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Rape as a Crime Against Humanity and as a War Crime in the Context of the International Criminal Tribunal for the Former Yugoslavia

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ABSTRACT
The main goal of this article is to analyse the crime of rape in the context of law and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as the legal impact that the operation of this tribunal has had on the law and practice of the International Criminal Court (ICC) in this matter. Therefore, the first part of this paper is dedicated to the research of the definitions of the crime of rape given in the practice of the ICTY, namely the ones that stemmed from the Furundžija and Kunarac et al. cases before that tribunal. The author argues that such a situation, in which one criminal tribunal does not have the definition of a crime for which it has jurisdiction in advance but rather has to create it in its practice, is a serious violation of some of the most important principles of criminal law, most importantly the principle of legality. The second part of the article focuses on the definition of rape adopted in the law of the ICC, i.e. by its Elements of Crimes act and the influence that the definitions of rape created by the ICTY have had on it. The author opines that, although the creators of the ICC's definition of the crime of rape surely had in their minds the definitions created by the ICTY, the definition contained in the Elements of Crimes is nevertheless different from those previous definitions. Having that in mind, the author argues that the ICC should rarely refer to the ICTY practice regarding the crime of rape in its future jurisprudence, and that it could do so only when such practice is completely in line with the definition of rape contained in the Elements of Crimes.
KEYWORDS
Rape, International Criminal Tribunal for the Former Yugoslavia, International Criminal Court, crimes against humanity, war crimes, sexual violence.

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Violul ca crimă împotriva umanității și ca crimă de război în contextul Tribunalului Penal Internațional pentru fosta Iugoslavie

REZUMAT
Scopul principal al acestui articol este de a analiza infracțiunea de viol în contextul dreptului și al jurisprudenței Tribunalului Penal Internațional pentru fosta Iugoslavie (TPII), precum și impactul juridic pe care funcționarea acestui tribunal l-a avut asupra dreptului și practicii Curții Penale Internaționale (CPI) în această materie. Prin urmare, prima parte a lucrării este dedicată cercetării definițiilor infracțiunii de viol consacrate în practica TPII, respectiv cele rezultate din cauzele Furundžija și Kunarac et al. în fața acestui tribunal. Autorul susține că o asemenea situație, în care un tribunal penal nu dispune în prealabil de o definiție a infracțiunii asupra căreia are competență, ci este nevoit să o creeze prin propria practică, constituie o încălcare gravă a unora dintre cele mai importante principii ale dreptului penal, în special a principiului legalității. A doua parte a articolului se concentrează asupra definiției violului adoptate în dreptul Curții Penale Internaționale, respectiv cea prevăzută în actul intitulat Elementele infracțiunilor, precum și asupra influenței pe care definițiile violului elaborate de TPII au avut-o asupra acesteia. Autorul este de părere că, deși autorii definiției infracțiunii de viol din cadrul CPI au avut, fără îndoială, în vedere definițiile create de TPII, definiția cuprinsă în Elementele infracțiunilor este totuși diferită de definițiile anterioare. Având în vedere acest aspect, autorul susține că CPI ar trebui să facă rareori trimitere la practica TPII privind infracțiunea de viol în jurisprudența sa viitoare și că ar putea face acest lucru doar atunci când această practică este pe deplin conformă cu definiția violului prevăzută în Elementele infracțiunilor.
CUVINTE CHEIE
Viol, Tribunalul Penal Internațional pentru fosta Iugoslavie, Curtea Penală Internațională, crime împotriva umanității, crime de război, violență sexuală.

I. INTRODUCTION

Sexual violence, and consequently rape as its most serious form, has almost always accompanied every war and armed conflict in human history[2]—namely, "the widespread occurrence of sexual violence in armed conflicts and other macro-criminal contexts is undisputed".[3] In other words, "rape during wars has probably existed since the dawn of humanity".[4]

2 See: Miloš Babić (2011): *Međunarodno krivično pravo*, Pravni fakultet u Banjoj Luci, Banja Luka, p. 152.
3 Tanja Altunjan: The International Criminal Court and Sexual Violence: Between Aspirations and Reality, *German Law Journal*, 5/2021, pp. 878–893, p. 878. For a wide list of examples of wars and armed conflicts during which the commission of rape was documented, see: Christine Chinkin: Rape and Sexual Abuse of Women in International Law, *European Journal of International Law*, 3/1994, pp. 326–341, pp. 327–329; Kathleen M. Pratt, Laurel E. Fletcher: Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, *Berkeley Women's Law Journal*, 1994, pp. 77–102, p. 80; Malaika Rajandran: Sexual Violence and International Law, *Refugee Survey Quarterly*, 4/2004, pp. 58–73, pp. 59–61.
4 Anne-Marie Roucayrol: Du viol comme arme de guerre, *La Pensée*, 4/2020, pp. 80–92, p. 80.

However, until relatively recently, International Law has rarely dealt with rape committed in such and similar contexts.[5] As Haddad points out, "[w]hile the history of conflict rape is brutal and extensive, conflict rape has historically been an invisible crime largely absent from international and domestic criminal prosecution".[6] Rape was a "natural part of war".[7] This situation started to change gradually during the 20th

5 "The concept of rape as an international crime is relatively new." Mark Ellis: Breaking the Silence: Rape as an International Crime, *Case Western Reserve Journal of International Law*, 2/2007, pp. 225–247, p. 227. Even though there have been some sporadic cases of criminal trials for rape committed during war (e.g. the earliest documented criminal prosecution for acts of sexual violence before some sort of international court was the trial of Peter von Hagenbach in Breisach in 1474, even though the emphasis in this trial was that the war during which those rapes were committed was deemed illegal/unjust, and not on rape *per se*; see more in: Diane Lupig: Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court, *Journal of Gender, Social Policy & the Law*, 2/2009, pp. 431–496, p. 436; Miranda Das, Sukhdev Singh: Crimes of Sexual Violence within International Criminal Law: A Historical Outline, *Journal of Politics and Law*, 1/2021, pp. 1–11, p. 2), it has largely passed unnoticed through the most part of human history. Perhaps the most notable example of the complete absence of the prosecution for rape committed during the war is the trial of major German war criminals in Nuremberg in the aftermath of the Second World War (see more: Kelly Askin: Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, *Berkeley Journal of International Law*, 2/2003, pp. 288–349, p. 301; Mark Ellis: Breaking the Silence: Rape as an International Crime, *Case Western Reserve Journal of International Law*, 2/2007, pp. 225–247, pp. 227–228; Lupig (2009): pp. 439–442; Das, Singh (2021): p. 3). The situation was only slightly different before the International Military Tribunal for the Far East (IMTFE; Tokyo Tribunal), where rape was addressed in some cases, but not as a separate category of war crimes/crimes against humanity but subsumed under other crimes, e.g. as a war crime of "inhuman treatment" (see more: Jennifer Green, Rhonda Copelon, Patrick Cotter, Beth Stephens: Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, *Hastings Women's Law Journal*, 2/1994, pp. 171–241, p. 173, fn. 5; Peggy Kuo: Prosecuting Crimes of Sexual Violence in an International Tribunal, *Case Western Reserve Journal of International Law*, 3/2002, pp. 305–321, p. 307; Askin (2003): p. 302; Ellis (2007): p. 228; Lupig (2009): pp. 436–439; Das, Singh (2021): pp. 3–4; Никола Пауновић [Nikola Paunović] (2024): Кривичноправни и доказни аспекти злочина силовања у међународном кривичном праву[Krivičnopravni i dokazni aspekti zločina silovanja u međunarodnom krivičnom pravu, in Milan Škulić], in Милан Шкулић, Родољуб Етински, Ивана Миљуш, Алекса Шкундрић [Milan Škulić, Rodoljub Etinski, Ivana Miljuš, Aleksa Škundrić] (eds.): *Однос међународног кривичног и националног кривичног права* [*Odnos međunarodnog krivičnog i nacionalnog krivičnog prava*], Vol. I, Удружење за међународно кривично право, Универзитет у Београду – Правни факултет [Udruženje za međunarodno krivično pravo, Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 637–656, pp. 638–639).

