Defining Rape: The Problem with Consent

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Abstract: *Rape is one of the most commonly reported crimes all over the world. It is a crime under both international and national law although it is still primarily prosecuted before domestic courts. The traditional common law definition of rape articulates three elements of the crime of rape; vaginal penetration, lack of consent and direct participation of the accused person. However, many jurisdictions are moving away from consent-based definitions of rape. Through a feminist lens, this paper explores the place of consent as an element of the crime of rape. It undertakes a comprehensive review of literature and case law and makes an analysis of the articulation of consent as an element of the crime of rape at both national and international levels. It establishes that the legal definition of rape has a significant impact on the prosecution of rape cases and on the victim of rape. If the definition is based on the need for the prosecution to prove the lack of consent, then the legal process is focused on her behaviour and reaction to the sexual assault. It concludes that a definition of rape based on lack of consent is problematic and hinders access to justice for rape victims and it is inconsistent with the contemporary understanding of rape as a crime of sexual violence.*

Keywords*: Consent, Definition, Jurisprudence, Rape, Victims*

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I. Introduction

Rape as a crime affects all categories of people. Traditionally rape was defined as an act of sexual intercourse by a man with a woman against her will. There have been shifts in definition and scope of what constitutes rape. However, these developments have not been uniform. While in most jurisdictions, rape is currently regarded as a gender-neutral crime, other jurisdictions maintain the traditional and narrow gendered definition of what constitutes rape.

Rape jurisprudence in most common law jurisdictions has established that for a successful prosecution of the offence of rape, the following have to be proved beyond reasonable doubt; the victim experienced penetrative sex in her vagina; the penetrative sex was experienced without her consent; and that the accused is the one who participated in it.[1]

The successful prosecution of a rape trial depends significantly on the victim of rape; her interpretation of the events and her willingness to pursue the criminal justice processes. This is because there are rarely any witnesses to the commission of rape. The definition and articulated elements of rape in any context is important because in practical terms, the legal definition of rape has a significant impact on the prosecution process and on the quest for justice by women who are the usual victims of rape. If the definition is based on the need

[1] *Uganda v Peter Ikomu* (alias Ofwono) (2010), The High Court of Uganda.

for the prosecution to prove lack of consent, then the criminal justice process is focused on the victim, her behaviour and reaction to the sexual assault. And if the definition is narrow, then her experience may not be regarded as constituting rape under the law regardless of how she defines This article provides an overview of the articulation of consent by courts, its implication for the prosecution of rape cases and argues that a definition of rape based on lack of consent is problematic and hinders access to justice for victims of rape. It focuses on and reviews cases from various international criminal tribunals as well as domestic decisions from East Africa primarily from Uganda.[2]

II. The problem with consent

According to the Webster Dictionary, to consent is to give assent or approval; to agree. *The social act of consent consists of communication with another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform.* To consent is to waive a right and relieve another person of a correlative duty.[3] Once it is established that sexual intercourse took place, consent is the transformative element between legitimate and criminal sexual intercourse between adult males and females. It marks a distinction between sexual intercourse which is of no consequence to the law and that which the law regards as a grave violation of individual autonomy.

Consent is not a self-defining concept, courts continue to struggle to articulate its meaning and parameters. In an exhaustive judgment, the Court of Appeal of Kenya grappled to define and explain the relevance of consent in cases of rape. It stated as follows:

> Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware… Consent to sex matters because it can transform coitus from being among the most

[2] Bacik I, Maunsell C, and Gogan S, 'The legal process and victims of rape: A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape' The Dublin Rape Crisis Centre, September 1998 https://www.drcc.ie/assets/files/pdf/drcc_1998_analysis_legal_.
process_for_rape_vicims_1998.pdf.

[3] *R v Park* (1995), The Supreme Court of Canada.

> heinous of criminal offenses into sex that is of no concern at all to the criminal law… Consent possesses the normative 'magic' to transform sexual intercourse from being conduct that is heinousness into being conduct that is criminally innocuous. It matters because to locate consent with respect to sexual intercourse is to locate the normative boundary between criminal rape and non-criminal sex.[4]

To speak of consent presupposes a measure of individual autonomy. Every individual has a right to bodily autonomy. Any physical interference with this autonomy is *prima facie* an assault. Autonomy being defined by some theorists as self-government or self-direction; it is predicated on the basis that an individual acts on motives, reason or values that are one's own. Bodily autonomy is understood to refer to '… the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own, and not the product of manipulative or distorting external forces'.[5] To speak of bodily autonomy assumes, rather fallaciously, that not only do women have control over their bodies, but also that they have agency, an awareness of it and the ability to exercise it. However, the capacity to exercise individual autonomy cannot be divorced from the social conditions within which one lives. Culture, religion and poverty can be determinants to the definition of the self and the parameters for the exercise of individual autonomy. Severely constraining external factors like oppressive gender socializations may impede the capacity for autonomy.[6]

Feminist thought is critical of the nature of the *self* and of the *value of autonomy* which is abstracted from social relations as being inimical to being a woman. It is argued that being a woman involves valuing social relationships of care whereas being autonomous devalues such relationships.[7] In that regard, it may be more pertinent to speak of relational autonomy which explains how internalized oppression and oppressive social conditions can undermine or erode an individual's autonomy. For instance, where a woman, through a process of weighing the perceived value of keeping her children in a two-parent household chooses to remain in an abusive relationship, or one who for financial reasons

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[4] *Charles Ndirangu Kibue v Republic* (2016) eKLR.

