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**UNIVERSITIES NETWORK FOR CHILDREN IN ARMED CONFLICT
ADVANCED TRAINING COURSE
INTERNATIONAL CRIMINAL JURISDICTION INVOLVING CHILDREN IN ARMED
CONFLICT
Procedural and deontological profiles concerning the role of lawyers
June 8th, 2022 - October 20th, 2022**

ANALYSIS OF CASE LAW

A Gender Perspective

6 July 2022

*The below material is provided to prepare for the session.
Please review said material and focus on the questions which will be discussed during the session.*



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1. The first conviction of sexual violence and rape as crimes of genocide and the first conviction of rape as crime against humanity

ICTR, *The Prosecutor v. Jean-Paul Akayesu*

“These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”.

(Trial Judgement para. 731).



Akayesu, Jean Paul

[Amended Indictment](#)

[Trial Judgment](#) (see in particular, Section 5.5 on Sexual Violence paras. 416-460; the Section on the Law under Rape paras. 596-598; and the Legal Findings paras. 685-697; 706-707, 731-734)

[Appeals Judgment](#) (see in particular, the ground of appeal on i) improper amendment of the original indictment paras. 102-123; ii) errors of fact and law regarding the charges of sexual violence paras. 181-214)

Summary of facts

During the Rwandan Genocide, between eight-hundred thousand and one million people were killed by Hutu extremists – a rate of killing four times greater than at the height of the Nazi Holocaust.

On 6 April 1994, the plane carrying Juvenal Habyarimana, the President of Rwanda, and Cyprien Ntaryamira, the President of Burundi, was shot down over Kigali. These assassinations shattered the peace agreement previously established in the hope of ending armed conflict between the Rwandan Patriotic Front and the Rwandan Government. Violence on an unimaginable scale spread throughout the entire country. Over 100 days, genocide, crimes against humanity and war crimes were perpetrated primarily against Tutsi civilians and moderate Hutus.



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The original indictment charged Akayesu, as *bourgmestre* (mayor) of Taba *commune*, under Article 6(1) of the ICTR Statute with genocide; complicity in genocide; crimes against humanity; direct and public incitement to commit genocide; violations of Article 3 common to the Geneva Conventions for criminal acts committed between 7 April and the end of June 1994.

On 17 June 1997, the original indictment was amended with three additional counts of sexual violence, violence and murder perpetrated at the *bureau communal* between 7 April and the end of June 1994. The Accused was thus charged under Article 6(1) and /or Article 6(3) of the ICTR Statute with rape and other inhumane acts as crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (outrages upon personal dignity, in particular rape, humiliating and degrading treatment and indecent assault). These new charges stemmed from the testimonies of witnesses (in particular Witness JJ) who testified that sexual violence, including multiple forms of rape, was continually perpetrated on women in the forest, in front of other people, at different refuge sites and also at the *bureau communal*.

On 2 September 1998, Trial Chamber I of the Tribunal found Akayesu guilty of nine out of fifteen counts. It was the first conviction ever for genocide and it was the first time that an international tribunal ruled that rape and other forms of sexual violence could constitute genocide. It was also the first conviction of an individual for rape as a crime against humanity. The judgement was confirmed on appeal. Akayesu was sentenced to life imprisonment.

Legal questions

- How the Trial Chamber defined sexual violence and rape ?
- Under which conditions rape can constitute genocide?
- Which acts with a gender component could be construed as measures intended to prevent births within a group?

Specific provisions

- [Article 3 common](#) to the Geneva Conventions.
- Article 3, 4(2)(e) of [Additional Protocol II](#).
- Articles 1, 2, 3, 4, 5, 6(1),(3), 12(1), 15, 17(1), 19(1), 20, 23, 24, 26, 27, 91(1) of the [ICTR Statute](#).
- Rules 3(A), 14(A), 15(A), 40, 45(A), 46(A), 50, 66, 71, 72, 73, 74, 77, 78, 80, 85(B), 87(A), 89(A),(C), 90(A),(B),(F),(G), 94bis, 101, 105, 111, 112, 115, 116, 118, 119, 123 of the [ICTR Rules of Procedure and Evidence](#).



