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A COMPARATIVE STUDY OF WARTIME RAPES: THE EXPERIENCE OF BOSNIA AND HERZEGOVINA AND UKRAINE

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ABSTRACT

Despite that they are tacitly accepted by many as an inevitable part of armed conflict, most of the international community condemns wartime rape and aims to prevent it. Although its preventive mechanisms were already developed nationally and internationally, wartime rape was perpetrated in the war in Bosnia and Herzegovina (1992–1995), and is perpetrated in the war in

Ukraine. This comparative study identifies patterns of wartime rapes in these two wars, as well as the analysis of the positive criminal codes of these two countries and the legal practice attendant thereto, in order to establish how they were regulated and what the criminal politics towards them is. Particularities of the experience with trialling wartime rapes in Bosnia and Herzegovina will be presented. These are presented as lessons Ukraine can benefit from, to fight against them, prevent them, and achieve justice most efficiently.

KEYWORDS

Wartime Rapes, Conflict-Related Sexual Violence, Criminal Law, War Crimes, Bosnia and Herzegovina, Ukraine.

INTRODUCTION

The Independent International Commission of Inquiry on Human Rights, in their report from September 25, 2023 documented allegations of rapes committed in the Kherson Region by Russian soldiers¹. The rapes and other forms of sexual violence had been perpetrated toward victims "...from age of 19 to 83, under threats or commission of other violations"², while frequently their family members were kept close by to hear the violations take place. Thirty years ago, similar reports made by various human rights committees documented the same pattern of wartime rapes and sexual violence in Bosnia and Herzegovina, during the war 1992–1995³. Victims, from a very young age (7) to old age (80), women, men, and children were not spared wartime rape, which used to be committed repeatedly, with the use of force, in front of family members, in their own homes or raping camps⁴. Similar patterns existed thousands of years ago within various different conflicts. Bilgio and Vogelstein note that "sexual violence has been tacitly accepted as an unavoidable part of the armed conflict"⁵, and that "they are being perpetrated against women, man, girls, or boys by an unformed member of an army, members of non-statute armed group, terrorist or civilians"⁶. Regardless of the fact that the law evolved and that we are living in the twenty-first century, patterns of humans' tendency towards evil, to hurt others, together with different and more cruel patterns of human victimization continues to exist, regardless to the intent of the international community to condemn wartime rapes through various international legal acts and legal mechanisms. These legal acts prohibit wartime rapes and threats with punishment of their perpetrators, yet wartime rapes are still part of the armed conflict⁷.

¹ In: <https://news.un.org/en/story/2023/09/1141417>, (15 October, 2023).

² Ibid.

³ "The war in Bosnia and Herzegovina (BiH) lasted from the spring of 1992 until the end of 1995, and consisted of two main conflicts. The initial fight was between Bosnian Serb forces (including the Army of Republika Srpska or VRS) and the combined Bosnian Muslim-Croat ones. However, from the autumn of 1992 until the spring of 1994, a conflict between Bosnian Muslim forces (including the Army of the Republic of BiH or BiH Army) and Bosnian Croat forces (including the Croatian Defence Council or HVO) also took place, while both continued to fight the Bosnian Serb forces as well." See: International Residual Mechanism of Criminal Tribunals, <https://www.irmct.org/specials/war-bosnia/>. „It was an armed aggression against the Republic of Bosnia and Herzegovina." The Bosnian American Genocide Institute and Education Center // <https://www.baginist.org/>

⁴ Saliha Đuderija, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015).

⁵ Jammie Bilgio and Rachel Vogelstein, *Understanding Sexual Violence in Conflict* (Council of Foreign Relations, 2017), 3.

⁶ Ibid., 3.

⁷ *Referring not only of the armed conflicts from the past, but the ongoing conflicts – more than 26 in the world* // <https://www.cfr.org/global-conflict-tracker>

The intent to prevent wartime rapes has existed far back into history, even in the time of "Richard II and Henry V whose *Army Laws* prescribed the death penalty for rape"⁸. In the 19th century and after the world wars, the interest to prevent these offences has increased. *Lieber Code* (1863) and the *Declaration of France, England and Russia* which condemned crimes against humanity were just a few examples of the intent of that aim⁹. In addition, the *Hague Convention* (1907) with the provision "Family honor and rights, lives and private propriety and religion must be respected" indirectly prescribes the impermissibility of wartime rapes, as they directly conflict with the value of family honor, which was stipulated above¹⁰. After World War II, which brought the biggest number of civil victims in the history of war, the process of condemnation of wartime rape and its incrimination became more wide-spread and more common. However, in each of these legal and legislative motions, the deep conviction remains that the law keeps coming too late, as wartime rapes are followed by those motions, and the existing ones were not efficiently preventing them.

The aim of this paper is not only to define and establish the definition, legal nature, and motives for the perpetration of wartime rapes, which are the subject of the first part of the paper, but also to present two case studies of wartime rapes: of Bosnia and Herzegovina, and Ukraine, respectively. This includes the ones from a past armed conflict and the second from the ongoing armed conflict. The wartime rape cases have been partially brought before the ICTY and national courts in Bosnia and Herzegovina, and many of those cases remained still unsolved or are even not reported. However, the way substantive law prescribes them as acts of criminal offenses, and the practical challenges and positive solutions from Bosnia and Herzegovina, will be presented, as they may serve as lessons to the upcoming criminal proceedings in Ukraine. The Ukrainian criminalization of conflict-related sexual violence within positive criminal law, with particular practical cases, will be presented as well. Together with historical, descriptive legal methods, comparative methods will also be used.

1. DEFINING WARTIME RAPES

"The widespread use of rape and other forms of sexual violence in armed conflicts around the world is one of the greatest, most persistent, and most neglected injustices"¹¹. Any kind of rape¹² perpetrated within or out of armed conflict is one of the heaviest violations of individuals' values and human rights, leaving immense physical and psychological consequences to its victims¹³. It directly or indirectly injures the

⁸ Ena Kazić, "International Challenges in Regulation of Sex Delicts": 823; in: *New Trends And Challenges In Today's Europe* (New Trends And Challenges In Today's Europe, Sarajevo: International University of Sarajevo, 2016); Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 107–108.

⁹ *Ibid.*, 823.

¹⁰ See more: *ibid.*, 824.

¹¹ *A Declaration of Commitment to End Sexual Violence in Conflict* (2013), UN, 3.

¹² Apart from the time of perpetration, they differ in their legal nature, and motives of perpetration.

¹³ L. A. Tenaw, M. W. Aragie, A. D. Ayele, T. Kokeb, N. B., "Medical and psychological consequences of rape among survivors during armed conflicts in northeast Ethiopia," *PLoS One* 17(12) (12 December 2022): e0278859. doi: 10.1371/journal.pone.0278859. PMID: 36508404; PMCID: PMC9744300. They vary from "Bruising, Bleeding (vaginal or anal), Difficulty walking, Soreness, Broken or dislocated bones, sexually transmitted infections and diseases, Pregnancy" to "Post-traumatic stress disorder (PTSD), including flashbacks, nightmares, severe anxiety, and uncontrollable thoughts; Depression, including prolonged sadness, feelings of hopelessness, unexplained crying, weight loss or gain, loss of energy or interest in activities previously enjoyed; Suicidal thoughts or attempts." <https://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape>

dignity...” of victims¹⁴. The society recognized its pathology and through its criminal codes, by criminalizing their acts and prescribing sanctions for their perpetrators condemned it and through its legal mechanisms fought against it. Although the permanency of the fight against rape committed out of armed conflict is recognizable, just as Kazić¹⁵ correctly notices when it comes to wartime rape, “the regulation was uneven in its volume and intensity”. It was uneven in volume because the subject of interest, until WWII, was mostly wartime rape, and not other types of conflict-related sexual violence¹⁶. It was uneven in its intensity since the interest of society to regulate it was lower until the end of World War II. With that war, which gave millions of civil victims whose victimization included rape as well, it became evident that “armed combat and modern warfare have changed, and nowadays civilians are the ones who are targeted”¹⁷. Subsequently to its termination, a number of both national and international legal sources aimed to define it and efficiently prevent it from happening again¹⁸. In the *Declaration of Commitment to End Sexual Violence in Conflict*, it is written that “preventing and responding to sexual violence is vital to resolving conflicts, enabling development, and building sustainable peace”¹⁹.

Since criminal law is predominantly national, what constitutes an act of rape and what sanction will be prescribed differs from one country to another. “Illegal rape is commonly defined to revolve around force and unwantedness in sexual intercourse. Many jurisdiction’s statutes, interpretations, or applications tend to emphasize either compulsion or lack of agreement. Some weigh one to the relative exclusion of the other; some permit one or the other alternately or simultaneously. Many require proof of both”²⁰. Similarly, some legislations state that wartime rape “is sexual intercourse without consent”, while some state “that within that intercourse objects may be inserted or bodily orifices are to be used”²¹. Yet, wartime rapes is an issue of international importance, so determining how it is being defined is a matter of great importance in order to recognize it and to fight against it.

