SEXUAL CRIMES IN INTERNATIONAL HUMANITARIAN LAW

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EXECUTIVE SUMMARY

This report contains a current and thorough study of how sexual crimes are handled in international humanitarian law. To achieve this objective, an analysis was conducted of the international policies that shape its legal regulatory framework, as well as the most significant case laws from the bodies of the international criminal justice system (International Criminal Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court and mixed or internationalised tribunals). It merits mention that the reference instrument has been the Rome Statute, given that it contains the most thorough regulations to date on international sexual crimes, both from substantive and procedural viewpoints.

As the title indicates, the material scope of the document is confined to international humanitarian law. Nonetheless, connections are established and continuous references are made to international criminal law and international human rights law, given the fact that sex crimes are handled at an international level through the interaction of these three regulatory spheres.

After a brief introduction, in which methodological details and clarifications are set out, the report's structure is broken down into three general sections.

We first examine the protection provided to women in situations of armed conflict in the Geneva Conventions and their Protocols. Then the first chapter centres on the process for categorising sexual violence as an international crime, and how the work of the United Nations General Assembly and Security Council contributed to this process. In light of the limits and shortfalls of the current legal framework, the adoption of an international agreement is proposed, which could specifically regulate sexual violence perpetrated within the scope of any armed conflict.

The second section focuses on the three main difficulties detected in how sexual violence is handled by international humanitarian law, which prevent its comprehensive treatment, namely: The lack of gender perspective in the construction and implementation of the international criminal justice system; the two-fold public-private significance of legally-protected interests in sexual crimes; and the chain of technical-procedural obstacles posed by the investigation and sanctioning of these crimes.

The third section sets out the particular features of the principle of international criminal legality as a preface to the individual descriptions of the different types of sex crimes determined in the Rome Statute, which include: rape, sexual slavery, enforced

prostitution, forced pregnancy, and other forms of sexual violence with a comparable seriousness. In describing the different types, a single schema has been followed, based on inquiries into what exactly defines each of these crimes, and on the interpretive problems that arise.

The report closes with several reflections that summarise the main theoretical and practical matters set out, as well as formulating several recommendations to encourage the international work currently being done and contribute to the actions of different stakeholders that are involved in preventing and punishing these ignominious crimes.

1. INTRODUCTION

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Sexual violence and armed conflicts have been inexorably and calamitously intertwined since ancient times. In historical perspective, committing sexual crimes –where the majority of victims are women and children– has been an inevitable and invisible consequence of the wars of men. Far from abating, at present the use of sexual violence against civil populations, with no distinction of gender or age, has become generalised as a weapon of war, becoming one of the most recognisable traits of contemporary armed conflicts.

The seriousness and scope of these crimes move our consciences and, as internationalists, have driven us to conduct a legal analysis in search of answers. For this reason, the purpose of this report is to present a systematic study of sexual crimes in international humanitarian law, based on an analysis that integrates the different applicable legal policies and instruments, and case laws from the international criminal justice system.

Our aim is therefore to offer a holistic vision, which combines theoretical regulatory development and the most recent international praxis, without leaving out the key questions in understanding why these crimes are committed and the main difficulties in investigating and penalising them.

Several clarifications must be made before starting. The first is that our main reference regulatory instrument is the International Criminal Court's Rome Statute, as it contains the most thorough regulations to date on sex crimes, both from substantive and procedural viewpoints. However, this study is situated in a broader setting, of what is known as the international criminal justice system, in which the concept of 'court' is far from a homogenous category. This is because it includes three models of judicial bodies with very different natures and characteristics: *ad hoc* international criminal courts, the International Criminal Court and mixed or internationalised tribunals.

The second precision is to clearly delimit the scope of study. On the one hand, we have limited the analysis of international sexual crimes, which involved the prior existence of a threshold of gravity and impact of the conducts examined that must be either matched to a specific intent, or to internal damages greater than those normally caused. On the other, we understand that these crimes are always manifestations of sexual violence, either explicit or implicit, in which gender-based inequality prevails against women and girls, without excluding that which is directed at men and boys.

Thirdly, it merits specifying that when handling international sex crimes, three sectors of international public law converge, which are international humanitarian law, international criminal law and international human rights law. As the title of this report indicates, we shall centre on international humanitarian law, which is the legal system typically competent for armed conflicts, although references and connections to the other two aforesaid sectors are inevitable and necessary, given that the regulatory framework of these crimes is the result of the interaction of these three regulatory arenas.

Fourth, we feel that it is not plausible to handle this subject if theoretical reflections are not interwoven with an analysis of the most representative case law from the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as situations and cases open in the International Criminal Court. We have also examined the jurisprudence and case law of mixed and internationalised tribunals, to which we make reference when they are particularly relevant for categorising international sexual crimes, as is the case with the Special Court for Sierra Leone and the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

In light of the previous considerations, our study starts with a section on examining the scope of the regulatory framework for sex crimes in international humanitarian law, resulting from a cross-fertilisation process between the policies that ban sexual violence against women in armed conflicts, those that incriminate different forms of sexual violence such as genocide, war crimes and crimes against humanity and those that protect women's human rights.

Then we have dedicated time to the treatment that sexual violence has merited in international humanitarian law and, in particular, on the difficulties standing in the way of achieving a fully comprehensive focus. This lets us frame and contextualise the issue so that, along with meta-legal reasoning, we devote preferential attention to the procedural issues that sex crimes incite.

The report's next section examines the types of sexual crimes in international humanitarian law. Taking the crimes set out in the Rome Statute as reference, we have analysed how, when and why they have been criminalised, to then immediately provide their defining elements, with the aim of verifying the existence of a separate category for international sexual crimes.

The study ends with a series of general valuation conclusions, and a few concrete proposals, with the goal of improving understanding and the approach to international crimes by the different stakeholders involved.

Finally, we would like to sincerely thank the ICIP (International Catalan Institute for Peace), especially Dr Antoni Pigrau, for believing in us and suggesting that we write this report, which we hope inspires international efforts aimed at preventing and punishing sex crimes in armed conflicts and fighting the impunity of the perpetrators.

As mentioned, this report was co-authored by Isabel Lirola, who wrote sections II and IV, 2, B, C, D, E and F), and Magdalena Martín, who prepared sections III and IV.1, 2 A) and 3.

All ideas were discussed and shared by the two authors, so that we wrote the Introduction and the Conclusions and Recommendations together.

2. THE LEGAL FRAMEWORK THAT REGULATES SEXUAL CRIMES IN INTERNATIONAL HUMANITARIAN LAW

2.1. A HETEROGENEOUS SYSTEM DUE TO THE INTERACTION OF POLICIES AND INSTRUMENTS THAT CONSIDER DIFFERENT LEGALLY-PROTECTED INTERESTS AND LEVELS OF PROTECTION

From an overall perspective, it merits mention that the current legal regulatory framework for sex crimes in international humanitarian law is the result of an extremely long and slow process of progressively becoming aware of the need to adopt international policies and instruments aimed at preventing, prohibiting and punishing sexual violence committed in the setting of armed conflicts.

During this development, which dynamically extends to the present day, legal policies and instruments converge that were elaborated at different historic times and from three fields of international law that interact with each other: international humanitarian law, international criminal law and international human rights law. We could therefore speak of the invisibility of sexual violence at an international level to its visibility through a cross-fertilisation process between different types of regulations.

This makes it possible to identify an initial core of protection that is constructed by the adoption, at an international level, of policies aimed at protecting women during armed conflicts. In addition to several significant precedents, this initial core was the outcome of the provisions of the 1949 Geneva Conventions and its Additional Protocols aimed at protecting women in armed conflict situations. They are a set of rules in the scope of *stricto sensu* conventional international humanitarian law, of which a highly significant part are today recognised as customary laws.

A set of policies and instruments from international criminal law can be added to this first regulatory block, primarily starting in the last decade of the 20th century, through which different forms of sexual violence are inculpated as war crimes, crimes against humanity and genocide. This set of regulations, fundamentally identified with the statutes and jurisprudence of the judicial bodies of what is known as the 'international criminal justice system', has its origins in the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda, in which the International Criminal Court's Rome Statute plays a particularly important role.

Nonetheless, these two regulatory blocks should not be considered as airtight or static compartments since, as we will see, they interact, first with each other and, secondly, with other instruments and mechanisms proceeding from the area of international human rights law.

In turn, the contribution from the work of United Nations bodies must be kept in mind, especially that of the General Assembly and the Security Council, which have also handled sexual crimes in the setting of armed conflicts, favouring their inclusion in specific action plans to protect women and adopting different soft law instruments that also interact with customary and conventional policies that are applicable in this area.

The outcome of all this regulatory interaction is that the regulatory framework for sex crimes in international humanitarian law is shaped as a heterogeneous system. Although they consider the protection of different legally-protected interests and have different scopes, as a whole they do tend to protect the dignity and integrity of all human beings affected by sexual violence perpetrated during armed conflicts and in implementing a specific category of crimes of sexual violence that entail the international criminal responsibility of their perpetrators.

2.2. THE CONSTRUCTION OF THE LEGAL FRAMEWORK THAT REGULATES SEXUAL CRIMES IN INTERNATIONAL HUMANITARIAN LAW

2.2.1. THE INITIAL CORE OF PROTECTION: THE ESTABLISHMENT OF RULES TO PROTECT WOMEN IN ARMED CONFLICTS; THE GENEVA CONVENTIONS

Historically, armed conflicts and sexual violence are perniciously and indissolubly linked, shaping the two sides of a single reality. It is therefore logical that the prohibition of committing rape and other acts of sexual aggression during wartime have been present in classical international law doctrine, as evidenced by the work by Francisco de Vitoria and Hugo Grocio[1], and that some of the first instruments for the codification of international humanitarian law established regulations protecting women as the secular victims of this violence. The Lieber Code of 1863 can also be mentioned in this regard, which expressly prohibits rape, as well as the Second Hague Convention of 1899, the Fourth Hague Convention of 1907 and their implementing regulations, which is done indirectly through the reference to the 'honour and rights of families'.

Prohibitionist efforts intensified during the period between wars and especially after the end of the Second World War, so that the Geneva Conventions of 1948 established a series of protective policies that both explicitly and implicitly prohibited rape and other sexual aggression against women. Thus, article 27 of the Fourth Geneva Convention on the protection of civilians in time of war specifically says that 'Women shall be especial-

[1]. In De Jure Belli ac Pacis, Grotius described rape not only as a violation against women but, most importantly, as harm against the community of the rapist (See Kinsella, Helen M. 2006. 'Gendering Grotius: Sex and Sex Difference in the Laws of War'. *Political Theory*, 34 (2): 161-191.

ly protected against all assaults on their honour and, in particular, against rape, enforced prostitution and from all indecent assaults'. Article 3 common does not contain any explicit reference to sexual violence, although it does establish the prohibition of 'attacks on bodily integrity' and 'personal dignity, especially humiliating and degrading treatment'. Similarly, Additional Protocol I sets out in art. 75, 2, b) the prohibition of torture and 'attacks on personal dignity, especially humiliating and degrading treatment, enforced prostitution and any indecent assault'. This instrument also contains a chapter entitled 'Measures in favour of women and children', in which its article 76. p 1 repeats, in terms similar to article 27 of the Fourth Convention, that 'Women shall be accorded special respect and protected from rape, enforced prostitution and any other type of indecent assault'. For its part, Protocol II expressly includes, in its article 4, p 2, e), within the prohibition of attacks on personal dignity, 'rape, enforced prostitution and any other type of indecent assault'.

Aware of the relevance of the protection that the Geneva Conventions and their Protocols have provided and continue to provide against sexual violence in armed conflicts, these provisions have been the object of several criticisms. Firstly, these critical discourses point out that, as the language and terminology make clear, the legal interest protected by these provisions seems to refer exclusively to the honour and dignity of women within a patriarchal and phallocratic view. Consequently, these provisions shall be limited to considering women as secondary and only to the degree that, by attacking their honour, the men in the social or family group to which they belong are attacked. This outlook would also be confirmed by the fact that even the Geneva Convention provisions that consider a more active position of women are centred almost exclusively on their role as mothers (Tachou-Sipowo 2010, 201). As pointed out, they would not recognise the attack on physical integrity and violation of privacy inherent to sexual crimes (Ayat 2010, 811).

Along this same line, they point out that these provisions completely neglect the fact that women experience armed conflicts very differently than men, as sexual and gender violence is 'the most obvious different experience of women in situations of armed conflict' (Rodríguez Manzano 2002, 296). In other words, the fact of referring solely to the protection of women, instead of establishing a prohibition of gender-based sexual violence, would be used to confirm the stereotype of women as 'victims', necessary in armed conflicts (Barrow 2010, 226).

Last, but not least, they criticised that violation of these provisions that protect women does not expressly appear within the list of serious offences in the Geneva Conventions, although sex crimes can –and this has been confirmed– be included in acts that do have this consideration, such as 'murder, torture and inhumane treatment' and the 'fact of deliberately causing great suffering or attacking physical integrity or health'[2]. As

[2]. In this regard, and without prejudice to the later confirmation by the case law of the international criminal courts for the former Yugoslavia and Rwanda and the International Criminal Court statute, the opinion of the ICRC must be taken into account, which clarifies the system for serious infractions contained in article 147 of the Fourth Geneva Convention and, in particular, 'the fact of deliberately causing great suffering or violating physical integrity or health'. This obviously does not only cover rape, but any other attack against women's dignity (See International Committee of the Red Cross, Aide-Memoire (1992), para. 2, and the opinion of the experts commission established in virtue of Resolution 780 (1992) of the Security

pointed out, this omission would come to be a sign of the consideration of the lesser seriousness of sexual violence against women and even some acceptance that it is 'an unfortunate yet inevitable effect of war' (Moreyra 2007, 39).

However and despite these criticisms, the Geneva Conventions do establish a basic regulatory core for protection against sexual violence committed during armed conflicts for two reasons. The first is because all the policies we have listed are today considered customary international law and, as a whole, they cover all armed conflicts, regardless of their nature or characteristics. Secondly, its extension to internal law must be taken into account, as several national military codes and criminal legislations have incorporated protective provisions on sexual violence during armed conflicts, which are based on the Geneva Conventions system[3].

Furthermore and as we will see, these provisions interact with policies from international criminal law and international human rights law, where this process leads to the application and dynamic and updated interpretation that lets the aforesaid limitations be overcome (undoubtedly derived from the time law was developed and the international society in which they were drafted) and their scope and level of protection be extended.

2.2.2. CATEGORISING SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: THE STATUTES AND CASE LAW OF JUDICIAL BODIES IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The adoption of policies aimed at establishing individuals' international criminal responsibility for crimes of sexual violence committed in the framework of armed conflicts is linked to the establishment of international criminal jurisdictions. Nonetheless, as was predictable when considering the context and time of their creation, the actions taken by the International Military Tribunals in Nuremberg and Tokyo were nearly non-existent, as sexual crimes were not included in the jurisdiction of international military tribunals[4].

Council (Letter dated 24 May 1994 addressed to the president of the Security Council from the Secretary-General, Doc. UN S/1994/647 of 27 May 1994, Appendix, para. 195).

3. A list of the military manuals that have added provisions in this regard can be viewed in *Customary International Humanitarian Law*, Volume II: Practice, pub. Henekaerts and Doswald-Beck (ICRC, Cambridge Press, 2005), para. 1620-1660.

4. As pointed out 'The first precedent in qualifying sexual aggression as international crimes that engender individual criminal responsibility was established by a commission created after World War I, in a list of 32 crimes in which rape and enforced prostitution were included as numbers 5 and 6. At the end of World War II, the Charter of the Nuremberg Military Tribunal did not expressly mention rape or other sexual aggression, and did not infer responsibilities for these acts, although those in charge of formulating accusations for the commission of war crimes and crimes against humanity in Eastern and Western Europe provided some information to the Tribunal in this regard: the French public prosecutor on the treatment of Jews and Aryans interned in the concentration camps, and the Soviet counterpart with regard to the mass rape of women and girls by the German troops in the territories occupied by the former Soviet Union' (Ojinaga Ruiz, María del Rosario. 2002. 'La prohibición y criminalización en Derecho Internacional de las

The Nuremberg Tribunal did not directly condemn the sex crimes committed during the Second World War, although there were countless cases of sexual violence committed by troops on both sides, which could have been considered as war crimes or crimes against humanity, as established in its Charter[5]. Given the characteristics of these tribunals and views held during this era, only the Tokyo International Tribunal actually condemned Japanese generals Toyoda and Matsui for crimes of war, for not preventing the mass rape of women during the occupation of the Chinese city of Nanking by forces under his command. As to the rest, the immense majority of these situations were not only not punished, despite the existing evidence, but their existence was even ignored or denied until very recently, as is the case of the so-called 'comfort women'[6].

Therefore, the criminalisation of the sexual violence committed in situations of armed conflict has gone hand-in-hand with the development of the judicial bodies that are today integrated into what is known as the 'international criminal justice system', which started up through the establishment of the International Criminal Tribunals in the former Yugoslavia and Rwanda. Thus, the General Assembly and the Security Council, faced with the gravity of the behaviours and the violations of human rights, including sexual violence in both conflicts, adopted numerous measures, which included the creation of both tribunals by the latter.

In the framework of the aforesaid interaction process between different international policies and mechanisms, it merits mention that the inclusion of sex crimes in these statutes was largely due to the awareness raising and actions of different international stakeholders and, very especially, to the progress made in the Vienna and Beijing International Conferences that, as pointed out, 'provided the political vehemence required' for this inclusion (Rodríguez Manzano 2002, 293). Although at first both conflicts attracted attention more due to their ethnic or genocidal nature than for the gravity of the sexual assaults, the politicisation of rape and its characterisation as a weapon of war

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violencias sexuales contra mujeres civiles en conflictos armados'. Boletín de la Facultad de Derecho de la UNED 19: 199-268 in 217).

5. Particularly infamous episodes included the mass rapes of women committed by troops under allied command in Italy and committed by the Soviet army while taking Berlin, and during the Nuremberg trials enough proof was presented on the rapes committed by German soldiers, see Rhonda Copelon, 'Gendered War Crimes: Reconceptualizing Rape in Time of War' in *Women's Rights, Human Rights, International Feminist Perspectives*, pub. Julie Stone Peters, Andrea Wolper (London/New York: Routledge, 1995), 197.

6. 'Comfort women' were women in countries occupied by Japan during World War II (including Koreans, Filipinos, Burmese, Chinese and Indonesian), who were kidnapped and forced to have sexual relations in sites especially established by the Japanese military. This situation, denied and obviated by Japan, was denounced in the report presented by the Special Rapporteur on violence against women, including their causes and consequences, Dr Radica Coomaraswamy, in accordance with Resolution 1994 of the Human Rights Commission, mission report sent to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the matter of the military's sex slaves in wartime, (Doc. E/CN.4/1996/53/add. 1, 4 January 1996), leading to some of the survivors testifying on their traumatic experiences and even filing claims against Japan. In 1998, a Japanese tribunal established the obligation for the state to pay financial settlements to the claimants. In 2007 the Japanese Parliament finally recognised their existence and officially apologised to the victims (See Askin, Kelly 2001, 'Comfort Women: Shifting Shame and Stigma from Victims to Victimizers'. *International Criminal Law Review*: 5-32 y Park, Michelle 2008, 'Defining Responsibility for Sexual assault-War crimes committed in the Second World War', available at www.standorf. edu/group/sjeaa/journal). Another non-government and much more incisive initiative must also be pointed out, consisting of the approval of the 'Women's International War Crimes Tribunal' (see Sakamoto, Rumi. 2001. 'The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the "Comfort Women Issue"'. *New Zealand Journal of Asian Studies* 3 (1): 49-58).

decisively contributed to its condemnation and to a change in public attitudes about the sexual violence perpetrated (Moreyra 2007, 63).

Indeed, the treatment of sexual crimes in both charters initially had certain weaknesses because the ICTY Charter only expressly mentioned the crime of rape, including it as a crime against humanity (art. 5, g), without it appearing as a crime of war, nor within the 'Serious Violations of the 1949 Geneva Conventions' (art. 2), or in the 'Violations of Laws or Customs of War' (art. 3). Along this same line, the ICTR Charter also included it as a crime against humanity (art. 3, g), but signals some progress, as it is incorporated as a war crime within the 'Violations of article 3 common to the Geneva Conventions and their Additional Protocol II' (art. 4, e).

These weaknesses have been overcome to the degree that both the Rules of Procedure and Evidence of both Tribunals[7], as well as adding female judges and public prosecutors with sensitivity and experience on gender and sexual violence, have led to the development of evolving and innovative jurisprudence, which has resulted in fundamental support in establishing a regulatory system that integrates the different legal instruments that comprise the regulatory framework of sex crimes in international humanitarian law.

In an initial approach, we must point out the contribution to the treatment of sex crimes in international humanitarian law entailed by the ICTY and ICTR case law centring on the protection of the dignity and physical integrity of all people who are victims of such crimes[8]. This assessment, which translates into overcoming the most conservative concept of rape and other sexual aggression as assaults on the honour of women, lets the provisions of the Geneva Conventions be interpreted more broadly and according to a gender perspective.

Secondly, ICTY case law has permitted the limitations of the serious infractions system of the Geneva Conventions to be overcome through a two-fold process. On the one hand, the lack of mention of rape and other sex crimes in the list of serious infractions in the 1949 Geneva Conventions, as mentioned in art. 2 of the Charter, qualifying these deeds as 'torture', 'inhumane acts' or 'deliberate acts that cause serious suffering or serious damage to physical integrity or health', namely as types of war crimes that do indeed have the consideration of serious infractions[9], has been remedied. Furthermore, to overcome the limitation stemming from applying this serious infractions system solely to international armed conflicts, sexual violence has been considered a violation of the laws or customs of war from art. 3 of the Charter, where this provision is under-

7. Rules of procedure 34 and 96 were particularly important. Their adoption seems to have anticipated the fact that alleged acts of sexual violence, understood more broadly than rape, would occupy a more substantial part of the tribunal's work. Furthermore, the Rules of Procedure could have contributed to the development of substantive law by recognising the commission of crimes of sexual violence and their potential meaning in the proceedings of both tribunals. Thus Rule 34 established that the support units for victims and witnesses would provide assistance, among other cases, in rape and sexual assaults. Rule 96 refers to proof in sexual assaults. Cf. O'Byrne, Katie. 2011. 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law'. *International Criminal Law Review* 11(3): 495-514 in 500.
8. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998, para. 495.

stood according to the non-comprehensive nature of the list of cases considered, as a general or residual clause in which sexual aggression is also included[10].

Despite the fact that Protocol II has not fully acquired the nature of a customary law, the ICTR has deemed that article 4.2 has this character, on 'Fundamental guarantees' that, as we saw, refers to 'assaults on personal dignity, especially humiliating and degrading treatment, rape, enforced prostitution and any type of indecent assault'[11].

Furthermore, both Tribunals have considered sexual aggression as a crime of genocide, either as '*serious injuries to the physical or mental integrity of group members*' or as the imposition of measures aimed at preventing births within the group'[12].

The acquis developed by the ICTY and the ICTR is contained in the Rome Statute of 1998 of the International Criminal Court. This instrument represents an unprecedented advance in how sexual crimes are treated in international humanitarian law. It must be recalled that the Charter provisions on this subject are the fruit of a complex negotiating process in which opposing influences and forces were involved: on the one hand, the tensions between the stances of progressive and conservative states on sexual and women's rights and, on the other, the pressure exerted by the NGOs working on these topics.

With respect to the first, the problems arose from the opposition of Islamic countries and the Vatican to the use of the term 'gender' and the inclusion of 'forced pregnancy', defining both concepts in extreme detail to avoid problems with interpretation. With respect to the second, feminist groups and women's associations created the Women's Caucus for Gender Justice as a pressure group, with the aim of achieving the inclusion of a gender perspective and types of sexual violence in the Charter, whose criminality had yet to be recognised in the international arena[13].

The outcome of this was that the Rome Statute now includes a gender perspective and specifically considers a category for sexual crimes. Furthermore, it contains the most complete regulation existing on crimes of this type in an instrument of international

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9. ICTR, TC, Prosecutor v. Akayesu, Trial Judgment (ICTR-96-40-T), 2 September 1998, para. 636 and 503; ICTY, TC, Prosecutor v. Zejnil Dedalic, Zdravko Music, Hazim Delic, Esad Landzi (Celebici Prison-camp), Judgement (IT-96-21-T), of 16 November 1998, para. 452-474.

10. ICTY, AC, Prosecutor v. Dusko Tadic, Judgement (IT-94-I), 15 July 1999 para. 81; ICTY, TC, Prosecutor v. Anto Furundzija, Judgement (IT-95-17/1-T), 10 December 1998; Prosecutor v. Zejnil Dedalic, Zdravko Music, Hazim Delic, Esad Landzi (Celebici Prison-camp), Judgement (IT-96-21-T), 16 November 1998.

11. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998, para. 636 and 503.

12. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998, para. 636 and 503. In the same regard, ICTR, TC, Prosecutor v. Rutaganda, Judgment (ICTR-96-3-T), 6 December 1999, para. 51 and 53; ICTR, AC, Prosecutor v. Alfred Musema, Judgement (ICTR-96-13-A), 16 November 2001, para. 908; ICTR, TC, Prosecutor v. Silvestre Gacumbitsi, Judgement (ICTR- 2001-64-T), 17 June 2004, para. 291-293; ICTR, TC, Prosecutor v. Mikaeli Muhimana, Judgement (ICTR-95-1B-T), 28 April 2005, para. 502; ICTR, TC, Prosecutor v. Kayishema and Ruzindama, Judgment (ICTR-95-1-T), 21 May 1999, para. 108-112, which added that rape can be considered within the acts liable to subject the group to living conditions that must involve their total or partial physical destruction.

13. See Bedont, Barbara, 1999. 'Ending Impunity for Gender Crimes under the International Criminal Court'. *Brown Journal of World Affairs* 6: 65-85 and Halley, Janet, 2008. 'Rape at Rome: Feminist Interventions in the Criminalisation of Sex-Related Violence in Positive International Criminal Law'. *Michigan Journal of International Law* 30: 1-123.

humanitarian law, which are explicitly incorporated in the category of crimes against humanity (art. 7) and crimes of war (art. 8). In turn, the Charter opens up the possibility of considering the sexual violence perpetrated in the setting of an armed conflict as a genocide crime, as this crime is also included in the Court's competence (art. 6).

Thus art. 7, 1, g) includes 'rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation and other sexual abuses with comparable gravity' as crimes against humanity. For its part, art. 8, 2, b), xxii includes crimes of war within 'Other serious violations of the laws and customs applicable in international armed conflicts', committing 'acts of rape, sexual slavery, enforced prostitution, forced pregnancy, defined in section f) of paragraph 2 of article 7, forced sterilisation and any other type of sexual violence that is a serious violation of the Geneva Conventions', and art. 8, 2, d), vi) in 'Other serious violations of the laws and customs applicable in armed conflicts that are not international', considers the commission of 'acts of rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation and any other type of sexual violence that also represents a serious violation of article 3 common to the four Geneva Conventions'.

In this regard and particularly with respect to war crimes, the importance was highlighted that the Rome Statute finally recognised sexual violence as a serious infraction of the Geneva Conventions and a serious violation of common art. 3, putting an end to previous omissions and debates (O'Byrne 2011, 502). Furthermore, it was pointed out that it was 'the first time that an international legal text had acknowledged that sexual violence acquires the level of a serious infraction', adding –an opinion that we do not share– 'that it is subject to universal jurisdiction and the consequences that this entails' (Zorrilla 2005, 67-66) [14].

In general terms, and without prejudice to a more specialised study both on the incorporation of a category just for crimes of sexual violence, and each of the sex crimes contained in the Rome Statute[15], as the texts of articles 7, 1, g) and 8, b), xxii and d), vi), make clear, the sexual crimes considered in both provisions are identical and are defined the same. These identical contents ensure the same level of incrimination and punishment, regardless of the situation under which the acts are committed, rendering irrelevant for these purposes whether they are classified as crimes against humanity or war crimes. It is also an open list, as it is not comprehensive, since in both cases a residual clause is considered that permits the Court's judgement in sexual abuses and sexual violence that are not expressly set out in the Charter[16].

In any case, it raises the question relative to the threshold of gravity required for the act of sexual violence to fall within the Court's competence. In this regard, we must first take into account the general thresholds established for all crimes against humanity (committed as part of a generalised attack or a systematic attack against a civil popula-

14. In principle, we do not share this opinion, because we believe that this comparison took place in the scope of a conventional instrument, such as the Statute, which effectively established great progress in recognising the gravity of sexual violence, although we must recall that the Court did not have universal jurisdiction (along this same line, Tachou-Sipowo 2010, 210).
15. See *infra* title IV.
16. See *infra* title IV.

tion) and war crimes (committed as part of a plan or policy or part of the large-scale commission of these crimes), which must always be met.

Secondly, the particular thresholds established in the Elements of Crimes must be considered with respect to the requirement so that the conduct in question can be deemed a crime against humanity: a gravity comparable 'to the other crimes in article 7, 1, g) of the Statute'; for crimes of war committed in an international armed conflict, a gravity comparable 'to a serious violation of the Geneva Conventions'; and for crimes of war committed in a domestic armed conflict, a gravity comparable to 'a serious violation of article 3 common to the four Geneva Conventions'.

With respect to this matter, the problem also arises of crimes of sexual violence of lesser gravity and whether or not they could be considered as included in crimes against humanity under the heading of 'other inhumane acts' from art. 7, 1 k) (Ojinaga 2002, 260). The same approach can be applied –in our opinion– to the war crimes in which this type of violence could be, as applicable, included under 'inhumane treatment' of the serious infractions of the Geneva Conventions and under 'humiliating and degrading treatment' of the serious violations in art. 3 common.

Another feature worth mentioning as a consequence of the aforementioned incorporation of a gender angle in the Statute, is the neutral way in which these crimes are formulated, whose victims, except in the case of forced pregnancies, can be women or men, girl or boy children, and the disappearance of any moralising element. In this regard, it has been pointed out that the provisions of the Rome Statute 'do not particularise women as a weaker group of victims that need special protection', but instead 'classify women as part of the human race that requires protection under international law' (Moreyra 2007, 92). These provisions also let the regulatory void be filled in international humanitarian law with respect to sexual violence against men who, as we have anticipated, are also increasingly frequently used as weapons of war in armed conflicts[17].

The value of the provisions of the Rome Statute on sexual crimes committed during armed conflicts has not been exhausted in being used by the International Criminal Court. As it is extremely important, it is conditioned by the limited number of cases that the Court can hear according to the conditions for exercising its jurisdiction and the chain of technical-procedural obstacles related to the investigation and sanction of the sex crimes that we shall make reference to below. For this reason, it is relevant to point out their two-fold internal and international scope.

With respect to the first, the provisions of the Rome Statute that we analysed are contained in the national legislations of all States party via the principle of complementarity and the obligation to incorporate these crimes into their national legislations to ensure that they are punished, when the requirements are not met for exercising Court

17. With regard to the particularities of sexual violence against men, see Linos, Natalia, 2009. 'Rethinking gender-based violence during war: Is violence against civilian men a problem worth addressing?', *Social Science and Medicine*, 68: 1548-1551; and Sivakumaran, Sandez, 2010. 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict'. *International Review of the Red Cross*, 877: 1-20.

jurisdiction. We believe that it could be of interest to verify what the real impact has been of the Statute provisions on sex crimes in the internal laws of States party and if they are really used to promote the repression and sanctioning of sexual violence at a state level. This information is relevant when recalling the relationship that exists today between habitual and permitted sexual violence in a society during peacetime as a contributory factor to that which has been developed in the setting of armed conflicts.

With regard to the second, the provisions of the Rome Statute have also been totally or partially projected to *other judicial bodies in the international criminal justice system*. With respect to the consideration of sexual violence as a crime against humanity, the Statute of the Special Court for Sierra Leone (art. 2)[18] and the regulation of the Special Panels for Serious Crimes in East Timor[19] include 'Rape, sexual slavery, enforced prostitution, forced pregnancy and any other type of sexual violence' in this category. In other words, they incorporate the majority, but not all of the crimes in art. 7, 1, g) of the Rome Statute, as they omit forced sterilisation. For its part, the law that regulates the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (art. 5) expressly refers only to one sexual crime, rape, although it considers crimes against humanity such as slavery, torture and inhumane treatment that, as we have seen in relation to ICTY and ICTR case law, can be used to incriminate sexual violence[20].

The projection for war crimes is also partial. Thus, the Statute for the Special Court for Sierra Leone considers the violations within its jurisdiction that are in article 3 common to the Geneva Conventions and in Additional Protocol II (art. 3), which include 'Assaults to personal dignity, in particular inhumane and degrading treatments, rape, forced prostitution and any other type of indecent aggression'. Section 6 of UNTAET Regulation 2000/15 on Special Panels for Serious Crimes in East Timor textually follows that which is established in art. 8 of the Rome Statute on war crimes, therefore letting sexual crimes be heard that are committed within armed conflict settings in the same terms as the ICC[21]. And the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea are competent to hear the serious infractions in the 1949 Geneva Conventions.

All of these judicial bodies, except for the Special Court for Sierra Leone, are also competent to hear the crime of genocide and, therefore, of sexual violence, which falls within the cases of commission of this crime.

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18. Statute contained as an appendix to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone', 16 January 2002 (available at www.sc-sl.org). This tribunal included within its jurisdiction crimes committed according to the legislation of Sierra Leona (art. 5), related to the offense of abusing children contrary to the law on the prevention of cruelty against children of 1926 (Chap. 31), which sets out the sanction for abusing girls younger than 13 years of age, abuses of girls 13 to 14 years old, and kidnapping girls with indecent intentions.

19. Section 10.1 of Regulation UNTAET 2000/11, and Section 1.3 of Regulation UNTAET 2000/15.

20. Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, as promulgated on 27 October 2004 (NS/RKM/1004/006) (available at www.eccc.gov.kh).

21. These chambers are also competent on sexual offences that are governed by the terms of East Timor's Penal Code (Sections 8 and 9 of Regulation UNTAET 2000/15).

The confirmation is therefore clear that sexual violence in the setting of armed conflict can constitute a crime against humanity, a war crime and even a crime of genocide. However, the disparities pointed out in regulating some of the judicial bodies in the international criminal justice system would be indicative of the enduring differences with regard to the scope and content of such crimes. From there, as we will see, comes the importance of case law at the International Criminal Court and these judicial bodies, particularly the Special Court for Sierra Leone, in order to clarify the content and scope of sexual crimes as crimes against humanity and war crimes.

2.2.3. THE CONTRIBUTION OF INTERNATIONAL HUMAN RIGHTS LAW ON THE MATTER OF SEXUAL VIOLENCE IN ARMED CONFLICTS; WORK BY UNITED NATIONS BODIES

A) THE INVISIBILITY OF SEXUAL VIOLENCE IN INTERNATIONAL HUMAN RIGHTS PROTECTION INSTRUMENTS; THE EXCEPTION OF SOME INSTRUMENTS ADOPTED IN THE AFRICAN ARENA

From a general perspective, the invisibility of sexual violence in conventional instruments for the universal protection of human rights is striking, as they do not directly refer to it or to the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. It is not mentioned in the human rights instrument more specifically for protecting women, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) of 18 December 1979. Only article 34 of the Convention on Children's Rights of 20 November 1989 establishes the obligation of States party to protect children from 'all forms of sexual exploitation and abuse', although it makes no concrete mention of the specific setting of armed conflicts. The Optional Protocol of the Convention on Children's Rights on the participation of children in armed conflicts of 25 May 2000 does not refer to the sexual violence to which child soldiers are victims or, very important, girl children (Tachou-Sipowo 2010, 203).

Following the same line as the reflections pointed out above on the initial imperative approaches in international humanitarian law and international criminal law, this invisibility makes it clear that sexual violence has not been traditionally considered as an assault on human rights (Movilla 2010, 4), but has instead been subsumed and justified in its consideration within a private and family scope until relatively recently. However, international human rights law also represents a regulatory field in which sexual violence in a setting of armed conflict has been treated in recent years, although from different spheres and with different consequences.

Thus, firstly, in the conventional regional scope, sexual violence against women is expressly considered in the Protocol to the African Charter of Human and People's Rights on the rights of women in Africa of 2004, whose art. 1 j) states that violence against women refers to 'all acts against women that cause or may cause them physical, sexual,

psychological or financial harm', including 'the threat of such acts or carrying out the imposition of restrictive or privation measures of fundamental rights in the private or public life in peacetime and in *situations of armed conflict or war* (italics ours).

This instrument also contains a specific provision on the protection of women in armed conflicts (art. 11), which establishes the obligation of the States party to take measures both to respect and ensure that the rules of international humanitarian law are respected that are applicable to situations of armed conflict that affect the population, particularly women. Concretely, the States party commit to protecting women applying for asylum, refugees and those subject to internal displacement from all forms of violence, rape and other forms of sexual exploitation and ensuring that such acts are considered crimes of war, genocide and/or crimes against humanity, and that their perpetrators are brought to justice before the competent criminal jurisdiction. It merits mention that the Protocol to the African Charter specifically considers the question of girl soldiers, establishing the obligation of the States party to take all measures necessary so that no child, especially girls younger than 18 years of age, participates directly in hostilities and are not recruited as soldiers.

The Protocol for the Prevention and Suppression of Sexual Violence against Women and Children[22] is situated in this same regional African scope. This instrument has greater interest, due to having been adopted in a region like the Great Lakes, particularly affected by the commission of sexual crimes in different conflicts in this area. It is also the first international conventional instrument whose specific objective is sexual violence, and it contains a thorough, albeit unclosed, definition of the action that can be considered as such (art. 1, p 5). Also noteworthy is the fact that this Protocol establishes the States party's obligation to sanction such acts when they are connected to the commission of the crime of genocide, crimes against humanity and war crimes (art. 4). Furthermore, it details a series of obligations of the States party in judicial, procedural, legal, medical, social and economic fields that are strengthened by regional cooperation mechanisms (art. 6)[23] .

However, it it noticeable that whereas in the case of crimes against humanity (art. 1, 2), the sexual crimes considered are the same as those that are set out in art. 7, 1, g) of the Rome Statute, namely rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation and other sexual abuses of a comparable gravity, the same cannot be said of war crimes. To the degree that war crimes (art. 1, 7) are only defined in relation to the serious infractions in the Geneva Conventions and do not have the broader scope contained in art. 8 of the ICC Statute, problems could arise with regard to sexual crimes that cannot be included on the list of serious violations (for example, sexual slavery and forced marriage, related to the situation of bush wives).

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22. Protocol of 30/11/2006 to the Pact on Security, Stability and Development in the Great Lakes Region, adopted on 15/12/2006 in Nairobi and in force since 2008. Pursuant to art. 7 of the pact, the protocol is compulsory for all States party to the pact and entered into force on the same date.

23. This provision establishes a mechanism to facilitate the arrest and detainment of people accused of the commission of a sexually violent crime; the criteria to take into account in criminal proceedings with regard to the victims of these crimes; and the obligation that they be compensated. To this end, a special fund was created, which was also allocated to the suitable training of personnel handling cases of sexual violence.

Secondly, and with respect to the CEDAW, General Recommendation 19 adopted by the Committee to eliminate discrimination against women, entitled 'Violence against women', includes in the definition of discrimination in art. 1 of the Convention, violence based on sex, namely 'violence against the women because she is a woman or that affects her disproportionately'. According to the Recommendation, these also represent discrimination for the purposes of the Convention: 'violence against women, which diminishes or annuls the enjoyment of their human rights and fundamental freedoms in virtue of international law or the different human rights conventions', including in these rights and freedoms: 'The right to protection under equal conditions according to humanitarian standards during times of international or internal armed conflict'. The Recommendation also makes mention of the special vulnerability of women in acts of sexual aggression in the setting of wars, armed conflicts and occupation of territories. Based on all these references, the Committee has been considered to have 'interpreted, with no ambiguity, that the Convention recognises the equal protection and non-discriminatory application of humanitarian rules for women and girl children during times of international or internal armed conflict, and reaffirms that the reparations for gender violence related to war, such as rape, are indeed related to human rights' (Visseur 2007, 28).

Thirdly, as we have seen, the commission of acts of sexual violence in settings of armed conflict have been the object of sanction by the ICTY and ICTR, in application of the Convention for the prevention and sanction of genocide and the Convention against torture and another cruel, inhumane or degrading treatment or punishments.

B) UNITED NATIONS' ACTIVITY RELATED TO SEXUAL VIOLENCE IN ARMED CONFLICTS

Different United Nations bodies have been concerned with sexual violence committed in armed conflicts primarily through soft laws that have centred on protecting women from sexual violence during the different states of conflict and post-conflict.

From a general viewpoint, the United Nations has been gaining awareness of the particular vulnerability of women in situations of armed conflict since the seventies, although initially the matter of sexual violence was not treated due to the tendency to consider and protect women fundamentally in their role as mothers and caretakers. The fundamental change in orientation took place starting in the nineties, where the events that occurred in the Kuwait War were particularly important, during which sexual violence was widely used during hostilities (Moreyra 2007, 53) and, as mentioned, in the conflicts in the former Yugoslavia and Rwanda.

Starting at this time, different courses of action converged, so that sexual violence against women in armed conflicts became the focus of attention at international conferences for the protection of human rights, and especially women's rights, in which the obligations of the states were recognised and brought to mind in accordance with the policies of international humanitarian law to prevent and sanction them. In turn, con-

crete strategies and action plans were shaped, and the protection offered by the CEDAW was strengthened.

Thus, as mentioned, at the World Conference on Human Rights in Vienna (1993), the vulnerability of women to sexual violence in armed conflicts was expressly recognised for the first time, which were defined as 'violations of the fundamental principles of human rights and international humanitarian law' (Vienna Declaration and Programme of Action, Part I, para. 38). In the Fourth World Conference on Women in Beijing (1995), the situation of women and girl children in armed conflicts was also considered, establishing that the violations of human rights in situations of armed conflict and military occupation are violations of the fundamental principles of human rights and humanitarian law considered in international human rights instruments and in the 1949 Geneva Conventions and its Additional Protocols, adding the objective of 'guaranteeing respect for international law, including humanitarian law, in order to protect women and girls in particular' (Beijing Declaration and Platform for Action, para. 33 and 133).

In 2007, the institutional innitative entitled 'The United Nations against Sexual Violence in Conflicts' was adopted which, led by the Special Representative of the Secretary-General for sexual violence in conflicts, aimed to coordinate all actions of subsidiary United Nations bodies and organisations. The measures established included a new analytical and conceptual framework to identify the structural causes of this violence and to facilitate action through, among other fields, peace and security, human rights and humanitarian law[24].

In particular, the *action of the General Assembly and the Security Council* merits mention. As the main bodies of the United Nations, they have adopted a series of key resolutions on this subject. Thus, the General Assembly adopted a first 'Declaration on the elimination of violence against women' (Resolution 48/104 of 10 December 1993), which affirms that 'violence against women constitutes a violation of human rights and fundamental freedoms and totally or partially prevents women from enjoying these rights and freedoms'. Although express mention was not made of sexual violence committed during armed conflicts, this could be understood as included in the reference that violence against women includes, but is not limited to 'physical, sexual and psychological violence perpetrated or tolerated by the state, wherever it takes place' (Manjoo, McRaith 2011, 20)[25].

The most significant resolution on this subject are the Security Council Resolutions 1325 (2000) and 1820 (2008), which gave rise to –as we will soon see– the adoption of a series of resolutions on this topic. Regardless of other aspects that shall be reviewed

24. See on this topic, 'UN action against sexual violence in conflict', Progress Report 2010-2011 at www.stoprapenow.org.

25. Along this same line, Resolution 61/1423 (2007), entitled 'Intensification of efforts to eliminate all forms of discrimination against women', the General Assembly urged states to protect women and children in situations of armed conflict and after conflicts and in situations in which, due to their condition as refugees or internally displaced persons, run a higher risk of being the target of violence, in which they often find their chances of applying for and obtaining reparations extremely restricted. Initiatives are therein adopted to eliminate impunity for all types of gender-based violence in situations of armed conflict.

later, it merits mention now to state that in practice, Resolution 1325 tends to be considered an independent legal framework without clear recognition of how this Resolution interacts with existing conventional instruments (Barrow 2010, 229). However, what is true is that these resolutions represent a strengthening of the rules of international humanitarian law, international criminal law and human rights law already examined, whose full respect and compliance is urged by the Security Council[26].

2.3. LIMITS AND SHORTFALLS OF THE CURRENT LEGAL FRAMEWORK: THE NEED FOR AN INTERNATIONAL HUMANITARIAN LAW INSTRUMENT THAT SPECIFICALLY REGULATES SEXUAL CRIMES

All the rules and regulations that we have looked at in previous sections would be leading to or would have led to the shaping of customary law that establishes a prohibition of sexual violence in armed conflicts (Ayat 2010, 811), a prohibition that some believe would even have the nature of *ius cogens* (O'Byrne 2011, 508).

Nonetheless, sexual violence in armed conflicts continues to be one of the most pressing problems at an international level, so that even the Security Council has repeated its deep concern about the fact that 'despite its repeated condemnation of violence against women and children, including all forms of sexual violence in situations of armed conflict, and despite its appeals addressed to all parties in armed conflicts to immediately put an end to these acts, they continue occurring and, in some situations, have become systematic and generalised' (Resolution 1960 [2010]). Indeed, one could conclude from the analysis conducted until now that the legal framework in place in international law has several shortcomings and limitations that mean that a sufficient and adequate response and protection are not provided for sexual violence in armed conflicts.

Thus, we have set out the questions that arise from the writing of the Geneva Conventions and how, in order to overcome them, these instruments have been subjected to a comprehensive and evolving interpretation and application, aimed at ensuring the complete protection of all people who are victims of sexual violence in the setting of armed conflict. For this reason, a modification of these Conventions would be highly advisable to ensure their greater effectiveness, by clearly introducing a gender perspective and codifying the changes enacted by customary and conventional procedures, including crimes of sexual violence within serious violations, an option that has not been possible to date.

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[26]. Thus in Resolution 1325, para. 9, the Security Council asked all parties in armed conflict to comply with and fully respect the international law applicable to rights protecting women and children, especially civilians, referring in particular 'to obligations in force due to the 1949 Geneva Conventions and their Additional Protocols of 1977, the 1951 Refugee Convention and its 1967 Protocol, the Convention to Eliminate all Forms of Discrimination against Women of 1979 and its and its Optional Protocol adopted in 1999 and the UN Convention on the Rights of the Child of 1989 and its two Optional Protocols of 25 May 2000, and to bear in mind the relevant provisions of the International Criminal Court's Rome Statute'. Oddly, Resolution 1820 is less explicit and systematic, although it also directly and indirectly refers to all these legal instruments and to the ensuing obligations of the states, although fundamentally from the perspective of their 'obligation to protect'.

We must also remember the limitations of time and space for the application of provisions on sexual crimes contained in the charters and regulations of the ad hoc international criminal tribunals and mixed tribunals, and even the disparities between them, in so far as which of these crimes are considered war crimes. With respect to the provisions of the Rome Statute that detail sex crimes, which are an essential support for international protection and sanction, we cannot set aside the limitations that derive from the conditions for exercising Court jurisdiction.

All of this leads us to suggest that this is an opportune moment to adopt a conventional instrument that specifically considers the treatment of sex crimes committed in armed conflicts. This instrument would join the various protective measures provided through human rights, international humanitarian law, international criminal law and criminal and judicial cooperation, as well as preventive, sanctioning and reparative measures[27].

Starting with the title of the new instrument, its purpose should be the prevention, sanctioning and reparation of sexual crimes in armed conflicts, considering from a gender perspective the protection of the dignity, physical integrity and freedom of all people likely to be victims of such violence (thus including men and boys), but also considering specific protective measures for women and girls and for specific situations (refugees and the internally displaced).

From a substantive viewpoint, starting from a concept of sexual violence[28], this instrument should contain a definition and characterisation of international sex crimes[29], taking the provisions of the Rome Statute as reference with regard to crimes against humanity, crimes of war and genocide. In this regard, it seems necessary to ensure uniform contents for sexual crimes, regardless of whether they are classified as crimes against humanity or war crimes, depending on the context in which they are committed. For the latter, although as mentioned it would be best to reproduce the contents of art. 8, 2, b), xxii and d), VI of the ICC Statute, it is worth insisting that they must always be included as serious violations of the Geneva Conventions and a serious violation of

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27. A particularly useful instrument to this end is the Protocol to Prevent and Suppress Sexual Violence against Women and Children in the Pact on Security, Stability and Development in the Great Lakes Region (view *supra*), which can be used as reference on some issues.

28. See on the definition of sexual violence from art. 5, p. 1 of this Protocol, which includes 'any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law, including, but not limited to: a. Rape; b. Sexual assault; c. Grievous bodily harm; d. Assault or mutilation of female reproductive organs; e. Sexual slavery; f. Enforced prostitution; g. Forced pregnancy; h. Enforced sterilization; i. Harmful practices, inclusive of all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and children, such as their right to life, health, dignity, education and physical integrity, as defined in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; j. Sexual exploitation or the coercion of women and children to perform domestic chores or to provide sexual comfort; k. Trafficking in, and smuggling of, women and children for sexual slavery or exploitation; l. Enslavement by the exercise of any or all of the powers attaching to the right of ownership over women and includes the exercise of such power in the course of trafficking in women and children; m. Forced abortions or forced pregnancies of women and girl children arising from the unlawful confinement of a woman or girl child forcibly made pregnant, with the intent of affecting the composition of the identity of any population or carrying out other grave violations of international law, and as a syndrome of physical, social, and psychological humiliation, pain and suffering and subjugation of women and girls; n. Infection of women and children with sexually transmitted diseases, including HIV/AIDS; and o. Any other act or form of sexual violence of comparable gravity'.

29. For example, in the style of art. 4 of the Protocol entitled 'Categories and Constituent Elements of Sexual Violence Crimes'.

art. 3 common and Additional Protocol II, guaranteeing their sanctioning in all types of armed conflicts.

As happens in international criminal law treaties, the States party would have to take on the obligation of adding such crimes to their domestic laws and ensuring their sanction, eliminating any possible legal and procedural obstacles and specifically excluding them from the scope of application of post-conflict amnesty laws.