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Further analysis

- S. Chenault, [And since Akayesu? The Development of ICTR Jurisprudence on Gender Crimes: A Comparison of Akayesu and Muhimana](#), *New England Journal of International and Comparative Law*, 2008, Vol. 14, pp. 221-250
- P.J. Magnarella, [Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: the 1998 Kambanda and Akayesu Cases](#), *Florida Journal of International Law*, Vol 11, pp. 517-538;
- J.E. Alvarez, [Lessons from the Akayesu Judgment](#), *ILSA Journal of International and Comparative Law*, 1998-1999, Vol. 5, pp. 359-381;
- C.A. MacKinnon, [Defining Rape Internationally: A Comment on Akayesu](#), *Columbia Journal of Transnational Law*, 2005-2006, Vol. 44, pp. 940-;
- M.Das & S. Singh, [Crimes of Sexual Violence within International Criminal Law : A Historical Outline](#), *Journal of Politics and Law*, Vol. 14, No. 1, 2021



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2. The first case recognising rape as a form of torture and sexual enslavement as crimes against humanity

ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*

“What the evidence shows, is that the rapes were used by members of the Bosnian Serb armed forces as an instrument of terror. An instrument they were given free rein to apply whenever and against whomsoever they wished. [...] What the evidence shows, are Muslim women and girls, mothers and daughters together, robbed of the last vestiges of human dignity, women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces, and more specifically, at the beck and call of the three accused”
(Judgement hearing)



Kunarac, Dragoljub



Kovač, Radomir



Vuković, Zoran

[Case Information Sheet](#)

[New amended indictment](#) (against Kunarac and Kovač, including SGBC)

[Trial Judgement](#) (see in particular, Section D Rape paras. 436-464; and the discussion about the individual rapes (from para. 630)

[Appeals Judgement](#) (see in particular, i) definition of the crime of rape paras. 127-133; ii) definition of the crime of torture paras. 142-156; iii) definition of outrage upon personal dignity paras. 161-166)

Summary of facts

The events giving rise to the case occurred in the area of Foča (Bosnia and Herzegovina) between April 1992 and February 1993. During this period, an armed conflict existed between Bosnian Serbs and Bosnian Muslims. The Bosnian Serb Army and paramilitary groups targeted the non-Serb civilian population aiming the ‘cleansing’ of the Foča area of non-Serbs.

Muslim men were separated from women and children. While the men were detained at the prison facility called Foča KP Dom (situated near Foča), the women and children were taken to collection points and transferred to the Foča High School and later to the Partizan Sports



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Hall (both located in Foča) where they were subjected to unhygienic conditions and mistreatments, including repeated rapes.

Kunarac was the leader of a reconnaissance unit forming part of the Foča Tactical Group of the Bosnian Serb Army (VRS), having access to the highest military command. Kovač and Vuković were members of the Bosnian Serb military unit/sub-commanders of the military police of the VRS and members of the paramilitary in the town of Foča.

The Prosecution accused Kovač, on the basis of individual criminal responsibility, of violations of the laws or customs of war for rape and outrages upon personal dignity and crimes against humanity for enslavement and rape; Vuković, on the basis of individual criminal responsibility, with violations of the laws or customs of war for torture and rape and crimes against humanity for torture and rape; and Kunarac, on the basis of individual and superior criminal responsibility, for all said crimes.

Dragoljub Kunarac was found guilty of crimes against humanity (torture, rape, enslavement), and war crimes (torture and rape) and, subsequently, sentenced to 28 years of imprisonment.

Radomir Kovač was also found guilty of the war crimes of rape and outrages upon personal dignity, as well as the crimes against humanity of enslavement and rape. He was sentenced to 20 years of imprisonment.

Zoran Vuković was found guilty of torture and rape as both war crimes and crimes against humanity. He was sentenced to 12 years of imprisonment.

The case marks the first time the ICTY issued sentences for rape and enslavement as crimes against humanity.

