

# Kunarac: Defining Rape under International Criminal Law

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WERNER HOFSS, OCT 16 2016

## Introduction

The last decade of the 20<sup>th</sup> century was plagued by two devastating conflicts in former Yugoslavia and Rwanda.[1] In both situations grave atrocities were committed and women, as is sadly always the case, were disproportionately the targets of rape and other forms of sexual violence.[2] The international community reacted by, amongst other things, establishing two Tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY)[3] and International Criminal Tribunal for Rwanda (ICTR).[4] The purpose of these tribunals was to ensure that the atrocities would not go unpunished.[5] Acts of sexual violence fell within the jurisdiction of these tribunals,[6] and the first major conviction of rape occurred in the Kunarac case.[7] Kunarac represented the first time that a case dealt solely with sexual violence, underlining the international community's willingness to recognise women's vulnerability to mass atrocities.[8] The Trial Chamber was faced with the issue of determining what the word rape entailed,[9] something complicated by the extreme nature of the situations which it had taken place.[10] This became difficult with regards to the inclusion, or not, of the element of consent in the definition.[11] In light of these problems this case analysis shall tackle the role of consent in definition of rape under international criminal law. Should the definition of rape contain an element of consent?

We shall start this analysis by exposing the facts of Kunarac, including the indictments and verdict, and by elaborating briefly on the importance of a qualitatively strong definition of rape in international criminal law. We shall also elaborate on the requirements necessary for a crime to be a Crime Against Humanity (CAH) or War Crime (WC). This because the context of crimes under international criminal law distinguishes them from crimes at the national level which impacts the definition thereof. Then, we shall proceed to examine the definitions that were in place before Kunarac, the Akayesu and Furundzija definitions. Followed by an examination of the definition offered in Kunarac in which the element of consent was introduced. We shall proceed to critically analyse this element, exposing its critiques and advantages. Finally, we shall expose the manner in which Kunarac was used in subsequent cases of the Tribunals, most importantly in Gacumbitsi.

## The Playing Field

### *The Facts*

In April 1992, Foča, a municipality and city in Bosnia and Herzegovina, fell victim to an attack by Serb forces. These forces rounded up all of the Muslims and separated the men from the rest.[12] The assailants then created what have been called "rape camps".[13] The women and girls that were forced to stay in these places and survived will probably never recover fully from the horrors that were inflicted on them, having been detained and raped for months before having been sold to other soldiers.[14] In relation to these atrocities three men, Kunarac, Kovač and Vuković, were charged. All soldiers,[15] they were accused of having raped, facilitated rape, degraded, humiliated and sold women and girls as young as twelve.[16] All three men were convicted of rape as a CAH and as a WC as well as a number of other crimes.[17] The Kunarac case put a number of questions in front of the Court concerning, amongst other things, the nexus between rape and WC and concerning the definition of sexual slavery.[18] However, the most

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important issue faced by the Chamber was, arguably, the definition of rape itself. Kunarac was the first major conviction, of rape,[19] making its approach to the definition influential. The importance of what the Tribunal considered as being rape cannot be stressed enough and is shown the ICTR's subsequent decision to take up the question *proprio motu*. [20]

## *Rape as WC or CAH*

Rape, and other criminal acts, under international criminal law do not exist in a vacuum and it is important to be aware of the context in order to be able to fully appreciate the importance of certain elements in the definition of the criminal acts in question.[21] The Trial Chamber, in Kunarac, being faced with rape as both a WC and as CAH, we shall shortly elaborate on the requirements that exist for a crime to be considered as being a part of either of these. For a crime to be considered a WC as found under article 3 of the ICTY Statute[22] there are two main prerequisites namely, that there is an armed conflict going on and that there is a "nexus" between the act and the armed conflict.[23] Once these requirements are met the act must fulfil four further conditions: (1) it must be against international humanitarian law; (2) the rule must be part of international customary law; (3) the violation must be serious and cause grave harm; (4) the rules must allow for individual criminal responsibility.[24] The conditions for a crime to be a CAH are that there must be a widespread or systematic attack, which the perpetrators are a part of, that is directed against a civilian population and that the perpetrator must know that his acts are part of this attack.[25] It is only once these elements have been fulfilled that the Tribunals consider the definition of rape itself, meaning that the Tribunals only consider rape when it is a "direct result of [an] armed conflict"[26] or when it is part of a "a widespread or systematic attack directed against a civilian population".[27] A definition of rape under international criminal law must thus fit within this context.[28]

## **Multiple Definitions**

### *Paving the Way*

The Trial Chamber of the ICTY, in Kunarac, did not start from scratch. Multiple definitions of rape had already been established and used in earlier cases.

