
The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape

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Abstract

The article analyses the over 20 years' jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda with respect to the crime of rape. It discusses how the attitude towards the prosecution of sexual crimes has changed since the Tribunals work began and what impact its jurisprudence has had on other attempts to define rape (elements of crime [EOC]). The article explores in depth the various definitions of rape given by the different chambers of both Tribunals. Consequently, it examines if the ultimate definition of the Kunarac chamber will prevail in international law. Not only are the weaknesses of the Kunarac definition that followed a pure consent approach revealed but the EOC of rape that opted for a combination of the coercion approach with one aspect of the lack-of-consent doctrine (incapacity) also face criticism. This leaves only one response – namely, that the elements of rape in international criminal law today can only be based upon a newly conducted comparison of national laws, thereby reflecting the general principles of the major legal systems of the world. The strongest accomplishment of both Tribunals concerning the crime of rape therefore lies not in the clarification of the elements of rape but, rather, in the revelation of a law-finding method, which is indispensable to the rudimentary field of international criminal law.

1 Introduction

An era has come to an end. The ad hoc International Criminal Tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR) have closed their doors. The ICTR completed its mandate in 2015, and the ICTY just rendered its last two

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judgements.¹ For over 20 years, the chambers of both Tribunals have interpreted crimes and many general legal issues of international criminal law that were in need of clarification. But the ad hoc Tribunals dedicated, in particular, great attention to one crime: the crime of rape. The Tribunals' contribution to the definition of rape is the focus of this article.

The jurisprudence of the Tribunals reveals that the definition of rape is based on a comparison of national laws according to Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute).² Due to the different approaches in domestic rape laws, rape is either committed through force or threat of force ('civil law' approach) or without consent ('common law' approach). The Tribunals' ultimate choice of the lack of consent as the decisive element of the offence has been questioned. The author argues that the Tribunals' definition will not prevail in international criminal law because of the deficits of a pure lack-of-consent solution. Already, the Preparatory Commission to the International Criminal Court (ICC) has opted for the 'civil law' approach (coercion) in devising its elements of crime (EOC) but added one aspect of the 'common law' approach (incapacity to give genuine consent) to the element of coercion. Nonetheless, this approach is not persuasive either; the combination of coercion with one aspect of the lack-of-consent doctrine protects two different legal wrongs in one offence (violent rape and sexual abuse), which reflect different degrees of guilt in the perpetrator's mind. The author comes to the conclusion that only a new comparison of the revised national laws would reveal an accurate definition of rape in international criminal law.

2 General Impact of the Tribunals' Jurisprudence

The ad hoc Tribunals for the former Yugoslavia and Rwanda were the first international criminal courts since the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE). Since that time, no international prosecution of international crimes has taken place. The Cold War had paralysed the development of international criminal law entirely. At the beginning of the 1990s, international criminal law represented an incomplete mixture of the provisions taken from international humanitarian and international human rights law. Rape had been contemplated as a 'by-product of war' and ignored by the IMT

¹ UN Doc. S/RES/1503 and 1534 (2015), available at www.icty.org/sid/10016. The three-phase plan foresaw that the investigation phase would be completed by the end of 2004, the trial phase would end in 2008 and the Tribunal would complete its work by the end of 2010. The first phase was met, but the other two dates could not be complied with due to late arrests and, simply, the complexity of some of the cases. Most of the proceedings were completed by 2013. The last proceedings against Ratko Mladić and Jadranko Prlić (Bruno Stojic, Slobodan Praljak, Milivoj Petkovic V. Alentin Coric and Berislav Pusic) ended in November 2017.

² Statute of the International Court of Justice 1945, 59 Stat. 1031.

and IMTFE, despite sufficient evidence.³ There was an uncertainty as to whether and to what extent rape represented an individually punishable war crime under international law.⁴

Since 1993, the ICTY has charged 161 individuals in 70 proceedings. The defendants have been politicians, high- and middle-ranking military and police officers of different ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and Macedonia. Thirty-seven individuals in 25 proceedings have been convicted for sexual crimes.⁵ From 1994 until 2015, the ICTR has prosecuted 93 individuals in a total of 75 cases. The perpetrators have been senior politicians including Prime Minister Jean Kambanda, mayors of municipalities, influential businessmen and military and militia members. Twenty-one of the 75 cases dealt with allegations of rape.⁶

These ad hoc Tribunals are pioneers in the clarification and condemnation of sexual violence in war situations. They have brought to light the truth about the frequency of rape in war and the destructive impact on victims and society as a whole.⁷ The judgments have shown that rape is committed during wartime as frequently as

³ Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', 17 *Human Rights Quarterly* (HRQ) (1995) 649, at 650–651; Gardam and Charlesworth, 'Protection of Women in Armed Conflict', 22 HRQ (2000) 148, at 152–158; MacKinnon, 'Crimes of War, Crimes of Peace', in E. Richter-Lyonette (ed.), *In the Aftermath of Rape: Women's Rights, War Crimes and Genocide, Report by the Coordination of Women's Advocacy* (1997) 13; Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory', 29 *Harvard Journal of Law and Gender* (2006) 201; Kohn, 'Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia', 24 *Golden Gate University Law Review* (1994) 199, at 204–205; Brownmiller, 'Making Female Bodies the Battlefield', in A. Stiglmayer (ed.), *Mass Rape, The War against Women in Bosnia-Herzegovina* (1994) 180, at 182: 'When the military history is written, when the glorious battles for independence become legend, the stories are glossed over, discounted as exaggerations, deemed not serious enough for inclusion in scholarly works. And the women are left with their shame.' *Trial of the Major War Criminals before the International Military Tribunal*, 14 November 1945–1 November 1946, 42 vols (1947), vol. 6, at 404–405. The French prosecutor uttered: 'The Tribunal will forgive me if I avoid citing the atrocious details', although he did not hesitate to mention other violence in detail. Further, the so-called 'Molotov Note' proved many cases of rapes, sexual mutilation and forced prostitution.

⁴ Rape was only mentioned as a crime against humanity in Art. 5(1)(g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) 1993, 32 ILM 1159 (1993). This uncertainty is also reflected in the indictments of the prosecutor of the ICTY. Since the prosecutor initially could not be sure whether the judges would consider a rape charge as a violation of the principle of legality because the offence of rape was not listed as a war crime in international treaty law until the adoption of the ICTY Statute, rape was first prosecuted under catch-all offences such as 'inhumane and cruel treatment', 'outrages upon personal dignity' or as an act of other offences, in particular 'torture'.

⁵ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), 'In Numbers', September 2016, available at www.icty.org/en/features/crimes-sexual-violence/in-numbers.

⁶ United Nations International Residual Mechanism for Criminal Tribunals, 'The ICTR in Brief', available at <http://unictr.unmict.org/en/tribunal>.

⁷ Before the jurisprudence of the ad hoc Tribunals, the subject of sexual violence in war was a taboo. Rape was considered an unimportant 'by-product' of war and, thus, inevitable. For many others, see Niarchos, *supra* note 3, at 650–651; Tompkins, 'Prosecuting Rape as a War Crime: Speaking the Unspeakable', 70 *Notre Dame Law Review* (1995) 850; C. Bassiouni and M. McCormick, *Sexual Violence, An Invisible Weapon of War in the Former Yugoslavia* (1996), at 4; Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley Journal of International Law* (2003) 288, at 300.

killings and ill-treatment and cause equally as severe, if not even longer-lasting, consequences for victims and for society than other non-sexual abuses.⁸ Due to a lack of representation by female lawyers and politicians in the past, crimes committed mainly against the female population have too often been overlooked.⁹ The Tribunals have ensured that treaties and conventions that prohibit the crime of rape on paper are finally being put into practice.¹⁰ The Tribunals' 20 years of jurisprudence has resulted in this theoretical international criminal law becoming an indispensable part of today's international law system. The world community now uses this field of law to limit or prevent renewed outbreaks of violence by holding the initiators of violence individually responsible.¹¹ The international crime of rape can no longer be ignored as it was before the ad hoc Tribunals were established. If there is a prosecution of war crimes, no court can afford to let rape go unnoticed. This represents significant progress in the fight against violence against women in armed conflict situations.

