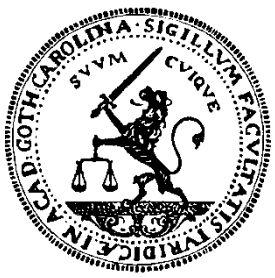

FACULTY OF LAW
Lund University

Marinet Sim

Adjudicating Intra-Party Rape and Sexual Slavery of Child Soldiers as War Crimes before the ICC: *Bosco Ntaganda Case*

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Letizia Lo Giacco

Term: Spring 2018

Table of Contents

Abstract

In adjudicating sexual violence offenses perpetrated against child soldiers in *Ntaganda case*, the Appeals Chamber holds that having regard to the established framework of international law, members of an armed force or group are not categorically excluded from the protection against war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group.

This research explores the drawbacks of the finding and considers its legal consequences. It finds the ruling not consistent with International Humanitarian Law given that the protective scope of the law applicable in non-international armed conflict covers only intra-Party treatment of persons who do not or have ceased to take active/direct participation in hostilities, including *hors de combat*. On the basis of the special protection for children under the age of 15 underpinned by Common Article 3, it then suggests that committing intra-Party sexual violence against child soldiers who are members of an armed group can constitute war crimes in question.

Since the judgment is inconsistent with the law concerned, the research further finds the compatibility of the decision with the principle of legality questionable. However, from another perspective, if the decision is widely accepted by the international community, especially States Parties to the Rome Statute, the decision can contribute to the development of International Criminal Law and International Humanitarian Law with respect to the prohibition of intra-Party sexual violence during armed conflicts.

Acknowledgments

First and foremost, I would like to express my sincere gratitude and greatest appreciation to my respectful supervisor Letizia Lo Giacco, who has guided me on my thesis from the very beginning until it is finished despite her other academic and professional commitments. Without her inspiration and invaluable comments through my research this thesis would never have come into existence. So the success of this thesis is, above all, attributed to her contribution.

I also owe my gratefulness to the Raoul Wallenberg Institute for providing me financial support for my study and stay in Sweden. I would like to extend my appreciation to the Raul Wallenberg library staffs for their assistance with valuable sources that I needed for my research. Because of their work my research became a lot easier. Finally, I am grateful to my family and friends for their encouragement and support during the thesis writing process, without which I would have not been able to complete this thesis.

Abbreviations

AC	Appeals Chamber
API	Protocol I to the Geneva Conventions Of 12 August 1949
APII	Protocol II to the Geneva Conventions Of 12 August 1949
APH/DPH	Active/Direct Participation in Hostilities
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DRC	Democratic Republic of the Congo
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Of 12 August 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GCIII	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time

	of War of 12 August 1949
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NIAC	Non-International Armed Conflict
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leon
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council

CHAPTER 1: INTRODUCTION

1.1 Background

The increase in the number of children involved in armed conflicts around the world has long been a concern of the international community. Among all victims suffering from armed conflict situations, children are ones of the most vulnerable, and are "deliberate targets of conflict-as soldiers, political pawns and victims of campaigns to terrorize civilians".[1] Particularly, children who are unlawfully recruited in armed groups/forces (armed groups) or employed in hostilities (child soldiers) are often imprisoned, raped, wounded or killed. In addition to performing combat functions, they are exploited for domestic chores, for cooking and for sex by their commanders in their armed groups. Despite all endeavors to fight against this phenomenal violence, from 2016 to 2018 the use of child soldiers in armed conflicts remained high, in at least 18 countries where sexual violence against them is still widespread.[2] Over 800,000 children in just Tanganyika and South Kivu have been displaced with many of them have been subjected to sexual violence or involuntary recruitment as soldiers.[3]

Sexual violence is one of the grave violations against children during armed conflicts, the solution of which has always been on the international community's agenda. One of the efforts to fight against this phenomenal occurrence has been the international legal framework where acts of sexual violence are strongly condemned under international law. It is well-defined that committing rape or other forms of sexual violence against children can amount to a war crime if it is committed in the context of, and is associated

[1] UNICEF, *Wars and the vulnerable*, <https://www.unicef.org/sowc96pk/vulnerab.htm> accessed 27 April 2018.
[2] Child Soldiers International, *Child Soldiers World Index reveals shocking scale of child recruitment around the world*, (Press release, 21 February 2018) <https://www.child-soldiers.org/news/child-soldiers-world-index-reveals-shocking-scale-of-child-recruitment-around-the-world> accessed 04 April 2018.
[3] Lydia Smith, *Conflict in Congo has led to children being sexually abused and recruited as soldiers, finds Unicef* (Independent, 25 January 2018) <https://www.independent.co.uk/news/world/africa/congo-children-sexual-abuse-child-soldiers-africa-unicef-drc-africa-democratic-republic-congo-a8178716.html> accessed 04 April 2018.

with an armed conflict,[4] however, is controversial whether it is the case for the same conduct committed against child soldiers by members of their armed group. Such controversy is by virtue of the limited legal framework in relation to the protection of child soldiers specially girl soldiers. Some scholars perceive that "the concerns of women and girls have been "obscured by and within the international legal order".[5]

Nevertheless, the issue of prosecuting perpetrators for sexual violence crimes committed against child soldiers within the perpetrators' armed groups has become more apparent in recent jurisprudence of the International Criminal Court (ICC), namely the cases of *Thomas Lubanga Dylio* and *Bosco Ntaganda*. However, it is in the latter that sexual violence against child soldiers has for the first time been included directly under the charges of war crimes of rape and sexual slavery pursuant to Article 8(2)(b)(xxii) and (e)(vi) of the Rome Statute.[6] In June 2014, the Pre-trial Chamber (PTC) confirmed the charges and held that sexual violence against UPC/FPLC child soldiers constituted war crimes of rape and sexual slavery under the aforementioned article. Following the decision, the Defence challenged the jurisdiction of the court over the alleged crimes arguing such intra-Party conducts were not covered by International Humanitarian Law (IHL) or International Criminal Law (ICL) but a given domestic law and International Human Rights Law (IHRL), thus did not constitute war crimes under the Rome Statute.

However, in June 2017 the Appeals Chamber (AC) settled this jurisdictional challenge by deciding that the court had jurisdiction over the alleged war crimes of rape and sexual slavery committed against members of an armed group by members of the same armed group.[7] To have reached that conclusion, the AC's finding in relation to the so-called

[4] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, 17 July 1998 (Rome Statute) Arts 8(2)(b)(xxii) and 8(2)(e)(vi).

[5] Rosemary Grey, 'Sexual Violence against Child Soldiers' (2014) 16 Intl Fem J Politics 601, 602.

[6] In *Lubanga*, the prosecutor did not indict the accused for sexual violence crimes despite evidence of widespread commission of this violence on child soldiers in his armed group was brought before his trial. More detailed will be explained in chapter 3.

[7] *The Prosecutor v Bosco Ntaganda* (Appeal Chamber Second Judgment) ICC-01/04-02/06-1962 (15 June 2017) [72].

"Status Requirements" under IHL is rather controversial. The holding that the victims of war crimes of rape and sexual slavery are not restricted to protected persons or persons taking no active part in hostilities in the sense of the Geneva Conventions or Common Article 3,[8] is mainly based on the interpretation of the "established framework of international law" as referred to under the article concerned. Accordingly, the AC finds that neither a general nor a specific rule related to rape and sexual slavery under IHL "… category excludes members of an armed group from protection against crimes committed by members of the same armed group."[9] While the judgment is welcomed by civil society like human rights and gender advocates for it being a breakthrough and historic judgment, it is criticized by some other commentators that it is unprecedented or simply lacks legal basis.[10]

Since the case was the first in history of international criminal justice to prosecute sexual violence crimes committed on child soldier victims by members of their armed group it is seen as a potential development of the court's jurisprudence in relation to the protection of child soldiers that had always been neglected. However, none of the Chambers in the present case answered the question of to what extent children under the age of 15 lose their civilian protection under IHL if they became members of an armed group.[11] Thus, this thesis intends to analyze the judgment regarding to the issue explained above to see if

[8] Ibid [51].

[9] Ibid [63]-[64].

[10] Women's Initiative for Gender Justice, 'Eliminating Sexual Violence in Conflict: Historic ICC Decision on the war crimes of rape and sexual slavery' (19 June 2017) <https://4genderjustice.org/pub/Historic-ICC-Decision-on-the-war-crimes-of-rape-and-sexual-slavery.pdf> Accessed 25 April 2017; Kevin Jon Heller, 'ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL' (2017) Opinio Juris <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/> Accessed 25 April 2017; Luigi Prosperi, 'The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in Ntaganda' (2017) Opinio Juris <http://opiniojuris.org/2017/06/27/33178/> accessed 25 April 2018.

[11] At the Pre-trial stage the contested issue was whether or not the special protection of children under the age of 15 upon recruitment into armed group/force provided for under Article 4(3)(d) of APII is dependent on their capture. *The Prosecutor v Bosco Ntaganda* (Decision on Confirmation of Charges) ICC-01/04-02/06-309 (9 June 2014).

it is consistent with IHL, as the Statute requires it to be.[12] It further aims to consider the legal consequences arising from the judgment.

1.2 Research questions and Purpose

This thesis will strive to answer two main questions. First, whether the Appeal Chamber's adjudicating acts of sexual violence constituting war crimes under the Rome Statute is consistent with existing conventional and customary IHL. I will argue that it is not. The purpose is to show the fallacies in the finding regarding to the above-mentioned interpretation of the established framework of IHL. Moreover, it also intends to clarify the protection of child soldiers from sexual violence crimes committed by their armed groups under IHL as well as how violations of those IHL provisions could amount to the war crimes. To achieve that, approaches suggested by scholars will be presented. Then another approach will be suggested where I will argue that in light of the interpretation of Article 3 common to the Geneva Conventions (Common Article 3), the special protection for children under Article 4(3) of the APII protects child soldiers from sexual violence within their armed group. As such the latter, when interpreted to the same extent as the former, can be a ground to prosecute the war crimes in question.

In connection with the above analysis that arguably the finding is not consistent with IHL, the second research question asks: what are the legal implications of the judgment? In answering the question, first of all, the judgment will be reviewed in consideration of the Rome Statute as to whether or not it conforms to the principle of legality. I will show that the compatibility of the judgment with this principle is questionable. Lastly, from another perspective, it can be said that the decision, more or less, contributes to the development of ICL and IHL with regard to the prohibition of rape and sexual violence during both international armed conflict (IAC) and non-international armed conflict (NIAC).

[12] Article 8 (2)(b) and (e) of the Statute gives reference to "the established framework of international law" as will be explained in Chapter 4 bellow.

Although there are a handful of literatures discussing about the protection of child soldiers during armed conflicts from violence in general including sexual ones, little has addressed such protection vis-à-vis their armed groups. Additionally, given the case law of international criminal tribunals concerning this issue of intra-Party conduct is limited while the interpretations of IHL rules regarding to it in legal scholarship are diverging, I hope this thesis will be read as a supplement to the existing literatures for a better understanding of the law. On the other hand, at the time of writing, almost none has considered the legal consequences of the judgment, probably, because the judgment has been just recently released in mid-2017. Thus this thesis should also be read as a thought provoking hypothesis for further discussions about the problem and development of the court jurisprudence.

The discussion of the legal issues revolving around the judgment is necessary because, on the one hand, the fact that the court "has the potential to be an especially powerful vehicle for norm expression"[13] indicates that the AC's ruling more or less has an impact on international law primary on ICL. On the other hand, the judgment also contributes to building up the future prospect of the court's jurisprudence as well as the perception of the court as a credible and sustainable institution within the international community.

1.3 Delimitations and Scope

By definition, sexual violence encompasses "… any violence, physical or psychological, carried out through sexual means or by targeting sexuality… [or] … a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts."[14] However, for the purpose of analyzing the

[13] Margaret M deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (TOAEP, Beijing 2012) 33.

[14] ECOSOC, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur' UN Doc E/CN.4/Sub.2/1998/13 (22 June 1998) [21]. The source is chosen because it being authoritative in this regard and was occasionally referred to by the ICC in its case law when defining acts of sexual violence, for instance, sexual slavery in *The Prosecutor v Germain*

judgment, in this thesis the term 'sexual violence' is limited to acts of rape and sexual slavery for the reason that the scope of *Ntaganda* judgment concerns only war crimes of rape and sexual slavery under Article 8(2)(b)(xxii) and (e)(vi) under counts 6 and 9. For the same purpose, the thesis only focuses on the aforementioned war crimes within the Rome Statute framework although Statutes and case law of other tribunals will be presented when needed for the purpose of the analysis. Lastly, the term 'children' used in the text refers to only children under the age of 15 as pursuant to the age limit for the prohibition of their recruitment and use in hostilities as well as their special protection under IHL, precisely, Articles 77 and 4(2) of the Additional Protocols I and II applicable in IAC and NIAC, respectively.

