

Crimes Of Consent: Role of the Element of Consent in defining a Crime of Rape under International Criminal Law

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Summary

This paper will discuss the difficulties emerging under international law with the creation of a definition of a crime of rape. Crime of rape has been criminalized in most of the national criminal codes as an act of intentional sexual penetration by force without a consent. However, the national definitions cannot be easily transposed on international level as they do not reflect the reality of the circumstances occurring in an international context. Rape occurring in the context of a war crimes, crimes against humanity and as a mean of genocide represents a situation in which genuine consent to a sexual act cannot be deemed to be given. Thus, the purpose of this paper is to describe how the international community developed a contemporary definition of a crime of rape, the setbacks it has faced with specific elements that would usually constituted a crime of rape and the importance of recognizing special circumstances in which these crimes occur under international criminal law, both for the international justice and the victims.

Key Words: Rape- Consent- Coercive Circumstances- Victims- International Criminal Law

1. Introduction

Sexual violence committed during the armed conflicts has been described as '*history's greatest silence*' by the United Nations.¹ One of the gravest and most common forms of violence against women is rape.² For a long time, rape was seen as the side effect of war and not the subject of an international concern. Both prejudice and lack of understanding have kept it from being tried on a wide scale, consequently leaving the cases of rape to individual states to prosecute before their national courts.³ Also, in the

¹ Ending History's Greatest Silence, <https://reliefweb.int/report/world/unifem-commends-unanimous-security-council-call-end-sexual-violence>, 15 August 2018

² UNiTE To End Violence Against Women, <http://www.un.org/en/women/endviolence/situation.shtml>, 10 August 2018

³ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 6

past, rape was not explicitly criminalized by international conventions or treated as a distinct offence in a uniform manner by international criminal law as it has been under most domestic criminal codes. As a result of this fragmentation, there were significant gaps in protection from crime of rape in its prohibition as well as in the punishment of the offenders.⁴

However, after the barbaric and systematic use of sexual violence in the armed conflicts in Rwanda and former Yugoslavia, rape amongst other crimes, has started to be seen not only as the problem that confines of the internal affairs of the state but rather as a problem affecting international community as a whole. Thus, international community responded by *inter alia* creating two tribunals: International Criminal Tribunal for the former Yugoslavia Crimes (ICTY)⁵ and International Criminal Tribunal for Rwanda (ICTR)⁶. Their main purpose was to ensure that atrocities, amongst which acts of sexual violence-rape were, would not go unpunished.⁷ Another development which addressed defects in the traditional system of crimes of rape under supranational criminal law was the creation of the International Criminal Court.⁸ Today rape may be considered as a violation of an international criminal law as a crime against humanity, war crime and a means of genocide.

However, the process of creating homogeneous definition of rape, and thus criminalizing and prosecuting it under supranational law, was demanding. Creators had to take into account special circumstances different than those under which crimes in national law occur, meaning that domestic definitions could simply not be transposed. The biggest problem occurred with the element of non-consent which usually forms substantive part of the domestic definition of rape. Therefore, this essay will answer the question: '*What role does the Element of Consent have in the definition of a Crime of Rape under International Criminal Law?*'

Firstly, the main differences between context of rape under national and international law will be elaborated on. Next on, the most important definitions of rape under international law, created by the case law of the *ad hoc* tribunals and given in the Elements of Crime of International Criminal Court, will be analyzed. The analysis will be based on the comparison between the main elements which constitute the criminal offence and the approach that was subsequently taken by the relevant court with regard to the notion of consent. Lastly, the conclusion will be drawn as to whether the element of consent should and, most importantly, could form the definition of a rape under international criminal law.

