CONFLICT-RELATED SEXUAL VIOLENCE UNDER INTERNATIONAL CRIMINAL LAW: PRECEDENTS OF THE INTERNATIONAL CRIMINAL COURT

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Annotation. This article examines the legal nature of conflict-related sexual violence (CRSV) through the lens of the International Criminal Court's practice. The author analyzes key provisions of the Rome Statute that classify sexual crimes as war crimes, crimes against humanity, and elements of genocide. Particular attention is paid to four cases: Prosecutor v. Germain Katanga, Prosecutor v. Bosco Ntaganda, Prosecutor v. Jean-Pierre Bemba Gombo, and Prosecutor v. Dominic Ongwen. In the Katanga case, the Court established for the first time the criteria for proving the involvement of commanders in the sexual crimes of their subordinates. In the Ntaganda case, the provision on sexual violence as a war crime was established even with regard to members of armed groups. The Bemba case was the first to conduct an in-depth analysis of the limits of command responsibility for sexual violence committed by subordinates. The Ongwen case was the first to classify forced pregnancy and forced "marital servitude" as separate crimes against humanity, as well as to combine individual and command responsibility. The article concludes that the practice of the ICC has finally established the principle in international criminal law that sexual violence in armed conflicts is not a side effect of war, but a separate type of international crime that requires proper classification and punishment.

Key words: International Criminal Court; conflict-related sexual violence; war crimes; crimes against humanity; command responsibility; forced pregnancy; forced marriage; Dominique Ongwen; Jean-Pierre Bemba; Bosco Ntaganda; Germain Katanga.

1. Introduction.

The relevance of the topic is due to the fact that sexual violence related to armed conflicts is recognized by international law as one of the most serious crimes, constituting a violation of both international humanitarian and international criminal law. The experience of the International Criminal Court, particularly in the cases of Katanga, Ntaganda, Bemba, and Ongwen, has shaped key legal approaches to the classification of sexual crimes as war crimes, crimes against humanity, and, in certain cases, as components of genocide.

Conflict-Related Sexual Violence is recognized by international law as a serious violation of human rights, international humanitarian law and international criminal law. Throughout human history, rape and sexual violence during armed conflicts has been used as one of the varieties of weapons, as a tool for terror, humiliation of the population and even genocide [1, 2].

History indicates that sexual violence is committed to dominate not only an individual, but also an entire community, to weaken resistance and deeply destabilize the civilian population. This suggests that sexual violence during armed conflict is part of deliberate military tactics. And this is what distinguishes it from sexual violence committed in "peacetime".

A number of international treaties, conventions, resolutions, and other sources of international law define and criminalize CRSV. We can ascertain that this type of crime is prohibited by various international human rights treaties, including the right to security, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as well as rules of international criminal law.

Such violence is not limited to rape and can take many different forms, including those that do not involve any physical contact. According to the United Nations, it "refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict".

2. The purpose of this article is to examine international legal approaches to crimes of sexual violence in the practice of the ICC, as well as to analyze their significance for the contemporary international criminal legal order. Particular attention is paid to the issue of command responsibility and individual participation in the commission of such crimes.

The relevance of the study for Ukraine lies in the fact that the practice of the ICC can be used in future investigations and trials of crimes of sexual violence committed during the armed aggression of the Russian Federation. The use of established international precedents will ensure the proper legal classification of such crimes, the protection of victims' rights, and the inevitability of punishment for the perpetrators.

3. Review and discussion.

Sexual violence in armed conflict has a long history, but it was only at the end of the 20th century that it began to be recognised not as a 'side effect' of war, but as a deliberately applied tactic. The international tribunals for the former Yugoslavia and Rwanda laid the foundation for the criminalisation of such acts. However, it was the International Criminal Court, established by the Rome Statute of 1998, that for the first time systematically recognised sexual violence as a war crime, a crime against humanity and an element of genocide.

