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Rape as a weapon of war?

A critical legal analysis of the definition of rape and the concept of rape as a weapon of war

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Summary

Systematic rape of women in wartime is an ancient issue. For centuries, rape was seen as an inevitable by-product of war and it is not until recently that the international community has recognized rape as a weapon of war. There are several reasons for the systematic use of rape in times of conflict and this thesis will provide some of the most generally received theories.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have made the most important advances regarding wartime rape. The tribunals were the first international criminal tribunals that explicitly recognized rape as a crime against humanity. The ICTR also acknowledged that rape could constitute an act of genocide. The thesis will give a comprehensive analysis of the requirements necessary for rape to be prosecuted as a crime against humanity or genocide. The recognition of rape as a weapon of war have been significant for the visibility of wartime rape, however, the concept may have had some unintended consequences. The concept may exclude some victims from the justice system and draw focus from the individual act of rape.

ICTY and ICTR have also developed different definitions of rape throughout its jurisprudence. The most received definition requires proof of non-consent or coercive circumstances for a successful conviction. The question of non-consent have been a subject for discussion among legal scholars and differences have arisen. This thesis will compare and analyse the definitions developed by the *ad hoc* Tribunals and the question of non-consent will be given further attention.

Sammanfattning

Systematiska våldtäkter av kvinnor i krigstider är inget nytt problem. Genom århundraderna har våldtäkt ansetts vara en oundviklig konsekvens av krigföring och det är inte förrän relativt nyligen som det internationella samfundet har erkänt att våldtäkt kan fungera som ett stridsmedel. Teorierna om den systematiska användningen av våldtäkt är många och denna uppsats ska föra fram några av de vanligaste förställningarna om varför våldtäkt i många fall används som en medveten stridsmetod.

Den Internationella Krigsförbrytartribunalen för det Forna Jugoslavien (ICTY) och den Internationella Krigsförbrytartribunalen för Rwanda (ICTR) har gjort stora framsteg när det gäller erkännandet av våldtäkt som stridsmedel. Tribunalerna var de första internationella krigsförbrytartribunalerna som uttryckligen konstaterade att våldtäkt kan utgöra ett brott mot mänskligheten och ICTR har även bekräftat att våldtäkt kan utgöra folkmord. Denna uppsats ska ge en genomgripande analys av rekvisiten för att våldtäkt ska kunna utgöra brott mot mänskligheten och folkmord. Erkännandet av våldtäkt som stridsmedel har varit betydande för uppmärksamheten av de storskaliga och systematiska kränkningar som många kvinnor i utsätts för krig. Emellertid kan konceptet av våldtäkt som stridsmedel få oavsiktliga konsekvenser. Det kan leda till att våldtäktsoffer exkluderas från definitionen eller så kan det avleda uppmärksamhet från den individuella våldtäkten.

ICTY och ICTR har genom sin praxis utvecklat ett antal olika definitioner av våldtäkt. Den mest erkända definitionen förutsätter att offret inte samtyckt till samlaget eller att det förelåg tvingande omständigheter. Frågan om samtycke har lett till en livlig diskurs bland folkrättsjurister och meningsskiljaktigheter har uppstått. I denna uppsats kommer de olika definitionerna att jämföras och analyseras samt att frågan om samtycke kommer att utredas ytterligare.

Abbreviations

ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia
UN	United Nations

1 Introduction

Systematic use of rape in times of conflict is an ancient issue and legal scholars have debated the subject for centuries. Even though the problem has been visible for a long time, it is not until recently the subject have been properly addressed in international law. The topic is very complex and requires an interdisciplinary approach for a comprehensive analysis. To achieve this it is necessary to create further academic discussions, researches and analyses regarding the topic. Even though substantial progress has been made in the last decades, many challenges remains. This thesis will focus on the definition of rape in international law, the concept of rape as a weapon of war and how rape can be prosecuted as a crime against humanity and genocide.

1.1 Purpose

The purpose of this thesis is to examine how the definition of rape under international law has developed throughout the jurisprudence of the *ad hoc* Tribunals. The thesis will also deal with the concept of rape as a weapon of war and the possibilities of prosecuting systematic rapes towards women in international courts and tribunals. The main purpose is to provide a legal analysis of the definition of rape and investigate how rape ought to be defined in international law. If possible, the thesis will provide some recommendations of how the definition could be improved. The thesis will also attempt to reveal the complexity of the subject and the unwanted consequences an inadequate definition could have.

1.2 Research questions and delimitations

This thesis will be limited to the analysis of female rape as a crime against humanity or genocide and the focus will be on the jurisprudence of ICTY and ICTR.

