

Ntaganda: Re-Alignment of a Paradigm

By
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Introduction:

On June 15, 2017, the Appeals Chamber of the International Criminal Court issued a significant judgment, in the proceeding in Prosecutor v. Ntaganda.¹ It concerned count 6, rape, and count 9, sexual slavery, under Article 8(2)(e)(vi) of the Rome Statute.² The Appeals Judgment comes after several Defence challenges³ to the Court's jurisdiction over these war crimes of sexual violence - a seemingly foreclosed matter of *ratione materiae* given their express enumeration⁴ in the Statute. The notoriety surrounding the judgment resides in the factual basis of the charges.⁵ Mr.

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¹ *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr. Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9,” No. ICC-01/04-02/06 OA5, 15 June 2017. (hereinafter, “Appeals Judgment”)

² The Rome Statute A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002

³ The Defence challenges resulted in several decisions. At the confirmation stage, Pre-Trial Chamber II rendered: Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014 (hereinafter Confirmation Decision) https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF; At the Trial stage, Trial Chamber VI rendered, Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892, 9 October 2015; In response to an interlocutory appeal at the trial stage, the Appeals Chamber handed down, Judgment on the appeal of Mr. Bosco Ntaganda against the ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1225, 22 March 2016; In response to appellate decision, Trial Chamber VI handed down, Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of counts 6 and 9, 2 ICC-01/04-02/06-1707, 4 January 2017. The Appeals Judgment constitutes the final decision in regard to the Defence’s challenge to the Court’s jurisdiction.

⁴ Article 8 of the Rome Statute governs war crimes. Sub-section (2)(e)(vi) proscribes:

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

...

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

⁵ Evidence in paragraph 82 of the Confirmation Decision in support of Counts 6 and 9 states:

“Abelanga, a UPC/FPLC soldier, raped a girl under the age of 15 years who was his bodyguard from November 2002 until at least March-May 2003. Around mid-August – beginning of

Ntaganda, allegedly, is responsible for rapes and sexual slavery committed by members of his armed forces against children who were members of that very armed force. Thrice the Defence contested the Court's ability to lodge the charges against the accused, once at the confirmation stage and twice at the trial stage.⁶ The fourth challenge rendered the Appeals Judgment. At the heart of the legal enquiry is whether the Rome Statute's jurisdictional reach extends to intra-party or "same side" war crimes for sexual violence, in a non-international armed conflict.

The normative paradigm holds that war crimes prohibit acts committed against protected persons in situations of international armed conflict (IAC) and committed against civilians and persons *hors de combat* in non-international armed conflict (NIAC).⁷

Manfred Lach's 1945 definition⁸ of IAC war crimes paid heed to shielding enemy citizens, citizens of a neutral states and stateless civilians from harm. The Geneva Convention regime of 1949's expressly conferred protected status on a broader class of persons. Protection therein is owed to wounded and shipwrecked combatants,⁹ prisoners of war,¹⁰ civilian populations in the hands of a Party of which they are not nationals *and* non-combatants such as accompanying civilians, and medical and religious personnel.¹¹ IAC war crimes protection also extends to UN forces.¹² Special protection is afforded children, whether they are recruited, engaged in hostilities or become prisoners of war.¹³ Protected person status under IAC, has

September 2002, young girls, including under the age of 15 years, were raped in Mandro camp. They were "domestic servants" and they "combined cooking and love services." Another girl, aged 13 years, was recruited by the UPC/FPLC and continuously raped by Kisembo, a UPC/FPLC soldier, until he was killed in Mongbwalu."

⁶ See, discussion *infra*. Section I.

⁷ Customary Rule 87 of the ICRC Study affirms that humane treatment is a core international humanitarian law (hereinafter, IHL) concept. See, International Committee of the Red Cross (ICRC), *Customary Humanitarian Law*, 2005, Vol. I, p. 306. (ICRC Study) available at <http://www.refworld.org/docid/5305e3de4.html>

Humane treatment is owed to protected persons and to persons *hors de combat*. International criminal jurisprudence has held such designation or status to be the parameters of the prohibitions of war crimes to persons. See, Prosecutor v. Sesay, Kallon, Gbao, Judgment, SCSL-04-15- T, 2 March 2009, para. 1451.

⁸ Manfred Lach's definition is: A war crime is any act of violence qualified as a crime, committed during and in connection with a war and facilitating its commission, the act being directed at a belligerent state, its interests, or its citizens, against a neutral state, its interests, its citizens as well as against stateless civilians, unless it is justified under the law of warfare. M. Lach, *War Crimes: An Attempt To Define The Issues* (Stevens and Sons) 1945, p. 100.

⁹ Customary Rule 111 states: "Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property." ICRC Study, Vol. I. p.403.

¹⁰ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Article 25-32. (hereinafter, Third Geneva Convention) available at: <http://www.refworld.org/docid/3ae6b36c8.html>

¹¹ ICRC Customary Rule 25 states: Medical Personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. ICRC Study, Vol. I. p.79.

¹² ICRC Customary Rule 33 states: Directing an attack against personnel and objects involved in peacekeeping missions in accordance with the Charter of the United Nations as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. ICRC Study, Vol. I, p. 112.

¹³ ICRC Customary Rule 136 states that, children must not be recruited into armed forces or armed groups. ICRC Study, Vol. I. p.482. However, Article 77 of Additional Protocol I recognizes that

been judicially interpreted to include citizens of the same country who differ in their allegiance.¹⁴

In NIAC, provisions such as Common Article 3 or Additional Protocol II's Article 4 cover fighters who have put down their arms or are otherwise *hors de combat*. Children, even if associated with armed conflict,¹⁵ and civilians without regard to national affiliation are protected.¹⁶

Same side NIAC wars crimes of sexual violence did not originate with the Ntaganda case; however, the Ntaganda chambers have turned out incisive jurisprudence. This brief article reviews the Ntaganda litigation. The first section examines the positions of the parties, the rulings of the chambers, and scholarly commentaries with regard to the preliminary Ntaganda decisions. The second section garners a closer look at the Appeals Judgment and the attendant scholarly commentaries. The third section proffers a complementary legal analysis under the framework of international law to bolster that of the Appeals Judgment. It attempts to critically identify the protection, if any, offered to child soldiers who are same side victims of war crimes of sexual violence during NIAC. In the fourth section, the author suggests that policy reasons might also augur for a nuanced re-alignment of the normative war crimes paradigm.

