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Feasibility of Applying Case Law of *Ad Hoc* International Tribunal for Former Yugoslavia in Cases of Sexual offences committed by Coercion

The effective functioning of mechanism of the national human rights protection implies approximation of national legislation towards international standards and refining the practice of national courts, which should be a continuous process and be aimed at adapting best international judicial practice to national judicial practice. In order to ensure adherence to high standards of universally recognised human rights it is essential and thus decisive significance is assigned to share practice of various countries and international institutions.

In the present article, discussing the stages of the evolutionary development of the definition of rape and distinguishing it from the crime of torture is based on analysis of landmark decision of the ad hoc International Criminal Tribunal for the former Yugoslavia (hereinafter referred as ICTY) the purpose of which is to introduce and apply them in judicial practice and thus to improve the reasoning of the decisions of national courts in similar cases.

Key words: *Definition of rape, sexual violence, consent of a victim, penetration, ICTY, ICC.*

1. Introduction

Unlike the law of European human rights, the scope of international criminal law is universal and includes the countries of all continents that ratified the Statute of the International Criminal Court -the Rome Statute.[1]

International criminal law, as a combination of regulations of international law and criminal law, is an independent branch of law which is still under the process of development that was considered as part of international law until the 1990s.[2]

The basis for formation of the international criminal law as a separate branch was 1) first, establishment of *ad hoc* International Criminal Tribunal for the former Yugoslavia (*ICTY*)[3] under the Resolution 808 of the United Nations Security Council of 25 May 1993[4], and then 2) establishment of *ad hoc* International Criminal Tribunal for Rwanda (ICTR)[5] under the Resolution 995 of the United Nations Security Council; 3) adoption of the Statute of the International Criminal Court in Rome on 7 July 1998 and on its basis, 4 years later, on 1 July 2002, establishment of the first standing International Criminal Court (ICC).

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1 See *Turava, M.,* Basics of International Criminal Law, Tbilisi, 2015, 239 (in Georgian).

2 Ibid, 5.

3 See Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council resolution 827 (1993) of 25 May 1993, document S/RES/827, art. 5 (hereinafter "Statute of the ICTY"), <https://casebook.icrc.org/case-study/un-statute-icty> [12.12.2018].

4 UNSC Resolution 808, 22/02/1993, <http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf> [20.08.2018].

5 See UN Security Council Resolution 955, 08/11/1994.

Since the period of establishment of this two *ad hoc* international tribunals, international tribunals for Former Yugoslavia and Rwanda cases, which were established in response to domestic conflicts in Former Yugoslavia (in 1992) and Rwanda (in 1994), were equally empowered to review[6] cases concerning ***"gender-based"*** crimes committed against women, including criminal cases concerning rape and other forms of sexual violence, which lead to exponential development of jurisprudence for cases of sexual violence.[7]

Although precedents of cases of rapes adopted by both tribunals are historically significant and valuable, they significantly differ from each other regarding the effectiveness of administration of justice. This was conditioned by the fact that the approval of the rape charges was a key element of the strategy of ICTY Prosecutor's Office, which was achieved through conducting gender-sensitive investigative procedures and was reflected on delivering appropriate judgements; the same is not true about cases of rape brought before ICTR where charges in 13 cases could not have been confirmed.[8] Judgements delivered by both tribunals arouse great interest around the subject of the research, although taking into consideration the format determined for submitting the present article, we will only be limited to analysis of several judgements delivered by the *ad hoc* International Tribunal for Former Yugoslavia.

2. Why case law of *ICTY*?

Sexual violence (including rape) is the key element attributing to throughout its entire activity of the *ICTY*.[9] During the domestic conflict within the territory of Former Yugoslavia (1992) a number of facts of rape and sexual violence took place and they were widespread. Rape, due to its social nature, was used as a weapon of ethnic cleansing during the war.[10]

Tribunals in former Yugoslavia, as well as in Rwanda, sought to elaborate and develop a mutually agreed definition of the elements of rape, including key aspects related to the definition of consent and violence. For this very purpose, a number of judgements delivered by both tribunals where in the context of regulations of international criminal law and on the basis of analysis of national criminal laws of various states (a sort of hybridisation),[11] notions of rape and other types of violent sexual assaults and their elements are interpreted and in certain cases rape is considered as a torture.

