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Rosa Raffaelli

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Sant'Anna School of Advanced Studies
Department of Law

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Abstract

This paper examines the definition of gender crimes in international criminal law. Moving from an analysis of the evolution of the definition of rape, it takes into account the definition of crimes such as sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization. Particular attention is paid to the case law of the existing international criminal tribunals, and to the discrepancies between their interpretations of the crimes, as well as to the relevant jurisprudence of the ECtHR. Finally, taking a critical approach, some amendments are suggested which would ensure that the definitions of gender crimes are constantly updated and ensure full protection of their victims.

Keywords

International criminal law; gender; rape; sexual slavery; prostitution; sterilization; sexual violence; women; gender-based violence.

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1. Gender crimes in the Rome Statute of the ICC: a short preliminary history

The adoption of the Rome Statute of the ICC, and in particular, of its provisions regarding gender and sexual crimes, has been welcomed as a groundbreaking step forward in the achievement of international justice. Indeed, if we confront the text of the provisions of the Statute dealing with gender and sexual crimes with the (somewhat laconic) provisions of the Statutes of the ICTY and ICTR, this enthusiasm cannot but be shared; and even more so if compared to previously existing international law.

Traditionally, international humanitarian law did not pay much attention to gender crimes; thus, while commission of crimes of sexual violence had long been prohibited by military codes in a number of countries, as well as by international law,[1] the prohibition had also been ignored and soldiers had consistently treated women and girls as "spoils of war." International law prohibiting crimes of sexual violence qualified them as crimes against the honour and the morality of women – thus, for instance, the 1907 IV Hague Convention provided that, in case of military occupation, family honour and rights must be respected (Art. 46).[2]

During the Second World War, sexual violence was widespread, both in Europe and in the Far East; in particular, episodes such as the "rape of Nanking" and the use of so-called "comfort women" at the disposal of the Japanese Army have become well known examples of the atrocities of the war in

[1] See T. Meron, 'Rape as a Crime Under International Humanitarian Law,' in 87 *Am. J. Int'l Law*, 1993, 424-428, at 425; M. C. Bassiouni, *Crimes against humanity in international criminal law*, II ed., Kluwer Law 1999, 344 ff. Of particular relevance is the so-called Lieber code: Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field,' Art. 44, (Apr. 24, 1863), in D. Schindler, J. Toman (Eds.), *The laws of armed conflict*, III ed., 1988. Article 44 proscribes the death penalty for soldiers who commit, i.a., rape.

[2] See *ibidem*.

the eyes of the civil society and historians.[3] However, in the enforcement of international law, little if any attention was paid to them: the statutes of the IMT and of the IMTFE did not expressly criminalize rape, and their judgments rarely, if ever, mention the crimes of rape, sexual violence and sexual slavery.[4] Even the plight of comfort women was often under-qualified by scholars as a case of enforced prostitution – a term already appearing in the IV Geneva Convention[5] but that, in this context, is a mere euphemism, which denies the level of coercion and the sufferings of the victims. In the traditional understanding, indeed, the term 'enslavement' was only applied to forms of slave labor which can apply equally to men and women,[6] while the form of slavery which is most specific to women (i.e., sexual slavery) was not recognized as such. The use of the term 'enforced prostitution' implies a certain degree of voluntariness (which is essential to the notion of prostitution),[7] thus denying the fact that women enslaved and forced to perform sexual services experience the same level of suffering of other slaves.[8] Even the drafting of the 1949 Geneva Convention represented only a partial step forward: indeed, the Fourth Convention, while mentioning rape and enforced prostitution among the violations from which women shall be protected, and thus recognizing the importance of prohibiting sexual violence as a method of warfare, considers them as attacks on women's honor.[9]

Subsequently, international law has been evolving swiftly; in particular, the creation of the *ad hoc* tribunals represented an opportunity to rethink the international prohibition against sexual violence. The Statute of the ICTY was a significant step forward in the recognition of the seriousness of

[3] For an analysis, see e.g. Y. Yoshimi, *Comfort women: sexual slavery in the Japanese military during World War II*, Columbia University Press, 2002. On the more recent attempts to address the case of comfort women, see C. M. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery,' in 95 *Am. J. Int'l L.*, 2001, 335-341.

[4] For an assessment, see K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles,' 21 *Berkeley J. Int'l L.* 2003, 288-349, at 295.

[5] Art. 27, IV Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

[6] And which, in most circumstances, were perceived to be 'manly' given the amount of physical force required to perform them.

[7] See B. Bedont, 'Gender-specific provisions in the Statute of the International Criminal Court,' in F. Lattanzi, W. Schabas (Eds.), *Essays on the Rome Statute of the ICC*, Sirente 1999, 183-210, at 200.

[8] For the finding that sexual slavery is a special form of slavery, see, i.a., Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, *Final report*, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 30 (stating that "in all respects and in all circumstances, sexual slavery is slavery and its prohibition is a jus cogens norm"); M. Boot, *Genocide, crimes against humanity, war crimes*, Schoten 2002, at 513. Also see Special Court for Sierra Leone, Prosecutor vs. Sesay, Kallon and Gbao, N. SCSL-04-15-T, Judgment 25 February 2009, para. 155. The consequences of qualifying a crime as slavery or as enforced prostitution are not to be underestimated: while the international prohibition of 'enforced prostitution' only applies in cases of armed conflict, the prohibition of sexual slavery, being a mere specification of the general prohibition of slavery, is a norm of international customary law having the rank of *jus cogens*.

[9] As in the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12th August 1949, whose Article 27(2) provides that 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'

crimes of sexual violence; indeed, the Statute listed rape among crimes against humanity,[10] following the only one precedent of Control Council Law n. 10.[11] On the other hand, the Statute did not explicitly mention rape among the war crimes over which the Tribunal had jurisdiction. Consequently, the Prosecutor was forced to address crimes of sexual violence committed in the course of the armed conflict in the Former Yugoslavia under different provisions;[12] and, while this gap in the Statute led the Tribunal to recognize that rape may amount to torture, in line with the jurisprudence of regional human rights courts,[13] it also meant that rape was not qualified as such – in order to punish rape as a war crime, it was necessary to legally characterize it as a different crime. Later, the Statute of the ICTR remedied this gap, incorporating rape not only among crimes against humanity, but also among war crimes – still, though, under the heading of "outrages upon personal dignity." Thus, while the law on sexual violence did evolve, the approach to rape remained somewhat traditional – either the conduct was not criminalized as such, leading to its equiparation to torture, or it was punished as a violation of dignity and honor, leading to a denial of the physical and mental harm suffered by victims of this crime. In a different context, another important step towards the recognition of the seriousness of sexual crimes, and in particular of what had until then been considered as 'enforced prostitution,' was the appointment, in 1993, of a Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during wartime, including in particular internal armed conflict:[14] since then, recognition that sexual slavery is a form of enslavement has become more and more common.

The drafting of the Rome Statute represented an important forum to rediscuss gender crimes and crimes of sexual violence in the context of international criminal law, and as such attracted a lot of attention on the part of women's organizations and NGOs, who saw it as an opportunity to finally modernize international criminal law applicable to sexual violence.[15] Scholars had been debating the issue of rape and the role of gender in the context of war, and more generally of international

[10] Rape had already been characterized as a crime against humanity under Control Council Law n. 10, Article 2(c); however, no prosecutions for this crime had taken place. For a comment see M. Boot, *Article 7(1)(g)*, in O. Triffterer, *Commentary to the Rome Statute of the ICC*, Beck Publisher, 2008, para. 41.

[11] See Art. II(1)(c) – this provision, however, was never applied.

[12] See ICTY Statute, Article 5(g).

[13] See in particular ECtHR, *Aydin v. Turkey*, Application 23178/94, Judgment adopted on 25 September 1997. Also see IACHR, *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., 1 March 1996. For a comment on the ECtHR's jurisprudence in a historical perspective, see C. McGlynn, 'Rape, torture and the European Convention on Human Rights,' in 58 *ICLQ*, 2009, 565–595.

[14] See Resolution 1993/24 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[15] For a brief history of the role of women NGOs at the Rome Conference, as well as of the evolution of international criminal law on rape and sexual violence, see e.g. R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law', in 46 *McGill L. J.* 2001, 217-240; P. Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power,' in 28 *Signs* 2003, 1233-1254. More generally, on how NGOs managed to influence the drafting of the Rome Statute, see W. R. Pace, M. Thieroff, 'Participation of Non-Governmental organizations,' in R. S. Lee (ed.), *The International Criminal Court. The making of the Rome Statute*, The Hague 1999, 391-398.

crimes, for a number of years, and the debate had increased in particular during and after the Yugoslav war, when reports on the existence of rape camps and on the widespread occurrence of ethnic rape became more widely known.[16] The debate on gender crimes at the Rome Conference was very heated, and NGOs – in particular, the Women's Caucus for Gender Justice – were confronted with traditional views of gender, sexuality and gender crimes. The final compromise of the Rome Statute was, however, groundbreaking – for the first time, gender and sexual crimes were recognized as such, and listed in a provision that aimed to be comprehensive and that, indeed, was much more expansive than any previously adopted rule.

Firstly, the ICC Statute recognizes rape as both a war crime and a crime against humanity. In this sense, the Statute of the ICC represents a step forward in at least two respects: on the one hand, rape and other forms of sexual violence are addressed as autonomous war crimes, no longer as outrages upon a person's dignity[17] or a woman's honour; on the other hand, Art. 8(2)(b)(xxii) of the Statute recognizes that sexual crimes are a grave breach of the Geneva Conventions.[18] These are already two important steps forward, since treating rape as a crime against personal dignity and honour denies its physical consequences, as much as not including it among the grave breaches regime represents a refusal to recognize its inherent gravity.

Secondly, the Statute prohibits not only rape, but also a number of different forms of sexual violence, which are grouped together both as war crimes and as crimes against humanity; some of these conducts have been recognized as constituent elements of the "core crimes" for the first time in history, while others have finally been qualified as sexual crimes, shedding light on their gendered nature.

In this paper, I will analyze the provisions of the ICC Statute dealing with gender crimes, examining them in their historical context, as well as the case law of the Court with regard to these crimes. Moreover, the case-law of other Courts will also be taken into consideration, in so far as it may be of relevance for the ICC.

