I. INTRODUCTION

Gender-based violence (GBV) is “violence that targets individuals or groups on the basis of their gender.” Under General Recommendation No. 19 of 

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the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately.”

It is said that in times of war, GBV has been a historical constant, albeit, generally under-documented and unrecognized as a distinct offense up until the 1990s. Specifically on rape, it is said that “literature is so replete with depictions of rape during war that it is exceptional to read in detail about one [war] without reading about the other [rape].” In her article, Ashley Dallman points out that women and girls’ bodies have served as “battlefields” for the infliction of sexual violence “in order to humiliate, demonstrate domination and instill terror, among other political motivations.” Even with the development of the body of laws known as International Humanitarian Law (IHL), which proscribes sexual violence, such violence has largely gone unpunished.

This Article examines how rape has been treated in International Criminal Law and analyzes its current definition and the elements necessary to prove it as a crime within the framework of the International Criminal Court (ICC). It will argue that the element of consent in rape, whether classified as a war crime or a crime against humanity should not be treated and proven as a separate and isolated element; and that a presumption of non-consent should exist, given the context in which rape occurs. The Article will draw on two major precedent-setting decisions where rape was defined as a crime, namely The Prosecutor v. Akayesu and The Prosecutor v.

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5. Id. (citing Kelly Dawn Askin, Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur, 1 GENOCIDE STUDIES AND PREVENTION 1, 13 (2006)).
7. Id.
Kunarac, et al.\textsuperscript{9} from the International Criminal Tribunal for the former Yugoslavia (ICTY). A few other decisions after the promulgation of these cases will also be discussed. It will then compare the treatment of rape in these cases with the provisions on rape under the Elements of Crimes\textsuperscript{10} adopted by the Assembly of State-Parties, pursuant to Article 9 of the Rome Statute.\textsuperscript{11}

**II. BRIEF OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK AND THE TREATMENT OF RAPE AS A CRIME**

**A. The Geneva Conventions**

There are four main treaties and two protocols that make up the major part of IHL. These are the four Geneva Conventions of 12 August 1949 and the two Additional Protocols of 8 June 1977.\textsuperscript{12} Both the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War\textsuperscript{13} and Protocol I relating to the Protection of Victims of International Armed Conflict\textsuperscript{14} provide for the protection of women from rape, enforced prostitution, and indecent assault;\textsuperscript{15} while Protocol II\textsuperscript{16} relating to the Protection of Victims of Non-International Armed Conflicts expressly prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault”\textsuperscript{17} and “slavery and the slave trade in all their forms.”\textsuperscript{18}


\textsuperscript{11. Rome Statute of the International Criminal Court art. 9, July 1, 2002, 2187 U.N.T.S. 93.}

\textsuperscript{12. See Alex Obota-Odora, Rape and Sexual Violence in International Law: ICTR Contribution, 142 NEW ENG. J. INT’L & COMP. L. 135, 142 (2005).}


\textsuperscript{15. Id. art. 76 & Fourth Geneva Convention, supra note 13, art. 27.}


\textsuperscript{17. Id. art. 4 (2) (e).}

\textsuperscript{18. Id. art. 4 (2) (l).}
Though these provisions acknowledge sexual violence such as rape and enforced prostitution, nevertheless, they have treated these as crimes against honor and dignity rather than as crimes of violence. Their true nature and severity have therefore been understated and muted. According to Alex Obota-Odora—

The prevailing principle of humanitarian law is that civilians should never be targeted for attack, and care must be taken to spare them from harm to the greatest extent possible. Another important principle is that all non-combatants must be treated humanely. This principle has tended to ignore the violent, hate-filled atmosphere of war.\(^{19}\)

In the first Special Rapporteur on Violence Against Women,\(^{20}\) Radhika Coomaraswami observed that

[by using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. ... When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as ‘dirty’ or ‘spoiled.’ Consequently, many women will neither report nor discuss the violence that has been perpetrated against them.\(^{21}\)]

\section*{B. The Nuremberg and Tokyo Trials}

After World War II, the International Military Tribunal (IMT) was set up by the Allied Forces, which conducted trials in Nuremberg for the German defendants and in Tokyo for the Japanese defendants.\(^{22}\) Despite evidence of systematic rape both in Asia and Europe, sexual violence perpetrated during the war was largely ignored.\(^{23}\)

According to Patricia Sellers, former Legal Advisor for Gender and a prosecutor at the ICTY, incidents of rape and other forms of sexual abuse were actually presented by French and Russian prosecutors in Nuremberg.\(^{24}\) Testimonies were introduced with regard to sexual abuse against both men and women, including experiments on sterilization conducted in Nazi

\begin{footnotesize}
\begin{enumerate}
\item Obota-Odora, \textit{supra} note 12, at 142.
\item \textit{Id.} ¶ 11.
\item Obota-Odora, \textit{supra} note 12, at 143.
\item Patricia Sellers, \textit{Rape}, in 2 \textit{Encyclopedia of Genocide and Crimes Against Humanity} 862-69 (Dinah I. Shelton ec., 2005).
\end{enumerate}
\end{footnotesize}
concentration camps.\textsuperscript{25} Despite this, however, the judgment made no mention of rape or any other form of sexual violence.\textsuperscript{26}

Sellers elaborates, thus —

In an apparent effort to explain their decision, the judges observed that, in the section of the [Judgement that dealt with [War] crimes and crimes against humanity, ‘the evidence was overwhelming in its volume and detail.’ They proposed, therefore, to deal with the multitude of atrocities quite generally, noting that ‘every conceivable circumstance of cruelty and horror’ had been perpetrated.

... 

