

The Rise and fall of a New Type of Crime against Humanity: the Crime against Humanity of Forced Marriage

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Abstract

The practice of forced marriage rose as a new crime against humanity in the case law of the Special Court for Sierra Leone, but it has had a short and contentious life, being abandoned after a few years by other international criminal tribunals. This paper is devoted to the study of the international case law established by the international criminal tribunals -Special Court for Sierra Leone, and International Criminal Court- that have heard cases where allegations of force marriage have been raised up.

Key words: International crimes, sexual slavery, forced marriage, international criminal tribunals.

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I. Introduction

International conventional law had never address crimes of sexual nature as a separate category of crime against humanity or crime of war before the signature of the Statute of the International Criminal Court (ICC), with the exception of the crime of rape. But the astonishing news of crimes of sexual nature carried against women in the conflicts of the former Yugoslavia ² and Rwanda ³.

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² Tadeusz Mazowiecki, the Special Rapporteur appointed by the UN Commission on Human Rights with the task to investigate human rights abuses in the former Yugoslavia, in particular, highlighted in his report that "*Rape is an abuse of power and control in which the rapist seeks to humiliate, shame, degrade and terrify the victim. In all his reports, the Special Rapporteur has emphasized the variety of methods which are used to achieve ethnic cleansing. Rape is one of these methods, as has been stated for the outset. In this context, rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in from of a whole village, designed to terrorize the population and force ethnic groups to flee*". NU. doc. A/48/92-S/25341 (1993), Report on the situation of Human Rights in the territory of the former Yugoslavia submitted by Mr. Tadeuszm Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, p. 20-21.

³ The amended indictment in the first case heard on the International Criminal Tribunal for Rwanda (Case nºICTR-96-4. Akayesu) alleged that "*between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings*".

Shocked and outraged the International Community leading to the establishment of international criminal tribunals that not only explicitly incorporated rape as a crime against humanity in their statutes⁴ but also issued several indictments relating to sexual violence, and convicted one defendant of genocide, including as a result of sexual violence⁵. The case law established by both tribunals led to important developments that were included in the debates of the Preparatory Committees for the Rome Conference between 1996 and 1998, as well as in the Conference of Rome itself, highlighting the major problem about prosecuting crimes of sexual nature: the inexistence of a separate and autonomous category of crimes of sexual nature in the Statutes of the international criminal tribunals⁶.

Breaking grounds in that matter, the Preparatory Committee, on its December 1997 session, included an autonomous category on crimes of sexual nature in the project of Statute for the International Criminal Court (ICC), both under crimes of war and crimes against humanity. Therefore, the Statute of the ICC became the first international instrument to contain that figure, constituting one of the most significant contributions of the Rome Statute to the development of tipification of crimes under international law.

Article 7.1.g) of the Rome Statute⁷ states that:

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

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

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

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

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

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

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

To this day, Tribunals have only contemplate in their proceedings the crimes of rape, sexual slavery and sexual violence⁸, being the more conflictual one the crime of sexual slavery in relation to which we have contemplated the rise and fall of a new crime: the crime of "forced marriage" in the case law of the Special Court for Sierra Leone.

⁴ Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR).

⁵ Akayesu trial. Vide note 2.

⁶ See, among other: HEALEY, S. A. (1995), "Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia", Brooklyn Journal of International Law, 21, 327-383; and KOVALOVSKA, A. (1997). "Rape of Muslim Women in Wartime Bosnia", ILSA Journal of International and Comparative Law, 3, 931-945.

⁷ Available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

⁸ BOU FRANCH, V. (2012). Los crímenes sexuales en la jurisprudencia internacional, Revista electrónica de estudios internacionales, 24, 1-44.

II. The Rise Of The Crime Against Humanity Of Forced Marriage In The Case Law Of The Special Court For Sierra Leone.

The Special Court for Sierra Leone⁹ was set up in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for "a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's civil war¹⁰.

