

**Intra-party sexual crimes against child soldiers  
as war crimes in *Ntaganda*.  
'Tadić moment' or unwarranted exercise of judicial activism?**

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1. *Introduction*

Consideration of the especially pernicious consequences of armed conflicts on the life, health and socio-economic conditions of children has elicited a vast literature in diverse fields of social sciences in recent years. International law, and particularly international humanitarian law (IHL), has been at the center of this discussion in light of the pertinent rules of conventional and customary law, as well as the position articulated on the subject by states, international organizations and other prominent actors such as the International Committee of the Red Cross (ICRC).<sup>1</sup> Significant contributions to this debate also came from the case law of international criminal tribunals, whose practice raised the awareness on the traditionally under-reported and under-prosecuted conducts impacting on children in the context of armed conflicts.<sup>2</sup> In this vein,

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<sup>1</sup> As regards the position of international organizations, see, recently, the annual reports of the UN Secretary-General, adopted pursuant to UN Doc S/Res/2225 (2015) (18 June 2015). One of the most relevant examples of the fundamental role of the ICRC is connected to the analysis of international practice carried out by the Committee. On the issue of child soldiers, see ICRC, *Customary International Humanitarian Law* (online IHL database), Rule 136. Recruitment of Child Soldiers <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule136](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136)>.

<sup>2</sup> For instance, the Office of the Prosecutor of the International Criminal Court recognizes that crimes against children have been traditionally under-prosecuted, thus warranting particular attention in the Office's selection and charging practices. See ICC Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) para 46. For reference to the case law of international tribunals, see (n 4) below.



conducts such as the enlistment, conscription and use of children under the age of fifteen to participate actively in the hostilities, already proscribed under IHL,<sup>3</sup> were explicitly elevated to war crimes under the Statute of the International Criminal Court (ICC) and the Statute of the Special Court for Sierra Leone (SCSL), thereby allowing the first prosecutions for these crimes.<sup>4</sup>

Children associated with armed groups are frequently subject to harsh treatment, sometimes involving conducts impinging upon their sexual integrity. These include various forms of violence such as rape, forced pregnancy, enforced sterilization and prostitution, and sexual slavery.<sup>5</sup> These conducts disproportionately affect female child soldiers, although male child soldiers are also targeted.<sup>6</sup> The occurrence of these conducts in intra-party relations both in international and non-international armed conflicts (IAC and NIAC respectively), ie among fellow soldiers of the same armed

<sup>3</sup> See art 77(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I) (8 June 1977) 1125 UNTS 3 and art 4(3)(c) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) (8 June 1977) 1125 UNTS 609, which contain an absolute prohibition against the recruitment in armed forces of children under the age of fifteen and of their use to participate actively in the hostilities. On the customary nature of the prohibition, see ICRC, *Customary International Humanitarian Law* (n 1) Rule 136.

<sup>4</sup> See art 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court, Doc A/CONF.183/9 (17 July 1998) (ICC Statute); art 4(c) of the Statute of the Special Court for Sierra Leone (16 January 2002), which both use the terms 'conscripting' and 'enlisting', instead of the term 'recruiting' used in the Additional Protocols. Case law of both courts clarified that the conducts of conscripting, enlisting or using are not cumulative elements of a single crime, but three discrete criminal offences. See *Prosecutor v Lubanga*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I (14 March 2012) (*Lubanga* Trial Judgment) para 609; *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, Trial Chamber (20 June 2007) para 733; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-A, Judgment, Appeals Chamber (28 May 2008) para 139. For an analysis of the differences between conscripting and enlisting, see NHB Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) 11 Chinese J Intl L 657, 673-679.

<sup>5</sup> These crimes are listed under art 8(2)(b)(xxii) and 8(2)(e)(vi) ICC Statute, in international armed conflicts and non-international armed conflicts respectively.

<sup>6</sup> This is a reflex of the fact that, in general, sex-related crimes disproportionately affect females. This has been internationally recognized by the Committee for the Elimination of Discrimination against Women (CEDAW) in art 6 of General Recommendation No 19 on Violence against women, UN Doc A/47/38 (29 January 1992).



force or group, has recently attracted scholarly attention, particularly in light of the controversial decisions of three different Chambers of the ICC in *Ntaganda*.<sup>7</sup>

The present contribution aims at clarifying the terms of the normative conundrum regarding the possibility to characterize conducts of sexual violence against child soldiers in intra-party relations as war crimes in NIAC, with particular regard to the relationship between the Rome Statute and the underlying framework of international humanitarian law (Section 2).<sup>8</sup> It goes on to analyze the diverging interpretive solutions provided by the Pre-Trial, Trial and Appeals Chamber (PTC, TC and AC, respectively) of the ICC in *Ntaganda*, in reaching the shared conclusion that intra-party sexual crimes committed against child soldiers could constitute war crimes under the Rome Statute (Section 3). A critical assessment of the reasoning of the Chambers — particularly that of the TC and AC — is then conducted both from an international law point of view and from an international criminal law (ICL) point of view (Section 4). The additional issues connected to the legal characterization of these conducts when involving children associated with terrorist groups are also briefly analyzed (Section 5). The article concludes by assessing the scope of the recent case law and its potential consequences on the future development of both IHL and ICL, suggesting that progress in the protection of children in armed conflict cannot be achieved solely through the judicial extension of individual criminal liability for war crimes.

## 2. *The traditional view on the scope of IHL in intra-party relations, with particular regard to sexual crimes against children: When “Status” matters*

The traditional doctrinal view on the scope of application of IHL holds that this branch of law is primarily — although not exclusively —

<sup>7</sup> See, eg, R Grey, ‘Sexual Violence against Child Soldiers’ (2014) 16 Intl Feminist J of Politics 601; T Rodenhäuser, ‘Squaring the circle?: Prosecuting Sexual Violence against Child Soldiers by their “Own Forces”’ (2016) 14 J Intl Criminal Justice 171; O Svaček, ‘Brothers and Sisters in Arms As Victims Of War Crimes: Ntaganda Case Before The ICC’ (2017) 8 Czech YB Intl L 346.

