

SEXUAL ABUSE AGAINST WOMEN SEA FARERS: THE NEED TO STRENGTHEN THE LEGAL AND REGULATORY FRAMEWORK*

Abstract

Sexual abuse against women seafarers or travelers on the high seas has recently remained a grave concern due to its phenomenal increase. This paper examined an essential and complex part of international human rights law that prohibits all forms of sexual abuse against women at all times. Driven primarily by efforts to curb the menace of sexual abuse against women seafarers or those on board a ship, international human rights law ensured that women are always protected. This body of law provides the basis for protecting and enforcing this right. The paper adopts doctrinal research methods and utilizes extant international and regional regulations and other relevant enabling laws in the analysis. Besides, it considers appropriate measures for dealing with and overcoming human rights abuse. In conclusion, it notes that it is necessary to find new ways of improving the implementation measures of the existing laws at the domestic and international levels.

Keywords: Sexual Abuse, Women, High Sea, International, Human Rights Law

1. Introduction

Sexual abuse against women seafarers or travelers on board a ship at the high sea has been a global concern in light of its attendant vices. In appraising women's rights, several issues come up for consideration, such as the right to human life and dignity or freedom from violence and all forms of discrimination. It unleashes emotional trauma on the victim and is a ready tool for spreading HIV/AIDS and other sexually transmitted diseases to the victim. Throughout human history, there have been mass rape, torture, enforced disappearance, and murder committed against individuals while moving goods and services across the high sea. However, in recent years, sexual harassment against female seafarers or travelers has become a topical issue not only at the global, but also at the national level too. It should be noted that while women and girls are particularly affected, their men folk are also victims of sexual harassment, which different crime perpetrators may perpetrate.¹ Despite its prevalence, it must be emphasised that sexual harassment and other crimes against humanity can be prevented through a robust legal

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¹ C. Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict', *Briefing Paper on a Workshop Held at the Overseas Development Institute*, London, 14 May, 2014, Available at: <<https://www.refugeelawproject.org/resources/briefing-notes-special-reports/87-sprpts-gender/358-into-the-mainstream-addressing-sexual-violence-against-men-boys-in-conflict.html>> Accessed March 26, 2022.

framework and the establishment of a vital institution capable of implementing the prohibitions of sexual harassment against women on board a ship at the high sea. This paper will show that the act of sexual harassment against women and other crimes against humanity are absolutely and adequately prohibited under international law, international human rights law, and, more precisely, under international criminal law.

Notwithstanding the crucial advances made by the above rules, it should be stressed that international criminal law has criminalised the most severe forms of sexual harassment at the international level of operations. It would be argued that to address the accountability gap that may arise where international tribunals cannot reach it, it is imperative to understand that national legal systems and their capacity to respond to cases of sexual violence when it is committed could be applied. Therefore, the argument being canvassed in this paper is that promoting the principle of complementarity, or the notion that national systems can or should take responsibility for prosecuting international crimes when committed, cannot be over emphasised.

However, it is much more realistic and commonplace to say that International Criminal Court has unfettered jurisdiction under articles 1-128, especially in Article 1 of the Rome Statute of the International Criminal Court,²to prosecute individuals and to hold such persons accountable for crimes against humanity.³In this sense, the international criminal court investigates and has jurisdiction following the Rome Statute⁴ to try individuals and not States charged concerning the following gravest crimes⁵ such as genocide; crimes against humanity, war crimes; and the crime of aggression as the case may be.

Fundamentally, this paper is much more concerned about crimes committed against humanity⁶ and crimes against humanity as a crime in international criminal law⁷ and as well as a sexual crime committed against women folks on board a ship while on the high sea.⁸ It should be noted that all these forms of crime are incorporated into the Rome Statute of the International Criminal Court (I.C.C.). In addition, Crimes against humanity is also mass crime known as a crime under International Criminal Law which Rome Statute had also adopted by the International Criminal Court as against humanity,

²Rome Statute of ICC (adopted 17 July, 1998 and entered into force 1 July 2002).

³ICC, Understanding the ICC. Available at: <<https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> Accessed June 8, 2021.

⁴Rome Statute of the International Criminal Court (adopted 17 July, 1998 and entered into force 1 July 2002, by the United Nations, Treaty Series, vol. 2187, No. 38544).

⁵Rome Statute of International Criminal Court (ICC) 1998, article 5.

⁶*Ibid*, article 7.

⁷V. Richard 'Crime against Humanity', *Encyclopedia Britannica*, June 2, 2017. Available at: <<https://www.britannica.com/topic/crime-against-humanity>>, accessed March 30, 2021.

