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Study on cases from national courts and international tribunals related to gender-based violence in armed conflict

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■ **Abstract.** Gender-based violence in armed conflicts is on the rise, destroying the lives of victims, their families, and even communities. Investigating and prosecuting such crimes is not only a step towards justice, but also a powerful tool to prevent analogous cases in the future. The purpose of this study was to research the practice of investigating crimes related to sexual or gender-based violence by national courts and international tribunals. The study analysed the judicial practice of national courts and international tribunals, investigated the relevant scientific literature, and made a comparative analysis of the specific features of national and international legal proceedings. The study identified a series of common challenges faced by national courts and international tribunals in investigating gender-based violence in armed conflict: collecting evidence in dangerous and difficult conditions, and its short-lived existence; ensuring the safety of victims and witnesses, who are often particularly vulnerable, and maintaining their confidentiality when necessary; overcoming stigma and discrimination that prevent victims from seeking help; and proving that violence was committed in armed conflict against civilians or prisoners of war. It was noted that when investigating crimes related to gender-based violence, courts should apply a gender-sensitive approach that considers the specifics of crimes related to this type of violence and its impact on victims. The study proved that a prerequisite for effective investigation of crimes of this category is cooperation at the national and international levels. The findings of the study can contribute to improving the quality of investigations into crimes of sexual or gender-based violence in armed conflict, as well as serve as a basis for developing programmes aimed at preventing these crimes

■ **Keywords:** sexual violence; genocide; war crimes; international organisations; gender equality; human rights

■ Introduction

Armed conflicts are a persistent part of reality. Their consequences are devastating not only for the infrastructure and economy of a particular country, but also have a significant impact on the lives of people regardless of sex or gender identity. Armed conflicts are always accompanied by violence against both military and civilians. One of the types of violence that can accompany armed conflict is gender-based violence (GBV). In armed conflict, GBV can take many

forms, including sexual violence, physical violence, psychological violence, and economic violence. The relevance of this study lies in the fact that combating GBV, especially in the context of armed conflicts, is one of the crucial humanitarian and social problems of modern time. The pre-trial investigation and prosecution of perpetrators of GBV is crucial to preventing analogous crimes in the future, ensuring justice for victims, and contributing to the restoration of

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peace in regions that have been affected by military conflicts. Both national courts and international tribunals play a vital role in this. National courts have jurisdiction on their territory and can try crimes related to GBV committed by nationals of their country or on their territory. International tribunals, such as the International Criminal Court (ICC), have jurisdiction over a limited range of crimes, including war crimes, crimes against humanity, and genocide. Notably, GBV is often not considered a war crime or a crime against humanity, which complicates its investigation and prosecution of perpetrators through international tribunals.

Having analysed a series of recent publications, there are currently no Ukrainian findings related to the study of cases of national courts and international tribunals in the investigation of crimes related to GBV in armed conflicts. At the same time, there are a series of studies in Ukrainian legal science related to manifestations of gender-based violence in general. Thus, A. Politova (2022) investigated combating GBV as a European value. The researcher found that since 2017, Ukraine has begun to develop a proper system of protection for victims of GBV and to give this problem a proper legal assessment by amending existing regulations and adopting new ones. At the same time, it was noted that in the context of the armed conflict in Ukraine, the problem of insufficient effectiveness of the mechanism for preventing and combating GBV and protecting victims stays an urgent issue.

It is worth mentioning the thorough study by A. Politova & M. Hrushko (2023), who were among the first in Ukrainian legal science to determine that the International Criminal Court (ICC) as a legal institution sets precedents and shapes further steps towards building an international mechanism for bringing to justice persons for grave crimes in the field of international law. In the same study, the researchers focused on the need for Ukraine to ratify the Rome Statute, which would “facilitate” the prosecution of individual Russian military personnel and the highest political and military command for crimes on the territory of Ukraine and would in some way simplify Ukraine’s access to the ICC’s jurisdiction.