6 Heidi Nicholas Haddad: Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals, *Human Rights Review*, 1/2011, pp. 109–132, p. 111.

7 The main reason why sexual violence, and most importantly rape, committed in times of war or armed conflict was rarely prosecuted is that it was simply deemed as a "natural part of war". However, some other reasons also contributed to this "under-prosecution", which are also common to sexual crimes in general, and not only when they are committed in contexts required for war crimes or crimes against humanity. Namely, "one of the specific issues

century, as a prohibition of rape in armed conflicts began to be included in various sources of International Law. Finally, with the creation and operation of the *ad hoc* International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), there came a revolution in this field.[8]

The goal of this article is to examine how the ICTY dealt with rape as a war crime and as a crime against humanity. More specifically, our focus shall be on the definition(s) of rape as a specific and individual form of war crimes and crimes against humanity. Also, we will research the relation between the definitions of rape used by the ICTY and the definition of said crime adopted for the International Criminal Court (ICC).

II. RAPE IN THE ICTY STATUTE

ICTY, the first form of international criminal judiciary since the post–Second World War international military tribunals, was formally established by the UN Security Council Resolution 827 of 25 May 1993.[9] One of the most publicly expressed reasons for the creation of this tribunal was the worldwide reaction to the alleged crimes of sexual violence, most notably rape, committed by various warring parties during the still ongoing armed conflicts in the former Socialist Federal Republic of Yugoslavia (SFRY), most notably in Bosnia and Herzegovina.[10]

related to sexual violence is that it remains an 'invisible' crime because feelings of guilt or shame, fear of retaliation or taboos may prevent victims from coming forward and talking about it", and "material barriers such as security risks, physical distance and transportation costs may also prevent victims from seeking help". Gloria Gaggioli: Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law, *International Review of the Red Cross*, 2014, pp. 503–538, p. 504.

8 "[T]he ad hoc Tribunals dedicated, in particular, great attention to one crime: the crime of rape". Alexandra Adams: The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape, *European Journal of International Law*, 3/2018, pp. 749–769, p. 750. Former ICTY Chief Prosecutor, Richard Goldstone, highlighted, "men had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war", and "the two UN Tribunals truly represent a distinct shift in mindset". Richard Goldstone: Prosecuting Rape as a War Crime, *Case Western Reserve Journal of International Law*, 3/2002, pp. 277–285, p. 279.

9 The UN Security Council claimed that, by establishing the ICTY, it acted under Chapter VII of the UN Charter, and that thus the creation of the ICTY as a subsidiary organ of the Security Council has the nature of the enforcement measure under said chapter, aimed at maintaining or restoring international peace and security. However, this method of creation of a body of international criminal justice, regardless of its *ad hoc* character *in concreto*, is often regarded as a very contentious one; see e.g. Babić (2011): pp. 184–186; Zoran Stojanović (2012): *Međunarodno krivično pravo*, Pravna knjiga, Beograd, pp. 119–121; Милан Шкулић [Milan Škulić] (2020): *Међународно кривично право* [*Međunarodno krivično pravo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 120–135.

10 See more: Goldstone (2002): pp. 278–279. Bedont and Martinez note, "the recent conflicts in the former Yugoslavia and Rwanda and the publicized mass rapes during those conflicts shocked the conscience of the world and spurred the creation of the two Ad Hoc Tribunals". Barbara

During the process of establishing the ICTY, "many women's groups turned to the task of ensuring that rape and related crimes against women would be recognised within the jurisdiction of the future Tribunal".[11] Nevertheless, the ICTY Statute explicitly mentioned rape in its normative part only once. Namely, it was included in the list of crimes against humanity that fall within the jurisdiction of the Tribunal.[12] On the other hand, rape is *expressis verbis* not stipulated as a war crime.[13] However, the ICTY Statute did not contain any definition of the crime of rape, even as a crime against humanity, but has barely stated that rape can constitute a crime against humanity, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[14]

This situation would not be so appalling if, in the International Law of the time, there had been a universally adopted definition of the crime of rape. But this was not the case. Namely, up to 1993, there was a substantial number of international legal documents that prohibited rape during armed conflicts.[15] However, none of them

Bedont, Katerine Hall Martinez: Ending Impunity for Gender Crimes under the International Criminal Law, *The Brown Journal of World Affairs*, 1/1999, pp. 65–85, p. 67. For example, Haddad points out that, in an 18-month period between April 1992 and September 1993, "139 media stories ran in major world publications with 'rape' in Bosnia in the headline of the story". Haddad (2011): p. 125. However, one should bear in mind that the "notion of rape and sexual violence in general, as a 'weapon of war', has been also widely used for propaganda actions, which often were not based on facts". Шкулић [Škulić] (2020): p. 265.

