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THE AFRICAN CONTRIBUTION TO THE PENALIZATION OF WAR CRIMES OF SEXUAL NATURE

ABSTRACT

Rape and other forms of sexual violence have been inseparably linked with the ongoing military conflicts. Despite the condemnation of war rape in modern times, its penalization arrived extraordinarily slowly. The last twenty years brought about a huge progress in the approach to the penalization of international crimes of sexual nature, which was developed in a hitherto unprecedented range in the jurisprudence of the international criminal tribunals, especially in Africa. The aim of this article is to present the cases of the International Criminal Tribunal for Rwanda (ICTR) which had a significant influence on the penalization of war crimes of sexual nature in the Statute of the International Criminal Court and two trials of the Special Court for Sierra Leone (SCSL), concerning the penalization of forced marriage. It shows how the African juridical traditions contributed to the problem of the penalization of sexual war crimes.

Keywords: war crime, sexual assault, international criminal tribunal, Rwanda, Sierra Leone

Sexual violence is one of the types of violence which is present during all armed conflicts, regardless of their intensity, extent or duration. Irrelevant to its presence remains also the nature of the war, the region of the world in which it takes place, and whether or not the conflict involves government troops, armed forces or paramilitary groups. However, these factors somewhat affect the diversity of the types of sexual violence, its purpose and the substrate. It is not in every conflict that we have to deal with all its incarnations, among which we can distinguish: rape, sexual torture, mutilation, sexual slavery, forced prostitution, forced sterilization and forced pregnancy¹. In certain conflicts, this violence is aimed at women of a certain ethnicity, while in other conflicts affiliation does not matter. Disparities are also subject to whether the acts of sexual violence are directed against women only or also against men; whether they committed by all parties to the conflict, or they are one-sided; whether they are committed individually or collectively; whether they are culturally alien in the area, or maybe they were already known there before the war. Each conflict is different as the intensity of the occurrence of acts of sexual violence².

Nevertheless, rape and other forms of sexual violence have been inseparably tied to the ongoing military conflicts. Despite the condemnation of war rape in modern times, its penalization arrived extraordinarily slowly. For centuries, rape and other forms of sexual violence were considered spoils of war, justified by the law of prey, which resulted primarily from the recognition of women as the property of a man (father or husband). In ancient times the woman was subject to a man completely without power even over her own body and sexuality³. The social position of women in the Middle Ages, has not changed considerably⁴. And although Grotius was the first to say that rape is incompatible with the law of nations, almost two and a half century after his death, we still cannot find any regulation forbidding it *expressis verbis*. The problem was also passed over in silence during the Nuremberg trials⁵, and barely mentioned in the judgments of the International Military Tribunal for the Far East after WWII⁶.

It is the last twenty years that brought about a huge progress in the approach to the penalization of international crimes of sexual nature, which was developed in a hitherto

¹ E. J. Wood, 'Armed Groups and Sexual Violence: When Is Wartime Rape Rare?', *Politics Society*, Vol. 37, No. 1 (2009), p. 133, at <<http://dx.doi.org/10.1177/0032329208329755>>.

² Eadem, 'Sexual Violence during War: toward an Understanding of Variation' in: S. Kalyvas, I. Shapiro, T. Masoud (eds.), *Order, Conflict, and Violence*, Cambridge 2008, pp. 321-322.

³ K. D. Askin, *War Crimes against Women. Prosecution in International War Crimes Tribunals*, The Hague 1997, p. 20.

⁴ *Ibid.*, pp. 23-24.

⁵ M. Ellis, 'Breaking The Silence: Rape as an International Crime', *Case Western Reserve Journal of International Law*, Vol. 38, No. 2 (2006/2007), pp. 227-228.

⁶ J.B. Sedgwick, 'Memory on Trial: Constructing and Contesting the Rape of Nanking at the International Military Tribunal for the Far East, 1946-1948', *Modern Asia Studies*, Vol. 43, No. 5 (2009), p. 1231, at <<http://dx.doi.org/10.1017/S0026749X08003570>>; 'International Military Tribunal for the Far East', *International Organization*, Vol. 3, No. 1 (1949), p. 184.

unprecedented range in the jurisprudence of the international criminal tribunals, particularly in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The conclusions contained in their findings were thereafter further developed in the regulations of the Rome Statute and other legislative acts of the International Criminal Court (ICC), as well as the jurisdiction of the Special Court for Sierra Leone (SCSL), which hitherto only judged in cases regarding crimes committed in Africa.

To say that Africa has had a significant impact on the penalization of war crimes of sexual nature does not exclusively mean that the only way the continent contributed to the said phenomenon was the place of the crimes. Indeed, all the cases investigated by the ICTR and SCSL referred to crimes committed in Africa, but the African juridical traditions contributed significantly to the penalization of the crimes, as shown in the decisions of the Tribunals, penned by the following African judges: Navanethem Pillay from RSA, William Hussein Sekule from Tanzania, Andrésii Vaz from Senegal, Julia Sebutinde from Uganda, Rosolu Johna Bankole Thompson from Sierra Leone and Benjamin Mutangi Itoe from Cameroon. It was their factual findings and decisions based on their own experience and juridical practice in the African legal system that made penalization possible, and not the place at which the crimes were committed. It is also extremely important to mention the efforts of the African scientists, activists and officials, both in the tribunals and outside of them, who fought to ensure careful and thorough investigations, formulating of indictments and conducting lawsuits of people responsible for said crimes.