2. Crime of Rape

2.1. Crime of Rape under domestic legislations

Criminal act is composed out of two elements - *actus reus*, the material element, and *mens rea*, the mental element.⁹ *Actus reus* designates which sexual acts are included within the limits of a crime of rape as well as the inclusion of elements of non-consent or force. *Mens rea* describes awareness of the perpetrator of the existence of non-consen-

⁴ M. Cherif Bassiouni & Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1 edn, Transnational Publishers, 1996)

⁵ United Nations Security Council Resolution 827

⁶ United Nations Security Council Resolution 955

⁷ UN Security Council Resolution 827, Preamble; UN Security Council Resolution 955, Preamble

⁸ UN General Assembly, *Rome Statute of the International Criminal Court* (as last amended on 29 November 2010), 17 July 1998

⁹ David Roef, *Comparative Concepts of Criminal Law* (2 edn, Intersentia 2016), p. 30

sual acts.¹⁰ Therefore, the majority of national legal systems deal with rape by defining it as an intentional sexual penetration by force without a consent.¹¹

The relevance of the consent in the domestic criminal law is essentially based on the idea of sexual autonomy which stems from the core of personal liberty and is thus of fundamental value. Sexual autonomy is the ability to choose whether or not to engage in sexual relations. More precisely, it is related to the legal competence and factual ability of concerned individuals to defend their protected interest which is being under attack. If the protected interest falls exclusively into the sphere of a victim, his/her genuine consent to its violation may negate the wrongfulness of the act and free perpetrator of criminal liability.¹² Following this reasoning, it can be said that under domestic legislation autonomy is closely related to the individual's consent. Therefore, the primary harm of rape, as seen under domestic legislation, is a non-consensual sex and physical assault in a form of force or coercion that may accompany it, is to be taken as a consideration in determining the level of gravity, but not the existence of the crime itself.¹³

2.2. Crime of Rape under International Criminal Law

For a crime of rape to fall within the jurisdiction of international criminal law it has to fulfil conditions necessary for a crime to be seen as a means of genocide, crime against humanity or a war crime. Rape, here as well, exists as an individual crime however, the awareness of the context under which it happens during the armed attacks is crucial for its definition. For a crime to be considered as the crime against humanity there must be a widespread or a systematic attack, which the perpetrator is a part of, that is directed against civilian population and of which the perpetrator must know his acts are part of.¹⁴ Furthermore, war crime demands two essential preconditions to be fulfilled; namely that there is an on-going armed conflict and a *nexus* between the armed conflict and the act. If these two conditions are satisfied, additional conditions are imposed.¹⁵ To prove crimes as a means of genocide is the most demanding task as there must be a proof that acts were committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.¹⁶ It is only after the act has fallen within one of these categories of crimes, that international criminal law intervenes.¹⁷

The prohibition of rape in international law has been greatly influenced by the domestic regulations of the offence. This can be seen from the fact that *ad hoc* tribunals have largely based their definitions of rape on general principles of law arising from

¹⁰ Joel Samaha, *Criminal law* (12 edn, Wadsworth Publishing 2016), p. 6

¹¹ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 107-111

¹² Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' [2007] 101 *The American Journal of International Law*, p.123

¹³ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 84

¹⁴ Article 5 on Crimes against Humanity of the ICTY Statute; Article 3 on Crimes against Humanity of the ICTR Statute; Article 7 on Crimes against Humanity of the ICC Statute

¹⁵ Further conditions: 'Act it must be against international humanitarian law; the rule must be part of international customary law; the violation must be serious and cause severe harm and the rules must allow for individual criminal responsibility' Article 3 of Violation of Laws and Customs of War of the ICTY Statute; *Prosecutor v. Tadic*, Appeals Chamber Decision 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', IT-94-1-AR72, 2 October 1995, par. 70.; Article 8 on War Crimes of the ICC Statute

¹⁶ Article 4 on Genocide of the ICTY Statute; Article 2 on Genocide of the ICTR Statute; Article 6 on Genocide of the ICC Statute

¹⁷ There is also a newly established core crime under international criminal law- the act of aggression. However, until this day, the crime of rape is deemed to occur only in the context of the war crimes, crimes against humanity and genocide.

domestic criminal codes.¹⁸ However, the concept of 'consent', as used in domestic criminal law, imports a notion of individual choice without a consideration of the reality of abuse of power- whether evidenced through physical force or other forms of coercion. On the other hand, consideration of whether an individual was able to exercise sexual autonomy takes into account an overall dynamic and environment surrounding of those sexual acts and how these had had an impact on the victim's ability to make a genuine choice. Thus, sexual autonomy cannot be conflated with views of 'consent' as seen under domestic criminal law which do not capture the reality of how acts of rape and sexual violence are committed. Consequently, these two must be seen as distinct concepts under international law.¹⁹