In turn, L. Villardón-Gallego *et al.* (2023) investigated the problem of GBV in the educational environment and its impact on the further development of violence in society. The study helped to analyse effective programmes for the prevention of gender-based violence among school-age children. The study was aimed at laying the groundwork for creating a state policy of equality and eradicating gender-based violence from an early age.

E.O. Bazaluk (2023) noted that the international community has been paying increasing attention to the problem of gender-based violence in armed conflicts over the past decade. This is confirmed by a

series of international and national regulations governing this area. Notably, the emphasis is on the relationship between gender-based violence and armed conflict. V. Hrytsaniuk (2023) found that women living in the frontline regions of Ukraine are at disproportionately high risk of gender-based violence. This violence, which manifests itself in various forms, often goes unnoticed and unpunished due to a series of factors related to the armed conflict. In this study, the researcher found that gender equality is one of the key aspects in preventing violence against women based on gender stereotypes.

Some researchers have investigated the issue of proper documentation of GBV-related crimes in armed conflicts. O.V. Shcherbanyuk & O.V. Sinkevich (2023) analysed the specific features of pre-trial investigation of international criminal offences and determined the role of non-governmental human rights organisations in this process. The researchers considered new functions assigned to certain non-governmental human rights organisations that have been operating in Ukraine since the beginning of the full-scale invasion.

Based on a doctrinal study, P. Shutava (2023) concluded that the key challenges faced in investigating crimes of sexual and gender-based violence during armed conflict include the lack of competence of law enforcement agencies and the lack of resources caused by the armed conflict. Procedural issues, such as lack of jurisdiction, are often significant obstacles, as well as the collection of evidence and the sensitive nature of such crimes. Furthermore, L. Protosavitska (2023) investigated the terms “gender” and “gender equality” in the definitions of international legal acts and national legislation of Ukraine on gender parity. This study was important for the development of the terminology component of the present research. Furthermore, L. Protosavitska (2023) gave a proper assessment of the transformations of Ukrainian legislation, which brought the concept of gender equality to a new stage of development.

Analysing the practices of other countries in combating gender-based violence in armed conflict, the study by J.-P. Pérez-León-Acevedo (2023) deserves attention, where the author analysed sexual and gender-based violence committed by non-state armed groups against women, girls, and LGBTI+ persons according to international humanitarian law. C.G. Adeyanju (2020) performed a thorough study, noting that due to the exhaustion of militants and the loss of territory, there has been a surge in the mass use of women and girls as material tools of war: fighters, suicide bombers, human shields, bargaining chips, sex slaves, informants, etc. The researcher assessed whether gender factors are responsible for this, identified the motivation for such behaviour, and offered some policy recommendations. When studying GBV in a single country in the context of

armed conflict, one cannot but ignore the study conducted by D.S. Tewabe *et al.* (2024), which assessed GBV and its consequences in war-torn areas in northern Ethiopia. A.V. Ivanov (2024) and V.V. Gutnyk (2024) analyse the current problems of the International Criminal Court, which is of immense importance in the context of the present study, since the ICC cases are being studied.

The purpose of this study is to properly analyse how national courts and international tribunals investigate crimes of gender-based violence in armed conflict; to develop relevant recommendations for national courts to improve the investigation of GBV; and to determine the significance of prosecuting perpetrators of GBV crimes in armed conflict.

■ Materials and Methods

This study examined the problem of investigating crimes related to gender-based violence in the context of armed conflict. For this, cases from national courts and international tribunals were analysed. The study was built on the concept of gender-based violence as a form of gender discrimination that manifests itself in the use of force or the threat of force against women and girls, men and boys, with the purpose of controlling them and causing them harm against a background of gender intolerance. This approach is based on the theories that have informed this study: gender equality, which is the study of feminine, masculine, or queer behaviour in various contexts, communities, societies, or academic fields; feminism, which emerged from the feminist movement and gender inequality, which is studied through the lens of social roles and experiences of women and men, which allows for a better understanding of the issue; and human rights overall, which recognise that GBV is a systemic problem that is based on inequality between men and women, is based on gender intolerance and can be directed against any person.

