



The offence of rape as a crime against humanity: insights from the United Nations ad hoc tribunals



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Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Master of Laws with Public Law and Legal Philosophy* at the North-West University

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Graduation: May 2023

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ACKNOWLEDGEMENTS

Firstly, I would like to take this precious moment to thank the Almighty for the strength and wisdom he has bestowed on me for the completion of this academic paper.

My gratitude goes to my supervisor, _____, for the complete dedication and commitment he has shown both as my supervisor and as an academic in general.

Special thanks go to my late parents, _____ and _____; my sister, _____, who is always by my side no matter the circumstance and _____ who continuously encourage me to be the best version of myself, thank you so much; and the support from everyone who in one way or another contributed to this study.

DEDICATION

This paper is dedicated to my beautiful daughter, _____, who brings joy to my heart each and every day. She remains a true blessing to my life.

TABLE OF CASES

ICTY

Prosecutor v Anto Furundžija ICTY IT-95-17/1-T

Prosecutor v Delalić, Mucić, Delić, and Landžo ICTY IT-96-21-T

Prosecutor v Dusko Tadic ICTY IT-94-1-T

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic ICTY IT-96-23 and IT-96-23/1-A

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic ICTY IT-96-23-T and IT-96-23/1-T

Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić and Zoran Žigić ICTY IT-98-30/1-A

Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić and Zoran Žigić ICTY IT-98-30/1-T

Prosecutor v Radoslav Brdjanin ICTY IT-99-36-T

Prosecutor v Rasim Delić ICTY IT-04-83-T

Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic ICTY IT-96-21-T

Prosecutor v Zlato Aleksovski ICTY IT-95-14/1-A

ICTR

The Prosecutor v Alfred Musame ICTR-96-13-A

The Prosecutor v Alfred Musame ICTR-96-13-T

The Prosecutor v Clément Kayishema and Obed Ruzindana ICTR-95-1-T

The Prosecutor v Eliézer Niyitegeka ICTR-96-14-T

The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze
ICTR-99-52-T

The Prosecutor v Ildephonse Hategekimana ICTR-00-55B-A

The Prosecutor v Jean-Paul Akayesu ICTR-96-4-T

The Prosecutor v Jean de Dieu Kamuhanda ICTR-95-54A-T

The Prosecutor v Juvénal Kajelijeli ICTR-98-44A-T

The Prosecutor v Laurent Semanza ICTR-97-20-A

The Prosecutor v Laurent Semanza ICTR-97-20-T

The Prosecutor v Mikaeli Muhimana ICTR-95-1B-T

The Prosecutor v Milomir Stakić ICTR IT-97-24-T

The Prosecutor v Pavle Strugar ICTR IT-01-42-A

The Prosecutor v Pavle Strugar ICTR IT-01-42-T

The Prosecutor v Sylvestre Gacumbitsi ICTR-2001-64-A

The Prosecutor v Sylvestre Gacumbitsi ICTR-2001-64-T

ICC

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuli ICC-01/04-01/07 OA

Prosecutor v Thomas Lubanga Dyilo ICC 01/04-01/06

SCSL

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu SCSL-04-16-A

Prosecutor v Sesay, Kallon and Gbao Case No. SCSL-04-15-T

OTHER

Cyprus v Turkey 25781/94, 10 May 2001

France et al v Goring et al (1946) 22 IMT 203, 13 ILR 203

R v White 1910 KB 124

Woolimington v DPP 1935 AC

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	
DEDICATION	
TABLE OF CASES	
LIST OF ABBREVIATIONS	1
CHAPTER 1	2
Introduction	2
1.1 Background of the study.....	2
1.2 Problem statement	6
1.3 Research Methods	7
1.4 Framework of the Study.....	7
1.5 Scope and Limitations of the study.....	8
1.6 Rationale and Justification	8
CHAPTER 2	9
The historical evolution of rape within international law	9
2.1 Introduction	9
2.2 Brief overview of rape in ancient times.....	9
2.3 International Legal Responses.....	12
2.3.1 Early codification of the prohibition of rape in international law.....	12
2.3.2 The establishment of the International Military Tribunals.....	15
2.3.2.1 The Charter of the International Military Tribunal, Nuremberg	15
2.3.2.2 The Charter of the International Military Tribunals for the Far	
East, Tokyo.....	16
2.3.3 Geneva Conventions of 1949 and Additional Protocol of 1977.....	17
2.3.4 Other Conventions prohibiting rape.....	18
2.3.5 The UN Ad Hoc Tribunals.....	19
2.3.5.1 Rape as a crime against humanity.....	20
CHAPTER 3	22
The material and mental elements of Rape: per the Jurisprudence of the <i>ad hoc</i> Tribunals	22

3.1 Introduction.....	22
3.2 Defining rape.....	23
3.2.1 <i>Actus Reus</i>	24
3.2.1.1 The Issue of Consent.....	28
3.2.1.1.1 Trial Chamber <i>Akayesu</i> case.....	28
3.2.1.1.2 Trial Chamber <i>Furundjiza</i> case.....	28
3.2.1.1.3 Trial Chamber <i>Kunarac</i> case.....	28
3.2.1.1.4 Appeals Chamber <i>Kunarac</i> case.....	29
3.2.2 <i>Mens Rea</i>	30
CHAPTER 4.....	31
Conclusion.....	31
BIBLIOGRAPHY.....	40

LIST OF ABBREVIATIONS

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council

CHAPTER ONE

Introduction

1.1 Background of the study

The prosecution of serious crimes in 1945 did not delve deeper into the sexual offences at that time.¹ However, developments that occurred in the Former Yugoslavia and Rwanda led to the establishment of two United Nations *ad hoc* Tribunals.² Looking at the violations committed in those territories, the establishment of the UN *ad hoc* Tribunals became opportunities for the investigation and prosecution of sexual offences in general, and rape in particular. In this regard, the Trial and Appeal Chambers of the UN *ad hoc* Tribunals were of crucial importance in the development of the legal anatomy of this category of sexual offence: rape.³

Notwithstanding the jurisprudence from domestic courts, the Statutes of the Tribunals did not endeavour to provide their own definitions of these substantive crimes. However, the UN *ad hoc* Tribunals made significant progress in developing their own definitions. Through construction, the crimes over which these Tribunals had jurisdiction were defined. This makes a case for a jurisprudential approach in delineating the material and mental elements of rape as developed by the Trial and Appeal Chambers of the ICTY and ICTR, respectively.

At the outset (for example, in 1999 when the first ICTR judgment was delivered in the case of *The Prosecutor v Jean-Paul Akayesu*),⁴ the definition of rape was very skeletal and lacking in substance, as compared to the view of the Trial Chamber in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.⁵ In between these

¹ See Campanaro J "Women, War, and International Law: The Historical Treatment of Gender-Based War Crime" 2001 *Geo. L.J.* 2557- 2570; Bassiouni MC *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011); De Wit T *The Analysis of the Development of Rape in International Criminal Law* (University of Tilburg 2005)

² Statute of the International Criminal Tribunal for the Former Yugoslavia Res 808/1993, 827/1993 (1993) (hereinafter referred to as "ICTY"); Statute of the International Criminal Tribunal for Rwanda Res 955/1994 (1994) (hereinafter referred to as "ICTR").

³ See Gagro SF "The Crime of Rape in the ICTY's and the ICTR's Case- Law" 2010 *Zbornik PFZ* 1309 -1334; Haffajee RL "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory" 2006 *Harvard Journal of Law & Gender* 201- 221

⁴ *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T.

⁵ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* ICTY IT-96-23-T and IT-96-

judgments, a few cases would display consistencies, oscillations, and inconsistencies in the construction of the meaning and elements of the crime of rape. Over time, the gradual development of these elements achieved some degree of consensus and the elements (*actus reus* and *mens rea*) of this crime, as developed by the Tribunals, can now be presented as forming part of the common law of the crime of rape within the scope of international criminal justice.

In criminal law, whether national or international, the *actus reus* and *mens rea*, otherwise known as the material and mental elements of a crime, are two of the most fundamental requirements for the purpose of determining criminal liability.⁶ These two requirements were derived from a Latinism which is deeply entrenched in English criminal law: *actus non facit reum nisi mens sit rea* – roughly translated, it means “an act does not make a person guilty unless their mind is also guilty”.⁷ When this principle is applied in international criminal law, guidance is taken from the general principles of law as practised by civilised nations.⁸ However, because of the gravity, magnitude, and complexity of crimes at international level, careful consideration is required of how various standards of the elements are applied and construed in the context of international law.

In respect of the concept of *actus reus*, also known as “guilty conduct”: for this particular element to arise, there must be physical conduct, be it an act or omission that is prohibited by a rule of international criminal law.⁹ This objective element can be descriptive or normative, concerned with the act, or with the perpetrator.¹⁰ The core attribute associated with the *actus reus* concept is that the criminal act must either be committed by an accused or arise as a result of the accused’s actions thereon.¹¹

23/1-T.

⁶ Mugabi 2015 *Us-China law review* 489; Smith and Hogan *Criminal law* 43.

⁷ *Woolimington v DPP* 1935 AC para 462; Smith and Hogan *Criminal law* 46; Mugabi 2015 *Us-China law review* 500-501.

⁸ Mugabi 2015 *Us-China law review* 511.

⁹ Guilfoyle *International Criminal Law* 187.

¹⁰ Werle and Jessberger *Principles of International Criminal Law* 172.

¹¹ *R v White* 1910 KB 124; Clarkson et al *Criminal law* 72.