I. Preliminary Decisions:

a. Pre-Trial Confirmation Decision

Even though the Ntaganda litigation ostensibly addressed subject matter jurisdiction, essentially, it asked “who” owed protection to child soldiers for same side sexual abuse not alleged as part of the war crimes of conscription, enlistment or active participation in hostilities.

At the confirmation stage, the Ntaganda Defence argued before Pre-Trial Chamber II, that counts 6 and count 9 could not be confirmed¹⁷ since the prohibitions of rape and sexual slavery under Article 8(2)(e)(vi) of the Rome Statute were not enforceable against members of one's own forces.¹⁸ Moreover, the Defense contested

children always enjoy special protection, even when recruited and if captured. *See*, discussion *infra*, Section III.

¹⁴ In a significant ruling, the Tadić Appeals Chamber overturned an acquittal for war crimes in an international armed conflict committed against persons of the same nationality. It opined that even when perpetrators and victims share a nationality, Geneva Convention IV safeguarded those civilians who do not enjoy “the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State” that held them. *Prosecutor v. Duško Tadić*, Judgment, Case No.: -94-1-A, 15 July 1999, paras. 168-170. *See also*, *Prosecutor v. Prlić et al.* Judgment, IT-04-74-T, 29 May 2013, paras. 608-610.

¹⁵ *Supra*, at *fn.* 13.

¹⁶ ICRC Customary Rule 87: “Civilians and persons *hors de combat* must be treated humanely”. *See*, Geneva Conventions of 1949, common Article 3.

¹⁷ Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, 14 April 2014, ICC-01/04-02/06-292-Red2, paras 250-263.

¹⁸ In particular, the Defence submitted that, “international humanitarian law does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict”. *See*, Confirmation Decision, para. 76.

the Prosecution's reliance on Article 4(3)(d) of Additional Protocol II¹⁹ by asserting that child soldiers who participated in hostilities only enjoyed special protection from sexual violence upon capture. Interestingly, the Defense's use of participation in hostilities seemed to be synonymous with a child soldier's status as a member of the armed group rather than as a time-bound moment of actively participating in hostilities. The Defense underscored that the alleged sexual conduct does not breach any rule of international customary law and, thus, if confirmed, Counts 6 and 9 would violate the principle of legality.²⁰

To address the submission, Pre-Trial Chamber II examined Common Article 3's guarantee of humane treatment for persons *hors de combat* and Article 4(1-2) of Additional Protocol II's similar safeguards for persons who do not take a direct part or who have ceased to take direct part in hostilities.²¹ It relied upon Article 4(3) of Additional Protocol II to refute the premise that a child's "mere membership" in an armed group could be equated with "determinative proof of direct/active participation in hostilities".²² Conflation of mere membership with active participation in hostilities undermines the protection child soldiers retain when not engaged in hostilities. Pre-Trial Chamber II rejected the Defence argument, reasoning that:

...[C]hildren under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities. That said, the Chamber clarifies that those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature, including rape.²³

Pre-Trial Chamber II opined that IHL protected child soldiers from rapes and sexual slavery when they were not partaking in hostilities since these acts could not be committed contemporaneously to their participation in hostilities. It found these IHL protections "reflected" in Article 8(2)(e)(vi). Accordingly, the Court was not "barred from exercising jurisdiction" over the rapes and sexual slavery committed against child soldiers by Ntaganda's forces.²⁴ It confirmed Counts 6 and 9.

One scholar commented that the Confirmation Decision's "swift conclusion" differentiating participation from non-participation in hostilities in regard to the commission of sexual abuses²⁵ requires further analysis. Rodenhäuser contrasts IHL's protection of civilians to that of child soldiers, noting that the latter are legitimate targets as members of an armed group even when not participating in hostilities. He sincerely queries, even given the continuing criminality-from recruitment to participation in hostilities-whether IHL affords any child soldiers protection other than that ascribed to any combatant or fighter. Members of armed groups, irrespective of age may be targeted, captured and detained.

¹⁹ Document Containing the Charges, *Ntaganda* (ICC-01/04-02/06), 10 January 2014, para. 107.

²⁰ Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 39.

²¹ Confirmation Decision, paras. 77.

²² *Ibid*, para. 78.

²³ *Ibid*, para. 79.

²⁴ *Ibid*, para. 80.

²⁵ The following discussion is based upon the article by Tilman Rodenhäuser, Squaring the Circle?: Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces', *Journal of International Criminal Justice*, Volume 14, Issue 1, 1 March 2016, Pages 171–193, <https://doi.org/10.1093/jicj/mqw006>.

The overarching inquiry, according to Rodenhäuser, resides in recognizing an implicitly expansive reading of civilian or of *hors de combat* status at the time of the intra-party sexual abuse against child soldiers. Armed groups do not have *carte blanche* to commit ill treatment upon children who form part of their group, even if those children exercise a continuous combat function or engage in hostilities. Whether under Common Article 3 or Article 8(2)(e)(vi) of the Rome Statute, Rodenhäuser first suggests that children who factually do not exercise continuous combat function even though subjected to the continuous illegality of recruitment remain under the protection of IHL. They retain their civilian character. Moreover, in terms of child soldiers who do have a continuous or even mixed combat function, he offers that the better view, irrespective of the enemy's ability to target child soldiers, would be for children to be seen by their armed groups as civilians who are owed special protection. Moreover, Rodenhäuser would understand the protection granted under *hors de combat* to apply to child soldiers who are sexually assaulted, intra-party, regardless of their civilian or continuous combat status as long as the conduct occurs in the context of an armed conflict. Such sexual violence, accomplished by coercion at the hands of the perpetrator, places the child soldier within the *hors de combat* scope of protection.