In the next paragraph, I will examine the definition of rape; I will then move to analyze the crimes of sexual slavery and enforced prostitution and, in the following paragraph, forced pregnancy and enforced sterilization. Finally, after an examination of the crime of "other forms of sexual violence," I will attempt to draw some conclusions.

[16] See, in addition to the articles cited above, e.g., C. A. Mac Kinnon, Crimes of war, crimes of peace, in S. Shute, S. Hurley (Eds.), *On Human Rights*, New York, 1993, 83-110.
[17] See the Statute of the ICTR, Art. 4(e).
[18] Giving rise to an obligation to criminalize and to either extradite or punish.

2. Rape

As noted above, rape had already been considered as an international crime by the Statutes and the case-law of the *ad hoc* tribunals. However, before the Rome Statute and its Elements of Crimes entered into force, the crime was not defined by international law, and different international criminal Courts had developed their own definitions of this conduct. A short analysis of the most relevant judgments adopted by the ICTY and ICTR and of the debate surrounding the definition of rape in their case law is essential in order to fully understand the importance of the ICC's Elements of Crimes.

2.1 The definition of rape in the case law of the ICTR and ICTY

The first definition of rape in international criminal law appears in the Judgment of the Trial Chamber of the ICTR in the case *Prosecutor v. Akayesu*:[19] here, the Court held that 'rape is a form of aggression' and thus 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.' After comparing the issue of the definition of rape to that of the crime of torture, which is also not defined by reference to a list of specified modes of conduct, the Trial Chamber defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'[20] Additionally, the Court stated that 'coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women.'[21]

This judgment was welcomed as an important progress in the achievement of gender justice not only due to the progressive definition of rape it enshrined, but also because it recognized that rape can represent one of the material elements of the crime of genocide, as well as an act of torture. In

[19] ICTR, TC, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 596-598.

[20] It seems worthy to cite in full the relevant portions of the judgment, since they clarify the reasons underlying this innovative approach to rape. The Chamber found that it 'must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The 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 frame work 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.' Ibidem.

[21] Ibidem, para. 688.

particular, with regard to genocide, the judgment was groundbreaking since the Court held that rape and sexual violence 'certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.' Thus, although the provision on genocide does not list rape among the modes of commission of the crime, the Court subsumed it in the notion of serious bodily and mental harm. Moreover, the ICTR adopted a very innovative approach to the definition of rape, with regard to both its material and its subjective elements; this approach has subsequently shaped the case law of the *ad hoc* Tribunals,[22] as well as the negotiation of the Elements of Crimes for the ICC.

The definition of rape adopted by this ICTR judgment was initially followed also at the ICTY, in particular, for the purpose of defining rape as a means to commit the war crime of torture.[23] Subsequently, however, the Trial Chamber of the Tribunal held that such a broad description did not comply with the criminal law principle of specificity (*nullum crimen sine lege*), and thus decided to redefine rape drawing upon 'the general concepts and legal institutions common to all the major legal systems of the world.'[24] Thus, the Court conducted a review of the domestic legislation of a number of States regarding rape, and found, firstly, a general trend to broaden the definition of rape so as to include acts that were previously subsumed under the notion of sexual violence, provided that they met some requirements - in particular, that of forced physical penetration. Additionally, the Court also found that, while many national legislations criminalized rape only when it was committed against women, in others the definition was gender-neutral;[25] moreover, all jurisdictions required an element of force, coercion, threat, or acting without the consent of the victim. The Court also discussed the issue whether forcible oral sex could be considered as rape: while stating that there was no uniformity in the domestic legislations surveyed,

[22] For an analysis of the legacy of the Akayesu judgment in the subsequent case law of the ICTR, see e.g. S. Chenault, 'And since Akayesu? The development of ICTR jurisprudence on gender crimes: a comparison of *Akayesu* and *Muhimana*,' in 14 *NEW ENG. J. OF INT'L & COMP. L.*, 2008, 221-237.

[23] See ICTY, Prosecutor v. Delalic and Delic, case IT-96-21-T, 18 November 1998, para. 479 and 496. The idea that rape could amount to torture had been anticipated by T. Meron, 'Rape as a Crime Under International Humanitarian Law,' in 87 *Am. J. Int'l Law*, 1993, 424-428, at 426.

[24] See ICTY, Prosecutor v. Furundzija, case IT-95-17/1-T, 10 December 1998, para. 177 ff. For an analysis of this judgment, as well as other relevant judgments of the *ad hoc* Tribunals, also see K. D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 2003, 288-349.

[25] The Court cited, in particular, as examples of legislations according to which rape can only be committed against a woman, Section 361 (2) of the Chilean Code, Art. 236 of the Chinese Penal Code (Revised) 1997, Art. 177 of the German Penal Code (StGB), Art. 177 of the Japanese Penal Code, Art. 179 of the SFRY Penal Code, and Section 132 of the Zambian Penal Code; as examples of legislations punishing rape even when committed against a man, Art. 201 of the Austrian Penal Code (StGB), the French Code Pénal Arts. 222-23, Art. 519 of the Italian Penal Code (as of 1978) and Art. 119 of the Argentinean Penal Code.

it held that such an act is in any case 'a most humiliating and degrading attack upon human dignity', which is the protected interest of international human rights and humanitarian law. Having come to the conclusion that the inclusion of this conduct in the definition of rape did not violate the principle of legality, the Court defined rape as: 'the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of force against the victim or a third person.'

With regard to the mental element, although the original definition of rape developed by the ICTY focused on coercion, force or threat of force, the jurisprudence of the tribunal subsequently developed to focus less on coercion and more on lack of consent. In particular, in the Kunarac case,[26] the Trial Chamber examined the definition of rape developed in the Judgment in the Furundzija case and the national case law on which this was based, coming to the conclusion that 'the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy.'[27] According to the Court, some jurisdictions focus on force and coercion, others emphasize additional factors (such as mental illness or other factors making true consent impossible), and common law systems focus on lack of consent: thus, the Court came to the conclusion that 'the basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.' Additionally, the Court found that threat or use of force are merely factors to be used as evidence of such lack of consent.[28] Accordingly, the Court offered a different definition of rape, on the basis of which consent 'must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.'

The decision of the Trial Chamber to shift the focus from the existence of coercive circumstances to lack of consent has been criticized by a number of scholars, as well as by the Appeals Chamber; indeed, the latter, while upholding the judgment, also highlighted the relevance of the inherently coercive circumstances which are typical of armed conflicts, underlining that, in such a situation, true consent may well not be possible.[29] The choice of the Trial Chamber seems particularly interesting since, in the specific case under consideration, it led to the accused being convicted for a

[26] ICTY, Trial Chamber, Prosecutor v. Kunarac, Kovac and Vukovic, cases IT-96-23-T & IT-96-23/1-T, Judgment of 22 February 2001.
[27] Ivi, para. 440 ff.
[28] Ibidem, para. 460.
[29] See ICTY, Appeals Chamber, Prosecutor v. Kunarac, Kovac and Vukovic, cases IT-96-23-A & IT-96-23/1-A, 12 June 2002, para. 129-130.

rape in which the victim's lack of consent was proven essentially through the existence of coercive circumstances.[30]

The subsequent case law of the tribunals has continued to shift from focusing on consent to coercion, and back again,[31] giving rise to a fervid debate on the reasons for these changes and their consequences. Some scholars have argued that focus on consent is meaningless in the context of international crimes, since they are committed in circumstances which are, per se, coercive (a widespread or systematic attack against any civilian population, an armed conflict, or a genocide).[32] Thus, it has been argued that consent, in the context of international crimes, should be treated as an affirmative defence, to be raised by the defendant in exceptional circumstances, shifting the burden of proof from the prosecutor to the accused.[33] Definitions focusing on consent have been considered as a 'regression,' turning rape from 'a physical act inflicted on the body of a victim to a psychic act committed in the mind of a perpetrator.'[34] However, allegations by the Prosecutor at the ICTR that consent should be considered as a defence to the international crime of rape, excluding non-consent from the elements to be proven by the Prosecutor, were rejected by the ICTR Appeals Chamber in the Gacumbitisi case.[35] Subsequently, the idea that, in certain coercive circumstances, 'there should be a presumption of absence of genuine consent to having sexual relations or contracting marriages' with combatants re-emerged in the case law of the SCSL; however, this statement followed an in-

[30] It seems particularly relevant, in this context, to recall the facts which the Court qualified as rape (see the Judgment of the Trial Chamber, paras. 644 ff.). In this case, the victim (D.B.) was a Muslim woman in the custody of the accused and the forces he commanded; she was threatened by one of his soldiers that, if she did not satisfy the desires of his commander, she would be killed. She subsequently entered the room where the accused was and actively initiated sexual intercourse with him. While at trial Kunarac alleged that he was not aware that D. B. was not willingly and freely consenting to sexual intercourse, the Trial Chamber held this to be 'highly improbable' 'given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time.' The Chamber also found it irrelevant as to whether the accused heard the threats against D. B., since, given the context, he could not reasonably believe her to be consenting.

[31] See for instance ICTR, Semanza, moving from Akayesu's definition to one focused on non-consensual sexual penetration.

[32] The idea that armed conflicts are characterized by the existence of coercive circumstances which 'establish a presumption of non-consent and negate the need, for the prosecution, to establish a lack of consent as an element of the crime' was already present in the Final report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, Ms. Gay J. McDougall, submitted on 22 June 1998: UN Doc. E/CN.4/Sub.2/1998/13, para. 25 f.

[33] See W. Schomburg, I. Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law,' in 101 *American Journal of International Law*, 2007, 121 ff. The Authors also argue that, if international criminal law is to draw from the definition of rape in national legal systems, it should take into account the fact that national legislations also exclude the relevance of consent whenever sexual intercourse takes place in inherently coercive circumstances, such as between a prisoner and a guard (see ivi, p. 158-159).

[34] See C. McKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*,' in *Columbia Journal of Transnational Law*, 2006, 940 ff., at p. 952.