The material element must be accompanied by the mental element of the crime; it could be intent, knowledge, negligence, recklessness or strict liability for it to give rise to criminal liability.¹² With regard to *mens rea*, in terms of the ICTY and ICTR approach, case-law contends that *dolus eventualis* and recklessness amount to sufficient mental element of a crime. The Trial Chamber in the *Prosecutor v Milomir Stakić* case stated that both *dolus directus* and *dolus eventualis* suffice as elements of *mens rea* in establishing the crime of murder.¹³ In terms of *dolus eventualis*, the active participant in a life-threatening behaviour must have foreseen the likelihood of death yet reconciled himself with such possibility.

Similarly, the Trial Chamber in *The Prosecutor v Alfred Musema* held that for a crime to be classified as murder, the requisite mental element is that the accused must have the intention to kill or to cause grievous bodily harm to the victim.¹⁴ This is the case even subsequent to the criminal's knowledge of the possibility of this conduct leading to the victim's death and is reckless as to whether or not death ensues. However, some *ad hoc* Tribunal cases appear to refer to slightly different standards. In the Trial Chamber of *Prosecutor v Pavle Strugar*, the Court stated that the term *dolus eventualis* may have obscured the degree of risk required by the Tribunal and that the preferable term was 'indirect intent' which would seem closer to *dolus indirectus* than *dolus eventualis*.¹⁵

The Trial Chamber case of *Prosecutor v Rasim Delić* defines "indirect intent" as "knowledge that the death of a victim was a 'probable' or 'likely' consequence of the act or omission of the defendant".¹⁶ The Trial Chamber also emphasised that negligence and gross negligence do not form part of indirect intent.¹⁷ It must be noted that the imposition of individual criminal responsibility, as stipulated in the Statutes of

¹² Clarkson et al *Criminal law* 72.

¹³ *Prosecutor v Milomir Stakić* ICTY IT-97-24-T para 587.

¹⁴ *The Prosecutor v Alfred Musema* ICTR-96-13-T para 215.

¹⁵ *Prosecutor v Pavle Strugar* ICTY IT-01-42-T paras 235-236.

¹⁶ *Prosecutor v Rasim Delić* ICTY IT-04-83-T para 48.

¹⁷ *Prosecutor v Rasim Delić* ICTY IT-04-83-T para 48.

the Tribunals, is based on the participation of the individual, which may range from direct to indirect.¹⁸

As a fundamental principle, criminal responsibility can only be imposed if there is evidence that an individual would, through the prescribed modes of participation, have caused the planning, preparation or commission of any of the crimes over which the Tribunal had jurisdiction.¹⁹ These modes of participation include: instigating, ordering, committing, or otherwise aiding, planning, preparing or executing the crimes to be prosecuted by the Tribunals.²⁰

Another observable point worth mentioning is the fact that in the realm of international criminal justice within which the offence of rape has been prosecuted, proving only the material and mental elements of the crime in question is not sufficient. The offence of rape, like any other crimes enlisted in the statutes, is not a standalone crime. In other words, the Tribunals did not have jurisdiction over the offence of rape: rather, they had jurisdiction over genocide, crimes against humanity, and war crimes. The crime of rape must fit into or be brought under the ambit of any of the crimes over which the Tribunals had jurisdiction. Rape was prosecuted either as a war crime, genocide or a crime against humanity. This therefore required that in addition to establishing the material and mental elements of the crime of rape, the prosecution had to prove that it was committed either as a war crime, genocide or a crime against humanity – each of which has its definitional elements.

For example, the crime of rape as a crime against humanity requires the prosecution to not only prove the material and mental elements of rape but also that the rape was committed as part of a widespread or systematic attack, directed against any civilian population based on ethnic, tribal, racial, religious or national grounds (the definitional or chapeau requirements of crimes against humanity).²¹

¹⁸ Articles 7 and 6 of the Statutes of the ICTY and ICTR, respectively.

¹⁹ Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR, respectively. Also see Articles 7(2) – (4) and 6(2) – (4) of the Statutes of the ICTY and ICTR respectively.

²⁰ Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR, respectively. Also see Articles 7(2) – (4) and 6(2) – (4) of the Statutes of the ICTY and ICTR respectively.

²¹ Article 3 and 5 of the ICTR and ICTY.

This research thus delves into the material and mental elements of the crime of rape as prosecuted by the ICTY and ICTR, respectively. In furtherance to that, this research looks into the specific definitional aspects of the offence of rape as a crime against humanity by the UN *ad hoc* Tribunals.

1.2 Problem Statement

The ICTY and ICTR are the *ad hoc* international criminal Tribunals which were established by the United Nations Security Council (UNSC).²² They had jurisdiction over genocide, crimes against humanity and war crimes.²³ The UNSC established the Tribunals in furtherance of its Chapter VII powers in dealing with atrocities and human rights abuses that constituted a threat to international peace and security.²⁴

Prior to these Tribunals, the classification and criminalisation of sexual offences in general and rape in particular, were not only embryonic but very skeletal as international criminal justice had not adequately dealt with that.²⁵ Nonetheless, inasmuch as the ICTY and ICTR seemingly changed this pattern to making significant strides in the area of sexual violence, the prosecution of rape and other forms of sexual violence (especially against women generally in times of peace and war) was relatively new but a colossal step in the right direction.

Rape, among other sexual offences, as evidenced in their Statutes, was not recognised as a standalone offence. It was subsumed under the broader categories of war crimes, genocide and crimes against humanity.²⁶ In addition, the word "rape" as used in the Statutes of the *ad hoc* Tribunals, was not defined therein. One of the objectives of this research is to explore the meaning of the word "rape" as used in the Statutes of

²² United Nations Security Council (hereinafter referred to as "UNSC").

²³ Articles 2, 3 and 4 of the ICTR and Articles 4, 5 and 3 of the ICTY, respectively.

²⁴ Article 1 of the ICTY and ICTR.

²⁵ De Wit *An Analysis of the Development of the Definition of Rape in International Criminal Law* 73.

²⁶ The formulation of the Statutes of the ICTY and ICTR evidence rape as a subset crime of genocide, crime against humanity and war crime. Article 5 of the ICTY together with Article 3 of the ICTR statutes expressly makes mention of rape as a crime against humanity, while, Article 3(3) of the ICTR provides that rape constitutes a grave breach of the Geneva Conventions. However, although the wording in the Statutes did not reflect this reality, the occurrence of rape in Rwanda and as construed by the *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T case suggested that rape could also be recognised as a constituent act of genocide. Be that as it may, these categories still do not define rape.

the *ad hoc* Tribunals as well as to analyse its constituent elements as a crime against humanity.

1.3 Research Methods

The qualitative method of research is used for this study. This method involves examining and reflecting on perceptions to gain an understanding of social and human activities. The study seeks to investigate the prosecution of the crime of rape by the UN *ad hoc* Tribunals, *viz*, the ICTY and ICTR, respectively, for a better understanding of the material and mental elements of the crime of rape as a crime against humanity in international criminal justice. The study also relies on the use of primary and secondary sources of law, such as international instruments, case law, journal articles, and academic books, as well as internet sources for the successful completion of this study.

1.4 Framework of the Study

Chapter One: Introduction

Chapter one serves as an introduction to the study, and it includes the background of the study, problem statement, research methods, framework of the study, scope and limitations of the study as well as the rationale and justification thereof.

Chapter Two: The historical evolution of rape within international law

Chapter two provides an overview of what is meant by the crime of rape and the historical development of the prosecution of rape in international criminal law.

Chapter three: The material and mental elements of rape: per the jurisprudence of the *ad hoc* Tribunals

Chapter three serves to evaluate the jurisprudence of these tribunals – the ICTY and ICTR - as well as the Trial and Appeal Chambers with a specific focus on the provisions relating to rape and the elements thereof.

Chapter four: Conclusion

This chapter serves as the general conclusion of this study.

1.5 Scope and limitations of the study

This study focuses solely on analysing the elements of the crime of rape as a crime against humanity, as construed and developed by the UN *ad hoc* Tribunals, *viz*, ICTY as well as ICTR. It seeks to investigate the material and mental elements of the crime of rape as well as its definitional elements as a crime against humanity, as developed through these Tribunals.

1.6 Rationale and justification

The UN *ad hoc* Tribunals have paved a way regarding the crime of sexual offences as a whole in international criminal justice. They were the first to provide the materials that enable any legal scholar to anatomise the offence of rape, whether as a crime of genocide, a crime against humanity and a war crime. The Tribunals' jurisprudence was relatively new and had a greater potential to cause uncertainty concerning the material and mental elements of rape. This study is relevant and necessary for a better understanding of the elements of rape as a crime against humanity, as prosecuted by the UN *ad hoc* Tribunals.

CHAPTER TWO

The historical evolution of rape within international law

2.1 Introduction

Rape is not a new phenomenon in international law. This chapter thus presents an overview of the legal framework applicable to the crime of rape in international criminal justice. It presents the historical background of the prohibition and prosecution of rape in international criminal justice that prevailed prior to the establishment of the UN *ad hoc* Tribunals, the ICTY and ICTR, followed by the discussion of these Tribunals themselves as well as their hybrid courts. However, this study first briefly delves into the general history of rape in international law.

2.2 Brief overview of rape in ancient times

Anciently, the laws regarding rape were still in the embryonic stage and thus very skeletal. If rape was not disregarded, it was often trivialised or mischaracterised. Rape was not recognised as a crime against humanity; if anything, it was considered a “socially acceptable behaviour well within the rules of warfare”.²⁷ During the Middle Ages, rape was considered a reward, a bonus for soldiers, and even became a way of measuring victory.²⁸

This atrocious conduct befell all women, internationally and nationally, irrespective of the primary grounds on which the conflict was fought, whether based on religion, ethnicity, politics or nationality, or a combination of all these.²⁹ The pain endured by women who were raped, surpassed any other when men as part of “friendly” forces, meant to protect them, also joined in on the rape.³⁰

²⁷ Askin *War Crimes Against Women* 21; De Wit *The Analysis of the Development of Rape in International Criminal Law* 5.

