

Who Are Protected by the Fundamental Guarantees under International Humanitarian Law?

Part 1: Breaking with the Status Requirement in Light of the ICC Case Law

Raphaël van Steenberghe

International Law Centre, University of Louvain, Place Montesquieu 2,
1348 Louvain-la-Neuve, Belgium
raphael.vansteenbergher@uclouvain.be

Abstract

International humanitarian law provides for fundamental guarantees, the content of which is similar irrespective of the nature of the armed conflict, and which are applicable to individuals even if they do not fall into the categories of specifically protected persons under the 1949 Geneva Conventions. Those guarantees, all of which derive from the general requirement of human treatment, include prohibitions of specific types of conduct against persons, such as murder, cruel treatment, torture and sexual violence, or against property, such as pillaging. However, it is traditionally held that entitlement to those guarantees depends upon two requirements: the ‘status requirement’, which basically means that the concerned persons must not or must no longer take a direct part in hostilities, and the ‘control requirement’, which basically means that the concerned persons or properties must be under the control of a party to the armed conflict. This study argues in favour of breaking with these two requirements, in light of the existing ICC case law. The study is divided into two parts, with each part devoted to one requirement and made the object of a specific paper. The two papers follow the same structure. They start with general observations on the requirement concerned, examine the relevant ICC case law and put forward several arguments in favour of an extensive approach to the personal scope of the fundamental guarantees. The first paper, which is published in this issue, deals with the status requirement. It especially delves into the ICC decisions in the *Ntaganda* case with respect to the issue of protection against intra-party violence. It advocates for the applicability of the fundamental guarantees in such a context by rejecting the requirement of a legal status, on the basis of several arguments. Those arguments rely

on IHL provisions protecting specific persons, on the potential for humanizing IHL on the matter and on the approach making the status requirement relevant only when the fundamental guarantees apply in the conduct of hostilities. The second paper, which will be published in a coming issue, deals with the control requirement. It examines several ICC cases in detail, including the *Katanga* and *Ntaganda* cases, in relation to the issue of the applicability of the fundamental guarantees in the conduct of hostilities. It is argued that the entitlement to those guarantees is not dependent upon any general control requirement, and that, as a result, some of these guarantees (mainly those whose application or constitutive elements do not imply any physical control over the concerned persons or properties) may apply in the conduct of hostilities.

Keywords

international humanitarian law (IHL) – international criminal law (ICL) – International Criminal Court (ICC) – fundamental guarantees – legal status – Geneva Law – conduct of hostility – intra-party violence – ‘humanisation’ of IHL – war crimes

1 Introduction

International Humanitarian Law (IHL) sets out a detailed regulatory framework for the protection of persons in relation to situations of armed conflict. Under Geneva Law, classically construed as the area of IHL protecting persons in the hands of the enemy, such regulation may significantly vary depending on the nature of the armed conflict and the status of the concerned persons. It is well known that those entitled to the status or treatment of prisoner of war (POW) as well as the civilians who qualify for the status of ‘protected persons’ benefit from a comprehensive protection in international armed conflicts (IACs), mainly under the third (GCIII) and fourth (GCIV) Geneva Conventions, respectively. Likewise, particular categories of persons, such as wounded and sick or women, children and elderly people, benefit from a specific protection, which is usually more detailed in IACs than in non-international armed conflicts (NIACs). However, IHL also provides for a level of basic protection applicable to any individuals even if they do not fall into the above categories. The content of that protection is arguably the same irrespective of the nature of the armed conflict. This basic protection is referred to as the ‘IHL fundamental guarantees’ for the purposes of this paper. Those terms do not therefore include protections whose content is similar to these guarantees but that are provided with respect to those persons specifically protected under

the Geneva Conventions, like the wounded, sick and shipwrecked,¹ POWs² and civilians entitled to the status of 'protected persons'³ under GCIV.⁴

The IHL fundamental guarantees constitute the central core of Geneva law. They encompass a general requirement of non-discriminatory humane treatment, a series of prohibitions of specific conduct and certain guarantees applicable in the case of deprivation of liberty or criminal prosecutions. Most of the specific prohibited conduct concerns the protection of persons themselves. The prohibitions relate to three specific types of conduct: violence to life and person, like murder, torture, cruel treatment and mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment; and *sui generis* conduct, such as the taking of hostages and acts of terrorism. To a much lesser extent, the specific prohibited conduct also concerns the protection of property, such as pillaging.

Under treaty law, most of those guarantees are provided by Article 3, 1) common to the four 1949 Geneva Conventions (Common Article 3) and Part II (Articles 4–6) of Additional Protocol II (APII) with respect to NIACs, and by Article 75 of Additional Protocol I (API) with regard to IACs.⁵ The content of these guarantees varies according to those legal texts, with APII providing the most comprehensive list and Common Article 3 the less detailed regulation. Certain conduct prohibited under APII, such as acts of terrorism or pillaging, do not appear in Common Article 3 nor in Article 75 API. In addition, certain fundamental guarantees contained in APII and Article 75 API, such as those

1 See Article 12 GC I and Article 12 GC II.

2 See Articles 13 and 14 GC III.

3 See Articles 27 and 31–33 GC IV.

4 Depending upon the category of protected persons, those guarantees are sometimes less extensive than the 'fundamental guarantees' (see, e.g., the absence of any prohibition of taking of hostages with respect to prisoners of war). However, they are more protective to the extent that they do not merely consist in prohibitions, unlike the 'fundamental guarantees', but also involve a positive obligation to protect.

5 Titles in APII may be confusing. Contrary to Article 75 API and Chapter 32 of the ICRC Study on Customary IHL (J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press, Cambridge, 2005), pp. 299–383) that list all the aforementioned protections (except the prohibition against pillage) under the heading 'fundamental guarantees', Part II of APII uses that term only with respect to the protections provided under Article 4, which contains the general requirement of human treatment and a series of prohibitions of specific conduct, in addition to certain guarantees concerning children. The other protections are provided in Articles 5 and 6, entitled 'Persons whose liberty has been restricted' and 'Penal prosecutions', respectively. The whole Part II, containing all the protections, is entitled 'Human Treatment'. Although these protections are all derived from the requirement of human treatment, all of them must also be considered of fundamental nature.

dealing with deprivation of liberty and criminal prosecutions, are far more developed than those summarily listed under Common Article 3.

However, there is a strong argument that the fundamental guarantees are quasi-identical in any type of armed conflict and include at least all those provided in APII. Under treaty law, certain non-listed fundamental guarantees may arguably be inferred from those explicitly mentioned. In that sense, the prohibitions against certain acts of sexual violence, such as rape, provided in the two Additional Protocols (APs),⁶ have been considered as also applicable under Common Article 3 although not mentioned in that Article, on the basis that they derive from the prohibition of outrages upon personal dignity expressly contained in Common Article 3.⁷ More generally, all the non-listed fundamental guarantees may arguably be inferred from the general requirement of human treatment contained in each of the three legal texts. It is clear that the requirement is not exhausted by all the specific prohibitions mentioned in the texts, since it is a catchall requirement capable of prohibiting conduct that is not expressly forbidden.⁸ On the other hand, the gaps under treaty law may be considered as having been fulfilled through customary law. As evidenced by the ICRC Study on Customary IHL,⁹ especially under Chapter 32, all the fundamental guarantees corresponding to those listed in Part II of APII apply in any armed conflict under customary law.¹⁰

6 Article 4, 2), e) APII and Article 75, 2), b) API.

7 See, e.g., ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998 (*Furundžija* Trial Judgment), para. 168; ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T& IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001 (*Kunarac* Trial Judgment), para. 436; ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 121.

8 See, e.g., the Updated ICRC Commentary on Common Article 3, 2020, para. 589, available online at ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096 (accessed 30 January 2021).

9 See Henckaerts and Doswald-Beck, *supra* note 5, pp. 299 *et seq.*

10 Admittedly, it is questionable whether all the details of certain fundamental guarantees contained in APII are also applicable in Common Article 3 armed conflicts. The ICRC Study does not indicate the type of NIAC in which the alleged customary rules apply. Concerns have been raised about the practicability of certain positive obligations provided by APII if they were extended to Common Article 3 armed conflicts, mainly for the reason that armed groups operating in such conflicts are not necessarily materially capable of respecting these more demanding obligations (see, e.g., J. d'Aspremont and J. de Hemptinne, *Droit international humanitaire. Thèmes choisis* (Pedone, Paris, 2012), p. 76). However, as argued in detail elsewhere (see R. van Steenberghe, 'Les interventions militaires étrangères récentes contre le terrorisme international. Seconde partie: droit applicable (jus in bello)', 63 *Annuaire Français de Droit International* (2017) 62–64), such concerns do not seem well founded. The

Although rudimentary, the fundamental guarantees only benefit a certain category of individuals. As we will see, it is traditionally held that the entitlement to these guarantees depends upon two requirements. The first is the legal 'status requirement', which basically means that the concerned persons must be either civilians who do not take a direct part in the hostilities or persons who are *hors de combat*. The second requirement is that of being 'in the power' of a party to the armed conflict, which essentially means that the concerned persons or properties must be under the control of that party. These two requirements are nonetheless called into question, especially in relation to specific issues.

The status requirement is debated in relation to the applicability of the fundamental guarantees to intra-party relations, namely, to acts of violence committed by one party to the armed conflict against persons who are affiliated to that party. Practice shows many instances in which members of armed forces, especially child soldiers recruited by armed groups, are victims of barbarous acts of violence, such as rape and sexual slavery, by members of the same armed forces. As examined in detail below,¹¹ the requirement of a legal status could act as an obstacle to the protection of those victims by the fundamental guarantees and hinder the prosecution of those barbarous acts as war crimes. The second requirement, namely the control over the concerned persons or properties, is debated in relation to the applicability of the fundamental guarantees in the conduct of hostilities. Conduct prohibited by fundamental guarantees, such as the killing or injuring of civilians, may well occur in the context of the conduct of hostilities, as a result of an attack against persons who were not under the control of the attacking forces at the time of the attack. The control requirement would then prevent the prosecution of the perpetrator of those violent acts for having breached the corresponding fundamental guarantees.

Yet, recent international criminal case law, mainly that of the International Criminal Court (ICC), calls into question those two requirements. It suggests that the entitlement to the fundamental guarantees is not dependent upon the status requirement with respect to some of them, namely the prohibitions of

concerned obligations are either formulated as obligations of conduct, the respect of which must be assessed in light of the material capabilities of their addressees, like the obligation to allow detainees to send and receive card letters (Article 5, 2), b) APII), or may be triggered only when the concerned party has sufficient capability to engage in the regulated conduct, such as proceeding to fair criminal prosecutions. In any case, the mere prohibitions and the basic positive obligations, such as to provide detainees with sufficient food or drinking water (Article 5, 1), b) APII), should not raise any potential practical problem for armed groups operating in the context of Common Article 3 armed conflicts.

11 Cf. *infra* 3.1.3.

rape and sexual slavery, nor upon the control requirement with respect to all of them. That case law therefore calls for an extensive approach to the personal scope of application of the fundamental guarantees, meaning that certain intra-party acts of violence or those committed in the conduct of hostilities would be prohibited as they would fall into the scope of the fundamental guarantees concerned.

That approach deserves to be the object of a comprehensive analysis, particularly in light of the few scholarly writings on the subject. This analysis will be divided into two parts. The first part, which is contained in this paper, will deal with the status requirement, whereas the second part, which will be published later in this journal, will concern the control requirement. Both papers follow the same structure. They start with making general observations about the requirement concerned and presenting the different positions upheld on the matter, including the view supported by the ICRC in its Updated Commentaries on the Geneva Conventions¹² (Section 2). They then scrutinize the relevant ICC case law and provide interpretations of that case law about the requirement (Section 3). They conclude with arguments in favour of an extensive approach to the personal scope of the fundamental guarantees by supporting an entire break with that requirement (Section 4).

2 General Observations about the Status Requirement

This section firstly enquires whether the status requirement similarly applies to both NIACs and IACs, since Article 75 API, unlike Common Article 3 and APII, does not expressly provide for that requirement (Section 2.1). It then describes the content of this requirement, by determining its two constitutive tests as well as the meaning of the concepts involved by these tests (Section 2.2). Finally, it examines the particular issue in relation to which it is debated, namely the issue of protection against intra-party violence (Section 2.3).

¹² When examining Common Article 3, unless otherwise provided, only the latest Updated ICRC Commentary on that Article will be quoted with respect to the two requirements, namely the 2020 Commentary on GCIII (*supra* note 8). However, that commentary is similar to the corresponding ones contained in the 2016 ICRC Commentary on GCI (ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press, Cambridge, 2016), paras 351–907) and the 2017 ICRC Commentary on GCII (ICRC, *Commentary on the Second Geneva Convention* (Cambridge University Press, Cambridge, 2017), paras 373–934).

2.1 *Similarly Applicable to both NIACs and IACs*

In NIACs, both Common Article 3 and APII expressly provide for a status requirement. According to Common Article 3, those entitled to the fundamental guarantees are all '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause.'¹³ Under Article 4 APII, the guarantees provided by that Article benefit '[a]ll 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'.¹⁴ Although the status requirement is not formulated in similar terms in the two texts, such formulations have generally been considered to have the same meaning. In particular, although in its English version, Common Article 3, unlike APII, uses the term 'active' rather than 'direct', both terms have been considered to be synonymous.¹⁵ Similarly, although APII, unlike Common Article 3, does not mention the category of 'members of armed forces who have laid down their arms', that category is arguably included among those 'who have ceased to take part in hostilities'. Finally, while, under APII, the status requirement is only provided in Article 4 and not in Articles 5 and 6, which contain the protections related to detention and criminal prosecutions, it is admitted that such a status implicitly extends to those protections.¹⁶

By contrast, Article 75 API, which lists the fundamental guarantees applicable in IACs, does not explicitly contain any status requirement. It merely refers to all 'persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol',¹⁷ namely wounded, sick and shipwrecked, POWs or civilians as 'protected persons'. That Article has nonetheless been considered as encompassing a status requirement, similar to that applicable in NIACs.

Firstly, like Common Article 3 and Article 4 APII, it may arguably be applicable to both civilians and members of armed forces. It is indeed well known that it was inserted as a residual clause, with the aim of affording a minimum standard of protection to all those who do not fall into the specific categories

¹³ Common Article 3, 1).

¹⁴ Article 4, 1) APII.

¹⁵ See, e.g., the Updated ICRC Commentary on Common Article 3, *supra* note 8, para. 559; ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 629; N. Melzer (ed.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009), p. 43.

¹⁶ See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva/The Hague, 1987), para. 4520 (1987 Commentary).

¹⁷ Article 75, 1) API.

of persons protected under the Geneva Conventions. Those persons may be either civilians or members of armed forces. The category of civilians includes all those who do not fulfil the conditions laid down in Article 4 GCIV to be entitled to the status of protected person under that Convention or who are the object of derogations to the Convention in accordance with Article 5 GCIV.¹⁸ On the other hand, even though Article 75 is inserted in Part IV, dedicated to the protection of civilians, it may be said to apply also to members of armed forces. That category includes all those who are members of (regular or irregular) armed forces but who are not entitled to the status of POW because of the violation of the conditions laid down in Article 4 GCIII or customary law, mainly the condition of distinction, and cannot benefit either from (all) the protections alternatively afforded by GCIV for the same reasons as those mentioned with respect to the category of civilians just described.¹⁹ This assumes firstly that those persons remain members of armed forces and do not become civilians, although they do not fulfil the conditions for benefitting from the status of POW,²⁰ and secondly that GCIV is alternatively applicable to them in order to fill the protective gap.²¹ Although these two positions have been contested,²² they can be considered to be broadly accepted.