<sup>8</sup> Reference to the ‘established framework of international law’ is contained in the *chapeaux* of art 8(2)(b) and 8(2)(e) ICC Statute, before the list of the other serious violations of the laws and customs of war applicable in IAC and NIAC.

concerned with the relations among members of opposing parties to an armed conflict and not with those occurring within the same armed force or group. Therefore, in principle, ‘crimes committed by combatants of one party to the conflict against members of their own armed forces do not constitute war crimes’.<sup>9</sup> Obviously, this does not mean that IHL imposes no obligation at all in intra-party relations, for instance as regards the treatment of fellow soldiers who are wounded or sick.<sup>10</sup> Nevertheless, as far as the relationship between primary rules of IHL and secondary rules generating international criminal responsibility is concerned, this view avers that there is a necessary correlation between the emergence of individual criminal responsibility for war crimes and the violation of an underlying conventional or customary rule of IHL. In other words, all conducts amounting to war crimes must also be a violation of IHL.<sup>11</sup> This position, while contested or criticized as excessively restrictive by other authors,<sup>12</sup> finds support in state practice and in part of the case law of international criminal tribunals (at least before the decisions in *Ntaganda*).<sup>13</sup>

<sup>9</sup> See, eg, A Cassese, P Gaeta (eds), *Cassese’s International Criminal Law* (OUP 2013) 67. This position is shared by KJ 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/>>, in his critique of the AC’s jurisdictional decision in *Ntaganda*, based on the textual analysis of the statutes of international tribunals, which invariably connect the commission of war crimes to underlying violations of IHL (either in the form of ‘grave breaches’, ‘serious violations’ of Common Article 3, or ‘other serious violations of the laws and customs’ applicable in international and non-international armed conflicts).

<sup>10</sup> See, eg, art 12 of First Geneva Convention (GC I); art 13 of the Second Geneva Convention (GC II); art 10(1) of API, all concerning the obligation to respect and protect the wounded, sick and shipwrecked irrespective of the party to which they belong.

<sup>11</sup> In this sense, KJ Heller (n 9).

<sup>12</sup> See, e.g., S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 247-248; J Kleffner, ‘Friend or Foe? On the Protective Reach of the Law of armed Conflict’ in M Matthee, B Toebe, M Bras (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (Asser Publisher 2013) 285, 291.

<sup>13</sup> Two instances of state practice are cited as evidence in support of this position by A Cassese (n 9), namely the post-war cases *In Re Pilz*, Judgment, Dutch Special Court of Cassation (5 July 1950), Intl L Reports, vol 17, 391 and *Trial of Susuki Motosuke*, Netherlands Temporary Court-Martial at Ambonia, Case no 77 (28 January 1948), Law Reports of Trial of War Criminals, selected and prepared by The United Nations War Crimes Commission, vol XIII (1949) 126. The SCSL clearly subscribed to this position in *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, Trial Chamber (2 March 2009) (*RUF Trial Judgment*) paras 1451-1453. The absence of state practice



This approach, making international criminal responsibility conditional on a violation of underlying rules of IHL, makes it problematic to conceptualize intra-party conducts as war crimes, especially in NIAC. This is particularly the case when IHL does not clearly stipulate that certain prohibitions are applicable also in intra-party relations, or limits their applicability to situations in which the victims possess a specific *status* (for instance, that of person not taking direct or active part in the hostilities or of *hors de combat*).<sup>14</sup> The situation of intra-party sexual violence — of which sexual violence against child soldiers is a *species* — is a perfect case in point. It is true that certain special guarantees stipulated in favor of children by Article 4 of Additional Protocol II might apply also when children under the age of fifteen take a direct part in the hostilities, but this appears to be conditional on the fact that they are ‘captured’ by the opposing party.<sup>15</sup> As a matter of fact, when children under the age of fifteen can be said to be members of an armed group in the context of NIAC and as long as they directly or actively participate in the hostilities (DPH/APH), it is difficult to conclude that under IHL they enjoy protection against sex-related violence by their fellow soldiers and that those conduct qualify as war crimes.<sup>16</sup>

pointing to the conclusion that intra-party sexual violence is *per se* a war crime even if does not violate IHL has been acknowledged by the ICC itself in *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-1962, 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”, Appeals Chamber (15 June 2017) (*Ntaganda* Appeal Jurisdictional Decision) para 60.

<sup>14</sup> Compare art 27 of the Fourth Geneva Convention and art 75(2)(b) of AP I concerning IAC, which explicitly refer to sex-related offences, with the applicable rules in NIAC, particularly Common Art 3 (which does not contain a specific reference to sex-related offences, but prohibits cruel treatment and torture as well as ‘outrages upon personal dignity’ that according to case law of the *ad hoc* tribunals comprise sex-related crimes) and art 4(2)(e) and (f) of AP II respectively relating to rape, enforced prostitution and any form of indecent assault and to slavery (of which sexual slavery is a specific form).

<sup>15</sup> Art 4(3)(d) of AP II. Nevertheless, Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 4559, do not comment upon the condition of capture, focusing on the purposes of the provision and implying that the special protection applies as long as the child is under the age of fifteen.