The study employed a comprehensive methodology that combined the methods of analysis, comparison, and description. These methods, considering the specific features of the study, had a series of advantages in the investigation of gender-based violence in armed conflicts. The analysis method helped to examine certain written sources, such as regulations,

court cases, reports, news, press releases, academic studies, etc. The comparative method was used to compare and evaluate the decisions of national courts and international tribunals: to identify comparable approaches to prosecuting perpetrators, to focus on the factors that are key in investigating the category of cases related to GBV committed in armed conflicts, and to summarise positive practices in the investigation of this category of cases by courts. The descriptive method helped to provide general characteristics of GBV and consider them in further research of relevant court cases. The research sequence included the following stages: 1) definition of keywords and concepts; 2) literature review; 3) selection of a sample of court cases, collection of data from relevant international reports and studies by NGOs; 4) analysis of the collected data; 5) formulation of relevant conclusions and recommendations.

The study analysed the judgements of national courts and international tribunals relating to GBV in armed conflicts. The study assessed the cases of the International Criminal Court “Prosecutor v. Bosco Ntaganda”¹ (2019), “Prosecutor v. Jean-Pierre Bemba Gombo”^{2,3}, as well as cases of national courts No. 748/1278/23^{4,5} and No. 650/1870/23⁶. Using the comparative legal method, the study identified common and distinctive features of the investigations of GBV by national courts of Ukraine and international tribunals. The results of this analysis were recorded in the form of a comparative table that reflects the key issues.

Furthermore, reports of international agencies and NGOs containing information on GBV and its investigation were used. The study analysed the report of the Rafal Lemkin Centre for Documentation of Russian Crimes in Ukraine (Zhuk *et al.*, 2024) and assessed the report of the UN Secretary-General dated 4 April 2024 (United Nations Security Council, 2024). The study used the relevant information related to the investigation of GBV in armed conflict, which is available on the official Internet resources of the Office of the Prosecutor General (n.d.), the United Nations (n.d.), the International Criminal Court (n.d.), and which was useful in forming the relevant stages of the study, collecting statistical data and forming a proper interpretation of a particular scientific term.

¹ Judgment of the International Criminal Court in Case No. ICC-01/04-02/06 “The Prosecutor v. Bosco Ntaganda”. (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

² Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 “The Prosecutor v. Jean-Pierre Bemba Gombo”. (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

³ Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 “The Prosecutor v. Jean-Pierre Bemba Gombo”. (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.

⁴ Judgment of the Chernihiv District Court of Chernihiv Region in Case No.748/1278/23. (2024, March). Retrieved from <https://reyestr.court.gov.ua/Review/117537510>.

⁵ Judgment of the Chernihiv Court of Appeal in Case No.748/1278/23. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119350031>.

⁶ Judgment of the Velyko Oleksandrivskyi District Court of Kherson Region in Case No.650/1870/23. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118734665>.

The specificity of the studied source base is that not every court case considered by both national courts and international tribunals concerns GBV committed in the context of armed conflicts. Furthermore, not every court case that results in the prosecution of perpetrators for crimes committed in the context of armed conflict will involve GBV or sexual violence. The small number of such cases and the incomplete description of the circumstances under which a conclusion can be made that GBV has been committed created certain challenges for this study. At the same time, the reports of international organisations tend to be based on the study of the specifics of GBV or sexual violence against women and girls, although any person, regardless of biological sex, can be a victim of this type of violence.

■ Results

As of 2024, there is no clear and universal definition of GBV in international legal instruments that would cover all its forms and aspects. Existing international instruments, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women¹, the Istanbul Convention², and the Rome Statute of the International Criminal Court³, contain definitions that focus on violence against women and girls based on their gender. This is conditioned by the fact that for quite a long time it was reasonably believed that “gender-based violence” and “violence against women” were identical in their content. This was primarily explained by the fact that women and girls are disproportionately affected by GBV. However, this definition does not *a priori* cover all forms of violence that may be based on gender identity or expression, such as violence against men and boys, violence against people with non-binary gender identities, and violence against LGBTQ+ people. At the same time, international governmental and non-governmental organisations are increasingly using the term “gender-based violence” in their documents (in various forms of its manifestation). Thus, the official website of the European Union defines

gender-based violence as violence directed against a person because of their gender or violence that disproportionately affects persons of a particular gender (What is gender-based violence?, n.d.).

