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THE PROGRESSIVE DEVELOPMENT OF WOMEN'S SAFEGUARDS IN INTERNATIONAL CRIMINAL LAW

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Abstract: The development of International Criminal Law in addressing gender-based crimes has been revolutionary, transitioning from invisibility to a more individualized characterization in the Statute of the International Criminal Court. Despite these advancements, women's protection during times of conflict remains insufficient, leading to dire consequences for women and girls due to their societal status and gender. This paper critically examines the progress and shortcomings in protecting women's rights in situations of armed conflict, emphasizing the need for more comprehensive and effective measures.

Keywords: International Criminal Law, gender crimes, women's rights, armed conflict, human rights.

1. Introduction

The development of International Criminal Law in the treatment of gender crimes can only be described as revolutionary. In the years passed since the first judgments declaring the international criminal responsibility of individuals, the doctrine has assisted to the evolution of crimes covering sexual violence during armed conflict or situations of systematic or widespread human rights violations, from its absolute invisibility to its individualized characterization in the Statute of the International Criminal Court. And although it is true that they are no longer forgotten crimes, we have to affirm that the protection of women in such times continues to be insufficient. As stated by the UN back in 1995:

“While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.

This affirmation is still applicable to the last conflicts of international concern. The Human Rights Council, in Its 37th session celebrated between 26 February and 23 March 2018 highlighted that:

“Sexual and gender-based violence against women, girls, men, and boys has been a persistent issue in Syria since the uprising in 2011. Parties to the conflict resort to sexual violence as a tool to install fear, humiliate and punish or, in the case of terrorist groups, as part of their enforced social order. While the immense suffering induced by these practices impacts Syrians from all backgrounds, women and girls have been disproportionately affected, victimized on multiple grounds, irrespective of perpetrator or geographical area”.

International criminal law has, therefore, been correcting the treatment of gender crimes throughout its evolution, but we must point out that such treatment is neither uniform nor complete. The advances that can be noted in

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certain judgments are abandoned by international criminal courts in other cases, so it is worth asking what protection is granted to women victims and to what extent at the present time. The end of the era of impunity is a major concern both to the international community and to the institutions dedicated to the fulfillment of such objective, as can be demonstrated with the 2018 Nobel Peace Prize awarded to Denis Mukwege and Nadia Murad for their efforts to end the use of sexual violence as a weapon of war and armed conflict.

The present article intends to provide a global vision of the treatment of such offences as international crimes typified in the statutes of the different international criminal tribunals and their subsequent jurisprudential specification, in order to deepen in the deficiencies of the system -which we advance exist- and be able to contribute to its improvement. As has been pointed out by the United Nations High Commissioner for Human Rights, such definitions have strong repercussions in the combat against impunity.

2. The Treatment of Gender Crimes before the Rome Statute for an International Criminal Court

2.1. The Early days: The Impunity of the Perpetrators and the Silence of the Instruments

Much has been written about the silence of the Nuremberg and Tokyo Judgments on sexual crimes, so it is easy to say that international criminal law preferred to ignore them at birth. This gap, unfortunately, was transferred to the international instruments that were derived from such processes for the regulation of armed conflicts and the tipification of war crimes.

None of the Four Geneva Conventions of 1949 did expressly include rape or other sexual crimes among their grave breaches, but they could be included under the general prohibitions of inhuman treatment or willfully causing great suffering or serious injury to body or health. Only the IV Geneva Convention included a provision, article 27, which recognized that:

“Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault”.

But again, this article was not part of the grave breaches provisions. The Additional Protocols of 1977 did include the prohibition of rape in their texts, but even in these instruments rape was not considered as an independent war crime.

In other hand, the Genocide Convention included a provision covering the so-called reproductive violence (imposing measures intended to prevent births within the group), and two acts that could implicitly covered other forms of sexual violence (causing serious bodily or mental harm to members of the group¹²; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part).

Other international instruments for the development of human rights included among their prohibited practices some of the actual gender crimes, but none of them defined specific crimes to be persecute under international criminal law.

This situation underwent a first overturn with the constitution of the ad hoc international criminal tribunals of Yugoslavia and Rwanda during the 1990s, which expressly included different forms of gender crimes.

2.2. The rise of Sexual Crimes as war Crimes and Crimes against Humanity. The work of the Ad hoc Tribunals of Yugoslavia and Rwanda.

