Palacký University in Olomouc

Faculty of Law

Pablo Martínez Ramil

“Adversary element in definition of war crimes”

Master’s thesis

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 # Abstract

The traditional view concerning International Humanitarian Law (IHL) is that intra-party offences do not qualify as war crimes, being left to domestic jurisdiction under the standards of international human rights law. However, in 2017 the International Criminal Court ruled in *Ntaganda* that the rape of child soldiers committed within the same armed group constituted a war crime, revolving the academia and generating a broad debate. For some, the decision was an exercise of judicial activism. For others, a *Tadić* moment in the ICC.

In order to shed some light on this debate, this thesis studies the adversary element in the definition of war crimes. It starts by examining the early development of war crimes law and its relation with IHL and ICL. It continues by addressing the adversary element in the light of the treaty law, customary international law (CIL) and jurisprudence, to determine that the adversary element has been traditionally acknowledged.

The thesis concludes with a critical analyze of the decisions of the ICC Pre-Trial Chamber, Trial Chamber and Appeal Chamber in *Ntaganda*. The results of this paper show that the solely decision of *Ntaganda* is not enough to remove the adversary element out of the definition of war crimes. Moreover, it indicates that the lack of state practice precludes the possibility of considering the *Ntaganda* decision the confirmation of a new customary rule of IHL. Therefore, it concludes that the adversary element is still a requirement under current IHL to prosecute war crimes.

Key words: war crimes, adversary element, Ntaganda, Geneva Conventions, Additional Protocols, Rome Statute, International Criminal Court, international humanitarian law, international criminal law.

Abstrakt

Tradiční pohled mezinárodního humanitárního práva (MHP) je takový, že trestné činy spáchané uvnitř jediné strany nejsou považovány za válečné zločiny a jako takové jsou ponechány na vnitrostátní jurisdikci v souladu se standardy mezinárodního práva v oblasti lidských práv. V roce 2017 však MTS vydal rozhodnutí, že znásilnění dětských vojáků v rámci stejné ozbrojené skupiny představuje válečný zločin, což vedlo k rozporům mezi akademiky a vyvolalo širokou debatu. Pro některé tímto rozhodnutím MTS upadl do soudního aktivismu. Pro jiné se však jednalo o historický moment srovnatelný s případem *Tadić*.

S cílem objasnit tuto diskuzi práce zkoumá prvek protivníka v definici válečných zločinů. Začíná přitom zkoumáním raného vývoje válečného práva a jeho vztahu k MPH a mezinárodnímu právu trestnímu. Pokračuje vyhodnocením prvku protivníka ve světle mezinárodních smluv, mezinárodní obyčejové právo a jurisprudence, aby určila, zda byl tradičně prvek protivníka určujícím elementem v souvislosti s válečnými zločiny.

Práce je poté zakončena kritickou analýzou rozhodnutí předsoudního senátu, senátu a odvolacího senátu MTS v případě *Ntaganda*. Závěry práce ukazují, že samotné rozhodnutí v případě *Ntaganda* nestačí k zanedbání prvku protivníka v definici válečných zločinů. Navíc naznačuje, že nedostatek státní praxe zároveň vylučuje možnost považovat toto rozhodnutí za potvrzení nové obyčejové normy MHP. Dospívá proto k závěru, že prvek protivníka je v současném MHP stále požadavkem pro stíhání válečných zločinů.

Klíčová slova: válečné zločiny, prvek protivníka, případ Ntaganda, Ženevské úmluvy, dodatkové protokoly, Římský statut, Mezinárodní Trestní Soud, mezinárodní humanitární právo, mezinárodní trestní právo.

Declaration

I hereby declare that this Master's Thesis on the topic "Adversary element in definition of war crimes" is my original work and I have acknowledged all sources used.

Place: Olomouc   Date: 28 May 2020   Signature: Pablo M. Ramil

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List of Abbreviations and Acronyms

Additional Protocol 1 – AP1

Additional Protocol 2 – AP2

Appeal Chamber – APC

AFRC – Armed Forces Revolutionary Council

Article – Art

Articles – Arts

Charter of the United Nations – UN Charter

Common Article 3 – CA3

Customary International Law – CIL

Defense Team of Mr. Bosco Ntaganda – DTN

Democratic Republic of Congo – DRC

Human Rights Law – HRL

International Armed Conflict – IAC

International Committee of the Red Cross – ICRC

International Court of Justice – ICJ

International Criminal Court – ICC

International Criminal Law – ICL

International Criminal Tribunal for Rwanda – ICTR

International Criminal Tribunal for the Former Yugoslavia – ICTY

International Humanitarian Law – IHL

International Law Association – ILA

International Law Commission – ILC

International Military Tribunal – IMT

International Military Tribunal for the Far East- IMTFE

International Military Tribunal of Nuremberg – IMTN

Non-International Armed Conflict – NIAC

Non-State Armed Groups – NSAGs

Office of the Prosecutor – OP

Page – p.

Pages – pp.

Forces Patriotiques pour la Libération du Congo Bosco – FPLC

Paragraph/ paragraphs – para.

Pre-Trial Chamber – PTC

Prisoner of war - POW

Public International Law – PIL

Rome Statute – the Statute

RUF – Revolutionary United Front

Special Court for Sierra Leone – SCSL

Trial Chamber – TC

United Nations – UN

Vienna Convention on the Law of Treaties – VLTC

World War I – WWI

World War II - WWII

1. Introduction.

1.1 Introduction to the topic.

The first article of the Rome Statute (hereinafter, the Statute) highlights the goal of the International Criminal Court (ICC), to rule on the most severe crimes of international concern. The present work will deal with those known as "war crimes". Cassese defined them as the most serious violations of international rules "belonging to the corpus of the international humanitarian law of armed conflicts"[1]. They are enshrined in the broad text of the Statue Art 8. However, their existence transcends, by far, their codification in the Statute. Proofs of their existence can be found along the history of mankind. From the ancient civilizations of China, India or Asia to the writings of Grotius or Francisco de Vitoria.[2] In that sense, Schabas dated the first attempt of their prosecution in an international trial in 1474, when Peter von Hagenbach was charged with war crimes and later on faced execution for them.[3] As it is expectable, the legal approach towards this category of crimes has been developed already for quite some time.

Although their understanding has been evolving by the hand of the jurisprudence, some of their features remained stable. Under a traditional view, international humanitarian law (IHL) has been considered to be applicable "to the relationship between enemy parties of an armed conflict"[4]. Already in this definition it is appreciable the necessity of the existence of an adversary. Thus, it was generally accepted that war crimes required to be perpetrated by soldiers against the military adversary or persons not taking active part in the hostilities.[5] In the words of Cassese, "crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes".[6] Cassese's view was grounded on the decisions on *Pilz* and *Motosuke*, finding a lot of support among scholars.

That is why the ICC recent decisions in the *Ntaganda* case did not go unnoticed to the academy. The ICC Pre-Trial Chamber (PTC), the Trial Chamber (TC) and the Appeal Chamber

[1] CASSESE, Antonio. International Criminal Law. Oxford, Oxford University Press, 2003, p. 47.
[2] LA HAYE, Eve. War Crimes in Internal Armed Conflicts. Cambridge Studies in International and Comparative Law. Cambridge University Press, 2008, pp. 104-105.
[3] SCHABAS, William A. An Introduction to the International Criminal Court, Third Edition. Cambridge University Press, 2007, p. 1.
[4] LONGOBARDO, Marco. The Criminalization of Intra-party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflicts. International criminal law review 19 (2019), p. 608.
[5] This category would include *hors de combat* as well. These concepts will be examined furtherly in this thesis.
[6] CASSESE, 2003, p. 48.

(AP) recently ruled that the sexual offences committed in the Democratic Republic of Congo (DRC) within the same armed group against child soldiers constituted war crimes. This new approach arose different critics among the scholars, bringing up more questions than answers. This research will attempt to shed some light on these matters.

1.2 Objectives.

The aim pursued by this thesis is to investigate the status of the "adversary element" under current IHL. Despite the contribution of the latest ICC decisions on the Ntaganda case, there is no consensus among scholars whether intra-party offences can be prosecuted as "war crimes".

In order to achieve that aim, the following objectives will be established:

- To study the elements of "war crimes" under IHL and International Criminal Law (ICL) (including its subparts, such as the Rome Statute) through the scientific literature and the relevant case law.
- To examine the current position of the "adversary element" under IHL.
- To determine if the grounds of the PTC, TC and the AC decisions in the *Ntaganda* case are in consonance with current IHL.

1.3 Research question and hypothesis.

The research question that will be discussed and furtherly answered is the following one:

- Can intra-party offenses constitute war crimes?

With that on mind, the thesis will check the veracity of the next hypothesis:

- The "adversary element" is still a requirement under current IHL to prosecute "war crimes".

1.4 Methodology.

In order to successfully conduct this investigation, it will be proceeded as follows. Prior to the writing of the thesis, a deep study of the scientific literature had been conducted, along with the relevant case law for this thesis' purposes. Given the complexity of the topic, several dimensions of the topic shall be addressed.

Firstly, this thesis will deal with war crimes and the question of their relation with IHL. An historical approach will be adopted in order to determine together with the legal developments the relevant legal framework for this research. The section will be closed with a part analyzing the contemporary understanding of war crimes.

Secondly, the adversary element will be addressed. Emphasis should be put at first on the relation between armed groups and IHL, but the main scope of this chapter will be the study of the relevant case-law, Customary International Law (CIL) and treaty law, what will facilitate the understanding of the current state of the adversary element in current IHL.

Thirdly, the grounds of the ICC PTC, TC and AP in the *Ntaganda* will be studied to determine whether the ICC approach seems convincing enough to be in line with current IHL.

The thesis will be concluded with a chapter approaching the research question in the light of the relevant IHL framework and the *Ntaganda* decision.

2. War crimes. The state of the question.

2.1 A brief historical overview.

The history of war crimes constitutes a topic itself too wide to be fully addressed in the present research. However, given the complexity of the object of this study, it becomes necessary to draft some comments about its modern historical development in order to be able to delimit the current IHL legal framework.

The existence of war crimes is very old, old as history itself. In 1952, Hersch Lauterpacht wrote: "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law".[7] Although this affirmation might not seem fair nowadays, the longer we go back in time, into the history of war crimes, the more accurate it becomes.

Some scholars start to identify their existence in the writings of the Chinese philosopher Sun Tzu, who made explicit references to the treatment of an enemy (in the 5th century BC). Crowe

[7] LAUTERPACHT, Hersch, 1952, quoted in SCHABAS, William A. The UN International Criminal Tribunals. The former Yugoslavia, Rwanda and Sierra Leone. Cambridge University Press, 2006, p. 226.

also highlighted the Roman Law codification of some forbidden conducts during war times, such as the prohibition of the "wholesale slaughter of captives after a campaign."[8] However, the facts that might be relevant for this thesis' topic start in 1863, when the jurist Francis Lieber wrote the Instructions for the Government of the Armies of the United States in the Field (the Order No.100). The American Civil War had already started and Liber was largely affected on an emotional level, since his three sons were taking active part in the hostilities. The Order No. 100 contained a set of rules with the aim of humanizing the law of war, declaring all wanton violence to be prohibited. The Lieber Code was adopted in 1870 by the Prussian Army and, four years later, constituted the grounds of the Brussels Declaration on the Laws and Customs of War. The Institut de Droit International also made use of the code to develop its manual "The Laws on War on Land" in 1880. These two documents inspired the legal framework for the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land, the basis of current Law of Armed Conflicts legal framework.[9]

The next step was taken by the Commission on Responsibilities in 1919 at the end of WWI, established at the Paris Peace Conference. The Commission confirmed then that those individuals who have been guilty of "offences against the laws and customs of war" were subjected to criminal liability.[10] This statement would be enshrined in the post-war prosecution clauses of the Treaty of Versailles and the Treaty of Sèvres.[11] Nevertheless, it was at the end the task of the national German courts to assess judgement on those matters. The German Supreme Court in Leipzig conducted 12 trials involving 17 German citizens in what were later known as the Leipzig War Crime Trials. Yet, these judgements were conducted according to the German Criminal and the Military Penal Codes, where the violations of the laws of war were enshrined.[12]

The first international prosecution of war crimes took place after WWII, in Nuremberg (which was later on followed by Tokyo). The Charter establishing the International Military Tribunal of Nuremberg (IMTN) addressed the concept of war crimes in its Art 6(b). This provision

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[8] CROWE, David M. War Crimes and Genocide in History, and the Evolution of Responsive International Law. Nationalities Papers: The Journal of Nationalism and Ethnicity, 37:6 (2009), pp. 757.