For a proper understanding of the specific features of prosecuting perpetrators of crimes committed, *inter alia*, on the grounds of gender intolerance, it is important to assess the practice of national courts and international courts, specifically the International Criminal Court in The Hague and the separately established International Tribunals. The ICC, pursuant to Article 1 of the Rome Statute, is a permanent body empowered to prosecute individuals for the gravest crimes that pose a serious threat to peace and security and therefore require attention and joint efforts at the global level. The ICC acts as a complement to national criminal justice systems, ensuring that perpetrators of such crimes are held accountable even if they have managed to escape justice in their home countries⁴. According to Article 5 of the Rome Statute, the ICC’s jurisdiction is limited to four categories of crimes that constitute a serious threat to international peace and security. According to this Statute, the Court has jurisdiction over the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression⁵.

Notably, although Ukraine signed the Rome Statute on 20 January 2000, it has not yet been ratified by the Verkhovna Rada of Ukraine. However, the country has twice exercised its right to accept the Court’s jurisdiction under Item 3 of Article 12 of the Rome Statute⁶. In 2014, Ukraine recognised the jurisdiction of the ICC over crimes committed on its territory during Euromaidan and the war in Donbas^{7,8}. On 31 March 2022, the Prosecutor of the International Criminal Court, Kareem Khan, announced an investigation into alleged war crimes and crimes against humanity committed in the context of the situation in Ukraine since 2014. This announcement was made after 39 states parties to the Rome Statute sent requests for investigation to the ICC (Situation in Ukraine, 2022).

¹ Convention on the Elimination of all Forms of Discrimination Against Women. (1979, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_207#top.

² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001-11#Text.

³ Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

⁴ *Ibidem*, 1998.

⁵ *Ibidem*, 1998.

⁶ *Ibidem*, 1998.

⁷ Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court No. 790-VII “On the Recognition by Ukraine of the Jurisdiction of the International Criminal Court Over Crimes Against Humanity Committed by Senior State Officials, which Led to Particularly Grave Consequences and Massacres of Ukrainian Citizens During Peaceful Protests Between 21 November 2013 and 22 February 2014”. (2014, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/790-18#Text>.

⁸ Resolution of the Verkhovna Rada of Ukraine No. 145-VIII “On the Statement of the Verkhovna Rada of Ukraine “On Ukraine’s Recognition of the Jurisdiction of the International Criminal Court Over Crimes Against Humanity and War Crimes Committed by Senior Officials of the Russian Federation and Leaders of the Terrorist Organisations “DPR” and “LPR”, which Led to Particularly Grave Consequences and Mass Murder of Ukrainian Citizens”. (2015, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/145-19#Text>.

The ratification of the Rome Statute stays a crucial step for Ukraine in strengthening the rule of law and combating impunity for the gravest crimes. It would also enable Ukraine to take a more active part in the work of the ICC and influence its activities. At the same time, it is important to emphasise that the International Criminal Court is different from national courts. According to the Rome Statute¹, it is the duty of every state to exercise its criminal jurisdiction over persons responsible for international crimes (Understand International Criminal Court, 2023). The International Criminal Court is not a substitute for national courts. In this interaction, they complement

each other. The ICC can only investigate and, if warranted, prosecute and hold individuals accountable if the states concerned are unwilling or unable to do so properly. This is in line with the requirements of the Rome Statute, under which the International Court of Justice operates. States retain primary responsibility for prosecuting the gravest crimes (Understand International Criminal Court, 2023). According to the data presented in Table 1 of the comparison of the ICC and national courts, it is possible to identify the key criteria that allow comparing and contrasting the effectiveness of the ICC and national courts in combating the gravest international crimes.