[35] ICTR, Appeal Chamber, S. Gacumbitisi v. The Prosecutor, Judgment 7 July 2006, case ICTR-2001-64-A, § 155. In that case, however, the Court held that the Trial Chamber may infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. For an analysis of how the issue of consent has evolved in the case-law of the *ad hoc* Tribunals, see in particular W. Schomburg, I. Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law,' in 101 *Am. J. Int'l Law*, 2007, 121-140.

depth analysis of the specific circumstances of the case, and was correctly held to be an *obiter dicta* by the Appeals Chamber of the Court.[36]

The approach according to which, in the context of international crimes, consent should be treated as a defence – to be raised by the accused – instead of a negative element of the crime seems extremely promising, since it sets a reasonable balance between the rights of the accused and the needs of the prosecution. Indeed, while it seems reasonable to presume that sexual relations between soldiers and enemy women (and men) are usually non-consensual, such a presumption should be rebuttable, allowing the defendants to argue, for instance, that in the specific circumstances of the case a person did consent. It is well known that, in the context of war, women are often forced to resort to prostitution in order to provide for themselves; in such a case, if no force or coercion was used, defendants should surely be acquitted of any accuse of rape. While this approach seems to set a reasonable balance between the interests at stake, it has been rejected by the Tribunals and, indeed, is difficult to justify given the text of the law. As the ICTR has clarified, this interpretation of international law is not a viable option – the discussion on the role of consent and of coercion is therefore still open.

2.2 The ICC Elements of Crimes

While the Statute of the ICC also lacks a definition of rape, exactly as the Statutes of the ICTY and ICTR, it specifically mentions this crime both as a crime against humanity – in Article 7(1)(g) – and as a war crime – in Articles 8(2)(b)(xxii) and 8(2)(e)(vi). Moreover, although the Statute does not include a definition of rape, the Elements of Crimes[37] are much more specific. As pointed out by Schabas, in the period of time that elapsed between the adoption of the Statute and that of the Elements of Crimes, the ICTY and ICTR had become involved in the dispute over the correct definition of rape mentioned above; thus, it was deemed necessary to include a more specific description of rape in this instrument, so as to prevent the ICC from being involved in the dispute or developing yet another definition.[38] The Elements of Crimes thus define rape, both as a crime against humanity and as a war crime, as follows:

> 1. The perpetrator invaded[39] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

[36] See SCSL, Trial Chamber, Prosecutor vs. Sesay, Kallon, Gbao (so-called "RUF case"), case n. SCSL-04-15-T, Judgment of 2 March 2009, para. 1471. Also see the Judgment of the Appeals Chamber in the same case, 26 October 2009, para. 737.
[37] Adopted, according to Article 9 of the Statute of the ICC, by a two-thirds majority of the Assembly of State Parties.
[38] See W. Schabas, *An introduction to the ICC*, Cambridge 2007, p. 108.
[39] The concept of "invasion" is intended to be broad enough to be gender-neutral.

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.[40]

The definition of rape to be applied at the ICC is therefore gender-neutral (as specifically indicated in the footnotes), very descriptive (although not including a 'mechanical description of objects and body parts', in the words of the Akayesu judgment) and focused on coercion or coercive circumstances. This definition was adopted based on two drafts, the US and the Swiss proposals, both of which focused on the two constituent elements of sexual penetration and of coercion or force.[41] During the negotiations, discussion arose as to the type of invasion constituting rape: according to the Elements of Crime, rape consists of the invasion of the body of a person resulting in penetration. This definition was adopted as a result of a compromise between States that supported the ICTR's definition of rape in the Akayesu case and States that maintained that the definition of rape should focus on forced physical penetration, in accordance with national criminal definitions of this offence.[42] The main novelties of this definition of rape are, essentially, its certain gender-neutrality[43] and the fact that the question of the inclusion of forced oral sex was finally overcome, since this is clearly also included in the notion of invasion. Moreover, while the definition of the conduct may seem ambiguous, since it requires the perpetrator to invade the body of the victim, it is clear that the provision also applies when the perpetrator forces the victim to penetrate his body, as well as when the perpetrator is distinct from the accused, i.e. in situations where the defendant is charged of having forced a victim to rape another.[44]

[40] It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

[41] See E. La Haye, 'Article 8(2)(b)(xxii)', in R.S. Lee, *The international criminal court. Elements of crimes and rules of procedure and evidence*, Transnational Publisher 2000, p. 187. A group of Arab States had proposed to add a clause excluding 'natural and legal marital sexual relations in accordance with religious practices or cultural norms in different national laws,' but the proposal was rejected.

[42] See E. La Haye, *loc. ult. cit.*

[43] This paper does not take into examination the inclusion of a definition of "gender" in Art. 7(3) of the Rome Statute: indeed, while it may give rise to interpretative problems in a number of context, sexual crimes are framed without making reference to the notion of 'gender,' and are thus applicable to all persons, regardless of gender or sexual orientation.

[44] In such a case, the accused could be found guilty of having committed the crime 'through another person,' in accordance with Art. 25(3)(a) of the Statute.

With regard to the second element of rape, that is, non-consent or coercion, the ICC's Elements of Crimes focus on force, threat, coercion (as specified in the illustrative list of examples, which includes fear of violence, duress, detention, psychological oppression or abuse of power) or, alternatively, on coercive circumstances, such as for instance the fact that the perpetrator took advantage of the contextual element of the crime or of the existence of a coercive environment. Thus, it may be concluded that, according to the ICC's definition of rape, non-consent is not an element of the crime, since this focuses exclusively on the existence of coercion or of coercive circumstances.[45]

2.3 The case law of the ICC and the use of its definition of rape by the SCSL

The special attention that the Statute of the ICC pays to gender-based crimes would be irrelevant, if it was not followed by a similar attention on the part of the Prosecutor and of the Court itself. Indeed, the experience at the ICTY and ICTR was mixed: while the Tribunals were created having in mind the horrific reports of mass rapes in Bosnia and in Rwanda, the Statutes did not pay enough attention to these crimes. Moreover, the Prosecutor was initially reluctant to charge the suspects with crimes of rape and sexual violence, and in both Tribunals it was often merely thanks to the judicial activism of the Chambers, and in particular of the female Judges sitting on the bench, that evidence of rapes emerged and was used to amend the charges.[46]

2.3.1. Lack of attention to gender crimes: the Lubanga case. Some procedural remarks.

The first case at the ICC, *Prosecutor v. Lubanga*, seemed to follow exactly the same pattern: the accused was not charged with sexual crimes, but only with conscripting, enlisting and actively using child soldiers, including girls. This decision, which was somewhat due to the specific circumstances of the case (the accused was under arrest in the Democratic Republic of the Congo and it was submitted that he would soon be released), has been widely criticized, in particular since the Prosecutor decided not to seek an amendment of the indictment to include additional charges.[47] However, in the course of the trial, evidence of sexual violence committed against the witnesses themselves emerged, in part thanks to the questioning conducted by the one female Judge sitting on

[45] Idem, p. 189.

[46] See R. Goldstone, 'Prosecuting rape as a war crime,' 34 *Case W. Res. J. Int'l L.* 2002, 277; C. Steains, 'Gender issues,' in R. S. Lee (Ed.), *The International Criminal Court. The making of the Rome Statute*, The Hague 1999, 357-390, at 378. Also see ICTY, Trial Chamber, Prosecutor v. Nikolic, Case n. IT-94-2-R61, Decision on the Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 33, in which the Court invited the Prosecutor to amend the charges against the Accused, including charges of sexual violence.

[47] See e.g. S. Merope, 'Recharacterizing the Lubanga case: Regulation 55 and the consequences for gender justice at the ICC,' in 22 *Criminal Law Forum*, 2011, 311-346; S. M. Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court,' in 17 *Transnational Law and Contemporary Problems*, 2008, 265-305.

the bench.[48] Given the specific procedural role that the Statute of the ICC assigns to victims, it was their legal representative who requested, and initially obtained, a decision of the Chamber foreseeing a possible amendment to the legal characterization of the charges, in accordance with Regulation 55.[49] Indeed, at the *ad hoc* Tribunals the emergence of facts which could form the basis for a conviction for sexual violence was followed by amendments to the charges by the Office of the Prosecutor; on the contrary, the procedure at the ICC seemed to allow the Trial Chamber (TC) to change the legal characterization of the facts without any need for the Prosecutor to amend the charges, provided that due notice was given to the participants. In a two-to-one decision,[50] to which the Presiding Judge attached a very powerful dissent,[51] the TC decided to grant the request of the Legal Representative of the Victims and thus issued a warning to the parties giving them notice that the legal characterization of the facts could subsequently be amended. As is well known, the Appeals Chamber finally rejected the TC's interpretation of Regulation 55;[52] the Lubanga case has therefore gone on without charges being brought for gender violence.

The interpretation of Regulation 55 adopted by the Appeals Chamber seems to be the sole interpretation ensuring that this rule does not clash with Article 74(2) of the Statute, which provides that the TC's decision 'shall not exceed the facts and circumstances described in the charges and any amendments to the charges,' nor with the distinction between the separate powers of the Prosecutor and the TC.[53] Regulation 55 can only play a limited role in ensuring that gender crimes are adequately taken into consideration in front of the ICC, since it may only be used if the new legal qualification of the facts does not exceed the facts and circumstances described in the charges. Thus, while this Regulation would allow the Court to recharacterize the charges, for instance, from enslavement to sexual slavery, or from sexual violence to rape, provided that the facts on which such new qualification is based are the same described in the charges, it will usually not be useful

[48] See for instance ICC, Trial Chamber, Prosecutor vs. Lubanga, Case n. ICC-01/04-01/06, Transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 32-33; Transcript of the hearing of 3 February 2009, No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 24-25.

[49] ICC, Trial Chamber, Prosecutor vs. Lubanga, Case n. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009.

[50] See ICC, Trial Chamber, Prosecutor vs. Lubanga, Case n. ICC-01/04-01/06, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009.

[51] See ICC, Trial Chamber, Prosecutor vs. Lubanga, Case n. ICC-01/04-01/06, Minority opinion on the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 17 July 2009.

[52] See ICC, Appeals Chamber, Prosecutor vs. Lubanga, Case n. ICC-01/04-01/06, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," 8 December 2009.