Secondly, like Common Article 3 and Article 4 APII, Article 75 API may be seen as applicable only to those who do not or no longer take a direct part

18 See in that sense the 1987 Commentary on Article 75 API, *supra* note 16, para. 3032.

19 See in that sense *ibid.*, para. 3031.

20 See in that sense Melzer, *supra* note 15, p. 22; D. Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities', 59(1) *International and Comparative Law Quarterly* (2010) 180–192, at pp. 183–184; M.N. Schmitt, 'The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', 1 *Harvard National Security Journal* (2010) 5–44, pp. 14–16. See also for instance the UK Manual, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2005), p. 39.

21 See, e.g., H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd edn. (Ashgate, Aldershot, 1998), p. 137; K. Ipsen, 'Combatants and non-combatants', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn. (Oxford University Press, Oxford, 2008), p. 83; G.D. Solis, *The Law of Armed Conflict* (Cambridge University Press, Cambridge, 2010), p. 325. See also K. Dörman, 'The legal situation of "unlawful/unprivileged combatants"', 85(849) *International Review of the Red Cross* (2003), and the numerous references cited in that article, in footnote 36. See nonetheless *contra*: I. Detter, *The Law of War* (Cambridge University Press, Cambridge, 2000), p. 136; C. Greenwood, 'International law and the "war against terrorism"', 78(2) *International Affairs* (2002) 301–317, at p. 316.

22 See, e.g., 'Memorandum from President George W. Bush to the Vice President, Secretaries of State and Defense, Attorney General, and Other Officials', para. 2(d) (7 February 2002), available online at https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed 30 January 2021).

in hostilities. Most of the guarantees embodied in that Article are indeed derived from those contained in Common Article 3 and are quasi-identical to those provided in Article 4 APII. This suggests that all these Articles are subject to the same status requirement: that of not taking a direct part in hostilities or of being *hors de combat*. That view finds support in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), in particular in the Tribunal's consideration of the scope of application of Article 3 of its Statute, which gave the Tribunal jurisdiction over violations of the laws or customs of war. In the *Delalić et al.* case, the Tribunal recalled that Article 3 of its Statute constituted a residual clause, 'designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the ... Tribunal',²³ and stated that, like Common Article 3, it applied irrespective of the nature of the armed conflict. It concluded that, although it qualified the armed conflict as an IAC in this case, it was not 'necessary for [it] to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts [since these] provisions [were] clearly based upon the prohibitions contained in common article 3 ...'.²⁴ This strongly suggests that the Tribunal did not consider Article 75 API as having any potentially broader (personal) scope of application than that of Common Article 3 and therefore was not a distinct legal basis to be relied upon when applying its jurisdictional residual clause as provided in Article 3 of its Statute.

This is actually in line with the approach supported by the ICRC in its Study on Customary IHL, which provides a status requirement for the applicability of the fundamental guarantees under customary law, irrespective of the nature of the armed conflict.²⁵ It is worth observing that the Study expressly refers to Article 75 API when dealing with the fundamental guarantees applicable in IAC under customary law.²⁶

2.2 Content and Meaning

The wordings of Common Article 3 and APII suggest that the key test involved in the status requirement is that of not taking a direct part in hostilities. Indeed, by providing that the fundamental guarantees are granted to all those who do

23 ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998 (*Delalić* Trial Judgment), para. 297. The Chamber quoted the 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' (ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87).

24 *Delalić* Trial Judgment, *supra* note 23, para. 314.

25 Henckaerts and Doswald-Beck, *supra* note 5, p. 299.

26 See *ibid.*, e.g., pp. 306; 308; 311; 315; 320; 321; 324 and 334.

not directly participate in the hostilities, ‘including members of armed forces’ who are placed *hors de combat*, Common Article 3 might suggest that the latter category is merely an example of the former.²⁷ APII is even more ambiguous in that respect since it only expressly refers to the test of not taking a direct part in hostilities. This is also the case in many decisions taken by international criminal jurisdictions, especially the ICTY which merely mentioned this test as part of the requirements involved by Article 3 of its Statute when the charged were based on Common Article 3.²⁸

However, a better view is that there is a second distinct test, that of being *hors de combat*, which is the only one to be applicable to members of armed forces.²⁹ The first test is only relevant with respect to civilians who did not take a direct part in hostilities, whereas the second test concerns any persons, either civilians who were directly participating in the hostilities or members of armed forces. As argued in the 1987 Commentary of Article 41 API³⁰ that defines the notion of persons *hors de combat*, such a notion applies to both civilians and members of armed forces. The view in favour of a twofold test is also in line with the ICRC Study on Customary IHL and the ICC Elements of Crimes. Indeed, in the introduction to Chapter 32 of its Study on Customary IHL, which deals with the fundamental guarantees, the ICRC provides that ‘this chapter applies to *all civilians* ... who do not take a direct part in hostilities, as well as to *all persons* who are *hors de combat*’.³¹ Similarly, the ICC Elements of Crimes concerning the war crimes resulting from serious violations of Common Article 3 require that those crimes must have been committed against all ‘*civilians, medical personnel, or religious personnel taking*

27 See also J.K. Kleffner, ‘The Beneficiaries of Common Article 3’, in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press, Oxford, 2015), p. 436.

28 See, e.g., ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. 1T-95-14-T, Trial Chamber, Judgment, 3 March 2000 (*Blaškić Trial Judgment*), para. 177; ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. 1T-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 420; ICTY, *Prosecutor v. Mladen Naletilić et al.*, Case No. 1T-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 229; ICTY, *Prosecutor v. Sefer Halilović*, Case no. 1T-01-48-T, Trial Chamber, Judgment, 16 November 2005 (*Halilović Trial Judgment*), para. 34; ICTY, *Prosecutor v. Jadranko Prlić et al.*, Case no. 1T-04-74-T, Trial Chamber, Judgment, 29 May 2013 (*Prlić Trial Judgment*), Vol. 1, para. 143. See however ICTY, *Prosecutor v. Dusko Tadić*, Case No. 1T-94-1-T, Trial Chamber, Judgment, 7 May 1997 (*Tadić Trial Judgment*), para. 616.

29 See, e.g., *infra* notes 31 and 32.

30 See the 1987 Commentary of Article 41 API, *supra* note 16, para. 1606.

31 Henckaerts and Doswald-Beck, *supra* note 5, p. 299 (emphasis added).

no active part in the hostilities [or *all persons* who were] either *hors de combat*.³² In both the ICRC Study and the ICC Elements of Crimes, the test of being *hors de combat* applies to ‘all persons’, meaning either civilians or members of armed forces. Moreover, with respect to the first test, the specific category of medical and religious personnel has been added to civilians in the ICC Elements of Crimes. Medical and religious personnel are indeed assimilated to civilians as they are not authorized to take part in hostilities. This duality of tests explains why, as we will see later,³³ the ICC rather refers to the expression ‘status requirements’ in the plural to designate that requirement.

Finally, it is worth observing that all the terms that are relevant for determining the scope of the status requirement, which conditions the applicability of the fundamental protections of Geneva Law, are specific to Hague Law, in particular the law on targeting. As will be detailed later,³⁴ those terms, like ‘direct participation in hostilities’, ‘civilians’, ‘members of armed forces’, or ‘persons *hors de combat*’, are accordingly defined in light of that law.

2.3 *The Related Issue of the Protection against Intra-Party Violence*

When examining the ICC case law in the next section, we will see that the status requirement has been called into question with respect to certain fundamental guarantees in the context of the discussions concerning the issue of intra-party protection under IHL. IHL is indeed classically construed as regulating ‘inter’ rather than ‘intra-party’ relations, which means protecting persons only from acts of the adversary and not from acts of their own party.³⁵ In particular, Hague Law, especially the law regulating attacks both in IACs and NIACs, normally applies only to enemies since the notion of attack itself is defined under IHL as ‘acts of violence against the *adversary*’.³⁶ Regarding Geneva Law,

32 See ICC, *Elements of Crimes* (ICC, The Hague, 2011), available online at www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (accessed 30 January 2021), p. 31, element 2, regarding the war crime of murder; p. 32, element 3 regarding the war crime of mutilation; p. 32, element 2 regarding the war crime of cruel treatment; p. 33, element 3 regarding the war crime of torture; p. 33, element 3 regarding the war crime of outrages upon personal dignity; and p. 33, element 4, regarding the war crime of taking hostages.

33 Cf. especially *infra* 3.3.

34 Cf. *infra* 4.3.

35 See, e.g., A. Cassese *et al.* (eds.), *Cassese's International Criminal Law*, 3rd edn. (Oxford University Press, Oxford, 2013), p. 67; M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing, Cheltenham/Northampton, 2019), p. 199.

36 See Article 49 API (emphasis added). That definition is also applicable in NIACs; see, e.g., the 1987 Commentary on Article 13 APII, *supra* note 16, para. 4783.

especially in IACs, most protections afforded to specific categories of persons by the four Geneva Conventions are also only applicable to the enemies. Those afforded to civilians as 'protected persons' under GCIV may normally benefit only the non-nationals of the parties to the armed conflict³⁷ or, under a particular interpretation made by the ICTY on the nationality criterion³⁸ and followed by the ICC,³⁹ only those who do not owe allegiance to those parties. Similarly, the protections afforded to POWs under GCIII only benefit those who 'have fallen into the power of the *enemy*'.⁴⁰ Finally, although the protections provided in the first (GCI)⁴¹ and second (GCII)⁴² Geneva Conventions as well as in API,⁴³ with respect to wounded, sick and shipwrecked, are normally applicable to any member of armed forces or civilian, irrespective of the party to which they are affiliated, many provisions of those treaties still remain dedicated to the protection of those who have fallen into the hands of the enemy.⁴⁴

This is much less clear as far as Geneva law in NIACs is concerned. Neither Common Article 3 nor APII contain express indications on that issue. Admittedly, specific protections have been claimed to be applicable to intra-party relations, such as those afforded to the wounded and sick,⁴⁵ by analogy to the general regime applicable in IACs, or the prohibition on recruiting or using child soldiers to participate actively in the hostilities. Regarding the latter prohibition, the ICC Pre-Trial Chamber expressly stated in the *Katanga* case that it could be violated 'by a perpetrator against individuals in his own party to the conflict [and that] allegiance of the child who [was] used in hostilities [was] not relevant for the purposes of this [prohibition], as long as the child in

37 See Article 4 GCIV. See nonetheless the specific protection applicable to refugees, Article 70 GCIV and Article 73 API.

38 See, e.g., ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-A, Appeals Chamber, Judgment, 15 July 1999, para. 166.

39 See, e.g., ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Pre-Trial Chamber, Decision of the Pre-Trial Chamber on the confirmation of charges, 29 January 2007, paras 277–280.

40 Article 4, A) GCIII (emphasis added).

41 See Article 13. Unlike Article 4, 1) GCIII, this article does not require that the wounded and sick must fall in the power of the adverse party (see the 2016 Updated ICRC Commentary on that Article, *supra* note 12, para. 1444).

42 See Article 13. Unlike Article 4, 1) GCIII, this Article does not require that the wounded, sick and shipwrecked must fall in the power of the adverse party (see the 2017 Updated ICRC Commentary on that article, *supra* note 12, para. 1485).

43 See Article 10: 'All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected' (emphasis added).

44 See, e.g., Articles 5, 14, 16, 18 and 25 GCI; Articles 16, 19, 36 and 37 GCII.

45 See, e.g., S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012), p. 248.

question [was] under the age of fifteen'.⁴⁶ However, the issue remains unsettled with respect to the other protections. This is equally the case with respect to protections provided in IACs outside of those afforded to specifically protected persons, like the guarantees listed under Article 75 API. It therefore remains controversial whether the fundamental guarantees are also confined to inter-party relations or may be extended to protect persons against intra-party violence. This issue is of particular importance for the protection of persons in relation to their own party when that party is a non-State armed group.

Indeed, international human rights law (IHRL) may significantly overcome the potential lack of any intra-party protection under IHL as far as States are concerned. The fundamental guarantees provided in IHL are almost a copy-paste of the guarantees enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR).⁴⁷ Unlike their counterparts in IHL, the applicability of these guarantees is not conditioned by any personal scope. It extends to any individual and therefore even to persons vis-à-vis their own party in case of armed conflict. Admittedly, such an extension may suffer from a twofold limitation. Firstly, IHRL can only apply extraterritorially if its beneficiaries are under the (territorial or physical) control of the State.⁴⁸ That

46 See ICC, *Prosecutor v. Germain Katanga et al.*, Case No. ICC-01/04-01/07, Pre-Trial Chamber, Decision on the confirmation of charges, 30 September 2008 (*Katanga* Confirmation Decision), para. 248. This has been criticized by certain scholars, who argue that children are civilians at the time the obligation comes into operation, since they do not belong to the armed forces recruiting or using them in active hostilities at that time yet. In their view, that obligation would not therefore constitute an example of intra-party protection (see, e.g., T. Rodenhäuser, 'Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their "Own Forces"', 14(1) *Journal of International Criminal Justice* (2016) 171–193, at p. 190). However, a party to an armed conflict does not merely consist in armed forces. Such forces are only the military wing of that party. As a result, intra-party relations exist not only between a member of armed forces and the other members of those forces but also between civilians who are affiliated to a party and that party. Similarly, the notion of intra-party protection refers not only to the protection of members of armed forces against other members of those forces but also to the protection of civilians who are affiliated to a party to a conflict against that party, including its armed forces. The prohibition to recruit or use child soldiers to participate actively in the hostilities may therefore be considered as applying in intra-party relations since it prohibits armed forces to recruit any children, including those, being civilians, who are affiliated with the party to which these armed forces belong.

47 This is at least the case of the fundamental guarantees listed under Article 4 APII and Article 75 API; see the 1987 Commentary on those Articles, *supra* note 16, paras 4515 and 3005.

48 At the international level, see, e.g., Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, 26 May 2004, available online at digitallibrary.un.org/record/533996 (accessed 30 January 2021), para. 10; at the European level, see, e.g., European Court of Human Rights

condition is nonetheless likely to be fulfilled in cases of acts breaching the fundamental guarantees, committed abroad by a State against its own civilians or members of armed forces. Most of those guarantees, like the prohibitions of rape or unfair trial, imply a sufficient degree of control to trigger the applicability of IHRL.⁴⁹ Secondly, States may derogate to IHRL in situations amounting to an armed conflict. However, the scope of that right is necessarily limited as far as the fundamental guarantees are concerned, since most of those guarantees correspond to fundamental human rights, with respect to which no derogation is allowed.

According to the traditional view,⁵⁰ IHRL is not, however, applicable to armed groups. As a result, under such a view, the supplementary protection afforded by IHRL is not available to those who would be victim of violations of the fundamental guarantees committed by an armed group to which they are affiliated. Yet such protection may be particularly needed, as evidenced by the current practice of certain armed groups, in particular the killing by some

(ECtHR), *Cyprus v. Turkey*, Application No. 25781/94, Grand Chamber, 10 May 2001, para. 77; ECtHR, *Assanidzé v. Georgia*, Application No. 71503/01, Grand Chamber, 8 April 2004, paras 138 and 143; ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Grand Chamber, 18 December 1996, paras 56 and 57; ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Grand Chamber, 12 May 2005, para. 91; ECtHR, Grand Chamber, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010, paras 66 and 67; ECtHR, *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Grand Chamber, 7 July 2011, paras 133–140; ECtHR, *Al-Jedda v. The United Kingdom*, Application No. 27021/08, Grand Chamber, 7 July 2011, paras 85 and 86; ECtHR, *Georgia v. Russia (II)*, Application No. 38263/08, Grand Chamber, 21 January 2021, para. 81; at the American level, see, e.g., Inter-American Court of Human Rights (IACtHR), *Coard and others v. The United States*, Case No. 10.951, 29 September 1999, para 37.