To the extent that the rapes and other forms of sexual violence inflicted upon German civilians, or civilians of other nationalities, were not judged to be traditional war crimes, the Tribunal condemned such conduct as inhumane acts under crimes against humanity. The failure to expressly include rape among the listed crimes against humanity, together with the paucity of clearer judicial explanation on how sexual assault evidence was characterized, has contributed to the continuing myth that rapes and other sexual violence evidence were not pursued at Nuremberg.\textsuperscript{27}

Christine Chinkin, on the other hand, argues that ‘[r]ape did not figure prominently at Nuremberg, not because the Germans were not guilty of rape, but because the allied forces, especially the Russians and the Moroccan forces under French control, were also guilty of many rapes.’\textsuperscript{28}

Despite the fact that the Tokyo Charter\textsuperscript{29} provides for crimes against humanity,\textsuperscript{30} the Tokyo Tribunal held that ‘all the atrocities committed by the Japanese forces, including the rapes, constituted war crimes.’\textsuperscript{31} Although the Tribunal did secure convictions for rapes committed under the category of war crimes,\textsuperscript{32} the prosecutors were unable to ‘present evidence on the systemic military sexual slavery conducted by the Japanese Army against tens, if not hundreds of thousands of Korean, Indonesian, Chinese, Burmese,

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Christine Chinkin, Rape and Sexual Abuse of Women in International Law, 5 EUR. J. INT’L L. 326, 334 (1994).
\textsuperscript{30} Id. art. 5 (c).
\textsuperscript{31} Id. note 24, at 862-69.
Japanese, and other women from Japanese conquered and occupied territories in Asia.\textsuperscript{33}

After the Nuremberg and Tokyo trials, there were “subsequent trials” conducted by the Allies in the zones they were occupying, under the framework of Control Council Law No. 10,\textsuperscript{34} which applied to those who were not considered major war criminals.\textsuperscript{35} Unlike the Nuremberg and Tokyo Charters, this law specifically included rape as a crime against humanity, providing—

Crimes Against Humanity. Atrocities and offenses, including but not limited to murder, extermination, deportation, imprisonment, torture, rape, or other inhumane acts committed against the civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.\textsuperscript{36}

In one of the trials in the Far East, Japanese General Yamashita was charged before the United States military court for multiple crimes, including rapes committed in the Philippines.\textsuperscript{37} Likewise, in Indonesia, the Dutch Batavia trials condemned the rapes committed as war crimes.\textsuperscript{38}

However, Sellers concludes that these subsequent trials based on Control Council Law No. 10 did not actually establish jurisprudence particularly on rape.\textsuperscript{39} The real contribution of said law lies “in its clear acknowledgement, so soon after the Nuremberg and Tokyo Charters, that acts of rape could be considered a crime against humanity.”\textsuperscript{40}


\textsuperscript{35} Sellers, supra note 24, at 862-69.

\textsuperscript{36} Control Council Law No. 10, art. II (1) (c) (emphasis supplied).

\textsuperscript{37} Sellers, supra note 24, at 862-69.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

There are two significant U.N. resolutions that brought to fore the issue of gender-based violence suffered by women and girls in situations of armed conflict, namely U.N. Resolution 1325\(^ {41} \) and 1820.\(^ {42} \)

Both these Resolutions were adopted after the creation of the ICTY in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. In both these ad hoc tribunals, rape has been explicitly recognized and punished as a crime against humanity.\(^ {43} \)

On 31 October 2000, the U.N. Security Council adopted Resolution 1325 on women, peace, and security. It expressed concern that “civilians, particularly women and children ... are targeted by combatants and armed elements”\(^ {44} \) and reaffirmed “the need to implement fully [International Humanitarian and Human Rights] law that protects the rights of women and girls during and after conflicts.”\(^ {45} \)

This Resolution, therefore, called on Member-States “to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict\(^ {46} \) and emphasized “the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls.”\(^ {47} \) It also stressed “the need to exclude these crimes, where feasible from amnesty provisions.”\(^ {48} \)

Almost eight years after, on 19 June 2008, the U.N. Security Council adopted Resolution 1820 stating that

despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to

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44. Security Council Res. 1325, supra note 41.
45. Id.
46. Id. ¶ 13.
47. Id. ¶ 11.
48. Id.
occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality.\textsuperscript{49}

The Resolution also noted that

women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities.\textsuperscript{50}

Hence, the Resolution demanded that civilians, particularly women and girls be protected “from all forms of sexual violence,”\textsuperscript{51} and called on Member-States to impose a categorical prohibition on their troops with regard to committing sexual violence against civilians, with the end in view of “debunking myths that fuel sexual violence.”\textsuperscript{52} It also emphasized enforcement of disciplinary measures on said military and command responsibility.\textsuperscript{53} Paragraph four of the said Resolution further underscored the importance of accountability, thus —

[R]ape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.\textsuperscript{54}

III. RAPE IN SITUATIONS OF ARMED CONFLICT: WHO AND WHY

Before discussing the jurisprudence on rape enunciated in the groundbreaking decisions of the international criminal tribunals, it is important to understand in what context GBV is committed and why it has been a constant in situations of armed conflict, whether internal or international.

While the most common forms of GBV are rape and sexual abuse, other forms have also been perpetrated during situations of conflict and post-

\textsuperscript{49} Security Council Res. 1822, \emph{supra} note 42.
\textsuperscript{50} \emph{Id.}
\textsuperscript{51} \emph{Id.} \textsuperscript{3}
\textsuperscript{52} \emph{Id.}
\textsuperscript{53} \emph{Id.}
\textsuperscript{54} \emph{Id.} \textsuperscript{4}
conflict, such as disease transmission, impregnation/miscarriages, forced nudity, kidnapping, slavery and trafficking.\textsuperscript{55} It has been said that “[r]ape in conflict settings is often violent and brutal, frequently involving gang-rape and rape with foreign objects such as guns and knives. In addition to rape, sexual abuse is also prevalent, particularly in the forms of forced nudity, strip searches, and other publicly humiliating and violating acts.”\textsuperscript{56} Additionally, it has been observed that —

Depending on the particular circumstances, an incident of rape may also constitute: (a) a violation of the laws or customs of war, (b) a grave breach of the Geneva Conventions, (c) torture, (d) enslavement, or (e) an element of genocide. The possibility of multiple charges reflects the fact that rapes committed during an armed conflict may have different motivations and contexts.\textsuperscript{57}