⁸ICC 'Understanding the Criminal Court,' available at: <<https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> Accessed March 30, 2021.

committed against the individual(s) such as mass Rape and murder, said it must however, be noted that while the high sea is a very vital aspect of the maritime industry in which goods and services are moved across at the high sea via vessels, cargoes or ships from one nation to another various crime are bound to be committed while on board the ship. One critical issue, consequently, stands out for clarification here. While on board the ship or in the course of moving goods and services on board the ship at the high sea, lots of atrocities have been committed against human beings, properties, living and non-living things; and such crimes include the raping of women by the sea pirates, a commission of murder, and or acts of terrorism which are all known as international crimes that impede the free movement of ships carrying people, goods and services, with its attendant economic challenges. The perpetrators, known as pirates, carry weapons and abduct ransoms. In this context, the act of rape in the course of a stand-still on the high sea is a great weapon used by pirates, terrorists, or murderers against their unsuspected victims in such a very ridiculous situation and one of the most horrendous human rights abuses ever. It is a violent, degrading, devastating, and cruel act in which immense pain is inflicted on women and their communities. Rape leaves physical, emotional, and psychological scars on them and has severe consequences, potentially affecting all aspects of a person's life and health in their physical, mental, social, and spiritual dimensions.⁹

This paper is divided into three parts. The introductory part highlights the background of the study. The second part examines the basic concepts in the article. In part three, the paper discusses the prohibition of sexual abuse under international human rights law and the prohibition of sexual abuse under international criminal law. While second to the last part examines the problems relating to prosecution and implementation and concludes that rape and other forms of crime against humanity are prohibited by international statutes touching on human rights and crimes. It also recommends that there is an urgent need to strengthen the implementation of the global prohibition of sexual harassment and the prosecution of sexual harassment both at the domestic and international levels, wherein the perpetrators are held accountable.

2. Understanding the Concepts

2.1 The Phenomenon of Sexual Abuse

In the realm of Criminal Justice Jurisprudence, to understand the concept "Sexual Abuse," one needs to have a background understanding of the concept of sexual violence. It was loosely defined as 'any sexual intercourse carried with compulsion against the victim's wish.'¹⁰ This definition is apt in that it identifies the act of a sexual nature as a

⁹ V. Sanford, *Buried Secrets: Truth and Human Rights in Guatemala* (New York: Palgrave Macmillan 2003), 313.

¹⁰*ICTR, Prosecutor v. Jean- Paul Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chambers), 2 September 1998, para, 688.

fulcrum upon which the physical force, threats, intimidation, and other forms of duress turn. In understanding the concept, The Trial Chambers further submitted that sexual violence is not limited to a physical invasion of the human body and may also include acts that do not involve penetration or even physical contact, as the case may be.¹¹ It should be noted that "sexual violence" encompasses "sexual harassment" and is broader than rape. In light of the above, the question has always been, what constitutes sexual violence in every situation? In this sense, it must be emphasised that there is no clear-cut answer to the above question raised, but be that as it may, the Statute of International Criminal Court has criminalised sexual slavery, enforced prosecution, forced pregnancy, or other forms of sexual violence of liked nature.¹² It is, however, necessary to emphasise that there is a Non- exhaustive list of the most severe forms of sexual violence that could be found under the jurisdiction of the International Criminal Court that provides the minimum gravity of threshold for an act to be seen as sexual violence.

More particularly, the ever-increasing rate of sexual deviance has led to several reforms of sexual offences in many countries, and many other countries have enacted laws on sexual harassment.

These Laws focused mainly on harassment in the workplace or educational institutions. It has not been easy, even in foreign jurisdictions, to fashion out a law on the subject as sexual harassment, among other things, implies unsolicited sexual advances, requests for sexual favours with the condition of reciprocal favour or disfavour attached or implied or unnecessary and inappropriate sex oriented touching or patting.

2.1.1. The Phenomenon of Rape

At the paradigmatic/conceptual level, the concept 'rape' has been clearly described as a sexually performed act without the due consent of the victim and often carried out with coercion.¹³ While on the other hand, it should be noted that the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.) initially aligned itself with the definition of rape preferred by the International Criminal Tribunal for Rwanda (I.C.T.R.) but later shifted to a more precise definition of rape in *Furundzija Case*.¹⁴ There appears to be little disagreement or understanding of the meaning of rape. The paper noted that in the *Kunarac case*, the Trial Chamber believed the definition of rape in the *Furundzija Case* was too narrow. It further submitted that in practice, the absence of genuine, freely given consent or voluntary participation might be shown by the presence of certain factors such

¹¹*Ibid.*

¹²Rome Statute of ICC (adopted 17 July 1998 and entered into force 1 July 2002).