[9] CROWE, 2009, p.769.
[10] SCHABAS, 2006, p. 226.
[11] CROWE, 2009, p. 770.
[12] NEUNER, Matthias. "When Justice Is Left to the Losers: The Leipzig War Crimes Trials", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors), Historical Origins of International Criminal Law: Volume 1, FICHL Publication Series No. 20 (2014), Torkel Opsahl Academic EPublisher, Brussels, (2014), p. 367.

was not a concrete one: the article included some conducts that constituted war crimes, [13] but at the same time its scope was extended to others as well.[14] The IMTN clarified on its decision against Göring and others that "the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law". The Court referred to Arts 46, 50, 52 and 56 of the Hague Convention of 1907, and Arts 2, 3, 4, 46 and 51 of the Geneva Convention of 1929.[15]

The latest developments came by the hand of the 1949 Geneva Conventions and their protocols. In the conventions, war crimes were enshrined as "grave breaches". Although this concept will be addressed in the following sections, some introductory elements should be highlighted. In that sense the first two Geneva Convention established in their Arts 50 and 51 (respectively) a set of conducts that would qualify as grave breaches.[16] The protection against these conducts would be granted to sick and wounded combatants of the armed forces, the subject of the first two Geneva Conventions. The 3rd Geneva Convention dealt with the status of prisoner of war (POW). Some extra conducts[17] were enshrined in its Art 130 that would qualify as grave breaches when committed against them. The 4th Geneva Convention addressed the issue of the protection of civilians during war times. For that reason, an even deeper level of protection was granted to them in Art 147.[18] The AP I would state years later that the grave breaches included in the conventions "shall be regarded as war crimes."[19] What it is important to highlight is that these grave breaches are only related to international armed conflicts (IAC). The minimum level of protection in non-international armed conflicts (NIAC) was enshrined in CA 3, as it will be

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[13] Those were "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

[14] Art 6(b) of the United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 1945.

[15] IMT, judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22 August 1946 to 1 October 1946), 1946, p. 467.

[16] "Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[17] Namely, "compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

[18] Namely, "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[19] Additional Protocol I to the Geneva Conventions, Art 85(5).

examined furtherly in this thesis.

Art 4 of the ICTR Statute, Art 2 of the ICTY Statute and Art 3 of the SCSL Statute included war crimes under the denomination of graves breaches of the Geneva Conventions and serious violations of law and customs of war.[20] The ICTR and the SCSL qualified them as serious violations of the CA 3. The last codification can be found in the Rome Statute, where its Art 8 embraces a several range of conducts that would fall under the scope of the ICC.

2.2 The relationship between war crimes and IHL.

One of the main arguments raised by the Defense in the *Ntaganda* case was the traditional view already drafted in the introduction, the idea that IHL only applies to the enemies' relationship within the context of an armed conflict. Therefore, intra-party conducts could not be prosecutable before the ICC. Considering that the position of the ICC will be addressed furtherly in this document, the focus will be now established on the legal and academic discussion. In connection with the previous section, a chronological approach will led to a better understanding of their relation and the current state of the question.

The relationship between war crimes and IHL, although it is indeed a close one, is not one of unity.[21] In this sense, Werle highlighted the war crimes' accessorial character to IHL.[22] Other scholars have opted for identifying it as the "criminal phase of humanitarian law"[23]. However, to start by the very beginning will help the purposes of this thesis. As it is well established, International Criminal Law (ICL) is a brand of Public International Law (PIL) with some unique features. Conversely to PIL, in ICL the responsibility is directly imposed on the individual. This branch of PIL deals only with crimes under international laws involving individual criminal responsibility and, among them, this thesis' object of study: war crimes.[24] Instead, IHL is a synonymous of Law of Armed Conflicts (*ius in bello*). Its aim is "to limit the use of force in armed conflict for humanitarian reasons".[25] It should be highlighted that both branches share some of

[20] SCHABAS, 2006, p.228.
[21] CRYER, Robert. The relationship of international humanitarian law and war crimes: International criminal tribunals and their statutes. In C. Harvey, J. Summers, & N. White (Eds.), Contemporary Challenges to the Laws of War: Essays in Honor of Professor Peter Rowe. Cambridge: Cambridge University Press (2014), p. 119.
[22] G. Werle, Principles of International Criminal Law, 2nd edn (The Hague: T.M.C. Asser Press, 2009), 358, quoted in CRYER, 2015, p. 119.
[23] LONGOBARDO, 2019, p. 607.
[24] SVAČEK, Ondřej. International Criminal Law. Univeryita Palackého v Olomouci, Olomouc, 2012, pp. 9-10.
[25] FAIX, Martin. Law of Armed Conflicts and Use of Force. Part Two. Limiting the effects of war: International Law

their most important sources: The Geneva Conventions with the Additional Protocols and the ICC Statute itself.[26] The close relationship between war crimes and IHL can be already intuited here.

Initially, and until the establishment of the IMTN, individual criminal responsibility under international law for war crimes was under the scope of domestic jurisdictions.[27] Examples will be addressed bellow such as *Motosuke* or *Pilz.* Back at that time, it is important to understand the fact that the term "international humanitarian law" did not exist as such. The renowned IHL expert F. Kalshoven established that this term started to be used at the time of the 1949 Geneva Conventions. The lawyers of the ICRC were using it as a synonymous of "Geneva Law", the rules for the protection of war victims. Conversely, the Hague Law (which dealt with the way of conducting the hostilities) was excluded from this branch. Nowadays, both set of rules are considered to be part of IHL. This was caused by the Geneva Conventions AP I, which "largely did away with the distinction between Geneva and Hague law, incorporating the conduct of hostilities and some principles on use of weapons into the body of IHL."[28] Both sets of rules identified with their development (especially in the case of Geneva Law after 1949) several of the breaches of their provisions as war crimes.[29]

The creation of Nuremberg and Tokyo changed the rules of the game through their statutes. For the first time, international courts were required to rule upon "violations of the wars and customs of war".[30] The IMTN did not question it. Conversely, it stated that "the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6", considering the Charter to be "decisive and binding".[31] The statute led the Court to rule over the violations of the Regulations attached to the Fourth Hague Convention of 1907 and Geneva Convention of 1929, the available treaty law legal framework. The fact that the Soviet Union was not part of the Hague Conventions was a problem that challenged the jurisdiction of

of Armed Conflicts. Univerzita Palackého v Olomouci, Olomouc, 2013, p. 5.

[26] SVAČEK, 2012, p. 12 and FAIX, 2013, p.9.

[27] CRYER, Robert. The relationship of international humanitarian law and war crimes: International criminal tribunals and their statutes. In C. Harvey, J. Summers, & N. White (Eds.), Contemporary Challenges to the Laws of War: Essays in Honor of Professor Peter Rowe. Cambridge: Cambridge University Press (2014), p. 121.

[28] KALSHOVEN, Frits. From International Humanitarian Law to International Criminal Law, Chinese Journal of International Law, Volume 3, Issue 1 (2004), p. 153.

[29] United Nations Office on Genocide Prevention and the Responsibility to Protect. Definition of War Crimes. Available in: https://www.un.org/en/genocideprevention/war-crimes.shtml

[30] Art 6(b), Charter of the International Military Tribunal, 1945.

[31] Trial of the Major War Criminals before the International Military Tribunal. Nuremberg, 14 November 1945 - 1 October 1946. Volume 1. Nuremberg, p. 218.

the IMTN. However, the Court asserted the existence of a CIL that protected the Soviet prisoners who were victims of war crimes.[32] At this point in time, the prohibition of some conducts that would qualify as war crimes nowadays was protected by CIL too.[33] In Tokyo, the Defense attempted to challenge the IMT jurisdiction alleging that only domestic jurisdiction would ensure a fair trial. Not even a single judge "saw fit to gratify this motion with any reasons for rejection".[34]

Out of the frying pan and into the fire, history moved on into a Cold-War environment. Since the idea of prosecuting and punishing war crimes at an international level was not realistic due to the Cold-War, it was up to domestic courts to enforce IHL. The regime of grave breaches created the international legal framework for this decentralized prosecution and punishment. As it was already mentioned, "grave breaches" was used as a sort of a war crimes' euphemism in the 1949 Geneva Conventions. The four documents contained a provision (Arts 49, 50, 129 and 146, respectively) with the same wording that called the states to prosecute "such grave breaches" regardless of the nationality of criminal "before its own courts".[35] The essential idea was that war criminals should be prosecuted regardless of where they were to face the punishment for their crimes before national courts. However, technical difficulties linked to the legal complexities of the Geneva Conventions and the political problem that involved the detention of foreign nationals "prevented belligerent states from initiating war crimes proceedings against enemies in their custody."[36]

The end of the Cold War marked the beginning of a new era with the appearance of new International Courts whose jurisdiction was established as IHL, according to the statutes of the ICTY, ICTR and ICC.[37]

The first relevant step was the establishment of the ICTY, not without the arousal of several questions. The Tribunal was established via resolution of the Security Council under the UN

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[32] CRYER, 2014, p.121.
[33] Trial of the Major War Criminals before the IMTN, Volume 1, p, 232.
[34] BOISTER, Neil and CRYER, Robert. The Tokyo International Military Tribunal: A Reappraisal. Oxford: Oxford University Press, 2008, p. 178.
[35] The paragraphs share the following text: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."
[36] STEWART, James G. The Future of the Grave Breaches Regime. Segregate, Assimilate or Abandon? Journal of International Criminal Justice 7, 2009, p. 856.
[37] KALSHOVEN, Frits. From International Humanitarian Law to International Criminal Law, Chinese Journal of International Law, Volume 3, Issue 1 (2004), pp. 153-154.

Charter Chapter VII. There was no international treaty behind the tribunal this time. Secondly, the respective SC resolution did not define the conflict as international or non-international. Instead, it was settled that the Tribunal would have jurisdiction over all violations of IHL committed on the territory of former Yugoslavia.[38] And thirdly, it was a priori not clear whether the wording of the ICTY Statute Art 2, which included the grave breaches of the Geneva Conventions (a.k.a. war crimes) required the existence of an IAC (there was no direct specification at that regard). The AC resolved the situation in *Tadić* by confirming that the crimes contained in Art 2 can only be prosecuted "under the strict conditions set out by the Conventions themselves."[39] To the Tribunal, the specific reference to the Geneva Convention implied that the conditions settled there should be met. In other words, while Art 2 would be applicable only in IAC, Art 3 would be applicable in both IAC and NIAC. The ICTY Statute Art 3 under the title "violations of the law and customs of war" contained other conducts that qualified as "war crimes". This provision "took to be a residual clause covering all other violations of applicable IHL".[40] The Tribunal "self-interpretation" of this article allowed the ICTY to overcome the issue of the conflict classification. Moreover, by relying on CIL the Tribunal was able to avoid the difficult fulfillment of the requirements that treaty law often required for war crimes. Such an article was not found later on, in the ICTR Statute. In substantive law issues, the Tribunal defended along their decisions the view that holds the "parasitic nature of the law of war crimes on IHL".[41]

The ICTR did not present such problems. There were no questions concerning the conflict classification and Rwanda was State Party to the AP II. War crimes were judged under the applicable framework without bigger concerns.[42]

Jurisdiction issues took place within the SCSL too. However, considering that the issue of war crimes in the light of different types of conflicts will be addressed in the next chapter, it will remain out of the scope of the present one. Concerning IHL and war crimes, the SCSL continued the "tradition" and considered IHL the law to be applicable to war crimes.[43]

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[38] Art 1. Statute of the International Criminal Tribunal for the Former Yugoslavia. United Nations Security Council, 1993.
[39] Prosecutor v. Tadić, Decision on Interlocutory Appeal on Jurisdiction (Case No. IT-94-1-AR72), ICTY Appeals Chamber, 2 October 1995, para. 80.
[40] CRYER, 2014, p.132.
[41] Ibid, p.134.
[42] Ibid.
[43] Ibid, p. 138.