1.4 Research Methodology

To achieve the objective of this legal research I have resorted to traditional legal analysis, which relevant international legal frameworks including both binding and non-binding instruments will be used to draw a picture of how international law treats the problem. In examining the AC's assessment of IHL framework, the decision will be viewed in light of the relevant IHL rules where relevant case law and scholarly literatures will be relied on to support my claim. In addition, to solve the problem, possible solutions adopted by scholars will be addressed. Then another approach will be suggested in light of the interpretation of the relevant IHL rules by majority of scholars in the current state of IHL.

With regard to finding the legal implications of the judgment, different types of sources will be utilized to support my hypothesis. First, to argue that the compatibility of the finding with the principle of legality is disputable, the relevant provisions of the Rome Statute will be primarily based upon and supplemented by the interpretation of the provisions by experts in the field. Subsequently, when discussing about the problematic interplay between the provisions of IHL and ICL within the concept of the war crimes in

---

Katanga and Ngudjolo Chui (Decision on confirmation of charges) ICC-01/04-01/07-717 (30 September 2008) [430]-[431].

question, the concept of war crimes adopted by the AC will be contrasted with the one established under the customary international law. To support the claim, scholarly literatures regarding the common understanding of the concept of war crimes will be relied upon.

1.5 Structure of the Thesis

This thesis consists of five chapters. In chapter 1, introduction of the research question is addressed. It covers the background of the problem, research questions and purpose, delimitation and scope of the research and methodology.

Chapter 2 covers the international legal frameworks on the prohibition of sexual violence against children during armed conflicts as provided for under ICL, IHL and IHRL. In relation to ICL, war crimes of sexual violence under Rome Statute will be presented. It is followed by grave breaches and serious violations of laws and customs of war under the 1949 Geneva Conventions (Geneva Conventions) and their Additional Protocols together with the practices of international tribunals to show that committing sexual violence during armed conflicts can amount to war crimes. In regard to IHL and IHRL, both generic and specific provisions concerning the issue will be elaborated and complemented by their applications in case law. Last but not least, the United Nation Security Council (UNSC) resolutions regarding sexual violence against children during armed conflicts is also included in the same chapter together with the Paris Principles[15].

Subsequently, chapter 3 shows that committing sexual violence against child soldiers in an armed group by members of that same armed group can constitute as war crimes under the jurisdiction of the ICC. In doing so, the chapter gives a brief presentation of the recent development of the court jurisprudence in dealing with intra-Party sexual violence of child soldiers. Subsequently, the *Ntaganda case*, which is the case in discussion, is introduced along with its procedural history from the PTC to the AC. The background of the phenomenon of sexual violence against Ntaganda's child soldiers in his armed group

[15] UNICEF, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris February 2007) (Paris Principles).

is also included. Finally, the key finding of the AC in relation to the so-called 'Status Requirements' for victims of war crimes under Article 8(2)(b)(xxii) and (e)(vi) of the Statute is also addressed.

Given the case at hand requires the AC to consider the scope of war crimes under the mentioned article in light of the 'established framework of international law', which is IHL in this case, chapter 4 analyzes whether the AC's finding regarding to the 'Status Requirements' is consistent with treaties and customary IHL. Next, the legal protection of child soldiers from sexual violence vis-à-vis their armed groups under IHL is illustrated. This will also include the discussion of how such conducts can result in war crimes.

Finally, in chapter 5, the legal implications of the judgment are explored. This chapter reviews the judgment in light of the Rome Statute framework in respect of the principle of legality. Subsequently, the impact of the judgment on international law, precisely ICL and IHL are addressed.

CHAPTER 2: THE INTERNATIONAL LEGAL FRAMEWORK ON THE PROHIBITION OF SEXUAL VIOLENCE AGAINST CHILDREN DURING ARMED CONFLICTS

Rape and sexual slavery against children are strongly condemned under IHRL, IHL and ICL. The three regimes strengthen one another[16] in ensuring that rape and sexual slavery cannot be tolerated. Under IHRL, the protection against sexual violence is afforded to any persons. However, under IHL, while the protection from rape and sexual slavery is given to individual without discrimination, it is applicable to protected persons or persons who do not or no longer take active/direct participation in hostilities (APH/DPH)[17]. ICL

[16] Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 IRRC 503, 503.

[17] The terms "active" and "direct" participation in hostilities stated in Common Article 3 and the Additional Protocols, respectively, refer to equal degree of participation. ICRC, *Commentary to*

on the other hand, reinforces this prohibition by making sure that individuals will be criminally accountable for violating international law.

The prohibition of rape and sexual slavery constitutes part of ICL. The first convictions of rape and sexual slavery as international crimes, namely rape and enslavement as Crimes Against Humanity were delivered by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[18] Rape and sexual slavery can also be the underlying offenses of other international crimes, namely Genocide and War Crimes and this latter is the focus of this section. This section will start with the discussion of War Crimes of rape and sexual slavery under the Rome Statute. Next, the grave breaches of the Geneva Conventions and other serious violations of the laws or customs of war will be discussed. Finally, the prohibition of the same conducts under IHL and IHRL and other binding and non-binding instruments will be presented.

2.1 Sexual Violence as War Crimes under the Rome Statute

The establishment of the ICC is seen as a success of putting the crime of sexual violence independent from the crimes of torture or inhuman treatment, willfully causing great suffering or serious injury to body or health.[19] The adoption of the Rome Statute in 1998, which entered into force in 2002, has enumerated, among others, rape and sexual slavery as serious violations of the laws and customs constituting War Crimes applicable in both IAC and NIAC under Articles 8(2)(b)(xxii) and (e)(vi) respectively. For a conduct to be qualified as a War Crime under the court's jurisdiction, the contextual elements must be

---

the First Geneva Convention of 1949 (2nd edn ICRC, 2016) [525]; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009) [43]. Thus, the abbreviation "APH/DPH" is used in this thesis when referring to either one or both of them.

[18] Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law: Extraodinary Advances, Enduring Obstacles' (2003) 21 Berkeley J Intl Law 288, 333. Citing from *Kunarac* Trial Chamber Judgment.

[19] Gaggioli (n 15) 529.

satisfied, which requires that the crime took place in the context of and was associated with an armed conflict either international or non-international.[20]

As a treaty-based institution, it only has jurisdiction over crimes committed in the territory of or by a perpetrator whose nationality is of a State Party to the Rome Statute.[21] The jurisdiction also extends to non-Party States provided that they accept the jurisdiction of the court over the relevant situation.[22] Additionally, to be prosecuted before the court, the crimes have to reach certain threshold of gravity. Guided by Article 8(1), the court should have jurisdiction over crimes "committed as a part of a plan or policy or as a part of a large-scale commission of such crimes".

This gravity threshold correlates with the manifestation in Article 5 on subject matter jurisdictions and Article 7 on the admissibility of the Statute.[23] As regard Article 5, only "the most serious crimes of concern to the international community as a whole" are subjected to the court's jurisdiction. As such, not all sexual crimes, precisely those of isolated rape and sexual slavery can be prosecuted before the court. Likewise, the crimes in question should be ones that are equivalent to a plan or widespread commission to the extent that they concern the international community as a whole.[24] In addition, Article 7 provides that a case is admissible before the court only when it was not investigated or prosecuted by the state that has jurisdiction over it by reasons of unwillingness or genuine inability of conducting such an action (complementarity principle). In principle the court is mandated to exercise complementary jurisdiction while States Parties to the Statute bear the primary responsibility to try suspects of War Crimes who happen to be under their jurisdictions.

---

[20] ICC, *Elements of Crimes* (2011) ISBN No 92-9227-232-2, Arts 8(2)(b)(xxii)-1&2 & 8(2)(b)(vi)-1&2.

[21] Rome Statute, art 12.

[22] Ibid.

[23] Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2015) 380.

[24] Ibid.

Another interesting aspect of the court is that its applicable laws are expressed in the Statute.[25] Accordingly, in addition to its internal sources, namely the Statute and the Rules of Procedures and Evidence and the Elements of Crimes, which the court shall apply primarily, other external sources are also applicable before it as secondary sources of law if there is a loophole in the primary sources.[26] The latter are "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".[27] Therefore, if there is a lacuna in the Statute the court may also recourse to IHL, which is a *lex specialis*[28] during armed conflicts when appropriate. On top of that, Article 21(3) provides that "the application and interpretation of the law pursuant to this article must be consistent with internationally recognized human rights." According to this paragraph, internationally recognized human rights are asserted to be superior over all the applicable rules mentioned above.[29]

With its advanced Statute covering a variety of sexual violence crimes, particularly rape and sexual slavery, the court as a permanent institution is looked up to deliver deterrence to prevent future sexual violence crimes as well as to provide restorative justice for the victims and the effected society as a whole.[30] However, given its limited jurisdiction and budget, there have been few cases dealing with these crimes in practice. Specifically, sexual violence crimes against child soldiers were brought before the court for the first time in the *Ntaganda* case, which will be presented in the next chapter.

---

[25] Rome Statute, art 21.

[26] *Prosecutor v Thomas Lubanga Dylio* (Appeals Chamber Judgment on Jurisdiction) ICC-01/04-01/06-772 (14 December 2006) [34].

[27] Rome Statute, art 21(1)(b).

[28] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [25].

[29] A Pallet, 'Applicable law, in Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP, Oxford 2015) 1080.

[30] In addition to restore immediate victims by letting them involve in trails and giving them reparations, with truth-telling function the court can also encourage reconciliation between victims and perpetrators as well as rehabilitation for the society broken by the atrocities. Margaret deGuzman (n 13) 30.

2.2 Sexual Violence as Grave Beaches and other Serious Violations of Laws or Customs of War

War Crimes consist of grave breaches of the Geneva Conventions and serious violations of laws and customs of war including the Hague and the Geneva Conventions as well as their Additional Protocols.[31] The Geneva Conventions require States Parties to adopt criminal sanctions for the violations as enumerated in the grave breaches provisions applicable in IAC context. Those provisions are Article 50 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), Article 51 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), Article 130 of the third Geneva Convention Relative to the Treatment of Prisoners of War (GCIII) and Article 147 of the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV). Grave breaches listed in these articles are identical and comprise of, among others, "torture or inhuman treatment, including … willfully causing great suffering or serious injury to body or health … of a protected person".[32]

Articles 11(4) and 85 of the 1967 Additional Protocol I to the Geneva Conventions (API) add a number of other violations against protected persons and properties to the grave breaches regime applicable in IAC situations. Although sexual violence is not expressly criminalized therein, it is established under the case law of the ICTY that sexual violence offenses are embedded in the grave breaches of "torture, inhuman treatment, willful causing great suffering and serious injury to body and health".[33] It is further affirmed in the International Conference for the Protection of War Victims in Geneva that "acts of sexual violence directed notably against … children… constitute grave breaches of

[31] Kelly Askin (n 18) 309.
[32] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (Geneva Convention IV), art 147.
[33] Kelly Askin (n 18) 310.

international humanitarian law".[34]

However, it should be noted that these grave breaches must be committed against protected persons and properties within the scope of the Geneva Conventions. For instance, protected persons in the scope of the GCIV are "those in the hands of a Party to the conflict or occupying power of which they are not nationals."[35] However, the ICTY interpreted this article to encompass victims of the same nationality as the perpetrator by having held that in light of the object and purpose of the convention "…allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test" in determining the protected persons. [36]

Apart from the grave breaches, as regard the law of NIAC, neither Common Article 3 nor the 1977 Additional Protocol II to the Geneva Conventions (APII) inserts criminal prosecution or penalty for violations of the provisions, let alone the criminalization of sexual violence. This means that while the law of NIAC prohibits the commission of sexual violence, it does not oblige States Parties to hold individual criminally accountable for its violation. However, as will be shown below, it is established under customary law that committing sexual violence is deemed as a serious violation of Common Article 3 and Article 4(2) of the APII, which can result in a war crime, thus entails criminal responsibility upon individual.

Common Article 3 and APII were relied upon by the ICTY in its case law despite they were not mentioned in its Statute. The ICTY confirmed that the two instruments were parts of "the laws and customs of war" in the meaning of Article 3 of the ICTY Statute.[37] Subsequently, their violations were codified as war crimes in Article 4 of the International Criminal Tribunal for Rwanda (ICTR) Statute, and in Article 3 of the Special Court for the Sierra Leon (SCSL) Statute, under the tribunals' jurisdictions. For

[34] Gloria Gaggioli (n 16) 527.
[35] Geneva Convention IV, art 4(1).
[36] *Prosecutor v Tadic* (Appeals Chamber) 1T-94-1-A (15 July 1999) [164]-[166].

