The Criminalisation of Intra-Party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict

Longobardo, M.

This is the peer reviewed version of the following article: Longobardo, M. 2019. The Criminalisation of Intra-Party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict. International Criminal Law Review, 19 (4), pp. 600-634. doi:10.1163/15718123-01904004, which has been published in final form at

https://dx.doi.org/10.1163/15718123-01904004.

THE CRIMINALIZATION OF INTRA-PARTY OFFENCES IN LIGHT OF SOME RECENT ICC DECISIONS ON CHILDREN IN ARMED CONFLICT

_____*

Abstract

Traditionally, international humanitarian law is considered to be applicable only to the relationship between different parties of an armed conflict, while domestic law and international human rights law address situations of intra-party conduct, i.e., conduct involving members of the same party only. In the recent case law of the International Criminal Court, however, intra-party offences against children used as child soldiers have been treated as war crimes. Various Chambers have offered different arguments on this inclusion, which touches upon fundamental issues related to the scope of application of international humanitarian law. This article explores whether the criminalization of intra-party offences as war crimes is in line with contemporary international humanitarian law, arguing that a positive answer must be based on the correct interpretation of international humanitarian law rules, rather than on the International Criminal Court Statute itself.

Key words: child soldiers; international humanitarian law; intra-party offences; sexual offences; war crimes

15133 words

1 Introduction

* _____

Since the beginning of historical records, armed conflicts have adversely affected children, who in turn have been enlisted as soldiers or have been made objects of violence during the conduct of hostilities.[1] For instance, according to some versions of the myth, once Troy was conquered by the Greeks, Achilles' son, Neoptolemus, who today would appear as a child soldier, killed Hector's infant son, Astyanax.[2] Notwithstanding the adoption of specific international law rules aiming at protecting children in armed conflicts,[3] on-going armed conflicts continue to disrupt children's lives around the world, both with regard to the employment of child soldiers and with regard to violence perpetrated against children.[4] Unfortunately, armed conflicts are situations during which children are particularly vulnerable to sexual offences such as rape, sexual slavery, and related heinous conduct, all of which are still commonplace notwithstanding the emergency of an international law ban on sexual offences in armed conflict.[5]

---

[1] For a historical overview, *see* the essays collected by James Marten (ed.), *Children and War: A Historical Anthology* (New York University Press, New Yok, 2002).

[2] *See* 'Astyanax' in M. C. Carry et al. (eds.), *Oxford Classical Dictionary* (Clarendon Press, Oxford, 1949) p. 111. For the debate on Neoptolemus' age, *see* David Breslove, 'How Old Were Achilles and Neoptolemus?', 39 *The Classical Journal* (1943) 159-161.

[3] *See, e.g.,* Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Articles 28 and 50; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, Articles 77 and 78; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (PCRC), 25 May 2000.

[4] *See* the data collected in the Report of the Security Council Working Group on Children and Armed Conflict, 29 December 2017, UN Doc. S/2017/1100; Report of the Security Council Working Group on Children and Armed Conflict, 31 December 2018, UN Doc. S/2018/1169.

[5] On international law and sexual offences in armed conflict, *see generally*, and for further references, Noëlle N. R. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Transnational Publishers, Ardsley, NY, 2005); Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff, Leiden, 2012); Caterina E.

Although the perpetrators of such offences may belong to the enemy armed forces, to a third party (such as UN peacekeepers),[6] or to the same party as the victim children, this article focuses only on sexual offences committed by members of an armed force or an armed group against children enlisted, recruited, or used as child soldiers in the same armed force or armed group of the perpetrators (so-called intra-party offences), in light of the relevant provisions of international humanitarian law. In particular, this article explores whether such conduct falls under the definition of war crime, a notion that has been historically considered to be applicable to offences between opposite parties. The analysis takes into account the relevant treaty law provisions and customary international law rules as applied by national and international case law since the end of WWII, focusing in particular on some recent decisions rendered by the International Criminal Court (ICC). The article relies also on the rules of interpretation embodied in the 1969 Vienna Convention on the Law of Treaties

---

Arrabal Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective* (Brill, Leiden, 2018); Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press, Cambridge, 2019). *See also* the essays collected in 96(894) *International Review of the Red Cross* (2014) 427-639.

[6] *See generally* Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents* (Brill, Leiden, 2014).

(VCLT),[7] which is applicable to the ICC Statute as well.[8] In order to explore this topic, this article first describes the peculiarity of child soldiers as victims of intra-party sexual offences (section 2) and the traditional view on the application of international humanitarian law only to offences between enemy parties (section 3). The article then goes on to analyse the recent case law of the ICC, according to which intra-party sexual offences are war crimes (section 4). The article finally assesses the pros and cons of criminalizing intra-party sexual offences in relation to the protection of children involved in armed conflict (section 5).

2 The Peculiarity of Intra-Party Sexual Offences against Child Soldiers

Before analysing the criminalization of intra-party offences against child soldiers, it is worthwhile to summarize the legal regime pertaining to child soldiers. However, the legal regime on child soldiers is presented here only as to better understand the ICC case law on intra-party offences

[7] Vienna Convention of the Law of Treaties, Vienna, 23 May, 1969 (VCLT). On treaty interpretation, also for further references, *see generally* Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill, Leiden, 2010); Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press, Oxford, 2015); Richard K. Gardiner, *Treaty Interpretation* (2nd ed., Oxford University Press, Oxford, 2015).

[8] The applicability of the VCLT to the ICC Statute is confirmed by a well-established case law. *See e.g.* Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of the PTC I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 31 July 2006, para. 33; Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 43; Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 75. For more on the interpretation of the crimes embodied in the ICC Statute, *see generally* Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, Cambridge, 2014).

and it should not be considered an exhaustive take on this topical issue. [9] Under the existing legal framework, the expression 'child soldiers', which is not a term of art but it is employed here nonetheless for practical reasons, refers to individuals under fifteen who take active part into the hostilities or are recruited, conscripted or enlisted by one belligerent. Although the UNICEF has taken the view that this definition should encompass individuals up to the age of eighteen,[10] states so far have failed to adopt such a standard in legally binding instruments. The UNICEF *soft law* instruments, nonetheless, are relevant for the interpretation of binding treaty rules and for understanding the possible development of the law from a *de lege ferenda* perspective.[11]

Conscripting, enlisting, and using child soldiers to actively participate in the hostilities is considered a war crime under the statutes of some international courts and tribunals, such as the ICC[12]

[9] For a more comprehensive understanding on child soldiers in international law, *see generally* Guy Goodwin-Gill and Ilene Cohn, *Child Soldiers, The Role of Children in Armed Conflicts* (Clarendon Press, Oxford, 1994); Matthew Happold, *Child Soldiers in International Law* (Manchester University Press, Manchester, 2005); Roberta Arnold, 'Children and Armed Conflict', in *Max Planck Encyclopedia of Public International Law online* (Oxford University Press, Oxford, 2006); Giuseppe Gioffredi, *La condizione internazionale del minore nei conflitti armati* (Giuffrè, Milan, 2006); Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, Oxford, 2012); Julie McBride, *The War Crime of Child Soldier Recruitment* (Springer, Leiden, 2014); Gus Waschefort, *International Law and Child Soldiers* (Hart, Oxford, 2015).

[10] *See, e.g.,* Cape Town Principles and Best Practices (27-30 April 2017) p. 1, available at http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf; The Paris Principles (February 2007) para. 2.0, available at https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.

and the Special Court for Sierra Leone (SCSL).[13] Similarly, international humanitarian law and international human rights law prohibit the recruiting of child soldiers, demanding that states endeavour to prevent the active participation of children in the hostilities. For instance, Article 77(2) of the 1977 First Additional Protocol to the 1949 Geneva Conventions (API), Article 38 of the Convention on the Rights of the Child (CRC),[14] and Articles 1 and 2 of the Optional Protocol to the Convention on the Rights of the Child provide that the parties to the conflict shall take all feasible measures to ensure that children who have not attained the age of fifteen do not take direct part in hostilities, and in particular, they shall refrain from recruiting them into their armed forces. Additionally, in relation to non-international armed conflict, Article 4(3)(c) of the 1977 Second Additional Protocol to the 1949 Geneva Conventions (APII) affirms that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities',[15] thus creating an imbalance between the rules upon states and those upon non-state actors; this difference is based on the assumption that state forces may guarantee the

---

[11] *See* Mark A. Drumbl, 'The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering', 15 *Yearbook of International Humanitarian Law* (2012) 87-116, p. 90. On *soft law* in international law, *see generally* Alan Boyle, 'Soft Law in International Law Making', in Malcom D. Evans (ed.), *International Law* (5th ed., Oxford University Press, Oxford, 2018) pp. 129-137.

[12] *See* Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statue of the International Criminal Court, Rome, 17 July 1998 (ICC Statute). For more on this provision, *see* William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press Oxford) pp. 285-291; Michael Cottier and Julia Grignon, 'Paragraph 2(b)(xxvi): Conscription or Enlistment of Children and their Participation in Hostilities', in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., CH Beck-Hart-Nomos, Munich, 2015) pp. 519-528.

[13] *See* Article 4(c) of the Statute of the Special Court for Sierra Leone, 14 August 2000.

[14] Convention on the Rights of the Child (CRC), 20 November 1989.

