



ОФІС ВІСЬОПРЕМ'ЄР-МІНІСТРА
З ПИТАНЬ ЄВРОПЕЙСЬКОЇ ТА
ЄВРОАТЛАНТИЧНОЇ ІНТЕГРАЦІЇ
УКРАЇНИ



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UAE**xperts**TM



Handbook

on the qualification of cases of
conflict-related sexual violence
(CRSV)

to be used by investigators, prosecutors, judges, human rights defenders
in their practical work and to streamline investigations and prosecutions
at the national and international levels

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This handbook has been prepared by the scientific and expert community, with the assistance of the Vice Prime Minister for European and Euro-Atlantic Integration Olha Stefanishyna and with the support of the United Nations Population Fund (UNFPA), implemented by the NGO "UA Experts" to be used by investigators, prosecutors, judges, human rights defenders in their practical work on the qualification of CRSV and to streamline investigations and prosecutions at the national and international levels.

FOREWORD

In the life of every Ukrainian, the day of 24 February 2022 is forever imprinted as the beginning of the tragic events associated with the full-scale aggression of the Russian Federation against Ukraine. In the modern history of Ukraine, the Russian Federation's non-compliance with the principles of international law has been documented, which poses a threat to the state sovereignty and territorial integrity of our country. The ongoing Russian-Ukrainian war since 2014 has once again reminded all of humanity of the horrors of war, and the atrocities of the occupiers after the full-scale unprovoked invasion of Bucha, Irpin, Borodianska, Hostomel, Okhtyrka, Izium, Mariupol, Kharkiv, Kherson, and many other Ukrainian settlements have once again proved that war in all its manifestations is brutal and merciless, depriving of the most precious thing - life, and the eternal companions of the horrors of war are ruined lives, despair, pain due to the loss of loved ones.

This is not the first time in history that Ukraine has been tested by war, but the current war is an existential war between two spaces: the Ukrainian space of freedom and the Russian space of slavery. It is for the Ukrainian space of freedom that the Armed Forces of Ukraine have become a reliable shield, and it is for the Ukrainian space of freedom that the entire nation has united in a sacred desire to defeat the enemy not only on the battle line, but also on the frontline of no less importance - the rule of law, respect for human life and dignity in order to preserve its historical and national identity as part of the European civilisational family of nations.

This handbook has been prepared by the scientific and expert community, with the assistance of the Vice Prime Minister for European and Euro-Atlantic Integration Olha Stefanishyna and with the support of the United Nations Population Fund (UNFPA), to be used by investigators, prosecutors, judges, human rights defenders in their practical work on the qualification of CRSV and to streamline investigations and prosecutions at the national and international levels.

It also identifies certain issues that need to be addressed in terms of qualifications and the need to comply with international standards in the field of prevention, detection and response to CRSV.

Section 1.

NATIONAL LEGISLATION IN THE FIELD OF PREVENTION, DETECTION AND RESPONSE TO CRSV, SPECIAL ASPECTS OF QUALIFICATION AND EVIDENCE.

Ukraine signed the Rome Statute on 20 January 2000, however, the ratification process is still ongoing. In particular, on 07 June 2021, the Verkhovna Rada of Ukraine endorsed the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law".

However, the shortcomings of national legislation is not an obstacle to the prosecution of crimes that essentially violate jus cogens, the mandatory rules of public international law. Therefore, the most important thing is proper collection of evidence and communication with the International Criminal Court (ICC), which can ensure the effectiveness of criminal prosecution. The provisions of the Rome Statute of the International Criminal Court (the Rome Statute) provide some guidance.

Thus, in accordance with Article 7(1)(g) of the Rome Statute, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence of a similar gravity constitute 'crimes against humanity' when

committed as part of a widespread or systematic attack directed against any civilian population and such attack is deliberately committed.

For the purposes of the Rome Statute, the term "war crimes" means, inter alia, rape, sexual slavery, forced prostitution, forced pregnancy as defined in Article 7(2)(f) of the Statute, forced sterilisation or any other form of sexual violence that also constitutes a grave breach of the Geneva Conventions (Article 8(2)(xxii)).

According to the Rome Statute, crimes against humanity do not require a link to an armed conflict - they can occur in peacetime.