Due to space limitations, this thesis will not deal with other gender-based crimes such as; sexual violence, enforced prostitution, enforced sterilization, forced marriage and sexual slavery. Neither will this thesis deal with the complex issue of rape and sexual violence against male victims, which should be addressed separately for a comprehensive analysis. The focus will be on the jurisprudence from the ICTY and ICTR, since these two tribunals have made the most significant progress when prosecuting rape as genocide or a crime against humanity, and in finding an adequate definition of rape.

The thesis will not deal with rape as a war crime due to the fact that most discourses related to the topic of this thesis regards rape committed as genocide or crimes against humanity. "Rape as a weapon of war" it is often used "widespread or systematic" or as a part of ethnic cleansing, which is why the thesis will focus on genocide and crimes against humanity. Neither will the thesis address the complex issue of the definition of armed conflict.

This thesis will attempt to answer the following research questions;

- How should rape be defined in international law for the definition to include as many cases as possible without neglecting the rule of law or the sexual autonomy?
- How have the concept of "rape as a weapon of war" affected the judicial situation for women?

1.3 Methodology and materials

In the research and writing of this thesis, I will use the traditional legal method to explore and interpret case law from the ICTR and the ICTY. I shall also use the traditional legal method to interpret and compare international statutes and conventions. Together with the traditional legal method, I will use critical legal methodology to determine the consequences of today's definition of rape and the concept of "rape as a weapon of war". I shall also use a critical approach in my attempt to find the sources to the frequent use of rape in armed conflict, as well as in my endeavour to find an adequate definition of wartime rape. These methods will be used together with a gender-oriented perspective, since the issue is gender-related. The gender-oriented perspective will be used when examining and comparing the jurisprudence from the *ad hoc* Tribunals, as well as when analysing different theories from legal scholars. I shall also put a gender-oriented perspective to the question of how rape ought to be defined and how the concept of "rape as a weapon of war" affects women's legal situation.

I will rely mostly on case law from the ICTY and ICTR, together with academic writing from legal scholars. In addition to this, I will use various international legal instruments such as; statutes and documents from international courts and tribunals, international conventions, UN Security Council Resolutions and UN reports.

1.4 Research status

The use of wartime rape is a wide and controversial subject. Several legal scholars have written about the subject over the years and numerous different angles of the problem have been viewed. Since the 1970s, legal feminists have made significant effort to get wartime rape recognized by the international community. The jurisprudential achievements made by the ICTY and the ICTR have been both applauded and criticized, and legal scholars constantly debate the question of non-consent as an element of

rape. A shift in paradigm has been visible the last decade and the undesirable consequences of an extensive definition of rape and high visibility of the concept of rape as weapon of war have been discussed. The most recent debate has also been more gender-neutral and the strict focus on female rape has been criticized.

1.5 Structrure

The second chapter of this thesis will give a short historical background to the use of wartime rape together with some theories about why rape is used as a weapon of war. The third chapter will give a brief presentation of the tribunals and courts that this thesis focuses on. The fourth chapter describes the elements required for rape to constitute genocide or a crime against humanity and the concept of "rape as a weapon of war". In the fifth chapter, the definition of rape in international law is examined throughout a case study of the jurisprudence of the ICTY and ICTR. The chapter deals with the *actus reus* and the *mens rea* of the crime, together with the question of non-consent. Chapter six will provide conclusions and a further analysis.

2 Historical background

For a long time, rape was socially accepted within the rules of warfare. Women were property of men and the conquered women were seen as spoils of warfare, belonging to the victor. Rape was an inevitable by-product of war.[1] Even though rape has been prohibited in warfare throughout history, international recognition and understanding of the crime did not emerge until after World War II.[2]

Countless acts of rape, mostly towards women and children, in Bosnia and Rwanda took the international community by surprise. This became a turning point for the recognition of rape as a weapon of war, as new codes of law were established, along with new legal institutions to uphold them. The first steps towards advancing international justice for rape as a weapon of war were made.[3]

2.1 Social and cultural dynamics

Armed conflicts have existed since the existence of mankind and rape has been its constant shadow. Rape has appeared both opportunistically and strategically with women and girls as main targets. The violence against

[1] Askin, Kelly: "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward". In: de Brouwer, Anne-Marie; Ku, Charlotte; Römkens, Renée; van den Herik, Larissa (eds.): *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge – Antwerp – Portland, Intersentia Publishing Ltd, 2013, p. 20.
[2] Ellis, Mark: *Breaking the Silence: Rape as an International Crime*, Case Western Reserve Journal of International Law, Vol. 38, Issue 2 (2006-2007), p. 227.
[3] de Brouwer, Anne-Marie; Ku, Charlotte; Römkens, Renée; van den Herik, Larissa: "Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International Crime". In: de Brouwer, Anne-Marie; Ku, Charlotte; Römkens, Renée; van den Herik, Larissa (eds.): *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge – Antwerp – Portland, Intersentia Publishing Ltd, 2013, p. 3.