Chinkin maintains that “[w]omen are raped ... whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these.”\textsuperscript{58} She points out that the perpetrators are not exclusively coming from enemy forces, but may come from “friendly” forces as well.\textsuperscript{59} For instance, rapes have been attributed to members of the U.N. peacekeeping forces sent primarily to help restore peace and security.\textsuperscript{60} Likewise, citing as an example the Iraqi invasion of Kuwait in 1990, Chinkin observes that Iraqi soldiers raped at least 5,000 Kuwaiti women during said invasion, but that after Kuwait was liberated, returning Kuwaitis committed sexual violence against foreign domestic workers employed in the country.\textsuperscript{61}

Chinkin posits that rape does not only occur by “chance” to women who happen to be “in the wrong place at the wrong time.”\textsuperscript{62} Accordingly, the act of rape is not about sex but about “power and control which is 'structured by male soldiers’ notions of their masculine privilege, by the

\textsuperscript{55} Rashida Manjoo & Calleigh McRaith, Gender-Based Violence and Justice in Conflict and Post-Conflict Areas, 44 CORNELL INT’L J. 11, 12 (2011) (citing ELISABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR, PEACE: THE INDEPENDENT EXPERTS’ ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN’S ROLE IN PEACE-BUILDING 9 (2002)).

\textsuperscript{56} Id.


\textsuperscript{58} Chinkin, supra note 28, at 326.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 327.

\textsuperscript{62} Id. at 328.
strength of the military’s lines of command and by class and ethnic inequalities among women.” 63 She further explains that—

[VI]olence against women may be directed towards the social group of which she is a member because ‘to rape a woman is to humiliate[ ] her community.’ Complex, combined emotions of hatred, superiority, vengeance for real or imagined past wrongs and national pride are engendered and deliberately manipulated in armed conflict. They are given expression through rape of the other side’s women. For the men of the community[,] rape encapsulates the totality of their defeat; they have failed to protect ‘their’ women.64

A. Reasons Behind GBV

To inflict rape and other forms of sexual abuse with severe brutality against a group, an entire community, and on a massive scale, is not only indicative of deep-filled hatred against the targeted group; it also negates any claim that these acts are a product of mere isolated incidents which are uncalculated and unplanned. Several factors have been advanced as to why rape and other forms of GBV are specifically inflicted during armed conflict. This can be classified into two main reasons: (1) the fact that women’s bodies are seen as spoils of war and (2) GBV is perpetrated as a tool of war. In both classifications, victims of GBV, specifically women and girls, are commodified and objectified in the worst possible ways.

1. Women’s Bodies as Spoils of War

Women’s bodies are objectified during armed conflict in various ways. Accordingly, included in the mercenary soldiers’ terms of employment is the “license to rape.”65 This serves as an incentive for accepting a mission.66 Such a repulsive practice shows that a woman in this context is not considered a human being, “but as a mere object, a prize, a trophy of war.”67

Rashida Manjoo and Calleigh McRaith also explain that “military units often view women’s bodies as ‘spoils of war’ and see rape as a standard practice of war earned by the victorious army.”68

Women and girls are also treated like chattels and goods. For instance, abductions are perpetrated either by the military or rebel forces where after

63. Id.
64. Chinkin, supra note 28, at 326.
65. Id. at 329.
66. Id.
67. Id. (citing Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (1992)).
being kidnapped, civilian women and girls are brought to the camps to
provide sexual and domestic services.69 Girls, furthermore, run the risk of
being trafficked and sold or traded either between military units belonging to
the same force or to an allied military unit.70

Manjoo and McRaith also point out that “kidnapping and trafficking
practices occur not only at the site of conflict, but also at refugee camps,
adding a new level of terror to what was intended to be a safe location.”71

2. GBV as a Tool of War

Obota-Odora observes that “[t]he bodies of women of all ages, races,
religions, and ethnicities continue to be used as envelopes to send messages
to the perceived enemy. The harm, silence and shame women experience in
war is pervasive, but their redress is almost non-existent.”72

As a tool of war, it is advanced that the reason why GBV is deliberately
inflicted is that it contributes to the “destabilization, humiliation, and
degradation of a population.”73 It is also used “to gather information and
determine loyalties” where women find themselves being accused of
sympathizing with enemy forces.74 In this scenario, the violence employed
against them is often severe that it qualifies as an act of torture.75 Torture is
deliberately inflicted because the “armies know such violence produces both
psychological as well as physical harm, further destabilizing the local
population and mentally traumatizing civilians.”76 GBV is likewise used to
wage a “campaign of terror,”77 effectively disputing the claim that the
manner by which GBV is inflicted “[i]s simply the random [choice] of
individuals.”78

Notably, GBV has also been perpetrated against men.79 This could be
attributed to the desire “to emasculate and stigmatize the survivor-victim and

69. Id. at 12–13.
70. Id. at 13.
71. Id.
72. Obota-Odora, supra note 12, at 139.
74. Id. at 15.
75. Id.
76. Id.
77. Id.
78. Id.
79. Program on Humanitarian Policy and Conflict Research, Harvard University,
ch.org/index.cfm?fuseaction=page.view&pageid=2104 (last accessed Sep.
6, 2012).
his community, an effect produced in part by stereotypes relating to masculinity and femininity as well as to social norms denigrating expressions of same-sex desire.\textsuperscript{80}

Lastly, other forms of GBV, especially systematic rape, are increasingly being utilized to perpetuate the policy of ethnic cleansing.\textsuperscript{81} Accordingly, camps have been specifically established for sexual torture, forced impregnation, and forced miscarriages.\textsuperscript{82} These atrocities form part of a war strategy that seeks to destabilize civilian population and violate what is perceived to be the honor of the enemy.\textsuperscript{83}