[53] S. Mouthaan, 'The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities,' in 11 *International Criminal Law Review*, 2011, 775–802, at 793.

for cases in which evidence of sexual violence only emerges in the course of the Trial. In this respect, it has been argued that the procedure in front of the ICC deprives the TC of an important power, which had been granted at the *ad hoc* Tribunals and which allowed them to take into consideration evidence of sexual violence which had emerged in the course of trial;[54] however, the specificity of the procedure adopted at the ICC is such that it is not possible to compare it to the procedure in front of the *ad hoc* Tribunals. Indeed, the existence of a Pre-Trial Chamber, tasked with reviewing the evidence and confirming, or declining to confirm, the charges, clearly requires limitations to the extent to which charges may be amended after they have been confirmed. Thus, in front of the ICC, the number of possible options to ensure that the charges reflect the reality of the battlefield is limited. One option, which was used for instance in the *Bemba* case, is for the Pre-Trial Chamber (PTC) to adjourn the hearing and request the Prosecutor to amend the charges, or to provide further evidence – thus, whenever evidence of gender crimes emerges already at the Pre-Trial stage, Article 61(7)(c) provides a viable solution to remedy their absence from the charges. If, on the contrary, evidence of sexual crimes only emerges during the trial, the TC has no avenue to ensure that the charges are amended so as to include new crimes. Indeed, in such a situation it will be for the Prosecutor to decide whether to issue a new indictment – which is perfectly in line with the structure of the trial at the ICC and the distinct powers of the Prosecutor and the TC.

2.3.2. The 'rape' case (Prosecutor v. Bemba). The issue of cumulative charges.

The initial lack of attention to gender crimes, which gave rise to accusations of "selective justice," has been followed by a number of indictments in which gender crimes were adequately represented, and in which they even constituted the core of the accuses. In particular, with regard to the jurisprudence on rape, most of the arrest warrants issued by the ICC until now also include charges of rape and gender crimes; moreover, the case *Prosecutor vs. Bemba* is centered around the mass rapes allegedly committed by the troops commanded by Jean-Pierre Bemba, the MLC (Mouvement de Libération du Congo). In the Decision on the Confirmation of Charges against Bemba, the PTC has already had an opportunity to clarify the notion of rape under the Rome Statute, as well as its approach to cumulative charges and to the possibility of charging rape both as such, and as an act of torture. This decision deserves further analysis, since its approach, if followed by other Chambers, might lead to a significant reduction of cases of cumulative charges, but also to a denial of the specificities of the single international crimes and of the ways in which they may interact.

The PTC has, firstly, clarified the constituent elements of the crime of rape. In particular, with regard to the *actus reus*, the Chamber expressly mentioned that the term coercion 'does not require

[54] See S. Merope, cit., p. 318.

physical force. Rather, "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence."'[55] However, the Court has exercised a level of scrutiny which was probably unnecessary in examining evidence of both coercion and lack of consent, engaging in a very detailed analysis of the facts of each act of rape, and of the circumstances excluding consent. During the pre-trial phase, the Defence had raised issues of consent, arguing that, in some instances, Central African women had freely engaged in sexual relations with MLC soldiers.[56] The PTC, however, rejected this argument since it was not specifically substantiated; moreover, in the analysis of the single acts of rape which formed the basis of its decision, specific attention was paid to the element of consent. The Court stressed that, in most cases, the witnesses were threatened with guns or other weapons, they were forcibly restrained and their ability to move freely was impaired; in one case, the Court felt the need to underline that the witness, who had been beaten with a gun and forced to undress by her assailant, 'stated that she had recently given birth, thus expressing lack of any consent.'[57] Such a level of analysis, while perfectly compatible with the circumstances of the case, where rapes were committed mainly through violence or under threat of death, would surely be problematic if adopted in different cases. Indeed, it is difficult to understand how a woman who was beaten and forced to undress could have consented, and thus why her statements were considered as an expression of lack of consent. Moreover, the Chamber seems to have focused on both coercion *and* lack of consent – an approach which has no clear legal basis. While this approach was probably linked to the specificities of the case, since evidence of both coercion and lack of consent abounded, it is to be hoped that it will not be used as a model by subsequent decisions, since otherwise it could be interpreted as setting an extremely high threshold in cases of rape.

The most problematic part of the Decision, however, seems to be the one rejecting the possibility to charge rape both as such and as an act of torture, in particular since the PTC expressly excluded it not only for torture as a crime against humanity, but also for torture as a war crime. With regard to the relationship between rape and torture as crimes against humanity, the Court held that 'as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least

[55] See ICC, Pre-Trial Chamber, Prosecutor vs. Bemba, Case n. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, p. 57-58. Also see ICC, Pre Trial Chamber, *Prosecutor vs. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 440.
[56] Ibidem, para. 168.
[57] Ibidem, para. 179.

one additional material element not contained in the other.'[58] According to this approach, which was based, i.a., on the decision of the Appeals Chamber of the ICTY in the Delalic case,[59] rape can never be considered as a constituent element of the crime against humanity of torture, since the latter merely requires the intentional infliction of severe pain or suffering upon a person in the custody or under the control of the accused, while rape specifically clarifies that such pain or suffering needs to arise from an act of sexual invasion. This decision has been widely criticized as adopting a too narrow approach to cumulative charging;[60] however, it may even be interpreted as a necessary consequence of the broad definition of torture as a crime against humanity adopted in the Rome Statute and of the recognition that rape, per se, always involves the infliction of severe pain or suffering. Indeed, since the Statute of the ICC has eliminated, from the traditional requirements of torture, both the official capacity of the perpetrator and the specific purpose of the conduct, at least with regard to torture as a crime against humanity, the conclusion reached by the PTC seems to follow as a corollary from the application of the principle of specialty (rape being *lex specialis* with respect to torture). However, this does not mean that rape cannot constitute also an act of torture as a crime against humanity – if not for the victim of rape, then for her relatives who are forced to witness this atrocity. The PTC was confronted with evidence of cases in which persons were raped in front of their family members, including young children, and in which individuals were forced to stand still while their relatives were subjected to brutal rapes. In such circumstances, while the act of torture may be 'fully subsumed'[61] in the count of rape in as much as the victims of rape are concerned, the PTC's narrow approach to cumulative convictions denies the mental suffering deliberately inflicted upon their family members.[62]

Additionally, the Chamber also declined to confirm charges of torture as a war crime based on acts of rape, arguing that, in the amended document containing the charges, the Prosecutor failed to provide the factual basis underpinning the charge of torture as a war crime, and that, even at the hearing, he did not elaborate on the specific intent of MLC soldiers that would have clearly characterized the alleged acts as acts of torture as a war crime.[63] It is clear from the Court's wording that it did not consider torture, as a war crime, to be fully subsumed in the charges of rape; indeed,

[58] Ibidem, para. 202.
[59] Ibidem, para. 202. The PTC expressly referenced ICTY, Appeals Chamber, Prosecutor v Delalic et al., Case No. IT-96-21-A, Judgment, 20 February 2001, para. 412. It is however worthy to note that, in that case, the Appeals Chamber used that criterion to exclude cumulative convictions for the same actions as both a grave breach of the Geneva Conventions and a violation of the laws and customs of war.
[60] See e.g. S. Mouthaan, cit., at 794.
[61] Ibidem, para. 205.
[62] Also see ICC, Pre-Trial Chamber, Prosecutor vs. Bemba, Case n. ICC-01/05-01/08, Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence, 31 July 2009, para. 28.
[63] See ICC, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, cit., para. 299.

application of its own criterion to identify cases of cumulative charges would surely not lead to such a conclusion, given that torture, as a war crime, requires specific intent. However, the factual conclusion of the PTC seems to be somewhat surprising, if seen in light of the evidence that had been submitted during the Confirmation of Charges Hearing. Indeed, as the PTC itself recognized, the Prosecutor had argued that MLC troops used torture through acts of sexual violence for the purpose of punishing and intimidating the civilian population for allegedly sympathizing with the rebels, as well as for the purpose of discriminating against their victims. It is difficult to agree that the evidence presented at trial was insufficient and the specific intent was not expressly clarified. Indeed, already during the Opening Statements, the Deputy Prosecutor recalled the story of Witness 23, who was raped by three MLC soldiers. After he informed them that he was a representative of the Government, the soldiers replied: 'You are exactly the kind of person we are looking for, because you protect the rebels.' They then went on to rape him in front of his family, his wife in front of him, and subsequently their children.[64] It is difficult to see how the Chamber could have found that there was insufficient evidence, or lack of clarity, as to the specific intent to punish the victim.

Notwithstanding these problematic aspects, the decision on the confirmation of charges in the Bemba case is a clear step forward in ensuring that international criminal tribunals pay specific attention to gender crimes. Indeed, the focus of the case on mass rapes is particularly significant given the role of the accused (former vice-President of the Democratic Republic of the Congo). Moreover, having one of the first cases at the ICC clearly focusing on rape and gender crimes is a recognition of the importance that the Court, and the Office of the Prosecutor, assign to the prevention and repression of sexual crimes.

2.3.3. The case law of the SCSL: the definition of rape

The definition of rape which is included in the ICC's Elements of Crimes is relevant not only with respect to the case-law of the ICC, but also to that of other tribunals. Thus, for instance, the Special Court for Sierra Leone has adopted a definition of rape which is at least partly based on the ICC's one. In particular, in its judgment in the so-called RUF case, the Trial Chamber adopted the definition of rape contained in the ICC's Elements of Crimes, but integrated it with two additional elements: that the accused 'intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur' and that 'the Accused knew or had reason to know that the

[64] See ICC, Pre-Trial Chamber, Prosecutor v. Bemba, Transcript of the 12 January 2009 hearing, ICC-01/05-01/08-T-9-ENG , at p. 17-18.

victim did not consent.'[65] With regard to the ICC's elements of crimes, the Court specifically mentioned that the second element describes circumstances in which the person could not be said to have voluntarily and genuinely consented to the sexual act; thus, while the use or threat of force provides clear evidence of nonconsent, it is not necessary.[66] The two additional elements specify the necessary *mens rea* and clearly derive from the ICTY's jurisprudence, and in particular, from the criterion adopted in the Kunarac case; however, their additional value seems to be specific to the SCSL, given the absence, in its Statute, of a general provision analogous to Article 30 of the Rome Statute and clarifying the mental element necessary for the perpetration of any international crime.[67] Thus, it seems that the adoption of the Rome Statute, and of its Elements of Crimes, has already played an important role in clarifying the notion of rape in international criminal law, possibly ensuring the codification of a definition which might be followed by other tribunals tasked with the application of international criminal law.