However, the common elements of a crime under the Rome Statute require that the act of conduct be part of a widespread or systematic attack against a civilian population. The attack need not be armed or military if it is widespread or systematic.

“Widespread” is defined as massive, meaning that the attack is directed at a large number of victims.

The term ‘systematic’ means that the attack must have a pre-existing plan or policy. In other words, it is not sexual violence per se that must be widespread or systematic to constitute a crime

against humanity, but an attack against a civilian population must be. In this context, an individual act of rape or other forms of sexual violence may constitute a crime against humanity if committed as part of a widespread or systematic attack directed against a civilian population.

Article 6 of the Rome Statute (Genocide) states that for the purposes of the present Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- a) killing members of such a group
- b) causing grievous bodily harm or mental disorder to members of such a group;
- c) intentionally creating living conditions for such a group that are designed to bring it to full or partial physical destruction;
- d) implementation of measures aimed at preventing childbearing within such a group;
- e) forcible transfer of children of this group to another group.

In the Akayesu case, the International Criminal Tribunal for Rwanda (ICTR) for the first time defined rape as an act of genocide and found a person guilty of genocide on the basis of, inter alia, acts of rape and sexual violence. Importantly, the tribunal recognised the intersectionality of the crime of genocide and rape. The court noted that ‘genocidal rape’ during the Rwandan genocide occurred to some women because of their ethnicity, especially Tutsi women or Hutu women who married Tutsi men. The Tribunal noted that these women were targeted both because of their ethnicity and because of Hutu beliefs and opinions about Tutsi women as women.

The Court recognised the commission of rape as genocide as perhaps the most effective and serious way of causing injury and harm to individual Tutsi women, thereby contributing to the destruction of the entire Tutsi group. The court actually stressed that sex worked to destroy people and that rape was used as a weapon of war.

With regard to rape as an act of genocide committed in Bosnia, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the rape was intended to have the effect of impregnating the victim, that she would have a child with a Serb man and that the child would be identified by the ethnicity of the rapist, which amounted to genocide as an act calculated to prevent the birth of children within the rape victim group and contributed to the ostracisation of women and their alienation from their communities.




An understanding of the above provisions of the Rome Statute and the judgments of the ICTR and the ICTY suggests that the provisions of national legislation in this area need to be improved and developed in order to bring them in line with international standards.

At the national level, CRSV should be qualified under Article 438 of the Criminal Code of Ukraine - violation of the laws and customs of war, which is a crime against peace, human security and international law and order.

It should be noted that national legislation is far from perfect, which undoubtedly leads to certain obstacles (regarding the application of substantive and procedural law) in criminal prosecution, especially in comparison with the relevant provisions of international criminal law.

Thus, international criminal law provides for an appropriate algorithm for analysing the elements of crimes under the Rome Statute.

This analysis is carried out at three levels:

-  **specific elements** of the crime of rape (*What happened, to whom and where?*)
-  **general elements** of a war crime, crime against humanity or genocide (*What was the context in which the act (predicate offence) was committed?*)
-  **elements for establishing linkages** (*Who is responsible and how?*)

Specific elements are proved by evidence that demonstrates that a specific act of conduct was committed and that a specific element of the underlying crime of sexual violence (e.g. rape) was present.

The general elements are proved by evidence that describes the circumstances in which the specific act was committed and 'elevates' it to the level of a war crime, crime against humanity or genocide. A specific crime can only constitute a crime under international law if it is committed in a context that makes it a war crime, crime against humanity or act of genocide (e.g., rape as a war crime requires that the act occurred in the context of and was connected with an international armed conflict and that the perpetrator was aware of the factual circumstances establishing the existence of an armed conflict).

This implies proper documentation of the common elements (fixing the evidence base) in accordance with international standards of evidence.

This means that if the common elements are not properly documented, the crime will only be prosecuted as a 'general criminal offence' under national law (e.g. rape per se), and not as a crime under international law (e.g. rape as a war crime), which has no statute of limitations.

The elements for establishing linkage, also known as 'types of responsibility', are proved by evidence describing the manner in which one or more perpetrators are criminally responsible for acts or omissions that constitute a crime under international law. This refers to direct responsibility (Article 25 of the Rome Statute) and command responsibility (Article 28 of the Rome Statute).

