Guest Lecture Series of the Office of the Prosecutor

Professor Catharine MacKinnon

"The Recognition of Rape as an Act of Genocide – *Prosecutor v. Akayesu*"[*]

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THE ICTR'S LEGACY ON SEXUAL VIOLENCE

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INTRODUCTION

Legacies begin after. To speak of the International Criminal Tribunal for Rwanda's (ICTR) legacy on sexual violence may seem premature with so many violated women left in a before—their injuries unaddressed and unredressed, their violators so far from any kind of justice. Many cases the Tribunal has brought are not yet over, including some, like *Karemera,*[1] that could be pivotal. But it is not too early to begin to assess what the Tribunal has and has not done: its signal accomplishments and remaining shortfalls.

Legacies of international initiatives are usually measured by violators held accountable and peace promoted. In the area of sexual violence, the Tribunal's impact will also be measured against the backdrop of the reality and law of sexual violence in every nation in the world, every single day, including outside zones of recognized conflict. In both settings, three areas could be affected: substantive law, law of criminal responsibility, and process.

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1. *See* Prosecutor v. Karemera, et al., Case No. ICTR 98-44-I, Amended Indictment (Aug. 24, 2005). The genocide charges against these officials specifies serious bodily and mental harm, which could encompass rape if proven; the charge for complicity in genocide expressly mentions rape, *id.* ¶ 66, as does Count 5 charging crimes against humanity. *Id.*

I. SUBSTANTIVE LAW

The Tribunal's single biggest substantive accomplishment, in my view, is its definition of rape in *Akayesu* as "a physical invasion of a sexual nature under circumstances which are coercive." Sexual violence was similarly defined as "any act of a sexual nature . . . under circumstances which are coercive."[2] The recognition that consent is meaningless for acts of a sexual nature that have a nexus to genocide, armed conflict, and crimes against humanity was a tremendous breakthrough. The insight judicially pioneered in *Akayesu* that:

> lack of consent as an element of the crime of rape (or any other sexual violence crime for that matter) is immaterial within the supranational criminal law context, especially in light of the violent and oppressive context in which rapes take place during genocide, crimes against humanity or armed conflict, and should therefore be rejected,[3]

is becoming increasingly accepted. The related provisions of the Rome Statute of the International Criminal Court also do not contain consent, grasping that such circumstances constitute coercion, such that consent is irrelevant and hence legally absent as an element.[4] This accomplishment was augmented by the *Akayesu* recognition that acts of sexual violence, when integral to a genocide in fact, are genocidal in law.[5] Defining sexual violence in terms of the force of circumstances of extreme inequality—here

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2. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 598 (Sept. 2, 1998).

3. ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 455 (Intersentia 2005).

4. *See* Rome Statute of the International Criminal Court art. 7 ¶ 1(g)-(h), July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]. "Taking advantage of a coercive environment" is recognized as a form of force in the ICC definitions of rape and enforced prostitution as crimes against humanity. International Criminal Court, Elements of Crimes arts. 7(1)(g)-1, 7(1)(g)-3, ICC-ASP/1/3 (Sept. 9, 2002). The same phrase is part of the definition of force in the war crime of rape, enforced prostitution, and sexual violence. *Id.* arts. 8(2)(b)(xxii)-1, 8(2)(b)(xxii)-3, 8(2)(b)(xxii)-6. Consent is not mentioned in any of these sections. The Elements of Crimes, defining rape, focus on force, threat of force, coercion, or a coercive environment, not non-consent. *Id.* art. 7(1)(g)-1, 8(2)(b)(xxii)-1. The ICC does have a procedural mechanism to address the issue of consent under certain circumstances, with the burden of proof on the defendant. *See* International Criminal Court, Rules of Procedure and Evidence, Rules 70, 72, ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter Rules of Procedure and Evidence] (providing for in camera review of admissibility of consent evidence).

5. *See Akayesu*, ICTR 96-4-T, Judgment, ¶¶ 732-34, for the decision of the first international court to embrace the insight. The first judicial recognition of the concept was *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

understanding genocide or campaigns of crimes against humanity as inequality *in extremis*—portentously located these crimes on a continuum with the same acts that take place in contexts of inequality in other settings, where the atrocities are often not yet recognized as systematic, widespread, group-based, or destructive of peoples as such, when actually they are.

Subsequent ICTR cases undermined or elided the key insight of *Akayesu* temporarily, as exemplified by the detours taken by the *Prosecutor v. Semanza* and *Prosecutor v. Kajelijeli* trial chambers[6]. Jurisprudence of the International Tribunal for Former Yugoslavia (ICTY) tended to pull in the opposite direction at times as well.[7] However, the appeals decision in *Prosecutor v. Gacumbitsi* effectively sustained the core insight of *Akayesu* in finally holding, as a matter of fact if not law, that under coercive circumstances nonconsent is not a separate element to be proven, but can be inferred from those circumstances.[8]

This is not just a matter of abstract theory. There is a real relation between the theory of rape used and the outcome achieved. It is no accident that it was in *Akayesu* and *Gacumbitsi* that the defendants were found guilty of rape as genocide, which is what these rapes actually were.[9] The reluctance to find, or in some instances to charge, rapes as genocide in other cases with very similar fact patterns remains worrisome, particularly given that rapes are often found to constitute crimes against humanity at the same time on the same testimony that murders are found to be genocidal.[10]

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6. *See* Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgment ¶ 506 (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment, ¶¶ 910-16 (Dec. 1, 2003). Semanza was, however, found guilty of instigating rape as a crime against humanity, and of instigating torture by rape and personally committing torture, convictions that were affirmed on appeal. Semanza v. Prosecutor, Case No. ICTR 97-20-A, Appeals Chamber Judgment, ¶¶ 256-57, 280-90, 390-93 (May 20, 2005).

7. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 177, 182-86 (Dec. 10, 1998) (centering definition of rape on the body parts approach *Akayesu* had explicitly repudiated); Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment, ¶¶ 436-64 (Feb. 22, 2001).

8. *See* Gacumbitsi v. Prosecutor, Case No. ICTR 2001-64-A, Appeals Chamber Judgment, ¶¶ 155-57 (July 7, 2006). The *Kunarac* appellate decision, which seems to be a bit of a Rohrshach, prefigured this reconciliation. There, the Appeals Chamber recognized that there are circumstances "so coercive as to negate any possibility of consent." Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Chamber Judgment, ¶ 125-33 (June 12, 2002).

9. *Akayesu*, ICTR 96-4-T, Judgment, ¶¶ 731-34; Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Judgment, ¶¶ 291-93 (June 17, 2004). *See also* Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment, ¶ 552-63 (Apr. 28, 2005).

10. *See, e.g., Gacumbitsi*, ICTR 2001-64-T, Judgment, ¶¶ 184-93 and Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 26 (Feb. 5, 1999) (per his guilty plea) (killing found as genocide, rape found as a crime against humanity, not genocide); s*ee also Semanza*, ICTR 97-20-T, Judgment, ¶ 435 (defendant found

Genocidal mens rea is thus unlikely to have been the problem. Anyone who, with genocidal intent, kills a woman he just raped, for example, likely raped her with the same thought in mind.

II. RESPONSIBILITY

Even the best substantive law can be undermined by incommensurate liability tools. Both provisions of the ICTR statute on criminal liability permit holding a man individually responsible for sexual acts other men committed as if he committed them himself.[11] Acts by others attributed to a defendant as a result of his authoritative relation to the immediate perpetrator are covered under Article 6(1); acts he could have prevented or punished but did not (termed "command or superior responsibility") are covered under Article 6(3).[12] The prosecutorial strategy of going after the top of hierarchies has meant that prosecutions have been, in the main, for acts the defendant did not commit himself, but for acts attributed to him—acts that other men engaged in, in some sense, for him. These prosecutions thus find themselves confronting the pervasive reluctance to hold men responsible for their sex acts, exascerbated by a distinct resistance to finding vicarious responsibility for sex acts other men commit.

One prosecutorial pattern in some cases is a comparative lack of charging rape at the same time as murder when evidence of both is strongly present, together with a willingness to drop rape charges in the course of plea deals when charges of murder are retained.[13] A parallel judicial pattern can be discerned in the seeming reluctance of the Tribunal, at times, to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder committed on virtually the same evidence, at the same time and place, by and against the

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guilty of complicity in genocide for killings, rapes found as crime against humanity). There are also several cases in which killing was charged and found as genocide and rape was charged but not found as a crime against humanity. *See, e.g.*, *Kajelijeli*, ICTR 98-44A-T, Judgment; Prosecutor v. Kamuhanda, Case No. ICTR 95-54A-T, Judgment (Jan. 22, 2004); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment (May 16, 2003). In *Kajelijeli* and *Kamuhanda*, extermination was also found as a crime against humanity. I hope none of this happens in *Karemera*.

11. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex arts. 6(1) & 6(3), U.N. Doc. S/RES/955/Annex (Nov. 8, 1994) [hereinafter ICTR Statute].

12. *See id.*

13. To the latter, see *Serushago*, ICTR 98-39-S, Sentence, ¶ 4; Prosecutor v. Bisengimana, Case No. ICTR 00-60-T, Judgment, ¶¶ 228, 231 (Apr. 13, 2006); Prosecutor v. Rugambarara, Case No. ICTR 00-59-T, Sentencing Judgment, ¶¶ 2-3 (Nov. 16, 2007). *See also* Prosecutor v. Nzabirinda, Case No. ICTR 01-77-T, Sentencing Judgment, ¶¶ 41-42, 44 (Feb. 23, 2007) (withdrawing counts of genocide, extermination, and rape "because the evidence is not there.").

same people. Judge Ramaroson's cogent dissent in *Kajelijeli* strongly suggests this, making the lack of appeal on this point a lasting frustration.[14] *Prosecutor v. Muvunyi*, in which the defendant was found guilty of genocide for murders but not for rape as a crime against humanity, may be another instance; *Prosecutor v. Niyitegeka* seems to be another.[15] It is as if, at both prosecutorial and judicial levels, a tacitly higher standard of credibility for witnesses to rape pertains than for witnesses to murder. An underlying sense also emerges that, while all these men would not likely have killed without direct orders, perhaps they would rape women en masse all on their own, without the supportive context of the defendant's authority.[16] On this boys-will-be-boys theme, grown up into men-will-run-amok, it is as if international authorities see these rapes as not really the leaders' fault. Whether they are or not in specific instances, the reluctance says a lot about background assumptions concerning sexual violence that support impunity.

Further to the vicarious liability two-step involved here, consider that, in all the prosecutions that have been brought, few superiors have been found to have raped personally even as superior defendant after defendant has been found to have committed murder after murder by his own hand, often in front of witnesses.[17] In *Niyitegeka,* the Trial Chamber came close to finding that the defendant raped a girl himself, but it ultimately decided that it could not essentially because no one saw him do it.[18] While the court of first instance is entitled to weigh the facts, a tacit social burden of proof in sexual assault cases seems to have survived the formal nonexistence of corroboration requirements. In a further tilt, the Trial Chamber's finding that Musema himself raped was overturned on appeal on the grounds that the four men who were with him at the time Nyiramsugi was raped could have done it.[19] No doubt some evidentiary factors are difficult for a distanced observer to assess. But can it really be true that all these superior

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14. *See* Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Ramaroson, ¶¶ 69-78 (Dec. 1, 2003).