49 Cf. *infra* 4.3.

50 See, e.g., J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012), p. 84; D. Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts', 42(1) *Israel Law Review* (2009) 8–45, at p. 37; d'Aspremont and de Hemptinne, *supra* note 10, p. 84, who evoke controversies on the issue; L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002), p. 52, who indicates that 'it would seem that the contrary practice is insufficient both in quantity and quality to challenge the principle that human rights law binds only the State in its relation with individuals living under its jurisdiction and not armed opposition groups involved in internal conflict'. However, there is an evolving trend in legal scholarship (see, e.g., D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing, Oxford, 2016) and practice (see, e.g., Geneva Academy of International Humanitarian Law and Human Rights (ed.), *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016, available online at www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf (accessed 30 January 2021)) that goes in favour of the applicability of IHRL to organised armed groups, especially when those groups exercise government-like functions.

of its members or their comrades who wish to withdraw from the group, the raping of female members, who are sometimes recruited by the group as child soldiers, or the conducting of unfair trials against its members for war crimes or ordinary crimes associated with the armed conflict.⁵¹

This practice may have motivated the International Committee of the Red Cross (ICRC), in its Updated Commentaries, to plead in favour of the applicability of Common Article 3 – and therefore of all the fundamental guarantees provided in that Article – to any civilian or member of armed forces, irrespective of his/her affiliation to the armed group.⁵² The ICRC supports such an extended scope of application by arguing that Common Article 3 does not indicate that it applies to persons ‘in the power of the enemy’.⁵³ In the ICRC view, this is logical with respect to civilians since, in practice, it is hardly difficult to identify to which party civilians belong.⁵⁴ That view is not, however, convincing. Affiliation may well be established in certain cases, in light of all the relevant circumstances ruling at the time, especially when the civilians are taking a direct part in hostilities and are placed *hors de combat* or when it is established that the civilians took a direct part in the hostilities in the recent past. Such participation necessarily implies that the civilians are or were supporting a party to the conflict to the detriment of the other. This is also evidenced by the ICC case law. By considering, as already seen, that the violation of the prohibition on recruiting children or using them to actively participate in hostilities could be ‘committed by a perpetrator against individuals *in his own party* to the conflict’,⁵⁵ the ICC indirectly acknowledged that civilians, in particular children who were not member of armed forces yet, could be considered as affiliated to one party to an armed conflict. This may also find support in the ICC case law concerning the war crime of destruction of property in NIACs.⁵⁶ One constitutive element of that war crime is that such destruction

51 Regarding such practice, see, e.g., Sivakumaran, *supra* note 45, p. 246; see also the 2020 ICRC Commentary on Common Article 3, *supra* note 8, para. 581.

52 *Ibid.*, paras 578–583.

53 *Ibid.*, para. 579.

54 *Ibid.*, para. 580.

55 *Katanga* Confirmation Decision, *supra* note 46, para. 248 (emphasis added).

56 That war crime is applicable in both IACs (Article 8, 2), b), xxiii)) and NIACs (Article 8, 2), e), xii)). It is based on the IHL prohibition that originally comes from Article 23, g) of the 1907 Hague Regulations. Although not expressly mentioned neither in the 1949 Geneva Conventions nor in any of the two 1977 Additional Protocols, that prohibition is generally considered as applicable in both IACs and NIACs on a customary basis (Henckaerts and Doswald-Beck, *supra* note 5, p. 175).

must concern an ‘adversary’ property.⁵⁷ In several cases, the ICC had to deal with destructions committed in NIACs against civilian properties. The ICC was able to identify criteria upon which a civilian property could be qualified as ‘adversary’.⁵⁸ That being said, one must concede that it remains easier to identify who is the enemy with respect to members of armed forces, since that enemy status can be determined on the basis of membership of the adverse forces. In any case, it is worth observing that the ICRC argues in favour of the applicability of Common Article 3 to intra-party relations, without calling into question the existence of a status requirement. As we will see in the next Section, this contrasts with certain ICC decisions.

3 The ICC Case Law: The *Ntaganda* Case

Recent ICC case law and, in particular, decisions taken in the *Ntaganda* case concerning cruel acts of violence committed in the Ituri province of the Democratic Republic of Congo (DRC), are worth examining in order to shed new light on the issue of the relevance of the status requirement in the context of the discussion about intra-party protection, and, more generally, on the scope and meaning of the status requirement.⁵⁹ In the *Ntaganda* case, the ICC dealt with the applicability of specific fundamental guarantees to intra-party relations, namely the prohibitions of rape and sexual slavery. Ntaganda was accused of several war crimes, including those resulting from acts of sexual violence committed within the armed group under his command, by some

⁵⁷ The term ‘adversary’ is used for qualifying the destroyed properties in NIACs, while the term ‘enemy’ is used in the context of IACs; cf. *supra* note 56.

⁵⁸ See, e.g., *Katanga* Confirmation Decision, *supra* note 46, para. 310; ICC, *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Pre-Trial Chamber, Decision on the confirmation of charges, 16 December 2011 (*Mbarushimana* Confirmation Decision), para. 171.

⁵⁹ Some indications may also be found on that requirement in the *Katanga* case. However, they only concern the prohibition of pillage and the Court did not elaborate on its ruling. In that case, the ICC rejected the applicability of the status requirement with respect to the prohibition of pillage by dismissing the Defence’s argument that IHL ‘require[d] that the property not belong to combatants or persons having directly participated in hostilities’ (ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3436-tENG, Trial Chamber, Judgment, 7 March 2014 (*Katanga* Trial Judgment), para. 907). However, although the Defence referred to IHL, the Court did not feel compelled to delve into that body of law to settle the issue and merely argued that ‘[the status] requirement appears neither in the Statute nor in the Elements of Crimes’ (*ibid.*). This contrasts with its elaborate rulings in the *Ntaganda* case, where it scrutinized IHL in-depth after having concluded that no status requirement was provided in its Statute or in the Elements of Crimes with respect to the concerned war crimes (cf. *infra* 3.2.1 and 3.3.1).

of its members or by himself against child soldiers arguably recruited by that group. Interestingly, the issue of intra-party protection against such acts of sexual violence revolved around the status requirement. That issue has been dealt with by the ICC as a response to the Defence's challenge to the jurisdiction of the Court in respect of the war crimes of rape and sexual slavery. The Defence indeed argued that the Court would violate the principle of legality by prosecuting those war crimes committed by members of an armed group against other members of that group, since such war crimes were not provided for in its Statute.

The Defence's position was based on a two-step argument. As a first step, the Defence submitted that the relevant (ICC and corresponding IHL) provisions dealing with rape and sexual slavery contained a status requirement, notably that the victim must not take a direct part in hostilities. As a second step, the Defence argued that such a status excluded intra-party protection against that conduct, since, in the Defence's view, the alleged victims, namely the abused child soldiers, were members of the armed group and 'the notion of "membership" of an armed force [was] not compatible with "taking no active part in hostilities"'.⁶⁰

This issue has been discussed at the three stages of the trial. Although the different chambers reached the same conclusion, that the abused child soldiers were protected against rape and sexual slavery under IHL even though that conduct was committed by members of their own group, their reasoning diverges. The Pre-Trial Chamber reached that conclusion by relying on the status requirement (Section 3.1), whereas the Trial Chamber rejected that status (Section 3.2) and the Appeals Chamber overlooked it and, rather, focussed on another requirement (Section 3.3).

3.1 *Pre-Trial Stage: Maintaining the Status Requirement*

The issue was addressed at the pre-trial level in the decision on the confirmation of charges of 9 June 2014.⁶¹ The Pre-Trial Chamber's reasoning will be described first (Section 3.1.1). It will then be criticized for two main reasons. It

⁶⁰ See ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Trial Chamber, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017 (*Ntaganda* Trial Decision), para. 27; ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, Appeals Chamber, Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', 15 June 2017 (*Ntaganda* Appeals Judgment), para. 31.

⁶¹ ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-309, Pre-Trial Chamber, 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 (*Ntaganda* Confirmation Decision).

appears mistaken not only because of its understanding of the notion of membership and the consequent improper way it applied the status requirement (Section 3.1.2), but also, and more essentially, because the Chamber should not have resorted to that status at all. It is argued that, even when properly applied, such a status only concerns relations between parties to an armed conflict and not intra-party relations (Section 3.1.3).

3.1.1 Chamber's Reasoning

The Chamber's reasoning is brief. Its substance is contained in only three paragraphs. It may accordingly be presented in three main steps. Firstly, the Chamber recalled the personal scope of application of Common Article 3 and APII, which both provide for protections against rape and sexual slavery. As other international criminal jurisdictions usually do,⁶² the Chamber only referred to the test of not taking a direct part in the hostilities. It is illustrative that, when quoting Common Article 3 and indicating that this Article applies to '[p]ersons taking no active part in the hostilities',⁶³ it did not mention the remaining part of the sentence, namely 'including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause'. It therefore concluded that '[a]ccordingly, ... the Chamber must assess whether these persons [the abused child soldiers] were taking direct/active part in hostilities at the time they were victims of rape and/or sexual slavery'.⁶⁴

Secondly, the Chamber considered the issue of membership of the abused child soldiers. It argued that, given the unlawfulness of their recruitment or use in hostilities, 'the mere membership of children under the age of 15 years in an armed group [could not] be determinative proof of direct/active participation in hostilities'.⁶⁵ Otherwise, as stated by the Chamber, those children would lose their protection as a consequence of an unlawful act of which they were victims and this 'would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities'.⁶⁶

Thirdly, the Chamber asserted that those children, as they could not be considered as members of an armed group, could lose their protection 'only during their direct/active participation in hostilities'.⁶⁷ As a result, since the crimes

62 Cf. *supra* note 28.

63 *Ntaganda* Confirmation Decision, *supra* note 61, para. 77.

64 *Ibid.*

65 *Ibid.*, para. 78.

66 *Ibid.*

67 *Ibid.*, para. 79.

of a sexual nature ‘involve elements of force/coercion or the exercise of rights of ownership’,⁶⁸ the Chamber concluded that the abused children could not be considered as directly participating in hostilities ‘during the specific time when they were subject to acts of sexual nature, including rape’.⁶⁹ The children were therefore entitled to protection against such acts, even when committed by members of their ‘own’ party.

The foregoing reasoning shows that the Pre-Trial Chamber’s refutation of the Defence’s argument focussed on only one part of that argument. The Chamber did not indeed contest that the relevant IHL provisions contained a status requirement, namely, that the victim must not take a direct part in hostilities. However, it rejected the second part of the Defence’s view, that such a status excluded intra-party protection, by arguing that the abused child soldiers could not be qualified as members of an armed group, given the unlawfulness of their recruitment into the group, and could not therefore be considered as necessarily taking a direct part in hostilities.

3.1.2 Improper Understanding of the Notion of Membership and Use of the Status Requirement

Although very brief, the Chamber’s reasoning raises numerous questions. A first question is why the Chamber focussed on only one constitutive test of the status requirement, namely that of not taking a direct part in the hostilities. The Chamber completely overlooked the other test, that based on the notion of person *hors de combat*, which is the only one applicable to members of armed forces, including armed groups.

One may wonder if this is because the Chamber did not want to delve into the status of the abused child soldiers concerned, as mere civilians used by the armed group in active participation in the hostilities or as members of that group,⁷⁰ given the various functions performed by these children.⁷¹ However, even if it did not wish to address that issue, it should have at least acknowledged that the children could be either civilians or members of armed group and it should have, accordingly, resorted to the relevant test of the status requirement for each category. In fact, its reasoning implicitly shows that it admitted that the abused child soldiers could have materially become members of the armed group through their recruitment into the group. Moreover, such a status

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ At the trial stage, the Chamber expressly stated that it would not address that issue; see *Ntaganda* Trial Decision, *supra* note 60, para. 53.

⁷¹ *Ntaganda* Confirmation Decision, *supra* note 61, paras 81 and 82.

was highly plausible in fact, even if considered in light of a narrow approach to membership in an armed group, such as the ICRC functional approach based on the notion of a continuous combat function.⁷² Indeed, when dealing with the war crime of conscripting or enlisting children under the age of fifteen or using them to participate actively in hostilities, the Chamber established that most children went to military camps to be trained for combat.⁷³ As a result, the test of being *hors de combat* should logically have to be examined by the Chamber.

That having been said, the lack of any reference to that test is more likely to result from the Chamber's unwillingness to provide the child soldiers with the *legal* qualification of members of an armed group, even though these children could *materially* be considered as such. Firstly, the Chamber was afraid that, as members of an armed group, children would lose their protection under IHL since, according to the Chamber's reasoning, membership in an armed group could be 'determinative proof of direct/active participation in hostilities'.⁷⁴ Secondly, in the Chamber's view, such loss of protection, as members of an armed group, would be untenable, since the child soldiers would have acquired that status in contravention of the prohibition on conscripting or enlisting them in the armed group or using them in the hostilities. These two justifications are nonetheless flawed.

The first justification, in particular the Chamber's fear of a lack of protection for the children as members of an armed group, is based on two mistaken assumptions. The first wrong assumption is that membership may be 'determinative proof of direct/active participation in hostilities'. Persons may well be members of armed groups without directly participating in the hostilities, such as when they cook or sleep. This is what actually differentiates members of armed forces from civilians, with the latter either taking or not taking a direct part in the hostilities, with no potential intermediary activity. The second mistaken assumption is that members of armed forces, including armed groups, necessarily lose their protections under IHL. Like civilians who are protected as long as they do not take a direct part in hostilities, members of armed groups are protected as long as they are *hors de combat*. This is precisely the situation contemplated by the second constitutive test of the status requirement, which is relevant for members of armed forces.⁷⁵

⁷² Melzer, *supra* note 15, p. 33.

⁷³ *Ntaganda* Confirmation Decision, *supra* note 61, paras 87–96.

⁷⁴ *Ibid.*, para. 78.

⁷⁵ One may not exclude that such mistaken assumptions of the Pre-Trial Chamber have been influenced by the way the Defence submitted its argument. The Defence indeed only focussed on one test, that of not taking a direct part in the hostilities, and mistakenly assumed that

Regarding the second justification, that the Chamber could not qualify the child soldiers as members of an armed group because they became part of that group in violation of IHL, in particular the prohibition on recruiting them, scholarship,⁷⁶ practice⁷⁷ and mere realities of war⁷⁸ clearly show that such a view is erroneous. Membership is indeed a question of fact and does not depend upon the legality of the way persons have become members of armed forces.