[15] Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977.

protection of the rights of the involved children better than armed groups, reflecting the traditional distrust against non-state actors and creating tensions with the principle of equality of belligerents. Individuals between fifteen and eighteen may be recruited only after having given priority to individuals older than eighteen,[16] and if the recruitment is genuinely voluntary and is carried out with the informed consent of the person's parents or legal guardians, if such persons are fully informed of the duties involved in such military service, and if they provide reliable proof of age prior to acceptance into national military service.[17] Categorically, Article 4 of the Optional Protocol to the Convention on the Rights of the Child forbids the recruitment of children between fifteen and eighteen by armed groups, emphasising again the different treatment of states versus non-state actors in relation to child soldiers.

As noted, a number of different behaviours are addressed by international law rules on child soldiers: recruitment, conscripting, enlistment, and use for active participation. Recruiting refers to the manner in which children become associated with an army or armed group,[18] and it encompasses both conscripting and enlisting.[19] The difference between enlisting and conscription rests on the consent of the child: based on the Elements of the Crimes, the ICC has affirmed that '"enlisting" is defined as "to enrol on the list of a military body" and "conscripting" is defined as "to enlist compulsorily". Therefore, the distinguishing element is that for conscription there is the added element of compulsion.'[20] The exact extent of the expression 'to use children to actively participate

[16] *See* Article 77(2) of the API and Article 38(3) of the CRC. However, *see* the trend against such practice as emphasised by the aforementioned UNICEF documents, *supra* note 10.

[17] *See* Article 3 of the PCRC.

[18] *See* Sandesh Sivakumaran, 'War Crimes before the Special Court for Sierra Leone', 8 *Journal of International Criminal Justice* (2010) 1009-1034, p. 1012.

[19] Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 607.

[20] *Ibid.*, para. 734.

in the hostilities', which is debated between scholars, has been addressed by the SCSL and ICC's case law, which failed to identify a specific definition, preferring to refer to lists of specific behaviours that are considered to fall into this concept case-by-case.[21] As this issue will be addressed subsequently,[22] suffice it to say here that, according to the ICC, 'the expression "direct participation" […] was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities,' beyond the concept of 'direct participation in the hostilities' embodied in Article 51(3) of the API.[23]

The fact that child soldiers are victims of enlistment, conscription, and use should not overshadow the reality of their conduct as combatants once such enlistment and recruitment in fact occur. Indeed, child soldiers are employed for the very reason that they are able to contribute to attainment of a military advantage. Accordingly, international humanitarian law makes a balance between the victim status of child soldiers and their role in hostilities by treating them as combatants if they meet the relevant requirements,[24] and at the same time by allowing them to benefit from the special protection offered to children by international humanitarian law.[25]

The participation of child soldiers in hostilities raises the legally and ethically troublesome issue of whether they may be lawfully targeted. Although humanitarian reasons could suggest that, as victims of an international crime, child soldiers should not bear the additional negative effects of the offences they have suffered with regard to the loss of civilian immunity, practical reasons linked to the combat capacity of child soldiers suggest that they should be treated as normal combatants. This

[21] *See* the accurate analysis by McBride, *supra* note 9, pp. 59-61, pp. 166-168 and pp. 187-189.

[22] *See infra*, section 4.1.

[23] Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, *supra* note 19, para. 627.

[24] *See* Arnold, *supra* note 9, paras. 25 and 40.

[25] *See* Article 77(3) of the API and Article 4(3)(d) of the APII.

means that, under international humanitarian law, they can be targeted on the basis of their capacity to contribute to the attainment of a military advantage.[26]

Equally troublesome is the issue of the criminal prosecution of child soldiers at national and international levels, should they commit war crimes. Indeed, Article 26 of the ICC Statute forbids the prosecution of individuals under eighteen, whereas Article 7 of the SCSL Statute affirms that the Court has no jurisdiction over individuals under fifteen, and that re-adaptation and reintegration measures shall be preferred to repressive ones with regard to individuals under eighteen. Accordingly, before most international criminal courts, child soldiers cannot be prosecuted for their actions, whereas a different approach may be taken by internationalized and domestic courts which apply domestic standards on liability.[27]

Child soldiers appear to be suspended between the status of victims and (potential) perpetrators,[28] between 'children', as protected persons, and 'soldiers', i.e. combatants. The link between the

---

[26] On this topic, beyond the purview of the present article, *see* Sam Pack, 'Targeting Child Soldiers: Striking a Balance between Humanity and Military Necessity', 7 *Journal of International Humanitarian Legal Studies* (2016) 183-203; René Provost, 'L'attaque directe d'enfants-soldats en droit international humanitaire', 55 *Canadian Yearbook of International Law* (2017) 33-71.

[27] For instance, since the Law on Specialist Chambers and Specialist Prosecutor's Office in Kosovo (3 August 2015, available at www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office) does not regulate the minimum age for criminal liability, the Specialist Chambers must apply Article 17(3) of the Criminal Code of the Republic of Kosovo, according to which individuals are liable above the age of fourteen (20 April 2012, English translation available at www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf). On this topic, *see generally* Noëlle Quénivet, 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?', 28 *European Journal of International Law* (2017) 433-455; Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law* (TMC Asser/Springer, The Hague, 2017).

[28] *Cf.* the different views of Matthew Happold, 'Child Soldiers: Victims or Perpetrators', 29 *University of La Verne Law Review* (2008) 56-87; Drumbl, *supra* note 9, pp. 1-101.

enlisting, recruiting, and use on the one hand, and the conduct of child soldiers on the other is impossible to ignore. Indeed, child soldiers are often forced to participate in the hostilities, with little to no choice on whether or not to commit actions that are often beyond their full understanding, thanks also to the common practice of using drugs and alcohol to make child soldiers more obedient and to facilitate the commission of heinous acts.[29] Accordingly, it is plausible that, at least sometimes, the negative effects of the conduct of child soldiers, including the commission of war crimes, arises from the harm suffered by the child soldiers themselves, and is the direct consequence of the crimes of enlisting, recruiting, and use child soldiers.[30]

The fact that child soldiers participate into the hostilities mainly as the consequence of the commission of another war crime against them must be taken into account when dealing with the legal issues regarding the criminalization of intra-party sexual offences against child soldiers in the ICC case law. Indeed, besides the criminalization of conscripting, enlisting and use of child soldiers clearly embodied in the ICC Statute, can other individuals be prosecuted for sexual offences as war crimes if the victims are child soldiers? The answer depends on whether child soldiers are considered combatants or protected persons, and on whether, if they are considered combatants, intra-party offences fall within the scope of international humanitarian law and war crimes.

3 The Traditional View on Intra-Party Offences under International Humanitarian Law

War crimes represent a peculiar kind of violation of international humanitarian law committed in connection with an armed conflict (belligerent nexus), which entail individual responsibility

[29] *See* Valentina Spiga, 'Indirect Victims' Participation in the *Lubanga* Trial', 8 *Journal of International Criminal Justice* (2010), 183-198, 192. *But see* Drumbl, *supra* note 9, pp. 85-86.

[30] *See* Spiga, *supra* note 29, pp. 183-198.

beyond state responsibility.[31] As noted, '[t]he law of war crimes is, in essence, the criminal phase of humanitarian law' and 'war crimes are parasitic upon that law',[32] since they are constructed as specific violations of international humanitarian law. Following a traditional view, international humanitarian law is considered applicable to the relationship between enemy parties of an armed conflict, being it an international or a non-international one, and as a result, war crimes may be committed only between enemy parties.

However, the idea that war crimes occur only between enemy parties is not clearly spelt out by the relevant treaty law, but has been advanced by domestic case law – which is relevant as state practice to be taken into account in the formation of customary international law[33] and in the interpretation of treaties[34] – as well as by international case law and the opinion of prominent

[31] *See* Antonio Cassese at al., *Cassese's International Criminal Law* (3rd ed., Oxford University Press, Oxford, 2013) p. 67. *See also* Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge University Press, Cambridge, 2016) p. 298.

[32] Robert Cryer, 'International Criminal Law', in Evans (ed.), *supra* note 11, pp. 743-773, p. 752. On the relationship between international humanitarian law and international criminal law, *see generally* Robert Cryer, 'The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and Their Statutes', in Caroline Harvey, James Summers and Nigel D. White (eds.), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press, Cambridge, 2014) pp. 117-146.

[33] *See* International Court of Justice, *Fisheries (United Kingdom v. Norway)*, Judgment, *ICJ Reports 1951*, p. 131; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports 2012*, para. 70.

[34] *See* Article 31(3)(b) of the VCLT. On the relevance of state practice on treaty interpretation, *see*, among others, Georg Nolte, *Treaties and Subsequent Practice* (Oxford University Press, Oxford, 2013); Erik Bjorge, *The Evolutionary*

publicists – which are subsidiary sources of international law.[35] For instance, the view that war crimes are committed only between enemy parties is clearly illustrated by Cassese, according to whom 'war crimes may be perpetrated *by combatants* or *by civilians* of a party to the conflict against *combatants* or *civilians or non-other military targets* (for instance, private property) of the other party to the conflict. Conversely, *crimes committed by combatants of one party to the conflict against members of their own armed force do not constitute war crimes.*'[36] Similarly, Cottier and Grignon have suggested that 'the general thrust of international humanitarian law and the law of war crimes' is to 'typically regulate acts committed against persons belonging to an adversary party to the conflict.'[37] This position is supported by more authoritative commentators such as Eve La Haye, Andrew Clapham and Mike Newton.[38] All these authors consider that it is in the nature of international

---

Interpretation of Treaties (Oxford University Press, Oxford, 2014); Luigi Crema, *La prassi successiva e l'interpretazione del diritto internazionale scritto* (Giuffrè, Milan, 2017).