In light of the gravity of sexual crimes committed in armed conflicts and for the sake of the effectiveness of the conventional instrument that regulates them, it seems logical to think that this penalisation would be guaranteed by a principle of universal compulsory jurisdiction, as well as through the establishment of international legal cooperation mechanisms aimed at guaranteeing that police and legal investigations are performed, and that the people responsible for such crimes are apprehended. These measures should be employed domestically to recognise the guarantees and particular procedural measures to be born in mind in legal processes in which sex crimes are heard.

In addition to sanctioning provisions, this treaty should include, as mentioned, mechanisms and measures aimed foremost at preventing sexual violence, incorporating the obligation of member states to adopt measures to ensure their compliance. These measures could include the training of state security forces and armies, medical personnel and social workers, as well as the adoption of concrete measures to protect the most vulnerable groups, such as women and minors. Secondly, mechanisms would also be needed to monitor compliance with this treaty, not only by the state, but also by all types of armed groups, regardless of their nature, that participate in armed conflicts. It would also be necessary to establish victim reparation mechanisms, which expressly include the obligation for the perpetrators of these crimes to make reparations and for the States party to adopt concrete measures aimed at providing social and legal assistance, medical treatment and to promote the rehabilitation and social reintegration of victims.

Finally, it would also be useful to accompany this instrument with model legislation aimed at ensuring the execution of the treaty in domestic law. In this sense, it is clear that what is most important is the effective implementation of an instrument that is particularly crucial for filling in the gaps and shortcomings in the current regulatory framework existing for sexual crimes during armed conflict.

3. HOW SEXUAL VIOLENCE IS HANDLED IN INTERNATIONAL HUMANITARIAN LAW: DIFFICULTIES IN OBTAINING AN ALL-INCLUSIVE FOCUS

3

> 'It has become more dangerous to be a women fetching water or collecting firewood than a fighter on the frontline.'
>
> *Margot Wallstrom, First Special Representative to the United Nations Secretary-General on sexual violence in conflicts (2012)*

As set out in the introduction, the construction of the regulatory legal framework for sexual crimes was handled in the preceding title, from its origins to its present configuration in the case law of judicial bodies in the international criminal justice system.

After delimiting the regulatory framework, we shall now examine how sexual violence has been handled in a broad sense in international humanitarian law. This is because, as stated, armed conflicts and sexual violence are the two sides of a single reality. Our intention is to prove that, despite progress recorded and the triangular convergence or cross-fertilisation between IHL and other regulatory groups, the response provided by international law to this matter is overall manifestly improvable. In our judgment, it suffers from three shortcomings or recurrent failures that make it impossible to achieve a sharp, all-inclusive focus. These three deficiencies are:

1. The absence of a gender perspective

2. The two-fold dimension (individual-collective and public-private) of legally-protected interests in sexual crimes

3. The chain of technical-procedural obstacles related to the investigation and sanction of sexual crimes

3.1. THE ABSENCE OF A GENDER PERSPECTIVE

The main weakness from which international humanitarian law has historically suffered when dealing with the way in which sexual violence is treated is, in our opinion, the lack of a gender perspective. Indeed, in the different phases that have taken place throughout the evolution of international society, both war and *ius in bello* itself have been markedly patriarchal and androcentric phenomena, in which man has held the leading role and women a subordinate one, almost as a mere extra. To this starting deficiency must be added the inability of doctrine and legislators to initially differentiate between 'sex' and 'gender', and subsequently to assign legal consequences to this distinction.

It was not until the nineties that a turning point took place. In the heat of the late incorporation of feminist theories to international law (Orford 2002, 296), the need was outlined to include gender perspective in the political-legislative treatment of sexual crimes, although this inclusion incited at least two structural objections.

Firstly, neither prohibition nor persecution of the alleged guilty parties manage to put an end to discrimination or sexual violence, as it is well known that repressive criminal measures in and of themselves are not enough to halt a multi-faceted and deeply-rooted phenomenon.

Secondly, the persecution of sexual crimes in the current international criminal justice system causes an unwanted collateral effect: as they are limited to purging individual criminal responsibility, state responsibility can be lessened, thus contributing to strengthening, instead of opposing, the gender inequalities existing in the majority of domestic ordinances. In other words, the International Criminal Tribunal for Rwanda has been able to process the main parties responsible for the Hutu power regime, but without questioning the unequal gender-based power relationships or the elements that favour sexual violence present in the frustrated Rwandan state. In the best of cases, the effect of the condemnatory sentences is extremely limited, given that a guilty verdict does not help per se in ending sexual violence, thus running the risk that in the end international criminal law only upholds an international system that is state-based and chauvinist (Buss 2011, 416).

Thus, the full inclusion of gender perspective must continue to be demanded, both in the elaboration of international rules and in their application (Rodríguez Manzano 2001, 250). This is not only about the fact that the majority of legislators are men, but rather that the lack of feminine imprints on the characterisation of sexual crimes and how they are handled by international humanitarian law produces specific negative effects, to such a degree that there could be a wide variety of potentially indictable conducts that women perceive as violent, although they have not been legally characterised as such because they have been codified by men.

Today, the gender perspective in IHL is therefore even more necessary as sexual crimes not only continue to exist, but have become worse on two counts. On the one hand, as we shall set out below, their frequency and scope have increased to the extent of becom-

ing 'weapons of war'. And on the other, as we have seen, the catalogue of potential victims has expanded and men have now been added to the group of women and minors, who are the passive subjects *par excellence*.

In the words of the present UN Secretary-General, Ban Ki Moon:

> *'Sexual violence, and the long shadow of terror and trauma it projects, affects a disproportionate number of women and girl children. However, recent information has made it clear that the situation of men who are victims and the suffering of children born out of rape during wartime require a deeper examination.'*[30]

The proliferation of sex crimes in new armed conflicts, and especially in those known as 'asymmetrical wars', their criminalisation through international rules has accelerated, although this has not gone hand-in-hand with the complete assumption of gender perspective for the purpose of their repression[31]. Indeed, when examining the constitutive instruments of the main tribunals that make up the international criminal justice system, the scarce or total lack of a gender perspective is revealed in four indicators or key areas:

- Definition of the term 'gender' for the purposes of its use and application by the judicial body
- Institutional or structural dimension (presence of the gender perspective in the internal composition and structure of the judicial body)
- Legal substantive dimension (presence of the gender perspective in the culture of each of the bodies that make up the international criminal justice system: their treaties, elements of crimes, rules of procedure and evidence, etc.)
- Procedural dimension (presence of the gender perspective in the criminal process and proceedings)

For all that, a clear and positive historical evolution has taken place from the silence during what we have called the initial phase of the international criminal justice system

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30. S/20/12/33. Report by the UN Secretary-General 'Sexual Violence related to Conflicts', 13 January 2012. Available in Spanish at http://www.un.org/spanish/docs/report12/repl12.htm, p 3.

31. Along this line, the reflections of Ban Ki Moon in this report: '[...] Last year several new armed conflicts took place, which were added to other existing ones, in which sexual violence was spread and, in some cases, may have been systematically aimed at civilians by armed forces and groups in order to punish, humiliate and destroy. Mass rapes of women and girl were also recorded. The generalised violation of public order, the absence of justice, the upholding of conflicts, deeply-rooted discriminatory attitudes and practices and the predominance of the culture of impunity in these situations let these crimes be committed, which not only had atrocious consequences for the victims, but also entailed the destruction of the social fabric as a whole [...]. In all these situations, the cases of sexual violence related to conflicts generally continue without being condemned due to several factors. These include social stigma, fear of retaliation, insecurity, lack of available response services and the perception that it is useless to speak out against them due to the weakness of the administration of justice, apathy and political pressure. In those cases in which the survivors publicise their cases, they often do so to receive medical care and psychosocial support and with the expectation of justice at some point in the future. Furthermore, cultural practices and customs tend to prevail over written laws in some settings, in which the burden of responsibility and proof rest with the victims. The justice system rarely imposes reparations or compensations in these cases. Moreover, given the slow pace of the majority of investigations in sexual violence cases, either due to the lack of willingness or ability, of specialised knowledge or resources, the reality is that the majority of those who perpetrate sexual violence remain in freedom and unpunished'.

to the explicit gender mandate set out in the International Criminal Court's Rome Statute.

3.1.1. IN THE INITIAL PHASE OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

As was foreseeable, bearing in mind the context and creation time of the *International Criminal Tribunals of Nuremberg and Tokyo*, although women were very present in the armed conflict, their influence in managing the post-conflict was much less. In fact, none of the thirty brief articles that made up the London Agreement of 8 August 1945, nor the sixteen precepts of the 'Public Announcement of the Creation of an International Military Tribunal for the Far East' referred in any way to the concept of sex or gender.

In both cases male pre-eminence was overwhelming, as the judges and the primary accused parties were all men. However, the role played by women in both tribunals was recently reviewed to highlight that they were not limited to performing the familiar jobs of secretaries, journalists or interpreters, but also exercised other functions[32]. This was the case of Cecelia Goezt, who was part of the team of North American prosecutors in Nuremberg[33]; and of other female lawyers who actively participated in the later processes promoted by the allies in national tribunals. Only one woman was convicted, a German scientist found guilty of committing crimes against humanity[34].

With regard to the gender presence in substantive and procedural issues, sexual crimes were not included in the jurisdiction of the international military tribunals. Despite this omission, art. II.1. c) of Control Council Law no. 10 of 20 December 1945, which governed the lesser trials in domestic jurisdictions, did expressly include rape among the crimes against humanity. As was made clear in the previous section, the lack of express characterisation did not prevent people from issuing pronouncements on sexual crimes and, concretely, about mass rapes and other sexual aggression, especially concerning the Nanking massacre.

The existence of significant limitations in the criminalisation and treatment of sexual crimes by the two international military criminal tribunals can be deduced from the above. However, it would be a mistake to underestimate the timid advances made with respect to this matter. The passage of time has proven that the majority of the shortcomings detected in 1945, like the aforesaid lack of typifying sexual crimes, their lesser gravity and the insufficient implication of judges and prosecutors in persecuting them,

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32. On this issue, see Amann, Diane M, 'Portraits of Women at Nuremberg', UC Davis Legal Studies Research Paper Series, no. 225, August 2010, Science Research Network Electronic Paper Collection. Available at http://ssrn.com/abstract=1654732.

33. With respect to the role played by women in general and by Goezt in particular, Amann, Diane M. 2011, 'Cecelia Goetz, Woman at Nuremberg', *International Criminal Law Review* 11: 607-620.

34. The person in question was Herta Oberheuser, accused of performing aberrant experiments at the Ravensbrück Camp, who was sentenced to 20 years in prison for crimes of war and crimes against humanity. She was released in 1952 and tried to start practicing medicine again, but could not do so due to protests

continue to endure today, and continue hindering the tasks of the *ad hoc* tribunals and the International Criminal Court itself, even a half century later. This can be seen from the separate and dissenting opinion of female Jude Odio Benito on the Lubanga case, which will be analysed later.

After this initial state, the gender perspective started to be addressed much more clearly in the International Criminal Tribunals for the former Yugoslavia and Rwanda. The Resolutions of the UN Security Council through which both tribunals were created did not mention or define the terms 'gender' or 'sex', but they did take the gender perspective into consideration in the remaining areas and indicators set out.

Thus, with regard to the institutional or structural dimension, although neither precept imposed the obligation of equality, the female presence has been constant and well-documented, as attested by the work developed in the Public Prosecutor's Office first by L. Harbour and later by C. del Ponte, and by the gender advisory services provided by P. Viseur Selles, and the magistrates' personal involvement in the fight against sexual crimes and the involvement of Tribunal presidents N. Pillay, G. Kirk McDonald y K. Rachid and, especially, P. Wald and E. Odio Benito.

The imprint of this active magistrate could be felt precisely in the procedural dimension, concretely in two of the Rules of Procedure and Evidence on the support that the Victims and Witnesses Unit should provide in the case of rapes[35], and the specificities of evidence in sex crimes. Previously, the Charter of both Tribunals had explicitly recognised rape as a crime against humanity for the first time (art. 5.g of the ICTY and 3.g and 4.e of the ICTR), laying the foundations for the development of abundant case law on sexual crimes (Askin 2005, 1007) whose main milestones – as we will have the chance to verify– were the sentences in the aforementioned Akayesu and Tadic cases.

3.1.2. THE GENDER MANDATE IN THE INTERNATIONAL CRIMINAL COURT AND ITS APPLICATION BY THE PUBLIC PROSECUTOR'S OFFICE

The adoption of the International Criminal Court's Rome Statute in 1998 represented a qualitative leap toward the full incorporation of gender perspective in the international criminal justice system. Indeed, compared to the previous silence, article 7.3 of the RS offers a controversial definition of the term 'gender':

> *'For the purposes of the present Statute, "gender" shall be understood as referring to the two sexes, male and female, in the context of society. The term "gender" shall not have any further meaning than the above."*

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from camp survivors. She died in 1978. On this case, see http://www.intlawgrrls.com/search/label/Women%20at%20Nuremberg.

35. They are Rules 34 and 96, whose literal texts appear in Rules 70 and 71 of the Rome Statute.

This text was the product of the consensus required to defeat the opposition, which was made up of extremely disparate delegations and groups, ranging from the Holy See to feminists and radical Islamists. Their objections were not due to the inclusion of the gender perspective, but to the single mention of this term, to the degree that all of them refused to recognise the freedom of sexual orientation and the different roles, legal statute and power that men and women have (Zorrilla 2005, 31)[36].

The final definition has been subjected to acerbic criticisms as, besides differing from the content of other international instruments like the Beijing Declaration[37], it is so ambiguous that it does not reflect the problem of the social construction of gender roles and the hierarchy that is coupled to it. A further criticism is that it does not prohibit sexual discrimination, although it is precisely this lack of precision that let the ICC carry out the crucial task of progressive development and the codification of the gender-international law binomial (Oosterveld 2005, 70).

Yet, aside from the inclusion of specific criminal types related to sexual crimes in compliance with the principle of international criminal legality, the main identifying trait of the ICC is that it contains a 'gender mandate' (Mouthaan 2011, 785), which is present in the Rome Statute in the four dimensions previously used as indicators.

With regard to the institutional dimension, which is connected to the composition and administration of the ICC, sex and gender are interwoven. Thus, attending to the principle of non-discrimination due to sex, article 36 8.a iii) of the RS imposes the obligation of a balanced representation of male and female magistrates.

In accordance with art. 44.2., the same criterion must be taken into account by the public prosecutor and secretary for the election of all other functionaries. In our understanding, this mandate should not be read as a question of quotas or maths, but as the fruit of learnings extracted from the *ad hoc* tribunals, whose experience proves the special sensitivity and involvement shown by female personnel in sex crime cases. The ICC's practice corroborates this assertion. This is deduced from the aforesaid separate and dissenting opinion of E. Odio Benito in the Lubanga case, from the decision of S. Steiner of 13 May 2009 on victims' rights in the Katanga case, and from the election of a woman, F. Bensouda, to run the Public Prosecutor's Office since June 2012, when she replaced the first prosecutor, L. Moreno Ocampo.

However, the Rome Statute does seem to meander along with no solution of continuity from sex to gender in three articles. Firstly, in 36.8.b), it sets out that there must be legislators specialising in violence against women among the magistrates, who can clearly be men. Secondly, in article 42.9, when it considers the appointment by the

36. Zorilla's aim in restricting the term 'gender' to the Charter text had two objectives. On the one hand, to prevent possible abuses, highlighting its neutrality, and, on the other, to pacify those countries that could feel threatened by the concept itself, due to considering it an open door to the acceptance of homosexuality. Maider Zorilla, 'La Corte Penal Internacional ante el crimen de violencia sexual' (*Cuadernos Deusto de Derechos Humanos* no. 34, Human Rights Institute, University of Deusto, Bilbao, 2005), 1-96.

37. The Beijing Declaration, approved in the 16th plenary session, held on 15 September 1995, during the 4th World Conference on Women, proclaims the need for all governments to incorporate gender mainstreaming in their policies and public programmes (points 14 and 38), as well as gender equality and the advancement of the role of women (point 24).

prosecutor of legal advisors who specialise in 'sexual violence, violence due to gender and violence against children', an appointment formalised on 26 November 2008 in the person of Professor C. McKinnon[38]. And, finally, in 43.6, by specifying that the Victims and Witnesses Unit 'shall have specialised personnel to assist victims of traumas, including those related to sexual violence offences'.

According to statistics provided by the NGO, Women's Initiatives for Gender Justice, the ICC has achieved a balanced composition of its staff. In fact, in absolute terms, out of the 697 functionaries, 53% are men and 47% are women. These distances are shortened in the Public Prosecutor's Office (51% men and 49% women) and in 2012 they invested in jurisdictional sections for the second consecutive year: of the 19 magistrates at present, 11 are women (58%) and 8 are men (42%), which means an extremely notable female representation compared to the majority of courts[39]. By way of example, recall that out of the 15 judges currently sitting on the International Court of Justice, only two are women, and that the female ratio in the Spanish Constitutional Court is very similar: two out of 12 magistrates[40].

Consequently, the presence of women in international tribunals continues to be a matter both of quantity and of quality. Of quantity, in the sense that women must be suitably represented in numerical terms, in critical mass, which still doesn't happen, and of quality, because as correctly pointed out by former ICTY judge P. Wald (Wald 2011,403):

> '*Women judges can and should be both women and judges. International criminal law is a field in which women stand front and centre in multiple ways. Not only are they the principal victims of the displacements inevitably associated with combat and military campaigns, but they also suffer most often from crimes, including rape, sex crimes, and forced labour, that enemy forces perpetrate against hapless civilians. Women judges may well have a special sensitivity to the degradation suffered by victims of such crimes. They should not be hesitant to express their unique perceptions of such harms when relevant. Nor should they hesitate to counteract the imperviousness of some men – even some judges – to the more subtle facets of gender-based assaults*'.

Yet what makes the ICC different from all other tribunals is not so much the female presence, as the explicit and important gender mandate that art. 54.1.b) of the RS imposes for the Public Prosecutor's Office, requiring that it adopts the measures needed to ensure the efficacy of the investigation and prosecution of all crimes in the Court's jurisdiction, and in particular 'crimes of sexual violence, violence for gender-based reasons and violence against children'.

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38. Professor Catherine Mckinnon has advised the ICC both on the development of a general policy on sex crimes and on the resolution of concrete cases such as those of Lubanga, Bemba and the events of the situation in Darfur.
39. 'Gender 2011 Report Card of the International Criminal Court'. The Netherlands, 2011. Available at http://www.iccwomen.org/publications/index.php.
40. Xue Hanqin, from China and Joan E. Donoghue, from the United States. With regard to the Spanish Constitutional Court, at present the only two female magistrates are Adela Asúa Batarrita and Encarnación Roca Trías, both considered supporters of the progressive sector. However, since the CC started to operate in 1980, only five women have been elected.

As things stand, the question that needs to be asked is whether the ICC's Public Prosecutor's Office has developed a special strategy to maximise the prosecution of sex crimes in virtue of this gender mandate. With the exception made in the express declaration to this end formulated in the Fourth Chautauqua Declaration, a declarative document signed on 31 August 2010 in which 10 prosecutors from international criminal tribunals over the years, including at the ICC, committed to duly investigate and prosecute gender crimes, the answer is no. What the Public Prosecutor's Office has put into practice is a general strategy, via a number of main policy lines, which have a particular impact on this area. Specifically, of the five main policy lines or strategic decisions implemented by the ICC's Public Prosecutor's Office in the 2009-2012 period, four redounded against the punishment of sex crimes and only one of them worked in its favour.

The first of the policy lines followed by the Public Prosecutor's Office in the past four years was the selection of 'sample' cases or focused trials, in order to prevent macroprocesses and stage short trials but with a great impact, selected due to the gravity of the charges and the representativeness of the victimisers, in order to maximise the dissuasive effect. Nonetheless, in our opinion this strategy can involve the Public Prosecutor's Office tacitly abandoning its persecution of sexual crimes, as in cases of genocide and other mass crimes, in which deaths number in the thousands, they could argue that the investigation of cases of rape would have secondary importance, both in qualitative and quantitative terms.

As pointed out by De Guzman ((De Guzman 2011, 519), this approach would be simplistic and wrong for two reasons. On the one hand, because it doesn't take into account the irreparable damage to society done by sex crimes, and on the other, because it is only by the recognition of victims, obtained after persecuting and indicting the guilty parties, that true restorative justice can be obtained.

In fact, this option can produce the opposite effect to that desired. If the ICC's aim, by selecting particularly serious cases in which those with the greatest responsibility are processed, is that political and military leaders receive the message that if they collaborate with or do not prevent the commission of international crimes they will end up sitting in the dock, it is inconceivable that they would exclude sexual crimes from their list, as happened in the Lubanga case, or that they would be included but in a very limited manner, as happened in the Katanga and Bemba cases. Paradoxically, what is conveyed is exactly the opposite of what is desired. It is likely that it helps confirm that, pursuant to art. 24 of the Rome Statute, the official post held does not matter and does not provide any shield, so that even heads of state can be tried for the most serious international crimes. However, this is then done with the understanding that – incomprehensibly– sexual crimes are not included, and seem to be granted an extremely secondary importance.

The Public Prosecutor's Office's second strategic decision that could end up having a negative impact on the persecution of sex crimes is that of making use of the power of initiating *motu proprio* investigations, that it is attributed in art. 15.1 of the RS with extreme caution, after a preliminary and very detailed analysis and only in non-

problematic situations, in which their intervention is not questioned. In the 10 years since the ICC started operating, the Public Prosecutor's Office's has not given much attention to sexual crimes, perhaps influenced by the difficulty in accessing information and evidence and due to the primacy of domestic jurisdictions, in application of the principle of subsidiarity. Thus, in the only two situations investigated to date at the prosecutor's initiative, those of Kenya and the Ivory Coast, only the first has open cases on sex crimes. In turn, charges were only presented in one of the two cases opened (Muthaura *et al.*Case)[41], while they opted to dismiss the second (Ruto Case *et al.*)[42]. Furthermore, in January 2012 Pre-Trial Chamber II agreed to not uphold the charges against one of the three accused due to lack of evidence, although it did ratify the charges against the other two, who it considered indirect co-perpetrators of the commission of crimes against humanity, including rape.

The third policy line followed by the Public Prosecutor's Office has consisted of 'positive complementarity', which has led it to turn to preliminary examinations as a mechanism to activate domestic jurisdictions so that they assume the responsibility for preventing and punishing the crimes committed in their respective territories. Nonetheless, the ICC prosecutor's decision to try only those with the greatest responsibility for the most serious crimes, and to urge domestic courts to punish minor criminals, in application of complementarity, is untenable in the case of sex crimes for two reasons. Firstly, because if the ICC has difficulties in investigating and obtaining evidence, it cannot help national tribunals which would probably run up against even greater problems, and secondly, because if the ICC itself does not treat sex crimes as serious crimes, it cannot require internal laws to do so. In some of these states, women continue to hold positions of legal inferiority and the criminal rules that sanction this type of violence are frequently much less clear and less categorical than, for example, those related to offenses against physical integrity (O'Conell 2010, 76).

The fourth strategic decision adopted by the Public Prosecutor's Office with negative repercussions on penalising sexual crimes was to establish extremely small investigation teams. Until 2009, they acted by following what is known as a 'sequential focus', consisting of concentrating all technical and human resources on a single case or on one of the parties to the conflict to then entirely transfer them to the next case or party, after the on-spot investigation concluded.

Furthermore, in order to reduce costs, it has assiduously turned to external sources and agents, not always professionals or with scant experience, to collect information and evidence. This practice has turned out to be particularly harmful in sex crimes, given that the lack of solidity of the accusations and the weakness of evidence has translated into the Public Prosecutor's Office inability to ratify charges in the evidentiary proceedings, with the consequent release of the accused parties (Mbarushimana Case[43]), as well

41. CPO, TC II, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on the confirmation of charges (/IT 01/09-02/11), 5 October 2011.
42. CPO, TC II, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the confirmation of charges (IT 01/09-01/11), 8 September 2011.
43. CPO, TC I, Prosecutor v. Callixte Mbarushimana, Decision on the confirmation of charges (/IT 01/04-01/10), 16 December 2011, para. 339-340: 'Accordingly, the Majority of the Chamber, the Presiding Judge dissenting, finds that the evidence submitted by the Prosecution is not sufficient to establish substantial

as constant dismissal of the Public Prosecutor's Office's investigative work by the Pre-Trial Chambers, either due to not having obtained sufficient proof of the link between the crime and the accused (Katanga Case[44]), or for upholding an interpretation contrary to international case law (Bemba Case[45]). Whatever the case may be, it is regrettable that a third of the total accusations for crimes of this nature could not be confirmed or prosecuted, which explains the new prosecutor F. Bensouda's requirements to proceed to an immediate review of this strategic decision.