²⁸ Askin *War Crimes Against Women* 23; Brownmiller *Against our will: Men, women and rape* 10; De Wit *The Analysis of the Development of Rape in International Criminal Law* 5.

²⁹ Schabas *The UN International Criminal Tribunals* 52.

³⁰ Reports indicating women being raped by members of United Nations peacekeeping forces were issued; Another press reports were issued whereby women were sexually abused by UNTAC in Cambodia as well as by UN forces.

As MacKinnon puts it:

The world has never seen sex used this consciously, this cynically, this elaborately, this openly, this systematically, with this degree of technology and psychological sophistication, as a means of destroying a whole people.³¹

No reason could justify this inhuman behaviour; if any reason could be given, it might be attempted at psychological level. Nonetheless, the historical background shows evidence of common patterns in which rape was committed.

Firstly, rape was used as a weapon of terror and a tool for retaliation intended to humiliate the pride of a community.³² Among other things, rape symbolised a weapon which was appropriate to humiliate the victim's family and especially the male opponents, with the eventual goal to destroy the cultural fabric of a targeted group. For instance, the inevitable consequence of a traditional Muslim woman having been raped was to turn her into an outsider in her own family and the community at large, irrespective of her energetic resistance towards the attacker. As a result, the whole community perceived her as amounting to nothing but dirt, thus despoiled.³³

[If she admitted being raped] I would ask for a divorce-even if I had 20 children. I don't hate her, but the story is before my eyes. I feel very cold toward her. [Kissing her] is like kissing a dead body."-Husband of a 22-year-old Muslim woman who denies being raped by Serb soldiers.³⁴

Stigmatic perceptions like these often exacerbate the feeling of fear when victims are required to divulge the violation, and that, consequently, jeopardise the potential realisation of justice.³⁵ Moreover, women were commonly perceived as part of the "spoils" of war to which soldiers were entitled.³⁶ Deeply entrenched in this notion is the idea that women are property - chattel available to victorious warriors.³⁷

³¹ MacKinnon 1993 *Ms Magazine* 27.

³² The 'Rape of Nanking' in World War II is a clear example of such atrocities; the UN Women 2000, available at un.org/womenwatch/daw/public/w2apr98.htm.

³³ Davis 2000 *INT'L L.* 1237.

³⁴ Brownmiller *Against our will: Men, women and rape* 62.

³⁵ Askin and Koenig *Women and International Human Rights Law* 54-55.

³⁶ Brownmiller *Against our will: Men, women and rape* 34; for instance, In the history of Ancient Rome, the Roman men raped Sabine women to forcefully acquire wives for themselves from neighbouring communities.

³⁷ The UN response of Sexual Violence and Armed Conflict Available at un.org/womenwatch/daw/public/w2apr98.htm.

Lastly, rape occurred as a means of troop mollification. This is predominantly the case where victims are compelled into military sexual slavery.³⁸ For example, during World War II, one hundred thousand women and girls were subjected to military brothels at the hands of the Japanese government to serve as "comfort women" for its troops. Another common rape-camp was established in the Soviet city of Smolensk, where hundreds of Russian women and girls were captured under German occupation.³⁹ These perceptions, as evidenced in the aftermath of World War II, encourage acts of slavery and torture towards women and girls, consequently hindering the core values of human rights.⁴⁰

For the purposes of demonstrating widespread rape during that era, this section will cite only a few incidents evidencing women raped by men of all traits - race, nationality, religion, and ideology. In 1990, the Iraqi soldiers raped an estimated 5000 Kuwaiti women.⁴¹ After the sexually abused Kuwaitis women were returned to their land, the Rwandan women were also caught up in the vicious civil war in that country.⁴² Notwithstanding the situation where thousands of women were raped in occupied Europe, thousands more were also forced to enter brothels for Nazi troops. Soviet soldiers moreover raped German women. Furthermore, the women in Kashmir also suffered rape at the hands of the Indian army.⁴³

The following shows evidence of the reporting of sexual violence in the civil war that took place in South America:⁴⁴

Throughout Peru's 12-year internal war, women have been targets of sustained, frequently brutal violence committed by both parties to the armed conflict ... Women have been threatened, raped and murdered by government security forces, and women have been threatened, raped and murdered by the Communist Party of Peru-Shining Path. Often, the same woman is the victim of violence by both sides.⁴⁵

³⁸ Brownmiller *Against our will: Men, women and rape* 86-114.

³⁹ Brownmiller *Against our will: Men, women and rape* 62.

⁴⁰ As evidenced in the aftermath of World War II.

⁴¹ Askin and Koenig *Women and International Human Rights Law* 54-55.

⁴² Africa Watch, Rivanda, Talking Peace and Waging War: Human Rights since the October 1990 Invasion (27 February 1992).

⁴³ Watch 1993 *Human Rights Crimes in Kashmir: A Pattern of Impunity*.

⁴⁴ Americas Watch and the Women's Rights Project 1992 *Violence Against Women in Peru's Armed Conflict* 1.

⁴⁵ Americas Watch and the Women's Rights Project 1992 *Violence Against Women in Peru's Armed Conflict* 1.

There also emerged an ethnic conflict in Liberia where women were repeatedly raped.⁴⁶ Sadly, rape had become an inevitable consequence of war across all forms of conflicts. Equally, the pattern in which these mass rape crimes were committed, was evidence of the violation beyond mere coincidence. The incidents were rather perpetuated by the lust for power and control, which had the effect of eroding the community in a way that few weapons can.⁴⁷

Rape, during that time (times of war) and as in peace, violates a person in the most intimate way possible. The effects emanating from this form of violence surpass the actual attack on women's lives. In addition to the fear, anger, and hatred it instils in the actual victim, its powers also destroy the family and the fabric of society.⁴⁸ Be that as it may, in the midst of all the tragedies, there were already existing international legal responses to rape and some were eventually established; both categories are yet to be explored.

2. 3 International Legal Responses

2.3.1 Early codification of the prohibition of rape in international law

The prohibition of rape was recognised mainly within the confines of war and was not recognised as the heinous crime that it really is. One of the first prohibitions of rape was incorporated into the main military codes of their era and gradually developed thereon.⁴⁹ As early as Medieval times, the military codes of 1385 established by *Richard II* and of 1419 established by *Henry V* of England imposed capital punishment on those who committed the offence.⁵⁰

Rome, under *Totila the Ostrogoth*, was also among the first few in history to condemn rape.⁵¹ Furthermore, *Hugo Grotius*, a well-known Dutch jurist, asserted under the work "The Law of War and Peace" that the prohibition of rape distinguishes the more

⁴⁶ Swiss 1991 *Women and Children Gravely Mistreated*, The Guardian 21 May 1993.

⁴⁷ Gagro 2010 *Zbornik PFZ* 1311.

⁴⁸ The level of non-genital injuries women sustain from wartime rape varies, obviously, with the level of accompanying violence; Ashworth 1985 *Of Violence and Violation: Women and Human Rights* 101; McDonald 2000 *Colum. J. Transnat'l L* 39.

⁴⁹ Gagro 2010 *Zbornik PFZ* 1311.

⁵⁰ Winthrop *Military Law and Precedents* 1412.

⁵¹ He forbid his troops from raping Roman women; Walker *A History of the Law of Nations* 65.

civilised from the less civilised. He additionally stressed rape as impermissible for degrading the difference between men and animals, Christians and barbarians.⁵²

There was very little success, if any, in the efforts of the scholarly writing to outlaw rape. Be that as it may, the legislative framework took progressive steps in an attempt to combat further atrocities emanating from such an act and within the confines of conflict. The establishment of the General Orders No. 100 of 1863, otherwise known as the Lieber Code, became the basis for the codification of the customary laws of war.⁵³

Among the conducts prohibited by the Lieber Code were acts of wanton and unnecessary violence, of which rape was amongst the crimes understood to be "wanton violence" and thus not permitted.⁵⁴ Article 37 of the Lieber Code implicitly protects women against rape; it stated that "Union Soldiers must acknowledge and protect the religion and morality, private property, persons of inhabitants especially women in hostile countries occupied by them".

Rape was expressly categorised as a capital offence punishable by death and the law further permitted a superior to kill on the spot a perpetrator in cases where the perpetrator of such an act commits such violence contrary to the given order.⁵⁵ Additionally, rape was also recognised as one of the crimes punishable by all penal codes and for which an American soldier could face death or severe punishment for committing it.⁵⁶ The Lieber Code regarded rape as a crime of "troop discipline".⁵⁷

Moreover, the Declaration of Brussels which was adopted in 1874 set a basis for the introduction of the Hague Convention IV for respecting the laws and customs of war on land.⁵⁸ Both the Hague Conventions of 1899, together with its revised version, the Hague Convention IV of 1907, became the first to embody comprehensive normative

⁵² Scott *Classics of International Law* 20.

⁵³ General Orders No. 100 of 1863, hereinafter "Lieber Code".

⁵⁴ Mitchell 2005 *Duke Journal of Comparative and International law* 219.

⁵⁵ Article 44 of the Lieber Code.

⁵⁶ Article 47 of the Lieber Code.

⁵⁷ Mitchell 2005 *Duke Journal of Comparative and International law* 219, 224.

