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ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator

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Readers of this blog will be interested in an important decision issued by Trial Chamber VI of the ICC in the case of *Ntaganda* yesterday. At issue was the Defence's argument that the Court could not have jurisdiction over the crimes of rape and sexual slavery allegedly committed against UPC/FPLC child soldiers, because war crimes cannot be committed against combatants from the same armed forces as the perpetrator. Such crimes, the Defence argued, would come within the ambit of domestic law and human rights, and were not covered by the war crimes prohibition.

Bosco Ntaganda. Picture credit.

The argument, on its face, is rather convincing – the Geneva Conventions and their Additional Protocols explicitly protect certain categories of persons, principally sick, wounded and shipwrecked persons not taking part in hostilities, prisoners of war and other detainees, civilians and civilian objects. Ntaganda is charged with these crimes under Article 8(2)(e)(vi) of the ICC Statute, which defines the war crime as:
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;

The *chapeau* of Article 8(2)(e) enumerates the crimes therein as being 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law'. It stands to reason, then, that we would examine that established international law framework in seeking to determine whether fellow combatants from the same armed forces as the perpetrator are protected by that framework.

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Common Article 3 refers explicitly to 'persons taking no active part in hostilities', while Article 4 of Additional Protocol II (which contains the prohibition on outrages upon personal dignity, rape, enforced prostitution and any form of indecent assault) applies only to those 'persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'.
The most obvious way to resolve this issue would seem to be to acknowledge that Article 8(2)(c) and (e) crimes cannot be committed against those actively taking part in hostilities, but to argue that those victims identified in paragraphs 66-72 of the Confirmation Decision as having been abducted to act as domestic servants and, in the words of one witness, provide 'combined cooking and love services' were obviously not actively taking part in hostilities. Yet, other victims mentioned in the Confirmation Decision acted as bodyguards, while other young girls abducted by the UPC/FPLC and later raped by soldiers in camps underwent military training, from which we can assume that they probably carried out some military functions. The issue here is that the Trial Chamber in *Lubanga* embraced a much broader definition of 'active participation in hostilities', in order to include a wide range of children who were forcibly recruited as victims under Article 8(2)(e)(vii). It determined, in paragraph 628, 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.

At the time of the *Lubanga* judgment, several authors noted that this expansive definition may have unintended negative consequences for the protection of children in armed conflict. For example, Nicole Urban argued that, 'Should the sexual exploitation of and violence against child soldiers render them 'active' participants in hostilities under one Article, there is a real risk that they will also be considered as active participants in hostilities under the others.' In a sense, the chickens have now come home to roost, as the Court in *Ntaganda* has to marry that interpretation, which seeks to protect child soldiers as victims of forcible recruitment, with an interpretation that includes them within the ambit of Article 8(2)(e) when they become victims of other war crimes.
The Pre-Trial Chamber took the position that individuals only lose their protection 'for such time' as they are actively participating in hostilities, and that those who were raped and subjected to sexual violence were clearly not participating in hostilities at that time. This interpretation is somewhat problematic, as it sidesteps the situation of those members of the armed groups who bear a 'continuous combat function'.
Trial Chamber VI in yesterday's decision took a rather different approach, by determining that:

While most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict, the Chamber

does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct. (para. 47)

It went on to conclude that, because the prohibition of rape had attained *jus cogens* status under international law (para. 51), 'such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status', and that it did not, therefore, need to determine whether the victims were 'members' of the armed forces at the relevant time (paras. 52-53).

Judge Kuniko Ozaki, one of the three Trial Chamber judges. Picture credit.

This decision neatly sidesteps the issues surrounding the notion of active participation in hostilities raised by the *Lubanga* judgment. Yet, the conclusion that members of the same armed force are not *per se* excluded as potential victims of war crimes is a very expansive interpretation of Article 8, and one that is not fully reasoned in the judgment. The decision appears to be founded on two separate aspects.

The first is that not all war crimes need to be committed against protected persons (para. 37). The Chamber referenced a number of sub-paragraphs of Article 8(2)(e) in this regard, namely Articles 8(2)(e)(ix) and (x) on perfidy and denying that no quarter will be given, in support of this argument. This is not entirely convincing, as Article 8(2)(e)(ix) explicitly refers to killing or wounding 'a combatant adversary' treacherously. Article 8(2)(e)(x), prohibiting a declaration that no quarter will be given, is explicitly prohibited because it would result in the killing of persons *hors de combat*.
The second justification for the decision appears to be the widespread prohibition of rape and sexual violence under international humanitarian law. The Chamber considered that to limit the protection against rape to exclude members of the same armed group would be 'contrary to the rationale of

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international humanitarian law, which aims to mitigate the suffering resulting from armed conflict, without banning belligerents from using armed force against each other or undermining their ability to carry out effective military operations.' Given that there could be no military objective or justification to engage in sexual violence against any person, regardless of whether or not that person was a legitimate target under the law of armed conflict, the Chamber considered that the prohibition of sexual violence under International Humanitarian Law was not limited to certain categories of persons, and that anyone could be a victim of this war crime. This justification is more convincing, but leaves many questions unanswered, as it seems to be limited to the prohibition of rape (which the Chamber considered to be a *jus cogens* norm of international law). We might ask, for example, whether armed forces who commit acts of humiliating or degrading treatment against their own members, or who deny those members a fair trial, may now find that they are committing war crimes under Article 8 of the ICC Statute.

This decision is clearly founded in a desire to offer the greatest level of protection to victims of sexual violence in armed conflict, regardless of their status. A similar argument was made in the ICRC's updated commentary to Common Article 3 of the Geneva Conventions, which stated that 'all Parties to the conflict should, as a minimum, grant humane treatment to their own armed forces based on Common Article 3.'
It will certainly be interesting to see what states' reactions to this expansive interpretation, and what the broader consequences of this decision, will be.