[35] *See* Statute of the International Court of Justice, 18 April 1946, Article 38(1)(d). On the relevance of these sources with regard to international humanitarian law, see Sandesh Sivakumaran, 'Who Makes International Law? The Case of the Law of Armed Conflict' (11 Dicembre 2017), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=3084238.

[36] *See* Cassese et al., *supra* note 31, p. 67 (last emphasis added).

[37] Cottier and Grignon, *supra* note 12, p. 523.

[38] Eve La Haye, *War Crimes in Internal Armed Conflicts War Crimes in Internal Armed Conflicts* (Cambridge University Press, Cambridge, 2008) p. 119 ('the laws of war applicable in internal armed conflicts bind members of armed forces and armed groups *vis-à-vis* their opponents who share the same nationality'); Michael A. Newton, 'Contorting Common Article 3: Reflections on the Revised ICRC Commentary', 44 *Georgia Journal of International & Comparative Law* (2017) pp. 513-527, p. 515. (denouncing that the application of international humanitarian law to intra-party violence 'is divorced from tenets of established law and state practice'); Andrew Clapham, 'Human Rights Obligations for Non-State-Actors: Where are We Now?', in Fannie Lafontaine and François Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, Anterwp, 2018) pp. 11-26, p. 16 (affirming that '[i]nternational humanitarian law does not cover how an armed group treats its own forces'.)

humanitarian law to be inapplicable to intra-party behaviours, which are ontologically outside its scope due to historical reasons behind the development of this branch of the law.

Some domestic case law regarding war crimes committed during WWII further establishes the ideas that international humanitarian law applies to inter-party actions only and that war crimes exist only against the enemy. For instance, in the *Motosuke* case, a Dutch court held that since the victim of an episode of wilful killing 'by joining the Japanese forces had lost his nationality "it could hardly be alleged that the act committed against him was contrary to the laws and customs of war".'[39] More clearly, in the *Pilz* case, another Dutch court affirmed that a victim of wilful killing by the occupying army, through 'his enlistment in the Occupant's army[,] had forfeited the protection of the law of nations';[40] in particular, 'The Hague Regulations of 1907 concerning the laws and customs of war had not […] been violated, *since the object of the Regulations, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces*',[41] 'nor did the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field apply, *since this Convention only protected members of an army against acts by members of the opposing army*.'[42] Similarly, a British military court in Singapore held that the Japanese actions against British prisoners of war who had voluntarily joined the Japanese forces are not war crimes in principle. According to the court, in relation to an individual who 'voluntarily joins the forces of the enemy and subjects himself to the military law governing such forces, international law does not regard as a war crime disciplinary action taken against [them] by the enemy.'[43] All these decisions reflect a clear understanding of the scope of application of

[39] Netherlands, East Indies, Temporary Court Martial at Amboina, *In re Motosuke* (28 January 1948), 15 *I.L.R.* 684.

[40] Holland, District Court of The Hague (Special Criminal Chamber), *In re Pilz* (21 December 1949), 17 *I.L.R.* 391.

[41] *Ibid*. (emphasis added).

[42] *Ibid.*, pp. 391-2 (emphasis added).

[43] *See* UK, Military Jurisdiction, *United Kingdom v. Tomoyuki Ikegami et al.* (13 February 1947), in National Archives Kew, London, WO 00235 No. 00979, JAG No. 65143, p. 4, available at www.legal-tools.org/doc/2fbd37/pdf/. The point

international humanitarian law, which is considered to be inapplicable to intra-party actions on the basis of its nature and function, so that it is impossible to conceive intra-party offences as war crimes.

More recent international case law has confirmed the non-application of international humanitarian law and war crimes to intra-party conduct. For instance, in 2008, an ICC Pre-Trial Chamber reached the same conclusion in relation to the war crime of pillaging in the *Katanga and Ngudjolo Chui* case. Without offering any particular reasoning, the Chamber noted that 'the pillaged property – whether moveable or immoveable, private or public – must belong to individuals or entities *who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator*'.[44] The Chamber went on to remark that although 'the war crime of pillage, described in article 8(2)(b)(xvi) does not require, explicitly, that the property pillaged belongs to an "enemy" or "hostile" party to the conflict[, h]owever, part of the doctrine endorses the view that, *as any war crime, the crime of pillage is committed against the adverse party to the conflict*.'[45] Accordingly, this Pre-Trial Chamber aligned itself with the traditional with on the applicability of international humanitarian law to inter-party conduct only.

Likewise, in 2009, the SCSL affirmed that 'the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces' and that 'the law of international armed conflict regulates the conduct of combatants vis-à-vis their adversaries and

---

was briefly mentioned also in UK, Military jurisdiction, *United Kingdom v. Shotaro Takashima et al.* (15 April 1947), National Archives Kew, London, WO 00235 No. 00974, JAG No. 65182, pp. 1-2, available at www.legal-tools.org/doc/a49d20/pdf/. For a brief discussion on international humanitarian law and intra-party offences in light of these decisions, *see* Cheah W.L., 'Dealing with Desertion and Gaps in International Humanitarian Law: Changes of Allegiance in the Singapore War Crimes Trials', 8 *Asian Journal of International Law* (2018) 350-370, pp. 366-368.

[44] *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 329 (emphasis added).

[45] *Ibid.*, note 430 (emphasis added) (referring to Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003) pp. 279-280.

persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities'.[46]

More nuanced is the position of other authors, such as Gaggioli, according to which 'if a military commander rapes a subordinate soldier in a military barracks as a form of punishment – as he may have done already in peacetime – *without this act having any link to the armed conflict situation*, I[nternational] H[umanitarian] L[aw] would not apply to the act.'[47] This view seems to rely on a presumption of lack of belligerent nexus between sexual offences against members of the same force and an armed conflict in order to justify the inapplicability of international humanitarian law to intra-party conduct. However, international case law on the existence of a belligerent nexus is flexible enough to consider similar intra-party sexual offences sufficiently related to an armed conflict to be regulated, in principle, by international humanitarian law. Without entering the debate of the exact definition of a belligerent nexus, suffice it to say that the existence of an armed conflict must play 'a substantial part in the perpetrator's ability to commit [the crime], his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.'[48] Accordingly, it is not possible to rule out all the intra-party sexual offences as not sufficiently linked to the armed conflict,

[46] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Case No. SCSL-04-15-T, 2 March 2009, paras. 1451-1452. This decision has been criticised on this point by Jann K. Kleffner, 'Friend or Foe? On the Protective Reach of the Law of Armed Conflict', in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds.), *Armed Conflict and International Law: In Search of the Human Face – Liber Amicorum in Memory of Avril McDonald* (TMC Asser/Springer, The Hague, 2013) pp. 285-302.

[47] Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law', 96(894) *International Review of the Red Cross* (2014) 503-538, p. 515 (emphasis added).

[48] See ICTY, *Prosecutor v. Kunarac et al*., T-96-23&IT-96-23/1-A, 12 June 2002, para. 58. This test has been adopted by the ICC (*see, e.g.*, Situation in the Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr, 15 November 2011, para. 150).

as demonstrated by the fact that inter-party sexual offences that occur in the exactly same contexts and situations are treated as war crimes. Rather, the inapplicability of international humanitarian law to intra-party conduct must rest on its scope of application.

Going back to the traditional view supported by domestic case law, the SCSL, and Cassese, intra-party offences are not covered by international humanitarian law and, thus, cannot be criminalized as war crimes, but rather, are subject to the domestic legislation of the belligerents.[49] According to the *Pilz* case, the legal position of a victim of such offences is 'regulated not by international convention, but by the military law of the occupying Power', in that case, the state of nationality of the victim and the perpetrator, 'since by his enlistment in the Occupant's army he (…) had voluntarily submitted himself to the laws of the occupying Power.'[50] Since states must adopt domestic criminal legislation in line with international human rights law standards, it is possible to conclude that, according to this view, international human rights law is the only international law branch that is relevant (albeit indirectly) for the criminalization of intra-party offences.

This solution, far from being a conservative opinion aiming at limiting the application of international humanitarian law,[51] is consistent with the origins of international humanitarian law, which was envisaged as a system of norms aiming at protecting a core of humanitarian values in the clash between enemies.[52] On the one hand, domestic legislation, which is shaped by constitutional –

[49] Cassese et al., *supra* note 31, p. 67. See, also, Gaggioli, *supra* note 47, p. 515; Cottier and Grignon, *supra* note 12, p. 523.

[50] *In re Pilz*, *supra* note 40, p. 391.

[51] Rather, Professor Cassese is renowned worldwide as one of the publicists who struggled more to widen the scope of application of international humanitarian law (*see, e.g.*, Marko Milanovic, 'On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese's Last Book', 23 *European Journal of International Law* (2012) 1033-1048).

[52] *See* Flavia Lattanzi, 'Il confine fra diritto internazionale umanitario e diritti dell'uomo', in Andrea Giardina and Flavia Lattanzi (eds.), *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol. III (Editoriale Scientifica, Napoli, 2004) pp. 1985-2036, p. 1992.

and, subsequently, international – human rights obligations, was tasked with the protection of individuals from intra-party offences. Indeed, taking into account the structural problems regarding the implementation of international humanitarian law on the one hand and the effectiveness of mechanism of implementation of international human rights law on the other,[53] it is possible to argue that international human rights law is more effective than international humanitarian law in combatting intra-party offences, including those involving children employed as soldiers.