The first comment that should be addressed to the Rome Statute regard the ICC sources. For the first time, the applicable law was expressly dealt within the statute of a criminal court (in a similar way to the ICJ).[44] The provision of Art 21 establishes a hierarchy between sources where "Statute, Elements of Crimes and its Rules of Procedure and Evidence" are followed by "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of IHL."[45] Cryer developed a very revealing analyses of the problems that arouse from this hierarchy and the war crimes' codification in the Statute. The first issue he identifies is that a certain number of war crimes in the Rome Statute are defined "more narrowly than their IHL counterparts". Cryer uses "collateral damage" as an example of it.[46] This led him to conclude that the Rome Statute cannot be read as "straightforward provisions of IHL". In the words of Cryer "to do so would risk narrowing the protection under IHL by reading a controversial definition of a war crime."[47]

These last statements added to the secondary character of IHL in the hierarchy of sources might led us to think that a division between IHL and the ICC case-law might be developed. However, once the historical development of the relation between IHL and war crimes has been examined, it is legitimate to assume that IHL constitutes a good source of reference for the ICC. Arts 8(2)(a), 8(2)(b) and 8(2)(e) of the Statute grant jurisdiction over "grave breaches of the Geneva Convention" and "serious violations of the laws and customs applicable in armed conflicts" of international and non-international character, respectively. In one hand, the reference to the Geneva Convention seems to make clear that the intention behind the wording was to refer the Court to the requirements established in the Geneva Conventions (in line with *Tadić*, mentioned before). In the other, the remaining provisions determines the jurisdiction "within the established framework of international law". Therefore, the Court has had a way of being in line with IHL. Examples of this behavior were highlighted by Cryer.[48] Although it seems that fragmentation between the ICC and IHL has been, until some point, avoided, it has to be kept in mind that the secondary character of IHL prevails and, therefore, the risk of fragmentation

[44] SCHABAS, The Rome Statute of the International Criminal Court, 281 –2, quoted in CRYER, 2014, p.138.
[45] Art 21. Rome Statute of the International Criminal Court. UN General Assembly, 17 of July 1998
[46] In that sense, Cryer highlights that a higher standard is required by Art 8(2)(b)(iv), compared to the definition settled in AP1.
[47] CRYER, 2014, p.140-141.
[48] See CRYER, 2014, p. 142-143.

remains.[49]

2.3 What do we talk when we talk about war crimes. A contemporary approach.

In short, war crimes are defined as breaches of a certain gravity of customary or treaty rules belonging to the branch of IHL.[50] This subchapter will address in detail the current understanding of war crimes. However, matters related to the specificities of every crime will remain out of its scope, the focus of this thesis being the general features that this category of crimes holds.

2.3.1 War crimes. Essential requirements.

Cassese's definition stated above comes from *Tadić* AC decision¸ where the ICTY had to interpret the applicability of its Statute Art 3.[51] The Court set up the conditions as follows:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[52]

It is clear, from the short definition stated above, that not every breach of IHL constitute a war crime, a "certain gravity" is necessary. The Tribunal stated, as an example, that a combatant appropriating a loaf of bread could not qualify as a serious breach. This interpretation allowed the Tribunal to determine that the serious breaches would fall under the scope of Art 3 regardless of whether the violation "occurred within the context of an international or an internal armed conflict."[53] However, the necessity of the existence of an armed conflict remains (so called war nexus).

As it was already highlighted, the Rome Statute Art 21 deals with the ICC's applicable law. Hierarchically, the first position is taken by the Statute, Elements of Crimes and its Rules of

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[49] Ibid, p. 141-144.
[50] CASSESE, 2003, p. 47.
[51] At this regard, see subchapter 2.2.
[52] Prosecutor v. Tadić, Decision on Interlocutory Appeal on Jurisdiction (Case No. IT-94-1-AR72), ICTY Appeals Chamber, 2 October 1995, para 94.
[53] Ibid.

Procedure and Evidence.[54] The Element of Crimes could be considered a support guideline for the ICC' interpretation and application of the crimes contained in the Statute. When addressing the different conducts that qualify as war crimes under Art 8, two elements are common to all of them:

> (1) The conduct took place in the context of and was associated with an international armed conflict.
>
> (2) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[55]

There are, therefore, three relevant elements. There must be an armed conflict, [56] a link must be established between the conduct and the conflict and the accused should be aware of the conflict existence. These statements seem to be consistent with the ICTY jurisprudence, which disregarded the conflict dimension and merely asserted that "for international humanitarian law to apply there must first be an armed conflict."[57]

However, there must exist a connection within the armed conflict. The breach itself must not be independent from it. In *Kunarac,* the ICTY determined that, at least, the conflict must "have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".[58] The Court also established the way of determining it, relying on the positions held by the perpetrator and the victim (whether there were combatants, their military interests etc.). The crime would not have to be committed necessarily in the front line, as IHL is to be applicable in the whole territory "of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there."[59]

Regarding the last condition (the awareness of the accused), the ICC's Elements of Crime already determine that there is no requirement of being aware of the legal circumstances or the facts surrounding the qualification of the conflict.[60] It is only required to be aware of the factual circumstances. Consequently, "it is clear that war crimes prosecutions do not generally require

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[54] Art 21(1)(a) Rome Statute.
[55] Elements of Crimes. International Criminal Court, 2011.
[56] The implications of the international or internal dimensions of the armed conflict over the law of war crimes will be discussed in section 2.3.2.
[57] ICTY, Furundžija (IT-9517/1-T), Judgment, 10 December 1998, para. 258 and Kordić et al. (IT-95-14/2-T), Judgment, 26 February 2001, para. 22.
[58] ICTY, Kunarac et al. (IT-96-23/1-A), Judgment, 12 June 2002, para. 58–59.
[59] Ibid, para.57.
[60] Elements of Crimes, p.13.

proof of a motive".[61]

Last but not least, it would be relevant to mention the fact that the Rome Statute limits the ICC jurisdiction to "war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crime." As Schabas established, such a threshold does not exist in IHL. Therefore, theoretically, a single war crime would be prosecutable under IHL if conditions are met.[62] This approach seemed to be confirmed by the ICC itself, which established that this requirement is not categorical for recognizing the existence of war crimes.[63]

2.3.2 International vs non-international conflicts.

The war crimes' prosecution substantially changes in the light of the armed conflict typology. Originally, the Lieber Code was promulgated to be applied by Lincoln in the American Civil War. However, the early treaty law that was developed on the grounds of the Code was only applicable *si omnes*. Therefore, IHL originally regulated only IAC.[64]

IHL had been considered to apply only to conflicts as between sovereign states, while the NIACs were left to the domestic jurisdictions. Nevertheless, the Spanish Civil War (1936-1939) and upcoming internal conflicts that took place in the 20th century promoted a discussion concerning the necessity of establishing some regulations.[65] Two main provisions should be highlighted here: CA 3 and AP II and Art 1.[66] These articles, however, were not free of controversy.

Regarding the AP II, it is only applicable to States Party. This means that it will not apply to countries like Syria, Iraq, Turkey or United States,[67] as it is established in VCLT Art 34. Moreover, the AP II Art 1 establishes a threshold that must be fulfilled, reducing the scope of its applicability. First, there must be a confrontation between the governmental armed forces and the adversary forces. Conversely, conflicts that does not involve governmental forces would be

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[61] SCHABAS, 2006, p. 240.
[62] Ibid, p. 230.
[63] MRÁZEK, Josef. International Criminal Court, War Crimes and Crimes against Humanity in ŠTURMA, Pavel (ed.). The Rome Statute of the ICC at Its Twentieth Anniversary. Achievements and Perspectives. Queens Mary Studies in International Law, Leiden, Boston, 2019, p.71.
[64] SCHABAS, p. 231.
[65] References to this can be found in relevant case law. At this regard, see Tadić Appeal, para. 97.
[66] FAIX, 2013, p.18.
[67] States party to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. International Committee of the Red Cross.

excluded. The non-governmental forces must be under a responsible command and they must be in control of a part of the territory.[68]

CA 3 carries some problems as well. Although it is true that it established some minimum rules that would apply to NIACs, the true is that nothing in the text of the Conventions seem to entail individual criminal responsibility. On the contrary, as it was already mentioned above, the grave breaches system was meant to be enforced under domestic criminal law. Consequently, these offences were considered to be part of the State's internal affairs and, therefore, outside the scope of the international community.[69]

However, IHL evolved despites this "restrictive" departure point, opening new paths and raising more questions. In this regard, the ICTR statute should be mentioned, considering that, regardless of the non-international nature of the conflict in Rwanda, directly established "the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions."[70] Nevertheless, great part of the credit should be granted to the breaking through decision in *Tadić*, where the ICTY held that it was an existing CIL rule that violations of humanitarian law that took place in a NIAC could entail individual criminal responsibility under IHL.[71] The findings were supported by state practice and *opinio juris* and in the consideration that punishment of perpetrators "was necessary to ensure the enforcement of humanitarian law".[72]

These two elements set the path to a "rapid approximation" of war crimes committed in IACs and in NIACs. The Rome Statute itself contains several provisions regarding war crimes that are prosecutable by the ICC in NIACs. Similar provisions can be found within the SCSL statute. The fact that several states have passed legislation regarding the prosecution of war crimes on the basis of universal jurisdiction seem to confirm this tendency. Summarizing, the law of war crimes' convergence under IHL has reduced to some extent the relevance of the conflict' typology where they are committed. However, the list of war crimes applicable to NIACs is still significantly smaller than that for IACs.[73] This might be a crucial issue. After all, as the ICTY

[68] FAIX, 2013, p.19.
[69] NERLICH, Volker. War Crimes (Non-International Armed Conflicts) in CASSESE, Antonio (ed). The Oxford Companion to International Criminal Justice, Oxford University Press, 2009, p.568.
[70] Art 4. ICTR Statute.
[71] See Tadić Appeal, para. 96-137.
[72] NERLICH, in CASSESE, 2009, p. 569.
[73] Ibid.

established in *Tadić*, "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[74] Until a certain point, the ICTY, the ICTR and the SCSL have relied on CIL to solve this "gap", when necessary.[75] At the same time, the existent amendments to the Art 8 of the Rome Statute – concerning the prohibition of certain means of warfare in NIAC - prove the existence of the tendency to close the gap.[76]

2.3.3 Victims of war crimes.

In defining the passive subject of the criminal conduct, the first reference that should be taken into consideration should be CA 3. It is stated there that the protection of the provision shall be granted to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat '."[77]

There is a wide legal framework that allow us to concrete the meaning behind "persons taking no active part in the hostilities". The first category that would come to mind are civilians. Their protection is ensured by Geneva Convention IV, some provisions of the AP I and customary rules. A definition is contained in AP I Art 50(1), grouping under this category every person not considered a combatant under Art 43.[78] However, civilians might be protected by IHL as long as they are not taking active part in the hostilities. The definition is problematic. In the moment a civilian joins the hostilities, it is clear that the IHL protection is lost and their actions could engage criminal prosecution. However, there is no clear definition of what does it mean direct participation. At that regard, Faix established acts that "intended to cause actual harm to personnel and equipment of the armed forces" -including their preparation-, being out of its scope other category of acts such as working "in a company producing arms".[79] It should be highlighted that the ICRC released in 2009 some recommendations at this regard. Three accumulative elements should be fulfilled by an act in order to qualify as "direct participation in the hostilities", according

[74] ICTY, Prosecutor v. Tadić, Decision on Interlocutory Appeal on Jurisdiction (Case No. IT-94-1-AR72), ICTY Appeals Chamber, 2 October 1995, para. 119.
[75] International Committee of the Red Cross. Custom as a source of International Humanitarian Law. MAYBEE, L. & CHAKKA, B. (ed.), International Committee of the Red Cross, 2006, p.109.
[76] Rome Statue of the International Criminal Court. Rome Statute - Amendments. International Criminal Court Official Website.
[77] Art 3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.
[78] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.
[79] FAIX, 2013, p.123.

to them:

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[80]

However, not only civilians are protected by IHL but also combatants under some circumstances, when they qualify as *hors de combat*. This category is defined in AP I. Behind this term there are three categories of protected persons: prisoners of war (POW), combatants that have laid down their arms and combatants unconscious or incapacitated by wounds or sickness.[81] The protection laid under this category proceeds from the Lieber Code, being considered a rule of customary character in both IACs and NIACs.[82]

3. The adversary element, war crimes and IHL.

The authority held by Cassese as one of the most renowned PIL experts is beyond doubts. His statements regarding the "adversary element" are often quoted in the academia:

> "War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes (…)."[83]

His words seem to be in line with the general understanding of IHL that has been drafted along the present thesis. However, they were written in 2003. As the ICJ established in *North Sea Continental Shelf*, a short period of time is "not necessarily, or of itself, a bar to the formation of

[80] MELZER, Nils. Interpretative guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law. International Committee of the Red Cross, 2009, recommendation V.
[81] Art 41(2) Additional Protocol 1.
[82] Rule 47. Attacks against Persons Hors de Combat. IHL Database. Customary IHL. International Committee of the Red Cross.
[83] CASSESE, 2003, p. 48.

a new rule of customary international law".[84] Therefore the validity of his statements should be tested at the light of the current IHL. For that purpose, the relation between the types of armed groups and IHL will be addressed first. An analysis of the relevant treaty law and case-law will follow, allowing us to determine the position of the "adversary element" prior to the *Ntaganda* decision.