[37] *Prosecutor v Tadic* (Appeals Chamber Judgment on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) [87]-[98],

instance, in *Musema case,* the ICTR Prosecutor charged the accused who had raped and induced his subordinates to rape a Tutsi woman in NIAC in Rwanda with rape pursuant to the Article 4 of the ICTR Statute. It should be noted that in this case, the accused was not found guilty due to the absence of the nexus of the conduct with the armed conflict.[38]

In light of the ICTY AC's legal reasoning in *Tadic case,* for a conduct to be considered as a serious violation of the laws or customs of war, regardless of the context within which it has been committed, the tribunal sets forth four criteria that must be met:

1. the violation must constitute an infringement of a rule of international humanitarian law;
2. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met…;
3. the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim…
4. the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[39]

Likewise, the ICTY held that given Common Article 3 has been recognized by the International Court of Justice (ICJ) as forming part of customary international law applicable to both NIAC and IAC alike,[40] its serious violations could be punishable as war crimes.[41] In a similar vein, certain provisions of APII concerning the protection of persons do no take or have ceased to take APH/DPH have been considered as "having crystallised merging rules of customary law".[42] Accordingly, the ICTY in *Kvoca case,* reaffirmed that violations of the prohibition of sexual violence under Article 4(2)(e) of

[38] Gloria Gaggioli (n 16) 529. Citing from *Alfred Musema Case* (Trial Chamber) ICTR-96-12 (27 January 2000).

[39] *Tadic case* (AC Jurisdiction) [94].

[40] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [218].

[41] *Tadic case* (AC Jurisdiction) [98], [128]-[134].

the APII could be prosecuted as war crimes.[43]

Therefore, despite the fact that both provisions only prohibit sexual violence and do not posit a criminalization clause in their text as a consequence of their violations, it is indisputable that they are recognized to be legal grounds for prosecuting individual for war crimes. More importantly, in light of the case law of the ICTY and ICTR, Common Article 3 has been a legal basis for prosecuting almost all of sexual violence crimes under Article 3 of the ICTY Statute and Article 4 of the ICTR Statute.[44]

2.3 International Humanitarian Law

As already mentioned, Article 21(1) of the Rome Statute stipulates that the court shall apply IHL as a supplement to its Statute in cases where a legal gap exists therein. The application of IHL, which is triggered whenever there is an armed conflict, is adopted to minimize the suffering from the armed conflict by limiting means and methods of warfare as well as protecting those who do not or have ceased to participate in hostilities. It is observed that IHL treaties while offering both general and specific provisions in relation to the protection of protected persons only few of them, yet vague, address the protection of women.[45] The same is true for the treatment of child soldiers who are considered to be taking APH/DPH as will be shown below.

2.3.1 Generic Provisions

The prohibition of rape was recognized since the Lieber Code in which death was the most severe sentence for committing rape.[46] However, neither rape nor sexual slavery is explicitly mentioned in early IHL treaties. Nevertheless, the evolution of the treaties

---

[42] Ibid [117].
[43] *Prosecutor v Kvocka* (Trial Chamber) IT-98-30-T (2 November 2001) 63-64 & n 409.

[44] Kelly Askin (n 18) 312.
[45] Kelly Askin (n 18) 594.
[46] Instructions for the Government of the United States in the Field by Order of the Secretary of War (24 April 1863) Rules of Land Warfare Doc No 467 (approved Apr. 25, 1914) (Lieber Code) art 44.

shows that sexual violence during armed conflicts was aware of and there was intention to prevent it.[47] In the Hague Regulation of 1899 and 1907, there are provisions respecting "family honour and rights" of persons in an occupied territory.[48] Whereas, the protection of "persons and honour" and the requirement to treat women "with all consideration due to their sex" are found in the 1929 Geneva Convention on Prisoners of War.[49]

In modern conventional IHL, in the context of IAC, the prohibition of rape is clearly stipulated in the GCIV provided that "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault".[50] While the GCIII repeats what was stated in the mentioned 1929 Geneva Convention,[51] Article 75 of the API provides fundamental guarantee where subparagraph (2)(b) lays down the prohibition of "outrageous upon personal dignity, in particular humiliating and degrading treatment, …and any form of indecent assault". Moreover, these conducts are "prohibited at all time and in any place whatsoever, whether committed by civilian or by military agents".[52]

In NIAC, although the prohibition of sexual violence is not explicitly stated, it is implied in Common Article 3. The article lists a number of prohibited conducts including "violence to life and person" together with "cruel treatment and torture" as well as "outrages upon personal dignity". The *ad hoc* tribunals interpreted the article to cover the prohibition of numerous acts of sexual violence.[53] More explicit terms are found in

---

[47] Gloria Gaggioli (n 16) 511.

[48] Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) (The Hague II) art 46; Convention (III) relative to the Opening of Hostilities (signed 18 October 1907) (The Hague III) art 46.

[49] Convention Relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931) 118 LNTS 343, art 3.

[50] Geneva Convention IV, art 27.

[51] The honour of prisoners of war must be respected with consideration of their sex for those of female. Geneva Convention Relative to the Treatment of Prisoners of War (August 12 1949) 75 UNTS 135 (Geneva Convention III) art 41.

[52] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3 (API), art 75(2).

[53] Kelly Askin (n 18) 313.

Article 4 of the APII where rape and sexual slavery are included in subparagraphs (2)(e) and (f). Hence, rape and sexual slavery in armed conflicts are both explicitly and implicitly prohibited under the Geneva Conventions and their additional protocols.

Furthermore, it is asserted that the prohibition on sexual violence forms part of customary international law.[54] Additionally, Rule 93 of ICRC Customary IHL Study states rape and sexual slavery are strongly prohibited in both IAC and NIAC.[55] However, it should be distinguished that this protection is rendered to, on the one hand, civilians unless at the time they are taking APH/DPH. On the other hand, the protection does not extend to members of an armed group except they have become *hors de combat*.[56] On this account, child soldiers who are members of an armed group would lose their civilian protection for as long as they have the membership, which is to be determined by their "continuous combat function" in the group.[57] Nevertheless, when it comes to children under the age of 15, by virtue of their vulnerability they are given special protection under IHL. However, it is ambiguous as to what extent they enjoy this protection against sexual violence by their commanders or fellow soldiers as will be discussed below.

2.3.2 Specific provisions

There exist provisions explicitly outlaw the recruitment into armed groups or use of children under the age of 15 in hostilities,[58] however, not much is stated about the extent to which they are protected against sexual violence once these provisions are violated. Precisely, when they are considered to be taking APH/DPH. In IAC context, children are specially protected from sexual violence according to Article 77 of the API provided that

[54] Ibid 303.
[55] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Volume 1: Rules, CUP, 2005) (*ICRC Customary IHL Study*) Rule 93.
[56] Jann K Kleffner, 'The Beneficiaries of the Rights Stemming from Common Article 3' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, Oxford 2015) 439.
[57] Nils Melzer (n 17) 33.
[58] API, art 77(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609 (AP II) art 4(3)(c).

they "shall be the object of special respect and shall be protected against any form of indecent assault".[59] In contrast to IAC, special protection against rape and sexual slavery for children in the context of NIAC is included under Article 4 of the APII, on fundamental guarantees[60] under sub-paragraphs (2)(e) and (f).[61] Furthermore, the protection from these conducts is generally provided to persons who do not or have ceased to take APH/DPH.[62]

Likewise, it then seems clear that children are covered by all the general and special protection, nevertheless, it is controversial for child soldiers who are taking APH/DPH to be protected from sexual violence committed by their armed group. This is because IHL provisions applicable in both IAC and NIAC, namely Articles 77 of the API and 4(3)(d) of the APII provide that children under the age of 15 are to be protected by special protection if they take APH/DPH, and fall in the hands of an opposing Party whether or not they are Prisoners of War (API), and are captured (APII). In any case, it is less contentious for the law of IAC given that Article 75(2)(b) of the API provides the protection from sexual violence without limiting to civilians or persons *hors de combat* requiring only that the persons "be in the power of a Party to the conflict … effected by an armed conflict or occupation" and cannot avail themselves to more a favorable treatment under the Geneva Conventions and API.[63] According to the ICRC, although specific application of this article to one's own nationals is not explicitly included "no negative conclusions should be drawn from the absence of such mention".[64]

By contrast, in NIAC situations, if Article 4(3)(d) is taken literally, one could argue that the article does not protect child soldiers from sexual violence by their fellow soldiers as they are not captured by an opposing Party. This paragraph was interpreted differently by the Prosecution and the Defence at the pre-trial stage of the present case, yet, the PTC did

[59] API, art 77(1).
[60] APII, art 4(3).
[61] Slavery and slave trade in all their forms are prohibited. AP II, art 4(2)(e) and (f).
[62] APII, art 4(1).
[63] Yves Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) [3009].
[64] Ibid [3020].

not answer whether the protection of child soldiers is dependent on their capture. Nevertheless, according to the ICRC Commentary on this article, although the term "capture" is not explained, the commentary clearly states that the purpose of this provision is to ensure that children under the age of 15 are protected from all the suffering caused by armed conflicts, thus they continue to enjoy this special protection as long as the age limit stipulated under subparagraph (c) is violated.[65] Therefore, in conformity with the objective of the provision, it can be inferred that this special protection does not rely on their capture.

2.4 International Human Rights Law

As mentioned, any interpretation or application of the applicable law before the ICC must be consistent with internationally recognized human rights norms.[66] While some consider the reference to human rights norms to be used as only a rule of interpretation some others deem human rights law to be applicable law and to "take precedence over all other applicable rules" due to the term "application" in the text of the provision.[67] Although the Statute does not define what to be recognized as "internationally recognized human rights", nor does it mention specific sources from which these norms to be derived, the ICC resorted to certain human rights treaties in its case law when relevant subject matters concerned, as will be addressed below.

2.4.1 Generic Provisions

All forms of slavery, torture, and inhuman or degrading treatment are condemned at all time, including during time of armed conflicts,[68] under the Universal Declaration of

[65] Yves Sandoz, C Swinarski and B Zimmermann (n 63) [4559].
[66] Rome Statute, art 21(3); *The Prosecutor v Thomas Lubanga* (Appeals Chamber Judgment on Jurisdiction) [36].
[67] Alian Pallet, 'Revisiting the Sources of Applicable Law before the ICC', in Margaret M deGuzman and Diane Marie Amann (eds), *Arces of Global Justice* (OUP, Oxford 2018) 247 and footnote 106.
[68] The ICJ confirmed that non-derogable human rights norms are applicable at all time including in time of war. *Legality of the Threat or Use of Nuclear Weapons* (n 28) [25].

Human Rights (UDHR)[69] and International Covenant on the Civil and Political Rights (ICCPR).[70] While rape is not expressly stated it is generally implied in the prohibition of torture, and inhuman or degrading treatment, which is also stipulated in other human rights treaties, for instance, Article 1 of United Nations (UN) Convention against Torture (CAT).[71] The European Court of Human Rights (ECtHR) is also well known for interpreting the prohibition of torture under Article 3 of the European Convention on Human Rights to comprise rape. For instance, in *Aydin v Turkey*, the court found that rape of a detainee to extract information from her by Turkish security forces constituted torture.[72]

It should be highlighted that not all cases of rape amount to torture or inhuman treatment because the definition of torture under CAT requires that there must be a direct involvement from a public official or any person with equivalent capacity. Yet, in such a case, Article 7 of the ICCPR comes into paly. The provision imposes states' responsibility not only to refrain from resorting to but also to protect individual against rape by private actors.[73]

Sexual slavery, on the other hand, is covered by a wider condemnation of slavery,[74] by virtue of the fact that the international community has long outlawed slavery and agreed on its *jus cogens* status.[75] In enumerating elements of war crime of sexual slavery, The ICC Elements of Crimes also broadens the definition of the crime pursuant to that provided under the broader framework of human rights, namely the Supplementary

[69] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) arts 4 and 5.

[70] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 4(2), art 7, art 8(1).

[71] Gloria Gaggioli (n 16) 521.

[72] App no 57/1996/676/866 (ECtHR, 25 September 1997) [83]-[86].

[73] Human Rights Committee, *General Comment 20/44: Prohibition of Torture* (3 April 1992) [2].

[74] Gloria Gaggioli (n 16) 525.

[75] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (adopted 30 April 1956, entered into force 30 April 1957) 226 UNTS 3; Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 Case W Res J Intl L 287, 293.

Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[76] Accordingly, the ICC in *Germain Kantanga and Ngudjolo Chui case* deemed sexual slavery as a "particular form of enslavement" and relied on the convention to include a variety of practices and institutions to be considered as acts of sexual slavery.[77] It further reaffirmed that committing sexual slavery amounted to violation of the "peremptory norm prohibiting slavery" in line with the report of the Special Rapporteur on contemporary forms of slavery.[78] Trial Chamber VI (TCVI) in the *Ntaganda case* also followed the same direction and went on to accept that rape also gained *jus cogens* status under international law.[79]

2.4.2 Specific Provisions

As a specific instrument in relation to the protection of women and girls, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also forbids discrimination against girls based on their sex.[80] Furthermore, any act of sexual violence against girls either perpetrated in public or private spheres was subsequently denounced under the Declaration on Elimination of Violence Against Women.[81] The CEDAW is also complemented by its protocol to guarantee the enforcement of the convention and to authorize the CEDAW committee to accepting complaints for violations of the convention by States Parties to the protocol.[82]

With regard to children, which include boys and girls, following the 1959 UN

---

[76] ICC, *Elements of Crimes* (n 20), art 8, footnote 66.
[77] *Katanga and Chui case* (Decision on Confirmation of Charges) [430].
[78] Ibid [431]. Citing from ECOSOC Report (n 13) [8].
[79] *The Prosecutor v Bosco Ntaganda* (Trial Chamber Second Decision) ICC-01/04-02/06-1707 (4 January 2017) [51]. Citing from Kelly Askin, *War Crimes against Women: Prosecutions in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997) 242; David S Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' (2005) 15 *Duke J Comp & Int'l L*, 219.
[80] Kelly Askin (n 18) 292.
[81] Kelly Askin (n 18) 292.
[82] Kelly Askin (n 18) 292.