The Trial Chambers of both the ICTY and the ICTR have not only drawn attention to the crime of rape, but they have also proven that rape is an international crime. Rape was prosecuted and sentenced for the first time under several international core crimes (*chapeau* crimes). The ICTY prosecuted forced sexual intercourse as a war crime (torture, inhuman or cruel treatment, outrages upon personal dignity, rape) and as a crime against humanity (enslavement, torture, rape, persecution and inhumane acts).¹² Unfortunately, the Tribunal reached no conviction for genocide involving the numerous rapes of Muslim Bosnian women by Bosnian-Serbian soldiers due to a lack of proof of the genocidal intent.¹³ However, many Trial Chambers have clarified that

⁸ A. Adams, *Der Tatbestand der Vergewaltigung im Völkerstrafrecht* (2013), at 39.

⁹ Since the 1990s, the participation of women in decision-making positions in all areas (politicians, journalists, non-governmental organization delegates, judges, prosecutors and professors) has ensured that the crime of rape was freed from taboos and ultimately convicted. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *American Journal of International Law (AJIL)* (1999) 97, at 98; Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2008) 1 with further references.

¹⁰ The prohibition of rape is mentioned in Hague Convention IV on Respecting the Laws and Customs of War on Land 1907, 187 CTS 227, Art. 46; Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55 (1946), Art. 2(1)(c); Geneva Conventions 1949, 1125 UNTS 3, Art. 3(1)(c); Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Art. 27(2); Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Art. 76(1); Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, Art. 4(2)(e).

¹¹ Examples are the establishment of the Special Tribunal for Lebanon, the initiation of investigations before the International Criminal Court (ICC) against the followers of Muammar Gaddafi's regime in Libya and Bashar al-Assad's regime in Syria.

¹² See the extensive analysis in Adams, *supra* note 8, at 222.

¹³ How is it possible to condemn mass killings as genocide, while mass rape under the same campaign against the same group by the same offenders falls short of showing a genocidal intent? The argument for this is unconvincing and has been heavily criticized in feminist literature. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu', 44 *Columbia Journal of Transnational Law* (2006) 940, at 949; Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', 99 *AJIL* (2005) 778, at 785; K. Greve, *Vergewaltigung als Völkermord* (2008), at 226, 239.

rape constitutes genocide mainly under the second alternative in Article 4(1)(b) – causing serious bodily or mental harm to the group – as well as under the third alternative in Article 4(1)(c) of the Statute of the International Criminal Tribunal for the former Yugoslavia – deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.¹⁴

The ICTR was the first court that prosecuted forced sexual intercourse as genocide. The Trial Chamber also affirmed in its substantive legal findings that rape might constitute genocide as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and as imposing measures intended to prevent birth within the group. Further, it prosecuted rape as a crime against humanity (torture, rape and persecution) and as a war crime (torture and outrages upon personal dignity).¹⁵ The jurisprudence also established that any rape per se meets the *actus reus* of torture,¹⁶ enslavement¹⁷ and persecution,¹⁸ if the other elements of the crime are present. In addition, the more recent jurisprudence of the

¹⁴ ICTY Statute, *supra* note 4. Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber I, 10 December 1998, § 172; Judgment, *Krstić* (IT-98-33-T), Trial Chamber I, 2 August 2001, § 513; Judgment, *Stakić* (IT-97-24-T), Trial Chamber II, 31 July 2003, § 516; Judgment, *Brdjanin* (IT-99-36-T), Trial Chamber II, 1 September 2004, §§ 690, 691; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber III, 24 March 2016, § 545; Judgment, *Mladić* (IT-09-92-T), Trial Chamber I, 22 November 2017, §§ 3434, 3462, 3489, 3491, 3522.

¹⁵ Adams, *supra* note 8, at 267.

¹⁶ Judgment, *Mucić* (IT-96-21-T), Trial Chamber I, 16 November 1998, §§ 481–496; *Furundžija*, *supra* note 14, §§ 264–267; Judgment, *Kunarac* (IT-96-23-T, IT-96-23/1-T), Trial Chamber II, 22 February 2001, §§ 465–496; *Brdjanin*, *supra* note 14, §§ 483–485; Judgment, *Kvočka* (IT-98-30/1), Trial Chamber I, 2 November 2001, §§ 142–151; Judgment, *Kunarac* (IT-96-23-A, IT-96-23/1-A), Appeals Chamber, 12 June 2002, §§ 149–151; Judgment, *Bralo* (IT-95-17-S), Trial Chamber III, 7 December 2005, § 15; Judgment, *Haradinaj* (IT-04-84-T), Trial Chamber III, 3 April 2008, § 127. It is regrettable that not every rape was classified as torture by the International Criminal Tribunal of Rwanda (ICTR), although the additional requirements of torture had been met (e.g., Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber I, 2 September 1998; Judgment, *Gacumbitsi* (ICTR-2001-64-T), Trial Chamber III, 17 June 2004; for a counter-example where rape was prosecuted as torture, see Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber III, 15 May 2003). This contradictory sentencing practice leads to an uncertainty in the understanding of the offence of torture. The Tribunal is bound by the charges (counts) of the prosecution; hence, the Tribunal must not assess the underlying facts of the case differently than the prosecution had charged them. The non-condemnation of rape as torture in some cases can be attributed to the defective indictment discretion of the prosecutor and not to the Tribunal's assessment that not every rape constitutes torture. Therefore, before the ICTR, rape also constitutes without further review a torture method.

¹⁷ Rape was convicted only in one case (*Kunarac*) as enslavement, although more women were raped in captivity and were treated like the property of the guards.

¹⁸ Judgment, *Tadić* (IT-94-1-T), Trial Chamber II, 7 May 1997, §§ 694–718 (Fellatio); Judgment, *Todorović* (IT-95-9/1-S), Trial Chamber III, 31 July 2001, §§ 1–15, 36–40, 117 (Fellatio); *Krstić*, *supra* note 14, §§ 514–518, 533–538; *Kvočka*, *supra* note 16, §§ 184–186, 189; *Stakić*, *supra* note 14, §§ 735–736; Judgment, *Nikolić* (IT-94-2-S), Trial Chamber II, 18 December 2003, §§ 108–109; Judgment, *Sikirica* (IT-95-8-T), Trial Chamber III, 13 November 2001, §§ 22, 125; *Bralo*, *supra* note 16, §§ 5, 15, 16; Judgment, *Krajisnik* (IT-00-39-T), Trial Chamber I, 27 September 2006, §§ 734–747, 1179, 1182, 1183; *Brdjanin*, *supra* note 14, §§ 992–994, 1002–1004; 1008–1013; Judgment, *Milutinović et al.* (IT-05-87-T), Trial Chamber II, vol. III, §§ 766, 785, 788; *Karadžić*, *supra* note 14, §§ 496, 511; *Mladić*, *supra* note 14, § 3232; Judgment, *Bagosora* (IT-98-41-T), Trial Chamber I, 18 December 2008, §§ 2208–2209. In *Semanza*, *supra* note 16, §§ 347–348, no conviction for persecution was reached, but the Chamber interpreted rape as a possible conduct to commit persecution.

Tribunal awarded the crime of rape the status of an independent war crime.¹⁹ This now makes it possible to prosecute the act according to its character as a crime of violence. The rules that are used to protect the dignity of a person (Article 3(1)(c) of the Geneva Convention) should no longer be used for the crime of rape.²⁰ Further, there is no more distinction between rape in an international or an internal armed conflict.²¹ Rape is a crime in any armed conflict.