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6 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, (International Tribunal for the Former Yugoslavia), Art. 1, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalTribunalForTheFormerYugoslavia.aspx> [06.08.2018].

7 Comp. *O'Brien M.*, Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes, International Criminal Law Review, 11(4), (Aug. 2011), 803-827, <https://www.researchgate.net/publication/233606169> [10.01.2019].

8 See *Haddad H. N.*, Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals, Journal Human Rights Review, Vol. 12, № 1, 2011, 109.

9 information on ICTY is available in the link below, <http://www.icty.org/en/documents> [24.10.2018].

10 *Ghosh G., Tiwari S.,* The Evolving Jurisprudence of Rape as a War Crime, International Journal of Law and Legal Jurisprudence Studies (IJIIJS), Vol. 1, Issue 6, 2018, 38.

11 Comp. *Schramm E.*, Internationales Strafrecht, 2011, 43. Cit. *Turava, M.,* Basics of International Criminal Law, Tbilisi, 2015, 14 (in Georgian).

It should also be noted that prior to establishment of *ICTY*, *ICTR* and *ICC* and prior to delivering appropriate judgements by these courts, in the international criminal law there were no internationally recognised interpretations of sexual offences committed by coercion, including rape. Judicial practice of these two tribunals with their valuable precedents became the basis for the further judicial practice of both *ICC* and hybrid (mixed) tribunals, the so called "third generation"[12] international courts. When judges were reasoning their judgements by, they often directly cited benchmark decisions of *ICTY* and *ICTR* and progressive implications and opinions were accepted in the original form.[13]

2.1. Should Common Courts of Georgia apply decisions (precedents) issued by *ICTY*?

Prior to considering the content of judgements delivered by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (*ICTY)* it is important to briefly review the issue regarding the importance of judgements of *ICTY* for the judicial system of Georgia and whether or not precedents of *ICTY* should be applied in reasoning the judgements of the Common Courts of Georgia.

The fact that the main source of *ICC*, as the "permanent court"[14] is the case law of *ICTY* (as well as of Nuremberg,[15] Tokyo and Rwanda) and to some extent the existence of the *ICC* is based on the above judgements, it seems fair to say, that it also provides an reputable interpretation of the offences provided for in the Statute (Rome Statute). The status of "permanent court" of *ICC* further increases[16] and does not deprive value of the mentioned judgements for the purpose of Georgian judicial practice as far as Georgia is a part[17] of the Rome Statute of the International Criminal Court, as part of the international treaty, which is recognised as the integral part of the legislation of Georgia.

By accession to the Rome Statute and other important international treaties of humanitarian law, Georgia has undertaken the commitment to implement their requirements which implied the implementation of provisions of elements of individual offences provided for in the Rome Statute in Criminal Code of Georgia through the relevant legislative amendments. More specifically, Georgia, by the Rome Statute, imple-

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12 See *Turava M.*, Basics of International Criminal Law, Tbilisi, 2015, 46 (in Georgian).

13 See e.g. *Prosecutor v. Brima, Kamara, Kanu*, SCSL Trial Judgement, Case № SCSL-04-16-T, 20.06.2007, § 693-694, <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> [12.02.2019]; see *also: Prosecutor v. Sesay, Kallon, Gbao,* SCSL Case № SCSL-04-15-T, 02.03.2009, § 143-148, <http://www.-rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> [12.02.2019].

14 See details *Turava, M.*, Basics of International Criminal Law, Tbilisi, 2015, 239 (in Georgian).

15 Although the Nuremberg Tribunal did not prosecute cases of rape and sexual assault directly, rape was qualified as a crime against humanity pursuant to Article II(1)(c) of the Rule No. 10 of the Control Council Law. Control Council Law № 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace And Against Humanity, <https://www.legal-tools.org/doc/ffda62/pdf/> [12.12.2018].

16 Cit. *Dgebuadze G.*, Model of Individual Imputing a Crime in International Criminal Law and its Development under the Impact of Anglo-American and German Criminal Law Systems, dissertation paper, TSU Publishing, Tbilisi, 2017, 171, footnote 725 (in Georgian).

