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Sexual Violence and Torture: Lessons Learned and Open Challenges in the ICTR Judgement on the *Case of Akayesu*[*]

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1. Introduction

Over the past few decades, the international community has taken progressive steps to put an end to impunity for sexual and gender-based crimes[1]. This is true both within international human rights law as well as international criminal law.

The Statute of the International Criminal Court (henceforth, the ICC), following the developments in the case law of both the International Criminal Tribunal for the former Yugoslavia (henceforth, the ICTY) and the International Criminal Tribunal for Rwanda (henceforth, the ICTR), expressly includes various forms of sexual and gender-based crimes —including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence— as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts.

Such an important recognition indicates that the relevance of the issue is well perceived at international level. At the same time, the inclusion of those crimes within the ICC Statute cannot be considered *per se* as a sufficient guarantee, especially in terms of protection of the victims.

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[1] The relevance of the fight against sexual violence at international level is also demonstrated by the adoption by the Un Security Council Resolution 1325 (2000), on women and peace and security, with its follow-up resolutions, identifying sexual violence, including rape, as a threat to international peace and security.

With this paper we intend to examine sexual violence with the lens of the crime of torture and analyse whether a definition of rape and sexual violence as autonomous crimes under international law would better serve the purpose of fighting against discrimination and protecting the victims of these hideous acts.

To do so, we shall consider the decision of the ICTR adopted in 1998, in the case against Jean Paul Akayesu[2].

2. The Case Against Jean Paul Akayesu before the International Criminal Tribunal for Rwanda

The case against Akayesu is credited to be a leading one in international criminal law for several reasons. First, it has resulted in the first adversarial conviction for genocide under international law since Nuremberg. It also established relevant precedents with reference to the constitutive elements of the crime of genocide and the related concepts of inducement and complicity. Nevertheless, Akayesu is known and celebrated as the first case recognising the concept of genocidal rape[3].

The Rwandan genocide and massacres are among the cruellest ones in the recent history of mankind[4]. The numbers of the Rwandans massacred between April and July 1994 are still uncertain, but the United Nations (henceforth, the UN) estimates that nearly one million of them died during that short period[5].

The genocide in Rwanda has been labelled as the 100 days genocide. It started on the eve of April 6, when the President Habyarimana was killed. This assassination was taken as the occasion for extremist leaders of Rwanda's Hutu majority to start a campaign to erase the Tutsis from the country. In their action, they included political representatives of moderate Hutu who had supported the Arusha Agreement signed in 1990 at the end of Tutsi rebellion against Hutu power. Massacres took place in towns as well as in small villages, and barriers were created by the Rwandan Army as well as by the Hutu Militia to prevent the escape of thousands of Tutsi. Those savage attacks, often carried out with machetes, involved the overall Hutu population, which responded to the incitement to genocide by their leaders[6].

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[2] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgement (Trial Chamber), Case No. ICTR-96-4-T, 2 September 1998.

[3] S.L. Russell-Brown, *Rape as an Act of Genocide*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 350 ss., available at *http://scholarship.law.berkeley.edu/bjil/vol21/iss2/5*.

[4] B. Nowrojee, *Shattered Lives: Sexual Violence During the Rwanda Genocide and Its Aftermath*, in *Human Rights Watch (Africa Division)*, 1996, available at *http://www.hrw.org/reports/1996/Rwanda.htm*

[5] B. Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in *Santa Clara Law Digital Commons*, 2008, available at *http://digitalcommons.law.scu.edu/facpubs/629*.

[6] See the information available at *https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml*; D. Nikuze, *The Genocide against the Tutsi in Rwanda: Origins, causes, implementation, consequences, and the post-genocide era*, in *International Journal of Development and Sustainability*, 3, 2014, p. 1086-1098, available at *https://www.isdsnet.com/ijds-v3n5-13.pdf*. It is interesting to note that many authors

Rape and sexual violence were amongst the preferred tools of annihilation of the targeted group. «The rapes, most of them committed by many men in succession, were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation. So many women feared them that they often begged to be killed instead. Often the rapes were in fact a prelude to murder. But sometimes the victim was not killed but instead repeatedly violated and then left alive; the humiliation would then affect not only the victim but also those closest to her»[7].

During the Rwandan genocide, widespread sexual violence, mostly against Tutsi women, took place in all the territory. Women were raped on the streets, in the fields, in churches or in public buildings where they were often directed on purpose, with the excuse of offering shelter. They were attacked in their homes, and often used as sexual slaves[8].