A point of criticism, however, is the collective prosecution of several rapes of various victims by several perpetrators charged under one count.²² Inevitably, the chamber only has to address one conviction instead of many, and, therefore, the trial is more economical. The disadvantage is that the conviction of multiple rapes of several victims as one offence does not reflect the extent and severity of the actual events. Only one conviction for rape would appear in the verdict, both for the offender who raped several women on several occasions as well as for the offender who raped only one woman. The problem of the accumulation of various offences should therefore be resolved at the sentencing level and not during the examination of the individual criminal responsibility. Although international criminal law does not separate cleanly between the individual criminal responsibility of an offender and the multiplicity of offences, it would have been a minimum requirement of a lawful conviction to work out the number of rapes charged under one count.

Even more critical is the conviction of multiple rapes of one victim or many different victims together as a single act²³ or with other criminal acts (for example, ‘murder’, ‘torture’, ‘assault’) together as one count of persecution.²⁴ The reason for this course of action is again trial economics. If the prosecution is willing to reduce multiple charges to one count, the defendant is more willing to give a confession and the trial ends faster with a sure conviction. However, the full extent of the individual acts of the perpetrator will not be revealed since not every act is considered in detail. The much shorter fact-findings in judgments with only one count of persecution compared to those with several counts corroborate this statement.²⁵ However, the real accomplishment of the ad hoc Tribunals lies in the development of a definition of rape as an international crime and the impact it has had on the creation of the EOC.

¹⁹ *Kunarac*, Trial Chamber, *supra* note 16, § 436.

²⁰ Geneva Conventions, *supra* note 10.

²¹ *Mucić*, *supra* note 16, §§ 475–477; *Furundžija*, *supra* note 14, §§ 165–169; *Kunarac*, Trial Chamber, *supra* note 16, §§ 408, 436; *Kvočka*, *supra* note 16, §§ 123–124.

²² For examples, see *Akayesu*, *supra* note 16, in which 32 victims of rape (unclear how many rapes every woman had to endure) were summarized in one count 13; *Gacumbitsi*, Trial Chamber III, *supra* note 16, in which eight rape victims, unclear whether multiple rapes were committed against the victims, were summarized in one count 5.

²³ *Kunarac*, Trial Chamber, *supra* note 16, §§ 636–656, 685.

²⁴ *Todorović*, *supra* note 18, §§ 1–15; *Nikolić*, *supra* note 18, §§ 33–37, 49; *Sikirica*, *supra* note 18, § 13; *Karadžić*, *supra* note 14, §§ 2500–2506; *Mladić*, *supra* note 14, §§ 3232, 3289, 3291.

²⁵ Compare *Nikolić*, *supra* note 18, §§ 33–37, 49 with the first indictment.

3 What Are the Requisite Elements of Rape?

This question first faced Trial Chamber I of the ICTR against the accused Jean Paul Akayesu.

A Sexual Invasion under Coercive Circumstances

Due to the general principle of legal certainty (*nullum crimen sine lege certa*), it was necessary to prove that the material elements of rape could be deduced from the sources of international law. The Trial Chamber could not find a generally accepted definition of rape in international (criminal) law. Only national criminal justice systems possessed rape definitions.²⁶ These definitions were limited to a mechanical transcription of the act on the basis of body parts and objects. However, the chamber refused to apply a similar definition of rape in international criminal law. It favoured a broad definition that considered any sexual invasion under coercive circumstances as the *actus reus* of rape. The chamber deduced this definition from the torture definition in the United Nations' Torture Convention.²⁷ The Torture Convention does not list specific acts constituting the offence but, rather, incorporates the aim of the perpetrator in order to include all imaginable cruel conduct as torture. This concept appeared to the Trial Chamber to be an efficient approach in international criminal law. Just like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. With torture, rape is a violation of personal dignity and could, in the presence of other conditions (involvement of a person in authority), ascend to torture.²⁸

The chamber defined rape as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature, which is committed on a person under circumstances that are coercive.²⁹ Three other judgements of the ad hoc Tribunals adopted this definition uncritically.³⁰

B Sexual Penetration by Coercion

Only the Trial Chamber of the ICTY in the case against Anto Furundzija changed the law-finding method. The Trial Chamber could not find elements of rape in international treaties or in international customary law. It saw the solution in the third source of international (criminal) law in accordance with Article 38(1)(c) of the ICJ Statute – namely, the general principles of the main legal systems in the world. These principles could be derived with due caution from a comparison of domestic criminal

²⁶ *Akayesu*, *supra* note 16, § 596.

²⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

²⁸ *Akayesu*, *supra* note 16, § 597.

²⁹ *Ibid.*, § 598.

³⁰ Judgment, *Musema* (ICTR-96-13-T), Trial Chamber I, 27 January 2000, §§ 220–229; *Mucić*, *supra* note 16, §§ 478–479; Judgment, *Niyitegeka* (ICTR-96-14-T), Trial Chamber I, 16 May 2003, §§ 455–458.

laws.³¹ The Trial Chamber cited 17 rape offences of national criminal codes and came to the conclusion that most jurisdictions regarded rape as a violent sexual penetration of the vagina or anus of the human body by the penis or other objects.³² However, the law seemed less uniform on the matter of forced oral sex (*fellatio*). Either oral sex was evaluated as rape or as the less serious crime of sexual assault.

To overcome this mismatch, the chamber took into consideration general principles of international criminal law and international law. It assessed violent oral sex ultimately as rape. Oral sex constitutes a most degrading and humiliating outrage to human dignity. Therefore, it violates the fundamental principle of international humanitarian and human rights law to respect human dignity.³³ Since oral sex is already treated as a crime, the principle of legal certainty is not infringed. If oral sex were to be condemned with the milder penalty accorded to sexual assault, the defendant would not suffer any injustice.³⁴ Particularly in times of war, rape constitutes not only a simple sexual act but also a sexual attack against a defenceless civilian population in form of a war crime or crime against humanity.³⁵ Thus, the Court formulated the offence of rape as:

- (i) 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;
- (ii) or of the mouth of the victim by the penis of the perpetrator;
- (iii) by coercion or force or threat of force against the victim or a third person.³⁶

The Trial Chamber added that any form of imprisonment precludes consent of the victim.

C *Sexual Penetration without Consent*

In February 2001, the so-called *Foča* judgment of the ICTY against the accused, Dragoljub Kunarac, was released.³⁷ This Trial Chamber did not deviate from the

³¹ *Furundžija*, *supra* note 14, §§ 175–178.

³² *Ibid.*, § 180.

³³ *Ibid.*, § 183.

³⁴ Although the *Furundžija* chamber was right to treat oral sex as rape and not as sexual assault, it appears objectionable that it applied the penalty of sexual assault. The chamber took only into account the principle of '*nulla poena sine lege*' and not the principle in question '*nullum crimen sine lege*'. With the application of the lower penalty, the chamber reduced the severity of the offence that it had just confirmed as being classified as rape. Forced oral sex in armed conflict causes just as serious physical and psychological injuries as vaginal and anal intercourse. A. McDonald, 'Sex Crimes at the *ad hoc* Tribunals', 15 *Nemesis* (1999) 81; B. Allen, *Rape Warfare, The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996), at 79: 'Due to the forced oral sex, women suffer from severe throat irritations because they are choked – particularly in camps – for days, weeks or months to force them to satisfy the offender orally and to swallow sperm and urine.' Mainly, these serious effects on the victim justify the qualification and punishment of forced oral sex as rape. The Chamber pointed out correctly that it was not forced oral sex per se but, rather, a sex crime in the form of a crime against humanity or a war crime.

³⁵ *Furundžija*, *supra* note 14, §§ 184–186.

³⁶ *Ibid.*, § 185.

