed in the various sub-paragraphs of article 8(2) of the Statute.” *Id.* ¶¶ 48, 50.

of Common Article 3.”⁵⁰ Thus, the Appellate Chamber was obliged to consider the “established framework of international law”—phrasing used in the preambles of both Articles 8(2)(b) and 8(2)(e)—in order to determine whether either Article 8(2)(b) or 8(2)(e) should be interpretively extended to sex-related crimes committed against members of one’s own military force.⁵¹

In considering the “established framework of international law,”⁵² the Appellate Chamber primarily looked to the four Geneva Conventions, ICRC Commentaries, and an analogous case from the SCSL.⁵³ This process seemingly adhered (at least in spirit) to a seven-part interpretative methodology identified by Professor Leila Sedat, who writes:

Interpreting the ICC Statute partakes as much of art as of science. In prior writings, I have suggested a methodology applying seven canons in addressing interpretative questions relating to the substantive law of the Statute based upon Articles 21 and 22 of the Statute, which are briefly summarized as follows: First, a plain reading of the text of the ICC Statute is required (Article 21(1)(a)), using ordinary principles of treaty interpretation such as good faith and consideration of context; second, the reading must be faithful to the object and purpose of the ICC Statute and consistent with the legality principle embodied in Article 22(2); third, where the meaning of a particular provision remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, the *travaux préparatoires* may be consulted; fourth, if gaps remain in the interpretation of a particular provision, the Court should look to Article 21(1)(b) sources of law, which include “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict,” and, failing that, Article 21(1)(c) sources that are “general principles of law derived by the Court from national laws of legal systems of the world . . .;” fifth, all provisions should be construed with the objective of protecting the rights of the accused and ensuring that

50. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 48.

51. *Id.* ¶¶ 52, 53–70.

52. *Id.* ¶ 52.

53. *See generally id.*

the application of the Statute is consistent with internationally recognized human rights (Article 21(3)). In addition, I have suggested two additional canons that should guide any consideration of open questions in the ICC Statute: The interpretation adopted should enhance judicial efficiency and the effectiveness of the ICC trial system, without compromising the values expressed in Canon 5 above (Canon 6); and the interpretation of a particular provision should enhance the expressive and normative function of international criminal law by rendering it transparent and comprehensible and reduce opportunities for fragmentation (Canon 7).⁵⁴

It is clear the Appellate Chamber proceeded through the first three steps of Professor Sadat's methodology with little success: Articles 8(2)(b)(xxii) and 8(2)(e)(vi) do not, apparently, lend themselves to a plain reading on the issue of scope (at least not in the ICC's view), nor does the overarching objective of the Rome Statute seem to indicate what the scope of these Articles should be. Finally, the *travaux préparatoires* suggest only that "the drafters [of these Articles] intended [them] to be 'distinct war crimes,' as opposed to merely illustrations of grave breaches of the Geneva Conventions [subsumed in Article 8(2)(a) of the Rome Statute] or violations of Common Article 3," though, paradoxically, "States were [also] aware of the potential overlap between the categories of crimes listed in the various sub-paragraphs of article 8(2) of the Statute" to include potential overlap between Articles 8(2)(a), 8(2)(b), and 8(2)(e).⁵⁵ Thus, in consulting the four Geneva Conventions, ICRC Commentaries, and an analogous case from the Special Court for Sierra Leone (SCSL), the Appellate Chamber was resorting to step four of Professor Sadat's methodology—application of Article 21(b) and 21(c) the Rome Statute.⁵⁶

54. Leila Nadya Sadat, *Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement*, 31 EMORY INT'L L. REV. 197, 233 (2017); see also Sadat & Jolly, *supra* note 7, at 764.

55. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 48.

56. *Id.* ¶¶ 56–61; see also Sadat, *supra* note 54, at 233; Sadat & Jolly, *supra* note 7, at 763–64.

In considering the four Geneva Conventions, the Appellate Chamber was quick to note Geneva Convention III (GC-III) and Geneva Convention IV (GC-IV) are “narrow in scope”—applying to “prisoners of war” and “civilians,” respectively—and thus not applicable to circumstances involving sexual misconduct against child soldiers.⁵⁷ However, according to the Appellate Chamber, “Geneva Conventions I [(GC-I)] and II [(GC-II)], which protect the wounded and sick on land and the wounded, sick and shipwrecked at sea respectively, provide protection ‘in all circumstances [. . .] without any adverse distinction founded on sex, race, nationality’ and prohibit violence against them.”⁵⁸ This was noteworthy to the Appellate Chamber, since, in its view, GC-I and GC-II protect persons “belonging to enemy armed forces, *but [also] wounded, sick, or shipwrecked members of a party’s own armed forces*, a rule that corresponds to the understanding of the scope of protection since the first Geneva Convention was adopted in 1864.”⁵⁹ While the Appeal Chamber openly admitted it was “not aware of any case in which the grave breaches regime has been applied to situations in which victims belong to the same armed force as the perpetrator,” it was nonetheless “unconvinced that this, in and of itself, reflects the fact that Status Requirements exist as a general rule of international humanitarian law.”⁶⁰ Thus, as far as the four Geneva Conventions are concerned, the Appellate Chamber was seemingly satisfied to conclude that there is no express “affiliation” status requirement (i.e. the need to belong to a particular force in order to be protected) since GC-I and GC-II do away

57. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 58; *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 243 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

58. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 59; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention].

59. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 59 (emphasis added).

60. *Id.* ¶ 60.

with them in favor of other status requirements (i.e. being wounded, sick, or shipwrecked irrespective of what force you may belong to).⁶¹

But, it seems the Appellate Chamber sensed that it could not rely solely upon GC-I and GC-II—indeed, neither actually apply to the *Ntaganda* case itself given that there were no allegations by the prosecutor that the child soldiers at-issue were wounded, sick, or shipwrecked at the time of the alleged sexual acts against them. So, the Appellate Chamber turned to (and strongly favored) the ICRC’s recent observation that Common Article 3 “protects members of armed forces against violations committed by the armed force to which they belong.”⁶² According to the ICRC in its new commentary to Common Article 3, “[t]he wording of common Article 3 indicates that it applies to *all persons* taking no active part in the hostilities, ‘*without any adverse distinction*,’” which would thereby include violations committed by one’s own party (in fact, Common Article 3 states “‘without any adverse distinction *founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria*’”—thus, conceptually limiting the phrase “without any adverse distinction”).⁶³

Finally, the Appellate Chamber—required to narrowly apply only the “*established framework* of international law” under Article 8(2)(e)⁶⁴—felt compelled to confront the *Sesay, Kallon, and Gbao* decision by the SCSL, who held in an analogous situation in 2009 that “the law of armed conflict does not protect members of armed groups from acts of violence

61. *Id.*

62. *Id.* ¶ 61.

