

International Criminal Law and the Dynamics of the Crime of Rape

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Abstract

Rape is now being used as a weapon of warfare. Many countries and persons are guilty of this usage. This is in spite of the fact that international criminal law disallows such a practice and utilization. Consent and coercion which are key components of the crime of rape are still seen as being problematic in their legal contextual propriety and obstacle in their successful prosecution. Very recently, rape now constitutes war crime and crime against humanity under international law. There is now certainty and clarity in the characterization and description of the crime of rape. This makes the prosecution of the crime of rape less cumbersome and seamless. It solves the problem of the intrinsic bizarre and preposterousness that have hitherto beclouded the definition of the components of rape. This is largely due to the unique aspects of consent and coercion that are inherent within a surrounding context of armed conflict. This article seeks to examine the elements of rape under international law with special consideration of the propriety of the corroboration of consent and coercion in the light of recent evolution of the jurisprudence surrounding the crime of rape. The article submits that there are more progressive and productive steps courts and prosecutors should employ in the prosecution of the crime of rape as a crime against humanity and war crime.

Keywords

International Law, Criminal Law, Crime, Rape, Jurisprudence and Elements of Rape

1. Introduction

Since the beginning of wars (Churchill, 2020), rape is being used as potent weapon during times of war by those who engage in it (Churchill, 2020). Women are usually used as sex slaves during wartime (Jackson, 2021). Luke (Luke, 2019) describes

the situation during war in this way:

Colossal number of women are forcefully raped. There is usually no consideration for how old the woman is or pitiable circumstances. The fact is that even under-aged children and elderly women are not exempted. The most despicable thing is that even pregnant women are not considered. In some cases, some of these women become victims of rape right in the hospitals or clinics while they are getting ready to give birth or who just gave birth. These vampire soldiers do not spare even women who by their sacred tradition are not supposed to be touched.

In spite of the wide spread presence and pervasiveness of rape during war times, rape was condemned and outlawed in time immemorial. International law as well as domestic law have developed a vast jurisprudence on the crudity and evil of the crime of rape (Jacobson, 2021). Despite this progressive legal expansion and growth on the crime of rape, many international courts and tribunals hold differing positions in the perception and interpretation of the crime of rape. Four of those perceptions (Banak, 2022) will be considered here. One of these perceptions is the issue of coercion exerted by the perpetrator during the act of rape and whether this act constitutes an element of the crime of rape. The second perception is whether the victim consented to the act and whether this consent was forcefully obtained or voluntarily given and whether it constitutes an element of the crime of rape. The third perception is whether a loose or stricter elucidation and interpretation should be given to the definition of the crime of rape. The final perception is how to balance the issue of equity in the way the victim is treated and an equitable consideration for upholding the rights of the accused.

2. Fundamental Ingredients of the Crime of Rape by the ICTY and ICTR

Many landmark cases have considered some fundamental ingredients of the crime of rape. One remarkable case that identified some fundamental ingredients of rape at the international level was *Prosecutor v. Akayesu* (ICTR-43-5), which was prosecuted before the International Criminal Tribunal for Rwanda (ICTR) in 1998. In this case, the accused was convicted of rape as a crime against humanity. The issue of a stricter definition of rape was a problem during the trial based on the varied nature of the perception of rape in different legal systems in the world (Rhena, 2019). The trial chamber was unable to come to a consensus on a universally recognized definition of the crime of rape in international law. Defining rape as a mere physical infiltration or incursion of a sexual nature which is done to a person under forceful circumstances was unsatisfactory to the international community (Rhena, 2019). The fact is that not every coercive situation can be seen by a show of physical force. Other compulsive circumstances can constitute coercion (Rhena, 2019). Sometimes coercion may be organic in its nature (Rhena, 2019). The perpetrators intention in this sense is to use coercion to outmanoeuvre justice.

One outstanding feature in the definition of rape was the attempt by the trial court to adopt the phrase “a physical infiltration of a sexual nature” which is a departure from the way rape was thitherto defined. The expansion of the definition of rape is commendable in many ways (Trust, 2019). First, the definition given by the court now added any form of sex through the mouth or anus. It also includes the use of a finger, toy, tongue or any other object on the vagina. Second, rape can be committed by both sexes, which means that both sexes can be victims of rape. What the court has done is to suggest that there are many ways coercion can be determined.