women has increased during the last century and in many conflicts, women and girls are primary targets.[4]

The usual conception about rape is that it is about power and dominance between the sexes and these dynamics are equally applicable in time of conflict.[5] Rape works as a mechanism of terror to control the woman, and it is an expression for women's subordinate social status. The sexual abuse symbolizes masculinity, sexual power and male supremacy.[6] When traditional male power dynamics are imbalanced, as in time of conflict, it is common that the number of rapes increases. It is as an instrument to maintain and restore the power balances in society and to suppress the challenges to the dominant group's social status.[7]

Female rape can be a symbol of men's failure in protecting "their" women. When female members of the family are raped, it is humiliating to the family and to the community.[8] Female bodies are used to disempower and emasculate the men and public rapes are used to achieve maximum humiliation.[9] Complex emotions of hate, vengeance and superiority towards the other side of the conflict can be expressed throughout rape of the enemy's women.[10]

[4] Askin, p. 19
[5] Sivakumaran, Sandesh: *Sexual Violence Against Men in Armed Conflict*, The European Journal of International Law, Vol 18 no. 2, 2007, p. 267.
[6] McKinnon, Catharine: *Reflections on Sex Equality under Law,* The Yale Law Journal, Vol. 100, No. 5, Centennial Issue, 1991, p. 328.
[7] Sivakumaran,, p. 267.
[8] Chinkin, Christine: *Rape and Sexual Abuse of Women in International Law,* European Journal of International Law, Vol. 5, Issue 3, 1994, p. 328.
[9] Sivakumaran, p. 268.
[10] Chinkin, p. 328.

3 Tribunals and Courts

3.1 ICTY

The conflict in the Former Yugoslavia was brutal, and rape was used as a systematic weapon to destroy the cultural fabric of the Muslim population.[11] The ICTY was established in 1992 by the United Nations (UN) Security Council throughout resolution 827. ICTY was established to put an end to the horrendous crimes and to prosecute those responsible for them.[12] The Tribunal has jurisdiction over grave beaches of the Geneva Conventions[13], other war crimes[14], crimes against humanity[15] and genocide[16] committed in the former Yugoslavia since 1991[17]. Rape is specifically mentioned as an act that can constitute a crime against humanity in the ICTY Statute.[18]

3.2 ICTR

During the genocide in Rwanda, rapes appeared on a massive scale. The number of rapes committed against women in Rwanda during the genocide has been estimated to between 250 000 and 500 000.[19] Rape was used as a weapon, *"it was the rule and its absence was the exception"*[20]. Rape was

[11] Ellis pp. 225-226.
[12] United Nations Security Council Resolution 827 of 25 May 1993.
[13] Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), Article 2.
[14] ICTY Statute, Article 3.
[15] ICTY Statute, Article 5.
[16] ICTY Statute, Article 4.
[17] ICTY Statute, Article 1.
[18] ICTY Statute, Article 5(g)
[19] Bianchi, Linda: "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR". In: de Brouwer, Anne-Marie; Ku, Charlotte; Römkens, Renée; van den Herik, Larissa (eds.): *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge – Antwerp – Portland, Intersentia Publishing Ltd, 2013, p. 126.
[20] Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, UN Doc. E/CN.4/1996/68, para. 16, (Degni Report) access April 13, 2015, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/104/66/PDF/G9610466.pdf?OpenElement.

used as a weapon and women of all ages were raped, no mercy was shown.[21] Most of the targeted women were Tutsi, who were targeted because of ethnicity and gender and most rapes took place in public. Some Hutu women were also raped because they were married to Tutsi men or had protected Tutsi. Several victims had to witness their families being tortured and murdered before being raped.[22]

ICTR was established in 1994 by the Security Council in resolution 955. The purpose of the Tribunal was to face the serious crimes committed in Rwanda during the internal conflict in 1994.[23] The Tribunal has jurisdiction over the crime of genocide[24], crimes against humanity[25] and some war crimes[26] committed in Rwanda during 1994.[27]

3.3 ICC

The ICC is a permanent, independent and treaty based international criminal court with its seat in Hague, the Netherlands. The court was created in 1998 when 120 states adopted the Rome Statute of the International Criminal Court (ICC Statute) and its purpose is to prosecute perpetrators of the most serious international crimes. The ICC Statute entered in to force in 2002 when it had reached the required 60 ratifications. [28]

In the ICC Statute, rape is expressly mentioned as an act that can constitute crimes against humanity[29] and war crimes[30]. The Court has codified many of the judgements of the ICTY and ICTR and made important advancement in recognizing rape as one of the most serious crimes under international

[21] Degni Report, para. 16-19.
[22] Bianchi, p. 126.
[23] UN Security Council Resolution 955 of 8 November 1994.
[24] Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), Article 2.
[25] ICTR Statute, Article 3.
[26] ICTR Statute, Article 4.
[27] ICTR Statute, Article 1.
[28] *About the Court*, International Criminal Court, access May 19, 2015, available at: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.
[29] ICC Statute, Article 7(1)(g).
[30] ICC Statute, Article 8(2)(b)(xxii).

law.[31] The Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression.[32]

[31] Ellis, p. 238.
[32] ICC Statute, Article 5.