It should be noted that in Ukraine, investigative and judicial practice under Article 438 of the Criminal Code of Ukraine is being developed to some extent. Of course, the instruments of national legislation do not allow for the full implementation of the possibilities of criminal liability for violations of the laws and customs of war, given the duration of aggressive actions, the temporary occupation of certain territories, and the commission of crimes against civilians, including CRSV. However, those cases of CRSV that are currently known (registered in the Unified Register of Pre-trial Investigations, under pre-trial investigation, or in court) must be properly documented and the evidence base must be beyond doubt.

For this purpose, it is necessary to comply with the requirements of national criminal procedure legislation (including the provisions of international criminal and international humanitarian law).

Thus, according to Article 91 of the Criminal Procedure Code of Ukraine (CPC of Ukraine), in criminal proceedings, the following shall be proved, inter alia: the event of the criminal offence (time, place, manner and other circumstances of the criminal offence); the guilt of the accused in committing the criminal offence, the form of guilt, motive and purpose of the criminal offence; the type and amount of damage caused by the criminal offence, as well as the amount of procedural costs; circumstances that affect the severity of the criminal offence.



Proof consists in the collection, verification and evaluation of evidence in order to establish the circumstances relevant to criminal proceedings.

For this purpose:

1 the prosecution shall provide such evidence that would exclude any doubt

Article 17 of the CPC of Ukraine refers to the need for the prosecution to prove the guilt of a person beyond reasonable doubt. Regarding the essential characteristics of this standard, the Supreme Court stated that the totality of the circumstances of the case established during the trial excludes any other reasonable explanation of the event that is the subject of the trial, except that the charged crime was committed and the accused is guilty of committing this crime. Each of the elements that are important for the legal qualification of an act must be proved beyond reasonable doubt: both those that form the objective side of the act and those that define its subjective side.

In particular, in cases where the existence and/or nature of intent is important for the legal qualification of an act, the court in its decision shall explain how the circumstances of the case established by it prove the existence of intent of the nature that is a necessary element of the crime and exclude the possible absence of intent or a different nature of intent.

2 evidence shall be admissible

In line with the provisions of national legislation, security investigative bodies conduct pre-trial investigations of criminal offences under Article 438 of the Criminal Code of Ukraine (Article 216(2)(1) of the CPC of Ukraine). However, in practice, pre-trial investigations are mainly conducted by investigators of the National Police, which in the future may lead to the inadmissibility of evidence obtained in violation of the rules of jurisdiction established by the criminal procedure law.

Thus, the issues of jurisdiction, consolidation and allocation of pre-trial investigation materials, as well as the place of pre-trial investigation and resolution of disputes on jurisdiction of criminal proceedings are defined by the provisions of Articles 216-218 of the CPC of Ukraine. In accordance with the provisions of Article 86 of the CPC of Ukraine, evidence is deemed admissible if it is obtained in accordance with the procedure established by this Code. Inadmissible evidence may not be used in making procedural decisions and may not be relied upon by the court in making a judgement. And Article 87(1) of the CPC of Ukraine states that evidence obtained as a result of a material violation of human rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, as well as any other evidence obtained through information obtained as a result of a material

violation of human rights and freedoms, is inadmissible.

This presupposes that evidence is admissible if it is obtained in accordance with the procedure established by the Criminal Procedure Law of Ukraine, and inadmissible evidence cannot be used in making procedural decisions).

The admissibility of evidence is one of the key prerequisites for ensuring the right to a fair trial as set out in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, evidence obtained in violation of the jurisdictional rules established by the criminal procedure law may be declared inadmissible, since the pre-trial investigation by unauthorised bodies and their officials is a direct violation of the general principles of legality and the rule of law.

Obviously, in cases of pre-trial investigation under Article 438 of the Criminal Code of Ukraine, it is necessary to comply with the rules of jurisdiction set out in Article 216 of the CPC of Ukraine in order to avoid at least a minimal probability of inadmissibility of evidence on formal grounds in the future.

This provision is also consistent with part two of Article 19 of the Constitution of Ukraine, according to which state and local authorities and their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine.