¹³ICTR, Akayesu (Trial Chambers), 2 September 1998, para. 688.

¹⁴ICTY, Prosecutor v. Anto Furundzija, Case No. IT-95-17-1, Judgment (Trial Chambers),10 December,1998, para.185.

as threats of force, force, and taking undue advantage of the vulnerable person.¹⁵ That said, it may be argued that the above factors do not constitute the essential elements of the crime of rape but rather a demonstration of the lack of genuine consent of the victim.

Similarly, rape is defined in section 357 Criminal Code¹⁶ as having ‘unlawful carnal knowledge of a woman or a girl, without her consent.’ Likewise, by section 282 of the Penal Code,¹⁷ a man commits rape if, among other things, he has sexual intercourse with a woman. The concept of rape has been expanded enormously in many foreign jurisdictions. In England, the Sexual Offences Act 2003¹⁸ defined rape as where a person, among other things, intentionally penetrates the vagina, anus, or mouth of another person with the penis. By this definition, rape does not include non-penile penetration. While this paper has acknowledged some good green shoots of developments arising from the different understanding of the concept, the authors believe that rape be confined to its traditional meaning of penile penetration of the vagina without consent. That said, penile penetration of the anus and mouth and penetration of the vagina, anus, or mouth with other objects should be separate offences. It may be argued that many do not qualify for the high stigma attached to rape. They could be easily accommodated under an improved definition of unnatural offenses¹⁹ with enhanced punishment.

Furthermore, with specific reference to acts of mass rape, it submitted that any act of mass rape committed on board the ship can be charged as a crime²⁰ against humanity, genocide, a war crime, or grave breaches of the Geneva Convention. It is acknowledged that the International Criminal Court has the explicit jurisdiction to investigate and prosecute mass rape cases as part of a systematic or widespread attack on people anywhere, especially on the high sea, which constitutes crimes against humanity.²¹ Also, rape of this nature is carried out by a vast number of pirates or terrorists on the high sea against innocent seafarers or helpless sea travellers who may be held hostage by their captors until they execute their heinous acts.

2.1.2 International Waters (IWs)or High Seas (HSs)

¹⁵*Ibid*, para. 458.

¹⁶See CCA, Cap 38 LFN 2004, section 357.

¹⁷See PC, Cap P3 LFN 2004, section 282.

¹⁸See Sexual Offences Act, 2003, section 1.

¹⁹Criminal Code Act, Cap C38 Laws of the Federation of Nigeria 2004, section 214 and Penal Code, Cap P3 Laws of the Federation of Nigeria 2004, section 284.

²⁰See Physicians for Human Rights: War -Related Sexual Violence in Sierra-Leone, a Populated Based Assessment Report, Boston, 2002.

²¹P, Chalk, ‘The Maritime Dimensions of International Security: Terrorism, Pirate, and Challenges for the United States’, (2008), 56.

The IWSor HSs consists of all parts in which the mass of water surrounds the entire globe. It is not part of the EEZ of a State.²² Indeed, the HSs (International waters) do not belong to any State's jurisdictions by the doctrine of *'Mare liberum'*. This suggests no State has exclusive right over the HSs. Every State can navigate, lay pipeline and even fish on the HSs without incurring a crime and even engaged in scientific research in this context. However, several significant treaties apply to using the HSs and concerning the sea which is regulated by UNCLOS.²³ In this sense, it should be noted that UNCLOS is the grundnorm for using the HSs without any restrictions. It is generally considered to be the existing rules governing the jurisdictions at the HSs. It should also be noted that the ICC applies to every mass rape that occurred or was perpetrated at the HSs along with the awareness created by the UNCLOS 1982, thereby introducing a treaty for managing human conducts at the HSs. The paper observed that HSs is noted to be an open atmosphere far from the land. It has brought people together to conduct various activities from different cultures on voyages of discovery, trade; conquest; war, or pure adventures. Notably, IWS can safely be classified as follows:

i. Exclusive Economic Zone (EEZ)

The Third United Nations Conference on the Law of the Sea (1982) adopted the concept for the use of an EEZ²⁴ for a situation whereby a coastal State has jurisdiction over the exploration and exploitation of marine resources in its adjacent section of the continental shelf, taken to be a band extending 200 miles from the shore.²⁵ However, the above EEZ comprised of an area which stretches across the coast from the seaward boundaries of the constituent States, for example, 3 to 12 nautical miles, and in most cases to about 200 nautical miles, which is 370 kilometres off the coast. It must be noted that nations can claim and exercise their sovereign rights and exclusive fishery management authority over all fish and all CS fishery resources.²⁶

ii. Territorial Sea (TS)