4 The crimes

This thesis will focus on crimes against humanity and genocide since the concept of "rape as a weapon of war" often is connected to these two crimes. The chapter will provide the requirements for systematic rape to be punishable under international law.

4.1 Crimes against humanity

Rape is generally a domestic crime, but when it appears in a certain context, it becomes an international crime. The definition of this context has varied over the years and the first definitions required the existence of an armed conflict. However, in latter definitions and in customary international law, the context requirements have changed.[33] The ICTY Statute is an exception, since it requires that the acts are "committed in armed conflict"[34]. However, the ICTY has admitted that the requirement of a nexus to an armed conflict is no longer required by customary international law.[35] This thesis will focus on the definition existing under customary international and in the statutes of the ICC and ICTR. The definition enacts that the conduct has to occur in the context of a widespread and systematic attack against a civil population.[36]

The crime is very complex and it consists of a conduct, contextual elements and mental elements. In this thesis, the relevant criminal conduct is rape and the conduct has to fulfil the elements required for the crime of rape. The definition of rape will be further analysed in the next chapter. For a criminal conduct to be classified as a crime against humanity it is also necessary to have mental elements. The perpetrator has to fulfil the mental element of the

[33] Cryer, Robert: "International Criminal Law". In: Evans, Malcom (ed.), *International Law*, fourth edition, Oxford; New York, Oxford University Press, 2014, pp. 759-760.
[34] ICTY Statute, Article 5.
[35] ICTY, case IT-94-1-T, *Prosecutor v. Dusko Tadic*, Trail Chamber Judgment of 7 May 1997, para. 627.
[36] ICTR Statute, Article 3 and ICC Statute, Article 7.

specific act (rape) as well as to be aware of the widespread and systematic context in which the act appeared. The contextual element involves a conduct that takes place within a widespread and systematic attack against a civil population.[37]

In the *Kunarac* case, ICTY successfully convicted individuals accused of rape as a crime against humanity for the first time.[38] The Appeals Chamber stated that; *"the phrase "widespread" refers to the large-scale nature of the attack and the number of victims, while the phrase "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence"*[39]. When similar criminal conducts are repeated and performed on a regular basis it can constitute proof of a systematic attack.[40] This definition has been established by the *ad hoc* Tribunals in several cases and it is universally applicable.[41]

It is not the rapes *per se* that has to be widespread or systematic but the rapes have to appear in the context of a widespread or systematic attack against civilians. In the *Gacumbitsi* case the rapes against female Tutsi occurred in an area where Tutsi were subjected to a widespread and systematic attack because of their ethnicity. The Appeals Chamber concluded that the rapes of Tutsi women were part of the widespread and systematic attack against the Tutsi population.[42]

In the *Brđanin* case the Tribunal was convinced that the rapes were connected to the armed conflict and a part of the widespread and systematic attack against the Muslim population in the area. The arguments about the rapes committed being "individual domestic crimes" was dismissed by the

[37] Cryer, pp. 759-761.
[38] Ellis, p. 229.
[39] ICTY, case, IT-96-23 & IT-96-23-1/A, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Appeals Chamber Judgment of 12 June 2002 (Kunarac Appeal Judgment), para. 94.
[40] Kunarac Appeal Judgment, para. 94.
[41] ICTR, case ICTR-2001-64-A, Prosecutor v. Sylvestre Gacumbitsi, Appeals Chamber Judgment of 7 July 2006 (Gacumbitsi Appeal Judgment), para. 101.
[42] Gacumbitsi Appeal Judgment, para. 102.

Tribunal. The Tribunal saw the rapes in a broader context and found the rapes being a part of the widespread and systematic attack against the Muslim population.[43]

4.2 Genocide

Genocide focuses on threats directed to the existence of a group.[44] The internationally accepted definition of genocide derives from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The crime is defined in Article 2 and prohibits attempts to destroy a group of people based on nationality, ethnicity, race or religion.[45] According to the International Court of Justice (ICJ), cultural destruction is not sufficient to constitute genocide; it has to be some kind of physical destruction. However, the Court noted that attacks on cultural and religious property or symbols often occur simultaneously with attempts to physically destroy a group.[46]

