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Faculty of Law

# Defining genocidal rape under international law - the *Akayesu* case

SOC032 International Criminal Law

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## 1. Introduction

After decades of uncertainty and discussion about the concept of rape, its definition and scope, big steps were made in the 1990's through the case law of international criminal tribunals. Furthermore, a specific link was made between rape and genocide. In this paper, I will first give a brief general overview of the concept of rape and its contextual background, particularly with respect to the context of armed conflict. Next, I will discuss the facts of the 1998 *Akayesu* case in Rwanda. I will elaborate on the judgment of the case and its impact on the development of the concept of genocidal rape.

## 2. In general: the concept of rape

It has proven to be a complicated and arduous issue to try and define the concept of rape under international criminal law. Each time a piece of legislation is created or a new case is tried which concerns the subject, people reconsider what rape actually comprises. The concept of rape is commonly defined to revolve around force and unwantedness in sexual intercourse. Many theories emphasize either on the presence of coercion on the one hand or a lack of agreement or consent on the other<sup>1</sup>. Emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, while 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<sup>2</sup>.

Irrespective of the theoretical discussion, it is significant to take a look at the sociological and contextual background of gender based crimes such as rape, as well as the environment that facilitates their commission in conflicts, to have a better understanding of the concept, especially when it involves rape in a context of armed conflict<sup>3</sup>. According to BANWELL, there is a higher risk of gender based crimes to be committed in countries where gender

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<sup>1</sup> MACKINNON, C.A., *Defining rape internationally: a comment on Akayesu*, Columbia Journal of Transnational Law 44, p. 940.

<sup>2</sup> *Id.*, p. 941.

<sup>3</sup> ALI, K., *Sexual and gender based crimes in international criminal law: moving forwards or backwards?*, International Journal of Law and Political Sciences, 2015, p. 3619, retrieved from <https://waset.org/publications/10003109/sexual-and-gender-based-crimes-in-international-criminal-law-moving-forwards-or-backwards->, consulted on May 26, 2018.

inequality and discrimination are high, because the pre-existing gender inequality is exacerbated during conflict. This exacerbated inequality coupled with the gendered notions of military and violence, often associated with masculinity, create a conducive atmosphere for such crimes to be committed<sup>4</sup>.

ALI further elaborates that patriarchal norms also play a role in explaining why heinous crimes such as rape are befallen on women particularly in conflicts. In societies where women are seen mostly as incomplete humans and their social identities are defined as extensions of their male family members, gender based crimes are no longer isolated crimes against women but rather are crimes perpetrated as acts of tarnishing the masculinity of male family members<sup>5</sup>. In this way, it means that rape is seen more as a crime against the husband or father of the woman raped as damage to his “property” and not as a violation of her own bodily integrity<sup>6</sup>. It can be concluded that gender based crimes, such as rape, in conflicts are not committed in a vacuum. Rather, the pre-existing social order shapes the basis of these crimes. Rape in conflicts, therefore, by nature is not just an act of violence against a woman, child or man, but is a crime that needs to be viewed within the context of the conflict that is taking place<sup>7</sup>.

During the twentieth century, a shift has taken place towards sexual violence as an explicit tactic of armed conflict. As the trend towards targeting civilian populations grows, so does the scale of sexual violence committed in this context<sup>8</sup>. As MCCAUSLAND accurately

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<sup>4</sup> BANWELL, S., *Rape and sexual violence in the Democratic Republic of Congo: a case study of gender based violence*, Journal of Gender Studies, 2014; ALI, K., *Sexual and gender based crimes in international criminal law: moving forwards or backwards?*, International Journal of Law and Political Sciences, 2015, p. 3619, retrieved from <https://waset.org/publications/10003109/sexual-and-gender-based-crimes-in-international-criminal-law-moving-forwards-or-backwards->, consulted on May 26, 2018.

<sup>5</sup> ALI, K., *Sexual and gender based crimes in international criminal law: moving forwards or backwards?*, id. Nr. 5.

<sup>6</sup> POWELL, C., *You have no God: an analysis of the prosecution of genocidal rape in international criminal law*, id. Nr. 4.