This aim of this paper is to trace the war criminal lawsuits conducted by the above mentioned tribunals, in order to show the African input into the penalization of sexual war crimes.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Despite many testimonies claiming that rape and sexual violence were alien to the Rwandan culture and tradition, and therefore could not have taken place during the act of genocide⁷, the tribunal took up this issue for as many as 28 of the 75 completed cases. It was established that in the period from April to July 1994, from 250 to 500,000 women were raped or sexually assaulted in other forms⁸.

Almost all the accused before the ICTR were members of the Hutu community, occupying senior positions in the army, police and administration at local and national level⁹, and they committed crimes of a sexual nature in the form of rape, torture, inhu-

⁷ UN, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820*, New York 2010, p. 47, par. 96.

⁸ R. A. Alija Fernández, 'Crímenes de derecho internacional y derechos de la mujer: de la protección del honor a la salvaguardia de la libertad' in J. A. Cruz Pacero, R. Vázquez (eds.), *Derechos de las mujeres en el Derecho Internacional*, México D.F. 2012, p. 223 (*Género Derecho y Justicia*).

⁹ UN, *Review of the Sexual Violence Elements...*, p. 47, par. 100.

mane acts and persecution as a crime against humanity, rape and attacks on personal dignity as war crimes and rape and serious bodily or mental health as genocide¹⁰.

Thus, despite the fact that sexual violence was not expressly mentioned in the 2nd article of the Statute, the ICTR established in its case-law that rape and other forms constitute genocide, like any other act, as long as they are committed with the specific intent to destroy, in whole or in part, a specific group¹¹.

CASE ICTR-94-4 – JEAN PAUL AKAYESU

In the original accusation against Jean Paul Akayesu, the governor of Taba, also responsible for the police activities and other uniformed services, there was a substantial lack of references to any sexual acts committed. It was not until one of the witnesses' statement, the involvement of judge Pillay – the only woman present in the adjudication panel, and the pressure from human rights organizations, that the charges were modified¹² to include rape as crimes against humanity, as well as attacks against personal dignity, including: rape, degrading and humiliating treatment and indecent assault and sexual assault as war crimes and acts of sexual violence as an element of genocide¹³.

ICTR decided that rape, being an act of aggression, cannot be defined with merely the tools and body parts involved in the act. Appealing to the provisions of the Convention regarding the ban on the use of torture and other cruel, inhumane or demeaning treatment and punishments, in which the definition of torture does not contain a specific description of acts that bear the traits of torture, the Tribunal decided that rape, committed in order to intimidate, degrade, discriminate, punish, dominate or destroy the victim and being an attack on personal dignity, may be defined as "a physical violation of sexual nature, committed upon another person without consent". Sexual violence, as a broad category to which rape can be added, was defined as "every sexual act committed unto another person without consent". Sexual violence, according to the court, does not necessarily imply a direct physical contact between the perpetrator and the victim. It can also mean forcing the victim to publicly strip naked, and the coercion may involve both threats and intimidation. Acts bearing the properties of sexual violence can be recognized as "[an]other inhumane act" in Art. 3(i) of the Statute, "attacks on personal dignity" in Art. 4(e) and "inflicting severe physical damage and mental disorders" in Art. 2(2)(b)¹⁴, and therefore be war crimes, crimes against humanity as well as crimes of genocide. This very broad definition allows rape to also mean acts such as

¹⁰ Ibid., p. 47, par. 98.

¹¹ Ibid., p. 48, par. 104.

¹² D. M. Amann, 'Prosecutor v. Akayesu. Case ICTR-96-4-T', *American Journal of International Law*, Vol. 93, No. 1 (1999), p. 196.

¹³ Prosecutor vs. Akayesu, ICTR-96-4-I, *Amended Indictment*, 6 June 1997, par. 12, counts 1-3, 13-15.

¹⁴ Prosecutor vs. Akayesu, ICTR-96-4-T, *Judgment*, 2 September 1998, para. 687-688.

the penetration of a woman's sexual organs not only with a penis, but also with other items like a stick or the barrel of rifle.

The Tribunal, referring to the first three charges regarding genocide, first considered the issue of putting the Tutsi under the protection of the UN convention regarding the Prevention and Penalization of Genocide.

An ethnic group is defined as a group whose members share a common language and culture¹⁵. According to the Tribunal, even though the Tutsi and the Hutu belonged in fact to the same cultural and linguistic group, they were distinguished in Rwanda as two separate ethnic groups. In accordance with the Rwandan civil code, one of the identifying features of a person is their ethnicity. The distinction of Tutsi and Hutu was present in multiple administrative documents, e.g. IDs¹⁶. The affiliation with a certain group was inherited patriarchally, and the distinction between groups was strongly linked to the social norms¹⁷. Hence, the Tribunal decided that the Tutsi and the Hutu were permanent groups, in which membership was based solely on birth. Even though they were not in any definition for groups directly protected by Convention for Prevention and Penalization of Genocide, it can be extrapolated that as permanent groups, they are under the protection¹⁸.

The Court decided that every act listed in Article 2 of the Statute, if marked with *dolus specialis*, regarding the will to entirely or partially exterminate a group under the protection of Convention for Prevention and Penalization of Genocide, constitutes the crime of genocide¹⁹. Their decisions meant that the victims of the acts committed in Rwanda were chosen by the offenders on the basis of their membership to the Tutsi group, with the intent to exterminate them. Hence, these acts are considered a part of said crime²⁰.

According to the ICTR, the rapes and sexual violence that Akayesu was charged with in Par. 12 of the indictment, were an act of genocide, just like every other act committed specifically in order to eradicate the Tutsi. The sexual violence was an integral part of the Tutsi extermination process, inflicting serious bodily and mental harm of the victims, mentioned in Art. 2(2)(b) of the statute as an act bearing the traits of genocide and committed exclusively upon the Tutsi women, resulting in public humiliation directed against the victims, their families and entire societies²¹.