As a result, two types of definitions emerged under international law: coercion-based and consent-based definitions. The first one focuses on crime of inequality which could be categorized as a crime of force, physical power or status while latter on deprivation of sexual freedom and individual's sphere of self-acting.²⁰ Proof of rape demanded in coercion-based definitions is located in the material sphere composed out of physical acts, surrounding contexts and exploitation of relative position. Contrastingly, in the non-consent definitions proof is located in psychical space of victim and perpetrator.²¹ Therefore, burden of proof, if the non-consent is considered to be element of the crime, is on the prosecution to prove beyond reasonable doubt that the victim did not consent to the conduct in question. If consent would be affirmative defence, as in the coercion definitions, it is on the defendant to prove probability of victim consenting.²²

2.3. Definitions of a Crime of Rape under International Criminal Law

2.3.1. Established by the ad hoc tribunals ICTY and ICTR

At the time tribunals came to life there was no normative provision in international criminal law existing, neither under international treaty nor customary law, that defines rape or its legal elements.²³ Therefore, one of the tribunals' objectives was to develop a definition that would encompass specific conditions of international criminal law by taking into account both interests of victims and right of the accused to a fair trial.²⁴

As a result, in their most prominent case law, the ICTY and ICTR established three lines of thinking regarding the crime of rape which could further be divided on a basis of a coercion in a violent context or non-consent of the victim.

¹⁸ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 53

¹⁹ Amnesty International, *Human Rights Law and Standards in the International Criminal Court* (1 edn, Amnesty International Publications 2011), p. 17

²⁰ Clare McGlynn and Vanessa E. Munro, *Rethinking Rape Law: International and Comparative Perspectives* (1 edn, Routledge 2011)

²¹ 'What Counts as Rape in International Crimes?', https://clg.portalxm.com/library/keytext.cfm?keytext_id=182, 10 November 2018

²² Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' [2007] 101 *The American Journal of International Law*, p. 123

²³ Sandra Fabijanac-Gagro, 'The Crime of Rape in the ICTY's and the ICTR's Case Law' [2010] 60 *Zbornik Pravnog fakulteta Zagreb*, p. 1313

²⁴ Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' [2007] 101 *The American Journal of International Law*, p. 123

2.3.1.1. Coercion-based definitions

First line of thinking adheres to the broad conceptual definition of rape as given in the *Akayesu* judgement of the ICTR.²⁵ The Chamber defined rape as '*physical invasion of a sexual nature, committed on a person under circumstances which are coercive*'.²⁶ Furthermore, '*coercive circumstances need not be evidenced by a show of physical force*' but '*may be inherent in certain circumstances*'²⁷ such as armed conflict or military presence of threatening forces. Definition does not include the traditional notions of rape which require penetration of a vagina or non-consent of victim, but it rather focuses on invading person's sexual autonomy and thus encompasses a variety of sexual acts. Significant freedom was given in determining what constitutes coercion as any threats, intimidations or other forms of duress would suffice.²⁸ Consequently, the *Akayesu* definition of rape diverges from national definitions in two ways.²⁹ Firstly, it includes acts which would under national laws be classified as sexual offences and not as a rape, providing victims with more remedy. Secondly, definition is gender neutral meaning that a male can be a victim and a female could be the perpetrator.³⁰

Importantly, the definition does not address the crucial aspect of the crime - the lack of consent of the perpetrator but rather circumvent it by including coercive circumstances which have to be proven.³¹ As well, it does not define the *mens rea* aspect of the crime.