The TS of a State is very close to the CZ. Interestingly, both are two maritime zones that overlaps with each other. They are both measured from the same baselines of the coastal State in which they exercise an element of sovereignty or control. The CZ is an extension of the coastal state's powers over the TS because when the coastal State enforces its customs, fiscal, immigration, or sanitary laws or regulations, it does so concerning

²²UNCLOS 1982, article 86.

²³*Ibid.*

²⁴UNCLOS, 1982, Part V, Article 55-75.

²⁵ Glossary of Environment Statistics, Studies in Methods, Series F, No. 67, United Nations, New York, 1997.

²⁶ Review of Fisheries in OECD Countries: Glossary, February 1998.

infringements of these laws carried out within the coastal state's territory or TS.²⁷ Also, the 12 nautical miles limit has been accepted by global regulations as the CSs controlled exclusive jurisdiction. However, innocent passers and transit passers who are engaged waterways movement through the global straits are permitted under the global regulations. Similarly, it must be emphasized that in such situations air-crafts are not allowed to fly across air space of a coastal State territorial sea, claiming innocence.

iii. **Contiguous Zone (CZ)**

In addition to the CZ where the coastal State has jurisdiction to enforce its maritime law, custom law, and immigration law and punish apprehended or fleeing criminals within the ocean surface and floor of its territory and territorial sea, the state does not have air and space rights. Outside its TS, a State can establish a maximum of 24 nautical miles from the baseline.²⁸

iv. **Internal Waters (IWs)**

Under the IWs, States are allowed to prohibit innocent passers within their internal water. This is so because the security of a State is at stake if purported innocent passers are allowed free passage within a country's territorial waters.²⁹

2.1.3. **Act of Piracy on the High Seas (HSs)**

Generally speaking, UN referred to piracy³⁰ as any illegal act, usually of a violent nature committed at the HSs against private ship or the passengers³¹ or property on board the ship under the terms stated in the IMO's definition.³² Adopting a more enlightened approach to a different perspective of acts of piracy on the HSs, there is no doubt that this sea pirate frequently engaged in maritime mass rape³³ crimes on varying occasions³⁴ against

²⁷K. Aquilina, 'Territorial Sea and the Contiguous Zone, The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea, Oxford Scholarly Authorities on International Law, available at <<https://opil.ouplaw.com/view/10.1093/law/9780199683925.001.0001/law-9780199683925-chapter-2>>, accessed 8 June, 2021.

²⁸United States Department of the Navy, *Annotated Supplement for the Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A)/FMFM 1-10), paras. 1.5.1 & 2.4.1 (1989).

²⁹ Law of the Sea, The Fletcher School of Law and Diplomacy, Tufts University, 2021.

³⁰J. Burgess, (1980) 'Pirates Plaguing Vietnamese Refugees', available at <<https://www.washingtonpost.com/archive/politics/1980/09/02/pirates-plaguing-vietnamese-refugees/ad8d9a2e-d502-4a98-bd45-e742e7781347/>>, accessed May 17, 2021.

³¹ Article 3 reads: 'Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air.

³² UNOLA, Division for Ocean Affairs and the Law of the Sea. UNCLOS, available at <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm>, accessed on May 17, 2021.

³³L, Knopp, 'Piracy at Sea Reaching the Executive Decision', available at: <<https://www.maritime-executive.com/article/piracy-at-sea-reaching-the-executive-decision>>, accessed May 17, 2021.

seafarers, sea travelers, or anyone present on the high seas during the said attack,³⁵ against humanity.³⁶ Piracy or terrorist attacks are perpetrated wholly or partly at sea and prohibited under applicable national and international law.³⁷

Piracy attacks³⁸ are known to be constant and a common occurrence against ships and people on the HSs. It presents a significant threat to all vessel travelers, especially international travelers from various regions. This has brought about an intimidating scenario causing instability in the movement of global commercial activities across the high seas, thereby exposing all crews and passengers worldwide to danger. It is pertinent to know that pirates strictly focused on the Somalia Coast in West Africa, South America, and Southeast Asia as their targets are merchant ships, cruising yachts, and passenger ships with several thousand people on board. Such attacks can result in loss of lives, short and long-term health issues and can further be complicated by the consequences of hostage situations on shore.³⁹