63. ICRC, *Commentary of 2016 Article 3: Conflicts Not of an International Character*, paras. 545–47, 565, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> (emphasis added) [hereinafter ICRC 2016 Commentary]. The ICRC appears content to read into Common Article 3 a “nationality” criteria despite its express absence. Notably, the similarly-defined “without adverse distinction” phrase in Article 12 of GC-I and GC-II does include a “nationality” criteria, suggesting “nationality” was purposefully omitted from Common Article 3. *Id.* (emphasis added); see also Sadat, *supra* note 54, at 206 n.43.

64. See *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 54

directed against them by their own forces.”⁶⁵ In the SCSL’s view, “[t]he law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law . . . a different approach would constitute an inappropriate reconceptualisation of a fundamental principle of international humanitarian law.”⁶⁶ The Appellate Chambers disregarded this conclusion by distinguishing the SCSL’s holding:

[We find] the decision of the SCSL Trial Chamber . . . unpersuasive, not least because it is apparently based solely on an analysis of Geneva Convention III . . . and the consideration that “an armed group cannot hold its own members as prisoners of war.” As noted above, while this is true as far as Geneva Convention III is concerned, it is the result of the specific subject-matter of [that] convention and not an expression of a general rule.⁶⁷

In sum, the Appellate Chambers, while openly admitting the “seemingly unprecedented nature of [its] conclusion” and acknowledging a perceived possibility that it was engaging in “judicial activism,” held it was “persuaded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group.”⁶⁸ It concluded:

65. See *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 61; see also *Prosecutor v. Sesay*, SCSL-04-15-T, Judgment, ¶ 1451 (Mar. 2, 2009).

66. *Sesay*, SCSL-04-15-T, Judgment, ¶ 1453.

67. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 61. Of course, in criticizing the SCSL for relying solely on GC-III, the ICC never stopped to consider that it was basing its own decision almost solely upon a loose reading of GC-I and GC-II, with only a tangential reference to Common Article 3 based on speculative (and frankly, misquoted) commentary from the ICRC. See *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 60; see also *infra* note 95 (noting that, elsewhere in the ICRC Commentary, it explicitly acknowledges the narrow scope of Common Article 3 to cover only civilians and those who are *hors de combat*).

68. *Id.* ¶¶ 63, 67.

[I]n the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery. . . . [T]he Appeals Chamber finds no reason to introduce Status Requirements to Article 8 (2) (b) (xxii) and (e) (vi) of the Statute on the basis of the “established framework of international law.”⁶⁹

The Appellate Chamber never seriously entertained Ntaganda’s second argument regarding the principle of legality under Article 22 of the Rome Statute. Recall that, at the Trial Chamber level, Ntaganda argued Counts 6 and 9 violated the principle of legality in that “criminalisation of acts committed against members of one’s own forces does not form part of customary law.”⁷⁰ In essence, Ntaganda attempted to argue that the ICC was not free to create its own version of customary law pursuant to the limitations of Articles 22(1) and 22(2). However, by the time this issue finally reached the Appellate Chamber on the merits, the Appellate Chambers was satisfied to conclude that determining whether to *add* elements to a crime (i.e. an affiliation-based “status requirement” that the victim be part of the enemy force and not the force of the perpetrator) pursuant to customary international law was not, in fact, a violation of the principle of legality at all, since such *additions*, if they be made, protect the accused from being convicted (the goal of the principle of legality is to protect the accused from unfair criminal convictions).⁷¹

69. *Id.* ¶¶ 65–66.

70. Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Decision II, ¶ 35 (Jan. 4, 2017).

71. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 54 (emphasis added).

III. ANALYSIS

A. How the Appellate Chamber Got It Wrong: An Erroneous Extension on the Scope of War Crimes

The Appellate Chamber made two distinct, but related, errors in permitting the application of Articles 8(2)(b)(xxii) and 8(2)(e)(vi) to extend to those circumstances in which the perpetrator and victim are from the same armed force. First, it erroneously applied the strict constructionist mandates of Article 22 of the Rome Statute. Second, it mistakenly concluded that Counts 6 and 9, *as applied*, are within its jurisdiction as understood by the “established framework of international law.” Each of these errors are addressed in turn.

i. The ICC's Error Under Article 22 of the Rome Statute

Article 22 of the Rome Statute (a codification of the principle of legality)⁷² provides two important protections for the accused. First, Article 22(1) states that “[a] person shall not be criminally responsible . . . unless the conduct in question constitutes, ***at the time it takes place***, a crime within the jurisdiction of the Court.”⁷³ Second, Article 22(2) states “[t]he definition of a crime shall be ***strictly construed*** and shall not be

72. The principle of legality (captured by the latin phrase “*nullum crimen sine lege*,” which means roughly “no crime without law”) holds, generally, that an individual may not be punished criminally unless the criminal law used against the individual existed as the time the individual committed the offending act. In essence, it is the civil law equivalent of the prohibition against *ex post facto* laws. Where the lines should be drawn between judicial interpretations that violates the principle of legality and those that do not is left to debate. Some courts use “reasonable foreseeability” as the guiding standard, while others use stricter notions. *See, e.g.,* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT’L L. 543, 555 (2010) (noting that the European Court of Human Rights concluded that “strict construction” principles are satisfied where a judicial interpretation of a criminal prohibition is at least “reasonably foreseeable” by the defendant—even if such an interpretation is not in conformity with the exact wording of the criminal law).

73. Rome Statute of the International Criminal Court, A/CONF.183/9, art. 22(1) (2002) (emphasis added).

extended by analogy. *In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.*⁷⁴ From these provisions, it is clear the Rome Statute purposefully adopts the doctrine of strict construction, having chosen the Americanized version of Article 22, which expressly included the words “strictly construed,” over a competing Japanese version, which did not.⁷⁵ More importantly, however, Article 22 expressly mandates that when there is lingering interpretive ambiguity—such as what existed in *Ntaganda* (essentially no clear consensus as between the ICRC and SCSL)—interpretations shall favor the accused in all respects, thus encapsulating the principle of leniency.⁷⁶

The Appellate Chamber first erred in its apparent burden-shifting. Recall, *Ntaganda* argued, in essence, that a novel, first-impression extension of the definition of “war crimes” to include such crimes directed at one’s own armed forces necessarily violates the principle of legality because criminal liability is being imposed without a clear basis in precedent. Said differently, *Ntaganda* argued the definitional scope of “war crimes” under traditional IHL principles had only ever included victims who were protected at the time of a wrongdoing, by status, as either a civilian or a combatant who was *hors de combat*.⁷⁷ The purported victims in *Ntaganda*’s case—child soldiers actively engaged in an operational military force—were neither.⁷⁸ Thus, *Ntaganda* expressly

74. *Id.* art. 22(2).

75. See Caroline Davidson, *How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court*, 91 ST. JOHN’S L. REV. 37, 47 (2017).