15. *See* Prosecutor v. Muvunyi, Case No. ICTR 00-55A-T, Judgment, ¶ 531 (Sept. 12, 2006); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment, ¶ 480 (May 16, 2003).

16. Of course, command responsibility often serves as a vehicle for getting at direct orders when those orders cannot be proven beyond a reasonable doubt.

17. One exception to this generalization is *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgment, ¶¶ 966-67 (Jan. 27, 2000) (finding the accused guilty of raping personally). Another could be the ongoing case *Prosecutor v. Nyiramasuhoko & Ntahobali,* Case No. ICTR 97-21-I, Indictment, ¶ 6.37 (Mar. 1, 2001).

18. *Niyitegeka*, ICTR 96-14-T, Judgment, ¶¶ 301-02. He was, however, convicted of sexually mutilating a dead woman. *Id.* ¶¶ 313-16.

19. *See* Musema v. Prosecutor, Case No. ICTR 96-13-A, Appeals Chamber Judgment, ¶¶ 184-94 (Nov. 16, 2001).

men killed people shamelessly in front of witnesses again and again but always managed to rape all by themselves, even as witnesses saw others raping women all around them by the thousands?

At times, it may be harder to determine if someone was raped than if that person was killed, but rape often leaves distinctive marks, psychological as well as physical. Identifying the rapist is not essentially more difficult—and may, at times, be easier—than identifying the murderer, who may leave no witnesses. Men do tend to protect the sexual prerogatives of other men, particularly their hierarchical superiors, and may protect their sexual prerogatives with a particular intensity of identification. (Judicially, there are, thankfully, exceptions to this critique, as the case of Muhimana, *conseiller* of Gishyita Secteur, illustrates.[20]) But what of the surviving women victims, who were there, usually witnessed their own rape, and often can tell about it? Surely all the rape victims of the so-called "big fish" are not dead, as the girl Niyitegeka was convicted of killing but not raping is. It should also be noted that, to every woman who is raped, the fish who did it is plenty big.

Combine this with the prosecutorial decision to pursue superiors and ignore subordinates, perhaps for reasons of resources, and the picture that emerges is of rapes committed by subordinates, few of whom the ICTR has or will hold responsible, and superiors sometimes being held responsible for rapes, almost none of which they committed themselves. This legacy is troubling both as to the message it sends and the incentives it sets in motion for the top and the bottom of hierarchies alike, as well as for the realities it ignores. Certainly, if only superiors of the immediate rapists are going to be charged for sexual violence committed by subordinates, on the theory that they will prevent the attacks if held responsible for them, then it becomes particularly important *that they be held responsible for them*—that is, that Article 6(3) and its successors be robust, not eroded.[21] Otherwise, international justice confirms for the subordinate men of the world, who

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20. *See* Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment, ¶¶ 552-63. Muhimana was convicted of rape as genocide as well as a crime against humanity for raping seven women and girls himself, and for aiding and abetting in the rape of five other Tutsi women and girls. *Id*. On appeal, his conviction for rape as genocide was upheld, and his conviction for rape as a crime against humanity for most of them was upheld as well. Muhimana v. Prosecutor, Case No. ICTR 95-1B-A, Appeals Chamber Judgment, ¶¶ 46-53, 94-104, 116-24, 148-92 (May 21, 2007) (upholding crimes against humanity convictions for rape except for responsibility for the rapes of Goretti Mukashyaka and Languida Kamukina).

21. This is especially important if, as in *Prosecutor v. Bagosora* and *Prosecutor v. Ndindiliyimana*, rape is charged exclusively under Article 6(3). Prosecutor v. Bagosora, Case No. ICTR 96-7-I, Amended Indictment, Count 7 (Aug. 12, 1999); Prosecutor v. Ndindiliyimana, Case No. ICTR 00-56-I, Amended Indictment, Count 7 (Aug. 23, 2004).

commit most of the rapes, not only that there is no chance they will be held responsible for each rape they commit, but also that there is only a small chance that their superiors will be.

Part of this problem is historical. Most of the atrocities committed in these settings, which increasingly are not armed conflicts by conventional definition, are not war crimes but crimes against humanity and acts of genocide—neither of which, in the actuality of the ways they are committed, requires or typically displays the chain of command or formal hierarchical ordering that characterizes armed conflict as such. Crimes against humanity and genocide were originally recognized, of course, in the context of warfare, crimes against humanity specifically requiring a nexus to it. Although the substantive causes of action have become increasingly liberated from that context[22]—a trend in which the ICTR has actively participated—the liability rules for these crimes have observably remained subliminally stuck in their original wartime setting.

There is a place where atrocities against women, which often have strong ethnic or racial dimensions, bear more resemblance to campaigns of crimes against humanity and genocide than they do to conventional armed conflict. The rank ordering is more social than formal, the power relations in their perpetration far from vicarious. That place is everyday life, where deference and command can be highly structured and organized yet tacit.

