Chapter 3
Defining Rape in International Criminal Law:
An Unsettled Tug of War?

Introduction
In the project of legal containment of the evil of sexual violence in armed conflicts, one angle in need of urgent attention is that of definition of rape. It is an area fraught not only with the substantive issues of the elements of the crime to be proved in specific litigation, but also issues of the procedural sequencing of acts in the play of litigation, with incidental consequences pertaining to questions of fairness of the treatment of the victims in the litigation process. The relevance of the issue to adequate legal responses to the evil of sexual violence is engaged when victims of sexual violence, motivated by reasonable apprehension of unfair treatment, refuse to participate in the litigation process. The result is that perpetrators may enjoy impunity.

There is no statutory definition of rape in international law. The result is that the rape jurisprudence of the ad hoc Tribunals, from Akayesu and Čelebići to Mubimana through Furundžija and Kunarac, reveals an apparent jostling of positions among the judges, on the definition of ‘rape’. What appears in the debate is a divergence of views on the objective of criminalising rape in international law—notably referred to in Akayesu as ‘the central elements of the crime of rape’. Yet, tarry a while and one realises that the debate might be ultimately academic, for it is possible to agree that within the omnibus of aims of international law (in criminalising rape) there is room for the various views. The strict packaging of the one view to the exclusion of all others is neither plausible nor, it is submitted, desirable.

Primary Focus on the Violence of the Occasion
Akayesu was the first case in which the judges of the ad hoc Tribunals had to grapple with both the issue of rape and the absence of its definition in international law. Having then to devise a definition, an ICTR Trial Chamber offered the following definition of rape: ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’ In arriving at this definition, the Trial Chamber took the view that proscription of aggression of a sexual nature was

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1 Akayesu, supra, para 687 [Trial Chamber].
2 Ibid, paras 598 and 688.

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the central objective of international law in criminalising rape. Hence, the judges declined to follow what they saw as 'a mechanical description of objects and body parts' which constituted the traditional view in many national jurisdictions. In the words of the Chamber:

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured.3

Throughout its discussion, the Chamber remained distinctly focused on the violence of the circumstances rather than the carnality of it, even insisting that 'sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'4

Next came Čelebići. In it, an ICTY Trial Chamber agreed with both the Akayesu definition as well as its expression of violence as the central reason of international law in proscribing rape.

Reversion to Focus on Body Parts and Consent

But Furundžija struck a departure. The facts in Furundžija involved not only the procurement of one male prisoner of war to vaginally rape the female victim, but also the subjection of the female victim to perform fellatio on the male prisoner of war. The ICTY Trial Chamber found both acts to qualify as rape. In their analysis, the Furundžija judges first noted the definition of rape stated in the Akayesu and the Čelebići cases, but with admirable show of judicial diplomacy, directly ignored it, formulating a different definition. They did this though the Chamber had appeared to have reached the same conclusion, as in Akayesu, that punishment of aggression was the objective of the law of rape.5

As with Akayesu, the Furundžija Chamber found that there was no definition of rape in international law. In those circumstances, the Chamber felt compelled to conduct a survey of how rape had been defined in domestic jurisdictions; a process evidently also undertaken in Akayesu but with the markedly different result that while the Akayesu judges chose not to follow what they saw, the Furundžija judges did precisely the opposite. Having done so, the Furundžija Chamber offered a definition of rape that depends on coitus. As they put it:

3 Ibid, para 687.
4 Ibid, para 688.
5 Furundžija, supra, paras 175, 180 [Trial Chamber]. It is to be noted, however, that as regards their eventual extension of the description of rape to forcible oral sex, the Chamber appeared to have based their analysis on the motivation of international law in preventing ‘outrages upon personal dignity’: see para 183.
The Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:
   (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   (b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.  

For their part, the judges in the subsequent case of Kunarac largely followed the Furundžija approach, but expanded it only as regards the ‘other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim,’ besides the factors of ‘coercion or force or threat of force against the victim or a third person’ indicated in Furundžija.