In contrast to the above, when handling the resolution of the dilemma 'peace versus justice', the ICC's Public Prosecutor's Office has leaned in favour of the second, confirming that upholding peace and international security is not his direct incumbency, but that of other institutions, fundamentally of the United Nations Security Council. A priori, this strategic decision, based on a restrictive application of the ambivalent concept of the 'interest of justice' from art. 53.2.c) of the Rome Statute, would favour the prosecution of sex crimes, given that this would entail departing from past precedents in which the persecution of these crimes was dependent on or subordinate to the negotiations between the parties or the signing of peace agreements. However, it would have a minor scope in all cases, given that it does not mean that the Public Prosecutor's Office had automatically assumed the obligation to persecute and the pertinent presentation of charges in each and every one of the cases in which there are rational indications of the commission of sexual crimes, as demonstrated in the Kony[46] and Gaddafi[47] cases.

In addition to the institutional or structural dimension, the innovative gender mandate contained in the RS is also made clear in legal and procedural dimensions. With respect

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grounds to believe that the Suspect encouraged the troops' morale through his press releases and radio messages, and, therefore, he could have not provided through his radio communications and press releases a significant contribution to the commission of crimes by the FDLR within the meaning of article 25(3)(d) of the Statute. 340. In view of the foregoing, the Majority finds that there are not substantial grounds to believe that the Suspect is individually responsible under article 25(3) (d) of the Statute for the crimes committed by the FDLR. FOR THESE REASONS, the Chamber, by majority, the Presiding Judge, Sanji M. Monageng, dissenting, hereby DECLINES to confirm the charges against Mr Callixte Mbarushimana; DECLARES that the Warrant of Arrest against Mr Callixte Mbarushimana ceases to have effect in its entirety; DECIDES that Mr Callixte Mbarushimana shall be released from the custody of the Court immediately upon the completion of the necessary modalities'.

44. ICC, PTC , Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, (ICC-01/04-01/07-474), 13 May 2008, para. 124-145.

45. CPO, TC II, Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges (IT 01/05-01/08), 15 June 2009, para. 299: 'The Chamber observes that indeed the Prosecutor failed to provide the factual basis in the Amended DCC underpinning the charge of torture as a war crime. Even at the Hearing, the Prosecutor only recalled a selection of factual circumstances pertaining to acts of rape in order to substantiate the count of torture as a war crime. However, he did not elaborate on the specific intent of alleged MLC soldiers which would have clearly characterised the alleged acts as acts of torture as a war crime'.

46. ICC, PTC II, Prosecutor v. Joseph Kony, Warrant of Arrest for Joseph Kony (ICC-02/04-01/05-53), 27 September 2005.

47. ICC, PTC I, Detention order for Saif Al-Islam Qadhafi (ICC-01/11-01/22), 27 June 2011 (official Court translation): Statement 12: 'Considering that there is therefore reasonable cause to believe that Saif Al-Islam Qadhafi is criminally responsible as an indirect co-author, pursuant to section a) of paragraph 3 of article 25 of the Statute, for these crimes committed by the security forces under his command in different locations in Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011:
i. murder as crime against humanity, in the sense of section a) of paragraph 1 of article 7 of the Statute; and
ii. oppression as crime against humanity, in the sense of section h) of paragraph 1 of article 7 of the Statute'.

to the first, we must recall that art. 21.3 of the RS sets out that the ICC cannot make any distinction based on gender when applying and interpreting the law.

With respect to the procedural dimension, although it will be the object of a more detailed study in the title devoted to the matter of technical-procedural difficulties, it is worth advancing that it has been defined in a series of Rules of Procedure and Evidence (Rules 17 to 19; Rule 86; Rule 90; Rule 112), which implement that which is set out in art. 68 on the protection of victims and witnesses in sexual or gender crimes. It is not only about all victims of such crimes requiring singular protection regardless of their sex, but also about becoming aware that victimisation is suffered differently by men and women.

What has been analysed until now lets us formulate three reflections on the consequences that the absence of gender perspective in handling sex crimes in international humanitarian law has also involved and the need for it to be included.

Firstly, after overcoming the confusion between sex and gender, we believe that when analysing sex crimes, it is plausible to bear in mind the different way in which they are, first, committed and experienced by men and women and, later, investigated and prosecuted by prosecutors and magistrates (men and women). In other words, the sex of victims and victimisers and those prosecuting the cases is important, because gender relationships, which are also present in law are, in this case, much more evident and can lead to a different approach, sensitivity and treatment of sexual crimes. In this same order of things, it seems reasonable to continue strengthening the presence of women in the international criminal justice system to improve its functioning, with the understanding that a gender perspective will provide special sensitivity and ability to understand all sides of the matter, although knowledge and authority do not depend on sex[48].

Secondly, we should add that our assertion of the need to include the gender perspective in the treatment of sexual crimes is not done from extremist feminist postulates, based on assuming the dogma of absolute male domination and female subordination, but is instead due to being convinced of the opportune nature and positive effects that, in accordance with praxis and case law, go hand-in-hand (Halley 2008, 54). This is despite the fact that at times the inclusion of gender perspective can cause undesired effects, for example, by classifying certain sexual aggression suffered by men not as rape but as torture due to the simple fact of the victim's sex[49].

Lastly, but no less important, it is worth pondering the importance of the inclusion of the gender perspective in its fair terms, that is, without advocating the creation of a type of 'ghetto' (Sadat 2011, 657), but aware that gender is one of the determining variables, or perhaps *the* determining variable, in the functioning of law, including of course international law. Law, whether domestic or international, is neither neuter not nuetral: it both has gender and, at the same time, creates gender.

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[48]. Along this same line, Grossman, Nienke. 2011 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts', *International Criminal Law Review* 3: 643-653.

3.2. THE TWO-FOLD DIMENSION (INDIVIDUAL-COLLECTIVE & PRIVATE-PUBLIC) OF LEGALLY-PROTECTED INTERESTS IN SEXUAL CRIMES

The second difficulty that has traditionally blocked the effective and holistic treatment of sex crimes in international humanitarian law is the complex nature of the legally-protected interests that it aims to protect.

This complexity becomes clear in the change of model employed. Thus, it is possible to appreciate how in classic humanitarian law, from the Lieber Code to the 1949 Geneva Conventions, to 1899 and 1907 Hague Conventions, the characterisation of violence was exceedingly restrictive[50]. On the one hand, the criminal definitions started from an immovable stereotype, in which victims were always women and the aggressors were men, thus excluding any form of violence against the male sex. On the other, the legally and explicitly protected interest was honour or decency, but not so much that of the individual woman as the family honour, bypassing the serious physical and emotional damages suffered by victims, which undervalued the effects of the crime and made their persecution difficult. The allusions to honour in international instruments such as art. 27 d) of the 1949 Geneva Convention on civilian protection during wartime substantiated the assumption by IHL of an archaic concept of femininity, which was identified with morality and purity.

This conception gradually started to change, and in the Additional Protocols II of 1977 to the 1949 Geneva Conventions, rape was separated from pillage and booties of war and, although the classification as an offence against decency was maintained, it ranked equally with assaults on personal dignity and humiliating and degrading treatment[51].

Yet, the change of paradigm would not be completed until the Statutes of the international criminal tribunals were adopted and their case law implementation, thanks to the influence of rules on the protection of human rights, when the patriarchal and chauvinist perspective was abandoned for the sake of a new criminalisation model, in which the interests to protect are people's dignity and freedom.

Indeed, the ICTY recognised that in the armed conflict in the former Yugoslavia rape was used as a 'weapon of war' in order to alter the population's ethnic composition, due to which sexual crimes transferred from the strictly private to enter the sphere of the

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49. On this issue, see Lewis, Dustin A. 2009, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings under International Law', *Wisconsin International Law Journal* 27:1-49.

50. See for example art. 37 and 44 of the 'Government Instructions for US Armies on the Battlefield', General Order no. 100 of 1863, better known as the Lieber Code. Its art. 37 textually reads that: *'The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished'*. Available at http://www.civilwarhome.com/liebercode.htm.

51. Art. 75.2 of Additional Protocol I to the 1949 Geneva Conventions: 'The acts below are and shall be prohibited at all times and all places, whether perpetrated by civil or military agents: b) assaults against personal dignity, especially humiliating and degrading treatment, enforced prostitution and any type of indecent assault'. Even more convincing is the proscription set out in article 4.2 e) of Additional Protocol II: 'Without prejudice to the general nature of preceding provisions, the following are and shall be prohibited at all times and places with respect to the people referred to in paragraph 1: e) assaults against the personal

state and of politics. Along this same line, in the Akayesu case sentence, the ICTY expressed this two-fold dimension –individual and collective– of rape with great clarity, by affirming that an assault against this same essence of dignity and physical integrity, can in parallel be used systematically to cause a devastating impact that, beyond individual victims, extends to the families and the general population[52].

As deduced from this jurisprudence, sexual crimes shall have the consideration of 'weapons of war' when they are used as part of a systematic political campaign, with precise military strategic objectives. Paradoxically, although advances in military technology let conventional and non-conventional weapons be employed that can be activated remotely, avoiding any contact between the parties, the increase in sexual violence in new armed conflicts points in exactly the opposite direction, as it involves proximity and forced intimacy between the attacker and the victim. We will return later to these particulars when dealing with the construction of a category just for crimes of sexual violence.

In this order of things, resorting to rape as a weapon of war seeks several goals. Starting from the study of the Yugoslavian conflict, Seifert (Seifert 1994, 60) set out a possible two-fold objective: reaffirming the masculinity of the perpetrators and insulting that of their opponents, by destroying their social and family structure.

Thus, on the one hand, the absolute submission of victims would be secured in the individual arena, defeating their personal and sexual autonomy. And, on the other, the collective dimension would be the means used by criminals to transfer the message to the rest of the society that they are the ones who hold the power and can destroy the social and family fabric of enemy groups by attacking their mainstay, as the raped women are responsible for caring for the children, in addition to being the guardians of tradition. In the words of the first United Nations Special Rapporteur on violence against women, R. Coomaraswamy:

> '*Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.*'[53]

Consequently, in addition to protecting private legal interests (i.e. life, physical and moral integrity, non-discrimination, equality, etc.) by typifying rape and other sexual abuses as international crimes, it also aims to preserve collective or public interests, which used to be related to the honour of men, the clan and the family, and today con-

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dignity, especially humiliating and degrading treatment, rape, enforced prostitution and any other type of indecent assault'.

52. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998 para. 495.

53. Report of the Special Rapporteur on violence against women, its causes and consequences. Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85 United Nations. February, 1996.

tinues presenting a community dimension, but in a broader sense, as the scope and gravity of sexual violence in armed conflicts have led to them being classified as a threat to international peace and security.

This is inferred from the United Nations programme Women, Peace and Security, started up by the Security Council starting in 2000. A decade later it has involved the approval of a series of resolutions that have already been analysed in this study, but at which we must pause once again to clarify several other considerations.

The first of these, Resolution 1325 (2000), was adopted by the Security Council a mere two months after a devastating report was presented on the UN's failure and inability to prevent genocide in Rwanda and to prevent the massacre in Srebrenica[54]. Three recommendations were formulated in this resolution. In general terms, it asked to increase female representation at all levels. More concretely, an increased presence of women was requested for the international peace and security agenda. And, thirdly, it required the parties to protect women and girl children in all armed conflicts from any form of violence, particularly gender-based violence, stressing the states' responsibility to fight against impunity and to prosecute crimes against humanity and war crimes, including sexual violence and other types against women and girls[55]. The theoretical strength of these measures was not accompanied by verification processes or sanctions in the event of noncompliance, which explains their scant level of implementation (Tryggestad 2009, 550).

The second significant one was Resolution 1820 (2008), which centred exclusively on sexual violence in armed conflicts, and was classified as a weapon of war employed to multiply damages and make enduring reconciliation and peace difficult. Its core centred on the obligation of protection. This obligation extends both to the parties at battle, which are required to put an end to its use and to quickly adopt measures to protect civilians, in particular women and girl children, and to organisations and associations within and outside the UN. To the degree that rape and other forms of sexual violence 'can' represent genocide, war crimes and crimes against humanity, the need is stressed for these acts to be excluded from amnesty provisions in peace processes, also urging the countries that participate in peacekeeping missions to increase the level of training of their contingents to be able to provide a suitable response to this particular form of violence[56].

The third, Resolution 1888 (2009), was adopted a year later[57], at the request of H. Clinton, US Secretary of State, coinciding with a dispiriting report on the monitoring of previously adopted measures. It contains a series of measures to strengthen the protection of women and children and to prevent sexual violence in armed conflicts. A note-

54. Known as the Brahimi Report, but whose official name is the Report of UN Peacekeeping Group, A/55/305-S/2000/809.
55. S/RES/1325 (2000), 31 October 2000. Available at http://www.un.org/womenwatch/ods/S-RES-1325(2000)-S.pdf.
56 S/RES/1820 (2008), 19 June 2008. Available at: http://www.humanas.org.co/archivos/R1820.pdf.
57 Report of the Secretary-General pursuant to Security Council Resolution 1820. Available at: http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/MYAI-7UD3DMfull_report.pdf/$File/full_report.pdf.

worthy measure is the appointment of a Special Representative to the Secretary-General who would lead the UN's actions on this matter, an appointment that was given to M. Wallstrom[58] in 2010. It also urged the States party to immediately prosecute those responsible for these acts and to ensure that the surviving victims of these acts were protected and duly compensated for their suffering, without distinction on grounds of sex[59].

The fourth of these myriad resolutions was Resolution 1889 (2009), which confirmed the parent Resolution 1325. It repeated the need to empower women and favour their participation in establishing peace and during post-conflict. It also requested the use of gender indicators and the appointment of advisors to protect women.

Finally, Resolution 1960 (2010) set out the implementation of all the previous ones by establishing monitoring, analysis and reporting provisions, as well as requesting the UN Secretary-General to include a list of the parties and perpetrators, with names and surnames, suspected of committing these crimes in its annual report.

In light of the above, one could conclude that the UN has managed to clearly identify the objectives and means necessary for its members to combat sexual violence, although the organisation itself is fully aware that it must keep working to bring together and coordinate the political will required to put them into practice.

3.3. THE CHAIN OF TECHNICAL-PROCEDURAL OBSTACLES RELATED TO THE INVESTIGATION AND SANCTION OF SEXUAL CRIMES

The third shortfall in the present treatment of sexual crimes is related to the procedural problems posed by their investigation and sanction. In practice, these obstacles have the same or even greater importance than the problems related to constructing a regulatory legal framework, and would let the notable disproportion be explained that exists between the number of sexual crimes committed in armed conflicts and the number of subsequent trials and convictions (Ambos 2012, 292).

In this sense, there are no complete updated statistics on the efficacy of the international criminal justice system in the repression and sanction of sex crimes, although published data offer a poor scorecard. Two examples suffice here:

Firstly, of the 161 cases tried by the ICTY through 2011, only 78 were accused of committing sexual crimes, and 28 of them have been convicted to date, fractionally above 17%.

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58. Margot Wallstrom, a Swedish politician with a long history of defending women's rights, took office, as the special representative to the UN Secretary-General for violence in conflicts on 2 February 2010. She set out five priorities to handle during her term of office, which included the fight against impunity and improving the response of the United Nations system to this problem. She played an important role in negotiations with armed groups in the Congo, which culminated in some of the suspects in committing sexual crimes being handed over to the ICC. She resigned from her post in April 2012 for personal reasons.

59. S/RES/1888 (2009), 30 September 2009. Available at http://www.ipu.org/splz-e/cuenca10/UN_1888.pdf.

Secondly, with respect to the ICC, we have already indicated that the figures are similar: in five of the seven situations currently under investigation, indications of the commission of sexual crimes have been detected, although there are only 12 accused. Furthermore, in two of the cases, the charges could not be confirmed due to lack of evidence and, to date, the only person convicted in the Lubanga case was not accused of rape or other sexual abuses.

This state of things can be partly justified by the fact that the international criminal justice system is extremely selective, to the degree that it has significant intrinsic limitations (*ratione materiae, temporis, personae*) heightened by socio-political and legal factors that sustain the idea that these types of crimes are more difficult to investigate and sanction than other international crimes.

With regard to socio-political factors, we shall focus on two of them to which we have already alluded, and which are also present in the domestic arena, but whose effects are magnified by the specificities of the international criminal justice system. We shall first refer to the masculine imprint that has traditionally characterised international law, whose regulatory structure has let sexual crimes be systematically ignored, as long as they didn't affect the dominant patriarchal state system or have men as victims. This was true until women were finally added to proceedings to adopt and apply international rules. The progressive change in mentality of the various legal operators (lawyers, judges, prosecutors, etc.) has been decisive in bringing an end to the stigmatisation and ostracism suffered by victims and to modernise the international legal framework.

The second socio-political factor would be the consideration of sexual violence as a private problem, which does not require state intervention, which would explain its invisibilisation and classification as 'the forgotten crime in International Law' (Chinkin 2009, 80). The beginning of the end of this invisibilisation started with the aforesaid change in paradigm that took place in the nineties, which led to trying to name the unnameable and give a legal slant to a problem that had been shirked until that time (Skjelsbaek 2010, 31).

In this order of things, a type of continuity can be detected in the logic of the invisibilisation and victimisation of women both in periods of peace and of war. This is demonstrated in cases apparently as different as Yugoslavia, the Congo and Colombia.

In the first case, Kosovan women had been the object of serious discrimination at all levels prior to the conflict. In Colombia, the Constitutional Court itself recognised that the exploitation and sexual abuse of women by all parties and armed groups in conflict was preceded by a practice of habitual, widespread and socially-tolerated abuses. The example of the Democratic Republic of the Congo is even more astounding, where women continue to live a situation of absolute precariousness even today, in which sexual violence is considered a normal practice[60].

[60]. A/66/657-S/2012/33, Sexual violence related to conflicts, Report by the Secretary-General dated 13 January 2012. With regard to Colombia, page 6 of the report states that: 'The Colombian Constitutional

Other legal factors can be added to these that are related to the difficulties involved in investigating and prosecuting sex crimes. As explained, one of the main obstacles in investigating sexual crimes is related to a selective policy employed by prosecutors of the tribunals that make up the international criminal justice system, and that translate into a strategic decision to present charges only in those cases in which the likelihood of obtaining convictions is very high, due to the firmness and soundness of inculpatory evidence. This goes against the persecution of sex crimes, which tend to lead to long and costly trials, plagued by evidential difficulties (Lawson 2009, 204). A series of technical-procedural obstacles must be added to this general handicap, whose thorough analysis oversteps the limits of the present study. However, a few merit at least superficial mention, without prejudice to going into greater depth a posterior on some of them.

3.3.1. THE NEED FOR SPECIALISATION

The particularities and high degree of technical exigency demanded both for the investigation and prosecution of sexual crimes is reflected in the fact that the different tribunals in the international criminal justice system have recruited personnel and created services and units that work exclusively with this type of violence. In particular, victims of sex crimes need preferential assistance from lawyers, prosecutors, doctors, psychologists, and so forth, which can only be provided by those who have specific training and education that let them alleviate the physical, moral and social damages suffered.

3.3.2. THE INCLUSION OF SEXUAL CRIMES AMONG THE CHARGES PRESENTED *AB INITIO* BY THE PUBLIC PROSECUTOR'S OFFICE

In principle, none of the prosecutors in the bodies that are part of the international criminal justice system planned to exclude sexual crimes from the charges presented

Court, in its ruling 092/08, stated that sexual violence against women is a regular, widespread, systematic and invisible practice in the setting of the Colombian armed conflict, as are exploitation and sexual abuses, by all the illegal armed groups confronted, and at times isolated, by the individual agents of the public forces. Among the concrete offences and circumstances linked to acts of sexual violence related to the conflicts mentioned by the Court are acts of sexual violence perpetrated as an integral part of violent operations, sexual violence against women, adolescents and girls that are forcibly recruited, sexual violence against women who are related to members of the armed groups, acts of torture and sexual mutilation, forced prostitution and sexual slavery. Sexual violence affects a disproportionate percentage of girls, women, and displaced girls, and Afro-Colombian and indigenous women and girls. Nonetheless, this phenomenon continues with almost nobody speaking out against it'.
And page 11, with regard to the DRC, reads: 'Despite the fact that the Government of the Democratic Republic of the Congo has doubled its efforts, with the support of the international community, including MONUSCO, to arrest and prosecute the material perpetrators, there has been no follow-through of a significant number of acts of sexual violence committed by members of armed groups and the FARDC by legal methods. Some are not investigated or, if they are, the trial is not held or the guilty parties do not complete their sentences. Even when the guilty are processed and convicted, judges tend to apply sentences less than the minimums established by law. The impunity enjoyed by high-ranking officials who have committed human rights violations, including cases of sexual violence, is particularly worrying. For example, those guilty of the rapes committed in Kikozi and in Bushani continue to be free'.

due to procedural difficulties. Nonetheless, as pointed out, in the Lubanga case, the Public Prosecutor's Office only charged the accused of the commission of war crimes, considering him the main party responsible for enlisting, recruiting and using children as soldiers in the conflict in Ituri, in the east of the Democratic Republic of the Congo.

It is worth clarifying that, given the difficulties involved in the investigation of sex crimes, it is understandable that sometimes the Public Prosecutor's Office needs some further time to collect evidence and hear testimonies that let it request an *a posteriori* extension of the accusation. However, the initial decision to not include sexual crimes in the indictment in the beginning is considerably risky, given that there is no certainty that it can be modified, even when managing to a posteriori obtain further evidence that let the prosecutor extend the charges. This in fact happened in the Lubanga case, in which victims' petition to add new charges related to the commission of the crime of sexual slavery and cruel, inhumane and degrading treatments to the crimes of war was initially admitted by the Pre-Trial Chamber, but was later overturned by the Appeals Chamber, as it was considered to undermine the rights of the accused.

Nonetheless, in this concrete case the reasons for the prosecutor's actions were due both to technical and political reasons. Technically, it was clear that the Public Prosecutor's Office was not competent to conduct investigations independently, as well as being dependence on outside sources in collecting evidence and being unable to contact witnesses who could corroborate the accusations. Politically, the aforementioned lack of commitment by the Public Prosecutor's Office stood out, and the tacit assumption that the persecution of gender crimes was not a priority, at least in the Democratic Republic of the Congo.

The Public Prosecutor's Office's stance and the consequences it involved were harshly criticised by magistrate E. Odio Benito in her separate and dissenting opinion, whose main argument precisely turned around the judicial body's decision to shy away from considering sexual violence and other inhumane and degrading treatments as consubstantial conducts to the crime of war that Lubanga perpetrated by recruiting minors and using them to actively participate in the hostilities[61].

Finally, as is known, for the purposes of the admissibility of an issue related to the commission of sex crimes, the Public Prosecutor's Office must also prove that they are serious enough to justify the ICC's intervention. In this regard, the ICTR did not dare to

[61]. ICC, TC I, Prosecutor v. Thomas Lubanga (ICC-01/04/01-01/06-2842), de 14 March 2012. Separate and Dissenting Opinion of Judge Odio Benito, para. 17-20: 'I thus consider it is necessary and a duty of the Chamber to include sexual violence within the legal concept of' "use to participate actively in the hostilities", regardless of the impediment of the Chamber to base its decision pursuant to Article 74(2) of the Statute [...]. Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence of their involvement with the armed group. Sexual violence is an intrinsic element of the criminal conduct of "use to participate actively in the hostilities"'.

classify forced nudity as a crime against humanity, faced with the doubt of whether or not it would surpass the required threshold of gravity (Bemba Case)[62].

Even more debatable was the decision of this same chamber to dismiss, in the hearing on the confirmation of charges, the Public Prosecutor's Office's request to add the crimes of forced nudity and inhumane and degrading treatment to the crime of rape attributed to Bemba, in light of the fact that the sexual abuses were committed publicly and in the presence of the victims' family members, as testified by the large quantity of documentary evidence and testimonies collected. However, despite the fact that the ICC's Elements of Crimes expressly admitted that '*a specific conduct can shape one or more crimes*', the Pre-Trial Chamber dismissed the accumulation of charges, alleging that no new evidence had been submitted, that the existing evidence was insufficient and, therefore, the accumulation of charges would seriously damage the accused's rights and ability to defend himself[63]. Thus, the ICC briefly and dangerously departed from the precedent established by the ICTY in the sentence on the Furundzija case[64], which classified forcing the victims to watch their family members while they were raped and sexually humiliated as a crime of torture.

However this restrictive turn by the ICC is not new, to the degree that it follows the lines and reasoning used in other sentences decreed both by the ICTR itself and the Special Court of Sierra Leone. Concretely, in the Akayesu case, the ICTR had to rule on the possible increase in charges against the principal accused to make room for the accusation of rape, after the spontaneous declarations of witnesses after the trial had started[65]. The Special Court of Sierra Leone faced an identical problem in the AFRC case[66], as the Public Prosecutor's Office had not initially included charges for sex crimes against all leaders of the armed groups. The Trial Chamber dismissed the request for an extension of charges because, realising that no further solid evidence had been presented; it would have entailed wrongfully dismissing the trial and violating the accused's rights to a fair and quick trial.

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62. CPO, TC II, Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges (IT 01/05-01/08), 15 June 2009, para. 302:302. 'The Chamber rejects the cumulative charging approach of the Prosecutor and therefore declines to confirm count 5 of outrage upon personal dignity as war crime in violation of article 8(2)(c)(ii) of the Statute'.