However, this conclusion is sound only with regard to intra-party offences involving state-actors, which have internal mechanisms for enforcement of domestic legislation and are bound by international human rights standards. Conversely, when intra-party offences are committed by members of non-state armed groups, the effectiveness of domestic law and international human rights law in preventing and punishing those offences is limited: armed groups usually fight against the state whose domestic legislation should be applied, and their duty to respect international human rights law is a matter of debate.[54] When non-state actors are involved, though, international humanitarian

[53] On this topic, *see generally* Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', 10 *Yearbook of International Humanitarian Law* (2007) 45-73; Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd ed., Oxford University Press, Oxford, 2013) pp. 647-700. For an useful comparison on the implementation mechanisms of international humanitarian law versus those established by international human rights treaties, *see* Paolo Benvenuti and Giulio Bartolini, 'Is There a Need for New International Humanitarian Law Implementation Mechanisms?', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham, 2013) pp. 590-627.

[54] This topic, beyond the purview of this article, has been explored, *inter alia*, by Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart, Oxford, 2016); Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups Under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press, Oxford, 2018) pp. 121-215. This last author suggests that the application of international human rights law to armed group

law would be a fitter framework because it is well established that non-state armed groups are subject to the law of armed conflict[55] and members of armed groups may be punished for war crimes if they engage in certain violations of international humanitarian law. In this scenario, the traditional view according to which international humanitarian law and war crimes are not applicable to intra-party offences is an important hurdle towards the protection of victims, including children employed as child soldiers, when intra-party offences occur.

Some treaty law provisions suggest that some international humanitarian law rules may be applied between members of the same party. For instance, some rules on the sick and the wounded refer to their protection in any circumstance, irrespective of their nationality, thus implying that they cover individuals of the same party as well.[56] Furthermore, according to Finland, 'the field of application of Article 75 [of the API] shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article', thus encompassing members of the same

---

would be an adequate way to address intra-party offences such as torture and rape that are not properly addressed under international humanitarian law (*ibid*., p. 190).

[55] *See generally* Marco Odello and Luca Berruto (eds.), *Non-State Actors and International Humanitarian Law* (Franco Angeli, Milan, 2010); Sandesh Sivakumaran, 'The Addressees of Common Article 3', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, Oxford, 2015) pp. 415-432; Rodenhäuser, *Organizing Rebellion*, *supra* note 54, pp. 19-120.

[56] *See* the detailed analysis of Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012) pp. 246-249 (referring, among others, to Article 6 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864; Article 1 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906; Article 1 of the Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929; Articles 12 and 13 of the Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 12 August 1949 (GCI); Articles 12 and 13 of the Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 12 August 1949 (GCII)).

armed forces.[57] Depending on whether one supports the traditional view on the scope of application of international humanitarian law or not, these provisions may be seen as explicit derogations from the inapplicability of international humanitarian law to intra-party conduct, or treaty confirmations on the lack of such a limited scope of application. However, the violations of these rules allegedly applicable to intra-party conduct are not criminalized as war crimes, but rather, the very idea of crimes against humanity was conceived to address criminal intra-party offences that were not considered to be included in the notion of war crimes.[58]

More striking is the very prohibition of enlisting, conscripting, and using child soldiers, which are actions that involve the members of the same party by definition and yet are treated as war crimes. Indeed, those commentators who support the traditional views consider that the rules on child soldiers and the relevant crimes embodied in the statutes of international courts and tribunals are explicit derogations from the established scope of application of international humanitarian law. As it has been suggested, 'criminalization of acts committed against or *vis-à-vis* persons belonging to the same party to the conflict deviates fundamentally from the general thrust of international humanitarian law.'[59] However, if there have been such explicit derogations to the traditional well-established rule, one could wonder whether *other* intra-party actions involving child soldiers may be regulated under international humanitarian law and punished as war crimes.

4 The International Criminal Court and Intra-Party Sexual Offences against Child Soldiers

[57] The declaration is reprinted in Adam Roberts and Robert Guelff (eds.), *Documents on the Laws of War* (3rd ed., Oxford University Press, Oxford 2000) p. 504.

[58] *See e.g.* Jonas Nilsson, 'Crimes against Humanity', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) pp. 284-288, p. 285.

[59] Cottier and Grignon, *supra* note 12, p. 523.

Recently, some Chambers of the ICC have addressed both the legal issues pertaining to child soldiers and intra-party conduct under international humanitarian law, focusing on episodes in which child soldiers were the alleged victims of intra-party sexual offences. The Chambers upheld a number of arguments in favour of the international criminalization of intra-party conduct as war crimes, offering a variety of different legal reasons. This section explores the path towards the fully acknowledgment of the possibility to apply international humanitarian law to intra-party conduct and to criminalise intra-party offences as war crimes, on the basis of a critical analysis of the ICC findings.

4.1 Being Victims of Sexual Offences as Active Participation in Hostilities in the Lubanga *Case*

The ICC discussed intra-party sexual offences against child soldiers for the first time during the trial against Thomas Lubanga Dyilo, in the framework of a debate on what constitutes using child soldiers to actively participate in the hostilities under the ICC Statute. Accordingly, in this case, sexual offences against child soldiers were not addressed as sexual war crimes.

In the *Lubanga* case, the Prosecution and the Trial Chamber held that Lubanga was guilty of having 'orchestrated campaigns in order to recruit soldiers of all ages, including those below the age of 15 years who were trained and sent to the front line',[60] and that these child soldiers 'were beaten, whipped, imprisoned and inadequately fed, and young girls were raped.'[61] The Chamber discussed whether Lubanga was guilty of the crime of using children under the age of fifteen to participate actively in the hostilities pursuant to Article 8(2)(e)(vii) ICC Statute. After having explored the threshold of the participation of underage persons in the hostilities that is required to fulfil the

[60] Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, *supra* note 19, para. 29. *See also* paras. 30-34.

[61] *See ibid.*, para. 32.

definition of the crime of using child soldiers under the ICC Statute,[62] the Trial Chamber declared that regardless of whether sexual violence may be included within the scope of using children under the age of fifteen to participate actively in hostilities, it could not pass judgment on rape and other sexual-related conduct because 'facts relating to sexual violence were not included in the Decision on the Confirmation of Charges'.[63] Accordingly, the focus of the charges and the facts that have been alleged by the Prosecutor, which did not include episodes of sexual offences, prevented the majority of the Chamber from addressing both whether sexual offences may be encompassed in the notion of 'active participation' and their assessment as war crimes.[64]

The Trial Chamber's decision was harshly criticised by the individual opinion of Judge Odio Benito, who considered that the fact of being victim of sexual offences should be considered *per se* as being used to actively participate in the hostilities, and thus should be criminalized as a war crime. According to Judge Odio Benito,

> [b]y failing to deliberately include within the legal concept of 'use to participate actively in the hostilities' the sexual violence and other illtreatment [*sic*] suffered by girls and boys,

---

[62] *See ibid*., paras. 619-628.

[63] *Ibid*., paras. 629-630.

[64] The Trial Chamber expressed its disappointment on this issue in unequivocal terms: 'The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.' (Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para. 60).

> the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group. I thus consider it necessary and a duty of the Chamber to include sexual violence within the legal concept of "use to participate actively in the hostilities.[65]

Judge Odio Benito went on to affirm that this conclusion is supported by the object and scope of the ICC Statute's provisions on the criminalisation of recruiting and enlisting child soldiers, according to which 'children are protected from child recruitment not only because they can be at risk for being a potential target to the "enemy" but also because they will be at risk from their "own" armed group who has recruited them.'[66] Accordingly, in Judge Odio Benito's view, intra-party sexual offences against child soldiers should be criminalized under the crime of enlisting, conscripting, and using child soldiers to take an active part in the hostilities.

There are a number of pros and cons regarding this Judge Odio Benito's view. This position has the advantage of covering conduct of children who are used only for sexual purposes, since this view widens the definition of what constitutes using child soldiers to actively participate in the hostilities, and criminalizes as such sexual assault against them. At a practical level, this solution may have overcome the flaws in the Prosecution's strategy regarding the relevance of sexual conduct in

[65] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, *supra* note 19, Separate and Dissenting Opinion of Judge Odio Benito, para. 16.

[66] *Ibid.*, para. 19.

the *Lubanga* trial, even if the Majority found that the factual allegations offered by the Decision on Confirmation of Charges did not include sexual offences.[67]

However, Judge Odio Benito did not base her interpretation of the expression 'to participate actively in the hostilities' on the interpretive criteria embodied in the VCLT, that is, the text of the relevant provisions, their context, object and purpose,[68] nor did she take into account Article 22(2) of the ICC Statute, according to which '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' As already noted, the interpretation of the expression 'to participate actively in the hostilities' is at the centre of a significant debate, and according to the ICC it involves a case-by-case analysis, taking into account the fact that the expression is wider than the 'direct participation in the hostilities' under API.[69] However, Judge Odio Benito's argument is not persuasive in demonstrating that being the victim of sexual offences is an activity that is sufficiently related to the hostilities,[70] since this requires at least a relevant nexus with

[67] Indeed, according to Article 55 of the Regulation of the Court, the Trial Chamber must not 'exceed[] the facts and circumstances described in the charges' (ICC-BD/01-01-04, 17-18 May 2004). For more on this, see Dov Jacobs, 'A Shifting Scale of Power: Who Is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55', in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, Aldershot, 2013) pp. 205-222.