In explaining their line of reasoning, the judges in Kunarac made it clear that they understood the ‘sexual autonomy’ of the victim as the ‘true’ objective of the law against rape. In this analysis, they focused primarily on the criminal situation as one of ‘sexual act’, involving ‘sexual penetration’ to which the victim did not give consent or was put in a position of ‘inability to resist’.

One notable curiosity of the suggested reason for the Furundžija-Kunarac departure from Akayesu was the principle of specificity in criminal law. The muted suggestion is that Akayesu had taken the rape definition beyond what is specifically settled by a review of the domestic laws of nations, as general principles of law recognised by modern nations, given that there was no definition of rape in international law. But the irony of this suggestion is that the Furundžija-Kunarac judges themselves also proceeded to extend the definition of rape to include forced ‘oral penetration’, when their own survey shows domestic laws to be united, in their definition of ‘rape’, only as far as forcible penetration of the vagina or anus.

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6 Furundžija, supra, para 185 [Trial Chamber].
7 So did the ICTR judges who decided the Semanza and Kajelijeli cases.
8 Kunarac, supra, para 438 [Trial Chamber], emphasis in original.
9 Ibid, paras 440 and 441.
10 See paras 438 to 460.
11 See Furundžija, supra, paras 182 and 184. Although the Chamber’s analysis in this respect started in paragraph 183 with a reference to ‘forced penetration of the mouth by the male sexual organ’, there is no doubt that the analysis would also contemplate coerced cunnilingus.
12 Ibid, para 181. As noted by the Chamber in paragraph 182: ‘A major discrepancy may, however, be discerned in the criminalisation of forced oral penetration: some States treat it as sexual assault, while it is categorised as rape in other States.’
Caught between Violence and Body Parts

The ICTR Trial judges who decided the Musema and the Niyitegeka cases followed the Akayesu definition,\(^{13}\) while their colleagues who decided the Semanza, the Kajelijeli and the Kamuhanda cases preferred the Furundžija–Kunarac definition.\(^ {14}\) For their part, the Gacumbitsi Chamber made the first attempt to reconcile the two schools of thought, while obviously limiting itself to the facts of the case before it, the Chamber stated as follows:

The Chamber is of the opinion that any penetration of the victim’s vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute \[fn\] is not limited to such acts alone. In the case at bench, the Chamber has already found that Witness TAQ was raped at the same time as seven other Tutsi women and girls; that the rapists either penetrated each victim’s vagina with their genitals or inserted sticks into them; that Witness TAO’s wife was raped, with the rapist penetrating the victim’s vagina with his genitals; that Witness TAS was raped in a similar manner, as well as Witness TAP and her mother. The Chamber finds that all these acts fall within the definition of rape.\(^ {15}\)

The Gacumbitsi Trial Chamber had referred to Kunarac in a footnote. This provokes the temptation to think that by saying that the definition of rape is not limited to ‘penetration of the victim’s vagina by the rapist with his genitals or with any object’, the Chamber might have had in mind only anal and oral penetration, which are also recognised as rape in Kunarac as the only other acts of rape other than vaginal penetration. Given, however, that the Chamber had also referred to Akayesu, it suggests that the Chamber meant to recognise the larger scope of rape as comprised in the Akayesu definition.

In the Muhimana case, another attempt was made to marry the two schools of thought, although the Chamber ended up on the side of the Akayesu definition.\(^ {16}\) The Chamber began the effort by suggesting that the Furundžija and Kunarac definitions...

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\(^{13}\) Musema, supra, paras 229, 907, 933 and 936; Prosecutor v Niyitegeka (Judgment and Sentence) 16 May 2003 [ICTR Trial Chamber], para 456. It is noteworthy, perhaps, that although the Niyitegeka Bench was composed of Judge Navanethem Pillay (presiding) and two other judges, Musema was decided by the same three judges (Laïty Kama, Lennart Aspegren, and Navanethem Pillay) who had decided Akayesu. In Musema, the Chamber reiterated the definition they offered in Akayesu, having considered the departure from that definition as was made in Furundžija: see Musema, supra, paras 220–229.