63. The Chamber's rejection of the accrual of charges to include sexual crimes in the Bemba case, and in virtue of Rule 103 of the Rules of Procedure and Evidence, caused the submission on 29 August 2009 of an 'amicus curiae' by a group of individuals and NGOs, with observations on the particular features. Among other arguments, the brief claimed that this accumulation was a widely accepted practice both nationally and internationally, and did not violate the right of the accused to a fair trial. It then added that rape has traditionally been considered as torture in the scope of international humanitarian law and that its exclusion would represent discrimination against women, who tend to be the victims of these crimes. The 'amicus curiae' brief was rejected on 4 September 2009. Pertinent to this is the opinion on different doctrinal contributions on the importance of this figure in the special and internationalised tribunals in volume 22, issue 3 of the magazine *Criminal Law Forum*.

64. ICTY, TC, Prosecutor v. Anto Furundzija, Judgement (IT-95-17/1-T), 10 December 1998.

65. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998.

66. SCSL, TC II, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC Case), Judgment (SCSL-04-16-T), 20 June 2007.

The unwanted collateral damage from this stance in defence of the rights of the accused is the possible damage done to the victims' rights to reparation and the failure to recognise the social and community damages that the crimes of sexual violence entail.

3.3.3. STRENGTHENING OF WITNESS PROTECTION

Starting from the praxis of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the ICC handled the question of the special protection required for witnesses to sexual crimes in the Rules of Procedure and Evidence.

This awareness translated into the creation of a special unit, led by the Secretary. The possibility of adopting a wide variety of measures was also agreed, characterised by the flexibility both to potential beneficiaries and the types of precautionary clauses to adopt. Indeed, the protective measures can be requested by the parties (prosecutor, accused or the witnesses themselves), although their approval depends on the tribunal. With respect to the types of measures, there is a wide range, including change of identity, individual and family security through relocation, and physical and psychological assistance. The protection of the victims' physical and mental wellbeing and procedural economy were reasons set forth by the prosecutor to request the accumulation of charges in the Katanga case[67]. In this same case, a type of conflict of jurisdictions took place between the Victims and Witnesses Unit and the Public Prosecutor's Office, as the prosecutor's decision to transfer two witnesses to sex crimes who they believed to be in danger, led Magistrate Steiner to dismiss the validity of their testimony, in the understanding that this measure could only be adopted by the Secretary[68].

In any case, as we shall have the chance to confirm below, there must be an attempt to avoid 'secondary victimisation' that can stem from the double role as victims and witnesses, so that the ICC must be particularly sensitive when requiring the description of sexual abuses suffered by the victims-witnesses, and running the cross-examination of those who hold this double condition.

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67. ICC, PTC I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges (ICC-01/04-01/07-717), 30 September 2008, para. 8-12: 'Considering that joint proceedings during the Pre-Trial phase are consistent with the object and purpose of the Statute and the Rules insofar as:
(i) joinder enhances the fairness as well as the judicial economy of the proceedings because, in addition to affording to the arrested persons the same rights as if they were being prosecuted separately, joinder:
a. avoids having witnesses testify more than once and reduces expenses related to those testimonies; 20
b. avoids duplication of the evidence; 21 and
c. avoids inconsistency in the presentation of the evidence and would therefore afford equal treatment to both arrested persons;22
(ii) joinder minimises the potential impact on witnesses, and better facilitates the protection of the witnesses' physical and mental wellbeing;23 and
(iii) concurrent presentation of evidence pertaining to different arrested persons does not per se constitute a conflict of interests'.

68. ICC, PTC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (ICC-01/04-01/07-474), 13 May 2008, para. 124-145.

3.3.4. PARTICULAR FEATURES IN EVIDENCE PRACTICES AND REQUIREMENT OF A HIGHER EVIDENTIAL STANDARD FOR SEXUAL CRIMES

It is known that in sexual crimes committed in the setting of armed conflicts, medical-forensic evidence tends to be unfeasible, so that witness evidence takes on great relevance. But obtaining reliable testimonies is not an easy task, as there are often no direct eyewitnesses because they have been murdered, are traumatised or are in turn the only witnesses in their own case.

Together with the means for obtaining evidence, a second problem is related to the standards required. Compared to an outlook classified as 'victim-friendly', or the favourable predisposition to safeguard the victims' rights, a stance that is the polar opposite seems to have been imposed in the jurisprudence of the international criminal courts, which is restrictive or limiting, which has instigated several questions (SaCouto 2009, 339). Notable here is the requirement that in order to place responsibility on superiors for the sex crimes committed by their subordinates, there must be an order, even tacit, by the superior, who ordered or agreed to the commission of such crimes. As pointed out by the ICTY, what was important was that the acts constitutive of the crime came from or were approved by a higher authority (Galic Case)[69]. This involved the need for evidence that proved the superior's direct knowledge of the crimes perpetrated by his subordinates, either via direct physical presence while they were committed or via precise orders. This same rigour was demanded with respect to the evidence on the legal concept of the instigator, by requiring that the nexus of causality between the instigation and the constituent acts of the sexual crime were absolutely clear, thus dismissing indirect and circumstantial evidence.

The volume of praxis of the international criminal tribunals has lead to the writing and contents of art. 96 of the ICC Rules of Procedure and Evidence, approved in 1994 and modified twice. It sets out three important new features on the probatory specificities for sexual crimes. We will go into greater detail on them later, but a brief summary is necessary here.

Firstly, the principle was dismissed that isolated testimonies lack value if they are not corroborative, accepting the lack of necessity for victims' single testimonies to corroborate, except where children were involved.

Secondly, it confirmed the rule that neither the victim's behaviour nor their past sex life can be used for or against them, thus preventing victims from becoming the accused due to their pasts.

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69. ICTY, TC, Prosecutor v. Stanislav Galic (IT-98-29-3), 5 December 2003, para. 765: 'The Trial Chamber has considered whether General Galic effectively controlled the actions of his troops and knew of the crimes committed by them. We are convinced by the evidence that the sniping and shelling activity of the SRK were under the control of the SRK's chain of command. The Trial Chamber is also satisfied that General Galic had the material ability to punish those who would go against his orders, who violated military discipline, or who committed crimes. It is therefore established that General Galic, as commander of the SRK, had effective control of SRK troops. There is ample evidence that General Galic was informed of the attacks against civilians committed by SRK forces. Formal complaints were lodged with him, and he was duly informed through his chain of command of the actions of his troops. The Trial Chamber has no doubt that the Accused was well aware of the unlawful activities of his troops'.

And, thirdly, the prohibition of using the victim's consent as a resource for defence was established, originally peremptory and later more nuanced.

Thus, the ICC seems to have softened the strictness of the international criminal justice system on evidence, aware that, if this were not done, it would be extremely difficult to try and sanction sexual crimes.

Nonetheless, in the Katanga case, Magistrate A. Usacka based her dissenting opinion against the expansion of accusations in the hearing on the confirmation of charges on the fact that there was enough evidence of the commission of rapes and sexual slavery by the Ituri militia, but not on the direct or indirect participation of the two parties accused of these crimes. This made it necessary to postpone the public hearing and ask the prosecutor to submit further evidence that proved the connection of the accused with the events (Katanga Case)[70].

By way of conclusion of that which has been set out, there are two ultimate causes that could help in understanding what we have called a chain of technical-procedural obstacles related to the investigation and sanction of sex crimes.

The first cause is rooted in the shaping of the regulatory legal framework for these crimes that, as we have repeated, is the fruit of the interaction of three regulatory branches or sections (international humanitarian law, international criminal law and international human rights law) that are extremely different from each other.

Nonetheless, the second cause is specifically connected to international humanitarian law, which has an intrinsic limitation. This is because, as it is by definition limited to regulations on armed conflicts, it cannot attend to the complete chronological sequence in which sexual crimes take place, namely both the pre-conflict and especially the post-conflict, a phase in which the investigation and indictment tend to take place. Thus, at times it has advocated limiting the scope of the prosecutions for the commission of these crimes, considered less important, in order to favour peace or reconciliation, or it has preferred to channel victims' reparation or compensation through non-jurisdictional mechanisms. In this order of things, it merits asking whether the efficacy of the international criminal justice system is exclusively measured in repressive or punitive terms or, conversely, its ability to facilitate (or at least not hinder) post-conflict

70. ICC, PTC I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges (ICC-01/04-01/07-717), Partly dissenting opinion of Judge Anita Usacka, 30 September 2008, para. 28: 'I appreciate the difficulty the Prosecution must face in acquiring evidence which would directly link a suspect to these types of crimes when criminal responsibility is alleged under article 25(3)(a) of the Statute on the basis of the existence of a common plan. I also appreciate that the Prosecution has a substantial burden under article 30 of the Statute in presenting evidence that the suspects either intended for rapes and sexual slavery to occur when it is not alleged that they were the direct perpetrators, or were aware that rapes and sexual slavery would occur in the ordinary course of events, when the basis for criminal responsibility is that they jointly committed the crimes through other persons, within the meaning of article 25(3)(a) of the Statute. However, in my view, it is not the duty of the Chamber to lessen the Prosecution's burden, but rather to assess the evidence presented and to decide whether such evidence is sufficient to establish substantial grounds to believe that each element of each of the crimes has been committed. On the basis of the evidence presented, I am not "thoroughly satisfied" that there are substantial grounds to believe that the suspects intended for rape and sexual slavery to be included in the common plan to attack Bogoro village on 24 February 2003. In my view, the evidence presented is insufficient to directly or closely link Germain Katanga and Mathieu Ngudjolo Chui to these crimes'.

management and the rebuilding of the societies affected by war must be taken into account. This is a controversial question, which vastly oversteps the limits of this work and that we shall return to again in the final conclusions.

4. SEXUAL CRIMES IN INTERNATIONAL HUMANITARIAN LAW: AN ANALYSIS OF CASE LAW IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

4.1. GENERAL CONSIDERATIONS ON THE CRIMINALISATION OF SEXUAL VIOLENCE IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The main contribution of the international criminal justice system, in addition to including the gender mandate examined above, has been the characterisation of sexual crimes. The description of conducts is, along with the determination of the content of responsibility, and the existence of a competent judicial body to try and punish these behaviours, one of the three essential elements that a complete system on criminal responsibility must meet (Huesa 1996, 157).

It thus complies with the requirements of the principle of criminal legality *nullum crimen, nulla poena sine lege previa* that, as is known, also governs in the scope of international law, although with special characteristics both with respect to its content and its interpretation and application, which distinguishes it from that which is in force on domestic laws. In our opinion, the two main differences rest, on the one hand, with the fact that in the international arena regulatory predetermination of conducts can take place through different sources such as custom, and not necessarily or exclusively via written laws and, on the other, on the clarifications of those subject to the requirement for strict legal precision and the principles of non-retroactivity and prohibition of analogy[71].

However, as we shall verify below, the interpretation of the principle of international criminal legality has undergone clear development, where there are notable differences between the treatment it received in *ad hoc* criminal tribunals and its implementation by the ICC in the Rome Statute, in the Elements of Crimes and in the Rules of Proce-

[71]. See Magdalena M. Martín, 'La configuración del principio de legalidad penal en el Derecho Internacional Contemporáneo', in *Nuevos Desafíos del Derecho Penal Internacional*, A. Cuerda and F. Jiménez (dir.), (Tecnos, Madrid, 2009), 384.

dure and Evidence[72]. This evolution is seen both in general and at a particular level with regard to the characterisation of sex crimes.

In general, the ICT Statutes do not expressly handle the principle of legality, which has let them uphold via case law that their sole obligation was to apply the rules of international humanitarian law, whether they were conventional or customary. Therefore, the only limit stemming from the principle of legality would be that the criminal types of the crimes were set out at the time they were committed, even when they were not previously codified in international treaties, thus confirming the value of custom as an international source. Thus, the requirement for certainty would be met by the mere fact that the conduct constituting the crime were set out in the Charter, although not comprehensively defined. For its part, the specificity would stem from being an international custom in force at the time of commission, and foreseeability would be met provided that the rule's content was accessible to the perpetrator, who could and should have known of its illegality before committing the unlawful act.

Conversely, articles 22 and 23 of the ICC Rome Statute do contain the principle of criminal legality in its substantive and formal aspects, but is extremely ambiguous in its literal sense. Indeed, as art. 22 states that 'Nobody shall be criminally responsible pursuant to the present Statute unless the conduct in question represented a crime in the Court's jurisdiction at the time it took place', from which it would be difficult to infer that the requirements of written, previous and specific domestic laws in force are being accommodated. Similarly, when art. 23 states that 'Whoever is declared guilty by the Court can only be penalised in accordance with the present Statute', no concrete penalty is predetermined for each crime. Instead, it only establishes a general description of imposing one of the statutorily defined punishments, without prejudice that they will later be individualised for each case.

Moving from the general to the concrete on the characterisation of sexual crimes, there has also been a progressive submission to the principle of criminal legality, in an attempt to uphold legal security and shorten the distance between domestic and international criminal justice systems[73]. Compared to the broad and vague definitions of sex crimes provided by the ICT Statutes, the ICC has chosen a strict interpretation of the requirements of this principle, comprehensively defining and detailing the criminal types that constitute different sexual crimes in articles 6, 7 and 8 of the Rome Statute.

The adaptation of the Rome Statute to the principle of criminal legality does not however prevent two types of problems, to which we will refer throughout the analysis of the content of each sexual crime considered herein. The first is related to problems of interpretation posed by the defining elements of some of the crimes, such as for example, enforced pregnancy or the residual clause on 'Other types of sexual violence'. The second problem rests with the fact that the list of sex crimes set out in the Statute does

72. A complete perspective of its development in Olásolo, Hector. 2006, 'Del Estatuto de los Tribunales ad hoc al Estatuto de Roma de la Corte Penal Internacional: reflexiones sobre la evolución del principio nullum crimen sine lege en el Derecho Penal Internacional', *Revista General de Derecho Público* 5: 8-30.
73. It merits mention in this respect that, in line with internal rights, art. 22.2 prohibits the use of analogy in interpreting criminal offences, and art. 24 sanctifies the non-retroactivity of criminal laws 'ratione personae', with the consequent proviso of the most favourable criminal law.

not exhaust the criminality of sexual violence or the possibilities that new crimes of this nature may arise, as may be the case, and as we shall verify below, of forced marriage.

The following pages contain an analysis of each of the sexual crimes set out in the Rome Statute starting from a series of preliminary assumptions. Firstly, we shall adopt a systematic approach, as the behaviours that constitute these crimes are the same, whether they are classified according to the contextual element as crimes against humanity or war crimes. Secondly, we shall take the gender mandate that the RS incorporates as a basis and, therefore, the assumption that sexual violence can affect both women and men, except in those sex crimes where, in virtue of their constitutive elements, only women could be the victims, as is the case in forced pregnancy. Thirdly, we shall follow the same schema in each of these criminal types, centring on their shaping as international crimes, the defining elements and the questions and problems that are kindled through their application and jurisdictional interpretation.

4.2. SEXUAL CRIMES CONTAINED IN THE ROME STATUTE

4.2.1. THE SEX CRIME PAR EXCELLENCE: RAPE

Of all sexual crimes, the one that has aroused the greatest legislative and jurisprudential attention is rape. This pre-eminence has led to other sexual crimes and abuses being neglected, to such as point that their definition is created through exclusion, after delimiting the concept of rape.

In our judgement, after surpassing the threshold of gravity required to be classified as an international crime, the two elements that are intimately interwoven that identify rape are, firstly, the constitutive acts and conducts and their characterisation as genocide, war crimes and crimes against humanity, and secondly, the debate on coercion versus the lack of victims' consent.

CONDUCTS CONSTITUTING THE CRIME OF RAPE: THEIR CHARACTERISATION VIA OTHER CATEGORIES OF CRIMES AND THE CONSTRUCTION OF AN ACCEPTED DEFINITION

With respect to this first aspect, an increasing trend can be verified, which reflects the progressive determination of the constitutive acts of the international criminal types, through incorporating acts and conducts that are not always included in the concept of

rape set out in domestic criminal laws, in which there is not an accepted or single definition[74].

Thus, in an initial phase, which was opened in the emblematic Akayesu case (1998), the ICTR constructed a non-mechanical definition of rape, a general interpretation based on verifying the sexual aggression suffered by the victim ('victim-friendly'), which comprised not only acts of vaginal penetration, but those committed with any object and in any body cavity[75]. Therefore, rape was initially an aggravated type of sexual abuse, understood as any harmful act of a sexual nature against the bodily integrity of the victim by employing coercion or perpetrated in an environment of coercion. Indeed, a conceptual approach was adopted that is similar to the one upheld in the crime of torture, whose conventional international definition is resorted to in order to endorse the use of common categories that avoid having to provide a detailed description of the acts[76].

To the above, the characterisation of rape as a crime of genocide is added, in so far as its aim is to destroy an ethnic or racial group, although, for the purpose of meeting the principle of criminal legality, it must be an act perpetrated against a person using coercion (physical force, threats, psychological oppression), which is employed by the perpetrator or resulting from the precise time or circumstances in which the crime is committed. As we shall verify hereafter, the ICTR did not allude to the victim's consent as an element constituting rape, but rather to the criminal's coercion, in its case law.

A mere four months later, the ICTY started a new stage with the Furundzija case, by moving away from the Akayesu definition, alleging the need of full abidance with the principle of international criminal legality. Supported by the characterisations set out in domestic criminal codes, the ICTY narrowed down the definition of rape and returned to the mechanical-physiological focus that it had previously ruled out in two regards. On the one hand, it requires sexual penetration, no matter how small. On the other, it requires that it took place through coercion, force or the threat of using force against the victim or 'a third party'. Consequently, this second definition is limiting with regard to the act of rape in and of itself, which was considered a crime of torture in this case, but neutral with respect to gender (De Brower 2005, 82).

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74. In this regard, article 179 of the Spanish Penal Code in force defines rape as an aggravated sexual aggression, which consists of the 'carnal access via the vagina, anus or mouth, or the insertion of body limbs or objects by any of the first two routes'.

75. A complete analysis of the matter in MacKinnon, Catherine A. 2006, 'Defining rape internationally: a comment on Akayesu', *Columbia Journal of Transnational Law* 44: 940-958.

76. Concretely in para. 597 and 598 of the cited Akayesu case, the ICTR upheld that: 'The Chamber 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. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. 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 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 Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive'.

Yet, the ICTY itself softened its position and turned the screw again in the Kunarac case, in which it endorsed the mechanical definition of rape, but considered the requirement of coercion, force or threat of force as highly restrictive. It sustained that it sufficed for the Public Prosecutor's Office to prove that the act was not voluntary or consensual. This happened in a good number of cases ranging from cases that proved the impossibility of resisting, the heightened vulnerability of the victim, their inability to understand the nature of the act, the abuse of authority, illegal arrest, etc. or, in other words, that the act violated victims' sexual autonomy, due to not being freely agreed, and provided that the perpetrator had the intention of performing penetration knowingly and in opposition to victims' wishes.

The third phase of the process to define the elements constituting the crime of rape in the international criminal justice system took place after the adoption of the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence. These three instruments establish a synthesis definition, which aims to reconcile the differences in previous legal pronouncements, and is characterised by reaffirming a broad definition of rape, definitively replacing the requirement of penetration for 'invasion' of any part of the victim's body, but providing a detailed and individualised list of the acts of sexual violence, which are also explicitly characterised as crimes against humanity (art. 7 g) and/or war crimes (art. 8.2 xxii).

The so-called 'non-contextual elements of rape' are identical both in crimes against humanity and in war crimes, given that both require that invasion takes place through force or coercion, which may be directly exercised against the victim, against another person, or simply be the product of a 'coercive environment'. The only differences between both crimes would therefore be contextual ones. While in the crime against humanity the perpetrator must be aware that rape forms part of a generalised or systematic attack against a civil population[77], in the war crime of rape the perpetrator must know that its commission takes place in the setting of an international armed conflict and be aware of factual circumstances that establish the existence of this armed conflict[78].

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77. A complete analysis in Christinan Wolffhuguel, 'El elemento contextual del crimen de lesa humanidad: una visión en el marco de las decisiones de la Corte Penal Internacional', in *La Corte Penal Internacional. Una perspectiva latinoamericana*, N. Boeglin *et al.* (ed.), (Open Knowledge Network Collection, 2012), 408: 'In other words: the assault must be mass, frequent, perpetuated by a group with considerable seriousness and directly target a multiplicity of victims, namely the civilian population –a category that provides protection without taking into account nationality, ethnicity or any other similar distinction– and must be the main objective of the assault and not one of its incidental victims'. Available at http://www.upeace.org/OKN/collection/cortepenal/index.cfm.

78. Concretely in para. 597 and 598 of the cited Akayesu case, the ICTR upheld that: 'The Chamber 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. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. 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 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 Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive'.

According to the 2011 report by the NGO Women's Initiative for Gender Justice, on 16 September 2011, the ICC accused 12 parties of the crime against humanity of rape and the war crime of rape in the seven different cases we cited above (Bemba; Kony *et al.*; Al-Bashir, Katanga and Ngudjolo; Mbarustmana; Muthaura *et al.* and, finally, Harun and Kushayb[79]). The same definition of rape set out in the ICC has also been applied by the Special Court of Sierra Leone in the AFRC case, in which it was expressly clarified that in situations of armed conflict, coercion and therefore the lack of victims' consent are presupposed, by convicting the accused of rape and sexual slavery as a crime against humanity.

This leads to the deduction that, after initial oscillations, the international criminal justice system seems to have found a consensual definition of rape based on two key concepts: the right to sexual autonomy and the importance of consent. Yet each of the tribunals in this system maintain full jurisdiction, as there is no hierarchical subordination between them. Nonetheless, from the results of the multiplication of jurisdictions and the atomisation of international law, inequalities among the victims of sexual crimes must be prevented (Visseur 2010, 44). Whatever the definition and interpretation of the requirement of consent adopted by each tribunal, a 16-year-old minor raped in Sierra Leone must be ensured of the same security and legal protection as a 14-year-old boy soldier raped in the Democratic Republic of the Congo.

B) THE DEBATE ON THE REQUIREMENT OF COERCION VERSUS THE LACK OF VICTIMS' CONSENT

One of the most controversial matters in international case law that we just pointed out is related to the interpretation of victim's lack of consent, and criminal's resulting awareness of their opposition[80]. Evidence of this requirement is a determinant in domestic legal systems, but one which seems to be extenuated or omitted in international crimes, replaced by the coercion typical in the circumstances under which the crime is perpetrated. This is because, unlike what happens at an internal level, in which there is interaction or voluntary contact in a peacetime situation between two individuals with complete free will, in the international setting sexual autonomy does not exist in a strict sense, given that abnormal circumstances concur that make it impossible[81].

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79. A complete analysis in Christinan Wolffhuguel, 'El elemento contextual del crimen de lesa humanidad: una visión en el marco de las decisiones de la Corte Penal Internacional', in *La Corte Penal Internacional. Una perspectiva latinoamericana*, N. Boeglin *et al.* (ed.), (Open Knowledge Network Collection, 2012), 408: 'In other words: the assault must be mass, frequent, perpetuated by a group with considerable seriousness and directly target a multiplicity of victims, namely the civilian population –a category that provides protection without taking into account nationality, ethnicity or any other similar distinction– and must be the main objective of the assault and not one of its incidental victims'. Available at http://www.upeace.org/OKN/collection/cortepenal/index.cfm.

80. On the particular Boon, Kristem. 2001, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent', *Columbia Human Rights Law Review* 32: 667-675.

81. On the distinction between consent and sexual autonomy, see the Amnesty International document 'Rape and sexual violence: Human Rights Laws and Policies in the International Criminal Court', IOR 53/001/2011, p 12: 'Sexual autonomy and consent are two distinct concepts. The concept of *consent*, as

Although in the Kunarac case, the ICTY ended up sustaining that the climate of threat surrounding the commission of crimes against humanity would convert any sexual abuse into non consensual, it was the ICTR Appeals Chamber in the Gacumbitsi case that fully tackled the problem of the pertinence of consent in situations of armed conflict. The verdict of the Trial Court condemned the mayor of Rusumo to 30 years of prison for the commission of genocide, and the crime against humanity of rape was appealed both by the defence and the Public Prosecutor's Office, where the latter was the party that expressly requested a clarification of the role of consent in the definition of rape. Concretely, the Public Prosecutor's Office upheld that in this case the lack of consent did not need to be proved, since the characterisation of the rape as a crime of genocide implicitly entailed coercion, so that it was impossible to think that the victims could have freely provided their consent[82].

This same line of reasoning would be applicable to the remaining crimes in the ICC's jurisdiction, in which by definition the victims had to either be members of a group whose destruction was sought (genocide)[83] or part of the civil population subjected to a generalised or systematic attack (crime against humanity) or a crime committed within an international armed conflict (war crimes), so that it went against legal logic to demand that the indictment had to prove their consent.

Starting from this appeal and that which is set forth in their respective Rules of Procedure and Evidence, the ICTs developed four general principles for evidence in sex crimes that, following J. Chinchón, can be summarised by (Chinchón 2007, 1):

a) No requirement for corroboration of the crime by third parties.

b) The absence of defence based on consent provided when the victim was subject to, or feared being subjected to, violence, threats, arrest or psychological pressures, or reasonably believes that if refusing one or more others could be subject to similar acts or pressures.

c) If the accused allege the victim's consent as defence, they must prove that their evidence in this defence is relevant and credible in a preliminary hearing.

d) The past sexual behaviour of the victim is irrelevant for the purposes of proof.