More generally, the paper noted that an Italian-flag cruise ship known as *Achille Lauro* was seized in an attack⁴⁰ while sailing from Alexandria to Port Said. The hijackers, who were members of the Palestine Liberation Front (P.L.F.), a faction of the Palestine Liberation Organization (P.L.O.), had boarded the ship in Genoa, posing as tourists; held the ship's crew and passengers hostage, and threatened to kill the passengers unless Israel released 50 Palestinian prisoners. They also threatened to blow up the ship if a rescue mission was attempted. When their demands were not met by the following afternoon, the hijackers shot Leon Klinghoffer, a Jew of U.S. nationality who was partially paralysed and in a wheelchair, and threw his body and wheelchair overboard. The U.S characterised the seizure as piracy,⁴¹ a position supported by some commentators and opposed by others.⁴² However, the UNCLOS in its Article 101⁴³ defines piracy to be 'any act of

³⁴K. Iczynski 'History of Piracy', 1996, available

at: <<http://www.abdn.ac.uk/web/dreamweaver/history.htm>>, accessed 17 May, 2021.

³⁵S, Gerry. "Linear Law: The History of International Criminal Law", in *Critical Approaches to International Criminal Law: An Introduction*, in C, Schwöbel (Oxford: Routledge, 2014), 159–179.

³⁶UK Essays, Piracy at Sea, Past and Present, 2003–2012, available

at: <<http://www.ukessays.com/essays/general-studies/piracy-at-sea-past-and-present.php>> accessed 17 May, 2021.

³⁷United Nations Convention on the Law of the Sea, 1982, article 105.

³⁸ ICC-International Maritime Bureau. Piracy and Armed Robbery against Ships, Report for the period Between 1 January–30 June, 2012 London: ICC-International Maritime Bureau, London; 2012.

³⁹ ICC-International Maritime Bureau. Piracy and armed robbery against ships, Report for the period 1 January–31 December 2012. London: ICC-International Maritime Bureau; 2012.

⁴⁰ October 7, 1985.

⁴¹ ICC, International Maritime Bureau, *Piracy and Armed Robbery Against Shps, Report For The Period 1 January-30 September 2009 ("IMB October 2009 Report")* 6-7(Oct 2009).

⁴²M, Halberstam, " Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety" (1988), 82 AJIL , 2 : 269-310.

depredate, any illegal acts of violence, detention against passenger committed on high Seas.’ Essentially, article 101 of UNCLOS provides as follows:

That in incorporating the offence into the domestic legislation, States might alter the scope or elements of piracy as defined in their national law. In this context, such an offence must be seen as an illegal, violent act of detention or any depredate perpetrated against passengers of a private ship or aircraft.

Moreso, the above provisions strongly suggest that the definition of personal ends as used in assessing any particular act in terms of its liability to be charged as piracy will depend on how the relevant national jurisdiction where the alleged pirates are prosecuted determines the issue. Notwithstanding the above provisions, it must be emphasised that the alleged piratical acts must take place outside the jurisdiction of any State. In that connection, the fundamental issue is that Article 58(2) of UNCLOS, specifically cross-refers to Articles 88-115 as provided in the HSs provisions of the UNCLOS (part vii) into the EEZ regime(part v) in so far as they do not contradict the resource- focused rights of CSs. Therefore, drawing from the above provisions, the authors contended that the offence of piracy under global regulations must occur in IWs, that is, those outside of IWs, TSs, or AWs (national waters), as the case may be.

2.1.4. Prohibition of Rape Under International Criminal Law

So far, it would seem sensible to state that domestic regulations of the offence have greatly influenced the prohibition of rape as a sexual offence in international law. In this regard, global recognition of the illegality of rape as a sexual offence largely emanated from the global criminalisation of the crime.⁴⁴ Today, it is clear that whereas rape has been criminalised in various domestic laws, the definition of rape has continuously transformed at the national level according to society's understanding of sexual morality. Indeed, the prohibition of rape has correlated strictly with the current status of women in society and therefore did not spark a comprehensive discussion of reform until the general women's movement in the 1970s in several Western States.⁴⁵ The Post-Second WW Control Council Law No.10⁴⁶ was the first instrument to declare rape as an offence against humanity. In a similar vein, the ICTR Statute,⁴⁷ the ICTR Statute,⁴⁸ and the ICC

⁴³Ibid.

⁴⁴ V.S Patricia, ‘Sexual Violence and Peremptory Norms: The Legal Value of Rape,’ p.302.

