

SEXUAL VIOLENCE, THE *AD HOC* TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT: RECONCILING *AKAYESU* AND *KUNARAC*

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I. INTRODUCTION

The International Criminal Court (ICC) will soon be the dominant international forum adjudicating allegations of international crimes, as those currently in operation are projected to complete their mandates in the next few years. Because the Court is at an early stage of development, the substantial body of case law developed at the *ad hoc* tribunals will remain significant reference points; the International Criminal Tribunals for the former Yugoslavia (ICTY) and International Criminal Tribunals for Rwanda (ICTR) will be particularly important. Notably, the ICC has only begun to interpret their codes regarding sexual violence, and in doing so, the Court has already relied upon the findings of the *ad hoc* tribunals.¹ There will be many further opportunities to do so, with at least five of the twelve warrants of arrest issued since July 2010 including counts of rape.²

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1. See Situation in Darfur, the Sudan, Case No. ICC-02/05-56, Prosecutor's Application under Article 58(7), ¶¶ 23, 28, 119, 371, 385 & 393 (Feb. 27, 2007). For a discussion of the limited extent to which the ICC has actually begun to interpret their code as relates to sexual violence, see K. Alexa Koenig, et al., *The Jurisprudence of Sexual Violence* (Human Rights Ctr. of UC Berkeley, Sexual Violence & Accountability, Working Paper, May 2011).

2. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>; Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Warrant of Arrest (Mar. 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344965.pdf>; Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest (Feb. 12, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf> (last visited Feb. 23, 2013).

It is therefore important to take stock of the *ad hoc* tribunal's findings on sexual violence.

A voluminous and dynamic debate has developed in academia and the international judiciary around how the international criminal law regime ought to define rape. Conflicts over competing definitions have found clear expression in international scholarship and within the chambers of the *ad hoc* tribunals and, more lately, the Pre-Trial Chambers of the ICC. These decisions are all the more impactful because of the influence each judgment affects throughout the international criminal law regime. This paper will define in clear terms the two prevailing definitions of rape in the Tribunals, and will put forward an explanation, using a procedural illustration to bring the point home, as to why the courts have come to conclusions at variance with one another. Finally, I will address the implications of the previous argument upon the prospect of overlapping charges. In doing so, I will suggest what might occur should a defendant be accused of sexual violence as a crime of genocide and as a crime against humanity.

The debate has essentially centered on what I shall call consent-dominant and coercion-dominant definitions of rape. The former, which has arguably come to characterize the prevailing trend in the law, is most succinctly articulated in the famous case, *Kunarac*, handed down by the ICTY in 2001. I am excited that counsel for the prosecutor in that case, Peggy Kuo, is with us this afternoon. The coercion-dominant definition, touted by Catherine MacKinnon as "the first time rape was defined in law as what it is in life,"³ was first articulated in the equally famous but less influential case *Akayesu*, delivered by the ICTR in 1998.

II. PROSECUTOR V. AKAYESU

Jean-Paul Akayesu, an ethnic Hutu, was a municipal administrator in the Taba Commune in central Rwanda during the Rwandan Genocide. He was arrested in 1995 on charges, *inter alia*, of genocide and crimes against humanity. Akayesu was found to have instigated a number of incidents of rape as part of a larger effort to eradicate the Tutsi, with the Trial Chamber determining that the act fell within the ambit of the genocide provision in the Tribunal's statute.⁴ For the first time, rape was considered a weapon of genocide.

3. Catherine MacKinnon, *Defining Rape Internationally*, 44 COLUM. J. TRANSNAT'L L. 940, 944 (2006).

4. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 731 (Sept. 2, 1998):

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as

The *Akayesu* decision was considered revolutionary because it abandoned “mechanical” descriptions of rape, which generally required a certain degree of penetration and, most critically, a particular state of mind on the part of the victim (that is, of non-consent). Rather, the Trial Chamber held, rape is better determined as “physical invasion of a sexual nature, committed under circumstances that are coercive.”⁵ In putting the elemental emphasis on force, and, furthermore, the force of the circumstances, the Trial Chamber made a strong case for abandoning consent entirely: Any consent the defense could claim would be invalidated by the genocidal violence attending the act. Prior to *Akayesu*, charges of rape had not figured into the prosecution of charges of genocide,⁶ but after the judgment was handed down this changed considerably. These new charges were in turn often used as chips in plea bargaining agreements.⁷ While *Akayesu* remained influential at the ICTR, a case at the ICTY, *Kunarac*, would change the way both *ad hoc* tribunals approached the question.