Article 2 g) of the Statute established that:

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

Based on such provision, the SCSL was the first international tribunal to heard cases where the indictments contemplated the practice of so-called "forced marriages" as a crime against humanity, describing such practice as:

"(The) so-called «forced marriages» involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts. The girls and women were taken against their will as «wives» by individual rebels. The evidence showed that the relationship of the perpetrators to their «wives» was one of ownership and involved the exercise of control by the perpetrator over the victim, including control of the victim's sexuality, her movements and her labour, for example, the «wife» was expected to carry the rebel's possessions as they moved from one location to the next, to cook for him and to wash his clothes. Similarly, the Trial Chamber is satisfied that the use of the term «wife» by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship. In fact, while the relationship of the rebels to their «wives» was generally one of exclusive ownership, the victim could be passed on or given to another rebel at the discretion of the perpetrator"¹¹.

But its legal definition has been highly controversial.

1. The initial qualification of "forced marriages" as a part of the crime of sexual slavery: The AFRC Case and Sentence.

The first problems with the legal definition raised with the Indictment presented by the Office of the Prosecutor in the AFRC Case. This case involved the judgment of three young officers who played key roles in the government of Sierra Leone and military responsibilities under different titles, after the 1997 coup that established by Mr. Koroma as President of Sierra Leone. The Prosecutor sustained that the practice of "forced marriages" had to be qualified as a crime against humanity of sexual slavery and any other form of sexual violence (count 7-article 2.g. of the Statute) and as a crime against humanity of other inhumane act (count 8-article 2.i. of the Statute), or in the alternative as a crime or war of outrages upon personal dignity as a violation of article 3 common to the Geneva Conventions and of Additional Protocol II (count 9-article 3.e. of the Statute)¹².

⁹ The Statute of the Special Court for Sierra Leone was annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002. UN. doc. S/2000/914.

¹⁰ UN. doc. S/2000/786, Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council.

¹¹ Para. 711 of the Judgement of Trial Chamber II of the Special Court for Sierra Leone in the case Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, case no. SCSL-2004-16, of 20th June 2007 (hereinafter, AFRC Judgement).

¹² Amended Consolidated Indictment in the case no. SCSL-2004-16, the Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, para. 51-57.

Trial Chamber II considered that count 7 (sexual slavery and any other form of sexual violence) *“was duplex and defective in as far as it does not enable the accused persons to know precisely which of the two crimes (sexual slavery or sexual violence) they should be defending themselves against”*¹³. For such defect, the Trial Chamber found by majority that the count should be dismissed in its entirety¹⁴.

But more controversial was the qualification of the practice of “forced marriages” as a crime against humanity of other inhumane acts in count 8. It is consolidated case law of international criminal tribunals that the category of crimes against humanity of other inhumane acts is a residual clause, meaning that it covers a broad range of acts not explicitly enumerated as crimes against humanity but of similar gravity. Under those grounds, the Trial Chamber II considered that it was a category that must be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity and that comply with three additional requirements:

“In addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the Trial Chamber adopts the following elements of the crime of other inhumane acts:

1. *The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;*
2. *The act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute; and*
3. *The perpetrator was aware of the factual circumstances that established the character of the gravity of the act”*¹⁵.

Entering into the consideration of “forced marriages” as a crime against humanity of other inhumane acts, the parties sustained different positions. The Prosecutor submitted that this crime had its own distinctive features and was sufficiently serious to qualify as an inhumane act. He claimed it consisted of words or other conduct intended to confer a status of marriage by force or threat of force or coercion distinct from sexual acts, even if this acts usually involved sex. At the same time, it was considered that sexual slavery did not necessarily amount to forced marriage. Thus, forced marriage as a crime against humanity of other inhumane acts could include sexual violence or slavery, but it involved distinct elements as well¹⁶. The Defence of Mr. Kanu sustained that the so-called practice of “forced marriages” could not be qualified as a crime against humanity of other inhumane acts as it was not of a similar gravity to the acts referred in Article 2 of the Statute. The Defence contended that if this practice could not be categorized as sexual slavery, the conduct would not constituted a crime against humanity¹⁷.

