

## ICC: PROSECUTOR v. DOMINIC ONGWEN (Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgement") / Lukáš Mareček

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**Abstract:** *The International Criminal Court for the first time found guilty and sentenced a perpetrator of gender-based crimes under international law. Moreover, it did so by defining a new crime of forced marriage, which was considered by the international criminal law as "other inhumane act." In its judgements, the International Criminal Court dealt with the challenges based on violation of legality and non-retroactivity principles. Further, it dealt with distinguishing the crime from sexual-based crime of sexual slavery. It upheld that the forced marriage is distinctive crime from the sexual-based crimes like forced pregnancy, sexual slavery, or rape, and that the principle of speciality does not bar cumulative convictions. Regarding the definition of forced marriage, it is not necessary for its commission to conclude valid marriage and the crime itself is continuing one, thus not only the act of entry into marriage is considered as criminal, but the whole duration of forced marriage. The third chapter puts the present development of international criminal law in the broader perspective of attempts to prosecute gender-based crimes and to distinguish them from the sexual-based crimes. Author comes to conclusions that the gender has to be interpreted in a conservative way and more extensive understandings of gender would require revision of the Rome Statute. International Law Commission itself was not firm in answering what the current rules on gender are.*

**Key words:** *International Criminal Court; Crimes under International Law; Crimes against Humanity; Ongwen; Gender-Based Crimes; Forced Marriage*

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## 1. INTRODUCTION

Dominic Ongwen was Brigade Commander of the Sinia Brigade of the Lord's Resistance Army. He was charged on 61 counts of crimes against humanity and war crimes allegedly committed after 1 July 2002 in northern Uganda. Arrest warrant was issued on 8 July 2005 and unsealed on 13 October 2005. Even though the investigation in principle finished in 2007, there were almost ten years of waiting due to the strict prohibition of trials *in absentia*. He was finally arrested and surrendered to the

International Criminal Court (hereinafter "Court" or "ICC") in 2015. The prosecution then undertook a further investigation in a period of a year between his arrest and confirmation hearing, to gain evidence that had become available since 2007.

In February 2021, the Trial Chamber IX found Mr Ongwen guilty of a total of 61 crimes and in May, it sentenced him to 25 years of imprisonment. On 15 December 2022, the Appeals Chamber confirmed the decisions of Trial Chamber IX on Mr Ongwen's guilt and sentence in two separate judgements on the appeals.

These two judgements of the Appeals Chamber combined amount to 742 pages; hence it is impossible to comment on them in totality. It would be also not appropriate. In this comment, we will focus namely on gender-based crimes distinguished from sexual-based crimes, and on the development of the crimes against humanity in the form of forced marriage, with which the Court dealt in this case for the first time.<sup>1</sup>

Mr Ongwen was, *inter alia*, charged of sexual and gender-based crimes allegedly directly perpetrated against seven women in his household; as well as indirect sexual and gender-based crimes against women and girls.

Other significant aspects of these judgements will not be dealt with in this commentary. Among those is his experience of being a child soldier during his childhood as a mitigating circumstance, which contributed to the decision of the ICC not to impose life imprisonment. Or the forced pregnancy with which, alongside forced marriage, the Court also dealt for the first time in this case. The case is important likewise in regard to the distinction of responsibility regimes of commander's responsibility<sup>2</sup> and responsibility for commission of crime through another.<sup>3</sup>

## 2. CONSIDERATIONS OF THE COURT

The Defence argued that "*forced marriage* is jurisdictionally defective, because it is *not in the Rome Statute*" and that "neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes, i.e. crimes not identified in the Statute"<sup>4</sup> - thus that the forced marriage is not a crime under the Rome Statute. And indeed, the Rome Statute distinguishes several forms of crimes against humanity amongst which there is no crime of forced marriage. The Trial Chamber considered forced marriage as "*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,*" under art. 7 para. 1 (k) of the Rome Statute.

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<sup>1</sup> The ICC referred to the decisions of the hybrid criminal tribunal (called also „internationalised“ or „mixed“). Such tribunal mix some aspects of domestic and international prosecution of crimes under international law. It can be hybrid as to the law they apply, or as to their composition (Svaček, 2012, p. 22). In this case the ICC referred to the decisions of Special Court for Sierra Leone (SCSL, Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-A, Appeal Judgement (26 October 2009), para. 736; and SCSL, Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-A, Appeal Judgment (22 February 2008) ("AFRC Appeal Judgement"), para. 196) which said that forced marriage may, in the abstract, qualify as 'other inhumane acts'. However, this is the first case of gender-based crimes at the level of a fully international criminal judicial body.