The mental element is the factor that distinguishes genocide from "mere" mass killing and the mental element consists of the intent to destroy the targeted group.[47] In the *Jelesic* case the Appeals Chamber concluded that personal motive was not required but direct intention was necessary. Indirect intent was insufficient.[48] Due to the heavy burden of proof, genocidal intent is hard to prove.[49] According to the ICTR, genocidal intent depends on circumstantial factors such as; overall context of the conduct, how victims are targeted, if the perpetrator have targeted the same group

[43] ICTY, case IT-99-36-A, *Prosecutor v. Brđanin*, Appeals Chamber Judgment of 3 April 2007, para. 256-257.
[44] Cryer, p. 755.
[45] Genocide Convention, Article 2.
[46] ICJ, Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007 (Bosnian Genocide Case), para. 344.
[47] Cryer, p. 756.
[48] ICTY, case No. IT-95-10-A, *Prosecutor v. Goran Jelesic,* Appeals Chamber Judgment of 5 July 2001, para. 49-51.
[49] Cryer, pp. 756-757.

when committing other crimes and the scale, scope and frequency of the destructive acts.[50]

Difficulties to define a protected group may occur. ICJ has stated that a group have to have some positive characteristics, like; national, religious, ethnic or racial. The Court rejected that a group can be defined negatively, like "all non-Serbs". The group has to have a particular group identity. The targeted part of the group has to be substantial and the acts perpetrated towards them have to have an impact on the group as a whole.[51] When deciding whether a victim belongs to a protected group, the main focus is the perpetrators subjective perceptions. It is sufficient that the perpetrator believes that the victim belong to the protected group and target the victim because of that.[52]

Rape is not expressly mentioned in the Genocide Convention, nor is gender listed as a protected group. However, rape can implicitly be included in the following acts; *"Causing serious bodily or mental harm to members of the group"*[53] or *"Imposing measures intended to prevent births within the group"*[54]. According to jurisprudence from the *ad hoc* Tribunals, rape can still be a part of the destruction process since it inflicts both physical and psychological harm to the victim and the targeted group.[55]

Public rape can work as an instrument to displace the ethnic group from the region as it spreads fear and humiliation throughout the community and may compel the group to flee. The same result can also be accomplished by

[50] ICTR, case No. ICTR-01-63-T, *Prosecutor v. Siméon Nchamihigo*, Trail Chamber Judgment of 12 November 2008, para. 331.
[51] Bosnian Genocide Case, para. 193.
[52] ICTR, case No. ICTR-97-20-T, *Prosecutor v. Laurent Semanza*, Trail Chamber Judgment of 15 May 2003, para. 317.
[53] Genocide Convention, Article 2(b).
[54] Genocide Convention, Article 2(d).
[55] Bianchi, p. 141.

forcing family members to rape each other. The targets are often young women, virgins and educated and prominent members of the community. [56]

Rape can be used to prevent births within the targeted group as it may damage the woman's fertility. The community may also see the raped women as undesirable or the rape may cause psychological damage to the woman and prevent her from procreating. In many societies the children's identity is determined by the father's ethnicity and the perpetrator may therefore deliberately impregnate the women with the intent that the child will belong to the father's group.[57]

The most important case concerning rape as part of genocide is the *Akayesu* case. Rape was not initially included among the charges towards Akayesu. When witnesses spontaneously started to testify of acts of rape the ICTR decided to investigate the matter further. The female judge Navanethem Pially initiated the investigation.[58] In the *Akayesu* case the Tribunal confirmed that Tutsi women were raped solely because they were Tutsi. Rape was used as a method to destroy the ethnic group, *"destruction of the spirit, of the will to live, and of life itself"*[59]. ICTR found that the rapes committed constituted acts of genocide, in accordance to Article 2(2) of the ICTR Statute, since it inflicted serious bodily and mental harm to the victims. ICTR clarified that rape can constitute an act of genocide in the same way as any other act as long as the perpetrators intention is to destroy the targeted group. The tribunal also concluded that rape is one of the worst ways of inflicting harm to the victim, since the harm is both bodily and mental.[60]

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[56] UN Secretary-General, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 of May 27 1994, para. 250(a), access April 8, 2015, available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.
[57] ICTR, case No. ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu,* Trail Chamber Judgment of 2 September 1998 (Akayesu Trail Judgment), para 507-508.
[58] Ellis, p. 233.
[59] Akayesu Trail Judgment, para. 732.
[60] Akayesu Trail Judgment, para. 731-734.