Thus, Rodenhäuser favors the Confirmation Decision's recognition of Article 8(2)(e)(vi) jurisdiction over intra-party war crimes, although he disparages Pre-Trial Chamber II's rushed reasoning²⁶ based on an inability to commit sexual violence while participating in hostilities.

Another scholarly comment²⁷ appraises the Confirmation Decision's rulings as a significant jurisprudential development. Grey welcomes that Ntaganda directly addresses the intra-party rapes against child soldiers unlike the more diffuse characterization of victims by the Special Court for Sierra Leone cases, notably the *Prosecutor v. Charles Taylor*.²⁸ Grey gleans that the Ntaganda analysis is consistent with the little recognized Taylor jurisprudence of war crimes. Both courts "similarly assessed" that the victims who were not taking part in hostilities when assaulted were protected.²⁹ Grey might have preferred that Pre-Trial Chamber II rely upon the Prosecutor's submissions based on Article 4(3)(d) of AP II. She considers the provision as an exceptional extension of the special protection against sexual violence to children even if they partook in hostilities and, subsequently, were captured.³⁰

While Grey agrees with the outcome, she nevertheless contests the Pre-Trial Chamber II's simplification of sexual violence as illogical, when it reasoned that child soldiers are protected because the rapes and sexual slavery do not occur when the children participate in hostilities. Unlike singular acts of rape, sexual slavery is a continuous crime that endures as long as the perpetrators' powers of ownership are exercised. The crime does not cease when children engage in hostilities, or resume

²⁶ *Ibid.*

²⁷ See, Rosemary Grey, (2014) Sexual Violence against Child Soldiers, *International Feminist Journal of Politics*, 16:4, 601-621, <https://doi.org/10.1080/14616742.2014.955964>

²⁸ Grey notes that victims are never accurately described as child soldiers, even though the evidence concerning Akiatu Tholley, who was sexually enslaved by the armed group, confirms that she was conscripted and used in hostilities. *Ibid.*, pp. 611.

²⁹ *Ibid.*, 612.

³⁰ *Ibid.*, 606. See, *infra*, discussion in Section III.

thereafter, nor for that matter when the child is “manning checkpoints, guarding or carrying messages”.³¹ Grey’s critique reveals a flaw in Pre-Trial Chamber II’s legal grasp of sexual slavery. Its continuing nature is analogous to the continuing criminality of conscription and enlistment of child soldiers.³²

Rodenhäuser and Grey approve of the outcome of the Confirmation Decision, yet each cautiously parse its nebulous reasoning, whether in relation to the protection that characterizes children not engaged in hostilities or in terms of the complexity of the crime of sexual slavery.

b. Trial Decisions

Once before Trial Chamber IV, the Defence re-litigated the validity of the Court’s jurisdiction over Counts 6 and 9.³³ The Trial Chamber denied the application,³⁴ stating that it was a substantive matter to be determined by proof at trial. The Defence, subsequently, appealed.³⁵ The first appeals judgment on Counts 6 and 9 reversed the Trial Chamber’s denial and remanded the Trial Chamber to examine the application concerning jurisdiction. The Appeals Chamber further requested the Trial Chamber to verify that the application conformed to the Article 19(4) provision that governs challenges to jurisdiction and admissibility.³⁶ The Trial Chamber’s ensuing decision ruled that procedurally the jurisdiction challenge was raised timely, since it was prior to the commencement of trial.³⁷ It, therefore, allowed the jurisdictional challenge noting that in conformity with Article 19(4) exceptional circumstances—judicial economy and justice—existed.³⁸

³¹ *Ibid*, 614.

³² Grey’s observation bears expansion. Sexual slavery, or enslavement, is a continuing crime. Sexual slavery might be evidenced by the infliction of physical rapes, pregnancies, mutilations, psychological sexual threats and constraints. The *actus reus* of sexual slavery might occur at any time when a person is exercising any or all the powers attaching to ownership over the enslaved person. Slavery ceases only when the exercise of powers attaching to the rights of ownership is withdrawn. It is a legal impossibility to posit that a child soldier whose sexual enslavement, that has a nexus to an armed conflict, ceases to be enslaved while actively engaged in hostilities. Said otherwise, sexual slavery is a continuous offense that cannot be neatly halted when a person simultaneously participates in hostilities or even when she has a continuous combat function. The legal determinate of protection, non-participation in hostilities, is not assessed correctly in terms of slavery and seems incongruent with the purpose of international humanitarian law; The trial Chamber in the Hissène Habré likewise case acknowledge the continuous nature of sexual slavery. *Ministère Public v. Hissène Habré*, Judgment 30 mai 2016, para. 1504. <http://www.legal-tools.org/doc/98c00a/pdf/>; See, *infra*, discussion Section III.

³³ Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06-804.1 September 2015.

³⁴ Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892. 9 October 2015. (Hereinafter, “Trial Decision”)

³⁵ Appeal on behalf of Mr. Ntaganda against Trial Chamber VI’s “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06-892’, ICC-01/04-02/06-909. 19 October 2015.

³⁶ Judgment on the appeal of Mr. Bosco Ntaganda against the ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1225 (Hereinafter, “First Appeal Judgment”), para. 40

³⁷ Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, No.: ICC-01/04-02/06, 4 January 2017, para. 18. (Hereinafter, “Second Trial Decision”)

³⁸ *Ibid*, paras.24-26.