Declaration of the Rights of the Child where the best interest of the child was invoked [83] the Convention on the Rights of the Child of 1989 (CRC) is the first internationally binding-instrument exclusively addressing children.[84] The CRC demands States Parties to prevent children under the age of 15 (in accordance with the API and APII) from participating in hostilities as well as to abstain from conscripting them into their armed groups.[85] States Parties are bound to protect children from sexual violence by both public and private actors given that the CRC unambiguously outlaws all forms of sexual exploitation and abuse against children, among others, exploitative use of children in unlawful sexual practice, and obligates States Parties to protect them from such violence by all means possible.[86]

It is notable that the additional protocol to the CRC stresses the obligation of States Parties to prevent armed groups from recruiting or using into hostilities children under the age of 18 by all means possible and to release and integrate recruited children into the society.[87] However, the issue of sexual violence against recruited children is not mentioned therein. Nevertheless, the CRC is widely ratified by states and was also applied by the ICC in its case law when the protection of children is concerned. For instance, in *Thomas Lubanga case*, the TC used the CRC, in addition to IHL, to stress the prohibition of the recruitment and use of children under the age of 15 in hostilities.[88]

2.5 Security Council Resolutions

With the engagement of children in armed conflicts, sexual violence against them has been reported as an increasing occurrence in armed conflicts. A series of resolutions were passed by the United Nation Security Council (UNCS) under the headline of children and

[83] UNGA, A/RES/1386(XIV) (adopted 20 November 1959).
[84] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[85] CRC, art 38.
[86] CRC, arts 19(1) and 34.
[87] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000) 2173 UNTS 222, art 4 & art 6.
[88] *The Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber) ICC-01/04-01/06-2842 (14 March 2012) [604].

armed conflict. Since 1999, at least seven resolutions have been adopted. The first five, namely Resolution 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003) and 1539 (2004) while denouncing sexual violence against children, they are said to have provided inadequate mechanisms to tackle the problem.[89] Subsequently, the UNSC has created the six grave violations against children, one of which is sexual violence. Pursuant to Resolution 1612 (2005), the Secretary General was authorized to monitor mechanisms addressing the grave violations and the Security Council working group on children and armed conflicts was also created.[90] Under this resolution, naming and shaming of countries breached the grave violations are adopted. However, only the violation of the prohibition of child soldier recruitments was prioritized under this approach.

Later in 2009, the UNSC issued resolution 1882 (2009), to extend this mechanism also to, among others, sexual violence against children.[91] This approach is a trigger to name parties to armed conflicts that acted contrary to the spirit of the resolution in the annex of the Secretary-General's Annual Report on Children and Armed Conflict.[92] Further, the resolution assigns a Special Representative on sexual violence in conflicts who works directly under the Secretary General and governs the UN Action against sexual violence in armed conflicts (UN Action) where the *Stop Rape Now* campaign was initiated together with three-pillared strategy to combat against the issue.[93] Those are: "country-level action involving joint strategies with UN country teams and peacekeeping operations; advocacy; and 'learning by doing' whereby a knowledge hub is developed in order to identify the most effective practice by UN actors."[94] However, following the incidents of mass rapes in the DRC, which the Special Representative was too late to discover, the UN Action was criticized as being a systematic failure due to ineffective

---

[89] Tom Dammers, 'Paper commissioned for the EFA Global Monitoring Report 2011, The hidden crisis: Armed conflict and education' (2011) 6.

[90] Ibid.

[91] Ibid.

[92] UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882 [3].

[93] Tom Dammers (n 90) 8.

[94] Ibid. Citing from <http://stoprapenow.org/about.html>

work done by the UN Peacekeepers.[95]

2.6 The Paris Principles

In 2007, supported by the United Nations International Children's Fund (UNICEF), the Principles on Children Associated with Armed Forces or Armed Groups (Paris Principles) were drafted in a conference in Paris by many different actors such as human rights and humanitarian actors, military actors from both state and non-state, associated organizations including that of UN, national, international and inter-governmental.

The Paris Principles' objective is to provide guidelines on how to protect children associated with armed groups as well as to offer assistance on policy making and decision programming.[96] In defining children associated with armed groups, the Principles do not limit to children who are participating in hostilities but also include those under the age of 18 who are used as "fighters, cooks, porters, messengers, spies or for sexual purposes."[97] The Principles also aim to "facilitate the release … [and] … the reintegration of children associated with armed groups [and] to ensure the most protective environment for all children."[98] Although it is a non-binding instrument it is seen as the international community's realization of the problem of sexual violence against child soldiers and their commitment to eliminate it.

CHAPTER 3: INTRA-PARTY SEXUAL VIOLENCE AGAINST CHILD SOLDIERS AS WAR CRIMES UNDER THE ICC

Sexual violence is commonplace in war. However, neither IHL nor ICL seems to have devoted much attention to it until late 1990s when States started to focus on preventing

[95] Ibid.
[96] Paris Principles (n 14) 6.

[97] Ibid.
[98] Ibid 6-7.

and adjudicating conflict-related sexual violence.[99] This change in attitude mainly attributed to the increased involvement of feminist advocates in international conferences.[100] In the filed of ICL, the ICTY and the ICTR are known for consolidating case law concerning sexual violence, which have been influential for the codification of a variety of sexual offenses in the Rome Statute.[101] As such, the Rome Statute appears to be the most comprehensive international criminal code in respect of sexual violence offenses, especially if compares to that of the ICTY and ICTR. In fact, while the Statutes of the ad hoc tribunals only identify rape as a crime against humanity, the Rome Statute criminalizes a wide range of sexual violence, including rape and sexual slavery, as both crimes against humanity and as war crimes in IAC and NIAC alike.[102] However, there have been only few cases before the ICC dealing with sexual violence charges. Moreover, only one of them, the *Ntaganda case*, deals with sexual offenses committed against child soldiers by members of their armed group. For this reason, this chapter will explain how the ICC has tackled the issues.

3.1 Recent Development of the ICC's Jurisprudence

As of 2015, the Institute for War and Peace has observed that the ICC has never successfully convicted anyone for sexual violence crimes.[103] The problem of sexual violence against child soldiers by members of their armed group in the *Ntaganda case* is not new to the ICC given that it was firstly brought before the court in the *Lubanga case* as will be shown. Subsequently, sexual violence against different groups of victim, namely civilian including children, and children members of armed groups, were directly

[99] Rosemary Grey (n 5) 604.
[100] Ibid.
[101] Ibid.
[102] Niamh Hayes, 'La Lutte Continue: Investigating and Prosecuting Sexual Violence at the ICC' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (OUP, Oxford 2015) 803.

[103] Blake Evans Pritchard, 'ICC Restates Commitment on Crimes of Sexual Violence' (Institute for War and Peace Reporting, 10 June 2014) https://iwpr.net/global-voices/icc-restates-commitment-crimes-sexual-violence accessed 15 May 2018.

charged under sexual crimes against three individuals. The first two, Germain Katanga and Ngudjolo Chui were charged for sexual violence against civilian including children as war crimes and crimes against humanity although both of them were acquitted in respect of these crimes.[104] Finally, Bosco Ntaganda, who was from the same armed group as Lubanga, has been indicted for sexual violence under several counts including ones against child soldiers perpetrated within his armed group as war crimes of rape and sexual slavery. The following will explain how these sexual violence charges developed from the cases of *Lubanga* to *Ntaganda.*

3.1.1 Lesson Learned from *Lubanga case*

The *Lubanga case* is the first to be tried by the ICC, concerning atrocities committed during a NIAC in the Ituri district of the DRC between the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) and other armed groups.[105] The court has convicted warlord Thomas Lubanga for war crimes of enlistment, conscription and use in hostilities of children under 15 on three counts.[106] During trial, despite evidence indicating to pervasive commission of sexual violence perpetrated within the UPC/FPLC the court could not prosecute him for such offenses because the former prosecutor failed to include their allegation at the pre-trail stage.[107] In his opening and closing submissions at trial, he attempted to incorporate the offenses under the charges of enlistment, conscription and use in hostilities of children, but the TC rejected the approach due to the fact that under the procedural rules, judges are not permitted to re-characterize the fact to include sexual violence crimes.[108] As a result, the TC did not assess whether sexual violence can be covered by the existing charges nor did

[104] Niamh Hayes (n 102) 810.
[105] Tilman Rodenhauser, 'Squaring the circle?: Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces' (2016) 14 J Intl Crim Justice 171, 174.

[106] *The Prosecutor v Thomas Lubanga Dylio* (Appeals Chamber) ICC-01/04-01/06-3121-Red (1 December 2014).

[107] Rosemary Grey (n 5) 606.
[108] Gloria Gaggioli (n 16) 536.

the TC prosecute it under an additional charge.[109]

Judge Odio Benito, in her separate and dissenting opinion, considered the commission of sexual violence to be part of using children to actively participate in hostilities because it was discriminatory to exclude sexual services, which were tasks given to girls.[110] On this account, in line with the charges brought against Lubanga, sexual violence can still be punished as part of "using to participate actively in hostilities". While this view is purported to be in accordance with Article 21(3) of the Rome Statute, its negative consequence would be to strip off the protection against attack by the adverse party from those recruited children who did not involve with combat functions.[111] Thus, approaches taken in *Lubanga* were not well founded for prosecuting sexual violence against child soldiers in the UPC/FPLC.[112]

The absence of bringing sexual violence charges against Lubanga left at least 100,000 victims un-redressed and overlooked the sexual violence issue in the DRC.[113] Katanga, a former chief of the *Lendu militia in the Front de Resistance Patriotique d'Ituri* (FRPI), is the first accused of the ICC being prosecuted for rape and sexual slavery as war crimes and crime against humanity committed in Bogoro, the DRC. Yet, he was acquitted for these crimes by the TC for the reason that there was not enough evidence to prove beyond reasonable doubt his responsibility for the commission of the alleged crimes.[114] In the same vein, Ngudjolo Chui, a former senior commander of the National Integrationist Front (FNI) has been released. Although evidence has shown that rapes and sexual slavery had been committed in Bogoro, he was not proven beyond reasonable

[109] Tilman Rodenhauser (n 105) 174.
[110] *The Prosecutor v Thomas Lubanga Dyilo*, (Trial Chamber Judgment: Separate and dissenting opinion of Judge Odio Benito) ICC-01/04-01/06-2842 (14 March 2012) [20].
[111] Rosemary Grey (n 5) 607.
[112] Ibid 607-608.
[113] Sarah T Deuitch, 'Putting the Spotlight on the Terminator: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence during Conflict' (2016) 22 Wm & Mary J Women & L 655, 674.

[114] ICC, 'Case Information Sheet: Situation of the Democratic Republic of the Congo, *The Prosecutor v Germain Katanga*' (20 march 2018) ICC-PIDS-CIS-DRC-03-014/18_Eng.

doubt to be liable for the crimes under the mode of liability alleged by the prosecutor.[115] These unsuccessful indictments are viewed as a "setback" to the combat against sexual violence in armed conflicts in the DRC.[116] Having learned from these lessons, there was a change in the prosecutorial policy of the Office of the Prosecutor (OTP) with regard to sexual violence crimes by the prosecutor Fatou Bensoda as explained in the following.