⁵⁸ Article XXXVIII of the Declaration of Brussels of 1874 stated that the "honour and rights of the family should be respected"; Also see Mitchell 2005 *Duke Journal of Comparative and International law* 219, 224.

principles regulating warfare on the basis of humanity.⁵⁹ This was followed by the formation of the League of Nations. In both their existences, nowhere do they explicitly provide for the law of rape. However, their respective reference to “family honour” and “the right to protection of honour” suggests that sexual violence, rape included, is prohibited.⁶⁰

The Preamble of the Hague Convention further declared that, in cases not included under the Convention, the inhabitants together with belligerents should resort to other already-existing principles of the law of nations as they are equally established by civilised people, from the laws of humanity and dictates of the public conscience.⁶¹

However, the concern regarding the prohibition of rape under this Convention seems to be mainly regarding its wording. The phrase “Protection against family honour” seems to reduce the crime of rape to a much lesser offence than it is. If anything, this legal response to prohibit rape just as the earlier ones, were not necessarily because it was within women’s rights to be protected from such acts in as far as their right to dignity is concerned.

Successors to the Hague Convention are the two multinational war-crimes tribunals, namely, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East known as the Tokyo Charter that were adopted to deal with the prosecutions of war crimes and punish war criminals.⁶²

⁵⁹ Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (1899); Hague Convention (IV) Respecting the laws and Customs of War on Land and its Annex: Regulations Concerning the Laws the Laws and Customs of War (1907) (hereinafter “Hague Conventions of 1907”).

⁶⁰ Article 46 of The Hague Conventions of 1907; Askin and Koenig *Women and International Human Rights Law* 13-17.

⁶¹ Askin and Koenig *Women and International Human Rights Law* 19.

⁶² The International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”) (1945) U.N.T.S. 280 (hereinafter “Nuremberg Charter”); The International Military Tribunal for Far East Tokyo (1946) T.I.A.S. 1589 (hereinafter “Tokyo Charter”).

2.3.2. *The establishment of the International Military Tribunals*⁶³

The International Military Tribunals in Nuremberg and Tokyo were established after the Second World War and focused on the basic principles of morality, natural law and international law. They aimed to prosecute the highest-ranked perpetrators of these atrocities.⁶⁴ The Nuremberg and Tokyo Tribunals were established to prosecute major war criminals of the European Axis countries.⁶⁵ The judges' commitment to prosecuting these atrocious conducts landed the Tribunals in the arena of international law and they were afforded requisite jurisdiction to prosecute war crimes and punish responsible individuals in an effective way.

Among the other achievements of the Tribunals, was the relatively new concept of "international individual criminal responsibility" incorporated in their Charters, purportedly to eradicate any form of impunity for heinous crimes committed. While some sang praises in commending the Tribunals for providing special legal remedies for the atrocities emanating from the Second World War, others criticised the Tribunals for their deficiencies and upheld the view that some of the charges encompassed in the Tribunals were retroactive and selectively applied.⁶⁶ Nevertheless, this section delves solely into the jurisprudence of rape as a crime against humanity in respect of the Nuremberg and Tokyo Tribunals.

2.3.2.1. The Charter of the International Military Tribunal, Nuremberg

In 1945, the Nuremberg Tribunal was established and as mentioned above, Article 6 of the Charter provided for the crimes which the Tribunal had jurisdiction over, which

⁶³ The Nuremberg Charter and the Tokyo Charter.

⁶⁴ McDonald *ILSA J. INT'L COMA L.* 663.

⁶⁵ The Allies had only investigated allegations of mass rape against the French and Belgian women, however, such investigations did not reach the prosecution stage due lack of sufficient efforts. but only the Germans and Japanese were tried respectively for crimes of peace, war crimes, and crimes against humanity. See Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter.

⁶⁶ Mettraux's anthology incorporates rich commendatory approaches of the Nuremberg, however, although all Allies acknowledge such, some also criticised it for not thoroughly documenting the commendatory approaches against the Tribunal, even when it had enough criticism to compel the prosecuting powers of their time to take remedial action thereon; See Mettraux G *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008); See also Boister N and Cryer R *The Tokyo International Military Tribunal: A Reappraisal*. (Oxford University Press, 2008).

are crimes against peace, war crimes, and crimes against humanity.⁶⁷ Rape could have been prosecuted as a crime against humanity under Article 6(c) of the Nuremberg Charter, which reads as follows:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on- political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁶⁸

The latter could have accordingly captured what rape truly is - nothing short of an inhumane act. Unfortunately, the trial proceedings which were conducted under the Nuremberg Tribunal did not seem to include the crime of rape or any form of sexual violence. The rape allegations during testimonies in court were handled in a reluctant manner; any mention of rape was only made in passing.

Nonetheless, the Control Council Law No. 10 was later adopted, in 1945, in order to prosecute lower-ranked criminals under the Allied military proceedings and became the first to list rape as a crime against humanity.⁶⁹ According to one scholar, the Control Council Law No. 10 formulated the following important principles:

- (1) that rape on a wide scale could be prosecuted as a war crime;
- (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and
- (3) that responsibility for such crimes could not be limited to military personnel and...liability could be attached to persons occupying other key positions.⁷⁰

2.3.2.2 The Charter of the International Military Tribunal for the Far East, Tokyo

The Tokyo Tribunal, established in 1946, was the second Tribunal that was set up for the prosecution of major war crimes in the Far East. Unlike Nuremberg, less literature was devoted to the Tokyo Tribunal.⁷¹ However, it similarly had jurisdiction over the crimes that were to be prosecuted, namely, crimes against peace, conventional war crimes and crimes against humanity, and none of these crimes made mention of rape

⁶⁷ Article 6(a), (b) and (c) of the Nuremberg Charter.

⁶⁸ Article 6 (C) of the Nuremberg Charter.

⁶⁹ Article III (1) (c) of the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945).

⁷⁰ Niarchos 1995 *Human Rights Quarterly* 672.

⁷¹ Boister and Cryer *The Tokyo International Military Tribunal: A Reappraisal* 358; Totani *The Tokyo War Crimes Trial* 355.

in the Charter.⁷² Though the crime was not prosecuted extensively, the Tokyo Tribunal accordingly charged rape under conventional war crimes as “inhumane treatment,” “ill-treatment,” and “failure to respect family honour and rights”.⁷³ According to the Tokyo Tribunal judgment records, about 20 000 cases of rape occurred during the attack on the city of Nanking during World War II.⁷⁴

The law of rape in this regard was developed to recognise rape as a crime against the woman herself, a crime against humanity.⁷⁵ It is a possibility that both the Nuremberg and the Tokyo Tribunals made a precedent for the ICTY and ICTR, as they all do not give a standard definition of rape.

2.3.3 Geneva Conventions of 1949⁷⁶ and Additional Protocol of 1977⁷⁷

The adoption of the Geneva Conventions IV became the first multilateral international agreements to both explicitly mention and prohibit rape. Article 27(2) thereof recognised rape, both in International and non-international armed conflict, as “an attack on a woman’s honour”.⁷⁸

Furthermore, their two Additional Protocols expanded specific protection of women. The Additional Protocol I provided that “women shall be the object of special respect and protected in particular against rape, forced prostitution and any other form of

⁷² Article 5(a), (b) and (c) of the Tokyo Charter, respectively.

⁷³ Article 5(b) of the Tokyo Charter recognised the Lieber Code and Hague Convention as laws of war prohibiting rape.

⁷⁴ Moreover, the Tokyo Charter featured that those at the command level in government had a duty to prevent any atrocity that they knew of and, failure thereto rendered them individually criminally responsible. General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota were held criminally responsible for, amongst other crimes, the crime of rape. Japanese military and civilian officials were also found guilty of rape for failing to ensure that their subordinates complied with international laws of war, as well as Admiral Toyoda who was later acquitted; See Roling and Ruter 1977 *The Tokyo Judgment* 445-456; See Goldstone 2002 *Res. J. Intl* 1279; Chang *The rape of Nanking: The Forgotten Holocaust of World*; see Parks 1973 *Military Law Review* 69-73 *War II* 73.

⁷⁵ Mitchell 2005 *Duke Journal of International and Comparative Law* 237; Lewis 2009 *Wisconsin Journal of International Law* 22.

⁷⁶ The Fourth Geneva Conventions (1949) hereinafter “Geneva Conventions IV”.

⁷⁷ Protocol Additional to the Geneva Conventions (1949), and relating to the Protection of Victims of International Armed Conflicts (1977) (AP I), (hereinafter “Additional Protocol I”); Protocol Additional to the Geneva Conventions (1949), and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (AP II), (hereinafter “Additional Protocol II”).

⁷⁸ Article 27(2) of the Geneva Conventions IV.

indecent assault” in international armed conflict.⁷⁹ Additional Protocol II forbids outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution, as well as any other form of indecent assault committed in non-international armed conflict.⁸⁰

Rape was rightfully recognised as a violation against a woman herself and not against the family or her husband, although rape seemed to have been treated largely as a moral offence in the wording “attack on women’s honour” as opposed to a serious human rights violation. The framing of rape in this regard poses a challenge, as its requirements go as far as the prosecutor having to prove the virginity or chastity of the woman in question, for which the general entitlement to physical security was insufficient.

This led up to the establishment of UN *ad hoc* Tribunals in the 1990s, which were designed to deal with atrocities emanating from both the Former Yugoslavia and Rwanda. However, before the latter is discussed, the study briefly provides an insight into other existing conventions in place to prohibit rape.