In conclusion, assuming that it was adequate to resort to the status requirement, as the Pre-Trial Chamber did, to support the position that the abused child soldiers were protected against intra-party violence, the Chamber at least had to consider the test based on the notion of person *hors de combat*. Moreover, had the Chamber resorted to that test, and following its own logic, it could have reached its intended objective, to afford those children with protection against intra-party sexual violence. It would have been able to conclude that the children, although members of the armed group, were necessarily *hors de combat* 'during the specific time when they were subject to acts of sexual nature, including rape', notably because they were in the power of a party to the armed conflict.⁷⁹

3.1.3 The Inadequacy to Resort to the Status Requirement

However, the whole methodology underlying the Chamber's reasoning, which consists in resorting to the status requirement to reach its conclusions, is flawed. It is indeed submitted that the two constitutive tests of such a status, not taking a direct part in hostilities and being *hors de combat*, are meaningful only with respect to relations with an adverse party. They can therefore only be relied upon to provide protections against inter-party violence.

Concerning the test based on the notion of direct participation in hostilities, two situations may be distinguished. In the first situation, the concerned persons directly participate in the hostilities against the adverse party. In such a case, it is meaningless to make the entitlement to the protection from their

membership in an armed group implied that its members are constantly taking a direct part in hostilities, which would necessarily exclude them from the entitlement to the relevant IHL protections.

⁷⁶ See, e.g., I. Cohn and G.S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* (Clarendon Press, Oxford, 1994), p. 70; Rodenhäuser, *supra* note 46, p. 185.

⁷⁷ See, e.g., US Department of Defense, *Department of Defense Law of War Manual*, 2015, pp. 168–169.

⁷⁸ This would indeed require under Hague Law that the party attacking children who are materially members of an armed group should always know whether those children would have lawfully or unlawfully become such members.

⁷⁹ Cf. *infra* 3.1.3 on the notion of 'persons *hors de combat*'.

own party dependent upon that participation. Such participation indeed does not change anything with respect to their relations with their own party, while it is pivotal with respect to the adverse one. In the second situation, the concerned persons directly participate in the hostilities against their own party. In such a case, that party must no longer be considered as their own party but the adverse one and the violence potentially committed by that party against them as a traditional situation of inter-party violence to which the protections apply. The conclusion that the test of not taking a direct part in the hostilities is only meaningful with respect to protection against adversaries is in line with the interpretation of that test in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which provides that any conventional text 'shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*'. Regarding the context, it has already been emphasized that most of the IHL provisions, especially those of the 1949 Geneva Conventions, grant protection against the adverse party, unless expressly stated otherwise.⁸⁰ Regarding the object and purpose, it is classically held that IHL aims at limiting the suffering caused by warfare, but distinguishes itself from IHRL as it is designed to protect persons against the enemy⁸¹ and not, as initially pursued by IHRL, to protect nationals against their own government.

Such an interpretation is even more straightforward concerning the second test, namely the test based on the notion of *hors de combat*. While, as a general matter, persons cannot be *hors de combat* vis-à-vis their own party since they do not engage in combat toward that party,⁸² otherwise it would be an adverse party, this finds clear support in the wording itself of Article 41 API, which is generally recognized as providing the definition of the notion of persons *hors de combat* in both IACs and NIACs. As expressly mentioned in the heading of Article 41, this Article deals with the '[s]afeguard of the *enemy hors de combat*'.⁸³ This cannot be clearer about the fact that only inter-party relationships are considered under that Article. Since this is provided in the heading of Article 41, it is relevant for the whole content of that Article and, in particular, for the three situations listed in the article in which a person may be qualified as a person *hors de combat*. Moreover, each of those situations, even when taken separately from the heading of Article 41, leads to the same conclusion. The first is explicit as it provides that '[a] person is *hors de combat* if ... he is in

⁸⁰ Cf. *supra* 2.3.

⁸¹ *Ibid.* and cf. *infra* note 140.

⁸² See also in that sense Rodenhäuser, *supra* note 46, p. 191.

⁸³ Emphasis added.

the power of an *adverse party*.⁸⁴ The second, according to which '[a] person is *hors de combat* ... if he clearly expresses an intention to surrender', would be meaningless if it was intended to apply to relations between a person and his/her own party since one can only surrender to a party against which one is combating and not to one's own party. This is also true with respect to the third and last situation, according to which '[a] person is *hors de combat* if ... he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself'. What matters is that the person 'is incapable of defending himself'. Such a defence presumably means defence against an attacking force and therefore an adverse party. In any case, this is the only relevant interpretation when read in light of the heading of Article 41 API.⁸⁵

More generally, it must be recalled that both tests, not taking a direct part in the hostilities and being *hors de combat*, are concepts defined in light of the law on the conduct of hostilities, in particular the regulation of attacks. They serve as pivotal tests for determining the lawfulness of attacks against civilians and members of armed forces. It therefore seems consistent to argue that they are only relevant with respect to inter-party relations since, as already seen, the definition of attack under Article 49 API only includes 'acts of violence against the *adversary*'.⁸⁶

In sum, it is true that the fundamental guarantees do not contain any 'inter-party requirement', meaning that the entitlement to those guarantees is not expressly limited to persons affiliated with the adversary, as GCIII and GCIV are in relation to POWs and civilians. However, such a requirement indirectly derives from the status requirement, since that requirement can only be construed as involving inter-party relations. Consequently, any reasoning that aims at demonstrating that the fundamental guarantees provide protections against intra-party violence is doomed to be flawed if the arguments put forward merely gravitate around the status requirement, without breaking with it. This was the case of the Pre-Trial Chamber's reasoning, but this is also

84 Emphasis added.

85 This seems to be overlooked by scholars who support another interpretation, namely that persons subject to acts of violence like rape by their own party could fall into that third case because they would be 'at least temporarily incapacitated, defenceless ...'; see Rodenhäuser, *supra* note 46, p. 191; see also K.J. Heller, 'ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL', *Opinio Juris* (15 June 2017), available online at opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl (accessed 30 January 2021).

86 Emphasis added.

the approach followed in several scholarly writings⁸⁷ and by the ICRC in its updated Commentary on Common Article 3.⁸⁸

3.2 *Trial Stage: Rejecting the Status Requirement*

In its decision of 4 January 2017, the Trial Chamber again rejected the challenge to its jurisdiction put forward by the Defence.⁸⁹ The Chamber's reasoning was, however, entirely different from that developed at the pre-trial stage. The Trial Chamber concluded that the abused child soldiers were protected against rape and sexual slavery even when committed by members of their own armed group, not on the basis of the status requirement, but by arguing that such a status did not exist in the relevant (ICC Statute and corresponding IHL) provisions (Section 3.2.1). Although such reasoning goes in the right direction, as it breaks with the status requirement, most of the arguments upon which it is based do not appear conclusive (Section 3.2.2).

87 See, e.g., *supra* note 85. See also the particular approach submitted by Rodenhäuser in relation to the *Ntaganda* pre-trial decision (Rodenhäuser, *supra* note 46, p. 186). The author argues that child soldiers should not suffer the consequences of their unlawful recruitment into an armed group and accordingly lose their protection vis-à-vis that group because they are their members. At the same time, he acknowledges that membership to an armed group is a question of fact and does not depend upon the legality of the way a person becomes member of that group. In order to overcome that difficulty, he submits that such children should still be considered as members of an armed group but only in relation to the adversary, not in relation to the group to which they belong. In the author's view, they would then remain civilians and benefit from the special protection afforded to that category of persons. This proposal is controversial since one person would have a different status, civilian *versus* member of armed forces, according to the author of the acts of violence committed against him/her, another member of these armed forces *versus* someone outside these forces. Moreover, such dichotomy would still make the issue of membership dependent upon legal considerations and not only upon facts. Finally, the protection of the member as a civilian vis-à-vis his/her own armed forces would still have to be assessed in light of the test of direct participation in hostilities, which is however only meaningful with respect to inter-party relations.

88 In addition, the application of the status requirement to support intra-party protection may lead to untenable consequences. This is particularly the case with respect to unlawful conduct, such as sexual slavery, that are of a continuous nature. As emphasized in legal scholarship (see, e.g., R. Grey, 'Sexual Violence against Child Soldiers', 16(4) *International Feminist Law Journal of Politics* (2014) 601–621, at p. 614), this would indeed mean that the victims would lose their protection against such conduct each time they take a direct part in hostilities against the adversary, while recovering it at the end of such participation.

89 *Ntaganda* Trial Decision, *supra* note 60.

3.2.1 Chamber's Reasoning

The Chamber started its reasoning by enquiring whether, in light of its Statute, the relevant provisions, namely Article 8, 2), b) xxii) with respect to IACs and Article 8, 2), e, vi) with respect to NIACs, contained a status requirement, which was similar, respectively, to that characterizing the war crimes amounting to grave breaches, only applicable to protected persons in terms of the Geneva Conventions (Article 8, 2), a)), or to that characterizing the war crimes resulting from serious violations of Common Article 3, only applicable to civilians or members of medical or religious personnel who do not take a direct part in hostilities or persons *hors de combat* (Article 8, 2), c)).⁹⁰ The Chamber concluded that no such legal status was required by the applicable ICC Statute provisions.⁹¹

In a second step, the Chamber considered those provisions in light of IHL. It did so on the basis of the requirement provided in the Introduction to the ICC Elements of Crimes for Article 8,⁹² namely that those elements must be interpreted in light of IHL, and the requirement contained in the chapeaux of Articles 8, 2), b) xxii) and 8, 2), e) vi), according to which the Court may prosecute the war crimes listed under those chapeaux 'within the established framework of international law'. After a brief survey of the various IHL provisions prohibiting acts of sexual violence, both in IACs and NIACs, as well as both in conventional and customary law,⁹³ the Chamber acknowledged that most of the prohibitions against rape and sexual slavery 'appear in the contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict'.⁹⁴ However, it argued that '[it did] not consider those explicit protections to exhaustively define, or indeed limit, the scope of protection against such conduct'.⁹⁵ After breaking free from these conventional and customary limitations, the Chamber then invoked a series of elements to support its extended view on the personal scope of application of the prohibitions against rape and sexual slavery. Firstly, it recalled the Martens Clause, as well as Article 75 API, which, in the Chamber's words, 'appl[ies] to, and protect, *all persons* in the power of a Party to the conflict'.⁹⁶

Secondly, it referred to the rationale of IHL, according to which IHL allows that suffering, death or damage may be caused to persons or properties,

90 *Ibid.*, paras 40–43.

91 *Ibid.*, para. 44.

92 ICC, *Elements of Crimes*, *supra* note 32, p. 13.

93 *Ntaganda* Trial Decision, *supra* note 60, para. 46.

94 *Ibid.*, para 47.

95 *Ibid.*

96 *Ibid.* (emphasis added).

provided that this 'is military necessary or ... will result in a definite military advantage'.⁹⁷ Accordingly, in the Chamber's view, rape and sexual slavery could never be justified under IHL, since they do not provide as such any military gain. As a result, for the Chamber, any test involving military considerations was irrelevant for the applicability of the prohibitions against such conduct. This is why it argued that, although the status of a person, as a member of the enemy armed forces or as a civilian directly participating in hostilities, is pivotal in order to determine if he/she may be lawfully targeted, it is irrelevant with respect to rape and sexual slavery: any person, being lawfully or unlawfully targetable, is protected against such conduct.⁹⁸

Thirdly, the Chamber referred to the 2016 ICRC Updated Commentary on Common Article 3⁹⁹ since, as already seen, the Commentary extends the scope of protection of the fundamental guarantees of Common Article 3 to intra-party violence.¹⁰⁰

Fourthly, the Chamber delved into the peremptory status of the prohibitions against rape and sexual slavery and concluded that both prohibitions had acquired such a status. Consequently, in the Chamber's view, rape and sexual slavery were 'prohibited at all times ... and against all persons, irrespective of any legal status'.¹⁰¹

The foregoing reasoning shows that the Trial Chamber refuted the first part of the Defence's argument, that the relevant provisions contained a status requirement. This therefore allowed it to dispense with addressing the second part of the argument, namely, whether such a status necessarily excluded protection against intra-party violence. That being said, the last considerations of its decision responded somewhat to that second part. Indeed, after recalling its conclusion that the protection against sexual violence in IHL was not subject to any status requirement, the Chamber felt the need to stress that the children unlawfully incorporated into an armed group could not lose their protections vis-à-vis that group because of such unlawful incorporation. It presented this as a necessary consequence of the general principle of law '*ex injuria jus non oritur*', according to which 'one cannot benefit from one's own unlawful conduct'.¹⁰²

97 *Ibid.*, para 48.

98 *Ibid.*, para. 49.

99 That Commentary is similar to the most recent one: the 2020 Updated Commentary on Common Article 3 as part of GCIII, *cf supra* note 52.

100 *Ntaganda* Trial Decision, *supra* note 60, para. 50.

101 *Ibid.*, para. 52.

102 *Ibid.*, para. 53.

3.2.2 Properly Rejecting the Status Requirement but on Controversial Arguments

Although properly rejecting the status requirement, the Trial Chamber's reasoning remains problematic as most arguments relied upon by the Chamber are debatable and some of them are definitely flawed. Its starting argument is that the limitations to the personal scope of the IHL prohibitions of rape and sexual slavery do not preclude those prohibitions from also applying without such limitations, in particular without any status requirement. The Chamber did not seem to have only in mind the prohibitions provided in Article 75 API, although it invoked that Article as not requiring any legal status in order to support its view. Otherwise, it would not have been able to conclude that no legal status was required with respect to all the prohibitions against rape and sexual slavery, either in IACs or NIACs. The Chamber's argument therefore appears to be the following: even if the status requirement conditions the applicability of the relevant prohibitions in express terms, that requirement is not 'exclusive', meaning that it does not exclude the applicability of those prohibitions when such a requirement is not fulfilled. This reasoning is puzzling.

As a matter of treaty interpretation, this would run counter to the well-known principle '*expressio unius est exclusio alterius*'. Many IHL limitations, especially those resulting from the applicability of specific protections to particular categories of persons under the Geneva Conventions, like those afforded to protected civilians under GCIV,¹⁰³ are not expressed in exclusive terms but are well understood as excluding the categories of persons who are not expressly mentioned. This must also be the case with respect to the fundamental guarantees. It would be unreasonable to support that, when drafting those guarantees, States would have to expressly indicate that they *only* benefit those who fulfil the status requirement in order to avoid any interpretation that the lack of such exclusive terms means that they may also benefit others. On the other hand, the Chamber did not appear to suggest the emergence of customary prohibitions of rape and sexual slavery that would be substantially similar to the conventional ones but the applicability of which would no longer be dependent upon any legal status. It did not embark upon any analysis of the State practice providing such a legal basis under customary law.

More generally, the elements to which the Chamber referred in that regard do not appear conclusive, whether they were relied upon to support any treaty

¹⁰³ That Chamber's approach would lead to untenable results, notably that a party to an IAC would have to provide persons with the status of protected persons under GCIV, even if those persons are the nationals of – or owe allegiance to – that party, since Article 4 GCIV is not formulated in exclusive terms.

interpretation towards reading the status requirement as not 'exclusive' or to support any emergence of parallel customary norms with a different personal scope of application. As far as the Martens clause is concerned, it is at least clear that it has no norm-creative effect. Its mere potential effect is only to serve as an interpretative guidance to existing IHL rules by referring to established usages, the laws of humanity and the requirements of the public conscience¹⁰⁴ or, according to the ICTY, to express the prior importance of the *opinio juris* when recognizing the existence of an IHL customary norm.¹⁰⁵

The swift reference to Article 75 API is also questionable. It must indeed be recalled that, although it does not expressly contain any status requirement, this might be implicitly inferred from the similarity of its content to that of Common Article 3 and Article 4 APII.¹⁰⁶ As has already been seen, such an interpretation is in line with the ICTY case law and the ICRC Study on Customary IHL, which support the existence of a status requirement irrespective of the nature of the armed conflict. In addition, the applicability of Article 75 API to intra-party relations in IACs, as envisaged by the Chamber, would imply that nationals of a party to an IAC might be entitled to protections from that party. Yet, as detailed below,¹⁰⁷ it is debated whether Article 75 API may apply to nationals. The Chamber did not even allude to that issue.