3.1 Armed groups. A complex legal reality.

Considering that the aim of this thesis is to determine whether intra party offences might be constitutive of war crimes, it is reasonable to dedicate some moments to the study of the "parties" where the offence is committed. The definition of an armed group is provided in Art 43(1) AP I. The provision states that "armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[85] However, in this definition there are no traces of a distinction between the two traditional IHL categories: state armed groups and non-state armed groups (NSAGs). Moreover, considering that the AP I deals with the protection of victims in IACs, it seems that Art 43(1) refers to state armed groups.

To define NSAGs, AP II only refers briefly to them in Art 1(1) to identify them as "dissident armed forces or other organized armed forces" opposite to the state regular forces.[86]

For the purposes of this thesis, the jurisprudence seems more clarifying. In that sense, one of the most relevant definitions was provided by the Trial Chamber in *Haradinaj*. The ICTY established the following indicative factors - being none of essential - to determine whether an organize armed group can be recognized:

> "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such

[84] North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, para. 74.
[85] Art 43(1) Additional Protocol 1.
[86] Art 1(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.

as cease-fire or peace accords."[87]

The first category (state armed groups) does not seem, a priori, as problematic for this reserach as the second. Being the states the primary subjects of not only IHL but general PIL, their troops have to enforce (while being subjected to them at the same time) treaty and CIL obligations. Following Cassese's approach, intra-party offences were out of the scope of IHL/ICL and were left to domestic jurisdiction.[88] His reasoning seemed to be in line with the available case-law and looked very appropriated. After all, the states adopt criminal legislation in line with their international obligations arising from human rights law' standards. Additionally, under the umbrella of the national constitutions, the guarantees of the judicial procedure are normally more than assured. Hence, it seems that domestic law deals very well with intra-party offences in state armed groups.[89]

The situation substantially changes when these violations take place within a NSAG. As Longobardo highlighted, this category of armed groups fight "against the state whose domestic jurisdiction should be applied."[90] Therefore, it is legitimate to question how HRL and IHL are binding on NSAGs.

Firstly, treaty law seems clear on bindingness and applicability on and to NSAGs. At this regard, CA 3 binds "each Party" in the conflict. AP II applies in NIACs when an armed group "exercise such control over a part of its territory as to enable them (…) and to implement this Protocol,"[91] indirectly recognizing that the whole AP II is binding to them. However, the reasons why CA 3 is binding on non-State actors is still debated. The ICRC on its CA 3 commentary summarized the main positions, being those very divergent among them.[92] Treaty law aside, most

[87] ICTY, Haradinaj et al. (IT-04-84), Judgement, 3 April 2008, para. 60.
[88] CASSESE, 2003, p. 48.
[89] LONGOBARDO, 2019, pp. 612-613.
[90] Ibid, 613.
[91] Art 1(1) Additional Protocol 2.
[92] Commentary of 2016. Article 3: Conflicts not of an international character. International Committee of the Red Cross, 2016, para 507.
"The exact mechanism by which common Article 3 becomes binding on an entity that is not a High Contracting Party to the Geneva Conventions is the subject of debate. Explanations include: that an entity claiming to be representing a State or parts of it, in particular by exercising effective sovereignty over it, enters into the international obligations of that State; that following the ratification of the Geneva Conventions by a State, common Article 3 becomes part of domestic law and therefore binds all individuals under the State's jurisdiction, including members of a non-State armed group; that common Article 3 and other humanitarian law treaties intended to bind non-State Parties to non-international armed conflicts are international treaty provisions lawfully creating obligations for third parties, similar to how treaties can, under certain circumstances, create obligations for States not party to them; that when a State ratifies a treaty, it does so on behalf of all individuals under its jurisdiction, who can therefore become the addressees

CIL rule applicable in NIACs bind every party in the conflict, with some exceptions related to State responsibility, compliance and enforcement, which are only binding on states. Therefore, it is currently asserted that both IHL treaty and CIL are binding on NSAGs.[93]

The situation is different when dealing with the relation between NSAGs and HRL. This is still under debate and not free of controversy, starting by the basis. If the aim of IHL has an horizontal character (to regulate the conduct during a conflict), the HRL is entirely vertical (the protection from the state to the individual). If IHL treaty law applies to the parties to the conflict, the HRL treaty law applies entirely to states. Digging into the debate would move us very far away from the scope of the present thesis. However, the current predominant position should be highlighted: NSAGs are subjected to human rights law "when they have control over territory, allowing them to exercise de facto State functions."[94] However, the level of this subjection is far away from the state's position and it is arguable whether this affirmation has reached the status of CIL.[95]

Hence, although domestic jurisdiction seems the most appropriate tool to deal with intra-party offences that might qualify as "war crimes", there are several doubts whether this would be the suitable instrument for NSAGs.

3.2 The adversary element and treaty law.

The sources of IL are considered to be enshrined in the ICJ Statute Art 38. Although treaty law will be studied in detail in the present section, CIL must not be overlooked as a primary source of IL. In that sense, it must be highlighted that CIL lies behind several provisions that will be addressed here – such as CA 3 – and the decisions of international courts and tribunals –such as

of direct rights and obligations under international law; that it 'derives from the fundamental nature of the rules [common Article 3] contains and from their recognition by the entire international community as being the absolute minimum needed to safeguard vital humanitarian interests'; and that non-State armed groups can also consent to be bound by common Article 3, for example through the issuance of a unilateral declaration or special agreement between Parties to an armed conflict."

[93] HENCKAERTS, Jean Marie & WIESENER, Cornelius. Chapter 8. Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice in HEFFES, Ezequiel *et al*. International Human Rights Law and Non-State Actors, Debates, Law and Practice. Springer, The Hague, 2020, p.199.

[94] Ibid, p.222.

[95] At this regard, see HENCKAERTS, Jean Marie & WIESENER, Cornelius. Chapter 8. Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice in HEFFES, Ezequiel *et al*. International Human Rights Law and Non-State Actors, Debates, Law and Practice. Springer, The Hague, 2020.

Tadić-.[96] In other words, although it will not be the main concern of the following two sections, CIL will be addressed when necessary.

It is evident that if any provision from IHL treaty law expressly regulated the adversary element, the aim of the present thesis would not make any sense at all. However, considering that the adversary element apparently emanates from the case-law interpretation of war crimes and IHL, treaty law shall not be overlooked. In that sense, the consolidated doctrine prior to *Ntaganda* considered IHL to apply between the parties of an armed conflict and not intra-party. That is why the present section will deal with these two dimensions. In one hand, the study of the codification of war crimes in the relevant IHL treaty law and, in the other, the arguments raised by the academia concerning the codification of intra-party IHL regulations.

First a reference should be made to treaty interpretation. The general rule of interpretation enshrined in VCLT Art 31 establishes that a treaty shall be interpreted in good faith attending to the ordinary meaning of its terms at the light of their context and purpose and establishes any subsequent agreements and practice as valid authentic methods of interpretation that should be taking into account for the purposes of establishing the "context".[97] These rules also apply as CIL.[98] With this on mind, this thesis will proceed with the study of the different treaty law sources, that will be addressed in chronological order.

Since the first international prosecution of war crimes took place in Nuremberg, the IMTN Charter will be first instrument addressed. The document does not offer a specific definition of war crimes despites of highlighting that they are "violations of the law and customs of war". However, the provision does include some examples. The ones that might be considered relevant for this thesis' purposes are the following: "murder, ill-treatment or deportation to slave labor for any purpose of civilian population", "murder or ill-treatment of prisoners of war or persons on the seas" and "killing of hostages".[99] These three examples stated in 1945 fall easily under one classical typology of war crimes. This category can be recognized under different names such as war crimes "committed against persons not taking part, or no longer taking part, in armed

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[96] However, decisions of international courts and tribunals are not an absolute proof of the existence of CIL, as the ILC and the ILA established. However, this issue will be addressed furtherly.
[97] Art 31. Vienna Convention on the Law of Treaties. United Nations. 23 May 1969.
[98] Conclusion 2 (1). Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries. International Law Commission, 2018.
[99] Art 6(b). IMTN Charter.

hostilities"[100] or "war crimes against persons requiring particular protection".[101] However, their scope is the same, grouping war crimes committed against a protected person not taking direct part in the hostilities: *hors de combat* and civilians. The examples contained in Art6(b) clearly set a line where the victims are identified: either by being civilians or *hors de combat*. Between the statuses of POW and "hostage" lies the adversary element, considering the absurd that would constitute an hostage situation where the subjects belong to the same party.

It should be highlighted that, although the provision also establishes that the conception of war crimes "shall not be limited" to the stated conducts - what prevents the absolute confirmation of this assumption - the existing IHL framework at that time (namely the Hague Conventions and the first Geneva Convention) does not contemplate specifically any intra-party conduct, what (at least, apparently) shifts the balance in favor of this thesis' assumptions.

In the case of the IMTFE, war crimes are settled as "violations of the laws or customs of war"[102]. The absence of examples serves as an opportunity to analyze the existent IHL treaty law in 1946. This is, the Hague Conventions of 1899 and 1907 and Geneva Convention of 1929. Although there is no reference to intra-party conducts as such, some remarks should be made. The Hague Law codifies – among other issues, such as the prohibited means of war - a set of rules regarding the POW protection that necessarily applies to the adversary.[103] However, there is a provision in the Geneva Law that might establish an intra-party mandate: the obligation of taking care of wounded or sick combatants, regardless of "whatever nation they may belong".[104] With these five words, the adversary element seems diluted (although the combatant stops taking direct active part in the hostilities too). This provision along with others that came after it will be addressed later.

As it was already established, the 1949 Geneva Conventions contain a provision establishing "grave breaches". These conducts would qualify as "war crimes" when "committed

[100] CASSESE, 2003, p.55.
[101] NERLICH, in CASSESE, 2009, p. 567.
[102] Art 5(b) International Military Tribunal for the Far East. Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946.
[103] Chapter IV, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
[104] Art 6. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

against persons or property protected by the Convention."[105] Considering that the Convention protects both *hors de combat* and civilians, a combatant that would not fall under these categories difficultly could be protected by IHL.

This research will proceed with the study of the modern IMTs' statutes. The ICTY addresses war crimes on its Arts 2 and 3, as it was already determined above. The prosecution of war crimes under Art 2 was subjected to the conditions establish on Geneva Conventions, as it was established in *Tadić.*[106] Therefore, it would be assumable that the protection would not be granted to combatants who fell out of the Conventions' protection scope. In the other hand, the ICTY used Art 3 to avoid the qualification of the conflict and, in many instances, the stricter requirements of treaty law.[107] It should be mentioned here that the examples provided in Art 3 difficultly would apply to intra-party conducts, more related to the means and methods of warfare.[108] Unfortunately, the Tribunal did not make any reference on its rulings under Art 3 of any CIL concerning this thesis' topic.

The Statutes of the SCSL and the ICTR addressed war crimes under the umbrella of the Geneva Conventions. Under the light of *Tadić*, the conditions required by the Geneva Conventions would apply, making difficult the prosecution of combatants outside of the scope of the protection granted by the Conventions.

The Rome Statute seems to be a little bit more complex. It establishes a diverse typology of war crimes along Art 8:

- Art 8(2)(a) concerns the grave breaches from the Geneva Conventions (in line with the IMTs' statutes).
- Art 8(2)(b) deals with other offenses constitutive of war crimes under IHL in IACs.
- Art 8(2)(c) addresses war crimes under serious violations of CA 3 in NIACs.
- Art 8(2)(e) deals with offences that qualify as war crimes under IHL in NIACs.