From various sources and witnesses it has become clear that the real scope of "genocidal rape" in Rwanda was to kill Tutsi women. Rape was used as a method of destruction through the transmission of AIDS, or because of the number of times a woman was raped, or as a means of social exclusion and annihilation of the survivors.

In this context the story of Akayesu that emerged from the trial is a particularly vivid one. The facts are probably well known, but it is worth briefly recollecting them.

Jean Paul Akayesu was indicted for genocide, crimes against humanity, incitement to commit genocide, violations of common article 3 of the Geneva Conventions and of article 4(2)(e) of Additional Protocol II. The indictment against Akayesu was submitted by the Prosecutor Louise Arbour, on February 13, 1996. The Office of the Prosecutor amended it during the trial, in June 1997, to add three counts (13-15, Crimes Against Humanity based on the allegations of rape and sexual violence) and three paragraphs (10A, 12A and 12B) to include the allegations of rape and sexual violence. It is definitely worth mentioning that it took nearly one year to add those specific accounts and that this was probably done due to the pressure by women's rights activists and public opinion.

This addition at the last minute is quite surprising when considering the situation on the field and the magnitude of the use of rape and sexual violence in the Rwandan conflict. Rape largely occurred also in the Taba commune, which was under the control of its bourgmestre, Akayesu. Rwanda is divided into prefectures and sub-divided into

describe the Tutsi genocide as the clear consequence of the Belgian colonization of Rwanda. The colonizer transformed the already existing groups present in the territory into different and opposing ethnicities.

[7] P. Landesman, *A Woman's Work*, in *The New York Times*, 2002, available at *https://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html.*

[8] B. Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, United Nations Research Institute for Social Development Occasional Paper 10, 15 November 2005, p. 1 ss., available at *http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument.*

communes, which are placed under the authority of bourgmestres. The latter is the most powerful figure in the commune and has exclusive control over the communal police and is responsible for the execution of laws and regulations and the administration of justice. Akayesu was the bourgmestre of the Taba commune, prefecture of Gitarama, from April 1993 until June 1994[9].

Between April 7 and the end of June 1994, hundreds of civilians took refuge at the bureau communal of Taba, trying to escape the massacres taking place in the territory at the time. The ICTR established that at least 2000 Tutsi were killed in Taba during Akayesu's mandate and that the acts were carried out openly, so much that it is impossible to maintain that the bourgmestre did not know about them (paras 179-181).

According to various sources and witnesses during trial, Tutsi women were regularly subjected to rape and other forms of sexual violence on or near the bureau communal premises and the civilian population was frequently murdered and/or beaten on or nearby them. It is thus quite shocking that the Office of the Prosecutor at the beginning of its investigations decided not to include charges for these rapes on the basis that there was non-sufficient evidence against the accused[10].

In the Additional Indictment, finally, under paragraphs 12A and 12B, especially devoted to rape and sexual assault, Akayesu was again charged with genocide, complicity to commit genocide, crimes against humanity (extermination, rape, and other inhumane acts) and violations of article 3 common to the Geneva Conventions and of article 4(2)(e) of the Additional Protocol II with reference to those facts.

With respect to the acts of rape and sexual violence, the Indictment charged that Akayesu knew that acts of sexual violence, beatings, and murders were being committed in the premises of the bureau communal or nearby them and that he was at times present during their commission. The Indictment further charged that Akayesu facilitated the commission of sexual violence, beatings, and murders by allowing those acts to occur on or near the bureau communal premises, and that, by virtue of his presence during the commission and his failure to prevent these acts, Akayesu had in fact encouraged, aided, and abetted these activities.

It is interesting to note that Akeysu's defence against the charges of rape and sexual violence was particularly strong. The Defence, in fact, did not deny that acts of genocide had took place, but rather argued that Akayesu could not be held responsible

[9] During the trial it was affirmed by expert witnesses that burgomaster enjoyed a wide degree of both de jure and de facto powers, rendering the position an extremely relevant one, also in terms of the degree of control over police forces (paras. 72-73).

[10] It is reported that Major Brent Beardsley, the assistant to Major-General Dallaire, was once declared: « [W]hen they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas. …[G]irls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and they would have been killed in that position». Many women were held in sexual slavery or were rendered infertile or HIV-positive by this kind of destructive rapes. B. Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims*?, cit.

for those acts due to his impossibility to prevent the behaviours of the Interahamwe on whom he did not have any direct power at the time. Vice versa, the Defence maintained that no sexual violence had taken place in the commune and that witnesses were to be considered completely unreliable. According to the Defence those charges had been added to the Trial only due to "public pressure" on the Office of the Prosecutor, but they had in fact no real connection with Akayesu's case (paras. 31 and 42)[11].