11 J. Green et al. (1994): p. 176.

12 See Art. 5 (1) (g) of the ICTY Statute.

13 See Articles 2 and 3 of the ICTY Statute.

14 Art. (1) of the ICTY Statute.

15 Rape was not mentioned in the Charters of IMTN and IMTFE, either as a war crime or as a crime against humanity. Even so, some authors claim, "[r]ape has always been considered a war crime, although it was not mentioned as such in either the Nuremberg Charter or the Geneva Conventions, which probably reflects the fact that it was not always prosecuted with great diligence." William A. Schabas (2001): *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, p. 43. Similarly: Marco Sassòli (2019): *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing Limited, Cheltenham, p. 555 (para. 10.160). For example, Meron reminds, "[r]ape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)." Theodor Meron: Rape as a Crime under International Humanitarian Law, *The American Journal of International Law*, 3/1993, pp. 424–428, p. 425. Nevertheless, it was for the first time explicitly stipulated as a crime against humanity in Article 2 (1) (c) of Law number 10 issued by the Allied Control Council for Germany in the aftermath of the Second World War. After that, there has been a series of international legal documents that have prohibited rape in the armed conflicts (e.g. Article 27 (2) of the Fourth Geneva Convention of 1949; Article 76 of the First Additional Protocol (1977) to the Geneva Conventions of 1949; Article 4 (2) (e) of the Second Additional Protocol (1977) to the Geneva Conventions of 1949). See more about the (declarative) prohibition of rape in wars and armed conflicts in the instruments of International Humanitarian Law: Askin (2003): pp. 290–300, pp. 303–305; Gaggioli (2014): pp. 511–513; Das, Singh (2021): p. 4; Пауновић [Paunović] (2024): pp. 638–639. However, neither the relevant provisions of the 1949 Geneva Conventions nor those of the 1977 Additional Protocols listed rape amongst their grave breaches provisions: Ilias Bantekas,

contained a definition of what, *in concreto*, the crime of rape under international law *is*. This could be acceptable from the point of view of the International Public Law in general, and, for instance, International Humanitarian Law as its integral part. However, such a situation is *per se* not acceptable in the context of International Criminal Law, which is part of International Law that contains rules that stipulate the conditions for individual criminal responsibility. In other words, how can we prosecute a person for the commission of a crime if we do not know what that crime is?[16] By what means could the prosecutor know what the elements of the crime are that he needs to include in the indictment and that he needs to prove during the trial? Also, how can the court know when the commission of the crime has been proved if it does not know what the elements are that have to be proven? And, finally, how can we speak of fair trial at all if the defence does not know the elements of the crime for which the accused is being accused?[17]

In lack of any definition in its Statute and general International Law,[18] the ICTY had to *create* its own definition(s) of the crime of rape.[19]

Susan Nash (2003): *International Criminal Law*, Cavendish Publishing Limited, London, Sydney, Portland, Oregon, p. 365. Sellers interestingly points out that the contemporary International Humanitarian Law, which has developed mainly out of European legal tradition, and which currently and openly prohibits rape during armed conflicts, "was preceded by humanitarian law precepts from the Middle East and Japan, dating from the seventh century, and from China, dating from the second century", and that "these precedents, now 'earlier modern' humanitarian law precepts, mainly military codes, regulated armed conflict and included prohibitions of sexual violence". Patricia Viseur Sellers: Sexual Violence and Peremptory Norms: The Legal Value of Rape, *Case Western Reserve Journal of International Law*, 3/2002, pp. 287–303, p. 290.

16 The former ICTY Chief Prosecutor, Richard Goldstone, has quite plainly admitted, "[s]ubstantively, one of the problems we faced in charging rape as a war crime was the absence of any definition of that crime" (Goldstone (2002): p. 283).

17 Having this in mind, we could not completely agree with the following statement. "Although in the past rape had been explicitly or implicitly prohibited under international humanitarian law, until the establishment of the ICTY it has never been defined in any of the instruments in which it was contained. Bantekas, Nash (2003): pp. 364–365. As we have seen, rape was only mentioned but not defined in the ICTY Statute. Maybe the cited authors were thinking of the definition(s) of rape given by the ICTY in its jurisprudence—however, as they have referred to international "instruments", it should be concluded that they were primarily aiming at the ICTY Statute, and not at the definitions of rape contained in the decisions of that tribunal.

18 The fact that there was no generally accepted definition of the crime of rape in the International Law at the time was upheld in the decisions of international criminal tribunals. For instance, the ICTR Trial Chamber stated in *Akayesu* that it "must define rape, as there is no commonly accepted definition of this term in international law". *The Prosecutor versus Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 596.

19 This situation was not a unique one for the crime of rape as a crime against humanity within the context of ICTY but more a general one regarding most of the criminal offences prescribed by the ICTY (as well as ICTR) Statute. For example, Croatian authors Degan and Pavišić point out, "the practice showed that the Statutes of the Tribunals are deficient" and that their judges have "awarded themselves the role of the legislators", concluding, "such legislative procedure, which is completely inappropriate for any criminal judicial body, bears a permanent risk to punish the accused for a conduct which was not, at the time of the commission, a crime under

III. DEFINITION(S) OF RAPE IN THE JURISPRUDENCE OF THE ICTY

However, the first international criminal judicial body to come up with a definition of the crime of rape in International Criminal Law was not the ICTY—it was the ICTR. In its seminal *Akayesu* case, the ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[20] This definition, which has been described as a "very broad and generic definition of rape",[21] has been accepted in some of the early cases before the ICTY.[22]

Nevertheless, ICTY has very soon chosen to create its own definition(s) of the crime, essentially departing from the one adopted by ICTR in Akayesu.[23] Firstly, in the *Furundžija* case, the ICTY Trial Chamber gave the following definition of the *actus reus* of rape:

> *(i) The sexual penetration, however slight:*
> *(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or*
> *(b) of the mouth of the victim by the penis of the perpetrator;*
> *(ii) by the coercion or force or threat of force against the victim or a third person.*[24]

It is interesting to see how the Trial Chamber in *Furundžija* came up with this definition.[25] Firstly, it stated, "[n]o definition of rape can be found in international law."[26] It further noted that neither "is resort to general principles of international criminal law

positive law". Vladimir Đuro Degan, Berislav Pavišić (2005): *Međunarodno kazneno pravo*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, pp. 54–55.

20 *Akayesu*, para. 598.

21 Gaggioli (2014): p. 507.

22 See e.g. *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, IT-96-21-T, Trial Judgment, 16 November 1998, paras. 478–479.

23 "Whereas the chamber initially referred to the Akayesu definition, it later ignored it when constructing its own definition". Philip Weiner: The Evolving Jurisprudence of the Crime of Rape in International Criminal Law, *Boston College Review*, 3/2013, pp. 1207–1237, p. 1211.

24 *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 185.

25 The ICTY Trial Chamber in *Furundžija* changed the law-finding method in relation to the one applied by the ICTR in *Akayesu*. Namely, in *Akayesu* (para. 597), ICTR came to its definition of rape through analogy with the way in which torture is addressed to in the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. However, the ICTY in *Furundžija* chose to apply Article 38 (1) (c) of the Statute of the International Court of Justice (ICJ), which prescribes "the general principles of law recognized by civilized nations" as one of the sources of International Law (see more on these principles in: Миленко Крећа [Milenko Kreća] (2019): *Међународно јавно право* [*Međunarodno javno pravo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 95–100). See more in Adams (2018): pp. 755–756.