3. Sexual slavery and enforced prostitution

The Statute of the ICC has been the first Statute of an international criminal court to recognize sexual slavery and enforced prostitution as separate offences; its example has been followed by the Statute of the Special Court of Sierra Leone, which also lists sexual slavery and enforced prostitution among the gender crimes over which the SCSL has jurisdiction. Moreover, while the Statutes of the ICTY and ICTR did not expressly mention sexual slavery, the two tribunals had jurisdiction over this crime, although it was qualified as enslavement. Thus, the case law of the ICTY on the crime of enslavement is relevant for the interpretation of the notion of sexual slavery in the Rome Statute.

The two crimes of sexual slavery and enforced prostitution will be considered separately but in a common section, since the notion of enforced prostitution is residual to that of sexual slavery; thus, it is only once the latter is defined that the definition of the former may emerge.

3.1. The definition of sexual slavery in the Elements of Crimes

The decision to define sexual slavery as a separate crime, distinguishing it from 'common' enslavement, is due to the pressure exerted by NGOs at the Rome Conference, as well as to the

[65] SCSL, Trial Chamber, Prosecutor vs. Sesay, Kallon, Gbao (so-called "RUF case"), case n. SCSL-04-15-T, Judgment of 2 March 2009, para. 145.
[66] Ibidem, para. 147.
[67] For a comment on the SCSL's case law on gender crimes, see V. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments,' in 44 *Cornell Int'l L.J.* 2011, 49-74.

increased attention to the specificities of sexual slavery, especially in connection with armed conflicts.[68]

The definition of sexual slavery in the Elements of Crimes is identical for crimes against humanity and war crimes (save for the contextual element), and is drawn directly from the Rome Statute's definition of enslavement, with the addition of a sexual element. Sexual slavery is thus so defined:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[69]
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

A general footnote further clarifies that 'given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.'

The first paragraph of this definition is identical to the definition of enslavement, and the footnote which specifies the notion of 'deprivation of liberty' is also drawn from that Element; thus, it is clear that sexual slavery is a special form of enslavement, and that the two crimes may not be charged together, since enslavement is fully subsumed into the crime of sexual slavery. However, sexual slavery is prohibited as a distinct offence given its sexual character, which was deemed to require a separate provision.

The ICC's definition of slavery and enslavement is based on the definition given by the 1926 Convention against Slavery, which describes slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[70] This definition is generally deemed to be a codification of the customary law prohibition against slavery, which is a peremptory norm of international law.[71] However, during the negotiations of the Elements of Crimes, it was held that the definition adopted in the 1926 Convention was too broad and vague; thus, it was additionally specified that the exercise of powers attaching to the right of ownership may take place 'by purchasing, selling, lending or bartering such a person or persons, or by

[68] For an analysis of the history of the inclusion of sexual slavery in the Rome Statute, see e.g. V. Oosterveld, 'Sexual slavery and the International Criminal Court: advancing international criminal law,' in 25 *Mich. J. Int'l L.* 2003-2004, 605, at 623 ff.

[69] It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

[70] Slavery Convention, done at Geneva, 25 September 1926, Art. 1(1).

[71] On the *jus cogens* nature of the prohibition against slavery, see e.g. I. Brownlie, *Principles of public international law*, IV ed., OUP 1990, at 512 f.; A. Cassese, *International law*, II ed., OUP 2005, 199-202.

imposing on them a similar deprivation of liberty.'[72] This list of modes of commission of the crime is clearly not exhaustive, since it ends with an open clause; the notion of 'similar deprivation of liberty' is further specified in a footnote. The adoption of this formulation has been criticized, since the listed modes of commission of the crime all involve a commercial transaction; however, the final clause, and the corresponding footnote, seem to expand the scope of application of the crime beyond commercial transactions.[73] It is interesting to note that, while the drafters of this definition (and of the 'twin' definition of enslavement) deemed it necessary to specify it in order to ensure full respect of the principle of legality, they did so, i.a., by reference to the notion of 'trafficking in persons', which, at the time of the adoption of the Statute, had not yet been defined. Indeed, the footnote clarifying the concept of 'similar deprivation of liberty' mentions servitude - which is further specified by reference to the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;[74] forced labour - which has been defined in a number of human rights treaties as well as in the 1930 ILO Convention concerning Forced or Compulsory Labour; and trafficking in persons. With regard to the latter phenomenon, its mention in the footnote is due to its explicit inclusion in the definition of enslavement in the ICC Statute;[75] however, while at the time of the adoption of the Statute there was no common definition of human trafficking, the main elements of this crime have been finally defined in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

This already very complex definition of enslavement is further specified, in the provisions on sexual slavery, through mention of the involvement in acts of sexual nature; this is a very broad concept, which might include not only rape, but also all acts of sexual violence. Additionally, since the notion of sexual acts does not necessarily require use of violence, it is clear that the crime of sexual slavery continues to be committed even once the victim is subdued, and regardless of whether violence needs to be used to force the victim to perform sexual activities. While this conclusion

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[72] See D. Robinson, 'The elements of crimes against humanity, art. 7 (1) (c),' in R. S. Lee (Ed.), *The International Criminal Court: the Elements of Crimes*, The Hague 2001, at 84 ff. Reference to the specific forms of exercise of the powers attaching to the right of ownership was included upon a US proposal. Moreover, the proposal to define enslavement and sexual slavery by reference to 'chattel' or to an 'attack' against the victim were rejected; see V. Oosterveld, op. ult. cit., at 629.

[73] See V. Oosterveld, op. ult. cit., at 643; *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur,* U.N. Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Protection of Hum. Rts., 52d Sess., Agenda Item 6, 71, U.N. Doc. E/CN.4/ Sub.2/2000/21 (2000), para. 8, 29, 50.

[74] The Convention, in its Art. 1, defines 'institution and practices similar to slavery' as including debt bondage, serfdom, traditional forms of forced marriage (where the woman is given in marriage on payment, or inherited upon the husband's death), and the sale of children for their exploitation.

[75] Reference to trafficking in persons was included in the Statute's definition of enslavement upon Italy's proposal; see H. von Hebel, D. Robinson, 'Crimes within the jurisdiction of the Court,' in R. S. Lee (Ed.), *The International Criminal Court: the making of the Rome Statute*, The Hague 1999, p. 79 ff., at 99.

would have been obvious even if the Elements had referred to acts of sexual violence, since the enslavement of the victim clearly constitutes one of the coercive circumstances excluding relevance of consent, the text of the provision is even clearer.

One problematic aspect of the definition of sexual slavery is footnote 52, which recognizes that, given the complex nature of the crime, its commission could involve more than one perpetrator as a part of a common criminal purpose. This clause is based on the obvious understanding that the enslavement of a person is a complex conduct, which may require the involvement of more than one person sharing a common plan. While this conclusion is undisputable, given that enslavement is a permanent crime, which requires a prolonged exercise of control over the victim, it is also clear that enslavement may also be committed by a single perpetrator, although this will not usually be the case, especially in the context of the commission of war crimes or crimes against humanity. However, while the footnote does not exclude this possibility (as evidenced by the use of the word 'may'), what remains unclear is why the footnote was deemed necessary with reference to sexual slavery alone, and not to the basic crime of enslavement. Indeed, it is certainly not the sexual nature of the crime which may require the involvement of more perpetrators; recognition of the probability that the commission of the crime will require action by more persons is a common feature of enslavement and of sexual slavery. The decision to include the footnote under examination in this Element, and not in its 'twin' provision, is therefore somewhat mysterious, and it is to be hoped that it will not affect the practical application of this crime.

Finally, it seems important to stress that the specific mention of trafficking in persons as one of the means through which the crime of sexual slavery may be committed finally clarifies that the crime is also committed in cases of *de facto* slavery.[76] Indeed, while slavery may be considered to be a legal condition, forced labor may be imposed by law, and even servitude may be legally recognized, trafficking in persons has never been recognized as a legal condition or status. However, mention of trafficking in persons renders the distinction between sexual slavery and enforced prostitution even more difficult to ascertain, as will be shown below.

3.2. The case law of the ad hoc tribunals and of the ICC

The most important precedent for the interpretation and application of the crime of sexual slavery is surely represented by the judgment of the ICTY in the Kunarac case.[77] This decision has contributed to clarify that sexual slavery is a form of enslavement, punishable as such as a crime against humanity. Moreover, it also expressly recognized that the international crime of enslavement does not require the exercise of legal powers over the victim, but also encompasses *de*

[76] For the existing dispute over the notion of 'slavery' as a legal or factual condition, see *infra*, footnote 68.
[77] ICTY, *Prosecutor vs. Kunarac et al.*, IT-96-23-T e IT-96-23/1-T, Judgment of 22 February 2001.

facto slavery – a conclusion which was by no means obvious, given the existing dispute as to the scope of application of the term 'slavery' in the 1926 Slavery Convention.[78]

In its final decision, the Trial Chamber of the ICTY defined the crime against humanity of 'enslavement' making reference to the 1926 Geneva Convention, which it deemed to reflect current customary international law and to be applicable to both legal and factual slavery.[79] The Chamber then moved to identify a number of 'indicators' of the crime of enslavement: according to its definition, 'indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.'[80] The facts of the case are particularly relevant in order to understand how the law was applied to sexual slavery. Kunarac, and his co-defendant, were accused of having enslaved two women, who were detained in a house, raped, and treated as the personal property of the defendants, being forced to perform sexual as well as domestic services. After a certain period of time, the victims were given the keys of the house where they were detained. However, the Court held that the girls were kept in the house to be used for sexual services and were not, in reality, free to go away, since they 'had nowhere to go, and had no place to hide' from the accused, even if they had attempted to leave the house, since this was in an area which was under the complete control of the Serbian troops.[81] The decision was subsequently confirmed by the Appeals Chamber, which held, on the one hand, that the modern definition of enslavement encompasses not only forms of 'chattel slavery,' but also contemporary forms of slavery, and on the other hand, that lack of consent is not an element of the crime, since

[78] Slavery Convention, cit., Art. 1(1). The idea that the term 'slavery' only applies to *de jure* slavery, where the victims are deprived of their legal personality, was expressly put forward during the negotiations of the ICCPR, and has been recently reaffirmed by such an authoritative Tribunal as the ECtHR. See ECtHR, Siliadin vs. France, Application no. 73316/01, Judgment 26 July 2005, para. 122. On the negotiations for the ICCPR see M. J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on civil and political rights*, Dordrecht 1987, at 167. For an in-depth analysis of this issue, see J. Allain, 'The definition of slavery in international law,' in 52 *Howard L.J.* 2008-2009, 239-275.