<sup>16</sup> In IAC this is far less contentious, since art 75(2)(b) of AP I does not make reference to the civilian or *hors de combat* status, and only requires that the person be ‘in the power of a Party to the conflict’. As it will be seen in the analysis of the ICC’s decisions in *Ntaganda*, the concept of membership to an armed group and that of DPH/APH

Even more recent and progressive doctrinal contributions, while advocating the applicability of various rules of IHL also to intra-party relations and irrespective of affiliation in NIAC, continue to maintain that the enjoyment of protection — and by implication the configurability of war crimes — depends on the condition that the persons concerned do not DPH/APH. In other words, they argue in favor of an objective conduct-based requirement instead of a purely subjective status-based requirement, but do not go as far as to consider intra-party conducts punishable as war crimes under all circumstances and irrespective of the status or conduct of the alleged victims.<sup>17</sup> For instance, the 2016 ICRC Commentary to the First Geneva Convention expresses the position that Common Article 3 (CA3) applies also to relations among members of the same armed group,<sup>18</sup> but still requires that the person concerned is taking no active part in the hostilities, which comprises having laid down the arms or being *hors de combat*.<sup>19</sup>

### 3. *Intra-Party sexual crimes as war crimes: Does the ICC Statute import a ‘Status Requirement’ from IHL? The Court’s decisions in Ntaganda*

Whereas IHL still imposes a status requirement (or at least a conduct-based requirement) for the enjoyment of protection against sexual violence in intra-party relations and their characterization as war crimes in NIAC, it cannot be excluded that treaty-based regimes of international criminal justice such as the ICC could do away with such requirement under the specific definition of the crimes. The issue of whether or not the Rome

should be carefully distinguished in order to properly apply the relevant provisions in concrete circumstances.

<sup>17</sup> See, eg, JK Kleffner, ‘The Beneficiaries of the Rights Stemming from Common Article 3’, in A Clapham, P Gaeta, M Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 435-436, where it is argued that the only requirement to enjoy the protection under CA3 is that the person ‘abstains from actively participating in the hostilities’. As it will be seen in the next section, the TC and AC in *Ntaganda* have affirmed that acts of sexual violence in intra-party relations can constitute war crimes irrespective of the specific status or conduct of the alleged victims, provided that the contextual elements of war crimes are satisfied.

<sup>18</sup> See ICRC, *Commentary to the First Geneva Convention of 1949* (2nd edn, ICRC 2016) paras 545-547. It should be noted that the Commentary cites as evidence of this conclusion the decision of the PTC in *Ntaganda*.

<sup>19</sup> *ibid* paras 518-519.



Statute imports from IHL a status requirement and makes it a constituent element of the sex-related offences listed under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) has been one of the central questions in the *Ntaganda* case. The Office of the Prosecutor (OTP) had included in the Document Containing the Charges (DCC) two counts concerning sex-related crimes as war crimes, namely rape and sexual slavery allegedly committed against child soldiers recruited in the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) by fellow soldiers of the same armed group.<sup>20</sup> On at least three occasions the defence for Ntaganda challenged the Court's jurisdiction based on the argument that sexual violence in intra-party relations, not being a violation of underlying rules of IHL, could not amount to a war crime under the Statute, and that any extension of the scope of application of Article 8 to that effect would violate the principle of legality enshrined in Article 22 of the Statute.<sup>21</sup> Three different Chambers rejected this view and affirmed the Court's jurisdiction, although based on different reasonings and interpretive strategies.<sup>22</sup>

<sup>20</sup> ICC Office of the Prosecutor, *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-203-AnxA, Document containing the Charges (10 January 2014) paras 100-108 (Count 6, rape as war crimes and Count 9, sexual slavery as war crime).

<sup>21</sup> See *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-T-10-Red-ENG, Transcript of Hearing (13 February 2014) 27 lines 15-25; Defence for Ntaganda, *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-804, 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 (1 September 2015) paras 44-46; Defence for Ntaganda, *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-909 (OA 2), 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 (19 October 2015); Defence for Ntaganda, *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-1256, Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges (7 April 2016).

<sup>22</sup> *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II (9 June 2014) (*Ntaganda* Confirmation of Charges Decision); *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI (4 January 2017) (*Ntaganda* Second Decision on Jurisdiction); *Ntaganda* Appeal Jurisdictional Decision (n 13).

The Pre-Trial Chamber ruled on the matter in its decision on the confirmation of charges, based on a clever reasoning aimed at preserving the normative symmetry between primary and secondary rules of IHL, while ensuring that sexual violence against particularly vulnerable persons would not go unpunished. In essence, PTC II first argued that a distinction between membership to an armed group and DPH/APH must be drawn, and that the former does not necessarily and in all circumstances imply the latter.<sup>23</sup> More importantly, preliminary judges clarified that whether or not child soldiers allegedly victims of intra-party sexual crimes come under the protection of IHL had to be determined with regard to the specific moment in time in which they were subject to rape or sexual slavery.<sup>24</sup> At the relevant point in time child soldiers could not be considered as DPH/APH, in light of the coercive character and the exercise of a right of ownership implicit in sexual crimes. Hence, they could be equated to *hors de combat* and the sex-related offences against them could be qualified as violations of IHL generating individual criminal liability for war crimes.<sup>25</sup>

The Trial Chamber, after having initially refused to decide on a second jurisdictional challenge and after having been directed to entertain it by the AC,<sup>26</sup> reached the same conclusion of the PTC, but based on a different and less convincing line of argument.<sup>27</sup> Trial judges affirmed that Article 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute do not incorporate the status requirement, hence the corresponding conducts could constitute war crimes even if committed against persons that do not qualify as pro-

<sup>23</sup> *Ntaganda* Confirmation of Charges Decision (n 22) para 78.

<sup>24</sup> *ibid* para 79.

<sup>25</sup> *ibid* para 80.

<sup>26</sup> *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-892, Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI (9 October 2015) para 28; *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-1225, 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", Appeals Chamber (22 March 2016) para 40.