The Chamber's consideration of the rationale of IHL is also puzzling, although they move in the right direction as they emphasize the irrelevance of the status requirement with respect to guarantees such as the prohibitions of rape and sexual slavery.¹⁰⁸ Firstly, when arguing that 'there is never a justification to engage in sexual violence against any person, irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law',¹⁰⁹ the Chamber wrongly assumed that such conduct could materially be committed against persons taking a direct part in hostilities or not being *hors de combat*. As argued in detail later in the paper¹¹⁰ and emphasized by the Pre-Trial Chamber in this case,¹¹¹ such assumption does not make

104 See A. Cassese, 'The Martens Clause: half a loaf or simply pie in the sky?' 11(1) *European Journal of International Law* (2000) 187–216, at pp. 201–202; T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94(1) *American Journal of International Law* (2000) 78–89, at pp. 86–87.

105 Meron, *supra* note 104, p. 88 and ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Trial Chamber, Judgment, 14 January 2000, para. 527.

106 Cf. *supra* 2.1.

107 Cf. *infra* 4.1.

108 Cf. *infra* 4.3.

109 *Ntaganda* Trial Decision, *supra* note 60, para. 49.

110 Cf. *infra* 4.3.

111 *Ntaganda* Confirmation Decision, *supra* note 61, para. 79.

sense, since the constitutive elements of acts of sexual violence such as rape logically exclude any possibility of the victim directly participating in the hostilities or not being *hors de combat* while subject to the prohibited conduct. Secondly, the Chamber's consideration suggests that no legal status must be required with respect to the prohibitions of rape and sexual slavery, otherwise such conduct would then be allowed when committed against persons targetable under IHL and would then remain unpunished. However, one must keep in mind that such a category of persons could then be protected by other norms only applicable to them, such as those prohibiting superfluous injury or unnecessary suffering. Those norms could serve as a legal basis to sanction any inhumane treatment committed against those persons while being involved in the hostilities.

The reference to the 2016 ICRC Updated Commentary is also intriguing. Admittedly, the ICRC pleads in favour of the applicability of Common Article 3 to intra-party relations in that Commentary. However, as already emphasized,¹¹² it did not do so by rejecting the existence of a status requirement. In the ICRC's view, the entitlement to the protections afforded by Common Article 3, including those against acts of sexual violence, remains dependent upon both the status and control requirements.

Likewise, the reference to the *jus cogens* concept appears inappropriate. It is true that the *jus cogens* character of a norm bears different legal consequences. In treaty law, a treaty conflicting with a *jus cogens* norm is either invalid or terminated if concluded following or before the emergence of such a norm, respectively.¹¹³ From the point of view of international responsibility, a State is not allowed to invoke a circumstance precluding wrongfulness in order to justify the violation of a *jus cogens* norm.¹¹⁴ Furthermore, it is bound to cooperate in order to bring to an end the violations of such a norm, not to render aid or assistance in maintaining the situation created by the said violations and not to recognize as lawful this situation.¹¹⁵ However, in the same way as stated by the International Court of Justice when considering as irrelevant the *jus cogens* character of a norm while addressing the issue of State immunity,¹¹⁶

¹¹² Cf. *supra* 2.3.

¹¹³ Vienna Convention on the Law of Treaties, 22 May 1969, Articles 53 and 64.

¹¹⁴ See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), available online at legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 30 January 2021), Article 26.

¹¹⁵ *Ibid.*, Articles 40 and 41.

¹¹⁶ See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports* 2012, p. 99, paras 92–97.

this character is equally irrelevant when evaluating the scope of application of a norm, in particular that of the IHL fundamental guarantees.¹¹⁷

Finally, it is also unclear why, at the end of its reasoning, the Chamber felt the need to come back to the view that armed groups could not benefit from their unlawful conduct, namely, the incorporation of children under 15 years into the group, to avoid any liability for inhumane treatment committed against those children. This indeed relates to the issue of whether membership in an armed group may be dependent upon legal considerations and echoes the problematic reasoning developed by the Pre-Trial Chamber in that respect.¹¹⁸ This is confusing since the Chamber appears to revert to considerations relating to the status requirement, while having previously developed a detailed reasoning to reject it.

3.3 *Appeals Stage: Overlooking the Status Requirement*

The trial decision was appealed by the Defence. The Appeals Chamber issued its judgment on 15 June 2017.¹¹⁹ It will be demonstrated that, whilst being apparently similar to the trial decision, (Section 3.3.1) the Chamber's reasoning is different in substance. The Chamber did not contest the existence of a status requirement in the relevant IHL provisions; rather it simply overlooked it and instead focussed on the 'inter-party requirement' (Section 3.3.2). Besides being confusing, this reasoning raises major problems (Section 3.3.3).

3.3.1 *Apparently Similar to the Trial Decision*

Like the Trial Chamber, the Appeals Chamber first examined the ICC Statute in order to establish whether, under that Statute, the relevant provisions contained any status requirement.¹²⁰ The Chamber clearly understood the requirement at this stage as that of being a protected person in terms of the Geneva Conventions with respect to the war crimes applicable in IACs and the requirement of not taking a direct part in hostilities in terms of Common Article 3 with respect to the war crimes applicable in NIACs. The Appeals Chamber also concluded that no such requirement was contained in the relevant ICC Statute provisions.¹²¹

¹¹⁷ See also in that sense O. Svacek, 'Brothers and Sisters in Arms as Victims of War Crimes: Ntaganda Case before the ICC', 8(1) *Czech Yearbook of Public and Private International Law* (2017) 346–357.

¹¹⁸ Cf. *supra* 3.1.2.

¹¹⁹ *Ntaganda Appeals Judgment*, *supra* note 60.

¹²⁰ *Ibid.*, paras 46–50.

¹²¹ *Ibid.*, para. 51.

Again, in line with the Trial Chamber's reasoning, it then assessed whether that conclusion was consistent with the 'established framework of [the] international law [of armed conflict]' in light of which the relevant provisions of its Statute had to be understood according to the Introduction to the Elements of Crimes for Article 8 and the chapeaux of Articles 8, 2) b) and e).¹²² Additionally, it based such an assessment on Article 21 of the ICC Statute, which lists the applicable law and provides that the ICC may resort to the law of armed conflict when there is a lacuna in the instruments to be applied in the first place, including the ICC Elements of Crimes.¹²³ This assessment led it to examine the issue in light of IHL. It reached the same conclusion as that upheld by the Trial Chamber, that there was 'no reason to introduce Status Requirements to Article 8 (2) (b) (xxii) and (e) (vi) of the Statute on the basis of the "established framework of international"',¹²⁴ namely IHL.

It resorted to similar arguments, including the Martens clause and the rationale of IHL.¹²⁵ It also referred to the ICRC Updated Commentary¹²⁶ and rejected the objections raised by the Defence about the relevance of that Commentary with respect to the issue at stake.

3.3.2 Different in Substance: From the Status to the Inter-Party Requirement

Although apparently similar, the trial decision and the appeal judgment are actually diverging, especially with respect to their reasoning on IHL. The Appeals Chamber did not question whether the relevant IHL provisions included a status requirement. Actually, it admitted that they contained such a status. Rather, it enquired whether the IHL provisions containing a status requirement automatically excluded intra-party protection on the ground that such a requirement would necessarily be associated with an 'inter-party requirement', expressly requiring that the beneficiaries must be affiliated with the adversary.

It started by examining the protections afforded to the specific categories of persons under the four 1949 Geneva Conventions in IACs.¹²⁷ It emphasized that, although the beneficiaries of those protections must necessarily have the

¹²² *Ibid.*, paras 56–65.

¹²³ *Ibid.*, para. 53.

¹²⁴ *Ibid.*, para. 66. Like the Trial Chamber, the Appeals Chamber referred to the status requirements in plural, because, in the Chamber's view, it was constituted by several tests (*cf. supra*, Section 2.2).

¹²⁵ *Ibid.*, para. 63.

¹²⁶ *Ibid.*, para. 61.

¹²⁷ *Ibid.*, paras 58–59.

status of protected persons under those Conventions (as a result of a *status requirement*), they did not have to be affiliated with the adversary in all cases (as a result of an *inter-party requirement*). The Appeals Chamber recalled in that respect that, unlike GCIII dealing with POWs and GCIV protecting civilians, GCI and GCII expressly 'extend [the] protection [afforded to wounded, sick and shipwrecked] irrespective of affiliation'.¹²⁸ It then turned to the protections provided under Common Article 3. It acknowledged that these protections are only granted to those who do not take a direct part in hostilities, but emphasized that the Article 'provid[ed] for unqualified protection against inhumane treatment irrespective of a person's affiliation'.¹²⁹ In other words, in the Chamber's view, those protections were subject to a status requirement but not together with an inter-party requirement.

This definitely confirms that the main focus of the Chamber's enquiry was not the existence of a status requirement but rather the existence of an inter-party requirement. Its considerations even suggest that it sometimes confused both requirements and that, while referring to the status requirement, it actually meant the inter-party one. Indeed, the Chamber acknowledged that it did not know any case in which 'the grave breaches regime [which is only applicable to those fulfilling the required legal status] has been applied to situations in which victims belonged to the same armed force as the perpetrators [i.e. to situations of intra-party violence]'. It then stated that, '[h]owever, [it was] unconvinced that this [absence of such case], in and of itself, reflect[ed] the fact that *Status Requirements exist as a general rule of international humanitarian law*'.¹³⁰ What the Chamber refused to consider as a potential general rule is not that IHL protections are only granted to protected persons (as a result of a *status requirement*), but rather that IHL protections only benefit those who are affiliated with the adversary (as a result of an *inter-party requirement*). This is confirmed by the Chamber's conclusions that no such general rule exists. The Chamber indeed stated that there was '[no] general rule excluding members of armed forces from protection against violations by members of the same armed force'. This clearly relates to the inter-party requirement.

Such a confusing reference to the 'Status Requirements' is also noticeable in its specific considerations concerning the IHL prohibitions against rape and sexual slavery. Although admitting that those prohibitions are most often subject to a status requirement, the Appeals Chamber nonetheless argued that

¹²⁸ *Ibid.*, para. 60.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* (emphasis added).

¹³¹ *Ibid.*, para. 64.

this did not have any impact ‘on who may be victims of such conduct’.¹³¹ It based its reasoning upon its previous conclusion that no general rule existed that excluded intra-party protection in IHL and it inferred from the lack of such a general rule that ‘there [was] no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery’.¹³² Accordingly, it concluded that there was ‘no reason to introduce *Status Requirements* [in the relevant ICC Statute provisions] on the basis of the “established framework of international law”’.¹³³ No ‘Status Requirements’ in that conclusion could only mean no ‘inter-party requirement’, since the Chamber previously admitted that such a status existed with respect to most IHL prohibitions against rape and sexual slavery.

3.3.3 Critical Appraisal

Although the Appeals Chamber avoided the difficulties faced by the Trial Chamber, by admitting the existence of a status requirement in the relevant IHL provisions, its reasoning remains problematic in several aspects. Firstly, it is confusing since, as demonstrated above, it focussed on the inter-party requirement instead of the status requirement and even referred to the latter although meaning the former. Its intended objective was not to pronounce on the existence of a status requirement in IHL in general or with respect to the relevant IHL provisions in particular. It was to demonstrate the inaccuracy of the common understanding of IHL, as a body of law traditionally confined to the protection of persons in relation to the adversary.¹³⁴ In that sense, the Chamber’s conclusions entail a Copernican revolution on the matter. Those conclusions imply a complete reversal of the traditional view that IHL only provides protection against inter-party violence, unless expressly provided otherwise, such as in GC I and GC II with respect to wounded, sick and shipwrecked. According to the Appeals Chamber, the proper view is that IHL indifferently provides protection against either intra or inter-party violence, unless expressly provided otherwise, such as in GC III and GC IV with respect to POWs and civilians, respectively. That being said, those considerations are alien to the issue of the status requirement that the Chamber started to deal with when interpreting its Statute and had to examine when coming to IHL.

In addition, the Appeals Chamber was not persuasive when summarily rejecting some case law that supported the traditional inter-party approach to IHL, including that of the Special Court for Sierra Leone (SCSL). The Chamber

¹³² *Ibid.*, para. 65.

¹³³ *Ibid.*, para. 66 (emphasis added).

¹³⁴ *Cf. supra*, Section 2.3 about that traditional understanding.

departed from this case law because, in its view, the SCSL had only based its reasoning on GCIII, which affords POWs' protections only to persons who have fallen into the power of the enemy.¹³⁵ According to the Chamber, the SCSL limited its reasoning to this specific convention and did not therefore attempt to express any general rule that IHL only regulates inter-party violence, unless provided otherwise.¹³⁶ Admittedly, the SCSL indicated in that case law that '[t]he law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another',¹³⁷ while having previously referred to the scope of application of GCIII. However, GCIII was not determinative in that case since the armed conflict in Sierra Leone had been qualified as a NIAC.¹³⁸ It is arguable that the reference to GCIII was merely illustrative, with the SCSL referring to GCIII as providing a useful example of a legal basis to detain members of armed forces, which could apply by analogy to NIACs with respect to detention by armed groups. In any case, it would be misleading to draw upon such a reference in order to deny the general scope of the view upheld by the SCSL, namely, that IHL was not intended to regulate intra-party violence. The SCSL indicated in general terms in that regard that 'the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces',¹³⁹ before referring to this idea as a 'fundamental principle of IHL'.¹⁴⁰

Secondly, it is controversial whether the Appeals Chamber properly responded to the Defence's argument, especially in relation to the second part of that argument. While not contesting the first part, that the relevant (ICC Statute and IHL) provisions contained a status requirement, the Chamber enquired whether such a requirement necessarily excluded intra-party protection, by examining if it was necessarily associated with an inter-party requirement in those provisions. At first glance, this might seem to respond to the second part of the Defence's argument, which indeed claimed that the status requirement necessarily excluded intra-party protection in favour of the child soldiers in this case. However, contrary to the Chamber's reasoning, the Defence's argument was not based on any claimed association of the status requirement with an inter-party requirement in the relevant provisions. It was rather based on an application of the status requirement itself to the case. As already seen,

¹³⁵ *Ntaganda Appeals Judgment supra* note 60, para. 61.

¹³⁶ *Ibid.*

¹³⁷ SCSL, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 1453.

¹³⁸ *Ibid.*, para. 977.

¹³⁹ *Ibid.*, para. 1451.

¹⁴⁰ *Ibid.*, para. 1453.

the Defence argued that, on becoming members of an armed group, as the children did, those members could not fulfil the status requirement since, in the Defence's view, membership in such a group was incompatible with the condition of not taking a direct part in hostilities. Nothing in the appeals judgment deals with that claim.