3. Consequences of GBV

Chinkin asserts that although the rapes perpetrated have not only targeted women, “in terms of numbers, rape is essentially a crime committed against women,”\textsuperscript{84} and that “women suffer from particular after-effects in rape that are not shared by men.”\textsuperscript{85}

There are many effects of GBV that are severely detrimental to women. Primarily affected is their physical health, which involves not only injury to reproductive organs but more importantly, acquiring sexually transmitted diseases, Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) in particular.\textsuperscript{86}

Victims of GBV also suffer from psychological consequences, such as “depression, anxiety, post-traumatic stress disorder, shock, memory loss, and sexual dysfunction.”\textsuperscript{87} Manjoo and McRaith further elaborate, saying that —

Suicide, behavior disorders, and eating disorders have also been frequently reported. Fear of additional sexual violence may also keep women from going about their normal activities, such as attending school, engaging in the market, or participating in politics. This is true both for conflict areas and post-conflict areas, as women remain exceptionally vulnerable to sexual violence even in societies that are engaging in post-conflict transitional justice mechanisms.\textsuperscript{88}

\textsuperscript{80} Id.
\textsuperscript{81} Manjoo & McRaith, \textit{supra} note 55, at 12.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Chinkin, \textit{supra} note 28, at 326.
\textsuperscript{85} Id.
\textsuperscript{86} Manjoo & McRaith, \textit{supra} note 55, at 16.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
Women are also stigmatized because of the abuse they have suffered and thus, they experience difficulty in reintegrating into society.\textsuperscript{89} Manjoo and McRaith note that in one study, “over 25% of married rape victims in Liberia were divorced by their husbands following their rape, while 15% of rapes resulted in an unwanted pregnancy. Indeed, unwanted pregnancies from rape may lead to further stigmatization by the community, as well as economic and emotional consequences for mothers who are unable to support their children.”\textsuperscript{89}

Victims of GBV further encounter difficulties in terms of accessing justice and receiving reparations.\textsuperscript{91} This is especially true where the violation is deemed primarily committed against the dominant figure in the woman’s life, like her father or husband, instead of against the woman herself.\textsuperscript{92} With this mindset, the focus of justice or reparation shifts to the father or husband “without ever acknowledging the woman’s right to criminal justice or participation in the truth commission process.”\textsuperscript{93} It can also happen that while reparations to the woman or her heirs are acknowledged, this would be based on her earning capacity.\textsuperscript{94} If she does not have employment and her contributions to the family are actually household-based, then whatever compensation she or her heirs receive would most likely be grossly disproportionate to the actual value of her contribution to the household and family.\textsuperscript{95}

\textbf{IV. The Akayesu and Kunarac Decisions}

In response to the mass atrocities which have taken place in Croatia and Bosnia-Herzegovina, the U.N., through the Security Council, established the ICTY. The primary objective of this tribunal “is to try those individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal’s Statute.”\textsuperscript{96}

\textsuperscript{89} Id. at 17.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Manjoo & McRaith, supra note 55, at 17.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 17–18.
\textsuperscript{96} U.N. International Criminal Tribunal for the Former Yugoslavia (ICTY), About the ICTY, available at http://www.icty.org/sections/AbouttheICTY (last accessed Sep. 6, 2012).
Although the ICTY was created one year prior to the ICTR, its decision in *Kumarac, et al.* came later than the landmark case of *Akayesu*, which was promulgated by the ICTR in 1998.

The ICTR was established by the U.N. Security Council in 1994 for the purpose of prosecuting “persons responsible for genocide and other serious violations of [IHL] committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.”97 It also covers “Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period.”98

A. The Akayesu Case

From April to July of 1994, about 800,000 men, women, and children from and in Rwanda were killed.99 This was largely precipitated by the shooting down of President Habyarimana’s plane in Kigali.100 In response, the Armed Forces of Rwanda and the *Interahamwe*101 began hunting and killing Tutsis and moderate Hutus. It was revealed that “[d]uring the wholesale slaughter, they perpetrated widespread sexual violence against [the] Tutsi, and some Hutu women and girls. This sexual violence included rape, mutilation and humiliation. Rwandan senior military and government officials sanctioned and encouraged these crimes.”102

In convicting Akayesu, the Trial Chamber of the ICTR found that—

[T]here is sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba.

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98. Id.


100. Id.


Hundreds of Tutsi, mostly women and children, sought refuge at the bureau communal during this period and many rapes took place on or near the premises of the bureau communal — Witness JJ was taken by *Interahamwe* from the refuge site near the bureau communal to a nearby forest area and raped there. She testified that this happened often to other young girls and women at the refuge site. Witness JJ was also raped repeatedly on two separate occasions in the cultural center on the premises of the bureau communal — once in a group of fifteen girls and women and once in a group of ten girls and women. Witness KK saw women and girls being selected and taken by the *Interahamwe* to the cultural center to be raped. Witness H saw women being raped outside the compound of the bureau communal, and Witness NN saw two *Interahamwe* take a woman and rape her between the bureau communal and the cultural center. Witness OO was taken from the bureau communal and raped in a nearby field. Witness PP saw three women being raped at Kimihura, the killing site near the bureau communal, and Witness NN found her younger sister, dying, after she had been raped at the bureau communal. Many other instances of rape in Taba outside the bureau communal — in fields, on the road, and in or just outside houses — were described by Witness J, Witness H, Witness OO, Witness KK, Witness NN and Witness PP. Witness KK and Witness PP also described other acts of sexual violence which took place on or near the premises of the bureau communal — the forced undressing and public humiliation of girls and women. The Chamber notes that much of the sexual violence took place in front of large numbers of people, and that all of it was directed against Tutsi women.

With a few exceptions, most of the rapes and all of the other acts of sexual violence described by the Prosecution witnesses were committed by *Interahamwe*.

... 

In considering the role of the Accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the Chamber has taken into account only evidence which is direct and unequivocal.

...

On the basis of the evidence set forth herein, the Chamber finds beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence or to punish the perpetrators of sexual violence. In fact there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence.