The breakthrough that would correspond to the *Akayesu* achievement on the substantive level has yet to take place on the level of accountability. The closest approximation is the judicially-created concept of "joint criminal enterprise" cognized by the ICTY in the absence of an otherwise workable co-perpetration rule for individual liability in settings of collective sexual violence.[23] This absence, too, is part of the ICTR's legacy. The same division between Articles 6(1) and 6(3), without further consideration of gaps between them; the same dubious divisions between

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22. Defining crimes against humanity, compare Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 5, U.N. Doc. S/25704, Annex (May 3, 1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) ("when committed in armed conflict") with ICTR Statute, *supra* note 11, art. 3 ("when committed as part of a widespread or systematic attack directed against any civilian population") and Rome Statute, *supra* note 4, art. 7 (same as ICTR).

23. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 220 (July 15, 1999); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 605 (Aug. 2, 2001); Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 326 (Nov. 2, 2001) (recognizing liability for sexual violence with common purpose or under knowing assumption of risk). For a lucid exposition of this common law development, see Patricia Viseur Sellers, *Individual(s') Liability for Collective Sexual Violence, in* GENDER & HUMAN RIGHTS 153 (Karen Knop ed., 2004).

active and passive, act and omission, doing and letting happen that underlies them; the same incomplete theorization of just what work Article 6(3) is there to do, together with the retention of the immediacy factor compellingly criticized by Chile Eboe-Osuji;[24] the same implicit sense that 6(1) is real liability and 6(3) is second-rate liability, only there as a catch-all when the real thing is unavailable; the same lack of focused tools for establishing individual responsibility for collective atrocities—all remain essentially intact going forward, even though the corresponding Articles 25 and 28 of the Rome Statute are an improvement.[25] If they ever were adequate, these liability tools are inadequate to today's conflicts, which are at once more organizationally chaotic and, socially, more hierarchically coherent than the military model on which they are predicated. In between imminent instigation ex ante and failure to punish ex post is the creation of an enabling environment that ranks some people as dominant above others, permissively contextualizing selective systematic aggression whether a more formal authority is around at the time or not, or even exists.

III. PROCESS

On the level of process, some of the problems that afflict rape prosecutions outside zones of recognized conflict have also beset the ICTR, including most prominently the pervasive sense communicated that sexual violence is not a serious priority.[26] The flood of rapes is effectively ignored,

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24. Chile Eboe-Osuji, *Rape and Superior Responsibility: International Criminal Law in Need of Adjustment*, GUEST LECTURE SERIES OF THE OFFICE OF THE PROSECUTOR 9-10 (June 20, 2005), http://www.icc-cpi.int/library/organs/otp/050620_Chile_presentation.pdf.

25. Article 25 provides for individual criminal responsibility for acts that "contribute[] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" so long as the contribution is intentional. Rome Statute, *supra* n. 4, art. 25(3)(d). It also provides for liability for committing a crime "jointly with another or through another person, regardless of whether that other person is criminally responsible." *Id.* art. 25(3)(a). Article 28, governing "Responsibility of commanders and other superiors," lays out in greater particularity that command responsibility attaches where the commander knew or should have known of crimes by forces under effective command and control that he failed to stop, and further encompasses "superior and subordinate relationships not described" in the section covering the military, in which the superior "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit … crimes" covered by the statute. *Id.* art. 28(b)(i).

26. *See* Binaifer Nowrojee, *"Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, 10 U.N. RES. INST. FOR SOC. DEV. OCCASIONAL PAPER (Nov. 2005), *available at* http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/56fe32d5c0f6dce9c125710f0045d89f/$FILE/OP10%20Web.pdf.

resources overwhelmed by never having imagined how many rapes there actually were. The ICTR shares these shortcomings with sexual violence prosecutions around the world, often prominently failing to charge rape when it should. The *Cyangugu* case[27] is the best known for this tendency, but the *Media Case*[28] is at least as notable. In the Rwandan genocide, rapes were incited and instigated by media just as murders were. But the rapes were not charged against the media leaders who were charged with the killings, for which some were convicted.[29] Perhaps prosecutors apply a stronger standard of directness or specificity to evidence of the relation of media to its actualization for rape than for killing. Or is the idea that rape does not need incitement or instigation to happen? This suggests that the tolerance of rape, including ethnic rape, is above—even far above—zero, even as it is the very circumstances of coercion required for rape under the *Akayesu* definition that the media in Rwanda so substantially contributed to creating.[30] When charges are not laid, and convictions not obtained, even on strong facts, particularly when killing the same people by the same people at the same time is alleged, women's intimate and distinctive violation is disregarded, leaving the impression that women do not matter. It can be hoped that the enhanced ability of victims to participate in ICC

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27. *See* Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe, Case No. ICTR 99-46-T, Decision on the Coalition for Women's Human Rights in Conflict Situation's Motion for Reconsideration of the Decision on Application to File an Amicus Curiae Brief (Sept. 24, 2001); Prosecutor v. Imanishimwe, Case No. ICTR 99-46-T, Judgment (Feb. 25, 2004).

28. *See generally* Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003) (convicting the three co-defendants, who were heads of media, of genocide and incitement to genocide leading to the well-known status as "the Media Case").

29. *Id.* ¶¶ 1069-84; Nahimana v. Prosecutor, Case No. ICTR 99-52-A, Appeals Chamber Judgment, ¶¶ 970-1016 (Nov. 28, 2007).

30. The Trial Chamber held that:

> Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura*. *The Ten Commandments*, broadcast on RTLM and published in *Kangura*, vilified and endangered Tutsi women. … By defining the Tutsi woman as an enemy in this way, RTLM and *Kangura* articulated a framework that made the sexual attack of women a foreseeable consequence of the role attributed to them.

Nahimana, ICTR 99-52-T, Judgment and Sentence, ¶ 1079. Why such evidence is not sufficient to demonstrate genocidal intent for sexual assault, when the genocide takes place and sexual assaults are integral to it, is the question.

proceedings, including through their own chosen representatives,[31] may make this better.