⁴⁵ S. Cassia and H. Julie, *Rape Law Reform: a Grassroots Revolution and Its Impact* (Plenum Press, 1992), 20.

⁴⁶ Control Council Law No.10, available at:<<https://www.avalon.law.yale.edu/imt/imt10.asp>>, accessed on March 22, 2022.

⁴⁷ICTR Statutes, Article 3(g).

⁴⁸ ICTY Statutes, Article 7(1) (g).

Statutes.⁴⁹ In this connection, it is instructive to note that the above Statutes prohibit rape as a sexual offence. It classified sexual offences amongst crimes against humanity, citing the *Kunarac Case* as a reference precedence.⁵⁰

2.1.5. Prohibition of Rape Under International Human Rights Law

The idea espoused in this paper is situated within the context of IHRL norms. In this sense, it aims to ascertain which IHRL norms includes the prohibition of rape as interpreted in global and regional human rights treaty bodies and Courts. Hence, this is a measure to eliminate violence against womenfolk, particularly rape, as a human rights issue. However, the steps to stop such violence are not at the States' discretion. In order words, a prohibition of rape would thus assist in assuring the woman's right to choose the number and spacing of children freely. Sexual autonomy thereby becomes an integral part of the right to family planning. Likewise, the fact that sexual rights have not been widely accepted has been criticised as the nature of such violence is not fully recognised.⁵¹ In addition, a conception of sexuality and sexual violence as an international human rights issue will lead to an argument that the international community has invited the state into our beds and turned private sex into a public concern. In light of the above, it is instructive to note that the philosophy of human rights law applies at all material times⁵². Whether most human rights treaties, universal or regional, contained an explicit or specific prohibition of sexual violence. Neither the global nor the regional treaties expressly had such bans. Again, even the provisions of the CEDAW⁵³ doesn't contain any provisions in that regard, but are issued on trafficking in women and exploitation of the prostitution of women that are explicitly prohibited because most human rights treaties do not contain a specific prohibition against sexual violence, they do not imply that it does not prohibit rape and other forms of sexual violence. Therefore, it is settled that all forms of sexual violence should be avoided, no matter the situation.⁵⁴

2.1.6. Problems Relating to Prosecution of Mass Rape

The ICC has jurisdiction over those who committed the *actus rea*,⁵⁵ which is known as a 'guilty act', of the crime of rape⁵⁶ physically, as well as other persons who are not present

⁴⁹See RS of ICC, Article 7(1)(g).

⁵⁰See ICTY, *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23 & 23/1(Trial Chamber, 22 February 2001, para. 766-774.

⁵¹L. Sarah and R. Reagan 'Female Sexual Autonomy and Human Rights' (1995), 8 HHRJ, 201: 227.

⁵²ICJ, 'Armed Activities on the Territory of the Congo(*DRC v. Uganda*), ICJ Reports 2005, paras 216-217.

⁵³CEDAW 1979, article 6.

⁵⁴ICCPR 1966, article 7 and ECHR 1950, article 3.

⁵⁵ ICC, 2011, 'Elements of Crimes: The Hague, Netherlands', available at: <www.icc-cpi.int>, accessed 26 March, 2022.

⁵⁶RS of ICC, article 7(1)(g).

physically⁵⁷ but had the *mens rea*⁵⁸ which is a guilty mind⁵⁹ to instruct another⁶⁰ to commit the crime of rape, or incited others to commit them, and also assisted them in carrying out such crimes.⁶¹ However, the Prosecutor and his Office must gather crystal clear information about the crime of rape committed on the high sea and present evidence against an accused before the court. From the above analysis, global regulations meant to prosecute perpetrators of sexual violence remained dead if not correctly implemented at the national level of operations. Moreso, for crimes of mass rape to be charged appropriately, domestic laws must prohibit and criminalise it in conformity with international rules and standards. Under the law:⁶²

Every accused person is deemed innocent until the contrary is proved; they must undergo a fair trial with the help of their Counsel, and such an accused is also entitled to an interpreter where it is essential to have one;⁶³ bearing in mind that the Rome statute is against any form of torture or coercive elicitation of evidence from the accused under trial.⁶⁴

Specifically, while the Court held the accused liable for the alleged offence, the ICC is obliged to remove accused persons who are not of sane mind⁶⁵ from criminal responsibility when that person has lost the mental capacity to acknowledge he committed such a crime. For example, an accused person with a mental disease; is under the alcoholic influence; acted to defend themselves; or any accused person who did not have stable mental health to know he committed such a heinous crime.⁶⁶ In this sense, any accused person(s) found guilty will be sentenced to a maximum sentence of 30 years jail term or life imprisonment.⁶⁷

At this point, the office of the prosecution can initiate an investigation for the offence of mass rape committed on the high sea in three ways: First, every single state that is a party

⁵⁷ M. Kelt and H. Von Hebel, 'What are the Elements of Crimes?' in R.S Lee (ed), *The ICCt: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 14.