<sup>27</sup> *Ntaganda* Second Decision on Jurisdiction (n 22).





tected persons in the sense of the grave breaches regime (for IAC) or serious violations of CA3 (for NIAC).<sup>28</sup> The Chamber, besides textual, contextual and historical analysis of the pertinent provisions of the Statute, considered that the ‘established framework of international law’ allowed such conclusion as a result of a teleological interpretation of the Geneva Conventions (GCs), Additional Protocols (APs) and of the case law of *ad hoc* tribunals;<sup>29</sup> the Martens Clause;<sup>30</sup> the rationale of IHL,<sup>31</sup> the updated ICRC Commentary;<sup>32</sup> *jus cogens*;<sup>33</sup> and the *ex injuria non oritur jus* principle.<sup>34</sup>

On the appeal of the defence for Ntaganda, the AC confirmed the existence of jurisdiction on counts 6 and 9 of the DCC, upholding the reasoning of the TC and confirming that the Statute does not import a status requirement.<sup>35</sup> Nevertheless, appellate judges carried out an autonomous assessment on whether such status requirement could be derived from the ‘established framework of international law’ to which the Statute refers for interpretive purposes.<sup>36</sup> Despite the admitted lack of relevant state practice and the contrary evidence coming from the post-war

<sup>28</sup> *ibid* paras 40-44. The Chamber held that ‘incorporating the Status Requirements, runs contrary to the structure of Article 8.’ Judges added that the reference in art 8(2)(b)(xxii) and 8(2)(e)(vi) to grave breaches of GCs and serious violations of CA3 is only connected to ‘any other form of sexual violence’ and not to rape and sexual slavery, citing in support the Elements of the Crimes and the drafting history of the Statute.

<sup>29</sup> *ibid* para 46.

<sup>30</sup> *ibid* para 47.

<sup>31</sup> *ibid* para 48.

<sup>32</sup> *ibid* para 50. It should be noted that the 2016 version of the Commentary cited by the TC as evidence to sustain its conclusion cites in turn the PTC decision on the confirmation of charges of 2014.

<sup>33</sup> *ibid* paras 51-52. The TC reasoned that in light of the peremptory character of the prohibition against torture, genocide and slavery, also the prohibition against rape (which can constitute an act of torture or genocide) and sexual slavery (which is a *species* of slavery) enjoy *jus cogens* status. Positively on the *jus cogens* status of the prohibition against rape in international law, see DS Mitchell, ‘The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine’ (2005) 15 *Duke J Comp & Intl L* 219.

<sup>34</sup> *Ntaganda* Second Decision on Jurisdiction (n 22) para 53. The Chamber held that because the enlistment/conscription/use of children under the age of fifteen is in the first place a serious violation of IHL, the defendant could not seek to benefit from its previous wrongful act in order to bypass criminal liability for other subsequent allegedly unlawful conducts.

<sup>35</sup> *Ntaganda* Appeal Jurisdictional Decision (n 13).

<sup>36</sup> *ibid* paras 17, 46-51.

trials and the SCSL's case law, the AC concluded that IHL does not categorically exclude protection for victims of crimes in intra-party relations.<sup>37</sup> With particular regard to rape and sexual slavery, judges concluded that there are no compelling reasons to put limits on who may be victim of such conducts based on status, considering that sexual violence is never justified or necessitated in armed conflicts.<sup>38</sup> The AC openly acknowledged the 'unprecedented' character of this finding, but considered the resulting extension of the scope of criminal responsibility for war crimes permissible both under the Statute (thereby rejecting the defence's concerns on the principle of legality) and the established framework of international law.<sup>39</sup>

4. *Issues with the ICC's approach: divorcing ICL from IHL as a means of progressive development of both areas of law?*

All three decisions of the Court in Ntaganda have been analyzed by various commentators, with diverging opinions as regards their persuasiveness, scope and future consequences.<sup>40</sup> This section shall not delve into all the problematic aspects of these decisions. Instead, it will succinctly take issue with the approach adopted in particular by the TC and AC both from an international law point of view (with regard to the use of sources and the interpretive methodology adopted by the Chambers), and from an

<sup>37</sup> *ibid* paras 60-63. Unfortunately, the AC did not go to great lengths in explaining why it considered not pertinent the post-war cases or 'unpersuasive' the reasoning of the SCSL.

<sup>38</sup> *ibid* paras 64-66.

<sup>39</sup> *ibid* para 67.

<sup>40</sup> See, very critically, KJ Heller (n 9); O Svaček (n 7). More positively on the reasoning of the various Chambers and the prospective influence of the decisions, see L Prospero, '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/>>; R Grey (n 7); PV Sellers, 'Ntaganda: Re-Alignment of a Paradigm' (2018) *International Institute of Humanitarian Law* <<http://www.iihl.org/wp-content/uploads/2018/03/Ntaganda-V.pdf>>. With regard to the decision of the PTC and TC see, respectively, the analysis by T Rodenhäuser (n 7) and Y McDermott, 'ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator' (2017) *INTLAWGRRLS* <<https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>>.



international criminal law perspective (with regard to the principle of legality and its corollaries enshrined in Article 22 of the Statute).

From an international law perspective, the Court's decisions, at least those of the TC and AC, reveal a markedly functionalist and purpose-oriented approach to the use of the sources of law applicable under the Statute, with particular regard to the relations between the 'Rome law' and the outer 'established framework of international law'. While the PTC has cautiously attempted at harmonizing ICL and IHL working on the category of *hors de combat*,<sup>41</sup> the TC and the AC have significantly diluted (if not severed) the normative connection between the violation of primary rules of IHL and the secondary rules generating international criminal responsibility, somehow bending the interpretation of the former to the criminal policy priorities underpinning the latter. Notwithstanding the TC's and AC's attempt to present their conclusions as based on a systematic interpretation of the underlying established framework of international law, judges made a rather selective and sometimes imprecise use of the relevant materials, especially of the pertinent principles and rules of IHL. In dispensing with the status requirement, they gave little or no weight to the complete absence of state practice in support of their conclusion, as well as to the contrary position of other international tribunals.<sup>42</sup> Moreover, their reliance on the 2016 ICRC Commentary — which despite its authoritativeness is not a direct source of law — as decisive evidence of the irrelevance of status is misplaced, since the document itself limits the applicability of CA3 to persons taking no APH, including those *hors de combat*.<sup>43</sup> Reliance on the protective 'rationale of international humanitarian law' and the Martens Clause as a means for extending the scope of application of war crimes is also unconvincing, given the elusive character of the former and the uncertain normative status of the latter.<sup>44</sup>

<sup>41</sup> This approach has been defended by KJ Heller (n 9) and T Rodenhäuser (n 7), 191-192.