Another remarkable case where the elements of rape was considered was the case of Prosecutor v. *Furundija* (ICTR:85-8) decided by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The court in this case considered the crime of rape as a breach of Common Article III of the Geneva Conventions and expanded the definition of rape in spite of the fact that there was no consensus definition of rape in international law. The court considered rape to include the sexual penetration of the vagina, anus or mouth of the victim by the penis of the accused or any other object used by the accused. One outstanding feature of the court’s decision was that the magnitude of the penetration was immaterial, which means that just a little penetration would suffice (Manager, 2018). Equally important in that decision is the issue of sex through coercive digital penetration as well as forced sexual relation arising from threat to a third person. For example, a woman having sexual relation as a result of a threat made against her child or a family member.

Another landmark case was that of *Prosecutor v. Kunarac, Kovac & Vokovic* (ICTY: 94-6) decided by the ICTY. The accused were charged with the crime of rape because they breached Common Article III as well as being a crime against humanity. This decision successfully dealt with some imbalances that hitherto existed under international law as regards the definition of rape (Monday, 2022). It was the view of the court that the proof of the crime of rape under international law is sexual penetration, no matter the magnitude into the vagina, mouth or anus of the victim by the penis of the accused or any other object used by the accused person so long as it was done without the consent of the victim or the consent was not given voluntarily (Johnson, 2022). These facts were deduced from the circumstances of the case at hand. According to the court the mens rea element requirement suggests that the accused had the general intention to do the sexual act as well as the knowledge that the sexual act was being done without the consent of the victim (Kofin, 2017).

This case went to the appeal panel (ICTR 85-8). The definition of rape was disputed and challenged. The argument was that the concept of the use of coercion or force during rape was not seen as a potent element of the crime of rape in contradistinction to lack of consent. This argument was not accepted by the panel because it was merely a jurisprudential explication of the nexus between the application of force and consent. The understanding was that, even though the fact

that force was used against the victim clearly shows that the victim did not give her consent it is not full proof element of the crime of rape. What this means is that the risk of laying so much emphasis on force will only enable the accused run away from culpability. This jurisprudential elucidation profoundly restructured the hitherto perception of the traditional elements of the crime of rape which only pushed it into further controversy.

The point is that the issues of force and consent are distinct and clear cut that must be solitarily and individually fulfilled in the prosecution of the crime of rape. This is because while the element of force or coercion is premised on the physical acts of the perpetrator, the concept of the proof of voluntary consensus has to do with the victim's state of mind.

Another profound case that comes to mind is that of *Prosecutor v. Muhimana* (ICTR: 85-8), by ICTR trial panel which gave a sagacious decision on the definition of the crime of rape. This case has to do with the perpetrator being prosecuted with rape as a crime against humanity. The panel was of the view that the elements of rape as opined in previous decisions are not discordantly variant in their application. The panel considered the issue of physical infiltration of a sexual nature as unambiguous and came to the conclusion that the accused was criminally culpable (Supra). Again, the panel equally considered and settled the contentious issues of the inability of the victim to give a valid consent and the accused's knowledge that the victim did not give a valid consent as potent elements rape as a crime against humanity (Lukim, 2019).

3. Fundamental Ingredients of the Crime of Rape by the International Criminal Court

The International Criminal Court has also considered the elements of the crime of rape in line with the Rome statutes just like ICTY and ICTR. The crime of rape is seen as a war crime or crime against humanity but the elements are identical and indistinguishable (Dominion, 2021). The ICC describes the *actus reus* of rape as a situation where the accused infiltrates the body of a person through penetration of the person's anus or any other genital opening or part of the body with any object by means of any form of force, or by threat of force or coercion, in a manner that results in intimidation, mental oppression, arbitrary confinement, misuse of power without proper consent (Dominion, 2021).

From the above definition of rape, the ICC has expanded the definition of rape to include other diverse forms of forced sexual activity which were not available in most traditional definitions in some legal systems (Thensy, 2022). One such inclusion is the reference to sexual intrusion of any part of the body of a victim whether a male or female person (Thensy, 2022). Another inclusion was the consideration of certain circumstances during periods of war by enlarging the connotative meaning of the use of the terms "coercion and force". The issue of certain persons who legally lack the capacity to give consent was addressed by the ICC. The understanding was that certain persons arising from their special state of

mind, infirmity or whether tender or old are not in a requisite frame of mind to give the required consent to any sexual activity voluntarily (Matthew, 2018).

Finally, the definition and the manner the ICC treats the issue of consent suggests a varied approach to this conversation of the crime of rape in contradistinction to the approach by some domestic jurisdictions. The ICC's definition certainly anticipates that certain persons, as a result of age, or other mental or physical shortcoming lack the capacity to give the needed consent to sexual activity (Matthew, 2018). This feature of the ICC definition corresponds with recent domestic legislative modifications that protect persons who, for various reasons, lack the capacity to give a valid consent in line with a broad reading of article 30 of the Rome Statute. The legal systems of Nigeria, Ghana, United States of America, South Africa amongst others readily comes to mind. The foregoing article, despite the fact that it excluded the issue of mens rea as the elements of the crime of rape, demands that rape is committed with the required intention and knowledge which includes the intention to infiltrate any part of the body of a person through penetration, and knowledge that such an infiltration was committed through the use of force and coercion (Blake, 2018).