The Charter of International Military Tribunal (hereinafter Nuremberg Statute), indirectly refers to wartime rapes, as it sets the jurisdiction of the Nuremberg Tribunal for crimes against peace, war crimes, and crimes against humanity. With the wide provision that these crimes include acts presented *exempli causa*, and they are not limited to them, indirectly it can be said it was referring to the wartime rapes²². A similar

¹⁴ Ibrahim Kuran, “Gender-Based Violence in Bosnia from Conflict to The Post-Conflict Setting,” *Avrasya Uluslararası Araştırmalar Dergisi* 11, No. 35 (20 June 2023): 1064–1077 // <https://doi.org/10.33692/avrasyad.1232961>, 107.

¹⁵ Ena Kazić, “International Challenges in Regulation of Sex Delicts”: 822; In: *New Trends And Challenges In Today’s Europe* (New Trends And Challenges In Today’s Europe, Sarajevo: International University of Sarajevo, 2016).

¹⁶ World Health Organization in the World Report on Violence and Health defined sex offences as “any sexual activity or intent of sexual activity that is unwanted or is an act of trafficking, that is committed against humans sexuality, by using sexual intercourse, the activity that could have been done by anyone, no matter what is the nature of its relations with the victim, and it can be committed anywhere including home and workplace”. See: www.who.org.

¹⁷ Stephanie N Sackellares, “From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict,” *Wisconsin Womens Law Journal* 20 (2005): 138.

¹⁸ *Ibid.*, 823.

¹⁹ *Declaration of Commitment to End Sexual Violence in Conflict*, from 25 September, 2013, UN, 3.

²⁰ Catharine A. MacKinnon, “Defining Rape Internationally: A Comment on Akayesu,” *Columbia Journal of Transnational Law* 44, No. 3 (2006): 940–941.

²¹ Ivana Živković, “Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju,” *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 117.

²² *Charter of International Military Tribunal*, art. 6 // https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

approach existed in the *Charter of the International Military Tribunal for the Far East*²³ (hereinafter Tokyo Tribunal), whose article 5 prescribes the jurisdiction over the same three criminal offences, described it in a wide manner.

The *Fourth Geneva Convention* from 1949 and its additional Protocols categorized rape as an attack on women's honor, stipulating provision of article 27 which says "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault"²⁴. The Statute of the *ad hoc* International Criminal Tribunal for Rwanda (ICTR)²⁵, prescribes rape to be an act of Crimes against Humanity, for which it has the jurisdiction. Article 3 states:

"the International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds... (g) rape"²⁶.

The Statute of the first permanent International Criminal Court²⁷, with article 7 (g) prescribes it as an act of Crimes against Humanity, and with article 8 2b (xxii), as an act of War Crimes. It is obvious that all of the above-mentioned documents basically set rape as a criminal offence, but do not define what the act itself is. The practice of the ICTR, the International Criminal Tribunal for former Yugoslavia (hereinafter ICTY²⁸) and ICC offer a valuable contribution in the establishment of the definition of wartime rapes.

To illustrate that, case Akayesu²⁹, which was trialled before the ICTR, offers a wide definition of all the elements of wartime rapes. In the Verdict, the Chamber found that "rape is a bodily invasion of sexual nature, committed on a person under circumstances which are coercive"³⁰. The Chamber continues in paragraph 597 of the Verdict that "rape is a form of aggression and that the central elements of rape cannot be captured in a mechanical description of objects and body parts". The Chamber put emphasis on the meaning of coercion, and apart from physical coercion introduced coercive circumstances which may not be physical force, but instead, threat, extortion, or even duration of the state of armed conflict or military presence. According to that, the ele-

²³ Section II, article 5 of the Tokyo Statute // https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

²⁴ Madeline Brashear, "'Don't Worry. These Girls Have Been Raped Once.' Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia," *Voces Nove* 8 (2018): 51.

²⁵ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. It has been established with the UN Resolution 955/94.

²⁶ Art. 3 (g) of the Statute.

²⁷ Document No. A/CONF.183/9 of 17 July 1998. According to article 1, "It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions". See: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

²⁸ The legacy of this ad hoc tribunal will be presented in the part of the article referring to Bosnia and Herzegovina.

²⁹ Case Prosecutor v. Jean Paul Akayesu, ICTR-96-4-A. Verdict was given in 2001. Jean-Paul Akayesu was the chief official in the municipality Taba in Rwanda. He was charged with Genocide, Crimes against Humanity, and for violation of the Article 3 of the Geneva Convention). He was subsequently charged for rape as well after one of the witnesses stated that three members of the paramilitary Hutu group Interahamwe had raped her six-year-old daughter. The Prosecutor counted rape as "other inhumane acts" and as an act of Crimes against Humanity. Eventually, he was found guilty of 15 counts of the indictment. More in: Ivana Živković, "Silovanje kao međunarodni zločin: razvoj definicije silovanja u praksi ad hoc tribunala za Ruandu i bivšu Jugoslaviju," *Pravnik: Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 107–153.

³⁰ Catharine A. MacKinnon, "Defining Rape Internationally: A Comment on Akayesu," *Columbia Journal of Transnational Law* 44, No. 3 (2006): 943.

ments of the definition of wartime rape are: "bodily invasion of sexual nature", sexual neutrality, and coercive circumstances³¹. Having bodily invasion of a sexual nature as an element of the body of the crime, a wide set of acts are included, such as oral sex and fellatio towards males, which was not the case before, although it used to happen in the practice.

Case Bemba, which was trialled before the ICC in 2016, left its legacy since it established the unisexuality of the perpetrator and the victim in the perpetration of wartime rape³². Similarly, the case of Nyiramasuhuko et al., within paragraphs 174-176 of the Verdict, from 2011, sets the rule that the judicial decision can be based on one single testimony of the witness. There is no requirement for the verdict to be based on more than one testimony.

1.1. Legal Nature of Wartime Rapes

Case *Akayesu* not only had an impact in creating the definition of rape, but also it set rape to be an act of genocide. MacKinnon summarized the verdict in that case and noted that the Chamber found rape to be "causing serious bodily or mental harm" when committed as part of an intentional campaign to destroy a people as such on an ethnic basis and that rapes under the *Akayesu* factual circumstances were acts of genocide "in the same way as any other act, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such".³³

From the previously presented examples, apart from the potential of being an act of genocide, when committed with genocide intent, wartime rapes can be also an act of Crimes against Humanity, and War Crimes. According to Đuderija, it can be also an act of torture, when there is deliberate suffering towards a person in detention or under the control of the accused³⁴. That brings us to the conclusion that the legal nature of wartime rapes is quite diverse.

Wartime rapes are commonly known to serve as a method of ethnic cleansing. According to Bassiouni and Manikas, "ethnic cleansing is a policy of rendering an area ethnically homogenous by using force or intimidation to remove the targeted person or a given group for the area", adding that "as a crime it is essentially a form of unlawful population transfer by force, causing terror, inspiring violence to inhibit any potential return to those expelled"³⁵. Wartime rape as its method may be used on a few levels. First, mass wartime rape causes fear of further life in a certain territory. Therefore, victims decide to move from their homes or territory and usually decide to never go back. The territory becomes free from a group. However, what was particularly visible during the war in Bosnia and Herzegovina was that wartime victims are usually women of a particular ethnicity, who very often remain pregnant due to rape by perpetrators. For example, among Bosniak communities in Bosnia and Herzegovina, the ethnicity of the child is treated to be the ethnicity of the father. Thus, children of rape are of the ethnicity of the perpetrator, and in the long term, those criminal offences leave a trace

³¹ Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 120.

³² *Ibid.*, 125.

³³ Catharine A. MacKinnon, "Defining Rape Internationally: A Comment on *Akayesu*," *Columbia Journal of Transnational Law* 44, No. 3 (2006): 944.

³⁴ Saliha Đuderij, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015), 52.

³⁵ Karen Engle, "Feminisms and Its Discontent: Criminalizing a Wartime Rape," *The American Journal of International Law* (2005): 790.

to the lack of numerosity of the members of the ethnic community of the victim³⁶. And in addition to that, forced impregnations that are the result of rapes are the mean of prevention of births. While being pregnant with the perpetrator, victims are disabled of being pregnant with their partners and thus the increase³⁷ of number of members of their ethnic group is impossible. In the same time, in the long term, raped women from traditional communities, become isolated from their families and spouses (who reject them), which also leaves an effect on procreation. Brashear in her research mentions the statement from a case of one Bosnian Serb who declared "that they wanted to plant seeds of Serbs in Bosnians"³⁸, which illustrates this understanding. In one year in Bosnia and Herzegovina, the UN Commission established that there were 119 cases of rape result pregnancies. Together with destroying the life of the victim, it destroys families, communities, and even entire culture. Sackellares correctly perceives wartime rapes as a symbol of cultural destruction and occupation of a country.

