

UNITED
NATIONS

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

Case No.: IT-95-17/1-T
Date: 10 December 1998
Original: English

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Antonio Cassese
Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 10 December 1998

PROSECUTOR

v.

ANTO FURUND@JA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misset} }
Mr. Sheldon Davidson

other less grave forms of serious sexual assault through Article 5(i) as “other inhuman acts”.²⁰¹

176. Trial Chamber I of the ICTR has held in *Akayesu* that to formulate a definition of rape in international law one should start from the assumption that “the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts”.²⁰² According to that Trial Chamber, in international law it is more useful to focus “on the conceptual framework of State sanctioned violence”.²⁰³ It then went on to state the following:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.²⁰⁴

This definition has been upheld by Trial Chamber II *quater* of the International Tribunal in *Delali*.²⁰⁵

177. 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

²⁰⁰ *Ibid.*, p. 15.

²⁰¹ The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. The expression at issue undoubtedly embraces such acts as serious sexual assaults short of rape proper (rape is specifically covered by Art. 27 of Geneva Convention IV and Art. 75 of Additional Protocol I, and mentioned in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993) S/25704, para. 48, hereafter “Report of the Secretary-General”), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights and covered by the provisions of humanitarian law just mentioned as well as the Report of the Secretary-General), or the enforced disappearance of persons (prohibited by the General Assembly resolution 47/133 of 18 Dec. 1992 and the Inter-American Convention on Human Rights of 1969).

²⁰² Case No. ICTR-96-4-T, para. 597.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, paras. 597-598.

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.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since “international trials exhibit a number of features that differentiate them from national criminal proceedings”,²⁰⁶ account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

179. The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a

²⁰⁵ Case No. IT-96-21-T, para. 479.

²⁰⁶ Para. 5, Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Dra`en Erdemovi*}, Judgement, Case No. IT-96-22-A, 7 Oct. 1997.

the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.

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. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an