III. PROSECUTOR V. KUNARAC

The three defendants in *Kunarac* were ethnic Serbs charged with rape, torture, enslavement, and outrages upon personal dignity, all related to their participation in a campaign to cleanse Muslims from a municipality then

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 . . . [s]exual 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.

5. *Id.* at ¶ 597, 687 (noting that consent is only mentioned when noting that a word the victims used to describe the rapes, “kunurgora,” is “used regardless of whether the woman is married or not, and regardless of whether she gives consent or not.”).

6. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 47 MCGILL L.J. 217, 236. Cf. Binaifer Nowrojee, *Your Justice is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?*, Occasional Paper No. 10, UNRISD, at 3:

The ICTR is feted by lawyers for its first landmark judgment in the case of *Akayesu* that expanded international law on rape—a point of pride that the ICTR officials always cite as a manifestation of their commitment of prosecute sexual violence. Yet as ground-breaking as the *Akayesu* judgment is, it increasingly stands as an exception, an anomaly (citations omitted).

This may well be true considering the influence of the *Kunarac* decision discussed below. But it remains true that *Akayesu* opened the door to the broader use of rape charges in indictments at the ICTR; it is questionable whether the judgments handed down thereafter followed in *Akayesu*’s spirit, however.).

7. See Doris E. Buss, *Rethinking “Rape as a Weapon of War,”* 17 FEM. LEG. STUD. 145, 151 (2009).

known as Foča. As Judge Florence Mumba noted in the sentencing hearing, “even the town’s name was cleansed,” referred to now as Srbinje. Serbs rounded up Muslims in Foča, killing most of the men on the spot and sending most of the women to collection points outside of the municipality. Kunarac, Kovač, and Vuković were found guilty of employing rape as an instrument of terror at these collection points, and that the instances of rape were systemically related to the overarching purpose of the Serbian presence in Foča, making them crimes against humanity.⁸

The judgment represents a milestone at the ICTY: Until that point no convictions of rape were ever rendered at the Tribunal. However, the definition of rape established at the court was controversial for manifestly ignoring the precedent offered by *Akayesu*. Rather than defining rape according to something akin to a strict liability standard (that is, with reference only to the circumstances of the crime rather than whether the defendant thought the alleged victim consented) the *Kunarac* court determined the definition of rape to turn on the question of consent abandoned at the ICTR three years before.

Claiming that no workable definition of rape in international law existed, the Trial Chamber sought a “lowest common denominator” element upon which to base their own definition by reviewing a diverse array of domestic criminal codes from around the world.⁹ While a fairly standard method of judicial interpretation, it carries an inherent danger in the context of defining sexual violence, particularly at a war crimes tribunal. Notwithstanding the meaningful differences in rape definitions across jurisdictions (civil law historically carrying a broader definition of what types of penetration may constitute rape than common law, for example),¹⁰ these domestic laws were formulated for adjudicating crimes in times of peace. It can, of course, be argued that the conditions established in the Serb detention camp have potential to be created in a jurisdiction not beset with conflict. A man might kidnap, unjustly detain, and rape several women in any jurisdiction. This was, perhaps, the logic the Trial Chamber followed in *Kunarac*. But as Judge Chile Eboe-Osuji, recently elected to a judgeship at the ICC, and Professor Anne-Marie de Brouwer have argued, the intended purpose of domestic rape law cannot be said to adequately match the intended purpose of international rape law, the latter of which

8. See, e.g., Prosecutor v. Kunarac, et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 759 (Feb. 22, 2001).

9. *Id.* at ¶ 439 *passim*.

10. MARIA ERIKSSON, DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW? 129 (2010).

generally deals with broad-conflict situations.¹¹ In these cases, rape would not have reasonably occurred but for the conflict, which adds, to my mind, sufficient justification to privilege “contexts of force” over “non-consent.”