Table 1. Comparison of the ICC and national courts of Ukraine

Criteria for comparison	International Criminal Court	National courts of Ukraine
Jurisdiction	Investigates and prosecutes the gravest crimes that pose a threat to international peace and security: genocide, crimes against humanity, war crimes, and crimes of aggression	Investigate and prosecute crimes committed on the territory of Ukraine according to the provisions of the Criminal Code of Ukraine, the Criminal Procedural Code of Ukraine, and other national laws.
Subjects of jurisdiction	Individuals (not states).	Individuals and legal entities.
Investigation procedure	Complex and time-consuming procedures that require considerable resources.	More flexible and faster procedures.
Application of the law	Operates based on the Rome Statute and uses other international legal instruments in its activities.	National legislation is applied.
Punishment	Prescribed in Article 77 of the Rome Statute. Imprisonment for a fixed term (not exceeding 30 years); Life imprisonment; A fine (additional punishment); Confiscation of income, property, and assets (additional punishment).	Prescribed in Article 12 of the Criminal Code of Ukraine.
Openness	Court proceedings are usually open to the public.	Court hearings are usually open to the public at all stages of the proceedings. This means that anyone can be present in the courtroom and observe the trial. Openness of court hearings guarantees transparency of justice and promotes trust in the judiciary
Accountability	It is accountable to the UN Security Council and the Assembly of States Parties to the Rome Statute.	Judicial independence is one of the fundamental principles of the rule of law
Advantages	Ensures justice when national justice systems do not function properly.	More accessible and familiar to people.
Disadvantages	Complex and lengthy procedures	May be biased or ineffective in some countries.

Source: compiled by the author of this study based on research of the Rome Statute² and Ukrainian legislation^{3,4}

Gender-based violence and sexual violence are increasingly being recognised as gravest crimes at both the national and international levels. The Rome Statute⁵ defines rape, forced prostitution, forced pregnancy, sexual slavery, and other forms of sexual violence as separate types of war crimes and is the first international document to formally establish this (Shunevich *et al.*, 2022). Furthermore, in 2014, considering the shortcomings of the Rome Statute in

terms of investigating crimes of gender-based violence and bringing perpetrators to justice, a policy paper on sexual and gender-based crimes was issued (Policy Paper on Sexual and..., 2014). The document aims to integrate a gender perspective into the investigation of crimes related to gender-based violence or sexual violence, improve work with witnesses and victims, and minimise mistakes in the investigation of gender-based crimes.

¹ Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

² Ibidem, 1998.

³ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

⁴ Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

⁵ Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

A major step towards the recognition of sexual violence and gender-based violence as war crimes is the study of the ICC case *Prosecutor v. Bosco Ntaganda*¹. The case was a landmark in the history of the International Criminal Court, as it was the first time the Court explicitly recognised sexual violence as a weapon of war and a crime against humanity. This case had a considerable impact on the development of international law and practice on the protection of victims of sexual violence in armed conflict. The case was about Bosco Ntaganda, a former commander of the Union des Patriotes du Congo (UPC) and the Free Patriots for the Liberation of the Congo (FPLC) militias, who was indicted by the International Criminal Court for war crimes and crimes against humanity committed in the Democratic Republic of the Congo in 2002-2005. Among other things, children involved in military operations (child soldiers) have suffered from sexual slavery and other forms of sexual violence (Shunevich, *et al.*, 2022).

When examining the gender aspect of the case in relation to Ntaganda's accusation, the following should be noted. Firstly, as noted above, Ntaganda was accused of using child soldiers as sexual slaves. This fact was investigated in the court proceedings and confirmed by numerous witnesses. This highlights the inextricable link between gender inequality and sexual violence in conflict zones. Secondly, in this case, the court recognised that rape and other forms of sexual violence are based on gender inequality and subordination. This was a crucial step towards recognising gender-based violence as a grave crime that has underlying causes. Ntaganda's case also demonstrated the significance of a gender-sensitive approach to the investigation and prosecution of sexual violence cases. This includes protecting survivors from stigmatisation and re-traumatisation and ensuring their participation in the process.