Next, wartime rapes are used as a weapon of the war. It affects the psyche of the man who participates in the combat. The torture of female members of the community in front of the males of that community sends the message that they failed in their role of the protector³⁹. That understanding of a failure to protect affects their capability to fight, so there is a high potential to be deceived in warfare.

Wartime rapes have specific *modi operandi*, that are usually in line with the motive of its perpetration. Very often wartime rapes are being committed in front of the family members of the victim or in a manner in which they can hear the victimization. This act diminishes human dignity and leaves a negative impact on the future life of the victim and on the family life in general⁴⁰. Just as an example, in the case *Mucić et al.* brothers in the camp were forced to fellatio one to another⁴¹. That kind of victimization remains for life and it is hard to overcome.

Gottschall in his research states that wartime rapes do not indicate isolated examples of rapes, but that they refer to mass rapes with distinct patterns of rape⁴². There are examples in history that are perpetrated in a *mass manner*, either towards the mass of victims or mass times towards the same victim. Both cases are evident in rape camps and in concentration camps. Skjelsbaek exemplifies it with the case of witness Danira, who was raped 100 times by Bosnian Serbs. Different men raped her, in different places. Eventually, she begged her perpetrator to kill her, to save her from further suffering⁴³. Evidently, they were perpetrated to humiliate and destroy the identity of the victim⁴⁴. The mass number of victims was evident in Rwanda, where in only three months of 1994, about 100 000-250 000 were raped⁴⁵.

³⁶ See similar: *ibid.*, 791.

³⁷ *Ibid.*, 794.

³⁸ Madeline Brashear, "'Don't Worry. These Girls Have Been Raped Once.' Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia," *Voces Nove* 8 (2018): 6.

³⁹ Saliha Đuderija, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015), 13.

⁴⁰ In the case Veselin Vlahović, one of his victims was raped in her own home, in the room next to the one where her father-in-law was present. The victim was already six months pregnant. See more: *Veselin Vlahović verdict* // www.sudbih.gov.ba

⁴¹ In: <https://www.icty.org/bcs/case/mucic>

⁴² Jonathan Gottschall, "Explaining Wartime Rape," *The Journal of Sex Research* 41, No. 2 (1 May 1 2004): 129 // <https://doi.org/10.1080/00224490409552221>

⁴³ Inger Skjelsbæk, "Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina," *Feminism & Psychology* 16, No. 4 (November 2006): 375 // <https://doi.org/10.1177/0959353506068746>

⁴⁴ *Ibid.*, 375.

⁴⁵ Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 112.

1.2. Motives for the Perpetration of Wartime Rapes

If the previous discourse about the legal nature of wartime rapes would be generalized, it is very easy to realize the potential motives of the perpetration of wartime rapes. Their legal nature explains the motives. Gottschall goes even more general and offers four types of theories explaining the motives for wartime rapes. Strategic Rape Theory is understood to be the most influential theory that simplifies rape to the accomplishment of military goals⁴⁶. Related to the previous discourse, wartime rape is the mechanism of ethnic cleansing, an act to destroy the psyche of the enemy to conquer them. Cultural Pathology Theory refers to rape as a mechanism of destruction of cultural identity and culture overall, while Sociocultural Theories find that rape is all about power and sadistic violence and not sex. According to the theory, military rape is often the result of a complex combination of causal factors⁴⁷. Biosocial Theories follow the biological etiology and find that "the soldiers' decision to rape is under genetic control. Some men possess sexual aggression that is restrained under normal conditions"⁴⁸. Alison represents the Feminist theory of wartime rape and sees the motive in the masculine desire to maintain a system of social control over all women, and that men continue what they do, but in a more mindless way⁴⁹. This theory is often criticized, because facts show that men are also victims of wartime rapes.

2. WAR RAPES IN BOSNIA AND HERZEGOVINA

War rapes had been committed during the 1992-1995 war in Bosnia and Herzegovina⁵⁰. During that war, which was one of the most devastating and long-lasting aggressions on one country in modern history, more than 104,737 people were killed, among which 42,106 were civilians⁵¹. The remains of many of them are still not found, as they are missing in undiscovered mass graves⁵². The war resulted in ethnic cleansing, as the territory that had been populated by Bosnians until 1992, by the end of the war, has been populated with non-Bosnian population as the majority⁵³. So, although now, more than three decades from its commencement, we can theoretically state figures about the number of killed, injured, and displaced people, the certainty fails when it comes to the estimation of war rapes. In the *UN Security Resolution 820* from April 17, 1993, it has been recognized that "rape in Bosnia and Herzegovina has been used massively, organized and systematically"⁵⁴. In his Report on the situation of human rights in the territory of the former Yugoslavia, Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, in the Second Chapter, part D, reported about rapes that had been perpetrated in Bosnia and Herzegovina, and stated there was "an alarming num-

⁴⁶ Jonathan Gottschall, "Explaining Wartime Rape," *The Journal of Sex Research* 41, No. 2 (1 May 2004): 130 // <https://doi.org/10.1080/00224490409552221>

⁴⁷ Ibid., 131-133.

⁴⁸ Ibid., 133.

⁴⁹ Miranda Alison, "Wartime Sexual Violence: Women's Human Rights and Questions of Masculinity," *Review of International Studies* 33, No. 1 (January 2007): 79 // <https://doi.org/10.1017/S0260210507007310>.

⁵⁰ The war ended with the Dayton Peace Agreement which was initialed in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995 (A/50/790-S/1995/999).

⁵¹ Saliha Đuderija, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015), 59.

⁵² Although the victims belonged to all ethnic communities of Bosnia and Herzegovina, it is indisputable that the majority of them are Bosnians. Đuderija estimates figures as 68101 Serbs, 8858 Croats, 22 779 Bosnians, 4995 others. See: *ibid.*

⁵³ Ibid., 53.

⁵⁴ Inger Skjelsbæk, "Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina," *Feminism & Psychology* 16, No. 4 (November 2006): 374 // <https://doi.org/10.1177/0959353506068746>

ber of allegations of the widespread occurrence of rape...”, and “that rape was being used as an instrument of ethnic cleansing”⁵⁵. In addition, he presented the findings of the medical expert committee that was sent to Bosnia and Herzegovina to investigate rapes in 1993, and they stated:

Rape of women, including minors, has occurred on a large scale. While the team of experts has found victims among all ethnic groups involved in the conflict, the majority of rapes that they [the team of experts] have documented had been committed by Serb forces against Muslim women from Bosnia and Herzegovina. The team of experts is not aware of any attempts by those in positions of power, either military or political, to stop the rapes. There is clear evidence that Croat, Muslim and Serb women have been detained for extended periods of time and repeatedly raped. In Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing.⁵⁶

In addition, it is said in the Report that “rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in front of a whole village, designed to terrorize the population and force ethnic groups to flee”⁵⁷. Girls and women were systematically raped in schools, camps, hotels, cultural and sport centers.

Just after the initiation of the peace, the UN Commission for Human Rights in its Resolution 1996/71 shared deep concern “by the information contained in the reports of the Secretary-General on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, particularly in the Republic of Bosnia and Herzegovina”⁵⁸. It is estimated in the resolution of the newer date, Resolution 1670/2009, in the paragraph 6, “that upward of 20,000 Bosniacs, Croat and Serb women were raped, often gang raped, and sometimes sexually enslaved and forcibly impregnated in so-called “rape camps”⁵⁹ by armies and paramilitary groups”⁶⁰. The Organization for Security and Co-operation in Europe estimates total number of rapes in 12,000-70,000 individuals.⁶¹

There are various reasons for the fact that war rapes remain in the “dark figure of crime”.⁶² Regardless if committed within or outside of armed conflict, rape carries the problem of remaining unreported, so similar reasons explain the lack of reporting of war rapes. Victims are usually ashamed to report it (particularly in traditional communities). They are afraid to report it for fear of being labeled “non-pure” and stigmatized, or not

⁵⁵ Par. 82.

⁵⁶ Tadeusz Mazowiecki, *Report on the situation of human rights in the territory of the former Yugoslavia*, (1993): 19.

⁵⁷ *Ibid.*, 19.

⁵⁸ UN Commission on Human Rights, *Situation of human rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, (23 April 1996), E/CN.4/RES/1996/71 (accessed 19 October 2023) // <https://www.refworld.org/docid/3b00f25638.html>

⁵⁹ Vilina Vlas, former hotel in Višegrad was one of the rape camps, where more than 200 women were raped “in order to be inseminated by the Serb seed”. <https://www.aljazeera.com/opinions/2020/10/17/visegrads-rape-camps-denial-and-erasure>

⁶⁰ *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 29 May 2009 as a report of the Committee on Equal Opportunities for Women and Men, rapporteur: Mrs Smet. <https://pace.coe.int/en/files/17741/html>

⁶¹ *Borba Protiv Nekažnjivosti Za Seksualno Nasilje u Oružanom Sukobu u Bosni i Hercegovini: Postignuti Napredak i Izazovi Analiza Krivičnih Postupaka Pred Sudom Bosne i Hercegovine u Periodu Od 2005. Do 2013. Godine* (OSCE, 2014), 13.