26 *Furundžija*, para. 175.

or to general principles of international law of any avail",[27] and that in order "to arrive at an accurate definition of rape [...] it is necessary to look for principles of criminal law common to the major legal systems of the world",[28] which "may be derived, with all due caution, from national laws".[29] The Trial Chamber then proceeds with a brief comparative legal analysis of the definitions of rape in various national legal systems[30] and comes up with its own definition of the crime of rape.

The said definition makes a distinction between two major types of sexual penetration that could be relevant. Firstly, the penetration of the vagina or the anus of the victim—in this constellation, the perpetrator can be either a man (who is penetrating the victim by his own penis or by any other object), or a woman, in which case only the penetration of the victim by some other objects (and not by the penis of the perpetrator) is viable. Secondly, the penetration of the mouth of the victim—here the object of the penetration could only be the penis of the perpetrator and not some other objects; therefore, in this situation, a perpetrator can only be male.[31] However, in both major constellations of relevant penetration, a victim could be both female and male.

In order to constitute rape, the relevant penetration needs to be committed by coercion or force or threat of force, which can be directed against the victim or against some other person. In other words, coercion/use or threat of force is a constituent element of the crime of rape according to the *Furundžija* definition, and therefore it must be proven in court. This approach can still be regarded as a traditional one,[32] even though some elements of the definition (e.g. the fact that a victim could be either female or male) do not fall within the classical, i.e. traditional legal notion of rape.[33]

It is pointed out in legal theory that "although the Furundžija approach purports to be specifically oriented, in reality it does not seem to differ much from the conceptual position adopted in Akayesu".[34] However, it seems to be beyond any doubt that, from

27 *Furundžija,* para. 177.
28 *Furundžija,* para. 177.
29 *Furundžija,* para. 177.
30 *Furundžija,* paras. 180–184.
31 One of the main problems encountered by the ICTY Trial Chamber while defining the crime of rape in *Furundžija* was the one if forcible sexual oral penetration constitutes rape or some other, milder criminal offence (e.g. sexual assault), given the fact that national legislations were divided on the matter. Finally, it concluded in favour of including the said penetration within the scope of the definition of the crime of rape (see *Furundžija* paras. 182–184).
32 In that sense: Тијана Шурлан [Tijana Šurlan] (2011): *Злочин против човечности у међународном кривичном праву* [*Zločin protiv čovečnosti u međunarodnom krivičnom pravu*], Службени гласник [Službeni glasnik], Београд [Beograd], p. 324.
33 The "pure" traditional normative approach considers the crime of rape to be "coercive sexual penetration of a woman by a man". Милан Шкулић [Milan Škulić] (2019): *Кривична дела против полне слободе* [*Krivična dela protiv polne slobode*], Службени гласник [Službeni glasnik], Београд [Beograd], p. 28.
34 Bantekas, Nash (2003): p. 366. However, it is also noted that the *Furundžija* definition "followed more closely the traditional common law understanding of rape than did the ICTR's definition of rape in Akayesu". Weiner (2013): p. 1211.

the criminal law point of view, the *Furundžija* definition is the more advantageous one given the fact that it is much more precise.[35]

The definition given in *Furundžija* was substantially changed in the *Kunarac et al*. case, which is considered ICTY's "seminal case relating to the crime of rape".[36] According to the *Kunarac* definition, the crime of rape is:

> *[s]exual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be 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.*[37]

The first part of the *Kunarac* definition, regarding the forms of sexual penetration, is the same as the relevant part of the *Furundžija* definition. Nevertheless, the crucial difference between the two definitions is that the *Furundžija* definition contains *coercion/use or threat of force* as an element of rape, whereas the *Kunarac* definition does not—it instead prescribes the *lack of consent* to the sexual act on the part of the victim as an element.[38] Moreover, the Appeal Chamber in *Kunarac* explicitly stated, "[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape."[39] The attempt of the Appeal Chamber in *Kunarac* to show that the definition of rape newly created by the Trial Chamber in the same case does not substantively depart from the definition given in *Furundžija* is unconvincing[40]—as Weiner correctly underlines, "the elements of the *actus reus* identified in the two cases are clearly different".[41]

35 Other authors also undoubtedly deem the Furundžija definition as a "more precise" one. Gaggioli (2014): p. 507. In this regard, Paunović argues that the Akayesu definition is "unacceptable because it loses the difference between rape and other sexual acts which are illegal, but which do not constitute rape". Пауновић [Paunović] (2024): p. 641. Similarly, Goldstone, who indeed regards the Akayesu definition as the "crucial step forward", admits, "it goes too far to the extent that it does not require any act of penetration of or by a sexual organ to constitute rape". Goldstone (2002): p. 283.

36 Weiner (2013): p. 1212.

37 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 460.

38 In this sense, Dixon underlines, "[i]n Kunarac, the Trial Chamber also expanded the definition of rape adopted in Akayesu and Furundžija, to encompass all situations in which consent is not 'freely' and 'voluntarily' given." Rosalind Dixon: Rape as a Crime in International Humanitarian Law: Where to from Here?, *European Journal of International Law*, 3/2002, pp. 697–719, p. 700.

39 *Prosecutor v Dragoljub Kunarac, Radomir Kovač, Zoran Vuković*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 129.

40 The Appeal Chamber stated, "[h]owever, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent." *Kunarac et al.,* Appeal Judgment, para. 129.

41 Weiner (2013): p. 1214.

What was the reason for this change? Firstly, the Trial Chamber in *Kunarac* argued that the *Furundžija* definition is "in one respect more narrowly stated than is required by international law",[42] namely, "[i]n 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."[43] Then the Kunarac Trial Chamber further stated that the basic underlying principle common to the national legal systems examined by the Trial Chamber in *Furundžija* is that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim",[44] and that the "full range of provisions referred to in that judgment suggests that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy".[45] In other words, "[t]he basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised."[46]

In fact, the differences in the approaches applied in *Furundžija* and *Kunarac* highlight two main comparative approaches in defining the crime of rape in general. The first one puts an emphasis on coercion/use or threat of force, whilst the other emphasises the lack of consent on the part of the victim.[47] These differences are not just theoretical, but they have practical repercussions as well. Namely, if coercion/use or threat of force is an element of rape, then the existence of it must be proven, i.e. it is not enough for the existence of the crime of rape that the victim claims not to have consented to the relevant sexual penetration, but it is necessary to prove that coercion/force or threat of force have been used towards her/him to materialize the said penetration. On the contrary, if the lack of consent is stipulated as an element of the crime, then it is enough to prove that sexual penetration occurred contrary to the will of the victim—it is not necessary to prove that force had been applied, nor that threats of use of force have been made.