Notably, despite the considerable progress made in the Ntaganda case, there are still many challenges in protecting survivors of sexual violence in armed conflict. This includes stigmatisation of victims, difficulties in accessing justice, and insufficient funding for support programmes. Nevertheless, the *Prosecutor v. Bosco Ntaganda* case² stays a landmark case that paved the way for a better understanding and

protection of the rights of survivors of sexual violence and gender-based violence.

Another case that is important for the Ukrainian judiciary and its further application in bringing the guilty to justice for crimes committed based on gender intolerance is the case of *Prosecutor v. Jean-Pierre Bemba Gombo*^{3,4}. Jean-Pierre Bemba Gombo was the Vice President of the Democratic Republic of the Congo (DRC) and a militia leader during the Second Congolese War (1998-2003). In 2006, the International Criminal Court arrested him on charges of war crimes and crimes against humanity committed by his militia in the Central African Republic (CAR) in 2002-2003. In 2018, Bemba was found guilty of war crimes, including murder, rape, and looting, and crimes against humanity, including murder, rape, and torture. This was the first ICC conviction for sexual violence crimes committed by a commander who was not directly responsible for the actions of his subordinates. Bemba was sentenced to 18 years in prison. However, in 2021, the ICC Appeals Chamber overturned some of his convictions and reduced his sentence to 10 years. The Chamber ruled that the prosecutors failed to prove that Bemba had knowledge of the crimes committed by his subordinates or that he failed to take all possible measures to prevent them.

The case is important for shaping Ukraine's legal position against the backdrop of the Russian Federation's military aggression in the International Criminal Court to bring commanders, military commanders, and other persons in a position of authority to justice for committing unlawful acts of gender intolerance by their subordinates. In the case of *Prosecutor v. Jean-Pierre Bemba Gombo*⁵, the guilt of the accused was not proved beyond reasonable doubt. The above should be taken into account by the law enforcement agencies of Ukraine and considered during the trial on a particular charge, as the commission of multiple acts of sexual violence and gender-based violence by Russian military personnel is not an accident and has been used to influence the civilian population, suppress the will of prisoners of war, etc.

Examination of the case of *Prosecutor v. Jean-Pierre Bemba Gombo*^{6,7} contributes to the understanding of the circumstances that must be proven for the persons who hold leadership positions and are

¹ Judgment of the International Criminal Court in Case No. ICC-01/04-02/06 "The Prosecutor v. Bosco Ntaganda". (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

² *Ibidem*, 2019.

³ Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁴ Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.

⁵ *Ibidem*, 2018.

⁶ Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁷ Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.

entitled to issue certain orders to suffer the appropriate punishment for the actions of their subordinates during armed aggression. In connection with the military aggression of the Russian Federation against Ukraine, numerous cases of sexual violence and gender-based violence committed by the military on the territory of Ukraine have now come to light. Victims of such crimes are mostly women, but other categories of people are also targeted, including children of all genders, men, and members of the LGBT-QI+ community (lesbian, gay, bisexual, transgender, queer, and intersex people).

The experience of international litigation is essential for the development of judicial practice by the national courts of Ukraine. At the same time, it is not possible to obtain comprehensive and reliable information on the total number of criminal proceedings opened to investigate sexual violence during the Russian army's invasion of Ukraine. Thus, the publicly available report of the Prosecutor General's Office "On Registered Criminal Offences and the Results of their Pre-trial Investigation" (Official website of the Prosecutor General's Office, n.d.) for January–April 2024 shows 8,569 criminal proceedings under Article 438 (Violation of the Laws and Customs of War), 171 proceedings under Article 152 (Rape) and Article 153 of the Criminal Code of Ukraine¹ (Sexual Violence), but it is unknown how many of them relate to sexual violence committed by the Russian military during the conflict (United Nations Security Council, 2024).