Despite the fact that Akayesu could not be deemed solely responsible for the committed crimes, with his actions and utterances he allowed and coaxed others to rape and perform other kinds of sexual violence like: forcing to strip, injuring sexual organs, forcible abortions, marriage and prostitution, all in his presence or with his knowl-

¹⁵ Ibid., par. 513.

¹⁶ Ibid., par. 170.

¹⁷ Ibid., par. 171.

¹⁸ Ibid., par. 511-516.

¹⁹ Ibid., para. 497-498.

²⁰ Ibid., para. 124-126.

²¹ Ibid., par. 731-732.

edge²², he was convicted for contributing acts of sexual violence by ordering, coaxing and assisting in genocide. The acts committed by the accused were deemed a crime against humanity, as they were an element of a large-scale, systematic attack on the civil population²³.

However, the accused has not been found guilty under 15, defining the attacks unto personal dignity, including: rape, degradation and sexual assault as war crimes, as the prosecutor was not able to prove the link between the ongoing military conflict and the acts committed, because according to the Tribunal, the accused was not involved in the military activities²⁴.

The Akayesu case showed that rape and other forms of sexual violence can be used as means of war and intimidation and their results affect not only the victims, but also entire societies, and can even lead to total physical extermination. The ICTR sentence was the first case in history to deem an act of sexual violence also an act of genocide and a crime against humanity and to define rape in international law as well as to consider various forms of sexual violence to be an inhumane act²⁵. Excessively high standards regarding a person's responsibility for war crimes cast a shadow of doubt on this ruling. The war crimes did not allow Akayesu to be convicted for them, even though, as the mayor, he supported the government's military efforts²⁶. The errors in the interpretation of war crimes seem to be the cause for the revocation of the charges in most of the cases hitherto recognized by ICTR²⁷.

CASE ICTR-95-1 – *CLÉMENT KAYISHEMA AND OBED RUZINDANA*

The accusation against Clement Kayishema, the prefect of Kibuye and Obed Ruzindana, a businessman, contained no charges as to sexually-oriented crime, mostly regarding murder, extermination and other inhumane acts such as genocide, crimes against humanity and war crimes²⁸.

The judgment made by the ICTR on 21st May 1999 contains many references to acts of sexual nature, including the link between these acts and the crime of genocide.

The Tribunal decided that soon after the crash of the presidential plane, the Hutu began to persecute the Tutsi in Kibuye, mostly by setting their houses on fire, killing

²² Ibid., par. 416-460.

²³ Ibid., par. 692-734.

²⁴ Ibid., par. 643.

²⁵ K. D. Askin, 'Gender Crimes Jurisprudence in the ICTR', *Journal of International Criminal Justice*, Vol. 3, No. 4 (2005), p. 1007, at <<http://dx.doi.org/10.1093/jicj/mqi061>>.

²⁶ D. M. Amann, 'Prosecutor v. Akayesu...', p. 199.

²⁷ K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21, No. 2 (2003), p. 313, at <<http://dx.doi.org/10.15779/Z384D2S>>.

²⁸ Prosecutor vs. Kayishema, ICTR-95-1-I, *Amended Indictment*, 29 April 1996.

the cattle and calling them “cockroaches” and “enemies”. Armed by the representatives of the local government, the aggressor commenced the banishment of the Tutsi from their homes, wounding them and raping the women. Afterwards, the Hutu murdered the Tutsi, while chanting songs that urged the Tutsi extermination²⁹.

The court called for the testimonies of many witnesses, confirming that several rapes occurred during the massacre. They mostly concentrated on group rapes, committed in front of the victims’ families³⁰, in order to humiliate the Tutsi and inflict serious wounds and mental damage to the members of the group³¹, which constituted an act mentioned in Art. 2(2)(b) of the Statute. Rape and other forms of sexual violence were also part of the deliberate creation of an environment aiming to cause the partial or total eradication of the members of the group³², which in turn bore the traits of an act mentioned in Art. 2(2)(c).

Both of the accused were convicted with committing and assisting in genocide³³, which also consisted, according to the Tribunal, of acts of sexual violence. Kayishema was also found guilty of the superior’s responsibility, based on the art. 6(3) of the Statute³⁴.

The Kayishema and Ruzidana case showed how the proven crimes of sexual nature can be reflected in the decision, even if they were not in the accusation³⁵. Even though it could not convict the accused of rapes and other forms of sexual violence, the Tribunal explicitly said that these acts, together with the assaults and death threats were causing serious injuries³⁶ and had a significant impact on the intention to exterminate the Tutsi, becoming a part of the genocide.

CASE ICTR-97-20 – LAURENT SEMANZA

Laurent Semanza had been the governor of Bicumbi for over twenty years, as well as a member of the MRND Central Committee – a Hutu party, ruling Rwanda from 1975 to 1994. During the genocide, he *de iure* and *de facto* led the army, the police and the Interahamwe squad, responsible for the initiation of the crimes committed in 1994³⁷.

Semanza was accused of committing and inciting to commit the crime of genocide in the form of murders, and inflicting severe damage or mental health disorders among

²⁹ Prosecutor vs. Kayishema, ICTR-95-1-T, *Judgment*, 21 May 1999, para. 293-294.

³⁰ *Ibid.*, par. 299, 532.

³¹ *Ibid.*, par. 547.

³² *Ibid.*, par. 116.

³³ *Ibid.*, par. 568, 571.