Thirdly, it is unclear whether the Chamber properly applied the requirement that the war crimes provided by the ICC Statute must be 'interpreted in a manner that is consistent with international law, and international humanitarian law in particular'.¹⁴¹ This requirement, that the Chamber inferred from both the Introduction to the Elements of Crimes for Article 8 and the chapeaux of Articles 8, 2), b) and e) is pivotal for the regulation of the relationships between IHL and the ICC law on war crimes. The relationships between IHL and International Criminal Law (ICL) have traditionally been seen as relationships between primary and secondary norms, respectively, with the latter establishing the conditions under which the violations of the former may give rise to individual criminal responsibility.¹⁴² Unlike the relationships between IHL and IHRL, which are two different bodies of law containing primary norms, the relationships between IHL and ICL do not apparently raise any particular issue of interactions, which would require the application of conflicts of norms' mechanisms, such as the *lex specialis* principle. No conflict could indeed arise between IHL and ICL. The role of ICL jurisdictions in that respect was usually limited to applying IHL, which led them to clarify its norms, sometimes in a very progressive way.¹⁴³ However, following the intensive judicial activism of the *ad hoc* international criminal tribunals, especially the ICTY, a body of law on war crimes emerged. That judicial body of law was partially incorporated into a text with the drafting of the ICC Statute. While the ICTY jurisdiction over war crimes was provided in its Statute by mere general references to violations of IHL, in particular to the grave breaches of the Geneva Conventions and to the violations of the laws or customs of war,¹⁴⁴ such general references no longer appear in the ICC Statute. In reaction to the quasi-legislative activity of the ICTY, the Statute provides for an elaborated but exhaustive list of war crimes, whose elements are detailed in the Elements of Crimes. In addition, under Article 21 of the ICC Statute, those Elements must

141 *Ntaganda Appeals Judgment*, *supra* note 60, para. 53.

142 *See, e.g.*, Sassòli, *supra* note 35, pp. 444–445.

143 *See, e.g.*, D. Scalia, 'Droit international pénal', in R. van Steenberghe (ed.), *Le droit international humanitaire: un régime spécial de droit international?* (Bruylant, Bruxelles, 2013), pp. 207–211.

144 *See* Articles 2 and 3 of the ICTY Statute, respectively.

be first applied, together with the Rome Statute and the Rules of Procedure and Evidence. As already seen, it is only when those documents show a lacuna that IHL may be applied.

The ICC law on war crimes could then be perceived as a self-contained regime, comprising primary norms that detail the various material elements of a series of war crimes and having therefore gained its independence from its primary historical source, namely IHL. Would that mean that a war crime could be committed under the ICC Statute without involving any IHL violation, because the elements of that crime would not include all the elements of the underlying IHL rule? This is precisely what the Introduction to the ICC Elements of Crimes for Article 8 and arguably the chapeaux of Articles 8, 2), b) and e) intend to avoid by requiring the ICC to examine whether the elements of the war crimes provided in its Statute are consistent with the 'established framework of [the] international law [of armed conflict]'.¹⁴⁵ Such a

¹⁴⁵ It is controversial whether a distinction should be made between the requirement provided in the Introduction to the ICC Elements of Crimes for war crimes, that all these elements 'shall be interpreted within the established framework of the international law of armed conflict', and the requirement contained in the chapeaux of Articles 8, 2), b) and e) of the ICC Statute, that the war crimes listed under those chapeaux and consisting in '[o]ther serious violations of the laws and customs applicable in [IAC or NIAC]' must be consistent with 'the established framework of international law'. It has been argued that the second requirement does not merely require the Court to interpret those war crimes in light of the underlying IHL rules but more fundamentally to examine if and to which extent they are provided under international law and therefore whether they constitute a violation of any IHL norm. This is based upon the view that these war crimes are not necessarily established under international law, contrary to those listed under Articles 8, 2), a) and c), which consist in grave breaches and serious violations of Common Article 3, respectively. Under that view, according to the terms contained in the chapeaux of Articles 8, 2), b) and e), the Court can prosecute the war crimes listed under those chapeaux 'only if and to the extent that general international law already regards the offence as a war crime' (see Cassese *et al.*, *supra* note 35, pp. 80–81). This means that they must be based upon an underlying IHL rule whose violation gives rise to individual criminal responsibility. However, the majority view is that those war crimes already existed under customary law at the time of their incorporation in the ICC Statute and are therefore based on IHL violations (see Sassòli, *supra* note 35, p. 446). The requirement contained in the chapeaux of Articles 8, 2), b) and e) would then merely mean that these customary war crimes must be interpreted in light of the underlying IHL rules. In this case, the ICC Appeals Chamber considered both requirements as having the same meaning, namely that the ICC Statute provisions on war crimes must 'be interpreted in manner that is "consistent with international law, and international humanitarian law in particular"' (Ntaganda Appeals Judgment, *supra* note 60, para. 53). It referred to its own case law, in particular to the Appeals judgment in the *Lubanga* case (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 322).

requirement may be seen as a proof that the ICC law on war crimes is not auto-sufficient and remains dependent upon the content of the IHL primary norms. Alternatively, if the ICC law on war crimes is nonetheless to be considered as a self-contained regime, this requirement could then be considered as a conflict of norms' mechanism, similar to the *lex specialis* principle but already provided in the treaty whose substance must be consistent with other bodies of law. As such, it would require the Court to interpret the ICC provisions applicable in armed conflicts, in particular those providing war crimes, in light of the rules specifically devoted to the regulation of such conflicts, namely the corresponding IHL norms. This interpretation process could then arguably be said to give rise to—or maintain—the 'humanitarization' of the ICC law on war crimes in the same way as it is now well established that IHL may 'humanitize' IHRL through the interpretation of IHRL in light of its norms.¹⁴⁶

In this case, the Appeals Chamber, like the Trial Chamber, was clearly concerned by the fact that the prosecuted war crimes under its Statute had to involve the violation of underlying IHL rules. This is indeed the reason why it resorted to the aforementioned mechanisms, even though it considered that this might lead to introducing additional elements to the war crimes provided in its Statute. In response to the Prosecution, which opposed referring to IHL on the issue at stake since this would add to – and not merely interpret – the ICC Statute, the Chamber stated that '[if] customary or conventional [IHL] stipulates in respect of a given war crime set out in article 8 (2) (b) or (e) of the Statute an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it'.¹⁴⁷ In that sense, it is definitely misplaced to assert, as certain scholars too quickly did, that the Appeals Chamber said '[a] war crime does not have to violate IHL'.¹⁴⁸ However, it is questionable whether it properly interpreted its Statute in light of IHL, since it did not look at the right issue under that body of law. The issue was indeed the existence of a status requirement for the war crimes of rape and sexual slavery. The Appeals Chamber, like its

¹⁴⁶ One of the first scholars to use this term was V. Gowlland-Debbas, 'The Right to Life and the Relationship between Human Rights and Humanitarian Law', in C. Tomuschat, E. Lagrange and S. Oeter (eds.), *The Right to Life* (Martinus Nijhoff, Leiden, 2010), p. 128; see also H. Tigroudja, 'Les conflits armés', in M. Levinet (ed.), *Le droit au respect de la vie au sens de la Convention européenne des droits de l'homme* (Anthémis, Limal, 2010), p. 215; d'Aspremont and de Hemptinne, *supra* note 11, 2012, p. 86.

¹⁴⁷ *Ntaganda Appeals Judgment*, *supra* note 60, para. 54.

¹⁴⁸ Heller, *supra* note 85.

trial counterpart, properly focussed on that issue when interpreting those war crimes in light of its Statute. By contrast, it did not concentrate any longer on that issue when looking at IHL in a second step, as it rather focussed on the existence of an express inter-party requirement in the relevant IHL provisions. In other words, the 'established framework of [the] international law [of armed conflict]' in light of which the ICC war crimes had to be interpreted was not the right framework. It is therefore arguable that the Chamber failed to correctly apply the mechanisms intended to avoid situations in which war crimes exist without any IHL violation.

Fourthly and more fundamentally, the whole Chamber's approach is flawed, at least with regard to the fundamental guarantees, including the prohibitions against rape and sexual slavery. It does not indeed make sense to enquire, as the Chamber did, whether the status requirement conditioning the applicability of those guarantees, in particular those contained in Common Article 3, was associated with an inter-party requirement in that Article. As demonstrated above,¹⁴⁹ the status requirement, in particular its two constitutive tests, necessarily involves an implicit inter-party requirement, because these tests are only meaningful with respect to inter-party relations. The Chamber could not therefore reach a conclusion on the non-existence of an inter-party requirement, while admitting at the same time the existence of a status requirement.

4 Breaking with the Status Requirement

The ICC objective of extending the applicability of the fundamental guarantees to intra-party relations is laudable, especially with respect to the cruel practices of certain armed groups vis-à-vis their own members. However, the reasoning that the Court developed to achieve such an objective is not satisfactory in several aspects. The main flaw, which characterizes both the pre-trial and appeals decisions in this case, is that they maintained the existence of a status requirement. In that respect, the trial decision appears more satisfactory, as it argued in favour of rejecting such a status.

This section aims at providing arguments in addition to those put forward by the Trial Chamber in order to justify breaking with the status requirement and, consequently, to support the applicability of all or some of the fundamental guarantees to any person, irrespective of his/her affiliation to any party to the armed conflict. The first argument relies on specific guarantees protecting

¹⁴⁹ Cf. *supra*, Section 3.1.3.

children and women, and concerns only protections against sexual violence (Section 4.1). The other arguments plead for an extension of the scope of application of all the fundamental guarantees. One argument focusses on the ‘humanization’ of IHL (Section 4.2), while the other submits that the two constitutive tests of the status requirement are only relevant where the fundamental guarantees apply in the context of the conduct of hostilities (Section 4.3).

4.1 *Specific Guarantees Protecting Women and Children*

The first argument draws upon the specific guarantees protecting women and children against indecent assault under IHL.¹⁵⁰ The ICC could have relied on those guarantees when examining the ‘established framework of [the] international law [of armed conflict]’ in light of which the war crimes of rape and sexual slavery had to be understood. These guarantees are expressly provided in treaty law under Articles 76, 1) and 77, 1) API, respectively. Although those provisions apply only in IACs, the protections that they offer to women and children are claimed to apply also in NIACs on the basis of customary IHL.¹⁵¹ These provisions do not contain any status requirement and, unlike Article 75 API, they have not been considered as reflecting the protections afforded under Common Article 3 and having a similar (personal) scope of application. The 1987 Commentary on those provisions clearly indicates that they are ‘not subject to any restrictions as regards [their] scope of application’.¹⁵² In addition, it is illustrative to note that, in the ICRC Study on Customary IHL, those customary protections against indecent assault are not included in Chapter 32, dealing with the fundamental guarantees, and are not subject to any status requirement. The applicability of those protections in intra-party relations may therefore be held to derive *indirectly* from the absence of such a status requirement.

It has been argued that, regarding children, the applicability of the protection against indecent assault in intra-party relations could rather be *directly* inferred from other obligations contained in Article 77 API, in particular from the combination of the obligations provided in Article 77, 2) and 3).¹⁵³ Under paragraph 2, States are bound both by an obligation of conduct, to take all

¹⁵⁰ See also in that sense, regarding the protection of children, P.V. Sellers, ‘Ntaganda: Re-Alignment of a Paradigm’, in F. Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law, San Remo, 2017), pp. 12–13.

¹⁵¹ See Henckaerts and Doswald-Beck, *supra* note 5, pp. 475–482.

¹⁵² See the 1987 Commentary on Article 77 API, *supra* note 16, para. 3177, regarding children and the 1987 Commentary on Article 76 API, *supra* note 16, para. 3151, regarding women.

¹⁵³ See Sellers, *supra* note 150, pp. 12–13.

feasible measures to avoid children under the age of fifteen taking a direct part in hostilities, and by an obligation of result, to abstain from recruiting such children. Article 77, 3) provides that, '[i]f, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall *continue* to benefit from the special protection accorded by this Article, whether or not they are prisoners of war'.¹⁵⁴ This 'continuous' nature of the protection has been interpreted by certain scholars as meaning that such protection already benefitted the children when they were within their own party vis-à-vis that party.¹⁵⁵ A comparable interpretation has been upheld with respect to Article 4, 3) APII, which has similarly been claimed to *directly* provide children with an intra-party protection against indecent assault in NIACs.¹⁵⁶ That Article imposes a general obligation on parties to the armed conflict to provide children 'with the care and aid they require'. Although containing an absolute prohibition on recruiting children or using them to take part in hostilities under sub-paragraph (c), it provides, under sub-paragraph (d), as Article 77, 3) does, that 'the special protection [it grants to children] shall *remain applicable* to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured'.¹⁵⁷

However, the foregoing interpretation of the continued applicability of the protection when the children fall into the hands of the adversary is highly questionable. The reason for such continued applicability is not that the protection would move from intra to inter-party relations once the children are captured, while taking part in hostilities or being members of armed forces. Before such capture, Articles 77 API and 4, 3) APII already protect children against the adversary, but as mere civilians who do not take a direct part in hostilities. The reason for such continued applicability then rather lies in the possible change of the status of the children and intends to safeguard their protection, irrespective of such a change and the applicability of other potential protections. Its purpose is to cope with situations where children, already protected against the adversary while not involved in hostilities, as mere civilians, nonetheless take a direct part in hostilities or become members of armed forces. Irrespective of such a change of status, children must remain under the protection of Article 77 API or Article 4, 3) APII. In addition, as emphasized in the 1987 Commentary on Article 77, 'all children who [would fall in

¹⁵⁴ Emphasis added.

¹⁵⁵ See Sellers, *supra* note 150, p. 13.

¹⁵⁶ *Ibid.*, pp. 14–15.

¹⁵⁷ Emphasis added.

the hands of the adversary while taking part in hostilities or being members of armed forces could] rely on the provisions of Article 77 even if they are prisoners of war or protected persons under the fourth Convention'.¹⁵⁸ This means that children remain entitled to the protections afforded by that Article, even if they also benefit from other protections as POWs or protected civilians. It must, moreover, be noted that the continued applicability of these protections is subject to the condition that the children must have been *captured* by the adversary, merely because those protections and other potential protections, such as those afforded to POWs in IACs, only apply once their beneficiaries are under the control of a party to an armed conflict.¹⁵⁹

The applicability of the protections granted to women and children against indecent assault in intra-party relations can therefore be established only *indirectly*, from the arguable lack of any status requirement, and only on the basis of customary IHL with respect to NIACs. Yet two difficulties must still be overcome. The first is whether such protections may apply to both civilians as well as members of armed forces. In particular, Articles 76 and 77, like Article 75 API, are included in Part IV, which is expressly devoted to the protection of the civilian population, and are subject to the scope of application provided in Article 72 API, according to which those Articles intend to supplement the protections offered under GCIV. Yet, the considerations developed above in order to demonstrate that Article 75 API also applies to members of armed forces, when they do not benefit from the status or treatment of POW and the status of protected civilians under GCIV,¹⁶⁰ are also relevant with respect to Articles 76 and 77. That view is confirmed by Article 77, which, as already seen, expressly considers the application of its protections to children even when they are POWs, which means that they may potentially be members of armed forces.

The second difficulty is specific to IACs. It is whether nationals could be entitled to the protections against indecent assault under Articles 76 and 77 API vis-à-vis their own State. This would be a logical consequence of the

¹⁵⁸ See the 1987 Commentary on Article 77 API, *supra* note 16, para. 3196.