An analysis of data from the Unified State Register of Court Decisions revealed two verdicts in which the court, among other things, assessed the facts of sexual and gender-based violence. In the future, the issue of investigating and prosecuting conflict-related sexual violence or GBV committed by the Russian Federation's military personnel may be considered by the International Criminal Court (Shunevich, 2022).

In the verdict of the Chernihiv District Court of the Chernihiv Oblast in case No. 748/1278/23^{2,3} it was established and proven that one of the servicemen of the Russian Federation, using his power and desire to satisfy his sexual needs, committed sexual violence against the victim. He forced her to perform unwanted sexual acts, including touching her

intimate areas with his hands. These actions humiliated the victim's honour and dignity and grossly violated her sexual inviolability. The court found that the accused had violated the requirements of Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War⁴, and Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977⁵.

The difficulty of proving the guilt of individuals in court at the national level is accompanied by many factors. Firstly, these are material traces of the crime, which may no longer exist at the stage when the crime is discovered and during the subsequent pre-trial investigation and trial. For example, there are no bodily injuries, no witnesses, and no means of committing the crime. Secondly, among the notable features is that survivors of sexual violence or GBV may conceal the fact of unlawful acts due to various circumstances.

To successfully investigate and prosecute sexual violence, it is important to understand the context of the crime. This means investigating where the crime occurred, whether it was linked to other crimes, and what role it played in the overall crime picture. This is important because sexual violence during conflicts is often silenced or tolerated, even if it is not officially encouraged (Shunevich, 2022). In case No. 748/1278/23⁶, the court examined and assessed enough evidence to indicate that sexual violence was committed during the armed conflict and with the intent to intimidate the civilian population.

In another case No. 650/1870/23⁷, which was considered by the Velyka Oleksandrivka District Court of Kherson Oblast, the court found that the criminal law qualification of the actions of the accused Russian Federation serviceman was determined by the pre-trial investigation body under part one of Article 438 of the Criminal Code of Ukraine as another violation of the laws and customs of war prescribed by international treaties ratified by the Verkhovna Rada of Ukraine, which consisted of rape, the use of physical and moral coercion, including intimidation by threats of physical violence against civilians, i.e., in violation of Part 2 of Article 27 of the Convention

¹ Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

² Judgment of the Chernihiv District Court of Chernihiv Oblast in Case No.748/1278/23. (2024, March). Retrieved from <https://reyestr.court.gov.ua/Review/117537510>.

³ Judgment of the Chernihiv Court of Appeal, in Case No.748/1278/23. (2024, May). Retrieved from <https://reyestr.court.gov.ua/Review/119350031>.

⁴ Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.

⁶ Judgment of the Chernihiv District Court of Chernihiv Oblast in Case No.748/1278/23. (2024, March). Retrieved from <https://reyestr.court.gov.ua/Review/117537510>.

⁷ Judgment of the Velyka Oleksandrivka District Court of Kherson Oblast in Case No. 650/1870/23. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118734665>.

Relative to the Protection of Civilian Persons in Time of War¹, Part 2 of Article 75, Part 1 of Article 76 of the Protocol Additional to the Geneva Conventions² of 12 August 1949.

The existence of direct intent in the actions of the accused to commit the crime charged, namely rape, the use of physical and moral coercion, including intimidation by threats of physical violence against a civilian in wartime, was established by the court based on the totality of the evidence examined, specifically, those confirming the circumstances that testify to the accused's awareness of the need to follow the laws and customs of war relative to the civilian population as a military personnel, namely the provisions of Part 2 of Article 27 of the Convention Relative to the Protection of Civilian Persons in Time of War³, Part 2 of Article 75, Part 1 of Article 76 of the Additional Protocol to the Geneva Conventions of 12 August 1949⁴, as he directly ensured the military occupation on the territory of Ukraine, took part in the seizure of buildings of local and state authorities, military facilities and law enforcement agencies, acted as a military officer who, by virtue of his official duties, had to know and consider during the preparation and conduct of combat (execution of the assigned task) the norms of international humanitarian law, which expressly prohibit the use of terror against the civilian population, including assault against the honour of women, commission of rape.