2.3.4 Other Conventions prohibiting rape

The customary international law regarding the crime of rape among other sexual violence offences, provides as follows: Article 1 of the Universal Declaration of Human Rights of 1948 protects the rights of every person in that they shall all be treated with equal dignity and in essence, includes the right to equality.⁸¹ Article 2 further guards against unfair discrimination of any sort, while Article 5 prohibits torture and inhuman acts.⁸² The International Covenant on Civil and Political Rights of 1966 speaks of freedom from torture and other cruel, inhumane or degrading treatment or punishment, and for every person to be treated equally and with dignity.⁸³ Article 3 of the International Covenant on Economic, Social and Cultural Rights of 1966 states that

⁷⁹ Article 76(1) and Article 77(1) Additional Protocol I.

⁸⁰ Article 4(2) (e) of the Additional Protocol II.

⁸¹ Universal Declaration of Human Rights (1948), (hereinafter “UDHR”).

⁸² See Article 2 of the UDHR.

⁸³ International Covenant on Civil and Political Rights (1966), (hereinafter “ICCPR”); See Article 7, 10, 26 and 27 of the ICCPR.

“The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.⁸⁴

Article 1 of the Declaration on the Elimination of All Forms of Discrimination against Women of 1979 declares that discrimination against women is unjust and constitutes an offence against human dignity.⁸⁵ Furthermore, Article 2 of the same declaration calls for all laws and customs discriminating against women to be abolished and for other existing UN human rights instruments to do the same.⁸⁶ The Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974 condemned all forms of atrocities committed against women and children during armed conflict.⁸⁷

The Declaration on the Elimination of Violence against Women of 1993 condemns any form of violence against women, and states that violence in any form, be it physical, sexual or psychological, including threats, coercion, or arbitrary deprivation of liberty is against the law.⁸⁸ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 1999 states that any person claiming to have been a victim of a violation of any right must submit communications to the Convention by the State Party and those doing it on the victim’s behalf must have consent to do so.⁸⁹

2.3.5 The UN *ad hoc* Tribunals

The UN *ad hoc* Tribunals, the ICTY and ICTR, were established by the UNSC to further its Chapter VII powers of the UN Charter vested in it and also dealt with situations that constituted a threat to international peace and security.⁹⁰ The ICTY was

⁸⁴ International Covenant on Economic, Social and Cultural Rights under Res 2200A (XXI) (1966).

⁸⁵ Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women Res 34/180 (1979).

⁸⁶ Convention on the Elimination of All Forms of Discrimination against Women Res 34/180 (1979).

⁸⁷ See Declaration on the Protection of Women and Children in Emergency and Armed Conflict Res 3318 (XXIX) (1974).

⁸⁸ Article 1 and Article 2 of the Declaration on the Elimination of Violence against Women Res 48/104 (1993).

⁸⁹ Optional Protocol to the Convention on the Elimination of Discrimination against Women Res A/54/4 (1999).

⁹⁰ Article 1 of the ICTY and ICTR, respectively.

established in 1993, while the ICTR was set up in 1994, to deal with serious crimes in international law, including the occurrence of the massive or systematic rapes.⁹¹

With all the developments regarding the laws governing rape in the international sphere, the jurisprudence of the ICTY and ICTR played the most significant role in breaking the silence around rape in international law. It also paved the way for subsequent instruments such as the ICC as well as the Special Court for Sierra Leone, which later came into operation. The advancement made by these Tribunals, the ICTY and ICTR, was such that rape could be prosecuted as genocide, a war crime and a crime against humanity. The ICTR Trial Chamber in the landmark case of *The Prosecutor v Jean-Paul Akayesu* not only recognised rape as a crime against humanity but further convicted it as genocide provided that it was employed to destroy, in part or in whole, a particular group.⁹²

The Tribunals further had to develop their own definition of rape, since from the inception of these Tribunals' statutes, rape was subsumed under broader crimes and had no definition. It was thus left in the hands of their respective Tribunals to develop their definitions of rape in international law. It is only recently that there slowly emerged a consensus on the definition of rape, both in terms of the *actus reus* and the *mens rea*, although some differences persisted.

2.3.5.1 Rape as a crime against humanity

As discussed earlier, the Tribunals did not have jurisdiction to prosecute rape as a standalone crime unless subsumed under broader categories of crimes which they had jurisdiction over. In addition to the establishment by the Tribunals of the material and mental elements of the specific crime of rape, rape could only be prosecuted as a war crime, genocide or a crime against humanity – each of which has a definitional aspect.

Article 3 and 5 of the ICTR and ICTY, respectively, defined rape as a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In *The*

⁹¹ There was a rough estimation of 60 000 commissions of rape in the Former Yugoslavia and about 500 000 Tutsi women were raped in Rwanda; See Article 1 of the ICTR.

⁹² *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T paras 685-734.

Prosecutor v Jean-Paul Akayesu, the court stated that the element of “Wide-Spread” entails large-scale or massive. Rape must have been a recurrent continuous action carried out collectively with considerably serious consequences and is directed against a cluster of victims.⁹³ Alternatively, rape must have been committed systematically. *The Prosecutor v Jean-Paul Akayesu* described systematic as “organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.” This policy need not be formal, but can be some form of a preconceived plan.⁹⁴

Moreover, the chapeau requirement of an attack against civilians or on certain catalogued discriminatory grounds was also necessary for the act of rape to constitute a crime against humanity.⁹⁵ Proof of non-consent could not have formed part of the element of rape given the circumstances under which the act arose. For instance, an attack which instils fear in people, is an example of “coercive circumstance” as it makes it impossible for the victim to give genuine and voluntary consent. Be that as it may, the *mens rea* of crime against humanity requires the knowledge of the attack. The material and mental elements of the specific crime of rape as defined by the Tribunals will be dealt with in the next chapter.

⁹³ *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T para 580.

⁹⁴ *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T para 580.

⁹⁵ *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T para 592.

CHAPTER THREE

The material and mental elements of Rape: per the jurisprudence of the *ad hoc* Tribunals

3.1 Introduction

In criminal law, whether national or international, constituent elements of any specific crime fundamental to determine criminal liability are called the material and mental elements of a crime, also known as the *actus reus* and *mens rea* respectively.⁹⁶ These concepts, respectively, entail physical conduct, omission or circumstances prohibited by law, and the mental element of intent or knowledge, giving rise to criminal liability.⁹⁷ In this case, the Statutes of the Tribunals give them jurisdiction over crimes, amongst which is rape. However, the constituent elements of rape were not inscribed into the statutes.⁹⁸ Generally, when such misfortune occurs, the courts, Tribunals, or any platform designed to interpret the law, steps in to play the significant role of providing elements of the crime in question.

However, this route poses possible adverse effects that lead to the development of different definitions of a crime by different courts, especially when there is no precedent to follow.⁹⁹ The topic at hand serves as the best example. Fortunately enough, after some consistencies, oscillations and inconsistencies in the construction of the meaning and elements of the crime of rape by the Trial and Appeal Chambers, a pattern that illustrates consensus on what constitutes rape as an international crime, gradually emerged. This put the Tribunals in the arena of international law for being the first-ever to define rape. Thus, the following reflects on the jurisprudential approach in delineating the material and mental elements of rape as a crime against humanity as developed by relevant Trial and Appeal Chambers of the ICTY and ICTR respectively.

⁹⁶ *Woolimington v DPP* 1935 AC para 462; Smith and Hogan *Criminal law* 43, 46.

⁹⁷ *Woolimington v DPP* 1935 AC para 462; Smith and Hogan *Criminal law* 43, 46.

⁹⁸ See the statutes of the ICTY and ICTR, respectively.

⁹⁹ In terms of the *stare decisis* principle, lower courts/tribunal are bound by the decisions of higher courts/tribunals when cases are similar or substantially similar; See *Prosecutor v Zlato Aleksovski* ICTY IT-95-14/1-A paras 110-111.

3.2 Defining rape

The Statutes of the Tribunals recognised rape as one of the grave crimes to be prosecuted under war crimes, genocide and crimes against humanity. However, the Statutes fell short of providing the definition of the crime of rape leaving the Tribunals to develop their own definitions. As a result, the Trial Chamber in *The Prosecutor v Jean-Paul Akayesu* case,¹⁰⁰ together with the Trial Chamber in the *Prosecutor v Anto Furundžija* case,¹⁰¹ became the leading cases in providing their own different elements of rape. While subsequent cases, one way or the other, seemed caught in between, they sgradually, more or less, reached the same conclusion. The *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* case, which came later, also played a fundamental role in outlining the crime of rape in international law.¹⁰²

In the Trial Chamber *Akayesu* case, rape is recognised as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.¹⁰³ The Trial Chamber *Furundžija* case defines rape as “a slight sexual penetration by a penis or an insertion of an object into a vagina or the anus by the perpetrator or of the mouth of the victim by the perpetrator’s penis by coercion or force or threat of force against the victim or a third person”.¹⁰⁴

The *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* case also seemed to concur with the *Furundžija* definition of rape except inasfar as the issue of consent was concerned. The court seemed to approve the approach implemented by the *Furundžija* case in considering, identifying and exploring the various definitions thereof within domestic legal systems. However, in doing so the court came to the conclusion that the “true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy.”¹⁰⁵ As

¹⁰⁰ *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T, hereinafter “*Akayesu*”.

¹⁰¹ *Prosecutor v Anto Furundžija* ICTY IT-95-17, hereinafter “*Furundžija*”.

¹⁰² *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* ICTY IT-96-23-T and IT-96-23/1-T.

¹⁰³ *Akayesu* para 598.

¹⁰⁴ *Furundžija* para 185.

¹⁰⁵ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* ICTY IT-96-23-T and IT-96-23/1-T, (hereinafter “*Kunarac*”) para 440.

such, the court stated that the issue of consent in the *Furundžija* case appears to be narrower than required in international law.