The main problem with the "lack of consent" approach, which was implemented in the *Kunarac* definition, is that, in a practical sense, it makes the definition of rape too extensive. In other words, how is the ICC prosecutor, or any other prosecutor who operates in the system which adopts the lack of consent concept of rape, going to prove that there was no consent to the relevant sexual act on the victim's behalf? Of course, in situations in which some kind of coercion (force, threat of force, or other) was applied, this can be proven by e.g. injuries on the victim's body. However, when

42 *Kunarac et al.*, Trial Judgment, para. 438.
43 *Kunarac et al.*, Trial Judgment, para. 438.
44 *Kunarac et al.*, Trial Judgment, para. 440.
45 *Kunarac et al.*, Trial Judgment, para. 440.
46 *Kunarac et al.*, Trial Judgment, para. 457.
47 Some authors regard the first possible approach (rape is either committed through force or threat of force) as the "civil law" approach and the second one (rape is a relevant act of sexual nature committed without the consent of the victim) as the "common law" approach: Adams (2018): p. 750. Others avoid labelling those approaches as "civil law" or "common law" ones, rather referring to them as the "traditional" and "relatively new(er)" approaches: Милан Шкулић [Milan Škulić] (2019): pp. 28–32.

no force, nor threat nor any other form of coercion was applied, what will be the proof that will generate the conviction in the mind of the judges that the crime of rape has indeed been committed?[48] Here, the main proof most certainly is the testimony of the victim—but what if, as it is expected to happen in most of the cases, the accused simply denies any involvement in the alleged crime, or if he/she denies that the sexual act in question was conducted without the consent of the victim? As Stojanović correctly points out, it is "erroneous to equalise the participation in an unwanted sexual act with a coercive sexual act".[49] In any case, "it is necessary that from the conduct of the victim one could conclude that she/he does not consent to the sexual act".[50] If the relevant sexual act were being conducted only contrary to the will of the "victim", without any manifestation of an objection to such an act from the victim, then such a lack of consent would be very hard to prove.

Without entering into further argument about the advantages and disadvantages of the possible approaches in defining rape as a crime, we must, however, conclude that the ICTY, i.e. the same international criminal judicial body, has applied two essentially different definitions of the crime of rape in its jurisprudence, in relation to events that took place during the same period (Yugoslav wars) and in the same territory (Former SFRY). From a criminal law point of view, this situation is inherently dubious. The conclusions that have been put forward by some authors that "it seems that both definitions are the same, because 'coercion or force or threat of force' essentially mean 'the lack of consent'",[51] as well as the remarks of the ICTY itself that the solution given in *Kunarac* "does not differ substantially from the Furundžija definition"[52] are not convincing. As we have seen, these two definitions are substantively different, given the fact that they adopt distinctive approaches in the normative construction of the crime of rape, which, on the other hand, can have different practical impacts. Even though the *Kunarac* definition was generally universally accepted in the subsequent jurisprudence of the ICTY,[53]

48 In this context, Stojanović poses an interesting question: if in a certain case no coercion has been applied, but at the same time in the same case the consent of the victim to the sexual act does not exist, then what enabled the perpetrator to conduct the relevant sexual act? See: Zoran Stojanović: Silovanje bez prinude – usaglašavanje KZ Srbije sa članom 36 Istanbulske konvencije, *NBP – Nauka, bezbednost, policija*, 1/2016, pp. 1–23, p. 16.

49 Stojanović (2016): p. 9.

50 Stojanović (2016): p. 13.

51 Antonio Kaseze (2005): *Međunarodno krivično pravo*, Beogradski centar za ljudska prava, Beograd [Original: Antonio Cassese (2003): *International Criminal Law*, Oxford University Press, Oxford, translated by Obrad Račić in cooperation with Vidan Hadži Vidanović and Marko Milanović], p. 91 fn. 94.

52 *Kunarac et al.*, Trial Judgment, para. 459.

53 See: *Prosecutor v Milomir Stakić*, IT-97-24-T, Trial Judgment, 31 July 2003, paras. 755–756; *Prosecutor v Radoslav Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 1008; *Prosecutor v Miroslav Kvočka, Mlađo Radić, Zoran Žigić, Dragoljub Prcać*, IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 395; *Prosecutor v Dragan Zelenović*, IT-96-23/2-S, Trial Judgment, 4 April 2007, para. 36; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, IT-04-84-T, Trial Judgment, 3 April 2008; *Prosecutor v Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, IT-05-87-T, Trial Judgment, vol. 1, 26 February 2009, para. 203; *Prosecutor v Vlastimir Đorđević*, IT-05-87/1-T, Trial Judgment,

this does not alleviate the inconsistency that existed in its overall practice—until the creation of the *Kunarac* definition, the ICTY applied a different one, the *Furundžija* definition (and even in some cases the *Akayesu* definition) of rape.

Finally, as Weiner correctly points out, the *Kunarac* definition also added "a two-part *mens rea* requirement",[54] which requires "not only proof of a general intent to effect the sexual act but also proof that the accused knew the sexual act was taking place without the victim's consent".[55]

IV. DEFINITION OF RAPE IN THE LAW OF THE INTERNATIONAL CRIMINAL COURT

Although the "adoption of the ICC Statute was heavily influenced by the creation and practice of the ICTY and the ICTR",[56] the creators of the ICC applied a different method in relation to the one applied by those who created the ICTY and the ICTR. Namely, the very norms of the Rome Statute of the ICC contain provisions which stipulate the principle of legality (*nullum crimen, nulla poena sine lege*), and, most importantly for our topic, its *nullum crimen, nulla poena sine lege scripta and nullum crimen, nulla poena sine lege certa* elements. Conversely, the Rome Statute stipulates, "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[57] In this way, the Rome Statute "clearly accepts the *lex scripta* segment of the principle of legality, given the fact that the crimes within its jurisdiction are solely contained within the Rome Statute as a written source of international law",[58] and it also "implies the significance of the *lex certa* element of the principle of legality, having in mind that most of the crimes within the jurisdiction *ratione materiae* of the ICC are precisely described in the Rome Statute".[59]

In accordance with such an approach, the legal framework of the ICC contains precise definitions of the crimes that fall within its jurisdiction. Namely, rape is

23 February 2011, para. 1766; *Prosecutor v Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić*, IT-04-74-T, Trial Judgment, vol. 1, 29 May 2013, para. 69; *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Trial Judgement, vol. 1, 24 March 2016, para. 511.