³⁴ *Ibid.*, par. 569.

³⁵ K. D. Askin, ‘Gender Crimes Jurisprudence...’, p. 1013.

³⁶ Prosecutor vs. Kayishema, ICTR-95-1-T, *Judgment*, par. 108.

³⁷ Prosecutor vs. Semanza, ICTR-97-20-I, *Third Amended Indictment*, 12 October 1999, par. 3.6.

the members of the Tutsi, with the purpose of their complete or partial eradication³⁸ and assistance in the crime of genocide³⁹. These accusations regarded the planning, initiating, organizing and active participation and assistance in the acts such as rape and other forms of sexual violence⁴⁰. According to the prosecutor, Semanza coerced, ordered and encouraged the fighters to rape the Tutsi women and to perform attacks against their personal dignity, due to which these acts were in fact committed⁴¹. The charges regarding genocide were based also on Art. 6(3) of the Statute, i.e. the superior's responsibility⁴².

The charges of persecution as a crime against humanity, cruelty i.e. rape as a war crime, rape as a crime against humanity and attacks against personal dignity of women, i.e. degrading, rape and assault, regarded the same acts of sexual nature⁴³.

According to the prosecutor, in April 1994 Semanza ordered a small group of men to rape a Tutsi woman before they were to murder her in the town of Gikoro, due to which three offenders raped two women and one was murdered⁴⁴. For this, the accused was charged and convicted of rape, torture and murder as crimes against humanity, as well as cruelty as war crime⁴⁵.

The Court deemed the charge number eight, regarding the incitement for one of the rapes, as crime against humanity, too unclear and violating the right of the accused for defense. For this reason, the Tribunal in no way touched upon the issue of the responsibility of the accused for the crime he was charged with⁴⁶.

The prosecutor failed to prove the rapes and assaults of sexual nature that supposedly took place during the massacre of Mwulire, in the Musha church and the mosque in Mabare, constituting the charges 1-9. A witness, who was not present when the events took place, only heard about them, also testified about the committed sexual crimes. The Tribunal managed to determine that the rapes and other forms of sexual violence really did take place in April 1994 in the towns of Bicumbi and Gikoro and that they could be included in the description of the charges by the prosecutor in paragraphs 3.15 and 3.16 of the indictment. However, in this case they were too unclear, due to which the Tribunal decided to ignore them⁴⁷. Despite the fact that the accused was found guilty of the collaboration in genocide (charge 3), the verdict in no way referred to the crimes assigned to him, to genocide, rapes and other forms of sexual violence. For the same reasons, he was acquitted from charges 8 and 9, the

³⁸ Ibid., counts 1-2.

³⁹ Ibid., count 3.

⁴⁰ Ibid., par. 3.14.

⁴¹ Ibid., par. 3.15.

⁴² Ibid., par. 3.16.

⁴³ Ibid., counts 6-9.

⁴⁴ Ibid., par. 3.17.

⁴⁵ Ibid., counts 10-13.

⁴⁶ Prosecutor vs. Semanza, ICTR-97-20-T, *Judgment and Sentence*, 15 May 2003, par. 61.

⁴⁷ Ibid., par. 250-251.

ones regarding rape as crime against humanity and attacks against personal dignity as war crime⁴⁸.

In the case of inciting to rape (charges 10-14), despite Semanza's assurance and defense testimony claiming that rape is not known in Rwandan tradition and culture and the accused himself never ordered the fighters to rape the Tutsi women, the Court determined that on 13th April 1994, around 10 AM, Semanza ordered a group of fighters to rape the women before murdering them. It was decided that, due to an order, one of the women was raped, but it was impossible to determine if the other one was as well, before she was murdered⁴⁹. A victim who survived the genocide released testimony from which it transpired that Semanza addressed the people who gathered with the following words: "Are you sure you're not killing Tutsi women and girls before sleeping with them.... you should do that and even if they have some illness, you should do it with sticks."⁵⁰ Three men then entered the room with the witness and her cousin. Two of them dragged the other victim outside, while the third remained with the victim and informed her that they have official consent to rape them. The man ripped her clothes off and proceeded to sexual intercourse, threatening her that if she resisted, she would be killed⁵¹.

The ICTR concluded that the act of rape upon the victim was an element of a widespread, systematic attack on the civilian population, and it possessed the characteristics of torture, because it led to severe mental suffering of the victim and was committed with discrimination in mind. Because the accused realized that he was inciting to perform an act fulfilling these criteria, he was found guilty under charges 10 and 11, i.e. incitement to rape and torture as crimes against humanity⁵². Due to the lack of majority in voting (Judge Ostrovsky failed to find a connection between the crimes and the ongoing military conflict⁵³, while judge Dolenc decided that the opportunity for the right combinations of crimes did not occur⁵⁴), the accused was acquitted in the first instance from charge number 13, in which the prosecutor attempted to assign the responsibility for cruelty as a war crime to him⁵⁵. However, the Court decided that assigning responsibility for war crimes, which required further proof of link with the ongoing military conflict, cannot be decided on the basis of assigning responsibility for genocide, which does not require these traits to occur. Since it was overruled with the majority of votes

⁴⁸ Ibid., par. 436, 474, 539.

⁴⁹ Ibid., par. 257-262.

⁵⁰ Ibid., par. 253.

⁵¹ Ibid., par. 254.

⁵² Ibid., par. 481-485.

⁵³ Prosecutor vs. Semanza, ICTR-97-20-T, *Separate Opinion of Judge Yakov Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II*, 15 May 2003, par. 53-54.