<sup>42</sup> See *In Re Pilz, Trial of Susuki Motosuke* and *RUF Trial Judgment* (n 13).

<sup>43</sup> See ICRC, *Commentary to the First Geneva Convention of 1949* (n 18) paras 518-519. KJ Heller (n 9), defines the TC's and AC's statements based on the Commentary 'incomplete and misleading'.

<sup>44</sup> As regards the Martens Clause, see the critique to its use by KJ Heller (n 9) and O Svaček (n 7) 354. Both authors refer to A Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European J Intl L* 187, 208 according to whom the 'laws of humanity' and the 'dictates of public conscience' referred to in the Clause cannot be

From an international criminal law point of view, the Chambers' decisions fail to satisfactorily address the defence's objections on the alleged violation of the principle of legality and its corollaries, as enshrined in Article 22 of the Statute.<sup>45</sup> As a matter of fact, the Chambers' reasoning results in a judicial extension *in malam partem* of the scope of application of war crimes under Article 8 of the Statute to intra-party conducts, criminalizing sex-related offences against persons not qualifying as protected under IHL applicable to NIAC. While this conclusion might be tenable as regards the law applicable to IAC,<sup>46</sup> it is highly contentious as far as the law applicable in NIAC is concerned,<sup>47</sup> and hardly complies not only with the statutory formulation of the principle of legality, but even with the more flexible *Tadić* test elaborated by the ICTY.<sup>48</sup> Moreover, the AC's reasoning on the issue of legality is contradictory on various grounds. On the one hand, the AC held that it would be in line with the principle of legality to identify — based on customary or conventional international law outside the Statute — one or more additional elements of a crime not expressly stipulated by a provision of the Statute, were this to be necessary to 'ensure consistency of the provision with international humanitarian law'.<sup>49</sup> On the other hand, it swiftly went on to do away

considered 'two additional and distinct sources of law', hence dismissing the norm-creating function of the Clause.

<sup>45</sup> Art 22(1) contains the enunciation of the *nullum crimen sine lege* in its non-retroactivity component, whereas para 2 establishes the principle of strict construction of the crimes, the prohibition of analogy and the principle *in dubio pro reo*. Critically on the effects of the decision on the principle of legality, see SK Blank, 'Prosecutor v. Ntaganda—the International Criminal Court's Dangerous Foray into the Shades of Lochner' (2019) 27 *Mich St Intl L Rev* 1, 18-23.

<sup>46</sup> In this sense, M Bothe, 'War Crimes', in A Cassese, P Gaeta, JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2015) 380, 386, 415, who argues that art 8(2)(b)(xxii) of the Statute mimics art 75(2)(b) and 76(1) of AP I, which do not contain a status requirement.

<sup>47</sup> See Section 2, particularly nn 15-16.

<sup>48</sup> *Prosecutor v Tadić*, Case No IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber (2 October 1995) (*Tadić* Appeal Jurisdictional Decision) para 94 on the conditions to be met in order to make a certain conduct in violation of a rule of IHL a war crime. On the importance of this decision see the concluding section of this article and (nn 72-74) below.

<sup>49</sup> *Ntaganda* Appeal Jurisdictional Decision (n 13) paras 54-55. The AC provides no reasoning at all on how this would not violate the principle of legality under art 22(2) of the Statute. One could argue that this is because reading an additional element into the definition of a crime makes it more difficult for the OTP to satisfy the burden of proof.



with an element of the relevant offence (the status requirement), which is required by the very customary and conventional law rules that the AC wishes to uphold and harmonize with the Statute.<sup>50</sup> This is a curious case of likely violation of *nullum crimen sine lege* ‘by subtraction’ of an element of a crime, with the effect of significantly reducing the burden of the proof for the Prosecution.<sup>51</sup> Finally, it is hard to understand how the self-proclaimed ‘unprecedented’ character of the conclusions reached by the Chamber can be reconciled with non-retroactivity component of the principle of legality (*lex praevia*) enshrined in Article 22(1) of the Statute.<sup>52</sup> ‘Because of the contradiction which consents not’,<sup>53</sup> either the Chamber’s conclusion extending the scope of application of war crimes is not actually ‘unprecedented’ or, if it is, it plainly constitutes a retroactive application by analogy of a rule that was not in force at the time of the conduct. The AC’s reassurance that an ‘undue expansion’ of the law of war crimes to the detriment of the accused can be avoided ‘by a rigorous application of the nexus requirement’ fails to address the substance of the challenges based on the principle of legality.<sup>54</sup>

From the above analysis it seems clear that the Chambers’ interpretive approach in *Ntaganda* was a conscious exercise of judicial activism, aimed at expanding the law of war crimes by autonomizing it from the underlying rules of IHL.<sup>55</sup> There are certainly valid criminal policy reasons to bring about the progressive development of both IHL and ICL

<sup>50</sup> *ibid* paras 56-67.

<sup>51</sup> SK Blank (n 45) 22.

<sup>52</sup> On the content of the *nullum crimen sine lege*, with particular regard to the requirement of non-retroactivity, see K Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part* (OUP 2013) 90-91. On the consequences of judicial expansionism on the principle, with particular regard to the case law of the *ad hoc* tribunals, see S Darcy, ‘The Reinvention of War Crimes by the International Criminal Tribunals’, in S Darcy, J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 106. More generally on the relations between the principle and progressive development of the law, see M Shahabuddeen, ‘Does the Principle of Legality Stand in the Way of Progressive Development of the Law?’ (2004) 2 J Intl Criminal Justice 1007.

<sup>53</sup> D Alighieri, *Divina Commedia* (Inf. 27.120).

<sup>54</sup> *Ntaganda* Appeal Jurisdictional Decision (n 13) para 68.