<sup>2</sup> Art. 28. Rome Statute of the ICC (1998).

<sup>3</sup> Art. 25 para. 3 (a). Rome Statute of the ICC (1998).

<sup>4</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 979.

This was considered by the Defence as impermissible extension of ICC's jurisdiction *ratione materiae* and violation of the *legality principle (nullum crimen sine lege)*<sup>5</sup> and of the *non-retroactivity ratione personae*. In addition, the requirements of marriage in the Acholi culture, namely the parental consents, were not fulfilled. The Defence asserted that the *alleged conjugal union* was "*mere cohabitation*", therefore the *situation cannot be considered as forced marriage*. Furthermore, the Defence stated that Mr Ongwen did not exercise complete ownership and authority over the "wives", as this was exercised by Mr Kony, towards whom Mr Ongwen himself was subjected and who could determine the fate of the conjugal unions as he wishes, not Mr Ongwen.<sup>6</sup>

Prof. Allain, as *amicus curiae*, on the other hand disagreed both with the Prosecutor, as well as with the Defence, and considered the forced marriage as a crime against humanity, but as a form of *sexual slavery* under art. 7, para 1. (g) and not as other inhumane acts under subparagraph (k) of the respective article.<sup>7</sup> At the time of the Rome Statute negotiations, there was no legal recognition of forced marriage as a violation separate from any of the recognised sexual and gender-based violations under international criminal law, particularly rape and sexual slavery. Commentators at the time referred to forced marriage as a form of sexual slavery. Thus, states did not include forced marriage as a separately named violation in the Rome Statute (Chappell, 2015, pp. 29-50, 92 et seq.; Oosterveld, 2014, pp. 563-580). This only highlights the activism of the Court and the reasons for prof. Allain's position.

## 2.1 Violation of Legality Principle?

According to the Court, the *list of crimes against humanity is not exhaustive* as it also includes category of "other inhumane acts," based on understanding that complete list of exhaustive enumeration is impossible. However, the open list of crimes against humanity *must be interpreted in a restrictive (conservative) way* – must not be used to expand uncritically the scope of crimes against humanity.

Being open provision does not mean that it is "catch all provision" leaving unlimited or quite broad margin for the Court. Other inhumane act means that the Rome Statute covers also conduct that is not expressly mentioned in art. 7 para. 1 (a) – (j), but which is of "similar character."<sup>8</sup> By similarity, we should understand not similarity in the definition of the crime, but similarity in the "nature and gravity."<sup>9</sup> It is thus not necessary

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<sup>5</sup> "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Art. 22 para. 1 of the Rome Statute of the ICC (1998). „1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Art. 15 International Covenant on Civil and Political Rights (1966).

<sup>6</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), paras. 981-985.

<sup>7</sup> *Ibid.*, para. 993.

<sup>8</sup> "1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 3. The perpetrator was aware of the factual circumstances that established the character of the act (...)" ICC: *Elements of Crimes*, pp. 249-250.

<sup>9</sup> ICC: *Elements of Crimes*, fn. 30.

that the act in question is similar in the *actus reus* sense to the other forms of crimes against humanity that are *expressis verbis* enumerated in the Rome Statute. In other words, such conduct does not have to be similar regarding the definition but *must be similar in terms of nature and gravity, to those enumerated crimes*.<sup>10</sup> The “other inhumane acts” are themselves settled category of crimes against humanity,<sup>11</sup> it is therefore not necessary for forced marriage to be expressly enumerated. It is sufficient to establish that its criminalisation is not impermissibly extensive interpretation of this provision.

All crimes against humanity are, in principle, aimed to the protection of the fundamental human rights against their widespread or systematic violations in form of attack against civilian population – they are protecting the right to life, right not to be tortured and so on (see e.g., Svaček, 2012, pp. 12-13, 51-52). Regarding forced marriage, it is “*the fundamental right to enter a marriage with the free and full consent of another person*.”<sup>12</sup> The Court considered forced marriage inhumane also with recourse to international instruments like Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), and Convention on the Elimination of All Forms of Discrimination against Women (1979) which all make emphasis on “free and full consent” of the intending spouses. Thus, forcing another to marriage at the time of relevant criminal acts amounted to *violation of widely recognised international human rights*.