The trial judgment was upheld on appeal, with the Appeals Chamber agreeing with my central proposition above. It noted that, while “inferring” non-consent from surrounding violent circumstances must be done with care, it is hardly unreasonable in light of rape during times of war.¹² The Appeals Chamber elaborated on the definition of rape as a war crime and emphasized that in order to be classified, it must be established that “but for” the armed conflict, the rape would not have been committed.¹³ This might be read as a criticism of the Trial Chamber’s use of domestic law as the source of their definition of rape, but it is important to remember that it is the Trial Chamber’s formula that has been subsequently discussed in the literature and utilized as precedent in the courts. Notwithstanding the criticism from above, the Trial Chamber’s formula has endured, perhaps as a consequence of a misreading of the Appeals Chamber’s binding judgment.

IV. RECONCILING *AKAYESU* AND *KUNARAC*

Over the years, scholars of international criminal law have used *Akayesu* and *Kunarac* to legitimize coercion-dominant and consent-dominant definitions of rape respectively. The two have been set up against each other in efforts to demonstrate one’s superiority.¹⁴ It is largely overlooked, however, that each adjudicated different overarching crimes: In *Kunarac*, rape fell under the rubric of crimes against humanity; in *Akayesu*, rape ultimately fell under the rubric of genocide.¹⁵ This distinction may elucidate how the respective Trial Chambers decided on definitions of rape at variance with one another. They essentially defined subtly different crimes. Because the evidentiary standards for crimes against humanity are less strict than those for genocide, insofar as a charge

11. ANNE-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR, 116 (2005); Chile Eboe-Osuji, *Rape as Genocide: Some Questions Arising*, 9 J. GENOCIDE RES. 251, 258 (2007).

12. Prosecutor v. Kunarac, et al., Case No. IT-96-23-T & IT-96-23/1-A, Appeal Judgment, ¶ 218 (June 12, 2002).

13. *Id.* at ¶ 58.

14. *E.g.*, Eboe-Osuji, *supra* note 11, at 251.

15. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-I, Amended Indictment, Counts 13, 15 (Jan. 1, 1996) (noting that because prosecutors could only charge the accused with rape via crimes against humanity, Akayesu’s indictment only named rape as a crime against humanity. The Trial Chamber nevertheless found rape to be a crime of genocide for the purposes of the case.).

of genocide can only succeed with proof of the requisite genocidal *mens rea*,¹⁶ perhaps the respective Chambers came to conclusions they thought best calibrated to the overarching crime at bar.

Akayesu himself conceded immediately that genocide occurred in Rwanda in 1994. While the debate over whether genocide occurred in the Balkan conflict of the 1990s continues to this day, the courts in The Hague (the ICTY, the International Court of Justice in *Bosnia v. Serbia*) have consistently found that genocide did not occur.¹⁷ It may be erroneous, therefore, to impose the evidentiary standard of *Akayesu* on *Kunarac* as Judge Eboe-Osuji and many others consistently do. Eboe-Osuji wrote in 1997:

[T]he very nature of the circumstances in which rape occurs in the context of genocide makes inquiry into consent almost wholly out of place. Rape as an act of genocide is predicated on the special intent to destroy a group in whole or in part, the victim of rape being part of the group targeted for such destruction In these circumstances, it is curious to import into the inquiry tenets of domestic law that were originally designed to ensure that a complainant had not merely changed her mind after the fact of a consensual “sexual activity” This is the major flaw in *Kunarac*, given its heavy reliance on domestic law.¹⁸

As this passage indicates, part of the impetus to emphasize coercion over consent relies on the context of the crime in genocide; yet nothing in the Trial Chamber’s deliberations over *Kunarac* indicated that genocide was a circumstance attending the crime, qualifying the crime, or motivating the defendants’ behavior. While this is not the time to elaborate on the difference between genocide and the crimes against humanity (for which *Kunarac* was in fact charged), the fact that the *Kunarac* trial chamber was dealing with a different over-arching crime should indicate that perhaps a different *mens rea*, one less inclined toward strict liability perhaps, would have been more appropriate. None of this amounts to anything if “genocide” and “crimes against humanity” are blended together; some

16. See Rome Statute of the International Criminal Court, July 17, 1998, arts. 6–7, U.N. Doc. A/CONF.183/9 (1998) (noting that the ICC Statute offers prevailing definitions of the two crimes) [hereinafter Rome Statute].

17. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, I.C.J. Reports 2007. Cf. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶¶ 1–38 (Feb. 22, 2001) (affirming Trial Chamber’s finding that genocide occurred in Srebrenica).