3.1.2 Putting Sexual and Gender-Based Violence Crimes as one of the Priorities

Never before had sexual violence been the focus of the OTP prosecutorial strategy. According to its previous policy papers and reports, not only did the OTP exclude sexual violence from its priority issues but also overlooked the problem and failed to tackle it in general.[117] Perhaps this is one of the reasons why the former prosecutor neither succeeded in prosecuting nor included the charges of sexual violence when he had the opportunity to. Likewise, he is criticized to have failed in reassuring the "office's gendered approach" during his tenure. [118]

Only after Prosecutor Bensouda took office, sexual violence crimes have been prioritized along with crimes against children.[119] Apart from her public statements and speeches, this determination is officially stated in the OTP strategic plan for 2012-2015, published in 2013, where six key strategic goals are identified.[120] Taking into account new challenges for investigating and prosecuting sexual violence crimes, strategic goal 3 is formulated to improve the integration of a gender perspective in every field of the OTP's work.[121] In response to "a serious and systematic under reporting of sexual and gender-based violence" and existing challenges relating to investigation and prosecution of sexual violence crimes, it pays special attention to victims and resorts to "gender-sensitive

[115] Niamh Hayes (n 102) 810.
[116] Sarah Deuitch (n 113) 675.
[117] Niamh Hayes (n 102) 828.
[118] Ibid 826-827.
[119] Ibid.
[120] ICC OTP, 'Strategic Plan June 2012-2015' (11 October 2013).
[121] Ibid 27.

approaches" for investigations.[122]

The prosecutor's commitment to preclude impunity for sexual violence crimes further resulted in the publication of her Policy Paper on Sexual and Gender-Based Violence in 2014.[123] Taking into account "experiences and lessons" from the OTP's work as well as of the ad hoc tribunals, the policy paper presents the most remarkable development of the OTP's prosecutorial strategy in dealing with sexual and gender-based crimes to date.[124]

Niamh Hayes praises the paper for genuinely focusing on improving the effectiveness of prosecution for sexual violence crimes, which covers all aspects and phases for the prosecution from the investigation to successfully holding the accused responsible for the crimes.[125] As a result, the prosecutor successfully charged sexual violence against Laurent Gbagbo and Bosco Ntaganda in which those charges were confirmed to trial. This step presents a fruitful result of her policy.[126] Moreover, with other 22 subsequent charges, she raised the rate of successful confirmation of sexual violence and gender-based charges to 59.46%.[127] In particular, indicting Ntaganda for sexual violence of his child soldiers is a groundbreaking work in the ICC history. Hence, the case is seen as a "promising development" and is expected to have deterring effect to prevent future sexual violence in the DRC.[128]

[122] Ibid.
[123] ICC OTP, 'Policy Paper on Sexual and Gender-Based Crimes' (2014).

[124] Ibid [10]; Niamh Hayes (n 102) 828.
[125] Niamh Hayes (n 102) 828.
[126] Ibid 808.
[127] Ibid and endnote 41.
[128] Cécile Aptel, 'Child Slaves and Child Brides' (2016) J Intl Crim Justice 305, 315; Sarah Deuitch (n 115) 675.

3.2 The *Bosco Ntaganda Case*

3.2.1 Sexual Violence of UPC/FPLC Child Soldiers

The two-decade long DRC armed conflict is an illustration of the issue of sexual violence against child soldiers. Since 1996 the DRC has been known to have widespread numbers of child soldiers throughout the country.[129] The case in Ituri is remarkable where children under 18 were used in numerous armed groups mainly the UPC/FPLC and PUSIC.[130] The eastern DRC was described by Margot Wallström, the UN special Representative to the Secretary-General on sexual violence in armed conflict, as "the rape capital of world".[131] During the armed conflict in eastern DRC woman and girl victims of sexual violence were not collateral damage of the war but endlessly targeted.[132]

In particular, the UPC/FPLC child soldiers, apart from participating in hostilities, were constantly raped and sexually enslaved by their commanders and fellow soldiers within the armed groups.[133] Beyond that these child soldiers were referred to as "*guduria"*, which means "a large cooking pot", a reference that they were to provide sexual services whenever they were wanted.[134] Girl soldiers while carrying multi-functions from combat-related tasks to housework they were sexually abused with their life threatened in the military structure, sometimes as punishment, without being able to resist or escape from the armed group.[135]

---

[129] Amnesty International, 'Democratic Republic of the Congo: Children at war' (Report 2003) *AI Index AFR 62/034/2003*.
[130] Ibid.
[131] Margot Wallström, *Conflict minerals' finance gang rape in Africa* (*Guardian,* London 14 August 2010) https://www.theguardian.com/commentisfree/2010/aug/14/conflict-minerals-finance-gang-rape> accessed 04 April 2018.
[132] Amnesty International (n 129).

[133] ICC OTP, 'Document Containing the Charges' (10 January 2014) ICC-01/04-02/06-203-AnxA [100].
[134] Ibid.
[135] Ibid [101]-[102].

3.2.2 Introduction of the Case

The case concerns crimes allegedly committed by the UPC/FPLC during a NIAC in Ituri, DRC, between 2002 and 2003.[136] Mr. Bosco Ntaganda, a former "Deputy Chief of Staff in charge of operation and organization"[137] is charged with 5 counts of crimes against humanity and 13 counts of war crimes including war crimes of rape and sexual slavery of the UPC/FPLC child soldiers under the age of 15 under counts 6 and 9.[138]

At the pre-trial stage, the Defence argued on two points. First, the charges against him for rape and sexual slavery of child soldiers violated the principles of legality as provided in Article 22 of the Rome Statute because the protection of children under Article 4(3) of the APII could not be extended to violence against child soldier members of his armed group when committed by other members of the same armed group.[139] Second, crimes committed by members of an armed group on other members of the same armed group did not fall within the jurisdiction of IHL or ICL.[140] The Defence subjected the latter argument to a series of challenges throughout the court until it was brought for the second time before the AC.

In the confirmation of charges stage, the PTC by taking into account IHL found that it was not abstained from exercising its jurisdiction over the alleged crimes thus confirmed the charges against Ntaganda.[141] In its finding, in light of the prohibition of recruitment of children under 15 into armed groups, the PTC was of a view that the mere fact they were members of the armed group did not mean they were taking APH/DPH.[142] It further stated that those child soldiers who were raped and sexually enslaved could not be

[136] *Ntaganda Case* (Decision on Confirmation of Charges) [31].
[137] ICC OTP, 'Document Containing the Charges' (n 133) [6].

[138] Ibid [100]-[108].
[139] ICC, Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-Red-ENG, 26-27.
[140] Ibid 27.
[141] *Ntaganda Case* (Decision on Confirmation of Charges) [76]-[82].
[142] Ibid [78].

deemed to have taken APH/DPH at the precise time they were sexually abused.[143]

The Defence then continued to challenge the court's subject-matter jurisdiction over these alleged crimes before the TC but this challenge was dismissed on the ground that the matter was not jurisdictional but substantive in nature, thus should be decided at trial.[144] He continued to appeal the decision and then it was accepted by the AC where it held that "the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature."[145]

Consequently, the case was referred to TCVI to re-address this issue where it was rejected for the second time. In doing so, TCVI sidestepped the question of APH/DPH and took the approach that not all victims of war crimes have to be protected persons in the sense of the Geneva Conventions.[146] The Defence appealed this second decision, which gave rise to the judgment at hand. The following are the significant as well as contested finding of the judgment.

3.2.3 Key Finding of the Appeal Chamber Judgment

The scope of appeal is to decide if TCVI made errors in its finding that:

> … victims of the war crimes of rape and sexual slavery listed in Article 8(2)(b) and (e) do not have to be "protected persons" in the sense of the Geneva Conventions of 1949 … or "[p]ersons taking no active part in the hostilities" in the sense of Common Article 3 to the

[143] Ibid [79].

[144] *The Prosecutor v Bosco Ntaganda* (Trial Chamber) ICC-01/04-02/06-892 (9 October 2015) [28].

[145] *The Prosecutor v Bosco Ntaganda* (Appeals Chamber) ICC-01/04-02/06-1225 (22 March 2016) [40].

[146] *Ntaganda Case* (TC Second Decision) [37], [44].

1949 Geneva Conventions … (so-called "Status Requirements").[147]

In determining whether the Status Requirements exist for victims of war crimes under the mentioned provisions the AC first considers this question in light of the court's "statutory framework" then the broader "established framework of international law", as referred to in the provisions. As for the first step, drawing on the ordinary meaning, context and drafting history of the provisions,[148] it finds that neither the Statute nor the *chapeaux* of Article 8(2)(b) and (e) explicitly states such a requirement.[149] Similarly, while the drafting history of the article was silent in this regard, it is undisputed in the AC's opinion that rape and sexual slavery underlying in these provisions are drafted to be "distinct war crimes" from those under Article 8(2)(a) and (c) where grave breaches of the Geneva Conventions and serious violations of Common Article 3 are explicitly indicated.[150] Thus it finds no errors in the TC VI's conclusion that the statutory framework of the court affords no Status Requirements for a person to be deemed as victim of war crimes of rape and slavery under Article 8(2)(b)(xxii) and (e)(vi).[151]

Turning to the issue at hand, according to the AC, it will be barred from exercising jurisdiction over the alleged crimes only if it finds that, within the established framework of IHL, there is a general or any specific rule in respect of the crimes of rape and sexual slavery categorically excludes members of the same armed group from the protection.[152] So after assessing subject matters of the four Geneva Conventions together with Common Article 3 it finds no Status Requirements therein for the reason that neither general nor specific rule relating to the crimes concerned categorically excludes members of an armed group from the protection against the war crimes under Article 8 (2)(b)(xxii) and

[147] *Ntaganda Case* (AC Second Judgment) [16]. (Citations omitted)
[148] In light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the court can recourse to preparatory work of the Rome Statute as a supplementary means in interpreting provisions of the Statute. Similar practice is found in its previous case, eg. *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Appeals Chamber Judgment) ICC-01/09-01/11-1598 (9 October 2014) [106]-[108].
[149] Ibid [46].
[150] Ibid [47], [48].
[151] Ibid [51].
[152] Ibid [56].

(2)(e)(vi) of the Statute when committed by members of the same armed group.[153]

Therefore, the AC re-affirms the TCVI's finding that in light of the "established framework of international law", victims of war crimes of rape and sexual slavery under Article 8(2)(b)(xxii) and (e)(vi) are not restricted to the "protected persons" or "persons taking no active part in the hostilities" in the meaning of the Geneva Conventions and Common Article 3.[154] Accordingly, it rejects the Defence's arguments, about how child soldier members of an armed group are to be considered as not taking APH/DPH, as "… moot in light of the … above finding that such Status Requirements [APH/DPH] do not exist."[155] It is this finding on the part of the Status Requirements under IHL that is controversial and needs to be discussed below.

CHAPTER 4: ANALYSIS OF THE APPEAL CHAMBER'S FINDING

It should be stressed that relying on Article 21(1) of the Rome Statute, the court may apply other applicable treaties and established principles of international law applicable in armed conflicts only when it considers that there is a loophole in the primary sources.[156] Nevertheless, Article 8(2)(b) and (e) specify that the underlying offenses enumerated thereunder be "serious violations of the laws and customs" applicable in IAC or NIAC "within the established framework of international law". More precise reference is found in the Introduction to the Elements of Crimes for the article that "[t]he elements for war crimes under Article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict".[157]

By virtue of these references, as the AC put it, "when read together with Article 21 of the

[153] Ibid [2], [63]-[64].
[154] Ibid [16], [66].
[155] Ibid [69].
[156] The AC also recalls the obligation to apply the applicable law under Article 21 as held in its previous case. Ibid [53].
[157] ICC, *Elements of Crimes* (n 20), art 8.

Statute, require … [Article 8(2)(b) and (e)] to be interpreted in a manner that is consistent with international law, and international humanitarian law in particular".[158] Accordingly, the AC needs to apply customary and conventional IHL notwithstanding of whether there is a legal gap in the internal sources to "ensure an interpretation of Article 8 of the Statute that is fully consistent with … international humanitarian law."[159]

For this reason this chapter assesses whether or not the AC's finding that the Status Requirements do not exist within the established framework of IHL is consistent with IHL as it is supposed to be. Subsequently, the question of how intra-Party sexual violence against child soldiers amounts to a violation of law of NIAC will be addressed.

4.1 The Status Requirements under IHL

This section argues that the so-called Status Requirements do exist. It will demonstrate bellow that the AC is right in finding that victims of war crimes of sexual violence could be members of one's own armed group. However, while it might not be controversial with regard to the law of IAC, it is on the contrary for that of NIAC given that the AC fails to conclude that law of NIAC contains an activity requirement that the persons concerned refrain from taking APH/DPH. This includes members of an armed group who "have laid down their arms" or rendered "*hors de combat* by sickness, wounds, detention, or any other cause" pursuant to Common Article 3 and APII. As such, the AC issues a finding that does not correspond to its legal reasoning by over stretching this protective scope to persons who are taking APH/DPH.

[158] *Ntaganda Case* (AC Second Judgment) [53].

[159] Ibid [54].

4.1.1 The Protection of *hors de combat* and Persons not taking APH/DPH against Intra-Party Sexual Violence

4.1.1.1 Case law

The Defence grounded his argument that intra-Party conducts are not envisaged by IHL but a given domestic legislation and IHRL on Cassese's traditional assertion that "… an offence … committed by a combatant against another combatant belonging to the same belligerent … is not a war crime, although the armed conflict may have been the occasion for the offence."[160] The same view was also taken by the SCSL in *RUF case*[161] that IHL:

> "was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate reconceptualisation of a fundamental principle of international humanitarian law."[162]

However, the SCSL's reasoning is criticized as comprising of "sweeping and unqualified

---

[160] *The Prosecutor v Bosco Ntaganda*, Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Appeals Chamber) ICC-01/04-02/06-1754 (26 January 2017) [52]. It is noteworthy that Cassese bases the above-mentioned view mainly on two domestic cases: Pilz (who was a doctor attached to an armed force, had failed to treat a member of the same armed force) and Motosuke (who was a Japanese officer, accused of shooting a Dutch who also served in the same army) were decided by two different Dutch courts that when a person joins an armed force he/she loses IHL protection against attack regardless of the person's nationality. Antonio Cassese, *Cassese's International Criminal Law* (OUP, Oxford 2008) 82.