3.2.1 *Actus Reus*

The Trial Chamber *Akayesu* case emphasised its departure from the *actus reus* of rape adopted by the many national jurisdictions - the "non-consensual sexual intercourse".¹⁰⁶ The Trial Chamber contended that the latter definition is captured in mechanical descriptions of objects and body parts,¹⁰⁷ and thus fails to adequately reflect on the actual nature of rape as an international crime. According to the Trial Chamber, rape constitutes an insertion of objects beyond the sexual organ itself, including the insertion of objects as well as the use of bodily orifices not considered to be intrinsically sexual; insertion of a piece of wood or a bottle would be sufficient.¹⁰⁸

Furthermore, rape, like torture, was seen as nothing short of an aggressive and physical invasion of a sexual nature that violates upon personal dignity.¹⁰⁹ Thus, rape is defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".¹¹⁰ After drawing guidance from the Trial Chamber *Akayesu* case, the Trial Chamber *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* case endorsed the rape jurisprudence outlined in the Trial Chamber *Akayesu* case.¹¹¹

Similarly, *The Prosecutor v Alfred Musema* Trial Chamber also concurs with the conceptual approach set forth by the Trial Chamber *Akayesu* case.¹¹² It further defined the "physical invasion of a sexual nature" provision as aggression that is expressed in a sexual manner under conditions of coercion, as opposed to particular details of the body parts and objects involved.¹¹³ The Trial Chamber also acknowledged and emphasised the already noticeable finding, that the conceptual

¹⁰⁶ *Akayesu* para 597.

¹⁰⁷ *Akayesu* para 687.

¹⁰⁸ *Akayesu* para 686.

¹⁰⁹ *Akayesu* para 594.

¹¹⁰ *Akayesu* para 598.

¹¹¹ *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* ICTY IT-96-21-T paras 936, 940 and 962.

¹¹² *The Prosecutor v Alfred Musema* ICTR-96-13-T, (hereinafter "*Musema*").

¹¹³ *Musema* para 226.

definition in the Trial Chamber *Akayesu* case is broad enough to encompass all actions described in the rape outlined in the Trial Chamber *Furundžija* case and more.¹¹⁴ Praising the Chamber for defining that better accommodate evolving norms of criminal justice.¹¹⁵

The Trial Chamber *The Prosecutor v Sylvestre Gacumbitsi* case refined the test of rape as a crime against humanity, noting, “any penetration of the sexual organs of the victim by that of an aggressor, or by an object used to the same ends, constituted rape”.¹¹⁶ The stance taken by the latter became apparent when the Trial Chamber held that rape also accommodates elements beyond the ones mentioned.¹¹⁷ The new definition of the crime included penetration by objects, such as sticks and guns, as constituting rape.¹¹⁸

After observing the definitions of rape by the Trial Chambers of the *Akeyesu and Musema* cases, the *Furundžija* Trial Chamber diverged from their jurisprudence, particularly that of the *Akayesu* Trial Chamber. This was stimulated by the finding of the court that rape cannot be found in international law.¹¹⁹ The Trial Chamber *Furundžija* case contended that the only way to arrive at an accurate definition of rape as an international crime is by resorting to the general principles common to the major legal systems of the world.¹²⁰ Thus, rape is developed to be “the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus”.¹²¹ The Trial Chamber further held that “the forced penetration of the mouth by the male sexual organ is equally humiliating and degrading upon the victim’s human dignity” and should thus form part of the definition of rape.¹²²

¹¹⁴ *Musema* para 227.

¹¹⁵ *Musema* para 228.

¹¹⁶ *The Prosecutor v Sylvestre Gacumbitsi* ICTR-2001-64-T (hereinafter “*Gacumbitsi*”) para 6.

¹¹⁷ *Gacumbitsi* para 6.

¹¹⁸ *Gacumbitsi* para 65.

¹¹⁹ *Furundžija* para 176.

¹²⁰ *Furundžija* para 176.

¹²¹ *Furundžija* para 185.

¹²² *Furundžija* para 185.

Subsequent to the observations from earlier judgments, the Trial Chamber *Kunarac* case concluded that specific elements of rape could not be found in the statute or international instruments.¹²³ Thus, the Trial Chamber endorsed the mechanical definition of rape outlined in the Trial Chamber *Furundžija* case; moreover, the Appeals Chamber has also elaborated on the issue of consent,¹²⁴ and defined the *actus reus* of rape as follows:

The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.¹²⁵

Interestingly, the definition of rape by the Trial Chamber in *The Prosecutor v Laurent Semanza* case was initially adopted from the Trial Chamber *Akayesu* case.¹²⁶ It also recognises rape as "physical invasion of a sexual nature in coercive circumstance and was not limited to forcible sexual intercourse". However, in the Appeal Chamber *Semanza* case, the Chamber withdrew from the initial jurisprudence of rape outlined in its Trial Chamber case to endorsing a narrower approach by the Appeal Chamber in the *Kunarac* case.¹²⁷

The reasoning of the Appeal Chamber in the *Semanza* case reasoning with respect to the sudden change in approach is motivated by the comparative analysis of the Appeal Chamber in the *Kunarac* case. Thus, the *actus reus* of rape was redefined as "non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the

¹²³ *Kunarac* para 437.

¹²⁴ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* ICTY IT-96-23 and IT-96-23/1-A, (hereinafter "the Appeals Chamber in the *Kunarac*") also stated, in addition, to the issue of consent that 'resistance' by the victim need not be established.

¹²⁵ The Appeals Chamber in the *Kunarac* para 460; *Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milošević, Mlado Radić and Zoran Žigić* ICTY IT-98-30/1 Trial and Appeal Chambers endorsed the definition by the Trial Chamber *Kunarac* case.

¹²⁶ *The Prosecutor v Laurent Semanza* ICTR-97-20-T (hereinafter "*Semanza*") para 332.

¹²⁷ *The Prosecutor v Laurent Semanza* ICTR-97-20-A, (hereinafter "the Appeal Chamber in the *Semanza*") para 208.

mouth of the victim by the penis of the perpetrator".¹²⁸ It was required that consent be given voluntarily, freely and further assessed on the surrounding circumstances.¹²⁹

The Appeal Chamber in the *Semanza* case, moreover, noted that any other acts of sexual violence which do not fall within the parameter of this narrow definition should be prosecuted under other crimes against humanity within the jurisdiction of the Tribunal, including torture, enslavement, persecution as well as other inhumane acts.¹³⁰ The Trial Chambers in *The Prosecutor v Juvénal Kajelijeli* and *The Prosecutor v Jean de Dieu Kamuhanda* also described the physical elements of rape, and thus refrained from adopting the analysis provided by the *Akayesu* Trial Chamber.¹³¹

The change in jurisprudential approaches to rape by the *Semanza* case led to subsequent Rwandan Chambers resorting to the mechanical definition of rape set forth by the *Kunarac* case.¹³² Some chambers departed from the strict requirements and sought to reconcile the mechanical definition in the Appeals Chamber *Kunarac* case with the conceptual definition in the Trial Chamber *Akayesu* case. According to *The Prosecutor v Mikaeli Muhimana*:

The chamber considers that *Furundžija* and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape – as was done in *Semanza* – actually are substantially aligned to this definition and provide additional details on the constituent elements of rape.¹³³

The Trial Chamber *Muhimana* case takes the view that the respective definitions of rape in the Trial Chamber *Akayesu* case and the Appeals Chamber in the *Kunarac* case are, in fact, not substantially different in their application.¹³⁴ While the Trial Chamber *Akayesu* case broadly referred to a "physical invasion of a sexual nature", the Appeals Chamber in the *Kunarac* case, on the other hand, provides parameters that would amount to the physical invasion of a sexual nature as constituting rape.¹³⁵ The

¹²⁸ The Appeal Chamber in the *Semanza* para 344.

¹²⁹ The Appeal Chamber in the *Semanza* para 344.

¹³⁰ The Appeal Chamber in the *Semanza* para 345.

¹³¹ *The Prosecutor v Juvénal Kajelijeli* ICTR-98-44A-T, (hereinafter "*Kajelijeli*") para 915; *The Prosecutor v Jean de Dieu Kamuhanda* ICTR-95-54A-T, (hereinafter "*Kamuhanda*") para 706.

¹³² See *The Prosecutor v Sylvestre Gacumbitsi* ICTR-2001-64-T endorsing the issue of consent by the Appeals Chamber in the *Kunarac* case.

¹³³ *Prosecutor v Mikaeli Muhimana* ICTR-95-1B-T, (hereinafter "*Muhimana*") para 118.

¹³⁴ *Muhimana* para 118.

¹³⁵ The Appeals Chamber in the *Kunarac* para 440.

Muhimana Trial Chamber thus endorsed the broad definition of rape, which also incorporates the elements outlined in the Appeals Chamber *Kunarac* case.¹³⁶

3.2.1.1 The issue of Consent

3.2.1.1.1 Trial Chamber *Akayesu* case

The “coercive circumstance” provision in the Trial Chamber *Akayesu* case does not require physical force.¹³⁷ If anything, it relates to the possibility of giving consent to sexual intercourse by the victim of rape. Threats, intimidation, extortion and other forms of duress, which prey on fear or desperation, would suffice to be coercive, and the Trial Chamber *Akayesu* case further stated that coercion is inevitable in certain circumstances.¹³⁸ For instance, war which instils fear in people, is an example of “coercive circumstance” as it makes it impossible for the victim to give genuine and voluntary consent. The Trial Chamber in *Prosecutor v Delalić, Mucić, Delić, and Landžo* also affirmed the latter.¹³⁹ Proof of non-consent is thus not an element.¹⁴⁰

3.2.1.1.2 Trial Chamber *Furundžija* case

The sexual activity in the Trial Chamber *Furundžija* case is accompanied by “force or threat of force to the victim or a third party”. The Trial Chamber stated that, in these circumstances, sexual activity occurs in the absence of consent as the victims become particularly vulnerable, and they are unable to give genuine consent thereto. Furthermore, the Trial Chamber emphasised that any form of captivity vitiates consent, which the Trial Chamber in the *Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić and Zoran Žigić* case also endorsed.¹⁴¹

3.2.1.1.3 Trial Chamber *Kunarac* case

¹³⁶ The Appeals Chamber in the *Kunarac* para 440.