Having heard all the arguments and evidences, Trial Chamber II sustained that is was not satisfied that the evidence was capable of establishing the elements of a non-sexual crime of “forced marriage” independent of the crime of sexual slavery¹⁸, so it was necessary to consider that category and its elements. The Trial Chamber II found by majority¹⁹ that the totality of the evidence presented for the “forced marriage” practices went to proof of elements subsumed by the crime of sexual slavery, and added that the use of the term “wife” by the perpetrators in reference to the victim was indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume marital or quasi-marital status with the victim²⁰. Therefore, there did not exist a lacuna in the law which would necessitate a separate crime of “force marriage” as an other inhumane act²¹.

As a result of the previous finding declaring count 7 as a duplicate, the Trial Chamber II went on to finally consider the evidence of sexual slavery under count 9 (outrages upon personal dignity), qualifying such acts as a crime under Article 3 of the Statute²².

¹³ Para. 94 AFRC Judgement.

¹⁴ Justice Doherty signed a Partly Dissenting Opinion on count 7 (sexual slavery) and count 8 (forced marriages).

¹⁵ Para. 698 AFRC Judgement.

¹⁶ Ibid. para. 701 and para. 1009-1012 of the Prosecution Final Brief in the AFRC Case.

¹⁷ Para. 702 AFRC Judgement.

¹⁸ Ibid. para. 704.

¹⁹ Partly Dissenting Opinion of Justice Doherty on count 7 (sexual slavery) and count 8 (forced marriages).

²⁰ Para. 711 AFRC Judgement.

²¹ Ibid. para. 713.

²² The Statute of the SCSL did not contain a provision defining sexual slavery as a crime of war. Therefore, in the following case law, the practice of forced marriages fell under the scope of the crime of war of outrages upon personal dignity.

2. The rise of the distinction between “sexual slavery” and “forced marriages”: The AFRC Appeal Sentence and the RUF Case.

The AFRC Sentence was appeal both by the defense and the Prosecutor, which allowed the Appeals Chamber to reconsider some of the decisions taken by the Trial Chamber, mainly the dismissal of count 7 and the dismissal of “force marriages” as a crime against humanity of other inhumane acts (count 8) ²³. The AFRC Appeals Sentence, regarding the dismissal of count 7 on the grounds of duplicity, hold that count 7, indeed, violated the rule against duplicity that applies to international criminal tribunals. But, it hold that the solution was not the dismissal of the count in its entirety, but to proceed on the basis that the offence of sexual slavery had been properly charged in count 7 and struck out the charge of “any other form of sexual violence” ²⁴.

Regarding the Trial Chamber's dismissal of Count 8 of the Indictment (“other Inhumane Acts”) for redundancy, the Appeals Chamber found that the Trial Chamber erred in law by finding that the category of “other inhumane acts” had to be restrictively interpreted. Furthermore, it did not see a reason justifying why the “exhaustive” listing of sexual crimes under Article 2.g. of the Statute should foreclose the possibility of charging as “Other Inhumane Acts” crimes which may among others have a sexual or gender component. The Trial Chamber therefore erred in finding that Article 2.i. of the Statute excludes sexual crimes ²⁵. The Appeals Chamber continued holding that the trial record contained ample evidence that the perpetrators of forced marriage intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime ²⁶. Analyzing the Prosecutor appeal ground, the Appeals Chamber concluded that:

“Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the «husband» and «wife», which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriages is subsumed in the elements of sexual slavery.

In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim” ²⁷.

As to the opinion of the Appeals Chamber, those practices amounting to forced marriages were of similar gravity to several of the crimes against humanity enumerated in the Statute ²⁸ and the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population definitely constitute a crime against humanity of “other inhumane acts” ²⁹.

²³Judgement of the Appeals Chamber of the Special Court for Sierra Leone in the case Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, case no. SCSL-2004-16, of 22nd February 2008 (hereinafter, AFRC Appeals Judgement).

²⁴ Para. 103 and 109 of the AFRC Appeals Judgement.

²⁵ Ibid. para. 185-186.