With respect to the second principle, we must mention that in the cases in which the victim's consent has been brandished as a legal defence, the ICTY has not turned to coercion in the context to exclude consent, but instead has taken witnesses' accounts at

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employed in domestic criminal law, necessitates a notion of individual choice, typically without a consideration of the reality of the abuse of power (whether evidenced by physical force or other types of coercion) and other factual conditions that may prevail before, during and perhaps after the sexual acts in question. By contrast, the consideration of whether an individual was able to exercise sexual autonomy, takes into account the overall dynamic and the environment surrounding those sexual acts and how these had an impact on the victim's ability to make a genuine choice'. Available at http://www.amnesty.org/en/library/asset/IOR53/001/2011/en/b82aaa3e-f7e0-46bc-97bd-1c6c4f1cbc49/ior530012011es.pdf.

82. ICTR, TC, Prosecutor v. Silvestre Gacumbitsi, Judgement (ICTR- 2001-64-T), 17 June 2004.

hearings particularly into account. This happened in the Kunarac case, in which Kovac's defence, the second of the accused, sustained that at least one of the victims had given her consent, as she was in love and had a romantic relationship with the defendant, whom she had 'seduced'. This craftily dodging the forced confinement, humiliating treatment and the threats to which the victim was subjected, circumstances ratified by different witnesses, led the tribunal to dismiss this line of reasoning.

The main contribution of case law in *ad hoc* tribunals, and concretely in the Gacumbitsi case, to the debate on the pertinence of consent rests in affirming that this concept is extremely difficult to define and even sometimes difficult to prove. This makes the detailed analysis of the particular conditions of each case necessary, which can remove personal autonomy and prevent its free provision, including the coercion that surrounds each armed conflict (Cole 2008, 79).

On this foundation, the ICC has provided a legal charter for the particularities of the definition and proof of consent in the Rules of Procedure and Evidence, with a de facto codification of the same principles that were previously recognised in the case law of the *ad hoc* tribunals we mentioned above.

Thus, Rule 63.4 confirms that the corroboration of evidence shall not be required in any of the crimes in the Court's jurisdiction, in particular that of sexual violence. This proscribes poor legal praxis, deeply rooted in past eras, which considered victims' testimony insufficient for proving rape.

Along the same line, Rule 70, connected to the Elements of Crimes that define rape as a crime against humanity (art. 7.1) g.6) and as a war crime (art. 8. 2) b) xxii), sets out the general negative situations in which the existence of consent is not inferred:

> a) When the perpetrator has used force or threatened to use it to commit rape.
>
> b) When the perpetrator has used coercion, such as that caused by fear of violence, intimidation, arrest, psychological oppression or the abuse of power.

In accordance with the case law of ad hoc tribunals, there is coercion when they break into a house bearing arms (Bemba Case[84]) or when the victim is confined to a well under surveillance (Katanga Case[85]). Moreover, while fear of violence is a subtle and indirect form of coercion, although equally invalidating consent (Akayesu Case[86]), intimidation is more categorical and broad, as it can include extortion, as the ICTY stated 'threats to which a person in this situation could not resist' (Kvocka Case[87]).

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83. For further information on this matter, see Kalosieh Adrienne, 2003, 'Consent to genocide?: The ICTY's improper use of the consent paradigm to prosecute genocidal rape in Foca', 24 *Women's Rights Law Reporter*, 121-136.
84. CPO, TC II, Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges (IT 01/05-01/08), 15 June 2009, para. 172.
.85 ICC, PTC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (ICC-01/04-01/07-474), 13 May 2008, para. 352.
86. ICTR, TC, Prosecutor v. Akayesu, Judgement (ICTR-96-40-T), 2 September 1998, para. 688.
87. ICTY, TC, Prosecutor v. Kvočka *et al.*, Judgement (IT-98-30/1), 2 November 2011.

Detention, legitimate or not, is intrinsically coactive (Kunarac Case[88]), which obliges the presupposition of the lack of the victim's consent. Finally, the abuse of power (political, military or of any other type) takes place regardless of whether the party practicing it is a public functionary, actually works as an official authority or is simply an individual. Indeed, the ICTR recognised (Musema Case[89]) the dominant position that the accused, the owner of a tea factory, exercised over his employees and neighbours, who he encouraged in order to capture, rape and murder Tutsi women in the Kibuye prefecture, a region in which the accused was considered an authority with *de iure* and *de facto* powers.

c) When the perpetrator takes advantage of the victim in a coercive environment.

Remember that the existence of armed conflict in and of itself represents a coercive environment. Unlike the previous forms of coercion, coercive environments are previous situations whose existence does not directly depend on the will or responsibility of the perpetrator, but that he benefits from for his own good. Retentions and internments in detention camps abound in armed conflicts, which are subject to surveillance by civil or military personnel, and perfectly illustrate what must be understood as a coercive environment in which it is impossible to freely provide consent. In the words of the ICTY (Kunarac Case):

> *'For the most part, the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent'*[90].

Nonetheless, a minority doctrinal sector shades this theory, by understanding that the lack of free and valid consent in sexual contacts that take place in settings of crimes of genocide, crimes against humanity and war crimes must not be absolutely presupposed without any possibility of exception. This is because even in these contexts of coercion, there is the possibility of consensual relations between two people on opposing sides (Schomburg and Peterson 2007, 130).

d) When the perpetrator takes advantages of any incapacity of the victim, whether it is natural (i.e. mental handicap), induced (i.e. by drugs or alcohol), or related to age, which prevents the victim from freely expressing consent.

In this same order of things, the victim's silence or lack of resistance is in no way equivalent to tacit acquiescence (Rule 70 c), in the same way that the conduct and sexual background of victims or witnesses lack probatory relevance (Rule 70 d). Unlike the

88. ICTY, AC, Prosecutor v. Kunarac *et al.*, Appeal Judgement (IT-96-23 & IT-96-23/1-A), 12 June 2002.
89. ICTR, AC, Prosecutor v. Alfred Musema, Judgement (ICTR-96-13-A), 16 November 2001, para. 880.
90. ICTY, AC, Prosecutor v. Kunarac *et al.*, Appeal Judgement (IT-96-23 & IT-96-23/1-A), 12 June 2002, para. 132.

rules followed in *ad hoc* tribunals, the ICC affirms the irrelevance of the sexual behaviour not only in the past, but also the sexual habits or conducts after the commission of the offence[91].

In accordance with art. 22 of the RS, when interpreting if there was 'genuine consent', the ICC must bear in mind not only its own rules, but that which is set forth on this issue in international human rights law[92], and particularly in the case law of judicial bodies in charge of their application in indictments for rape, especially that of the European Court of Human Rights[93]. Concretely, in the sentence of 4 December 2003 (M.C. versus Bulgaria Case), after examining the definition and the elements constitutive of right in European comparative law and in the ICTY case law, the ECHR concluded that:

> *'In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances... While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse'*[94].

Both the Rome Statute and the Rules of Procedure and Evidence give preferential attention to participation in the proceedings and the protection of victims and witnesses of rape, in order to elucidate whether or not consent existed and in order to prevent incurring what has graphically been called the 'myths and stereotypes' related to rape.

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91. Rule 70. Principles of evidence in cases of sexual violence: 'In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:
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;
d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.
Rule 71: Evidence of other sexual conduct:
'Bearing in mind the definition and nature of the crimes within the jurisdiction of the Court and, except for that which is set out in paragraph 4 of article 69, the Chamber shall not admit evidence on the prior or subsequent sexual conduct of a victim or witness'.

92. Along this same line, Sheppard Daniel, 2010, 'The International Criminal Court and Internationally Recognized Human Rights: Understanding Article 21(3) of the Rome Statute', *International Criminal Law Review* 12: 43-71.

93. For further details, see the document 'Rape and Sexual Violence: Human Rights Laws and Policies in the International Criminal Court'. Amnesty International, 2011. Available at http://www.amnesty.org/en/library/asset/IOR53/001/2011/en/b82aaa3e-f7e0-46bc-97bd-1c6c4f1cbc49/ior530012011es.pdf.

94. TEDH, M.C. versus Bulgaria (Application no. 39272/98), Judgement of 4 December 2003, para. 163. Available at:
http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/m.c.v.bulgaria_EN.asp.

One of the most recurrent stereotypes is related to the victims' reticence to make statements. It is undeniable that victims of rape must make arduous efforts to speak aloud of their traumas, with lights and court stenographers, although there are also other factors that are no less difficult in providing testimonial evidence, although they often go unnoticed.

As we set out in previous chapters, these include the existence of a type of undeclared hierarchisation or ranking of international crimes, in which rape would hold a secondary position. The gravity and impact of crimes of genocide and against humanity feed the belief that rape is a lesser crime, assumed even by the victims themselves, to the degree that they are still alive to speak of it. The selective strategy followed by prosecutors in the different courts of the international criminal justice system should be added to the above. As we have verified, they do not always show a determined will to investigate and try the crime of rape, particularly due to the technical-procedural obstacles that they must deal with first to confirm the charges and then to try them during the trial.

The impossibility of conducting immediate medical check-ups, as well as the perception that the trauma and degree of emotional involvement of victims and witnesses to the crime of rape lessen the possibility that their testimonies are considered believable, are dissuasive elements. As Sharrat concludes: '*the combination of lack of competence on gender issues, lower percentage of success, the additional time sometimes required and the time pressure created by large caseloads make their reluctance understandable*' (Sharrat 2011, 58).

Although in theory prosecutors and judges share the theory that the categorisation of rape as a crime of genocide or against humanity presupposes the lack of genuine consent from victims, in practice great relevance is still attributed to witness evidence. Paradoxically, lawyers, judges and prosecutors are aware that examinations and cross-examinations of rape victims must be done delicately in order to prevent further trauma but, in parallel, with enough precision to uncover details that could be determinants in exonerating or condemning the accused. An example of the difficulty presented in suitably handling such contradictory interests and considerations is given in the two examples from the field study performed by Sharrat: a prosecutor's action, who is interrogating a victim who had suffered serial rape, along with nine other women, asking them to specify the order in which the rapes took place and her numerical position in this order, and of a lawyer who argued to another victim that his defendant had 'only' raped once and without inflicting additional damages or injuries (Sharrat 2011, 59).

In light of the above, Rule 72 sets out a special closed-door proceeding to determine the pertinence or admissibility of evidence related to consent in sex crimes. Its purpose it to prevent victims and witnesses from having to make statements and being subjected to cross-examinations in those cases or circumstances in which there is coercion. However, the particularities stemming from the need to protect victims and witnesses to the crime of rape must be reconciled with the right of the accused to a suitable defence and fair trial. This can be achieved if the ICC, instead of understanding that consent exists

unless the opposite is proved, considers that the right to sexual autonomy requires proving 'affirmative consent', which would be actively obtained and freely given[95] (Kiran 2012, 388).

4.2.2. SEXUAL SLAVERY

A) DEFINING ELEMENTS

Despite having occurred repeatedly throughout history, sexual slavery was not criminalised until relatively recently according to the new forms of slavery, forced labour, inhumane treatments and sexual aggression that identify current armed conflicts. What happened in the Kunarac case is exemplary of these types of situations, in which the ICTY considered the events in which women and girl victims were retained in detention centres in the municipality of Foca as a crime against humanity with regard to the crimes of rape and slavery considered in arts. 5 (c) and (g) of its Statute[96].

The differentiated incrimination of this legal concept occurred for the first time in the Rome Statute, which expressly includes sexual slavery as an independent crime of sexual violence in the category of crimes against humanity (art. 7, g) and war crimes (art. 8, b, xxii and d) vi. The Statute of the Special Court for Sierra Leone also considers it within crimes against humanity, as an independent crime of sexual violence. 2, g). Conversely, the law regulating the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea only considers slavery (art. 5), without referring expressly to sexual slavery. These nuances are important to the degree that the Special Court for Sierra Leone has already had the occasion to speak on and condemn the commission of this crime[97], which is also considered in some of the outstanding cases with the ICC[98], and could be in those being heard in the Extraordi-

95. Grewal Kiran, 2012, 'The protection of Sexual Autonomy under International Criminal Law', *Journal of International Criminal Justice* 10: 373-396.
96. ICTY, TC, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgment (IT-96-23 & IT-96-23/1-A), 22 February 2001, para. 744.
97. SCSL, TC II, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC Case), Judgment (SCSL-04-16-T), 20 June 2007; SCSL, AC, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC Case), Judgment (SCSL-04-16-T), 22 February 2008; SCSL, TC I, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15-), 2 March 2009; SCSL, TC II, Prosecutor v. Charles Ghankay Taylor, Judgment (SCSL-03-01-T), 30 May 2012.
98. Situation in Uganda, ICC, PTC II, Prosecutor v. Joseph Kony, Warrant of Arrest for Joseph Kony (ICC-02/04-01/05-53), 27 September 2005; ICC, PTC II, Prosecutor v. Vicent Otti, Warrant of Arrest for Vicent Otti (ICC-02/04-01/05-54), 8 July 2005; ICC, PTC II, Prosecutor v. Okot Odhiambo, Warrant of Arrest for Okot Odhiambo (ICC-02/04-01/05-56), 8 July 2005; ICC, PTC II, Prosecutor v. Dominic Ongwen, Warrant of Arrest for Dominic Ongwen (ICC-02/04-01/05-57), 8 July 2005, in which charges were filed with respect to sexual slavery as a crime against humanity (art. 7.1.g). To date, none of the suspects has been arrested or appeared before the court, which is why there is no procedural activity other than the arrest warrants. Situation in the Democratic Republic of the Congo, ICC, PTC I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges (ICC-01/04-01/07-717), 30 September 2008, charges of sexual slavery as a crime against humanity (art. 7.1.g) and crime of war (art. 8.2.b.xxii and 8.2.e.vi).

nary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea[99].

With respect to the defining elements of the crime of sexual slavery, pursuant to the terms of the ICC Elements of Crimes, and as confirmed by case law, the *actus rei* of this crime is determined by two elements:

Firstly, an element of slavery, consisting of 'That the perpetrator has exercised one of the attributes of the right of ownership over one or more people, such as buying them, selling them, lending them or swapping them, or all of these, or has imposed some similar type of privation of freedom on them'.

Secondly, a sexual element, identifiable with 'That the perpetrator has made this person or these people perform one or more sexual acts (RUF Case)[100].

With respect to the element of enslavement, its essential notes are the exercising of the right to ownership over the victim and the privation of their autonomy or freedom (Ambos 2012, 160). In this sense, it has been pointed out that sexual slavery can be considered a particular form of slavery (Katanga Case)[101], whose main characteristic is the victim's lack of consent or autonomy (Taylor Case)[102]. For its part, the listing of the forms by way of which ownership can be exercised over a person is not comprehensive. Thus, as clarified in the ICC Elements of Crimes, the privation of freedom can, under some circumstances, include the exaction of forced labour or the reduction of a person to a servile condition in another way, as this is defined in the Supplementary Convention on the abolition of slavery, the treatment of slaves and the institutions and practices analogue to slavery, of 1956. The conduct described in this element is also understood to include people trafficking, in particular women and children (Elements of Crimes, note 18). Furthermore, the expression 'some similar type of privation of freedom' can also refer to those situations in which the victims are not confined, but cannot escape because they have nowhere to go and fear for their lives (RUF Case)[103].

In this regard, the ICTY had already indicated several factors, clarified by the prosecutor), which may be taken into consideration to determine the commission of this crime and that are illustrative of the exercising of ownership and lack of autonomy, such as having control over victims' movement, controlling their physical environment, psychological control, adopting measures aimed at preventing or stopping victims from escaping, exercising force, threatening force or coercion, the duration, affirmation of exclusivity, subjection to cruel treatment or abuse, control of sexuality and forced labour (in

99. ECCC, OICJ (Case 002/19-09-2007), Closing Order of 15 September 2010, in which the investigating judges considered that a crime against humanity was committed of 'Other inhumane acts' with respect to the forced marriages that were imposed throughout the country and in specific work camps.
100. SCSL, TC I, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15), 2 March 2009, para. 159.
101. ICC, PTC I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges (ICC-01/04-01/07-717), 30 September 2008, para. 430.
102. SCSL, TC II, Prosecutor v. Charles Ghankay Taylor, Judgment (SCSL-03-01-T), 30 May 2012, para. 420.
103. SCSL, TC I, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15-), 2 March 2009, para. 161.

the same sense, the Taylor Case)[104]. It was also pointed out that the mere capacity to be able to buy, sell, trade or inherit a person or their work or services should be considered a relevant factor (Kunarac Case)[105].

With regard to the sexual element, as specified in the Katanga Case[106], paragraph 431, the ability to decide on issues related to the victim's sexual activity constitutes a particular parameter of the crime of sexual slavery, bearing in mind that the sexual acts to be considered are not limited to rape (Ambos 2012, 160).

Thirdly, the crime of sexual slavery requires, in addition to the threshold common to all crimes against humanity 'That the conduct was committed as part of a generalised or systematic attack against a civil population', the concurrence of a subjective element of knowledge by the perpetrator that the conduct was part of such an attack or had had the intention for this to be so. As can be concluded from the opinion of the Pre-Trial Chamber in the Katanga case (Chamber majority, dissenting vote from Judge Anita Ušacka), while it may not be possible to prove that the common plan on which the attack was developed against the civil population includes specific instructions to soldiers to sexually enslave civilian women, it suffices that the accused knew that in the normal course of events, the implementation of the common plan would inevitably give rise to the commission of this crime[107].

It states:

> *'Consequently, in the opinion of the Chamber majority, this conclusion, related to the crimes against humanity of rape and sexual enslavement of women and girl children, is also corroborated by the fact that:*
>
> *(i) rape and sexual slavery against women and girls constitutes a common practice in the region of Ituri over an extended period of time in armed conflicts;*
> *(ii) was a common practice broadly recognised among soldiers and commanders;*
> *(iii) in past and later attacks against the civil population, militias were guided and led by the suspects to perpetrate attacks that included rape and sexual slavery against women and children who live in Ituri;*
> *(iv) soldiers and boy soldiers were trained (and grew up) in the camps in which the women and girls were constantly raped and kept in conditions to facilitate sexual slavery:*
> *(v) Germain Katanga and Mathieu Ngudjolo Chui and their commanders visited the camps under their control, and frequently received reports on the activities of the camps from the commanders of each of them under their command, and were in permanent contact with the combatants during the attacks, including the attack of Bogoro;*

[104]. SCSL, TC II, Prosecutor v. Charles Ghankay Taylor, Judgment (SCSL-03-01-T), 30 May 2012, para. 420.
[105]. ICTY, TC, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgment (IT-96-23 & IT-96-23/1-A), 22 February 2001, para. 543.
[106]. ICC, PTC I, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges (ICC-01/04-01/07-717), 30 September 2008, para. 431.
[107] Ibid, para. 551.

(vi) the fate reserved for the women and girls captured was very well known among combatants; and
(vii) the suspects and combatants were aware, for example, of the camps and the commanders who most frequently partook in this practice.'[108]

In short, today sexual slavery has the consideration of a customary law and an international crime that represents the violation of the rule of *ius cogens*, in the same way that the crime of slavery and its incrimination, as pointed out by the SCSL, responds to the aim of centring attention on serious crimes that have been historically ignored, recognising the particular nature of a type of sexual violence that has been used, normally with impunity as a war tactic to humiliate, dominate and cause fear among victims, their families and communities during armed conflict (RUF and AFRC Cases)[109].

B) THE PROBLEMATIC CASE LAW INTERPRETATION OF THE CRIME OF SEXUAL SLAVERY: DIFFERENTIATION FROM 'FORCED MARRIAGE' AS AN INDEPENDENT CRIME

If, as we just pointed out, it is possible to verify a large jurisprudential coincidence with regard to the elements that constitute the crime of sexual slavery, the same does not happen at this time with respect to its differentiation from 'forced marriage'. As an international crime of sexual violence, it is not considered autonomously in any international instrument, including the statutes of the international criminal bodies we have referred to.

Indeed, forced marriage was considered for the first time as a 'new' crime against humanity and different from the crime of sexual slavery in SCSL case law related to the situation of the 'bush wives' or 'rebels' wives'. They are women and girl children who were kidnapped from their homes or other places of refuge and forced to act as 'wives' of the members of the rebel groups in the Sierra Leone conflict. However, the differentiation between both categories of crimes and the existence itself of an independent crime of forced marriage is not clear or well-established. This is primarily because, as the SCSL is the only judicial body at this time that has had the chance to pronounce on the issue, a deep discrepancy is observed between the prosecutor and Trial Chamber II, and between the latter and Trial Chamber I and the Appeals Chamber[110].

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[108]. Ibid, para. 568.
[109]. SCSL, TC I, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15-), 2 March 2009, para. 157 and SCSL, TC II, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC Case), Judgment (SCSL-04-16-T), 20 June 2007, para. 705.
[110]. In the case Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, (AFRC Case), the public prosecutor included forced marriage within 'Other inhumane acts' from art. 2 (i) of the Statute as an independent count of 'Sexual slavery and other forms of sexual violence' from art. 2(g), which led to it being dismissed by Trial Chamber II and admitted by the Appeals Chamber. In the case Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), the charge of forced marriage within 'other inhumane acts' was admitted by Trial Chamber I and upheld by the Appeals Chamber. Conversely, in the case of Prosecutor v. Charles Ghankay Taylor, Trial Chamber II did not admit it because the public prosecutor did not include it in the charges submitted.

According to these discrepancies, in the AFRC case, Trial Chamber II considered that according to the evidence presented and in relation to these 'forced marriages', the relationships between the perpetrators of these acts and their victims was ownership, along with the exercising of control over their victims, including their sexuality, movements and work. Thus, the Chamber deemed that the use of the term 'spouse' was indicative of the intention to exercise ownership over victims and not an attempt to assume a marital status or quasi-marriage in the sense of establishing the mutual obligations inherent to the conjugal status. Indeed, the Tribunal made it clear that although the relations of the rebels and their wives were generally that of exclusive ownership, victims could be transferred or given to another rebel at the perpetrator's discretion. For these reasons, the Tribunal considered that these events were completely subsumed in the crime of sexual slavery and that there were no legal gaps that required the shaping of a separate crime of forced marriage within the category of crime against humanity of 'other inhumane acts'[111].

Continuing with this line of reasoning, in the Taylor case, the same Chamber assessed that the term 'forced marriage' is inappropriate to refer to the forced conjugal situation, imposed on women and girl children during armed conflict, and that sexual slavery is included as forced labour, resulting much more appropriate, in its opinion, to refer to a conjugal form of enslavement. The Tribunal clarified that although all forms of forced marriage violate human rights pursuant to international law, the abuses suffered by girls and women in a context such as described, are criminal in and of themselves and of sufficient gravity to constitute a crime against humanity. According to the Chamber, although this crime does contain more elements of sexual slavery, it meets all of its constituent elements, without being able to consider that it is a new international crime with additional elements[112].

Conversely, in the AFRC case, the Appeals Chamber used the particular and serious physical and mental suffering of the victims of such acts as a reference (as described by prosecutor expert, Ms Zainab Bangura). It found that the perpetrators had the intention of imposing a conjugal association, more than exercising mere ownership of civilian women and girl children, and considered that no tribunal could reasonably have considered that forced marriage was subsumed within the crime of sexual slavery. Thus, the Appeals Chamber stated that, although both crimes share some common elements such as non-consensual sex and the privation of freedom, there are distinctive factors. First, forced marriage consists of the perpetrator obliging a person, through force or threat of force, from the perpetrator's work or conduct or those with whom he associated, to a conjugal association that caused great suffering, or serious physical or mental harm to the victims. Secondly, unlike sexual enslavement, forced marriage implies an exclusive relationship between 'husband' and 'wife', whose rupture can give rise to disciplinary consequences. According to these differences, the Chamber consid-

111. SCSL, TC II, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC Case), Judgment (SCSL-04-16-T), 20 June 2007, para. 711-713.
112.SCSL, TC II, Prosecutor v. Charles Ghankay Taylor, Judgment (SCSL-03-01-T), 30 May 2012, para. 425-430.

ered that forced marriage is not a predominantly sexual crime and, therefore, is different than sexual slavery[113].

In this same sense, in the RUF case, Trial Chamber I admitted the charge of forced marriage within the category of crime against humanity for '*other inhumane acts*', establishing as a distinctive element of this crime due to '*a forced conjugal association based on exclusivity between the perpetrator and the victim*'. The Chamber also considered that the conduct sanctioned with this charge was different than the charges of sexual slavery that it also admitted, clarifying that forced marriage is not subsumed in sexual slavery[114]. Furthermore, by admitting the charge of acts of terrorism as a war crime (art. 3, d) of the Statute, the Chamber pointed out how both crimes, sexual enslavement and forced marriage, were used as part of the campaign to terrorise the civil population of Sierra Leone.