3 the primary criteria for proving the position of the prosecution are relevance, probative value and weight of evidence

According to Article 85 of the CPC of Ukraine, relevant (proper) evidence is evidence that directly or indirectly confirms the existence or absence of circumstances to be proved in criminal proceedings and other circumstances relevant to criminal proceedings, as well as the reliability or unreliability, possibility or impossibility of using other evidence. This means that the materials available in the criminal proceedings in their entirety must be analysed for the presence of evidence properties and with the application of evidence evaluation criteria.

The probative value of evidence is defined according to the level at which a particular piece of evidence proves something in criminal proceedings. The probative value is also determined according to the criteria that characterise the quality of the evidence.

The weight of evidence is characterised by the relative importance that should be given to such evidence when deciding whether a particular statement is proven. Weight is a largely subjective criterion that depends on the quality and characteristics of the evidence, as well as the quantity and quality of other available evidence of the same fact.

Evidence is the official term for information that is an integral part of the judicial process in the sense of using such information to prove or

disprove the fact of a crime. Thus, information is essentially 'primary evidence': all evidence is information, but not all information is evidence.

According to the national legislation, evidence (Article 84 of the CPC of Ukraine) in criminal proceedings is factual data obtained in accordance with the procedure provided for by this Code, on the basis of which the investigator, prosecutor, investigating judge and court establish the presence or absence of facts and circumstances relevant to criminal proceedings and subject to proof. Procedural sources of evidence include testimony, material evidence, documents, and expert opinions.

Obviously, compliance with the standards of evidence plays an important role not only in bringing to criminal responsibility at the national level, but also in fact determines the future criminal law assessment by international judicial institutions of the crimes committed by the Russian Federation on the territory of Ukraine, including the assessment of the CRSV as war crimes, crimes against humanity and genocide.

The most pressing issue is the proper documentation and prosecution of conflict-related sexual violence crimes. Such prosecutions are possible, first of all, within the framework of Ukrainian national jurisdiction; further, within the framework of universal jurisdiction (meaning that the national authorities of any state investigate and prosecute persons suspected of the most serious crimes from the point of view of international law, such as war crimes, crimes against humanity, genocide

and aggression, regardless of where these crimes were committed and regardless of the nationality or residence of the victims or suspects).

Special attention should also be paid to the consequences of CRSV in both the short and long term.

The physical consequences of CRSV can manifest themselves in injuries, including pelvic, genital, anal and oral injuries, which sometimes lead to death, illness, sexually transmitted infections, disability, sexual dysfunction, infertility, etc.

In the context of armed conflict, medical care, diagnosis and treatment are extremely limited or unavailable. The traumatic consequences that develop as a result of sexual violence can be associated with chronic pain, inability to control the passage of fluids, etc. In addition, the physical consequences of CRSV can certainly include the suppression or deprivation of reproductive capacity, which in the short and long term will affect the mental and psychological state of victims.

The psychological and mental consequences of CRSV can manifest themselves in acute stress disorders, depression, pathological states of anxiety, fear, extreme helplessness and despair, feelings of shame and guilt, self-blame and low self-esteem, emotional stupor, suicidal tendencies, high-risk behaviour, including substance abuse, and mental illness of varying

severity. Survivors of sexual violence tend to have a deep distrust of people they know and strangers, dissociate themselves from humanity and the outside world, and socio-cultural taboos around sexuality complicate their rehabilitation. Psychological and mental harm is also suffered not only by those who have been sexually abused, but also by those who have been forced to witness such acts.

The social consequences of CRSV can include exclusion from the community, avoidance of social contacts, inability to work and provide for their own needs, social stigmatisation of survivors, destruction of their relationships with families and communities, ostracisation of survivors and the destruction of social order and traditional ways of life in certain communities. Unwanted pregnancies and 'children born of rape' also cause social stigma and rejection by communities, turning into a continuous replay of painful traumatic events.

SEXUAL ASSAULT EVID

EXP. DATE:




NOTE: EXPIRATION DATE APPLIES TO BLOOD
COLLECTION TUBES ONLY. IF EXPIRED,
REPLACE WITH SAME FROM HOSPITAL OR
CLINIC STOCK.