76. *Id.* at 91 (Professor Davidson, in explaining the relation between the doctrine of strict construction and the principle of lenity, concludes that the principle of lenity should be invoked only after “an ambiguity remain[s] after all sources of law in Article 21 and standard tools of interpretation are exhausted.”); see also Grover, *supra* note 72, at 555–56 (“While strict construction cannot be said to have a fixed place in interpretive reasoning, it has been suggested that it is one of the points which a judge must consider when interpreting a criminal offence. It requires judges to ‘exercise restraint’ and favour the suspect or accused when ‘left in doubt about the legislative purpose.’”)

77. See *supra* note 32.

78. Prosecutor v. *Ntaganda*, ICC-01/04-02/06, Trial Decision I, ¶ 12 (Oct. 9, 2015).

invoked Article 22(1), explaining Counts 6 and 9 were not, in fact, crimes under the Rome Statute when the underlying conduct allegedly occurred (another way of saying truly first-impression issues must be resolved in his favor).⁷⁹ However, he also impliedly invoked Article 22(2), suggesting that, if there be some continued ambiguity in the definition (and thus jurisdictional scope) of “war crimes” under Article 8, such ambiguity must be interpreted in his favor.⁸⁰

To wit—and this point will be further discussed in reference to the Appellate Chamber’s second error—Article 8 effectively codifies Article 22(2) (including its strict constructionist ideals) by requiring under 8(2)(b) and 8(2)(e) that a violation, if it not be otherwise captured under the Geneva Conventions pursuant to 8(2)(a), must nonetheless be “within the *established framework* of international law.” This “established framework” mandate thereby excludes novel applications in the guise of customary law, as well as applications that essentially pick sides amongst split authorities (to include, also, applications that would themselves create a split in authorities).⁸¹ Rather than tackle these issues, the Appellate Chamber confusingly opined that deciding whether to *add* an element to a crime under the “established framework”—i.e. whether to add a “status” element that the victim be either civilian or *hors de combat* at the time of the alleged wrongdoing—is permissible under Article 22 because such an *addition*, if it is made, works to protect the accused by requiring the prosecution to overcome additional hurdles (recalling that the principle of legality is designed to protect the accused from unfair convictions).

As best as can be gleaned, the Appellate Chamber was apparently attempting to decide whether the *prosecutor*, not the accused, had a valid defense under the principle of legality to block the addition of, not avoid the subtraction of, a particular element—an unorthodox notion in itself.⁸²

79. See *supra* note 36.

80. See *supra* note 76 (according to the general observations of several scholars, Ntaganda’s leniency argument is not without a sound basis).

81. Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 8(2)(b), 8(2)(e) (2002) (emphasis added).

82. Prosecutor v. Ntaganda, ICC-01/04-02/06, Appellate Judgment II, ¶ 54 (June 15, 2017). “As to the *Prosecutor’s argument* that the ‘established framework of

Furthermore, the Appellate Chamber wasn't actually adding elements under its holding—it only *subtracted* them based on a conclusion (over Ntaganda's objection) that a "status" element never explicitly existed as a "general rule" and therefore wouldn't be applied in the instant case.⁸³

Simply put, the Appellate Chamber utterly confused, and frankly, ignored, Article 22 in what appears to be an obsessive focus to offer its own views on the desirability of the prosecutor's proposed scope-expanding definition of "war crimes."⁸⁴ Certainly, it can be concluded, the ICC was faced with conflicting authority about the interpretive scope of "war crimes," (the ICRC in one corner, and the SCSL in the other) which requires, both under the "established framework" regime of Article under 8(2)(b) and 8(2)(e) and Article 22's strict constructionist and leniency principles, a tie-breaking decision in Ntaganda's favor—particularly as to jurisdiction-expanding decisions having an effect well beyond the immediate case (i.e. the broadening of "war crimes" to

international law' should 'merely assist in the interpretation of the crimes and elements as prescribed by the Statute and the Elements,' without introducing *additional elements*, the Appeals Chamber considers that clearly distinguishing between interpreting the existing elements on the one hand and introducing additional elements on the other when examining the 'established framework of international law' may not always be possible *In the view of the Appeals Chamber, this does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted.*" *Id.* (emphasis added).

83. *Id.* ¶¶ 65–66. "[I]n the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery. . . . [T]he Appeals Chamber finds no reason to introduce Status Requirements to article 8 (2) (b) (xxii) and (e) (vi) of the Statute on the basis of the 'established framework of international law.'" *Id.* (emphasis added).

84. Appellate Judgment II, ¶ 54. "*The Appeals Chamber agrees with the Trial Chamber's finding that 'there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.'* Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery." *Id.* (emphasis added).

include a new category of persons).⁸⁵ However, the ICC chose to tackle none of these concerns under the rubric of Article 22. From its judgment, there is no sense whatsoever that the ICC factored in the principles of legality and leniency, nor that it restrained its decision-making within the boundaries of the Rome Statute's strict constructionist mandate.

ii. The ICC's Error in Applying the "Established Framework of International Law" Standard Under Articles 8(2)(b) and 8(2)(e)

This leads to the Appellate Chamber's second error: the Appellate Chamber did not, in fact, identify *established* customary law to support its conclusion. To the contrary, it openly boasts about the "unprecedented nature of [its] conclusion," it anxiously comments on its perceived "judicial activism" (while stating in conclusory fashion that, in fact, its holding aligns with established international law), and it cautions that "any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement"—all concerning indications that, in fact, the Appellate Chamber's holding is not so incontrovertible as to be considered

85. See, e.g., Grover, *supra* note 72, at 555–56. "Judges are mandated to interpret and apply the law, which requires giving content in good faith to the text in light of its ordinary or special meaning, context, object, and purpose, as well as subsequent practice, subsequent agreements, and applicable law. Thus, both the strict construction imperative and ban on analogy are said to 'not stand in the way of progressive juridical clarification of the content of an offence.' This interpretive exercise is not considered to undermine the notion of fair warning or separation of powers concerns so long as the Court's reasoning does not yield a new crime not contemplated by states parties. . . . However, *if Articles 6, 7, and 8 are lacking in some way, it is for the [Assembly of States Parties of the Court] to decide whether to amend the Court's jurisdiction.* While strict construction cannot be said to have a fixed place in interpretive reasoning . . . [i]t requires judges to 'exercise restraint' and favour the suspect or accused when 'left in doubt about the legislative purpose.' . . . Thus, *elements of the principle of legality remind judges to begin with the text of a criminal prohibition and return to it before reaching a conclusion by asking whether the interpretation contemplated respects the right of the accused to fair notice and is consistent with the role of judges interpreting and applying the law but not making it.*" *Id.* (emphasis added).