In terms of its substantive examination, whether the Court had jurisdiction over intra-party or “same side” war crimes, Trial Chamber IV responded to the Defence,³⁹ the Prosecutor⁴⁰ and the Legal Representatives of the Victims’ arguments.⁴¹ First, it notified the parties that it would examine the issues in light of IAC and NIAC since the chamber could re-characterize⁴² the classification of the armed conflict by the end of the trial. Secondly, and strikingly, the chamber viewed the Rome Statute’s construction of war crimes under Article 8 as providing jurisdiction for: grave breaches of the Geneva Conventions; other serious violations of the laws and customs of war in IAC; serious violations under Common Article 3; and, other serious violations of the laws and customs of war for NIAC.⁴³ Plainly, the chamber reasoned that the Rome Statute’s breadth of war crimes foresaw the possibility of prosecution of rape and sexual slavery within a context other than one bound to the chapeaux requirements of the grave breaches regime or of Common Article 3.⁴⁴ Accordingly, the Article 8(2)(e)(vi) would necessitate neither a particular victim status nor a distinct perpetrator status.⁴⁵

The chamber, thirdly, interpreted Article 8(2)(e)(vi)’s chapeau requirement of “established framework of international law” as referring to the uncontested customary international humanitarian law prohibitions⁴⁶ of rape and sexual slavery in IAC and NIAC. It pointed out that:

While most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons hors de combat in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct.⁴⁷

³⁹ The Defence contested the Court’s jurisdiction stating that: 1) Article 8(2)(e)(vi) of the Statute, the basis of Counts 6 and 9, is subject to the requirements of international humanitarian law; 2) Neither Common Article 3 nor the Geneva Conventions admit war crimes committed by armed forces against their own members; 3) Victims of Counts 6 and 9 are characterized as members of an armed forces; 4) Membership in an armed force is incompatible with ‘taking no active part in hostilities’; and 5) international law does not recognize an exception for child soldiers. *Ibid*, para. 27.

⁴⁰ The Prosecution submitted that the Court had jurisdiction over Article 8(2)(e)(vi) and that *hors de combat* status requirements of Common Article 3 should not be imported into Article 8(2)(e)(vi). The Prosecution offered, alternatively, that if Article 8(2)(e)(vi) were to come under Common Article 3’s protection, that the sexual violence was committed while the victims were not actively participating in hostilities and that, anyway, the children were recruited illegally as soldiers. Moreover, it argued that sexual violence is prohibited ‘without exception’ under the framework of international law and that, in general, neither international humanitarian law, nor Common Article 3 requires victims or perpetrators have different affiliation. *Ibid*, para. 27.

⁴¹ The Legal Representative of the Victims (LRV) cautioned that same side war crimes are recognized under international humanitarian law and that Common Article 3 was irrelevant in determining the scope of protection of child soldiers who are not considered as regular members of armed forces. The LVR emphasized that children affected by armed conflict are unconditionally protected under international law. Furthermore, children, even as members of armed groups can be understood as not taking active part in hostilities. *Ibid*, paras. 32 and 33.

⁴² *Ibid*, para. 34.

⁴³ *Ibid*, para. 40.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, paras. 40 and 44.

⁴⁶ The Trial Chamber contends that such international customary law has been formed and recognized by instruments such as the Lieber Code, the 1949 Geneva Conventions and the Additional Protocol to the Geneva Conventions, international criminal jurisprudence of the ICTY and publications of learned scholars such as T. Meron and C. Bassiouni. *Ibid*, para. 46.

⁴⁷ *Ibid*, para. 47.

After invoking the aims of the Martens Clause to uphold the principles of humanitarian law and recognizing that the Fundamental Guarantees countenance no exception to humane treatment by any Party, the chamber articulated the incompatibility of sexual violence with the goals of military necessity or military advantage.⁴⁸ The chamber distinguished the legitimate targeting of a person, even a child soldier, during armed conflict, from the unjustifiable infliction of sexual violence against that person irrespective of the allegiance of the perpetrator.⁴⁹ The chamber's understanding of the established framework of international law was broader than the HL norms as forwarded by the Defence. As such, the chamber flatly refused, as vexing, the Defence's position that a child soldiers' participation in hostilities would be incompatible with conferring humanitarian protection.

Trial Chamber IV also underscored the *jus cogens* status of sexual slavery under international law. By a majority, the bench likewise recognized rape as having obtained *jus cogens* status.⁵⁰ When committed within the context of armed conflict, both peremptory norms can be characterized as war crimes.⁵¹

Moreover, the chamber found support in the Fundamental Guarantees of Article 75 in Additional Protocol I, interpreting it to apply to both the opposing party of the victim and the victim's party.⁵² It also found, as a general principle of law, that compounded criminality does not absolve an offender. The chamber stated:

It is further a recognised principle that one cannot benefit from one's own unlawful conduct. ... [B]y committing a serious violation of international humanitarian law by incorporating, as alleged by the Prosecution, children under the age of 15 into an armed group, the protection of those children under that same body of law against sexual violence by members of that same armed group would cease as a result of the prior unlawful conduct.⁵³

Consequently, Trial Chamber IV confirmed its jurisdiction over Counts 6 and 9 and ruled that same side victims are not *per se* excluded from the safeguards of rape

⁴⁸ *Ibid*, para. 48.

⁴⁹ *Ibid*, paras. 49-50. For emerging discussions about when child soldiers who are not directly or actively participating in hostilities can be targeted, as well as the occurrence of sexual violence perpetrated during hostilities, see René Provost, *Targeting Child Soldiers*, EJIL TALK, (Jan. 12, 2016), <http://www.ejiltalk.org/targeting-child-soldiers/>.

⁵⁰ *Ibid*, paras. 51.

⁵¹ *Ibid*, paras. 52.

⁵² *Ibid*, para. 111.

⁵³ *Ibid*, para. 53. The chamber cited in support rulings from the International Court of Justice that forbade States to recognize and maintain illegal situations in breach of their international obligations, (see, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 21 June 1971). It also invoked international law principles that disallowed any agreements that would adversely affect or restrict the rights of prisoners of war under the Third Geneva Convention or would disregard the special protection of children under Article 4(3)(d) of Additional Protocol II, even if captured after participating in hostilities.

and sexual slavery as enumerated in Article 8(2)(e)(vi).⁵⁴ The Defence promptly filed its notice of interlocutory appeal in regard to the Second Decision.⁵⁵

One academic commentator viewed the Second Decision as an expansive and not fully reasoned interpretation of Article 8(2)(e)(vi).⁵⁶ McDermott found unconvincing the chamber's proposition that war crimes did not necessarily have to be committed against protected persons. The flawed reasoning, she notes, was premised on examples under Article 8(2)(e) that relied upon treacherous killing of an enemy combatant or the *hors de combat* status of a fighter victim. McDermott queries whether the article's reach should encompass intra-party infliction of acts such as humiliating treatment, in spite of her acknowledgement of the Court's sincere concerns about sexual violence.