17 Ratified by the Resolution N 2479-of the Parliament of Georgia of 16 July 2003.

mented[18] international offences[19] of *ICC*, i.e. offences falling within the scope of jurisdiction of "the additional authority of the national judicial system"[20], by which created the opportunity to hear cases of international offences under the Rome Statute committed in the territory of Georgia, to be subject to the criminal jurisdiction of Georgia, in order to avoid the need to refer the cases to the International Criminal Court.[21]

That is, Common Courts have the right to apply the case law of *ad hoc* International Tribunal for Former Yugoslavia (*ICTY*) in the course of exercising the justice in the cases of international offences provided for in the Statute (Rome Statute) and implemented in the national criminal law, that enables proper understanding and reflection of legal definitions lacking the specificity in most cases and further imposition of a sentence. for the reason that the terms referring to the violent offences of sexual nature are worded in very general manner in the appropriate provisions of the Rome Statute and it is difficult to interpret and apply correctly the case law of *ICTY* without reputable interpretation of offences envisaged in the Statute (Rome Statute).

Therefore, case law of *ICTY*, in administration of justice in cases of international crimes implemented in national criminal law by national court, should be perceived as the organic part of the national criminal law, as the direct source of law prevailing the national law, as they interpret and explain the content of the text of the Statute.

In addition, judgements discussed in this article, although they are not delivered specifically in relation to Georgia, Common Courts may apply them for the purpose of interpretation of norms reflecting sexual offences committed by coercion in national criminal legislation, as the inspiration for for remedying the shortcoming existed in criminal law.

Furthermore, the fact that the violation of right to sexual freedom and inviolability, as the part of right to honour and dignity is protected by provision of both, international law of human rights and international humanitarian law and international criminal law, helps courts to address specific issues, substantiate the judgement by combined application of individual areas of criminal law and the case law[22] that is definitely is the higher standard of reasoning judgements.

In the present article, analysis of definition of rape is based only on the case law of the *ad hoc* International Criminal Tribunal for Former Yugoslavia *(ICTY).* Obviously, due to the limitations estab-

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18 It should also be noted that there are gaps in the process of harmonisation of relevant provisions of Criminal Code of Georgia with the Rome Statute and provisions of appropriate national law relevant to those of the Rome Statute are not similar. See det. *Turava M*, Basics of International Criminal Law, Tbilisi, 2015, 89-98 (in Georgian).

19 Under Article 5(1) of the Rome Statute of ICC, the jurisdiction of court shall be applied to the following offences: The crime of genocide; crimes against humanity; war crimes; the crime of aggression.

20 See *Turava M*., Basics of International Criminal Law, Tbilisi, 2015, 81 (in Georgian).

21 See Ibid, 82.

22 European Court of Human Rights ruled that international law of human rights and international humanitarian law may be applied simultaneously, which may be interpreted as the ability of a national court of a member state of a Treaty to refer to both case law and practice of international law of human rights (including human rights of European law) and international humanitarian law. Comp. *Hassan v. the United Kingdom,* European Court of Human Rights (ECHR), Grand Chamber, Application no. 29750/09, Judgment, Strasbourg, 16 September 2014, § 77, <http://hudoc.echr.coe.int/eng?i=001-153400> [19.11.2018].

lished for submission of the article, not all of them could be discussed in it. This, of course, does not reduce the value of these decisions in light of applying standards of international law of human rights. Only those few decisions have been selected that refer to and deal with the in-depth discussion of certain elements of the crime of rape and interpret the definition of this term.

All the above mentioned demonstrates that landmark decisions of the Tribunal delivered on the basis of reviews of crimes against humanity, and along with collective good of community, protects individual interests of individual victims of crime[23] as well, is a good example for analysing the definition of rape may definitely be the valuable material in the course of application of law in judicial practice in cases of rape in reasoning the legal issues of judgements when administering the justice by the Common Courts. And reasoning " Means application of provisions of national law, European law, international law and it should reflect Constitution, national legislation, as well as European and international law. Where applicable, it may reflect national, European and international case law, including recommendations regarding case law adopted by courts of other states."[24]