[68] *See* Article 31 of the VCLT.

[69] See *supra* section 2. The full analysis of this issue is beyond the limited purview of this article. On this topic, *see generally* Joe Tan, 'Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in *Lubanga*', 15 *Yearbook of International Humanitarian Law* (2012) 117-151; Michael E. Kurth, 'The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity', 5 *Goettingen Journal of International Law* (2013) 431-453; McBride, *supra* note 9, pp. 187-189.

[70] *See* Sylvain Vité, 'Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the *Lubanga* Case', 15 *Yearbook of International Humanitarian Law* (2012) 61-85, pp. 80-82.

combat operations, even for those ancillary activities that are not a form of direct participation.[71] Accordingly, the policy-oriented interpretation suggested by Judge Odio Benito does appear as an overstretched interpretation of some crimes embodied in the ICC Statute, out of line with the principle of legality governing the action of the ICC.[72]

Moreover, Judge Odio Benito's view should be accompanied by a clear distinction between the notions of 'participating actively in the hostilities' and 'taking direct part into the hostilities' in order to avoid negative outcomes on children who risk being targeted only for their status as victims of sexual crimes. Indeed, civilians 'taking direct part into the hostilities' lose their immunity from attacks under Article 51(3) API.[73] Although, wisely, the Trial Chamber stressed that to participate actively in the hostilities for the purpose of Article (2)(e)(vii) ICC Statute has a broader scope than the direct participation in the hostilities under Article 51(3) API,[74] nonetheless the two concepts are historically linked. Accordingly, there is a significant risk that these child victims of sexual abuses

[71] International case law mentioned this requirement on a number of occasions (*see, e.g.*, SCSL, *Prosecutor v. Brima et al.*, SCSL-04-06-T, Trial Chamber, 20 June 2007, para. 737; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, *supra* note 19, para. 621). *See also* Tilman Rodenhäuser, 'Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their "Own Forces"', 14 *Journal of International Criminal Justice* (2016), 171-193, pp. 181-182.

[72] *See* Alberto Oddenino, 'The Enlistment, Conscription and Use of Child Soldiers as War Crimes', in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds.), *War Crimes and the Conduct of Hostilities* (Edward Elgar, Cheltenham, 2013) pp. 119-135, p. 129.

[73] On this provision, *see* Giulio Bartolini, 'The Participation of Civilians in Hostilities', in Michael J. Matheson & Djamchid Momtaz (eds.), Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts (Brill, Leiden, 2010) pp. 321-409.

[74] *Ibid.*, para. 598. The existence of such a distinction is supported by the deliberate different wording of the two rules. For more on the distinction between these two concepts, also in light of the different authentic linguistic versions of the ICC Statute, *see* Rodenhäuser, 'Squaring the Circle?', *supra* note 71, pp. 180-182. *Contra, see* Natalie Wagner, 'A Critical

might be targeted as combatants *qua* child soldiers or as civilians taking part in hostilities.[75] Sensibly, this reading was rejected by the SCSL, according to which 'an overly expansive definition of active participation in the hostilities would be inappropriate as its consequence would be that children associated with armed groups lose their protected status as persons *hors de combat* under the law of armed conflict',[76] although the SCSL lost the opportunity to emphasize the difference between the two concepts. Consequently, Judge Odio Benito's attempt to protect children rights from sexual offences might compromise their right to life, especially in relation to armed conflicts where the belligerents may treat children the same way, based on the non-legal label of child soldiers rather than on the subtle distinction between active and direct participation in the hostilities.

Finally, subsuming sexual war crimes under the notion of 'use to participate actively in hostilities' is not the optimal solution because it does not take into proper account the specific suffering of the victims of sexual violence, rape, sexual slavery, and forced pregnancies, that was one of the reasons behind considering them separate offences under the ICC Statute.[77] Even an author supporting this dissenting opinion admitted that '[t]he preferred scenario naturally involved recognition of these crimes in their own right and this ought to be the route taken in future cases. The

---

Assessment of Using Children to Participate Actively in Hostilities in *Lubanga*: Child Soldiers and Direct Participation', 24 *Criminal Law Forum* (2013) 143-203.

[75] *See* Cecil Aptel, '*Lubanga* Decision Roundtable: The Participation of Children in Hostilities', *Opinio Juris* (18 March 2012), available online at http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities/; Nina H. B. Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law', 11 *Chinese Journal of International Law* (2012) 657-688, pp. 681-684; Nicole Urban, 'Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's Decision in *Lubanga*', *EJIL: Talk!* (11 April 2012), available online at www.ejiltalk.org/direct-and-active-participation-in-hostilities-theunintended-consequences-of-the-iccs-decision-in-lubanga/;

[76] *Prosecutor v. Sesay, Kallon, and Gbao*, *supra* note 46, para. 1723.

[77] *See* Aptel, *supra* note 75. For the proposal to criminalize sexual offences even more autonomously, beyond the traditional core crimes embodied in the ICC Statute, *see* Arrabal Ward, *supra* note 9, pp. 129-179.

act of merging sexual crimes into the "child soldier" paradigm, can, in fact, create more harm than good as valuable prosecutions on these charges are lost, and the opportunity to draw attention to child victims of sexual crimes is squandered.'[78]

For all these reasons, the criminalization of intra-party sexual offences against children in armed conflict through an extensive interpretation of what constitutes active participation in the hostilities, and, thus, through a broad understanding of the crime of using child soldiers, should be rejected as contrary to the object and purposes of international humanitarian law conventions and the ICC Statute. This construction widens too much the scope of the relevant war crimes in conflict with Article 22(2) of the ICC Statute and risks diluting the specific reasons behind the prosecution of sexual offences as separate crimes.

4.2 Revolving Door and Child-Soldier Status: The **Ntaganda** *Decision of 2014*

In the trial against Bosco Ntaganda, in 2014, a Pre-Trial Chamber affirmed that intra-party sexual offences against child soldiers fall under the crime of rape and other related sexual offences embodied in the ICC Statute. According to the Chamber, when sexually exploited, child soldiers are persons *hors de combat*, and thus they should not be considered members of the same armed force of the perpetrators.

In particular, the Pre-Trial Chamber affirmed that 'there are substantial grounds to believe that the UPC/FPLC soldiers committed acts of rape and sexual slavery against child soldiers under the age of 15 years'.[79] The Pre-Trial Chamber argued that the prohibition of recruiting and using children actively in the hostilities as embodied in international humanitarian law conventions and in the ICC

[78] McBride, *supra* note 9, p. 188.

[79] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/04-02/06-309, Pre-Trial Chamber II, 9 June 2014, para. 74

Statute should be interpreted so as not to deprive children of the protection offered to them by international humanitarian law in armed conflict.[80] The Pre-Trial Chamber noted that common Article 3 of the 1949 Geneva Conventions affirms that '[p]ersons taking no active part in the hostilities […] shall *in all circumstances* be treated humanely', and that Article 4(1) and (2) of AP II stipulates that '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities […] shall *in all circumstances* be treated humanely' and that 'outrages upon personal dignity, in particular […] rape, enforced prostitution and any form of indecent assault [...] shall remain *prohibited at any time and in any place whatsoever*'.[81] According to the Pre-Trial Chamber, the duty to interpret the ICC Statute in light of its normative context suggests that the child-soldier status is a revolving door status: once the individuals actively participate in the hostilities, they are child soldiers; once they are sexually assaulted, they are persons *hors de combat* and, accordingly, international humanitarian law protects them against sexual offences through the criminalization of such illegal conduct.[82] In the Pre-Trial Chamber's view, 'those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities *during the specific time when they were subject to acts of sexual nature, including rape* […]. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.'[83]

The reasoning of the Pre-Trial Chamber is interesting since it criminalizes the intra-party sexual offences against child soldiers through actually denying their intra-party character. Indeed, the Pre-Trial Chamber takes the view that child soldiers should be considered *hors de combat* when they are

[80] *Ibid.*, para. 78.

[81] *Ibid*., para. 77 (emphases added).

[82] *Ibid*., paras. 77-80.

[83] *Ibid.*, para. 79 (emphasis added). This conclusion is quoted with approval by Patricia Viseur Sellers and Indira Rosenthal, 'Rape and Other Sexual Violence', in Clapham, Gaeta and Sassòli (eds.), *supra* note 55, pp. 343-368, pp. 356-357, note 87, and p. 367.

victims of sexual offences, and thus the crimes should be considered as committed against protected persons. Indeed, the protection granted to children under Article 4(3) APII does not cease due to the enlistment and conscription of children as soldiers. Clearly, not only is the contextual interpretation relevant for this argument, but also the object and purpose of the provisions protecting children in armed conflict support such an interpretation. This reasoning resonates the revolving door rule regarding the direct participation of civilians in the hostilities, according to which civilians may be targeted only for the time they are directly participating in the hostilities, revolving to their civilian immunity when they are not doing so.[84]

The Pre-Trial Chamber's argument deserves praise since it preserves the protection offered to children involved in armed conflict and since it is based on correct interpretive criteria. As it has been suggested, on the basis of this decision, it is possible to argue that, except in their relationship to the adversary, children retain their civilian status and therefore their special protection under international humanitarian law in all circumstances, including when sexual offences are committed.[85]

However, the arguments employed by the Pre-Trial Chamber have a significant flaw. In its view, the fact that the status of child soldier is subject to the revolving door rule – an idea without any basis in the relevant treaty law – is based on the logical incompatibility between active participation in the hostilities and being victims of rape and sexual slavery. However, this conclusion is empirically incorrect with regard to sexual slavery: this offence may be a continuous crime, since it requires the exercise of 'any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them

[84] *See* Article 51(3) of the API. *See also* Bill Boothby, 'And for Such Time as: The Time Dimension to Direct Participation in Hostilities', 42 *New York University Journal of International Law & Politics* (2009) 741-768.