Legal questions

- Should the definition of rape contain an element of consent?
- [Rule 96](#) of the Rules of Procedure and Evidence of the ICTY stipulate that consent can, in certain cases, be used as a defence against rape charges. Do you see any implications in including then an element of consent in the definition of rape?
- In your opinion, does the inclusion of the element of consent has an impact on victims?

Specific provisions

- Articles 3, 5, 7(1) and 7(3) of the [ICTY Statute](#).
- Rule 96 of the Rules of Procedure



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Further analysis

- C.S. Maravilla, [Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & \(and\) Vukovic on International Humanitarian Law](#), *Florida Journal of International Law*, 2000-2001, Vol. 13, pp. 321-343.
- W. Hofs, [Kunarac: Defining Rape under International Criminal Law](#), 2016



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3. Sexual Victimization of Men and Boys

Traditionally, sexual violence has been considered as an offence committed by men against women. While sexual violence against women has thus received significant and almost exclusive attention within the international community, recognition and intervention to address male-centred sexual harms remains elusive and marginalized despite constituting a frequent occurrence.

- In your opinion, why sexual violence against men and boys is under-prosecuted?
- Sexual violence against men and boys manifests in different forms of physical and mental abuse. In your opinion which are these different forms of abuse?
- Do you know any case of prosecution of sexual and gender based crimes against men and boys before international courts and tribunals?

Useful reading

- T. Frunse, [Hidden Constructs of Sexual Victimization of Men and Boys in Armed Conflict: Prosecutorial and Jurisdictional Trajectories of the International Criminal Courts and Tribunals](#), Journal of Human Trafficking, enslavement and conflict-related sexual violence, vol. 1, nr. 1, 87-112
- V. Oosterveld, [Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals](#), Western University, 2014
- I. Garofalo, [Prosecuting male sexual violence at the ICC: Idealism Or Realism?](#), Centre for African Justice, Peace and Human Rights



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4. Gender and International Humanitarian Law (IHL)

Over the last decade, some feminist legal theorists have advanced a range of critiques on the 'gendered' nature of IHL. Concerns generally centre on the challenges that arise where systems of formal equality, such as IHL, are required or expected to deliver substantively equal outcomes, particularly given the fundamentally diverse ways armed conflict impacts upon men and women. In short, these academics have argued that IHL is inherently discriminatory, as it is a legal regime that prioritizes men – specifically male combatants – and often either relegates women to the status of victims, or accords them legitimacy only in their role as child-bearers.

Some authors state that of the 42 specific provisions relating to women within the Geneva Conventions and the 1977 Additional Protocols, almost half deal with women in their roles as expectant or nursing mothers. Similarly these authors argue that the other category of protection, specifically the crime of sexual violence, is understood in terms of chastity and modesty of women. Evidence of this claim is provided in the wording of Article 27 of Geneva Convention IV which states that '*women shall be especially protected against any attack on their honour...*'. Much has also been written in the past decades about the historical lack of prosecution of rape as a war crime, as well as the fact that it is not listed within the 'grave breach' provisions of the Geneva Conventions, which appears to give it a lesser status within the strict hierarchy of war crimes.

On the other hand, some writers have acknowledged the use of outdated language within the body of IHL, but argue that like any text, the Geneva Conventions must be read with a temporal understanding of views in the 1940s and within a range of cultural constructs. Furthermore, the language used to articulate crimes involving sexual violence during armed conflict has been updated over time; for example, the wording used in the 1977 Additional Protocols (which does not include the term 'honour'), and the wider codification of prohibitions on sexual violence under the ICC Statute which neither uses such terms nor focuses exclusively upon women.

- What role did gender and sexuality play in the making of the 1949 Geneva Conventions?
- How did the drafters of the most important document ever formulated for armed conflict envision men and women's rights in wartime?



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Useful reading

- H. Durham and K. O'Byrne, [The dialogue of difference: gender perspectives on international humanitarian law](#), IRRC, Vol. 92, Nr. 877, March 2010
- B. van Dijk, [Gendering the Geneva Conventions](#), Human Rights Quarterly, Vol. 44, Nr. 2, May 2022
- H. Durham, C. Droege, L. Cameron, V. Murphy, [Gendered impacts of armed conflict and implications for the application of IHL](#), ICRC Report, June 2022