No shortfall can overshadow the ICTR's biggest accomplishment, one it shares with the survivors of sexual atrocities: expanded world attention under international law to these violations. However inadequate the international response has been to the monumental scope of the survivors' violations, both in quantity and profundity, that response has, finally, begun to be made.[32] And it has been in the ICTR, not in the ICTY, that it has truly begun. Every bit of this focus, for which Rwandan women and the ICTR, together with the local and international groups who worked tirelessly since the Bosnian conflict to make the horrific realities visible, is more attention than the international community ever gave to this subject before. The fact that the ICC even exists, with its prohibitions on sexual violence, however imperfect, displaying the detail and seriousness they do, is due in no small part to the impetus provided by the ad hoc tribunals, and those who gave them life by believing in them enough to testify before them. The Rome Statute shows that these outrages are more palpable and prominent in international legal thinking today than they ever have been. This legacy, among many others, can never be erased. And *Akayesu*'s legs are only beginning to walk all over the world.

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31. *See, e.g.*, Rome Statute, *supra* note 4, art. 68(1)(3); Rules of Procedure and Evidence, *supra* note 4, R. 16(1); ICTR Statute, *supra* note 11, art. 21.

32. That the Special Court for Sierra Leone has in general proceeded more satisfactorily, and that the ICC is beginning to charge rapes in the situation in other settings, for example in Darfur, Sudan, see, for example, Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad al-Bashir, International Criminal Court, The Hague, July 14, 2008, are hopeful indications on this front.

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are women human?

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Defining Rape Internationally

A Comment on *Akayesu*

Each time a rape law is created or applied, or a rape case is tried, communities rethink what rape is. Buried contextual and experiential presumptions about the forms and prevalence of force in sexual interactions, and the pertinence and modes of expression of desire, shape determinations of law and fact and public consciousness. The degree to which the actualities of raping and being raped are embodied in law tilt ease of proof to one side or the other and contribute to determining outcomes, which in turn affect the landscape of expectations, emotions, and rituals in sexual relations, both everyday and in situations of recognized group conflict.

Illegal rape is commonly defined to revolve around force and unwantedness in sexual intercourse.[1] Many jurisdictions—by statute, interpretation, or in application—tend to emphasize either compulsion or lack of agreement. Some weight one to the relative exclusion of the other; some permit one or the other alternately or simultaneously.[2] Many require proof of both.[3] In life, the realities of compulsion and lack of accord in sexual interactions overlap and converge. Force abrogates autonomy just as denial of self-determination is coercive. Although the determinants of desire and techniques of compulsion (and the mutual interactions of the two) are far from simple, anyone who has sex without wanting to was compelled by something, just as someone who had sex they wanted was not forced in the conventional sense. Yet conceptually speaking, emphasis on nonconsent as definitive of rape sees the crime fundamentally as a deprivation of

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sexual freedom, a denial of individual self-acting.[4] Emphasis on coercion as definitive, on the other hand, sees rape fundamentally as a crime of inequality, whether of physical or other force, status, or relation.[5]

Where coercion definitions of rape see power—domination and violence—nonconsent definitions envision love or passion gone wrong. Consent definitions accordingly turn proof of rape on victim and perpetrator mental state: who wanted what, who knew what when. This crime basically occurs in individual psychic space. Coercion definitions, by distinction, turn on proof of physical acts, surrounding context, or exploitation of relative position: who did what to whom and, often, in some sense, why. This crime basically takes place on the material plane. Accordingly, while consent definitions tend to frame the same events as individuals engaged in atomistic one-at-a-time interactions, coercion definitions are the more expressly social, contextual, and collective in the sense of being group-based.

The statutes of the ad hoc criminal tribunals for Yugoslavia and Rwanda,[6] conflicts in the 1990s where sexual atrocities were deployed for ethnic destruction,[7] were established to adjudicate international violations of the laws of war and humanitarian law. Rape under these statutes is thus not a free-standing crime but must be charged as an act of war, genocide, or crime against humanity.[8] Expressly defining rape under international law for the first time in 1998, the *Akayesu* decision of Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) held that rape, there charged as a crime against humanity, is "a physical invasion of a sexual nature committed on a person under circumstances which are coercive."[9] As with torture,[10] to which it was analogized, rape's purpose to the perpetrators[11] in context, together with its specific nature as sexual, defined it. *Akayesu* defined rape as an act of coercion not reducible to narrow bodily description: "The Chamber considers that rape is a form of aggression and that the central elements of rape cannot be captured in a mechanical description of objects and body parts."[12] Crucially, "[c]oercive circumstances need not be evidenced by a show of physical force" but "can be inherent in circumstances like armed conflict or military presence of threatening forces on an ethnic basis."[13]

Interpreted in light of the distinction between force-centered definitions, on the one hand, and consent-centered definitions, on the other, to be sexually invaded under coercive circumstances, as *Akayesu* terms it, is clearly to be subjected to an unwelcome act, but that did not make nonconsent a matter of proof for the prosecution. Under the conditions of overwhelming force present in a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[14] that constitutes a context of crimes against humanity, in acts found part of this campaign, inquiry into individual consent was not even worth discussion. Mr. Akayesu was found individually criminally responsible for crimes against humanity for ordering, instigating, aiding, and abetting the sexual violence under his aegis that took place as part of such a widespread and systematic attack on civilians.[15] And, arguably for the first time, rape was defined in law as what it is in life.