[85] This idea is advocated by Rodenhäuser, 'Squaring the Circle?', *supra* note 71, p. 186.

a similar deprivation of liberty.'[86] Although it is not necessary that the enslavement or deprivation of liberty last indefinitely or for a prolonged period of time, the duration may be one significant factor to be taken into account in defining a situation as sexual slavery.[87] Accordingly, it is possible that an individual under fifteen does actively participate in the hostilities while, at the same time, they are treated as property for sexual purposes.[88] For instance, it has been reported that young girls in Eastern DRC have been used as 'fighters one minute, a "wife" or "sex slave" the next, and domestic aides and food providers at another time'.[89] Accordingly, it is very difficult to draw a line between combat and non-combat functions so as to take into account the frenetic switch from one status to another of the victims. Simply, at least with reference to the crime of sexual slavery, an individual may be a victim of the crime while simultaneously participating actively in the hostilities.[90] The only way to argue the logical incompatibility between combat functions and sexual slavery would be to consider being a victim of sexual slavery to be a revolving door status as well; however, such an interpretation

[86] Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York (3-10 September 2002), p. 28.

[87] Michael Cottier and Sabine Mzee, 'Paragraph 2(b)(xxii): Rape and Other Forms of Sexual Violence', in Triffterer and Ambos (eds.), *supra* note 12, pp. 473-503, pp. 493-494.

[88] *See* Rosemary Grey, 'Sexual Violence against Child Soldiers', 16 *International Feminist Journal of Politics* (2014) 601-621, p. 614; Patricia Sellers Viseur, '*Ntaganda*: Re-Alignment of a Paradigm', in Fausto Pocar (ed.) *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (Franco Angeli, Milano, 2018) pp. 116-136, p. 121.

[89] See United Nations Special Representative of the Secretary-General on Children and Armed Conflict, Written submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict (*Lubanga Dyilo* case) (2008), para. 22.

[90] Rodenhäuser, 'Squaring the Circle?', *supra* note 71, pp. 185-186.

would reduce sexual slavery to rape, diminishing the significance of the role of the exercise of powers akin to ownership beyond the commission of sexual acts.[91]

Accordingly, the Pre-Trial Chamber's reasoning, notwithstanding its desirable outcome, appears to be inadequate at least when child victims of sexual slavery perform both combat and non-combat (sexual) functions. A more persuasive reasoning had to be found.

4.3 Challenging the Inapplicability of International Humanitarian Law to Intra-Party Sexual Offences in the **Ntaganda** *Case*

Three subsequent decisions in the *Ntaganda* case addressed intra-party sexual offences against child soldiers through challenging the traditional assertion that international humanitarian law does not apply to intra-party hostilities. Since the various Chambers involved have offered different arguments on the criminalization of intra-party offences against child soldiers under the ICC Statute, each decision deserves a separate analysis.

4.3.1 The *Ntaganda* Decision of 2015

In a very brief decision of 2015, a Pre-Trial Chamber affirmed that the provision criminalizing rape and other sexual offences in the ICC Statute 'does not specify who can be victims of the war crimes listed therein, and that the corresponding Elements of Crimes refer only to "person" and "persons"' and that '[w]hereas for certain crimes, the relevant provisions or their respective elements of crime explicitly limit the scope of the criminal conduct to certain types of victims, no such statutory

[91] *Contra*, *see* Alessandra Spadaro, 'International Humanitarian Law in the Jurisprudence of International Criminal Tribunals and Courts', in Dražan Djukić and Niccolò Pons (eds.), *The Companion to International Humanitarian Law* (Leiden, Brill, 2018) pp. 135-153, p. 152 (who considers that an individual may be at the same time a targetable because of their combating function and a person *hors de combat* in relation to their own armed forces).

limitation is provided for with respect to rape and sexual slavery.'[92] In this Chamber's view, the silence of the ICC Statute on its applicability to intra-party actions should be considered a reason not to exclude them from the scope of application of war crimes.

Despite the fact that the Pre-Trial Chamber's statement presents a very clear-cut argument and was quoted without further elaboration by some authoritative publicists,[93] it must be noted that the Pre-Trial Chamber did not offer any other insight into the legal basis behind it. Rather, the Pre-Trial Chamber cautiously, and ambiguously, added that it 'need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group',[94] thus leaving the legal framework uncertain. Accordingly, this decision does not clarify the legal framework applicable to the criminalization of intra-party sexual offences against child soldiers, although it is the first ICC attempt to open the door to this idea.

4.3.2 The *Ntaganda* Decision of January 2017

A decision of January 2017 of a Trial Chamber elaborates in a better way the reasons why intra-party sexual offences against child soldiers should be criminalized under the ICC Statute. The Trial Chamber argued on the basis of the wording of Article 8 of the ICC Statute and other applicable international law rules.

The Trial Chamber openly addressed whether, under the ICC Statute's provisions regarding sexual offences, the victim must have the status of protected person under the 1949 Geneva

---

[92] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, ICC-01/04-02/06-892, Pre-Trial Chamber IV, 9 October 2015, para. 25

[93] See, *e.g.*, Schabas, *supra* note 12, pp. 252-253.

[94] *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, *supra* note 92, para. 28.

Conventions or of 'persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause' pursuant to common Article 3 of the same Conventions[95] (so-called status requirements). The Trial Chamber considered that such status requirements for victims must be excluded on the basis of the structure of Article 8 of the ICC Statute.[96] Indeed, only the crimes listed under Article 8(2)(a) and 8(2)(c) require such a status since they are grave breaches of the 1949 Geneva Conventions and of common Article 3, while crimes under Article 8(2)(b) and 8(2)(e), such as the provisions regarding sexual offences, do not have the reference to the 1949 Geneva Conventions in their *chapeaux*, and thus, in principle, do not require a particular victim status.[97] Accordingly, only those specific provisions under Article 8(2)(b) and 8(2)(e) of the ICC Statute explicitly referring to the status of the victims would require such a status as an element of the crime; however, since the provisions pertaining to sexual offences do not refer to the status requirements, they are applicable to the enemy, to persons *hors de combat*, and to comrades alike.[98] Indeed, following the Chamber's reasoning, the reference to 'any other form of sexual violence also constituting a grave breach of the Geneva Conventions' in Article 8(2)(b)(xxii) and to 'any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions' in Article 8(2)(e)(vi) are relevant only for the crimes of 'any other form of sexual violence',– thus excluding the applicability of the status requirement to other sexual offences listed in the two provisions.[99]

---

[95] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, ICC-01/04-02/06-1707, 4 January 2017, para. 40.

[96] *Ibid.*, para 44.

[97] *Ibid*., para. 40.

[98] *Ibid*.

[99] *Ibid*., para. 41.

The Trial Chamber went on to explore the prohibition of sexual offences in international law beyond the ICC Statute, arguing that although most of the prohibitions under international humanitarian law focus on the protection of civilians and persons *hors de combat*, there is no reason to limit the scope of these prohibitions to protected persons.[100] Such a conclusion would be supported by the protective scopes of the Martens clause and of Article 75 API,[101] as well as by the rationale behind international humanitarian law, according to which raping and sexually enslaving children under the age of fifteen would never bring any military advantage.[102] The Trial Chamber also mentions the fact that the prohibition of slavery and, according to the Majority, of rape are *jus cogens*.[103] Furthermore, on the basis of the principle *ex iniuria jus non oritur*, it would be unfair to bar the prosecution of the perpetrators of such conduct on the basis of their unlawful enlisting, conscripting, or using child soldiers, which are international crimes in their own right.[104]

The wealth of arguments put forward by the Trial Chamber are generally persuasive, even though some of them, if taken into account individually, do not withstand scrutiny. With regard to the argument based on the structure of Article 8 of the ICC Statute, the idea that there must be a rationale behind the division of crimes in different categories is sensible, even though the Trial Chamber fails to fully explain why this rationale would be linked to the status requirements alone. Indeed, the text of the relevant provisions is not as univocal as it appears from the Trial Chamber's reasoning, and the counterarguments based on a different reading of the meaning of the word 'also' in Article 8(2)(b)(xxii) and 8(2)(e)(vi) should not have been relegated to a footnote.[105] However, the Trial Chamber's reasoning becomes more persuasive if one takes into account not only textual

[100] *Ibid*., para. 47.

[101] *Ibid.*

[102] *Ibid*., para. 48.

[103] *Ibid*., paras. 51-2.

[104] *Ibid*., para. 53.

[105] *See ibid*., para. 41, note 91.

interpretation, but also the context, object and purpose of the relevant provisions, as required under Article 31 of the VCLT.