[79] Ibidem, para. 540.

[80] Ibidem, para. 542. In the subsequent paragraph, the Court listed the factors to be taken into consideration in determining whether enslavement was committed. These include 'the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour' as well as the fact of buying, selling, trading or inheriting a person or his or her labours or services.'

[81] Ibidem, para. 740-741.

enslavement flows from claimed rights of ownership, regardless of consent.[82] This ICTY case is particularly relevant since it represents the first conviction, by an International criminal tribunal, for the crime of enslavement through sexual slavery; the Court thus had an opportunity to clarify the constituent elements of the crime, the material factors which show that the crime has been committed, as well as to rule out the relevance of freedom of movement, when this is only apparent due to the inherently coercive circumstances related to the contextual element of the international crime. Moreover, the Appeals chamber also clarified that 'enslavement, even if based on sexual exploitation, is a distinct offence from that of rape:'[83] the same conclusion seems to hold true for the crime of sexual slavery.

The SCSL has also had an opportunity to clarify the scope of application of the provisions related to sexual slavery and enforced prostitution. As noted above, the Statute of the Court also recognizes sexual slavery and enforced prostitution as separate offences, following the example of the ICC Statute. In its case law, the Court has followed the definition of sexual slavery given by the ICC's Elements of Crimes, but it integrated it with elements of the Kunarac decision, including the indicators of enslavement set out in this judgment.[84] The approach of the Court is particularly interesting with regard to cases of forced marriage; indeed, while it is usually argued that this conduct would fall within the scope of application of the crime of sexual slavery, the Appeals Chamber of the SCSL has held that the two crimes differ, and thus, that coercing women into forced marriages constitutes an 'other inhuman act', as well as a form of sexual slavery. In the so-called ASCL case, the Trial Chamber had originally acquitted the defendants of the former crime, arguing that the conduct of coercing women into 'marriages' was fully subsumed in the crime of sexual slavery, and thus could not also form the basis for a conviction of 'other inhumane acts.'[85] Subsequently, however, the Appeals Chamber rejected this approach. After an in-depth analysis of the elements and consequences of forced marriage, the Chamber held that this conduct has distinctive elements to sexual slavery, and is not predominantly a sexual crime. The Chamber took into consideration the fact that the relationship between the soldiers and their 'wives' was one of exclusivity, giving rise to a number of duties for the women (including to have sexual relations, to perform domestic chores, and of faithfulness) and to an additional level of suffering for the

[82] ICTY, AC, *Prosecutor v. D. Kunarac, R. Kovac e Z. Vukovic,* N. IT-96-23 e IT-96-23/1-A, Judgment 12 June 2002, para. 117-120.
[83] See ICTY, Appeals Chamber, Prosecutor v. Kunarac, cit., para. 186.
[84] See SCSL, Trial Chamber, Prosecutor v. Brima, Kamara, Kanu (also called AFRC case), SCSL-04-16-T, Judgment of 20 June 2007, para. 708; SCSL, Trial Chamber, RUF case, cit., para. 158.
[85] See SCSL, Trial Chamber, AFRC case, cit., para. 713.

women.[86] The Court therefore held that the material elements of forced marriages could be characterized as 'other inhumane acts' giving rise to a separate conviction for this crime.[87]

The ICC has also already had an opportunity to apply the provisions regarding sexual slavery and to clarify which rules are deemed to apply to cases of forced marriage. In its decision confirming the charges against Katanga and Ngudjolo, the PTC confirmed charges of rape and sexual enslavement, finding that the victims had been raped both before their abduction and during their period of enslavement. The Court confirmed that sexual slavery, although included as a separate offence, may be regarded as a form of enslavement, and that practices such as the detention of women in rape camps, forced temporary marriages to soldiers, and practices involving the treatment of women as chattel are a violation of the peremptory norm prohibiting slavery.[88] Moreover, it clearly held that the two provisions also applied to cases of 'women forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.'[89] Thus, the Court clarified that cases of forced marriage fall within the definition of sexual slavery; in order to reach this finding, the Court paid specific attention to the fact that abducted women were forced to perform not only sexual, but also domestic services, such as cooking and cleaning.

This decision seems to be entirely in line with the rationale behind the introduction of a separate crime of 'sexual slavery' and its definition. Indeed, while it is clear that forced marriages are not exclusively sexual crimes, the position adopted by the SCSL on this issue postulates a very restrictive interpretation of 'sexual slavery.' According to the SCSL's rulings, the term sexual slavery only encompasses enslavement if directed exclusively at obtaining sexual services; thus, whenever a woman is enslaved in order to obtain from her both sexual and other types of services, two different crimes would be committed. According to this interpretation, it even seems possible to have cumulative convictions for enslavement and sexual slavery, whenever a person is enslaved and forced to perform both sexual and non-sexual services. However, such an interpretation is not compatible with the definition of sexual slavery, as incorporated in the ICC's elements of crimes and adopted by the SCSL. Indeed, sexual slavery is defined exactly as enslavement, with the additional element that the perpetrator must have caused the victim to engage in acts of sexual nature. Moreover, footnote 18 lists forced labour and servitude (as defined by the 1956 Geneva Convention) among the forms of deprivation of liberty that are relevant for the crime of sexual

[86] See SCSL, Appeals Chamber, AFRC case, SCSL-04-16-A, 22 February 2008, para. 187-196.

[87] For a more in depth analysis of these SCSL judgments, as well as of the judgment in the case Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009), see P. Viseur Sellers, Wartime female slavery: enslavement?, in 44 Cornell Int'l L.J. 2011, 115, at 132 ff.

[88] See ICC, Pre Trial Chamber, *Prosecutor vs. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 430-431. This is also one of the few instances in which the Court cited the cases decided at the *ad hoc* Tribunals, in particular, the Indictment of Gagovic at the ICTY.

[89] Para. 431. Also see para. 350-354.

slavery; this is a clear indication that this crime also encompasses situations where the victim is forced to perform other types of services in addition to sexual acts. Thus, the Katanga and Ngudjolo decision of the ICC's PTC has clarified that the crime of sexual slavery is committed both when the victim is forced exclusively to perform sexual services and when she is coerced to perform different types of services.

3.3. Enforced prostitution

The term 'enforced prostitution' was originally included in Art. 27(2) of the IV Geneva Convention; the ICRC commentary made reference to the practice of forcing women into brothels, which occurred during WWII, and specifically defined enforced prostitution as 'the forcing of a woman into immorality by violence or threats.'[90] The Statute of the ICC prohibits enforced prostitution both as a war crime and as a crime against humanity. The crime is defined in the Elements of Crimes as follows:

> The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
>
> The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.[91]

The list of the possible means for the commission of the crime is identical to that included in the definition of rape and of sexual violence. The distinctive element of the crime of enforced prostitution is the intent to obtain pecuniary or other advantage; this element was included based on the US proposal.[92]

The main problematic aspect of this crime is its relationship to sexual slavery and to rape. Indeed, the term 'enforced prostitution' was originally meant to refer to cases in which women were forced into 'comfort stations' - a situation that, nowadays, is widely recognized to amount to sexual slavery. Thus, the scope of application of forced prostitution remains unclear;[93] some Authors argue

[90] ICRC, *Commentary on the Geneva Conventions of 12 August 1949, Vol. IV*, Geneva 1958, p. 206.
[91] See ICC, Elements of Crimes, Articles 7(1)(g)-3, 8(2)(b)(xxii)-3, and 8(2)(e)(vi)-3. The definition of enforced prostitution is the same in all three cases, but the contextual element varies.
[92] See E. La Haye, cit., p. 193.
[93] For a more in-depth analysis of the distinction between sexual slavery and enforced prostitution also see, i.a., N. V. Demleitner, 'Forced Prostitution: Naming an International Offense,' 18 *Fordham Int'l L.J.* 1994, 163; V. Oosterveld,

that the crime is completely subsumed into that of sexual slavery, and that the use of the term 'enforced prostitution' reflects stigmatizing prejudices on gender.[94] In theory, it seems to be possible to draw a line between cases where women are held captive, deprived of their autonomy and forced to perform sexual services, and cases where the women, although coerced into prostitution, maintain a certain degree of autonomy and freedom of movement. In practice, however, this line seems to be very thin. Indeed, as recognized by the ICTY in the *Kunarac* case and confirmed by some delegations during the negotiations of the ICC's Elements of Crimes, in many cases the apparent degree of autonomy and of freedom of movement of the victims is non-existent in practice, given that the women may have 'nowhere to go' or be held in an area which is subjected to the control of enemy troops. The distinction between sexual slavery and forced prostitution is further blurred by the specific mention, among the modes of commission of the crime of sexual slavery, of trafficking in persons. Indeed, according to the most widely accepted definition of trafficking, this crime is committed 'for the purpose of exploitation,' and exploitation also includes 'exploitation of the prostitution of others.'[95] Thus, if trafficking may be a form of deprivation of liberty relevant for the purpose of sexual slavery, and one of the forms of trafficking is committed with a view to the exploitation of the prostitution of the victim, it seems that, in many cases, enforced prostitution will actually be characterized as sexual slavery. Moreover, a distinction also needs to be drawn between enforced prostitution and rape, since the description of the criminal conduct is broad enough to also include cases where the victim is coerced to engage in sexual acts, for instance, through an abuse of power, or by the existence of a coercive environment.[96] While it has been argued that the crime of 'enforced prostitution' would also be applicable when the 'other person' expecting an advantage is the victim, 'hoping simply not to be killed,'[97] it seems that such a situation would usually fall within the scope of application of the crime of rape or sexual violence. This is confirmed by the interpretation of the crime of rape given by the ICTY in the Kunarac case, where the Court convicted the accused of rape of a victim who had been coerced by others to engage in sex with the defendant, i.a., through threats of death.[98] In this specific case, the Court held

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'Sexual slavery and the International Criminal Court: advancing international criminal law,' in 25 *Mich. J. Int'l L.* 2003-2004, 605.