²⁶ Ibid. para. 190.

²⁷ Ibid. para. 195-196.

²⁸ Para. 200.

²⁹ Para. 202.

The distinction established by the Appeals Chamber was followed by the Prosecutor Office in the RUF Case presenting an indictment that charged the accused with the commission of crimes against humanity of sexual slavery, crimes against humanity of other inhumane acts and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (outrages upon personal dignity) with the aim of covering all the criminal aspects involved in the practice of forced marriages³⁰.

The RUF Case involved the judgment of three former commanders of the Revolutionary United Front for their role in the civil war which ended in 1999. In the original indictment against the former rebels, two further accused, Foday Saybana Sankoh and Sam Bockarie, were charged with war crimes and crimes humanity, but their indictments were withdrawn following their deaths in 2003. On the matter of "forced marriages" and the possibility on entering cumulative convictions, the Trial Chamber I in the RUF Sentence stated that:

"The Chamber considers that the crime charged under Count 8 ('forced marriage') as an "other inhumane act" requires a distinct element from the crime of rape (Count 6), and viceversa. The offence of rape requires sexual penetration, whereas 'forced marriage' requires a forced conjugal association based on exclusivity between the perpetrator and victim.

Therefore, the Chamber finds that it is permissible to convict on both counts.

(...).

The Chamber considers that the conduct charged under Count 8 is distinct from the charges of sexual slavery under Count 7 (sexual slavery). The Appeals Chamber has explicitly held that 'forced marriage' is not subsumed by sexual slavery. The distinct elements are a forced conjugal association based on exclusivity between the perpetrator and victim. Therefore a conviction on both Counts 7 (sexual slavery) and 8 (other inhumane acts) is permissible"³¹.

As such, these case law established the rise of a new crime against humanity of other inhumane acts resultant of the practices of "forced marriages" that had never been typified in any international treaty or defined in previous case law. But this interpretation of sexual slavery and forced marriages as different crimes has been criticized by a part of the scholarly studying international crimes, as it tends to interpret "sexual slavery" in a very restrictive manner that, at the end, alters the elements of the crime as established both in the case law and the Statute of the ICC³².

3. The fall of the distinction between sexual slavery and "forced marriages": The Taylor Case.

The SCSL case law qualifying "forced marriages" both as a crime against humanity of sexual slavery and of other inhumane acts, had a short life with the ruling in the last case heard by the Court: the case in the Prosecutor against Charles Ghankay Taylor, former President of Liberia³³. The change can be explained by two simple facts. First, the change in the direction of the Office of the Prosecutor³⁴. And second, the Trial Chamber which heard the case was Trial Chamber II³⁵.

The indictment in the Taylor Case meant a change in the Prosecutors Office tactics, as it contemplate that the practices of "forced marriages" could only be charged as crimes against humanity of sexual slavery (count 5) and violations of common Article 3 (outrages upon personal dignity-count 6)³⁶. The count regarding the separate crime against humanity of other inhumane acts disappeared.

³⁰ Amended Consolidated Indictment in the case Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCL-04-15.

³¹ Para. 2206-2207 of the Judgement of Trial Chamber I in the case Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCL-04-15, of 2nd March 2009 (RUF Judgement, hereinafter).

³² *Vide*, BOU FRANCH, V. (2014). Los crímenes sexuales en la jurisprudencia internacional. Revista Electrónica de Estudios Internacionales, 24, 34; PALMER, A. (2009). An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of «Forced Marriage». Northwestern Journal of International Human Rights, 7, 1-26; GONG-GERSHOWITH, J. (2009). Forced Marriage: A «New» Crime Against Humanity? Northwestern Journal of International Human Rights, 8, 1-24.

³³ HELLER, K. J. (2013). The Taylor Sentencing Judgment: A Critical Analysis, Journal of International Criminal Justice, 11/4, 835-855.

³⁴ In February 2010, the Secretary General of United Nations had appointed Ms. Brenda J. Hollis, as Chief Prosecutor of the Special Court.