It is important that Common Courts interpret the issue not only in the vacuum of the national legislation but in harmonisation with the other rules of European and international public law.[25]The Constitution of Georgia does not reject universally recognised human rights and freedoms, recognises primacy of universally recognised norms and principles and declares international treaties of Georgia as the integral part of the legislation of Georgia.[26] Legislation of Georgia, as the applicable source of law, fully complies with universally recognised principles and norms of international law, and the international treaties of Georgia shall prevail over domestic normative acts unless they contradict the Constitution of Georgia or the constitutional agreement.[27]

3. Definition of Rape in *ICTY* Case Law

ICTY played the historic role in investigating cases of sexual offences committed by coercion in former Yugoslavia and in charges against persons committed such crimes. The tribunal convicted 23 people in total, judgements delivered at that time became the basis of other judgements worldwide which were delivered later in cases of similar category.

ICTY was the first criminal tribunal where the court considered the rape as the form of torture and assessed the concept of rape in the context of crime committed against humanity. The court also made reference to interpretations of consequences of rape which, in most cases were harmful and irreparable which that generally characterise / accompany the commission of sexual violence.

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[23] See *Ambos K.,* International Strafrecht, 3. Aufl., München, 2011, 245-246; *Werle G.*, Volkerstrafrecht, 3. Aufl., 2012, 384; cit. *Turava M*., Basics of International Criminal Law, Tbilisi, 2015, 102 (in Georgian).

[24] See Opinion N 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg, 18.12.2008, 4b.44, 7 <http://hcoj.gov.ge/files/pdf%20files/aqtebi/strasburgi%2011.pdf> [30.08.2018].

[25] Comp. *Hassan v. the United Kingdom, [2009]* ECHR, § 77.

[26] See Article 6, Law of Georgia on International Treaties of Georgia, Parliamentary Gazette, 44, 11/11/1997; see also: Article 7, Organic Law of Georgia on Common Courts, LHG, 41, 08/12/2009.

[27] Article 4(5), Constitution of Georgia, Departments of the Parliament of Georgia, №31-33, 24/08/1995.

3.1. Case - *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli* and *Esad Lando*

The first case where *ICTY* interpreted the notion of rape in the context of humanitarian law was the case known as *Celebici case*.[28] In the same case, the court devoted extensive consideration to the issue whether rape, as a sexual assault, could be considered as torture.

The major convicted persons of the case were employees occupying different positions in *Celebici camp* who were sentences within the period of May and December 1992 in the territory of former Yugoslavia, in particular, for serious crimes of international humanitarian law (torture, sexual violence, beating and other cruel and inhuman treatment) committed in *Celebici camp*.

When considering the issue, in the mentioned judgement, the court cited and analysed established judicial practice of both, European Court of Human Rights and the various international judicial authorities related to similar issues and indicated that domestic legislation of certain countries interpreted the rape as the involuntary (non-consensual) sexual relation with its different variations.

The Court accepted definition of rape and sexual violence made by *ICTR* in the case *Prosecutor v. Jean-Paul Akayesu* where rape was interpreted as physical penetration of sexual nature in the body of a person being in forced circumstances. While sexual violence, which includes rape, was considered as any action of sexual nature committed by coercion.[29]

And finally, taking into consideration the context of interpretation, *ICTY* additionally considered in this case 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."[30]

The content of the delivered judgement indicates that one of the objectives of the panel of judges reviewing the case was also the consideration of the issue, whether the rape was torture in accordance with the provisions of Geneva Convention.

Although Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment envisages the definition of torture, but there is no reflection of specific acts defining the torture, it is more focused on the conceptual framework of the state sanctioned violence.

In order to determine in which cases rape may be qualified as torture, the Court, for the purposes of their further application, considered it necessary to examine relevant conclusions made in judgements of various international and quasi-judicial authorities as well as the United Nations certain relevant reports.

In their judgements, Inter-American Commission of Human Rights and European Court of Human Rights responded the key question - whether or not the rape is the crime of torture.

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[28] See, *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case № IT-96-21-T,16/11/1998, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

[29] See *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwand, Case № ICTR–96-4-T, Trial Chamber I, 02/09/1998, 241, <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf> [06.08.2017].