18. E.g., Eboe-Osuji, *supra* note 11, at 258.

scholars have been willing to take this step for purposes of defining rape.¹⁹ Perhaps they should not be, as the requirements of proof for the *mens rea* of genocide and crimes against humanity are substantially different.

Again, notwithstanding the Chamber's long proof of the fact in their opinion,²⁰ genocide was a foregone conclusion in *Akayesu*; the defendant never denied the existence of genocide. Once this threshold question was affirmatively answered, requiring the demanding proof of specific intent to destroy, in whole or in part, a protected group, it is my opinion that the Chamber then defined rape in a broad manner that lowered the evidentiary standards for the prosecution.²¹ *Kunarac*, on the other hand, never alleged genocidal intent and the standard of proof is much lower. Rather than specific intent, crimes against humanity requires proof of knowledge that a protected group will be compromised as a result of their acts.²² The *Kunarac* Chamber seems to respond to this lower threshold of proof by raising the evidentiary standard for rape by requiring "explicit and affirmative inquiry into the consent of the victim."²³ Under the *Akayesu* regime, it seems that because the demanding *mens rea* requirement of genocide has already been met, the definition of rape may tend more toward a strict liability standard, holding any genocidaire who has sexually engaged a protected group member under conditions of genocide criminally liable for rape due to the overarching presence of coercion. Sex with a genocidaire under conditions of genocide, *Akayesu* affirms, cannot be consented to, so non-consent is not an element of the crime. Under *Kunarac*, with crimes against humanity serving as the template upon which the judgment shall read its definition of rape, courts will tend to enforce the non-consent requirement, as the culpability of the accused has not already been determined to be the highest possible. Sex with someone accused of crimes against humanity, *Kunarac* seems to say, may not be unequivocally a weapon of the crime and the Court must look toward other standards of culpability, such as non-consent.

V. *IN CAMERA* HEARINGS

Discussing *in camera* hearings, a procedural device meant to assess the appropriateness of consent defenses in criminal trials involving rape at

19. Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Law*, 101 AMER. J. INT'L L. 121, 123–24 (2007).

20. *Akayesu*, Case No. ICTR 96-4-I, Amended Indictment, ¶¶ 112–29.

21. Rome Statute, *supra* note 16, art. 6.

22. *Id.* art 7(b).

23. Koenig, *supra* note 1, at 12.

the *ad hoc* tribunals and the ICC, may help to clarify the points I made so far. *In camera* hearings allow the defendant to provide private testimony to be held in the judges' chambers so as to alleviate pressure on alleged victims of sexual violence during litigation. While not a novel practice in American criminal law, *in camera* hearings were introduced to the ICTY's amended Rules of Procedure and Evidence in 1995. The rule sought to protect the rights of victims and witnesses by having the accused introduce any consent-related defenses in a private hearing before the judges in their chambers. If the judges determine the defense to be untenable, the defense cannot be admitted in trial. If it is deemed tenable, the defendant may bring it forward as an affirmative defense.²⁴ The ICC inherited this procedural safeguard in Rule 72 of its Rules of Procedure and Evidence. While it seems well intended on its face, a proponent of a coercion-dominant definition of rape might raise concerns that it reflects a potential lack of confidence in a strong, violence-based definition. For those who tend toward favoring a consent-dominant definition of rape, the procedure might appear as a premature determination on the merits, which may prejudice the defendant's case.²⁵

The debate I described a moment ago as to whether allegations of rape should be treated the same if there were no question of fact as to the overarching presence of genocide on the one hand, or crimes against humanity on the other may shed some light on this. Let us suppose that the fact of genocide is unquestioned before the court (as in *Akayesu*). Non-consent might be abandoned entirely as a possible defense. If the fact of genocide is in question, *in camera* hearings become more appropriate, with

24. R. P. EVID. for the former Yugoslavia, Rule 96(ii)(a-b) (amended May 3, 1995); R. P. EVID. for the former Yugoslavia, Rule 96(iii) (revised Jan. 3, 1995). They read as follows, and are repeated verbatim in the Rules of Procedure and Evidence for the ICTR:

- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim ['she' in previous versions] did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.

The language change in (ii)(b) may have been in anticipation of the *Tadic* indictment, which included charges of sexual assault against a male. Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defense Motion on Form of the Indictment (Nov. 14, 1995).