In *Akayesu*, acts of rape and other sexual violence were also charged as genocide for "causing serious bodily or mental harm" when committed as part of an intentional campaign to destroy a people as such on an ethnic basis.[16] Because facts of sexual violence were indicted under this existing legal definition of genocide, rape was not defined in this connection; the kind of sexual violence that constitutes genocide is defined by whatever causes serious bodily or mental harm. As was first judicially found in Kadic v. Karadžić[17] addressing the Bosnian conflict in the United States, the ICTR trial chamber stressed that rapes under the *Akayesu* factual circumstances were acts of genocide[18] "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."[19] Mr. Akayesu was found individually criminally responsible for genocide for abetting the infliction of serious bodily and mental harm on Tutsi women for the purpose of destroying the Tutsi group as such.[20] Again, rape was recognized in law as what it was in life: an act that inflicted serious harm with intent to destroy an ethnic group as such.

In the line of cases that followed, the International Criminal Tribunal for the Former Yugoslavia (ICTY) led in tipping the definition of rape for both tribunals away from the *Akayesu* breakthrough resolution and, step by step, back in the direction of nonconsent. Although the ICTY trial chamber's *Delalic* decision initially embraced *Akayesu*'s definition,[21] in a reversion first publicly visible[22] late in 1998, the ICTY's *Furundzija*[23] trial decision, acknowledging that rape was a forcible act,[24] mentioned the *Akayesu* definition only to ignore it. In nothing other than the "body parts" definition *Akayesu* had expressly rejected as mechanical and missing the whole point three months earlier,[25] the *Furundzija* tribunal required a showing of vaginal or anal penetration by a penis or object, or oral penetration by a penis.[26] "[W]ithout the consent of the victim"[27] crept back in at the same time. By five years later, this regression culminated in the ICTR's *Semanza*[28] and *Kajelijeli*[29] trial decisions turning rape on nonconsent.

The *Furundzija* trial chamber predicated these developments on a lengthy recital of national laws, the purpose for which was a claimed need for "specificity" and "accura[cy]" in definition.[30] This rationale was supported by the implication (in Latin) that without such specification, the defendants—guards of concentration camps charged with sexual assault on prisoners in their custody—might not have known with sufficient precision that what they were accused of doing was a crime.[31] Although the tribunal purported to avoid mechanically drawing on "common denominators"[32] among national rape laws in writing its international definition, it failed to note the fundamental tacit presumption they shared: that coerced sex was not a routine phenomenon instrumentalized as a tool of group coercion in their jurisdictions.

Even before *Furundzija*, the ICTY's rape prosecutions were marked by missteps and missed opportunities. In the first case to be resolved at trial, *Tadic*, brought against a guard at the Omarska camp notorious for systematic rape of a group of women captives,[33] the one count for rape of a woman victim had to be withdrawn, leaving a sexual attack on a man the only sexual assault adjudicated in the case.[34] Particularly, women survivors of captivity in Omarska found this to be an insulting, even traumatic misrepresentation, a public mockery of their experiences. Making matters worse, the ICTY's Rule 96, which had originally provided that "consent shall not be allowed as a defense"[35] to charges of rape under the tribunal's jurisdiction, giving the tribunal considerable credibility with survivors, was changed by the tribunal so that it no longer ruled out consent entirely.[36] That the tribunal could imagine that rapes that were part of war, genocide, or a campaign of crimes against humanity could be consensual outraged many women survivors of that conflict and badly damaged the tribunal's credibility with that community.[37]

A further and connected problem has been the long-term reluctance of the ICTY to charge rape as an act of genocide. Many perpetrators have been indicted for rape and other sexual violence under other rubrics, and others for genocide for other acts,[38] but despite *Akayesu* showing the way, only ten ICTY cases have indicted rape as genocide, prominently culminating in the Milošević indictment in 2001,[39] compared with almost four times as many by the ICTR.[40] Since survivors of rape in the Serb-led genocide against Bosnia-Herzegovina and Croatia typically understood that they had been raped precisely to destroy their ethnic and religious communities, in acts of sexual violence against women because they were not Serbian,[41] the ICTY's seeming reluctance to grasp the entire point of their victimization made survivors unwilling to put themselves in its hands, damaging

trust and opportunities for cooperation. The limited access to witnesses that ensued no doubt had a circular effect on charging practices, supporting the stubborn misperception that "ethnic cleansing" in the "former Yugoslavia"[42] was something other than a euphemism for genocide. How mass rapes could fail to be genocidal when they were committed as part of the same campaign, by and against the same peoples, attendant to and simultaneous with, indeed sometimes as acts of, the same mass murders that are recognized as genocidal, remains a mystery.

The soft-pedaling of the genocidal conditions faced by non-Serbian women in the region, realities to which the rapes were integral, became judicial minimization of the organized collective realities of coercion, a vacuum filled in rape cases by inquiry into the comparatively individual factors of body parts and consent. A perfect vehicle for this process, the *Furundzija* case first reflected and then exacerbated it. That Mr. Furundzija is Croatian[43] placed his case far from the Serbian genocidal core of the conflict; that he was not indicted for his own sex acts but for those he witnessed being performed by his subordinates distanced him somewhat from the acts themselves; and that the sexual aggression in question prominently included forced fellatio[44] seemed to some (those who continue to see rape as confined to a penis penetrating a vagina) to call for legal exertions to render it recognizably rape. In contrast, the Rwanda Tribunal's general clarity that it was facing a genocide[45] to which rape and other sexual atrocities were integral components encouraged a conception of the acts focused not on the absence of individual consent but on the presence of group force.[46] Where extremist Hutu exterminated and raped and otherwise sexually violated Tutsi by the hundreds of thousands, as in Rwanda, the decontextualized interaction of discrete body parts and one-at-a-time mental states was simply irrelevant, otherworldly. Simply put, the ICTR grasped that inquiring into individual consent to sex in a clear context of mass sexual coercion made no sense at all.