With the adoption of the Rome Statute in 1998, international criminal jurisdiction gained a universal tool for prosecuting persons responsible for the most serious crimes, including war crimes, crimes against humanity, genocide and the crime of aggression [3]. One of the fundamental innovations of the Statute was the codification of specific types of sexual crimes in international law. Under the provisions of the Rome Statute of the International Criminal Court (ICC), sexual violence may be prosecuted as a war crime under article 8(2)(b)(xxii), as a crime against humanity under article 7(1)(g) or as one of the forms of genocide under articles 6(b),(d).

That said, according to the International Criminal Court and the definition in resolution S/RES/1960, it includes rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, forced marriage, and other forms of sexual violence of comparable gravity against women, men, girls, or boys that are directly related to the conflict [resolution]. It also includes trafficking in persons for the purpose of sexual violence and/or exploitation when it occurs in a conflict situation, which constitutes a violation of physical integrity and sexual autonomy.

Article 7 of the Rome Statute recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity as crimes against humanity when committed as part of a widespread or systematic attack against a civilian population.

Article 8 of the Rome Statute provides for similar sexual crimes as war crimes when committed in the context of an international or non-international armed conflict. Thus, sexual violence has been fully enshrined in law at the universal level.

The practice of the International Criminal Court has confirmed the effectiveness of these provisions in a number of landmark cases that have significantly advanced international criminal law doctrine on sexual crimes.

Particularly important in the context of ICC practice is the case of Prosecutor v. Germain Katanga, as it was the first ICC case in which charges were brought for sexual violence in the context of armed conflict, namely charges of rape and sexual slavery as war crimes and crimes against humanity [4]. According to the case, the prosecution considered Germain Katanga to be an accomplice to crimes of sexual violence, as his supply of weapons to combatants created the conditions for their

commission. During the trial, the ICC found that cases of rape and sexual slavery took place during and immediately after the attack on the village of Bogoro. At the same time, due to a lack of evidence, the Court concluded that these crimes were not part of the militants' common purpose.

As a result, Katanga was convicted on these charges, and the Court emphasised that in order to prove his responsibility, it had to be confirmed that:

- rape and sexual slavery were part of the overall objective of the attack on Bogoro and were the conscious intention of all combatants;
- such crimes were a common practice among combatants during armed attacks;
- Katanga was aware, when organising the attack and handing over weapons, that this would facilitate sexual violence and enslavement.

Thus, the simple fact that combatants committed acts of sexual violence is not sufficient to hold the organiser of the armed conflict accountable if it is proven that such actions were not part of the overall objective of the armed conflict. In cases where the organiser of the conflict does not directly participate in the commission of sexual crimes, it is necessary to establish and confirm the fact of his actual facilitation or support of the actions of combatants that led to these crimes [5].

In turn, based on the results of the consideration of this case, it was established that sexual slavery and forced marriage, as separate types of sexual violence in the context of armed conflict, may constitute crimes against humanity, but not war crimes. As noted by international colleagues, this decision may be of significant value in preparing Ukrainian lawyers and amicus curiae to bring criminal charges against the perpetrators [6].

At the same time, despite Katanga's acquittal on charges of rape and sexual slavery due to insufficient evidence, the ICC nevertheless noted that such crimes did take place during the attack on Bogoro, and therefore the victims are fully entitled to compensation for the harm caused. This is a particularly important element in the practice of implementing reparations for victims of the armed conflict in Ukraine.

Another of the first cases that truly confirmed the precedent set by the ICC was Prosecutor v. Bosco Ntaganda [7]. Bosco Ntaganda, commander of the Patriotic Forces for the Liberation of Congo, was prosecuted for 18 war crimes and crimes against humanity, including rape, sexual slavery, forced recruitment of children and their use as soldiers. During the conflict, child soldiers (called 'kadogo') were expected to provide sexual services to soldiers of military groups whenever the latter wanted. At the same time, during attacks on communities, soldiers used coercion to force women and girls to have sex with them, using various objects to penetrate their bodies.