**EVIDE
SEAL I**

A proper assessment of the consequences is important, as property and/or non-pecuniary damage caused by a crime is the basis for recognising a person as a civil plaintiff (Article 61 of the CPC of Ukraine).

We have paid attention to physical, psychological and mental harm as consequences of CRSV, but the peculiarity of the national criminal procedure legislation is also the recognition of the victim (or his/her representative (legal representative)) as a civil plaintiff and the right to file a civil claim during the pre-trial investigation for compensation not only for property but also for moral damage. In accordance with the exercise of this right, victims (their representatives) may file a civil claim with the pre-trial investigation body during the pre-trial investigation, and the pre-trial investigation body cannot refuse to accept such a claim. It is also necessary to explain to the victims that the civil claim will be considered in court when the indictment is sent to the court.

In justifying the qualification under Article 438 of the Criminal Code of Ukraine, pre-trial investigation bodies and courts, in addition to national legislation, should also take into account the provisions of international instruments:

-  in cases of CRSV committed against women, refer to Article 27(2) of the Geneva Convention and Article 76(1) of the Additional Protocol to the Geneva Conventions, according to which women need special protection from any attack on their honour and, in particular, protection from rape or any other form of outrage against their morality, taking into account her inability to resist for fear of physical violence against her and her family members;
-  in relation to the acts of CRSV committed against children, refer to the provisions of Article 77 (1) of the Additional Protocol to the Geneva Conventions, according to which children shall be treated with special respect and protected from all forms of abuse, and Article 38 (1), (4) of the Convention on the Rights of the Child;
-  in relation to the acts of the CRSV committed against men, refer to the provisions of Article 3, paragraph 3, of the Geneva Convention relative to the Prevention of Cruelty to Civilians in Occupied Territories and Article 27 of the Convention relative to the Protection of Civilian Persons in Time of War, which provides for the right of persons under its protection to personal respect, respect for their honour, humane treatment and protection from any act of violence or intimidation.

It is worth paying special attention to the provisions of international humanitarian law that are violated by the Russian military when committing CRSV against Ukrainians (women, children, men), and what significance this may have when submitting materials to international judicial institutions, since law enforcement agencies are often limited to the 'basic' documents of international humanitarian law that provide for the principles of treatment of civilians.

However, as we have already noted, it is important that notices of suspicion and court decisions also take into account the norms of other international treaties (in particular, the Rome Statute, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) that are violated by Russian military personnel committing some form of CRSV. This will significantly strengthen Ukraine's position in cases before international judicial institutions.

Thus, given these factors, Ukraine will face the need to prove (in accordance with the standards of proof) in international judicial institutions that the Russian Federation committed the crime of genocide on the territory of Ukraine, in particular: *to prove the objective side of genocide in the form of causing serious bodily or mental harm to members of a particular group or, for example, in the form of measures designed to prevent childbearing among such a group, as well as the need to prove a special genocidal "intent", by means of the acts listed in the objective elements of the crime, "to destroy in whole or in part a national, ethnic, racial or religious group as such", i.e., in essence, the use of rape as a weapon of war.*

Obviously, the provision of Article 442 of the Criminal Code of Ukraine, which establishes liability for genocide, does not fully comply with the approaches of the Rome Statute, in particular, it does not take into account the difference between grievous bodily harm and 'serious' bodily harm, and ignores mental harm.

Another peculiarity of the national procedural legislation is that the case can be considered in the absence of the suspect, and the announcement of a notice of suspicion is made by publishing such a document on the official website of the Office of the Prosecutor General.

Thus, even if the Russian serviceman who committed the CRSV has returned to Russia,

is on the temporarily occupied territory of Ukraine or is otherwise hiding from the law enforcement agencies of Ukraine, but there are sufficient grounds to believe that it was he who committed or ordered the CRSV, the fact that a notice of suspicion was issued is extremely important for bringing him to justice. This is due to the fact that Ukrainian legislation provides for a special procedure - a special pre-trial investigation (in absentia), which means that there is a way to bring perpetrators to justice for committing CRSV even if they are temporarily physically absent from Ukraine. Obviously, in such cases, the evidence base must meet the standards of proof, as we have already mentioned.