Second line of thinking was established in the *Furundžija* case³² by the ICTY. The Chamber firstly indicated that when certain definition of crime cannot be found in the international law, it is necessary to look into the principles of criminal law which are common to the major legal systems of the world.³³ Moreover, it concluded that the *Akayesu* definition of rape is not sufficiently specific and is in violation of the legality principle.³⁴ The Chamber agreed that rape should take more mechanical approach by being defined as '*penetration of vagina, anus and mouth by the penis and of vagina and anus by means of objects*'.³⁵ This is clear departure from the broad definition given in *Akayesu* which, consequently, makes it more difficult for rape victims to have their perpetrators prosecuted and in general build their case as they have to prove the anatomical details of the crime itself. The circumstances which need to be established for an act to constitute rape are '*coercion or force or threat of force against the victim or a third person*'³⁶ which in the end come down to the same type of circumstances as defined in *Akayesu*. However, definition did go beyond the national definition of rape in deciding to classify forced

²⁵ Jean-Paul Akayesu was judged guilty of genocide and crimes against humanity for acts he engaged in and oversaw while being mayor of the Rwandan town of Taba.

²⁶ *The Prosecutor v. Akayesu*, ICTR Trial Chamber Judgement, 2 September 1998, p. 598

²⁷ *ibid*, p. 597

²⁸ Catharine A. McKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' [2006] 44 Columbia Journal of Transnational Law, p. 1210

²⁹ Joshua Dressler, *Understanding Criminal Law* (7 edn, LexisNexis 2015), p. 567

³⁰ *The Prosecutor v. Akayesu*, ICTR Trial Chamber Judgement, 2 September 1998, p. 688.

³¹ Catharine A. McKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' [2006] 44 Columbia Journal of Transnational Law, p. 1210

³² Anto Furundžija was the commander of a special unit of the Croatian Defence Council called the "Jokers." He was brought before the ICTY for the commission of crimes against Bosnian Muslims who were interrogated at the headquarters of the "Jokers" in May 1993. During the interrogations, those detained were subjected to sexual assaults, rape and other physical and mental suffering.

³³ *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, 10 December 1998, p. 177

³⁴ *ibid*

³⁵ *ibid*, p. 185

³⁶ *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, 10 December 1998, p. 185

oral sex as a rape and including that coercive element can extend to encompass the threats of force against the third persons as well.³⁷ Thus, this definition makes it harder for the victims to come forward as they need to prove the sexual act itself and could be discouraged by that. However, there is a considerable advancement as proof of circumstances, same as in the *Akayesu*, can suffice to prove rape. Again, *mens rea* was not addressed and the non-consent as an element of a crime of rape was not mentioned as a part of the definition but rather circumvented with the inclusion of circumstances.

2.3.1.2. Consent-based definition

The *Kunarac, Kovac and Vukovic*³⁸ judgment (*Kunarac* from this moment) has had a substantial impact in developing the elements of the crime of rape on the international level and is considered the most groundbreaking case in the area of sexual violence in current international criminal law.³⁹ In this case, the ICTY relied heavily on the definition of rape as provided in domestic jurisdictions.

In the beginning, similarly to the *Furundzija*, the Chamber emphasized the lack of uniform definition under international law and went on creating its own. First part of the *actus reus* encompasses the identical mechanical description of body parts and objects involved as the definition in the *Furundzija* judgement.⁴⁰ However, the second part regarding the sufficient circumstances which should be included caused a lot more controversies. The Court rejected a coercion-based standard which was considered as not being enough restrictive as it would be required by the international law.⁴¹

The Court conducted its own survey, focusing again on the common principles incorporated into criminal law of major national legal systems. As a result, the Court developed three categories of circumstances which need to be proven in order for an act to constitute a rape. Thus, besides the '*force and threat of force*', circumstances such as '*non-consent of the victim*' or '*special circumstances which made the victim particularly vulnerable or negated the ability to make an informed refusal*' were added.⁴² While there are many national states which require an element of force for a rape to be effective, the fear was that such a formulation would exclude cases where no explicit force is present but the circumstances are such so as to make consent impossible.⁴³ The common objective of national rape laws was thus the penalization of '*violations of sexual autonomy*' and the essence of the present force is not considered as an element of rape *per se*, but rather a negation of genuine consent is.⁴⁴ For these reasons, the Trial Chamber arrived at the conclusion that circumstances which have to be proven in order to define *actus reus* of crime of rape should be encompassed by all-embracing phrase '*without the consent of the victim*'.⁴⁵

³⁷ Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' [2013] 54 Boston College Law Review 54, p. 1211-1212

³⁸ Dragoljub Kunarac, Zoran Vuković and Radomir Kovač participated in a campaign by Bosnian Serb forces in Foča; together, the three men played a prominent role in organising and maintaining a system of rape camps. Women were captured and transferred to various locations where they were detained, kept in intolerably unhygienic conditions and subjected to multiple forms of abuse and violence.