### *Akayesu*

The first case in which an international criminal tribunal defined rape was the Akayesu case of the ICTR.[29] The Chamber, having to adjudicate on rape but lacking a definition, was forced to create one.[30] The definition given by the Court was that rape constituted "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[31] This definition was intentionally made to be broad[32] and conceptual,[33] and without an element of consent.[34] The Court arrived at this definition by making an analogy to torture, a crime to which the victim cannot consent.[35] The first case of rape that the ICTY considered was Čelebići,[36] in which it fully embraced the Akayesu definition, [37] even further discussing the torture analogy.[38]

### *Furundzija*

However, in Furundzija the ICTY defined rape in a different manner and marked the first deviation from Akayesu. It stated that raped constituted:

- "the sexual penetration, however slight:
- of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- of the mouth of the victim by the penis of the perpetrator;
- by coercion or force or threat of force against the victim or a third person." [39]

This definition was arrived at after the court stipulated that there existed no definition of rape under international criminal law and,[40] thus reverted to a comparison of national laws in order to encounter common elements that

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could be used in an international definition.[41] It is unclear why the Chamber did not consider the Akayesu definition as being a definition of rape under international law and it has been argued that the conceptual nature of the Akayesu definition was the reason for the creation of a different definition by the Court.[42] This definition clearly differentiates itself from the Akayesu definition in being more “mechanical”. [43] It involves an explicit description of acts and body parts, something that was not done in Akayesu.[44] This route was chosen seeing as that the Chamber had to decide whether forced oral sex fell within the definition of rape,[45] and that the Chamber wanted a specific definition of rape so as to be in line with the principle of *nullum crimen sine lege*. [46] Nevertheless, this new definition is in line with Akayesu in that it does not mention an element of consent and sticks to the idea of “coercion”. [47] Later, Musema chose to follow the Akayesu definition, emphasising the divide between it and the Furundzija definition. It stated that a mechanical definition could not fully encapsulate the concept of rape.[48]

## *Kunarac: The Definition*

When the time came for the Chamber to adjudicate it thus had the choice between two definitions: Akayesu and Furundzija. Both definitions however avoided the element of consent. The Court decided to take the mechanical route,[49] whilst adding the element consent to the definition. Rape was defined, for third time, as being:[50]

- “the sexual activity is accompanied by force or threat of force to the victim or a third party;
- 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
- the sexual activity occurs without the consent of the victim.”[51]

The Court arrived at this decision by undertaking, once again, an analysis of various national law definitions of rape. It concluded that consent was a common element in a great number of systems and thus considered it as being a necessary element of the definition.[52] Furthermore, it argued that the lack of the element of consent in Furundzija created a gap in the law,[53] arguing that a situation might exist where someone might not consent to the sexual act without there being any coercion, force or threat.[54] The idea of the Court was thus to broaden the definition so as to include cases in which the victim was, amongst other things, drugged or incapacitated.[55] This was done because the coercive element in the case, which concerned situations of detention, was not considered as evident.[56] This definition is at odds with previous ones given by both the ICTR and by the ICTY itself. The two main conflicts between the definitions are conceptual as opposed to mechanical[57] and coercion as opposed to consent. The latter being the conflict upon which we shall now elaborate.

## **Analysis of Kunarac**

The element of consent to the definition raises a number of questions and concerns.

### *The Context of CAH and WC*

The first major concern one can raise with the inclusion of the element of consent in the definition of rape is that it fails to realise in what context these crimes take place.[58] As mentioned earlier, before the Court even looks at cases of rape the act has already been considered as being part of a widespread or systematic attack against a civilian population or as being a direct result of an armed conflict.[59] Meaning that proving a sexual act was not consented to can seem redundant considering the existence of circumstances that would negate the possibility of any genuine consent.[60] It has been argued that including consent because it is a common element found in numerous national systems is inappropriate because it cannot be used for situations in which international criminal law applies, situations of mass atrocities and conflict.[61] A comparison often made is that of national laws which, in circumstances such as sexual acts between detainees and guards, prevent the giving of consent.[62] It is argued that such an impossibility of the giving of consent should be applied in international criminal law.[63] This argument has two flaws. One, it stipulates that national criminal laws cannot simply be copied into the realm of international criminal law while, at the same time, arguing that national criminal law should be copied into international criminal law. Two, it does not necessarily imply that consent should not be an element of the crime of rape, it merely indicates situations in which genuine consent cannot be considered as having been given. This reasoning actually makes consent a crucial