Female rape has not yet been included in a genocide conviction in ICTY.[61]

4.3 Rape as a weapon of war or genocide

Rape as a weapon of war is not a legal concept, but the term have developed legal significance by the work of ICTY and ICTR. The Tribunals have recognized rape as an instrumental component to armed conflict and not only a by-product.[62] The UN Security Council has recognized that sexual violence (including rape) is used as a weapon of war in many conflicts.[63]

Many legal feminist believes that the *ad hoc* Tribunals have not gone far enough in protecting women and their rights in wartime. During the Balkan war, two different camps among feminists emerged. One side saw the rapes committed being primary genocidal and focused on rapes towards Bosnian Muslim women. The other side wanted the international community to response equally to rapes committed on both sides of the conflict.[64] The latter did not deny the genocidal aspects of the rapes committed against Bosnian Muslim women, but they would rather see that all rapes committed were considered genocidal because of how they affected women as a group. They wanted "women" to be a protected group for the crime of genocide. [65] Both feminist camps described women as victims of war. Especially Bosnian Muslim women were seen as rape victims and were identified as *"raped women", "powerless"* or *"broken"*.[66]

According to Buss, the categorization of rape as a weapon of war has had some unintended consequences.[67] When classifying rape as a weapon of war

[61] Engle, Karen: *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, The American Journal of International Law, Vol. 99, No. 4, 2005, p. 783.
[62] Buss, Doris E: *Rethinking "Rape as Weapon of War",* Feminist Legal Studies, Vol. 17, Issue 2, 2009, p. 148.
[63] UN Security Council Resolution 1820 of 19 June 2008.
[64] Engle, p. 779.
[65] Engle, p. 785.
[66] Engle, p. 795-796.
[67] Buss, p. 151.

or genocide the image of rape as an inevitable and natural part of armed conflict is preserved. This may result in the naturalization of rape as an always available weapon in armed conflict. Women are portrayed as raped or possible rape victims. When recognizing rape as a weapon of genocide in the conflict in Rwanda, the rapes perpetrated were derogated to *"Hutu men raping Tutsi women"*. Using the term "rape as a weapon of genocide" may exclude many women who were victims of rape from the justice system. Many women who suffered during the Rwandan genocide were not included in the term "Tutsi women" and were excluded from the international legal system. To put too much focus on the broader context and "rape as a weapon of war/genocide" may also draw attention from the individual act of rape.[68]

In the *Akayesu* case, the ICTY declared that; *"The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them."*[69] This conclusion made by the Tribunal disregards that other women, not solely Tutsi women, were victims of rape during the conflict. When derogating the definition to *"rapes perpetrated by Hutu men towards Tutsi women"* the full complexity of the usage of rape in the Rwandan genocide is not adequately reflected. To define the rapes committed solely as a weapon of genocide also leads away attention from the social, political and economic structures that were the source to the genocide.[70]

[68] Buss, pp. 155-158.
[69] Akayesu Trail Judgment, para. 732.
[70] Buss, pp. 158-160.

5 The definition of rape

This thesis will focus on four different definitions of rape developed by the ICTR, ICTY and ICC.

The first definition was developed by ICTR in the *Akayesu* case. The Tribunal declared that there was no commonly accepted definition of rape in international law and found the definition of rape as "non-consensual sexual intercourse", not being suitable in the context of international law. The Tribunal found several similarities between rape and torture as they are both violations on personal dignity and intended to intimidate, humiliate, punish and control the population. Therefore the Tribunal found it suitable to use an approach similar to the one used for torture.[71]

The term rape was defined as; *"a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"*[72] The Tribunal also gave examples of coercive circumstances: *"Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."*[73]

The definition developed in the *Akayesu* case diverges from the traditional definition of rape adopted in domestic legal systems in two ways. It includes forced oral and anal sexual penetration as well as forced penetration with other body parts, such as fingers and tongue. The definition is also gender neutral. It is noteworthy that the Tribunal did not address the question of lack of consent or the *mens rea* of the crime.[74]

[71] Akayesu Trail Judgment, para. 686-687.
[72] Akayesu Trail Judgment, para. 688.
[73] Akayesu Trail Judgment, para 688.
[74] Weiner, Phillip: *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, Boston College Law Rewiew, Vol. 54, Issue 3, 2013, p. 1210.

In the *Furundžija* case the ICTY discussed the definition developed in the *Akayesu* case but did not apply it. Instead the Tribunal concluded that the term rape was not clearly defined in international law and turned to the major legal systems of the world to find applicable principles of criminal law. After examining different legal system's definition of rape, the Tribunal found this to be acceptable objective elements of rape[75]: *"(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) by coercion or force or threat of force against the victim or a third person."*[76]

An important conclusion made in the *Furundžija* case was that coercion could be directed towards a third party and not exclusively towards the victim. The definition was made more explicit, and for the first time the Tribunal expressly mentioned oral penetration as an act that could constitute rape.[77] The *Furundžija* definition is narrower and closer to the common law understanding of rape than the *Akayesu* definition. The definition is practically delimited to male perpetrators and digital penetration is not included. ICTY also concluded that force or coercion was an element of rape.[78]