During the early 1990s, the international community witnessed scenes of unimaginable violence, both in the Former Yugoslavia and Rwanda. In both conflicts, mass rapes, sexual torture, sexual slavery and other forms of sexual violence were widespread and systematic and the international community decided to put an end on such impunity.

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The Statute of the ICTY included for the first time the crime of rape as a crime against humanity and the genocidal conducts of reproductive violence. The Statute of the ICTR included the previous ones and added the war crimes of rape, enforced prostitution and any form of indecent assault, as a violation of art. 3 common to the Geneva Conventions and Additional Protocol II of the Geneva Conventions.

Despite such provisions and the efforts of different international actors to prosecute those responsible for conducts that could be constitutive of such acts, the prosecutors of the ad hoc tribunals initially did not proceed to include them in the indictments. But then, the *Akayesu* case started at the ICTR and the change began.

In 1997, and after the testimonies of two witnesses who spoke of multiple rapes, the Prosecutor of the ICTR amended the indictment against Jean Paul Akayesu including rape and sexual violence as part of the counts of genocide, crimes against humanity and war crimes. The Prosecutors in both ad hoc tribunals started to use the provisions on sexual violence with different views, and so did the other international criminal tribunals (or hybrid) established during the next decade (the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia), permitting the establishment of a corpus of case law defining different sexual crimes.

2.2.1 The Crime of rape in the Jurisprudence of the ICTR-ICTY

The *Akayesu* case was, as mentioned, a starting point for the case law regarding sexual crimes, and specially, rape. The Trial Chamber, in its 1998 Judgment, defined rape as a crime against humanity and as an act of genocide for the first time in international criminal law, establishing its legal elements and boundaries. For the Trial Chamber:

“(...) The Tribunal notes that while rape has been historically defined in national jurisdictions as nonconsensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. (...)

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. (...) Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. (...). The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence (...). Sexual violence falls within the scope of „other inhumane acts“, set forth Article 3(i) of the Tribunal's Statute, „outrages upon personal dignity“, set forth in Article 4(e) of the Statute, and „serious bodily or mental harm,“ set forth in Article 2(2)(b) of the Statute”.

This first international definition of the crime of rape –that is „a physical invasion of a sexual nature, committed on a person under circumstances which are coercive“- put all the emphasis in the coercive element that was highlighted by the use of terms as „invasion“ and „coercive“. This definition was helpful in addressing rapes whether committed against women or men, and with no regards to the parts of the body involved in it.

But the *Akayesu* definition was almost coincident in time with another definition of rape- this time by one of the ICTY's Trial Chamber; the one laid down on the *Furundžija* case. The ICTY Trial Chamber, after affirming that no definition of rape could be found under international law, and reviewing both the case law and national criminal codes, adopted a mechanical description of the crime of rape, stating that:

“Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other

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object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person”.

So, in 1998, International Criminal law found itself with two case-law definitions of rape, and a long path ahead. The division between trial chambers was real, and each one applied the definition as its own will.

The Judgment in the *Kunarac et al.* case came to clarify the second element of the Furundžija definition: the element of force, rejecting that only force, threat of force or coercion could render an act of sexual penetration as non-consensual, and including other factors that influence a victim’s free will to consent. The element of force was replaced by the „lack of consent of the victim“. The Chamber considered that:

“(…) the Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.

The Appeals Chamber in the case went further in clarifying the elements of rape, and especially the ones related to “lack of consent”. For the Appeals Chamber, it was worth to highlight two points, points that have been brought to these days’ prosecutions of rape in other jurisdictions:

“First, it rejects the Appellants’ «resistance» requirement, an addition for which they have offered no basis in customary international law. The Appellants’ bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong in law and absurd on the facts.

Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal’s prior definitions of rape. However, in explaining its focus on the absence of consent as the condition sine qua non of rape, the Trial Chamber did not disavow the Tribunal’s earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are “factors other than force which would render an act of sexual penetration nonconsensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consent by taking advantage of coercive circumstances without relying on physical force. (...) While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible”.

The *Kunarac* definition was followed by the majority of the decisions³⁹ containing the charge of rape (whether as war crime or as a crime against humanity). But both definitions, as stated by the ICTR, were not incompatible or substantially different, as one can complete the other, permitting the Chambers to endorse the conceptual definition in *Akayesu* with the elements set out in *Kunarac*.