McDermott views the ICRC's updated commentary to Common Article 3, that urges all parties to an armed conflict to grant humane treatment to their own forces, as an impetus to the reasoning behind the Second Decision. Nonetheless, she anticipates future reactions and consequences for this expanded interpretation of Article 8 of the Rome Statute.⁵⁷

Another commentator took issue with the Second Decision's interpretation of Article 75 of Additional Protocol I.⁵⁸ Heller cautioned against the use of an international armed conflict provision to determine a non-international armed conflict issue, especially given that, in his view, Article 4 of Additional Protocol II refrains from expanding protection beyond civilians and persons *hors de combat*.⁵⁹ For him, NIAC protection only safeguards civilians and persons *hors de combat* including fighters who have laid down their arms, not active fighters. Also, Heller refuted the Trial Chamber's resort to the Martens Cause as ill-conceived judicial activism and norm creation.⁶⁰

While McDermott finds the Second Decision well intentioned but problematic, Heller strongly disagrees with an outcome he deems contrary to IHL.

II. The Ntaganda Appeals Judgment:

The Defence's second recourse to the appeals chamber squarely raised the issue of whether Trial Chamber IV erred in its legal conclusions in the Second

⁵⁴ *Ibid.* para. 54.

⁵⁵ Appeal on behalf of Mr. Ntaganda against Trial Chamber VI's 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707, 10 January 2017, ICC-01/04-02/06-1710 (OA 5).

⁵⁶ Yvonne McDermott, ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator, 5 January 2017. <https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>

⁵⁷ *Ibid.*

⁵⁸ Kevin Jon Heller, ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>

⁵⁹ Grey and the Prosecutor's submissions at the Pre-Trial would oppose Heller's narrow perspective of Article 4(3) of APII. *See, supra*, discussion in Section I. a.

⁶⁰ *Ibid.*

Decision. The Defence primarily advanced that the girl child soldiers in question were neither protected persons nor were they *hors de combat*. Therefore they could not be considered “victims” under Article 8(2)(e)(vi)’s proscription of other serious violations of the laws and customs of war in NIAC. The Appeals Chamber independently set about to determine whether Article 8(2)(e)(vi) required that victims have a protected status and to interpret the phrase “established framework of international law”.

The Appeals Chamber assessed the plain meaning of Article 8(2)(e)(vi). It was drafted, the Appeals Chamber found, to distinctively outlaw wartime rape and sexual slavery without an express or limiting pre-requisite that victims must be protected persons à la the Geneva Conventions or be persons who were *hors de combat*.⁶¹ In other words, there was no status requirement of the victim. Indeed, if the victims of Article 8(2)(e)(vi) did have a protected status that overlapped with Article 8 (2) (b) (xxii) and (e) (vi), such redundancy was not necessarily unintended or fatal to the pursuit of the crimes.⁶² Therefore, the Appeals Chamber concluded that the *Second Decision*’s ruling that there was no status requirement under Article 8(2)(e)(vi) was not erroneous.⁶³

Next, the Appeals Chamber sought to determine whether the phrase, of “established framework of international law” introduced other requirements into Article 8(2)(e)(vi) that would render the *Second Decision* erroneous. As a preliminary matter, the Appeals Chamber interpreted the established framework of international law as permitting recourse to customary and conventional international law, in particular IHL.⁶⁴ In general, the established framework of international law mandated that victims had to be protected persons under the Geneva regime or *hors de combat* in line with Common Article 3. The Appeals Chamber recognized that IHL sought to safeguard vulnerable persons, typically enemy combatants or enemy civilian as set forth in the Third and Fourth Geneva Conventions.⁶⁵ Furthermore, it underscored that the First and Second Geneva Conventions made compulsory the protection of the wounded and shipwrecked in all circumstances, irrespective of party affiliation.⁶⁶ Case law in the aftermath of World War II that aimed at pursuing crimes committed against Allied nationals exemplified the paradigm of protection accrued to enemy nationals. The Appeals Chamber’s reading of the Geneva Conventions and the case law failed to detect any general rule in IHL that stipulated that intra-party victims must be excluded from the safeguards of the prohibitions.⁶⁷

As pertains to victims of rape and sexual slavery, the Appeals Chamber found no conceivable reason to justify such criminal conduct⁶⁸ irrespective if the person, otherwise, may be legally targeted in armed combat.⁶⁹ Furthermore, the established framework of international law did not “reframe” rape or of sexual slavery as war crimes by stipulating that proof of protected person status or of *hors de combat*

⁶¹ Appeals Judgment, para. 48.

⁶² *Ibid*, paras. 49-50.

⁶³ *Ibid*, para. 51.

⁶⁴ *Ibid*, para. 53.

⁶⁵ *Ibid*, paras. 57-58.

⁶⁶ *Ibid*, para. 59.

⁶⁷ *Ibid*, paras. 62-63.

⁶⁸ *Ibid*, paras. 64-65.

⁶⁹ *Ibid*.

circumstances exist. In other words, the Appeals Chamber found with regard to the established framework of international law, that members of an armed force or group are not *per se* or categorically excluded from the protection of war crimes of rape and sexual violence when committed by members of the same armed forces or group.

*Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed forces, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery*⁷⁰

It is the absence of any pre-requisite status of the victim that actually aligns with the established framework of international law.⁷¹

The only requirement under Article 8(2)(e) is a nexus to an armed conflict. The Appeals Chamber opined that this nexus sufficiently and appropriately delineates war crimes from ordinary crimes.⁷² Hence delving into any examination of whether the victims were actively participating in hostilities or were protected persons is rendered moot. The Appeals Judgment ultimately upheld the *Second Decision* and found no legal error in the Trial Chamber's rulings. It affirmed that the Court exercised jurisdiction over Counts 6 and 9.⁷³

To date, scholarly commentary on the Appeals Judgment has been scarce. Scholars, practitioners and courts, both national and international, will undoubtedly contemplate the holding and provide their assessment. One commentator has asserted that the outcome is unlawful.⁷⁴ Keller finds that the decision requires Ntaganda to answer to conduct that does not violate a positive rule of IHL for non-international armed conflict. He agrees that the First and Second Geneva Conventions protect the wounded and shipwreck from inhumane acts, including rape and sexual slavery irrespective of the party perpetrating such conduct. He finds no contestation for protecting any person when *hors de combat*.

However, he distinctly challenges the Appeals Judgment's position that IHL "generally" protects civilians and *hors de combat* combatants. Keller avers that IHL protection applies "only to those two categories" of individuals and that plain treaty interpretation of Article 8(2)(e) is limited to those specific rules. The Appeals Judgment, he argues, subverts a long-standing norm, namely that a war crime "must violate a rule of IHL". Furthermore, he notes that the burden to prove the existence of a rule that demonstrates a violation of IHL remains with the Prosecutor, not the Defence.⁷⁵ Nor, in his opinion, does the Appeals Judgment's reliance on Article 75 of Additional Protocol I, which governs IAC support the Courts logic and nor does any activist reliance on the Martens Clause.

Essentially, Keller reiterates the Defence position that the Geneva Conventions and Common Article 3 status requirements govern the application of the

⁷⁰ *Ibid*, para. 65.

⁷¹ *Ibid*, paras. 66-67.

⁷² *Ibid*, para. 68.

⁷³ *Ibid*, 69-71.

⁷⁴ Kevin Jon Heller, ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>

⁷⁵ *Ibid*.

protective mechanism of humanitarian law.⁷⁶ Heller makes no reference to Article 4(3) of APII that addresses special protection of children in relation to Article 4 safeguards from sexual violence.

Another commentator agrees with the outcome of the Appeals Judgment.⁷⁷ Luigi Prospero, however, objects to the circumscribed rationale of the Appeals Chamber. He asserts that the chamber should have relied upon a more strident invocation of Article 21 (3)'s recognition of human rights law as an interpretive source to proscribe sexual violence and upon the Rome Statute's teleological aim in regard to children as reflected in Article 8(2)(e). Prospero especially deems it imperative that the Court exercise jurisdiction over rape and sexual slavery of child soldiers when those crimes originate from the perpetrators' prior unlawful conduct. Here, Prospero echoes the Trial Chamber's Second Decision. He directly takes issue with Heller's stance that IHL does not "generally and categorically prohibit" pursuit of rape and sexual slavery. Moreover, without recalling the references to the Martins Clause, he points to the "evolutionary nature" of the Rome Statute exemplified by its adherence to the interpretation of international human rights law. Thus, it is justifiable, according to Prospero, that such interpretation finds resonance in Article 8(2)(e)(vi).

III. A Complementary Analysis:

This author agrees with the outcome of the Appeals Judgment in Ntaganda. Similar to Prospero's critique of looking at a broader legal basis, it is offered that the Appeals Judgment could have referred to other relevant legal precepts when determining the content of the "established framework of international law. This might have better honed the legal incompatibility of sexual violence and the special protection owed to children under IHL. In particular, little detected proscriptions of intra-party sexual violence, as framed in provisions of API and APII and in the Third Geneva Convention, could have strengthened the reasoning the Appeals Judgment.

To illustrate, even though the Appeals Chamber looks at Article 75 of Additional Protocol I, it overlooks the Article 77 of Additional Protocol I. Article 77(1) addresses the special respect owed children, including protection from sexual violence, committed by any Party to an IAC.⁷⁸ Article 77's provisions develop "both the Fourth Geneva Convention and other rules of international law".⁷⁹ Significantly, the *Pictet Commentary* interpretation of Article 77 is that:

⁷⁶ *Ibid.*

⁷⁷ Luigi Prospero, The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in Ntaganda <http://opiniojuris.org/2017/06/27/33178/>

⁷⁸ Article 77(1) of Additional Protocol I to the Geneva Conventions of 12 August 1949 reads: Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

⁷⁹ Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 3176, para. 899.

The article not subject to any restrictions as regards its scope of application; it therefore applies to *all* children who are in the territory of States at war, whether or not they are affected by the conflict.⁸⁰

Article 77(1) states, and therefore intends, that all children ‘*shall* be the object of special respect and *shall* be protected against *any* form of indecent assault’. The ICRC commentary to Rule 93 clarifies that ‘any form of indecent assault’ performs a residual function⁸¹ to cover sexualized conduct that contravenes humane treatment, such as rape and sexual slavery. The ICRC commentary also cites to Article 77 as upholding this principle in regard to children.⁸² Any other form of indecent assault, likewise, must be read in context with outrages upon personal dignity, enforced prostitution and other sexual assault conduct prohibited in Article 75(2)(b) and Article 76(1).⁸³

Article 77(1)’s obligation is mandatory. As constructed, the obligation requires the protection of children from indecent assault by members of their own party or the opposing party. Article 77(3) requires that when children who have taken part in hostilities fall into the hands of an adverse party, that such adverse party must *continue* to afford them special protection, whether detained as POWs or not.⁸⁴ The obligation to provide special respect and protection from indecent assault is continuous and not diminished by the fighter status or the civilian status of the child, even while in the hands of their own party. The plain reading of the provision safeguards any child who takes part in hostilities ‘against any form of indecent assault’ including intra-party sexual violence.⁸⁵ It further safeguards them from sexual assault committed when detained by adversaries.

The Appeals Chamber could have cited to Article 77 as reflective of a specific rule of IHL that proscribes sexual violence against all children irrespective of their affiliation or their engagement in an IAC. Article 77 does not, on its face, condition its enforcement on any grounds other than age. Parties are specially directed to include child soldiers within this protection. Article 77 proscription of any form of sexual violence against all children could be indicative of a customary norm of international law, irrespective of the characterization of the conflict.⁸⁶

⁸⁰ *Ibid*, para. 3177.