[5] Christman J, 'Autonomy in moral and political philosophy' The Stanford Encyclopedia of Philosophy, 2018 https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral/.

[6] Christman J, 'Autonomy in moral and political philosophy'.

[7] Stoljar N, 'Feminist perspectives on autonomy'. The Stanford Encyclopedia of Philosophy, 2018 https://plato.stanford.edu/archives/fall2015/entries/feminism-autonomy/.

decides to continue in a relationship with a partner who has subjected her to rape. The values and choices are hers and hence autonomous. However, the circumstances in which she lives are such that her sense of self is strongly constituted by social relations and is not autonomy supporting. In *Uganda v Chekuta William*,[8] the accused was found guilty of rape. In his mitigation statement, he informed court that after the rape, he had agreed with the victim that he would take her on as his third wife. It would not be farfetched to assert that in this case the victim's conditions of internal social oppression, coupled with oppressive gender socialization, impeded the capacity for and removed the *de facto* power required to exercise individual autonomy but also led to the adoption of values that are oppressive to them.[9]

In most parts of East Africa, women as a social group are marginalized and disempowered. While there are varying degrees and intersections of marginalization and oppressions, overall, traditional attitudes on gender are deeply ingrained and limit women's access to education, participation in politics, access to health, decision-making platforms, and control over resources.[10] Consent is therefore not clear cut and definitive.

Adjudicating consent: The jurisprudence of Ugandan courts

In Uganda, the crime of rape is provided for under Section 125 of the Penal Code Act, Cap 120 which states that:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.[11]

The Ugandan Penal Code does not attempt to define what amounts to consent. It has therefore been left to the courts to determine what amounts to

[8] (2015), The High Court of Uganda.

[9] Stoljar N, 'Feminist perspectives on autonomy'.

[10] See Minister of Gender, Labour and Social Development, *Uganda Gender Policy*, 2007; International Federation of Human Rights (IFDH), *Women's rights in Uganda: Gaps between policy and practice,* 2012; Boyd R, 'Empowerment of women in Uganda: Real or symbolic' 16(45) *Review of African Political Economy, 1989* and United Nations Population Fund Country Programme (UNPFC), *Worlds apart in Uganda: Inequalities in women's health, education and economic empowerment*, 2017.

[11] Section 125, Penal Code (Uganda).

consent. In the prosecution of rape cases, the High Court of Uganda often relies on the case of *DPP v Morgan and 3 Others,* where Lord Hailsham (as he then was) defined rape as, '*having unlawful sexual intercourse with a woman without her consent and by force... It does not mean there has to be a fight or blows have to be inflicted. It means there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is over borne* [Emphasis added] '.[12] In applying this decision, when articulating the elements of the crime of rape, Ugandan courts have routinely required the prosecution to show that the defendant had exerted actual force, and that the victim had offered physical resistance.[13] The two elements—that is, of lack of consent and force—are therefore seen as cumulative. A cursory and random review of Ugandan decisions shows that this principle is applied almost uniformly as illustrated in the following cases.

1. *Uganda v Mewuva Alex and Another:* Dr. Senyonyi carried out a medical examination of the victim Faridah Moreen. He found that she was 20 years of age. Additionally, he also found an old rapture of the hymen and that there were *no injuries to her private parts, thighs, and legs*. He also found no evidence of force being used in the sexual act. Briefly, Dr. Senyonyi found no evidence that the victim was involved in sexual intercourse let alone forceful sexual intercourse'.[14]

2. *Uganda v Muhwezi Lamuel*: The issue before the court was whether the victim consented to sexual intercourse. Her evidence of non-consent was adequately corroborated by her injuries on the neck and her alarm.[15]

3. *Uganda v Kiberu & 3 Others:* The victim did not make any physical resistance because she feared for her life. However, she was able to scream and this was corroborated by Godfrey Katosi who responded to her scream for help. He testified that he saw the victim the following day with a swollen neck and bruises around it. Dr. Sarah also certified that the victim had scratch marks on the left breast superior aspect and bruises on the posterior aspect of the left elbow joint.[16] The court considered the aspect of resistance even after noting that the accused persons were found inflageranto delicto '…a passerby who

[12] *DPP v Morgan* (1976), The House of Lords.

[13] UNPFC, *Worlds apart in Uganda: Inequalities in women's health, education and economic empowerment*, 2017.

[14] *Uganda v Mewuva Alex and another (2013)*, The Resident Magistrate Court of Uganda.

[15] *Uganda v Muhwezi Lamuel, (2012),* The High Court of Uganda.