“established” under Articles 8(2)(b) and 8(2)(e).⁸⁶ Indeed, if the Appellate Chamber’s holding is, in fact, “unprecedented” (to mean something beyond merely novel, and more so into the realm of simple unforeseeability), then it necessarily fails to satisfy Article 22(1) requiring “the conduct in question [to] constitute[], *at the time it takes place*, a crime within the jurisdiction of the Court.”⁸⁷ Similar conclusions based on the generalized strict constructionist canons of Article 22(2) have been routinely drawn in American courts.⁸⁸

Put simply, the precedential preferences of the Appellate Chamber, picking authoritative favorites as it did to bolster its own conclusions while ignoring or loosely distinguishing contrary authorities, hardly demonstrates an “established” practice by the international community of the sort that would put Ntaganda on “fair notice” as is required by Articles 22(1) and 22(2).⁸⁹ Indeed, the Appellate Chamber’s myopic reliance on certain, favored authorities is easily critiqued and, thus, hardly of an “established” quality. For starters, the Appellate Chamber heavily relied on the fact that GC-I and GC-II do not require affiliation-type statuses, being that both apply to protect persons who are

86. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶¶ 67–68.

87. Rome Statute of the International Criminal Court, A/CONF.183/9, art. 22(1) (2002) (emphasis added).

88. *See, e.g.*, *United States v. Moss*, 872 F.3d 304, 315 (5th Cir. 2017) (refusing to find defendants subject to criminal liability for novel interpretations of regulations promulgated under the Outer Continental Shelf Lands Act); *see generally* *Kelsey v. Pope*, 809 F.3d 849, 865 (6th Cir. 2016) (decision of Indian tribal court to recognize jurisdiction over conduct of member of tribe, in touching victim’s breast at off-reservation community center, was not a violation of “fair warning” due process guarantees despite applicable substantive offense ordinance expressly applying only to conduct on the reservation; the tribal court’s decision was foreseeable, and thus permissible, given that tribe’s constitution mandated exercise of jurisdiction over accused’s conduct and the procedural ordinance, complementing the substantive offenses ordinance, explicitly defined criminal jurisdiction by reference to the constitutional definition); *United States v. Lanier*, 520 U.S. 259, 266, 271–72 (1997) (noting the “canon of strict construction of criminal statutes” ensures fair warning by resolving statutory ambiguity in favor of the accused unless the conduct is “clearly covered” by statute, and holding that, at minimum, this means the unlawfulness of certain conduct must be “apparent”).

89. *See generally* Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 22(1), 22(2) (2002).

“wounded, sick, or shipwrecked” regardless of whether they belong to an enemy or friendly force.⁹⁰ True enough, but both GC-I and GC-II do, nonetheless, include a status requirement ignored by the Appellate Chamber—the status of being *hors de combat*, either on land or at sea—of which the victims in Ntaganda’s case were neither. Thus, GC-I and GC-II, concerned only with those who are *hors de combat*, can hardly act as the basis for a blanket rule disposing of affiliation-type statuses as a general matter.

This leaves the ICRC’s interpretation of Common Article 3, to which the Appellate Chamber clings in finding that “Common Article 3 protects members of armed forces against violations committed by the armed force to which they belong.”⁹¹ It is abundantly clear the ICRC is interpretively reading into Common Article 3, under its “without any adverse distinction” clause, a concept of “nationality” as an example of the “other similar criteria” prong (recalling that Common Article 3 requires humane treatment “without any adverse distinction found in race, colour, religion or faith, sex, birth or wealth, *or any other similar criteria*”).⁹² Of course, if we look again to GC-I and GC-II relied on by the Appellate Chamber, we soon discover that “nationality” was arguably intentionally omitted from Common Article 3, since that term, while absent from Common Article 3, expressly appears later on in Article 12 of both GC-I and GC-II (both state, “[s]uch persons [who are *hors de combat*] shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, *nationality*, religion, political opinions, or any other similar criteria.”).⁹³ The ICRC’s interpretive expansion is, thus, not ironclad. Perhaps it could be argued that the term “birth” in Common Article 3 is a metonym for “nationality,” though its association with the term “wealth” suggests it means something more along the lines of social class, rather than nationality.⁹⁴ Even so, no matter how far Common

90. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 59.

91. *Id.* ¶ 61.

92. ICRC 2016 Commentary, *supra* note 63, paras. 545–47.

93. Compare First Geneva Convention, *supra* note 58, arts. 3, 12, with Second Geneva Convention, *supra* note 58, arts. 3, 12 (emphasis added).

94. *Id.*

Article 3 might be stretched, it nonetheless includes a status (before arriving to the “without any adverse distinction” clause) that, once again, does not apply to the child soldiers in Ntaganda’s case—a point expressly recognized by the ICRC in its own Commentaries—thereby defeating the ICC’s reliance thereupon:

[COMMON] ARTICLE 3. In the case of armed conflict not of an international character . . . each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) **Persons taking no active part in the hostilities**, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, **shall in all circumstances be treated humanely, without any adverse distinction found on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.**⁹⁵

Simply put, in holding that there is “no reason to *introduce* Status Requirements to article 8 (2) (b) (xxii) and (e) (vi) of the [Rome] Statute” on a perceived basis of the “established framework of international law,” the Appellate Chambers entirely ignored the long-running existence of such status requirements as expressly set forth in Common Article 3 (those “taking no active part in the hostilities”), GC-I and GC-II (those who are *hors de combat*), GC-III (those who are prisoners of war), GC-IV (those who are civilians), and as found by other competent international courts, including the SCSL, which found “the law of armed conflict does not protect members of armed groups from

95. See, e.g., ICRC, *Conflicts Not of an International Character: Article 3*, <https://ihl-databases.icrc.org/ihl/WebART/375-590006> (emphasis added) [hereinafter Common Article 3]. As mentioned, it appears the ICRC commentary, itself, acknowledges that Common Article 3 narrowly applies to those who are *hors de combat* (or else civilians), stating: “[t]he protection of persons not or no longer participating in hostilities is at the heart of humanitarian law. **The persons protected by common Article 3 are accordingly described by way of explicit delimitations: ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.’**” ICRC 2016 Commentary, *supra* note 63, para. 519 (emphasis added). Again, this point was either missed or glossed-over by the Appellate Chamber.

acts of violence directed against them by their own forces.”⁹⁶ As Professor Davidson recently suggested, where “an ambiguity remain[s] after all sources of law in Article 21 and standard tools of interpretation are exhausted”⁹⁷—clearly the case in *Ntaganda*, given (at minimum) the conflicting views between the ICRC the SCSL, a modern history of IHL law almost completely silent on the ICC’s desired holding, and a very questionable analysis of Common Article 3, GC-I, and GC-II bordering on results-oriented policy-making⁹⁸—Article 22(2) *required* the Appellate Chamber to favor Ntaganda.⁹⁹ It is, in sum, a far cry to suggest the ICC was applying “*established*” international law under Article 8(2)(b) and 8(2)(e).¹⁰⁰

In sum, the long-accepted history of IHL—a good starting place for any strict constructionist approach, as is required by Article 22(2)—has been that “war crimes” are those committed only against civilians or persons who are *hors de combat* (to also include, more broadly, the phrase “persons taking no active part in the hostilities”).¹⁰¹ This history

96. See *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 66 (emphasis added); see also First Geneva Convention, *supra* note 58, arts. 3, 13; Second Geneva Convention, *supra* note 58, arts. 3, 13; Third Geneva Convention, *supra* note 57, arts. 3, 4; Fourth Geneva Convention, *supra* note 57, arts. 3, 4; Prosecutor v. Sesay, SCSL-04-15-T, Judgment, ¶ 1451 (Mar. 2, 2009).