Concretely, it stated that:

> *'The Chamber has proved that countless women of all ages were routinely captured and forcibly separated from their families, homes and communities and forced into prolonged and exclusive conjugal relations as wives of the rebels. The practice of 'forced marriages' and sexual slavery stigmatise the women, who lived in share and afraid to return to their communities after the conflict. The Chamber considers that the model of sexual enslavement employed by the RUF was a deliberated system aimed at extending terror by means of the mass kidnapping of women, forcibly separated from the legitimate husbands and families, regardless of their ages or previous marital status.'*[115]

Thus, the Chamber considered that rape, sexual slavery, 'forced marriages' and other assaults on personal dignity, due to being committed against a civil population with the specific intention of terrorising them, entailed an act or terror and that the evidence presented established that the members of AFRC/RUF regularly committed such acts of sexual violence as part of a campaign to terrorise the civil population of Sierra Leone.

The discrepancies at a jurisprudential level have given rise to the corresponding debate on doctrine, in which arguments are seen both for[116] and against[117] the consideration of forced marriage as an international crime, different than sexual slavery.

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113. SCSL, AC, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, (AFRC Case), Judgment, (SCSL-04-16-T), 22 February 2008, para. 192-195.
114. SCSL, TC I, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15-T), 2 March 2009, para. 2307, confirmed by the SCSL, AC, Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (RUF Case), Judgment (SCSL-04-15-T), 26 October 2009.
115. Ibid, para. 1351-1352. Own translation.
116. Among others, Clark, James M, 2012. 'Forced Marriage: the Evolution of a New International Criminal Norm', *Abeerdeen Student Law Review*, 3:1-24; Frulli, Micaela, 2008, 'Advancing International Criminal Law: the Special Court for Sierra Leone Recognizes Forced Marriage as a New Crime against Humanity', *Journal of International Criminal Justice* 6: 1033-1042; Jain, Neha, 2008. 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution', *Journal of International Criminal Justice*, 6(5): 1013-1032; Palmer, Amy, 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; Oosterveld, Valerie 2011, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', *Cornell International Law Journal* 44:49-74.

With regard to the positions in favour of establishing this new international crime – along the same line of reasoning as Trial Chamber I and the SCSL Appeals Chamber– the physical, mental and psychological suffering was stressed that victims of this crime suffer by the addition of a forced conjugal association and the exclusivity that it entails (Clark 2012, 12).

It was added that this is a plural crime in which sexual and non-sexual behaviours are included, which is more extensive than sexual enslavement. Concretely, it specified that forced marriage entails specific elements of psychological and moral suffering for victims, and not only of sexual exploitation and abuse, which justify considering it as an independent crime with a description that describes the totality and complexity of this criminal behaviour. It is relevant to stress, as pointed out, that forced marriage is prohibited by numerous instruments of international human rights and even by several domestic legislations, and that forced marriage committed in the context of armed conflict on a mass scale has been taken into consideration and repeated condemned by several bodies in charge of protecting human rights (Frulli 2008, 1037-1039)[118].

It also stated that there are different mental and psychological elements in the effect that imposing the condition of 'wife' has on women, in the sense that it can decrease their ability to leave their 'husbands'; the social pressure of caring for any children that could be the fruit of this 'union'; and the consequence of this situation of possibly not being able to reintegrate into their families or communities due to the stigma of having been 'married' to a rebel and having helped in rebel activities (Palmer 2009, 8).

Finally, it highlighted that in the context of the conflict in Sierra Leone, the commission of both crimes are interwoven, as they occurred in the same period of time, but with different women and girls, and both were part of a specific pattern of conduct aiming to terrorise the civil population of Sierra Leone (Oosterveld 2011, 73-74).

For its part, against the recognition of forced marriage as a new crime against humanity, it was considered first that in the framework of armed conflict, international criminal jurisdictions must not validate discriminatory concepts of marriage that contribute to the violence, without qualifying them for what they are: sexual enslavement or slavery. Secondly, it was stated that it did not seem suitable to create blurry categories of crimes against humanity of sexual violence that, as is the case of forced marriage, could in turn confuse the difference between the situation of the 'bush wives' in Sierra Leone and the case of the so-called arranged marriages during peacetime[119]. In summary, the conclusion was that the situations that the SCSL considered as forced marriage were better defined as 'sexual enslavement plus', with respect to which the imposition of a

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[117]. Among others, Bunting, Annie, 2012. 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes', *Canadian Journal of Human Rights* 1(1): 165-185; Gong-Gershowitz, Jennifer, 2009, 'Forced Marriage: A "New" Crime Against Humanity?', *Northwestern Journal of International Human Rights*, 8:1-24.

[118]. Bear in mind that the Draft Organic Law, which modified Organic Law 10/1995 of 23 November on the Penal Code, approved by the government on 11 October 2012 introduces the offence of forced marriage to Spanish law, which is typified as an aggravated offence of coercion (www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2012/refc20121011.htm#CodigoPenal).

[119]. The dissenting opinion of Judge Teresa Doherty is of great interest in this respect, and the separate opinion of Judge Julia Sebuntinde in the sentence of Trial Chamber II, 20 June 2007 in the AFRC case.

'conjugal association' could be considered an aggravating circumstance that involves an additional punishment when dictating the judgement (Gong-Gershowitz 2009, 76). In some opinions, the factual situations that comprise forced marriage could even be new forms of the crime of slavery (Bunting 2012, 181).

With regard to all the polemic aroused on the international crime of forced marriage, it seems clear, as explained –even by the opinions that favour its consideration as a new crime against humanity– that clarification and greater precision is required on what its defining elements are (Clark 2012, 16). It would be expedient for this work to be done by the International Criminal Court for two reasons. The first is that this conceptual clarification should be accompanied by a unified jurisprudential focus that overcomes the currently existing discrepancies between the SCSL Chambers. The second is that this would prevent the crime of forced marriage from being seen solely as a legal concept typical of the SCSL, as the situation in which the victims were women and girls in the Sierra Leone conflict also occurred in several of the situations that the Court is hearing, such as those pointed out in Uganda and the Democratic Republic of the Congo, to which the conflicts in Darfur and the Central African Republic can be added (Frulli 2009, 1041).

However, at the moment, the ICC has not considered the sexual violence suffered by the girl children obliged to join the militias in the Lubanga case (and thus forced to become 'bush wives') within the crime on the use of minors under 15 years of age to actively participate in hostilities, which could have been employed to pronounce on the crime of forced marriage[120]. It is also striking that the crime of forced marriage received no attention at the Review Conference of the Rome Statute.

In our opinion, the crime of forced marriage is effectively shaped as a new international crime that, following the SCSL Appeals Chamber in the AFRC case, would be determined by the fact of obligating a person, through force or the threat of force, into a conjugal association in a system of exclusivity that causes great suffering, or serious physical or mental damages to its victims.

Thus, the defining elements of this crime, adding those resulting from an analysis of doctrine (Jain 2012, 1031) would be:

Firstly, the imposition of a conjugal association through words or actions of one or more people, through force or coercion, fear, violence, detention, psychological pres-

120. ICC, TC I, Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute (ICC-01/04-01/06-2842), 14 March 2012, para. 36, despite the fact that the UN Special Representative for children and armed conflicts, Radica Coomaraswamy, submitted an *amicus curae* brief. Bear in mind the separate and dissenting opinion of Judge Elisabeth Odio Benito to the Sentence of Trial Chamber I, 14 March 2012, para. 20-21, in which she referred to the girl soldiers used as sex slaves or 'wives' of the commanders and other members of armed groups and the specific gender consequences that can arise from the unwanted pregnancies of girl soldiers that frequently lead to the death of the mother or child, to diseases, AIDS, psychological traumas and social isolation. In this respect, she considered that, although crimes of sexual violence and different and separate crimes that could have been assessed separately by the Chamber, if the public prosecutor had filed charges against these criminal conducts, the sexual violence against girl soldiers should have been included in the crime of war of 'recruiting or enlisting children younger than 15 years of age in the national armed forces or using them to actively participate in hostilities'.

sure, the abuse of power, or taking advantage of a coercive environment or victims' inability to give genuine consent.

Secondly, the obligation to behave and carry out all tasks associated with conjugal 'obligations' under a system of exclusivity, including primarily the realisation of sexual acts.

Thirdly, that this situation produces great suffering or serious physical or mental damage to victims.

Lastly, that these acts are part of a generalised or systematic attack against a civil population.

Thus, the international crime of forced marriage is clearly different from the legal concept of arranged marriages during peacetime and from the international crime of sexual slavery, although it does share some elements with them, as we shall see below. With regard to arranged marriage, both entail the imposition of the conjugal bond and the victim's lack of consent, as well as suffering and serious physical or mental damage for the victim. Indeed, as pointed out, the datum is indicative that the international crime of forced marriage has been committed in sociocultural settings, such as Sierra Leone and Cambodia, in which the custom was prevalent of marriages arranged between the contracting parties' families (Jain 2008, 102). Now, what makes forced marriage an international crime against humanity is the double threshold of gravity of the degree of victims' suffering (so that it is contained in the category 'Other inhumane acts') and of forming part of a generalised or systematic attack against the civil population.

With regard to sexual enslavement, the loss of sexual autonomy and the obligation to perform sexual acts are also elements typical of the international crime of forced marriage, so that we believe this legal concept should be considered a crime of sexual violence, even when this violence is not the consequence of the will or pressure of one of the members of the conjugal association over the other, but derives from third parties' actions that force them to establish this union. However, in our opinion, it is the entirety and the accumulative effects of all the 'conjugal' obligations imposed on the victims that sets the crime of forced marriage apart from that of sexual enslavement. From this viewpoint, as pointed out, we would be looking at a neutral gender crime that would also be applicable in situations like that of Cambodia, in which men and women were forced to contract 'marriage', with all the ensuing consequences of this situation, which primarily included the imposition of sexual relations for procreation[121].

In short, we are facing a new international crime, whose contours and specific elements have yet to be confirmed by international case law. Nonetheless, this lack of definition should not be used to leave these types of behaviours unpunished that, in all cases, can be subsumed under the crime of sexual slavery, as a sex crime.

[121]. As mentioned, the majority of cases of forced marriage were done under threat of death, where violence was employed and those who refused were executed (ECCC, OICJ, [Case 002/19-09-2007], Closing Order, 15 September 2010, para. 1447).

4.2.3. FORCED PROSTITUTION

A) THE INCRIMINATION OF FORCED PROSTITUTION AS A WAR CRIME AND CRIME AGAINST HUMANITY

The legal concept of forced prostitution was already considered in the Commission Report on the Peace Conference of 1919 in which, along with rape, reference was made to the 'kidnapping of women and girls for forced prostitution'[122]. However, as pointed out, although during the Second World War women were confined to force them to work in prostitution, as was the case of Japan's 'comfort women', the Nuremberg and Tokyo Tribunals did not judge these acts, which were only punished on a very exceptional basic by domestic courts[123].

In reaction to this situation, the Fourth Geneva Convention on the protection of civilians in wartime specifically establishes in its art. 27 that 'Women shall be especially sheltered... against forced prostitution', although forced prostitution does not appear on the list of 'serious violations' in art. 147 of this convention. Additional Protocol I prohibits it at all times and in all places in art. 75, 2, b) and art. 76. p 1 repeats, in terms similar to article 27 of the Fourth Convention, that 'Women shall be accorded special respect and protected from rape, forced prostitution and any other type of indecent assault', although neither is it included as a serious violation. Art. 4, p 2, e) of Protocol II does not expressly prohibit it either within the assaults on personal dignity.

Therefore, forced prostitution has been considered and clearly prohibited in international humanitarian law, although its consideration as a war crime could have been initially obstructed due to not appearing on the list of serious violations in the Geneva Conventions and not being expressly mentioned in art. 3 common. Indeed, forced prostitution is not specifically detailed in the Statute of the Tribunal for the former Yugoslavia, although it could be considered as included in the violation of the laws and customs of war (art. 3). Conversely, the Statute of the International Tribunal for Rwanda does contain it expressly in its art. 4, e) within the violations from art. 3 common to the Geneva Conventions and the Conventions' Additional Protocol II, thus confirming its status as a war crime.

Consequently, with respect to forced prostitution committed in the setting or an international or domestic armed conflict, art. 8, 2, b), xxii and e) vi) of the Rome Statute is limited to detailing and clarifying the acquis existing in international humanitarian law in which it had already taken on the consideration of a war crime.

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122. On these first precedents, see Lupig, Diane, 2009. 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court', *American University Journal of Gender, Social Policy & the Law* 17 (2): 431-496.

123. See the Sentence of 25 October 1946 by the *Netherlands Temporary Court-Martial* in Batavia, case no. 76, Washio Awochi, in which the accused was sentenced to 10 years for the crime of forced prostitution due to having recruited Dutch women and girl children in the Dutch East Indies into enforced prostitution, in violation of the rules and customs of war.

The same cannot be said with regard to forced prostitution as a crime against humanity, as the Rome Statute is the first international instrument that incriminates it as such in art. 7, 1, g. This absence of forced prostitution in the preliminary process of shaping the category of crimes against humanity could be due, among other reasons, to the general problems provoked by prohibiting prostitution in international instruments and the inclusion of this legal concept within the offence of human trafficking. Therefore, its international repression is subsumed by the measures adopted in relation to this statute[124].

With regard to the international practice on the crime of forced prostitution, it merits mention that the Special Court for Sierra Leone also contains forced prostitution as a crime against humanity (art. 2, g) and war crime (art. 3, e). Conversely, it was not considered in the crimes within the jurisdiction of the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. At this time, there is no international case law on this crime, which is only mentioned in some ICTY and the ICTR sentences on the broadest category of sexually violent crimes (Kvočka and Semanza Cases)[125].

B) DEFINING ELEMENTS

Pursuant to that which is established in the Elements of Crimes, the crime of forced prostitution is defined according to two specific elements that are added to the contextual elements typical of crimes of war and against humanity:

Firstly, a sexual element, consisting of 'That the perpetrator has made one or more persons perform one or more sexual acts through force or the threat of force or coercion, such as that caused by fear of violence, intimidation, arrest, psychological oppression or the abuse of power, against this person or these persons or against another or taking advantage of a coercive environment or the inability of this person or persons to give genuine consent'.

Secondly, a 'lucrative' element, which is identified with the fact 'That the perpetrator or another person has obtained or expected to obtain pecuniary or other types of advantages in exchange for acts of a sexual nature or in relation to them'.

The consequence of these two elements is that they let forced prostitution be differentiated from the two legal concepts that are most similar to it, on one hand rape and, on the other, sexual slavery. With respect to rape, the differentiation is clear to the degree that the sexual element required of both crimes has a different scope, as in the case of

124. With respect to these matters, see, Demleitner, Nora, 1994, 'Forced prostitution: Naming an International Offense'. *Fordham International Law Journal* 18(1): 163-197; and Ann Jordan, 2010. 'The UN Protocol on the Treatment of People: an Imperfect Approach'. American University, Washington College of Law, discussion paper, 1 November 2010.
125. ICTY, TC, Prosecutor v. Kvočka *et al.*, Judgment (IT-98-30/1), 2 November 2011; and ICTR, TC, Prosecutor v. Semanza, Judgment (ICTR-97-20), 15 May 2003.

rape it must be 'the invasion of a person's body by conduct that has involved penetration, no matter how insignificant, of any part of the victim's or perpetrator's body with a sexual organ or of the victim's anal or genital cavity with an object or another part of the body', whereas forced prostitution refers to the realisation of 'one or more sexual acts', whose content is not specified. Furthermore, forced prostitution requires a specific lucrative element that is not required in rape.

Conversely, the differentiation with respect to sexual slavery is more difficult, given that the content of the sexual element is identical that is, in both cases, the realisation of one or more acts of a sexual nature in a situation in which the victim's lack of consent is inferred. However, in the case of forced prostitution, the Elements of Crimes makes specific reference to the circumstances under which this lack of consent is inferred, in so far so the case of sexual slavery, it is presumed from the context in which these crimes are committed according to what the perpetrator 'has done', namely, has forced the victim.

In our opinion, the greatest difficulties in differentiating between the two crimes is determined by distinguishing between 'exercising one of the attributes of the right to ownership' and 'obtaining an advantage in exchange for sexual acts', since if the perpetrator 'buys, sells, lends or swaps, or imposes a similar type of privation of freedom' and has made the person or persons perform one or more acts of a sexual nature, which would be the elements typical of sexual enslavement, the perpetrator would be obtaining the pecuniary or another type of advantage in exchange for the sexual acts referred to for forced prostitution. Indeed, the Statute itself and the Elements of Crime lead to some confusion between both legal concepts, by including human trafficking, in particular women and children, within slavery (art. 7, 2, c) and by establishing that the conduct described as sexual slavery includes human trafficking, in particular women and children (Elements of Crimes, art. 7, 1, (g, note 17). For these reasons, as pointed out, the crime of forced prostitution could be considered a residual legal concept that would include the situations not contained in the Elements of Crimes for sexual slavery (Ambos 2012, 163).

4.2.4. FORCED PREGNANCY

A) THE REPERCUSSION OF THE CONFLICTS IN THE FORMER YUGOSLAVIA AND RWANDA ON THE PROSECUTION OF FORCED PREGNANCY

The international crime of forced pregnancy was shaped from the conflicts in the former Yugoslavia and Rwanda, where as the consequence of the commission of mass rapes for ethnic reasons, it is estimated that there were approximately 400-600 births in Bosnia and 2000-5000 in Rwanda. To the degree that this legal concept is not contained in the ICTY and ICTR Statutes, neither of these tribunals ended up directly in-

criminating these conducts. This only occurred in the Ayakesu case, where the ICTR referred to measures aimed at preventing the births of an ethnic group with respect to the crime of genocide, and made reference to forced pregnancy if the rapist impregnated a woman in the ethnic group considered with the attempt to force her to give birth to a child that belonged to the other ethnic group, as established in a patriarchal society in which belonging to the group is established according to paternal identity[126].

In fact, in the case related to the application of the Convention to the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Bosnia pleaded the existence to the ICJ during this conflict of Serbia's systematic policy to impregnate Muslim women with the sperm of Serbian men and detain them until they gave birth to Serbian children[127]. Although the ICJ did not admit as proven the existence of this policy by Serbian leaders, its sentence referred to the Karadzic case, in which the ICTY verified that several detention camps were especially devoted to rapes, with the aim of causing pregnancies so that Serbian children would be born[128].

All of these events caused the question of the crime of forced pregnancy to be an important point during negotiations of the Rome Statute, in which the Women's Caucus for Gender Justice decisively influenced the final inclusion of this crime in the Statute, overcoming the reticence of the Vatican and other dissenting states that opposed it due to the issue of abortion[129]. Nonetheless, as we shall see hereafter, such tensions are reflected in the way and limitations of how this crime is defined.

In any event, forced pregnancy is incriminated for the first time in the Rome Statute as a crime against humanity (art. 7, 1, g) and as a war crime (art. 8, a, b), xxii and c, vi). In light of what happened in the former Yugoslavia and Rwanda, some authors believe that it should also be considered in the framework of the crime of genocide and, therefore, must be understood as included in art. 6, d of the Rome Statute under 'measures aimed at prevented births within the group'[130].

The Statute of the Special Court for Sierra Leone only includes it as a crime against humanity (art. 2, g) and the law regulating the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea does not

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126. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998, para. 507.
127. ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, 26 February 2007, para. 367.
128. See ICTY, TC, Prosecutor v. Radovan Karadzic, Ratko Mladic, Review of the indictments pursuant to Rule 61 of the rules of procedure and evidence (IT-95-5-R61, IT-95-18-RG1), 11 July, para. 64. Bear in mind that the trials against Radovan Karadzic and Ratko Mladic, listed in cases IT-95-5/18-I and IT-09-92, respectively, are still underway and that the respective sentences could contribute relevant data to the debate on whether forced pregnancy should be considered a measure aimed at preventing births in the group with regard to the crime of genocide.
129. For a more complete development of the different stances and the negotiations related to forced pregnancy during the Rome Conference, see Drake, Alyson M. 2011-2012. 'Aimed at Protecting Ethnic Groups or Women - A Look at Forced Pregnancy under the Rome Statute'. *William & Mary Journal of Women and the Law*, 18: 606-608.
130. Among others, Allen, Beverly, Rape Warfare: *The Hidden genocide in Bosnia-Herzegovina and Croatia* (Minneapolis: University of Minnesota, 2006); Fisher, Siobban, 1996. 'Occupation of the Womb: Forced Impregnation as Genocide'. *Duke Law Journal* 46: 91-133; MacKinnon, Catharine, 1994. 'Rape, Genocide and Women's Human Rights'. *Harvard Women's Law Journal* 17: 5-47.

consider it. At this time, cases have yet to be filed with the ICC in which charges are established on the crime of forced pregnancy and, as set out by doctrine, it does not seem likely that it will be done in light of the way in which the Rome Statute currently defines this crime (Drake 2011-2012, 597 Markovic 2006, 22).

B) DEFINING ELEMENTS AND INTERPRETATION DIFFICULTIES

The Rome Statute defines forced pregnancy in art. 7, 1, g), art. 8, a, b), xxii and c, vi, according to two typical elements:

First, an objective element on the 'illegal confinement of a women impregnated by force'.

Second, a subjective element, concerning the intention of this behaviour to 'modify the ethnic composition of a population or commit other serious violations of international law'.

It also establishes that 'By no means shall this definition be understood to affect domestic rules on pregnancy'.

The Elements of Crimes do not clarify anything on these two elements typical of the crime of forced pregnancy, except for setting out that:

- The contextual element 'that the conduct was committed as part of a generalised or systematic attack against the civil population', when cases are crimes against humanity and, in war crimes, that the conduct took place in the setting of an international armed conflict or that is not international but was related to it.
- The *mens rea* common to all crimes against humanity that 'the perpetrator had knowledge that the conduct was part of a generalised or systematic attack against the civil population or had the intention that the conduct was part of an attack of this type' and, for war crimes, 'that the perpetrator had been aware of factual circumstances that established the existence of an armed conflict'.

However, the interpretation of all defining elements of the crime of forced pregnancy raises a series of questions that, examined as a whole, make it clear that, in principle, it seems like it would be difficult to file charges for this crime with the ICC or any other international criminal jurisdiction according to the current way this crime is worded in the Rome Statute.

Thus, with regard to the objective element that 'one or more women were confined who were impregnated by force', the punishable act turns out to be the act of confinement, whose perpetrator may or may not be the same party who caused the forced pregnancy (Boon 2001, 660). Thus, in charges of forced pregnancy, it seems logical that charges would also need to be presented on the offence that caused this pregnancy, presumably rape (although also sexual enslavement, forced prostitution or even forced marriage), with the probatory hardship that the perpetrators of such acts are presumably not the same (Markovic 2006, 6). Remember that pregnancy by force can even take place with-

out violence, as would be the case in artificial insemination. In our opinion, the forced nature is given due to the woman's lack of consent both with respect to the actual act that led to pregnancy, and her detainment once impregnation takes place. Like other sex crimes in the Statute, lack of consent is inferred from the coercion under which these events occur, as is the case in a situation of armed conflict.

However, as pointed out, the greatest difficulties for the jurisprudential application of this legal concept stem from the need that this crime is committed with the intention of 'modifying the ethnic composition of a population or committing other serious violations of international law'. Indeed, forced pregnancy is the only crime of sexual violence contained in the Rome Statute that requires a special intentionality, whose concurrence can be particularly difficult in so far as the perpetrator's intent to modify the ethnic composition of a population must be proven (Drake 2011-2012, 618). Furthermore, in light of this element, it would seem that this crime could only take place in those cultural contexts in which an individual's ethnic status stems solely from the father's ethnicity. In other circumstances (such as for example those in which the aim is the loss/alteration of the ethnic properties typical of an indigenous people), it would seem more suitable for them to be judged as genocide. The reference to the intention to commit other serious violations of international law seems easier, given that it can be used to establish the connection of this crime to other international sexual crimes (like sexual slavery or, in the case of forced marriage, the case of the 'bush wives' or work camps in Cambodia, or forced prostitution linked to child trafficking) or other international crimes (forced disappearance with respect to the past commission of a sex crime).

Finally, the problems must be mentioned that stem from the specific mention that 'by no means shall this definition of forced pregnancy in the Rome Statute affect domestic rules on pregnancy'. It infers that the existence cannot be deduced from the Rome Statute of a right to abortion when pregnancies occur by force in the framework of the commission of an international crime (for example, mass rapes of women in armed conflict whom are denied the possibility of abortion). However, in our opinion, the most delicate issue arises in those cases in which, according to national legislation, women who were forcibly impregnated can be kept confined so that they don't have abortions, as in this case it would be very difficult, in light of the exception considered by the Statute, to consider such acts an international crime of forced pregnancy (Markovic 2006, 11).

If the purpose of sex crime legislation is to prevent sexual violence and respect personal dignity and autonomy (in this case, necessarily women), it does not seem logical that related policies do not result in an international crime if not accompanied by the specific intent to modify the ethnic composition of a population or to commit other serious violations of international law. In this sense, we agree with the assessment that considers that, as the crime of forced pregnancy is written in the Statute, the protection of the rights of women's sexual autonomy and freedom is relegated below the protection of the ethnic group to which these women belong. This is so despite the fact that forced pregnancy implicitly entails the two-fold suffering of the victim, due to having been the object of a violation of her physical and sexual integrity and, furthermore, having to

endure pregnancy as a result of this act (Drake 2011-2012, 622). Consequently, awaiting the jurisdictional practice that may be presented, we believe this is one of the sexually violent crimes in the Statute whose text must be reviewed to eliminate the special intentionality required, and to limit the subjective element required by the commission of any crime against humanity or war crime.