³⁹ 'Kunarac: Evolution, recognition, catharsis', https://www.researchgate.net/publication/295073515_Kunarac_Evolution_recognition_catharsis, 10 November 2018

⁴⁰ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia, 22 February 2001, p. 460

⁴¹ *ibid*, p. 438

⁴² *ibid*, p. 442

⁴³ *ibid*, p. 458

⁴⁴ *ibid*, p. 440

⁴⁵ *ibid*, p. 460

The trial panel also added, for the first time, the two-part requirement for *mens rea* to further protect the rights of the accused. *Mens rea* requires both proof of general intent regarding the sexual act and proof that the accused knew that sexual act was taking place without the consent of the victim.⁴⁶ This definition is the least favourable outcome for the victims of rape as they need to prove the absence of consent rather than the occurrence of certain circumstances what can subsequently lead to discrediting and discounting traumatizing experiences victims had to go through.

2.3.2. Established by the International Criminal Court

Even though the *ad hoc* tribunals substantially developed the international law, their jurisprudence has been criticised for lack of consistency. Their interpretation and application of international law was mainly focused to meet demands of the specific situation that lead to their creation.⁴⁷ As the first permanent international criminal court, the ICC has a unique opportunity to develop the international jurisprudence in uniform matter with regard to sexual violence through its acknowledgement of rape as an element of genocide, war crimes or crimes against humanity.⁴⁸

The Rome Statute, which established the Court, relies heavily on the precedents of the ICTY and ICTR and to a large extent codifies the legal arguments and case law of the two *ad hoc* tribunals. Since the statutes of the tribunals are largely silent on the issue of crime of rape, the Rome Statute constitutes an important step in codifying the rules for it.

Until today, there was only one judgement by the International Criminal Court which has rendered the guilty verdict for crime of rape as an act of war.⁴⁹ In the past, poor prosecution decisions, weak evidence and conservative judging have slowed the progress of recognition and prosecution of sexual crimes before the ICC.⁵⁰ The *Bemba* judgement, as said by the Prosecutor of the Court-Fatou Bensouda '*has highlighted the critical need to eradicate sexual and gender-based crimes as weapons of war under international criminal law*'.⁵¹

2.3.2.1. Coercion-based definition

Actus reus is mainly based on the mechanical definition of rape which was developed in the *Furundzija* case and follows the approaches of most national laws. Although the notion of '*invasion*' was included in the definition, it is far from being interpreted as in the *Akayesu* decision. It is rather restricted in a sense that invasion needs to result in a penetration of body parts by other body parts or objects as opposed to the invasion

⁴⁶ *ibid*

⁴⁷ Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' [2013] 54 Boston College Law Review 54, p. 1218-9

⁴⁸ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (1 edn, Intersentia 2005)

⁴⁹ 'The court's guilty verdict against a former Congolese commander marks a milestone', <https://www.economist.com/news/middle-east-and-africa/21695328-courts-guilty-verdict-against-jean-pierre-bemba-marks-milestone>, 10 August 2018

⁵⁰ 'The Politics of Gender Justice at the ICC: Legacies and Legitimacy', <https://www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/>, 29 October 2018

⁵¹ 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the conviction of Mr Jean-Pierre Bemba: "This case has highlighted the critical need to eradicate sexual and gender-based crimes as weapons in conflict"', <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-bemba-21-03-2016>, 19 September 2018

of sexual autonomy of an individual, as defined in *Akayesu*.⁵² It is thus wider than the *Furundzija* and *Kunarac* mechanical definition, but narrower than the conceptual *Akayesu* definition of rape.