97. Davidson, *supra* note 75, at 91.

98. See *supra* note 67.

99. Rome Statute of the International Criminal Court, A/CONF.183/9, art. 22(2) (2002); see also Davidson, *supra* note 75, at 91. “Since an estimation of consensus is part of the inquiry [of Article 22], judges are less likely to enact controversial expansions of the law. In essence, judges must wait for a norm to develop.” *Id.*; Grover, *supra* note 72, at 555 (suggesting only the Assembly of States Parties, not the ICC itself, should be responsible for jurisdiction-expanding interpretations of the Rome Statute).

100. Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 8, 22 (2002).

101. See *Sesay*, SCSL-04-15-T, Judgment, ¶¶ 1451-1453. “The **law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another**, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law.” *Id.* at ¶ 1453 (emphasis added); OFF. GEN. COUNS. DEP’T DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1118 § 18.19.2 (2016),

<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Man>

was patently ignored, erroneously so, by the Appellate Chamber in what can only be described as a results-oriented approach to “end impunity” exuding all the signs of judicial activism. At minimum, the ICC made no attempt to analyze whether the child soldiers fit into a classic IHL status (perhaps they—or at least a few of them—were not, in fact, “soldiers” at all, such that, in reality, they were not participating in hostilities) and chose, instead, to simply create a new, status-less regime based on a loose assumption that “status” has never been the general rule—it is, and always has been.¹⁰²

ual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190 (noting that “prosecutions of war crimes as . . . [those] characterized as international law violations as opposed to violations of domestic law[] have only been undertaken when a State seeks to punish enemy nationals or persons serving the interests of the enemy State. [Whereas], [w]hen members of a State’s armed forces . . . violate the law of war, that State generally prosecutes those persons for offenses under ordinary domestic law or military law.”) (emphasis added); ICRC 2016 Commentary, *supra* note 63, para. 519. “**The protection of persons not or no longer participating in hostilities is at the heart of humanitarian law.** The persons protected by common Article 3 are accordingly described by way of explicit delimitations: ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.’” *Id.* (emphasis added); see also HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 1-2 (Dartmouth Publication Co., 1st ed. 1990); Commander Gregory P. Noone et. al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 68 (2004); Rachel E. VanLandingham, *Criminally Disproportionate Warfare: Aggression as a Contextual War Crime*, 48 CASE W. RES. J. INT’L L. 215, 246 (2016); Gabriella Blum, *On A Differential Law of War*, 52 HARV. INT’L L.J. 163, 196 (2011); Sadat, *supra* note 54, at 233.

102. Compare note 101, with Prosecutor v. Ntaganda, ICC-01/04-02/06, Appellate Judgment II, ¶ 60 (June 15, 2017). “[T]he Appeals Chamber is not aware of any case in which the grave breaches regime has been applied to situations in which victims belonged to the same armed force as the perpetrators. However, *the Appeals Chamber is unconvinced that this, in and of itself, reflects the fact that Status Requirements exist as a general rule of international humanitarian law.*” *Id.* (emphasis added).

B. An Unintended Effect: the Dangers of Judicial Activism in International Law

If, as I suggest, the ICC's decision in *Ntaganda* is a manifestation of judicial activism, why should this matter? Before beginning that inquiry, it might be useful to first define what the term "judicial activism" means. In fact, it can have many meanings: it can refer to court interference with duly-enacted legislation; it can refer to a court ignoring precedent (an invocation of the validity of *stare decisis*, though even *stare decisis* has its limitations in the face of truly erroneous precedent); it can refer to judges who willingly "legislate from the bench" (a difference between interpreting the law and outright creating law); it can refer to "results-oriented judging" (whereby a judge has an ulterior motive for making a particular ruling); and it can refer to a wholesale refusal to utilize the "tools of the trade," or interpretive canons, when confronting otherwise ambiguous legal text.¹⁰³ Stated plainly, judicial activism is a colloquial reference to any conduct by a judicial body that has the net effect of damaging its perceived legitimacy (and by legitimacy, I do not mean simply that affected persons strongly disagree with the court's holding, but that there are cogent criticisms over the court's methodological approach irrespective of its substantive impact).¹⁰⁴ Onlookers may not always like the law handed down, or the court's interpretation of it, but they should feel comfortable with the court's method of getting to its result, necessitating stable, transparent, and readily comprehensible interpretive decision-making.

An immediately observable example of judicial activism, which damaged the court's long-term legitimacy through the utilization of a poor methodological approach, is the case of *Lochner v. New York*, a 1905 U.S. Supreme Court decision that invalidated maximum work hours legislation as an unconstitutional exercise of state police power based on little more than the Court's own perception that such laws were

103. See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441, 1449, 1463-76 (2004).

104. *Id.*

“unwise.”¹⁰⁵ This case—almost universally criticized today¹⁰⁶—would later be called a symbol of “judicial activism taken to excess,” and the “foremost reproach to the activist impulse in federal judges . . . widely disparaged for its mobilization of personal judicial preference.”¹⁰⁷ Indeed, the term “Lochnerism” has become a metonym for judicial activism, and commentators now discuss the “Shades of Lochner” as a stark warning against repeated legislative invasion by the courts.¹⁰⁸ The “Lochnerism” concern in American jurisprudence should, likewise, be a concern for the fledgling ICC, which, unlike the U.S. Supreme Court, serves a constituency free to leave at any time pursuant to Article 127 of the Rome Statute (as Burundi recently demonstrated in late 2017, and the Philippines in 2018).¹⁰⁹ Indeed, prominent scholars, including Professor Sadat, have argued the ICC should refrain from making “unjustified

105. See *Lochner v. New York*, 198 U.S. 45, 68 (1905). “We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.” *Id.* at 58; *Lochner overruled in part by Ferguson v. Skrupa*, 372 U.S. 726, 730 (“The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”).

106. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting). Justices from both parties in American politics, Democrat and Republican, have invoked *Lochner* in criticizing perceived judicial activism. See *Id.* (Roberts, J. dissenting); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 701 (1999) (Breyer, J., dissenting).

107. *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 890 (4th Cir. 1999).

108. See David J. Seipp, *Symposium: Lochner Centennial Conference*, 85 B.U. L. REV. 671, 671 (2005); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 299 (1992).