[16] *Uganda v Kiberu & 3 Others* (2018), The High Court of Uganda.

responded to her alarm and found two of the accused persons lying on top of her as she was groaning in pain'.[17]

4. *Uganda v Kyamusungu Ivan*: The complainant was examined by a doctor whose evidence was that the complainant had had sexual intercourse, *had sustained injuries on the thighs, legs and elbows and that she had inflammation around her private parts*. In his opinion, the *injuries were consistent with her having put up a struggle with the person who had sexual intercourse with her.* That evidence clearly supported the complainant's claim that she had not consented to the sexual act.[18]

5. *Uganda v Maganda Fred:* If there was consent, she could not have raised the alarm.[19] Where consent is *alleged, one should show use of force*. It was not absolutely necessary for the prosecution to adduce medical evidence although it would have been desirable if consent had been alleged in defence which *would help court to infer violence as evidence of force from the evidence of PW1 and PW3 which the court has believed*.[20]

Similarly, in the Kenyan case of *Charles Ndirangu Kibue v R*, the Court of Appeal of Kenya stated that

> Consent means an intelligent, positive concurrence of the 'will' of the woman. The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. The essence of rape is the absence of consent… the lack of consent is an essential element of the crime of rape...The mental element is to have intercourse without consent or not caring whether the woman consented or not …, the prosecution is required to prove that the complainant physically resisted or, if she did not, her understanding and knowledge were such that she was not in a position to decide whether to consent or resist .[21]

Essentially, in all these cases, the courts were saying lack of consent should be proved by injuries on the victim as rape, is an act of violence. When courts direct themselves and articulate the law as in *Uganda v Mewuva Alex and Another* or as in *Charles Ndirangu Kibue v R, (*discussed above), they are adding an

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[17] *Uganda v Maganda Fred (2010)*, The High Court of Uganda. It is one of the rare cases where the accused admitted that there was sexual intercourse but that the victim had consented to it.

[18] (1996), The High Court of Uganda.

[19] *Uganda v Maganda Fred* (2010), The High Court of Uganda.

[20] *Uganda v Akute Steven* (alias Ouma) (2008), The High Court of Uganda.

[21] *Charles Ndirangu Kibue v Republic* (2016) eKLR.

additional requirement that the victim should have experienced two forms of assaults: a non-sexual physical assault as well as a sexual assault. A victim who assesses her situation and perhaps decides that it is of no use to fight or resist, either because the perpetrator is physically stronger or no help will be forthcoming, and acquiesces, may therefore question whether or not her experience could be defined as rape in the eyes of the law. In *Uganda v Erikando (supra), the victim who testified that, 'The accused had sexual intercourse with me. I accepted because I was helpless' (Emphasis added).* This cannot be said to constitute consent. In trials before the International Criminal Tribunal for the former Yugoslavia (ICTY), medical examinations showed no injuries on victims. Many victims did not fight back, because if they resisted the men took it as a challenge and not only were they raped but the victims were beaten black and blue and therefore left much worse off.[22]

Further, when the courts speak of the 'victim's self-will being overborne' an implied obligation is placed on the victim to resist her assailant. This is an onerous burden not applied to victims of other forms of assault. For instance, in cases of physical assault, the court never considers if the victim consented, nor if the victim fought back. In fact, the victim's conduct or response to the assault is never an issue nor an element of the crime except perhaps when the defence of provocation is raised. So, why does it become material in rape cases?

Using the so called 'reasonable man test',[23] suppose one were to ask a reasonable adult man; was your last sexual interaction consensual? How do you measure consent? 'She didn't fight me' would not be a socially acceptable answer because consensual sex is not defined by lack of physical resistance. The rationale of rape laws is to protect the bodily autonomy of women ─the right of women to choose with whom and when they want to have sex ─ not to protect them from physical violence or to protect their morals. Therefore, lack of physical resistance cannot be the test for meaningful consent to sex.

In many of the decided cases, courts look at lesions and injuries of a sexual nature including bruises around the vagina or thighs. This is based on a false premise that non-consensual sex must be violent and forceful, which stems from the rape

[22] Powell C, 'You have no God': An analysis of the prosecution of genocidal rape in international criminal law, 20(1) *Richmond Public Interest Law Review,* 2017, 25.

[23] The reference to the 'reasonable man' test here is in no way an agreement with the test. For a discussion of the applicability of the test in cases of rape see, Hubin D and Haely K, 'Rape and the reasonable man' 18(2) *Law and Philosophy,*1999,113-139.

myth of an innocent maiden being ravished by a stranger and putting up resistance. If consent to sexual intercourse can be communicated by means of either *'verbal or non-verbal behaviour'* then lack of consent should be similarly communicable.

The legal irrationality of construing lack of resistance as consent was illustrated in the English case of *R v Olugboja.*[24] In this case, two young women—Karen and Jayne—were forced by the two accused persons into the apartment of Mr. Lawal. Lawal forcefully raped Jayne and then dragged Karen into another room where he also raped her. Left alone with Jayne, Olugboja told her he was going to have sex with her and asked her to remove her clothes. Jayne removed her trousers because she said she was afraid. She did not struggle; she made no resistance nor did she shout or scream for help. Asked whether the victim had consented to the intercourse, Olugboja's response was, 'Not at first, but I persuaded her'. On appeal against conviction for rape, it was contended for Olugboja that Jayne consented or he thought she consented. The Court of Appeal argued:

> The question of law before the court is whether to constitute the offence of rape it is necessary for the consent of the victim of intercourse to be vitiated by force, the fear of force, or fraud; or whether it is sufficient to prove that in fact the victim did not consent.