⁵⁸ N. Koursami, (2018), 'The Contextual Element of the Crime of Genocide' (2018), 36 *NJHR*, 4, 236.

⁵⁹ L. Levenson, 'Good Faith Defenses: Reshapeing Strict Liability Crimes', (1993) 78 *CLR* 401, and Web Solutions, *Criminal Law – Elements of a Crime: Mens Rea and Actus Reus*, 2021, available at: <law.jrank.org.>, accessed on March 26, 2022.

⁶⁰ J. Herring & M. Cremona, *The Mental Element in: Criminal Law* (Macmillan Law Masters. Palgrave, London, 1998), available at: <https://doi.org/10.1007/978-1-349-13561-5_4>, accessed March, 26, 2022.

⁶¹ S. Rani, 'Actus Reus', 2020, available at: <<https://lawtimesjournal.in/actus-reus-2/#:~:text=Actus%20reus%20refers%20to%20the,Origin>> . Accessed June 7, 2021.

⁶² RS of ICC, 2012.

⁶³ RS of ICC, 2011, article 55(C).

⁶⁴ *Ibid*, article 55(b).

⁶⁵ *Ibid*, article 30 (1-3), *Ibid*, Article 31 (1-3) RS of ICC, 2011.

⁶⁶ *Ibid*, article 31 (1-3), *Ibid*, Article 30 (1-3).

⁶⁷ *Ibid*, article 77 (1-2).

to the RS Statute can refer a mass rape case committed on the HSs to the prosecutor of the ICC.⁶⁸ Second, the UNSC can also refer a mass rape case committed on the high sea to the prosecutor. Finally, the onus is on the prosecutor to instantly commence investigations upon receiving a petition from anyone, states, victims, or any other source, based on credible information that he has received.⁶⁹ This is because the International cannot just conclude in a rape case but will carefully look at the weight of the rape crime committed to ascertain the level of individual responsibility in such rape crime. In the context of mass rape, it must be emphasised that the provisions of article 15 of RS of ICC provides that the prosecutor usually take a stand in that situation where a mass rape case had occurred in a country either to take action directly with a State referral or directly without a State referral.

During the trial of mass rape cases, the testimonies of all survivors of mass rape are very paramount, but they can be bypassed;⁷⁰ however, this does not necessarily mean that ICC prosecutors should not allow survivors to give relevant vital information, evidence, or testify *in facie curia* or *ex facie curia* if the victim is desirous of testifying in the case.

2.1.7 Barriers to Successful Investigation and Prosecution of Mass Rape Cases Committed on the High Seas

The prosecutor's office must investigate rape crimes committed on the high sea. During the investigation, victims and witnesses can testify or reveal what happened during the mass rape on the HSs. It is pertinent to note that asking women to openly disclosed their encounters on the HSs during mass rape can bring shame and disgrace upon them. Most victims donot frankly wish to revealed what happened to them; instead, they prefer to keep mute and never disclose such because saying such might cause their husbands to divorce them; society might remove them from specific responsibility, which might bring about lasting stigma.

Victims of mass rape are compulsorily entitled to justice automatically; they have the right to an effective and prompt investigation of their cases that is already before the court, which may lead to those pirates who were responsible being identified, prosecuted, and convicted.⁷¹

Given these grave consequences, most women will be adamant about facing ICC to testify before the Court. This attitude of mass rape victims will prevent the prosecution from getting firsthand testimony or information from victims of mass rape on the high sea. Most victims also prefer to remain silent by not disclosing what transpired during the

⁶⁸ *Ibid*, article 15 (b).

⁶⁹ Rome Statute of the International Criminal Court, 2011, article 15.

⁷⁰ *Ibid*, article 68.