⁶² “Dark figure of crime” is defined as „the unknown mass of unreported and unrecorded offences, which in turn exposed the limitations of using official statistics to measure crime.” // <https://www.oxfordreference.com/display/10.1093/acref/9780199683581.001.0001/acref-9780199683581-e-2530>

supported by their loved ones. The chaotic war situation disrupts the process of reporting and the fight for justice. Very correctly Živković mentions the fact that many of the victims are displaced from their homes or become refugees in other countries, so the process of reporting is left behind, as their past life⁶³. Finally, pure fear from retaliation⁶⁴ and fear for their own safety and the safety of their loved ones is also one common reason for the lack of reports of war rapes⁶⁵.

2.1. Response of the International Community to the Atrocities in Bosnia and Herzegovina

In the early stage of the war in Bosnia and Herzegovina, on 25 May 1993, the Security Council of the United Nations passed Resolution 827⁶⁶, with which 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 (hereinafter ICTY) has been formally established. According to Article 2 of the ICTY Statute, its jurisdiction is "to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions". The acts are counted as

(a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostage.

In addition to this general provision, the ICTY has had the jurisdiction to prosecute violations of the laws or customs of war, genocide, and crimes against humanity⁶⁷. When it comes to rape, its jurisdiction to trial wartime rapes has been specifically prescribed with article 5, as one of the acts of the Crimes against humanity. Out of 161 prosecuted person in total, the ICTY put 78 people on trial for sexual violence (among other counts of indictment), from which 36 were found guilty.⁶⁸

2.1.1. The Legacy of the Icty for Prosecution of War Rapes Perpetrated in Bosnia and Herzegovina

Apart from the fact that the establishment of the ICTY by the international community to try the war crimes committed at the territory of former Yugoslavia sent a message

⁶³ Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 112.

⁶⁴ Ibrahim Kuran, "Gender-Based Violence in Bosnia from Conflict to The Post-Conflict Setting," *Avrasya Uluslararası Araştırmalar Dergisi* 11, No. 35 (20 June 2023): 1067 // <https://doi.org/10.33692/avrasyad.1232961>

⁶⁵ „Women Victims of War” is an NGO from Bosnia and Herzegovina which gathers women victims of rape and other war crimes. Through their active engagement in is establishing the truth, they gathered about 4350 statements of women about the rapes and from that number 1570 victims received the recognition as a „civilian victim of war”. See Saliha Đuderija, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015), 17.

⁶⁶ www.icty.org.

⁶⁷ Art. 3–5 of the ICTY Statute.

⁶⁸ Saliha Đuderija, *Monografija o ratnom silovanju i seksualnom zlostavljanju u ratu u Bosni i Hercegovini* (Udruženje Žene žrtve rata, 2015), 65; Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 113.

of its intolerance to these crimes and condemnation for their perpetration and perpetrators and that it brought to justice a number of war criminals, the ICTY's practice also left an important legacy in trying the war crimes and in defining rape as such. Just like the statutes of the Nuremberg and Tokyo tribunals, its statute does not define wartime rape. It was through its occurrence that the definition of wartime rape was shaped. In that process, such as in the cases of Furundžija⁶⁹ and Kunarac, among others, there was a high impact in determining the *actus reus* of wartime rape⁷⁰. For instance, in the case Furundžija, the council stated that when there is no definition of the crime in international law, national law should be followed, taking in the particularities of the international criminal procedure⁷¹. The council established in paragraph 185 of the Verdict that rape is "sexual penetration, no matter how slight into a) the victim's vagina or anus with the offender's penis or any other object which the perpetrator used; or b) the victim's mouth with the offender's penis; with the use of coercion or force or under the threat of force against the victim or a third party". Although this definition particularized and widened the understanding of what is the act of rape, Živković⁷² correctly criticized this definition as it basically excludes women as perpetrators⁷³.

Very similar to that definition, but slightly wider, is the definition given by the Council in the case of Kunarac⁷⁴. In that case there are additions made to the definition from the case of Furundžija that the penetration was not consensual. Within paragraph 442 of the Verdict, there are three potential conditions that may represent rape. Those are "behavior in which force or threat are included; behavior that lacks with the consent of victim; and behavior that includes special circumstances which made victim particularly vulnerable or disabled them to reject the attack".

In addition to the substantive impact on the adjudication of wartime rapes, there is a procedural impact of the ICTY in dealing with wartime rapes. The Rules of Procedure and Evidence prescribed Rule 96, named Evidence in Cases of Sexual Assault, set grounds for gathering evidence and deciding in the cases of sexual assault that had been applied in the cases. The Rule excluded the need for corroboration of the victim's

⁶⁹ Case Verdict IT-95-17/1, tried before the ICTY. Anto Furundžija was a commander of the "Jokers", a unit of the Croatian Defence Council (HVO). He was charged for one count of grave breaches of the Geneva Conventions and two counts of violations of the laws or customs of war. He was also charged for torture, outrages upon personal dignity, including rape, and found guilty and punished with imprisonment of 10 years. While Furundžija was interrogating a Muslim woman, a subordinate soldier threatened her by rubbing his knife on her inner thighs and saying that he would cut out her private parts", while in another room, another woman and her friend were interrogated and beaten on their feet with a baton by a Croatian soldier. "The woman was then repeatedly raped by a group of soldiers. The Croatian soldier was forced to watch the sexual attacks against his friend. Anto Furundžija did nothing to stop or curtail these actions in his presence, and the continued interrogation substantially contributed to the criminal acts committed upon the woman and her friend". See more: https://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf

⁷⁰ First case of trial for rapes in war crimes in Bosnia and Herzegovina was the case Tadić. See more: Edward M. Zitnik, "Honors Research Distinction in the Undergraduate Colleges of The Ohio State University," n. d., 21.

⁷¹ Ivana Živković, "Silovanje Kao Međunarodni Zločin: Razvoj Definicije Silovanja U Praksi Ad Hoc Tribunala Za Ruandu I Bivšu Jugoslaviju," *Pravnik : Časopis Za Pravna i Društvena Pitanja* 54, No. 106 (2020): 126.

⁷² *Ibid.*, 128.

⁷³ In the war in Bosnia and Herzegovina, women were also perpetrators of war crimes. However, the research conducted by Kazić and Aidoo, confirmed that they do not show the process of the perpetration of war crimes. One of the examples where sexual violence related acts was perpetrated by women, is case Terzić S1 1 K 005665 11 KrI. See: Ena Kazić and Mariama Aidoo, *Women as perpetrators of war crimes: a case of Bosnia and Herzegovina* (Iliria, 2021), 144.

⁷⁴ Verdict Kunarac et al. IT-96-23 & 23/1. Dragoljub Kunarac was a Leader of a reconnaissance unit of the Bosnian Serb Army (VRS) which formed part of the local Foča Tactical Group and was convicted of 28 years of imprisonment for Torture and rape (crimes against humanity and violations of the laws or customs of war). Namely, "Kunarac raped three victims at his headquarters at Osmana Đikića Street no. 16 in Foča. He aided and abetted the gang rape of four victims by several of his soldiers. He and two other soldiers raped and threatened to kill a witness and also threatened to kill her son". See more: https://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf

testimony⁷⁵. It also excluded the consent to be used as a piece of evidence, if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear⁷⁶. This regulation is of immense importance for procedures, as it is grounded in the fact that consent given on a fearful occasion cannot be understood as proof of consent. Finally, in paragraph (4) this rule also excludes the relevance of the prior sexual life of the victim as evidence.

2.1.2. Prosecution for the Wartime Rapes by the National Courts in Bosnia and Herzegovina

Later, with the rule *11bis* of the ICTY, the jurisdiction to trial in the crimes from the above-mentioned jurisdiction of the Court could have been transferred "to the authorities of a State in whose territory the crime was committed; or in which the accused was arrested; or having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State"⁷⁷. With this provision, courts in Bosnia and Herzegovina were encouraged to extensively trial for war crimes (in a wider sense). From 2004–2016, overall there were 418 cases before the courts in Bosnia and Herzegovina, against 614 individuals, out of which number 116 cases were referring to the wartime rapes⁷⁸. According to the OSCE data from 2016, in total 53% of these cases have been tried by the State Court of Bosnia and Herzegovina, 22% by the courts in the Federation of Bosnia and Herzegovina, 19% by courts in the entity Republika Srpska, and 6% courts in Brčko District BH⁷⁹.

2.1.3. Insights in the Positive National Criminal Law Related to Wartime Sexual Violence

Due to the specific constitutional state organization of Bosnia and Herzegovina, stipulated by Annex IV of the Dayton Peace Agreement, the jurisdiction to legally regulate the field of criminal law is set for the state, entities Federation of Bosnia and Herzegovina and Republika Srpska, and Brčko District BH. Therefore, there are four applicable positive criminal codes in Bosnia and Herzegovina, followed by the four procedural and four executive code. Among all of them, it is the Criminal Code of Bosnia and Herzegovina⁸⁰ that criminalizes wartime rapes⁸¹ and prescribes rape as an act of both Crimes against humanity and War Crimes against Civilians.