After tracing the common law origins of the law on rape, the Court came to the conclusion that, '…as far as the *actus reus* of rape is concerned, the question is simply, At the time of the sexual intercourse, did the woman consent to it? It is not necessary to prove that what might have appeared consent was in reality submission induced by force, fear or fraud…'.[25] The conviction of Olugboja was upheld. Lord Dunn distinguished consent from submission noting that, '… consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent'.

From the foregoing, the decision in *DPP v Morgan* is therefore bad law. To illustrate this, following the decision in *Morgan*, an Advisory Group on the Law of Rape was set up in 1975, in the United Kingdom, to review a number of aspects of the crime of rape and the conduct of rape trials. In their report, the Advisory Group noted that the definition of rape, as articulated in *Morgan,*

[24] *Regina v Olugboja* (1982), The Court of Appeal of England and Wales.

[25] *Olugboja v Regina* (1981), The Court of Appeal of England and Wales.

emanated from the common law which defines rape as intercourse without her consent, by force, fear or fraud. It noted that this decision can be misleading since the essence of rape consists in having intercourse with a woman without her consent. Therefore, it is possible to have intercourse with a woman who is asleep or who unwillingly submits without a struggle. Lack of consent is the crux of the matter and this may exist though no force is used.[26] In jurisdictions where consent is definitive of rape, the right of the individual to be free of non-consensual sexual contact will be protected only if consent is interpreted as an absolute issue. In essence, a failure to find that there was consent is taken to demonstrate that it was absent: '*The law provides that sexual touching is assaultive unless the person touched agrees to be touched. It does not provide that the transaction is non-assaultive unless the person touched objects*'.[27] The test is not *was the act against her will but was it without her consent.* The Advisory Group further noted that, it is wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape.[28] The provision of the English law in question is in *pari materia* with section 125 of the Penal Code Act of Uganda.

The second aspect of concern is that consent is a highly contextual concept. Women engage in sex for various reasons, including out of affection, coercion, and psychological or economic pressure. Similarly, consent ranges across a spectrum from enthusiastic willingness to a silent acceptance and acquiescence. To speak of consent pre-supposes an active assent. '…the consent required for sex to be legal both in marriage and outside of it should be 'affirmative consent' rather than implied, implicit or passive consent; unless a woman affirmatively consents to sex, all parties should understand her to have withheld consent, rendering the sex non-consensual and therefore rape'.[29] A requirement for affirmative consent has been criticized for being unreasonable because human refusals in many contexts are complex and often implicit; it is therefore unconscionable to expect that with respect to sex women should go against the grain.[30] Further, even this affirmative consent can be token. Women

[26] UK Home Office, Report of the Advisory Group of the Law of Rape, 1975, 3.

[27] *R v Park* (1995), The Supreme Court of Canada

[28] UK Home Office, *Report of the Advisory Group of the Law of Rape*, 1975.

[29] West R, 'Marital rape, consent, and human rights: Comment on 'criminalizing sexual violence against women in intimate relationships'. 109(1) *AJIL Unbound*, 2016, 199.

[30] Coy M, Kelly L, Garner M, Kanyeredzi A, and Vera-Gray, F, 'From 'no means no' to 'an enthusiastic yes': changing the discourse on sexual consent through sex and relationships education'

can be coerced to say 'yes' because it is rare that they are negotiating sex from a position of equal power with their partner. Rape laws fail because they are not reflective of the social context of inequality in which they operate, focusing, as they so often do, on isolated proof of non-consent. This is against a false background of presumption of consent, in the context of a presumed equality of power that is not socially real.[31] It is also too simplistic because in the experience of women, sex is not a simple binary of rape and consent, but a more complex continuum of reality that includes negotiation, pressure and coercion.

Consent would be appropriate as an element of rape, if the social conditions in which a woman gives or refuses consent, were those of equality of power and freedom of choice. The far-reaching gender inequality and domination of women, by men, in all areas of social life vitiate any consent that may be given. Much too often, perhaps even typically, women engage in sex they do not want.[32] For instance, in prostitution, women have sex with men they would otherwise not. The money is not a measure of consent but a compelling factor. The man who pays her for sex pays buys her consent. For many women, poverty and economic marginalization are not enabling conditions for the exercise of individual autonomy. It has therefore been argued from a feminist perspective, that the very idea of consent is no longer helpful nor, indeed, meaningful. Rape law's emphasis on the primacy of consent/non-consent to establish whether a crime has been committed is misplaced. When rape is defined as an act of violence ─as proposed by Susan Brownmiller, and other feminist scholars, consent is not legitimate because no one can consent to an act of battery. Accordingly, it is proposed that, 'rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime'.[33]

In the randomly selected cases that I reviewed above, consent as an element was rarely pursued by the defence. Instead, a blanket denial of all elements of rape is made. Out of over thirty cases I reviewed, *Uganda v Maganda Fred* was the only case where lack of consent was contested. [34] The Defence

in Sundaram V and Saunders H(eds), *Global Perspectives and Debates on sex and relationships education: addressing issues of gender, sexuality, plurality, and power*, Palgrave Macmillan, London,2016,2.