³⁵ The Trial Chamber II was the chamber judging the AFRC case in first instance in which it was affirmed that the practices of forced marriages was completely covered by the crime against humanity of sexual slavery.

³⁶ Second Amended Indictment in the Case Prosecutor against Charles Taylor, SCSL-03-01-PT-263, 29 May 2007.

The Trial Chamber II did not miss the opportunity of reclaiming its previous rulings highlighting the disappearance of the count of "forced marriages"³⁷, criticizing the practice followed in the AFRC Case by the Office of the Prosecutor and its negativity to adopt the remedy suggested by Judge Julia Sebutinde for the defect of duplicity³⁸.

The Chamber went on criticizing what it called the "erroneous pleadings" of the Prosecution with regard to various forms of sexual violence. In the Trial Chamber's view, the Prosecution erred in various indictments by charging "forced marriage" as a crime that falls within the scope of the crime against humanity of other inhumane acts. It highlighted that the dissenting opinion in the AFRC Judgment of Justice Doherty had observed that *"the abduction of girls and their coercion into marital unions, as described by the Prosecution expert and by witnesses, is not the same nor comparable to arranged or traditional marriages"* and that the crucial element of "forced marriage" to be *"the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim"*³⁹. The Chamber took into account the Concurring Opinion of Justice Sebutinde in the AFRC Case stating that the practice of "forced marriages" could be described as *"the forceful abduction and holding in captivity of women and girls («bush wives») against their will, for purposes of sexual gratification of their «bush husbands» and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties)"*⁴⁰, to finally and unanimously declared that *"the sexual and non-sexual acts involved in this forced conjugal association cannot be considered separately as they are integrated in this form of abuse"*. Adding that, in the Trial Chamber's view, the term "forced marriage" was *"a misnomer for the forced conjugal association that was imposed on women and girls in the circumstances of armed conflict, and which involved both sexual slavery and forced labour in the form of domestic work such as cooking and cleaning"*⁴¹.

Aiming to refute the case law laid down by the Appeals Chamber in the AFRC Appeals Judgement and the RUF Case, the Trial Chamber II started its analysis of the now-called "forced conjugal association" affirming that this practice satisfies the two elements required by the crime of sexual slavery; that is, deprivation of liberty and the non-consensual sexual acts. And as such, it should rather be considered a conjugal form of enslavement. For Trial Chamber II, these "forced conjugal associations" constituted a form of enslavement in that the perpetrator exercised the powers attaching to the right of ownership over their "bush wives" and imposed on them a deprivation of liberty, causing them to engage in sexual acts as well as other acts⁴². Finally, the Chamber declared:

*"The Trial Chamber is of the view that the conjugal slavery best describes these acts, and while they may constitute more than sexual slavery, they nevertheless satisfy the elements of sexual slavery"*⁴³. Therefore, the Trial Chamber II concluded opposing to the rise of a new type of crime against humanity of other inhumane acts for such loathsome acts:

"The Trial Chamber considers that part of the confusion created by the Prosecution's charge of «forced marriage» was its presentation as the conceptualization of a new crime. In light of the above considerations, the Trial Chamber considers that conjugal slavery is better conceptualized as a distinctive form of the crime of sexual slavery, with the additional component described by the Appeals Chamber. However, the Trial Chamber is of the view that this additional component, which relates to forced conjugal labour, is simply a descriptive component of a distinctive form of sexual slavery. It is not a definitional element of a new crime, in the same way that gang rape is a distinctive form of rape, yet nevertheless falls within the scope of the crime of rape."

³⁷ *"The Trial Chamber notes that in this case, unlike the AFRC case and the RUF case, «forced marriage» is not charged in the Indictment. Nevertheless, the evidence adduced by the Prosecution under the charges related to Sexual Violence includes extensive testimony by women and girls regarding forced conjugal association to which they were subjected. In the absence of the charge of «forced marriage», the Trial Chamber has considered this evidence with regard to the charges in the Indictment, as well as the past jurisprudence of the SCSL with regard to this issue"*. Judgement in the case Prosecutor v. Charles Taylor, 18th May 2012, para. 422 (hereinafter, Taylor Judgement).