⁵⁴ Prosecutor vs. Semanza, ICTR-97-20-T, *Separate and Dissenting Opinion of Judge Pavel Dolenc*, 15 May 2003, par. 35.

⁵⁵ Prosecutor vs. Semanza, ICTR-97-20-T, *Judgment and Sentence*, par. 552.

that this connection did occur, the Court decided to eventually convict the accused with rape as a war crime⁵⁶.

The ICTR decision showed that even a single rape can constitute a crime against humanity, on condition that it is an element of a widespread, systematic attack on the civilian population.

CASE ICTR-01-64 – *SYLVESTRE GACUMBITSI*

Sylvestre Gacumbitsi, the governor of Rusumo, was charged with genocide and alternatively with the participation in the crime of genocide (charges 1 and 2), as well as extermination, murder and rape as crimes against humanity (charges 3-5). All of the charges, except number 3, regarding the murders, were based mainly on the crimes of sexual nature, because during the organization and conduct of the the attack on the Tutsi, he was aware or should be aware of the fact that sexual violence against women is or can be a common phenomenon, and his subordinates, who take part in the genocide, following orders and instructions, may be found guilty. The act of incitement to rape has also been emphasized as one that Gacumbitsi had committed, driving around Rusumo and shouting through a megaphone to rape the Tutsi women. The rapes became an element of the genocide charge due to the fact that most women were raped right before being murdered and many died because of the injuries inflicted during the rapes. In the case of all the charges regarding crimes against humanity, Gacumbitsi was also accused of the superior's accountability⁵⁷.

The Tribunal determined that on 16th April 1994, the accused, driving through the Nyarubuye district, spoke through a megaphone to the young Hutu men, telling them to rape the Tutsi girls, who rejected marriage, and, in case of their resistance, to cruelly murder them. This resulted in the rape of eight women and killing one of them by impaling her. It was determined that sexual violence constituted a part of a widespread, systematic attack on the civilian population and was a direct result of the incitement of the accused⁵⁸. The decisions mentioned above were the basis to convict the accused of genocide through inciting to rape, as this act caused severe physical damage to members of the Tutsi and his aim was their total extermination⁵⁹.

Referring to the charge of rape as a crime against humanity, the ICTR at first referred to the arrangements regarding its definition of the case against Akayesu and ICTY's case against Kunarac. Determining that rape can involve penetration with a penis as well as any other item, it decided that the acts committed in the Nyarubuye district bore the traits of said crime. Despite the fact that one of the raped women was of Hutu descent, ICTR determined that the real target of the attack was her Tutsi husband, hence all the

⁵⁶ Prosecutor vs. Semanza, ICTR-97-20-A, *Judgement*, 20 May 2005, para. 365-371.

⁵⁷ Prosecutor vs. Gacumbitsi, ICTR-01-64-I, *Indictment*, 20 June 2001.

⁵⁸ Prosecutor vs. Gacumbitsi, ICTR-01-64-T, *Judgment*, 17 April 2004, par. 200-228.

⁵⁹ *Ibid.*, par. 259, 292-293.

victims were chosen on the basis of their origin or any other ties with the Tutsi. All of the victims were also civilians. The instructions of the accused, saying that in case of resistance the women were to be killed cruelly and the fact that the women were assaulted by the people from whom they had been trying to hide, was sufficient proof of lack of consent for partaking in sexual intercourse. Due to the fact that the previously proven rape of eight girls was a direct effect of the instructions of the accused and took place in a widespread, systematic attack on the civilian population, he was found guilty of rape as a crime against humanity. It was not possible to assign other rapes committed in the area of Nyarubuye to the accused, because the direct link between them, and the words uttered by Gacumbitsi through the megaphone was not proven⁶⁰.

Neither was the accused charged with the superior's responsibility, because his superiority over the fighting groups committing the crimes could not be proven⁶¹.

During the appeal, Gacumbitsi accused the Tribunal that only single instances of rape were proven, and they could not possess traits of crimes against humanity, being of more of a group crime. The court once again confirmed what already transpired during the ICTY's trial against Kunarac, which is that not the rape itself, but the attack of which rape is an element must fulfill the criteria of a widespread, systematic attack against any civilian population⁶².

An incredibly significant element of the Court ruling in the Gacumbitsi case was the fourth charge, in which the Tribunal's prosecutor asked the ICTR to clarify the norms regarding rape as crime against humanity and genocide within the scope of consent for sexual intercourse. According to the prosecutor, the lack of victim's consent and the offender's awareness of it, should not bear the signs of an act that has to be proven by the prosecutor during the lawsuit, because the tribunal's jurisdiction only covers cases of rapes committed during genocides, military conflicts, or widespread, systematic attacks on the civilian population. In these circumstances, consent is not possible. That is why the crime of rape should be considered similarly to the crime of torture or slavery, i.e. there should be no demand for providing proof for the lack of consent. According to the prosecutor, this viewpoint is also supported by the rule number 96, which burdens the accused with proof⁶³.

Despite the fact that the Tribunal's decisions in the Gacumbitsi case did not leave any doubts as to the existence of coercive circumstances, rendering any consent impossible, the Board of Appeal decided to take care of the prosecutor's appeal *motu proprio*, as an issue in the general sense⁶⁴.

The ICTR noted that in the ICTY court statement from the Kunarac case, the circumstances in most of the war crimes and crimes against humanity are almost always coercive, hence true consent was not possible⁶⁵.

⁶⁰ Ibid., par. 324-333.

⁶¹ Ibid., par. 243.

⁶² Prosecutor vs. Gacumbitsi, ICTR-01-64-A, *Judgment*, 7 July 2006, par. 102.