[94] See, e.g., K. D. Askin, 'Women and International Humanitarian Law,' in K. D. Askin, D. M. Koenig (Eds.), *Women and international human rights law*, Transnational Pub. 2001, 41, 48 n. 29; C. M. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II,' 21 *Berkeley J. Int'l Law*, 2003, 375-389, at 386 f. *Contra*, see V. Oosterveld, op. ult. cit., at 622.

[95] See the Additional Protocol to the UN Convention on Transnational Organized Crime.

[96] The 'forcible' element need not be present for each individual sexual act, but it is sufficient that it be present regarding the complex of the sexual activity of the victim. See M. Boot, 'Rape… or any other form of sexual violence of comparable gravity,' in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlag, 1999, § 48 ff.

[97] See E. La Haye, cit., p. 193; the Author makes reference to statements made during the negotiations of this element.

[98] See ICTY, Trial Chamber, Prosecutor v. Kunarac, cit., para. 646.

that the victim could not be deemed to have consented since she was in fear for her life. While in the specific circumstances of the case the defendant's awareness of the threats made to the victim was deemed irrelevant, since she was in captivity, it seems that, whenever a person engages in sexual activity with another, while being aware that the latter's consent is vitiated, e.g., by fear for life, threats, or coercion, the perpetrator may be convicted of rape. If, on the contrary, the person engaging in sexual conduct is not aware of such threats, the person who threatened the victim may be found guilty of enforced prostitution. Moreover, the latter crime may also be considered to apply whenever the victim agrees to engage in sexual activities in order to obtain some economic or other advantage, but her consent is vitiated by abuse of power, or inherently coercive circumstances. Thus, the provision seems to also cover cases of 'survival sex,' whenever the victim is forced to engage in sexual activities in order to obtain access to basic resources such as food, water, or shelter, if the perpetrator abuses his position of power or authority. This seems to be a far-reaching consequence, which might lead to consider most forms of prostitution in situations of armed conflicts as enforced prostitution, given that, in many cases, persons engage in prostitution with enemy troops merely in order to secure their own survival. However, the provision is clearly broad enough to encompass such situations; it remains to be seen whether it will be applied in these circumstances.

4. Forced pregnancy and enforced sterilization

The inclusion of the crime of forced pregnancy was among the issues giving rise to the most vehement debate during the negotiations of the Rome Statute, since this issue was mistakenly believed to be intertwined with the national treatment of abortion.[99] The final compromise led to the inclusion of the crime, but also of a specific definition, in the Statute itself. Attention to the phenomenon of forced pregnancies had been raising since the war in the former Yugoslavia, where forced pregnancies were widely reported in connection with a policy of 'ethnic cleansing' or genocide;[100] these reports formed the basis to reach consensus, allowing the delegations to overcome their initial diffidence.

On the other hand, the criminalization of enforced sterilization did not give rise to particular concerns, and its inclusion in the Statute was not controversial. Forced sterilization is widely

[99] For an analysis of the debates, see e.g. B. Bedont, cit., p. 197; C. Steains, 'Gender issues,' in R. S. Lee (Ed.), *The International Criminal Court. The making of the Rome Statute*, The Hague 1999, 357-390, at 365 ff.; A. M. L. M. de Brouwer, *Supranational criminal prosecution of sexual violence*, Intersentia 2005, p. 143 ff.

[100] See e.g. K. D. Askin, *War crimes against women*, M. Nijhoff Pub., 1997, at 273.

reported to have taken place during WWII,[101] and, while it was already foreseen, albeit in a more comprehensive language, as a mode to commit genocide,[102] it had never been recognized as constituting, per se, a crime against humanity or a war crime.

4.1. Forced pregnancy

During the negotiations of the Rome Statute, a number of States, in particular catholic and Arab countries, opposed the idea of including the crime of forced pregnancy, since they believed that this provision would require amending the national legislation on abortion.[103] Finally, an agreement was reached to also include a definition of 'forced pregnancy' in the Statute itself, clarifying that this term means: 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.' The definition included in the Elements of Crimes thus merely restates that the perpetrator must have 'confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.'

As has been noted, the crime requires that the victim be forcibly made pregnant, either through rape or through other means; thus, confinement of a woman who was made pregnant with her consent would not be included.[104] Additionally, the woman needs to be unlawfully confined during her pregnancy – a requirement which seemingly excludes cases in which the victim is forcibly impregnated and immediately released. Finally, the commission of the crime also requires a *mens rea* element, that is, the specific intent either to affect the ethnic composition of a group, or to commit another serious violation of international law. Whenever the crime is committed in order to change the ethnic composition of the group, it might also amount to an act of genocide; however, the crime is also punishable absent such intent, provided that the perpetrator acts in order to commit a different violation of international law. This alternative intent was included so as to ensure that

[101] See K. D. Askin, ibidem, at 88-93. Also see U.S.A. vs. Karl Brandt (so called 'Medical case'), *Trial of War Criminals before Nuremberg Military Tribunals under Control Council Law n. 10*, 1946-1949, in which evidence was brought as to medical experiments carried out by Nazi doctors in order to sterilize concentration camps detainees.

[102] The Genocide Convention includes among the prohibited conducts that of imposing measures 'intended to prevent births within the group.' Enforced sterilization has been recognized as falling within the scope of definition of this rule, together with measures such as the prohibition of marriages or the separation of men and women, by the ICTR, Trial Chamber, Prosecutor v. Akayesu, cit., para. 507-508.

[103] See e.g. B. Bedont, cit., 197-199. Also see C. Steains, cit., at 365-367.

[104] See B. Bedont, cit., p. 198.

forced pregnancies would also amount to international crimes when committed for different purposes – such as use in medical experiments, as happened in the Nazi era.[105]

While the inclusion of this crime gave rise to a significant number of concerns and discussions, there have been no prosecutions up until now. Indeed, although the facts cited in the Katanga case also included cases of women who were abducted, raped, and who became pregnant during their captivity, this conduct was prosecuted as rape and sexual slavery alone. However, the definition of the crime seems to be broad enough as to encompass even such cases: indeed, whenever pregnancy results from detention in rape camps, the perpetrator will have acted with the intent to commit a serious violation of international law, such as rape or sexual slavery. The crime thus also seems to have the potential to lead to cumulative charges, since it requires an additional element if compared to the crimes of rape and sexual slavery. The subsequent practice of the ICC will show whether forced pregnancy will also be charged when it is a consequence of detention in rape camps, or whether it will only be considered in relation to cases in which pregnancy of women was intentionally pursued.

4.2. Enforced sterilization

The Statute of the ICC is the first instrument to recognize enforced sterilization as an international crime. The definition of the crime given by the Elements of Crimes is as follows:

> The perpetrator deprived one or more persons of biological reproductive capacity.[106]
>
> The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.[107]

During the negotiations of the Elements of Crimes, the Belgian delegation suggested departing from the language of 'sterilization,' which tends to suggest removal of organs or other surgical operation, in order to allow application of this criminal provision even in cases of use of chemical weapons or other means to render a person sterile. Other delegations, however, expressed their wish to ensure that the crime would not encompass measures intended for birth control; finally, agreement was reached to add a footnote in order to ensure that the provision would not be applicable whenever sterilization is, in practice, non-permanent. Clearly, however, the use of measures whose effect is, in

[105] See E. La Haye, cit., 194. The inclusion of the additional *mens rea* element, requiring *dolus specialis*, has been strongly criticized since it distinguishes this crime (i.e., the only crime that may only be committed against women) from other offences. See in particular C. Chinkin, 'Gender-related violence and international criminal law and justice,' in A. Cassese (Ed.), *The Oxford Companion to International Criminal Justice*, OUP 2009, 75 ff.

[106] The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

[107] It is understood that "genuine consent" does not include consent obtained through deception.

practice, permanent would also be included and criminalized; thus, a mass campaign of forcible administration of contraceptive pills or injections, if repeated over time, might also fall within the scope of application of this provision. The second paragraph aims to ensure that voluntary sterilization, where the person gave genuine, undeceived consent, and sterilization justified by medical necessity would not be prohibited.

The inclusion of a provision on forced sterilization, both as a crime against humanity and as a war crime, is particularly important and may have groundbreaking effects on the laws and practices of certain countries, especially if States will also incorporate it into national law in order to give full effect to the principle of complementarity. Indeed, mass campaigns of forced sterilization have been carried out, even in the recent past, in a number of States, often as a result of a governmental policy to prevent births among certain groups, such as mentally disabled persons, persons living in poor and neglected areas, or certain ethnic groups.[108] The potential relevance of the ICC Statute is only enhanced by the fact that the contextual element of crimes against humanity requires the crimes to be carried out on either a widespread or systematic manner; thus, even a campaign of forced sterilization aimed at a small group, and not carried out in a widespread manner, could be relevant, if systematic. Additionally, a recent judgment of the European Court of Human Rights has also recognized that enforced sterilization may constitute 'inhuman or degrading treatment', and thus a violation of a fundamental right.[109] There seems to be a growing attention to the practice of forced sterilization, especially when directed against specific ethnic groups; recognition that such a practice may amount to an international crime even when it is not carried out with genocidal intent is therefore a clear step forward in the process of ensuring better protection of fundamental rights.

5. Any other form of sexual violence

The list of gender-based crimes included in the Rome Statute is clearly not exhaustive: indeed, its final clause, which is the only clause which has different formulations with respect to war crimes in international and non-international armed conflicts and to crimes against humanity, mentions 'any other form of sexual violence.' The need to include such an open clause, notwithstanding the fact that the provision concerning gender crimes is much more inclusive than its predecessors, emerged

[108] See in particular, for the mass sterilization campaign which took place in the poorest areas of Peru, accompanied by a requirement that doctors meet a certain quota of sterilization, the Report of the Committee established by the subsequent Health Ministry: Comisiòn Especial Sobre Acrtividades de Anticoncepciòn Quirùrgica Voluntaria (AQV), *Informe Final*, July 2002, *available at* http://www.mamfundacional.org/ef/Informe-Final.pdf.