According to the Trial Chamber “*the central element, and underlying act of forced marriage is the imposition of this [marital] status on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim’s physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a ‘legitimate’ spouse. To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and child-bearing*.”<sup>13</sup> Accordingly, the harm suffered from forced marriage can consist of “being ostracised from the community, mental trauma, the serious attack on the victim’s dignity, and the deprivation of the victim’s fundamental rights to choose his or her spouse.”<sup>14</sup> The inhumane act of forced marriage means “*namely forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment*.”<sup>15</sup>

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<sup>10</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), paras. 2745-2747.

<sup>11</sup> Art. 6 of the London Charter of the International Military Tribunal in Nuremberg; art. 5 of the Charter of the International Criminal Tribunal for the Far East; art. 5 of the Statute of the International Criminal Tribunal for Former Yugoslavia; Art. 3 of the Statute of the International Criminal Court for Rwanda; art. 2 Draft Articles on Prevention and Punishment of Crimes against Humanity (2019).

<sup>12</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgement” (15 December 2022), para. 1003.

<sup>13</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15-1762-Red, Trial Judgement (4 February 2021), para. 2748.

<sup>14</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2749.

<sup>15</sup> *Ibid.*, para. 2751.

The Court did not incline to the Prof. Allain's opinion and distinguished the forced marriage from *sexual slavery*,<sup>16</sup> that is a typical form of crimes against humanity.<sup>17</sup> The difference is in that the forced marriage penalises perpetrator's imposition of conjugal association on the victim and not violation of the victim's sexual autonomy. Despite that being common, *the forced marriage is not necessarily sexual in nature*. Hence, it can be perpetrated without any sexual acts during such forced marriage, thus no such evidence is necessary.

Based on this, the forced marriage cannot be considered as falling under some of typical forms of crimes against humanity, but it is an atypical form of "other inhumane acts," which is however similar to the typical ones in character, that is in meaning of nature and gravity. *Forced marriage thus is not a new stand-alone crime against humanity*, but it is "other inhumane act," which is enumerated in the Rome Statute.

The Court noted that "based on the evidence, that as a result of the imposition of a conjugal union, the victims endured severe mental and physical suffering by being subjected to repeated forcible sexual intercourse, actual physical violence, deprivation of liberty, and threat of violence and death."<sup>18</sup> Thus, some cases of forced marriage that are not connected with similar mental and physical suffering would not meet the *threshold of gravity* necessary for committing a crime under international law. The Court need to look further for evidence of existence of such grave suffering and not be satisfied with evidence that conjugal unions between Mr Ongwen and his "wives" were involuntary.

Appeals Chamber noted that Mr Ongwen was convicted of forced marriage not as a stand-alone crime but as an "other inhumane act".<sup>19</sup> Defence's jurisdictional challenge based on violation of the legality principle was rejected already in 2019.<sup>20</sup> Other aspects of interpretation of the forced marriage were dealt with in the present judgement.

## 2.2 Forced Marriage Does Not Require Formal Marriage and Exercise of Ownership

It was further contested by the Defence that there was no marriage, as the formal requirements of Acholi culture were not fulfilled – namely the parental consent. Thus, the marriages were not validly concluded. The relationship between Mr Ongwen and his „wives" was „mere cohabitation," not „marriage."

The Appeals Chamber said that „to establish "marriage" or "conjugal union", recognition as a formal or official marriage in a particular society is not required (...) it may be established on the facts of the case including the nature of the relationship

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<sup>16</sup> "While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone." ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2750.

<sup>17</sup> Art. 7 para. 1 (g) of the Rome Statute of the ICC.

<sup>18</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), paras 2028-2093, 2183-2309.

<sup>19</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1013.

<sup>20</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 OA4, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision' (17 July 2019).

between the perpetrator and the victim, as well as the subjective view of the victim, third parties and the perpetrator committing the act and his or her intention to consider the two of them to be “spouses”.<sup>21</sup>

Hence, fulfilment of formal requirements for marriage is not element of the forced marriage, „*what matters is whether or not a conjugal union was factually imposed on the victims.*”<sup>22</sup>

As we said in the previous subchapter, forced marriage is associated with the imposition of duties and expectations generally associated with “marriage”. It entails a “*gendered harm*”, which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to “wife” or “husband”. Thus, the criminal conduct does not have to involve sexual aspects, despite that being common. Furthermore, what distinguishes forced marriage from the sexual slavery is that the *forced marriage does not necessarily require exercise of the ownership* over a person.