³⁷ *Kunarac*, Trial Chamber, *supra* note 16, § 437.

description of the penetration in the *Furundzija* definition. However, it changed the *Furundzija* definition in relation to the element of coercion. In the view of the *Kunarac* chamber, the *Furundzija* definition disregards factors other than ‘coercion, force or threat of force against the victim or a third person’ that cause an infringement of the victim’s will.³⁸ The Trial Chamber re-examined this issue in various national criminal law systems. It found that all systems share a common principle that rape is committed if the sexual penetration was not really wanted by the victim or was done without consent. In many legal systems, ‘coercion, force or threat of force’ are mentioned as material elements of rape. The common factor is based on a more fundamental principle – namely, the punishment of the violation of sexual self-determination.³⁹ One group of nations counts on the exercise of force, threats or other coercive circumstances to capture the infringement of the victim’s will; another group – mainly, supporters of the ‘common law’ system – treats the sexual penetration as an offence if the victim does not give his or her consent. The chamber then went on to define the physical act of rape as follows:

- (i) 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;
- (ii) where such sexual penetration occurs without the consent of the victim.

Consent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.⁴⁰

If the victim has not consented voluntarily to the act described in the first part of the definition, the requirements of the offence of rape are met. Force, threat of force and coercion no longer constitute material elements of crime; they can only prove the lack of consent. It must be verified whether any consent, in the circumstances, was indeed given voluntarily.⁴¹

On 12 June 2002, the Appeals Chamber confirmed the rape definition of the Trial Chamber. The Appeals Chamber clarified that the Trial Chamber did not want to depart from the previous jurisprudence of the Tribunal but desired to work out the relationship between the elements of ‘coercion’ and of ‘lack of consent’. The Trial Chamber sought to prevent the impunity of an offender who merely takes advantage of coercive circumstances without using physical force.⁴² As examples of such coercive circumstances, the Appeals Chamber referred to national jurisdictions in which

³⁸ *Ibid.*, §§ 438–439, 457–460.

³⁹ *Ibid.*, § 440.

⁴⁰ *Ibid.*, § 460.

⁴¹ Boon, ‘Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent’, 32 *Columbia Human Rights Law Review* (2001) 625, at 675; for other opinions, see Grewal, ‘The Protection of Sexual Autonomy under International Criminal Law, the International Criminal Court and the Challenge of Defining Rape’, 10 *Journal of International Criminal Justice* (2012) 373, at 379–381.

⁴² *Kunarac*, Appeals Chamber, *supra* note 16, § 129.

neither the use of a weapon nor physical subjugation of the victim was necessary to show coercion. According to the Appeals Chamber, circumstances in cases of war crimes or crimes against humanity cause constraint on the victim and therefore make voluntary consent impossible from the outset.⁴³ The Tribunal referred to the German Criminal Code and North American laws in which the lack of consent is not a material element of rape; rather, circumstances such as any form of captivity would be considered to be coercion, making the lack of consent *a priori* irrelevant.⁴⁴ In this particular case, the Appeals Chamber deemed the circumstances in which the rapes were committed to be so threatening that it excluded any possibility of consent. The appellants had treated the women as legitimate ‘sex prey’ and had regularly raped the women in military headquarters, prison camps and houses of the soldiers.⁴⁵

In the case against the accused Miroslav Kvočka (Dragoljub Prcać, Milojica Kos, Mlađo Radić and Zoran Žigić), the Trial Chamber adopted the *Kunarac* definition, although it changed the wording slightly:

- (i) The sexual activity must be accompanied by force or threat of force to the victim or a third party;
- (ii) The sexual activity must be accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated the ability to make an informed refusal, or
- (iii) The sexual activity must occur without the consent of the victim.⁴⁶

Similar to the decision of the Appeals Chamber in *Kunarac*, a clear preference cannot be distinguished between the *Kunarac* or the *Furundzija* definition. Rather, a combination of both definitions of the Trial Chambers was favoured by making both – coercion and the lack of consent of the victim – alternative elements of crime. In the subsequent appeal, however, the Appeals Chamber in *Kvočka* emphasized that the Trial Chamber had applied the *Kunarac* definition, which had established the lack of consent of the victim, not force or threat of force, as elements of crime. This definition was previously confirmed by the Appeals Chamber and corresponds to international law.⁴⁷

⁴³ The interpretation of the Appeals Chamber (presumption of coercion due to the circumstances of war) declares de facto all sexual relations between Muslim civilians and Serbian soldiers during the armed conflict in Bosnia as generally unintentionally. Despite the war, voluntary sexual relationships between Muslims and Serb soldiers had happened. Engle, *supra* note 13, at 806–810, n. 168; Grewal, ‘Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women’s Human Rights’, 33 *Australian Feminist Law Journal* (2010) 57, at 71; *Kunarac*, Appeals Chamber, *supra* note 16, §§ 271, 280, 293. Such a simplistic view that no voluntary consent to sexual intercourse is possible in conflict situations is unacceptable. It would violate the rights of the accused. The lack of consent – if one relies on consent in the definition – must be checked in each individual case and cannot be simply affirmed by casual references to a violent environment.

⁴⁴ *Kunarac*, Appeals Chamber, *supra* note 16, § 131.

⁴⁵ *Ibid.*, § 132.

⁴⁶ *Kvočka*, *supra* note 16, §§ 175–177.

⁴⁷ Judgment, *Kvočka* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 395.

Furthermore, the Appeals Chamber agreed with the Trial Chamber's interpretation that any form of captivity precludes the consent of the victim to the sexual contact.⁴⁸

The Trial Chambers in *Stakić* and *Brdjanin* endorsed this view. They evaluated the means of coercion, including force or threat of force, as evidence of a lack of the victim's consent but not as elements of crime.⁴⁹ Similarly, the Trial Chambers of the ICTR in *Semanza*, *Kajelijeli*, *Kamuhanda* and *Gacumbitsi* applied the *Kunarac* definition.⁵⁰ The Appeals Chamber in *Gacumbitsi* finally brought more clarity on the matter. The prosecutor had appealed against the definition of rape. She did not consider the lack of consent and the related intent as elements of rape. Voluntary consent could not be given in the context of crimes against humanity, war crimes and genocide as these situations were coercive, and, therefore, a lack of consent was presumed. The prosecution should not bear the burden of proof for the lack of consent of the victim. Consent could only be regarded as a defence.⁵¹ Other violations of international criminal law, such as torture and enslavement, do not require consent from a victim. Further, Rule 96(ii) of the ICTR Rules of Procedure and Evidence treats consent as a defence.⁵²

However, the Appeals Chamber clearly decided on the criteria of lack of consent and downgraded the means of coercion and coercive situations to mere evidence for a lack of consent. Arenas of war or of crimes against humanity create an atmosphere of violence, and, thus, the victims' consent is precluded from the outset. However, the lack of consent and the related intent constitute elements of rape that must be proven by the prosecutor. Rule 96 only determines the circumstances under which consent could be admissible at trial. In national criminal law systems, lack of consent is treated as a material element and not as a defence.⁵³ The prosecution could prove the lack of consent by the presence of coercive circumstances under which the victim could not possibly have given his or her consent. The prosecution is not required to present evidence concerning the words or behaviour of the victim, the relationship of the victim to the perpetrator or the use of force. But the chamber could derive a lack of consent from circumstances such as a current genocide campaign or the captivity of the victim.⁵⁴ Furthermore, the defence is limited in presenting doubts about the lack of consent in order to protect victims of sexual offences. A victim's evidence of consent

⁴⁸ *Ibid.*, § 396.

⁴⁹ *Stakić*, *supra* note 14, §§ 754–756; *Brdjanin*, *supra* note 14, § 1008; *Nikolić*, *supra* note 18, § 116:

- (i) the perpetrator committed a sexual penetration of the vagina or anus of the victim by his penis or any other object used by him, or;
- (ii) the perpetrator committed a sexual penetration by the mouth of the victim by his penis;
- (iii) the perpetrator intended to effectuate the sexual penetration of the victim;
- (iv) the perpetrator intended the sexual penetration and knew that it was committed against the will of the victim.