[31] Mackinnon C, *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989,955

[32] Promirac I, *Radical Feminism on Rape*, 498.

[33] Mackinnon C, *Towards a Feminist Theory of the State,* 245.

[34] *Uganda v Maganda Fred (2010)*, The High Court of Uganda.

alleged that the 19-year-old victim had consented. This may perhaps have been because the victim was a virgin at the time of the offense, there was medical evidence of a recently broken hymen, and the accused was placed at the scene, so a blanket denial would have been weak.[35]

This lack of contestation of consent could be attributed to several factors. It may be the case that victims are unlikely to go to the police in the first place if they have no physical evidence to corroborate their allegation. Another reason may be that rape has been so redefined by the courts that prosecutors and the police are reluctant to pursue cases where there is no evidence of violence. The latter appears to be a more compelling reason. In the UK, which has a provision on consent similar to that under Uganda's Penal Code, following the abatement of several cases where consent was alleged by the defence, the British Crown Prosecution Service noted that the decision on which cases to pursue is not made lightly. The DPP then issued a warning to women that if they stayed silent during rape, their attackers may have assumed consent was given and therefore escape being charged.[36]

The ultimate effect of this is that the legal system not only places an obligation on victims of sexual assault to fight off their attackers, get injuries as proof, and to scream, it also devalues or ignores the plight of victims of non-violent forms of coercion.[37] Under the Police Act of 2006, victims of assault are required to undergo a medical examination. The Examining officer is required to fill out a medical form. Initially, the form used in all cases was Police Form 3—a general-purpose 'Medical Examination Form of an Injured Person'—which was used in all cases of assault. It made no mention of sexual assault and focused on physical injuries that were classified as harm, grievous harm, dangerous harm, and maim. It was of value only in circumstances where there was a physical fight and the victim sustained injuries. Further, the medical examination could only be carried out and the form filled out by a medical Doctor or a police surgeon. With a Doctor to patient ratio of up to 1:25,000, the form could not be filled expeditiously without undue hardships to the victim.[38]

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[35] The list of cases reviewed for this section is attached and marked Annex 1.

[36] Bowcott O, 'Stay silent during rape and attackers may assume consent, warns DPP'. *The Guardian*, 22 Jan. 2018 https://www.theguardian.com/law/2018/jan/22/stay-silent-during-and-attackers-may-assume-consent-warns-dpp

[37] Dingwall G, 'Addressing the Boundaries of Consent in Rape' 13(1) *King's Law Journal*.

[38] See ACORD, Protection and Reparations for Survivors of Sexual and Gender Based Violence in the Great Lakes Region, 2011 - www.acordinternational.org

Underlying the examination appeared to be an assumption that non-consensual sex is rough and will leave related injuries. Court often focuses on injuries around the genitalia. For instance, in the case of *Uganda v Korani Alfred,*[39] Dr. Joseph Idoru certified that he examined the victim and found abrasions on the lower lip, scratch marks on the neck, multiple lacerations on the abdomen *but no abrasions or bruises on the genital area*. The court stated that the examination should be considered within the context of the fact that the examination occurred 2 days after the act *and that if she had put up resistance, she would've occasioned injuries to the genital areas*.

It is also a fallacy that, non-consensual sex will leave physical injuries around the genitals. There is a possibility for rape to be committed without violence just as it is possible for women to attain injuries and physical marks during consensual sex. Following criticism and advocacy from various quarters,[40] in 2012, the form was revised and replaced with a Police Form 3A. Form 3A is specifically for the 'Medical Examination of a Victim of Sexual Assault'. The form is more comprehensive and provides not just for the physical examination but for an examination of the victim's emotional state, as well as an examination of their clothing. It also provides for documentation of particular injuries sustained by the victim. And can be filled out and tendered in court by a Medical/Health practitioner including a clinical officer, registered midwife or a medical doctor.

Defining its parameters as well as articulating the relevance of consent may perhaps be the most contentious aspect in discussions of rape legislations. As a result, the more progressive decisions of the international criminal tribunals moved away from a definition of rape focusing on consent as an element.

III. Consent in the jurisprudence of the International Criminal Tribunals

Internationally, no international human rights instrument specifically prohibits rape. Nevertheless, rape and other forms of assaults are implicitly prohibited by the provisions safeguarding physical integrity, which are contained

[39] (2018), The High Court of Uganda.