⁶³ Ibid., par. 147-149.

⁶⁴ Ibid., par. 150.

⁶⁵ Ibid., par. 151.

It was determined, however, that the victim's lack of consent and the offender's awareness of it are both aspects of rape. For this reason, it is up to the prosecutor to prove these aspects and erase any doubt. Otherwise, it is up to the prosecutor to provide evidence of consent right from the start. The lawsuit and evidence rules do not influence the traits of crimes defined in the Tribunal's Statute or in international law, merely specify the circumstances in which proof for consent is allowed⁶⁶.

The prosecutor is allowed to prove beyond all doubt the lack of consent by proving that certain circumstances, rendering it impossible to express consent occurred during the act. However, according to the ICTR, it is not essential to quote the words said by the victim, their behavior, the connection with the offender or the use of force. Evidence of the lack of consent can be extrapolated from general circumstances of the act, such as the act of genocide or enslavement. The awareness of lack of consent on the other hand can be proven by assuring that the offender knew or should know about the particular circumstances that rendered it impossible for consent to occur⁶⁷.

The files against Gacumbitsi contain a lot of evidence for the use of sexual violence during the genocide in Rwanda, such as: individual and group rapes, sexual slavery or mutilation of sexual organs. The statements provided some guidelines, useful for preparing indictments in the following cases regarding crimes of sexual nature, indicating above all that the proof of lack of consent during the act is sufficient premise for proving that the act was in fact rape⁶⁸.

SPECIAL COURT FOR SIERRA LEONE

Special Court for Sierra Leone (SCSL) was established under the agreement between the UN and the Government of Sierra Leone of 16 January 2002, as a mixed tribunal, which includes both international and domestic judges. Although the case law of the Court, in comparison with the ICTY or ICTR, is relatively poor, because it focuses only on those who bear the greatest responsibility for violations of international humanitarian law and national law committed during the Sierra Leone civil war (1991 – 2002)⁶⁹, it contains a very significant finding for the development of the penalization of crimes of a sexual nature. Namely the penalization of the forced marriage, which was not heretofore recognized in any legal act or case pending before any international tribunal, as well as in the Rome and SCSL Statutes⁷⁰.

⁶⁶ Ibid., par. 153-154.

⁶⁷ Ibid., par. 155, 157.

⁶⁸ A. Cole, 'Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law', *International Criminal Law Review*, Vol. 8, No. 1/2 (2008), p. 83, at <<http://dx.doi.org/10.1163/156753608X265231>>.

⁶⁹ M. Matyasik, P. Domagała, *Międzynarodowe trybunały karne oraz inne instrumenty sprawiedliwości transztywniej*, Warszawa 2012, pp. 176-186.

⁷⁰ See: UN Security Council, *Rome Statute of the International Criminal Court*, Rome, 17 July 1998; UN Security Council, *Statute of the Special Court for Sierra Leone*, Freetown, 16 January 2002.

CASE SCSL-04-16 – AFRC

The accused in the case regarding the crimes committed by the Armed Forces Revolutionary Council (AFRC) were: Alex Tamba Brima – one of the most significant leaders of the organization, being at the forefront of its supreme council and the forces attacking Freetown in 1999; Brima Bazzy Kamara – taking part in the coup in 1997 as well as the attack on Sierra Leone capital, and Santigie Borbor Kanu – member of AFRC supreme council, responsible for the military actions directed against the civilian population⁷¹.

Among the fourteen charges of crimes against humanity and war crimes, charges 6-9 regarded crimes of sexual nature, describing the use of various forms of sexual violence, including violent rapes and forced marriages by the members of the AFRC and Revolutionary United Front (RUF)⁷². Due to carefulness in the lawsuit, the term “forced marriage” appears in the indictment in alternative to sexual slavery, because it had not yet been deemed an international crime. That is also why, aside from charge number 6, regarding rape as a crime against humanity, the indictment contains three charges for this act: sexual slavery and other forms of sexual violence as a crime against humanity (charge number 7), other inhumane act as a crime against humanity (charge number 8) and attack on personal dignity as a war crime (charge number 9)⁷³.

The court, considering the issue of forced marriage, decided that it would not create a separate category for acts constituting crimes against humanity, not unlike sexual slavery⁷⁴. According to the judges’ understanding, to be able to qualify the behavior described in the indictment as other inhumane acts, they could not bear the traits of sexual crime, because such felonies were listed in Art. 2(g) of the Statute (rape, sexual slavery, forced prostitution, forced pregnancy and other forms of sexual violence). The “other sexual act” could not therefore be defining a crime of sexual violence⁷⁵. The prosecutor failed to provide sufficient proof to justify the theory that forced marriage does not fit the category of crimes against humanity, listed in Art. 2 of the Statute⁷⁶. According to the tribunal, the offenders referred to their victims as “wives” not in order to marry them, but in order to emphasize their ownership rights, while the proof quoted by the prosecutor confirmed the sexual nature of the act. In conclusion, it was decided that it bore the traits of sexual slavery⁷⁷.

⁷¹ K. Stasiak, *Trybunały umiędzynarodowione w systemie międzynarodowego sądownictwa karnego*, Lublin 2012, p. 244.

⁷² Prosecutor vs. Brima, Kamara & Kanu, SCSL-04-16-PT, *Further Amended Consolidated Indictment*, 18 February 2005, para. 51-57.

⁷³ Ibid., counts 6-9.

⁷⁴ Prosecutor vs. Brima, Kamara & Kanu, SCSL-04-16-T, *Judgment*, 20 June 2007, par. 713.

⁷⁵ Ibid., par. 697.