Arts 8(2)(a) and 8(2)(c), in line with *Tadić*, would be applicable when the conditions set by

[105] Art 50. Geneva Convention I.
[106] Prosecutor v. Tadić, Decision on Interlocutory Appeal on Jurisdiction (Case No. IT-94-1-AR72), ICTY Appeals Chamber, 2 October 1995, para. 80.
[107] See, at this regard, Section 2.2.
[108] Art 3 ICTY Statute.

the Geneva law are met. The first provisions literally contemplates its application when the acts are committed "against persons or property protected under the provisions of the relevant Geneva Convention"[109], while the second deals with persons not taking active part in the hostilities, including *hors de combat.*[110] However, the other conducts included in provisions 8(2)(b) and 8(2)(e) would be prosecutable depending on the "established framework of international law". These articles established an exhaustive list that, as it was stated above, is not a codification of current IHL.

The interesting fact is that some of these conducts could fit in intra-party relations. For example, the following one: "Committing outrages upon personal dignity, in particular humiliating and degrading treatment."[111] Considering that the conditions for the applicability of this provision rely on the "established framework of international law", if the ICC determined that IHL allowed it, an offence under this provision committed within the same party could be constitutive of a war crime. Although the possibility is there, the ICC would have to demonstrate first that current IHL admits that war crimes might take place within the same armed group.

There is therefore a crucial question that remains regarding whether IHL might apply intra-party. Surprisingly, there are some evidences that point out in this direction. As it was highlighted before, Art 6 of the 1864 Geneva Convention establishes a mandate of protecting the wounded and sick combatants "whatever nation they may belong". Under this wording, the obligation seems bidirectional: inter-party and intra-party. The next Geneva Convention in 1906 addressed this issue in the same direction. Under its Art 1, the wounded and sick should be taken care of "without distinction of nationality, by the belligerent in whose power they are". Moreover, the second paragraph of the provision establishes an obligation of, when by necessity a wounded or sick combatant is abandoned, it shall be leaved "a portion of the personnel and 'matériel' of his sanitary service to assist in caring for them"[112]. There are stated two clear obligations that must be complied intra-party direction: the obligation of taking care of the wounded of its own party and, when being compelled to abandon then, the obligation of leaving with them part of the resources that would provide healthcare to the wounded combatant. This path would be followed by Arts

[109] Art 8(2)(a). Rome Statute.
[110] Art 8(2)(c). Rome Statute.
[111] Art 8(2)(b)(xxi). Rome Statute.
[112] Art 1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906.

12 and 13 of the 1949 Geneva Conventions (I) and (II), where similar obligations were stated.

However, what might seem more interesting for us is the AP I Art 75, which provides "fundamental guarantees". The provision applies to "persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol".[113] It includes a list of acts forbidden (such as murder or torture) with the aim of guaranteeing a minimal protection to those who does not fall under a status protected by the Convention. The ICRC, at the time of drafting this article, expressed that "a minimum of protection should be granted in time of armed conflict to any person who was (…) unable to claim a particular status, such as that of prisoner of war, civilian internee in accordance with the Fourth Convention, wounded, sick or shipwrecked."[114] With respect to this article, Finland made an interpretative declaration at the time of its ratification stating that "field of application of Article 75 shall be interpreted to include also the national of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict."[115] As Longobardo states, this broad interpretation might as well include members of the same armed forces.[116] The fact of the existence of intra party obligations may be considered either as "explicit derogations from the inapplicability of international humanitarian law to intra-party conduct" or as "treaty confirmations on the lack of such a limited scope of application."[117] Nevertheless, the violation of this conducts is not typified as war crimes, rather falling under the category of crimes against humanity.[118]

3.3 The adversary element and the case-law.

To determine the current position of the adversary element in IHL, the relevance of the current treaty law has been asserted. In that sense, it is convenient to have a look first to the ILC' Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Its second conclusion establishes the sources contained in the VCLT,

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[113] Art 75. Additional Protocol 1.
[114] ICRC. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. SANDOZ, Yves et al (ed.), International Committee of the Red Cross, 1987, p. 864.
[115] HANNIKAINEN, Lauri, HANSKI, Raija & ROSAS, Allan. Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland. Martinus Nijhoff Publishers, Abo Akademi University, Institute for Human Rights, 1992, p. 5.
[116] LONGOBARDO, 2019, p. 614.
[117] Ibid.
[118] Ibid.

including "subsequent practice" on the application of the treaty. Together with the remaining elements (the wording, the context and the subsequent agreements) it works as a "single combined operation" in the process of interpretation. In the third conclusion, subsequent practice is qualified as an "authentic method of interpretation". The ILC highlighted on its commentary that there is no hierarchy among sources, being the relevance of the practice emphasised. Moreover, as the fifth conclusion established, "subsequent practice under Arts 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions."[119] Nevertheless, this assertion is not exempt of problems. The ILC refers here exclusively to domestic courts, international tribunal being outside of the scope of the definition of state practice.

Moreover, in their Draft conclusions on identification of customary international law, the ILC established that "decisions of international courts and tribunals concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules."[120] On its commentary, the ILC stated that the used wording "denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law."[121] In addition, the International Law Association (ILA) established in their Statement of principles applicable to the formation of general customary international law that, although international tribunals may be useful for the purposes of studying – among others - the verbal acts of a state for determining state practice,[122] their decisions "do not constitute formally binding precedents".[123] Therefore, the decisions examined in the present section should be addressed carefully, bearing on mind their secondary role.

The first issue that should be stated is that not many cases have dealt with the question of the "adversary element" in the definition of war crimes. However, some rulings have been made in both national and international level. The first case that will be studied is the much-quoted *Motosuke*. Summarising, Susuki Motosuke was a First Lieutenant of the Japanese Army Engineer

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[119] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries. International Law Commission, 2018, pp. 1-22.
[120] Draft conclusions on identification of customary international law, with commentaries. International Law Commission, 2018, p. 149.
[121] Ibid.
[122] International Law Association. Statement of principles applicable to the formation of general customary international law. Final report of the committee. Committee on formation of customary (general) international law, London Conference, 2000, p. 14.
[123] Ibid, p. 4.

Corps. He was prosecuted by the Netherlands Temporary Court Martial at Amboina under the charges of committing four war crimes during the months of August and November of 1944. In one hand, he was charged with the murder of a Dutch national named Barends in August and, in the other, the execution of three Indonesians in October. The first had been accused of opening fire against a Japanese called Yamamoto. The latter were executed because of different offences (such as stealing a rifle) without –as the Court determined- the celebration of a fair trial. Although in the case of the three Indonesians the Court did not find any issues with the qualification of Motosuke's conducts as war crimes, Barends execution presented a substantive issue. He had joined the "Gunkes", volunteer combatants serving under the Japanese Army. For the court, the act of joining the Japanese Army implied that he was not a Dutch national at the time of its execution. To address this issue, the Court referred to a document entitled "Explanation of the Legislation drafter with regard to war crimes".[124] In this document, the Commission has taken the view that the concept "applied to victims who were nationals of the United Nations, i.e. to "allied" nationals".[125] Therefore, as Barends had lost his nationality, the Court stated that "it could hardly be alleged that the act committed against him was contrary to the laws and customs of war".[126]

Although this case is used as one of the classical grounds for defending the existence of the adversary element, the true is that the definition of war crimes used at the time implied that should be committed against the allied powers. In one hand, it could be arguable that allies are fighting together against adversaries. In the other, the definition still presented several issues. In April 1944, the Belgian representative, Chairman of the UN Committee on Facts and Evidence proposed to amplify the definition to cover offences against other individuals that were not "allied" nationals, including even enemy nationals. In that sense, he refer to the killing of Italian hostages by the Nazis, the offences perpetrated against neutral or co-belligerent countries and even to the crimes committed by the allies. A proposal was drafted but no unanimity was achieved, the issue being adjourned. Although legal basis was not established at the UN level, based "in the heinous nature of the offence, irrespective of whether the victim or the perpetrator was or was not an Allied national", the offences were treated "either as war crimes proper or as acts analogous to war crimes

[124] The United Nations War Crime Commission. Law Reports of Trials of War Crimes, Volume XIII. The United Nations War Crimes Commission by his Majesty's stationery office. 1949, p. 127.
[125] The United Nations. History of the United Nations War Crimes Commission and the development of the laws of war. The United Nations War Crimes Commission by His Majesty's stationery office, 1948, p. 172.
[126] The United Nations War Crime Commission, 1949, p. 127.

stricto sensu."[127] From this evolution it is appreciable that maybe the fundamental problem of *Motosuke* was not so related to the "adversary element" but to the existent definition of war crimes at the time. However, it cannot be denied that, attending to the evolution and the debates within the UN, the adversary element was still implicitly present in all the proposals concerning the expansion of the definition.

There is another case in the WWII environment that is widely quoted as a proof of the existence of the adversary element, the *Pilz* case. Pilz stands for Dr. Fritz Georg Herman Pilz, a German doctor serving in the German occupied Netherlands who refused to provide medical assistance to a wounded soldier who tried to desert, ordering a subordinate to carry out his execution. The executed was a Dutchman who had joined the German forces.[128] The District Court of The Hague ruled that "the wounded person was part of the occupying army and the nationality of this person is therefore irrelevant, given that, by entering the military service of the occupying forces, he removed himself from the protection of international law and placed himself under the laws of the occupying power."[129] Moreover, the Special Court interpreted that 1929 Geneva Convention on Wounded and Sick only applied when the subjects were enemies of adversary armies.[130] This interpretation seems a bit problematic, considering that already the 1929 Geneva Convention Art 1 establishes the obligation of taking care of wounded and sick "regardless of their nationality" as well as the obligation of providing medical material in case that an army is compelled to abandon the wounded.[131] However, it clearly encompasses the idea that war crimes take place between adversaries, ruling out the intra-offences to jurisdiction of domestic criminal courts.

The analysis will proceed with the study of two cases that concerned "desertion", a status that has never been properly addressed by IHL.

The first one is *Ikegami Tomoyuki.* Ikegami was the head of a force that included the so-known "Romu Tai", a force often referred as a "Special Labor Force". Within this force there were Indians (belonging to the allied forces) that had being captured (enjoying the POW status)

[127] The United Nations, 1948, pp. 173-174.
[128] MEHRING, Sigrid. First Do No Harm: Medical Ethics in International Humanitarian Law. International Humanitarian Law Series, Volume 44, 2014, pp .158-159.
[129] *Pilz* in CASSESE, 2003, p. 48.
[130] *Pilz* in MEHRING, 2014, p. 159.
[131] Art 1. 1929 Geneva Convention. What it is highlighted here is the fact that the Convention imposes some obligations not related to the adversary in a conflict.

and later joined the Japanese army. On 18th June 1945, five members of " Romu Tai" were arrested while trying to escape from the army. After concluding that those members were conspiring to desert with secret information, Ikegami ordered their execution. A similar incident took place on 26th June with another eleven members. These executions were prosecuted as war crimes. The defense of the accused alleged that by joining the Japanese army they could no longer be considered POW. Therefore, the question that the Military Court in Singapore had to deal with at first was whether the executed held a POW status or not. After several days of trial, the court stated that under constitutional and international law, "subjects were unable to renounce their allegiance during a state of war". Therefore, the victims retained the status of POW and Ikegami was condemned to capital punishment.[132] In the *Takashima Shotaro* case, the facts are quite similar. The accused where charged with ill-treatment of "POWs", belonging as well to Romu Tai. The defense argued again that the executed were members of the Japanese army not enjoying the status of POW. However, based on the grounds of its previous decision, the Court rejected this argument and found the accused guilty.[133]

Nevertheless, this is not the end. Both cases were revised by the Judge's Advocate General Department and, unsurprisingly, the decisions were not confirmed. The reasoning in the *Ikegami Tomoyuki* case was the following:

> "(…) although the domestic law of England does not recognize change of nationality of a British subject to enemy nationality while he is in enemy or enemy occupied territory during the existence of a war and holds him liable for any offence against the English law of treason despite such purported change of nationality, nevertheless where he voluntarily joins the forces of the enemy and subjects himself to the military law governing such forces, international law does not regard as a war crime disciplinary action taken against him by the enemy, which is in accordance with that military law."[134]

The appeal established that, by joining the forces of the enemy, the individuals were accepting the military Japanese jurisdiction, being a disciplinary action governed by the Japanese military law out of the scope of international law. Same approach was applied to the *Takashima Shotaro*, rejecting the findings of the first instance.[135]

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[132] CHEAN, W.L. Dealing with Desertion and Gaps in International Humanitarian Law: Changes of Allegiance in the Singapore War Crimes Trials. Asian Journal of International Law, 8 (2018), p. 358.
[133] Ibid, p. 359.
[134] *Ikegami Tomoyuki*¸ Department of JAG, p. 4.
[135] *Tokushima Shotaro,* Department of JAG, p. 2.