³⁸ Para. 93 of AFRC Judgement and para. 423 of Taylor Judgement.

³⁹ Para. 423 of Taylor Judgement.

⁴⁰ Concurring Opinion of Justice Sebutinde in the AFRC Case, para.12.

⁴¹ Para. 424-425 of Taylor Judgement.

⁴² Para. 427 Taylor Judgement.

⁴³ Para. 428 Taylor Judgement.

The Trial Chamber considers that unlike the concept of «forced marriage», as it was presented by the Prosecution in the AFRC and other cases before this Court, conjugal slavery is not a new crime with additional elements. Rather it is a practice with certain additional and distinctive features that relate to the conjugal aspects of the relationship between the perpetrator and the victim, such as the claim by the perpetrator to a particular victim as his «wife» and the exercise of exclusive sexual control over her, barring others from sexual access to the victim, as well as the compulsion of the victim to perform domestic work such as cooking and cleaning. In the Trial Chamber's view, these are not new elements that require the conceptualization of a new crime”⁴⁴.

The Taylor Judgement was appealed but none of the parties presented grounds related to the qualification of “forced marriages” or “forced conjugal association” as crimes against humanity of sexual slavery, excluding its qualification as crimes against humanity of “other inhumane acts”. The Appeals Chamber wisely did not enter into its consideration.

III. The Treatment Of “Forced Marriages” By Other International Criminal Tribunals After The Special Court For Sierra Leone Special Case Law.

The International Criminal Court has started investigation in two situations involving sexual slavery both as a crime against humanity and as a crime of war: the situation in Uganda⁴⁵ and the situation in the Democratic Republic of Congo, but only in one of the cases brought about the Democratic Republic of Congo⁴⁶ have been discussed practices of “forced marriages”.

In the case the Prosecutor against Germain Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber I of the ICC confirmed the charges presented by the Office of the Prosecutor, allowing the case to proceed against Mr. Katanga and Mr. Ngudjolo Chui for the commission of several crimes jointly committed through other persons, among which the crime of sexual slavery, both as a crime against humanity and as a crime of war, was included⁴⁷.

In this occasion, Pre Trial Chamber I confirmed that the elements of crimes to be considered in the crime of sexual slavery are the same whether considered a crime of war or a crime against humanity⁴⁸ and that although sexual slavery is included as a separate offence in the Statute, it may be regarded as a particular form of enslavement⁴⁹. In its view:

“In the view of the Chamber, sexual slavery also encompasses situations where women and girls are forced into «marriage», domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in «rape camps» or «comfort stations», forced temporary «marriages» to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery”⁵⁰.

⁴⁴ Ibid., para. 429-430.

⁴⁵ As explained by the ICC, The cases The Prosecutor v. Joseph Kony and Vincent Otti and The Prosecutor v. Dominic Ongwen are currently being heard before Pre-Trial Chamber II. Five warrants of arrest have been issued against five top members of the Lord's Resistance Army (LRA). Following the confirmation of the passing of Raska Lukwiya and Okot Odhiambo, the proceedings against him have been terminated. On 16 January 2015, Dominic Ongwen was surrendered to the ICC's custody and transferred to the ICC Detention Centre on 21 January 2015. His initial appearance took place on 26 January 2015. The opening of the confirmation of charges hearing in respect of Dominic Ongwen is scheduled for 21 January 2016. On 6 February 2015, Pre-Trial Chamber II severed the proceedings against Dominic Ongwen from the Kony *et al.* case. The opening of the confirmation of charges hearing in respect of Dominic Ongwen is scheduled for 21 January 2016 at the seat of the Court in The Hague, Netherlands. Joseph Kony and Vincent Otti remain at large.