⁷⁶ Ibid., par. 713.

⁷⁷ Ibid., par. 711.

Judge Doherty did not agree with the majority, and noticed that forced marriage contains non-sexual elements, like moral, mental and physical suffering, hence a general violation of accepted norms, according to which both parties must express consent to marriage. Most of the “wives” were rejected by their societies, rendering it impossible for them to return. According to judge Doherty, forced marriage constitutes the “other inhumane act” through bearing the traits of “words or other acts aiming to achieve marriage by force or coercion, inducing fear of violence and using unfavorable circumstances to force the victim’s consent for marriage”⁷⁸.

The Appeals Chamber decided that a wrong interpretation of an inhumane act has occurred during the lawsuit. In many other proceedings before the international criminal courts it was deemed fulfilled through acts of sexual nature⁷⁹. The Chamber decided that in the lawsuit it was proven that the offenders wanted to have a sort of a compulsory marital relationship with their victims rather than execute ownership rights over them, and the act itself did not have to be of sexual nature. Women fell victim to terrible violence, were forced to relocate with the troops and to do various other things, like regular sexual intercourse, housework and giving birth to children for the offenders. In return the “husbands” provided them with provisions, clothes and shelter, including protection from rapes other men could commit. This behavior is difficult to observe in the case of sexual slavery⁸⁰. Additionally, the offenders caused physical and mental suffering in women, e.g. by forcing them to give birth to children, lack of medical care and by terrorizing them⁸¹. The Appeals Chamber agreed with Judge Sebutinde’s opinion that forced marriage should not be confused with “arranged marriage”, which does break the international law norms, such as the ones in the convention aiming to end all discrimination against women, but it was never tied with imprisoning women and inflicting mental and physical suffering to the extent it is done in the case of forced marriages⁸². According to the Appeals Chamber, it could not be rationally determined whether forced marriage and sexual slavery are the same acts, because aside from the common elements, i.e. deprivation of freedom and forcing to perform sexual intercourse, the former is also characterized by a “perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim”, as well as the exclusive relationship between the offender and the victim, whose violation may lead to punishment. This makes forced marriage a crime not of purely sexual nature and is not equal to sexual slavery⁸³.

⁷⁸ Prosecutor vs. Brima, Kamara & Kanu, SCSL-04-16-T, *Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages)*, 20 June 2007, para. 14-71.

⁷⁹ Prosecutor vs. Brima, Kamara & Kanu, SCSL-04-16-A, *Appeal Judgment*, 22 February 2008, par. 184-186.

⁸⁰ Ibid., par. 190.

⁸¹ Ibid., par. 192.

⁸² Ibid., par. 194.

⁸³ Ibid., par. 195.

Therefore the Appeals Chamber decided that the act of forced marriage is “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim”⁸⁴. According to the Chamber, this act was of similar importance as the other crimes against humanity listed in the Statute⁸⁵ and bore the traits of the other inhumane act⁸⁶.

Due to lack of basis for the cumulative conviction for the same crimes based on charge number 8 and 9 (attack on personal dignity), despite the fact that forced marriage was deemed a crime against humanity as the other inhumane act, the accused were not convicted of it⁸⁷.

Despite the eventual lack of indictment for forced marriage, the SCSL initiated the penalization of another crime, which is almost always tied with the use of sexual violence. It turned out, however, that despite the theories of Appeals Chamber, the catalogue of crimes of sexual nature is not a closed one and the behavior with hitherto unknown traits can be categorized as other inhumane acts.

CASESCSL-04-15 – RUF

The original indictment against Issa Hasan Sesay, Morris Kallon, and Augustine Gbao, the three out of five main leaders of RUF, did not contain any mention of forced marriage. This was added afterwards, according to Art. 15(4) of the Statute in response to the rising need to punish people committing crimes of sexual nature during the Sierra Leone conflict. The Appeals Chamber referred in this case to the nature of forced marriage, noting that it is linked to crimes of sexual nature, like rape, sexual slavery, and other forms of sexual violence⁸⁸.

Acts of sexual nature in the indictment have been qualified as: rape (charge number 6), sexual slavery and other forms of sexual violence as a crime against humanity (charge number 7), other inhumane act as a crime against humanity (charge number 8) and attack on personal dignity as a war crime (charge number 9)⁸⁹. Charge number 8 regarded exclusively forced marriage⁹⁰. It is worth mentioning that forced marriage is included in the indictment as an alternative to sexual slavery⁹¹, which is a sign that the penalization of the former act is still unsure.

⁸⁴ Ibid., par. 196.

⁸⁵ Ibid., par. 200.

⁸⁶ Ibid., par. 202.

⁸⁷ Ibid.

⁸⁸ Prosecutor vs. Sesay, Kallon & Gbao, SCSL-04-15-PT, *Decision on the Prosecution request for leave to amend the indictment*, 6 May 2006, par. 50-51.

⁸⁹ Prosecutor vs. Sesay, Kallon & Gbao, SCSL-04-15-PT, *Corrected amended consolidated indictment*, 2 August 2006, par. 54-61.

⁹⁰ Prosecutor vs. Sesay, Kallon & Gbao, SCSL-04-15-T, *Judgment*, 2 March 2009, par. 464.

⁹¹ See: Prosecutor vs. Sesay, Kallon & Gbao, SCSL-04-15-PT, *Corrected amended consolidated indictment*, 2 August 2006, par. 54-61.

During the lawsuit, the differences between rape, characterized by sexual penetration, and forced marriage, characterized by the particular, coercive and exclusive “marital” relationship of the offender and victim, were presented⁹². Then forced marriage was distinguished from sexual slavery, based on the premises described in the AFRC case by the Appeals Chamber, i.e. the difference between the relationships of the offender and victim in each case⁹³.