...

On the two occasions Witness JJ was brought to the cultural center of the bureau communal to be raped, she and the group of girls and women with her were taken past the Accused, on the way. On the first occasion he was looking at them, and on the second occasion he was standing at the
entrance to the cultural center. On this second occasion, he said, 'Never ask me again what a Tutsi woman tastes like.'

... When Witness OO and two other girls were apprehended by Interahamwe in flight from the bureau communal, the Interahamwe went to the Accused and told him that they were taking the girls away to sleep with them. The Accused said 'take them.' The Accused told the Interahamwe to undress Chantal and march her around. He was laughing and happy to be watching and afterwards told the Interahamwe to take her away and said, 'you should first of all make sure that you sleep with this girl.' The Chamber considers this statement as evidence that the Accused ordered and instigated sexual violence, although insufficient evidence was presented to establish beyond a reasonable doubt that Chantal was in fact raped. 103

In September 1998, the Trial Chamber found Akayesu guilty, inter alia, of genocide and crimes against humanity. 104 Rape and other acts of sexual violence were recognized as constituted elements of said offenses. 105 As far as the crime of genocide is concerned, the Trial Chamber held that —

With regard, particularly, to the acts described in paragraphs 12 (A) and 12 (B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [inflicting] harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence, described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. 106

In its Decision, the Trial Chamber also found it necessary to define rape within a context that was more appropriate to situations of armed conflict, such as in Rwanda where the rapes in question were committed, thus —

103. Akayesu, Case No. ICTR-96-4-T, ¶¶ 449-452.
104. Id.
105. Id.
106. Id. ¶ 731.
The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony — the *Interahamwe* thrusting a piece of wood into the sexual organs of a woman as she lay dying — constitutes rape in the Tribunal's view.

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.

... The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the *Interahamwe* to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. 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.107

In June 2001, the Appeal Chambers affirmed Akayesu’s guilty conviction and the Trial Chamber’s sentence of life imprisonment.108

*Akayesu* is the first case that defined rape and expounded on the scope of sexual violence in International Criminal Law.109 It also departed from the usual focus found in most domestic laws where non-consent is required to be proven independently from the very act of penetration or from any overt act which is deemed to constitute as rape.110 Notably, it recognized that certain circumstances or situations like armed conflicts or even the military presence among refugees are coercive per se, which effectively engender fear, intimidation, and feelings of duress.111

107. Id. ¶¶ 686-688.
109. Obota-Odora, supra note 12, at 147.
110. Id.
111. Akayesu, Case No. ICTR-96-4-T, ¶ 687.
B. The Kunarac Case

In the meantime, earlier in February of the same year, the ICTY concluded the trial of Dragoljub Kunarac, who was a commander of the Bosnian Serb Army, and two others in Foca. The facts of the case showed that—

Dragoljub Kunarac took Woman 1 and Woman 2 several times to his headquarters. ... On or around 16 July 1992, Dragoljub Kunarac, together with his deputy [nicknamed] ‘Gaga,’ took Woman 1 and Woman 2 to this house for the first time. When they arrived at the headquarters, a group of soldiers [was] waiting. Dragoljub Kunarac took Woman 2 to a separate room and raped her, while Woman 1 was left behind together with the other soldiers. For about [three] hours, Woman 1 was gang-raped by at least 15 soldiers (vaginal and anal penetration, and fellatio). They sexually abused her in all possible ways. On other occasions in the headquarters, one to three soldiers, in turn, raped her.\textsuperscript{112}

The above incident is reflective of the pervasiveness of sexual violence in Foca, a town in eastern Bosnia and Herzegovina which was invaded by Serb forces in April 1992.\textsuperscript{113} Women and children were specifically targeted by Serb forces, rounding them up and bringing them to several detention centers where they were raped repeatedly, to the extent that “they were consequently unable to assess with precision the number of times they had been raped.”\textsuperscript{114} Some women and girls were sold and rented like common goods; girls who were as young as 12 were taken.\textsuperscript{115}

James McHenry writes that —

The attacks on the Muslim women of Foca were part of a broader campaign of ethnic cleansing by Bosnian Serbs to reduce the non-Serb population in Serbian-claimed regions of Bosnia-Herzegovina. To effectuate this policy, the Bosnian Serb leaders in charge of Foca murdered most of the non-Serb men in the town and sent the survivors to concentration camps. The women, however, were not killed immediately; rather, they were sent to rape camps like the one described in the ICTY’s indictment where they were forced to perform sexual services for the Bosnian Serb soldiers. Many of the women were gang-raped and forced to live in a condition of sexual slavery. Put simply, these actions were ‘calculated, cynical, and subhuman,’ yet they were also grimly effective. Before 1992, Foca’s population of approximately [40,000] was almost evenly divided between Muslim and Serb ethnic groups. As of 2002, however, Foca’s population is


\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{115} Id.
approximately [24,000], and fewer than [100] non-Serbs live within its borders.\textsuperscript{116}

Kunarac, Radomir Kovac, and Zoran Vukovic were tried before the ICTY in March 2000 and were found guilty in 2001.\textsuperscript{117} Kunarac was found guilty of (1) crimes against humanity for enslavement, rape, and torture; and (2) violations of the laws or customs of war for rape and torture.\textsuperscript{118} Kovac was found guilty of (1) crimes against humanity for enslavement and rape; and (2) violations of the laws and customs of war for rape and outrages upon personal dignity.\textsuperscript{119} Vukovic was found guilty of (1) crimes against humanity for rape and torture; and (2) violations of the laws or customs of war for rape and torture.\textsuperscript{120} The three accused were given single sentences of 28, 20, and 12 years of imprisonment, respectively.\textsuperscript{121}

The Appeal Chambers in June 2002 upheld the convictions of Kunarac, Kovac, and Vukovic.\textsuperscript{122} It also affirmed the Trial Chamber’s findings —

From April 1992 until at least February 1993, there was an armed conflict between Bosnian Serbs and Bosnian Muslims in the area of Foca. Non-Serb civilians were killed, raped or otherwise abused as a direct result of the armed conflict. The Appellants, in their capacity as soldiers, took an active part in carrying out military tasks during the armed conflict, fighting on behalf of one of the parties to that conflict, namely, the Bosnian Serb side, whereas none of the victims of the crimes of which the Appellants were convicted took any part in the hostilities.