[40] ACORD, Protection and Reparations for Survivors of Sexual and Gender Based Violence in the Great Lakes Region, 2011.

in several international treaties.[41] The evolution of rape as a crime in international law is a fairly recent development arising mainly in the context of international humanitarian and international criminal law.[42] The establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the UN Security Council, following gross violations of human rights in Yugoslavia and Rwanda, respectively, saw the first codification of rape as a war crime[43]. This was later followed by the Rome Statute of the International Court,[44] which is said to, '… represent the normative benchmark of international criminal law; gender crimes (*including rape)* [Emphasis added] are now given the recognition that has been denied to them for a long time'.[45]

Today, under international law, the crime of rape has different characterizations and is a constituent element of various international crimes depending on the context within which it occurs. It is possible for rape to be committed as a constitutive act of genocide, a form of torture, a crime against humanity or a war crime.[46] The legal framework and the jurisprudence on the definition and proof of rape in the prosecution of the crime of rape by the ICTY, ICTR, and the ICC, have varying implications on the victims of rape.

Reconsidering consent: Rape jurisprudence under the temporary tribunals for Rwanda and Yugoslavia

The International Criminal Tribunal for Yugoslavia (ICTY) was

[41] *The Prosecutor v Anto Furundžija*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) Judgement of 10 December 1998, para 170.

[42] The Rome Statute of the International Criminal Court (ICC) represents the codification of Rape as a Crime under International Law.

[43] Article 5(g) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at p.36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).; Art. 3(g), *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Security Council Resolution 955.

[44] Sections 7(g) and 8(b) XIII, *Rome Statute of the International Criminal Court*, 7 July 1998, United Nations Treaty Series Volume 2187, No. 38544.

[45] Gagro S, 'The crime of rape in the ICTY's and the ICTR's case-law' 60(3) Zbornik PFZ, 2010, 1313.

[46] UN Resolution 1820 (2008), adopted by the UN Security Council at its 5916th meeting on 19 June 2008. See also, Articles 7 and 8 of the Rome Statute of the International Criminal Court.

established through UN Security Council (SC) Resolution S/RES/827 (1993), '…for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia'.[47] The tribunal had jurisdiction over crimes against humanity, including rape.[48] The Statute of the ICTY did not provide for the definition of rape and the tribunal developed its own definition of rape.

The International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council for the sole purpose of 'prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994'.[49] Although not defined, rape was categorized as a crime against humanity. Under article 3(g), the tribunal had the power to prosecute persons responsible for rape when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

The ICTR was the first international tribunal to identify the elements of rape in an international setting in the case of The *Prosecutor v. Akayesu (*hereinafter *Akayesu)* in 1998.[50] The Trial Chamber explored the definition of rape in various jurisdictions and went ahead to develop its own definition:

> While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations of the act of rape may include acts which involve the insertion of objects and/or other use of bodily orifices not considered to be intrinsically sexual …the Chamber 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 Chamber *defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*'.[51]

The chamber further explained that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and

[47] Resolution 827 adopting the ICTY Statute.

[48] Article 5(g) of the ICTY Statute.

[49] UN Resolution 955, Adopted by the UN Security Council on 8 November 1994.

[50] ICTY, Judgment of 2 September 1998.

[51] The *Prosecutor v. Akayesu, ICTY,* paras 596-598. Emphasis added.

coercion may be inherent in certain circumstances such as armed conflict or the military presence of *Interahamwe* among refugee Tutsi women.[52]

Akayesu focuses holistically on the overall environment, and the power dynamics between an accused person and the victim. Further, although *Akayesu* required that the sexual acts be committed under coercive circumstances, the decision provided significant latitude in determining what constitutes coercion.[53] By implication therefore, the existence of coercive circumstances makes nugatory a definition of rape focusing on consent. According to Catherine Mackinnon, '…The ICTR grasped that inquiring into individual consent to sex for acts that took place in a clear context of mass sexual coercion made no sense at all'.[54]

However, the *Akayesu* decision was not strictly followed in subsequent cases before both the ICTR and the ICTY.[55] The ICTR continued to grapple with the definition of rape in subsequent cases while the ICTY sought to develop its own jurisprudence.

The ICTY considered the definition of rape in *The Prosecutor v Anto Furundžija* (hereinafter *Furundžija*). Similar to the ICTR in the *Akayesu Case*, the ICTY Trial Chamber noted that, '… No definition of rape can be found in International Law. [56] However, some general indications can be discerned from the provisions of international treaties'.[57] The Chamber then considered and rejected the definition adopted in *Akayesu*, and went on to look at the sources of International Law. Consequently, the Chamber then considered general

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[52]Weiner P, 'The evolving jurisprudence of the crime of rape in international criminal law' 54(3) *Boston College Law Review*, *2013,* 1209.

[53] Weiner P, 'The evolving jurisprudence of the crime of rape in international criminal law'1209.

[54] Mackinnon, 'Defining rape internationally: A comment on *Akayesu*' 44(3) *Columbia Journal of Transnational Law, 2006,* 950.