By exercising of ownership over persons, we understand “the exercise of any or all of the powers attaching to the right of ownership over one or more persons.”<sup>23</sup> The term “forced” should be interpreted as the act, and continuing relationship, being involuntary by the use of physical or psychological force, or threat of force, or taking advantage of a coercive environment. Not as requirement of exercising the ownership over persons in question. The Court thus rejected the arguments of the Defence that Mr Ongwen did not exercise ownership over the women, but Mr Kony, to whom he himself was subjected.<sup>24</sup>

### 2.3 Other Aspects of Forced Marriage

Criminal is not only the act of conclusion of marriage itself but the whole continued forced relationship, up to the moment when the victim is freed – it is a *continuing crime*.<sup>25</sup>

What was confirmed by the Appeals Chamber is that the fact that these women became “wives” before 1 July 2002, thus that the conduct in question started outside of the jurisdiction *ratione temporis* of the Court (on basis of its entry into force),<sup>26</sup> does preclude imposing a sentence. It is sufficient that the crime continued also after this date.

In the author’s view, it is possible to commit forced marriage also in situation when the act of marriage itself was voluntary and the marriage became forced only subsequently. Or, on the contrary, it remains to be criminal even if it was forced in the beginning and became voluntary later – however, it would be criminal only for the first part of the relationship. Such a scenario could be relevant for the Court in situation when forced marriage became voluntary (ceased to be forced) prior to Court’s jurisdiction

<sup>21</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgement” (15 December 2022), para. 1025.

<sup>22</sup> *Ibid.*

<sup>23</sup> ICC: *Elements of Crimes*, article 7(1)(g)-2.

<sup>24</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgement” (15 December 2022), para. 1026.

<sup>25</sup> “Forced marriage as a form of other inhumane acts is “a continuing crime”, which “covers the entire period of forced conjugal relationship, and only ends when the individual is freed from it.” ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2752; cited as in ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgement” (15 December 2022), para. 1029.

<sup>26</sup> Art. 24, 126 of the Rome Statute of the ICC (1998).

*ratione temporis*. According to the author's opinion, in such a case, the Court would not enjoy jurisdiction.

As to the mental element (*mens rea*), it is not necessary that the perpetrator made a value judgment and considered the situation as "inhumane" but it is sufficient that the perpetrator was "aware of the factual circumstances that established the character of the inhumane act."<sup>27</sup>

Furthermore, the Court decided not only that the forced marriage is a separate crime distinguished from forced pregnancy, sexual slavery or rape, but it also concluded, that there is *no relation of speciality of forced marriage to these crimes*. Therefore, *cumulative convictions* are allowed.

### 3. GENDER-BASED v. SEXUAL-BASED CRIMES

Regarding the observations from previous chapter, the crime of other inhumane act of forced marriage is therefore gender-based crime and not sexual-based crime. Rome Statute is the first source of international criminal law that uses term "gender." For purposes of the Rome Statute, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any different meaning,<sup>28</sup> and thus it is not possible to extend the term "gender" for purposes of the Court to include other gender identities – to understand gender in extensive meaning.

The French authentic language version of the Rome Statute uses term "sexe" (sex) and not "genre" (gender), which might bring some uncertainties and confusion of these two terms. The French version of the Rome Statute in following articles (arts. 42, 54, 68) further differentiates "violences sexuelles/à caractère sexuel," and "violences à motivation/caractère sexiste." Gender being thus related to sexism, which is commonly understood as discrimination based on sex.<sup>29</sup>

The term "gender" refers to socially constructed roles played by women and men that are ascribed to them based on their sex. While "sex" refers to physical and biological characteristics of women and men, "gender" is used to refer to the explanations for observed differences between men and women based on socially assigned roles (Hall, 2016, p. 293).