Thus, a distinctive feature of this proceeding was that, for the first time, the Court recognised sexual violence committed within an armed group against its own fighters as a war crime, which was extremely important for the development of international practice. It should be noted that it was this non-international armed conflict in the Democratic Republic of Congo that became most notorious for the use of sexual violence as a separate type of weapon. It was this nature of the armed conflict that led to further mass trials at the International Criminal Court, which called Congo the "rape capital of the world".

Thus, the ICC considered the actions committed by armed groups, in particular, as part of war crimes and crimes against humanity. According to Article 8(2)(e)(vi) of the Rome Statute, in non-international armed conflicts, the following are recognised as war crimes: rape, sexual slavery, forced prostitution, forced pregnancy, any other form of sexual violence.

The ICC found that rape and sexual slavery were closely linked to the armed conflict in Ituri (DR Congo). Sexual violence occurred both during UPC/FPLC attacks on civilian settlements and in camps controlled by this group, confirming their direct link to the armed conflict.

An important contribution of this case was the recognition that sexual violence against women and girls forcibly recruited into the ranks of the UPC/FPLC also constitutes a war crime. Previously, this category of victims often remained outside the scope of legal protection because they were formally classified as "combatants". The court emphasised that even as part of an armed group, individuals retain protection from sexual crimes.

When considering these crimes through the prism of crimes against humanity, it should be noted that Article 7(1) (g) of the Rome Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence of comparable gravity are crimes against humanity if they are:

- committed as part of a widespread or systematic attack;
- directed against the civilian population;
- committed with knowledge of such an attack.

The ICC concluded that sexual violence was part of a widespread and systematic attack by the UPC/FPLC against the civilian population of Ituri. The crimes were not limited to isolated incidents: they were committed regularly, both during attacks on villages and within the structure of the group, including the forced subjugation of recruited girls and women.

In the case of The Prosecutor v. Bosco Ntaganda the International Criminal Court concluded that the actions of the UPC/FPLC forces against the civilian population constituted actus reus of war crimes and crimes against humanity and were not isolated incidents, but rather the foreseeable result of a premeditated strategy directed specifically against civilians. The Court noted that the crimes committed were consistent with the general policy of the UPC/FPLC, and that Bosco Ntaganda himself, in his leading military position, was aware of the unlawful nature of the actions and played a key role in their organisation and implementation, which indicates that he had the necessary mens rea to be held criminally responsible.

In 2019, the ICC found Ntaganda guilty on 18 counts of war crimes and crimes against humanity, in particular under Article 25(3) (a) of the Rome Statute, Bosco Ntaganda was found guilty as an indirect perpetrator of rape as a crime against humanity (Article 7(1)(g) of the Rome Statute) and as a war crime (Article 8(2)(e)(vi) of the Rome Statute). The ICC sentenced him to 30 years in prison, the longest sentence ever handed down by the International Criminal Court, emphasising the systematic nature of sexual crimes as a tactic of control over the population and subordination within armed groups.

The case of Prosecutor v. Bosco Ntaganda can be considered a turning point in the ICC's practice regarding SNC. For the first time, the Court comprehensively recognised the systematic nature of sexual violence as a war crime and a crime against humanity committed as part of an organised policy of an armed group. The decision was an important step towards overcoming impunity for sexual crimes in armed conflicts and, at the same time, expanded the legal standards for the protection of victims. At the same time, the decision on the outcome of this case clearly established how evidence should be formulated (actus reus and mens rea), what role commanders play, and how the organised policy of a group is determined.

While in the Ntaganda case, where the ICC found that Ntaganda had not taken any measures to stop crimes of sexual violence, it is worth noting that the assessment of the accused's actions to take measures to stop crimes of sexual violence in armed conflict, by the ICC Trial Chamber and the Appeals Chamber differed in The Prosecutor v. Jean-Pierre Bemba Gombo, which set an important precedent for the further development of the doctrine of command responsibility [8].

Jean-Pierre Bemba Gombo, leader and commander-in-chief of the Movement for the Liberation of Congo (MLC) and its military wing (ALC), whose subordinates committed numerous rapes and killings of civilians during an operation in the Central African Republic in 2002–2003, had real authority to hold those responsible to account and to appoint and dismiss military personnel.