The armed conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population in the wider area of the municipality of Foca. The campaign was successful in its aim of ‘cleansing’ the Foca area of non-Serbs. One specific target of the attack was Muslim women, who were detained in intolerably unhygienic conditions in places like the Kalinovik School, Foca High School, and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. The Appellants were aware of the military conflict in the Foca region. They also knew that a systematic attack against the non-Serb


\textsuperscript{117} Kunara, Case No. ICTY-IT-96-23-T & IT-96-23/1-T.

\textsuperscript{118} Id. \textsuperscript{\cite{883-885}}.

\textsuperscript{119} Id. \textsuperscript{\cite{886-887}}.

\textsuperscript{120} Id. \textsuperscript{\cite{888-890}}.

\textsuperscript{121} Id. \textsuperscript{\cite{885, 887, & 890}}.

\textsuperscript{122} The Prosecutor v. Kunarac, Case No. ICTY-IT-96-23 & IT-96-23-1-A, Appeal Judgment (International Criminal Tribunal for the former Yugoslavia (ICTY) June 12, 2002).
civilian population was taking place and that their criminal conduct was part of this attack.\textsuperscript{123}

The Trial Chamber of ICTY in \textit{Kunarac} also found the necessity to define rape and articulate its elements, bearing in mind that it is being charged as a war crime and a crime against humanity.\textsuperscript{124} It reviewed an earlier case, \textit{The Prosecutor v. Anto Furundžija},\textsuperscript{125} where the court examined the laws on rape in various countries since it is not defined in the ICTY Statute, in IHL, or in International Human Rights Law. After the court itself had done a survey of rape laws in various domestic jurisdictions, it held, thus

As noted above, the Trial Chamber in the \textit{Furundžija} case considered a range of national legal systems for assistance in relation to the elements of rape. In the view of the present Trial Chamber, the legal systems there surveyed, looked at as a whole, indicated that the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim. The matters identified in the \textit{Furundžija} definition — force, threat of force or coercion — are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy. The relevance not only of force, threat of force, and coercion but also of absence of consent or voluntary participation is suggested in the \textit{Furundžija} judgement itself where it is observed that all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or \textit{acting without the consent of the victim} — force is given a broad interpretation and includes rendering the victim helpless.’

A further consideration of the legal systems surveyed in the \textit{Furundžija} judgement and of the relevant provisions of a number of other jurisdictions indicates that the interpretation suggested above, which focuses on serious violations of sexual autonomy, is correct.

...  

In light of the above considerations, the Trial Chamber understands that the \textit{actus reus} of the crime of rape in international law is constituted by 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

\textsuperscript{123} Id. \textit{\textcopyright} 2-3.

\textsuperscript{124} Kunarac, Case No. ICTY-IT-96-23-T & IT-96-23/1-T, ¶ 437.

\textsuperscript{125} The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgment (International Criminal Tribunal for the former Yugoslavia (ICTY) July 21, 2000).
victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.126

As stated before, the Appeals Chamber in 2002 affirmed the convictions of Kunarac, Kovac and Vukovic. It, however, clarified that although “[force or threat of force provides clear evidence of non][]-consent,”127 it is not, per se, an element of rape because “there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”128

It can be observed that the definitions of rape in the Akayesu and Kunarac decisions are very different in terms of focus.

In Akayesu, rape is construed as the “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”129 While non-consent is not mentioned as an element, it is implied because rape is committed under coercive circumstances.130 Moreover, given that the rape is to be proven within the context of genocide or crimes against humanity, the court did not deem it important to focus on consent as an independent element to be proven; neither did it give emphasis on what particular body part is being penetrated of a “sexual nature.”131

In Kunarac, however, non-consent on the part of the person being violated assumes an important element in proving rape.132 It also enumerated the specific body parts that should be involved in the commission of the crime.133

Obota-Odora notes that for many legal scholars, the Kunarac case “was a step backward from the Akayesu threshold”134 in that aside from adopting a definition which emphasizes a “mechanical” description of committing rape, it also required proof of non-consent on the part of the victim.135

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127. Id., Case No. ICTY-IT-96-23 & IT-96-23-1-A, ¶ 129.
128. Id.
129. Akayesu, Case No. ICTR-96-4-T, ¶ 598.
130. Id.
131. Id.
133. Id. ¶ 437.
134. Obota-Odora, supra note 12, at 152.
135. Id.
Sellers also observes that —

*Kunarac* mandated a two-pronged lack-of-consent requirement, namely the victim’s consent that is given voluntarily as a result of the victim’s free will, and the perpetrator’s knowledge that penetration occurs without consent. It opined that consent must be assessed in the contents of the surrounding circumstances. The *Kunarac* definition is at times referred to as the *Funndžija/Kunarac* definition since it retains the mechanical elements of the *Funndžija* definition albeit it removed the elements of coercion, force, and threat of force. The *Kunarac* Appeals Chamber upheld the *Kunarac* Trial Chamber definition retaining the prerequisite of ‘lack of consent’ of the victim, even though the judges intoned that the detention centers where the victims were held amounted to ‘circumstances that were so coercive as to negate any possibility of consent.’

Subsequent cases decided by both the ICTY and ICTR appeared to have subscribed to the definition of rape set out in the *Kunarac* case. Sellers explains that *The Prosecutor v. Laurent Semanza* followed the definition of *Kunarac* under the principle of *stare decisis*, but that after this case, “the Rwandan Trial Chambers followed the *Kunarac* appellate definition of rape, even though certain Trial Chambers endeavored to formulate a practical congruency that reconciled the conceptual *Akayesu* definition with the mechanical *Kunarac* elements of rape.”