[109] See ECtHR, V.C. v. Slovakia, Application no. 18968/07, Judgment, 8 November 2011. The ECtHR has already held that refusal to grant access to a person's medical records is a violation of the right to privacy; the case concerned 8 Slovak women of Roma origin, who suspected having been forcibly sterilized during a cesarean. See K.H. and Others v. Slovakia, Application no. 32881/04, Judgment, 28 April 2009.

clearly from the case law of the *ad hoc* tribunals, as well as from a number of national legal systems. Indeed, although the definition of rape adopted in the Elements of Crimes is very broad, and as comprehensive as possible, it does not encompass all possible forms of sexual violence, since it requires an act of physical invasion. The final clause is therefore meant to allow for prosecution of acts of sexual violence which do not involve penetration or physical invasion, including forms of sexual violence which do not require physical contact.

The decision to maintain a distinction between rape and sexual violence might seem somewhat conservative, especially if seen from the point of view of international human rights law. Indeed, human rights bodies have recently started suggesting that the distinction between rape and sexual violence is outdated, since the focus on proof of penetration does not account for the full range of sexual violations and their impact on the victims,[110] as well as being a potential tool for revictimization at trial. Thus, it is often suggested that national criminal legislation should no longer distinguish between rape and sexual violence, but only include a broadly defined crime of 'sexual assault,' applicable to all types of unwanted sexual contact.[111] While this suggestion has been addressed to national legislators, it would be even more fitting in the context of international criminal law. Indeed, while at the national level it would usually still be necessary to understand the details of the facts in order to set the punishment and ensure that it reflects the seriousness of the crime, international criminal tribunals might not need to establish exactly the level of physical invasion in order to set an adequate punishment. Indeed, once it has been established that the unwanted sexual contact took place in the context of an international crime, it seems unnecessary to determine whether such contact involved penetration; and especially so since the definition of rape has evolved to include a broad range of acts of physical invasion and no longer focuses on vaginal penetration. Thus, the decision of the drafters of the Rome Statute to maintain a distinction between 'rape' and 'sexual violence,' although based on the tradition of international criminal law, seems already outdated; while it may be considered a codification of the law as it was at the time of the adoption of the Statute, it will probably have the unfortunate effect of 'freezing' the legislation, preventing the Judges from interpreting it in line with the development of customary law. While this may be a necessary sacrifice in order to ensure full respect of the principle of legality (*nullum crimen sine lege*), a more progressive approach to gender crimes at the time of the negotiations

[110] See Division for the Advancement of Women, Department of Economic and Social Affairs, UN Secretariat, *Handbook for legislation on violence against women*, 2009, p. 26, *available at* http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf.

[111] See e.g. CEDAW Committee, Communication n. 18/2008, submitted by Karen Tayag Verdido, decided on 16 July 2010.

could have ensured against the risk of codifying the law at a moment in time when it was evolving towards a new standard.

The notion of 'any other form of sexual violence' is broader than that of sexual assault, as shown both by the negotiating history of the Statute and by the case law of the *ad hoc* Tribunals. Indeed, while during the negotiations of the Statute it had been suggested to maintain the language of the Geneva Conventions, where reference is made to 'indecent assault,' it was subsequently held that the use of the word 'assault' could have implied the exclusion of forms of sexual violence which do not imply physical contact, such as forced nudity. Thus, the choice was made to use the broader notion of sexual violence both in the Statute and in the Elements of Crimes.[112] During the negotiations of the latter, it was suggested to define sexual assault either as 'the commission of a physical or psychological act of a sexual nature upon a person under circumstances that are coercive'[113] or as the commission, by force, of 'an act of a sexual nature against one or more persons' (according to the US proposal). The delegations focused on the need to define sexual violence or assault broadly, so as to include the commission of any act having a sexual nature by force, threat or coercion. The definition adopted in the Elements of Crime, whose core is identical for sexual violence as a crime against humanity and as a war crime, is as follows:

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

The case law of the *ad hoc* Tribunals shows the importance of adopting such a broad definition of sexual violence. Thus, for instance, the ICTR, in the *Akayesu* case, held that sexual violence is a broad term, which extends to also include rape, and defined it as 'any act of a sexual nature which is committed on a person under circumstances which are coercive.'[114] Accordingly, sexual violence was considered not to require physical contact; in the case of Akayesu, this led to the suspect's conviction for the crime of 'sexual violence' for cases of forced nakedness.[115] Another definition of

[112] See E. La Haye, cit., p. 197.
[113] See the Swiss proposal, which was inspired by the Report of the Special Rapporteur on systematic rape cited below; see E. La Haye, cit., p. 197.
[114] See ICTR, TC, Akayesu, cit., para. 597-598.
[115] Ivi, para. 692 (with reference to the case of a girl who was forced to undress and to march naked in front of the accused).

sexual assault is to be found in the jurisprudence of the ICTY, in the *Furundzija* case: the Court held that international law criminalizes 'any serious sexual assault falling short of actual penetration,' i.e., 'all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.'[116] Although this definition included the word 'assault,' which might be deemed to only extend to cases involving physical contact, the specific mention of abuses inflicted upon the moral integrity of a person seems to point to a more expansive interpretation of this term.

The definition of sexual violence in the Rome Statute, and in the Elements of Crimes, also includes an additional element, which was deemed necessary to ensure that the act would meet the necessary gravity threshold, and which differs for crimes against humanity and for war crimes. In the case of war crimes, the gravity element is that sexual violence must also constitute 'a grave breach of the Geneva Conventions' (in international armed conflicts) or 'a serious violation of article 3 common to the four Geneva Conventions' (in non-international armed conflicts). The first specification is particularly relevant since it recognizes that all the gender crimes listed in Art. 8(2)(b)(xxii) constitute grave breaches of the Geneva Conventions. Indeed, while the provision on gender crimes has not been included in Art. 8(a), which lists specifically grave breaches of the Geneva Conventions, its last clause clarifies that these crimes are also considered to be grave breaches,[117] and thus subjected to the special regime provided for these violations (i.e., the obligation of States parties to criminalize the conduct and to either prosecute or extradite those suspected of committing it). However, the wording of this clause is quite problematic, since it is phrased as a qualifier of 'any other form of sexual violence,' therefore suggesting that only forms of sexual violence of a gravity comparable to grave breaches fall within the scope of application of this provision. The same holds true for the wording of Article 8(2)(e)(vi), where sexual violence is qualified as 'also constituting a serious violation of article 3 common to the four Geneva Conventions.' Even in this case, since common Article 3 does not expressly mention rape and gender crimes, the provision might be considered as a clarification that such conduct is, indeed, prohibited by common Article 3; however, it may be considered superfluous since this rule expressly forbids 'outrages upon personal dignity,' i.e. a conduct which has long been considered as including rape and other gender crimes. Finally, with regard to crimes against humanity, article 7(1)(g) specifies that sexual violence must be 'of comparable gravity' to the other listed forms of gender-based violence. This requirement, however, raises a number of problems. On the one hand, it has been argued that it is 'superfluous,'

[116] See *ibidem*, para. 186.

[117] At least for the purpose of the Rome Statute; it is evident that the Statute cannot amend the Geneva Conventions, and thus, while it might be used in the interpretation of the latter, it does not change their scope of application.

since sexual violence, if committed on a widespread or systematic scale, will always meet the gravity threshold.[118] However, this interpretation risks to render the provision meaningless, contrary to a well established canon of interpretation; thus, although it seems, indeed, to be a superfluous element, it will need to be interpreted so as to have a meaning, and therefore so as to exclude forms of sexual violence which are not 'of comparable gravity.' Additionally, this clause is also not specific enough to satisfy the prohibition of analogy in the interpretation of criminal law; thus, while the provision on gender crimes generally complies with the principle of legality, this last clause might be deemed incompatible with it.

6. Conclusions

The Statute of the ICC represents the culmination of a process towards recognition of the gravity of crimes of sexual violence in which civil society organizations was pivotal. Expectations were therefore very high when the Court began working; however, not all of them seem to have been met. In the first cases, the Court has either ignored allegations of sexual violence, or adopted an approach to cumulative charges that prevents full recognition of the harms caused by sexual crimes; thus, although there are a number of cases in which defendants have been charged with sexual crimes, they are still under-represented if compared with their widespread diffusion. Moreover, the definition of rape, which constituted one of the most important steps forward at the time of the adoption of the Statute and the product of a process of gradual evolution in which the *ad hoc* tribunals had played an essential role, has blocked any possible further evolution of the concept. Thus, while in other fields of international law the concept of rape is changing, international criminal law cannot adapt to these changes – full respect for the principle of legality having prevailed over the need to allow the Court to pursue a dynamic interpretation of its Statute.

While rape is often considered as the most prominent among the crimes of sexual violence, the Rome Statute also recognizes the gravity of other gender crimes. The role played by sexual slavery in this context is surely very important: the inclusion of specific reference to this offence might, over time, lead to the disappearance of the crime of enforced prostitution, unless this is re-interpreted to encompass less serious cases. However, the interpretation of the notion of sexual slavery seems somewhat problematic, given the approach of the SCSL – the ICC is therefore faced with the need to clarify this concept, either following the SCSL or distinguishing its case-law from that of the latter. On the other hand, crimes such as that of forced pregnancy, which was the object

[118] See B. Bedont, cit., p. 195.

of a very adversarial discussion at the Rome Conference, seem to be bound to play little if any role in the jurisprudence of the Court – the constituent elements of this offence, indeed, make gathering sufficient evidence extremely difficult, thus making it a less attractive alternative than charging rape or sexual slavery. Finally, this paper argues that the crime of enforced sterilization, which was not broadly discussed at the Rome Conference and did not raise particular objections on the part of any State delegation, might play an important role in the near future, through either international or national implementation of the statute; the case-law of regional human rights courts might also be affected by its inclusion among international crimes.