25. See, e.g., Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AMER. J. OF INT'L L. 97, 104 (1999); DE BROUWER, *supra* note 11, at 121 (seeming to suggest the *in camera* rule may rule out consent). For more background on the origins of the rule at the ICTY, see MacKinnon, *supra* note 3, at 945.

non-consent acting as an affirmative defense granted by the judge by shifting the burden of proof onto the defendant. And finally, if the fact of genocide is not even brought to bar, consent may become an element of the crime of rape (as in domestic jurisdictions) and the burden shifts back to the prosecution to prove non-consent beyond a reasonable doubt.

This does not answer the question as to what should constitute consent or non-consent in the context of ethnic cleansing, but it does go some way to explain the trend in the case law. The *Akayesu* and *Kunarac* courts seem to be pointing two different crimes: Rape as a weapon of genocide and rape as a crime against humanity. The debates over *Akayesu* and *Kunarac* and their progeny may not have taken sufficiently into consideration this factor. The courts seem to have caught hold of this and calibrated their judgments according to the situation in which the crime was committed. Professors MacKinnon and de Brouwer and Judge Eboe-Osuji demand from these opinions a settled, singular definition of rape, but the courts seem to want to define rape along a spectrum, with the type of over-arching crime as a reference point.²⁶

Looking at it this way also helps to explain the discomfort many of the commentators on the subject felt when the ICTR, a tribunal dealing almost exclusively with genocide claims, handed down several decisions that utilized *Kunarac*'s requirement of non-consent as an element of the crime of rape. For example, *Semanza* and *Kajelijeli*,²⁷ two cases heard at the ICTR, applied the *Kunarac* standard, though, in Professor MacKinnon's words, "there was no implication that the women who were sexually violated before they were murdered might have consented."²⁸ If the standards seem appropriate to their particular contexts, applying them elsewhere is not always sensible. In fact, it may indicate that the situations in which they are applied are elementally different, by virtue of the variable *mens rea* (though not necessarily variable results) and that the definitions themselves must accommodate to the situations accordingly.²⁹

26. See MacKinnon, *supra* note 3, at 940; DE BROUWER, *supra* note 11, at 116; Eboe-Osuji, *supra* note 11, at 251.

27. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 344 (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment ¶ 911 (Dec. 1, 2003).

28. MacKinnon, *supra* note 3, at 952.

29. The *mens rea*, again, being the chief distinguishing factor between genocide and the crime against humanity of ethnic cleansing. The result elements of the crimes—potentially the targeting and elimination of members of a protected group—may be the same.

VI. OVERLAPPING CHARGES

If it may be accepted that judges at the ICTR and the ICTY have sought to calibrate the definition of rape according to the predicate crime of which it is a part, it becomes unclear whether a judge would privilege one over the other if the defendant before her has been accused of both rape as a weapon of genocide and as a crime against humanity. At the ICTR this has actually been common practice. Rape has appeared on indictments as an act of genocide and as a crime against humanity repeatedly since *Akayesu* was handed down.³⁰ The problem this presents with regard to the thesis put forward here is why should the definition of rape be different according to whether it is alleged to have been part of a genocide or as a crime against humanity, since the *actus reus* remains the same regardless? That is, rape will consist of the same physical act whether it is a function of genocide, crimes against humanity, or war crimes. It may therefore be unclear why the variant *mens rea* would demand a different evidentiary standard for an identical act.

We have a glimpse how this may operate, however, in a case we have already discussed: *Akayesu* was indicted on charges of rape as a crime against humanity and on charges of genocide.³¹ The Trial Chamber found him guilty of both, but determined the acts of rape fell also under the charge of genocide, and in doing so applied the standard discussed above. The Trial Chamber discussed the problem that arose from concurrent charges, based on the same set of facts, as follows.

The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus, an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.³²

The Chamber went on to explain that it was permissible to find the accused guilty of overlapping charges over the same acts, provided each charge consisted of a crime possessing different elements. Concluding that

30. See Buss, *supra* note 7, at 151; see also Nowrojee, *supra* note 6, at 3.

31. *Akayesu*, Case No. ICTR 96-4-I, Amended Indictment, counts 1, 13.

32. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 462. The Trial Chamber relies on *Tadic*, Case No. IT-94-1-T, Decision on Defense Motion on Form of the Indictment.

the offences under its statute “have different elements and, moreover, are intended to protect different interests,” the Chamber found that “multiple convictions for these offences in relation to the same set of facts is permissible.”³³ The *Akayesu* Chamber indicates that irrespective of the underlying factual allegations, genocide and crimes against humanity are fundamentally different crimes, neither of which are subsumed into the other or considered, for purposes of the Statute, greater or lesser than the other.³⁴ Rape, it would follow, as an expression of these crimes, may carry with it differing elements according to the overarching crime.

The ICC’s Pre-Trial Chamber encountered a version of this problem in rendering its initial negative determination regarding the prosecutor’s application for a warrant of arrest for President al-Bashir of Sudan. The prosecutor sought charges of genocide, crimes against humanity, and war crimes, using the same underlying allegations of widespread rape to support all three. The Chamber rejected the prosecutor’s “reliance on the nature and extent of the war crimes and crimes against humanity allegedly committed by [the Government of Sudan] forces as evidence of [the Government’s] genocidal intent.”³⁵ The prosecutor was, however, using the same factual background to allege the commission of a separate crime unrelated, as an elemental matter, to the other crimes. Kelly Askin has suggested that widespread rape may in itself serve as evidence of genocidal intent,³⁶ and ultimately the Appeals Chamber agreed, remanding the prosecutor’s application.³⁷ From this it can be ascertained that, just as crimes against humanity and genocide are discretely different crimes, rape may carry different definitions calibrated to the greater crime of which it is a part. The facts regarding an incident of rape underlying a charge of genocide or crimes against humanity will be the same, of course. Rape is alleged either way. But the contextual elements and varying mental state requirements of the crimes of genocide or crimes against humanity may militate in favor of approaching the underlying facts with different *mens rea* requirements.

33. *Id.* at ¶¶ 469–70.

34. *Id.*; see also PAYAM AKHAVAN, REDUCING GENOCIDE TO LAW: DEFINITION, MEANING, AND THE ULTIMATE CRIME (2012).

35. Prosecutor v. Bashir, Case No. ICC 02/05-01/09, Decision on the Prosecution’s Application of Arrest, §§ 190–201 (Mar. 4, 2009); see also Situation in Darfur, The Sudan, Case No. ICC 02/05-157, Public Redacted Version of the Prosecutor’s Application under Article 58, §§ 76–209 (July 14, 2008).

36. Kelly Dawn Askin, *Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur*, 1 GENOCIDE STUD. & PREVENTION 13, 20 (2006).

37. See *Bashir*, Case No. ICC 02/05-01/09, Decision on the Prosecution’s Application of Arrest.

As the above suggests, concurrent charges of rape as an act of genocide and rape as a crime against humanity may pose procedural difficulties. What should be done if evidence of consent is considered unilaterally irrelevant for purposes of the genocide charge, but not for the crime against humanity charge, as *Akayesu* and *Kunarac* imply? The answer would seem to lie in *Akayesu* and *al-Bashir*: If the fact of genocide had been established *ex ante*, or if there is reason to believe there existed the requisite *mens rea* of genocide in early investigation, few procedural difficulties to this end will be encountered. With the Pre-Trial Chamber having finally permitted the prosecutor's application to go through with a genocide charge attached,³⁸ the prosecutor's office will have the opportunity to begin establishing through investigation whether genocide occurred in the Sudan or not, the result of which will affect the manner of the proceedings upon al-Bashir's arrest.

VII. CONCLUSION

The foregoing argument has sought to articulate a central tension in the precedent established at the *ad hoc* tribunals with regard to the crime of rape. The tension exists between coercion-dominant and consent-dominant definitions of rape as articulated in the leading cases *Akayesu* and *Kunarac* respectively. I have suggested that the definitions put forward in these cases must be read in relation to the predicate crime of which rape was a part: Genocide in the first and crimes against humanity in the second. I have also argued that much of the scholarly literature on the subject may have overlooked this distinction. I then explored two possible implications of this interpretation through the use of *in camera* hearings and overlapping charges. In spite of the voluminous commentary on the issue, it is clear that the definition of rape is far from settled. In the years ahead, the Court will have many opportunities to develop a more workable definition than the ones currently available. With the fate of international criminal justice essentially resting in their hands, it is their responsibility to do so.

38. Prosecutor v. Bashir, Case No. ICC 02/05-01/09, Second Warrant of Arrest (July 12, 2010) (noting that the Pre-Trial Chamber affirmed the charges of genocide, though they were founded upon the same factual background as the other charges).