⁴⁶ Regarding the situation in Congo, the ICC explains that the following cases have been brought before the relevant Chambers: The Prosecutor v. Thomas Lubanga Dyilo; The Prosecutor v. Bosco Ntaganda; The Prosecutor v. Germain Katanga; The Prosecutor v. Mathieu Ngudjolo Chui; The Prosecutor v. Callixte Mbarushimana; and The Prosecutor v. Sylvestre Mudacumura. Thomas Lubanga Dyilo, Germain Katanga and Bosco Ntaganda are currently in the custody of the ICC. Sylvestre Mudacumura remains at large.

⁴⁷ Doc. ICC-01/04-01/07, Pre-Trial Chamber I of the International Criminal Court, 30 September 2008, Situation in the Democratic Republic of the Congo. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. Decision on the confirmation of charges (Katanga and Chui Decision), para.576 and 580.

⁴⁸ Ibid, para. 343 and 429.

⁴⁹ Ibid., para. 430.

⁵⁰ Ibid., para. 431.

Therefore, Pre-Trial Chamber I considered the practices of “forced marriages” as included in the crime of sexual slavery, with no necessity of completing such crime with others⁵¹. This qualification of the practice of “forced marriage” as a crime of sexual slavery in exclusivity came with a necessary *mens rea* different that the one defended by the Appeals Chamber of the SCSL in the AFRC Appeal Judgement:

*“there is sufficient evidence to establish substantial grounds to believe that when the combatants (i) abducted women from the village of Bogoro, (ii) captured and imprisoned them and kept them as their «wives», and (iii) forced and threatened them to engage in sexual intercourse, they intended to sexually enslave the women or knew that by committing such acts, sexual enslavement would occur”*⁵².

After severing the cases⁵³, Trial Chamber II declared Mr. Ngudjolo Chui innocent of all charges brought against him⁵⁴ and continued the prosecution of Germain Katanga in a separate Trial⁵⁵. Regarding the counts of sexual slavery, it is to be noted that the practice of the “forced marriages” conducted in the Democratic Republic of Congo was on the base of the indictment of Mr. Katanga in this case.

In Mr. Katanga Judgement⁵⁶, Trial Chamber II analyzed the necessary elements of crime for the crime of sexual slavery, focusing its analysis in the Elements of Crime Documents issued by the ICC and without changing the case law established by the SCSL. But, the Chamber decided to avoid any of the terms used in previous decisions, considering them to be injurious for the victims.

The Chamber started point out that the term “wife” was used by the attackers to make their fate clear to the victims, obviously had, given the circumstances, a very specific meaning, which is of particular importance to its analysis of the crime of sexual slavery. The Chamber was of the view that *“in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was “taken as a wife” by a combatant or that she was to “become his wife” is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature”*⁵⁷. Under this premises, the Chamber affirmed:

⁵¹“(…) Article 7(1)(k) of the Statute defines the conduct as «other» inhumane acts, which indicates that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as another inhumane act encompassed by article 7(1)(k) of the Statute”. Ibid. para. 452.

⁵² Ibid., para. 435.

⁵³ Doc. ICC-01/04-01/07-3319-tENG/FRA, Trial Chamber II of the International Criminal Court, 21 November 2012, Situation in the Democratic Republic of the Congo. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons.

⁵⁴ *“In conclusion thereafter, the Chamber considered that it could not determine beyond reasonable doubt that Mathieu Ngudjolo was, as alleged by the Prosecution, the leader of the Lendu combatants who participated in the attack on Bogoro. Therefore, in the Chamber’s view, the Prosecution has not proven beyond reasonable doubt that Mathieu Ngudjolo committed the alleged crimes under article 25(3)(a) of the Statute, insofar as his role within Bedu-Ezekere groupement, as it emerges from the evidence examined, in no way allows the Chamber to accept or even contemplate the notion of indirect perpetration adopted by the Pre-Trial Chamber, regardless of how article 25(3)(a) of the Statute is construed”*. Doc. ICC-01/04-02/12. Trial Chamber II of the International Criminal Court, Situation in the Democratic Republic of the Congo. The Prosecutor v. Mathieu Ngudjolo Chui, Judgement of 18 December 2012 pursuant to article 74 of the Statute (Mathieu Ngudjolo Chui Judgement), para. 110; and *ibid.*, para. 503. The Judgement was confirmed by the Appeals Chamber. Doc. ICC-01/04/-02/12 A. Appeals Chamber of the International Criminal Court, Situation in the Democratic Republic of the Congo. The Prosecutor v. Mathieu Ngudjolo Chui, Judgment of 27 February 2015 on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”.