¹³⁷ *Akayesu* para 688.

¹³⁸ *Akayesu* para 688.

¹³⁹ *Prosecutor v Delalić, Mucić, Delić, and Landžo* ICTY IT-96-21-T para 688.

¹⁴⁰ *Akayesu* para 689.

¹⁴¹ *Furundžija* para 271; *Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić and Zoran Žigić* ICTY IT-98-30/1-T para 178.

The Trial Chamber *Kunarac* case found that the provision of “force or threat of force to the victim or a third party”, by the Trial Chamber *Furundžija* case, is not sufficient to accommodate the question of consent when dealing with rape in international law. According to the *Kunarac* Trial Chamber, it is too narrow to render “an act of sexual penetration non-consensual or non-voluntary”.¹⁴² Thus, the Trial Chamber additionally stated that genuine consent for this purpose must be given voluntarily and as per the victim’s free will, assessed in the context of the surrounding circumstances.¹⁴³ There need not be a physical force to prove coercion, and even its absence is sufficient to demonstrate the absence of consent.¹⁴⁴ The definition does not cater for implied consent.

3.2.1.1.4 Appeals Chamber *Kunarac* case

The Appeals Chamber in the *Kunarac* case approved its Trial Chamber's definition of rape, ruling that it would be “absurd on the facts” to require “resistance” to be established as an element of rape.¹⁴⁵ The Chamber furthermore stated that although “force or the threat of force” shows clear evidence of non-consent, it does not, however, form part of the element of rape *per se*. This is for the simple reason that it might allow perpetrators to evade liability for the crime, where the victim did not give genuine consent, as the latter definition mainly focuses on the presence of physical force.¹⁴⁶

Thus, the Chamber ruled that consent must be given voluntarily of the victim’s own free will as assessed in the context of the surrounding circumstances.¹⁴⁷ The Appeal Chamber *Gacumbitsi* judgement adopted the definition by the *Kunarac* case, recognising consent as one of the elements required to constitute rape. The Appeals Chamber in the *Kunarac* case found that non-consensual penetration can be divided into three categories:

- 1 the sexual activity is accompanied by force or threat to the victim or third party;

¹⁴² *Kunarac* paras 439-441.

¹⁴³ *Kunarac* paras 440; 459.

¹⁴⁴ *Kunarac* para 459.

¹⁴⁵ The Appeals Chamber in the *Kunarac* paras 128- 133.

¹⁴⁶ The Appeals Chamber in the *Kunarac* paras 127-132.

¹⁴⁷ The Appeals Chamber in the *Kunarac* paras 127-132.

- 2 the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- 3 the sexual activity occurs without the consent of the victim.¹⁴⁸

3.2.2 *Mens Rea*

The Tribunals have not said much about the *mens rea* element of rape. However, the judgement in the *Prosecutor v Dusko Tadic* case established the *mens rea* element required for crimes against humanity as intent as well as knowledge of the crime that has been committed.¹⁴⁹ More specifically, the *Kunarac* Trial Chamber stated that the *mens rea* of rape was the “intent to penetrate the victim sexually with the knowledge that it occurred without the consent of the victim”. The *Prosecutor v Radoslav Brdanin*¹⁵⁰ and *Kajelijeli*¹⁵¹ Trial Chambers also affirm the latter jurisprudence.

¹⁴⁸ The Appeals Chamber in the *Kunarac* para 442.

¹⁴⁹ *Prosecutor v Dusko Tadic* ICTY IT-94-1-T para 503.

¹⁵⁰ *Prosecutor v Radoslav Brdjanin* ICTY IT-99-36-T para 1008.

¹⁵¹ *Kajelijeli* para 915.

CHAPTER FOUR

Conclusion

The 20th century marks a significant stride in the development of the offence of rape in international law. The change in perception reflected the shift mainly from viewing rape as “the spoils of war” to the grave crime that it is. Rape was aligned with crimes known for their heinous nature, which, consequently, equates rape as a serious crime. This dramatic milestone is mainly a result of the establishment of the ICTY and ICTR. Under the *ad hoc* Tribunals, rape was prosecuted only as subsumed under the broader categories of genocide, war crimes, or crimes against humanity.¹⁵²

Among other crimes, rape was recognised as a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.¹⁵³ Another great contribution by the Tribunals, which brings us to the objective of this study, is their advancement in outlining the jurisprudential approach to the mental and material elements of rape as derived from various Trial and Appeal Chambers. Ultimately, the Tribunals determined the elements of rape as gradually agreed upon through an interpretation from these cases, as the definition of rape was not included within the statutes of the Tribunals.

The landmark case of the *Akayesu* is the first ever to recognize rape as a crime constituent to genocide and equally being the first in international law to establish a conceptual definition of rape. The subsequent Trial Chamber case of *Furundžija* provides a narrower approach which requires “penetration” as opposed to “sexual invasion”. Both of these cases are said to derive their different jurisprudence of rape, respectively, from the use of principles of international law and the jurisdiction of national laws.

More specifically, the Trial Chamber *Akayesu* case defines rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.¹⁵⁴

¹⁵² See the Statutes of the ICTY and ICTR, respectively.

¹⁵³ Article 3 and 5 of the ICTR and ICTY, respectively.

¹⁵⁴ *Akayesu* para 598.

To meet the requirements of rape as construed by the latter case, one must have been physically assaulted, accompanied by evidence that the rape had indeed occurred. This distinguishes rape from other forms of sexual violence.

Furthermore, the *Akayesu* definition accordingly allowed any means that might have been used beyond the actual use of body organs and was also gender-neutral. However, the only issue with this adopted definition of rape would be its broadness and generic nature. Inasmuch as the definition emphasises the seriousness of the offence, the definition also makes it difficult to capture and understand its elements, thus leaving it wanting in substance.

The Trial Chamber *Furundžija* case established a narrower approach that is more fluid and contained an expressive definition of rape. According to the *Furundžija case* rape is “a slight sexual penetration by a penis or an insertion of an object into a vagina or the anus by the perpetrator or of the mouth of the victim by the perpetrator’s penis by coercion or force or threat of force against the victim or a third person”.¹⁵⁵

It is worth noting that the definition provided in this case does not radically depart from the one provided for by the *Akayesu* case. If anything, this one provides for specific acts that are constituent to the acts considered to be rape. This decision was ultimately adopted by many subsequent cases within the Tribunals over a broad definition by the Trial Chamber *Akayesu* case. The word “Penetration” makes the offence a gender-specific one in which only females may be victims of rape. The decision in that regard seems gender-biased in consideration of incidents that occurred in an armed conflict where men were also victims of sexual violence. Furthermore, although the definition seems precise to a certain extent, the issue was more on the question of consent.

On the one hand, the *Akayesu* case in this regard recognised that “coercive circumstance” suffices as the necessary element in the crime of rape and it need not take place in the presence of physical force. The Trial Chamber *Furundžija case*, on

¹⁵⁵ *Furundžija* para 185.

the other hand, considers coercion, force, or threat of force against a victim or third person as proof of non-consent.

In a different trial that dealt exclusively with sexual violence, that is the Trial Chamber *Kunarac* case, the case equally concurred with the conclusions made by the *Furundžija* case, while elaborating on the issue of consent in that regard. The Trial Chamber *Kunarac* incorporates the following broad categories of consent concerning the crime of rape:

- 1 the sexual activity is accompanied by force or threat of force to the victim or a third party;
- 2 the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- 3 the sexual activity occurs without the consent of the victim.¹⁵⁶

However, there seems to be an issue with the condition of the lack of consent. Consent should not form part of the element of rape for the following simple reasons. Firstly, it blurs out the nature of the crime with the connotation that victims could consent to rape. Secondly, questions of determining consent in a clear case of coercive circumstances or force should remain irrelevant. Not only is it painful and humiliating on the side of the victims, but insulting too as they undermine the circumstances in which the sexual violence took place. Moreover, the fact that the burden of proof lies with the prosecutor also does not help much as it once again subjects the victim to an inquiry of whether he/she consented to it.

For those reasons, the lack of consent by the victim should not be the requirement for determining the crime of rape. Coercive circumstances should suffice in which physical force is a mere factor and not a requirement. Be that as it may, the *Akayesu* and *Furundžija* Trial Chamber cases played an important role in the development of today's definition of rape in international law, particularly in terms of the issue of consent and the physical definition with the ultimate contribution by the *Kunarac* Trial Chamber defining rape as:

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the

¹⁵⁶ *Kunarac* para 460.

mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.¹⁵⁷

Furthermore, without undervaluing the remarkable progress made by the Tribunals, it seems that the full coverage of the offence of rape is falling short. It could be argued that rape should have been prosecuted as a standalone offence, and not as a subset of other grave crimes. The statutes of the Tribunals fail to bring rape to the fore as an independent crime; this unintentionally trivialize the offence, and failure to prosecute it as such consequently seems to portray the offence as less distinctive.