4. The Special Court for Sierra Leone and Its Analysis of the Crime of Rape

The crime of rape has been defined by the Special Court of Sierra Leone (SCSL) in many landmark decisions. The court in the case of *Prosecutor v. Brirmur SCSL-2004 = AR79*⁹ opined that rape includes a situation where there was penetration without a valid consent, no matter the depth of penetration of the vagina or anus or mouth of the victim by the penis of the accused or by any other object or instrument used by the accused and the accused knowingly carried out the sexual penetration, and the accused is fully aware that it occurred without the consent of the victim.

The ICTY trial chamber adopted this kind of definition in *Prosecutor v. Brimna (ICTR-45-7)* when it opined that even though force or threat of force were factors that determined lack of consent but they are not elements of the crime of rape.

The SCSL in *Prosecutor v. Seresayi (SCSL)*, adopted a varied position in the definition of the crime of rape. The accused was charged with rape as a crime against humanity. The court (Supra) described the crime of rape to have been committed in any of the following circumstances:

- i. A situation where an accused person infiltrates the body of a victim through penetration, no matter the magnitude, of any part of the body of the victim or of the accused with any sexual organ, or of the anal or other genital opening of the victim with any object or
- ii. The invasion was committed by the use of force, threat or coercion, such that it resulted in fear of violence, duress, detention, psychological oppression or abuse of power or
- iii. The attack was carried out against a person incapable of giving cogent

consent or

- iv. The Accused truly intended to carry out the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
- v. The Accused was aware or had the capacity of knowing that the victim did not give any valid consent.

The court explained that the first element of the *actus reus* suggests the kind of attack that is needed to constitute the offence of rape and covers two types of penetration, no matter how slight the penetration may be (Durey, 2021). The first part deals with the penetration of the vagina or any opening of the body of the victim with a sexual organ (Durey, 2021). The infiltration or penetration may be through different means which may include genital, anal or oral penetration (Durey, 2021). The second part deals with the penetration of the genital or anal opening of the victim with any object or instrument on any other part of the body of the victim (Durey, 2021). This part is meant to include penetration with something different from sexual organ which may include any of the body parts or any other object or instrument (Durey, 2021). This understanding and the use of the word invasion is very wide and is gender neutral, which means that both men and women can be victims of the crime of rape (Strawson, 2018). This is in line with contemporary exigencies (Strawson, 2018).

5. Consensus International Definitions of the Crime of Rape

No doubt, there is overwhelming jurisprudence surrounding the definition of the crime of rape notwithstanding the fact that there is still no generally accepted definitive definition in international criminal law (Houthon, 2019). The definition by the ICC seems to be most cumulative and expansive in spite of its stand on the second part of the *mens rea* element which arbitrarily permits the infiltration of the defense of a mistake of *fact* (Houthon, 2019). Many other international bodies and treaties like the ICTY and ICTR have varying definitions on the crime of rape. There may be a need to harmonize these definitions. One area for harmonization is the issue of providing proof of consent and coercion. One fallout from the decisions of the courts is the differentiation of the situation in times of war which is radically dissimilar from the circumstances in a traditional national jurisdiction in the period of peace (Thompson, 2016). The understanding is that in such coercive situations the element of real consent may not be practicable and the element of coercion may debauch true consent (Thompson, 2016). This was reflected in some of the decisions by the ICTY and ICTR which suggest that a proof of physical force is not necessary to establish coercive situations. What this suggests is that terrorizing and intimidating attacks may constitute coercion so long as they create fear in the minds of the victims (Gosh, 2016). Equally important is the fact that consent cannot be a defense so long as there has been coercive circumstances a victim has been subjected to (Gosh, 2016). The same reasoning applies in a situation where the victim reasonably believes that submitting to a perpetrator's demands will prevent subjecting a third party to similar arbitrary intimidation

(Gosh, 2016). This informed the decisions of ICC as well as courts and tribunals in Rwanda, Sierra Leone, and Bosnia and Herzegovina.

6. The Crime of Rape and the Influence of Extraneous Policies

Procedural and evidentiary policies are equally important in the prosecution of the crime of rape. Some of these murky and convoluted measures and policies applied in some jurisdictions sometimes negatively affect the prosecution of accused persons (Thamys, 2022). Sometimes such accused persons are acquitted on technical grounds (Thamys, 2022). The first issue has to do with a situation where the law requires corroboration of a victim's statement on oath in order to sustain a conviction of the accused for the crime of rape. Corroboration as a prerequisite element originated from the assertion of Lord Chief Justice Matthew Hale who suggested that it is very easy for a person to accuse another person of rape but it is very difficult to prove same and it is equally very difficult for the accused to defend an allegation of rape even though the innocence of such an accused may not be very easy to discern (Haveny, 2019).