54 Weiner (2013): p. 1213.

55 Weiner (2013): pp. 1213–1214.

56 Altunjan (2021): p. 879.

57 Art. 22 (1).

58 Алекса Шкундрић [Aleksa Škundrić] (2024): Начело законитости у међународном кривичном праву [Načelo zakonitosti u međunarodnom krivičnom pravu], in Милан Шкулић, Родољуб Етински, Ивана Миљуш, Алекса Шкундрић [Milan Škulić, Rodoljub Etinski, Ivana Miljuš, Aleksa Škundrić] (eds.): *Однос међународног кривичног и националног кривичног права* [*Odnos međunarodnog krivičnog i nacionalnog krivičnog prava*], Vol. I, Удружење за међународно кривично право, Универзитет у Београду – Правни факултет [Udruženje za međunarodno krivično pravo, Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 589–614, p. 607.

59 Милан Шкулић [Milan Škulić]: Начело законитости у кривичном праву [Načelo zakonitosti u krivičnom pravu], *Анали Правног факултета у Београду* [*Anali Pravnog fakulteta u Beogradu*], 1/2010, pp. 66–107, p. 95.

prescribed in the Rome Statute as one of the acts of sexual violence that can constitute crimes against humanity,[60] as well as war crimes, committed both within international[61] and non-international armed conflicts.[62] However, the exact definition of what rape *is* for the purposes of the ICC is not given in the Rome Statute but in the Elements of Crimes, an act that represents "some kind of addendum of the Statute".[63]

It is noted that, *inter alia*, in the field of crimes of sexual violence, the "jurisprudence of ICTY and ICTR had a significant impact on the Preparatory Commission of the ICC in the preparation of the Elements of crimes for the Rome Statute".[64] According to this act,[65] rape is

> *the invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body,*[66]

where such an 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.*[67]

60 Art. 7 (1) (g).
61 Art. 8 (2) (b) (xxii).
62 Art. 8 (2) (e) (vi).
63 Шкулић [Škulić] (2020): p. 73.
64 Adams (2018): p. 763. Some authors similarly underline, "[t]he definition of rape found in the Elements of Crimes is heavily influenced by the legal reasoning in cases regarding rape of the ICTY and the ICTR." Maria Sjöholm (2017): Article 7 (1) (g): Crimes against Humanity – Rape, in Mark Klamberg (ed.): *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, p. 50 fn. 52. This fact was also acknowledged during the time of drafting the Rome Statute. Namely, Zimmermann noted, "[t]aking into account the recent experiences of both the conflict in the former Yugoslavia as well as those of the conflict in Rwanda, it is not surprising that the current draft for the statute of the ICC now contains a provision which no longer considers rape and similar forms of sexual violence as constituting outrages upon personal dignity, but that it created a specific provision." Andreas Zimmermann: The Creation of the Permanent International Criminal Court, *Max Planck Yearbook of United Nations*, 1998, pp. 169–237, p. 194. Finally, besides the undoubtful influence of the *ad hoc* tribunals' law and practice on the creation of the legal framework of the ICC, great impact in the field of crimes of sexual violence, including rape, and their normative construction in the law of the ICC was made by the so-called *Women's Caucus for Gender Justice*; see more: Bedont and Martinez (1999): pp. 66–69.
65 It should be noted that the same elements constitute rape in all three situations in which it appears in the Rome Statute, aside from the different contextual elements that are required for crimes against humanity / war crimes.
66 Element 1 of Art. 7 (1) (g)-1, Element 1 of Article 8 (2) (b) (xxii)-1 and Element 1 of Article 8 (2) (e) (vi)-1.
67 Element 2 of Art. 7 (1) (g)-1, Element 2 of Article 8 (2) (b) (xxii)-1 and Element 2 of Article 8 (2) (e) (vi)-1. In its jurisprudence, the ICC has correctly underlined, "the second constituent element

It is generally true to say that the "ICC Statute contains the essential definition of rape that came out of the ICTR and ICTY cases and retains much of the language first used by these Tribunals".[68] Nevertheless, generally speaking, the ICC definition of rape is closer to the *Furundžija* definition than to the *Kunarac* one.[69] It prescribes force / threat of force / coercion as alternative elements of the crime, although it gives further elaboration on those circumstances, most notably the notion of coercion, than the *Furundžija* definition does. Namely, "[c]oercion may arise through fear of violence, duress, detention, psychological oppression or abuse of power. These situations are provided as examples, apparent through the use of the term 'such as'."[70] Besides the situations when the perpetrator himself used force, threat, or coercion, the crime of rape may also arise if the perpetrator "took advantage of a coercive environment".[71]

Generally speaking, lack of consent is not an element of the crime of rape in the law of the ICC.[72] However, the ICC definition also contains the alternative possibility for the crime of rape to arise even when there has been no force, nor threat of force nor coercion, namely if the victim was "incapable of giving genuine consent" to the relevant invasion, which reflects the fact that the *Kunarac* definition also had some influence on its creation.[73] Nevertheless, this equalisation of the situations of relevant sexual penetration committed through force / threat of force / coercion

enumerates the circumstances and conditions of invasion of the body of the victim which give it a criminal character". *The Prosecutor v Germain Katanga*, Trial Judgment, ICC-01/04-01/07, 7 March 2014, para. 964.

68 Ellis (2007): p. 240. Weiner similarly states, "[t]he ICC derived this definition from the Akayesu, Furundžija and Kunarac judgments" (Weiner (2013): p. 1217).

69 Adams points out, "[a]lready, the Preparatory Commission to the International Criminal Court (ICC) has opted for the 'civil law' approach (coercion) in devising its elements of crime (EOC) but added one aspect of the 'common law' approach (incapacity to give genuine consent) to the element of coercion" (Adams (2018): p. 750).

70 Sjöholm (2017): p. 50. According to the ICC's practice, "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". *The Prosecutor v Dominic Ongwen*, Trial Judgment, ICC-02 / 04-01 / 15, 4 February 2021, para. 2710

71 Namely, "coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population". *The Prosecutor v Ongwen*, Trial Judgment para. 2710; *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Judgment, ICC-01 / 12-01 / 18, 26 June 2024, para. 1198.

72 This was affirmed in the jurisprudence of the ICC, according to which "[i]t is not necessary to prove the victim's lack of consent, and there is no requirement of resistance on the part of the victim." *The Prosecutor v Ongwen*, Trial Judgment, para. 2709. 1 in: *The Prosecutor v Al Hassan*, para. 1197. In the *Bemba* case, the Trial chamber noted, "[t]he preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice." *The Prosecutor v Jean-Pierre Bemba Gombo*, Trial Judgment, ICC-01 / 05-01 / 08, 21 March 2016, para. 105.