\(^{14}\) See Semanza, supra, paras 344–346; Kajelijeli, supra, paras 910–915; and, Prosecutor v Kamuhanda (Judgment and Sentence) 22 January 2003, paras 705–710 [ICTR Trial Chamber].

\(^{15}\) Gacumbitsi, supra, para 321.

\(^{16}\) Muhimana, supra, paras 551.
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Jurisprudence did not necessarily set out to depart from the Akayesu definition, but had ‘tacitly accepted’ it.\(^\text{17}\) This proposition is highly debatable, in my view. For one thing, the Furundžija-Kunarac jurisprudence was quite clear in saying that the definition of rape must be governed by what was viewed as the rule of ‘specificity’\(^\text{18}\): an obvious suggestion that the Akayesu definition was overly broad. Nevertheless, the conclusion in Muhimana that the Furundžija-Kunarac fits within the Akayesu definition\(^\text{19}\) is entirely accurate; for while the Furundžija-Kunarac school focused on the proscription of sex without consent, with coercive circumstances being recognised as vitiating consent, Akayesu had focused just on the concept of aggression or violence. Of course, the reverse is not necessarily true: the Akayesu definition does not necessarily fit within the Furundžija-Kunarac construct of rape. In other words, while every scenario envisaged as rape in the Furundžija-Kunarac definition would also qualify as rape in the Akayesu definition, not every scenario envisaged as rape in Akayesu would qualify as such in the Furundžija-Kunarac construct. The significance of this difference will be discussed below.\(^\text{20}\)

Rape Law Reform in Domestic Jurisdictions

It is opportune, perhaps, to review at this point a certain related development seen in some domestic jurisdictions in the last few decades, in the legal and philosophical discourse on the subject of rape. This development has as a central element the debate on whether to view rape primarily as an act of sex or an act of violence.\(^\text{21}\) This debate is captured in the following quote:

> Among the conceptual questions to be asked about rape … is whether it is an instance of sex, violence, or both. Assuming that rape is some kind of sexual intercourse (an assumption that may well deserve to be questioned), should it be conceived as forced sex, violent sex, coerced sex, compelled sex, nonconsensual

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17 Ibid, paras 541 and 549.
18 In this connection, one must note the following remark in Furundžija following the Chamber’s note of how rape had been defined in Akayesu and Ćelebići:

This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim “nullum crimen sine lege stricta”), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

19 Muhimana, supra, paras 550 and 551.
20 See discussion under the subtitle ‘The Problems with Kunarac’.
21 See Chinkin, supra, at note 13.
sex, pressured sex, exploited sex, involuntary sex, expropriated sex, objectified sex, unwanted sex, nonmutual sex, or bad sex?22

It is not my aim here to weigh in on either side of this debate, for the issue might well be close to moot in international criminal law, given, as will be demonstrated later, that violence is the dominant context of rapes in armed conflicts—armed conflicts being typically the raison d’être of international criminal law.23 It might do, nevertheless, to point out that the modern view, increasingly gaining ground in some domestic jurisdictions, is that rape is centrally a crime of violence and domination and not just a crime of sex without consent. ‘On this account, the failure to distinguish rape from sex derives from a sexist point of view that fails to encompass the perspective of the victim for whom rape is a violent—rather than a sexual—act.’24 This represents an important shift, even if ever subtle to some, from the traditional view of rape as a crime of sex without consent. To those who hold the modern view, it is improper for the traditional view to focus the inquiry in rape trials on the conduct of the victim, which is necessarily the case where the inquiry is to find out whether or not sex was had with her without her consent. According to Burgess-Jackson:

> Whether the language in question is “by force,” “against her will,” “without her consent,” or some combination of the three, the focus of rape law and practice has been on the victim’s mental state and behavior. [fn] This fact about the law of rape has struck many reformers, liberal and radical alike, as misplaced, unjust, and intolerable, and has led to the enactment of statutes that eliminate nonconsent as an element of the offense.25

Since the traditional inquiry has focused on the conduct of the victim—to see whether or not she gave consent to the sexual activity—victims have often found it difficult to submit themselves to such inquiries by reporting the rapes: as a result, many a rape has gone unpunished.26

Many domestic jurisdictions have now reformed their rape law in line with this modern view. Canada is one notable national jurisdiction which has done so. As Brenda Baker observed:

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22 Keith Burgess-Jackson, ‘Introduction’ in K Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* [New York: Oxford University Press, 1999] p 4. Emphasis received.

23 See discussion of the ‘Sex→Consent→Force Inquiry’ below.

24 Jeffery Gauthier, ‘Consent, Coercion and Sexual Autonomy’ in Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape*, supra, p 71.

25 Burgess-Jackson, ‘A History of Rape Law’ in Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape*, supra, p 21.

26 David P Bryden and Sonja Lengnick, ‘Rape in the Criminal Justice System’ (1997) 87 *Journal of Criminal Law and Criminology* 1194 et seq.
In 1983, Canada replaced its rape law with the offense of sexual assault. The sexual assault law took the form of a multitiered offense recognizing different severities of sexual violation, incorporating sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, and aggravated sexual assault. The new classification was designed both to respect gender neutrality as required by the *Canadian Charter of Rights and Freedoms* [fn] and to emphasize that sexual aggression against women and other persons should be viewed as a crime of violence and domination rather than one of sexual passion. It acknowledged feminist arguments that rape is not about sex but about power.27

This Canadian law reform effort followed a similar effort in the American state of Michigan. According to one commentator:

Michigan's reform statute, for example, which became effective in April 1975,[fn] emphasizes the force or coercion used by the rapist, not the resistance (or lack thereof) of the victim.[fn] This, it is claimed, brings rape in line with other violent felonies. No prosecutor has to prove beyond a reasonable doubt that a robbery victim did not consent to the taking of his or her money or that a murder victim did not consent to being killed; so why should a prosecutor in a rape case have to prove that the rape victim did not consent? So goes the argument. This development goes to the core of the legal understanding of rape and has therefore generated heated controversy. Much has been written about the Michigan experiment in particular.28

There is still much debate as to whether the reform efforts in national jurisdictions have produced the intended results.29

**The Problems with Kunarac**

Returning now to the judicial debate at the *ad hoc* Tribunals, a few comparative remarks are here warranted. First, the allusion to Canadian rape law in the

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27 Brenda M. Baker, ‘Understanding Consent in Sexual Assault’ in Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape*, supra, p. 49. See also Sheila McIntyre et al., ‘Tracking and Resisting Backlash against Equality Gains in Sexual Offence Law’ (2000) 20 *Canadian Woman Studies* 72.

28 Burgess-Jackson, ‘A History of Rape Law’ in Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape*, supra, p. 21. Emphasis in original.

29 See generally Elizabeth Sheehy, ‘Legal Responses to Violence against Women in Canada’ (1999) 19 *Canadian Woman Studies* 62; Bryden and Lengnick, supra; Margaret Denike, ‘Sexual Violence and “Fundamental Justice”: On the Failure of Equality Reforms to Criminal Proceedings’ (2000) 20 *Canadian Woman Studies* 151 et seq.; Vivian Berger, ‘Rape Law Reform at the Millennium: Remarks on Professor Bryden’s Non-Millennial Approach’ (2000) *Buffalo Criminal Law Review* 513.
The Kunarac judgment appears misleading as to the true state of the law in Canada. The allusion suggests that Canadian law is still operating under the traditional view, being the view favoured by the judges in the Kunarac case. Second, there are other national jurisdictions apart from Canada that now adhere to the modern view. They include Italy, apart from many states within the USA, besides Michigan. The discussion in Kunarac did not indicate that. Third, it is evident that the Akayesu analysis leans towards the modern view.