Related to Crimes against Humanity, according to article 172:

Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts (g) Coercing another to sexual intercourse or an equivalent sexual

⁷⁵ Rule 96 (1) of the Rules of the Procedure and Evidence.

⁷⁶ Rule 96 (2) of the Rules of the Procedure and Evidence.

⁷⁷ Rule 11bis of the Procedure and Evidence before the ICTY. This rule was adopted on 12 November 1997, and revised 30 September 2002.

⁷⁸ See: *Borba Protiv Nekažnjivosti Za Seksualno Nasilje u Oružanom Sukobu u Bosni i Hercegovini: Postignuti Napredak i Izazovi Analiza Krivičnih Postupaka Pred Sudom Bosne i Hercegovine u Periodu Od 2005. Do 2013. Godine* (OSCE, 2014), 8.

⁷⁹ *Ibid.*, p. 9.

⁸⁰ Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina No. 3/2003, 32/2003 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/21, 31/23, 47/23), hereinafter CCBH.

⁸¹ Observing the topic of this paper, the author analyses only the provisions related to the wartime rape. Rape as a separate criminal offence that can be committed out of armed conflict, is regulated by the entity criminal codes and the district one and it is not going to be subject of our analysis.

act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.

Although the perpetrator can be any person, regardless to their gender, position, age, and the acts are alternatively prescribed in sense that the criminal offence would exist if either of the acts would be perpetrated, "this criminal offence has three essential elements of body of crime: the time (within the widespread or systematic attack), the passive subject (civilians) and *mens rea* (intent – as perpetrator knows that attack is happening). For this criminal offence, the strictest sanctions in the criminal law system of sanctions are alternatively prescribed: imprisonment not less than ten years or long-term imprisonment".⁸² With that sanction, Bosnian and Herzegovinian legislators aimed to stress the negativity of this criminal offence and to emphasize special and general prevention.

Wartime rape is an act of War Crimes against Civilians, which article 173 (1) e) explains as "coercing another to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution..." to be acts of War Crimes against Civilians, when they are perpetrated or ordered, in violation of rules of international law in time of war, armed conflict or occupation. The perpetrator can be any person, regardless of their position in the military structure, including civilians, regardless to their age, ethnicity, or gender. The essential elements of the body of this crime are their perpetration in violation of rules of international law, and the time of perpetration: war, armed conflict or occupation. Regarding *mens rea*, the perpetrators' act is punishable in intent, and that intent is in two levels: voluntarist and intellectual elements of intent referring to the War Crimes against Civilians criminal offence. In addition, both of these elements refer to the act that is treated to be an act of War Crimes against Civilians (rape). The prescribed sanction is in the same alternation and special minimum and maximum, as for Crimes against Humanity.

When it comes to the procedural criminal law of Bosnia and Herzegovina, apart from the applicable general rules of the criminal procedure applicable for all criminal offences, all procedural criminal codes prescribe important special provision that refers to dealing with sexual violence-related criminal offences, which is very similar to the one from the ICTY Rules of the Procedure and Evidence. According to article 264 (1), it is not permissible to question victims' sexual experience prior the criminal offence. In addition to that, "any evidence offered to show, or tend to show the injured party's involvement in any previous sexual experience, behavior, or sexual orientation, shall not be admissible"⁸³. Following the provision of the ICTY Rules of the Procedure and Evidence, in the same article of the Criminal Procedure Code of BH, there is a provision stating that the consent of the victim may not be used in favor of the defense. Finally, hearing in camera before admitting evidence is obligatory in these cases and all the documents from it has to be sealed in special envelope.

2.2. Lessons to be Learned from Bosnia And Herzegovina

The fact that national law prescribed rape as an act of Crimes against Humanity and War Crimes against Civilians, and that national courts have jurisdiction to run trials of

⁸² Which may be lasting maximum 45 years.

⁸³ Article 264 (1) of the Criminal Procedure Code of Bosnia and Herzegovina, art. 279 (1) of the Criminal Procedure Code of Federation of Bosnia and Herzegovina, art. 264 (1) of the Criminal Procedure Code of Brčko District BH.

them, have resulted in a number of trials, that are good grounds for scholastic evaluation and whose positive sides or challenges may serve as an example of the challenges or good comparative solutions for other countries. One of them is without any doubt Ukraine, which is in the present day confronting with wartime rapes as one of its great challenges for prevention and fight against. The lessons that emerged from the legislative solutions and the practice may serve to benefit of Ukraine which is already or is about to confront perhaps similar challenges.

Two institutes that bring controversies in wartime rape cases are part of our positive criminal law: plea agreement and substitution of imprisonment with a monetary fine. The plea agreement⁸⁴ is a transplant from the Anglo-Saxon law. It is basically a contract/agreement between the parties on taking responsibility for the guilt of the criminal offence, agreeing about the sanction with the potential for it to be more lenient from the one prescribed by the law, and agreeing about the secondary elements of the procedure, including the damage compensation, costs, etc. The institute became quite popular among practitioners, as it shortened the procedure. If an offered plea agreement is accepted by the court, the next step is a hearing for determination of sanction. There would not be any criminal trial. Not only does that save time, but it also saves the costs of the trial. By 2022, there were about 26 cases of war crimes (in general, not particularly related to wartime rapes) that were tried both by national courts and the ICTY, in which this institute had been used⁸⁵. The problem that occurs is the fact that for many of them, the potential of giving more lenient sanctions was used as a rule, not as a potential. The perpetrator in various of these cases was punished with the sanction under the legal minimum. That brings the question of the prevention of these crimes, and the perception of victims about the potential of achievement of justice. Its applicability in war crime cases decreases the chances for the establishment of transitional justice in this war-torn country. Victims are disregarded, and the perpetrators are not taught about the negativity of their act so it would not be perpetrated again. With those, criminal justice as the mechanism of transitional justice cannot be achieved at its best.

It is important to note how Ukraine's regulated plea agreement may be a lesson for Bosnia and Herzegovina. According to the Ukrainian Criminal Procedure Code (herein after CPCU), one of the agreements that may be concluded in criminal procedure is a plea agreement⁸⁶, and there is potential to conclude it "in proceedings in respect of criminal misdemeanors, as well as crimes of minor or medium gravity, grave crimes, perpetration of which caused damage only to state or public interests"⁸⁷. The possibility to have a plea agreement is widely open for a number of criminal offences, including the grave ones. However, the Ukrainian legislator correctly set the criteria to be considered in every case when it comes to the conclusion on the plea agreement. The public prosecutor has to evaluate

- 1) [the] degree and nature of cooperation on the part of the suspect or the accused in conducting criminal proceedings regarding him or other persons;
- 2) [the] nature and severity of the charges brought (suspicion);
- 3) [the] availability of public interest in ensuring a faster pre-trial investigation and trial, and detection of more criminal offences;
- 4) [the] availability of public interest in

⁸⁴ Article 231 Criminal Procedure Code of Bosnia and Herzegovina.

⁸⁵ In: www.warcrimesdatabase.net, November 2022.

⁸⁶ Article 468, par 2 CPCU.

⁸⁷ Article 469, par 4 CPCU.

prevention, detecton and termination of more criminal offences or other more serious criminal offences”.

Taken all these into consideration, it is unlikely to have plea agreements for wartime sex offences, which suspend all possible justice-related risks that exist in Bosnia and Herzegovina.

Should the decrease of the sanction bring the imprisonment to one year⁸⁸, then the second problematic institute may be used, and that is the substitution of the imprisonment for a monetary fine⁸⁹. It affects the achievement of the goals of criminal and transitional justice in the same manner as the previously mentioned one.

The positive example from the practice in BH is the organization of courts in the sense that they have specialized offices for witness protection, including a special code on the protection of witnesses under threat and endangered witnesses. So, the emphasis is on the protection of witnesses who are at the same time victims, from secondary victimization, through well-thought, legal mechanisms. The witness protection office gathers experts in psychology and social work, who engage with witnesses (including victims) before, during, and after their hearing. That support is essential not only for the benefit of the psychological health of victims but for the quality of the data that will be given by them, if and when they feel supported⁹⁰. However, the above-mentioned code offers various measures for the protection of witnesses, especially the use of pseudonyms, giving testimony from another room, and many others. Although this code protects all endangered and witnesses under threat regardless to criminal offences, the fact is that there is particular potential for its application by the Court upon Prosecutors' request for the witnesses of the wartime rapes.