The reasons of the different approaches carried by the military courts and the JAG Department were addressed by Chean. He highlighted in one hand the lack of qualification, "as most judges and trial personnel did not hold formal legal qualifications." In the other, that if the court had ruled that the victims were able to switch their allegiance, other questions concerning the reasons behind the crimes and whether they had been coerced to enroll the Japanese army should have been addressed.[136]

The words of the JAG Department should be addressed once more for the purposes of this research. The assertion that "international law does not regard as a war crime disciplinary action taken against him by the enemy, which is in accordance with that military law" implies that the action should be in accordance with that military law. Although the question concerning what would happen if the action is not in accordance with military law is still there, by establishing that the POW status is lost after enrolling the Japanese army, the judge implicitly assumed that the topic would fall out of the scope of international law. Thus, it would not be unconceivable that such a conduct would be prosecutable under domestic criminal jurisdiction.

As the ICC acknowledged in *Ntaganda*, there is, surprisingly, no record of cases "in which the grave breaches regime has been applied to situations in which victims belonged to the same armed force as the perpetrators."[137] That is the reason behind the lap of 60 years between the previous and the following analyzed decisions.

The ICC addressed the adversary element in *Katanga and Ngudjolo Chu* in relation to the war crime of pillaging. When addressing the subjective and objective elements of the crime, the PTC stressed the following:

> "Like the war crime of destruction of property under article 8(2)(b)(xiii), the war crime of pillaging under article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an "enemy" or "hostile" party to the conflict. Therefore, the pillaged property - whether moveable or immoveable, private or public - must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator."[138]

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[136] CHEAN, 2014, p. 364.
[137] ICC, The Appeals Chamber, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Judgment on the appeal of Mr. Ntaganda against the "Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, para. 60.
[138] Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, icc01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 329.

The ICC recognizes in a footnote that this requirement of "property belonging to an adversary" is not expressly stated in the Rome Statutes or the Elements of Crimes. In that sense, when the Elements of Crime addresses the "war crime of destroying or seizing the enemy's property", its second elements is "such property was property of a hostile party".[139] This clear reference was not expressed in the case of pillaging. However, the PTC considered that "part of the doctrine endorses the view that, as any war crime, the crime of pillage is committed against the adverse party to the conflict."[140] The Court references a commentary on the Elements of War Crimes under the Rome Statute which supports this conclusion. This reference addresses the codification of the war crime of pillaging in national military legislations, showing a quite divided paradigm. While Canada defines – in the context of pillaging – the property as "enemy private or public property", the former Socialist Republic of Yugoslavia included the appropriation of private property *inter alia.*[141] It seems that the Court was a bit reluctant to address in more absolute terms the adversary element.[142] However, there is a quite clear stand established behind the words "as any war crime (…) is committed against the adverse party to the conflict".

The SCSL seemed less hesitant to recognize the existence of the "adversary element" in the *Issa Hassan Sesay.* When addressing the issue of the "Killing of 63 suspected Kamajors and one AFRC (Armed Forces Revolutionary Council) fighter *hors de combat*" by the RUF (Revolutionary United Front), the alliance between the AFRC and the RUF was highly considered. In the words of the Court, Kayioko (the AFRC victim) was "an hors de combat member of the AFRC, who fought alongside the RUF in the armed conflict."[143] The SCSL established then that "the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces."[144] The SCSL went beyond this and affirmed the following:

> The law of international armed conflict regulates the conduct of combatants vis-à-vis their adversaries and persons hors de combat who do not belong to any of the armed groups participating in the hostilities.[145]

[139] Elements of Crimes, p.25.
[140] Katanga and Ngudjolo, 2008, note 430.
[141] DÖRMANN, K., Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, Cambridge, 2003, p. 280.
[142] After all, within the words "part of the doctrine" it is recognized the existence of the debate.
[143] SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, Case No. scsl04-15-T, 2 March 2009, para. 1451.
[144] Ibid.
[145] Ibid, para. 1452.

Moreover, when addressing the death of another combatant (Kanu) that qualified as *hors de combat*, the Court disregard the condition reiterating that "the killing of a member of an armed group by another member of the same group does not constitute a war crime."[146] Besides this, the Court also emphasized that domestic criminal law and human rights law would be the appropriate brands of law to deal with intra-party offences.[147]

Part of the academia criticized the fact that the SCSL referred within these paragraphs to "the law of international armed conflicts" to address the conflict in Sierra Leone, which qualified as a NIAC. Fernández addressed this issue and determined that the statement corresponds to a reference error. Moreover, the scholar also highlighted that, being well-known the fact that IHL grants a higher level of protection within IACs than in NIACs, if offences within the same armed group do not qualify as war crimes in IACs, it should be concluded that the same would happen in NIAC.[148]

However, not all the case-law has been uniform at this regard. In the *Kvočka* case, the ICTY took a different view. Here, Zoran Žigić was declared guilty of a "violation of the laws and customs of war" for the murder of Drago Tokmadzić. The latter was a half-Serb police officer that "had declared loyalty to the Serbian authorities."[149] Žigić was a Serb guard in the Omarska camp. Again, the question was whether the offence would or would not constitute a war crime. Žigić claimed that Drago "could not possibly be treated as a prisoner of war in the Omarska camp."[150] Although the defense claimed that the adversary element as a requirement for war crimes was missing, the Court dismissed it and stated that since "he was detained in the camp, he belonged to the group of persons protected by the Common Article 3 of the Geneva Conventions".[151] In this case the ICTY took a total different approach from the one that the SCSL would use some years later, establishing that being *hors de combat* was enough requirement regardless of the intra-party character of the offence. As it has been established, two *ad-hoc* Courts arrived to two different interpretations.

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[146] Ibid, para.1455.
[147] Ibid, para.1453.
[148] FERNÁNDEZ CARTER, C. (2018). Los crímenes de violencia sexual cometidos al interior de un grupo armado: el caso de los niños soldados en The Prosecutor vs. Bosco Ntaganda. ANIDIP, 6, pp. 99-100.
[149] ICTY, Kvočka et al. (IT-98-30/1-A), ACH, 28th February 2005, para. 560.
[150] Ibid.
[151] Ibid, para. 561.

4. The *Ntaganda* case.

The most influential case that initiated a very vivid scholarly debate – and the *raison d'être* of this thesis – is the *Ntaganda* case. In 2019, the former commander of operations and Deputy Chief of the Staff of the Forces Patriotiques pour la Libération du Congo (FPLC) Bosco Ntaganda was sentenced in 2019 to 30 years of imprisonment for war crimes and crimes against humanity, the longest sentence handed by the ICC so far.[152] The FPLC was the military wing of the Union of Congolese Patriots, being engaged in a conflict in Ituri, a DRC north-eastern region from 2002 to 2003.[153]

What revolved the academia and originated a broad debate was the fact that the ICC PT, TC and AC ruled that intra-party sexual crimes perpetrated against child soldiers could be prosecuted as war crimes under the Rome Statute,[154] generating a great debate. As it has been established in the present thesis, prior to *Ntaganda*, IHL did not allow to affirm (at least, categorically) that the adversary element was not a necessary precondition for the prosecution of war crimes. Conversely, it seemed that historically the more supported assertion was that intra-party offences were left to domestic criminal law, governed by human rights law standards.

The present chapter will be therefore focused on the critical analysis of the arguments raised by the ICC in all its chambers, complemented by the scholars' contributions. Along this section, 18 different documents from the procedure will be addressed for this purpose. Given the complexity of the case, this chapter will be divided among the different chambers that had to deal with the topic of this research.

4.1 The Pre-Trial Chamber.

Ntaganda began with the ICC Office of the Prosecutor (OP) submitting the document containing the charges against Bosco Ntaganda. Among them, "rape and sexual slavery of UPC/FPLC child soldiers". After the prosecuted conducts were described in detail, the OP

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[152] Bosco Ntaganda sentenced to 30 years for crimes in DR Congo. BBC News, 7 November 2019.
[153] Footnote 5. KENNY, C. & MCDERMOTT, Y. The expanding protection of members of a party's own armed forces under International Criminal Law. ICLQ vol. 88, October 2019, p. 945.
[154] POLTRONIERI, L. Intra-party sexual crimes against child soldiers as war crimes in Ntaganda. "Tadić moment" or unwarranted exercise of judicial activism? QUIL, Zoom-in 60(2019), p. 51.

legitimated their prosecution under the category of war crimes based on two "levels of protection". In one hand, the "afforded general protections against sexual violence under the fundamental guarantees applicable to persons affected by NIAC". In the other, their "special protections because of their vulnerability as children". The OP referred explicitly to AP II Art 4 and CA 3 to establish that "these levels of protections support the recognition of child soldiers as victims of sexual violence for the purposes of charges under article 8(2)(e)(vi)."[155]

This legal basis is not free of controversy. As it has been established, CA 3 grants protection to "persons taking no active part in the hostilities", including *hors de combat*. However, a child soldier participating actively in the hostilities would hardly fall under that scope. In the other hand, it is true that AP II Art 4 establishes a set of fundamental guarantees during a NIAC. However, some remarks should be made. The first one, that Art 4(1) refers again to "All persons who do not take a direct part or who have ceased to take part in hostilities (…)". The question regarding the protection of child soldiers seems to be clarified in the light of Art 4(3)(d). This provision establishes that, even if children "who have not attained the age of fifteen years" take direct part in the hostilities, the special protection provided by this article should apply if they "are captured".[156] The wording of the article legitimately leads to think that a combatant is captured by the adversary forces, being questionable whether this protection would apply within the same group.

The PTC seemed to be aware of the controversy that surrounded the charges. After all, the Defense had alleged that "international humanitarian law ("IHL") 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".[157] The Chamber decided to avoid the substantive issue (this is, whether the adversary element is necessary in the definition of war crimes) and focused its decision on the special nature of child soldiers and the sexual offences committed. In that sense, the arguments of the PTC deserve some attention.

Firstly, the PTC picked up the baton of the articles referred by the OP. In the first place, the

[155] 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, para. 197.
[156] Art 4(3)(d). Additional Protocol II.
[157] ICC Pre Trial Chamber II, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo,ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 76.

Chamber highlighted that both CA 3 and AP II Art 4(1) and 4(2) conferred protection to persons taking no active part in the hostilities. Among the prohibitions established against those protected individuals the Court stressed "rape, enforced prostitution and any other form of indecent assault". Therefore, the PTC decided that the right way to go would be via determining whether those persons were taking active part in the hostilities "at the time they were victims of acts of rape and/or sexual slavery".[158] With that purpose on mind, the Chamber emphasized that the active or direct participation in the hostilities should be addressed in the light of Art 4(3)(c), that prohibits "to recruit and use children under the age of 15 years to take part in hostilities". This allowed the Chamber to conclude that "the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities". Conversely, in the view of the chamber, child soldiers under the age of 15 would lose the IHL protection "only during their direct/active participation in hostilities". The PTC continued arguing that, due to the sexual character of the crimes, "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".[159] With this interpretation, the child soldiers would classify as *hors the combat* at the moment of the crime and would be granted the IHL protection.

Several problems arise under this approach. The first one is the continuous character of the crime of sexual enslavement. As Svaček highlighted, this would imply a high level of protection as long as they are enslave, benefiting for instance from target immunity. This "irreconcilable contradiction" could be resolved through a "bifurcated standard of protection", being protected from their own armed group but not from the military adversary.[160] At this regard the figure of the "revolving door" (situation when an individual loses his or her protection under IHL for the time they are participating in the hostilities) should be examined. When addressing it, the ICRC clarified that this scenario applies only to persons who are not members of an armed group. The pertinence to the armed group would be determined by "whether a person assumes a continuous combat function" for the group, qualifying as direct participation in hostilities.[161] Therefore, it can be estimated that the "revolving door" would not shed any light at this matter.