The second element of the *actus reus* of rape is one including the circumstances which make the sexual act criminal. Three types of circumstances have been recognized. First being the 'force or threat of force or coercion' resembling to the *Furundzija* definition, second 'taking advantage of a coercive environment' similar to the *Akayesu* wording and last 'against person incapable of giving genuine consent' which refers to the people such as mentally ill, minors or unconscious who are legally incapable of giving the consent.⁵³ In contrast to *Kunarac* definition, the focus of the ICC is not on the lack of consent but rather, as in *Akayesu* and *Furundzija*, the coercive circumstances. Therefore, if any of these circumstances can be proven; it is presumed that the person was incapable of giving consent, so an additional proof of the person not consenting is not needed. The notion of non-consent is not a central element in the definition but rather an addition to the main elements of force and coercion. It aims to ensure that, with regard to certain categories of people, where force or coercion may not be necessary to accomplish an act of rape because of their inability to form decisions as to their sexual autonomy, such people are still protected.⁵⁴

The *mens rea* requirement is not explicitly included within the element of the crime but the requirements are similar as in the *Kunarac* judgement, namely the knowledge of non-consent and intention towards the sexual act.⁵⁵ This is rather interesting as the *actus reus* of rape disregards the element of non-consent while the *mens rea* of rape still demands of the perpetrators the knowledge about their victim not consenting to the sexual act.

2.4. Why Element of Consent has not played a role in the definition of a Crime of Rape under International Criminal Law?

The stability of a non-consent standard and in general existence of non-consent based definitions under international criminal law can be questioned. As it can be seen from the majority of definitions provided, non-consent indeed is not usually recognized as the element of rape under international criminal law but is rather circumvented by other notions. The ICC definition, the one with the most universal and contemporary application, excludes non-consent as a part of definition and by doing that gives ultimate proof of rejection towards this approach. In summary, few reasons will be provided as to why international criminal law has mostly adopted this approach.

Firstly, national laws which are used as a common denominator by the *ad hoc* tribunals were never intended to fit the definition of rape within the framework of international criminal law. It is impossible to transpose elements from the national legislation into supranational law without taking into consideration specific differences that exist for

⁵² Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' [2013] 54 Boston College Law Review 54, p. 1218-9

⁵³ '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. [A footnote here reads: 'It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.']; Element 2 of the Elements of Crimes relating to Article 7(1)(g)-1 of the ICC, Article 8(2)(b)(xxii)-1, Article 8(2)(e)(vi)-1 of the ICC

⁵⁴ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 492

⁵⁵ Article 30 of the Rome Statute of the International Criminal Court

these two bodies of law. Context of genocide, crimes against humanity and armed conflicts will, in practically all cases, lead to conclusion that crimes were committed under force or coercive circumstances where any possibility of consent is negated.⁵⁶ This approach was backed up by Gay McDougall, UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, who stated that '*the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime*'.⁵⁷ What separates international crimes from ordinary domestic crimes is the 'international element' which presumes mass-atrocities. This makes the question of consent unquestionable since such situations are inherently coercive. Thus, one could argue that in a stage of determination whether the crime fits the jurisdiction of *ad hoc* tribunals or the International Criminal Court, the sole fact that it does is an affirmation *per se* that there are circumstances which vitiate consent.⁵⁸

Secondly, if one accepts that rape constitutes a form of international crime it can well be argued that including consent to prove rape implies that victim could actually consent to the act of genocide or other crimes.⁵⁹ No other form of crime inflicting bodily or mental harm has consent as the element to prove their existence. This then diminishes the gravity of the crime and sends wrong implications. There is a danger in viewing rape in a de-contextualised manner and by framing it as a potentially wanted individual sexual encounter, rather than mass atrocities, imposes an excessively high threshold of evidence.⁶⁰

Lastly, obtaining explicit evidence of non-consent is offensive and shocking to the victims of sexual violence. Posing questions during the proceedings on the victim's state of mind and conduct is inappropriate and humiliating in the context of the armed conflict and international crimes.⁶¹ This places burden on the Prosecutor to prove there was no consent while it should be the case that raising consent is rather affirmative defence possible under strict conditions and thus imposing the burden of proof on the defendant.⁶² In *Kunarac* case, witness who was raped more than 150 times during period of 40 days in the Foča camp, was asked at trial proceedings whether sexual contact has been against her will.⁶³ This type of approach will only lead to silencing the victims and stopping them from coming forward with their experiences because the victims may get the impression of disbelief and that they indeed did give the consent.⁶⁴ Therefore, this will lead to less effective prosecutions of perpetrators.