Joint teams are also being set up to investigate war crimes committed on the territory of Ukraine as part of Ukraine's international cooperation with such states as Lithuania, Poland, Slovakia, Estonia, Germany, Sweden, Latvia, Norway and France.

In addition, certain digital tools have been developed, such as the Office of the Prosecutor General's web-resource warcrimes.gov.ua and its analogues, to collect evidence.

The existence of verdicts of national courts under Article 438 of the Criminal Code of Ukraine does not preclude the possibility of further criminal prosecution in international judicial bodies (in particular, for war crimes, crimes against humanity, genocide). And the evidence base on which national courts have

delivered guilty verdicts under Article 438 of the Criminal Code of Ukraine can be used by international judicial bodies established to assess the crimes of the aggressor country.

It should be noted that the national criminal procedure legislation does not specifically state the principles of investigation, but the content of these principles can be logically traced in the provisions of Chapter 2 "Principles of Criminal Proceedings" of the CPC of Ukraine.

Apparently, the basic principles can be identified, which include:

- do no harm;
- compliance with minimum standards of proof;
- impartiality and objectivity;
- competence;
- confidentiality of witnesses and sources of information and their protection;
- focus on collecting information (evidence);
- properly record and store information (evidence) in accordance with the requirements of the criminal procedure legislation;
- comply with the procedural procedure for the storage and transfer of material evidence.

It is necessary to emphasise the importance of observing the no harm principle. The essence of this principle is to comply with all procedures defined by law, considering the specific features of CRSV: the victim's perception of the situation, their moral and psychological (emotional) state, fear of assessment and perception of the violence experienced by relatives, friends and acquaintances. In this regard, it is important to provide psychological assistance to victims, to ask the right questions

to clarify the actual circumstances, so that the procedure of collecting evidence (including through interrogation of the victim or interrogation as a witness) does not harm either the victims (witnesses) or the process of proof. In particular, Article 11 of the CPC of Ukraine states that respect for human dignity is one of the general principles of criminal proceedings.



Section 2.

INTERNATIONAL STANDARDS ON PREVENTION, REPORTING AND RESPONSE TO CRSV

To understand the international standards for preventing, detecting and responding to CRSV, it is necessary to refer to the norms of international criminal law (ICL), international humanitarian law (IHL), which relate to the laws and customs of war, in order to compare them with the relevant national law.

The basis of international law is: The Geneva Convention relative to the Treatment of Prisoners of War of 1949, the Protocol Additional to the Geneva Conventions of 12 August 1949, the UN Convention on the Rights of the Child, the Rome Statute of the International Criminal Court, the IV Hague Convention relative to the Laws and Customs of War on Land of 1907 and the generally accepted principles and rules of international law relating to armed conflict (as set out in the Protocol Additional to the Geneva Conventions of 12 August 1949, Relative to the Protection of Victims of International Armed Conflicts), the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Murad Code, the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, the UN Security Council Resolution on Women, Peace and

Security and related resolutions.

The provisions of IHL presuppose that parties to a military conflict are aware of the requirements of the Conventions and other international instruments governing the laws and customs of war, which is an established fact by virtue of the general presumption of knowledge, as well as in accordance with the dissemination obligations under international law.

Under customary international law, rape and other forms of sexual violence are recognised as permanently prohibited. And IHL, as applied in armed conflict, contains rules prohibiting rape and other forms of conflict-related sexual violence and is aimed at protecting certain categories of persons who are not or no longer involved in hostilities.

Under the provisions of ICL, which criminalises particularly serious international crimes, sexual violence is also prohibited.

According to the Geneva Conventions I-IV of 1949, protected persons include, inter alia, civilians who are at any time and in any circumstances under the authority of a party to a conflict or an occupying power of which they are not nationals.

According to IHL, forms of conflict-related sexual violence include: a) rape; b) sexual slavery; forced prostitution; c) forced pregnancy; d) forced abortion; e) forced sterilisation; f) forced marriage; g) any other form of sexual violence of comparable gravity (including sexualised torture, female genital mutilation, forced nudity, etc.)