73 According to the Elements of Crimes (see footnotes 16, 51, and 64 of Elements of Crimes), "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."

with the penetration committed when the victim was incapable of giving genuine consent, i.e. when there was no force, nor threat of force nor coercion, is sometimes criticised in legal theory. In this regard, Adams argues, "the combination of coercion with one aspect of the lack-of-consent doctrine protects two different legal wrongs in one offence (violent rape and sexual abuse), which reflect different degrees of guilt in the perpetrator's mind",[74] and "[i]f one summarizes different criminal acts under the same offence with the same penalties, one would violate the prohibition of equal treatment of unequal facts."[75] Although from the dogmatic point of few these arguments are somewhat convincing, it seems that this is not too important an issue given the fact that, even in some national criminal legal systems that recognise two distinctive criminal offences in similar situations, there is no difference in the prescribed penalties.[76]

It is also worth noting that the *actus reus* of the crime of rape in the ICC definition is somewhat broader than in the *Furundžija* and *Kunarac* definitions, which, as we have seen, share the same ac*tus reus*. Firstly, according to the ICC definition, rape will also exist when the male victim is penetrating the body of a female perpetrator by his penis—it is now correct to state that the Elements of Crimes define the crime of rape in a completely "gender-neutral way".[77] On the contrary, in ICTY definitions, a woman could be a perpetrator of this crime only if she has penetrated the victim's vagina or anus (in this second situation, the victim could also be male) by some other object, but not also in the situation if she, e.g. coerced the male victim to penetrate her vagina with his penis. In general, this normative development in the law of ICC should be welcomed given the fact that it is indeed possible, however unlikely, that such cases of so-called "reversed rape" also appear in its practice. Namely, it is "biologically possible that a woman might force a man to penetrate her body, which calls for a recognition in the definition of the crime".[78]

Secondly, the penetration of *any part of the body*, either of a victim or of a perpetrator, by the sexual organ,[79] conversely, belonging to either the perpetrator or the victim,

74 Adams (2018): p. 750. The cited author further elaborates this idea elsewhere: Adams (2018): p. 766.

75 Adams (2018): p. 766.

76 For example, Criminal Code of the Republic of Serbia (*Sl. glasnik RS,* br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024) contains two distinctive criminal offences – rape (Art. 178) and "sexual intercourse with a helpless person" (Art. 179), for which it prescribes the same penalties.

77 Шкулић [Škulić] (2020): p. 266. The ICC has affirmed this in its jurisprudence, stating that "invasion", in the Court's legal framework, "includes same-sex penetration, and encompasses both male and/or female perpetrators and victims". *The Prosecutor v Bemba*, Trial Judgment, para. 100; *The Prosecutor v Bosco Ntaganda*, Trial Judgment, ICC-01/04-02/06, 8 July 2019, para. 933.

78 Adams (2018): p. 764. The cited author then correctly recognizes that "[s]ince women are now being admitted into the military and are also appearing in high-level political positions, it is to be expected that women will take on the role of the perpetrator in the future and will not only be the victims of rape" (Adams (2018): p. 764).

79 Although the Elements of Crimes here also use a gender-neutral language, speaking of "sexual organ", and not of "penis", it is understood that only a male sexual organ, i.e. a penis,

is sufficient to constitute rape according to the ICC definition. It is understood that in the vast majority of cases, the object of such sexual penetration would be the *vagina*, *anus*, or the *mouth* of the victim, or, much more rarely, of the perpetrator. However, the ICC definition allows for determining the existence of rape even in situations in which the penis of the perpetrator or, in some cases, the penis of the victim, penetrated any other part of the body of the victim or, in some cases, of the perpetrator. These other parts of the body could be, for example, the ears, nose, or eyes of the victim.[80] On the contrary, according to the *Furundžija* and *Kunarac* definitions, the relevant object of penetration could only have been the vagina, anus, and the mouth of the victim.

Thirdly, the ICC definition stipulates that the relevant penetration of the anal or genital opening of the victim could be done with any object or any part of the body of the perpetrator. In this segment, the ICC definition is also broader than the *Kunarac* (and *Furundžija*) definition. Namely, according to *Kunarac*, the relevant sexual penetration of the vagina or anus of the victim could be done *only* by the penis of the perpetrator or by any other object used by the perpetrator, but not by some other parts of the body of the perpetrator (e.g. hand, foot, etc.). The inclusion of the penetration of the vagina or anus of the victim by other parts of the perpetrator's body could be regarded as a positive progressive development regarding the ICC definition of rape, having in mind that such acts can humiliate the victim in the same serious manner as the other recognised sexual penetrations.[81]

Nevertheless, even a broad definition such as the ICC one can be subjected to certain critiques given the fact that, echoing the old Roman law maxim *omnis definitio in iure periculosa est*, no legal definition can be completely perfect. For example, the situation when a female perpetrator coerces a male or a female victim to perform oral sex on her (the perpetrator's) vagina or anus could sometimes not be subsumed under the ICC definition because, in some variants of such oral sex, no penetration might occur. This is so because, following the conception adopted by the creators of the Elements of Crimes, "[t]he key element that separates rape from other acts is penetration."[82] However, in our opinion, there is no essential difference in the level of attack on the victim's sexual autonomy, which is considered to be the main "object of protection" when it comes to sexual crimes,[83] if the victim (male or female) is coerced to perform oral sex on the male or on the female perpetrator, even if in this second situation penetration does not occur but only the stimulation of the female sexual organ, e.g. clitoris, "from the outside" of the woman's body.[84] Therefore, we can argue that the Elements of Crimes provision regarding the crime of rape could be revised to also cover the explained situations.

Regarding the mental elements (*mens rea*) of the crime of rape in the law of the ICC, in the absence of specifically stipulated elements, the general provisions of Article 30

can physically conduct a penetration.

80 Sjöholm (2017): p. 50.

81 Adams (2018): p. 764.

82 Sjöholm (2017): p. 49.

83 See more: Шкулић [Škulić] (2019): p. 257; Наташа Делић [Nataša Delić] (2021): *Кривично право: посебни део* [*Krivično pravo: posebni deo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], p. 95.

