



The role of consent for sexual violence in armed conflict.

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Consent to an unlawful action is a vexed problem, and in no area is it more vexed than in the area of sexual abuse against women. However, there are situations in which sexual abuse, and the possibility of consent, should provide no problem in law.

The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish a lack of consent as an element of the crime. Further, the defense of consent clearly should not be allowed when the sexual assault is charged and prosecuted as slavery, crimes against humanity, genocide, torture, or other *jus cogens* crimes to which issues of consent are irrelevant. In addition, consent is not an issue as a legal or factual matter when considering command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations.¹

Sexual slavery as a form of slavery is an international crime and is a violation of the *jus cogens* norms in the exact same manner as slavery. As a *jus cogens* crime, neither state nor its agents, including government and military officials, can consent to the enslavement of any person under any circumstances. In the same manner, a person cannot under any circumstances, consent to be enslaved or subjected to slavery. Thus it follows that a person accused of slavery cannot raise consent of the victim as a defense.²

It is worth noting here that the meaning of sexual slavery in the modern era must be seen clearly. For example, the Japanese army forced thousands of Korean and Philippino women into sexual slavery during the Second World war. This has had echoes in Zimbabwean history with the claims that many young women were coerced into sexual relationships in the camps and "bases" during the Liberation War, and has had contemporary re-emergence in the allegations that young women have similarly been forced into sexual favours at the "bases" set up around the country since 2000.

¹ McDougall Contemporary forms of slavery .Systematic rape, sexual slavery and slavery like practices during armed conflict. Commission on Human Rights, E/CN.4/SUB.2/2000/21. June 2000. P.13.

² McDougall Contemporary forms of slavery .Systematic rape, sexual slavery and slavery like practices during armed conflict. Commission on Human Rights, E/CN.4/SUB.2/2000/21. June 2000. P.13.

The issue of consent may however be raised as an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The defence in such cases must initially satisfy the judicial body hearing the cases that the evidence of consent is "reliable and credible." The rules of procedure and evidence of these *ad hoc* tribunals provide that, in cases involving sexual assault, consent shall not be allowed as a defense if the victim had been subjected to or threatened with violence, duress, detention, or psychological oppression. This rule of procedure and evidence also require no corroboration of victim's testimony and restricts the defense of consent in sexual assault cases.³

There have been some arguments that introduction of the element of non-consent and lack of knowledge of non-consent as advocated in the *Kunarac, Kovac and Vukovic*⁴ cases by the ICTY Appeals Chamber was unnecessary and inappropriate. The prosecutor had established that coercion, force, and threats of force were present; the lack of consent should instead be inferred by the judges themselves.⁵ The absence of consent should not be an element of rape in supranational criminal law because it is impossible to transfer the elements of rape as found in national laws into supranational criminal law.⁶ To do that would be failing to take into account the specific differences that exist in these two bodies of law.

The definitions of rape in national laws were written in peace-time situations which justifies the inclusion of the element of non-consent. In the context of genocide, crimes against humanity and armed conflict, most of the cases, act of sexual violence will have been committed under threat of force, coercion or coercive circumstances, and the issue of consent becomes redundant.⁷ The counter-argument to the above proposition is that, if the accused is disallowed to raise the element of consent as a defense to the alleged crime of rape, this would be a violation of the accused right to raise a defense and the right to a fair hearing. The accused therefore should be allowed to raise this defense, but the burden or onus of proof should be shifted to the accused to prove that there was consensual sex in that alleged situation.⁸

The new definition of rape established in *Kunarac, Kovac and Vukovic* may theoretically rule out any possibility of the victim consenting. However, consent is not an acceptable element in supranational

³ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, as amended on the 25 July 1997, Rule 96 (Evidence in cases of sexual assault). International Criminal Tribunal for Rwanda, rules and procedure and evidence adopted on 29 June 1995, Rule 96 (Rules of evidence in cases of sexual assault).

⁴ Prosecutor v *Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic IT-96-23-T, 19 April 2000pp.1979-1982.*

⁵ De Brouwer Supranational Criminal Prosecution of Sexual violence 123

⁶ De Brouwer Supranational Criminal Prosecution of Sexual violence 119.

⁷ De Brouwer Supranational Criminal Prosecution of Sexual violence 120.

⁸ Matysak Interview and Opinion. 1 July 2009

criminal law and its inclusion as an element in the definition of rape in international law must be strongly contested.⁹

⁹ De Brouwer *Supranational Criminal Prosecution of Sexual violence* 123.