⁵⁰ *Semanza*, *supra* note 16, §§ 344–346; Judgment, *Kajelijeli* (ICTR-98-44A-T), Trial Chamber II, 1 December 2003, §§ 910–916; Judgment, *Kamuhanda* (ICTR-95-54A-T), Trial Chamber II, 22 January 2004, §§ 705–710; *Gacumbitsi*, Trial Chamber III, *supra* note 16, § 321.

⁵¹ Judgment, *Gacumbitsi v. Prosecutor* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, §§ 147–148.

⁵² *Ibid.*, §§ 149–150. ICTR Rules of Procedure and Evidence, 11 February 1994.

⁵³ *Gacumbitsi*, Appeals Chamber, §§ 151–154.

⁵⁴ *Ibid.*, § 155.

is not admissible under Rule 96(ii) if the victim or a third person was threatened or he or she had reason to fear violence, duress, detention or psychological oppression. Even if the evidence of consent may be admissible in trial, the chamber could disregard the evidence if it assumes it has been an involuntary consent under the concrete circumstances.⁵⁵ The intent of the perpetrator could be proven once the perpetrator was aware, or had reason to know, that coercive circumstances were present that prevented the possibility of voluntary consent.⁵⁶

E *Integration Theory*

In 2005, the ICTR made an unexpected turn in the *Muhimana* case. The Trial Chamber stated that the *Akayesu* definition would not be incompatible with the *Kunarac* definition. The second definition only completed the first definition by adding further details. Where the *Akayesu* definition speaks of a physical invasion of a sexual nature, the *Kunarac* definition specifies the characteristics that describe the invasion of a sexual nature. The chamber adopted the *Akayesu* definition, which included the elements of the *Kunarac* definition.⁵⁷ In other words, the precise *Kunarac* definition is integrated in the general *Akayesu* definition.

The ICTR's next judgment against the accused Tharcisse Muvunyi confirmed the 'integration theory' of the *Muhimana* chamber. The *Akayesu* and *Kunarac* definitions were actually not so far apart. Both definitions had in mind the protection of the victim's sexual self-determination. Thus, they are not incompatible. One chamber preferred a broad definition (physical invasion), while the other chamber supplemented the definition of invasion with additional features. The key was the lack of consent of the victim. Coercive circumstances prove a lack of consent. Although the *Muvunyi* chamber assumed that the *Akayesu* definition enclosed the *Kunarac* elements,⁵⁸ it preferred to formulate a definition itself:

Rape exists whenever there is sexual penetration of the vagina, anus or mouth of the victim, by the penis of the perpetrator or some other object under circumstances, where the victim did not agree to the sexual act or was otherwise not a willing participant to it.⁵⁹

Nonetheless, all of the following 13 judgments of both Tribunals turned unequivocally to the *Kunarac* definition.⁶⁰

⁵⁵ *Ibid.*, § 156.

⁵⁶ *Ibid.*, § 157.

⁵⁷ Judgment, *Muhimana* (ICTR-95-1B-T), Trial Chamber III, 28 April 2005, §§ 534–551.

⁵⁸ Judgment, *Muvunyi* (ICTR-2000-55A-T), Trial Chamber III, 12 September 2006, §§ 520–521.

⁵⁹ *Ibid.*, § 522.

⁶⁰ Judgment, *Zelenović* (IT-96-23/2-S), Trial Chamber I, 4 April 2007, § 36; *Haradinaj*, *supra* note 16, §§ 129–130; *Bagosora*, *supra* note 18, §§ 2199–2200; *Milutinović et al.*, *supra* note 18, § 203; Judgment, *Renzaho* (ICTR-97-31-T), Trial Chamber II, 14 July 2009, §§ 791–792; Judgment, *Hategekimana* (ICTR-2000-55B-T), Trial Chamber II, 6 December 2010, §§ 723–724; *Dordević*, *supra* note 18, § 1766; Judgment, *Ndindiliyimana et al.* (ICTR-2000-56-T), Trial Chamber II, 17 May 2011, § 2121; Judgment, *Nyiramahuko et al.* (ICTR-98-42-T), Trial Chamber II, 24 June 2011, § 6075; Judgment, *Karemera et al.* (ICTR-98-44-T), Trial Chamber III, 2 February 2012, § 1676; Judgment, *Ngirabatware* (ICTR-99-54-T), Trial Chamber II, 20 December 2012, § 1381; Judgment, *Prlić et al.* (IT-04-74-T), Trial Chamber III, 29 May 2013, § 69; *Karadžić*, *supra* note 14, § 511.

F Conclusion

The jurisprudence of both tribunals can be described as homogeneous with respect to the criminal act. Only the initial *Akayesu* definition represents an exception. However, the *Akayesu* definition was only adopted in the three cases of *Mucić*, *Musema* and *Niyitegeka*, wherein each of the chambers did not deal with the given definition. Otherwise, the definition was ignored by all subsequent criminal courts as being too vague. True, the Trial Chambers in *Muhimana* and *Muvunyi* tried to give renewed attention to the *Akayesu* definition by regarding the *Kunarac* definition as being contained in the *Akayesu* definition. Ultimately, however, they applied the elements of the *Kunarac* definition, albeit, in the *Muvunyi* case, they did so in a somewhat modified version. Why the two chambers ever thought it was necessary to refer to the *Akayesu* definition remains a mystery. That the *Akayesu* definition's 'invasion of a sexual nature' assimilates the *Kunarac* definition arises from the fact that the first definition is simply designed so broadly that it almost covers all sexual behaviour.⁶¹ This is just an argument to reject the imprecise definition, as almost all subsequent chambers of both Tribunals have done.

The *Kunarac* definition is based on the general principles of law from the most important national criminal law systems. The Trial Chamber in the *Akayesu* case had rejected the source of national law categorically. Instead, it followed the model of the Torture Convention, an international human rights instrument. This was not a legitimate method. The chamber could not derive any elements of rape, but only the concept of the protection of human rights against torture, to formulate an *actus reus* without concrete acts and to restrict the possible criminal conduct for the particular purposes of the perpetrator. Rape, however, has never been treated in this way in any international legal instrument. Due to national criminal laws and jurisdictions, very specific acts are recognized as constituting the offence of rape. All other sexual acts are caught mostly under the basic offence of sexual assault. The purpose of the perpetrator has never been incorporated in a definition of rape so far. Besides, the *Akayesu* definition failed to implement a specific purpose. It only declared that rape would usually be committed for the same reasons as torture. Thus, the *Akayesu* chamber had neither adopted the concept of the Torture Convention nor derived the term 'invasion of a sexual nature' from an international treaty or customary international law. It had basically invented it itself.

In addition, both definitions follow opposing approaches to criminalize sexual intercourse, thereby showing no similarities in the structure of the offence as well. The *Akayesu* definition incorporates coercion, while the *Kunarac* definition implements consent as the decisive factor. Moreover, there was no practical reason to opt for the wide *Akayesu* definition; no case existed where a forced sexual intercourse could not have been convicted because of the potentially narrow *Kunarac* definition. It seems most probable that the chambers described the *Akayesu* and *Kunarac* definitions as overlapping

⁶¹ Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', 54 *Boston College Law Review* (2013) 1207, at 1208, 1215.

in order to create conformity in the case law on rape at the Tribunals. Ultimately, the *Akayesu* definition constitutes a violation of the principle of legal certainty and, thus, is a serious setback in the determination of the material elements of rape.⁶²

The new wording of the *Muvunyi* chamber is even less clear. It only leads to misunderstandings. According to this definition, the introduction of objects into the victim's mouth is now rape, which was clearly not the intention of the chamber. It is not comparable with the other acts of serious impairment of sexual self-determination. Also, it makes little sense to replace a legal concept such as 'lack of consent' with legally unknown expressions ('not to agree' or 'not a willing participant'). The definition must be pronounced as a failure. The *Akayesu* definition has not been confirmed again so that the utterances of the Trial Chambers in *Muhimana* and *Muvunyi* are of no importance concerning the modification of the elements of rape.