The said trait of forced marriage has been confirmed by many witnesses testifying in the case and it became a common practice by the RUF soldiers⁹⁴. According to the witnesses’ statements, the soldiers chose the most attractive women from the occupied villages and automatically, without giving them a chance to object, made them their “wives”⁹⁵. The Tribunal confirmed that the women, in return for “protection” were forced to take care of the rebels’ personal belongings, having sexual intercourse whenever the offenders wished it and doing housework, while many of them gave birth to the offenders’ children⁹⁶. The occurrence of sexual slavery in the described cases was not an obstacle to considering these acts a forced marriage⁹⁷. It was also determined that the crime possessed traits of an attack on personal dignity, as the offender’s “wives” fell victim to systematic acts of sexual nature and lived in difficult and coercive conditions⁹⁸.

It is worth mentioning that the sexual violence applied by the RUF was deemed an act of terror by the tribunal aimed at the civilian population, particularly women. This was done through violent rapes, inserting various items into victims’ sexual organs, rapes on pregnant women and forcing civilians to perform sexual intercourse with each other. The way the women were treated by the rebels in the occupied villages induced fear among the civilian population and it was the main aim of the offenders. Sexual violence during the Sierra Leone conflict was a widespread occurrence, touching upon entire societies, as the women were raped and forced to “marry”, falling victim to social exclusion, without any chance of rebuilding any relationship within their own societies. The forced marriages were also considered an element of this kind of crime. It stigmatized women, living in shame and fear of returning home after the end of the conflict⁹⁹.

It was decided that all the crimes charged, including crimes of sexual nature, including forced marriage, were committed in order to claim control over Sierra Leone, as part of a criminal organization¹⁰⁰. Because the accused knew about the participation in sexual relationships by the members of RUF without the victims’ consent, the tribunal decided that their existence was part of the tactical plans of the leaders, in order to as-

⁹² Prosecutor vs. Sesay, Kallon & Gbao, SCSL-04-15-T, *Judgment*, para. 2306-2307.

⁹³ *Ibid.*, par. 2307.

⁹⁴ *Ibid.*, par. 1154-1155, 1178-1179, 1211-1213, 1295.

⁹⁵ *Ibid.*, par. 1410-1412.

⁹⁶ *Ibid.*, par. 1413.

⁹⁷ *Ibid.*, par. 1462-1473.

⁹⁸ *Ibid.*, par. 1474.

⁹⁹ *Ibid.*, par. 1346-1356.

¹⁰⁰ *Ibid.*, par. 1982, 1985, 2070.

sist the troops and help them to achieve their criminal goal¹⁰¹. All of the three accused were found guilty of all charges regarding crimes of sexual nature, presented to them in the indictment¹⁰².

The verdict regarding the RUF case was the first case in history to result in the conviction of the accused for the crime of forced marriage as other inhumane act, constituting a crime against humanity. While deliberating on many aspects of the crime that were not included in the ruling regarding AFRC, the tribunal noticed that the word “wife” was used by the offenders to amplify the enslavement and manipulation of women¹⁰³.

SUMMARY

The cases presented had a significant influence on the penalization of war crimes of sexual nature in the Statute of the International Criminal Court, signed in Rome, July the 17th, 1998. Its attachment, entitled “Elements of Crimes”, which defines the traits of crimes and circumstances in which an act must be punished, contains many references to ICTR decisions. While defining rape, the authors of the “Elements of Crimes” drew from the definitions contained in the *Akayesu* and *Gacumbitsi* cases, determining that¹⁰⁴:

- 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body,
- 2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The inspiration by the ICTR’s decision is clearly visible in the annotation 16, saying that “It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”¹⁰⁵, and containing direct references to the *Gacumbitsi* judgment.

Thanks to ICTR efforts together with the ICTY, it was possible not only to increase the international sensitivity for crimes of sexual nature, or decide on their final and clear penalization in international criminal law, but also to break an age-long and

¹⁰¹ Ibid., par. 2107, 2148, 2151.

¹⁰² Ibid., IX. Disposition.

¹⁰³ Ibid., par. 1466.

¹⁰⁴ International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1.

¹⁰⁵ Ibid., note 16.

erroneous interpretation, saying that these acts were merely violating the dignity of the victim, while in reality they are infringe every person's right to decide what happens with their bodies and sexual freedom.

The effect of the forced marriage penalization in the SCSL judgments was to charge identical accusations in the ongoing trials of the Khmer Rouge in Cambodia, and the decisions made by the tribunal can serve ICC in the future, which, despite the fact that the crime is not to be found in the Rome Statute, can still investigate it considering the charges of other inhumane acts. It is also worth mentioning that acts of a sexual nature are counted among the acts of terror¹⁰⁶.

Furthermore, the judgments of the SCSL proved that despite the detailed descriptions of committed crimes in the Rome Statute and the Elements of Crime of the International Criminal Court, the development of this penalization has not run its course and we can still expect new decisions which will enrich and improve these rulings. In this case, particular attention must be given to the efficiency of the investigation regarding the responsibility of the described crimes. The verification of the efficiency of the contribution to the proceedings of highly specialized employees of the Office of the Prosecutor, Office of Public Counsel for Victims, witnesses and judges offices and special court instruments, referring to witnesses and victims of crimes of sexual nature is still pending.

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¹⁰⁶ V. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', *Cornell International Law Journal*, Vol. 44, No. 1 (2011), pp. 68, 74.

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