3. The Decision of the Trial Chamber

As we said in the introduction, the judgment of the ICTR is extremely interesting on various aspects, including those related to leaders' individual criminal responsibility[12].

Nevertheless, we are going to focus our attention on the interpretation of substantial international criminal law adopted by the judges. In this context, the decision is relevant in terms of the definition of rape as an international crime, rape as genocidal act, rape, and sexual violence as acts of torture and crimes against humanity.

[11] As the Chamber noted (para. 47) these allegations were not followed by any actions against the witnesses by the defence. According to the judges, «Defence counsel's attempt in his closing arguments to tar all prosecution witnesses with the same broad brush of suspicion cannot be accepted by the Chamber. Thus, the credibility of each witness must be assessed on its merits, considering the witness's demeanour and the consistency and credibility or otherwise of the answers given by him or her under oath».

[12] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit. para. 691: «The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them», and para. 693: «The Tribunal finds, under article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place». The Tribunal decided not to uphold the responsibility of Akayesu under art.6(3) of its Statute, defining superior responsibility, considering that it was not demonstrated during trial that he had the control over the actions of the Interahamwe. This could be somehow challenged, but it stems from the diverse approach adopted between military and political leaders when it comes to superior responsibility. See A. Viviani, *Crimini internazionali e responsabilità dei leader politici e militari*, Milano, 2005.

3.1. Definition of Rape

The difficulties linked to the definition of rape as an international crime have emerged clearly since the first ICTY trial[13] in the *Tadić* case. As the first international war crimes trial since Nuremberg and Tokyo, *Tadić*[14] has been a leading case in international criminal law, considering that the accused was also charged with rape and sexual violence as crimes against humanity and war crimes. The case law of the ICTY has opened the door to the reconstruction of the *actus reus* and *mens rea* of rape as an international crime, but many questions remained uncertain[15].

It is therefore to be expected that the ICTR in the *Akayesu* judgment also felt the need to contribute to this definition.

According to the judges, rape can be considered «as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact… 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 at the bureau communal»[16].

The definition adopted in Akayesu's case is extremely broad and looks at the concept of "invasion" rather than "penetration", thus focusing more on the victim's perception of how his or her body has been violated. The judges also did not include the element of lack of consent which they considered probably largely proved through the situation of coercion and danger suffered by the victims as demonstrated during the trial. In the context of genocide, crimes against humanity and war crimes of this magnitude to investigate each single victim's lack of consent is not only redundant, but it also requires, during trial, for each person to reveal further and more painful details

[13] Rape was also prosecuted by the International Military Tribunal for the Far East, but without adopting a clear definition of the elements of crime. The actions of the Japanese Army during World War II were so serious that, even though the Statute did not explicitly mention rape, the Far East Tribunal held some defendants responsible for the crimes, including rape, committed by persons under their command. It must be noted, nevertheless, the crimes against the so called "comfort women" were not mentioned in the judgment. It was only under Control Council Law N° 10, that the Allied Powers included rape as a crime against humanity. Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946). In the 1949 Geneva Convention on the treatment of prisoners of war, rape was also included amongst war crimes

[14] ICTY, *The Prosecutor v. Duško Tadić*, Judgment (trial Chamber), Case No. IT-94-I-T, 14 July 1997.

[15] M. Ellis, *Breaking the Silence: Rape as an International Crime*, in *Case W. Res. J. Int'l L.*, 38, 2007, p. 225, available at *https://scholarlycommons.law.case.edu/jil/vol38/iss2/3*; K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, in *Berkeley J.Int'l L.*, 21, 2003, p. 288 e 318.

[16] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit., para. 688.

of their experiences[17]. Considering the acts of violence against Tutsi women, the judges stressed that «the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts»[18], because there is rather the need to understand the overall framework of the involved communities.

Such a broad approach to sexual violence identified as any act of a sexual nature clearly infringing upon the persona dignity of the victim, although upheld in other judgments such as *Celibici*[19] and later *Musema*[20], was not adopted in the case of *Furundžija*[21], when the ICTY chose a somehow more technical definition of rape which, to be defined as such, needs to include penetration[22].