The wording of the criminal act imply that the perpetrator of vaginal, anal and oral intercourse can only be a man because the perpetrator must have accomplished the penetration with his penis. The possibility of a woman forcing a man to penetrate her body was excluded. However, the wording of the definition does not address the fact that the perpetrator of the penetration of objects into the vagina or the anus can be both a man and a woman. As a result, this means that both a man and a woman could be the potential victims of this criminal act. In addition, the victim of anal and oral intercourse may also be a man.

Also problematic is the second part of the definition, which refers to the impairment of the victim's will. Either it is possible to express the impairment of sexual self-determination by objective elements as force, threat of force and another exercise of coercion or by a subjective element such as the lack of consent of the victim. Ultimately, the *Kunarac* definition is binding since the Appeals Chamber has repeatedly confirmed this definition and it represents the highest authority in the hierarchy of the court structure. This is also the case because the *Kunarac* decision was adopted without objection and was applied as jointly contained in the *Akayesu* definition. Therefore, the criterion of a lack of consent is essential to the definition of rape and not the means of coercion. In relation to the mental element, the Tribunals required direct intent: 'The *mens rea* for rape is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.'⁶³

⁶² For an opposing view, see Cole, 'Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law', 8 *International Criminal Law Review (ICLR)* (2008) 55, at 57, 74; Haffajee, *supra* note 3, at 210, who favoured the wide *Akayesu/Muhimana* rape definition.

⁶³ *Kvočka*, *supra* note 16, § 179; *Nikolić*, *supra* note 18, § 113: '(3) the perpetrator intended to effectuate the sexual penetration of the victim; (4) the perpetrator intended the sexual penetration and knew that it was committed against the will of the victim'; *Kamuhanda*, *supra* note 50, § 709; *Semanza*, *supra* note 16, § 346; *Muvunyi*, *supra* note 58, § 522; *Zelenović*, *supra* note 60, § 36; *Haradinaj*, *supra* note 16, § 130; *Bagosora*, *supra* note 18, § 2200; *Milutinović*, *supra* note 18, § 203; *Renzaho*, *supra* note 60, § 792; *Hategekimana*, *supra* note 60, § 724; *Ndindiliyimana*, *supra* note 60, § 2122; *Nyiramasuhuko*, *supra* note 60, § 6075; *Ngirabatware*, *supra* note 60, § 1381; *Prlić*, *supra* note 60, § 69; *Karadžić*, *supra* note 14, § 511. Although the choice of words 'knowledge' suggests that even with regard to the lack of consent a direct intent (*dolus directus*, 2nd degree) is required. However, contrary to that suggestion is the fact that national legal orders, which are the source of that definition, require only 'recklessness' (*dolus eventualis*). See Weiner, *supra* note 61, at 1214, 1235.

4 Will this Definition Prevail?

The ICTY has shown an important law-finding method, which allows the underdeveloped international criminal law to prove certain crimes. The Court was in the position to fill gaps in the *actus reus* of rape through the third source of law as stipulated in Article 38(1)(c) of the ICJ Statute. It is now clear how an international crime that is evident in international legal documents, but still undefined, may yet satisfy the principle of legal certainty. The judgments of the two ad hoc Tribunals were the first international instruments that sought to find a definition of rape. They had a significant impact on the Preparatory Commission of the ICC in the preparation of the EOC for the Rome Statute.⁶⁴ To date, almost all authors rely on the statements of the Trial Chambers of the ad hoc Tribunals and the EOC when they reiterate the offence of rape.⁶⁵ Whether the *Kunarac* definition, however, is still up to date or convincing in this matter may be doubtful.⁶⁶

A Missing Forms of Penetration

The rape definition of the ad hoc Tribunals includes only vaginal, anal and oral penetration of the victim by the penis of the perpetrator and the introduction of objects into the vagina or anus of the victim. The definition does not consider the manipulation of the tongue on the vagina or anus, or the introduction of other parts of the body other than the penis into the anal or vaginal orifices, as rape. Yet it does not capture the so-called 'reverse rape' where the perpetrator forces the victim to penetrate her body orifice with the victim's sexual organ. Thus, the possibility was excluded that a woman may be the perpetrator of vaginal, anal and oral intercourse.

⁶⁴ A. de Brouwer, *The Supranational Criminal Prosecution of Sexual Violence* (2005), at 130, with further references. Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 7(1)(g)-1, Art. 8(2)(b)(xxii)-1, Art. 8(2)(e)(vi)-1 (elements of crime [EOC]):

- (i) The perpetrator invaded^a the body of a person by conduct resulting in the penetration, however slight, of any part of the body of the victim or of 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.
- (ii) 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.^b (Notes: (a) the concept of 'invasion' is intended to be broad enough to be gender-neutral; (b) it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of Art. 7(1)(g)-3, 5, 6; Art. 8(2)(b)(xxii)-3, 5, 6; Art. 8(2)(e)(vi)-3, 5, 6.)

See K. Ambos, *Treatise on International Criminal Law* (2014), vol. 2, at 92.

⁶⁵ The fact that the citation of judgments (assisting source of law) is not sufficient to provide evidence of an international crime, which would require that the offence is based on a universally binding source of international law, is explained in more detail in Adams, *supra* note 8, at 77; Adams, 'Die Tatbestandsmerkmale der Vergewaltigung im Völkerstrafgesetzbuch von Deutschland', 12 *Zeitschrift für Internationale Strafrechtsdogmatik* (2012) 500, at 501.

⁶⁶ The shortcoming of this third source of law is that it is ultimately based on national law, which always undergoes reforms.

Already the EOC have extended the acts constituting the offence. They treat any invasion of the body of the victim or of the perpetrator with a sexual organ, as well as the penetration of the anus or genitals of the victim with any object or body part other than the penis, as rape. The facts were formulated in a completely gender-neutral way so that the perpetrator and the victim may be of any sex.⁶⁷ The inclusion of the penetration of the vagina or anus by other parts of the body than the penis as well as the ‘reverse rape’ as acts constituting the offence demonstrates an increased sexual reference due to the inclusion of the genitals of the perpetrator and/or the victim in the act. The act humiliates the victim in the same serious manner as the other recognized sexual penetrations. These acts are perceived by victims as highly traumatizing and are very similar to sexual intercourse. They include either introducing a body part (such as a finger or tongue) into the victim’s body or performing sexual intercourse with reversed roles – that is, the victim penetrates the perpetrator rather than the perpetrator penetrating the victim. It would be inappropriate to exclude these forms of penetration only because they occur less frequently than vaginal, anal or oral sexual intercourse by a male perpetrator.⁶⁸ Also, the impunity of a woman in the case of ‘reverse rape’ – though a man would be liable for an identical behaviour – would violate the prohibition of unequal treatment. Most likely, the ad hoc Tribunals have neglected women as perpetrators because they have not been faced with such a case scenario. Nevertheless, it is biologically possible that a woman might force a man to penetrate her body, which calls for a recognition in the definition of the crime. Since women are now being admitted into the military and are also appearing in high-level political positions, it is to be expected that women will take on the role of the perpetrator in the future and will not only be the victims of rape.⁶⁹

B The Disadvantage of a Lack of Consent Definition

The *Kunarac* definition depends solely on the lack of consent of the victim to the sexual act without further explanation as to when the consent is lacking. True, those victims are protected who have found it difficult to form a counter-will or to demonstrate that will.⁷⁰ The lack-of-consent concept requires only that the victim has not agreed to the sexual act. However, the argument for extensive victim protection may not be satisfactory if the definition is too vague. A lack-of-consent definition would not let citizens understand when the crime of rape occurs. A variety of influences exist that could void a woman’s or man’s consent.⁷¹ The common law jurisprudence and literature

⁶⁷ Weiner, *supra* note 61, at 1218.

⁶⁸ Adams, *supra* note 8, at 568.