[30] See, Footnote 29, § 478

In its Judgement[31] of 1996, Inter-American Commission of Human Rights in the case of *Fernando and Raquel Mejia v. Peru* (the case concerned a school teacher rape twice by the soldier of Peruvian military army), established that the rape of Raquel Mejía was the violation of Article 5 of the American Convention.[32] Within the scope of Article 5, the Commission held that in order to qualify a certain act as the torture (crime of torture) it shall contain three necessary elements. ***First***, it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; ***second***, it must be committed with a purpose; ***third***, it must be committed by a public official or by a private person acting at the instigation of the former.[33]

Regarding the mentioned case, the Commission established that the three elements of the definition of torture were presented to qualify the rape of *Raquel Mejia* as torture, in particular, the fact that rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, to reflect on the fact of being made the "subject of abuse"[34] of this nature also causes a serious psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

The establishment of the fact by the Court that Ms *Mejia* was raped as the alleged member of a revolutionary and sabotage group, this act to some extent was her personal punishment and the rape as the punitive measure that totally met the conditions of the above mentioned second element and finally, the main point is that, the third element was also established, she was raped by the service member of Peruvian Army.

In the referred judgement, regarding the consequences of rape and whether the rape cause pain or suffering when discussing the issue, the Court concluded that it shall be assessed not only by noticeable physical injuries but by psychological and social consequences of rape as well. In determining the gravity of pain and suffering that accompanies rape as the act of violence, consideration should be given to physical and mental feelings of the victim relating to public ostracism[35], as well as how the victim's spouse, children and family members in general respond to the fact; whether their family integrity is at stake, etc.[36]

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31 See *Fernando and Raquel Mejia v. Peru*, Case № 10.970, 01.03.1996, Annual Report of the Inter-American Commission on Human Rights, Report № 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157, 1996, <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm> [22.08.2017].

32 See Inter-American Convention on Human Rights "Pact of San Jose, Costa Rica", 22.11.1969, <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf> [22.08.2017].

33 See Footnote 29, § 483.

34 *Fernando and Raquel Mejia v. Peru*, Case № 10.970, 01.03.1996, Annual Report of the Inter-American Commission on Human Rights, Report № 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157, 1996, <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm> [22.08.2017].

35 Ostracism (*Ostrakismos*) — exclusion and rejection from a society, repudiation, criticism, sarcasm, Dictionary of foreign words of National Library of the Parliament of Georgia, 1989, <http://www.nplg.gov.ge/gwdict/-index.php?a=term&d=3&t=28951> [10.12.2018].

36 See Footnote 32, § 186, cit *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, Case № IT-96-21-T, 16.11.1998, ICTY, § 486, 494, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

The opinion that rape as a form of sexual abuse constitutes torture was also mentioned by the UN Special Rapporteur on Torture in a report submitted pursuant to the Commission on Human Rights in 1992,[37] which emphasised that "since it was clear that rape against women held in detention were a particularly ignominious violation of their inherent dignity and right to physical integrity of the human being, rape, as the method of torture,[38] accordingly constituted an act of torture."[39]

In his first report, the UN Special Rapporteur listed various forms of sexual aggression as the methods of torture, including rape and insertion of objects into the orifices the body.[40]

In the above mentioned second Report of the Special Rapporteur, submitted pursuant to Commission on Human Rights, Commission of Special Experts[41] drafted report regarding harm inflicted to victims of rape. The Report states that "rape and other forms of sexual assault harm not only the body of the victim, the more significant harm is inflicted to honour and dignity of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity."[42]

In reasoning its judgement, *ICTY* Trial Chamber, when considering the issue of segregation the rape from the act of torture, referred to the Report of UN Special Rapporteur - "Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict"[43] and considered the rape as torture on discriminatory grounds. The Special Rapporteur noted that the The Committee on the Elimination of Discrimination against Women had recognised that violence during armed conflicts directed against a woman solely because of her being a woman, including "acts that inflict physical, mental or sexual harm or suffering", represents a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms.

Finally, in view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

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37 See Summary record of the 21st meeting, held at the Palais des Nations, Geneva, on Tuesday, E/CN.4/-1992/SR.21, 11.02.1992: Economic and Social Council, Commission on Human Rights, 48th session, § 35, <http://hr-travaux.law.virginia.edu/document/cped/ecn41992sr21/nid-2460> [24.08.2017].

38 See *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases of International Criminal Tribunals, Vol. VIII: The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 950, § 181.