In many jurisdictions, this precondition has now been discarded (Makeme, 2018). For instance, so long as there is credible and convincing evidence an accused person can be convicted on the uncorroborated testimony of the victim in Nigeria, United States and United Kingdom (Makeme, 2018). This is equally the position of the ICTY, ICTR, and ICC. Many jurisdictions have equally rejected the unpopular argument that the victim must have resisted the accused but was eventually overpowered out of exhaustion (Kenedy, 2020). International criminal tribunals see this argument as unreasonable and atavistic (Kenedy, 2020).

One way a victim's credibility can be impinged is by alleging that he is suffering from medical and stress disorder and therefore incapable of being a reliable witness (Kenedy, 2020). This approach is deplored by the defence to undermine the validity of the testimony of a victim. This approach has been rejected by courts as being inaccurate and unwieldy because it is not a comprehensive proof at all times that a particular state of mind of a witness renders his testimony unreliable. The trial chamber in the case *Prosecutor v Furudarui* (ICTR-647) ruled that the testimony of persons suffering from any form depression arising from any stress disorder may not necessarily be incorrect and unreliable.

A similar argument was raised in the appeal decision of above case where the appellant submitted that it was inaccurate to rely on the testimony of victims of rape because of the kind of excruciating experience such victims suffer arising from the sexual ordeal (Supra). The appeal chambers rejected this claim as being blown out of proportion.

The issue of gender neutrality in the conversation about rape victims is still developing. International courts and tribunals see the crime of rape as gender neutral. It is settled that the laws of some countries allow for males to be victims of rape (Haveny, 2019). Many national jurisdictions adopt the jurisprudence that the crime of rape is gender neutral in line with contemporary international law

practice (Gosh, 2016).

7. Recommendations

One key recommendation is the need to create special rules like the ICTY and ICTR Rules of procedure meant to protect victims from intimidation, harassment and arbitrary questioning. These measures will ensure that victims are not compelled to divulge whatever is their sexual history before the alleged rape takes place. Even though the Rules that were used during the ICTY and ICTR period were timely and relevant, the use of such rules many seem insufficient and anachronistic because of modern exigency (Thompson, 2016). This paper submits that a more comprehensive form of protection is needed for victims to be properly accommodated in line with contemporary times.

Another recommendation is for the courts to ensure that extraneous measures and steps are not taking against victims meant to viciously and emotionally attack their reliability and reputation (Durey, 2021). Victims should not be subjected to any form of blackmail meant to impugn their credibility. There is a need to ensure that such extraneous matters should not be clothed with having probative value as regards to the crime of rape (Durey, 2021).

The third recommendation is premised on how to ascertain the issue of whether or not the victim gives a valid consent. In *Tunaracan's* case ICTY trial judgment outlined a bipartite *mens rea* element to the crime of rape which suggest that the prosecutor is required to prove that the accused was aware that the sexual penetration was not mutually done. In other words, a *mens rea* element that makes knowledge a prerequisite to lack of consent is arbitrary, unwarranted and should be obliterated (Ibid). There is no need to include a knowledge requirement in armed conflict situation in spite of the surrounding circumstances even though *mens rea* requirement may be necessary to maintain fairness to an accused who faces allegations of rape (Ibid). The understanding is that the accused is protected because the prosecution is duty bound to prove all the elements beyond a reasonable doubt in order to get a conviction for the crime of rape.

The final recommendation is the need to deplore the concept of strict liability in cases in which the alleged victim of rape is a minor or a vulnerable person (Blake, 2018).

8. Conclusion

This paper has thoroughly made the point that one way to ensure an equitable and seamless prosecution of rape cases as a war crime or crime against humanity is for international criminal tribunals or courts to make a holistic and substantial architectural variation of their prosecutorial mechanism. One of these modifications is to painstakingly adopt policies that promote the search for justice and gender-neutral analysis as well as demystify cumbersome conditions. Another approach is for courts to adopt and enhance modern jurisprudential procedures and rules in line with various domestic laws and practice. A holistic overview and adoption

of more progressive requirement issues like consent and lack of knowledge maybe necessary. A more radical jurisprudential evolution of the concept of rape as well as its prosecution is needed. There is, therefore, a call for some restructuring of international and national criminal laws in line with contemporary exigencies to improve the prosecution of the crime of rape at the international and national levels.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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