This is reflected also in the understanding of the ICC's Office of the Prosecutor which issued Policy Paper in 2014<sup>30</sup> according to which term "gender" refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys, whereas "sex" refers to the biological and physiological characteristics that define men and women. *Gender-based crimes* are consequently *crimes committed against persons, whether male or female, because of their sex and/or socially constructed gender roles*. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender. While this Policy Paper cannot bind the Court, it took a step toward a recognition of gender norms, or at least, according to Chappell, a significant step away from their misrecognition (2015, pp. 124-126).

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<sup>27</sup> ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1007.

<sup>28</sup> Art. 7, para. 3, Rome Statute of the ICC (1998).

<sup>29</sup> "Attitude de discrimination fondée sur le sexe (spécialement, discrimination à l'égard du sexe féminin)" Petit (2016).

<sup>30</sup> ICC-OTP: *Policy Paper on Sexual and Gender-based Crimes*, June 2014.

Differentiation between sexual and gender-based crimes was, finally, confirmed in the judgements in the Ongwen's case. It is a development which was influenced (also) by the attitudes of prosecutors, where the first prosecutor – Moreno Ocampo – was criticised for not bringing any charges of gender-based crimes despite the provision in the Rome Statute (Grey, 2019, p. 6), the second – Fato Bensouda – under which the Policy Paper on Sexual and Gender-based Crimes was prepared, and finally with the third one – Karim Khan – the prosecution of first gender-based crime was finally brought to an end.

It is thus established that there is difference between gender and sex, albeit the definition of gender in the Rome Statute refers to the sexes. Therefore, it prefers the more *conservative gender theory*. Broader definition of gender would be impassable by the negotiating states. The negotiations were polarised between states supportive of a multidimensional understanding of gender and conservative states wishing to restrict the term to mean biological sex. The negotiations resulted in the adoption of a definition that recognised that gender is socially-constructed, while at the same time referring to two sexes (Chappell, 2015, pp. 29-50, 92 et seq.; Oosterveld, 2014, pp. 563-580).

Conversely, more *broader understanding of gender cannot be understood as being part of international law*, despite the Rome Statute's definition being criticised by some academics like Oosterveld.<sup>31</sup> It can be discussed if gender-based crimes are already forming part of customary international criminal law, but the fact that states<sup>32</sup> included them, but requested limitation of understanding of gender to two sexes, is itself an expression of their *opinio juris*. Thus in such an eventuality the custom would reflect the more conservative view on gender.

Nevertheless, according to the International Law Commission, since the adoption of the Rome Statute in 1998, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term "gender".<sup>33</sup>

International Law Commission originally wanted to include the definition of gender from the Rome Statute into the Draft articles on crimes against humanity (adopted in 2019), but after many comments to inclusion of the Rome Statute's definition, the International Law Commission decided, based on states' recommendation, rather to omit the definition from the draft as such (Murphy, 2019, paras. 80-86). By this, we may conclude that the International Law Commission is not sure what the current rules of international criminal law on defining of gender are. Otherwise, the International Law Commission would include the narrower or more extensive definition. Broader understanding of gender, than that included in Rome Statute, therefore remains outside of the legally binding scope of international criminal law and opposite postulate has to be regarded as claim seems to be unsubstantiated. Author of such statement has to be asked to provide evidence on opposite.

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<sup>31</sup> "This definition is a study in constructive ambiguity, an oft-used diplomatic move in which a term or definition is deliberately left unclear in order to reconcile polarised position. The result is that the actual definitive interpretation of the term is left to another day and another decision-maker." (Oosterveld, 2014, p. 45). Or "The Rome Statute definition of "gender" has not been adopted in any other treaty or statute of an international criminal court or tribunal (...) by deliberately avoiding the clear prioritisation of one theory of gender over the other in order to ensure wide support for the treaty, the drafters arguably provided a broad definition that covers all manifestations of socially constructed gender norms and is flexible enough to embrace future developments in international law." (Rosenthal, Oosterveld and SáCouto, 2022, p. 21).

<sup>32</sup> Original state parties and consequently other states agreeing with them by accession. Currently 123 states of international community are state parties to the Rome Statute, last state accessed being Kiribati in 2019.

<sup>33</sup> Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two, para. 41.



International Law Commission hence rejected to cut the Gordian Knot (which, in the end, is not the commission's function to do). It, however, said that states might be guided by the sources indicated in its commentary for understanding the meaning of the term gender.<sup>34</sup> The indicated sources ("guidelines") by the International Law Commission, for current understanding of gender in international law, are provided in the footnote.<sup>35</sup>

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<sup>34</sup> *Ibid.*, para. 42.