Regarding the objective of the law, however, there is no reason to suppose that the different views cannot be accommodated within the compass of international law. What is more important is the need to develop international criminal law in a manner that produces deterrence from international crimes and to do justice to victims. To achieve this aim, it must be acknowledged that there is no one ‘true’ answer to the problem, as was suggested in the Kunarac case. Surely, to subject someone to an unwanted contact of a sexual nature in an aggressive manner (the point of Akayesu) is to violate the person’s sexual autonomy (the point of Kunarac).

The Akayesu judges had done as much service to the advancement of international law in the way they defined rape, as did the Furundžija judges in extending to forcible oral sex the tag of rape. To develop international law in this way is precisely what is implied in article 38(1)(d) of the Statute of the International Court of Justice when it indicates judicial decisions as a subsidiary means for the determination of rules of law. In my opinion, the value of article 38(1)(d) is that where all of the primary sources of law (treaties, customary international law and general principles of law) do not lend suitable assistance to the legal question at hand, the judges must then decide the case as best they can bearing in mind what

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The troubling part of the Kunarac judgment includes mentioning Canada in the context of a dense review of national jurisdictions that have retained the element of ‘sexual penetration’ in their rape laws (which is no longer an element of Canadian law of sexual assault), and then saying as follow:

453. In most common law systems, it is the absence of the victim’s free and genuine consent to sexual penetration which is the defining characteristic of rape. The English common law defined rape as sexual intercourse with a woman without her consent. In 1976 rape was also defined by statute. Under the provision in force at the time relevant to these proceedings, a man committed rape where “(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it …” Force or threat or fear of force need not be proven; however where apparent consent is induced by such factors it is not real consent. Similar definitions apply in other Commonwealth countries including Canada, New Zealand and Australia.

See generally Amy Jo Everhart, ‘Predicting the Effect of Italy’s Long-Awaited Rape Law Reform in “The Land of Machismo”’ (1998) 31 Vanderbilt Journal of Transnational Law 671.

See generally Ronet Bachman and Raymond Paternoster, ‘A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come’ (1993) 84 Journal of Criminal Law and Criminology 554.
they understand to be the mischief which international law had set out to address in particular circumstances. That is precisely what the Akayesu judges were doing, and properly so as will become presently apparent, when they were defining rape in international criminal law.

Finally, as regards practical consequences of the different approaches, as opposed to the objectives of international criminal law of rape, it is easy to see much that is weak in the heavy reliance in Kunarac on what was identified there as the preponderant theme in domestic jurisdictions. The theme in question is the sex → consent → force inquiry.33

To appreciate the difficulties with the sex → consent → force inquiry in international criminal law, one must recall the famous counsel of Judge McNair (as he then was) in the International Status of South West Africa Case34 advising against the wholesale uploading of the principles of domestic law. According to McNair:

What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to ‘apply .... (c) the general principles of law recognized by civilized nations.’ The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of ‘the general principles of law’. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.35

In no area of international law is this caution more fitting than in the area of rape as an international crime. While the circumstances of the inquiries in domestic law situations might make the inquiry into consent more appropriate (such as date rape and acquaintance rape, for instance), the very nature of the circumstances in which rape occurs in the context of international law makes inquiry into consent almost wholly out of place.36 In international criminal law, judges will typically, if not exclusively, deal with rape in any of the following circumstances:

33 Prosecutor v Kunarac (Judgment) of 12 June 2002 [ICTY Appeals Chamber] para 129.
34 Case concerning International Status of South West Africa (1950) ICJ 128.
35 Ibid, at p 148.
36 See Kunarac, supra, para 130 [ICTY Appeals Chamber].
• rape as genocide
• rape as a crime against humanity, or
• rape as a war crime.