[55] Gagro S, 'The crime of rape in the ICTY's and the ICTR's case-law' 1322 notes that the *Akayesu* decision was not uniformly followed by the ICTR. The conceptual definition of rape was approved in the *Musema* case, and the Trial Chamber highlighted the difference between 'a physical invasion of a sexual nature' and 'any act of a sexual nature' as being the difference between rape and sexual assault. See The Prosecutor v Alfred Musema, ICTR Judgement of 27 January 2000. Nevertheless, the '*Akayesu* definition' of rape has not been adopted *per se* in all subsequent jurisprudence of the international criminal ad hoc tribunals. The ICTR's Trial Chambers in the Prosecutor v Laurent *Semanza, ICTR Judgement of 15 May 2003 ;* The Prosecutor v. Juvénal Kajelijeli, ICTR Judgement of I December 2003. The Prosecutor v. Jean de Dieu Kamuhanda, ICTR Judgement of 22 January 2004, for example, described only the physical elements of the act of rape, and thus seemingly shifted their analyses away from the conceptual definition established in the *Akayesu* case.

[56] *The Prosecutor v Anto Furundžija, ICTY*.

[57]*The Prosecutor v Anto Furundžija, ICTY*, para 175.

principles of International Criminal Law and general principles of law to eventually arrive at a definition of rape:

> Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:
> (i) The sexual penetration, however slight: …
> (ii) *By coercion or force or threat of force* against the victim or a third person.[58]

This conceptualization is wider than the traditional definition of rape.[59] It discounts consent as an element of rape.[60]

The ICTY had a second opportunity to consider the definition of rape in *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (hereinafter *Kunarac).* [61] As in *Furundžija* and *Akayesu*, the ICTY Trial Chamber in *Kunarac* began by noting that there was no definition of rape in the Statute or international humanitarian or human rights law and then reviewed the definitions adopted by the ICTR in the *Akayesu* case as well as its own decision in the earlier *Furundžija* case.[62] The ICTY Chamber noted that

> …in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition. The Trial Chamber considers that the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by International Law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.[63]

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[58] *The Prosecutor v Anto Furundžija, ICTY,* para 185.

[59] At common law, which is reflected under section 125 of the Penal Code of Uganda.

[60] Rule 96 of the ICTY Rules of Procedure and Evidence provides that: In cases of sexual assault:
(ii) consent shall not be allowed as a defense 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 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;.

[61] ICTR Judgment of 22 February 2001.

[62] *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* paras 437 and 438.

[63] *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* ,para 438.

The Chamber then looked at the definition of rape focusing on consent in various jurisdictions. It noted that, the common denominator in the different circumstances underlying the definition of consent, is the effect that the victim's will was overcome or that her ability to freely refuse the sexual acts was temporarily or more permanently negated. It concluded that 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.[64] It then decided as follows:

> In light of the above considerations, the Trial Chamber understands that the actus reus of the crime of rape in International Law is constituted by: the sexual penetration, however slight: …where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[65]

Kunarac therefore reintroduced lack of consent as an element of rape, as well as a further layer that *the accused person should know that the intercourse is taking place without the consent of the victim.* This is not only an unnecessarily onerous burden on the prosecution but allows for the defence of mistake of fact — that the accused thought the victim was consenting. For all intents and purposes, therefore, *Kunarac* introduced physical force as an element of rape because the only sure way the perpetrator can know there is no consent is when the victim resists. On appeal, the Appeals Panel held that, 'Force or the threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape'. [66] The Appeals Panel further noted that a 'narrow focus on force or threat of force' would be inappropriate and allow 'perpetrators to evade liability'. [67] The relevance of force or threat of force as an element of rape in the context of an armed conflict is highly questionable. With or without direct force or threats being applied, it is highly doubtful whether a woman faced with sexual demands from a combatant would be able to meaningfully exercise autonomy and consent.

In 2006, in *Sylvestre Gacumbitsi v Prosecutor*[68] (hereinafter *Gacumbitsi*), the

[64] *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* para 452, 453.

[65] *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* 460.

[66] *Prosecutor* v *Kunarac, Kovac & Vukovic*, ICTR Appeal Judgment of 12 June 2002.

[67] *Prosecutor* v *Kunarac, Kovac & Vukovic*, ICTR Appeal

[68] ICTR Appeals Panel Judgement of 7 July 2006.

ICTR Appeals Panel (which also served as the ICTY Appeals Chamber) reviewed the elements of rape in both *Akayesu and Kunarac.* The appellant, Gacumbitsi, had been convicted by the ICTR Trial Chamber of, among other charges, rape as a crime against humanity and sentenced to 30 years imprisonment. On appeal, the prosecution sought a clarification of the law relating to rape as a crime against humanity or as an act of genocide. It was argued that non-consent of the victim of rape and the perpetrator's knowledge thereof should not be considered elements of the offence of rape, which must be proved by the prosecution. Rather, consent should be considered an affirmative defence.[69] It noted that rape should be viewed in the same way as other violations of International Criminal Law such as torture or enslavement, for which the prosecution is not required to establish absence of consent. The argument was made by the prosecution that when rape occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population, genuine consent is impossible.