84 In this sense, see also: Adams (2018): p. 764.

of the Rome Statute, requiring intent and knowledge on the part of the perpetrator, apply.[85] Given so, besides the mental requirements oriented towards the contextual elements of the crimes against humanity or war crimes under which the crime of rape is being subsumed *in concreto*, the perpetrator "must also have intended to penetrate the victim's body and be aware that the penetration was by force or threat of force".[86] According to the ICC jurisprudence, "[i]ntent will be established where it is proven that the perpetrator meant to engage in the conduct in order for the penetration to take place.",[87] while in relation to the requirement of "knowledge", "it must be proven that the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent".[88] In determining whether the mental element is fulfilled in the given case, the ICC has examined the "nature of acts" performed by the perpetrator, as well as the "sustained character of the acts over a long period of time".[89] In one particular case, the ICC adjudicated the existence of the mental element upon the circumstances that the "attackers themselves, physically and psychologically, committed acts of violence against the victim and humiliated her" and that, "in addition, they could not have been unaware of her verbal objections".[90]

V. RAPE IN THE PRACTICE OF THE INTERNATIONAL CRIMINAL COURT

Having in mind that the ICC started its operation in 2002, its practice regarding the crime of rape has not been too extensive. The first trial before this court, which, *inter alia*, dealt with the charges of rape, was in the *Katanga* case in 2014, in which the accused was declared not guilty of rape, both as a crime against humanity and as a war crime.[91] The first trial judgment in which the accused was condemned for rape, both as a crime against humanity and as a war crime by the ICC, albeit under the provision of command responsibility, was issued in 2016 in the *Bemba* case.[92] However, by the decision of the Appeals Chamber in 2018, the accused in the *Bemba* case was acquitted of all charges, including the ones for rape.[93] The first case in which the Appeals Chamber upheld the conviction by the Trial Chamber for rape,[94] both as a crime against humanity and as a war crime, was the *Ntaganda* case.[95] This was followed by the Trial Chamber

85 See in this sense: *The Prosecutor v Bemba*, Trial Judgment, para. 110.
86 Sjöholm (2017): p. 50.
87 *The Prosecutor v Bemba*, Trial Judgment, para. 111.
88 *The Prosecutor v Bemba*, Trial Judgment, para. 112.
89 *The Prosecutor v Ongwen*, Trial Judgment, para. 3042.
90 *The Prosecutor v Katanga*, para. 996.
91 See *The Prosecutor v Katanga*, XII. Disposition.
92 *The Prosecutor v Bemba*, Trial Judgment, para. 752.
93 See *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Appeal Judgment, 8 June 2018.
94 See *The Prosecutor v Ntaganda*, Trial Judgment, VII. Disposition.
95 See *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeal Judgment, 30 March 2021.

conviction in the *Ongwen* case,[96] which was upheld by the Appeals Chamber.[97] The newest decision of the ICC in relation to rape was rendered in 2024, when the accused in *Al Hassan* was declared innocent by the Trial Chamber on the charges of rape, both as a crime against humanity and as a war crime.[98]

In its up-to-date jurisprudence regarding the crime of rape, the ICC did not refer too much to the existing practice of the ICTY, although it did do so in several places. For instance, in the mentioned *Bemba* case, the ICC Trial Chamber explicitly referred to the practice of the ICTY as a support to the fact that "[o]ral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration."[99] Also, in its more recent judgment in the *Ongwen* case, the ICC cited some of the ICTY decisions.[100] However, these references to the ICTY practice, which could be regarded as sporadic, were mainly aimed at reinforcing legal reasoning, which already unequivocally stems from the law applied by the ICC, in this case, most importantly, from the Elements of Crimes. We consider this level of influence of the ICTY practice on the contemporary (and future) jurisprudence of the ICC to be an appropriate one. Namely, the *ad hoc* international criminal tribunals in general, and with them the ICTY, have operated in "completely different normative frameworks"[101] in relation to the ICC. The ICC has its codified law, which predominantly fulfils the conditions set by the *nullum crimen, nulla poena sine lege* principle. This could not be said for the law applied by the ICTY. Therefore, in our opinion, the ICC should use the ICTY jurisprudence regarding the crime of rape, as well as in all other situations, only when such practice is in line with the normative solutions contained in the Rome Statute and attached acts, in this case, most importantly, the Elements of Crimes.

VI. CONCLUSIONS

During the past three decades, sexual crimes, and among them most importantly the crime of rape, finally started to be prosecuted by the international criminal judicial bodies. Such a development *in abstracto* deserves to be appreciated. Nevertheless, the way in which these prosecutions took place was not always perfect.

96 *The Prosecutor v Ongwen*, Trial Judgment, para. 3116.
97 *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15 A2, Appeal Judgment, 15 December 2022.
98 See *The Prosecutor v Al Hassan*, para. 1785.
99 *The Prosecutor v Bemba*, Trial Judgment, para. 101. It seems that, for example in the *Bemba* case, the ICC paid much more attention to the ICTR practice, e.g. when it was, in its own words, guided in determination of the notion of "coercive circumstances" contained by the Elements of Crimes by the *Akayesu* Trial Judgment's discussion of "coercive circumstances"; see: *The Prosecutor v Bemba*, Trial Judgment, para. 103.
100 E.g. when underlying the fact that there is no need to prove the resistance on the behalf on the victim, the ICC Trial chamber referred, *inter alia*, to the *Kunarac et al.* appeal judgment; see *The Prosecutor v Ongwen*, Trial Judgment, para. 2709, fn. 7147.
101 Шкулић [Škulić] (2020): p. 142.

Firstly, speaking of the ICTY, it is generally a positive step forward that this *ad hoc* international criminal tribunal has dedicated much of its attention towards the prosecution of the crime of rape as one of the most heinous of all crimes. However, speaking in legal terms, the method used by the ICTY in addressing this matter could be subjected to criticism. Firstly, this *ad hoc* international criminal tribunal did not have even the minimum of a normative framework regarding the crimes for which it nominally had jurisdiction, in our case, regarding the crime of rape. Its Statute did not contain the slightest clue as to what the definition and what the elements of the crime of rape were, for a commission of which it had the authority to condemn. And in the absence of these elements, the ICTY, i.e. the court itself, had to create its own definition of the crime of rape, which it was then going to apply retroactively. Such a situation could be considered a blasphemous one by any criminal lawyer, practitioner, or theoretician.

Secondly, even in the creation of its own definition of rape, the ICTY did not maintain a completely consistent approach. On the contrary, it created two definitions, stemming from the *Furundžija* and the *Kunarac et al*. cases. These definitions were opposed to each other because they adopted two completely different normative approaches to legally defining the crime of rape—the first one focused on the use of force/threat/coercion, while the second one adopted the lack-of-consent approach. Although these definitions surely had a significant impact on the further development of the International Criminal Law and, most importantly, on the definition and the elements of the crime of rape in the context of law of the ICC, it remains to be said that it is legally dubious that the same tribunal, regarding the same crime, committed during the same time and on the same territory, applied completely different definitions of the said crime.

Finally, we can conclude that the situation regarding the crime of rape in the context of the ICC is, legally speaking, a far better one than the one we had in the case of the ICTY. Namely, the Rome Statute and the Elements of Crimes contain precise provisions regarding rape, both as a crime against humanity and as a war crime. Having that in mind, we can argue that the ICC in its future legal practice regarding this crime, which is indeed still in its juvenile phase, should not pay much attention to the jurisprudence of the ICTY, and that it could only do so in situations when the decisions of the ICTY to which the ICC wishes to refer to are completely in accordance with the legal reasoning which arises from the legal sources applicable before the ICC.