⁵⁶ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (1 edn, Intersentia 2005), p. 120

⁵⁷ Gay J. McDougall, Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on Systematic rape, Sexual slavery and Slavery-like Practices During Armed Conflict, p. 25

⁵⁸ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (1 edn, Martinus Nijhoff Publishers 2011), p. 452

⁵⁹ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (1 edn, Intersentia 2005), p. 121

⁶⁰ Catharine A. McKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' [2006] 44 Columbia Journal of Transnational Law, p. 952

⁶¹ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (1 edn, Intersentia 2005), p. 122

⁶² Adrienne Kalosieh, 'Consent to Genocide: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' [2003]24(2) Women's Rights Law Reporter, p. 122

⁶³ *Prosecutor v. Kunarac, Kovac and Vukovic*, Transcripts, 25 April 2000, pp. 2235- 2236, witness nr 95.

⁶⁴ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (1 edn, Intersentia 2005), p. 123

3. Conclusion

This paper addressed the research question: '*What role does the Element of Consent have in the definition of a Crime of Rape under International Criminal Law?*'. The *ad hoc* tribunals, ICTY and ICTR, and the ICC have codified rape as an international crime. Rape is referred primary as a war crime and crime against humanity, but can also be addressed in other categories of crimes, such as acts of genocide, when the conditions for such crimes are fulfilled.

Codification has been a demanding process not unequivocally followed by the courts. Particular difficulties arose with the notion of the non-consent and its inclusion in the definition. In the majority of definitions, namely the ones from the *Akayesu* and *Furundzija* judgement as well as in the ICC definition, courts and legal practitioners were reluctant to include consent as the relevant element and decided to rather circumvent it by incorporating circumstances such as *force* or *coercion* which would, if proven, automatically exclude the possibility of giving the consent.

Reasons for excluding element of consent from the international definition are three-fold. First is the impossibility of transposing domestic laws into international ones without taking into consideration special, inherently coercive, circumstances surrounding these types of crimes. This then demands different approach with different elements of a crime that have to be proven. Secondly, the implication of possible consent to the crime of rape in the form of genocide or war crime can have serious repercussions both in the trial proceedings and in the seriousness of how one perceives the crime itself. Lastly, policy reasons should prevent asking the victims of such horrific crimes whether sexual intercourse was against their will.

After the analysis of the most prominent definitions existing under international criminal law, maybe it would be better to modify the question by asking why element of consent *is not* a part of a definition of rape. Proof of the existence of core crimes under international criminal law establishes circumstance under which person's genuine consent to a sexual contact is indeed impossible and should not have to be proven. At the present moment, international legal community has rightfully accepted that for the element of consent there is no place in a definition of a crime of rape under international criminal law.

Zločini Pristanka: Uloga elementa Pristanka prilikom definiranja Zločina Silovanja u Međunarodnom kaznenom pravu

Sažetak

Svrha rada je ukazati na teškoće u međunarodnom pravu prilikom stvaranja definicije za kazneno djelo silovanja. Počinjenje silovanja je kriminalizirano, odnosno kazneno djelo u svim nacionalnim kaznenim zakonima. Međutim, nacionalne definicije ne mogu se s lakoćom primijeniti u međunarodnom pravu, iz razloga što ne odražavaju realne okolnosti u kojima se događaju zločini silovanja. Zločini koji se događaju u kontekstu ratnih zločina, zločina protiv čovječnosti i kao sredstvo genocida predstavljaju situacije u kojima se pristanak na seksualni čin ne može smatrati dobrovoljnim. Stoga ovaj rad opisuje kako je međunarodna zajednica razvila suvremenu definiciju za zločin silovanja u međunarodnom kontekstu, probleme s kojima se suočavala prilikom analiziranja specifičnih elementa koji inače čine zločin silovanja te važnosti prepoznavanja posebnih okolnosti u kojima se ti zločini događaju, kako za međunarodnu zajednicu tako i za žrtve.

Ključne riječi: Silovanje- Pristanak- Prisilne okolnosti- Žrtve- Međunarodno kazneno pravo