¹⁵⁹ In addition, regarding Article 4, 3) APII in particular, that Article does not expressly provide for any specific protection against indecent assault, notably against rape and sexual slavery. It has nonetheless been claimed that this Article 'incorporate[ed] and further specifi[ed] the sexual violence and slavery prohibitions contained in Article 4, 2), (e) and (f)', which provides for the fundamental guarantees (Sellers, *supra* note 150, p. 14). However, this must therefore logically imply that Article 4, 3) has to be read in light of Article 4, 2). Yet the guarantees listed in that paragraph are undoubtedly subject to the status requirement. This therefore precludes the applicability of Article 4, 3) to intra-party relations.

¹⁶⁰ Cf. *supra*, Section 2.1.

applicability of those protections to intra-party relations in IACs. That issue does not only concern Articles 76 and 77 API, but more generally all protections provided by Articles 73 to 79 API (Section III of Part IV), including all the fundamental guarantees enshrined in Article 75 API. Those provisions are indeed subject to a common scope of application provided in Article 72 API. Admittedly, that article does not expressly mention that the protections contained in Section III are also applicable to nationals. In addition, it provides that these protections aim at complementing those contained in Part III of GCIV, the applicability of which is subject to the non-nationality of the concerned persons. However, according to Article 72, those protections are also intended to complement 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict'. Since IHRL applies to any individuals, including nationals, the protections provided in Section III of Part IV, as being additional to IHRL, would also apply to such persons. This view is supported by the 1987 Commentary on API¹⁶¹ as well as endorsed by some States when ratifying API.¹⁶² In addition, certain articles of Section III, Part IV of API, such as those dealing with the protection of children¹⁶³ or journalists,¹⁶⁴ impose obligations to States vis-à-vis their own nationals.

4.2 *The 'Humanization' of IHL*

Certain scholars have claimed that the ICC should have resorted to Article 21, 3) of its Statute in the *Ntaganda* case to extend the applicability of the war crimes of rape and sexual slavery to intra-party relations.¹⁶⁵ However, such assertions are not significantly elaborated. There is no further detail on how the application of Article 21, 3) could lead to such a result.

As already seen, that Article deals with the law applicable before the ICC. The third paragraph contains a general test of consistency of that applicable

¹⁶¹ See the 1987 Commentary on Article 72 API, *supra* note 16, para. 2629.

¹⁶² See, e.g., the Finnish declaration quoted in the 1987 Commentary, *supra* note 16, para. 2913, regarding the scope of application of Article 75 API.

¹⁶³ See, e.g., Article 77, 2). A parallel may be drawn with the prohibition to recruit children or to use them to participate actively in hostilities in NIACs (*cf. supra* note 46).

¹⁶⁴ See, e.g., Article 79, 3).

¹⁶⁵ See L. Prospero, 'The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in *Ntaganda*', *Opinio Juris* (27 June 2017), available online at opiniojuris.org/2017/06/27/33178/ (accessed 30 January 2021); R. Grey, 'Emerging Voices: Sexual Violence As War Crimes: Controversial Issues in the International Criminal Court', *Opinio Juris* (16 June 2017), available online at opiniojuris.org/2014/07/28/emerging-voices-sexual-violence-war-crime-controversial-issues-international-criminal-court/ (accessed 30 January 2021).

law with IHRL, as it provides that '[t]he application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights ...'. According to legal scholarship¹⁶⁶ and ICC case law on the matter,¹⁶⁷ this test may perform three main alternative functions. These functions may be summarized as follows: making IHRL applicable in addition to the relevant applicable law ('complementary function');¹⁶⁸ setting aside any applicable law when inconsistent with IHRL ('exclusionary function')¹⁶⁹ or making IHRL a means for interpreting the applicable law ('interpretive function').¹⁷⁰

If applied to war crimes, the consistency test would mean that the elements of those crimes should be consistent with IHRL. Such a test would lead to odd results under the 'exclusionary' or 'complementary' functions with respect to the personal scope of application of the fundamental guarantees. It would indeed lead to the modification of the content of the corresponding war crimes and result in an extension of their scope of application, either through the exclusion of the status requirement as provided by the underlying IHL provisions (under the 'exclusionary function') or through the inclusion of a broader legal status (under the 'complementary function'), without impacting at the same time the content of those underlying IHL provisions. Yet this would mean that the content of the war crimes would no longer be consistent with IHL. This would be in contravention of the requirements contained in the chapeaux of Article 8, 2), b) and e) and the Introduction to the Elements of Crimes for Article 8. Conduct would then amount to a war crime without necessarily involving any IHL violation. By contrast, such a problem could not arise under the 'interpretive function' of the consistency test, since IHL would,

166 See, e.g., G. Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015), pp. 436–443; E. Irving, 'The other side of the Article 21 (3) coin: Human rights in the Rome Statute and the limits of Article 21 (3)', 32(4) *Leiden Journal of International Law* (2019) 837–850.

167 Cf. *infra* notes 168–170.

168 See, e.g., ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-772, Appeals Chamber, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para. 37.

169 See, e.g., ICC, *Prosecutor v. Germain Katanga et al.*, Case No. ICC-01/04-01/07-3003-tENG, Trial Chamber, Decision on an *Amicus Curiae* Application and on the "*Requête tendant à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0326, DRC-D02-O-0228 aux Autorités Néerlandaises aux Fins d'Asile*" (Articles 68 and 93(7) of the Statute), 9 June 2011, para. 73. That function is nonetheless controversial: see, e.g., Bitti, *supra* note 166, p. 441.

170 See, e.g., ICC, *Prosecutor v. Germain Katanga et al.*, Case No. ICC-01/04-01/07-257, Trial Chamber, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, p. 7.

it is assumed, incorporate the broader personal scope of application provided in IHRL. War crimes, even when committed against those who would not fulfil the status requirement, would involve a violation of IHL, with the latter being informed by IHRL.

One must nonetheless enquire whether the consistency test with IHRL is applicable to the elements of war crimes. This test seems to have been construed especially for procedural matters.¹⁷¹ The ICC case law shows that it has been mainly invoked in relation to the protection of the rights of the participants to the proceedings before the Court, notably those of the victims, the accused and the witnesses.¹⁷² However, it has also been used, although to a much lesser extent, to interpret elements of crimes within the jurisdiction of the Court, in particular the crime of torture as a crime against humanity¹⁷³ and the war crime of sentencing or execution without due process.¹⁷⁴ In the latter case, the Court notably referred to the IHL procedural guarantees listed in Articles 6 APII and 75 API, and undertook to interpret them in light of the 'internationally recognized human rights', in accordance with Article 21, 3) of its Statute.¹⁷⁵

In any case, the mechanism provided by that Article, which offers a great potential for the ICC to extend its competence on the basis of IHRL, is confined to the proceedings before the Court and cannot have any impact on IHL outside of those proceedings. In addition, its potential may be greatly limited by the principle of legality that is a key feature of any criminal procedure. Yet, under its 'interpretive function', Article 21, 3) echoes a well-known process that has been applied outside the ICC context in relation to IHL norms, including those underlying certain war crimes and, in particular, the fundamental guarantees. That process consists in the 'humanization' of IHL through the interpretation of its norms in light of IHRL. It must not be confused with the 'humanization' of IHL through the creation of new IHL conventional norms influenced by IHRL, such as the fair trial guarantees listed in Articles 6 APII

171 See, e.g., W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, Oxford, 2016), p. 531.

172 See the case law described in *ibid.*, pp. 530–534.

173 ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18-461-Corr-Red, Pre-Trial Chamber, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019 (*Al Hassan Confirmation Decision*), para. 243.

174 *Ibid.*, paras 378 and 383.

175 *Ibid.*, para. 383.

and 75 API,¹⁷⁶ or through the creation of new customary IHL norms, based on IHRL practice, such as the prohibition on arbitrary detention considered as a customary norm by the ICRC in its Study on Customary IHL.¹⁷⁷ Until today, no IHL rules, which would have been influenced by IHRL, have replaced those providing for a status requirement with respect to the fundamental guarantees. The ‘humanization’ of IHL through its interpretation in light of IHRL must not be confused either with the mere ‘humanization’ of armed conflicts through the applicability of IHRL alongside IHL in those conflicts. In such cases, the IHRL rule is not incorporated into IHL.¹⁷⁸ As a result, the scope of application of this rule remains that specific to IHRL. Even when applied in armed conflicts, it then only binds States and not armed groups. As already seen,¹⁷⁹ IHRL used in that sense could overcome the potential lack of protection against intra-violence under IHL with respect to States but not armed groups. By contrast, the ‘humanization’ of IHL through its interpretation in light of an IHRL norm incorporates that norm into IHL, with this norm becoming subject to the broader scope of application specific to IHL. In that sense, although traditionally seen as applicable only to States and not to armed groups, IHRL norms have been used to inform the content of IHL rules applicable in NIACs and therefore binding upon both States and armed groups.¹⁸⁰

Such ‘humanization’ process already had major impacts on IHL and, in particular, on the fundamental guarantees. It led to the clarification of the content of some of those guarantees, by providing a definition of the prohibited conduct when such definition was lacking, such as with respect to torture,¹⁸¹

¹⁷⁶ Cf. *supra* note 47.

¹⁷⁷ See Henckaerts and Doswald-Beck, *supra* note 5, pp. 344–352. Most fundamental guarantees identified by the ICRC as having a customary nature are based on IHRL practice, including IHRL treaties; see *ibid.*, pp. 299–306.

¹⁷⁸ Regarding the distinction between these two processes, see R. van Steenberghe, ‘The Impacts of Human Rights Law on the Regulation of Armed Conflicts: A Coherency-Based Approach to Deal with both the “Interpretation” and “Application” Processes’, forthcoming.

¹⁷⁹ Cf. *supra*, Section 2.3.

¹⁸⁰ Cf. *infra* notes 181–183. Practice shows that certain sources external to IHL have even been mobilized to interpret IHL although expressly providing that they are not applicable in armed conflicts: see the ICTY case law referring to the International Convention Against the Taking of Hostages while defining the prohibition of hostage-taking under IHL, although that Convention excludes its applicability in armed conflicts (Article 12); see, e.g., ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004 (*Blaškić* Appeals Judgment), para. 639, footnote 1332.

¹⁸¹ See, e.g., ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgment, 15 March 2002 (*Krnojelac* Trial Judgment), para. 181. See also *Furundžija* Trial Judgment, *supra* note 7, paras 143 *et seq.*; *Delalić* Trial Judgment, *supra* note 23, paras 452–493 and 534–542.

cruel/inhumane treatment¹⁸² or slavery.¹⁸³ It also led to the extension of existing IHL requirements provided by certain guarantees, like those ensuring protection against unfair trial in case of criminal prosecutions.¹⁸⁴ It also proved capable of introducing additional requirements in other types of IHL obligations, making those obligations more demanding and increasing the protection of persons involved in armed conflicts. This might arguably be the case in relation to the use of lethal force against legitimate targets, with IHRL being used to limit such a force under IHL, by the requirement to favour capture and arrest rather than killing when feasible in light of the circumstances ruling at the time.¹⁸⁵ Finally, IHRL is also used to serve as a standard for the interpretation of the secondary rules applying to IHL, such as those determining whether an international norm bestows rights to individuals (rights-based approach) or merely imposes obligations upon States that elaborated it (obligations-based approach). Traditionally, IHL has been construed as regulating the conduct of States in hostilities and only as imposing obligations upon them.¹⁸⁶ Now, under the influence of IHRL, there is a clear trend towards an IHL-based rights approach.¹⁸⁷

182 See, e.g., *Delalić Trial Judgment*, *supra* note 23, paras 534–540.

183 See, e.g., *Kunarac Trial Judgment*, *supra* note 7, paras 519–520; *Krnjelac Trial Judgment*, *supra* note 181, para. 353.

184 See US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, available online at www.supremecourt.gov/opinions/05pdf/05-184.pdf (accessed 30 January 2021), pp. 70–71 and M. Milanovic, 'Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* case', 89(866) *International Review of the Red Cross* (2007) 373–393, at p. 391.

185 See the interpretation of the relevant customary IHL norm by the Israel Supreme Court, *Public Committee Against Torture v. Government*, case HCJ 769/02, 14 December 2006, para. 40.

186 See, e.g., K. Parlett, *The Individual in the International Legal System* (Cambridge University Press, Cambridge, 2011), p. 224; Z. Bohrer, 'Divisions over Distinctions in Wartime International Law', in Z. Bohrer, J. Dill and H. Duffy (eds.), *Law Applicable in Armed Conflict. Part 2 of Max Planck Dialogues on the Law of War and Peace* (A. Peters and Christian Marxsen (section eds.)) (Cambridge University Press, Cambridge, 2020), pp. 9–13.

187 See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn. (Cambridge University Press, Cambridge, 2010), p. 20; R.-J. Wilhelm, 'Le caractère des droits accordés à l'individu dans les Conventions de Genève', 32(380) *International Review of the Red Cross* (1950) 561–590; T. Meron, 'The Humanization of Humanitarian Law', 94(2) *American Journal of International Law* (2000) 239–278, at pp. 251–252; G. Abi-Saab, 'The Specificities of Humanitarian Law', in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet* (ICRC/Martinus Nijhoff, Geneva/The Hague, 1984), p. 265; P. Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011), p. 319.

All of this shows that IHL norms are flexible enough to be subject to extensions through the interpretive action of IHRL. Such an extension is even more easily conceivable outside any war crime context, since it could not be hampered by the application of the principle of legality that characterizes criminal proceedings. There is thus a strong argument that IHRL could potentially be used in a similar way, to extend the personal scope of the IHL fundamental guarantees, by making them applicable irrespective of any legal status.

That being said, this would not mean that the two constitutive tests of the status requirement would no longer play any role and that, for example, civilians taking a direct part in hostilities or members of armed forces who were not *hors de combat* could benefit from fundamental guarantees such as the prohibition of murder and could not therefore be targeted. This would apparently run counter to the Hague Law regime, which allows the targeting of such persons. As explained in detail in the next development, the two tests would remain relevant, but as part of the rules on the conduct of hostilities when the fundamental guarantees, like the prohibition of murder, are applied in such a context.

4.3 *The Two Tests Required only in Relation to the Conduct of Hostilities*

Another general argument in favour of the applicability of the fundamental guarantees in intra-party violence starts from the view that it is meaningless to subject those guarantees to the status requirement in any circumstance, given the particular nature and role of the two constitutive tests of that requirement. As already seen, those tests, that of not taking a direct part in hostilities and that of being *hors de combat*, are specific to the conduct of hostilities, in particular to the law on targeting. They are indeed pivotal in order to determine whether a person may lawfully be the object of an attack under IHL. The international case law, including that of the ICTY and the ICC,¹⁸⁸ defines these two tests by reference to provisions or documents pertaining to the law on targeting. In particular, the notion of ‘direct participation in hostilities’ has been defined for the purpose of the applicability of war crimes based on violations of IHL fundamental guarantees in NIACs by reference to the 1987 Commentaries on Article 13, 3) APII, which deals with the conduct of hostilities.¹⁸⁹ That notion has also been defined by reference to the ICRC Interpretive

¹⁸⁸ Cf. *infra* notes 189–195.

¹⁸⁹ See, e.g., *Katanga Trial Judgment*, *supra* note 59, para. 790; ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Trial Chamber, Judgment, 8 July 2019 (*Ntaganda Trial Judgment*), para. 883.