<sup>55</sup> The same conclusion is reached by SK Blank (n 45) 29. On judicial activism at the ICC and the differences with the *ad hoc* tribunals, see A Appazov, ‘Judicial Activism and the International Criminal Court’ (2015) 17 iCourts Working Paper Series 1. More generally on values-oriented approaches to the interpretation of international law (including ICL), see I Venzke, ‘The Role of International Courts as Interpreters and

in order to provide more adequate safeguards for the most vulnerable subjects in armed conflicts and to fully express the stigma connected to sexual crimes, but it is questionable whether this could be achieved through the interpretive ‘quantum leap’ of the Chambers in *Ntaganda*.<sup>56</sup> In this sense, the TC’s and AC’s decisions clearly exemplify the expansionary tendency of international criminal law.<sup>57</sup> Ironically, as lucidly foreseen by Jean d’Aspremont, this expansion is the result of a ‘variable geometry’ approach to the interpretation and application of the very principle of legality and of the statutory rules on the applicable sources, whose formalization in the Statute had originally been conceived as a way of curtailing creative judicial interpretation.<sup>58</sup>

##### 5. *Crimes against children associated with terrorist groups in the context of armed conflicts: The limits of the existing legal framework*

Based on the foregoing, it can preliminarily be concluded that the international legal framework concerning intra-party conducts in armed conflicts — with particular regard to sex and gender-based crimes against

Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation’ (2011) 34 *Loyola LA Intl & Comp L Rev* 99, 114.

<sup>56</sup> Other authors have argued that these decisions do not bring about a paradigm-shift, but a re-alignment of paradigm as regards the scope of application of war crimes. See PV Sellers (n 40) 16-17.

<sup>57</sup> On the reasons for the expansionist attitude of ICL, see J d’Aspremont, ‘The Two Cultures of International Criminal Law’ (2017) 1 *Amsterdam Center Intl L Research Paper* 1, 4-9.

<sup>58</sup> *ibid* 17-18, 24-26. The author stresses the fact the shift from source-based expansionism (what he calls ‘Bavarian culture of international criminal law’ referring to the experience of the post-war military tribunals and the *ad hoc* tribunals), to interpretation-based expansionism (what he calls ‘Roman culture of international criminal law’), took place thanks to the empowerment of the judicial interpreter implicit in ‘codes on interpretation’ such as art 22(2) and 21 of the Statute. On the drafters’ attempt to curtail judicial creativity at the ICC, see J Powderly, ‘The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretive Technique’, in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 444. In this connection, the concrete capacity of these provisions to limit the creative power of the judicial interpreter might have been overestimated. See, e.g., S Darcy (n 52) 127, according to whom ‘The era of judicial creativity for the law of war crimes which began at Nuremberg and continues through the life of the ad hoc Tribunals may, however, be coming to an end.’



children — is in a state of flux in which alleged gaps of protection under IHL have been at least partially filled through a case-by-case extensive interpretation of the law of international criminal responsibility. Things become even more complicated when one considers the situation of children associated with terrorist groups who are subject to sex and gender-based violence, an unfortunately frequent occurrence.<sup>59</sup> As far as international criminal responsibility and the protection of physical and psychological integrity of children through criminal law are concerned, there are various limitations on the reach of the applicable international rules.

First of all, when considering the category of war crimes, it should be borne in mind that the contextual elements stipulated under the pertinent provisions must always be satisfied in order to make the relevant conducts international crimes. In particular, it must be established that an armed conflict actually exists according to the applicable intensity threshold,<sup>60</sup> that the terrorist groups involved possess the organizational features to be qualified as a party to an armed conflict;<sup>61</sup> that the individual acts of its members present a nexus with the armed conflict<sup>62</sup> and that the alleged perpetrator is aware of the factual circumstances establishing the existence of an armed conflict.<sup>63</sup> Although it has aptly been observed

<sup>59</sup> In relation of the most recent examples of targeting of children (especially girls) by terrorist groups or of the commission of sex and gender-based violence within such groups, see NHB Jørgensen, ‘Children associated with terrorist groups in the context of the legal framework for child soldiers’ (2019) 60 QIL-Questions Intl Law 8-10.

<sup>60</sup> See *Tadić* Appeal Jurisdictional Decision (n 48) para 70 for a classical definition of ‘armed conflict’, widely accepted by various chambers of the ICC. See, e.g., *Lubanga* Trial Judgment (n 4) para 533; *Prosecutor v Katanga*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II (7 March 2014) (*Katanga* Trial Judgment) para 1173; *Prosecutor v Bemba*, Situation in the Central African Republic, ICC-01/05-01/08-3343, Judgment pursuant to article 74 of the Statute, Trial Chamber III (21 March 2016) (*Bemba* Trial Judgment) paras 128-130, 137-141.

<sup>61</sup> *ibid* paras 134-136.

<sup>62</sup> *Prosecutor v. Kumarac et al*, Case No. IT-96-23 and T-96-23/1-A, Appeal Judgement, Appeals Chamber (12 June 2002) para 59; *Katanga* Trial Judgment (n 60) para 1176; *Bemba* Trial Judgment (n 60) paras 143-144; *Ntaganda* Appeal Jurisdictional Decision (n 13) para 68. The nexus requirement is expressly stipulated by the Elements of Crimes for all the crimes listed in art 8 of the Statute. See, e.g., ICC Elements of Crimes, art 8(2)(b)(xxvi) element 4; art 8(2)(e)(vii) element 4; art 8(2)(b)(xxii)-1 and 2 element 3; art 8(2)(e)(vi)-1 and 2 element 3, for the crimes relevant to the present discussion.

<sup>63</sup> *Bemba* Trial Judgment (n 60) paras 145-147. See also ICC Elements of Crimes, art 8(2)(b)(xxvi) element 5; art 8(2)(e)(vii) element 5; art 8(2)(b)(xxii)-1 and 2 element 4; art 8(2)(e)(vi)-1 and 2 element 4 for the crimes relevant to the present discussion.

that ICL does not make distinctions among armed groups based on the adherence to terrorist motives or ideology,<sup>64</sup> the extremely diverse manifestations of the terrorist phenomenon make the fulfilment of the required contextual elements uncertain in concrete cases. With regard to specific conducts, while the enlistment/conscription/use of children to participate in the activities of terrorist groups might certainly constitute a war crime, the concrete modalities of their association and participation in the group do not always fit into the traditional schemes and practices of non-terrorist groups for which those prohibitions have been designed.<sup>65</sup> With regard to sex and gender-based crimes, the same uncertainties on the general configurability of war crimes in intra-party relations apply to terrorist groups.