39 See, Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Mr. *Nigel S. Rodley*, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/-1995/34, § 16. <http://hrlibrary.umn.edu/commission/thematic51/34.htm> [24.08.2017].

40 Comp. *Report* by the *Special Rapporteur,* Mr. *Kooijmans P.,* appointed pursuant to commission on human rghts resolution 1985/33, § 119, <http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf> [24.08.-2017].

41 Special Commission of Experts was established pursuant to the United Nations Resolution 780. The Commission of Experts had to draft the Opinion for submission to the Secretary-General of the United Nations regarding the serious violation of provisions of humanitarian law in the territory of Former Yugoslavia within the period of November 1992 to April 1994.

42 See Footnote 29, § 492.

43 Comp. Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report submitted by Ms. *McDougall. Gay J.*, Special Rapporteur, E/CN.4/Sub.-2/1998/13, 22.06.1998, § 55, <http://www.awf.or.jp/pdf/h0056.pdf> [10.11.2018].

First, there must be an act or omission that causes severe pain or suffering, whether mental or physical,

Second, act is inflicted intentionally;

Third, and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind;

Fourth, and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity. [44]

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.[45] Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which such act was committed or entrapped or consented, etc.[46]

3.2. Case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovac* and *Zoran Vukovic*

This case known as *Foca Case*, is also known as the *rape case* in the case law of International Criminal Court where the Court established the facts of rape, as the crime against humanity and it was the first verdict of guilty for the Tribunal where the Court, applying norms of national legislation of various countries, decided on the rape as the type of sexual violence. The importance of the case is also underscored by the fact that the majority of the 23 persons convicted by the tribunal have been tried in this case. Although, in fact three accused (*Kunarac, Kovac, Vukovic*) were detained in this case, eight other Bosnian Serb policemen and service members were tried for similar offences in their absence.[47]

Dragoljub Kunarac[48], *Radomir Kovac* and *Zoran Vukovic* as public officials appeared before *ICTY* within the period of April 1992 to February 1993 for their role in committing crimes against Muslim peaceful residents of Bosnia by the soldiers of the military unit under their control.[4950]

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[44] However, later on, several years later, *ICTY*, in the case of Kunarac, established standard on definition of torture in international criminal law different from the current practice; in particular, it did not consider necessary participation of a public official or any other person having similar powers in the commission of the act to qualify the crime as torture. See det. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Kunarac TC)*, Trial Chamber (TC) II, Case № IT-96-23-T & IT-96-23/1-T, ICTY Judgement, 22.02.2001, § 496-497.

[45] See *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, Case № IT-96-21-T, 16.11.1998, § 491, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

[46] See Ibid, § 495.

[47] See *Barkan J*., As Old as War Itself: Rape in Foca, Dissent Magazine Winter, 2002, <http://dissentmagazine.org/article/?article=633> [18.08 2018].

[48] Details concerning the case of Kunarac, see http://www.internationalcrimesdatabase.org/Case/97/Kunarac-et-al/> [24.09.2018].

[49] All three accused were members of a military unit, formerly know as the *"Dragan Nikolic unit",* which was part of a local tactic group and was deployed in the city of Foca in Bosnia and Herzegovina.

The Tribunal held that among other actions they held Muslim women and girls under detention during months who were raped on regular basis and they were not just following orders (if there were such orders), the evidence shows free will on their part.[51]

In the referred case both, Trial Chamber and Appellate Chamber explained definition of rape within the scope of Article 3 of Geneva Convention as the crime committed against honour and dignity and Article 5(c) of the Statute of Tribunal as the crime committed against humanity.[52]

Under the circumstances that the elements of rape were not considered neither in the norms of the Statute or international law, nor in the human rights instruments, the Trial Court reviewed the judgements delivered in *Furundzija case*[53] and *Prosecutor v. Jean-Paul Akayesu*[54] and finally held that it was impossible to establish the elements of crime only based on the norms of customary law and international criminal law or on the basis of analysing the general principles.