When it comes to the rights of victims, according to article 198 of CCBH, victims are entitled to property claims. That claim is never equal to their suffering or loss; it is more of a symbolic nature and victims may perceive that the State understands their suffering and appreciates their dignity by their adjudication. One paragraph from the verdict in the case *Savić* very thoroughly illustrates what the property claim should represent:

[the] Court finds that by compensation for this crime the principle of social justice is approved. From sociological point of view, this principle should have the same importance as the principle of punishing as a method of social reaction to the crime. The aim of justice is not only repression towards the perpetrator of the crime but it should intent to establish the same state as it had been before the crime occurred⁹¹.

The court may decide upon that request within the criminal procedure. However, should that process extend the procedure, the criminal court will divert the victim to the civil court⁹². From the establishment of the State Court, and since the trials before other

⁸⁸ Article 42a CCBH. Interestingly, the exemptions of when this institute can not be used (criminal offences of Terrorism, against integrity), but crimes against international law are not mentioned there. Most probably the legislator had in mind that the minimum sanction prescribed for them is 10 years, so the pronounced sanction may not be 1. However, through insitutes of decrease of sanction, obviously it is possible to reach up to one year even for these criminal offences.

⁸⁹ An option like this is not allowed for this crime in Ukrainian Law.

⁹⁰ One good example is the Witness Protection Office of the State Court. See more: www.sudbih.gov.ba

⁹¹ Verdict in case *Momir Savić*, x-KRŽ-07/478, 19/02/2010

⁹² Goran Šimić and Ena Kazić, "The Contribution of Prosecutors to the Failure of Damage Claims of Victims in War Crimes Trials at the Court of Bosnia and Herzegovina," *ILIRIA International Review* 7, No. 2 (27 December 2017): 85 // <https://doi.org/10.21113/iir.v7i2.306>

courts in war crime cases in Bosnia and Herzegovina had begun, it was in 2015 when the first cases of the property claim adjudication to the war crimes victim happened within the criminal procedure. Since that time, there have been 16 cases in total⁹³ of similar adjudication. Šimić and Kazić⁹⁴ argue that the number is low. The reason for that low number may be on the side of prosecutors, who should be in charge of preserving the interest of victims and introducing them to their rights. Although the civil procedure adjudication stands as an option, the problem might occur if the victim is at the same time a protected witness. In order to claim property compensation in the civil procedure, they must reveal their identity, and that may be one of the reasons why victims are not keen on turning to the civil courts with their claims⁹⁵. This entire discourse is completely applicable for the wartime rape victims. Overall, adjudication of property claims in the criminal procedure would save time, gain of efficiency and economy as it would not cause additional costs to victims, and would help them to preserve their protection measures.

The consistent problem of reporting (wartime) rapes is still a challenge that needs to be overcome. With the flow of time and growing apart from the critical events of three decades, the chances to bring perpetrators to justice decreases, just as the number of victims who are still alive and may contribute their prosecutions. Victims should be better embraced in society, which should release them of the stigma of being victims of rape. Adding to that equation the efficient protection mechanisms, only then will they feel protected and safe to speak about their victimization and to report their rapists. Instead, wartime victims from Bosnia and Herzegovina can easily find the place of their victimization, the former rape camp "Vilina Vlas", as a recommended hotel on travel sites; or they see the glorification of war criminals as heroes in Republika Srpska; or they see the potential for perpetrators to be released from prison upon one year of imprisonment or substituting it with a money fine although those are criminal offenses with a prescribed sanction is minimum 10 years; or they see the impossibility to execute the achieved property claim due to insolvency of the convict. Hopefully other countries will learn from these lessons and achieve justice.

3. CONFLICT RELATED SEXUAL VIOLENCE IN UKRAINE

The war started by the Russian federation on the territory of Ukraine was not an exception to the shameful practice of using the CRSV as a means of armed conflict. "The escalation of Russia's advances to the invasion of Ukraine in 2022 has led to a notable increase in both the magnitude and volume of cases of CRSV across the country"⁹⁶. The wartime rapes and other conflict-related sexual violence are a demonstration of enemy force against vulnerable persons protected by the Geneva Conventions and are

⁹³ *Procjena djelotvornosti zahtjeva za naknadu štete u krivičnom postupku* (Trial International, 2022), 8. Those are cases: Bosiljko Marković et al., Slavko Savić, Krsto Dostić, Adil Vojić and Bekir Mešić, Mato Baotić, Nenad Vasić, Anto Jozić and Đemaludin Mahalbašić, Momir and Petar Tasić, Draganj Janjić, Vuk Ratković, Milan Todorović, Goran Mrđa and others, Milomir Davidović, Saša Cvetković, Samir Kešmer and Mirsad Menzilović, Radovan Paprica and Slavko Ognjenović. The highest claim of 40 000 KM has been adjudicated in the case Krsto Dostić.

⁹⁴ Goran Šimić and Ena Kazić, "The Contribution of Prosecutors to the Failure of Damage Claims of Victims in War Crimes Trials at the Court of Bosnia and Herzegovina," *ILIRIA International Review* 7, No. 2 (27 December 2017): 88 // <https://doi.org/10.21113/iir.v7i2.306>

⁹⁵ *Ibid.*, 89.

⁹⁶ Mariam Uberi, *Ukraine's efforts to investigate conflict-related sexual and gender-based violence and the role of the 'complementarity' in International Criminal law*, (2023) (25 October 2023) // <https://fpc.org.uk/ukraines-efforts-to-investigate-conflict-related-sexual-and-gender-based-violence-and-the-role-of-the-complementarity-in-the-international-criminal-code/>

intended to intimidate the defenders of Ukraine and the civilian population. Its forms constitute war crimes, crimes against humanity, and can also be qualified as genocide if a specific intent to destroy, in whole or in part, any national, ethnic, racial or religious group as such is proved, just as proven in the case *Akayesu*.

As of July 24, 2023, 215 cases of CRSV were recorded, including 13 against minors. The gender breakdown shows that the vast majority of victims are women (143); however, a significant number of men were also affected – 73 of them.⁹⁷ However, there are reasonable assumptions that these figures do not reflect the real number due to the fear and shame of the victims to report CRSV, the phenomenon often seen and confirmed in the example of Bosnia and Herzegovina. "According to the Special Representative of the UN Secretary-General on Sexual Violence in Conflicts, for every officially registered case of war-related sexual violence, in Ukraine, there are ten to 20 unregistered ones"⁹⁸. In addition, there are unknown data from currently temporarily occupied parts of the territory of Ukraine⁹⁹. Nevertheless, the survey "Assessing public attitudes towards conflict-related sexual violence (CRSV) and message testing", prepared for Kimonix International Inc., from the USAID Project "Communications Transformation," showed that the majority of respondents believe that in wartime, the likelihood of becoming a victim of violence increases for anyone¹⁰⁰.

Prey et al. correctly remind us of various UN reports that report on the state of human rights in Ukraine, and most of them indicate that gang rapes are a pattern in Ukraine¹⁰¹. These authors explain this pattern as a bonding, cohesion element "among soldiers who do not have a shared background or the same allegiance toward an ongoing war".¹⁰² In addition, they mention that Ukrainian women reported mass rapes, in their homes, and in front of their families¹⁰³, which is a pattern well-known in the case of Bosnia and Herzegovina and it is confirmed as a pattern in the war Ukraine.

3.1. Peculiarities of Conflict-Related Sexual Violence Qualifications According to National Ukrainian Legislation

Ukrainian doctrine has repeatedly emphasized the problematic nature of qualifying conflict-related sexual violence under Article 438 of the Criminal Code of Ukraine (hereinafter – the CC of Ukraine)¹⁰⁴, both because of the blanket nature of the article, the lack of

⁹⁷ *Website of the Prosecutor General's Office* // <https://www.gp.gov.ua/storage/uploads/5ffed5c1-da8a-43b3-b536-7396ad90ca32/1-2.jpg>

⁹⁸ Mariam Uberi, *Ukraine's efforts to investigate conflict-related sexual and gender-based violence and the role of the 'complementarity' in International Criminal law*, (2023) (25 October 2023) // <https://fpc.org.uk/ukraines-efforts-to-investigate-conflict-related-sexual-and-gender-based-violence-and-the-role-of-the-complementarity-in-the-international-criminal-code/>

⁹⁹ In order to fight it, "on 26 June 2023, the Prosecutor General of Ukraine signed the Strategic Plan for the Implementation of the Powers of the Prosecutor's Office in the Field of Criminal Prosecution for Conflict-Related Sexual Violence". See more: Mariam Uberi, *Ukraine's efforts to investigate conflict-related sexual and gender-based violence and the role of the 'complementarity' in International Criminal law*, (2023) (25 October 2023) // <https://fpc.org.uk/ukraines-efforts-to-investigate-conflict-related-sexual-and-gender-based-violence-and-the-role-of-the-complementarity-in-the-international-criminal-code/>

¹⁰⁰ Assessing public attitudes towards conflict-related sexual violence (CRSV) and message testing. Prepared for Kimonix International Inc., USAID Project. "Communications Transformation" Under contract #TCA0022-02/02. Executed by the contractor "Kyiv International Institute of Sociology LTD" LLC. https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=234456

¹⁰¹ Emily Prey, Tanya Domi, and Dr Kinsey Spears, *Conflict-Related Sexual Violence in Ukraine* (New Lines Institute, 2023), 7 // <https://newlinesinstitute.org/wp-content/uploads/Sept2023-Policy-Report-CRSV-in-Ukraine-Lessons-from-Bosnia-NLISAP.pdf>

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ K. P. Zadoia, O. O. Dudorov, "Sexual violence as a war crime: features of criminalization and qualification under the legislation of Ukraine," *Bulletin of LSUJA named after E. O. Didorenko*, Issue 2 (102) (2023.): 90–110, 95. DOI: 10.33766/2524-0323.102.90-110. I. Zavorotko, K. Duchenko, *Sexual Violence of the*

a formulation of the seriousness of the violations, and the absence of a separate form of objective side – sexual violence. The Rome Statute of the International Criminal Court, which has not been ratified by Ukraine, lists the following war crimes: “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”¹⁰⁵. Therefore, this issue is currently relevant and important, given that there have already been notifications of suspicion on the facts of CRSV in Ukraine¹⁰⁶.