In its first major successful prosecution of rape, the ICTY's 2001 trial chamber decision in *Kunarac* found the rapes of a group of women in a brothel-like setting in Foča to be a form of enslavement. If not genocide, at least enslavement was a collective concept with an ethnic resonance, although little was made of ethnicity in the case. Reviewing the definitional issue again, the *Kunarac* trial chamber took the view that "the basic underlying principle common to the legal systems surveyed in *Furundzija*" was that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim" and that "the true common denominator which unifies the various systems may be a wider or basic prin-

ciple of penalising violations of sexual *autonomy*."[47] This was observed to be particularly the case in common-law systems. Rather than nonconsent being a presumed corollary of the presence of force, evidence of force became reduced to evidence of nonconsent.[48]

Casting a critical eye on this decision, the ICTY appellate decision in *Kunarac* noted that the trial chamber "appeared to depart from the Tribunal's prior definitions of rape" in "focus[ing] on the absence of consent as the condition sine qua non of rape."[49] The Appeals Chamber leaned to "the need to presume non-consent here,"[50] given that the defendants were convicted of raping women in de facto custody where they "were considered the legitimate sexual prey of their captors."[51] It concluded that "[s]uch detentions amount to circumstances that were so coercive as to negate any possibility of consent."[52] Note the use of the *Akayesu* terms: "circumstances that were . . . coercive." Consent was held "impossible"[53] on such facts. This holding, while strongly militating against a nonconsent definition of rape and constituting a precedent for similar cases, did not yet squarely hold against the nonconsent definition per se. Instead, it found that the coercive circumstances in the Foča captivities *in fact* precluded the legal possibility of proof of nonconsent. By ruling thus on the facts, the *Kunarac* appellate chamber, while siding with a coercion-based definition, stopped short of finding consent legally irrelevant on principle in cases where the rapes have a nexus to war, crimes against humanity, or genocide.

Back at the ICTR, which endorsed the *Akayesu* definition in *Musema*[54] and *Niyitegeka*,[55] one trial chamber, following the lead of the ICTY, reverted to the consent-based rape definition that *Akayesu* had already superseded. The *Semanza* ruling in 2003, termed the *Akayesu* definition "broad"; the ICTY's definition—"the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator"—was termed "narrower."[56] It is unclear what these two terms mean except that they imply that some acts included in the *Akayesu* definition are not actually rapes. In any case, many rapes clearly encompassed by the *Akayesu* definition become difficult or impossible to prove under the *Semanza* definition, which makes the forest indiscernible for the trees. Centering its definition of rape on nonconsent, the *Semanza* trial chamber held that "the mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim."[57] At least consent was to be "assessed within the context of the surrounding circumstances."[58]

Nothing in the *Semanza* record called for the conflicting reversion to the consent-based rape definition. There was no implication that the women who were sexually violated before they were murdered might have consented. Testimony showed that Semanza said to those under his command, "Are you sure you're not killing Tutsi women and girls before sleeping with them. . . . You should do that, and even if they have some illness, you should do it with sticks."[59] Why such facts called for regression to a consent standard is unclear. As rape under law effectively went from being a physical act inflicted on the body of a victim to a psychic act committed in the mind of a perpetrator, the circumstances of war, crimes against humanity, and genocide in which the rapes legally and materially participated receded into the background. Indeed, Semanza was not charged with genocide for these sexual atrocities.

Instead of foregrounding the larger (and statutory) context of reality in which the acts took place, proof was now to focus on mechanical interactions of specified body parts of individuals and what individual perpetrators were thinking about what their victims were thinking—almost as if the *Interahamwe* might have been going on a date with the Tutsi women they hunted down and slaughtered with machetes. In defining rape exclusively by nonconsent, *Semanza* completed the full turn backward to the English common law. No other crime against humanity has ever, once the other standards are met, been required to be proven nonconsensual. With sex, it seems, women can consent to what would otherwise be a crime against their humanity, making it not one.

Continuing the *Semanza* trajectory, the ICTR trial chamber decision in *Kajelijeli* in late 2003[60] further combined body part interactions (called "more detailed")[61] with nonconsent, incorrectly citing the *Kunarac* appellate decision as authority.[62] Again, nothing in the facts or issues of the case conduced to such a definition. *Kajelijeli* was not about whether women were raped or whether the defendant raped them but about whether Mr. Kajelijeli, the rapists' superior, could be held responsible for the rapes that had in fact been perpetrated by his subordinates.[63] In the relatively rare acquittal, the trial chamber majority found Mr. Kajelijeli innocent of rapes proven to have been committed by forces under his command, both rapes he allegedly ordered and those he allegedly knew or should have known about.[64] Nor was Mr. Kajelijeli indicted for genocide for these rapes.

It is hard to believe that the individual decontextualized focus on the one-at-a-time image of rape had nothing to do with the tribunal's unwillingness to hold the superior responsible for these rapes. The less rapes are framed as mass atrocities, and the more they are framed as potentially wanted individual sexual interactions, the less courts may be willing to

hold others responsible for them. The assertion that the majority decision in *Kajelijeli* was based on inconsistencies and inadequacies in the testimonial evidence was challenged (arguably demolished) by the powerful dissent of Judge Arlette Ramaroson, who in effect exposed the majority's double standard for evaluating facts going to superior accountability for killings on the one hand and rapes on the other.[65] While not expressly said, the point that superiors are more readily found responsible for murders than for rapes, acts said by the same witnesses to have been committed at virtually the same time, emerges starkly.