[158] Ibid, para. 77.
[159] Ibid, para. 78.
[160] SVAČEK, O. Brothers and sisters in arms as victims of war crimes. Ntaganda case before the ICC. Czech Yearbook of International Law, 8, 2017, p. 352.
[161] KENNY, C. & MCDERMOTT, Y., 2019, p. 947.

A very interesting question was highlighted by Kenny and McDermott. They reminded the fact that the distinction between combatants and civilians belongs to the IAC sphere, while the distinction founded on the direct or active participation in hostilities is related to NIACs. By limiting their analysis to the concept of directive participation and granting the protection to the victims based on their impossibility to participate in the hostilities at the time the crimes were being perpetrated, "the Pre-Trial Chamber left unanswered the question of whether combatants in international armed conflicts were similarly protected when not carrying out combat functions."[162]

Another consequence that this view approach might carry is related to the *Lubanga* case. The ICC TC interpreted broadly the notion of "direct participation in hostilities", with the aim of protecting as much victims of forced recruitment as possible, stating that "those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants". The Court stated then that "if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target".[163] To determine this, the ICC TC defended a case by case' approach. In any case, in comparison, the approach taken in *Ntaganda* clearly advocates for a very restrictive approach for defining active participation in hostilities. As Kenny and McDermott highlighted, the PTC arose a question concerning whether "children who were primarily recruited to an armed force for the purpose of sexual slavery fell outside the scope of the prohibition of conscription of child soldiers."[164]

Last but not least, it should be highlighted that, when addressing the AP II Art 4, the PTC seemed to have overlooked the provision 4(3)(d). In that sense, the Chamber develops its interpretation "inspired" by the prohibition enshrined in Art 4(3)(c). However, the AP II recognized that, despites of the existence of the prohibition, child soldiers might be enlisted as well on Art 4(3)(c). For them, protection was already granted when they were captured (implicitly, by the adversary), as it was stated above. It seems reasonable to doubt whether the intention of the AP II drafters was to extend this protection intra party, as the PTC originally did.[165]

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[162] Ibid, p. 948.
[163] ICC Trial Chamber 1. Prosecutor v Thomas Lubanga, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, 14 March 2012, para. 628.
[164] KENNY, C. & MCDERMOTT, Y., 2019, p. 948.
[165] While the APII Art 4(3)(c) states "Children who have not attained the age of fifteen years shall neither be recruited

As it has been established, the ICC PTC did not address any of the mentioned issues here. The ICC TC might have seen them as well as problematic, since it took a completely different approach, as it will be furtherly discussed.

4.2 The Trial Chamber.

After the charges were confirmed by the PTC, the Defense Team of Mr. Ntaganda (DTN) sent an application challenging the jurisdiction of the Court concerning the crimes of rape and sexual slavery. This application was furtherly replied by the prosecution and the Office of Public Counsel for Victims, representing the child soldiers. Several legal issues were addressed regarding the jurisdiction of the Court. However, given the purposes and scope of this thesis, this research will be focused only into the ones related to this thesis' topic.

In that sense, the DTN challenged the jurisdiction of the Court defining it as "exhaustive" and highlighting that among the crimes contained in the Statute Art 8(2)(e)(vi) it is not included rape and sexual slavery of child soldiers.[166] The defense also seemed to answer the argumentation of the PTC by establishing that the categories protected by CA 3 (persons taking no active part in the hostilities, including *hors de combat*), preclude child soldiers.[167] Regarding the AP II Art 4, the Defense highlighted that the protection is granted when child soldiers are captured, as it was already commented. Considering that the child soldiers were not captured and, in addition, belonged to the same armed group, the protection would not apply.[168] Moreover, they also argued that IHL does not protect members of an armed group from "acts of violence directed against them by their own forces", quoting the SCSL decision also discussed above.[169] Therefore, the defense established that "other than the crimes of enlistment, conscription and use to participate actively in hostilities, child soldiers cannot be victims of war crimes".[170]

After listening to the parts, the TC had to take a stand. However, it seems that, at least at

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in the armed forces or groups nor allowed to take part in hostilities", Art 4(3)(d) establishes that "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."

[166] ICC Defense Team of Mr. Bosco Ntaganda, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges, 1 September 2015, para. 16-20.

[167] Ibid, para. 21-27.

[168] Ibid, para. 41.

[169] Ibid, para. 28.

[170] Ibid, para. 28-32.

first, it was specially reluctant. Essentially, the Chamber established that questions concerning CIL or IHL did not need to be addressed, arguing that "war crimes within the Court's jurisdiction are set out in Article 8 of the Statute in an exhaustive list". The Court observed that, although there is no reference in the Art 8(2)(e)(vi) of the Statute to the victim and its status, the Elements of Crimes refer to "person" and "persons". Highlighting that certain categories of war crimes within the Statute limit their scope to "certain types of victims", it should be understood that such limits are not established by the provisions enshrining the war crimes of rape and sexual slavery.[171]

Moreover, the Court stated that the substantive question concerning whether "children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group" should be addressed in a later state of the procedure, leaving us with no answer.[172]

Again, the Defense appealed this decision, followed by the corresponding answers from the different parts. Summarizing, the DTN highlighted on its application that the question concerning the existence or not of a crime (under the Rome Statute) had a certain priority and should be addressed before the beginning of the procedure. In other words, whether the war crimes of rape and sexual slavery can take place or not within the same group is a legal issue that will remain regardless of the facts of the case. Addressing this question would contribute to the efficiency of the trial proceedings.[173]

The AC[174] supported this view. In that sense, it highlighted that "the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature". The Chamber highlighted that, if the conduct is finally excluded from the scope of Art 8(2)(e)(vi), even if the Prosecutor had succeeded in proving the criminal conduct, the TC would not address it. Moreover, the Court considered the fact that "former child soldiers may be called as witnesses to provide

[171] ICC Trial Chamber VI, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 9 October 2015, para. 25.
[172] Ibid, para. 28.
[173] ICC, The Appeals Chamber, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Judgment on the appeal of Mr. Bosco Ntaganda against the "Decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 22 March 2016, para. 25.
[174] Although the findings of the AC will be discussed in the following section, a brief reference to the chamber should be made in the present one, considering that the issue was referred back to the TC.

detailed testimony about traumatic events" to stress the necessity of resolving such a jurisdictional issue "as early as possible in the proceedings".[175] Therefore, it reversed the previous decision, forcing the TC to take a stand.

And so it did. At first, the TC addressed the interpretation of the Statute in order to determine whether the status of victims of the war crimes of rape and sexual slavery depended on the conditions settled in CA 3. The Court examined the structure of the Statute, determining that the crimes codified under Arts (2)(a) and (c), required for their prosecution the fulfillment of the CA 3 conditions, as it was established in the *chapeaux* of the provisions. If Art 8(2)(e)(vi) and its variant for IAC required the same standards, the differentiation would not make any sense, according to the Court. After that, the TC analyzed the wording of the Art 8(2)(e)(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;[176]

As it was already established several times, the scope of CA 3 protection embraces those who are not taking direct part in the hostilities, including *hors de combat*. The Chamber noted that "the inclusion of 'also' in the wording of the crimes listed in Art 8(2)(b)(xxii) and Art 8(2)(e)(vi) (…) is to be regarded as connecting the phrases 'any other form of sexual violence' and 'constituting a grave breach of the Geneva Conventions'", meaning that such a conduct should be "of a gravity comparable to that of a grave breach of the Geneva Conventions". With this affirmation, the Court excluded the conducts enumerated at the beginning of the provision from that threshold. Therefore, the TC declared that the status of victim of these crimes should not be subjected to the conditions settled in CA 3.[177]

This line of argumentation was fairly criticized. To Kenny and McDermott, the reasoning of the Defense seemed more appropriate. The DTN had argued that Arts 8(2)(e) and 8(2)(b) should be interpreted in accordance with their *chapeaux*, i.e. "the established framework of international law". The scholars relied on the work of Cottier, who established that the crimes "set out in Article 8(2)(e) are primarily derived from Additional Protocol II (AP II) to the Geneva Conventions".

[175] Ibid, para. 40-41.
[176] Art 8(2)(e)(vi), Rome Statute.
[177] ICC Trial Chamber VI, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, para. 40-44.

The prohibition of rape and all forms of slavery is enshrined in AP II Art 4, which limits its protection to "all persons who do not take a direct part or who have ceased to take part in hostilities".[178] Consequently, the scholars considered that the crimes enshrined in Arts 8(2)(e) and 8(2)(b) (in line with the *chapeaux*) should be examined considering the AP 2 Art 4 "in order to determine its scope and the material elements of the crime."[179]

The TC moved on with the evaluation of the established framework of IHL in order to determine whether rape and sexual slavery could constitute war crimes in absence of the adversary element. The Chamber started referencing historical IHL sources such as the Lieber Code to highlight the historical and long-term character of these prohibitions. The TC, after recognizing that "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", found that those legal expressions do not define or limit the scope of the protection.[180] Moreover, an updated ICRC commentary from 2006 on the CA 3 was used as evidence that CA 3 should apply regardless of the adversary element.[181]

At this regard, the Court highlighted as well the Martens clause, which "mandates that in situations not covered by specific agreements, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[182] With this on mind, the Court reasoned that the aim of IHL is "to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other". The TC also established that damage and harm are consequences of following "actions that are military necessary" to reach an military advantage. Following this line, raping and sexually enslaving children under the age of 15 difficulty can provide any military advantage. Therefore, its prohibition would fall under the scope of IHL.[183] To support this argumentation, the Court also referred to the *ius cogens* character of the prohibition of rape and enslavement.[184]

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[178] M Cottier, 'Article 8' in O Triffterer and K Ambos (eds), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (3rd edn, Hart/Beck 2016), p. 317 in KENNY, C. & MCDERMOTT, Y., 2019, p. 950.
[179] KENNY, C. & MCDERMOTT, Y., 2019, p. 950.
[180] Ibid, para. 46-47.
[181] Ibid, par. 50.
[182] Ibid, par. 47.
[183] Ibid, par. 48-49.
[184] Ibid, par. 51-53.

However, as Svaček highlighted, extending this protection to persons taking active part in the hostilities without a further argumentation "should be fully reasoned". [185] It does not seem to be the case. Indeed, it is correct that no military advantage is achieve through rape and sexual enslavement. However, it does not mean that based on that any action without military justification in an armed conflict would automatically qualify as a war crime.[186] Thus, the Martens clause cannot be relied "as having a norm-creating function" to expand IHL "not only beyond conventional law, but beyond customary IHL."[187]

Concerning the reference made by the ICC to the ICRC commentary on the CA 3, it should be noted that the ICRC updated its commentary in 2016, supporting its statement[188] in the PT decision of *Ntaganda*.[189] Therefore, it is reasonable to think that this sort of "symbiotic mutual relationship" lacks legitimacy.

Regarding the *ius cogens* nature of this crimes alleged by the Chamber, the arguments of O'Keefe should be considered. He established that the idea of *ius cogens* relates to "obligations, negative or positive, directed towards and binding on states."[190] The traditional definition establishes that a peremptory norm is a norm from which no derogation is permitted. Considering that individuals difficultly would have the capacity to derogate such a norm, "it is difficult to see how the concept of *ius cogens* could pertain to crimes under customary international law as such".[191] Moreover, irrespective whether these crimes are or are not of peremptory character**,** it "does not provide any support for the establishment of the subject-matter jurisdiction".[192] Kenny and McDermott developed a very critical (not unreasonably) analyze of this reference. The TC based its slavery qualification as a *ius cogens* norm on *Barcelona Traction*. In the words of the scholars, "this is remarkable, as the International Court of Justice's first reference to the concept of jus cogens norms was not until 16 years later, in its Nicaragua judgment."[193] Moreover, on the specific prohibition of sexual slavery as a *ius cogens* norm, the sources referred by the TC seemed

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[185] SVAČEK, O., 2017, p. 354.
[186] KENNY, C. & MCDERMOTT, Y., 2019, p. 951.
[187] SVAČEK, O., 2017, p. 354.
[188] [t]he fact that […] the abuse [is] committed by their own Party should not be a ground to deny such persons the protection of common Article 3. In Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, para. 50.
[189] Ibid.
[190] O'KEEFE. International Criminal Law. Oxford International Law Library, 2015, p. 82.
[191] Ibid.
[192] SVAČEK, O., 2017, p. 354.
[193] KENNY, C. & MCDERMOTT, Y., 2019, p. 952.

to be self-referred, being only one at the end. Concerning the prohibition of rape as *ius cogens*, the sources referred by the TC argued that is not yet *ius cogens* but it should be in the future.[194]

In sum, the arguments developed by the TC were fairly criticized and seem to lack the weight that only state practice and *opinio iuris* would provide in order to adopt this "revolutionary" approach.