Sellers also points out that in the subsequent ICTR case of *The Prosecutor v. Mikaeli Muhimana*, the Trial Chamber tried to reconcile the definitions of rape found both in the *Akayesu* and *Kunarac* decisions by stating that it endorses the conceptual definition of rape in *Akayesu* which includes the elements of rape in *Kunarac*. A closer look at *Muhimana*, however, would indicate that rape was still construed essentially using the parameters established in *Kunarac*, thus —


140. *Id.* at 21–22.


This Chamber considers that Funundziya and Kunara, which sometimes have been construed as departing from the Akayesu definition of rape — as was done in Semanza — actually are substantially aligned to this definition and provide additional details on the constituent elements of acts considered to be rape.

The Chamber takes the view that the Akayesu definition and the Kunara elements are not incompatible or substantially different in their application. Whereas Akayesu referred broadly to a ‘physical invasion of a sexual nature,’ Kunara went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.

On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in Akayesu, which encompasses the elements set out in Kunara.143

Another case which Sellers cites is The Prosecutor v. Gacumbitsi,144 where lack of consent was established by the fact that “the accused admonished the Intetensumwe to kill, in an atrocious manner, any females who resisted the sexual attacks”145 and that “the rape victims were attempting to flee from their attackers when raped.”146 Sellers opines that although the Appeals Chamber examined the existence of coercive circumstances, it was still for the purpose of establishing non-consent.147 Quoting the decision, Sellers observes that despite the Chamber’s discussion on coercive circumstances, Gacumbitsi essentially affirmed the Kunara pronouncements on rape and its focus on consent as a necessary element of the same, thus —

The Prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary as a legal matter, for the Prosecutor to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator; [nor does it need to] introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim.148

143. Muhimana, Case No. ICTR-95-1B-T, ¶¶ 549-551.
146. Id.
147. Id. at 23.
148. Id. (citing Gacumbitsi, Case No. ICTR-2001-64-A, ¶ 133).
It should be remembered that both the *Kunarac* and *Furundžija* cases culled the elements of rape after examining how it is defined under various domestic laws and what acts of penetration were considered to be within the purview of the crime of rape. *Kunarac*, in particular, cited rape laws from around 33 countries, including the Philippines.\(^\text{149}\) Thereafter, it concluded that the common factor from the various rape laws is the violation of sexual autonomy which must be penalized.\(^\text{150}\) Necessarily, since autonomy became the highlight of its inquiry, the ICTY Trial Chamber concluded that non-consent is an indispensable element in rape.\(^\text{151}\) Hence, the court stated that

An examination of the above provisions indicates that the factors referred to under the first two headings are matters which result in the will of the victim being overcome or in the victim’s submission to the act being non-voluntary. The basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalized. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

In practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions — [ ] force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.

Given that it is evident from the *Furundžija* case that the terms *coerption, force, or threat of force* were not to be interpreted narrowly and that coercion in particular would encompass *most conduct* which negates consent, this understanding of the international law on the subject does not differ substantially from the *Furundžija* definition.\(^\text{152}\)

The problem with this approach and its resulting interpretation is that it largely ignores the conditions under which the acts of rape have taken place and the nature of the crimes for which rape is being considered. Domestic laws on rape rightfully give importance to the element of non-consent that must be proven beyond reasonable doubt because such laws do not envision rape happening in an environment where violence and unrest are the norm.\(^\text{153}\) Thus, it is but logical for the prosecution to prove non-consent and

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150. *Id.* ¶ 457.
151. *Id.*
152. *Id.* ¶¶ 457-459 (emphases supplied).
153. See An Act Expanding the Definition of the Crime of Rape, Reclassifying the Same as a Crime Against Persons, Amending for the Purpose Act No. 3815, as
quite often, this is done by proving the existence of threat and intimidation that would vitiate consent.\textsuperscript{154} This is not the case for the nature of the crimes within the jurisdiction of international criminal tribunals. In the context of genocide, crimes against humanity, and war crimes, at the very least, rapes are committed in situations of conflict, violence, and coerciveness.

Sellers has also noted that \textit{Gaumbits}, which discussed coercive circumstances \textit{vis-à-vis} the lack of consent, has been subject to criticism.\textsuperscript{155} She specifically cites Wolfgang Schomberg and Ines Petersen who argue that

\begin{quote}
[The sharply unequal positions of the perpetrator and the victim/survivor are inherent in the 'international element,' the very circumstances that transforms rapes committed during wartime into crimes against humanity into the international crimes. A lack of consent is inappropriate in the international law context since the determination of the jurisdiction amounts to a determination that the sexual act took place in a context in which sexual autonomy was absent.\textsuperscript{156}
\end{quote}

It is worth mentioning that a quick glance at some cases where acquittals on rape were handed down by both the ICTY and ICTR shows that such acquittals were based on grounds other than the fact that consent was successfully raised as a defense or the fact that non-consent was not established.

The grounds for acquittal were:

\begin{enumerate}
\item Rape was included as a lesser offense to torture as a grave breach of the Geneva Conventions and torture as a serious violation of Common Article 3;\textsuperscript{157}
\item Testimony on rape was hearsay;\textsuperscript{158} and
\end{enumerate}

\textsuperscript{154} See generally People v. Rabago, 400 SCRA 447 (2003) & People v. Buates, 408 SCRA 278 (2003). In these Cases, the argument of the accused is that the prosecution was unable to prove the existence of force, threat, or intimidation.

\textsuperscript{155} Sellers, \textit{The Prosecution of Sexual Violence}, supra note 33, at 23.

\textsuperscript{156} \textit{Id.} (citing Wolfgang Schomberg & Ines Petersen, \textit{Notes and Comments on Genuine Consent to Sexual Violence Under International Criminal Law}, 101 AM. J. INT’L L. 128 (2007)).