⁸¹ ICRC CIHL Study, Rule 93. Vol. I., p.324.

⁸² *Ibid*.

⁸³ *Ibid*. See, Patricia Viseur Sellers and Indira Rosenthal, ‘*Rape and Sexual Violence*’, THE GENEVA CONVENTIONS IN CONTEXT: A COMMENTARY, Profs. Clapham, Geata and Sassoli, eds. Oxford University Press (2015), pp. 356-357.

⁸⁴ Article 77(3) of Additional Protocol I to the Geneva Conventions of 12 August 1949 reads: If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall *continue to benefit from the special protection* accorded by this Article, whether or not they are prisoners of war. Emphasis added.

⁸⁵ See, Patricia Viseur Sellers and Indira Rosenthal, ‘*Rape and Sexual Violence*’, *supra*, fnt.83, pp. 356-357.

⁸⁶ ICRC CIHL Study, Rule 93. Vol. I., p.323; See, Patricia Sellers, *Child Soldiers - Protected beyond Gender? An International Criminal Law Perspective*, UNIVERSITY OF OXFORD PODCASTS, (Nov. 26, 2013), <http://podcasts.ox.ac.uk/child-soldiers-protected-beyond-gender-international-criminal-law-perspective-0>.

Article 77 of API applies to IAC. That is uncontested. Keller rejected the Trial Chamber's reliance on Article 75 of AP I based on its IAC jurisdictional requirement. Grey refuted Article 77's applicability, an analysis that relied upon commentary that predated the ICRC CIHL study linking sexual violence and Article 77(1) to children.⁸⁷ Grey also failed to grasp the meaning that "continued" protection implies that it is owed by the adversary in the eventuality of capture, and also owed previously to children by their own party. The protection is ongoing. While the direct applicability of Article 77 is dependent upon the ultimate characterization of the armed conflict, the principle that each party bears responsibility for any form of indecent assault against children must be recognized as broader than the jurisdictional pre-requisites. With this understanding, the Appeals Chambers might have countered the dismissive reasoning in the *Prosecutor. v. Augustine Gbao et al* case handed down by the Special Court for Sierra Leone,⁸⁸ by contemplating the customary rule enunciated in Article 77. This author advances that the compounded customary norms of the proscription of sexual violence and Article 77's proscription of sexual violence against any child by any party should have informed the discussion of "established framework of international law" in the Appeals Judgment. Moreover, this customary rule of IAC resonates in NIAC under Article 4(3) of Additional Protocol II.⁸⁹

Since the submission by the Prosecutor at the pre-trial stage, Article 4(3) has drawn little judicial notice even though it parallels the Article 77(3) interdiction. As previously stated, Pre-Trial Chamber II relied upon Article 4(3)(c) of Additional Protocol II to refute the premise that a child's mere membership in an armed group be equated with determinative proof of direct/active participation in hostilities.⁹⁰ The special protection afforded children under Article 4(3) logically incorporates and further specifies the sexual violence and slavery prohibitions contained in Article 2(e) and (c).⁹¹ Article 4(3)(c) and (d)'s drafting process was contemporaneous to that of Article 77.⁹² The "continued" proscription of sexual violence found in Article 77(3) of API for children who participate in hostilities and who are captured, also, is reflected in Article 4(3). The wording differs slightly. Article 4(3)(d) states that the "special protection shall remain applicable" in regard to children who engage in

⁸⁷ Grey, *supra*, *fn*t.27, pp. 605-606.

⁸⁸ Appeals Judgment, para. 63.

⁸⁹ Article 4(3) of Additional Protocol II reads in part:

3. Children shall be provided with the care and aid they require, and in particular: ... d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph c) and are captured; ...

Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II), of 8 June 1977, Article 4(3). http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.35_AP-II-EN.pdf. The author acknowledges Giuliana Saldarriaga Velásquez, Oxford University Masters Candidate, for her insights on Article 4(3) of APII.

⁹⁰ *Supra*, Section I.

⁹¹ Article 4(2) reads in part:

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;

⁹² Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 1380, para.4558.

hostilities and are captured. The Commentary to Article 4(d) of APII notably is entitled, “Sub-paragraph (d) - Continued protection in the case that sub-paragraph (c) is not Applied.”⁹³ Sub-paragraph (c) refers to the illicit recruitment of children in armed groups. The continued protection in sub-paragraph (d) exists for children who, in spite of the sub-paragraph (c) prohibition of recruitment, partake in hostilities and are captured.

Grey offers that Article 4(3)(d) creates an exception to the general protections in Article 4(2) of AP II, which apply only to “persons who do not take a direct part or who have ceased to take part in hostilities.”⁹⁴ The exception Grey envisions is limited to children engaged in hostilities. The commentary to Article 4(3)(d), however, suggests more expansive coverage that extends to all recruited children, especially those under 15 years of age. It reads:

It should be recalled that the aim of this provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will continue to enjoy privileged rights in case the age limit of fifteen years laid down in subparagraph (c) is not respected. In this case making provision for the consequences if any possible violation tends to strengthen the protection.⁹⁵

A coherent reading of Article 4(3)(d)’s purpose would be to protect child soldiers, of all ages, including those engaged in hostilities. The special protection is in vigor during recruitment according to 4(3)(c). Such protection *shall remain* whenever an adversary captures child soldiers. There is a continuum of protection. This reading inevitably entails the protection of child soldiers from intra-party sexual violence, similar to the special protection of Article 77 of API.

The norm that children are to always be spared sexual violence is found in the entirety of Article 4(3). Its mandatory application evinces a rule. Its applicability to same side perpetrators is a cogent interpretation of the special protection offered child soldiers under sub-paragraph (c) or the interpretation of the inter-action of sub-paragraphs (c) and (d). This author suggests that the Appeals Judgment could have considered a closer reading of Article 4(3) and the relevant commentary to inform its observations of the established framework of international law in regard to Article 8(2)(e)(vi).