In the *Kunarac* case, ICTY expanded the definition of rape. The Tribunal accepted the *Furundžija* definition but found it necessary to clarify and expand the definition in paragraph (ii) of the Furundžija definition. The Tribunal considered the *Furundžija* definition to be narrower than

[75] Case No. IT-95-17/1-T, *Prosecutor v. Anto Furundžija*, Trail Chamber Judgment of 10 December 1998, (Furundžija Trail Judgment), para. 174-185.
[76] Furundžija Trail Judgment, para. 185.
[77] Ellis, p. 231.
[78] Weiner, pp. 1211-1212.

international law required in this aspect. The *Furundžija* definition did not include non-consensual or non-voluntary sexual penetration of the victim.[79]

Similar to the *Furundžija* case, the Tribunal examined different legal systems to find an accurate definition of rape. They found that the basic principle, common to the examined legal systems, was that serious violations of a person's sexual autonomy were penalized. The tribunal defined violation of sexual autonomy as; any act that was not freely agreed to or which the victim did not participate in voluntarily.[80]

The Tribunal stated that the *actus reus* of rape in international law was: *"the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."*[81]

The tribunal also established that the *mens rea* of rape was the penetration of the victim with the knowledge that it occurred without consent. According to the ICTY, the *mens rea* of rape consists of two requirements; the perpetrator has to have general intent to the sexual act as well as knowledge of lack of consent.[82] The relation between the *Akayesu* definition and the *Kunarac* definition appeared as unclear and it was not until the *Gacumbitsi* case in 2006 that the question was addressed properly. The ICTR Appeals Chamber adopted the Kunarac definition of rape and concluded that non-consent and knowledge thereof are elements of rape under international law.[83]

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[79] Case No. IT-96-23-T& IT-96-23/1-T, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trail Chamber Judgment of 22 February 2001 (Kunarac Trail Judgment), para. 438.
[80] Kunarac Trail Judgment, para. 457.
[81] Kunarac Trail Judgment, para. 460.
[82] Kunarac Trail Judgment, para. 460.
[83] Weiner, p. 1216.

The work of the *ad hoc* Tribunals in these three cases has made it easier for the ICC to establish an accurate definition of rape in its statute.[84] The ICC has defined the crime of rape in the Elements of Crimes and the definition is a combination between the definitions developed by the ad hoc Tribunals in *Akayesu*, *Furundžija* and *Kunarac*. According to ICC, rape is defined as followed: *"The perpetrator invaded the body of a person by conduct resulting in 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.*

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"[85]

The ICC definition uses the term "force or coercion" instead of lack of consent, however, the terms has a broad area of application. The definition does not address the *mens rea* of the crime but in Article 30 in the ICC Statute it is stated that a person should be criminally responsible if the act was committed with intent and knowledge. This corresponds with the approach in the *Kunarac* case were there were two requirements for the *mens rea* of rape.[86]

5.1 Consent

The question of consent or non-consent as an element of the crime of rape is constantly debated. The subject has been examined by the ICTY and ICTR

[84] Ellis, p. 231.
[85] Elements of Crimes, International Criminal Court (ICC Elements of Crimes), Article 7 (1) (g)-1, access April 8, 2015, available at: http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf .
[86] Weiner, p. 2017.

in several cases. In the *Kunarac* case, the Tribunal stated that proof of non-consent is required to convict someone of rape under international law. ICTY did thus accentuate that non-consent can be interfered from background circumstances like an ongoing genocide or detention. Most cases brought before the ICTY are cases including charges of war crimes or crimes against humanity. In these cases, true consent is not possible because the crimes are almost universally committed under coercive circumstances.[87] The Appeals Chamber also established that there was no requirement of resistance from the victim in international law. Neither is force *per se* an element of rape but force, or threat of force, constitutes clear evidence of non-consent.[88]

In the *Gacumbitsi* case, the ICTR sought clarification around the question of non-consent. The Tribunal emanated from the definition established in the *Kunarac* case where non-consent was required for conviction. The ICTR decided that non-consent has to be proven beyond reasonable doubt. However, it was enough to prove the existence of coercive circumstances where meaningful consent is not possible. The Tribunal was free to consider all relevant evidence in its evaluation of the background circumstances.[89] An important acknowledgement made by the ICC is that certain people are incapable of giving genuine consent. People may be incapable due to age, mental capacity or physical condition. This approach corresponds with the main part of the domestic legal systems.[90] Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence generally provides that consent cannot be used as a defence if coercive circumstances exist.[91] The Rule refers to some of the matters that negate consent. If a witness is subjected to a factor listed in Rule 96, genuine consent is not possible. This