As the recent activities of the OTP concerning the situation in Nigeria reveal, there might be room for investigation and prosecution of conducts involving children associated with terrorist groups under the heading of crimes against humanity.<sup>66</sup> Again, the main obstacle would be to fulfil the contextual elements stipulated under Article 7 of the Statute, and particularly the existence of an organizational policy to commit an 'attack directed against any civilian population'.<sup>67</sup>

Besides the substantive issues analyzed above, the reach of ICL as regards criminal conducts involving children associated with terrorist groups is further restricted by the jurisdiction and admissibility regime of the ICC resting on the principle of complementarity, which assigns priority to national jurisdictions. In this sense, the complex interactions between domestic law (especially the statutes dealing with terrorist crimes) and international criminal law could make it difficult to properly assess the adequacy of national proceedings for the purposes of the complementarity analysis. The OTP and the Court might therefore have hard

<sup>64</sup> NHB Jørgensen (n 59) 6, 13.

<sup>65</sup> *ibid* 15-16.

<sup>66</sup> See, recently, ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2018' paras 223-226.

<sup>67</sup> See art 7(2)(a) of the ICC Statute. It might not be straightforward to establish that the commission of sex and gender-based crimes against children associated with the terrorist group within the group (sometimes as a means to force or obtain their association) corresponds to a precise organizational policy and fulfils the definition of 'widespread or systematic attack against any civilian population'.





times at applying the ‘substantially the same conduct’ test, for the purposes of the admissibility analysis.<sup>68</sup>

6. *Concluding remarks. The actual scope of the Ntaganda case law and its systemic consequences: Progress, adaptation or contestation?*

The expansionary attitude inspiring the *Ntaganda* case law is but a symptom of a broader dissatisfaction for the perceived inadequacy of both IHL and ICL in safeguarding particularly important legal values — such as the physical and psychological integrity of children — whose protection allegedly calls for increased doses of criminalization based on a victim-centered approach.<sup>69</sup>

With regard to the scope of the innovations expounded in *Ntaganda* it could be asked whether the TC’s and AC’s reasoning should be confined to sex and gender-based crimes against child soldiers, or the Chambers’ interpretive scheme is capable of being applied to any other intra-party conduct not expressly prohibited under IHL. The first option seems preferable, since it counts on more persuasive reasons of criminal policy, particularly in light of a human rights-oriented interpretation of international criminal law and the consideration of the special protection afforded to children under IHL.<sup>70</sup> Nevertheless, it would introduce a potentially unreasonable inequality of treatment among analogous situations exclusively based on the age requirement, something hardly consistent with human rights law itself. The second option, to the contrary, would allow international judges to extend and adapt the law of war crimes so to cover other less ‘visible’ conducts, based on the

<sup>68</sup> On the issue of ‘sameness’ for the purposes of the proper functioning of the complementarity regime, see R Rastan, ‘What is “Substantially the Same Conduct”? Unpacking the ICC’s “First Limb” Complementarity Jurisprudence’ (2017) 15 J Intl Criminal Justice 1.

<sup>69</sup> On the relationship between human rights (including those of victims) and criminal law, see F Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 J Intl Criminal Justice 577 and M Delmas-Marty, ‘Le paradoxe pénal’, in M Delmas-Marty and CL de Leyssac (eds), *Libertés et droits fondamentaux* (Seuil 1996) 368. On victim-centrism in ICL see N Jain, ‘Judicial Lawmaking and General Principles of Law in International Criminal Law’ (2016) 57 Harvard Intl L J 111, 146-148 and D Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 Leiden J Intl L 925, 929-931.

<sup>70</sup> Reference could be made not only to the provisions of the GCs and APs specifically directed to children but also to the United Nations Convention on the Rights of the Child of 1989 and the Optional Protocol adopted in 2000.

perceived social demand for justice and symbolic norm-expression.<sup>71</sup> This would nevertheless come at the expenses of a rigorous application of the principle of legality.

With regard to the potential systemic consequences of the *Ntaganda* case law, these decisions might well represent the kind of ‘seismic shift’ produced in ICL by the seminal *Tadić* jurisdictional decision,<sup>72</sup> thereby triggering a dynamic of progressive development of both IHL and ICL, with the former trying to keep up with the judicially-enforced innovations of the latter. Nevertheless, past experience shows that this kind of innovations only succeed when, on the one hand, states are prepared to accept and acquiesce to creative judicial solutions<sup>73</sup> and, on the other hand, subsequent case law consolidates and coherently develops such solutions.<sup>74</sup> This rare concomitance of conditions, which might at least in part depend on fortuitous or transitory international political circumstances, is what can be called a ‘*Tadić* moment’ in the development of ICL.

The expansionist attitude of international criminal jurisdictions is frequently associated with the idea of *progress* of a branch of law traditionally perceived as underdeveloped.<sup>75</sup> Various commentators have praised the *Ntaganda* decisions for their potential influence on future cases and their evolutionary victim-oriented approach in characterizing rape and sexual violence in armed conflicts as war crimes in all circumstances and against whoever committed.<sup>76</sup> It might be the case that the Chambers’ approach will have a

<sup>71</sup> On the expressive function of international criminal law, see RD Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 *Stanford J Intl L* 39. More specifically on norm-expression and prosecutorial discretion in ICL, see MM deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan J Intl L* 265.

<sup>72</sup> R O’Keefe, *International Criminal Law* (OUP 2015) 126. On the many revolutionary aspects of this decision, see S Darcy (n 52) 111-119; C Greenwood, ‘International Law and the Tadic Case’ (1996) 7 *European J Intl L* 265; L Maresca, ‘The Prosecutor v. Tadić’ (1996) 9 *Leiden J Intl L* 219; AM Danner, ‘When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War’ (2006) 59 *Vanderbilt L Rev* 1.