[161] The case concerned the murders of three individuals who were fighting on the same side as the Revolutionary United Front (RUF) to which the accused are members. The ICTY found the killings did not constitute war crimes. *Prosecutor* v *Sesay, Kallon and Gbao* (Trial Chamber) SCSL-04-15-T (2 March 2009) (*RUF case*) [1454], [1455] and [1457].

[162] *RUF case*, [1453].

assertion".[163] The AC in *Ntaganda* also finds this reasoning unconvincing on the ground that the SCSL relied its assessment entirely on GCIII, which only concerns the treatment of prisoners of war, thus, it is not an indication of a general rule.[164] In *Prlic case*, the ICTY rather had a different opinion. Having rejected the application of GCIII to HVO Muslims who were detained by the HVO, which had power over them, the ICTY TC found that they were entitled to the protection under GCIV with the reasoning that in line with *Tadic case*, the persons who have fallen into the hands of a Party to the conflict of which they were not allies and were excluded from the protection afforded by the other three conventions were covered under Article 4 of the GCIV.[165] It should be noted that, however, the status of the HVO Muslims was debatable between the Prosecution and the Defence but the TC weighted circumstance of the confinement of victims by the Party which did not own their allegiance against their prior status, thereby afforded them the protection.[166]

II. Recent Scholarly Literatures

In the recent development of IHL, it is well recognized that IHL regulates intra-Party conducts as opposed to the position taken by the Defence above. This is evidenced by the interpretation of relevant IHL rules in a number of authoritative sources. Sivakumaran takes the view that despite IHL of NIAC does not explicitly provide intra-Party protection as that of IAC,[167] the obligation to provide humane treatment (including the prohibition of sexual violence) under Common Article 3 is applicable to *hors de combat* and persons taking no APH/DPH without limiting to their affiliation or any distinction.[168] He further asserts that this reading is also corresponding to APII because in the instrument, in addition to the protective scope to "all persons affected by an armed

[163] Jann K Kleffner, 'Friend or Foe? On the Protective Reach of the Law of armed Conflict' in M Matthee, B Toebes and M Bras (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (Asser P, The Hague 2013) 291.
[164] *Ntaganda Case* (AC Second Judgment) [61].
[165] *Prosecutor v Jadranko Prlic et al* (Trial Chamber) IT-0474-T (29 May 2013) [604]-[611].
[166] Ibid [591]-[600].
[167] Geneva Convention I, arts 12 and 13; AP I, arts 10 and 75.

[168] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 247-248.

conflict" provided for under Article 2, Article 7 stipulates that wounded, sick and shipwrecked regardless they have taken part in hostilities, shall be treated humanely with no distinction can be made on them.[169]

Similarly, Kleffner in a Commentary to GCI elaborates that unlike the law of IAC where status of the persons is the requirement for granting the protection,[170] Common Article 3 sets out "conduct-based" protection.[171] As such he further specifies, "no requirement, other than that the person concerned abstains from actively participating in hostilities, conditions the protection under Common Article 3."[172]

This position also aligns with the updated ICRC Commentary that the application of Common Article 3 to "persons not or no longer participating in hostilities is at the heart of humanitarian law."[173] Likewise, the applicability of the article to all persons regardless of their affiliation is confirmed with only a condition that the persons not taking APH/DPH.[174] The ICRC persuasively explains that in NIAC, it is not necessary to consider if a person be in the hands of an opposing Party because unlike in IAC situations where nationality can be a determinative factor to find out to which party the person is affiliated, it is impossible to do so in NIAC.[175] Additionally, the ICRC emphasizes the fact that members of an armed group sexually assaulted by their own group should not be a ground to exclude the persons from the protection under Common Article 3 because the provision "has been recognized as a 'minimum yardstick' in all armed conflicts and as a reflection of 'elementary considerations of humanity'."[176]

---

[169] Ibid.

[170] The protected persons in the sense of Geneva Conventions are for instance, Prisoners of War, wounded, sick and shipwrecked, medical and religious personnel.

[171] Kleffner (n 56) 435-436.

[172] Ibid.

[173] ICRC, *Commentary to the First Geneva Convention of 1949* (2nd edn ICRC, 2016) (*ICRC updated Commentary*) [519].

[174] Ibid [545].

[175] Ibid [546].

[176] Ibid [547].

It is worth mentioning that, the PTC in this very case, to which the ICRC refers in the aforementioned commentary, also took the same approach. As explained above, pursuant to Common Article 3 and Article 4(1) and (2) of APII the PTC had to determine whether or not the child soldiers concerned were taking APH/DPH at the exact time they were subjected to the alleged sexual violence for them to be excluded from the protective scope of these provisions.[177] Therefore, it is established that the law of NIAC indeed entails activity requirement that the persons take no APH/DPH, which is what the AC calls "Status Requirements".

III. The Appeals Chamber's Legal Reasoning

Turning to the AC's reasoning, in assessing whether or not the general rule of IHL contains the so-called Status Requirements, it actually confirms the position suggested above. It rightly observes that GCIII and GCIV define categories of persons subjected to their protective regimes, namely prisoners of war and enemy civilians, respectively,[178] and that it is not the case for GCI and GCII where their protective scopes encompass wounded, sick and shipwrecked of a Party's own armed group without discrimination (para.58-59).[179] However, the AC does not consider the wounded, sick and shipwrecked to be protected persons in the sense of the two Geneva Conventions since they completely disappear from the conclusion.

---

[177] *Ntaganda Case* (Decision on Confirmation of Charges) [77]. Rosemary Grey comments the PTC's approach as presented in subsection 3.2.2, as problematic for sexual slavery for the reason that its continuous in nature does not reconcile with the notion of continuous APH/DPH. On this account, she asserts that one could argue the commission of sexual slavery is not a violation of IHL for the time the victims take APH/DPH. Rosemary Grey, 'PROSECUTING CHILD SOLDIERS FROM SEXUAL VIOLENCE BY MEMBERS OF THE SAME MILITARY FORCE: A RE-CONCEPTULISATION OF INTERNATIONAL HUMANITARIAN LAW?' (ICD Brief, 10 April 2015) 11.

[178] The same decisions are found in ICTY cases. For instances, *Prlic case*.

[179] For instance, Art 13(1) common to the GCI and the GCII provide protection to wounded, sick and shipwrecked belonging to a Party to a conflict. Whereas Art 14 of the GCI states that these categories of persons when falling into the hands of enemy shall gain Prisoner of War status. Taking into account the wording of the two articles, the terms "a Party to a conflict" include the Party to which the persons concerned belong. Kleffner (n 56) 294-296.

While this might not be much of a problem in situations of IAC because, as indicated, Article 75(2)(b) of API requires no such status for persons who found themselves in a power of a Party to the conflict to be protected from sexual violence, it is disputed in the context of NIAC. Despite noting that Common Article 3 offers a minimum protection to any persons with only a condition that they are taking no APH/DPH at the relevant time (para.60) it excludes this consideration from its finding, thereby concludes that IHL does not limit victims of sexual violence to only persons taking no APH/DPH in the sense of Common Article 3.

Additionally, when the AC supports TCVI where the latter cited paragraph 547 of the updated ICRC commentary in extending the application of Common Article 3 to members of non-opposing Party, it does not notice that paragraph 545 of the same commentary unambiguously reads: "the article contains no limitation *requiring a person taking no active part in hostilities* to be in the power of the *enemy* in order to be protected under the article."[180]

Apart from that, to determine whether there is a specific provision of IHL entails a Status Requirement, it upholds the TCVI's reasoning that rape and sexual slavery are strongly condemned under IHL although their prohibition "generally appear[s] in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict". Hence, it takes a view that it is not conceivable to deem such "explicit protection" to contain a Status Requirement.[181] This is contentious because this conclusion is contrary to what already established above that Common Article 3 and APII do not generally but limitedly protect *hors de combat* and those who take no APH/DPH against sexual violence.

This reasoning lends itself to criticism because, as stressed in the literature, and as Kevin Heller puts it, IHL specifically excludes active combatants from the protective scope of intra-Party sexual violence by the rule "that says violence in member-against-member

[180] *ICRC updated Commentary* [545].

[181] Ibid [64].

situations violates IHL only when the victim is *hors de combat*".[182] This argument certainly applies vis-à-vis members of an armed group in NIAC. In addition, this opinion is supported by a basic rule of treaty interpretation, *expression unius est exclusion alterius*,[183] a rule of construction of legal documents that "the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas."[184] On this ground, the explicit stipulation of only *hors de combat* in those existing rules implies that active members of armed groups are excluded.[185]

This argument is further grounded by the ICRC updated commentary that "[t]he persons protected by Common Article 3 are … described by way of explicit delimitations" referring to persons taking no APH/DPH including members of armed groups who have surrendered and those rendered *hors de combat*.[186] Hence, the fact that the law of NIAC consistently sets out the activity requirement and none of its rules stipulates otherwise, suggests that only persons who meet this requirement can qualify for the protection. Therefore, it can be concluded the AC's finding that victims of war crimes concerned are not restricted to persons not taking APH/DPH is not consistent with IHL.

4.2 Intra-Party Sexual Violence of Child Soldiers as War Crimes in NIAC

So the question remains to address is how could intra-Party sexual violence perpetrated on child soldier members of an armed group constitute a war crime. First, approaches suggested by scholars will be mentioned. Subsequently, it is argued that, as long as children are concerned, Article 4(3) of APII, underpinned by Common Article 3, applies to intra-Party conducts. Hence, it can be a basis to prosecute sexual violence of child

[182] Kevin Heller (n 10).

[183] Ibid.

[184] Clifton Williams, 'Expression Unius Est Exclusion Alterius' (1931) 15 Marq L Rev 191,191.

[185] Kevin Heller (n 10).

[186] *ICRC updated Commentary* [519].

soldiers by their armed groups.

One way to resolve the problem could be to categorize the victims as *hors de combat*.[187] According to the ICRC, a person *hors de combat* could be one who is in the power of an opposing Party, who is defenseless because of unconsciousness, shipwreck, wounds or sickness, or who clearly expresses an intention to surrender, requiring that the person "abstains from any hostile act and does not attempt to escape."[188] The rationale behind this concept is to protect persons who ceased to be a threat to the opposing Party, as such attacking them would not justify any military gain.[189]

Rodenhauser convincingly suggests that although *hors de combat* is seemingly "ill-placed" in this context its application is possible given that the physical and psychological suffering inflicted on child soldiers by sexual violence could make them "temporarily incapacitated, defenceless and thus *hors de combat*."[190] Furthermore, *hors de combat* by detention, if not strictly interpreted, can be also another basis for this position.[191] By virtue of the components of sexual violence which involve coercion or deprivation of liberty, one could argue that during the commission of the offence child soldier victims are held captive by the offenders against their will, thus they could qualify *hors de combat* by detention.[192]

It should be noted that, however, Odrej Svacek considers this approach connected to that of the PTC, thus problematic although the author does not clearly explain the reason.[193] The author recommends combining the law of IAC with that of NIAC by reading the latter in the same way as Article 75 of API.[194] This is not conceivable because it goes against the reason why IHL is divided into the two domains since the outset. The law of

[187] Tilman Rodenhauser (n 105) 191.
[188] *ICRC Customary IHL Study*, Rule 47.
[189] Kleffner (n 56) 443.
[190] Tilman Rodenhauser (n 105) 191.
[191] Ibid.
[192] Ibid.
[193] Ondřej Svaček, 'Brothers and Sisters in Arms As Victims Of War Crimes: Ntaganda Case Before The ICC' (2017) 8 CYIL 346, 356.

[194] Ibid.

NIAC is more limited comparing to that of IAC because sovereign States' internal affair is weighted against humanitarian consideration in NIAC situations. By the same token, States are only bound by treaties they ratified except for rules regarded as customary international law.