Furthermore, the Trial and Appeals Chamber enunciated a restrictive view of the Third Geneva Convention in terms of intra-party harm. A more astute interpretation of the Third Geneva Convention might have found the reiteration of a norm in the seldom sighted to Pictet Commentary to Article 25 (4)(c). That provision obliges a Detaining Party to separate prisoners of war according to gender in order to avoid the Detaining Party’s responsibility, *inter alia*, for prisoners of war committing intra-party sexual violence.⁹⁶ The requirement for sex-segregated accommodation in Article 25 paragraph 4 of GC III, Pictet notes, was intended to ensure that male POWs

⁹³ *Ibid.*

⁹⁴ Grey *supra*, fnnt 27, p. 608.

⁹⁵ Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 1380, para.4559.

⁹⁶ Pictet Commentary GC III on Art 25 (Quarters), at 195.

could not access female POW quarters to commit sexual abuse. Although the Detaining Power would be liable for such prohibited acts, clearly the underlying policy of this Geneva rule is to safeguard detained combatants from intra-party sexual violence, irrespective of age. To that extent, the First, Second and Third Geneva Conventions disallow intra-party sexual violence. This precept should have been folded into the Appeals Judgment's understanding of the "established framework of international law".

A complementary reading of Article 77 of API, Article 4(3) of APII and Article 25(4)(c) of the Third Geneva Convention could have convincingly pointed to a customary norm to prohibit intra-party sexual violence especially for children, including child soldiers. Combined with the updated ICRC Commentary, the Appeals Judgment might have articulated a positive rule rather than the absence of a contrary rule that eschews the intra-party protection of child soldiers from sexual violence. Read together, the instruments are coherent and quite logical in their posture that children and child soldiers must be as protected from sexual violence in NIAC as they are in IAC, even without having to lay down their arms.

IV. Re-Alignment of a Paradigm:

Ntaganda does not shatter, rather it re-aligns, the normative war crimes paradigm that prohibits intra-party sexual violence. It illuminates the extent of protection afforded children, especially those associated with armed groups or armed forces. Perhaps, Ntaganda also warrants the articulation of policy rationales to re-enforce such realignment.

The Ntaganda rulings could be strictly construed as only applying to children. Crimes concerning the recruitment of children, whether specified as enlistment or conscription, stand as the customary exception to the paradigm of opposite-side harms. If there were a "silent" peremptory norm it would be the recruitment of children and their use in hostilities. No modern justification pardons the transgressions of child-related crimes under international humanitarian law. The Ntaganda facts reveal how the compounded peremptory harms of rape and of slavery accompany the infliction of war crimes related to child soldiers. Ntaganda does not sidestep nor evade registering the entirety of the criminal conduct. Absent Ntaganda, redress of crimes must be severed and pursued in separate jurisdictions. Rape and slavery, would then constitute military disciplinary matters, isolated and removed from their contextualization of recruitment crimes concerning child soldiers. Judicial bifurcation readily deforms and belittles the complex nature of the harms inflicted upon child soldiers. The Appeals Judgment takes aim at the overlap of intra-party war crimes, in real time, by keeping in sight the compounded suffering of the victims and the multiple acts of the perpetrators.

Another manner to contemplate the Appeals Judgment resides in its provision of special protection for all children, irrespective of their illicit status as members of the armed group. In IAC, Article 77(1) protects children from sexual violence by all parties under all circumstances. In NIAC, under Article 4(3) children are protected from sexual violence even when they have not laid down their arms and when they are captured. Absent the ruling of Ntaganda, children who are members of armed

groups or who are participating in hostilities can be subjected to sexual violence without recourse to protection from such conduct as a war crime, even though their illicit recruitment and use in hostilities is predicated on a nexus to armed conflict. Obviously, they stand in an unequal position, read an adversely discriminatory position, *vis a vis* other children. This situation is particularly aggravating regarding child soldiers, given the Lubanga jurisprudence that found child soldiers legally incapable of consenting to their recruitment.⁹⁷ Under other Rome Statute provisions they are, likewise, genuinely unable to consent to sexual violence and under international customary law they are legally estopped from consenting to any form of slavery. Child soldiers are subjected to complex layers of criminality through none of their own volition. Ostensibly, child soldiers are adversely affected, compared to other children in NIAC and IAC situations, when their subjugation to intra-party sexual violence is not redressed.

There is another determinate other than age - the *jus cogens* nature of wartime slavery and rape. Irrespective of the Ntaganda Appeals Judgment the violations of peremptory norms invoke *erga omnes* obligations that inure to each state of the international community. The pursuit of enslavers remains an obligation regardless of the status of the victims or their relationship to the perpetrators. If slavery and wartime rape are impermissible in all circumstances, then inserting qualifiers upon the victims or perpetrators legally circumscribes the circumstances. As Trial Chamber IV seems to have inferred, privileging the doctrine of military necessity or military advantage would effectively disallow redress of sexual slavery and undermine obligations related to the peremptory norm. Moreover, serious war crimes, such as the grave breaches are, themselves, peremptory norms. Allowing a narrow reading of the Geneva mechanisms to result in the selective enforcement of peremptory norms is disconcerting. Is there a hierarchy of peremptory norms? Is the *jus cogens* status and the attendant *erga omnes* obligations of rape and slavery of less value than the *jus cogens* status of other war crimes?

V. Conclusion:

Re-alignment of the normative war crime paradigm treads on hallowed legal grounds. Identification, articulation, crystallization, codification, enforcement of each prohibition treks a seemingly fragile path until yielding to a steadily durable paved road of redress. The Ntaganda Appeals Judgment's recognition of jurisdiction for rape and slavery committed against child soldiers by members of their own forces has undertaken the journey. The Appeals Judgment based on Article 8(2)(e)(vi) of the Rome Statute binds the Court and possibly will persuade other internationalized jurisdictions. Its response to the inquiry of "who" owes protection to child soldiers for crimes of sexual violence is none other than the perpetrators.

⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06, 14 March 2012, paras. 613-618.