It should be noted that the Trial Chamber merged two different and separate issues in its attempt to characterize intra-party sexual offences as war crimes on the basis of the status requirement: one issue is whether the relevant international humanitarian law rules cover conduct against protected persons only or against combatants as well, a different issue is whether those rules are applicable in principle to actions between different parties. This difference has been established by a Pre-Trial Chamber in the aforementioned 2008 *Katanga and Ngudjolo* decision, in relation to the war crime of pillaging, where the Chamber treated separately the issues of the existence of any status requirement of the property subject to the appropriation, and the intra-party applicability of the relevant rules;[106] indeed, the fact that pillaging encompasses both protected property and non-protected property has no direct consequences on the separate issue of whether pillaging covers inter-party and intra-party behaviours alike. Accordingly, the absence of any status requirements in a specific rule is not always decisive to assess its intra-party applicability, even though there is a certain overlapping between the protected status and belonging to a specific party as the latter may be relevant in order to ascertain the former.[107]

Similarly troublesome is the analysis of the 'established framework of international law' embodied in the chapeaux of paragraphs (2)(b) and (e) of Article 8. The meaning of this clause is that the interpretation of these crimes 'must be consistent with international law, and international

---

[106] *See* Situation in DRC, *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Confirmation of Charges, *supra* note 44, para. 329.

[107] *See, e.g.,* Article 4 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, which reads: '[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of *which they are not nationals*' (emphasis added).

humanitarian law in particular'.[108] Although this conclusion limits the idea that war crimes under the ICC Statute may be constructed independently from international humanitarian law,[109] there is no need for the Trial Chamber to invoke some elements which are not directly relevant in order to ascertain that international law supports its view on intra-party sexual offences. For instance, it is difficult to understand why the Trial Chamber mentions the fact that the ban on slavery and torture are likely *jus cogens* since the only well-established areas of international law in which the notion of peremptory norms is relevant are treaty law and the law on state responsibility; accordingly, mentioning *jus cogens* without arguing more in-depth why this characterization would be relevant for the case at hand appears to be just a 'promotional' invocation of *jus cogens* for rhetorical ends.[110] More persuasive is the reference to the principle *ex iniuria jus non oritur*, which, however, should have been constructed on the *jus cogens* character on the ban on recruiting, enlisting, and using child soldiers, which is not a well-established idea.[111] Similarly, the reference to the Martens clause is not sound since this clause, in the famous reading given by Cassese, may be used to apply international

[108] *See* Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction, ICC-01/04-01/06-3121-Red, Appeals Chamber, 1 December 2014, para. 231.

[109] Scholars are divided between those who consider that the ICC Statute was not able to create new war crimes not already criminalised under treaty or customary international humanitarian law (following the ICC decisions commented here), and those considering the ICC Statute as an autonomous source of certain international humanitarian law rules and war crimes. For an overview of this debate, *see* Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar, Cheltenham, 2019) pp. 445-446.

[110] On this use of *jus cogens*, *cf.* the views of Carlo Focarelli, 'Promotional Use of *Jus Cogens*: A Critical Appraisal of *Jus Cogens*' Legal Effects', 77 *Nordic Journal of International Law* (2008) 429-459, and Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 19 *European Journal of International Law* (2008) 491-508.

[111] On this principle, *see generally* John Dugard, *Recognition and the United Nations* (Martinus Nijhoff, Leiden, 1987); Anne Lagerwall, *Le principe* ex injuria jus non oritur *en droit international* (Bruylant, Brussels, 2016).

humanitarian law to cases in principle *outside the scope* of its application;[112] however, in the Trial Chamber's opinion, intra-party sexual offences *do fall* into the scope of application of international humanitarian law,[113] and thus there is no room to apply the Martens clause.

Despite the Trial Chamber's confusion between the status requirement and the intra-party applicability of international humanitarian law, as well as the aforementioned misleading references to *jus cogens* and the Martens clause, the overall outcome of Trial Chamber's reasoning is persuasive.[114] The Court implicitly relied on the interpretive criteria applicable to international treaties, to argue that the object and purpose of the relevant international humanitarian law and international criminal law provisions require the application of the ban on sexual offence to intra-party conduct against child soldiers. This result is in line with the duty to interpret these provisions in light of other applicable international law rules, human rights at the forefront.[115]

However, the Trial Chamber did not challenge the aforementioned traditional view on the inapplicability of international humanitarian law to intra-party conduct on the ground of the correct

---

[112] *See* Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *European Journal of International Law* (2000) 187-216.

[113] *See* the reference to Article 75 of the API as a rule applicable to intra-party conduct, according to which some conduct, such as rape, 'are and shall remain prohibited at any time and in any place whatsoever' (Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, *supra* note 95, para. 47). This reference to a rule of the law on international armed conflict in a situation of non-international armed conflict has been criticised (*see* Kevin Jon Heller, 'ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL', *Opinio Juris* (15 June 2017), available at opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/), even if there is room to argue that Article 75 of the API reflects customary international law applicable to non-international armed conflict as well.

[114] *Contra*, *see* the critical remarks by Yvonne McDermott, 'ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator', *Intlawgrrs* (5 January 2017), available at ilg2.org/2017/01/05/icc-extendswar-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/.

[115] *See* Article 31(3)(c) of the VCLT.

interpretation of international humanitarian law provisions themselves, but rather, it focused on alleged peculiarities of the ICC Statute's rules on sexual offences. Accordingly, the Trial Chamber's reasoning would open a divide between the scope of application of international humanitarian law rules and the scope of application of the ICC Statute provisions pertaining to the criminalization of war crimes.[116]

4.3.3 The *Ntaganda* Decision of June 2017

The task of challenging directly the traditional view on the inapplicability of international humanitarian law to intra-party offences fell upon the Appeals Chamber, which affirmed that there is nothing in international law barring the application of international humanitarian law to intra-party conduct.

Correctly, the Appeals Chamber opened its reasoning by stating that the issue at hand is about the *absence* of any specification regarding the status requirements in the provisions on sexual offences embodied in the ICC Statute.[117] On the basis of the preparatory works of the ICC Statute, the Appeals Chamber stressed that the existence of overlapping crimes in Article 8(2) is not an issue,[118] and that the reference to the 1949 Geneva Conventions in Article 8(2)(b)(xxii) and (e)(vi) pertains to the

[116] The criminalisation of intra-party sexual offences is discussed in the framework of cases of courts 'having stretched the application of I[nternational] H[umanitarian] L[aw] beyond its original scope' by Rogier Bartels, 'A Fine Line Between Protection and Humanisation: The Interplay Between the Scope of Application of International Humanitarian Law and Jurisdiction over Alleged War Crimes Under International Criminal Law', 20 *Yearbook of International Humanitarian Law* (2017) 37-74, pp. 43-46.

[117] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, 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', ICC-01/04-02/06-1962, Appeals Chamber, 15 June 2017, para. 46.

[118] *Ibid.*, para. 48.

crimes of 'any other form of sexual violence' only.[119] The Appeals Chamber thus concluded that there is nothing in the ICC Statute *limiting* the application of sexual offences to victims who are protected persons.[120]

The Appeals Chamber's reasoning regarding 'the established framework of international law' challenged the inapplicability of international humanitarian law to intra-party offences.[121] Correctly, the Appeals Chamber recalled the aforementioned rules of international humanitarian law explicitly dealing with the protection of vulnerable individuals from intra-party violence, such as those embodied in the First and Second Geneva Conventions.[122] Although the Appeals Chamber admitted that there is no precedent of any war crime trial for intra-party offences, nonetheless, the Chamber rejected the idea that a prohibition on the application of international humanitarian law to intra-party conduct in fact exists merely because there is no contrary precedent.[123] The Appeals Chamber went on to challenge the findings of the two post-WWII decisions which Cassese considered to be at the basis of the inapplicability of international humanitarian law to intra-party conduct, the aforementioned *Motosuke* and *Pilz* cases, as well as the aforementioned findings of the SCSL.[124] Accordingly, the Appeals Chamber concluded that there is nothing in the ICC Statute and international humanitarian law requiring that sexual offences are criminalized only if committed against protected persons.[125] Finally, the Appeals Chamber concluded that the rigorous application

---

[119] *Ibid*., para. 49.

[120] *Ibid*., paras. 50-51.

[121] *Ibid*., para. 56.

[122] *Ibid.*, paras. 57-59. *See supra,* section 3.

[123] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, 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', *supra* note 117, para. 60.

[124] *Ibid*., paras. 61-62.

[125] *Ibid*., para. 66.

of the belligerent nexus requirement should be used to prevent any undue expansions of the notions of war crimes.[126]

The Appeals Chamber's reasoning has the advantage to engage directly with the traditional view on the scope of application of international humanitarian law, with full knowledge of the ground-breaking character of its findings regarding the criminalization of intra-party offences as war crimes.[127] In particular, the Appeals Chamber's strategy of focusing on the absence of any limit in the relevant treaty provisions rather than on the existence a wider scope of application deserves praise, since it allowed the Appeals Chamber to rebut the presumption against the applicability of international humanitarian law to intra-party conduct.

Despite the fact that the Appeals Chamber's conclusions appear sound and desirable, though, there are some minor flaws in the reasoning that deserve some attention. For instance, like the Trial Chamber, the Appeals Chamber fails to elaborate on the difference between the scope of application of international humanitarian law in relation to intra-party conduct and the applicability of the same rules only to actions involving protected persons (status requirements). However, the Appeals Chamber's discussion on 'the established framework of international law' seems to cover the intra-party applicability beyond the status requirements.