The Court held that it was impossible to word the precise definition of rape without applying the national criminal legislation of a number of countries worldwide where the rape as the elements of crime is defined in the most precise manner taking into consideration the specificity of principles of criminal law.

for this reason, it was necessary to review the principles of criminal law inherent to the basic legal systems worldwide and the Court reviewed norms on rape of national legislation of 27 countries[55] and at the initial stage grouped different factors envisaged for qualification of various actions of sexual nature as rape into three categories:

- ***First***, ssexual activity committed using violence or threat of violence against a victim or a third person;
- ***Second***, sexual activity accompanied by various such circumstances the presence of which places the victim in particularly vulnerable / unprotected position or negate her ability to make an informed consent[56] or refusal;
- ***Third***, sexual activity occurs without consent of the victim.[57]

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50 See, det. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Kunarac TC)*, Trial Chamber (TC) II, Case number IT-96-23-T & IT-96-23/1-T, ICTY Judgement, 22.02.2001, <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [25.08.2018].

51 See *Mertus J*., Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, American Society for International Law, 2001, <https://www.asil.org/insights/volume/6/issue/6/judgment-trial-chamber-ii-kunarac-kovac-and-vukovic-case> [07.09.2018].

52 See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), UN Security Council, (UNSC Res. 808), 25.05.1993, <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [24.09.2018].

53 See *Prosecutor v. Furundzija*, Case IT-95-17/1-T, Judgement, ICTY, 10.121998.

54 See det. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR–96-4-T, Trial Chamber I, 02.09.1998, § 597. ICTY also referred to this judgement in the case of *Prosecutor v. Zejnil Delali and Others*, Case IT-96-21-T, Judgement, 16112.1998, § 478-479.

55 The court mainly compared norms of criminal law of the UK, Canada, Belgium, India, South Africa and Australia. See ICTY, Prosecutor v. Dragoljub Kunarac and others, Trial Judgement, § 453-456.

56 Informed consent - is the necessary precondition to provide certain medical care in the medical sector, although in the given case, the term refers to conscious voluntary consent or refusal concerning penetration of sexual nature. Such case may be deemed as absence of the informed consent as: when the consenting person is a child, a person with severe mental disorder or otherwise incapable, when, at the moment of consent, he or she does not fully understand or realise what he or she is consenting to and what are the surrounded circumstances.

The indicated factors violate *sexual autonomy* of the victim and penalise the act of sexual nature. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.[58]

The Court also emphasised the importance to establish the fact of victim's consent as the additional element of rape and broadly reviewed the issue of absence of non-voluntary or non-consensual sexual intercourse on the basis of generalised analysis of national criminal legislation of various countries and explained more widely the importance of the fact of victim's will and consent being in vulnerable state.

The Court explained that in the disposition of rape, solely express reference to and further identification of penetration methods of sexual nature and forms of their commission i.e. force or threat of force against, as it took place in the judgements of the above mentioned cases, do not fully reflect the nature of this crime in international law. "Victim's consent" is the common element for almost all countries' jurisdictions, therefore it considered that definition of rape taking into account all the above mentioned elements, makes the definition of the elements of this crime more complete.[59]

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: (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, where such sexual penetration occurs without the consent of the victim.[60]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.[61]

Regardless the above mentioned position of the prosecution, Report of the Preparatory Commission for the International Criminal Court on the Elements of Crimes[62] justifies the part of conclusion of the Trial Chamber concerning the establishment of victim's consent as the fact of presence of the mandatory element of rape, the content of which fully complies with the provisions of Articles 6, 7 and 8 of the Rome Statute and in its essence, it is an auxiliary mean to identify certain elements of crimes envisaged in the Statute and properly qualify the act as a crime; where the rape is considered in the context of the

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57 See *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 442.

58 See ibid, § 457.

59 See ibid, § 438-440.

60 Comp. Elements of rape and sexual violence, Report of the Preparatory Commission for the International Criminal Court. Finalised draft text of the elements of crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 06/07/-2000, <https://www.auswaertiges-amt.de/blob/229242/7295447c97512a3ca7cfe5970d729239/dl-elementsofcrime-data.pdf> [24.11.2018].

61 See, *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 460, ob. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases of International Criminal Tribunals, Vol. VIII, The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 940.