⁵⁵ Following Rule 55, Mr Katanga’s liability was to be considered on the basis of article 25(3)(d) of the Statute (complicity in the commission of a crime by a group of persons acting with a common purpose) and no longer solely on the basis of article 25(3)(a) of the Statute (commission of a crime in the form of indirect co-perpetration).

⁵⁶ Doc. ICC-01/04-01/07-3436, Trial Chamber II of the International Criminal Court, 7 March 2014, Situation in the Democratic Republic of the Congo. In the case of the Prosecutor v. Germain Katanga. Judgment pursuant to article 74 of the Statute (Katanga Judgement), para. 975-980.

⁵⁷ Para. 1000 Katanga Judgement.

“In the view of the Chamber, in the case at bar, the fact that the combatants declared that the civilians captured in Bogoro and brought to their [military] camps were «their wives» does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them”⁵⁸.

After review the direct testimony rendered in Court, the Chamber established that all the elements of the crime of sexual slavery had been met⁵⁹. And for that, it affirmed:

“In the light of the foregoing, the Chamber accordingly finds that the evidence establishes beyond reasonable doubt that crimes of sexual slavery as a war crime and a crime against humanity under articles 8(2)(e)(vi) and 7(1)(g) of the Statute were intentionally committed, in the aftermath of the battle of Bogoro on 24 February 2003, by combatants from camps belonging to the Ngiti militia of Walendu-Bindy and by others in the camps”⁶⁰.

But even if the analysis was of great deep and that the Chamber considered that the commission of the crimes had been proved, the outcome of the Judgement was a disappointment for the victims, as Mr. Katanga was considered not guilty of the counts regarding sexual slavery as the Prosecutor could not prove his involvement in the acts⁶¹.

IV. Conclusion.

As it has been shown, international criminal tribunals faced during the last years the challenge of typifying and establishing a proper reparation for the victims of a series of practices that were nominate practices of “forced marriage”. These practices fell under the scope of sexual crimes and gender crimes putting the eye of the international community in such cases that constitute a new frontier under international criminal law.

The SCSL was the first tribunal to enter counts in relation to such practices but the path was not clear and the Prosecutor Office fell into the necessity of covering in the indictment all the acts involved in the “forced marriage” situations: sexual slavery, other inhumane acts, violations of common Article 3 (outrages upon personal dignity). The Trial Chamber issued a decision on duplicity and “forced marriage” practices were included in the conviction for violations of common Article 3. This qualification left the victims feeling abandoned by international justice, and the Office of the Prosecutor had to change its strategy. In following cases, the practices were define in the indictments as a particular crime against humanity of other inhumane acts, which allowed the Trial Chamber to issue a judgement recognizing the born of a new crime against humanity that have never been contemplated in legal texts or previous case law.

But, the crime had a short life. After two judgements, the SCSL Trial Chamber and the Office of the Prosecutor came together in defining such practices as covered by the crime of sexual slavery, broadening its meaning. And such decision was followed by the ICC in its ruling, ending at to this point the legal controversy. In any case, the rulings of SCSL and the ICC about the sexual crimes and the practices of forced marriage have brought precision and clarity to the elements of crime of the broader type of sexual slavery, as defined by the case law. As such, we hope that this new approach to sexual slavery permits the ICC to continue its work in protecting victims against such horrible practices, but it is still too early to assess whether the response is the necessary to obtain the objective of international justice: the reprehension of the crimes and the reparation of the victims.

⁵⁸ Katanga Judgement, para. 1001.

⁵⁹ Ibid., para. 1007-1008, 1012-1013, 1017-1019, 1021.

⁶⁰ Ibid., para. 1023.

⁶¹ None of the parties appealed the Judgement in this case.

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