Rectifying the Coloniality of Omission

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On the 24 February 2023, the German Federal Ministry of Justice published a white paper outlining proposals of legislative amendments that in its view seek to develop and strengthen international criminal law with the aim to "close criminal liability gaps, strengthen victims' rights and improve the broad impact of international criminal law". The Code of Crimes against International Law (CCAIL) has been enacted on the same day that the Rome Statute was ratified and operates in honor of Germany's responsibilities as a signatory State to the Rome Statute to enable the domestic investigation and prosecution of international crimes in support of the international criminal justice ecosystem.

Such proposals build on the experience of the last several years during which Germany became internationally known for conducting structural investigations and concluding prosecutions under the principle of universal jurisdiction, for example in the Anwar R. case at the Higher Regional Court of Koblenz – the worldwide first addressing state torture in Syria – and the Taha Al. J. case in front of the Higher Regional Court of Frankfurt – the worldwide first addressing genocide by ISIL against the Yazidi. Notably, while the Office of the Prosecutor (OTP) at the International Criminal Court (ICC) has published its Policy Paper on the crime against humanity of persecution on gender grounds, German courts have already significantly advanced international criminal law jurisprudence through successful convictions relating to the crime against humanity of persecution on intersecting grounds of religion and gender, in for example the Sarah O. and Jalda A. case. In the past several years, there was a significant increase of investigations and prosecutions of international crimes in third States under the principle of universal jurisdiction or extraterritoriality in Europe and beyond. Moreover, there is a notably diversification of legal avenues (criminal, civil and sanctions), multiple establishments of international justice mechanisms (IIIM-Syria, IIMM, UNITAD) as well as increasing interplay of legal frameworks (international criminal law, international human rights law, international law) contributing towards justice for mass violence. All to say that the future of international justice is multidirectional and its effectiveness is founded on the interdependency between its international, regional and domestic actors as well as institutions. Amidst global calls for reparations and restorative approaches to mass violence, the complementarity of international criminal efforts and jurisprudential consistency flow bidirectionally from internationalized courts and tribunals to the national level and vice versa.

The outlined priorities address *inter alia* procedural matters which were identified as challenging during the prosecutions carried out at several Higher Regional Courts in the past years. The proposed developments pertaining to procedural aspects, such as the right of accessory prosecution for victims of crimes against humanity and war crimes; unconditional psychological trial support; interpretation for media representatives in court proceedings; video recording for scientific and historical purposes and the translation of judgments in the field of international criminal

law into the English language are to be applauded and raise hopes of significant changes that victim representatives, academics and civil society actors have been advocating for. However, in relation to the material aspects, the paper contains several deficiencies – some of which have been addressed here. What thus far remained unaddressed is the problematic proposal to amend the current CCAIL to include the crime of sexual slavery as a crime against humanity and as a war crime to "ensure consistency with the corresponding norms of the Rome Statute of the International Criminal Court (ICC)".

The contribution outlines why the addition of sexual slavery to the CCAIL will lead – as the jurisprudence of the ICC demonstrates – to impunity and protection gaps for persons affected by slavery crimes, sexualized and reproductive crimes, in contradiction to the aims of the white paper. Considering the recent announcement by Sierra Leone to propose an amendment of the Rome Statute and the Draft Crimes against Humanity Treaty to include the international crime of the slave trade in both instruments, Germany is now in a unique position to strengthen its already solid and increasingly adjudicated legal framework as it pertains to international crimes by respectively adding the international crimes of the slave trade as an underlying act of crimes against humanity and war crimes in harmonization with international customary law.

A Decolonial Feminist Analysis of the Crime of Sexual Slavery

International customary law and, most fundamentally the 1926 Slavery Convention and the 1956 Supplementary Convention, guide towards the understanding that slavery and the slave trade are two separate, yet interrelated conducts and crimes. International customary law establishes that next to slavery, the slave trade is an international crime with the highest normative status in international law. The Draft Law of the Federal Government on the Introduction of the International Criminal Code dated March 2002 underlines that it "contains only criminal offenses covered by the Rome Statute and customary international law" (p.13) and criminal offenses that have a "basis in international customary law" (p.21). It is uncontested that the slave trade has a solid basis in international customary law.

Specifically, the slave trade means

> "*all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance*" (Article 7 (c) 1956 Supplementary Slavery Convention).

International customary law further reveals how the control of sexuality, sexual and reproductive autonomy, as well as of sexual integrity over enslaved persons, in line with an understanding of how colonial dominance has been exercised, is *an indica or evidence* of slavery.