<sup>7</sup> ALI, K., *Sexual and gender based crimes in international criminal law: moving forwards or backwards?*, id. Nr. 5.

<sup>8</sup> MCCAUSLAND, C., *From tolerance to tactic: understanding rape in armed conflict as genocide*, id. Nr. 3, p. 151.

observes, this tactical evolution reflects a realization on the part of combatants that sexual violence is a deadly efficient tool of domination and an ultimate weapon of war. In fact, perpetrators of sexual violence continue to be met with immunity and are rarely held accountable for their actions<sup>9</sup>.

There are many examples of the use of rape and other sexual violence in armed conflicts involving civilians, one of the most recent being the events that occurred during the “Bosnian genocide” in the early 1990’s, of which it is estimated that Serbian forces raped between 10.000 and 60.000 women. Another example are the numerous rapes of Tutsi women in Rwanda in 1994, which will be further elaborated on in the next paragraphs.

### 3. The *Akayesu* case

#### 3.1 Background

From April 1993 until June 1994, Jean-Paul Akayesu served as bourgmestre of the Taba commune in Rwanda. In that period, Rwanda was an extremely violent environment, characterized by brutal killings and sexual violence. As bourgmestre, Akayesu was charged with the maintenance of public order within his commune. At least 2000 Tutsis were killed in Taba in 1994, while Akayesu was still in power. The killings in Taba were openly committed and so widespread that Akayesu must have known about them. Although he had the authority and responsibility to do so, Akayesu never attempted to prevent the killing of Tutsis in the commune in any way<sup>10</sup>.

Jean-Paul Akayesu knew that acts of sexual violence were being committed against a large number of Tutsi women and was at times even present during their commission.

In 1995, Akayesu was arrested, and on February 13, 1996, the then prosecutor submitted an Indictment before the International Criminal Tribunal for Rwanda (ICTR), individually

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<sup>9</sup> MCCAUSLAND, C., *From tolerance to tactic: understanding rape in armed conflict as genocide*, id. Nr. 3, p. 151.

<sup>10</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.

charging Akayesu among other things with genocide, rape, murder and other inhumane acts upon personal dignity<sup>11</sup>.

### 3.2 Judgement of the ICTR

The *Akayesu* case is considered the most important case for prosecuting rape as an international crime, because for the first time, the concept of rape was expressly defined under international law.

The ICTR described rape as “a form of aggression the central elements of which cannot be captured in a mechanical description of objects and body parts”, thus departing from earlier descriptions of the concept of rape. Rather, the ICTR developed a new definition, stating that “rape is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”<sup>12</sup>. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.

Furthermore, the significance of this case was also in its expansion of prosecution for gender-based crimes. It was the first international tribunal case to link the crime of rape explicitly to genocide<sup>13</sup>. The ICTR recognized sexual violence as an integral part of the genocide in Rwanda and eventually found Jean-Paul Akayesu guilty of genocide for crimes that included sexual violence.

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<sup>11</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.

<sup>12</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.; AFRICAN LEGAL MATERIALS, *Summary of the judgement in Jean-Paul Akayesu case*, African Journal of International and Comparative Law 11, p. 344.

<sup>13</sup> ELLIS, M., *Breaking the silence: rape as an international crime*, Case Western Journal of International Law, 2006-2007, p. 232.

In its judgement, the ICTR refers to Article II of the Convention for the Prevention and Repression of the Crime of Genocide (Genocide Convention) which defines genocide as<sup>14</sup>:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Although rape is not specifically mentioned in the Genocide Convention, it has been made clear by the ICTR that rape and other acts of sexual violence can be genocidal acts. As stated above, establishing genocide requires the intent to destroy a national, ethnical, racial or religious group. This means that rape does not constitute a genocidal act simply because it occurs at the same time as or in the context of a genocide. The intent must be proven<sup>15</sup>. To that extent, the ICTR further elaborated on the fact that such a genocidal intent was indeed present in the case at hand.