---

[126] *Ibid.*, para. 68. This is quoted with approval by some authors (*see, e.g.*, Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge, 2019) p. 83).

[127] *Ibid.*, para. 67: 'The Appeals Chamber appreciates the seemingly unprecedented nature of this conclusion. […] However, as reasoned above, the conclusion is not only permissible under article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute, but is also aligned with the established framework of international law.' Indeed, even the Prosecution, at an initial stage, had advertised its prosecutorial strategy on intra-party offences as 'an innovation that the Office of the Prosecutor will be bringing to international criminal justice' (Fatou Bensouda, *Ntaganda Case* Press conference (1 September 2015), min. 33:38 to 34:07, available at www.youtube.com/watch?v=gOgZc-IgDlA). Although one author considers this statement sufficient to deny the fact that international humanitarian law covered intra-party offences before the *Ntaganda* case (Newton, *supra* note 38, pp. 515-516), this assertion proves too much.

Moreover, the Appeals Chamber relied heavily on the preparatory works of the ICC Statute in order to interpret its provisions, even though preparatory works may be used as interpretive tools only when the application of the textual, contextual, and teleological interpretive criteria is not sufficient to clarify the meaning of a provision; the Chamber should have emphasised the different role of interpretive criteria under Article 31 of the VCLT versus those embodied in Article 32 of the VCLT in order to better support the reasoning behind its approach to intra-party conduct[128]

Furthermore, the Appeals Chamber dismissed the relevance of post-WWII case law by considering one decision incorrect and another politically driven.[129] A better argumentation, based on the scarcity of this practice, taking into account the role of domestic decisions *qua* state practice that is relevant both for the emergence of customary international law and the interpretation of treaties, would have been more persuasive. Similarly, the Appeals Chamber too quickly dismissed the relevance of the SCSL's jurisprudence, just invoking merely the different position purported by the greatly authoritative ICRC's Updated Commentary, which is not a binding source or a judicial precedent.[130] Although judicial precedents of other international courts are not binding upon the

[128] *See* Article 32 of the VCLT.

[129] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, 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', *supra* note 117, para. 62.

[130] *Ibid.*, para. 61, referring to the view of the ICRC on the scope of application of common Article 3 of the 1949 Geneva Conventions to intra-party conduct (*see* Lindsey Cameron et al., 'Article 3 – Conflicts Not of an International Character', in ICRC, *Updated Commentary on the First Geneva Convention* (Cambridge University Press, Cambridge, 2016) pp. 126-325, p. 191, para. 547). The ICRC commentary has been criticized on this point by some authors, which pointed out that its position relies only on the *Ntaganda* case rather than on state practice and *opinio juris* (*see* the hard but methodologically correct words of Newton, *supra* note 38, p. 515: '[n]o examples of state practice or jurisprudence support the ICRC assertion that the humanitarian protections embedded in Common Article 3 may be extended to such intra-force offenses. The ICRC simply cites to the ICC Prosecutor's position in charging Bosco Ntaganda as evidence that such an extension is warranted. Reliance on the ICC charging documents by the ICRC represents an aspirational

ICC,[131] such a dismissal of the SCSL's decision appears quite rash, particularly in light of the frequent reference that ICC chambers have made to other international criminal courts' decisions to support their findings.

However, notwithstanding these remarks, the conclusion of the Appeals Chamber has the potential to change the entire discourse regarding the characterization of intra-party offences as war crimes, both if committed against child soldiers and against other victims. In the future, this decision could represent the decisive factor behind 'a fundamental rethinking of the law of armed conflict' with regard to intra-party offences,[132] which would extend the protective reach of international humanitarian law to conduct that was traditionally considered not governed by the law of armed conflict.

5 Conclusions: The Arcs of the Criminalization of Intra-Party Sexual Offences and the Protection of Children in Armed Conflicts

The study of the criminalization of intra-party sexual offences as war crimes may be constructed as the arduous effort to overcome a presumption crystallized after WWII about the non-applicability of international humanitarian law to intra-party conduct. Under close scrutiny, that view does not rest on solid ground, but rather, on a few very old domestic decisions, on one international decision, and on the opinion of some renowned publicists. These few domestic decisions are not as uniform as to be relevant as state practice in order to assess the existence of a customary rule on this issue, nor are

---

statement of *lex ferenda*'). More in general, the same author demonstrated the circularity of the relationship betwwn the ICRC Commentary and the *Ntaganda* decisions, since the ICRC commentary relied only on the 2014 *Ntaganda* decision to support its position on the intra-party applicability of common Article 3, whereas the 2017 *Ntaganda* decision relied primarily on the very ICRC commentary to support the same view (*ibid.*, pp, 515-522).

[131] Article 21(2) of the ICC Statute only refers to the ICC's own case law.

[132] Cheah, *supra* note 43, p. 367.

they as consistent as to determine the interpretation of the relevant treaty provisions. Similarly, isolated international decisions and the opinions of renowned publicists are only subsidiary sources of international law, and it is not surprising that contrary international decisions and contrary scholarly views arose in due time.

This author believes that the troubled path towards the criminalization of intra-party offences, in particular intra-party sexual offences against child soldiers, is justified by a correct interpretation of international humanitarian law and international criminal law provisions alike. After so many significant words on the humanization of international humanitarian law,[133] linking the interpretation of the relevant treaty provisions to a scarce practice emerged mainly before the entry in force of the 1949 Geneva Conventions seems absurd today.[134] Rather, the object and purpose of international humanitarian law and international criminal law provisions require the application of international humanitarian law to intra-party conduct. The same outcome is suggested by the application of international human rights law rules as the relevant interpretive context of international humanitarian law and international criminal law provisions.[135]

However, the ICC – either out of deference or for fear of being accused of judicial activism – has been reluctant to challenge the traditional view on the inapplicability of international humanitarian

[133] The topic has been explored by many authors. *See generally* Alessandro Migliazza, 'L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'Homme', 137 *Recueil des cours de l'Académie de droit international de La Haye* (1972) 141-241; Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, Napoli, 1979); Theodor Meron, 'The Humanization of Humanitarian Law', 94 *American Journal of International Law* (2000) 239-278.

[134] *See* Kleffner, *supra* note 46, p. 299.

[135] *See* Luigi Prosperi, 'The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in *Ntaganda*', *Opinio Juris* (27 June 2017), available at opiniojuris.org/2017/06/27/33178/.

law to intra-party sexual offences.[136] Indeed, in the *Lubanga* case, Judge Odio Benito attempted to characterize intra-party sexual offences as a form of using child soldiers, invoking a different war crime in order to avoid tackling the issue of intra-party conduct. Similarly, in the 2014 *Ntaganda* decision, the Pre-Trial Chamber advanced the idea of the existence of a revolving door in order to criminalize sexual offences against child soldiers without labelling them as intra-party conduct. However, since 2015, the ICC Chambers have attempted to demolish the myth of the inapplicability of international humanitarian law to intra-party offences, addressing straightforwardly and with adamant resolve all the relevant legal issues. As demonstrated above, although the aim was clear and commendable, the reasoning offered by the different Chambers was not always persuasive.

All in all, one has to register significant progress in the criminalization of intra-party offences. In January 2017, the Trial Chamber limited its findings to sexual offences against child soldiers: explicitly, even if only in a footnote, the Trial Chamber affirmed that 'it is analysing whether the protection of rape and sexual slavery is limited so as to not include members of one's own forces (in particular, children under 15 years of age) and does not need to address whether a person is protected by international humanitarian law against being killed by members of his or her own force'.[137] Clearly, when dealing with children in armed conflict, the role of international human rights law and human rights reasoning is more relevant than in other context, as demonstrated by the adoption of a human rights instrument – the PCRC – to regulate armed conflict-related rights.[138]

---

[136] The decision to criminalize intra-party offences is criticize as a form of judicial activism e.g. by Shane K. Blank, '*Proseuctor v. Ntaganda*–The International Criminal Court's Dangerous Foray into the Shades of Lochner', 27 *Michigan State International Law Review* (2018) 1-40, p. 1.

[137] Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, *supra* note 92, para. 49, note 117.

[138] Also some publicists suggested that these findings on intra-party offences should be applied only to children (*see, e.g.*, Sellers Viseur, *supra* note 88, p. 134).

The Appeals Chamber showed more courage by affirming, implicitly, that, absent any explicit status requirements in the ICC Statute or in the underlying international humanitarian law provisions, international humanitarian law applies to intra-party conduct and, thus, intra-party offences may be punished as war crimes, without limiting its findings to war crimes committed only against child soldiers. Accordingly, the criminalization of intra-party offences which was first affirmed in relation to sexual offences against children might be extended in the future to other offences and other victims, strengthening not only the protection of children in armed conflict but also the more general accountability for violations of individuals' rights in armed conflict.

The relevance of the criminalization of intra-party offences, with particular reference to sexual offences against children, is particularly important in the context of non-international armed conflicts, when there is no state apparatus within armed groups protecting the most vulnerable from the violence of the leaders. Accordingly, the slow but successful march towards the criminalization of intra-party offences should be considered as an important goal in order to strengthen the protection of children involved in armed conflict and in order to reduce the heinous impact of violence upon those who are enlisted, recruited, and used a child soldiers.