A closer look at the elements of crimes of sexual slavery unravels, however, how "an act of a sexual nature" is listed as an additional element to the elements required to substantiate enslavement (or slavery), namely *"the exercise of any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*". It follows that adding sexual slavery to the CCAIL will thus be in contradiction, not alignment with international customary law. Moreover, as the jurisprudence of the ICC in Katanga, Chui, Ntaganda, and Ongwen demonstrates, it will likely lead to the adjudication of sexual slavery solely and reductively applied to evidence of heteropatriarchal and heterosexual men-on-women rape. The result of sexual slavery as an underlying act of crimes against humanity next to enslavement (or slavery) in jurisprudential practice creates two categories of slavery victims, those who have been raped and those who have not, overshadowing valuable indica of slavery, while distorting and invisibilizing sexual and reproductive harms such as control of sexuality, sexual and reproductive autonomy, as well as sexual integrity over enslaved persons of all ages and genders.

A decolonial feminist analysis critically examines the continuous impact of colonial dominance exercised through the control of the economy, the stealing, hoarding and control over land, the control of authority, the control of sexuality and the control of subjectivity and knowledge. Understanding the crime of enslavement (slavery) through a decolonial feminist analysis confirms that control of sexuality, sexual and reproductive autonomy, as well as sexual integrity, historically has been integral to creating and upholding racialized and heteropatriarchal systems of social and political domination in the context of enslavement. Disrooting control of sexuality, sexual and reproductive autonomy, as well as sexual integrity from its position of an integral conduct that is evidence of how the crime of slavery historically has and presently is being committed, is a dissemblance of the crime of slavery. The divorce from historical realities posed by the crime of sexual slavery is further reinforced by the jurisprudential developments at the ICC in cases in which sexual slavery is applied next to enslavement (slavery).

For example, the Ongwen case at the ICC has demonstrated how the crime of sexual slavery has been applied next to enslavement in a way that led to an artificial distinction of victims who had been raped (victims of sexual slavery) and those who had not been raped (enslavement). Regrettably, the nuanced and grave harms against them through the control of their sexuality, sexual and reproductive autonomy, as well as sexual integrity in the context of their enslavement remain unaccounted for. Examples include the sexualized grooming of girls under 18 years of age, whose sexuality and reproduction were monitored through, *inter alia*, menstruation checks or the control over sexuality of boys under 18 years of age subjected to forced conscription. To avoid such impunity for sexual harms in the context of enslavement, a historically aligned understanding of how control of sexuality in the context of enslavement in all its forms is indica rather than an addition element to prove as the crime of sexual slavery requires is foundational going forward.

The Coloniality of Non-Recognition of the International Crime of the Slave Trade

On 11 April 2023, during the resumed session of the Sixth Committee of the United Nations General Assembly, Sierra Leone proposed the addition of the slave trade to the Draft Crimes against Humanity Treaty and announced that it is "in the process of submitting proposals to amend the Rome Statute to enumerate (…) the slave trade (…) in the Rome Statute" (definition is aligned with Article 7(c) of the 1956 Supplementary Slavery Convention). Specifically, Sierra Leone outlined that the Rome Statute contains significant "legal gaps that result in manifest impunity for slavery and the slave trade crimes under the Rome Statute. Regrettably and critically, the Rome Statute does not contain provisions for the slave trade which governs the intent to bring a person into – or maintain them in – a situation of slavery". It is expected for Sierra Leone to respectively propose the inclusion of the international crime of the slave trade into the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes, and other International Crimes which will be negotiated and adopted from 15-26 May 2023.

As a recent joint communication by a group of Special Rapporteurs made crystal clear, the coloniality of Germany hiding behind the intertemporal principle instead of assuming its legal obligation as an exception to the principle for its implications in colonial crimes, including its involvement in slavery and the slave trade in Namibia and elsewhere, must end and "reparatory justice for the victims of genocide, slavery, slave trading and racial apartheid" (E. Tendayi Achiume, A/74/321) must follow. Germany is now invited to make effective and inclusive practical, political and legal amend(ment)s as the recommendations of the Special Rapporteurs demand. Beyond, Germany – in line with global demands for reparatory justice – is recommended to consider taking proactive steps towards guarantees of non-repetition of not just enslavement but also the slave trade. Respectively, in line with international customary law and in accordance with the aims of the white paper, Germany is called upon to add the international crime of the slave trade as a crime against humanity and war crime (not sexual slavery) to the CCAIL.

From structural investigation proceedings concerning Ukraine to ongoing prosecutions addressing international crimes against the Yazidi, the conduct – the abducting, selling, buying, transporting of person into situations of slavery – and crime of the slave trade already forms part of the work of Germany's criminal justice authorities. Although evidence of the slave trade appears in form of abducting, selling, buying or transporting in many international crimes cases, one may argue the colonial logics of not perceiving, in contradiction with international customary law, the slave trade as a separate and distinct criminal conduct and crime from slavery. Germany has a unique opportunity to step into leadership in support of Sierra Leone's efforts by rectifying the coloniality of omission of the international crime of the slave trade in its own laws and thereby closing protective gaps in the international law framework that result in grave injustices and impunity, today, from Ethiopia, Afghanistan, the Democratic Republic of Congo and Libya to Uganda.

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