Charting the beginning of its recovery from the *Semanza* detour, the *Muhimana* trial decision in 2005 marked the ICTR's return to the course *Akayesu* began. In an accurate synthesis of prior rulings with the facts of the cases both tribunals confront, *Muhimana* applied *Akayesu* toward resolving the definitional debate. It held that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape"[66] and that most international crimes "will be almost universally coercive, thus vitiating true consent."[67] It pointed out that *Akayesu* and *Kunarac* are neither "incompatible [n]or substantially different in their application."[68] Judicially tactful and substantially valid, this latter point evaded the fact that *Akayesu*, having satisfied the mens rea for genocide and crimes against humanity of which the rapes were shown to be a part, required no additional mens rea for rape—the function of nonconsent that *Furundzija* and *Semanza* thought was needed, and that *Kunarac* on appeal incompletely rejected as a matter of law. To the degree daylight was discernible between *Akayesu* and *Kunarac* in this respect, however, *Muhimana* tended to side with *Akayesu*.

Extending the present definitional analysis of rape to legal and factual settings beyond those of the ad hoc tribunals requires beginning with the true context of rape, coercive inequality of the sexes,[69] and the true common denominator of rape laws: they do not work. Most rapes are unreported because most women know they will not get justice; state rape is a more appropriate description of their experiences, with rapes ineffectually addressed to a discriminatory degree.[70] In most legal settings outside recognized zones of conflict, a woman charging rape is still effectively presumed to have wanted the act, an assumption for which consent is a proxy, no matter how much force was involved, turning the acts back into sex based on specific body part interactions, presumptive consent that she must rebut, often with little more than her word. *Akayesu* in effect reversed this presumption for rapes proven inflicted as part of war, genocide, or crimes against humanity, defining rape in terms of its function in collective crimes. Appropriate to such contexts, its definition shifted the focus of proof from individual interactions to collective realities, from proof of defendant subjective psychological state to proof of objective facts inflicted on the complainant with others similarly located. No longer burdened by presumptive consent, *Akayesu* built into its rape definition the context of violent inequality common to the crimes the ad hoc tribunals are statutorily authorized to prosecute. Once a context of coercion was shown, from a crime notoriously stacked against victims, rape became an act provable by prosecutors with relative ease by usual legal means. The question becomes, what distinguishes other settings in which rape occurs?

To make a transition to settings where no collective conflict is recognized to exist, for example, to global sex inequality with its attendant violence against women,[71] requires bringing into focus the extent of force that exists as a background condition for specific rapes in these other settings. The *Akayesu* approach and the pattern of outcomes in cases since support the suggestion that rape laws fail because they do not recognize the context of inequality in which they operate, focusing as they so often do on isolated proof of nonconsent against a false background presumption of consent in an unreal context of equality of power. Consent often operates as a flag of freedom flown under the illusion that, if it is instituted as a legal standard, whatever sex women want will be allowed and whatever sex women do not want will be criminal. Legal consent standards do not conform to this fantasy anywhere, wholly apart from the complexities that inequality introduces to what members of powerless groups can want or reject. But an unnoticed slippage in the discussion of the term between social myths of and desires for freedom, on the one hand, and legal discussions of actual rules that tacitly reflect and impose inequalities, on the other, gives the term an appeal it does not earn.

Put another way, body parts and consent fit together in rape definitions in being utterly decontextualized. If rape is fundamentally an interaction of body parts, it is essentially sex unless something else is wrong with it, which is where nonconsent is supposed to come in. Even if social customs deeply define consent, conceptually it is inherently individual in the sense of taking place within an individual's psyche. By contrast, although overwhelming force is a physical reality, coercion is largely social in the sense that the hierarchies and pressures it deploys are inherently contextual. In the context of international humanitarian law, to look to coercion to define rape is to look to the surrounding collective realities of group membership and political forces, alignments, and clashes. If sex was being engaged in simply for sexual gratification, for instance, it would predictably not be

one-sidedly imposed on one ethnic group by another, as it was when inflicted on Muslim and Croat women in Bosnia-Herzegovina and Croatia and on Tutsi women in Rwanda. Such collective realities of group-based destruction expose the instrumentalization for acts that are part of it through which victim consent is rendered practically, hence properly legally, irrelevant.

The *Akayesu* definition is clearly well suited to addressing rapes that are part of mass group-based atrocities. Its focus on real world external rather than subjective realities also makes it more susceptible to standard forms of legal proof. For the same reasons, it is adaptable to situations of inequality outside conventionally recognized conflicts. *Akayesu* has legs, having already been incorporated into legislation in two states in the United States.[72] Since rape can be a crime against humanity under the International Criminal Court's (ICC) Rome Statute,[73] targeted on the basis of sex, 'might the highest rape rate in the world, that in South Africa,[74] qualify? That rape becomes banal does not disqualify it as a crime against humanity—to the contrary. In light of the realism and administrability of the *Akayesu* definition, it is regrettable that the ICC codified rape for its international purposes in the chronological middle of the tribunals' process described here, taking one page from *Akayesu*'s invasion of a sexual nature under coercive circumstances and one from *Furundzija*'s body parts without consent,[75] straddling the definitional difference rather than resolving it. Although the ICC's elements lean toward force and coercion in defining sexual assault crimes, the door that *Akayesu* shut so decisively and appropriately was left once more ajar by its evidentiary code,[76] through which rapists might walk away following rapes in international conflicts that show no sign of stopping.[77]