The Appeals Chamber noted that: *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt. It further held that the Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible.[70] As to the accused's knowledge of the absence of consent of the victim, it may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.[71] Commenting on the ridiculousness of the element of consent in rape happening in a context of '…a widespread and systematic attack against a civilian population,' Catharine MacKinnon rightly notes that, 'No other crime against humanity has ever, once the other standards are met, been required to be proven non-consensual. With sex, it seems, women can consent to what would otherwise be a crime against

[69] *Sylvestre Gacumbitsi v Prosecutor, ICTR Appeal Panel,*para 147. The argument was made that when rape occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population, genuine consent is impossible.

[70] *Sylvestre Gacumbitsi v Prosecutor* paras 153 and 155.

[71] *Sylvestre Gacumbitsi v Prosecutor,* para 157.

their humanity, making it not one'.[72]

The outcomes in the prosecution of the rape cases before the ICTY and the ICTR were therefore mixed. The jurisprudence from both tribunals served as a foundation for the gender violence provisions in the Rome Statute of the International Criminal Court (ICC).

IV. Rape under the International Criminal Court

The ICC was established under the Rome Statute of the International Criminal Court which entered into force in 2002. Its mandate is to exercise jurisdiction over the most serious crimes of international concern and it operates complementary to national criminal jurisdictions.[73] Under the Statute, rape is an element of Crimes against Humanity as well as a War Crime.[74] Drawing from the jurisprudence of the ICTY and the ICTR, the Rome Statute has defined elements of the crime of rape broadly as where:

> The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[75]

The first rape case handled by the ICC was that of *The Prosecutor v. Jean-Pierre Bemba Gombo* (hereinafter *Bemba*). [76] Bemba, a national of the Democratic Republic of the Congo (DRC), was charged with crimes against humanity of murder (under Article 7(1) (a)) and rape (Article 7(1) (g)), and the war crimes of murder (Article 8(2) (c) (i)) and rape (Article 8(2) (e) (VI). The case against Bemba was that, while he was acting as military commander, forces under his control committed crimes. The crimes were committed because of his failure to exercise proper control over the forces, yet he knew the forces were committing

[72] Mackinnon, 'Defining rape internationally: A comment on *Akayesu*' 952.

[73] Article 1 of the Rome Statute.

[74] Articles 7(1) (g) and 8(2) (b) of the Rome Statute.

[75] ICC, Elements of Crimes, adopted at the 2010 Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010. The elements of rape as a Crime against Humanity are provided for under Art. 7(1) (g)-1 and rape as a war crime under 8(2) (b) xxii-1.

[76] *The Prosecutor v. Jean-Pierre Bemba Gombo,* Trial Chamber 111 Judgment of 21 March 2018.

or about to commit such crimes. He failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[77]

With regard to the circumstances within which rape occurs, the Chamber noted coercive environment would negate consent:

> . . . the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime . . . the Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute . . . here 'force', 'threat of force or coercion,' or 'taking advantage of coercive environment' is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent.[78]

Under the ICC therefore, one key aspect of rape is the existence of coercive circumstances. Although it is possible to argue that the context within which rape as a war crime or as a crime against humanity occurs renders meaningful consent impossible, to assume a lack of consent *a priori* not only eases the latter procedure in court and the burden of proof, but also the victims' situation of not being interrogated and questioned regarding his/her disagreement on the actions taken by the offender.[79] It is sufficient to prove that sexual intercourse occurred and that the circumstances were coercive. In essence, it puts the victim of rape on the same footing as victims of other forms of assault where consent or lack thereof is not in issue. It may be worth noting that the ICC trial chamber decision was made by an all-female bench.[80]

V. Conclusion

The legal process distils everyday human experience and interactions into legal relevancies. In so doing, it endows the law with powers to disqualify alternative accounts. For victims of rape, the first stage in this process is the

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[77] *Prosecutor v. Jean-Pierre Bemba Gombo*, para 59.

[78] *The Prosecutor v. Jean-Pierre Bemba Gombo*, paras 99-105.

[79] Maier N, 'The crime of rape under the Rome statute of the ICC: With a special emphasis on the jurisprudence of the Ad Hoc criminal tribunals' *Amsterdam law Review* http://amsterdamlawforum.org/article/viewfile/209/397 .

[80] Judge Sylvia Steiner, Presiding Judge Joyce Aluoch Judge Kuniko Ozaki.

manner in which the crime of rape is defined. The legal definition of rape will determine the direction of the investigation and the court process, including the questions the victim will be asked by the police, the nature of testimony and the details she will be required to recount, the cross examination, and ultimately whether her experience qualifies as rape or not in the eyes of the law. The insistence on consent, shifts the focus of the criminal justice process to the victim and to her response during the rape ordeal.

So far, courts have been unable to define lack of consent in a manner that is exclusive of use of force and physical violence against the victim. A focus on the use of force introduces an additional element requiring that the victim should have been raped, physically assaulted and have injuries to show for it. It obliges victims of rape to fight and resist their attackers, a requirement not applicable to victims of any other forms of assault. If the crime of rape is premised on the protection of bodily integrity of the woman, as it should be, then all sexual touching is assaultive unless the person touched expressly and voluntarily agrees to be touched. In which case, consent should not be an element of rape, to be proved but rather a defence to charges of rape.