First of all, the ICTR recognized that rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims as laid down in part (b) of the above cited article. The Tribunal found that the acts of rape were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated and raped several times, often in public and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. It was even stated that rape and sexual violence in this situation were one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm<sup>16</sup>.

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<sup>14</sup> Article II of the Convention for the Prevention and Repression of the Crime of Genocide of 9 December 1948.

<sup>15</sup> RUSSELL-BROWN, S.L., *Rape as an act of genocide*, Berkeley Journal of International Law, 2003, p. 362.

<sup>16</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.; AFRICAN LEGAL MATERIALS, *Summary of the judgement in Jean-Paul Akayesu case*,

Secondly, the ICTR affirmed that measures intended to prevent births within a group, part (d) of Article II of the Genocide Convention, specifically targeting women as both members of an ethnic group and as women, can constitute genocide<sup>17</sup>. Moreover, it made the critical link between rape and genocidal intent<sup>18</sup>, stating that “in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group”<sup>19</sup>. The judges of the tribunal also indicated that “measures intended to prevent births within a group may be mental as well as physical, as rape can be regarded as such a measure when the person raped refuses subsequently to procreate because of the threats and trauma suffered”<sup>20</sup>.

As regards the allegations of rape and sexual violence, Jean-Paul Akayesu was eventually found guilty of genocide as well as crimes against humanity and sentenced to life imprisonment.

### 3.3 Impact of the judgment

The *Akayesu* case resulted in an extremely important decision in the international law on rape and acts of sexual violence in armed conflict as well as in recognizing rape as an act of

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African Journal of International and Comparative Law 11, p. 344.; ELLIS, M., *Breaking the silence: rape as an international crime*, Case Western Journal of International Law, 2006-2007, p. 232.

<sup>17</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu; ALVAREZ, J.E., *Lessons from the Akayesu Judgement*, ILSA Journal of International and Comparative Law 5, p. 362.

<sup>18</sup> ELLIS, M., *Breaking the silence: rape as an international crime*, Case Western Journal of International Law, 2006-2007, p. 233.

<sup>19</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.

<sup>20</sup> <sup>20</sup> International Criminal Tribunal for Rwanda, 2 September 1998, Case No. ICTR-96-4-T, The prosecutor vs. Jean-Paul Akayesu.; ALVAREZ, J.E., *Lessons from the Akayesu Judgement*, ILSA Journal of International and Comparative Law 5, p. 362.

genocide. Furthermore, it also substantially contributed to the clarification of earlier debates about genocidal rape<sup>21</sup>.

In her comprehensive article on the subject of genocidal rape, Sherrie RUSSELL-BROWN emphasizes the great impact of the *Akayesu* case on international criminal law as regards rape. Amongst other things, RUSSELL-BROWN underscores that the ICTR acknowledged in its *Akayesu* judgment, through its innovating definition of rape, that it viewed rape not as simply sexual in nature, but as a tool of war, a violent act perpetrated against members of a group with the intent of destroying that group. It recognized how sex can be used to destroy a people. The ICTR was the first international tribunal to ever do so. Contrary to the historical characterization of rape, as a wrong against men, against the woman's husband, father or brother, the ICTR finally 'properly' defined rape as a form of aggression against both the victim itself, as well as her community or ethnical group<sup>22</sup>.

#### 4. Conclusion

It is clear that it is a complex issue to give a comprehensive definition of rape. However, there is a strong need for an explicit description of the concept, especially in the context of armed conflict after a shift has taken place in the last decades towards rape and sexual violence as a tactic of war. The *Akayesu* case is the first case in which rape was actually expressly defined under international law. Furthermore, it was the first case to link the crime of rape to genocide. For the first time, it was recognized by an international criminal tribunal that rape can be used as a tactical tool in armed conflict and that it can even be used to destroy a community and their ethnicity, thus constituting an act of genocide under international criminal law.

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<sup>21</sup> RUSSELL-BROWN, S.L., *Rape as an act of genocide*, Berkeley Journal of International Law, 2003, p. 362.

<sup>22</sup> *Id.*, p. 23-24.

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