Guidance on the Notion of Direct Participation in Hostilities,¹⁹⁰ although that document expressly provides that it ‘examines the concept of direct participation in hostilities *only for the purpose of the conduct of hostilities* [and that its] conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities ...’.¹⁹¹ Similarly, when dealing with war crimes based on violations of IHL fundamental guarantees, certain jurisdictions clarify the notion of ‘civilians’ and the condition of ‘taking a direct part in hostilities’ by merely referring to the definitions that they elaborated when dealing with the war crime of attacking civilians.¹⁹² Such cross-references have also been made in the reverse way.¹⁹³ In certain cases, the jurisdictions provide only one definition while dealing with both the war crime of attacking civilians and the war crime of murder.¹⁹⁴ Likewise, in its Updated Commentary on Common Article 3, the ICRC defines each term of the two tests, including the notion of persons *hors de combat*, by reference to provisions related to the conduct of hostilities.¹⁹⁵ Legal scholarship follows such an approach.¹⁹⁶

Accordingly, these tests should logically be used only in relation to the conduct of hostilities. It is true that the applicability of the fundamental guarantees in the conduct of hostilities is debated. However, as demonstrated in detail in the paper that will be published later in the *Review* on the control requirement, at least certain fundamental guarantees may apply in the context of the conduct of hostilities, in particular when the prohibited conduct is committed *as part of an attack*. The most straightforward cases in international case law include the prohibitions of murder and cruel treatment, with the former implying the unlawful killing of persons and the latter the causing of serious/severe pain or suffering, either of a physical or of a mental nature.

It is therefore submitted that the two constitutive tests of the status requirement are relevant only when the fundamental guarantees, such as the

190 See, e.g., *Mbarushimana* Confirmation Decision, *supra* note 58, paras 148 and 149; *Katanga* Trial Judgment, *supra* note 58, para. 790, footnote 1827.

191 Melzer, *supra* note 15, p. 11 (emphasis added).

192 See, e.g., *Halilović* Trial Judgment, *supra* note 28, para. 34, footnote 77, which refers to elements identified by the Tribunal in the *Galić* case with respect to the war crime of attacking civilians (ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 50).

193 See, e.g., *Katanga* Trial Judgment, *supra* note 59, para. 801; *Ntaganda* Trial Judgment, *supra* note 189, para. 921.

194 See, e.g., *Mbarushimana* Confirmation Decision, *supra* note 58, para 148.

195 See, *supra* note 8, paras 559, 568 (footnote 275) and 572.

196 See, e.g., Kleffner, *supra* note 27, pp. 437, 440 and 443.

prohibition of murder and cruel treatment, are applied in the conduct of hostilities. Yet, the issue of the applicability of the fundamental guarantees in intra-party relations becomes moot in such situation. The conduct prohibited by the fundamental guarantees, such as murder or cruel treatment, would necessarily be committed against the adversary because they would be *part of an attack* and the notion of attack is only meaningful in inter-party relations, as it means ‘acts of violence *against the adversary*’. No attack in its legal meaning under IHL is conceivable against members of one’s own party. Consequently, and consistently, the two tests would only regulate acts of violence that can only be committed in inter-party relations. This is in line with the view, developed above,¹⁹⁷ that they are meaningful only with respect to relations with an adversary party. In addition, those tests should then be seen as a mere expression of the conditions required by the relevant rules on the conduct of hostilities, which prohibit direct attacks against civilians, unless and for such a time as they directly take part in hostilities, as well as persons *hors de combat*. Indeed, any act of violence must at least conform to those requirements when being part of an attack, as derived from the principle of distinction. They would also have to conform to any other relevant norm pertaining to the conduct of hostilities, including the prohibition of causing superfluous injury or unnecessary suffering if the acts of violence are directed against lawful targets.¹⁹⁸ Acts of violence, like cruel treatment, committed against such persons in the conduct of hostilities could be prohibited on that basis.

The two constitutive tests of the status requirement would not therefore be relevant when the fundamental guarantees are applied outside the conduct of hostilities, that is, when their underlying prohibited conduct is *not part of an attack*. The acts of violence could then be committed either in inter or intra-party relations. As also detailed in the paper to be published later in the *Review* on the control requirement, fundamental guarantees cannot be applied in the conduct of hostilities if their application in particular circumstances or the acts that they prohibit necessarily involve a physical control over the concerned persons. This includes guarantees like the prohibition of murder or cruel treatment when the prohibited conduct is committed in certain circumstances, such as against captured/detained persons, and guarantees like the prohibitions against acts of sexual violence and the taking of hostages as well as the protections applicable in case of deprivation of liberty and criminal

¹⁹⁷ Cf. *supra*, Section 3.1.3.

¹⁹⁸ See Article 35, 2) API; rule 70 of the ICRC Study on Customary IHL, applicable in both IACs and NIACs (Henckaerts and Doswald-Beck, *supra* note 5, pp. 237–244).

prosecutions, whose constitutive elements necessarily involve physical control over the persons.

That approach, which confines the applicability of the two constitutive tests of the status requirement to the fundamental guarantees applying in the conduct of hostilities, is reasonable not only for consistency reasons, as it draws upon the particular nature and primary function of those tests, but also because it may find support in international case law. It is indeed illustrative that the two tests, in particular that of not taking a direct part in hostilities, are mostly detailed and discussed by international criminal jurisdictions in relation to the war crimes sanctioning the violations of fundamental guarantees applied in the conduct of hostilities, especially the prohibition of murder.¹⁹⁹ By contrast, they are only briefly mentioned, and, at times, they are not even evoked at all with respect to the same guarantees but which are not applied in the conduct of hostilities,²⁰⁰ or with respect to other guarantees such as the prohibitions of rape²⁰¹ and mutilation.²⁰²

In addition, this approach is in line with the logic underlying the Trial Chamber's consideration of the IHL rationale in the *Ntaganda* case. The Chamber indeed recalled that IHL provided certain tests, namely, that of directly taking part in hostilities or being members of armed forces, that are decisive for determining when a person may be targeted and killed. However, it acknowledged that such tests were irrelevant for determining who may be the object of rape or sexual slavery. It is in that sense that it concluded, as already seen, that 'there [was] never a justification to engage in sexual violence against any person, *irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law*'.²⁰³ Interestingly, in a footnote clarifying the scope of that conclusion, the Chamber felt the need to stress that this only concerned the protection against rape and sexual slavery and was without prejudice to any other conclusion regarding the protection against

199 See, e.g., *Katanga* Trial Judgment, *supra* note 59, paras 787–791; ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain et al.*, Case No. ICC-02/05-03/09-121-Corr-Red, Pre-Trial Chamber, Corrigendum of the 'Decision on the Confirmation of Charges', 7 March 2011, paras 101–104; *Ntaganda* Trial Judgment, *supra* note 189, paras 883–899.

200 *Prlić* Trial Judgment, *supra* note 28, Vol. 3, paras 1155, 1165, 1169, 1174, 1180, 1183, 1186, 1191, 1196, 1200 and 1203.

201 See, e.g., the very brief reference to the requirement of a legal status with respect to the victims of rape in *Kunarac* Trial Judgment, *supra* note 7, para. 569.

202 See, e.g., the very brief reference in *Mbarushimana* Confirmation Decision, *supra* note 58, para. 159.

203 *Ntaganda* Trial Decision, *supra* note 60, para. 49 (emphasis added).

murder.²⁰⁴ The Chamber therefore suggested that a distinction had to be made between these two protections and that the two constitutive tests of the status requirement could potentially be relevant only for the protection against murder. This confirms the view that, although irrelevant for the applicability of certain fundamental guarantees whose constitutive elements involve a physical control over persons, like the prohibition of rape, the two tests may nonetheless be relevant with respect to other fundamental guarantees that do not necessarily involve such control, like the prohibition of murder.

Finally, the proposed approach is also in line with the view that the two tests may only play a meaningful role in determining the applicability of a fundamental guarantee when such a guarantee does not necessarily imply the fulfilment of these tests, given the particular circumstances in which it is applied or its constitutive elements. This is precisely the case when the fundamental guarantees do not involve any physical control over the concerned persons, such as the prohibition of murder when killings are committed against persons who were not captured or detained. It is relevant to enquire in such situation whether those killed fulfilled one of the two tests since they may or may not have in fact been directly participating in hostilities or *hors de combat* when killed. By contrast, this is not the case with respect to the fundamental guarantees whose prohibited conduct involves a physical control over the concerned persons. Such degree of control indeed implies that the two tests would necessarily be met at the time of the unlawful conduct. This was clearly emphasized by the Pre-Trial Chamber in the *Ntaganda* case with respect to the prohibitions of rape and sexual slavery. As already seen, the Chamber stated that ‘the sexual character of [the war crimes of rape and sexual slavery], which involve elements of force/coercion or the exercise of rights of ownership, logically precludes active participation in hostilities at the same time’.²⁰⁵ This is also applicable to any fundamental guarantees involving the capture and/or detention of the concerned persons. International case law clearly evidences that, for factual reasons, those captured or detained could not in any way be qualified as directly participating in hostilities or not being *hors de combat*.²⁰⁶ This includes guarantees such as the prohibition of murder when killings are committed against captured/detained persons, or guarantees such as the

²⁰⁴ *Ibid.*, footnote 117.

²⁰⁵ *Cf. supra*, Section 3.1.1.

²⁰⁶ See *Tadić* Trial Judgment, *supra* note 28, para. 616; *Prlić* Trial Judgment, *supra* note 28, Vol. 3, paras 1155, 1165, 1169, 1174, 1180, 1183, 1186, 1191, 1196, 1200, 1203 and 1416.

taking of hostages²⁰⁷ or the protections applicable in case of deprivation of liberty or criminal prosecutions.²⁰⁸

Admittedly, jurisdictional practice is not entirely straightforward in that respect. In some instances, judges enquired whether the victims fulfilled the required status, especially the test of not taking a direct part in the hostilities, even with respect to fundamental guarantees whose prohibited conduct involves a sufficient degree of control over the victims to exclude such direct participation in any case. This practice especially concerns the prohibition of rape²⁰⁹ and the protections against unfair trial.²¹⁰ However, this arguably results from an erroneous understanding of the scope *ratione temporis* of that status. The judges examined the issue of the direct participation of the victim in the hostilities by looking at his/her past conduct and not at the time the prohibited conduct was committed. Yet, as emphasized in the case law²¹¹ as well as stressed by the ICRC in its Updated Commentary,²¹² the moment at which that legal status must be fulfilled is during the commission of the prohibited conduct. Such erroneous scrutiny of the status requirement may also be explained by the ICC Elements of Crimes as far as the ICC case law is concerned. The Elements of Crimes indeed expressly provide for a status requirement with respect to the war crimes amounting to serious violations of Common Article 3, including that of ruling unfair trials.²¹³ However, such requirement should be considered as irrelevant by the Court in light of the foregoing considerations, especially because the two constitutive tests of that status cannot play any role in determining the applicability of these guarantees, since they would necessarily be fulfilled in any case.

207 See *Blaškić Appeals Judgment*, *supra* note 180, paras 635–646; SCSL, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 25 February 2009, para. 240; ICC, *Elements of Crimes*, *supra* note 32, Articles 8 (2) (a) (viii) and 8 (2) (c) (iii), pp. 17 and 33.

208 See nonetheless *infra* notes 209–210.

209 See *Kunarac Trial Judgment*, *supra* note 7, para. 569.

210 See *Al Hassan Confirmation Decision*, *supra* note 173, paras 477–481. The ICC indeed examined whether the victims of unfair criminal prosecutions by armed group's tribunals were not taking a direct part in hostilities or were *hors de combat*.

211 See *Tadić Trial Judgment*, *supra* note 28, para. 615. The test identified in that case has been consistently repeated in the subsequent case law of the Tribunal; see, e.g., *Blaškić Trial Judgment*, *supra* note 28, para. 177; *Halilović Trial Judgment*, *supra* note 28, para. 32.

212 Cf. *supra* note 8, para. 562.

213 ICC, *Elements of Crimes*, *supra* note 32, Article 8 (2) (c) (iv), p. 34.

5 Conclusion

The IHL fundamental guarantees have traditionally been construed as being subject to a status requirement, limiting the scope of their beneficiaries to those who do not or no longer take a direct part in hostilities. Although not always properly noticed in case law and practice, such a status involves a two-fold test: that of not taking a direct part in hostilities, mainly applicable to civilians, as well as to medical and religious personnel, and that of being *hors de combat*, applicable to any person, including members of armed forces.

This requirement has nonetheless been called into question in relation to the discussions concerning the protection against intra-party violence, an issue which is of particular importance, especially with respect to acts of violence committed within armed groups since no alternative protection may normally be found in IHL. In particular, the Trial Chamber in the *Ntaganda* case was able to conclude on the applicability of the war crimes of rape and sexual slavery, and therefore of the underlying IHL prohibitions, to intra-party relations by rejecting the existence of a status requirement with respect to those prohibitions. By contrast, the Pre-Trial and Appeals Chambers reached the same conclusion, but without contesting the existence of such a requirement. This is also the approach adopted by the ICRC in its Updated Commentary on Common Article 3 as well as by most legal scholars. However, such an approach may hardly be sustained in light of the meaning of the two constitutive tests of the status requirement. Both the test of not taking a direct part in hostilities and that of being *hors de combat* are only meaningful with respect to inter-party relations. As a result, it is argued that the only way to ensure the entitlement to the fundamental guarantees in the context of intra-party violence is to break with the status requirement.

Since the arguments put forward by the Trial Chamber in the *Ntaganda* case do not appear satisfactory, three additional arguments have been submitted in order to justify setting aside the status requirement. The first argument only concerns the protections against indecent assault afforded to specific categories of persons, namely women and children, and is based upon both customary IHL and particular provisions of API. The two other arguments have a broader scope since they concern all the fundamental guarantees. One of them refers to the 'humanization' of IHL, understood as the interpretation of that body of law in light of IHL. Although specifically envisaged in the ICC context, through Article 21, 3) of the ICC Statute, such a process has already been implemented outside such a context and shows a great potential to extend the protections afforded by IHL, including by allowing the entitlement to the fundamental guarantees to any individual, irrespective of any specific legal

status. The other argument relates to the nature of the two constitutive tests of the status requirement. Those tests are indeed only relevant with respect to the conduct of hostilities and, accordingly, should only determine the personal scope of the application of the fundamental guarantees when these guarantees are applied in the context of the conduct of hostilities. However, in such a context, the two tests act as conditions belonging to the rules on the conduct of hostilities and the prohibited conduct could only be committed between parties to the conflict as they are part of an attack. Outside the context of the conduct of hostilities, the two constitutive tests become irrelevant. This is in line with the fact the fundamental guarantees that do not apply in the conduct of hostilities necessarily involve such a degree of control over their beneficiaries that they render the two tests useless, since these tests are then necessarily fulfilled.

On the basis of those arguments, it may therefore be held that the fundamental guarantees protect persons against either inter or intra-party violence. Consequently, Geneva Law, the essence of which is constituted by those guarantees, cannot be seen as exclusively dealing with the treatment of persons in the power of the 'enemy'. Under such a position, the fundamental guarantees actually revert to the philosophy underlying the initial protections provided under modern IHL in 1864, namely, those afforded to wounded and sick soldiers, as those protections were seen as applying irrespective of the affiliation of their beneficiaries to any party to the armed conflict.

Acknowledgements

The author is a Research Associate at the Fund for Scientific Research (F.R.S.–FNRS) of Belgium and Professor of International Humanitarian Law and International Criminal Law at the University of Louvain (UCLouvain). He is grateful to Philippe Jacques, a Ph.D. student at UCLouvain, for sharing his interesting insights on the topic and for making valuable comments on previous versions of that paper.