In my view, the special protection for children provided for under Article 4(3) of APII is more persuasive and the most suitable for unlawfully recruited child soldiers. On the surface, subparagraph (d) of this provision is debatable, for instance, the Defence strictly interprets the phrase: if they take APH/DPH and "are captured", to cover only the protection of captured child soldiers by an enemy. However, as already addressed above, according to the ICRC commentary, the special protection continues to apply regardless of their being captured because a continuing protection is set out to strengthen the protection of children in case the prohibition of recruitment and use of children in hostilities is breached.[195] Furthermore, to argue that they are only protected from sexual violence vis-à-vis the opposing group and not vis-à-vis the Party unlawfully uses them would indeed go against the objective of the provision that is "to guarantee children special protection in the turmoil caused by situations of conflict".[196]

This assertion is further supported by the recognition that the law of NIAC applies to intra-Party sexual violence. Since Common Article 3 applicability is already recognized to encompass intra-Party treatment it is logical to apply the only specific provision for children, Article 4(3) of APII, to the same extend. This means by virtue of its objective, Article 4(3) of APII should be read in the same manner as Common Article 3, to protect child soldiers from intra-Party sexual violence as Common Article 3 does to *hors de combat*. Thus, due to their particular vulnerability, child soldier members of an armed group who are under the age of 15, regardless of their affiliation, should deserve the special protection in the same way *hors de combat* enjoys the protection under Common Article 3.

[195] Yves Sandoz, C Swinarski and B Zimmermann (n 63) [4559].
[196] Ibid.

The claim further aligns with Rodenhauser's explanation that the notion of APH/DPH under IHL concerns the conduct of hostilities between conflicting Parties. Likewise, child soldier members of an armed group can be directly attacked by the adverse Party at anytime but they remain protected from sexual violence perpetrated by their armed groups which in fact is outside the conduct of hostilities.[197] In addition, to withdraw their special protection from violence committed by their unlawful recruiters does not justify humanitarian principles and military necessity.[198] It is notable that the Prosecution similarly submitted at the pre-trail in the present case that while child soldiers might be attacked by the opposing Party by virtue of their APH/DPH, in light of Article 4(3)(d) of APII, the special protection against sexual violence continues to apply to them.[199] As such, the special protection for children appears to be more convincing as it is exceptionally applicable for child soldiers under the age of 15. After all, it's already recognized as a general principle of law that "there is a duty not to recognise situations created by certain serious breaches of international law… [and that] … one cannot benefit from one's own unlawful conduct".[200]

In light of Article 21(3) of the Rome Statute, this contention is also aligned with the internationally recognized human rights, the peremptory norms on the prohibition of rape and sexual slavery, together with the protection of children from such conducts under the CRC. As mentioned, the ICC in *Lubanga case* also took into account the CRC to reinforce the protection of children associated with armed conflicts.[201] On the same footing, TCVI in the present case also partly relied on the *jus cogens* nature of the

[197] Tilman Rodenhauser (n 105) 186.
[198] Ibid.
[199] *Ntaganda Case*, 'Public Redacted Version of Prosecution's submissions on issues that were raised during the confirmation of charges hearing, 7 March 2014' (24 March 2014) ICC-01/04-02/06-276-Red, [188]-[193]. The Prosecutor differentiated two levels of protection for children, namely general protection (Common Article 3) and special protection (Article 4(3) of APII) but she only relied on the ICRC commentary to the protocol and did not used Common Article 3 to support her claim for intra-party application of Article 4(3)(d).

[200] *Ntaganda Case* (TC Second Decision) [53].
[201] *Lubanga Case* (TC) [604]-[605].

prohibition of rape and sexual slavery under IHRL.[202] This is not to say that IHRL alone can be a ground for extending the court's jurisdiction over the crimes concerned but rather suggest that this approach is consistent with both IHL and IHR. On the other hand, ignoring the special protection for children, as the AC does, by categorizing child soldiers and adult soldiers to the same group of victims is not different from lowering the level of protection for the former to the same level as that for the latter.

Therefore, according to Article 4(3) of APII, child soldier members of an armed group enjoy special protection against sexual violence either committed by members of their armed group or an enemy. Hence, violation of this article could result in a war crime if the nexus requirement is met. The AC could have taken this into consideration and should have been precise in its conclusion to distinguish between victims of sexual violence crimes being persons taking no APH/DPH, including *hors de combat* and child soldier members of armed groups as an exceptional case for unlawfully recruited child soldiers under 15.

CHAPTER 5: LEGAL IMPLICATIONS OF THE JUDGMENT

Since the AC's conclusion on the part of the established framework of IHL does not appear to be consistent with IHL as required by the Statute, it will be shown that the conformity of the interpretation of the war crimes concerned with the principle of legality is questionable. Finally, if one reviews the judgment from another perspective, it can be asserted that the decision reinforces the prohibition of sexual violence and can contribute to the development of ICL and IHL rules in this respect if States Parties broadly accept it.

[202] *Prosecutor v Ntaganda* (TC Second Decision) [51].

5.1 A Consideration of the Judgment in Accordance with the Principle of Legality

Article 22(2) of the Statute requires the court to strictly define the definition of crimes and not to expand it by analogy. Therefore, it is arguable that the AC's extensive interpretation of the war crimes under Article 8(2)(b)(xxii) and (e)(vi) is compatible with the principle of legality as will be discussed bellow.

Antonio Cassese interprets the phrase "within the established framework of international law", under Article 8(2)(b) and (e), to require the underlying offenses under the provisions to be war crimes only when they are already deemed as such under customary international law.[203] Likewise, to determine whether an act of sexual violence constitutes a war crime within the scope of the aforementioned provisions, the court would have to consider two elements. First, if under general international law, it is deemed as a breach of IHL.[204] Second, if its commission constitutes a war crime under customary international law.[205] These criteria are in accordance with the ones adopted in *Tadic case,* as it must be established that, *inter alia,* the offense be an infringement of a rule of IHL, and that customary or conventional international law imposes criminal responsibility for such a violation.[206]

Basing on this reading, raping and sexually enslaving persons who are not regarded as protected persons in the meaning Common Article 3, can not fall into the scope of war crimes under Article 8(2)(e)(vi) due to the fact that the commission of intra-Party sexual violence certainly has never been recognized as a war crime under customary international law in NIAC. As already established above, Common Article 3, as a norm of customary law, together with Article 4 of APII limit their protective regime with the activity requirement, except in the case of children. However, the AC does not single

[203] Antonio Cassese and P Gaeta (eds), *Cassese's International Criminal Law* (OUP, Oxford 2013) 80.
[204] Ibid 81.
[205] Ibid.
[206] See Section 2.2.

them out. Thus, drawing on the AC's interpretation, no IHL rule or customary law is violated. Hence, it is not necessary to consider whether committing intra-Party sexual violence against persons taking APH/DPH can involve criminal accountability under customary international law.

This might hold true even for Article 8(2)(b)(xxii) applicable in situations of IAC. Even though Article 75 of API affords the protection against sexual violence without limiting to protected persons it is disputable that violation of the provision can amount to criminal responsibility because Article 85 of the same protocol unambiguously restricts grave breaches to only conducts committed against protected persons, particularly, persons or wounded, sick and shipwreck belonging to an opposing Party.[207] It is even more so under customary international law as the AC also notes that its decision is contrary to the positions taken in previous case law.[208] It is notable that the Prosecution in *Prlic case* invoked Article 75 of API when trying to prove the HVO Muslims' protection regardless of their status.[209] However, the factual circumstance outstanding in the case was their detention by the Party deemed to be their enemy,[210] which is different from the case at hand.

Nonetheless, according to Michael Bothe as in line with the AC's view, both subparagraphs (2)(b) and (e) of Article 8 refer to violations of IHL in general, including API and APII, respectively.[211] On this ground, the underlying offenses stated in the aforementioned provisions encompass violations of both customary law and any other existing international instruments applicable during time of armed conflicts.[212] In particular, subparagraph (b)(xxii) corresponds to Articles 75(2)(b) and 76(1) of API as supplement to Article 27(2) of the GCIV.[213] In the same vein, subparagraph (e)(vi), as repeating subparagraph (b)(xxii), parallels to the prohibition of sexual violence under

[207] API, art 85(1).
[208] *Ntaganda Case* (AC Second Judgment) [67].
[209] *Prlic Case* [596].
[210] See 4.1.1.1.
[211] Michael Bothe (n 23) 386.
[212] Ibid.
[213] Michael Bothe (n 23) 415.

Article 4(2)(e) of APII.[214]

In light of the later view, the AC's finding is legally defensible with regard to the law of IAC as sexual violence is prohibited under Article 75(2)(b) without a status requirement. Hence, violations of the article can amount to war crimes under Article 8(2)(b)(xxi). However, it is still contentious for the law of NIAC. As repeatedly demonstrated above, it is unambiguous that sexual violence of persons who are taking APH/DPH is not a violation of either Common Article 3 or Article 4(2) of APII. Despite noting the activity requirement imposed by Common Article 3, the AC expands the protective scope of the article beyond this limitation without invoking any other IHL rule to support such an interpretation. Thus, one could argue that the AC does not strictly abide by the interpretative guideline as required under Article 22(2) of the Statute. While not all use of analogy is prohibited and narrow ones are allowed for filling a gap of a given definition of crime in some cases, it is forbidden to impose criminal responsibility for a substantially new crime.[215] Even though, the crime of sexual violence *per se* is indeed not a new crime the expansion of its protective scope to another category of person not previously covered is a relatively new notion, thus hardly finds a legal basis in the IHL framework.

As a result, the AC's broad interpretation of the elements for war crimes under Article 8(2)(e)(vi) is arguably not compatible to the principle of legality.[216] Furthermore, Article 22(1) of the Statute provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Therefore, it remains to see how the ICC will bypass the principle when holding Ntaganda responsible for the alleged crimes that are controversial as to whether they can be characterized as war crimes under the Statute.

---

[214] Ibid 422.

[215] Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP, Oxford 2015) 753.

[216] Svacek also raises the same concern. Ondřej Svaček (n 193) 357.

5.2 Contribution of the Judgment to the Development of ICL and IHL on Intra-Party Sexual Violence

5.2.1 An Advancement in ICL

Notwithstanding the above legal issue, it is irrefutable that the decision is a turning point of the ICC jurisprudence toward setting a precedent for intra-Party sexual violence crimes.[217] By virtue of the Rome Statute being an "international criminal code for Parties to it",[218] one could also assert that the AC has the authority to define the crimes concerned in light of the Statute's object and purpose to promote the fight against impunity for massive commission of intra-Party sexual violence.[219] In upholding the objective, all Chambers in the present case, consistently confirmed the court's jurisdiction over the alleged crimes. Therefore, the ICC clearly reaffirmed that the commission of sexual violence during armed conflicts could amount to a war crime under its jurisdiction, regardless of the status or activity of the victims, or the context in which it is committed. As such, to distinguish between war crimes and ordinary crimes the determinative requirement is the nexus of the conducts and the conflict.

Consequently, the judgment could also be seen as a progress in advancing ICL of war crimes in this regard. For instance, in the context of IAC, even though intra-Party sexual violence is prohibited under Article 75(2)(b) of API, violation of the article is not a grave breach of the protocol. This means the level of protection for this group of persons is not as high as that for the protected persons because unlike in the case of grave breaches States Parties to the Geneva Conventions are not required to prosecute violations of the article, although they are free to do so. However, on the basis of the AC's finding, war crimes of sexual violence under the court's jurisdiction are not necessarily grave breaches

---

[217] The case is expected to be a "landmark" case for sexual violence crimes. Sarah Deuitch (n 122) 686.

[218] *Ntaganda Case* (TC Second Decision) [35].

[219] Rome Statute, preamble.

of the article. Thus, the court strengthens the prohibition of the violence during armed conflicts, especially for territories or nationals of States Parties to the Rome Statute. The court with its complementarity jurisdiction can also suppress States Parties to investigate or prosecute large-scaled commissions of the crimes at national level if the States want to avoid the jurisdiction being triggered.

5.2.2 Fostering Development in IHL

One of the traditional methods to "ensure compliance" of IHL is to hold individuals criminally accountable for violations of the proscribed conducts.[220] From this standpoint, IHL can be enforced and strengthened through ICL, for instance the illustrative lists of grave breaches and violations of the laws and customs of war under the Rome Statute make the exiting IHL rules more precise and further supplement them with additional criminalization. [221] In addition to that, IHL application in international criminal tribunals, particularly in relation to war crimes, has made a considerable influence to its development.[222]

As presented in chapter 2, the ICTY jurisprudence is a great example in the evolution of IHL in many respects.[223] For instance, as demonstrated, despite the text of Article 4 of GCIV posits only enemy nationality as a criterion for civilian status the AC in *Tadic case* re-conceptualized the definition to include allegiance to the enemy. The notion was later adopted, for instance, in *Prlic case* as presented in chapter 4 above. In the same case, the AC created criminal responsibility for violations of Common Article 3 and APII as violations of laws and customs of war despite only violations of the law applicable in

[220] Paola Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OSAIL, 2015) 737.

[221] Marco Sassòli, 'The interplay of International Criminal Law and other Bodies of Law, Humanitarian Law and International criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OSAIL, 2009) 114.

[222] Ibid.
[223] Ibid.