Notwithstanding the differences existing in the decisions of both ICTY and ICTR in various cases, the influence of the Akayesu decision is remarkable looking at the final definition of rape adopted in the ICC Elements of crimes. Despite being closer to the technical approach adopted in Furundzija, the use of the term of "invasion" together with the reference to all parts of the body of the victim demonstrates that the Akayesu legacy had its effects in Rome[23].

3.2. Rape as a Genocidal Act

The second aspect worth mentioning, and according to many commentators possibly the most relevant one, is the fact that the ICTR found Akayesu guilty of

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[17] In this sense see also C.A. Mackinnon, *Defining Rape Internationally: A Comment on Akayesu*, in *Colum. J. Transnat'l L.*, 44, 2006, p. 940.

[18] ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit., para. 597.

[19] ICTY, *Mucić et al.*, Case No. IT-96-21, Judgement 16 November 1998.

[20] ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement 6 May 1999.

[21] ICTY, The *Prosecutor v. Furundija*, Case No. IT-95-17/1-T, T 185, Judgment 10 December 1998.

[22] In *Furundžija*, the ICTY starting from the recognition that there was not a precise definition of rape under customary international law, argued that the actus reus of rape constitutes of: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person. This decision is relevant because it upheld that coercion is present also when directed toward third parties and not only towards the victims. See also the ICC Elements of Crime: article 7 (1) (g)-1 Crime against humanity of rape: «1. The perpetrator invaded15 the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent». Available at *https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf*.

genocide under articles 2(2)(a) and (b) of the Statute, killing and inflicting serious bodily and mental harm on members of said group[24] in connection with the rapes occurred at the bureau communal premises. The judges affirmed: «With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act if they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, 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 inflicting harm on the victim as he or she suffers both bodily and mental harm… These rapes resulted in physical and psychological destruction of Tutsi women, their families, and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group» (para. 731).

The ICTR recognised that rape and sexual violence are acts of genocide because they aim at the destruction of the victims, but it also recognised that they might be considered as acts «imposing measures intended to prevent births within the group» with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

The judges were particularly discerning in the identification of the essential links existing between rape and intent in the context of the Rwandan genocide. They found that: «[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group» (para. 507).

In another significant passage, the ICTR in *Akayesu* found that the attempt to prevent births within a specific group can be both physical and mental. In fact, it is possible to recognize that when a woman, who has been raped, cannot begin a pregnancy because of the psychological harm suffered, the crime of genocide has been committed, for there is evidence of the causal link existing between the act of rape and impossibility of giving birth afterwards.

This is an important recognition of the multiple effects that rape, and sexual violence have both on the victims themselves as well as on their families and communities. Rape therefore can be seen as a genocidal act not only because it destroys the person, but also because it annuls the victim as member of a specific community. This approach adopted by the ICTR shows a profound understanding of the relevance

[24] J.M. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, in *Mich. J. Race & L.*, 8, 2003, p. 503 ss., available at *https://repository.law.umich.edu/mjrl/vol8/iss2/5*; S. Rogers, *Sexual Violence, or rape as a constituent act of genocide: lessons from the ad hoc Tribunals and a prescription to the ICC*, in *Geo. Wash. Int'l L. Rev.*, 48, 2016, p. 265 ss.

of the suffering caused by rape to women, as an act that infringes upon the core of their personal identity and dignity.

The relevance of the approach thus adopted by the ICTR in terms of genocidal rape produced an impact on the Rome negotiations on the Elements of Crimes for the Statute of the International Criminal Court. The decision was taken to include a specific reference linking sexual violence and torture to the crime of genocide, by means of a footnote specifying that acts of genocide «by causing serious bodily or mental harm […] may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment»[25].

3.3. Rape as a Crime Against Humanity and Torture

Finally, we need to look at the third interesting aspect of the Akayesu decision, which made clear and explicit the existing analogies between rape and torture as international crimes.

Together with the charges for genocide, the ICTR found Akayesu responsible under Article 3(g) of the ICTR Statute for the rape and sexual abuses against various Tutsi women, considering that such violent acts were committed as part of a widespread or systematic attack against the civilian population on ethnic grounds. Because Tutsi women were targeted based on their ethnicity, «the ICTR concluded that the rapes formed part of widespread and systematic attack on a civilian population ... and that the rape crimes in Akayesu were punishable as crimes against humanity»[26].