⁶⁹ The offences of female US soldiers against male Muslim prisoners at the Abu Ghraib prison in Iraq are a good example of the more and more relevant role of women as perpetrators of sexual offences. Engle, *supra* note 13, at 812, highlights that women can just as easily become perpetrators of sexual violence as men if they get the power to do so.

⁷⁰ M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (2011), at 93.

⁷¹ Bryden, ‘Redefining Rape’, 3 *Buffalo Criminal Law Review* (2000) 373; J. Dressler, *Criminal Law* (2005), at 331.

show that it is not an easy task to determine if the influence on the victim's will is severe enough to allow it to vitiate consent when the influence lies beneath coercion as in cases of deception and financial or emotional dependency.⁷² Many common law states have now distanced themselves from a pure lack of consent definition of rape. Instead, they have objectified the definition by adding circumstances and victim's characteristics that might exclude consent. A negative list includes objective elements that eliminate a specific consent.⁷³ A rape offence that relies solely on a lack-of-consent provision must be considered an imprecise criminal provision, therefore violating the principle of legal certainty.⁷⁴

Moreover, a lack of consent is much harder to prove than means of coercion. The inner state of mind of the victim must be shown even though it does not appear externally like force or threat of force.⁷⁵ It must be deduced from an externally observable behaviour of the victim and the surrounding circumstances. Since sexual behaviour between men and women is often ambiguous, wrong conclusions may be easily drawn from the victim, the perpetrator's behaviour and the surrounding circumstances.⁷⁶ Even if a court may infer a lack of consent from the behaviour of the victim and the circumstances of the case, this does not yet apply to the perpetrator. He may have succumbed to sexist or outdated sexual ideas and interpreted the dismissive behaviour of the victim as a play 'to be hard to get' and, thus, as consent. Such a mistake of facts would eliminate the intent and, thus, the offence.⁷⁷

A further disadvantage of the consent approach is the attention that it draws to the victim's behaviour before the sexual attack. Since the victim's inner state of mind is mainly deduced from his or her behaviour, the defence in national trials has exploited every opportunity to expose the mainly female victim as a sexual predator who had wanted the sexual relation and therefore consented to the act. Her sexual antecedent, her clothes and erotic behaviour prior to the attack have been explored in trial only to

⁷² Could a lie about having a sexual transmitted disease, being a millionaire or the willingness to marry the victim, about his identity, about performing a medical examination or that the sexual act would cure the victim from a fatal disease vitiate consent? Some examples include *Regina v. Flattery*, 1877, 2 QB 410 (surgery); *Regina v. Williams*, 1923, 1 KB 340 (singing voice); *Regina v. Tabassum*, 2000, 2 Cr. App. R. 328 (medical examination); *Boro v. Supreme Court*, 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (1985, Cal. Sup. Ct). See further D. Omerod and K. Laird (eds), *Smith and Hogan Text, Cases, and Materials on Criminal Law* (2014), at 715; J. Loveless, *Criminal Law, Text, Cases, and Materials* (2014), at 538; C. Keating and H. Clarkson, *Criminal Law, Text and Materials* (2014), at 646.

⁷³ See, e.g., the Penal Codes of Alabama (ss. 13A-6-60-13A-6-70); Alaska (para. 11.41.470); California (ss. 261, 262, 286, 288a, 289), Columbia (para. 22-3001); Colorado (para. 18-3-401); Connecticut (para. 53a-65); Delaware (paras 770ff); Indiana (s. 35-42-4-1); Iowa (para. 702.17); Kansas (Art. 35); Kentucky (para. 510-010); Maine (paras 251ff); Maryland (para. 3-301); Michigan (ss. 750.520a-520n); New York (s. 130.05, para. 2 NYPL) Ohio (s. 2907.02). In the presumption norms of England (ss. 76, 75 SOA 2003), similar conditions are mentioned that would exclude consent. See further Weiner, *supra* note 61, at 1224-1225.

⁷⁴ Adams, *supra* note 8, at 512, with further references; Adams, 'The First Rape Prosecution before the ICC: Are the Elements of Crimes Based on a Source of International Law?', 15 *ICLA* (2015) 1098, at 1114.

⁷⁵ MacKinnon, *supra* note 13, at 955; Adams, 'First Rape Prosecution', *supra* note 74, at 1115.

⁷⁶ C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (2012), at 155.

⁷⁷ Adams, 'Die Tatbestandsmerkmale', *supra* note 65, at 1115.

slander her reputation, to question her credibility and to make jurors dislike her. The result has been that rape victims have been victimized for a second time during these trials.⁷⁸

C The Disadvantage of Combining Coercion with the Lack-of-Consent Doctrine

The EOC, on the other hand, have opted for a coercion definition of rape (use of force, threat of force or coercion, taking advantage of a coercive environment) but have added a particular ground for a lack of consent (the victim was an incompetent person), thereby indicating that the pure lack-of-consent approach of the Tribunals would be untenable.

Coercion exists when the victim or third party fears violence, duress, detention or psychological oppression or when a position of power is abused. A coercive environment means a situation of war or a genocide campaign.⁷⁹ In addition, the consent of the victim is invalid if the sexual act is committed against a person who is incapable of giving consent (see the explanation in the second footnote) due to his or her age or inflicted or natural deterioration of his or her mental faculties (sleep, loss of consciousness, intoxication, mental retardation or diminished intellectual maturity).

Unfortunately, the decision to combine the means of coercion with one aspect of the lack-of-consent doctrine also remains questionable. A paradigm is the perceived difference between an act of violence and the severe physical and psychological trauma that it entails compared to a sexual act that is performed without consent because of a mental impairment of the victim. Furthermore, the perpetrator's mindset is more reprehensible if he uses any sort of coercion to enforce his sexual desires without regard to the physical and psychological suffering that he imposes on the victim. The systematic separation between coercive sexual offences and sexual abuse offences in national law systems is based on this difference of the legal wrong and the guilt allegation towards the perpetrator.⁸⁰ If one summarizes different criminal acts under the same offence with the same penalties, one would violate the prohibition of equal treatment of unequal facts. Sexual abuse is prosecuted under the same offence of rape and puts the perpetrator of the sexual abuse at a disadvantage. Vice versa, the legal wrong of the perpetrator is not sufficiently punished if forced sexual intercourse is dealt with under the same crime as sexual abuse that requires no coercion.

⁷⁸ Decision on the Prosecution's Motion for Redaction of the Public Record, *Prosecutor v. Zejnil Delalić et al.* (IT-96-21-T), Trial Chamber II, 5 June 1997, § 48. The Anglo-American laws have prevented the defamation of the victim in trial by so-called 'rape shield laws'. J. Dressler, *Understanding Criminal Law* (2009), at 642; Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent', 92 *Columbia Law Review* (1992) 1794; Weiner, *supra* note 61, at 1231.

⁷⁹ The element of (implied) threat of force encompasses the elements of coercion and of a coercive environment so that these additional elements could have been omitted, especially because they require interpretation. Adams, *supra* note 8, at 572.

⁸⁰ Exploiting a mental weakness represents an abuse in the domestic legal systems and is inconsistent with the concept of coercion. See also Adams, 'Die Tatbestandsmerkmale', *supra* note 65, at 1116; Adams, 'First Rape Prosecution', *supra* note 74, at 1113.

D The Lack of Sexual Abuse Offences in International Criminal Law

It is certainly problematic when sexual abuse situations cannot be prosecuted under the offence of rape. The sexual penetration of a mentally impaired person without consent is generally considered a crime. Most domestic jurisdictions criminalize this behaviour as sexual abuse. However, in international criminal law, no sexual abuse offences exist. One could argue that in the sense of justice it would be preferable to include this sexual abuse under the offence of rape than to let it go unpunished. The minor legal wrong due to the lack of coercion could be considered on the sentencing level. This approach would indeed initiate a system break between rape by coercion and sexual abuse from the perspective of some 'civil law' states, but it would not let a crime go unpunished. The crucial question, therefore, is whether the overall criminal liability of sexual abuse justifies letting go of dogmatically 'clean' solutions in favour of 'feasible' justice.