62 See Report of the Preparatory Commission for the International Criminal Court. Finalised draft text of the elements of crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 06/07/2000, <https://www.auswaertiges-amt.de/blob-/229242/7295447c97512a3ca7cfe5970d729239/dl-elementsofcrime-data.pdf> [24.11.2018].

crimes committed against humanity and war crimes and the mandatory element of which is the declared so called "true consent" of the person in whose body the penetration of sexual nature occurs.[63]

The judgement delivered by the Appellate Chamber on the basis of the appeal of defence where appellants challenged the Trial Chamber's definition of rape. With negligible differences in diction, they propose instead definitions requiring, in addition to penetration, a showing of two additional elements: (a) force or threat of force and (b) the victim's "continuous" or "genuine" resistance,[64] in which one of the appellant Kovac contended that the latter requirement provides notice to the perpetrator that the sexual intercourse is unwelcome. He argued that "resistance had to be real throughout the duration of the sexual intercourse because otherwise it may be concluded that the alleged victim consented to the sexual intercourse.[65]

In contrast, the Respondent dismisses the Appellants' resistance requirement and largely accepts the Trial Chamber's definition. In so doing, however, the Respondent emphasises an important principle distilled from the Trial Chamber's survey of international law: "serious violations of sexual autonomy are to be penalised"[66] and that force, threats of force, or coercion nullifies true consent.[67]

The Appeals Chamber concurs with the Trial Chamber's definition of rape based on review of common law legal system and continental law legal system and noted that the Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.[68]

The Trial Chamber considered the definition of rape in the present case to be more progressive compared to the tribunal's earlier definition of a rape[69] and attempted to clarify the relevance and importance of establishing the facts of violence and victim's consent for correct interpretation of the definition of rape. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.

The Trial Chamber attempted to explain that there are factors [other than force] (e.g. (Violent or coercive circumstances, state) which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. A narrow focus on force or threat of force could permit perpetrators

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63 Ibid. Article 7 (1) (g)-1 Crime against humanity of rape, Article 7 (1) (g)-6 Crime against humanity of sexual violence, Article 8 (2) (b) (xxii)-1 War crime of rape, Article 8 (2) (b) (xxii)-6 War crime of sexual violence.

64 See *Kunarac* AC, §125 (Kunarac Appeal Brief, § 99; Vukovic Appeal Brief, § 169 ço Kovac Appeal Brief, § 105.), < http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.htm> [25.08.2018].

65 See *Kovac* Appeal Brief, § 107, об. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases Of International Criminal Tribunals, Vol. VIII: The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 939.

66 See Prosecution Consolidated Respondent's Brief, § 4.19, cited: *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 457.

67 See Prosecution Consolidated Respondent's Brief, § 4.19, see det. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases Of International Criminal Tribunals, Vol. VIII, The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 939; *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 126.

68 See *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 127-128.

69 See *Prosecutor v. Anto Furundzija*, Trial Judgement, ICTY, 10.12.1998, § 185, <http://www.icty.org/-x/cases/furundzija/tjug/en/> [29.11.18].

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.[70]

Given the coercive circumstances and state, in which each victim of the crime had to be, any consent by the victim to sexual intercourse with the appellants was nullified, and the court did not grant the complaint request concerning to the definition of rape.

4. Conclusion

The analysis of landmark cases of *ICTY* demonstrated that international humanitarian law declares the rape as punishable act, which is primarily aimed at preventing offence of sexual penetration. Furthermore, in a number of progressive judgements delivered by the Tribunal "gender neutral"[71] notion of sexual offences committed by coercion is suggested that is the confirmation of the fact that rape may be committed against both women and men using force or threat of force even if the victim did not make a voluntary consent or otherwise involuntarily participated in it.

All the above mentioned, along with the other benefits, at the national level enable the Common Courts, in the course of administering the justice, together with the case law of the European Court of Human Rights may apply case law of International Criminal Court (including *ad hoc* tribunals) in reasoning the judgements as they are adopted on the basis of the norms of humanitarian and international criminal law and fully comply with the universally recognised principles and norms of international law that is considered as the integral part of the Constitution of Georgia and current legislation.

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[70] See *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 129

[71] Comp. *Weiner P.*, The Evolving Jurisprudence of the Crime of Rape in International Criminal Law, Journal Boston College Law, Vol. 54, Iss. 3, 2013, 1209-1233, <https://lawdigitalcommons.bc.edu/bclr/vol54/iss3/-14/> [10.02.2019].

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