It should be noted that the procedures for proving conflict-related sexual violence in criminal proceedings have their own peculiarities, which are caused by the need to protect victims and witnesses. Therefore, it was logical to create rules and mechanisms for such protection. These rules and mechanisms have been developed by the International Criminal Court (Rules 70 and 71 of the ICC Rules of Procedure and Evidence) and other international tribunals and courts.

These procedures address the following issues:

- a) consent;
- b) corroboration of violence by additional facts;
- c) previous and subsequent sexual behaviour of the victim.

The rules provide for a certain algorithm:

■ **First:** *prosecutors do not need to provide evidence of force or threat of force to prove lack of consent, because:*

a) sufficient evidence proving the existence of coercive circumstances already excludes the possibility of genuine consent, and the focus should be on proving coercive circumstances;

b) the silence or lack of physical resistance of victims does not imply consent;

c) victims (witnesses) should not be asked any questions about consent unless the court is hearing the case in camera, where it has given prior express permission to do so after considering the arguments of the parties, and such questioning should be done in camera.

■ **Second:** *in line with the principles of international criminal procedure, cases of sexual violence do not require corroboration by additional facts.*

This means that the testimony of victims (provided it is reliable and credible) can be sufficient evidence of conflict-related sexual violence in the absence of any other additional corroboration of facts from other witnesses, documents, medical records, photographs or any other potential evidence.

■ **Third:** *most international criminal tribunals (courts) prohibit questions about the prior and subsequent sexual behaviour of victims.*

Such questions can be particularly humiliating and are considered unnecessary and inappropriate. Appropriate questions relate to the factual and objective circumstances and the assessment of such circumstances as to whether they allowed or did not allow the victim to freely consent to sexual acts with the suspected offender in a particular case.

■ **Fourth:** *other protective procedures are designed to ensure that victims, their families, relatives and friends, as well as witnesses, are not exposed to the risk of retaliation or retraumatisation.*

These procedures can be both structural (e.g., fair gender representation in the judiciary, staff with experience in dealing with trauma of sexual violence, experience in prosecuting gender-based crimes) and organisational and procedural security (e.g., personal protection, protection of housing and property, issuance of special personal protective equipment and danger warnings, replacement of documents and change of appearance, change of place of work or study, relocation to another place of residence, ensuring confidentiality of information).





The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has shaped the legal framework for CRSV in international criminal law, in particular, rape was prosecuted for the first time as a war crime, a crime against humanity and an act of genocide.

The judgements of the ICTR and ICTY ad hoc tribunals show three trends in the development of the understanding of rape in international criminal law.

The first line: from the Akayesu case (ICTR) to the Čelebići case (ICTY) - where the emphasis is on the concept of violence and aggression without focusing on the mechanical description of objects and body parts.

The Akayesu case was the first decision to define rape in international law. The Court noted that rape is a form of aggression and that the essential elements of the crime of rape cannot be found in a mechanical description of objects and body parts. The Court also noted the sensitivity associated with the public discussion of intimate matters and recalled the painful reluctance and inability of victims to disclose the anatomical details of the sexual violence they had suffered. The focus was on the coercive nature of the circumstances, noting that "sexual violence is not limited to physical intrusion into the human body and may include acts not involving penetration or even physical contact".

In Čelebići, the ICTY agreed with the conclusions of the Akayesu judgment regarding the understanding of violence as the central reason why international law prohibits rape.

The second line: from the Furundžija case (ICTY) to the Kunarac case (ICTY). In contrast to the first line, the main emphasis is placed on the characteristics of the act of rape, and the derivative emphasis is on the prohibition of non-consensual sex in view of the coercive circumstances that are recognised as prejudicial to consent.

In Furundžija, the court again tried to focus on the body parts and characteristics of the act of rape, in a way narrowing the approach taken in the Akayesu judgment. However, the Kunarac case reflects the court's understanding of 'sexual autonomy' as the 'true' purpose of rape laws, focusing on a sexual act involving sexual penetration to which the victim did not consent or was placed in a position of 'inability to resist'.

The third line: in the Gacumbitsi (ICTR) - Muhimana (ICTR) cases, there is an attempt to reconcile the approaches of the first two lines, with an emphasis on the absence of contradictions between these lines.

In fact, this practice has led to the formation of special rules of procedure and evidence in cases of sexual violence.