At this point, no one doubted that rape was a crime against humanity or a war crime by its own merits. But the acts of rape were conceived by the Chambers not only as a crime themselves but also as an act that could be covered by other crimes such as torture; persecution; enslavement; terrorism; and, for the first time, part of the crime of crimes, genocide⁴⁵.

³⁸*Ibid.*, paras. 129-130.

³⁹See also ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64, Trial Chamber Judgment, 17 June 2004, para. 321; ICTR, *Prosecutor v. Bagosora et al.* (Military II), Case No. ICTR-98-41, Trial Chamber

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Judgment, 18 December 2008, paras. 2199-2200; ICTR, *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A, Trial Chamber, Judgment, 1 December 2003, paras. 910-915; ICTR, *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A, Trial Chamber, Judgment, 22 January 2004; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Trial Chamber Judgment, 2 February 2012; ICTR, *Prosecutor v. Ndindilyimana et al.* (Military II), Case No. ICTR-00-56, Trial Chamber, Judgment, 17 May 2011, paras. 2121-2122; ICTR, *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14, Trial Chamber, Judgment, 16 May 2003, para. 56; ICTR, *Prosecutor v. Nyiramasuhuko et al.* (Butare), Case No. ICTR-98-42 Trial Chamber Judgment, 24 June 2011, para. 6075; ICTR, *Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31, Trial Chamber Judgment, 14 July 2009, paras. 791-792; ICTR, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20 Trial Chamber, Judgment, 15 May 2003, paras. 344-346. ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84, Trial Chamber Judgment, 3 April 2008, paras. 130-132; ICTY, *Prosecutor v. Kvočka et al.* (Omarska, Keraterm & Trnopolje Camps), Case No. IT-98-31/1 Trial Chamber Judgment, 2 November 2011, paras. 175-177; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74, Trial Chamber, Judgment, 29 May 2013, paras. 69-71; ICTY, *Prosecutor v. Sikirica et al.* (Keraterm Camp), Case No. IT-95-8, Trial Chamber, Judgment, 17 October 2003, paras. 754-756; ICTY, *Prosecutor v. Stakić* (Prijedor), Case No. IT-97-24 Trial Chamber Judgment, 31 July 2003, paras. 754-756.

2.2.2 Sexual Assaults

“Sexual assault” was the other type of sexual category which definition was developed in the case law of both tribunals, intending to cover other situations with a sexual nature that could not be describe or conceive as rape. It is then a broader crime than rape and encompasses „all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading for the victim“s dignity“.

The Trial Chamber in the *Sainović et al.* Judgment identified the elements of sexual assault as follows:

- (a) The physical perpetrator commits an act of a sexual nature on another; this includes requiring that other person to perform such an act.
- (b) That act infringes the victim“s physical integrity or amounts to an outrage to the victim“s personal dignity.
- (c) The victim does not consent to the act.
- (d) The physical perpetrator intentionally commits the act.
- (e) The physical perpetrator is aware that the act occurred without the consent of the victim.

Even if it is evident that sexual assault requires that an act of a sexual nature take place, physical contact is, however, not required for an act to be qualified as sexual in nature. As stated by the Appeals Chamber in the *Dorđević* case forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner“.

With regard to the issue of consent, the Appeals Chamber too considered that any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress and generally oppressive surrounding circumstances, may constitute proof of lack of consent and usually is an indication thereof. In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.

As happened with the crime of rape, sexual assaults could be part of other types of crimes, such as persecution or torture, or be persecuted under the “other inhumane acts” provision.

2.3. The work of the Hybrid Courts of Sierra Leone and Cambodia: Force Marriage and Sexual Slavery.

The Statute of SCSL went a step forward in the prosecution of sexual crimes as crimes against humanity. Its Article 2 g) established that:

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“The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence”.

The main accomplishment regarding sexual crimes of the SCSL was the indictment and persecution of the first international cases of the practice of “forced marriages” as a crime against humanity. But its practice was highly controversial as each Chamber of the SCSL followed a different approach to the figure.