4.2.5. FORCED STERILISATION

A) BACKGROUND AND DEVELOPMENTS

Forced sterilisation was already condemned as a crime of war and against humanity in virtue of Council Law 10 on allied control in the case known as the Medical Case (United States v. Karl Brandt and others), in which German medical and administrative personnel were tried and convicted for having performed medical experiments on prisoners of war and civilians between March 1941 and January 1945, aimed at developing large-scale sterilisation methods to ensure the eventual elimination of enemy populations while keeping captured civilians for forced labour[131].

Forced sterilisation was not included in the ICTY and ICTR Statutes, due to which the Rome Statute established the first explicit incrimination of forced sterilisation as a crime against humanity (art. 7, 1, g) and war crime (art. 8, 2, b), xxii and e) vi) (Lupig 2009, 476).

At this time, there is no international practice related to this crime, which was not included either in the Special Court for Sierra Leone or the law regulating the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, although some situations, such as women's forced sterilisation during the Fujimori regime in Peru could be constitutive of a crime against humanity[132].

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131. The text of this sentence can be read at:
http://www.worldcourts.com/imt/eng/decisions/1947.08.19_United_States_v_Brandt.pdf.

132. On the occasion of the Year of Austerity and Family Planning, the 1991-1995 National Population Programme was launched, whose aim was to stop the increase in poverty in Peru through demographic population controls, where family planning methods included voluntary surgical contraception (VSC), which became an institutional mass practice at health clinics. It therefore gave rise to multiple situations in which the sterilisation was done without victims' consent or by exercising coercion or violence. Regardless of the adoption of an amicable settlement agreement between the Peruvian government and the legal representatives of a woman who died as a consequence of this practice before the Inter-American Commission on Human Rights, in which the Peruvian state recognised its international responsibility and pledged to compensate the victim's family members, an investigation was conducted that concluded in 2009 with the case being closed by the Public Prosecutors. This was done despite the fact that some opinions felt that the events had the contextual elements needed to be considered crimes against humanity. In this regard, Montoya Vivanco, Ivan, 'Derecho penal y métodos feministas' in *Métodos feministas en el Derecho. Aproximaciones críticas a la jurisprudencia peruana* (coord.) Marisol Fernández / Félix Morales (Lima: Prisma 2011), p 145-182. The case was reopened by the State Prosecutor's Office in 2011.

B) DEFINING ELEMENTS

The crime of forced sterilisation, as a crime against humanity and war crime, is defined pursuant to the terms of the Elements of Crimes based on two specific elements:
Firstly, that its perpetrator deprives one or more persons of their ability to biologically reproduce.
Secondly, that this conduct is not justified by medical or clinical treatment of the victim or victims and has not been performed with their genuine consent.
The first element is the one that clearly turns out to give this legal concept its substantive nature. However, this apparent clarity is overshadowed by footnotes 19 and 54, which refer to the exclusion of birth control measures that do not have a permanent effect in practice. As mentioned, the compatibility of this restriction with international law seems questionable, given that such measures could always give rise to the commission of the crime of genocide when aimed at preventing births within a group and, even despite the temporary nature, could represent a violation of their fundamental right to personal autonomy (Ambos 2012, 166) or even a crime of torture[133].
The second element of the crime of forced sterilisation is also modified in footnotes 20 and 53, which establish that 'the genuine expression of consent is understood' as not including consent obtained through deceit. This clarification seems unnecessary, firstly if bearing in mind the respective contextual elements required to consider such conducts as war crimes and crimes against humanity that in and of themselves generate situations of coercion in which the victim's consent could never be inferred. The second reason is that, as we have seen, when analysing each of the crimes of sexual violence made reference to in the Statute, all of them due to their nature as 'forced acts' share the victim's lack of consent.

4.2.6. THE RESIDUAL CLAUSE: OTHER TYPES OF SEXUAL VIOLENCE

Since the beginning of the prohibition of sexual violence in the framework of armed conflicts, there has been an awareness of the difficulty of annotating all behaviours by which this violence is defined. For this reason, the formulation of this prohibition has tended to include residual clauses, such as the one in art. 27 of the Fourth Geneva Convention, when it states that women shall be especially sheltered '... from all indecent attacks'. In identical terms, art. 75, 2, b) of Additional Protocol I contains the prohibition of 'any form of indecent assault' and art. 4, p 2, e) of Protocol II includes the prohibition of 'any other form of indecent assault'.

With respect to the ICTY and ICTR, only the latter in art. 4, e) refers to assaults on personal dignity to 'any form of indecent assault'. Nonetheless, the case law of both tribunals mention numerous times the prohibition of any form of sexual aggression defined

133. Sifris, Ronli. 2010. 'Conceptualising Involuntary Sterilisation as "Severe Pain or Suffering" for the Purposes of Torture Discourse', *Netherlands Quarterly of Human Rights*, 28 (4): 523-547.

by international humanitarian law[134], and that the rules of international criminal law not only sanction rape but any form of serious sexual aggression[135].

Arts. 7, 1, g) and 8, b), xxii and d), vi) of the ICC Statute expressly establish a series of residual clauses related to 'Any other form of sexual violence', both with respect to crimes against humanity and war crimes of sexual violence. The inclusion of these residual clauses is extremely useful, because it is not possible to predict the evolution and dynamic of sexual violence in armed conflicts. In this respect, if reality does make something clear, it is that the increased recourse to sexual violence as a weapon of war has entailed the appearance of new forms of criminal practices that are not always specifically considered and incriminated as such, although they share the core and contextual elements of the sex crimes already set out.

The case law of *ad hoc* tribunals offer numerous examples in this respect, which let what these behaviours could consist of be defined, starting from the idea that sexual violence does not require invasion, penetration or physical contact (as is the case of forcing a person to strip naked and perform gymnastics in front of a crowd in a public square)[136]. Therefore, these types of conducts include, but are not limited to, sexual abuses, sexual and genital mutilations, forced marriages and forced abortions[137].

However, like what generally happens with all types of residual clauses in the field of criminal law, the question is posed on the thresholds of gravity that specific behaviours must have to be considered as a crime against humanity or a war crime of sexual violence. In this regard, both the Statute and the Elements of Crimes require, as we have seen, a gravity comparable 'to the other crimes in article 7, 1, g) of the Charter' for crimes against humanity; a gravity comparable 'to a serious violation of the Geneva Conventions' for crimes of war committed in an international armed conflict; and, a gravity comparable to 'a serious violation of article 3 common to the four Geneva Conventions' for crimes of war committed in a domestic armed conflict.

As pointed out, in all three cases there are minimum thresholds of gravity that establish objective parameters that should lead to the exclusion of the cases of sexual violence of lesser gravity (Ambos 2012, 167). These cases, as stated, can be sanctioned, including them within other international crimes, such as for example 'other inhumane acts', from art. 7, 1, k, for crimes against humanity, or the 'inhumane treatments' for the serious violations in the Geneva Conventions and 'humiliating and degrading treatments' for the serious violations in art. 3 common, for war crimes. And, if they do not have enough gravity to be thus considered, they can and should be sanctioned as ordinary offences by the respective national jurisdictions.

134. ICTY, TC, Prosecutor v. Zejnil Dedalic, Zdravko Music, Hazim Delic, Esad Landzi (Celebici Prison-camp i), Judgment, (IT-96-21-T), 16 November 1998.
135. ICTY, TC, Prosecutor v. Anto Furundzija, Judgement (IT-95-17/1-T), 10 December 1998.
136. ICTR, TC, Prosecutor v. Akayesu, Judgment (ICTR-96-40-T), 2 September 1998, para. 636 and 688.
137. ICTY, TC, Prosecutor v. Kvočka *et al.*, Judgment (IT-98-30/1), 2 November 2011, para. 180 with respect to note 343 that states that 'Sexual violence would also include such crimes as sexual mutilation, forced marriage and forced abortion, as well as the gender-related crimes explicitly listed in the ICC Statute [...]' and ICTY, TC, Prosecutor v. Todovoric, Judgement (IT-95-9/1), 31 July 2001, para. 38 and 66.

4.3. THE CONSTRUCTION OF A SEPARATE CATEGORY FOR INTERNATIONAL CRIMES OF SEXUAL VIOLENCE

As deducted from that which has been set out until this point, the construction of a separate legal category for sexual violence crimes in contemporary international law is a long-standing process, which has needed interaction between different rules (conventional, customary, deeds by international organisations) and in which the contribution of case law from judicial bodies in the international criminal justice system has been decisive in assisting the transition from the initial 'invisibilisation' to the present-day 'visualisation'.

Indeed, while the majority of domestic legislations have progressively typified sex crimes until establishing their absolute prohibition, in classic international humanitarian law this ban was originally limited to rape, a limitation from which the statutes of international criminal courts also suffered.

Nonetheless, starting from the practice since the end of the Second World War and ICTY and ICTR case law, drawing upon the crimes of torture, enslavement and other inhumane and degrading acts, and their respective Rules of Procedure, a catalogue of sex crimes in international humanitarian law has been gradually elaborated. These crimes have finally been codified in arts. 6, 7 and 8 of the Rome Statute as a sub-category typical of sexually-violent crimes, although subsumed in three of the four international categories (genocide, crimes against humanity and war crimes), which are the jurisdiction of the International Criminal Court.

Concretely, in accordance with art. 7 of the RS and art. 7.1.g) of the Elements of Crimes, sex crimes are constitutive of crimes against humanity if they meet two requirements.

First, that they are committed as part of a generalised or systematic attack against the civil population.

And, second, that the perpetrator had been aware of this fact or had had the intention that his behaviour was part of an attack of this type.

The Elements of Crimes adds the requirement of a multiple commission with a high number of victims with the aim of fulfilling or promoting 'the policy of a State or an organisation', which enables not only public functionaries and state agents to be tried by the ICC, but any individual. Among the most controversial aspects of this treatment, it merits mention that the distinction between civil population and combatants is not easy to trace. There is the possibility that the alleged perpetrator defends himself by proving that he committed the acts of sexual violence for personal reasons, without the intention of collaborating with or forming part of any plan.

With respect to the consideration of sex crimes as war crimes, according to art. 8.2.vi) of the RS and 8.2.b) xxii of the Elements of Crimes, when sexual crimes occur in the course of an international armed conflict of which the perpetrator is aware, they shall be classified as war crimes, provided that they were employed as weapons of war, namely, as part of a systematic political campaign with strategic military goals and

whose ultimate purpose, as we have stressed, is not the defeat of the enemy, but its annihilation, the destruction of individual traits of identity and also those of the society and community to which the victim belongs, who do not necessarily have any type of connection or personal relationship with the perpetrators.

Finally, recall that in virtue of art. 6 of the RS, some sex crimes, such as forced sterilisation, can also be classified as the crime of genocide, provided that in addition to mass damage, it is set apart quantitatively from those perpetrated in domestic settings, that they were perpetrated with the intention of preventing births within the heart of a national, racial ethnicity or religious group with the aim of totally or partially destroying this group.

After analysing the categorisation of sex crimes and other international crimes, we must point out that this in no way hinders them from being classified as crimes that are substantive in their own right. Indeed, we can infer from the jurisprudential acquis examined throughout the present work that the international categorisation of sexually-violent crimes, regardless of the concrete legal concept in question, is supported by two constitutive elements.

The first concept is sexual autonomy. All of the crimes of sexual violence analysed, whether rape, sexual slavery, prostitution, forced pregnancy or any other form of sexual violence with comparable gravity, violate the victims' sexual autonomy, assault their physical and psychological integrity and represent an assault on human dignity and one of the most serious violations of human rights. The notion of sexual autonomy is useful, because it lets rights and their consequences be emphasised. On the one hand, the right of all people to have sexual relations with full freedom, with no restrictions stemming from state impositions or resulting from coercion or coercion exercised by another person. And, on the other, as a consequence of this right, the international obligation of the States party to prevent and sanction harmful acts, either with or without penetration, that assault this sexual autonomy.

The second element of categorising crimes of sexual violence is consent, which becomes a crucial factor in determining if the human right to sexual autonomy has been violated or not. But neither doctrine nor case law are unanimous on this point, as so far as there are diverging interpretations on whether or not consent needs to be proved in cases of coercion and in coercive environments, such as those surrounding armed conflicts. From this viewpoint, the debate on the requirement of coercion versus the victims' lack of consent, which we discussed earlier with regard to rape but that is common to all sexual crimes, reveals differences in criteria that are more formal than substantial since, in our judgement, regardless of the position held, the characteristic sequence of sex crimes is identical: The perpetrator commits an act of a sexual nature that violates the right to sexual autonomy of the victim, as it is done knowing the victim's opposition.

Reaching this point, it is convenient to recapitulate the two apparently opposing viewpoints on consent as an element constitutive of crimes of sexual violence, both around two theoretical binomials: consent-coercion and peace-war.

The first defends a model of 'affirmative consent', based in transferring the importance that consent and its proof are attributed in the majority of domestic criminal legislations to international law. The differences between 'common' sexual crimes, understood as those perpetrated on a daily basis within societies, and international crimes that take place in cases of genocide and due to armed conflicts (peace-war binomial) do not justify a different legal treatment of consent at an international level.

In this sense, granting a legal nature to the coercion test, which consists of presupposing the lack of the victim's consent not only when coercion is verified, but also automatically and generally in the coercive environments inherent to international crimes that are the competence of the ICC (consent-coercion binomial) has three relevant consequences.

On the one hand, it would entail undervaluing the gravity of ordinary sex crimes in virtue of the debatable theory that being a victim of rape by an enemy soldier is 'worse' than being raped by her own partner. On the other, it would strengthen the stereotype of the weakness of the female sex, where victims would require special protection that would exempt them from being submitted to testifying as witnesses, even at the expense of prejudicing the rights of the accused. And, finally, it would obviate the fact that in the end, the vulnerability of women and girl children in armed conflicts is the product of androcentrism and gender inequalities prevailing during peacetime in domestic societies, ignoring the efforts made by national legislations to obligate that subjects involved in all sexual contact prove the mutual existence of genuine and free will, which can never be deduced and has to be actively proved.

Conversely, the second viewpoint proposes displacing the focus of attention of the requirement of consent to that of coercion, either exercised by the perpetrator or the product of a coercive environment, because while consent emphasises individual will, coercion emphasises the importance of the context. The categorisation of crimes of sexual violence as international crimes starts from the premise that their ultimate nature is not that of serious sexual offences with violence, but instead are acts of violence, terror and/or torture with a sexual component, committed on a large scale or as weapons of war, in which it is materially impossible that the victims have provided consent, whose proof, in addition to irrelevant, would be contrary to human dignity.

Thus, there is a substantial difference with regard to intentionality and importance between sex crimes committed in a domestic setting and international crimes of sexual violence that, without questioning the gravity of the first, accent the scope of the damage inflicted by the second. Crimes of sexual violence, along with other forms of serious violence, are the criminal instruments employed by perpetrators to destroy the identity (sexual, ethnic, religious, etc.) of their victims, and their individual and collective identity. Relationships of power, submission and domination underlie these acts, which in qualitative and quantitative terms are much more complex than the purely physical interaction between the perpetrator and the victim, whose ultimate purpose would be to uphold the patriarchy and subordination of women in the social order. It follows that crimes of sexual violence require particular legal treatment that, unlike that which is followed in internal bodies of law, involves opting for the presumption of non-

consent in cases of coercion and contexts of coercion, which are consubstantial to the sexual crimes in the ICC's jurisdiction.

5. CONCLUSIONS AND RECOMMENDATIONS

Following the conclusion of this report, there are a series of general reflections whose aim is to satisfy two goals: Firstly, to summarise the main theoretical and practical questions that arise from the treatment of crimes of a sexual nature in international humanitarian law and, secondly, formulate several recommendations that could contribute to improving their comprehension by different stakeholders (States party, public institutions, international organisations, tribunals, academics, investigators and NGOs).

1) The legal framework that regulates sex crimes in international humanitarian law is shaped as a heterogeneous system, resulting from the interaction of the 1949 Geneva Conventions and their Additional Protocols with the statutes and jurisprudence of the international criminal justice system, to which the rules contained in different texts and treaties to protect human rights are added. The activity of the United Nations bodies (especially the General Assembly and the Security Council) is projected onto this set of regulations, which urges and strengthens their compliance through the adoption of soft laws centred on protecting women from sexual violence in different phases of the conflict and also in the post-conflict.

This regulatory framework has engendered the construction of a particular category for international crimes of sexual violence, which have been codified in articles 7 and 8 of the Rome Statute as their own sub-category, although subsumed in two of the crimes (crimes against humanity and war crimes), which are the competence of the International Criminal Court.

In general, there would be three elements that characterise this category of international crimes of sexual violence: first, the threshold of gravity, which is given by the contextual element, converting them into crimes against humanity when they constitute a generalised or systematic attack against a civil population, or into war crimes if they are committed as part of a plan or policy or as part of the large-scale commission of such crimes; second, the violation of individual sexual autonomy; and third, the coercive environment in which these crimes are perpetrated, which excludes the concurrence of victims' consent.

2) With regard to the catalogue of crimes that would form part of its own category of international crimes of sexual violence, articles 7 and 8 of the Rome Statute include rape, sexual slavery, forced prostitution, forced pregnancy and forced sterilisation, to which a residual clause is added on other forms of sexual violence with a compa-

rable gravity, which would be required for any other behaviour not expressly considered in the statute in order to be considered a crime against humanity or a war crime.

We understand that the list above does not exhaust the incrimination of sexual violence or the possibilities that new types of crimes of this type may arise, as the case of forced marriage may be. In this regard, we must clarify whether this legal concept constitutes an independent crime of sexual violence with respect to the crime of sexual slavery, specifying what its defining elements would be. Faced with the discrepancy upheld by the SCSL Chambers, the task of clarification should be assumed by the International Criminal Court, although in principle in the Lubanga case, the ICC decided to evade the matter of the sexual violence suffered by the girl children forced to join the militias and become 'bush wives'. For this reason, it would be recommendable for the ICIP to further doctrinal discussions on this possible new international crime.

3) In light of the analysis performed, we believe that the existence of a general prohibition of sexual violence in the framework of all international or domestic armed conflicts can be confirmed, whose violation is considered an international crime that, as such, entails the individual international criminal responsibility of its perpetrators. In this sense, it is pertinent to ask whether, in the framework of international humanitarian law, the prohibition of committing sex crimes in armed conflict settings, and the consequent obligation to persecute and sanction their perpetrators, can be considered a peremptory norm, or *ius cogens*.

In our judgement, there are solid arguments that endorse an affirmative response, but with nuances. We believe that this *ius cogens* norm would exist with respect to all crimes of a sexual nature considered in articles 7 and 8 of the Rome Statute, although a distinction would need to be established between those crimes, such as for example the prohibition of rape and sexual enslavement, whose character as *ius cogens* norms has been expressly recognised, and those others, such as forced prostitution, forced pregnancy and forced sterilisation, in which due to little international practice, this character has still not been established, but that entail the violation of other *ius cogens* norms, such as the prohibition of slavery and torture.

Thus, we have verified how at an international level, both conventional and customary rules and jurisprudence in the international criminal justice system unequivocally work in favour of considering the prohibition of rape as *ius cogens*. Along the same line, the soft law emanating from the United Nations merits mention, along with regional treaties and the pronouncements of regional judicial bodies, particularly the European Court of Human Rights. Indeed, a single precept or international sentence cannot be found that permits or authorises, whatever the circumstances or context may be, the commission of rapes and other sex crimes with comparable gravity, which would prove their non-derogability. Unavailability and non-acceptance of agreements against them are precisely two of the characteristic fea-

tures of binding, or hard law. To the above, the consolidation of an international regulatory acquis must be added that has ended up codifying previous customary rules, and for which the Rome Statute would be the main exponent, which not only specifically prohibits the commission of such acts but, depending on their gravity, classifies them as international crimes.

The enormous chasm existing between the categorical legal prohibition and international praxis, that is between legal treatment and the harsh statistics on sexual violence, in no way contradict or obviate the possible nature of *ius cogens* of the international prohibition of rape and sexual slavery. Similarly to what happens in other paradigmatic examples of peremptory norms, as would be the case in prohibiting recourse to force and the threat of force, in which a contradiction between theory and practice is observed, the perpetrators of such crimes do not deny the existence of the prohibition, its validity or applicability, but are instead limited to trying to seek exonerating or attenuating circumstances to their international criminal responsibility, which in the end would be confirming their compulsory nature.

With regard to the domestic level, the majority of national criminal legislations already have common or civil law, prohibit rape and other sexual crimes, both during war and peacetime, and also assume the duty to prevent and sanction their commission.

Thus, the uniformity of prohibition both in domestic and international arenas would indicate the existence of an international *erga omnes* obligation, which affects the international community as a whole, with the consequent particularities on the contents of this obligation and the determination of the individuals with regard to international responsibility. In fact, the *erga omnes* nature would enable recourse to the principle of universal jurisdiction to prevent perpetrators from having impunity.

The fact that the prohibition to commit sex crimes in general, and rape in particular, does not appear at all in the catalogue of *ius cogens* norms listed in the Project of International Responsibility elaborated in its day by the International Law Commission is determinant, especially when a de facto expansion of the material content of mandatory law has taken place. Its consideration as *ius cogens* would thus be grounded in the existence of an international obligation taken on by the States party, and ratified by national legislations, to persecute and punish. The duty to fight against impunity, reflected in the *aut dedere, aut iudicare* principle, would obligate the trying of sex crimes or, otherwise, that the states activate mechanisms of cooperation to ensure their prosecution by other national jurisdictions or by international jurisdiction.

Due to the above, we find it necessary to insist that the prohibition of the commission of sexual crimes is a mandatory law, in order to contribute to the protection against sexual violence in situations of armed conflict is definitively established as a constitutional principle of international law.

With this objective, we believe it would also be suitable to strengthen the current legal framework that regulates sexual crimes in international law by adopting a conventional rule that specifically considers the treatment of sex crimes committed during armed conflicts. The best would be to adopt a universal multilateral treaty that bring together the different dimensions of human rights protection, international humanitarian law, international criminal law and criminal and judicial cooperation, as well as preventive, sanctioning and reparative measures. Thus, as a general recommendation, it would be advisable for the ICIP to initiate the debate on the opportunity to proceed to elaborating a proposal on an 'international agreement aimed at the prevention, sanction and reparation of sexual crimes in armed conflicts', which could be initially approached in the European and Latin American arena, attracting the greatest number of stakeholders possible (states, regional organisations, ICRC and other non-governmental organisations) that could be involved.

4) Over the course of the present study, it has become blatantly clear that the criminalisation of sexual violence in situations of armed conflict is the fruit not only of the cross-fertilisation of different regulatory branches and sections of international law, but also of the constant interaction between this and national laws.

Indeed, domestic and international legal systems are in a constant process of mutual influence, like communicating vessels. In this sense, rape has a long tradition in the majority of domestic criminal codes, which contrasted with the absence of characterisation in the classic conventional international legal system. Its later international conceptual development and its interpretation by the judicial bodies in the international criminal justice system have been largely conditioned by its domestic configuration. Obviously, what is taking place is not an automatic transfer of legal parameters, but a fruitful dialogue between regulatory systems. For example, this has taken place with the international debate approached internally on the importance of consent as a constitutive element of sexual crimes, a debate that has taken on its own nuances and connotations at the level of international crimes.

This interaction is two-way, and also takes place from international law to domestic law. This is verified by regulatory and case-law development of new sexual crimes, like forced pregnancy and forced sterilisation, whose contours are yet to be defined but that, following their international treatment, have started to receive attention in national laws. Concretely, the Spanish legislator has been obligated to constantly update and modernise 'crimes against the international community'. It is no coincidence that the strengthening of the criminal protection provided for women and children in armed conflicts through the new criminal offences approved in virtue of Organic Law 5/2010 of 22 June (arts. 611 and following of the Criminal Code), have matched the first ICC sentence in the Lubanga case.

Consequently, we recommend recurring to and using international law to strengthen the legislative reforms needed, in order to improve how sex crimes are handled in domestic rights and, especially, to more suitably handle procedural problems as im-

portant as those related to probatory principles and victim and witness protection in these crimes.

5) Indeed, our study has confirmed that what we have called the 'chain of technical-procedural obstacles' is just as determining as substantive problems on characterisation and categorisation, which helps explain the notable disproportion between the frequency and magnitude of sexual crimes committed in the framework of current armed conflicts and the extremely-low number of subsequent trials and convictions.

In our judgement and as we expected, one of the causes of this shortage rests with the intrinsic limitation from which international humanitarian law suffers, which is to regulate the complete chronological sequence of the commission of sexual crimes, which encompasses not only the armed conflict, but also the pre-conflict and, above all, the post-conflict and peace negotiations, which is the phase during which investigations and trials take place.

In this regard, we believe that reflections must continue on whether the efficacy of the courts that make up the international criminal justice system, particularly the ICC, must be measured exclusively in punitive terms or whether, conversely, one of its functions is to facilitate, or at least not block, the management of post-conflict and the rebuilding of societies broken by wars. However, this topic is so controversial and has such a broad scope that it must be handled in another report.

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