However, the special rules of procedure and evidence in cases of sexual violence will

be applied only if the act is qualified as a violation of the laws or customs of war.

For this purpose, it is necessary to establish and prove the existence of mandatory elements of the objective side, namely: time, place, environment (situation) - the so-called contextual elements. This means that qualification of an act as a violation of the laws and customs of war is possible only in the following cases: a) the existence of an international armed conflict; b) the actions took place in the context of an international armed conflict and were related to it; c) the perpetrator was aware of the actual circumstances that testified to the existence of an armed conflict, the deliberate targeting of civilian objects, i.e. objects that are not military targets.

Article 1 of the Law of Ukraine "On the Legal Regime of Martial Law" defines the concept of martial law: "Martial law is a special legal regime introduced in Ukraine or in some of its localities in the event of armed aggression or threat of attack, threat to the state independence of Ukraine, its territorial integrity and provides for the granting of powers to the relevant state authorities, military command, military administrations and local self-government bodies necessary for averting the threat, repelling armed aggression and ensuring national security, eliminating the threat to Ukraine's state independence and territorial integrity, as well as temporary restrictions on constitutional rights and freedoms of man and



citizen and the rights and legitimate interests of legal entities, caused by the threat, with the duration of these restrictions specified.”

By its very nature, the introduction of martial law in Ukraine is a response to the fact of armed aggression. Therefore, the existence of an international military, armed conflict, which is subject to IHL, as a characteristic of one of the elements of the objective side of the crime under Article 438 of the CC of Ukraine, is legally defined and has evidentiary value before and after the end of the military conflict. The methods of committing the crime under Article 438 of the CC of Ukraine are the result of the wording of international law provisions relating to the relevant area of legal regulation.

With the emergence of the permanent International Criminal Court (ICC), which operates on the basis of the Rome Statute, the issue of conflict-related sexual violence has been further developed.

PECULIARITIES OF PROVING CASES RELATED TO SEXUAL VIOLENCE IN THE ICC.

The problematic nature of the issue of investigating CRSV is due to the following factors:

a) material traces of CRSV may not exist at the time of the investigation (no injuries on the victim’s body, inability to find the instrument of CRSV if used, etc.) or sexual violence was committed in the absence of witnesses;

b) victims may keep silent about the fact of the commission of the crime (fail to report or report not all the circumstances) for various reasons. Therefore, the Rules and Procedures of Evidence highlight certain peculiarities of proof in cases of sexual violence, namely (Rule 70):

- consent cannot be presumed from any words or behaviour of the victim where force, threat of force, coercion or the use of compelling circumstances have undermined the victim’s ability to give ‘voluntary’ and ‘genuine’ consent;
- consent cannot be presumed from any words or behaviour of the victim when he or she lacks the capacity to give ‘genuine’ consent;
- consent cannot be presumed from the victim’s silence or lack of resistance in response to the alleged sexual assault;
- the trust, character and propensity for sexual relations of the victim or witness cannot be presumed on the basis of the victim’s or witness’s previous or subsequent sexual behaviour.

In the ICC's case law, proving the existence of coercive circumstances that made consent impossible is sufficient to hold a person liable for sexual violence. Therefore, it is not necessary to prove the absence of the victim's consent, which is confirmed by Rule 63(4), according to which the Trial Chamber does not impose a legal requirement to prove any crime within the Court's jurisdiction, including crimes of sexual violence. The ICC Appeals Chamber has noted that "...the circumstances in which such war crimes or crimes against humanity are committed are predominantly coercive".

Obviously, such case law, as well as the application of the rules of international criminal procedure, should be taken into account by national law enforcement agencies and courts during the investigation and judicial proceedings in criminal proceedings on crimes under Article 438 of the CC of Ukraine in order to ensure both international standards in the field of prevention, detection and response to CRSV and international standards of human rights protection at the national level.



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AND MECHANISMS INTO NATIONAL LEGISLATION
FOR THE PURPOSE OF RESPONSE AND PREVENTION
OF CONFLICT RELATED SEXUAL VIOLENCE (CRSV)



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ОФІС ВІЦЕПРЕМ'ЄР-МІНІСТРА
З ПИТАНЬ ЄВРОПЕЙСЬКОЇ ТА
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