In the *AFCR* case, the Prosecutor sustained that the practice of “forced marriages” had to be qualified as a crime against humanity of sexual slavery and any other form of sexual violence (count 7-article 2.g. of the Statute) and as a crime against humanity of other inhumane act (count 8-article 2.i. of the Statute), or in the alternative as a crime or war of outrages upon personal dignity as a violation of article 3 common to the Geneva Conventions and of Additional Protocol II (count 9-article 3.e. of the Statute)

After the dismissal of count 7 for its duplicity, Trial Chamber II studied its qualification as a crime against humanity of other inhumane acts in count 8, affirming that, based in its residual character, this category should be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity and that it had to comply with three additional requirements:

- “1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
2. The act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute; and
3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

Trial Chamber II sustained that it was not satisfied that the evidence was capable of establishing the elements of a non-sexual crime of „forced marriage“ independent of the crime of sexual slavery⁵⁴, and that the totality of the evidence presented for the „forced marriage“ practices went to proof of elements subsumed by the crime of sexual slavery. Therefore, there did not exist a lacuna in the law which would necessitate a separate crime of “force marriage” as included in the residual category of “other inhumane act”, dismissing the count.

Both the defence and the Prosecutor appeal the Judgment, which allowed the Appeals Chamber to reconsider the decisions taken by the Trial Chamber regarding this crime.

About the dismissal of count 7 on the grounds of duplicity, the Appeals Chamber held that count 7, indeed, violated the rule against duplicity but the solution was not the dismissal of the count in its entirety, but to proceed on the basis that the offence of sexual slavery had been properly charged in count 7 and struck out the charge of “any other form of sexual violence”.

About the Trial Chamber's dismissal of Count 8 (“other Inhumane Acts”), the Appeals Chamber found that the Trial Chamber erred in law by finding that the category of “other inhumane acts” had to be restrictively interpreted. Furthermore, it did not see a reason justifying why the “exhaustive” listing of sexual crimes under Article 2.g. of the Statute should foreclose the possibility of charging as “other Inhumane Acts” crimes which may among others have a sexual or gender component.

The Appeals Chamber continued holding that the trial record contained ample evidence that the perpetrators of forced marriage intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime⁶¹. The Appeals Chamber concluded that:

“Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of

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force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the «husband» and «wife», which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriages is subsumed in the elements of sexual slavery.

In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim”.¹

As to the opinion of the Appeals Chamber, those practices amounting to forced marriages were of similar gravity to several of the crimes against humanity enumerated in the Statute² and the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population definitely constitute a crime against humanity of “other inhumane acts”⁶⁴.

This controversial interpretation³ was followed by the Prosecutor Office in the *RUF* case⁴ presenting an indictment that charged the accused separately with the commission of crimes against humanity of sexual slavery, crimes against humanity of other inhumane acts and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (outrages upon personal dignity) with the aim of covering all the criminal aspects involved in the practice of forced marriages⁵, being possible to enter into cumulative convictions^{6,7}.

But this interpretation was abandoned in the case *the Prosecutor v. Charles Ghankay Taylor*, former President of Liberia⁸. The indictment in the *Taylor* case contemplated that the practices of „forced marriages“ could only be charged as crimes against humanity of sexual slavery (count 5) and violations of common Article 3 (outrages upon personal dignity-count 6)⁹, abandoning the separate crime against humanity of other inhumane acts.

The Trial Chamber II did not miss the opportunity of reclaiming its previous rulings regarding the practice of “forced marriages”¹⁰, by criticizing the practice followed in the *AFRC* case and other cases.

¹ *Ibid.*, paras. 195-196.

² *Ibid.*, para. 200. ⁶⁴*Ibid.*, para. 202.

³ See Bou Franch, V. *supra* note 28; Palmer, A. (2009). An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of «Forced Marriage». *Northwestern Journal of International Human Rights*, 7, 1-26; Gong-Gershowith, J. (2009). Forced Marriage: A „New“ Crime Against Humanity? *Northwestern Journal of International Human Rights*, 8, 1-24.

⁴ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCL-04-15. The *RUF* Case involved the Judgment of three former commanders of the Revolutionary United Front for their role in the civil war which ended in 1999. In the original indictment against the former rebels, two further accused, Foday Saybana Sankoh and Sam Bockarie, were charged with war crimes and crimes humanity, but their indictments were withdrawn following their deaths in 2003.

⁵ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCL-04-15, Amended Consolidated Indictment.

⁶ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCL-04-15, Trial Chamber, 2 March 2009, paras.

⁷ -2207. *Hereinafter*, *RUF* Judgment.