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element in the definition of rape because it underlines the importance for genuine consent to sexual acts as being the distinguishing factor between a legal sexual act and an illegal one.[64]

## *Consenting to CAH or WC?*

A second point of critique is that such consent implies that a CAH or a WC could indirectly be consented to.[65] The analogy is often made to crimes which do not have an element of consent such as murder, grievous bodily harm or torture, in all of which the consent of the victim does not matter.[66] This was done by the ICTR in Akayesu in relation to torture.[67] There are two points of concern that can be mentioned. First, such a form of indirect consent would cross the line between the context to which a certain (sexual) act is linked and the (sexual) act itself.[68] In order for an act to be a CAH or a WC it must be a criminal act linked to a certain context. One cannot say that an act that is not criminal becomes criminal solely because it is undertaken within the context of an armed conflict or widespread or systematic attack against a civilian population.[69] The argument has however been made, by some, that this should be allowed in such situations.[70] Secondly, the analogy to crimes to which no consent is possible always concern crimes which involve serious harm to the body or mind.[71] However, when it comes to sexual acts this does not always necessarily have to be the case.[72] It is understandable that a person should not be allowed to consent to his own torture however, arguing that one is not able to consent to any sexual act raises several questions with a regards to "sexual autonomy".[73] That is not to say that a lack of genuine consent cannot be presumed based on coercive circumstances as would (almost) always exist in rape cases in international criminal law.

## *Rule 96*

Furthermore, the Rules of Procedure that apply to the ICTY and ICTR, stipulate that consent can, in certain cases, be used as a defence against rape charges.[74] The use of consent as a defence would imply that it is not an element of the crime.[75] as such and should not come up unless the defence brings it up.[76] Such an approach would put the burden of proof for consent on the defence.[77] A desirable approach because obliging the prosecution to ask victims whether they consented to the act is absurd and redundant in a context of armed conflict or of an attack against civilians.[78] The Court however did not see this defence as technical, meaning that it has to be present before moving on towards the consideration of defences.[79] The Court argued that the rule merely "serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given".[80]

## *Burden of Proof*

This points out another problem, the Kunarac approach puts the burden of proof on the prosecution. This is undesirable, whether or not it goes against the Rules of Procedure, for various reasons.[81] including the aforementioned need to ask victims of rape whether they consented. [82] However, the Chamber, in its definition, stated that there could be circumstances that would be coercive so as to remove the possibility of genuine consent.[83] Considering the context in which these acts take place, and the fact that the prosecution would already have to prove the link of the act to this context, one can consider the threshold for coercive circumstances in cases of rape as part of international criminal law to (almost) always have been reached when it comes time for the prosecution to prove a lack of consent.[84] Such an approach of course retains consent as an element of the crime but, in fact, puts the burden of proof on the accused who would have to then prove genuine consent within the restrictions of Rule 96.[85]

## *Effect on Victims*

An additional element to consider is the effect of such a definition on the victims.[86] The inclusion of the element of consent can be insulting towards victims in the sense that it is implied that there might be consent to the act.[87] Furthermore, this could have the side-effect of deterring potential victims and/or witnesses from coming forward due to the feeling that the definition of rape is not in conformity with reality.[88] These arguments are both valid concerns and must be taken into account by both the Court and the prosecution however there are also other ways in which these fears can be overcome that do not imply changing the definition of rape. Using the circumstances to presume a

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lack of consent is one such possibility. Furthermore, the abovementioned removal of a person's sexual autonomy by stating that their consent is irrelevant to the definition of rape can also be seen as insulting and, to some, even as patronising in that, decisions are being made for them.[89] A system in which consent is an element of the crime but that proving it is an easy/non-existent task, due to circumstances, could offer a fair balance.

## *Why Include Consent?*

The inclusion of consent also has a few positive elements. The findings of the court that consent is a common element amongst a number of national law definitions is not wrong and having definitions that have already been tried in domestic systems can be beneficial to the Court.[90] Furthermore, it is also important to take into account the rights of the accused to a fair trial.[91] If one considers Rule 96 one can see that claims of sexual assault do not have to be corroborated.[92] This favours the prosecution and,[93] in combination with the other limitations found in Rule 96,[94] can be seen as broad a restriction on the rights of the accused.[95] The importance of fair trials in international criminal law cannot be understated and removing the element of consent from the definition of rape could make proceedings (seem) unfair, removing from the Tribunals' credibility.[96]