The ICC found that Bemba had taken a number of actions to respond to the crimes: he issued general warnings to troops about the inadmissibility of violence against civilians, set up two commissions of inquiry, organised a military court that tried seven lower-ranking soldiers, and initiated the so-called "Sibut mission". At the same time, the Court of First Instance found these measures to be insufficient, as they did not meet the criterion of 'necessary and reasonable' actions to prevent and stop crimes within his command authority. In the Court's view, Bemba could have taken more effective measures, in particular: initiating a full investigation into war crimes and referring the cases to the competent authorities; changing the location of troops to reduce their contact with the civilian population; withdrawing the MLC contingent from the Central African Republic; rotating or dismissing military personnel involved in crimes.

The difference in the conclusions of the Trial Chamber and the Appeals Chamber in the case of Prosecutor v. Jean-Pierre Bemba Gombo is crucial for the further development of the doctrine of command responsibility. While the Trial Chamber took a stricter approach, requiring the commander to respond as fully and proactively as possible to the crimes of his subordinates, the Appeals Chamber, on the contrary, narrowed the scope of criminal responsibility, recognising that the assessment of the commander's actions must take into account the actual context, capabilities and circumstances in which he acted. This decision struck a balance between the requirement for effective control over troops and the principle of individualisation of criminal responsibility, avoiding imposing on commanders a duty to act beyond their actual capabilities [9].

Last but not least, an important decision in my research paper was the case of Prosecutor v. Dominic Ongwen, in which the accused, a former commander of the Lord's Resistance Army in Uganda, stood trial on 70 counts, most of which related to sexual violence: rape, sexual slavery, forced pregnancy, forced marriage and other forms of crimes against humanity and war crimes [10].

In this case, the ICC recognised forced marriage and sexual slavery in the form of 'wife-captives' as a separate crime against humanity for the first time, classifying them as part of the armed group's systematic criminal practice.

Considering the acts committed as part of war crimes and crimes against humanity, the ICC recognised that the sexual crimes committed by the LRA under Ongwen's leadership were systematic and widespread. Sexual violence was not random, but an integral part of the LRA's strategy:

- girls and women were abducted from villages;
- forced into 'marriage' with commanders, which in effect meant sexual slavery;
- rape was used as a means of intimidation, control and punishment.

The court also emphasised that forced pregnancy was used as a tool to maintain control over women and ensure 'future generations' of fighters. This was the first case in which such a crime was classified and proven separately.

In turn, this case is important from the perspective of the application of command responsibility and individual responsibility. Thus, unlike the Bemba case, which concerned the assessment of the 'adequacy of measures' taken by a commander, the Ongwen case is characterised by the fact that the accused not only had the status of a commander but also participated directly in the commission of crimes of sexual violence.

The court emphasised that 1) Ongwen personally contributed to the organisation and implementation of the system of 'forced marriages'; 2) he was a direct beneficiary of sexual slavery, holding women and girls captive; 3) he had complete control over the LRA unit and deliberately directed his subordinates to commit crimes.

Thus, the Court found him guilty both as a direct perpetrator and as a person who exercised command responsibility. The Ongwen case was landmark for several reasons, including:

For the first time, the ICC convicted someone for forced pregnancy as a separate crime.

The Court recognised that even as members of an armed group, women and girls remain protected from sexual violence, and that their 'status as the commander's wife' has no legitimacy.

Unlike the Bemba case, where the key issue was the "adequacy of the commander's measures", the Ongwen case proved a combination of individual participation and command responsibility, which made it unique.

Consequently, this case deepened the ICC's practice in the area of sexual violence crimes, strengthening the emphasis on both individual and team responsibility.

4. Conclusions.

It should be noted that all the cases analysed in this article have become landmark precedents that have finally established the principle in international criminal law that sexual violence in armed

conflict is not a side effect of war, but a separate form of international crime that requires separate qualified prosecution. In addition, the decisions in the Ntaganda and Ongwen cases established grounds for holding commanders accountable for the crimes of their subordinates due to their failure to prevent them or take measures to stop them.

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