Once that the judges established that the attacks on Tutsi women were part of a such a qualified attack, the discussion proceeded to the definition of the nature of the crimes against humanity represented by rape and sexual violence. Considering the definition of rape adopted, «as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive», the judges further explained 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 at the bureau communal» (paras. 687-688).

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[25] U.N. Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 6(b)3. See also: K.D. Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments* in *J. Int'l Crim. Just.*, 3, 2005, p. 1007 ss., p. 1009-1012 and V. Osteerved, *Gender Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, in *New Eng. J. Int'l & Comp. Law*, 12, 1, 2005, p. 120.

[26] A.-M. de Brouwer, *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR*, Tilburg, 2005.

The focus on coercion and the broad definition of rape accepted by the judges, give them the possibility to recognize the similarities existing with the crime of torture by referring to the Convention against torture and other cruel inhuman and degrading treatment or punishment, which does not «catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence» (para. 687).

The judges went on in their analogy with torture by affirming that: «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...» (para. 597).

This statement qualifies the level of harm and distress caused by rape and sexual violence among the most severe ones a human being can suffer, hence the reference to the crime of torture.

The chosen wording stresses that the situation of coercion, which is the essential element of rape, but also of torture, needs not to be proven by reference to a specific violent physical or psychological act, but rather it can be inferred by the overall circumstances of the case. Once again, the fact that the discussion on the "consent" of the victim is completely out of the picture for the judges in Akayesu's case when dealing with the rape of Tusti women, confirms the analogy with torture: in both cases the core of the violation rests on the coercion and torment suffered[27].

It can be argued that the vision of rape as torture based on the victims and the level of suffering which characterizes the Akayesu decision has, once again, had an influence in the ICC Elements of Crime. In the ICC's definition there is no requirement that there be a purpose to either obtain a confession from the victim or third party, to punish the person for an act, or to intimidate or coerce the victim or third party based on discrimination of any kind, for the act to be considered rape as a crime against humanity. What matters is that the intent to cause the victim severe physical or mental pain, is by itself a significant element of the crime.

[27] Unfortunately, once again the encompassing approach adopted in the Akayesu decision was not necessarily followed in other relevant cases. In particular, the role of consent has been dealt with the ICTY in the case of *Kunarac* where the Tribunal ruled that the «absence of consent» is the element of the crime. «It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is «subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression» or «reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear», any apparent consent which might be expressed by the victim is not freely given (22 February 2001, Case No. IT-96-23/I-T, *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, p. 464.

4. Rape and Sexual Violence as Torture in International Human Rights Law

As stated, the judges in Akayesu's case made clear that rape and torture are both international crimes and have core elements in common.

This attitude is shared by other international judicial organs, such as the European Court of Human Rights. Since 1997, in the case of *Aydin v. Turkey*[28] the Strasburg Court has consistently affirmed that rape can be considered as a violation of article 3 of the Convention, when the acts of both physical and mental violence through rape reach the threshold of suffering included in the definition of torture. It is important to note that the Court is not ready to admit that all rapes should *per se* be considered as acts of torture. The ECtHR has also repeatedly affirmed that the lack of consent of the victim is the essential element of the crime of rape, therefore national authorities must prosecute all cases of non-consensual sexual acts, even if the victim had not resisted physically[29]. It must be noted that the element of coercion in the case of single acts of rape cannot usually be inferred from the situation, which is why the Strasbourg judges maintain that the obligations for national authorities to investigate and prosecute need to cover all cases of lack of consent.

The consideration of rape as tantamount torture is shared by other international monitory bodies on human rights law, such as the UN Committee Against Torture and the UN Human Rights Committee[30].

Similarly, at regional level, first the Inter-American Commission on Human Rights included rape as torture under the InterAmerican Convention to Prevent and Punish Torture, and later affirmed the same under the American Convention on Human Rights. This has been followed by the Inter-American Court of Human Rights that in its case law considers sexual violence, committed either by State actors and by non-State actors, as torture[31].

Very recently the Special Rapporteur on violence against women, its causes, and consequences, Dubravka Šimonović, has affirmed that sexual violence, and in particular rape, is recognized as a human rights violation that could amount to torture and is characterized as a gender-based crime[32]. In the Report submitted to Human

[28] ECtHR, *Aydin v. Turkey*, 25 September 1997.

[29] ECtHR, *M.C. v. Bulgaria*, (Application no. 39272/98), 4 December 2003.