⁷¹ RS of ICC, 2011, Part 5, Article 53-61,77-80 .

voyage on the high sea, even when they seek medical attention from medical professionals, making it difficult for medical doctors to record mass rape victims' testimony. Some might not even show up for medical treatment preventing the complete tendering and acceptance of the medical doctor's testimony as an exhibit in Court. The ICC has a legal framework that allows the conviction of accused persons who raped their victims on the high seas. It is a crime against humanity based on different evidence than direct physical victim testimony. This kind of evidence may include the more conventional evidence that has been used in many global criminal tribunals to date, such as eyewitnesses' accounts, expert witnesses' accounts, documentary evidence, medical and forensic evidence, as well as documentation from UN agencies and humanitarian organisations, N.G.O. reports, and investigative journalists, which can be corroborated. During the Court proceeding, the success of the case will be determined by the Chamber to rule on the relevance or admissibility of the evidence before them, and by considering, bearing in mind that sexual crimes are invisible and the perpetrator is not easy to be identified; hence weak evidence is a barrier to prosecution and conviction of a suspect.

More so, it is not all victims of mass rape might be willing to testify; this might result from insecurity, dignity or privacy concerns. However, others who are victims may be willing to do so. Therefore it is essential to be open to and look for the evidence of sexual violence right from the beginning, at the investigation stage, to know which protective and special measures for the victims are applicable.⁷² Notably, it should be pointed out that most victims of mass rape are neglected and lack complete care; this prevents total or willing participation in given evidence in court,⁷³ which brings about the poor investigation of such cases and a lack of convincing and valuable evidence before the ICC. The often question is whether a conviction can be sustained under the international criminal court for mass rape without a single testimony from victims?. In this sense, regardless of the provision of Article 68 of RS requiring prosecutors to preserve the safety and privacy of the victims of the HSs rape, the victims are often reluctant to come forward to give testimony in the ICC Chambers due to cultural stigmatisation and societal hindrances it could place on the victim in the future. Even the use of face and voice distortion techniques during prosecutions has still not encouraged victims of rape to participate in the trail in I.C.C. Chambers freely.⁷⁴ The ICC rules had provided that the prosecution could prove its case without direct evidence of victims and corroborative evidence.

⁷²UN, 'Shame, Stigma Integral to Logic of Sexual Violence as War Tactic, Special Adviser Tells Security Council, as Speakers Demand Recognition for Survivors' (2017), available at : <<https://www.un.org/press/en/2017/sc12819.doc.htm>>, accessed June, 10, 2021.

⁷³C. Rittner and J.K. Roth, *Rape: Weapon of War and Genocide* (Minnesota: Paragon House 2012),13.

⁷⁴ C. Powell, 'You Have No God: an Analysis of the Prosecution of Genocidal Rape in International Criminal Law'(2017), 20 RPILR, 1.

However, it is still doubtful if the prosecutor could prove its case beyond a reasonable doubt regarding mass rape.⁷⁵ It is also questionable if medical pieces of documentary and forensic evidence without the direct evidence of the victims of rape could be sufficient to prove a crime beyond a reasonable doubt.⁷⁶ Adopting this approach to prosecuting an accused person may violate the rule of fair hearing in the *RS*. In this case, then the paper asked: Should ICC convict an accused without the direct evidence of the victims as in the Libya case? Such practice generated a lot of tension in the global community.⁷⁷ The controversy now is whether it is right to prosecute and convict an accused person without direct and corroborative evidence supporting the trial?. Such a practice would go against the principle of natural justice, equity and good conscience in any criminal law jurisprudence around the globe.⁷⁸

3. Conclusion

This paper has attempted to show that sexual violence is the most violent, humiliating, and brutal act against any woman or women work on the HSs, leaving the victim physically, emotionally, and psychologically traumatised. This paper has also highlighted some of the notable ethical challenges experienced in the prosecution of mass rape cases committed on board the ship at the high sea. It was submitted that while international law has evolved over the years, and this evolution has created several provisions that have criminalised mass rape and made it a crime against humanity and that the victims have a legal right to reparations. Therefore, this paper's position is in line with the provisions of international criminal law that the perpetrators should be accountable for, and justice must be meted out against such perpetrators. The *RS* of ICC, UNCLOS, and IHRL Treaties and Conventions approaches are the significant treaties comprising some of the essential regulations attempting to protect the humanitarian, cultural and human rights of women on board the ship within a framework that adequately protect and provide assistance to the victims of sexual violence. From the issues appraised in this paper, it will be safe to conclude that global obligations on States to criminalise rape in domestic criminal law by way of IHRL, ICL and IHL will have long-term benefits not only for the present generation but also for the generations yet to come.

⁷⁵Rome Statute, Rule 63(1).

⁷⁶*Ibid.*

⁷⁷ *RS* of ICC, 2011, article 68.

⁷⁸K. Alexa Koenig, *etal.* 'Contextualizing Sexual Violence Committed During the War on Terror: a Historical Overview of International Accountability', (2011) 45 *U.S.F.L. Rev.* 911.