109. See Rome Statute of the International Criminal Court, A/CONF.183/9, art. 127 (2002). It is noted that both Burundi and the Philippines appears to have left the ICC over frustration of pending investigations involving them. Still, the point is made to show that states can (and do) withdraw from the Rome Statute. Perceived activism is simply another, and perhaps more potent, justification for departing. See, e.g., Grover, *supra* note 72, at 583 (noting that perceived illegitimacy of an interpretive outcome by an international court can dissuade state participation).

interpretive leaps in order to ‘end impunity’” since doing so “risks destroying the legitimacy of the endeavor” of international criminal law as a whole.¹¹⁰

However, the debate over judicial activism and judicial restraint has raged on for many years without a conclusive result as to the appropriate line of demarcation. As early as the late 1700s, Blackstone and Bentham engaged in heated discourse about the proper role of the judiciary in interpreting English law,¹¹¹ and today, as one can easily glean from a

110. See Sadat & Jolly, *supra* note 7, at 768.

111. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOLUME 1 OF THE RIGHTS OF PERSONS (1765) 58 (University Chicago Press, 2002). Sir William Blackstone first remarked that “[w]hen any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it,” an interpretive methodology labeled as “bad . . . [since] it affords great room for partiality and oppression.” *Id.* Thus, Blackstone would have the court “explore,” for itself, the “intentions” of the legislator “at the time when the law was made” by consulting “the words, the context, the subject-matter, the effects and consequence, [and] the spirit and reason of the law.” *Id.* at 59. Bentham’s disagreement with this approach is evident in the following passage:

A law is made: it is made to a certain end. The intention is manifest: it is to attain that end. It is improvidently penned: the effect is, that there is a case in which complying literally with its directions would not contribute to the attainment of that end. It is plain therefore that such compliance was not intended to be enforced at the time the Law was making. Exact it not, then, I say to the Judge . . . [t]o this case the Law is not to be interpreted to extend. For to this case the will of those who made the Law never did extend. . . . Change of circumstances may happen: but change of circumstances may be gradual: and may have happened in the eyes of some before it has in the eyes of others. The expectation of some men concerning the enforcement of the Law will not have followed the opinion concerning such a change in others. It is for them only to alter the course of expectation who first gave it its direction.

JEREMY BENTHAM & CHARLES WARREN, COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 122–23 (Charles W. Everett ed., 1928).

Of course, modern legal scholars also disagree with Blackstone. If there was a concern by Blackstone over the partiality and oppression of legislative interpretive methodologies, so too can that concern be levied against judicial interpretive methodologies. To wit, consider the late Justice Scalia’s invocation of the oppressive effect of unrestrained judicial interpretation:

The substance of today’s decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes. . . . It is of overwhelming importance, however, who it is that rules me. Today’s

cursorily review of the American “substantive due process” experiment (and related textual interpretive exercises), a lingering skepticism continues to follow high courts who straddle too closely between the line of proper judicial interpretation of legal texts and *Lochner*-esque supplantation of the legislative function.¹¹² So, where *should* the line be drawn?

decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Obergefell, 135 S. Ct. at 2626–27 (2015) (Scalia, J., dissenting) (emphasis added).

112. See *supra* notes 4, 105, 106; *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (in an early, formative case for the “substantive due process” doctrine, in which the “right of privacy” was first explicitly recognized, the court pointed haphazardly to the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments in order to hold the “right of privacy” existed, despite never expressly being mentioned in the U.S. Constitution, as an “emanation” or “penumbra” of the Bill of Rights); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating “[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978) (noting the demise of substantive due process principles in the “area of economic regulation”—an inference to *Lochner* and its progeny—has permitted “legislative bodies . . . to experiment with economic problems”); see also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137, 162, 164 (2d Cir. 2018) (Lynch, J., dissenting) (stating “[s]peaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day—and I hope that day comes soon—I will have that pleasure. . . . But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice. Accordingly, much as I might wish it were otherwise, I must conclude that those arguments fail. . . . Just last Term, a unanimous Supreme Court foreclosed judicial efforts to ‘update’ statutes, declaring that, although

Professor Sadat suggests that “unjustified interpretative leaps,” while risking the destruction of the ICC’s long-term legitimacy, specifically “run afoul not only of Article 22(1) [of the Rome Statute] but [also] Article 21(3)’s admonition that the ‘application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights.’”¹¹³ Similarly, Professor Caroline Davidson argues Article 22(2) of the Rome Statute—requiring application of strict constructionist principles to the Rome Statute as a whole—“is an admonition to judges to avoid usurping the role of the drafters. In essence, judges should avoid contravening the clear intention of states parties, unduly encroaching on state sovereignty, and unfairly surprising defendants.”¹¹⁴ Professor Glover adds, “the principle of legality [under Article 22] ensure[s] that rules are ‘fixed, knowable, and certain’ . . . [thus,] [i]t remains for the [Assembly of States Parties] to determine whether and when a new crime should be added to the [ICC]’s jurisdiction.”¹¹⁵

Thus, one rightfully questions the conclusion of the ICC in its jurisdiction-expanding *Ntaganda* decision. The ICC primarily relied upon ICRC Commentaries, GC-I, and GC-II.¹¹⁶ But, as has already been explained above, it requires little effort to show how the ICRC Commentaries were misquoted (or at minimum, are legally suspect) and, further, how GC-I and GC-II have, in fact, no relevance to *Ntaganda* beyond an incredibly indirect suggestion that affiliation-based status may not always be required under IHL principles. Mind, too, that I do not suggest unequivocally that my interpretation of the scope of Article 8 of the Rome Statute *must be* correct. To the contrary, I aim only to offer an equally valid counter interpretation, a conclusion similar to the SCSL’s determination (no less side-stepped by the ICC) that “[t]he law of international armed conflict was never intended to criminalise acts of

‘reasonable people can disagree’ whether . . . ‘Congress should reenter the field and alter the judgments it made in the past.’”).

113. Sadat, *supra* note 54, at 259.

114. Davidson, *supra* note 75, at 42-43.

115. Grover, *supra* note 72, at 582.

116. Prosecutor v. Ntaganda, ICC-01/04-02/06, Appellate Judgment II, ¶¶ 60-61 (June 15, 2017).

violence committed by one member of an armed group against another.”¹¹⁷ In doing so, I urge the reader to look with a critical eye to Article 22(2)’s strict constructionist regime (favoring the accused in toss-up situations after a fair exhaustion of Article 21), and Article 8(2)(b) and 8(2)(e)’s express limitation that the ICC apply only “established” international law. Ask yourself how these requirements comport with the ICC’s “unprecedented” decision (its own description) which, most certainly, surprised both *Ntaganda* and a great many onlookers (a result Article 22 tries to avoid).¹¹⁸ How does one know the line has been crossed into the realm of unwarranted judicial activism? Apply, foremost, the “overriding principle” of ICC interpretive methodologies: “a fidelity to the text [of the Rome Statute],”¹¹⁹ pursuant, no less, to the specific mandate of Article 21(1) expressly requiring the ICC to look, first, to the Rome Statute itself, which requires a considered analysis of the precise limitations imposed by Articles 22(1), 22(2), 8(2)(b) and 8(2)(e) on acceptable interpretive methodologies.¹²⁰ This, as is abundantly clear from the Appellate Chamber’s judgment, it did not do.¹²¹

117. See *Id.* ¶ 61; Prosecutor v. Sesay, SCSL-04-15-T, Judgment, ¶ 1453 (Mar. 2, 2009).

118. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶ 67; Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 8, 22 (2002).