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. Rape as a crime against humanity is predicated on the rape being part of a widespread or systematic attack against a civilian population, with the victim being raped as part of that attack. And rape as a war crime is predicated on the existence of an armed conflict (internal or international), during which the victim was raped. As reiterated in Mubimana, this makes general violence, force or coercive circumstance a constant feature of the rape narrative in international criminal trials. In these circumstances, it becomes almost hapless to import into the inquiry tenets of domestic law that were designed to try to ensure that a complainant had not merely changed her mind after the fact of a consensual ‘sexual activity’, often involving a lecherous employer, colleague, suitor, or other acquaintance. This is the major flaw in Kunarac, given its heavy reliance on domestic law.

In defence of Kunarac, however, it must be acknowledged that the Chamber did recognise that force and coercion do negate consent. But this does not make things right in the Kunarac analysis. It is rather, in a way, the nub of the matter. It will reduce the administration of justice into a mere academic or mechanical exercise where in every case the judges insist that the prosecutor must go through a checklist of proof in the following order:

Step 1: Sex
+ Step 2: Absence of Consent
+ [Step 3: Presence of Force*]

= Rape

First Scenario

* Reference to ‘force’ here includes real force, threat of use of force or other coercive circumstance.

In international criminal law, the requirement of Step 2 above is entirely academic. The only value it may serve, when made routine as Kunarac would have it, is routinely to hold out the prospect of forensic embarrassment to every victim who is a witness in a rape trial, even though there may not be any question that she might have been raped as part of a plot to destroy her in a genocide, as was the case in Rwanda.

37 Mubimana, supra, para 546. See also Chinkin, supra, at note 13.
In my view, it is amply sufficient, in a rape trial before an international criminal court, to require the case for the prosecution to comprise no more than:

Step 1: Sex

Step 2: Presence of Force

= Rape

Second Scenario

Furthermore, the proof of force should be deemed as discharged if established at the overarching level of, say, a war in progress. More precisely, ‘force’ in this equation is synonymous with ‘coercive circumstances’, if you will.38

At this stage, it must be made clear that what I am advancing here is not a theory of complete abolition of the consent inquiry from rape trials in international criminal law, as might have been advocated in some quarters in North America in the context of rape trials under domestic law. As will be seen presently, there may yet be a place for that inquiry in the interest of justice, however improbable that might be.

As noted earlier, the first scenario does focus attention on the victim, at times unduly so, while the second does not. On the face of it, the ends of justice may be served in both scenarios. In real terms, however, to the extent that the victim’s conduct is also the subject of the inquiry, justice may not be done if the victim elects not to submit herself to that inquiry, which results in the abortion of the trial. In this connection, it needs to be said with maximum emphasis that justice is not well served in a system of rape inquiry that needlessly turns attention to the conduct of the victim in such a central way.39 She is not on trial. Conversely, there is

38 In this connection, one must note the concern of the Appeals Chamber saying as follows: ‘A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.’ [Kunarac, supra, para 129 [ICTY Appeals Chamber]]. With respect, this concern might not have arisen if the notion of ‘force’ is taken, as it should, to include the presence of coercive circumstances, such as that which exists in the typical context of the events that give rise to the rape cases tried before international criminal courts. It is submitted that this is what the Akayesu Trial Chamber was driving at; and that is where the Akayesu Trial Chamber’s aim meets the analysis and analogy made by the Kunarac Appeals Chamber in paragraphs 131 to 132 of their judgment.

39 Much of what makes the consent inquiry, nay the traditional view, particularly suspect is its ancient link to Sir Matthew Hale’s now much criticised jury caution that ‘it must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.’ Matthew Hale, Pleas of the Crown, or, a methodical summary of the principal matters relating to that subject, vol 1, [London: W. Shrewsbury, 1694] p 635. See also William Blackstone, Commentaries on the Laws of England, vol 4 [Oxford: Clarendon Press, 1765-69] pp 214–15; Burgess-Jackson, supra, p 18. While reasonable people may disa-
no injustice in a system of rape inquiry that requires the prosecutor to prove only the presence of force on the part of the perpetrator. This does not negate the right of the accused to full answer and defence, which might include rebuttal as to the presence of force in the particular sexual relation. And such a rebuttal of force may entail the proof of consent.