⁸ Heller, K. J. (2013). The Taylor Sentencing Judgment: A Critical Analysis. *Journal of International Criminal Justice*, 11/4, 835855.

⁹ SCSL, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-PT-263, Second Amended Indictment, 29 May 2007.

¹⁰ „The Trial Chamber notes that in this case, unlike the *AFRC* case and the *RUF* case, «forced marriage» is not charged in the Indictment. Nevertheless, the evidence adduced by the Prosecution under the charges related to sexual violence includes extensive testimony by women and girls regarding forced conjugal association to which they were subjected. In the absence of the charge of «forced marriage», the Trial Chamber has considered this evidence with regard to the charges in the Indictment, as well as the past jurisprudence of the SCSL with regard to this issue“. SCSL, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01, Trial Chamber, 18May 2012, para. 422. *Hereinafter*, *Taylor* Judgment.

⁷²Para. 423 of *Taylor* Judgment.

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In the Trial Chamber's view, the Prosecution erred in various indictments by charging "forced marriage" as a crime that falls within the scope of the crime against humanity of other inhumane acts. It highlighted that the crucial element of "forced marriage" were "the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim"⁷².

The Chamber took into account the Concurrent Opinion of Justice Sebutinde in the *AFRC* case stating that the practice of "forced marriages" could be described as "the forceful abduction and holding in captivity of women and girls („bush wives") against their will, for purposes of sexual gratification of their «bush husbands» and for genderspecific forms of labour including cooking, cleaning, washing clothes (conjugal duties)",¹¹ to finally and unanimously declared that "the sexual and non-sexual acts involved in this forced conjugal association cannot be considered separately as they are integrated in this form of abuse". Adding that, in the Trial Chamber's view, the term "forced marriage" was "a misnomer for the forced conjugal association that was imposed on women and girls in the circumstances of armed conflict, and which involved both sexual slavery and forced labor in the form of domestic work such as cooking and cleaning"¹².

Aiming to refute the case law laid down by the Appeals Chamber in previous cases, the Trial Chamber II started its analysis of the now-called "forced conjugal association" affirming that this practice satisfies the two elements required by the crime of sexual slavery (deprivation of liberty and the non-consensual sexual acts). And as such, it should rather be considered a conjugal form of enslavement¹³.

Therefore, the Trial Chamber II concluded opposing to the rise of a new type of crime against humanity of other inhumane acts for such loathsome acts.¹⁴

But the discussion is not near to end, as later decisions of the ICC regarding forced marriage have again reclaimed the treatment as a crime against humanity of "other inhumane acts"¹⁵. The ECCC too has decided to side with the old approach considering that forced marriages should be included in the residual provision¹⁶, leaving again the door open for the arise of a new crime in international law.

3. The Rome Statute for an International Criminal Court: The Consecration of Gender and Sexual Crimes.

During the negotiations of the Rome Statute, it was make clear that gender and sexual crimes needed a special provision. The case law established by the ICTY and ICTR led to important developments that were included in the debates of the Preparatory Committees for the Rome Conference between 1996 and 1998, as well as in the Conference of Rome itself, highlighting the major problem about prosecuting crimes of sexual nature: the inexistence of a separate and autonomous category of these crimes in the Statutes of the international criminal tribunals. And for the first time,¹⁷ different forms of sexual violence were included in the articles dedicated to crimes against humanity and war crimes.

Article 7.1.g) of the Rome Statute dedicated to crimes against humanity states that:

¹¹ Concurring Opinion of Justice Sebutinde in the *AFRC* case, para.12.

¹² Para. 424-425 of *Taylor* Judgment.

¹³ Para. 427 *Taylor* Judgment.

¹⁴ *Ibid.*, para. 429-430. The *Taylor* Judgment was appealed but none of the parties presented grounds related to the qualification of „forced marriages" or „forced conjugal association" as crimes against humanity of sexual slavery, excluding its qualification as crimes against humanity of „other inhumane acts" .

¹⁵ See, e.g., ICC, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, the Decision on the confirmation of charges against Dominic Ongwen, Situation in Uganda, 23 March 2016.

¹⁶ ECCC, *Prosecutor v. Khieu Samphan and Nuon Chea*, Case No. 002/2, Trial Chamber, Judgment, of 16 November 2018.