119. Sadat & Jolly, *supra* note 7, at 765.

120. Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 8, 21, 22 (2002).

121. *Ntaganda*, ICC-01/04-02/06, Appellate Judgment II, ¶¶ 52–70. I should pause, also, to take a moment to observe that Additional Protocol I, Article 77, is likewise of no use in saving the *Ntaganda* decision—though I have seen some academic scholars rely upon it for its language broadly favoring the protection of children. Foremost, the situation involved in *Ntaganda* was a NIAC, to which additional protocol would not apply. In any event, Article 77 of AP also clearly divides itself between civilian and combatant statuses. To wit, Article 77(1) discusses children generally as if it were assumed they are (ordinarily) civilians, but Article 77(3) talks of “exceptional” cases in which children “participate in hostilities,” who are thus capable of being “prisoners of war” (Article 77(3) reads in part: “whether or not they are prisoners of war”). Civilians cannot normally be “prisoners of war” in any circumstance (unless, when captured, they are acting as privatized contractor-type personnel directly assisting the military under GC-III, Art. 4(4) or as crews of civilian aircraft or the merchant marine under GC-III, Art. 4(5)). Thus, it seems, Article 77 of AP I is of no utility in sweeping away all status

C. The Rebuttal: A Court's Ability to Tell Us What the Law Is

It may be worthwhile to touch, briefly, upon an obvious rebuttal to this article's analysis: isn't it part of a court's job (here, the ICC's job) to tell us 'what the law is' (an implication that the ICC was simply doing what it is purposed to do)? Certainly so, telling us 'what the law is' has been the long-accepted role of the judiciary; indeed, to find this principle one need look no further than the famed case of *Marbury v. Madison*, where it was declared: "It is emphatically the province and duty of the judicial department to say what the law is."¹²² However, to posit that the judiciary has the rightful authority to tell us "what the law is" as a counter to *Lochner* is to misunderstand the relationship *Lochner* has with *Marbury* (while I cite to two U.S. Supreme Court cases in an article ultimately focused upon the ICC, it bears mentioning that both have had a profound, transnational effect on the development of "judicial review" over the last century).¹²³

I would submit *Lochner* is simply the outer boundary for which *Marbury* legitimately operates. While *Marbury* is the origin of broad judicial review, *Lochner* acts as its necessary endpoint, ensuring, as a

classifications for children whatsoever, as some academic commentators have urged in a narrow viewpoint under Article 77(1)'s "special respect" clause. Why is this important? Because retaining the distinction—even as to children—between the status of being a civilian (GC-IV) and being a combatant (GC-I, GC-II, GC-III), ultimately, differentiates domestic crimes from international ones. When someone is a combatant (including children), and thus enjoys the attendant benefits of being a combatant, they must generally be harmed *by an adversary* while *hors de combat* in order to trigger international protections (see: GC-I, GC-II, GC-III)—internal harms within a particular military force, outside of *hors-de-combat*-type abuses, normally remaining the concern of domestic law, not international law (at least as concerns the "war crimes" regime). See ICRC, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (Protocol I) art. 77 (1977).

122. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

123. See, e.g., Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1472–74, 1480, 1485–86 (2009) (noting *Marbury* and *Lochner*'s effect on Argentina, Australia Mexico, Canada, and others who "generally adopted judicial review after the Second World War and had the opportunity, therefore, to learn from [the American] experience with *Lochner*").

cautionary tale, that “judicial review” does not dive headlong into outright “legislative policymaking.” Professor Schor writes: “*Marbury* now stands for the proposition that courts have an important role to play in effectuating rights . . . [whereas] *Lochner* now stands for the proposition that courts armed with the power of judicial review may abuse that power and is considered, therefore, to be the opposite of *Marbury*.”¹²⁴ This seems a sound conclusion—that *Marbury* (a tool of judicial empowerment) and *Lochner* (a tool of judicial restraint) act as necessary counterweights to create an equilibrium somewhere in the middle. So, to counter criticism against *Lochner*-esque judicial decision-making by arguing the courts have authority to tell us ‘what the law is’ is simply to shout from one end of a spectrum as against the other. It misses the point.

It is my humble conclusion that the ICC’s *Ntaganda* decision constitutes a readily-observable example of the aforementioned judicial imbalance between *Marbury* and *Lochner*. As previously mentioned, Article 22—most notably its incorporation of the principle of leniency¹²⁵—requires the ICC to be mindful of activist impulses and decide matters of lingering ambiguity in favor of the accused; it tips the scales ever-so-slightly away from *Lochner*-esque despotism. Particularly in the realm of criminal law, the shades of *Lochner* have considerable gravitational pull in determining the appropriate equilibrium point, providing stronger influence in toss-up decisions to require an exercise of restraint over judicial creativity.¹²⁶ Where, as in *Ntaganda*, the ICC was

124. *Id.* at 1494.

125. See Davidson, *supra* note 75, at 91. See also Rome Statute of the International Criminal Court, A/CONF.183/9, art. 22(2) (2002). “The definition of a crime shall be strictly construed . . . [i]n case[s] of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.” *Id.*

126. See Grover, *supra* note 72, at 555–56 (“While strict construction cannot be said to have a fixed place in interpretive reasoning, it has been suggested that it is one of the points which a judge must consider when interpreting a criminal offence. It requires judges to ‘exercise restraint’ and favour the suspect or accused when ‘left in doubt about the legislative purpose.’”). Unwarranted activism is, of course, most harmful in the criminal law arena—as the defendant stands more to lose than simply money damages. This is why Article 22 has a sort of bookend application, requiring the judge—in hard-to-decide interpretative situations—to err on the side of restraint.

faced with conflicting authority (essentially as between the ICRC and the SCSL, with a substantial amount of secondary authorities favoring the SCSL's position) it cannot be said that, in choosing to side with the ICRC, the ICC recognized the appropriate gravity of *Lochner*. The ICC was not concerned with the equilibrium demanded by Article 22, as it made no attempt to analyze Ntaganda's Article 22 arguments. Rather, it was concerned only with whether its decision was perceived to venture too deeply into the realm of *Lochner* as to be patently offensive to order and justice. This arguably is why the ICC openly acknowledged its "unprecedented conclusion" while immediately brushing off any potential criticisms of its perceived "judicial activism"—the ICC could seemingly sense its own decisional imbalance.¹²⁷ It bears repeating: *Lochner*, like the ICC's *Ntaganda* decision, was wrong not because it attempted to tell us "what the law is," but because it attempted to tell us "what the law is" *without a concrete methodological foundation*. The *Ntaganda* decision ignored the existence of conflicting authority and ignored the strict constructionist guideposts of Article 22 in those circumstances of conflicting authority. This was the ICC's cardinal error, and it's dangerous foray into *Lochner*-esque "judicial activism."