IAC had been criminalized prior to the decision. As a result, violations of the aforementioned instruments were codified as war crimes accordingly in the Statutes of the ICTR (Article 4) and the ICC (Article 8(2)(c) and (e).[224]

In light of these practices, along all the criticisms that may arise, one can also consider the present judgment as contributing to the development of IHL, particularly in bringing the law of NIAC closer to that of IAC with regard to the prohibition of intra-party sexual violence. This is so because, generally, the protective scope of the law of NIAC is more limited comparing to the one of IAC. However, the AC interprets the protective scope of the former to the same extent as the latter when it concludes that the protection against sexual violence in situations of NIAC is not confined to persons taking no APH/DPH in the sense of Common Article 3. It does so despite noting this limitation in its legal reasoning. Hence, the AC brings the protective scope of the law of NIAC to the same degree as that of IAC, thereby diminishing the gap between the two regimes.

Lastly, it should be acknowledged that a development of IHL on the intra-Party protection is partly attributed to this very case. As presented in the analysis, the ICRC updated commentary cites the PTC judgment when explaining the obligation under Common Article 3 to treat humanely one's own armed group. Hence, if the AC's interpretation is widely accepted the decision can be expected to fostering development in IHL in the future.

[224] Marco Sassòli (n 221) 115.

Conclusion

Finally, the research has demonstrated that the protection from sexual violence under IHL is not limited to the treatment of members of an opposing Party but also extended to the treatment of members of one's own armed group. However, the protective regime under IHL is not applicable to persons who are taking APH/DPH in situations of NIAC. Unlike the law of IAC where Article 75(2)(b) of API does not set a status or activity requirement, Common Article 3 and Article 4(2) of APII, limit the protective scope to only persons refraining from taking APH/DPH. Therefore, the AC's finding that IHL provides protection against sexual violence without containing the Status Requirements might be consistent with IHL in situations of IAC. Nevertheless, it is certainly not consistent with both conventional and customary law applicable in the context of NIAC.

Subsequently, the thesis has discussed different legal arguments of how intra-Party sexual violence of child soldiers who are members of an armed group can be regarded as a war crime in a way consistent with IHL as follows. The first one, as suggested by Rodenhauser, is to classify the child solder victims as being *hors de combat* so that they can be entitled to the aforementioned protection. Given the approach is criticized as problematic the research found the special protection for children to be more plausible and most suitable for children.

While the Defence in the present case argued that Article 4(3) of APII is applicable to only the treatment of captured child soldiers vis-a-vis an opposing Party, the discussion has clarified that the article equally applies to the treatment of the child soldiers vis-a-vis their own armed group. In light of the recognition of the applicability of Common Article 3 to intra-Party treatments, this approach suggests that Article 4(2) of APII should be interpreted to give the same effect in providing special protection to child soldiers regardless of their affiliation. Hence, the captivity of the child soldiers concerned is irrelevant in determining their qualification for the protection. Therefore, violation of Article 4(3) of APII could constitute a war crime of sexual violence, if the nexus requirement is established. However, the AC does not limit the victims of war crimes

under Article 8(2)(e)(vi) to be only child soldiers or persons taking no APH/DPH, including *hors de combat* but rather stretching to active members of armed groups who are not under the IHL protective regime.

As a consequence, the research found that the AC's interpretation of the war crimes concerned is arguably not compatible with the prohibition of the interpretation by analogy under the principle of legality as stipulated under Article 22(2) of the Statute. From another viewpoint, the decision can also result in contributing to the development of ICL and IHL in respect of intra-Party sexual violence. Given the potential influence of the ICC jurisprudence on ICL one could see the judgment as a progressive advancement in setting criminal responsibility for the commission of sexual violence regardless of the status or activity requirements, and context of the armed conflict in which it is committed.

Simultaneously, through criminal sanctions, the prohibition of intra-party sexual violence during armed conflicts can be strengthened. Given the court interprets the protective regimes under IAC and NIAC to equally protect individuals from intra-party sexual violence without a requirement other than the nexus, it is possible to say the judgment promotes the development of IHL in reducing the gap of the protective scopes between the two regimes. Finally, it should be noted that, however, States Parties' reactions to the decision are significant because States can withdraw from the ICC as they are allowed to do so under Article 127 of the Statute. Therefore, it is crucial that any interpretation of a given crime comply with the principle of legality as concerned in the thesis in order to uphold the court's credibility and sustainability.

Bibliography

Books

Bothe M, 'War Crimes' in Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2015)

Cassese A and Gaeta P (eds), *Cassese's International Criminal Law* (OUP, Oxford 2013)

Cassese A, *Cassese's International Criminal Law* (OUP, Oxford 2008)

Henckaerts JM and Doswald-Beck L (eds), *Customary International Humanitarian Law* (Volume 1: Rules, CUP, 2005)

ICRC, *Commentary to the First Geneva Convention of 1949* (2nd edn ICRC, 2016)

Melzer N, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009)

Sandoz Y, Swinarski C and Zimmermann B (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987)

Sivakumaran S, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012)

Book chapters

deGuzman M, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (TOAEP, Beijing 2012)

Gaeta P, 'The Interplay Between the Geneva Conventions and International Criminal Law' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OSAIL, 2015)

Hayes N, 'La Lutte Continue: Investigating and Prosecuting Sexual Violence at the ICC' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (OUP, Oxford 2015)

Kleffner J, 'Friend or Foe? On the Protective Reach of the Law of armed Conflict' in M Matthee, B Toebes and M Bras (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (Asser P, The Hague 2013)

Kleffner J, 'The Beneficiaries of the Rights Stemming from Common Article 3' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (OUP, Oxford 2015)

Lamb S, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP, Oxford 2015)

Pallet A, 'Applicable law', in Antonio Cassese, Paola Gaeta and Jonh RWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP, Oxford 2015)

Pallet A, 'Revisiting the Sources of Applicable Law before the ICC', in Margaret M deGuzman and Diane Marie Amann (eds), *Arces of Global Justice* (OUP, Oxford 2018)

Sassòli M, 'The interplay of International Criminal Law and other Bodies of Law, Humanitarian Law and International criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OSAIL, 2009)

Journal Articles

Aptel C, 'Child Slaves and Child Brides' (2016) J Intl Crim Justice 305

Askin K, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley J Intl Law 288

Deuitch S, ‘Putting the Spotlight on the Terminator: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence during Conflict’ (2016) 22 Wm & Mary J Women & L 655

Gaggioli G, ‘Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law’ (2014) 96 IRRC 503

Grey R, ‘Sexual Violence against Child Soldiers’ (2014) 16 Intl Fem J Politics 601

Rodenhauser T, ‘Squaring the circle?: Prosecuting Sexual Violence against Child Soldiers by their ‘Own Forces’ (2016) 14 J Intl Crim Justice 171

Sellers P, ‘Sexual Violence and Peremptory Norms: The Legal Value of Rape’ (2002) 34 Case W Res J Intl L 287

Svaček O, ‘Brothers and Sisters in Arms As Victims Of War Crimes: Ntaganda Case Before The ICC’ (2017) 8 CYIL 346

Williams C, ‘Expression Unius Est Exclusion Alterius’ (1931) 15 Marq L Rev 191

Other print sources

Amnesty International, ‘Democratic Republic of the Congo: Children at war’ (Report 2003) *AI Index AFR 62/034/2003*

Dammers T, ‘Paper commissioned for the EFA Global Monitoring Report 2011, The hidden crisis: Armed conflict and education’ (2011)

Grey R, ‘PROSECUTING CHILD SOLDIERS FROM SEXUAL VIOLENCE BY MEMBERS OF THE SAME MILITARY FORCE: A RE-CONCEPTULISATION OF INTERNATIONAL HUMANITARIAN LAW?’ (ICD Brief, 10 April 2015)

Internet Sources

Child Soldiers International, *Child Soldiers World Index reveals shocking scale of child recruitment around the world* ((Press release, 21 February 2018) <https://www.child-soldiers.org/news/child-soldiers-world-index-reveals-shocking-scale-of-child-recruitment-around-the-world> accessed 04 April 2018

Evans-Pritchard B, *ICC Restates Commitment on Crimes of Sexual Violence* (Institute for War and Peace Reporting, 10 June 2014) https://iwpr.net/global-voices/icc-restates-commitment-crimes-sexual-violence accessed 15 May 2018

Kevin Jon Heller, 'ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL' (*Opinio Juris,* 2017) <http://opinionjuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/> accessed 25 April 2017

Luigi Prosperi, 'The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in Ntaganda' (*Opinio Juris*, 2017) <http://opinionjuris.org/2017/06/27/33178/> accessed 25 April 2018

Smith L*, Conflict in Congo has led to children being sexually abused and recruited as soldiers, finds Unicef* (25 January 2018) <https://www.independent.co.uk/news/world/africa/congo-children-sexual-abuse-child-soldiers-africa-unicef-drc-africa-democratic-republic-congo-a8178716.html> accessed 04 April 2018

UNICEF, *Wars and the vulnerable*, <https://www.unicef.org/sowc96pk/vulnerab.htm> accessed 27 April 2018

Wallström M, *Conflict minerals' finance gang rape in Africa* (Guardian, London 14 August 2010) https://www.theguardian.com/commentisfree/2010/aug/14/conflict-minerals-finance-gang-rape> accessed 04 April 2018

Women's Initiative for Gender Justice, *Eliminating Sexual Violence in Conflict: Historic ICC Decision on the war crimes of rape and sexual slavery* (19 June 2017)

<https://4genderjustice.org/pub/Historic-ICC-Decision-on-the-war-crimes-of-rape-and-sexual-slavery.pdf> Accessed 25 April 2017

Table of Cases and Institutional Instruments

ICC

The Prosecutor v Bosco Ntaganda (Decision on Confirmation of Charges) ICC-01/04-02/06-309 (9 June 2014)

The Prosecutor v Bosco Ntaganda (Trial Chamber Second Decision) ICC-01/04-02/06-1707 (4 January 2017)

The Prosecutor v Bosco Ntaganda (Appeals Chamber Second Judgment) ICC-01/04-02/06-1962 (15 June 2017)

The Prosecutor v Germain Katanga and Ngudjolo Chui (Decision on confirmation of charges) ICC-01/04-01/07-717 (30 September 2008)

The Prosecutor v Thomas Lubanga Dylio (Appeals Chamber Judgment on Jurisdiction) ICC-01/04-01/06-772 (14 December 2006)

ICC, 'Case Information Sheet: Situation of the Democratic Republic of the Congo, *The Prosecutor v Germain Katanga*' (20 march 2018) ICC-PIDS-CIS-DRC-03-014/18_Eng

Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, 17 July 1998

ICC, *Elements of Crimes* (2011) ISBN No 92-9227-232-2

ICC OTP, 'Policy Paper on Sexual and Gender-Based Crimes' (2014)

The Prosecutor v Bosco Ntaganda, Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Appeals Chamber) ICC-01/04-02/06-1754 (26 January 2017)

ICC OTP, 'Strategic Plan June 2012-2015' (11 October 2013)

ICC OTP, 'Document Containing the Charges' (10 January 2014) ICC-01/04-02/06-203-AnxA

ICC, Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-Red-ENG

The Prosecutor v Thomas Lubanga Dyilo (Trial Chamber) ICC-01/04-01/06-2842 (14 March 2012)

The Prosecutor v Thomas Lubanga Dylio (Appeals Chamber) ICC-01/04-01/06-3121-Red (1 December 2014)

The Prosecutor v Bosco Ntaganda (Appeals Chamber) ICC-01/04-02/06-1225 (22 March 2016)

The Prosecutor v Bosco Ntaganda (Trial Chamber) ICC-01/04-02/06-892 (9 October 2015)

ICTY

Prosecutor v Tadic (Appeals Chamber Judgment) 1T-94-1-A (15 July 1999)

Prosecutor v Tadic (Appeals Chamber Judgment on Jurisdiction) ICTY-94-1-AR72 (2 October 1995)

Prosecutor v *Sesay, Kallon and Gbao* (RUF) (Trial Chamber) SCSL-04-15-T (2 March 2009)

Prosecutor v Kvocka (Trial Chamber) IT-98-30-T (2 November 2001)

Prosecutor v Jadranko Prlic et al (Trial Chamber) IT-0474-T (29 May 2013)

ICJ and ECtHR

Aydin v Turkey App No 57/1996/676/866 (ECtHR, 25 September 1997)

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

International treaties and UN Documents

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

Convention Relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931) 118 LNTS 343

ECOSOC, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur' UN Doc E/CN.4/Sub.2/1998/13 (22 June 1998)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287

Geneva Convention Relative to the Treatment of Prisoners of War (August 12 1949) 75 UNTS 135

Human Rights Committee, *General Comment 20/44: Prohibition of Torture* (3 April 1992)

Instructions for the Government of the United States in the Field by Order of the Secretary of War (24 April 1863) Rules of Land Warfare Doc No 467 (approved Apr. 25, 1914)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000) 2173 UNTS 222

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (adopted 30 April 1956, entered into force 30 April 1957) 226 UNTS 3

The Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900)

The Hague Convention (III) Relative to the Opening of Hostilities (signed 18 October 1907)

UNGA, Declaration of the Rights of the Child A/RES/1386(XIV) (20 November 1959)

UNICEF, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris February 2007)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III)

UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882