Article 438 of the CC of Ukraine, which is applicable to the qualification of criminal offence War crimes, has the following objective elements: “cruel treatment of prisoners of war or civilians; expulsion of civilians for forced labor; looting of national property in the occupied territory; use of means of warfare prohibited by international law; other violations of the laws and customs of war provided for international treaties ratified by the Verkhovna Rada of Ukraine; as well as giving an order to commit such acts; the same acts if they are combined with intentional murder”¹⁰⁷. There is no direct mention of the conflict-related sexual violence. This, on the one hand, does not prevent sexual violence from being qualified under this article; but, on the other hand, it requires a detailed explanation in procedural documents of what form of violation of the laws and customs of war a particular manifestation of CRSV is. There is no unity in the doctrine on this issue¹⁰⁸, which is connected, firstly, with different categories of protected persons to whom it applies, and secondly, with the variety of forms of sexual violence, while it is not interpreted only as related to cases of penetration of the victim’s body.

For the correct qualification of CRSV under Article 438 of the CC of Ukraine, it is necessary to determine how sexual violence is understood by international standards and practice of international courts and tribunals. The list of acts of sexual violence in them is much wider than the list of criminal offenses against sexual freedom and sexual inviolability of a person. As previously noted in this article, the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda on sexual violence is extensive. As well as the practice of the International Criminal Court (and the cases of *The Prosecutor v. Germain Katanga*¹⁰⁹, *The Prosecutor v. Bosco Ntaganda*¹¹⁰, *The Prosecutor v. Jean-Pierre Bemba Gombo*¹¹¹, *The Prosecutor v. Dominic Ongwen* are just a few examples to mention¹¹²). This practice made it possible to formulate an understanding of the essence of the interpretation of the CRSV as an international crime, in particular:

Russian Military as a War Crime: Challenges of qualification under national legislation // <https://zmina.info/articles/seksualne-nasytstvo-rosijskyh-vijskovyh-yak-voyennyj-zlochyn-vyklyky-kvalifikaciyi-zanaczionalnym-zakonodavstvom/>

¹⁰⁵ *Rome Statute of the International Criminal Court* // <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

¹⁰⁶ *Website of the Prosecutor General's Office* // <https://www.gp.gov.ua/ua/posts/povidomlennya-pro-pidozru-33083>

¹⁰⁷ This criminal offence is punishable by imprisonment from eight to 12 years.

¹⁰⁸ Iryna Hloviuk, “Criminal proceedings for war crimes: challenges and answers,” *Law of Ukraine*, No. 5 (2023): 85–100, 91. DOI:10.33498/louu-2023-05-085

¹⁰⁹ *The Prosecutor v. Germain Katanga* // https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF

¹¹⁰ *The Prosecutor v. Bosco Ntaganda* // https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF

¹¹¹ *The Prosecutor v. Jean-Pierre Bemba Gombo* // https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF

¹¹² *The Prosecutor v. Dominic Ongwen* // https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF

Sexual assault is not limited to acts of penetration and has been found to include “all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim’s dignity”.¹¹³ Also, sexual violence is found when (i) the perpetrator commits an act of a sexual nature on another or requires the victim to perform such an act, (ii) that act infringes on the victim’s physical integrity or amounts to outrage to the victim’s personal dignity, and (iii) the victim does not consent to the act. The perpetrator must intentionally commit the act, and be aware that the victim did not consent to the act.¹¹⁴

This also indicates the possibility of qualifying sexual violence under different forms of the objective side of Article 438 of the CC of Ukraine. It should be noted that there is a position of correlation of national Articles 152 and 153 of the Criminal Code of Ukraine with the cruel treatment of prisoners of war or civilians¹¹⁵. Torture or inhuman treatment are serious violations of the Geneva Convention and Protocol, and they can undoubtedly include conflict-related sexual violence¹¹⁶. It is difficult to disagree with this, given the known facts of CRSV committed against prisoners of war¹¹⁷ and civilians in the territories temporarily occupied by the Russian Federation also include those acts¹¹⁸.

This understanding is confirmed with the following:

1) in terms of qualification under Art. 438 of the CC of Ukraine, sexual violence that violates the provisions of treaty-based International Humanitarian Law may be covered by the following forms of crime provided for in part 1 of this Article, such as “cruel treatment of prisoners of war or civilians” (first special form) and “other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine” (universal form); 2)

¹¹³ Case Milutinović.

¹¹⁴ Case (Prosecutor v Karadzic). *Peter Robinson’s Summary of Decisions of the International Criminal Tribunal for the Former Yugoslavia. ICTY statute, rules of procedure and evidence, directive on assignment of defence counsel, and code of conduct for defence counsel annotated*, (2023): 150 // https://peterrobinson.com/wp-content/uploads/2023/08/Peter-Robinson_ICTY-Digest_July-2023.pdf

¹¹⁵ *Standards for the investigation of war crimes. General part*, (2023): 23 // https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_zagalna-chastyna.pdf

¹¹⁶ I. Zavorotko, K. Duchenko, *Sexual Violence of the Russian Military as a War Crime: Challenges of qualification under national legislation* // <https://zmina.info/articles/seksualne-nasylstvo-rosijskyh-vijskovyh-yak-voyennyj-zlochyn-vyklyky-kvalifikacziyi-za-nacziionalnym-zakonodavstvom/>

¹¹⁷ Rape and sexual violence are Russia’s “military strategy” in Ukraine, says UN representative Victims are mostly women and girls, but Russians also rape men and boys. https://lb.ua/world/2022/10/15/532666_zgvaltuvannya_seksualne.html.

“The age of the victims of sexual violence ranges from 4 to 85 years old,” prosecutor Didenko. https://lb.ua/news/2022/10/24/533571_vik_postrazhdalih_vid_seksualnogo.html

Torture of civilian and prisoners of war, testimonies of survivors: results of the OSCE meeting. <https://mipl.org.ua/event/katuvannya-czyvilnyh-i-vijskovopolononyh-svidchennya-tyh-hto-vyzhyv-pidsumky-zustrichi-v-obsye/>

¹¹⁸ In addition, in order to fully understand the essence of the criminal offence under Article 438 of the Criminal Code of Ukraine, which consumes wartime rape, it is important to determine the content of the criminal offence Rape, prescribed in Article 152. The sanction of three to five years of imprisonment is prescribed for “rape, that is sexual intercourse combined with violence, threats of violence, or committed by taking advantage of the victim’s helpless condition”. The provision prescribes punitivity of sexual intercourse in which the free will of the victim is excluded. The provision covers a wide set of act, in which violence, threat of violence or taking advantage of the victims’ helplessness is included. The violence or threat of violence may refer directly to the victim, but also to persons close to them. In paragraphs 2-4, aggravated forms of rape are prescribed, in which aggravating circumstances vary from recidivism, modus operandi (group rape), subject of protection (child, person under 12), to aggravated consequences. Finally, an act that also may be an act of perpetration of criminal offence from article 238 is prescribed with article 153, criminal offence Violent unnatural gratification of sexual desire. The criminal offence is prescribed in a similar manner as the criminal offence rape, with the basic and three aggravated forms. The basic form consists of violent unnatural gratification of sexual desire “with physical violence, or threat to violence or committing it by taking advantage of the victim’s helpless condition”. The sanction of imprisonment up to five years is prescribed. Aggravated forms are prescribed just like the aggravated forms of rape (where aggravating circumstances are MO, recidivism, and consequences of the status of passive subject)

manifestations of sexual violence against prisoners of war and civilians are covered by the first special form of the crime under Part. 1 of Article 438 of the CC of Ukraine; 3) all other cases of sexual violence that are violations of the norms of treaty-based International Humanitarian Law are covered by the universal form of the crime under Part 1 of Article 438 of the CC of Ukraine¹¹⁹.

This is a more differentiated and more appropriate approach, which reflects the specificity of possible types of sexual violence.