127. See Schor, *supra* note 123, at 1489. Professor Schor mentions the U.S. Supreme Court, concerned that it not be perceived as an illegitimate policymaking body, now attempts to constrain its activist impulses internally through the use of "judicial modesty" (abstract virtues), rather than external mechanisms such as "political accountability" (concrete oversight frameworks). In speaking of "balance," I suppose I, too, would offer disciplined virtue as the most enduring remedy against *Lochnerism*. In my view, the judiciary should not be at constant war with the other branches—it should not be so mistrusted with power as to necessitate constant oversight-minded rulemaking. Rather, judges should respect their incredible power while simultaneously recognizing their duty to effectuate the will of the people (or in the case of the ICC, the sovereign states), and thus be guided by the need for transparent, consistent, well-articulated decision-making (truly, the mandate of Article 22 in a nutshell). As the late Justice Scalia put it, a certain court-imposed formalism is necessary to assure the court isn't simply engaged in an unfettered "art or a game, rather than an [observable] science." Schor, *supra* note 123, at 1490–91 (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 8 (Amy Gutman ed., 1997)).

IV. CONCLUSION

As mostly only hinted at by other scholars, I would go so far as to conclude Article 22(2), in particular, but also the entire framework of the Rome Statute as a whole, totally forecloses the possibility of *Lochner*-esque activism by the ICC. Such activism has no place in criminal law, given the high cost of legal errors, and certainly has no place in an international framework whereby the constituency, unhappy with perceived activism, may withdraw at any time under the provisions of Article 127 to protect against attacks to their sovereignty.¹²⁸ Professor (and former judge) Lietzau notes, “several hundred years of experience recommend against imbuing judges with legislative power.”¹²⁹ This sound historical observation, shared by many regardless of political affiliation, strikes against the notion that judicial activism is a

128. See Robert Cryer, *The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake*, in SHANE DARCY & JOSEPH POWDERLY, *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* 163 (Oxford University Press, Inc., 2010). “[T]he judges of the ICTY know very well that their ability to affect the law is related to the extent to which they can convince states that their interpretation of the law is acceptable.” *Id.* Grover, *supra* note 72, at 583. “The legitimacy of the Court will be influenced by whether judges interpret the Rome Statute in a manner which adheres to the rule of law. In order for the interpretive outcomes reached by judges to be perceived as legitimate, they should appear to be consistently guided by sound methodological reasoning. If judges invoke diametrically opposing canons of interpretation for crimes in the Rome Statute, they may call into question the legitimacy of international criminal law, as they may appear to be invoking a particular interpretive canon because it yields a desired outcome. . . . [I]nterpretive outcomes can . . . encourage or dissuade non-state parties to join the Court.” *Id.*; William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT’L L.J. 477, 482 (1999). “[M]any delegations sought open-ended elements in order to expand the discretion of the Court. These states envisioned a Court that would not only adjudicate criminal cases, but also could define the law and thus foster its evolution. However, judicial activism of this nature conflicts with the most fundamental principles of criminal law, and it is arguably inconsistent with the Burkean conservative character of most English-speaking judges. While the Court should ensure greater accountability for perpetrators of the most serious violations of international law, it should not accomplish this goal by leaving the elements problem to judicial discretion; several hundred years of experience recommend against imbuing judges with legislative power.” *Id.*

129. Lietzau, *supra* note 128, at 482.

worthwhile counter-majoritarian tool used to right long-existing wrongs cemented by majorities.¹³⁰ For every *Obergefell*, a praise upon the court's ability to break through societal barriers under the power of law, there is a *Korematsu*, a bruise upon the court's long-term legitimacy for having allowed law to unduly oppress the constituency it serves.¹³¹ From a purely legalistic perspective, both suffer equally from the ghosts of *Lochner*.¹³² The overarching concern of *Lochner*-esque activism,

130. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Bobbs-Merrill Company, Inc., 1962).

131. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invoking court-created “fundamental rights” under the Fourteenth Amendment to help legalize same-sex marriage nationwide) with *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding as constitutional, under the war power, an executive order forcing Japanese Americans into internment camps during World War II regardless of their citizenship). Both have been heavily criticized for their perceived nonsensical judicial activism. See, e.g., Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 77 (1996) (quoting Jacobus tenBroek, *Wartime Power of the Military Over Citizen Civilians within the Country*, 41 CAL. L. REV. 167, 181 (1953)) (noting *Korematsu* has been called “a muddled hodge-podge of conflicting and barely articulate doctrine”); Strauss, *supra* note 2, at 373 (suggesting *Lochner* and *Korematsu* are in contention for being the most “reviled decision of the last hundred years”); *Obergefell*, 135 S. Ct. at 2611 (Roberts, J., dissenting) (“[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise ‘neither force nor will but merely judgment.’”); *Obergefell*, 135 S. Ct. at 2640 (Thomas, J., dissenting) (“Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible understanding of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded.”); *Obergefell*, 135 S. Ct. at 1640–41 (Alito, J., dissenting) (“For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.”).

132. See Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 884 (2008). “We must never forget that *Dred Scott v. Sandford*, *Lochner v. New York*, and *Korematsu v. United States* were all substantive due process decisions where the Court was guided by its own twisted ideas about what human

encapsulated in the observable legacy it left behind, is that “unjustified interpretive leaps” destroy the long-term “legitimacy of the court.”¹³³ The ICC’s decision in *Ntaganda* may, in one sense, have been a small justice—one man will pay for the full balance of his wrongdoing. However, if it comes at the risk of state parties questioning their continued participation due to the activist methodologies of the Court, one wonders whether a much larger justice is being sacrificed in turn. This, I urge, must be the ever-present concern of the ICC: to execute the “*established*” will of the international community, and not its own.¹³⁴ Equally then, the role of jurisdictional expansion should be left to the Assembly of State Parties under the framework of Article 121 as the rightful “legislative” body of the Rome Statute.¹³⁵

dignity required. One could make a powerful case that the history of judicial review has been largely one of errors and tragedies.” *Id.*

133. Sadat, *supra* note 54, at 259.

134. See Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 8(2)(b), 8(2)(e) (2002) (requiring the ICC to look to the “established framework of international law” in interpreting war crime violations); see also *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

135. See Rome Statute of the International Criminal Court, A/CONF.183/9, art. 121 (2002) (authorizing the Assembly of State Parties to adopt amendments to the Rome Statute).