Relevant are only those cases in which the victims cannot form a counter-will because they are sleeping, unconscious or mentally incapacitated to a level that they do not understand or perceive the act. Rape as an international crime occurs in times of crisis such as war or a genocide campaign. Rape will not happen in a quiet, deserted place between familiar perpetrators and victims such as during peacetime. It will occur between hostile populations. The dominant population will attack members of the other group, keeping them locked up in detention camps, schools and houses and beaten, raped and killed by armed soldiers. The case that the perpetrator attacks mentally impaired victims (drugged, sleeping, retarded) is in this environment possible, but it represents at most an insignificant phenomenon compared to the mass rapes in armed conflict. The intention here is not to deny that even mentally impaired victims can be targeted sexually. It is important to understand that it is not a sexual abuse just because a mentally inferior or disabled person is the object of a sexual act. Even a child, who does not yet understand the sexual act, will verbally and physically defend itself against the violence carried out with the sexual act. The same must be said for a mentally impaired person.⁸¹

In addition, in domestic legal orders, a criminal liability of rape is not waived due to the existence of sexual abuse offences.⁸² If a mentally impaired victim defends himself or shows any resistance and the perpetrator performs the act with force or (implied) threats of force, the offence of rape is committed. Sexual abuse offences have only a 'catch-all' function. If a mentally impaired person lags behind a non-impaired adult because he or she does not understand right away that he or she has the right to resist or to know how to resist, then he or she has been sexually abused. However, if a disabled or otherwise mentally impaired person is compelled by force or other coercion

⁸¹ In Visegrad, former Yugoslavia, soldiers had broken into a home for disabled people and had raped them. The girls were hiding, crying or screaming out of fear of the armed men. The counter-will of these handicapped victims was very much present and externally detectable. Centar za istraživanje i dokumentaciju Saveza logorasa Bosne i Hercegovine, *Ich flehte um meinen Tod, Verbrechen an Frauen in Bosnien-Herzegowina* (2000), at 65–168.

⁸² See also Oberlies, 'Selbstbestimmung und Behinderung, Wertungswidersprüche im Sexualstrafrecht?', 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2002) 130.

to perform or endure a sexual act, he or she has been raped. He or she is then entitled to the same protection by criminal law as a non-impaired person. Otherwise, one would be discriminating against mentally impaired persons. If the abuse of mentally impaired persons is integrated in a rape offence, the lesser guilt of the accused must be compensated in the sentence as a mitigating factor. There is a danger that as soon as signs of a mental defect exist, the act will be treated as sexual abuse, albeit the victim has resisted or opposed the sexual act. The abuse of a mentally impaired victim would in fact mean that at the sentencing level the offence is reduced to a less serious crime.⁸³

E Principles of Subsidiarity and Proportionality

Due to the violent circumstances surrounding a genocide campaign or war, the scope of application of sexual abuse is anyway limited to unconscious or severely disabled people who are no longer capable of any mental activities. We are talking about a very small group of people who are protected by the EOC. Basically, the number of possible victims is not a decisive criterion. This would run counter to the principle of fair criminal law. However, in international criminal law, the principle of subsidiarity of criminal law plays an important role. So far, no real need for a criminal offence of sexual abuse has appeared in practice.⁸⁴ The justice of a criminal law system cannot be measured by criminalizing any punishable behaviour. Each criminal law is regulated only in a fragmentary manner.⁸⁵ Proportionality is crucial; only if the penalty is founded on the wrongfulness of an act, on the criminal energy and force employed by the perpetrator and on the criminal intent of the perpetrator can the penalty be regarded as relatively fair. This proportionality is also reflected in domestic criminal laws. The crimes are catalogued according to the value of the legal interest of the offence. Within a section, various offences are listed to make further distinctions based on the legal wrong. Only these differentiations in the legal wrong of an act make it possible to punish an offence fairly. If one integrates a punishable, but very rare, abuse in a violent offence, one rejects the principle of proportionality and does not satisfy the claim of a rightful punishment. Consequently, in international law, a combination of coercion with abuse should be avoided and only the means of coercion should be applied in the definition of rape.⁸⁶

⁸³ Adams, 'Die Tatbestandsmerkmale', *supra* note 65, at 1116.

⁸⁴ Rape of mentally impaired victims did not play a role before the ICTY, the ICTR or the Special Court for Sierra Leone. Furthermore, there is no scholar discussion about sexual abuses in international criminal law. Adams, 'Die Tatbestandsmerkmale', *supra* note 65, at 1117.

⁸⁵ M. Kieler declares that an adequate victim protection is already available when the right to sexual self-determination is completely protected against particularly massive and dangerous attacks. M. Kieler, *Tatbestandsprobleme der sexuellen Nötigung, Vergewaltigung sowie des sexuellen Missbrauchs widerstandsfähiger Personen* (2003), at 160.

⁸⁶ However, there is no reason not to introduce a separate crime of sexual abuse in the series of sexual offences in order to protect these victims appropriately, if the parties to the Rome Statute should see a social need for such an offence.

5 Conclusion

It cannot be emphasized enough how the jurisprudence of the two ad hoc Tribunals has triggered change for the crime of rape – from previously being viewed as a ‘by-product’ of war, to a war crime, to the ultimate crime of genocide. In this respect, the ICTR, in particular, deserves commendable recognition for its numerous convictions of rape as genocide. Undoubtedly, the clarification of the definition of rape represents an important aspect of the ad hoc Tribunals’ legal legacy. All of the judgments of the ICTY and ICTR that have dealt with elements of rape – in particular, *Akayesu*, *Furundzija* and *Kunarac* – have contributed to the development of substantive international criminal law. The judges of the ad hoc Tribunals have introduced a law-finding method for international crimes that are prohibited in international instruments but still lack precise elements of crime in order to satisfy the principle of legal certainty. The Trial Chambers have left for other courts and scholars a comparison of various national rape laws, a deduction of general principles and an implementation of those principles as elements of the offence of rape on the international plane. The definition of rape that was so derived has assisted the Preparatory Commission in formulating the EOC of rape that has kept the dichotomy of paraphrasing the sexual act in the first part of the definition and the impairment of the victim’s will in the second part. Further, the Tribunals have pointed out the two possible approaches on how to determine a sexual penetration as criminal action: on the one hand, the ‘civil law’ approach, which requires the coercion of the victim (*Furundzija*, *Akayesu*); on the other hand, the ‘common law’ approach, which focuses on the victims’ lack of consent (*Kunarac*). Ultimately, the ad hoc Tribunals have opted for a definition of lack of consent. However, the *Kunarac* definition has been proven to be too narrow and not up to date anymore; it was not formulated in a gender-neutral way and, therefore, did not include the rape of a man by a woman, nor did it include the introduction of other parts of the body than the penis in sexual orifices. Indeed, the ‘common law’ approach was not included in the EOC. The EOC of rape not only emphasize the coercion of the victim but also list one aspect of the lack-of-consent concept – namely, the mentally impaired victim who can give *a priori* no genuine consent. The EOC thus represent a combination of the two legal concepts of national legal systems.⁸⁷ But the EOC approach is also not persuasive. The combination of the sexual abuse of a mentally impaired person with forced sexual penetration in one offence of rape raises many concerns. Since the Tribunals’ definitions and the EOC, many years have passed. National legal systems have undergone reforms and today include other elements of crime. Correction can only be made through a new comprehensive comparison of domestic rape laws.⁸⁸

⁸⁷ For an extensive interpretation of the EOC regarding rape, see de Brouwer, *supra* note 64, at 129–137; Eriksson, *supra* note 70, at 424.

⁸⁸ See the comparative law analysis in Adams, *supra* note 8, at 347.