## **Rape Post-Kunarac**

The definition given by the Trial Chamber in 2001 has not been left untouched and other charges of rape have since been brought in front of International Tribunals.[97]

## *Kunarac Appeal*

The Kunarac case itself proceeded to the Appeals Chamber.[98] The Appeals Judgement did not touch upon the definition provided by the Trial Chamber,[99] and also upheld the findings concerning enslavement[100] and the nexus between rape and the armed conflict.[101] It only accentuated or clarified certain points, the definition of rape as provided by the Trial Chamber was concurred with in its entirety.[102] It, for example, underlined the importance of the definition not be too narrow.[103] This seems at odds with the mechanical nature of the definition, as opposed to, the more conceptual Akayesu definition.[104] Further, the Appeals Judgement stated that, due to the context in which international criminal law applies, the possibility of genuine consent is almost impossible.[105] This does not mean that consent is not an element of the crime,[106] just that it will probably never be the element left unproven so as to prevent a conviction for rape.[107]

## *Choices of Definitions*

Since Kunarac, the Courts have thus had to deal with either the Akayesu definition or the Kunarac definition.[108] In some of the cases, such as Niyitegeka,[109] the Chambers followed the conceptual approach laid down by Akayesu whereas in others, such as Semanza, Kajelijeli and Kamuhanda,[110] they followed down the path that was laid out by Kunarac without questioning it.[111] However, in the Muhimana case the ICTR decided to take another route,[112] instead of choosing between the two definitions. It considered the Kunarac definition as falling within the broader definition of rape as found in Akayesu.[113] The Court, in the end, stipulated that it "[endorsed] the conceptual definition of rape established in Akayesu" but that doing so did not mean that it rejected the Kunarac definition.[114]

## *Gacumbitsi*

The Trial Chamber in Gacumbitsi did not explicitly refer to the definition it chose and cited both Akayesu and Kunarac.[115] It did however concur with Muhimana insofar as that it considered the Kunarac definition as being part of the Akayesu definition.[116] The case was appealed and the prosecutor requested an elaboration on the element of consent.[117] The Chamber took a clear stance in favour of the inclusion of consent as being part of the definition of rape.[118] It also explicitly stated that the burden of proof was on the prosecution.[119] Nevertheless, it did make clear that coercive circumstances, which would render the giving of genuine consent impossible, could be inferred from context,[120] meaning that there would be no need to "focus on the victim's conduct" as much.[121] The

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Chamber clarified that the accused could still claim that there was consent, consent that would need to be proven within the framework of Rule 96.[122] It expressed that the Rules of Procedure could not affect the ICTR Statute and that thus the “defence” of consent was no more than a set of rules on how to prove consent.[123]

## **Conclusion**

To conclude, this analysis has shown that including consent in the definition of rape has divided jurisprudence. As shown at the beginning of this paper, before a crime can be considered as being a CAH or a WC it must be part of a widespread or systematic attack against a civilian population or be a direct result of an armed conflict. The first ever definition of rape in such contexts, given by Akayesu, was conceptual and omitted mentioning the element of consent, only making mention of coercion. In Furundzija the ICTY deemed this definition too vague, creating a new, mechanical, definition that, also, only included coercion. Kunarac was the first case to include consent in its definition and with this came a lot of debate and criticism. The non-inclusion of consent is supported by the idea that in the contexts of CAH and WC genuine consent is never possible and should thus not be a necessary element to be able to prove rape. Within this line of argumentation consent can still be used as a defence under strict conditions, as indicated in Rule 96. The opposite approach is also possible, that of including consent as an element of rape that has to be proven by the prosecution. This approach places an extra burden on the prosecution. However, such a burden can be alleviated or even removed completely if one considers the circumstances as being of such gravity to make genuine consent (almost) impossible. This is the approach that was taken by the Appeals Chamber in Gacumbitsi, where the ICTR attempted to bring together the Akayesu and Kunarac definitions whilst still remaining more on the side of Kunarac by retaining the element of consent.[124] Even though the definitions seem to now no longer be as conflicting as before a number of questions still remain. The mechanical nature of the definition, for example, poses a number of problems with regards to the exclusion of certain acts.[125] Finally, with the closing down of the ICTY and the taking over of cases by national court system of Bosnia and Herzegovina,[126] as well as with the definition of rape under the International Criminal Court,[127] concerns regarding the role of consent in the definition of rape remerge. This can make one wonder to what extent the unifying exercise of the Appeals Chamber in Gacumbitsi was useful.

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