[30] Committee against Torture, General Comment No. 2, 2007; Human Rights Committee, General Comment No. 28, 2000. See also the decision of the Committee against Torture in the cases of *V.L. v. Switzerland* (CAT/C/37/D/262/2005) and *C.T. and K.M. v. Sweden* (CAT/C/37/D/279/2005), recognizing that rape can be defined as torture.

[31] See *Inter-American Commission on Human Rights, Martín de Mejía v. Peru*, Report No. 5/1996, Case No. 10.970, Merits, 1 March 1996; and *Ana, Beatriz and Celia González Pérez v. Mexico*, Report No. 53/2001, Case No. 11.565, Merits, 4 April 2001. See also Inter-American Court of Human Rights, *Case of Rosendo Cantú et al. v. Mexico*, 31 August 2010; and *Case of López Soto et al. v. Venezuela*, 26 September 2018.

[32] See also in 2019, the statement entitled *Absence of consent must become the global standard for definition of rape*, issued by the Platform of Independent Expert Mechanisms on Discrimination and Violence

Rights Council, she further affirms: «While all States reviewed in my report criminalize rape, the vast majority of them do it in a way that is not harmonized with human rights standards and international law… States must address widespread impunity for perpetrators of rape and lack of justice for victims, and must harmonize their criminal laws with international human rights, criminal and humanitarian law». Issues related to the definition of rape, full protection of the victims, lack of criminalization for marital rape, and lack of gender-sensitive prosecution are still far away from being solved[33]. It must be observed that criminal systems in most States still define rape only in cases where the use of force or threats of violence can be proved. Moreover, in some States, the age of sexual consent is extremely low, at 12 to 14 years old or even lower, which inevitably means less protection for especially vulnerable victims, and it is in contrast with the duty to protect persons under the age of 18 as established by the UN Convention on the Rights of the Child[34].

To conclude we would like to point out that the efforts done at international level by both international criminal tribunals and international human rights courts and monitoring bodies are producing a relevant impact at a national level. In this sense it is worth mentioning the decision of the Italian *Corte di Cassazione* on May 2021, in which the supreme judges have very acutely qualified rape by a former partner as an act of torture[35]. According to this decision torture determines a serious and prolonged physical and moral suffering of the human being, so that its peculiarity lies in the overt and terrible attitude that it possesses, that is to completely subjugate the person who, at the mercy of the will of others, is transformed from a human being into "res". The precise content of the criminally relevant offense lies in the lesion of "human dignity", and in the arbitrary denial of inviolable fundamental rights. In this case sexual violence is one of the acts against the victim that concur in reaching the threshold of the acute suffering which constitutes the core element of torture.

According to this approach, as we have seen for the ECtHR case law, not all rapes can be defined as torture, but there is the need for the acts of sexual violence to reach an additional degree of seriousness to be qualified as such. Bringing this line of

against Women, available at *https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E*

[33] Human Rights Council, 19 April 2021, A/HRC/42/26, *Rape as a grave, systematic and widespread human rights violation, a crime, and a manifestation of gender-based violence against women and girls, and its prevention*, Report of the Special Rapporteur on violence against women, its causes, and consequences, Dubravka Šimonović, available at https://undocs.org/en/A/HRC/47/26.

[34] According to the 2021 Report of the Special rapporteur Simonovic «(b) Criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible; for example, when the victim is in an institution such as a prison or detention centre, or is permanently or temporarily incapacitated owing to the use of alcohol and drugs;

(c) Legislation criminalizing rape should establish that consent of children below the age of 16 is immaterial, 60 and that any sexual intercourse with an individual below the age of consent is rape (statutory rape), where determination of lack of consent is not required» (p. 14).

[35] Sent. 38232/2020, May 25th, 2021, on file with the author.

reasoning to its extremes, it could be argued that rape does not represent *per se* a lesion of human dignity equal to torture, but there is the need for a particularly violent conduct to recognise the core elements of the crime. We would argue that such an approach does not necessarily take into sufficient consideration the gender element that characterises gender-based violence[36].

5. The Difficulties of Prosecuting Sexual Violence

The lack of gender sensitiveness is a serious issue when it comes to the prosecution crimes of sexual violence both at a national and international level. It has been observed that «speaking about conflict-related sexual violence, in and outside legal settings, has generally proven to be a difficult undertaking»[37]. Trials are especially difficult for the victims as they will experience stigmatisation, rejection from their families and communities, and will be discriminated against together with any child born out of a rape. Akayesu also demonstrates that prosecutors and judges were not particularly at ease dealing with such cases. Clearly the social attitude towards the discussion in public of sexual related violence, probably due to the still existing patriarchal view of men-women relations, generates problems.