This nuance is important in international criminal law in the following practical way. Removing the requirement (on the prosecutor) to prove non-consent will meet the practical needs of international criminal justice as indicated above and, by the way, has a potential to shorten the trials. On the other hand, the very benefit of eliminating this a priori inquiry into the conduct of the victim also portends the side-effect that a prosecutor may improperly prosecute an innocent man with whom the ‘victim’ had consensual sex. If the prosecutor is not required to call the ‘victim’ or ask her about consent, then that story of consent may entirely escape the inquiry, certainly so during the case for the prosecution. But this is not an argument to require the prosecutor routinely to call the ‘victim’ as part of the case for the prosecution in every case, notwithstanding that consent might not be a real issue. It is, rather, an argument to leave the defendant to raise consent as part of his case.⁴⁰ Where such consent is raised, then it falls on the Prosecution to disprove it as part of the case for the Prosecution, as with other cases of affirmative defences such as alibi and diminished mental capacity. Noting that article 67(1)(i) of the ICC Statute forbids imposing on the Defendant ‘any reversal of the burden of proof or any onus of rebuttal’, it bears stressing that there is an appreciable difference between establishing a proposition as a question of burden and raising it. Although, as the law of alibi tells us,⁴¹ there needs to be evidence of the proposition raised, before it can pass the required juristic muster, it is still possible that all that the evidence does is raise—rather than establish—the proposition in question beyond a mere assertion.

The value of this manner of proceeding before international criminal courts is that as it eliminates the routine of proof of non-consent as part of the case for the...
prosecution, it also ensures that the soldier who genuinely had a love affair with an enemy in an occupied village is not punished for that love affair.

Happily, however, the Appeals Chamber of the ICTR has now recognised the foregoing dilemma in its judgment in the _Gacumbitsi_ Case. In that judgment, the ICTY Appeals Chamber refused to depart from the view expressed in _Kunarac_ that proof of lack of consent of the victim will remain an element of rape to be proved by the prosecution beyond a reasonable doubt.\[^42\] Nevertheless, the ICTR Appeals Chamber has clarified that the prosecution will be able to prove absence of consent by establishing the presence of coercive circumstances. As the Appeals Chamber put it:

The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. [fn] Indeed, the Trial Chamber did so in this case.\[^43\]

Although the foregoing decision is to be applauded, it might have been better for the Appeals Chamber to override the flawed jurisprudential analysis in _Kunarac_ which failed to recognise organically that there is no place for the consent inquiry as a necessary consideration in the case for the prosecution in a case involving rape as an act of genocide.

**Conclusion**

In the effort to achieve a holistic legal framework aimed at containing the evil of sexual violence during armed conflicts, a proper definition of rape in international criminal law must play a part. The part envisaged here will include procedural legal developments which will not permit perpetrators of sexual violence during armed conflicts to enjoy impunity. Such impunity may occur if victims of sexual violence during armed conflicts are induced to refrain from participating in rape trials due to an unhealthy focus on their conducts. This may result from a definition of rape that unwittingly puts the victims on trial, by routinely focusing on whether or not they gave consent to the sexual acts. A definition of rape which concentrates on the coercive circumstances of the occasion is more likely to achieve the

\[^42\] _Prosecutor v Gacumbitsi ( Judgment)_ dated 7 July 2006, Case No ICTR-2001-64-A [ICTR Appeals Chamber] para 154.

\[^43\] _Ibid_, para 155.
ends of containment of sexual violence than is one which routinely requires the
Prosecution to prove that the victim did not give consent to the sexual act.
In the next chapter, we will examine the question of rape as an act of geno-
cide, and whether there are some resulting questions that will have a bearing on
the need to contain the evil of sexual violence during armed conflicts.