Be that as it may, the outstanding legacy of the Tribunals continues to live on, giving precedence to the International Criminal Court for which its statute encompassed a codified standard definition of rape, and thus continues to develop the laws concerning rape.¹⁵⁸ The statute of the International Criminal Court serves as the first-ever international instrument to codify the elements of rape, enumerating rape as a crime against humanity as well as a war crime, in both internal and non-international armed conflict.¹⁵⁹ The ICC defines the *actus reus* of rape, irrespective of whether rape is prosecuted as a war crime or as a crime against humanity, as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁶⁰

This definitional element of rape was built on those used at both the ICTY and ICTR cases of *Akayesu*, *Furundžija*, and *Kunarac*.¹⁶¹ The Pre-Trial Chamber of the

¹⁵⁷ *Kunarac* para 460; *Prosecutor v Miroslav Kvočka, Dragoljub Prcać, Milošica Kos, Mlado Radić and Zoran Žigić* ICTY IT-98-30/1 Trial and Appeal.

Chambers endorsed the definition by the Trial Chamber *Kunarac* case.

¹⁵⁸ The Rome Statute of the International Criminal Court (1998) ISBN No. 92-9227-227-6.

¹⁵⁹ Article 7 and Article 8 of the Rome Statute of the International Criminal Court (1998) ISBN No. 92-9227-227-6, (hereinafter "ICC").

¹⁶⁰ Article 6 of the ICC.

¹⁶¹ *Akayesu* paras 597, 688; *Furundžija* para 402; *Kunarac* para 460.

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui played a significant role in elaborating on the elements of rape under the ICC.¹⁶² The first paragraph in the definition rightfully avoids a typically narrow description of sexual penetration where only insertion of a sexual organ into that of another is required. It focuses on a more complex form of invasion, i.e. sexual penetration by any part of the body or even by an object. Moreover, the change in terminology from “penetration” to “invasion” enhances the gender-neutral aspect of the definition.¹⁶³ The ICC has broadened the definition such that it acknowledges that both males and females can be victims of rape.

In addition, the elements of rape encompass the use of force or coercion as a fundamental element. The broad latitude given to the terms “coercion” and “force” by the ICC as elements, anticipates the full range of circumstances in wartime.¹⁶⁴ In particular, a threat against a third person is sufficient to satisfy this element.¹⁶⁵ Furthermore, the ICC’s definition covers individuals who, for various reasons, cannot give consent due to age, mental or physical condition, or infirmity.

The definition of rape under the ICC does not focus on the *mens rea* of the crime but rather dwells on the material element of the crime of rape. However, the deed can only be criminalised with the presence of the *mens rea* element. Article 30(1) of the ICC deals with the *mens rea* of crimes punishable by the ICC, which presupposes that the material elements be “committed with intent and knowledge”. Therefore, the required *mens rea* of the crime of rape under the ICC is that the perpetrator must (1) intend to invade the body of a person resulting in penetration, and (2) know that the invasion was committed through the use of force, threats, coercion, or by taking advantage of a coercive environment, or a person incapable of voluntarily consenting.¹⁶⁶

¹⁶² *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 OA (hereinafter “*Prosecutor v Katanga and 1 other*”) para 438- 441.

¹⁶³ *Prosecutor v Katanga and 1 other* para 649.

¹⁶⁴ *Prosecutor v Katanga and 1 other* paras 438- 441; *Akayesu* para 688.

¹⁶⁵ Weiner 2013 *Boston College Law Review* 1214.

¹⁶⁶ *Prosecutor v Katanga and 1 other* paras 438- 441.

It is worth noting that this definition of rape only qualifies as a crime against humanity if committed as part of a widespread or systematic attack directed against a civilian population. Therefore, the perpetrator ought to have known that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.¹⁶⁷ Whilst rape as a war crime is the conduct that took place in the context of and was associated with an international armed conflict, the perpetrator must have been aware of factual circumstances that established the existence of armed conflict.¹⁶⁸ It is from this definitional context that one can identify the intentions of the then President of Sierra Leone in combating the atrocities of the internal conflict that plagued the nation by establishing the Special Court of Sierra Leone, as it is known today.¹⁶⁹

In 2007, after reviewing the jurisprudence by the ICTY, ICTR and ICC, the Special Court Sierra Leone also took the task upon itself to deal with the issue of defining the crime of rape in the Trial Chamber case of *Prosecutor v Alex Tamba Brima*.¹⁷⁰ Article 2(g) of the SCSL Statute had already enumerated rape as a crime against humanity. However, the Article did not provide its constituent elements thereof. It is for this reason that the Trial Chamber case of the *Prosecutor v Alex Tamba Brima*¹⁷¹ developed its own definition of rape as follows:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
2. The intent to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.¹⁷²

The latter Trial Chamber's definition of rape was derived from the ICTY *Kunarac* case, which adopted the national domestic definition of rape.¹⁷³ The Trial Chamber, in this

¹⁶⁷ Article 7 (1)(g) of the ICC.

¹⁶⁸ Article 8 (2) (e) (vi) of the ICC.

¹⁶⁹ Letter of President of the Republic of Sierra Leone, President Alhaji Ahmad Tejan Kabbah, U.N Doc S/786 (2000).

¹⁷⁰ Statute of the Special Court for Sierra Leone 2178 U.N.T.S 145 (2002) (hereinafter "SCSL"); See *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* SCSL-04-16-A, (hereinafter "*Prosecutor v Brima and 2 others*") para 202.

¹⁷¹ *Prosecutor v Brima and 2 others* para 202, 693.

¹⁷² *Prosecutor v Brima and 2 others* para 202, 693.

¹⁷³ *Kunarac* para 460.

case, also stated, just as in the *Kunarac* case, that “force or threat of force” is only the factor determining “lack of consent” and not the element of rape per se.¹⁷⁴ Moreover, “Consent of the victim must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surroundings ... in situations of armed conflict coercion is, to a large extent universal”. It should also be noted that continuous resistance by the victim and physical force are factors indicating coercion; however, are not a requirement thereof. The element of consent does not apply to children below the age of 14 as they are incapable of giving valid consent.”¹⁷⁵

Two years later in 2009, the SCSL Trial Chamber in the case of *Prosecutor v Sesay, Kallon and Gbao*¹⁷⁶ adopted a different definition of rape, although, just as in the former case, the accused was charged with rape as a crime against humanity. The Trial Chamber re-visited the history of rape as a war crime and as a crime against humanity, and arrived at the following definition of rape:

1. The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological or abuse of power or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
3. The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
4. The Accused knew or had reason to know that the victim did not consent.¹⁷⁷

The first two paragraphs are derived from the ICC definition of rape,¹⁷⁸ whilst the last two are derived from the ICTY *Kunarac* judgment.¹⁷⁹ The definition of rape by this Trial Chamber consists of two *actus reus* elements necessary to constitute rape, the

¹⁷⁴ *Prosecutor v Brima and 2 others* para 694.

¹⁷⁵ *Prosecutor v Brima and 2 others* para 202.

¹⁷⁶ *Prosecutor v Sesay, Kallon and Gbao Case No. SCSL-04-15-T* (hereinafter “*Prosecutor v Sesay and 2 others*”) para 145.

¹⁷⁷ *Prosecutor v Sesay and 2 others* para 145.

¹⁷⁸ Article 7 (1) (g)1, Article 8 (2) (e) (vi) of the ICC.

¹⁷⁹ *Kunarac* para 460. However, the third paragraph does not fall within the *mens rea* element encompassed in Article 30 of the ICC which requires the material element to be committed with intent and knowledge.

first element providing for different types of invasion, while the other provides for the circumstances which deem the first *actus reus* element to be criminal.

In terms of the first *actus reus* element, in paragraph one, it is a requirement that there should be at least one of the following two types of penetration, however slight. The first part of the provision refers to the penetration of a sexual organ into any part of the body of either the victim or the accused,¹⁸⁰ be it genital, anal, or oral penetration. Furthermore, it also refers to the penetration of any object or any other part of the body into the genital or anal opening of the victim. This definition of invasion inclusively dictates that both men and women can be victims of rape.

The second *actus reus* element refers to the circumstance which criminalises the act in the first *actus reus* element - lack of consent. In essence, this element describes those cases where the person could not be said to have given voluntary or genuine consent to the act. The use of force or threat is sufficient evidence to prove a lack of consent; however, it is not a requirement. The court went on to say that even in the absence of force or coercion, a person cannot genuinely give consent if they do not have the capacity to make informed decisions, for instance, where a person is too young, under the influence of some substance or where a person is suffering from an illness or disability.¹⁸¹

The Trial Chamber case of *Prosecutor v Sesay and 2 others*¹⁸² also has a two-part *mens rea* requirement, in paragraph 3 and 4 of the definition above. The first part of *mens rea* is that "the Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur". The second one is that "The Accused knew or had reason to know that the victim did not consent". To fulfil this requirement, the onus rests upon the prosecutor to prove beyond a reasonable doubt that the accused was aware or had reason to be aware of the coercive circumstances which rule out the possibility of genuine consent.¹⁸³ The "had reason to know" Clause is mostly used in a situation where the accused, in fact, denies knowing about the

¹⁸⁰ *Prosecutor v Sesay and 2 others* para 146.

¹⁸¹ *Prosecutor v Sesay and 2 others* paras 147-148.

¹⁸² *Prosecutor v Sesay and 2 others* para 145.

¹⁸³ *Prosecutor v Sesay and 2 others* para 112.

alleged victim's lack of consent.¹⁸⁴ Through the developments that took place, it looks promising that rape might soon be prosecuted not as subsumed under any other crime but as an independent crime under customary international law.

¹⁸⁴ *Prosecutor v Pavle Strugar* Case No. IT-01-42-A para 299–301.

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