These difficulties are clearly confirmed by the existing data. In the case of the ICTY, 78 out of 161 accused individuals (forty-eight percent) were charged of sexual violence; in the ICTR, 40 out of 87 and in the ICC, 18 out of 31 accused individuals faced charges of sexual violence[38]. Even with these relatively small numbers, acquittals for these charges have been relatively high. This again proves that persecuting sexual violence is not at the core of the actions of international criminal tribunals[39].

At the same time, we most note some positive steps undertaken by the international community such as the adoption of the ICC Policy Paper on Sexual and Gender-Based Crimes in 2014, in which the ICC recognized the challenges and obstacles to effective investigation and prosecution of sexual and gender-based crimes and elevated the issue to one of its key strategic goals in its Strategic Plan 2012– 2015.

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[36] In the past a similar view has been proposed by H. Charlesworth *et. al.*, *Feminist Approach to International Law,* 1991. The Author considered the definition of torture in international law incomplete because it does not include acts of brutality and sexual violence against women (627–29).

[37] A.-M. de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, in *Cornell International Law Journal*, 2015, p. 639, available at *http://scholarship.law.cornell.edu/cilj/vol48/iss3/4*.

[38] S. Sharratt, *Voices of Court Members: A Phenomenalogical Journey. The Prosecution of Rape and Sexual Violence of the ICTY and the BIH*, in A.-M. de Brouwer, *et al.* (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge, p. 353 ss.; see also B. Van Schaack, *Engendering Genocide*, cit., p. 27.

[39] R. Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, in *European Journal of International Law*, 13, 3, 2002, p. 697-719, affirms: «the potential to recognize the specific gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process».

Having said that, it is still the case that these crimes are underrepresented in the work of the ICC. In certain cases, despite strong evidence, the Office of the Prosecutor has not included those charges to the indictments. Until 2010 rape was even not included as genocidal act in the indictments. Very recently there have been some comforting steps. One could refer to the case of *Prosecutor v. Ntaganda*[40]. In the same year the ICC started the case against Al Hassan for crimes against humanity and war crimes committed during the conflict at Timbuktu (Mali). This is the first time that gender crimes have been included in the crime of persecution (crime against humanity). On February 21, 2021, the ICC Chamber found Dominic Ongwen guilty for crimes against humanity and war crimes committed in Northern Uganda, in particular rape, sexual slavery, forced marriage and forced pregnancy[41].

Notwithstanding these recent positive outcomes, the difficulties linked to the fair prosecution of gender-based crimes are present also at a national level, even in legal systems which are theoretically better equipped to persecute such crimes.

For example, we could recall that very recently the ECtHR has found Italy in violation of art. 3 of the Convention due to the wording of a judgment adopted by an Appeal criminal court in a case of acquittal for rape, where the victim had been subjected to the phenomenon of the so-called secondary victimization[42], due to the mistreatment she received on trial[43].

6. Conclusion

Considering the above-described situation the question of whether rape and sexual violence should be considered and persecuted as autonomous crimes seems relevant. We maintain that there is a reason to advocate the autonomous character of

[40] July 2019 - sentencing judgment in November 2019, para. 930 ss. describe the findings of the ICC for rape as crime against humanity and the final decision, now confirmed, found Ntaganda guilty of the charges of gender violence.

[41] ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15.

[42] The term has been also qualified by the Council of Europe Committee Of Ministers, Recommendation Rec 8 of the Committee of Ministers to member states on assistance to crime victims, Adopted by the Committee of Ministers on 14 June 2006.

[43] ECtHR, *J.L. vs Italy*, 27 May 2021, Application N° 5671/16, Judgment. See M. S. *Ilieva, J.L. v. Italy: A Survivor Of Trivictimisation – Naming A Court's Failure To Fully (Recognize And) Acknowledge Judicial Gender-Based Revictimisation*, Strasbourg Observers, available at *https://strasbourgobservers.com/2021/09/06/j-l-v-italy-a-survivor-of-trivictimisation-naming-a-courts-failure-to-fully-recognize-and-acknowledge-judicial-gender-based-revictimisation/*. Even in this interesting judgement there are traces of the fact that judges are not fully prepared to accept the idea that the rule of consent should apply only to the single act of violence and that previous behaviour of the victim should not be taken into consideration. The Court considered that only some of the lawyers' personal questions should not have been asked, thus perpetrating the idea that inquiring on the intimate life of the victim is possible during such trials.

sexual violence as an international crime *per se* and not necessarily as a form of "torture".