The Benchbook on the adjudication of international crimes explains that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence of any other form may be subsumed under any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine"¹²⁰ to which Article 438(1) refers.

3.2. Judicial Practice of Qualification Of Crsv Under Art. 438 of the Criminal Code of Ukraine

In Ukraine there is already a verdict on sexual violence against a minor¹²¹. Given the number of notifications of suspicion, a much larger number of such verdicts are expected. The text of the verdict shows that sexual violence was committed in the form of forced nudity and physical contact by touching the lower abdomen, accompanied by the statement that the minor had already reached sexual maturity. This is not rape, but another form of sexual violence that is a war crime. Despite the fact that there was no penetration of the human body, this does not prevent us from interpreting this act as sexual violence, which is recognized in the practice of international courts and tribunals.

The verdict describes the contextual element: "There was an international armed conflict; the conduct took place in the context of and was associated with an international armed conflict; the perpetrator was aware of the factual circumstances that established the existence of an armed conflict"¹²². Given that Russia attacked Ukraine back in 2014 and that part of Ukraine's territory is occupied by Russia, this already indicates an armed conflict due to Russian aggression. The verdict takes into account the following aspects: Russia's invasion of the Autonomous Republic of Crimea; creation of the terrorist organization "Donetsk People's Republic" in Donetsk region of Ukraine, and the terrorist organization "Luhansk People's Republic" in Luhansk region of Ukraine (control and coordination of the activities of these terrorist organizations, as well as their financial and material support, including weapons, ammunition, military equipment, are

¹¹⁹ K. P. Zadoia, O. O. Dudorov, "Sexual violence as a war crime: features of criminalization and qualification under the legislation of Ukraine," *Bulletin of LSUIA named after E. O. Didorenko*, Issue 2 (102) (2023): 90–110, 100–101. DOI:10.33766/2524-0323.102.90-110

¹²⁰ In addition to that, it is noteworthy the information that in the period from March to May 2022, Ukraine's prosecutorial body has opened over 14,000 criminal proceedings under Article 438. See more: Mariam Uberi, *Ukraine's efforts to investigate conflict-related sexual and gender-based violence and the role of the 'complementarity' in International Criminal law*, (2023) (25 October 2023) // <https://fpc.org.uk/ukraines-efforts-to-investigate-conflict-related-sexual-and-gender-based-violence-and-the-role-of-the-complementarity-in-the-international-criminal-code/>. Also: *Benchbook on the adjudication of international crimes*, 123, 130, 137, 142, 147, 151 // <https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/649be9e62eb37d7e512f6f83/1687939571825/Benchbook+on+international+crimes+adjudication.pdf>

¹²¹ Verdict of Bobrovytskyi District Court of Chernihiv Region of November 25, 2022, Case No. 729/592/22 // <https://reyestr.court.gov.ua/Review/107503138>

¹²² *Benchbook on the adjudication of international crimes*, 156 // <https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/649be9e62eb37d7e512f6f83/1687939571825/Benchbook+on+international+crimes+adjudication.pdf>

carried out by representatives of the authorities and the Armed Forces of the Russian Federation); Russia's recognition of the "independence" of "Donetsk people's republic" and "Luhansk people's republic"; a large-scale armed invasion of Russian troops on the territory of Ukraine on February 24, 2022; and, the understanding by Russian military personnel of the nature of the invasion, as they exercised control over a Ukrainian settlement, wore military uniforms with insignia, carried automatic weapons, and entered civilian homes in the settlement¹²³. All of this clearly indicates the presence of a context that should be considered in the aspect of a special subject of proof¹²⁴.

The objective elements of sexual violence are

the perpetrator (1) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature (2) 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; (3) the conduct must be of a gravity comparable to that of a grave breach of the Geneva Conventions¹²⁵.

The verdict specified that the act was committed against a minor with knowledge of his age, physical violence was used against the victim, and mental violence (death threats) against family members¹²⁶. The convict and his accomplice had automatic weapons. Both from the standpoint of age and from the standpoint of coercion, there was no question of any consent and free will. This is in line with international practice: consent cannot be inferred by reason of any words or conduct of a victim where force or coercion taking advantage of a coercive environment was used¹²⁷.

In relation to the requirement of the existence of a "coercive environment", it must be proven that the perpetrator's conduct involved "taking advantage" of such a coercive environment¹²⁸. The intent of the perpetrator is dual: intentionally committing the criminal offence under 438, and also having an intellectual and voluntarist approach to the act of perpetration of that criminal offence (which in this context may be criminal offence – rape). The subjective elements of sexual violence are that

the perpetrator (i) intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature; (ii) the perpetrator was aware that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a

¹²³ Verdict of Bobrovytskyi District Court of Chernihiv Region of November 25, 2022, Case No. 729/592/22 // <https://reyestr.court.gov.ua/Review/107503138>

¹²⁴ I. V. Hloviuk, H. K. Teteriatnyk, "Contextual circumstances in war crimes proceedings: sui generis subject of proof," *Juridical scientific and electronic journal*, No. 6 (2022): 394–398, 397. DOI <https://doi.org/10.32782/2524-0374/2022-6/87>

¹²⁵ *Benchbook on the adjudication of international crimes*, 153 // <https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/649be9e62eb37d7e512f6f83/1687939571825/Benchbook+on+international+crimes+adjudication.pdf>

¹²⁶ Verdict of Bobrovytskyi District Court of Chernihiv Region of November 25, 2022, Case No. 729/592/22 // <https://reyestr.court.gov.ua/Review/107503138>

¹²⁷ *Peter Robinson's Summary of Decisions of the International Criminal Court. ICC Statute, Rules of Procedure and Evidence, Regulations of Court, and Code of Professional Conduct for Counsel annotated*, (2023): 118. // https://peterrobinson.com/wp-content/uploads/2023/08/Peter-Robinson_ICC-Digest_July-2023.pdf

¹²⁸ *Peter Robinson's Summary of Decisions of the International Criminal Court. ICC Statute, Rules of Procedure and Evidence, Regulations of Court, and Code of Professional Conduct for Counsel annotated*, (2023): // https://peterrobinson.com/wp-content/uploads/2023/08/Peter-Robinson_ICC-Digest_July-2023.pdf

sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct"¹²⁹. The intent is evidenced by "actions to establish the victim's age and statements about his or her sexual maturity; prevention of resistance from family members; being in the house with automatic weapons; actually overcoming the victim's resistance; striking him or her; understanding the victim's minority and the impossibility of free will when threatening family members"¹³⁰.

CONCLUSION

Wartime rapes are a challenge for legislators. They often omit to describe elements of the body of these crimes. However, in understanding the content of their legal practice of the *ad hoc* and permanent criminal tribunals, they manage to offer us an outline for defining wartime rapes. They have a diverse legal nature, which corresponds to the motives of their perpetration. Their consequences surpass the typical consequences of general rape (physical and psychological). They affect the identity of the victim, their family, culture, and society. Most commonly, they are perpetrated as a tool of ethnic cleansing, as confirmed in the case of Bosnia and Herzegovina, and a weapon of war intended to affect the psychological health of the enemy, as was visible in the case of Bosnia and Herzegovina, and which is happening now in Ukraine.

Both Bosnian and Ukrainian criminal codes either directly or indirectly cover it as an act of another criminal offence(s) against international law, like crimes against humanity and crimes against civilians, or war crimes. The difference between these two countries is that the term rape is literally prescribed as an act of those criminal offences in Bosnia and Herzegovina, while in Ukraine it is not; but, with legal interpretation of the provision and with understanding its wider sense, that act can fall under war crimes. The sanctions for them are severe, yet their perpetration is not prevented. Both ICTY and national courts in Bosnia and Herzegovina prosecuted wartime rapes, and still, there are many ongoing trials. However, the big challenge for the achievement of justice is the fact that the majority of them remain unreported. The same pattern is already visible in Ukraine. Positive law of Bosnia and Herzegovina allows the application of plea agreements and substitution of imprisonment with monetary fines even on cases of war crimes. Any similar institute in Ukraine should not allow for war crimes *in legi ferendi*. As this article has argued, they affect the process of transitional justice and satisfaction of victims and the existing approach of Ukraine, and as such this is a good lesson for Bosnia and Herzegovina. Although victims in Bosnian positive law have recognized rights, primarily to property claims and there are laws that may protect them as witnesses in case that would be required, transferring the claims from criminal to civil procedure seems inefficient and not a recommendable motion, which should be better regulated and practiced by Bosnian courts. The protective special codes are a good example for Ukraine to consider.

¹²⁹ *Benchbook on the adjudication of international crimes*, 156 // <https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/649be9e62eb37d7e512f6f83/1687939571825/Benchbook+on+international+crimes+adjudication.pdf>

¹³⁰ *Ibid.*

Overall, clear regulations of wartime rapes, heavy sanctions with no substitutions, and an effective judicial system seem the best preventive mechanisms for wartime rapes, and that goal is still achievable in Ukraine. Lives, families, and society have to be protected as the most important values.

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