¹⁷ Even if the Statute of the SCSL contemplated such crimes, it has to be born in mind that the Statute of the ICC was prior in time to the Statute of the SCSL.

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“1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.

In other hand, Article 8.2.b) (xxii) and 8.2.e) (vi) of the Rome Statute states that:

“2. For the purpose of this Statute, „war crimes“ means:

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

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

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

3.1. Old Crimes and new Offences in the ICC Statute and case law

At the present moment, only rape and sexual slavery have been part of several indictments presented at the ICC. The rest of the crimes have not been part on any indictment so far, and for that we can only rely in the DEC for establishing their elements.

3.1.1 Rape

The crime of rape has been established both as a crime against humanity and as a war crime in the ICC Statute. The DEC has determined the following elements for the conduct:

“1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.

As can be easily point out, the DEC endorses the case law of the ICTY-ICTR regarding this crime. Under these standards, it is not necessary that the prosecution shows an explicit demonstration of force or threat of attack by the perpetrator to prove lack of consent by the victim¹⁸.

The definition of rape possess no further questions for future prosecutions under the ICC Statute, having reached a status of customary international law.

3.1.2 Sexual Slavery

Even if the crime of sexual slavery is not new, the position of the ICC regarding the crime will be crucial in order to clarify whether the practice of “forced marriages” falls into this crime or is left to the “other inhumane acts” provision.

¹⁸ This interpretation of „consent“ has been reinforced by the Rules of Procedure and Evidence set up by the tribunal, which in rule 70 established that: „(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim“ s ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence“ .

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To this date, the OTP has included this crime (whether as a crime against humanity or as a war crime) under seven cases: *Katanga* case¹⁹; *Kenyatta* case²⁰; *Kony et al.* case²¹; *Ntaganda* case²²; *Ngudjolo Chui* case²³; *Ongwen* case²⁴, and *Al Hassan* case²⁵. But only in the *Katanga* and *Ngudjolo* cases the Chamber has reached a judgment on the charge of sexual slavery⁸⁸.

Under the DEC, the elements that define the crime are:

“1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature”.

Regarding the first element (the exercise of powers attaching to the right of ownership over one or more persons), the Chambers have agreed that in determining such element, they have to consider various factors collectively and that they do “not consider that in the absence of other factors, mere imprisonment or its duration are sufficient to satisfy the element of ownership over the victim of the crime of sexual slavery”²⁶.

The enumeration contained in the DEC is not an exhaustive list, as the “right of ownership” and the powers attaching to it may take many forms. For the Trial Chamber, this element “must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy”²⁷.

The second element is of special importance as is the one that allows the conduct to be individualized from the general category of “enslavement”, which is another type of crime. The sexual nature of the act will be considered under a case by case basis.

As it has been advanced, the case law of the ICC will be clarifying the position of the practice of the so-called “forced marriages”. It is necessary to highlight that the OTP and the Pre-Trial Chambers have followed a similar path that the one started by the SCSL²⁸: in the first cases, both the OTP and the Pre-Trial Chambers decided to include the practice under the sexual slavery charge, but this interpretation has changed after the reflexion made on March 2016, by Pre-Trial Chamber II about the decision of the OTP to charge *Dominic Ongwen* with the crime against humanity of other inhumane acts within the meaning of article 7(1)(k) of the Statute in the form of forced marriage committed both directly and indirectly²⁹.

After analyzing the international case law regarding such practices, Pre-Trial Chamber II concluded that the crimes of sexual slavery and forced marriage are different. The crime of forced marriage has a distinct conduct,

¹⁹ ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07.

²⁰ ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11.

²¹ ICC, *Prosecutor v. Joseph Kony and Vincent Otti* (formerly, *The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odiambo and Dominic Ongwen*), Case No. ICC-02/04-01/05.

²² ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06.

²³ ICC, *Prosecutor v. Nathien Ngudjolo Chui*, Case No. ICC-01/04-02/12.

²⁴ ICC, *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15.

²⁵ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18. ⁸⁸ In both cases, the Trial Chamber dropped the charges against the accused.

²⁶ ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, Situation in the Democratic Republic of the Congo, para. 53.

²⁷ ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Trial Chamber, Judgment, para. 975.

²⁸ See section 2.3.

²⁹ ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Document containing the charges in the case, 22 December 2015, para. 134.