[87] Kunarac Appeals Judgment, para. 130.
[88] Kunarac Appeals Judgment, para. 128-129.
[89] Gacumbitsi Appeal Judgment, para. 147-157.
[90] Weiner, p. 2017.
[91] Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 96, access 10 May 2015, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf, Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 96, access 15 May 2015, available at: http://www.unictr.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf.

was established in the *Kunarac* case. However, the Trail Chamber did make an ambiguous statement when declaring that *"consent will be considered to be absent in those circumstances unless freely given"*[92] The Tribunal attempts to balance the rights of the victim with the rights of the accused and wishes to avoid to establish strict liability.[93]

5.2 The legal discourse

According to Ellis, some legal scholars want rape to constitute an individual crime. To put rape in the subsection of other crimes may lead to rape being viewed as a lesser crime or makes it less distinctive.[94] Weiner believes that it is unnecessary to require proof of knowledge of non-consent in war crime tribunals as the circumstances are generally coercive. Weiner also discuss the possibility of strict liability in cases where the victim is a minor or mentally disabled.[95]

One feminist with a different view is Karen Engle. She believes that going further may rather aggravate than improve women's situation. Engle is critical towards the direction the ICTY took in the *Kunarac* case where the Tribunal presumed coercive circumstances during armed conflict. She considers this presumption being counterproductive since it makes consensual sexual relationships legally impossible under some circumstances. This denies that some Muslim women may have chosen to have sex with male Serbian soldiers during the war and strips women from their independence and sexual agency. It also picture women as powerless victims, which may affect women's possibilities to use their powers to solve and prevent conflicts. Another problem with the presumption of non-consent in armed conflict is that the definition of armed conflict would decide where genuine consent may be possible. Engle also criticizes the

[92] Kunarac Trail Judgment, para. 464.
[93] Weiner, p. 1228.
[94] Ellis, p. 246.
[95] Weiner, p. 1236.

ICTY due to the low number of women prosecuted, even though women clearly participated in the war. This may contribute to the maintenance of the picture of women as victims and men as perpetrators. To solely focus on rape may also deflect attention from other harms that women may have suffered during the war. Many women witnessed their family members being tortured or killed, was separated from their family or had their homes burned down and communities destroyed. Engle also points to the fact that many women may have suffered less because they were women. Men were often tortured, killed or detained. At the end of the war, women were also the first prisoners to be released.[96]

[96] Engle, pp. 804-814.

6 Conclusion

The recognition of rape as weapon of war made by the *ad hoc* Tribunals have been significant for the attitude towards wartime rape. Rape has been classified as one of the most serious crimes of war and international courts and tribunals have made important advancements to end impunity for rape-related offences during armed conflict. Several war criminals have been convicted for rape as a crime against humanity or genocide and the ICTY and ICTR have made it clear that rape was used as a weapon of war or genocide. However, there are still challenges left.

The concept of rape as a weapon of war has been significant for the international recognition of wartime rape. However, I agree with Buss that the concept may work counterproductive as it may exclude some victims from the justice system. It may also draw attention from the individual act of rape since it focuses on the rapes in a broader context, which could have unintended consequences. I believe that the concept is important since it draws attention to the problem, but that courts and tribunals should use it carefully and consider its consequences.

It is important to continue the academic discussions concerning the subject and to work interdisciplinary to solve the problem. The use of rape as a weapon of war is very complex and it is insufficient to examine the problem solely from a judicial perspective. The intense discourse has contributed to important advancements and it is important to continue the discussions to reach a comprehensive understanding of the subject.

The *ad hoc* Tribunals have developed a relatively uniform definition of rape under international law. The definition is close to the common law understanding of rape and requires proof of non-consent or coercive circumstances. The question of non-consent is constantly debated and legal scholars have different views on the subject. The definition of rape as non-

consensual sexual intercourse is equitable under international law and it is suitable for prosecuting rape as genocide or crimes against humanity. Thus, it is problematic and counterproductive to presume non-consent during times of conflict as the *ad hoc* Tribunals have done in some cases. I agree with Engle that the presumption of coercive circumstances may aggravate the situation for women, since it strips them from their sexual autonomy. If such presumptions are made, it is legally impossible for women to have consensual sexual relations with "enemy soldiers". This generalisation may also jeopardize the rule of law and the presumption of innocence. At the same time, it is important that the victim's burden of proof is not unreasonably high. The balance between the two have to be made carefully.

Thus, it is equitable to have a stricter liability for the perpetrators knowledge of non-consent when the victim is a minor or mentally disabled. The ICC has made an important recognition when stating that some people are incapable of giving genuine consent.

It is important to not portray women as victims or treat them as powerless or broken. I believe that it is important to make women involved in the decision-making, in the legal system and in the peacekeeping. To give women more power instead of making them victims is an important key to prevent systematic use of rape in times of conflict. It is also important to prosecute war criminals with rape-related crimes to show that impunity for wartime rape is no longer the rule.

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