4.3 The Appeal Chamber.

However, this was not the end of the proceedings. The DTN filed an appeal against the decision, providing the ICC AC a good opportunity to "arrange" better grounds to sustain more efficiently the TC decision.

First, the AC addressed the ordinary meaning, context and drafting history of the provisions Art 8 (2) (b) (xxii) and Art (2) (e) (vi), finding "no error in the Trial Chamber's finding that (…) the victims of the war crimes of rape and sexual slavery need not be "protected persons in the (limited) sense of the grave breaches or Common Article 3"."[195]

As it was stated in the previous section, this assertion is not free of controversy. One of the arguments raised by the AC as a reply to the DTN argumentation was the lack of "any debate on whether protection under this provision should be limited to victims who are "protected persons" under the Geneva Conventions or "persons taking no active part in hostilities" in terms of Common Article 3."[196] Kenny and McDermott estimated that just the fact that no expression to the limits was made is not a "convincing reason to expand the scope of the law beyond them".[197] They highlighted that, according to observers present at the drafting of the Statute, "the reference "established framework of international law" was inserted to exclude all too progressive interpretations of those sub-paragraphs, and to underline that the offences must be interpreted in accordance with established international humanitarian law".[198]

The AC differentiated itself from the TC by analyzing first whether the expression "established framework of international humanitarian law" in the *chapeaux* implies that IHL can

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[194] Ibid.
[195] ICC, The Appeals Chamber, Prosecutor v Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, Judgment on the appeal of Mr. Ntaganda against the "Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, para. 51.
[196] ICC, The Appeals Chamber, 15 June 2017, para. 50.
[197] KENNY, C. & MCDERMOTT, Y., 2019, p. 953.
[198] Cottier, 2016, p. 354 in KENNY, C. & MCDERMOTT, Y., 2019, p. 953.

incorporate additional elements to the crimes. The Chamber recognized that the Statute Art 21(a) allows the recourse to other elements whenever the primary legal sources enshrined there - the Statute, Elements of Crimes and Rules of Procedure and Evidence - cannot face a "lacuna". However, the AC considered that, "regardless of whether any lacuna exists", the Statute permits the inclusion of other elements of the crime in order to make it fully consistent with IHL.[199]

The Chamber continued analyzing the scope of Geneva Conventions. At this regard, it identified the scope of the III and IV Geneva Convention to be "subject-matter".[200] The Chamber supported this affirmation referring to specific provisions of both Conventions that limited the scope to POW and whoever "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[201] According to the AC, the first two Geneva Conventions stand out by providing protection "in all circumstances", establishing intra-party obligations.[202] Although the Court acknowledged the lack of cases where "the grave breaches regime has been applied to situations in which victims belonged to the same armed force as the perpetrators",[203] it established that this itself does not reflect "the fact that Status Requirements exist as a general rule of international humanitarian law".[204] In this sense, the Chamber considered the OP argumentation concerning CA 3, stating that its protection is granted "requiring only that the persons were taking no active part in hostilities at the material time". To support it, the AC relied again on the updated ICRC Commentary on CA 3. However, this time, the fact that the *Ntaganda* PTC' decision was a source of that commentary had been brought by the Defense. The Chamber considered that the reference "is not an indication that the ICRC's conclusion was incorrect."[205]

The argumentation of the Chamber does not seem very persuasive. As Svaček highlighted, the requirement of taking active part in the hostilities disappeared without further reasoning.[206] Moreover, grounds should be provided to assert that CA 3 protects everyone taking no active part in the hostilities "at the material time" of the crime. Would that mean that military objectives

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[199] ICC, The Appeals Chamber, 15 June 2017, para. 53.
[200] Ibid, para. 58.
[201] Ibid.
[202] This issue was addressed in the section 3.2.
[203] Ibid, para. 60.
[204] Ibid.
[205] Ibid, para. 61.
[206] SVAČEK, O., 2017, p. 356.

could not be targeted if they are not taking part in the hostilities in a determined moment? In addition, the ICRC 2016 commentary, despites its authoritativeness, is not a direct source of law.[207] At this regard, although the paragraph 547 of this establishes that the protection should be granted within the same party, paragraphs 518 and 519 state that this rule applies only to persons not taking active part in the hostilities, including *hors de combat.* No reference was made to the "material moment".[208]

Then, the AC proceed to address the previous contradicting jurisprudence, namely *Pilz*, *Motosuke*, and the SCSL decision in *Issa Hassan Sesay*. Concerning the SCSL's decision, the Chamber stated that the SCSL assessment was unpersuasive, due to the fact that it was "based solely on an analysis of Geneva Convention III". To the Chamber, the subject-matter of that Convention cannot led to "an expression of a general rule".[209] Regarding *Pilz*, the Chamber established that the case "appears to have been wrongly decided", implying that the intra-party protection was already guaranteed "as far back as in 1864." Concerning *Motosuke*, the AC relied on the fact that "the intention after the Second World War had been to prosecute war crimes committed against Allied nationals".[210]

Once the case law was contested, the Chamber confirmed the position settled by the TC and established that such a status limitation does not exist in current IHL. The Chamber itself recognized the "unprecedented nature" of its findings.[211]

Finally, the AC established that the requirement that "delineates war crimes from ordinary crimes" is no other than the nexus to the conflict. In the words of the Court, "it must be established that the conduct in question "took place in the context of and was associated with an armed conflict" of either international or non-international character". A reference to the ICTY decision in *Kunarac* was made at this regard.[212]

It can be seen how the approach of the AC consisted of focusing on the lack of limits in the relevant treaty law and the flaws of the existent case law to "to rebut the presumption" of

[207] POLTRONIERI, L., 2019, p. 59.
[208] ICRC, Commentary to the First Geneva Convention of 1949, 2016, para. 547, 518-519.
[209] Ibid.
[210] Ibid, para. 62.
[211] Ibid, para. 67.
[212] Ibid, para. 68.

prosecuting war crimes within the same armed group.[213] Till which point this is convincing, it will be settled furtherly.

However, some remarks concerning this decision should be made. As Poltronieri highlighted, both the TC and the AC took a very functionalized and "purpose-oriented" approach. The PTC tried to harmonize ICL and IHL with its (not totally persuasive) qualification of the arm children as *hors de combat* at the moment of the crimes perpetration. Conversely, both the TC and the AC bended the interpretation of primary rules of IHL to "to the criminal policy priorities underpinning the latter."[214]

5. The adversary element under the light of the *Ntaganda* case.

As it was expectable, the academia reacted in very different ways to this controversial decision. To Tridgell, "the ICC signaled the end of impunity for sexual abuse within armed forces."[215] Also Longobardo valued positively this decision, establishing that there is a "slow but successful march towards the criminalization of intra-party offences",[216] what would strengthen the protection of children involved in armed conflicts. Moreover, he defended the extension of this approach "to other offences and other victims, strengthening not only the protection of children in armed conflict but also the more general accountability for violations of individuals' rights in armed conflict."[217] Nerlich considered this decision to be the closest one to a *Tadić* moment. However, he did not considered the AC to adopt a progressive approach. To him, the fact that the argumentation started and ended in the Rome Statute reflected "a rather 'cautious' approach to the interpretation of the substantive crimes, in keeping with the principle of strict construction."[218]

It is also legitimate to think that these approaches might diminish the state sovereignty over the prosecution of these conducts. In that sense, Kenny and McDermott advocated for a case-by-

[213] LONGOBARDO, 2019, p. 630.
[214] POLTRONIERI, L., 2019, p. 59.
[215] TRIDGELL, J. Prosecutor v Ntaganda: the end of impunity for sexual violence against child soldiers? Australian International Law Journal 23, 2017, p. 161.
[216] LONGOBARDO, 2019, p. 634.
[217] Ibid.
[218] NERLICH, V. Chapter 9. The International Criminal Court and Substantive Criminal Law: Progressive Development or Cautious Reluctance? In The International Criminal Court in Turbulent Times. International Criminal Justice Series. Werle, G. & Zimmerman, A. (ed.), International Criminal Justice Series, p. 150.

case approach. According to them, "the practical realities of conflict and violent state repression" might led to a mistreatment of the individuals that, in some cases, can reach "a certain threshold beyond which it becomes a matter of concern to international law."[219] For those cases, allowing the international prosecution of the crimes would be in line with "the nature and purpose of the protection envisaged by international law."[220]

Conversely, other scholars examined this decision more critically. Poltronieri highlighted the fact that two scenarios might take place after this decision. The two of them, very problematic. If the TC's and AC's argumentation is applied to "any intra-party conduct not expressly prohibited under IHL", it would "come at expenses of the principle of legality."[221] Conversely, if the reasoning only applies "confined to sex and gender-based crimes against child soldiers", "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."[222] Svaček advocated for taking the PTC as the starting point for the establishment of a "bifurcated or hybrid status for child soldiers"[223] that would allow them to "be treated as protected persons and lawful target at the same time, depending on the perspective of either one's own or opposing armed forces."[224] Other scholars, like Fernández, directly stated that the ICC decision of confirming its jurisdiction by not identifying any rule that would deny it "constitutes a breach of the principle of legality."[225]

In the opinion of the author, after examining the arguments raised by the PTC, TC and AC and the counterarguments brought up by the scholars, it would be hard to state that the reasoning of the chambers was convincing enough. It is indeed desirable the protection of child soldiers, and the offences committed against them cannot go unpunished. At the same time, the author agrees with the arguments brought up by Kenny and McDermott concerning the practical approach towards the conflict' environment. Sometimes, domestic courts might not address properly these issues. However, from a legal point of view, such an international prosecution should be carried out in solid legal grounds. It does not seem to be the case. As it was stated previously, decisions

[219] KENNY, C. & MCDERMOTT, Y., 2019, p. 975.
[220] Ibid.
[221] POLTRONIERI, L., 2019, p. 65.
[222] Ibid.
[223] SVAČEK, O., 2017, p. 357.
[224] Ibid.
[225] FERNÁNDEZ C, 2018, p. 101.

of international courts and tribunal do not prove the existence of a rule of CIL neither provide a solid ground for treaty interpretation. Moreover, even the scholars who valued positively this decision considered the specificities of the conduct in *Ntaganda*, sexual crimes against child soldiers. Amplifying the ICC reasoning to all war crimes does not seem realistic *a priori*. However, that is something impossible to determine today. As Poltronieri stated, 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."[226]

6. Conclusion.

This thesis originally aimed to answer the question: Can intra-party offenses constitute war crimes? As it has been demonstrated, several answers have been provided by several judicial bodies. However, no definitive conclusion has been drafted.

In the opinion of the author, the Rome Statute constitutes a separate legal order from IHL. This affirmation is supported by the fact that the Statute cannot be read as straight forward provision of IHL, as it was established by Cryer. The Statute applies to the States Party, while customary rules of IHL apply to the parties in an armed conflicts. In addition, as it was determined, the Elements of Crime provide a definition of victim in several war crimes. That implies that, according to the Statute, some war crimes can only be committed against the adversary. The reasoning of the Court might be applicable to some conducts, but not to every war crime. Moreover, the conducts enshrined under Arts 8(2)(a) and 8(2)(c) required the fulfillment of the conditions settled by CA 3. Therefore, war crimes falling under those provisions could only be committed against persons not taking active part in the hostilities including *hors de combat*. As it was already highlighted, many questions were left unanswered. Therefore, at this point in time, with no state practice supporting the approach taken by the ICC, it is not possible to assume that the adversary element has been disregarded in the definition of war crimes.

Conversely, as it has been demonstrated, the study of the pertinent treaty law, CIL and case-law seems to acknowledge the existence of the adversary element behind several different

[226] POLTRONIERI, L., 2019, p. 67.

provisions. In line with this, the argumentation of the TC and the AC ignores important parts of these elements to reach the conclusion that were aiming. Moreover, considering the subsidiary character granted by the ILC and the ILA to the decisions of international tribunals and courts, only the *Ntaganda* decision cannot create a rule of IHL. Therefore, it is possible to proceed with the confirmation of this thesis' hypothesis: The "adversary element" is still a requirement under current IHL to prosecute "war crimes".

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