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a distinct harm and protects different interests that the crime of sexual slavery, even though they are usually connected as a *matrioska*: one containing the other³⁰.

The central elements in the crime of forced marriage are the imposition of „marriage“ on the victim and the element of exclusivity of such conjugal union, which could lead to disciplinary consequences for breach of this arrangement. It is not important whether the union is recognized under the applicable national law, as the core element is the imposition of such union on the victim³¹.

The protected interest on both crimes is different too. In the case of the crime of forced marriage, the conduct violates the basic right to consensually marry and establish a family, right that cannot be suspended in times of armed conflict³².

And in the protection of such interest is where the victims could suffer different harms summed up to the ones describe and contained in other crimes described at the Statute. In the case of „sexual slavery“, the aim of such prosecution is the protection of two fundamental human rights: the physical and sexual integrity, and the personal liberty of the victim.

This interpretation of the crime has been maintained in the last case brought to the Pre-Trial Chamber's attention, that is, the *Al Hassad* case³³.

3.1.3 The list of new Crimes: The Never Prosecuted Crimes.

The rest of the gender crimes have never been part of an indictment to this date. Nonetheless, the elements established by the DEC permit to designed the future prosecutions of these crimes.

The crime of enforced prostitution will require to exam two elements: lack consent and a special mens rea³⁴; the sexual nature of the acts will be asses under a case-by-case basis, following the *Dorđević* Appeal Judgment findings.

It could be easily argued that enforced prostitution is a particular form of sexual slavery too, which highlights the „benefit“ of the perpetrator (or another person) as the central element of the crime that needs to be proved. And it is easy too to imagine the evidentiary difficulties that could be presented for the OTP in order to proceed to open prosecutions including this crime.

³⁰ *Ibid.*, para. 92.

³¹ *Ibid.*, para. 93 „According to the Chamber, the central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator” s «wife». The fact that such «marriage» is illegal and not recognized by, in this case, Uganda, is irrelevant. What matters is that the so-called «marriage» is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. As held by the SCSL, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the «husband» and «wife», which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is «not predominantly a sexual crime” .

³² Art. 23 of the International Covenant on Civil and Political Rights and art. 16 of the Universal Declaration of Human Rights.

³³ In the Decision on the Warrant of Arrest for *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I found that „(...) there are reasonable grounds that the crimes against humanity of persecution on religious and gender grounds under article 7(1)(h) of the Statute, rape and sexual slavery under article 7(1)(g) of the Statute, torture under article 7(1)(f) of the Statute and other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health, including forced marriage and physical violence, under article 7(1)(k) of the Statute, were committed in Timbuktu, Mali, between April 2012 and January 2013” . ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC 01/12-01/18, Decision on the Warrant of Arrest, 27 March 2018, para. 12.

³⁴ DEC, Article 7 (1) (g)-3. „1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person” s or persons” incapacity to give genuine consent. 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature” .

Original Article

Forced pregnancy is defined as „the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law“. The definition establishes a specific intent (*mens rea*) for this crime: the intent of affecting the ethnic composition of a population or carry out other grave violation of international law. Such intent applies to the confinement and not to the pregnancy itself or to its outcome.

Enforced sterilization protects the right to the biological reproductive capacity and requires that such deprivation happen without genuine consent or without a medical or hospitalarian treatment justification³⁵.

Finally, the residual provision intends to close the enumeration with an open provision of „[a]ny other form of sexual violence of comparable gravity“, that could be assimilated to the „sexual assaults“ of ICTY. In this case, the OTP will have to prove:

“1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person“s or persons“ incapacity to give genuine consent.

2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.

3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct”³⁶.

At this point, scholars and professionals are demanding a new interpretation of such provision, that will help include the trafficking on human beings under the provisions of sexual crimes.

4. Conclusion

We must conclude that the international community has walked a long line to established an international definition of one of the first crimes, rape, and that the understanding of the rest of sexual crimes is still needed of a more cohesive definition, especially in the case of sexual slavery and other inhumane acts. The principles of international criminal law *nullum crimen sine lege* and the rule of law demand such cohesion, and so the victims of these crimes. The forgotten crimes are now in the public eye of the ICC.

³⁵ DEC, Article 7 (1) (g)-4. 1. „The perpetrator deprived one or more persons of biological reproductive capacity. 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent“ .

³⁶ DEC, Article 7 (1) (g)-6.