So far, as we have seen rape has been included as a subset of crimes against humanity, genocide, or war crimes and has not always been prosecuted or recognised as the grave crime that it is. For a very long time, sexual violence and rape have been considered as "inherent" to armed conflicts and gross human rights violations. Doing so, on the one hand rape has been universally qualified as among the worst acts of human behaviour, but, on the other hand, rape often disappears among war crimes and crimes against humanity and loses its distinctive character as a gender-based human right violation.

Some commentators for example have argued that criminalizing rape only when part of genocide or of widespread and systematic attacks creates the danger of «rendering rape invisible once again» and obscures the gendered nature of these conducts. Moreover, there is the risk of assuming that certain victims of rape are more entitled to protection than others[44].

It thus appears to us that maintaining sexual violence as a crime and a human rights violation with an autonomous character, distinguished from the definition of torture would better guarantee the possibility for the victims to receive justice[45]. Rape, as it has been recognized by the international case law, infringes upon human dignity, and causes a high level of suffering both physically and mentally and can have a devastating impact on the lives of the victims and of their communities. The time has come to think of rape not as a sub-section of another international crime but rather as an autonomous crime, the prosecution of which requires the highest judicial standards and degree of attention and consideration for the position of the victims.

It seems that reaching this goal is still further ahead. One possible step to achieve increasing protection for gender-based crimes is to enhance the understanding of the multiple facets of sexual violence. In this regard States must fulfil their positive obligations to guarantee the respect of the prohibition of rape as it is expected for the prohibition of torture. International case law on states' positive obligation related to the prohibition of torture is extremely interesting and detailed, especially in terms of the duty to investigate and to give access to effective remedies for the victims. Such standards should be applied also in the case of rape and sexual violence. In terms of positive obligations international human rights monitoring bodies have often underlined the role of adequate training. Education is crucial, both for those dealing today with sexual violence in courts as well as for future law defenders. As the Special Rapporteur Šimonović has affirmed: «States must ensure the age-appropriate

[44] R. Copelon, *Gendered War Crimes: Reconceptualizing Rape in a Time of War*, in J. S. Peters – A. Wolper (eds.) *Women's Rights, Human Rights: International Feminist Perspectives*, 1995, p. 204.

[45] It must be noted that some commentators have also argued that prohibition of rape as such should be considered as a *ius cogens* norm at the same level as the prohibition of torture. See D.S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 2005, p. 219.

education of children and adolescents on sexual autonomy and human rights, including the importance of understanding lack of consent (the 'no means no' approach) and of promoting affirmative consent (the 'yes means yes' approach)» (para. 107).

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Abstract: The decision adopted by the International Criminal Tribunal for Rwanda in 1998 against Akayesu has been considered a landmark one when it comes to the definition of rape and sexual violence as international crimes. This paper, after revisiting the main points of the decision, aims at evaluating whether the definitions adopted more than 20 years ago by the ICTR still offer a sound legal basis for the prosecution of rape and sexual violence in international law. The time has come to discuss sexual gender-based violence as an autonomous crime under international law. Looking at the records of the International Criminal Tribunals, the International Criminal Court, and the European Court of Human rights, it seems that there is still a long road ahead to the full recognition of the women's right to be protected against sexual violence

Abstract: La decisione adottata dal Tribunale penale internazionale per il Ruanda nel 1998 contro Akayesu è stata considerata una pietra miliare quando si tratta di definire lo stupro e la violenza sessuale come crimini internazionali. Questo scritto, dopo aver rivisitato i punti principali della decisione, mira a valutare se le definizioni adottate più di 20 anni fa dall'ICTR offrano ancora una solida base giuridica per il perseguimento di stupri e violenze sessuali nel diritto internazionale. È giunto il momento di discutere la violenza sessuale di genere come un crimine autonomo ai sensi del diritto internazionale. Osservando gli atti dei Tribunali penali internazionali, della Corte penale internazionale e della Corte europea dei diritti dell'uomo, sembra che ci sia ancora molta strada da percorrere per il pieno riconoscimento del diritto delle donne a essere protette dalla violenza sessuale

Keywords: rape – sexual violence – women's rights – international law – International criminal tribunals

Parole chiave: stupro – violenza sessuale – diritti delle donne – diritto internazionale – tribunali penali internazionali

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