<sup>73</sup> R O’Keefe (n 72) 126-127. States’ preparedness to accept the paradigm-shift is demonstrated by the negotiations at the Rome Conference, which led to the consolidation of war crimes in art 8 of the Statute, only three years after the *Tadić* decision.

<sup>74</sup> See n 60 above, for reference to few of the many international cases assuming the *Tadić* jurisdictional decision as a fundamental point of reference on central issues of IHL and ICL.

<sup>75</sup> J d’Aspremont (n 57) 6.

<sup>76</sup> In this sense, see L Prospero (n 40); PV Sellers (n 40); S Deutch, ‘Putting the Spotlight on the Terminator: How the ICC Prosecution of Bosco Ntaganda Could



decisive influence on future case law and favor an *adaptive* response on the part of other international and national jurisdictions (including military ones), under the threat of depriving states of the *jus puniendi* in respect of particularly egregious intra-party conducts in armed conflicts.<sup>77</sup> Nevertheless, as other authors have suggested, it cannot be excluded that states' response could be of explicit or implicit *contestation* of the new rule, perceived as the product of an unwarranted exercise of judicial activism.<sup>78</sup> In this sense, the question which gives the title to this article might well be considered a false dilemma: only the dialectical interactions of future international judicial and state practice will determine whether the holding of the *Ntaganda* decisions will become accepted law or remain an isolated attempt of judicial expansionism. After all, a judicial decision might be legally *unwarranted* (or simply unpersuasive), but *wise* (or vice versa) in a specific context of time and space, according to its pragmatic consequences.<sup>79</sup>

The recent decision of TC VI,<sup>80</sup> which convicted Ntaganda as an indirect co-perpetrator for rape and sexual slavery against child soldiers, including an instance of rape against a girl of approximately nine years of age,<sup>81</sup> will certainly reinforce the stance taken with the previous jurisdictional decisions and represent a breakthrough in the jurisprudence of the

Reduce Sexual Violence during Conflict' (2016) 22 William & Mary J Women & L 655. In any event, such a victim-centered approach is evidently not pursued in a consistent fashion both in terms of prosecutorial policies and strategies, and of overall judicial philosophy. One might for instance refer to the judicial trends concerning victims' rights to participation and reparation, or to the recent decision of the PTC not to authorize an investigation in Afghanistan, considering that it would not have been in the interests of justice (despite victims being overwhelmingly in favor of an investigation). See *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II (12 April 2019).

<sup>77</sup> This is connected to the complementarity regime and the incentives to deal with international crimes domestically. The Chambers' decision might contribute to trigger reforms of national military codes and manuals, or of other national legislation implementing the Rome Statute.

<sup>78</sup> KJ Heller (n 9); Y McDermott (n 40).

<sup>79</sup> For a philosophical discussion concerning the 'practical wisdom' of international judicial decisions based on the Aristotelian concepts of *métron* and *phronesis*, see M Varaki, 'Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court' (2016) 27 European J Intl L 769, 786-788.

<sup>80</sup> *Prosecutor v Ntaganda*, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-2359, Judgment, Trial Chamber VI (8 July 2019).

<sup>81</sup> *ibid* paras 974-986. At paras 970-973 the Chamber reached a negative conclusion on some of the alleged conducts, in particular due to the uncertainty on the age of certain victims.



Court from a gender-based perspective, although the Chamber limited its findings on intra-party relations to the specific circumstances of time and space relevant to the confirmed charges.<sup>82</sup>

Nevertheless, the current international political and institutional circumstances do not resemble those accompanying the triumphal developments of ICL in the '90s, when international criminal justice was at the top of the international agenda. Today, at a time of existential crisis of international criminal justice, with the ICC threatened by external factors such as the lack of state cooperation and stable financing, and internal ones such as contradictory case law, inconsistent prosecutorial strategies, alleged administrative malpractice and loose enforcement of judicial ethics,<sup>83</sup> it is at least doubtful that the kind of expansive solutions adopted in *Ntaganda* could constitute foundational '*Tadić* moments', helping the Court in the struggle for global discursive legitimacy.<sup>84</sup>

<sup>82</sup> *ibid* para 984. The Chamber, after noting the defence's submission that 'sexual abuse is widespread in armed forces around the world', emphasized that 'it is *not generally pronouncing* on whether such sexual abuse, while criminal, constitutes a war crime.' (emphasis added). Hence, the Chamber's conclusions on the matter were limited to the specific conducts against child soldiers that took place between or about 6 August 2002 and 31 December 2003 in Ituri. Very positively on the significance of the recent *Ntaganda* judgment, see R Gray, 'Gender-based crimes: A monumental day for the ICC' (2019) INTLAWGRRLS <<https://ilg2.org/2019/07/08/gender-based-crimes-a-monumental-day-for-the-icc/>>.

<sup>83</sup> For an in-depth analysis of the current issues of the ICC, see D Guilfoyle, 'This is not fine: The International Criminal Court in Trouble', Part I, II and III (2019) EJIL: Talk! Blog of the European J Intl L <[www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/](http://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/)>; <[www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/](http://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/)>; <[www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/](http://www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/)>. As regards instances of administrative malpractice one might refer to the alleged mismanagement of assets seized to Jean-Pierre Bemba, who was finally acquitted by the Court, leading to an unprecedented request for compensation of damages. As regards judicial ethics and their enforcement, critics have questioned the appropriateness of Judge Ozaki's conduct (as well as the Court's decisions on the issue) as regards her continued participation to the deliberation in *Ntaganda*, considering her appointment — to which she later renounced — as Japanese Ambassador to Estonia. See KJ Heller, 'Judge Ozaki Must Resign — Or Be Removed' (2017) *Opinio Juris* <<http://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/>>.

<sup>84</sup> MJ Struett, 'The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court', in SC Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009) 107, 113.