(3) There was insufficient evidence to prove that the accused participated in the crime of rape or was involved in its planning, instigation, etc.\textsuperscript{159}

It is the position of the Author that it is highly unlikely that acquittals on rape charges under crimes against humanity and war crimes would hinge on the failure to prove non-consent of the alleged victim(s).

V. THE INTERNATIONAL CRIMINAL COURT

The ICC, established under the Rome Statute,\textsuperscript{160} “is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”\textsuperscript{161} The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.\textsuperscript{162} As of 1 July 2012, there are 121 State-Parties to the Statute.\textsuperscript{163}

Under Article 9 of the Rome Statute, two-thirds majority of the members of the Assembly of State-Parties shall adopt the Elements of Crimes,\textsuperscript{164} which “shall assist the Court in the interpretation and application of [A]rticles 6, 7 and 8.”\textsuperscript{165} Article 6 refers to Genocide; Article 7 refers to Crimes Against Humanity; and Article 8 refers to War Crimes. Rape is punished under Crimes Against Humanity and under War Crimes — both in situations of international and internal armed conflicts.

Article 7 of the Rome Statute defines crimes against humanity, thus:

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or


\textsuperscript{160} International Criminal Court (ICC), About the Court, available at http://www.icc-cpi.int/Menus/ICC/About+the+Court (last accessed Sep. 6, 2012).

\textsuperscript{161} Rome Statute of the International Criminal Court, supra note 11.

\textsuperscript{162} Rome Statute of the International Criminal Court, supra note 11, art. 5 (1) (a).


\textsuperscript{164} ICC Elements of Crimes, supra note 10.

\textsuperscript{165} Rome Statute of the International Criminal Court, supra note 11, art. 9.
systematic attack directed against any civilian population, with knowledge of the attack:

... 

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. 166

On the other hand, Article 8 of the Rome Statute defines “War Crimes” as

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

... 

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

... 

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions. 167

The relevant provisions in the ICC Elements of Crimes as far as rape is concerned first define rape as a crime against humanity, thus:

1. 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.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. 168

Moreover, rape is also defined as a war crime, thus:

166. Id. art. 7.
167. Id. art. 8.
168. Id. art. 7 (1) (g)-1.
1. 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.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.\textsuperscript{169}

Article 8 (2) (e) (vi)-1, which enumerates the elements of rape as a war crime committed during international armed conflict contains identical provisions with the above elements save for the third one, which substitutes the “international armed conflict” with “conflict not of an international character.”\textsuperscript{170} It has yet to be seen how the ICC, through case law, would treat the issue of consent in rape when committed either as a crime against humanity or as a war crime. The Elements of Crimes has not dispensed with the “consent” requirement. In all three categories where the elements of rape are defined, there is a common proviso referring to the manner of its commission which requires that “the invasion was committed against a person incapable of giving genuine consent.”\textsuperscript{171} Thus, the question is; Is the element of consent so central to rape that there has to be certainty that the act involved was non-consensual, whether the accused is charged under a domestic law or under an international criminal statute?

Sellers advances that the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime (Protocol)\textsuperscript{172} could inform IHL on the insignificance of consent in heinous crimes.\textsuperscript{173} Accordingly, the Protocol “unequivocally states that the heinous crime of

\textsuperscript{169} Id. art. 8 (2) (b) (xxii)-1.

\textsuperscript{170} Id. art. 8 (2) (e) (vi)-1.

\textsuperscript{171} Rome Statute of the International Criminal Court, supra note 11, art. 8 (2).


\textsuperscript{173} Sellers, The Prosecution of Sexual Violence, supra note 33, at 35.
trafficking, when evidenced by coercive circumstances, renders consent as a defense irrelevant. Consent to any resulting sexual exploitation, that could implicitly comprise acts of rape, therefore would be banned.”

This claim is based on Articles 3 (a) and 3 (b) of the Protocol, which state that consent of the victim is irrelevant if the trafficker employed the following means: “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the living or receiving of payments or benefits to achieve the consent of a person.”

Indeed, the Protocol penalizes acts perpetrated against a person because their purpose is for sexual and/or labor exploitation. Consent of the victim does not occupy prime importance because the Protocol does not assume that free and genuine consent can be given in an atmosphere where, at the very least, one party is taking advantage of the vulnerable situation of the other.

Sellers further cautions that the access to justice of victim-survivors of rape should not be “mired in gender-weighted myths about sexual violence nor legal inaction or inappropriate actions,” and that raising the issue of consent frequently with them might produce “a disproportionate gendered chilling effect” on their right to access remedy under humanitarian law. Recalling the Kumanac proceedings, Sellers writes —

Notably, when [female] witnesses gave live testimony as to the lack of consent element in the Kumanac case, Bower noted:

“The reaction of [female] Witness 95 ... to the question posed by the prosecutor — whether the sexual contact had been against her will — was met with outrage, and is illustrative in this regard: ‘Please Madame, if over a period of 40 days you have had sex with someone, several individuals, do you really think that is with your own will?’

In conclusion, it is worth reiterating that for rape to be considered as a crime against humanity, it should be “part of a widespread or systematic attack directed against a civilian population.” Likewise, for rape to constitute as a war crime, it must have taken place “in the context of and

174. Id.
175. Trafficking Protocol, supra note 172, arts. 3 (a) & 3 (b).
176. Id. art. 3.
177. Id.
179. Id.
180. Id.
181. Id.
182. ICC Elements of Crimes, supra note 10, art. 7.
was associated with” either an international armed conflict or an armed conflict which is not of an international character. 183

Therefore, with these circumstances, it can hardly be argued that the rapes did not occur under coercive environments, much less can it be claimed that consent should be the defining factor despite the fact that the “invasion” was perpetrated either because it was part of a calculated attack against civilians or because it was deemed acceptable in situations of armed conflict. Ultimately, international criminal tribunals such as the ICC must not lose sight of the fact that this issue will be determinative of whether the victims can obtain justice for the gender-based atrocities committed against them within the IHL framework.

183 Id. art. 8.