<sup>35</sup> ICRC, *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, Geneva, 2004, p. 7 ("The term 'gender' refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term 'sex' refers to biological and physical characteristics"); Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 38 (A/66/38 (Part Two)), annex III, p. 108. Paragraph 5 of the recommendation refers to "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences"; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, Treaty Series, No. 210. Article 3 (c) of the Convention defines "gender" for purposes of the Convention to "mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men"; Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017) (A/HRC/35/23), paras. 17 et seq.; the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2018) (A/73/152), para. 2 ("Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms."); ICC-OTP: *Policy Paper on Sexual and Gender-based Crimes*, June 2014. Article 7 (3) of the Statute defines "gender" as referring to "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the 1998 Rome Statute]; *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender identity, and equality and non-discrimination against same-sex couples], Advisory Opinion OC-24/17 of 24 November 2017, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016) (CAT/C/57/4 and Corr.1), para. 53; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44), annex VI; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice (CEDAW/C/GC/33); Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44), annex X; Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant), Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2 (E/2006/22-E/C.12/2005/4), annex VIII; Report of the Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (2001) (A/56/156); Human Rights Committee, general comment No. 28 (2000) on article 3 (equality of rights between men and women), Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40), vol. I, annex VI B; Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (1996) (A/51/322); Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1993) on violence against women, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38), chap. I; ICTR, Prosecutor v. Ferdinand Nahimana, Jean Bosco and Hassan Ngeze, Case No. ICTR-99-52-T, TC I, Judgment and Sentence (3 December 2003), in: International Criminal Tribunal for Rwanda, Reports of Orders, Decisions and Judgements 2003, p. 376, at p. 1116, para. 1079; ICTY, Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, TC, Judgment (2 November 2001), para. 327; ICTY, Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, AC, Judgment (28 February 2005), paras. 369–370; Situation in the Democratic Republic of Congo in the case of the ICC,

The term gender is by some of references understood in narrower sense and by others in a way that allows more extensive approach to understanding of gender.

The International Law Commission thus found itself in curious position in which it *was able to include gender-based crimes* into the draft articles<sup>36</sup> but for polarised positions of state *was not able to define what gender actually is*.

The ICC Prosecutor's policy paper refers in its application and interpretation of term gender to internationally recognised human rights. It would be therefore important to watch the development of gender in international human rights law, as this will have influence on international criminal law. Moreover, the prosecution of crimes against humanity is an *ultima ratio* measure for human rights protection and therefore the influence of development of international human rights law on understanding of crimes against humanity is nothing than natural. Despite the potential aspiration of the ICC's Prosecutor, even in case of development in international human rights law towards broader understanding of gender than the one in Rome Statute, extension at the level of the Court should not be done by judicial (or prosecutorial) activism, but rather it has to be done on a basis of *revision* of the international treaty made by the state parties, as broader understanding of gender would be in direct conflict with explicit provision of the Rome Statute.

#### 4. CONCLUSION

Mr Ongwen's conviction of gender-based crimes is a significant step towards suppression of gender-motivated violence or criminality in general. And its significance is only highlighted by previous reluctance to prosecute gender-based crimes despite the Rome Statute provisions. Some commentators spoke about "missed opportunities" (Grey, 2019, p. 7), namely on prosecution of persecution based on gender grounds.<sup>37</sup> Punishment of "gender-based persecution" remains for the future and it is only curious that the Court sentenced a perpetrator for the first time actually for a gender-based crime that is not explicitly mentioned in the Rome Statute.

Gender-based crimes became gradually part of daily jargon of the Judges, Prosecution, as well as of Defence (Grey, 2019, p. 37). However, commonly interconnected with sexual-based crimes as SGBS (sexual and gender-based crimes), which might indicate that the differentiation between these two is not firmly established. By some the gender and sex are still used as interchangeable with gender being only more "less embarrassing" and polite version of the same thing (Grey, 2019, p. 43). The way towards prosecution of gender-based crimes and their differentiation is thus still on its beginnings.

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Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (7 August 2012), para. 191, cited as in Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two.

<sup>36</sup> Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two, Art. 2 para. 1 (h).

<sup>37</sup> "Persecution against any identifiable group or collectivity on (...) gender (...) or other grounds (...)" Art. 7 para. 1 (k), Rome Statute of the ICC (1998).

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