Furthermore, the court found beyond reasonable doubt that the victim, by her behaviour and circumstances at the time of the crime, met all the criteria of a civilian, i.e., she did not take any part in hostilities, did not perform or facilitate any combat tasks, she wore civilian clothes in everyday life, was engaged in civilian affairs, was in a helpless state caused by the lack of an objective opportunity to resist an armed and specially trained military personnel who also controlled the movement of civilians⁵.

International humanitarian law clearly and unequivocally prohibits rape and other forms of sexual violence or gender-based violence under any circumstances. The prohibition of sexual violence is not limited to an outright ban. It is also prohibited as torture or cruel, inhumane, or degrading treatment or punishment. The recognition of rape and other forms of sexual violence as genocide, crimes against

humanity, and war crimes is fundamental. This ensures that the perpetrators will be held individually criminally accountable at the international level for these gravest crimes.

According to a report by the Rafal Lemkin Centre for Documentation of Russian Crimes in Ukraine (Zhuk *et al.*, 2024), the Russian army uses sexual violence as a systematic instrument of terror in the occupied territories. Women live in constant fear as Russians use rape and threats of rape to intimidate and control the population. The victims of these crimes are in a state of helplessness and constant terror, as they have no protection from the occupiers.

Furthermore, according to the report of the UN Secretary-General dated 4 April 2024 (United Nations Security Council, 2024), since the full-scale invasion of Ukraine by the Russian Federation, the UN Human Rights Monitoring Mission in Ukraine has documented 85 cases of conflict-related sexual violence against civilians and prisoners of war, affecting 52 men, 31 women, 1 girl, and 1 boy. In cases where sexual violence was used against adult men, such violence took place as a method of torture during their captivity, by representatives of occupation law enforcement agencies or Russian military groups. The violence included rape, threats of rape against the victims and their relatives, electric shocks and beatings of the genitals, electric shocks to the breasts, threats of castration, genital mutilation, unwanted touching, forced undress and nudity.

It is important that GBV investigations are conducted in a gender-sensitive manner. This means that the specific experiences and needs of GBV survivors, the majority of whom are women and girls, should be taken into account. Investigations should be safe and confidential for victims and respect their dignity. In these categories of cases, prosecutors need to prove that the crime was committed with intent and that it is linked to the armed conflict. It is important that the courts can impose severe penalties on perpetrators of GBV-related crimes. National courts and international tribunals should cooperate to ensure that those responsible for such crimes are held accountable, to prevent their recurrence and to ensure justice for all involved. Combating GBV in the context of armed conflict is challenging, but it is an urgent necessity.

¹ Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.

³ Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.

⁵ Judgment of the Velyka Oleksandrivka District Court of Kherson Oblast in the Case No. 650/1870/23. (2024, April). Retrieved from <https://reyestr.court.gov.ua/Review/118734665>.

■ Discussion

Notably, in the context of comparing and examining the court cases related to GBV in armed conflicts investigated by international tribunals and national courts, there are no analogous studies conducted by Ukrainian researchers. At the same time, a series of foreign researchers have assessed ICC cases related to sexual violence in the context of their significance for the development of further judicial practice, the identification of gender-based violence and the specific features of gender tolerance by the court.

As O. Oyewole (2023) notes, the prosecution of crimes of sexual and gender-based violence is one of the most pressing, but at the same time extremely complex issues for international criminal justice. The researcher explains this, first of all, by the fact that in the past, crimes of sexual violence in the context of international armed conflict were not considered crimes in themselves. This is confirmed by the fact that the Nuremberg and Tokyo tribunals did not prosecute sexual and gender-based crimes, despite the undeniable use of the “comfort women system” in Tokyo during the Second World War. However, with the emergence of the International Criminal Court, the investigation and prosecution of gender-based crimes should be a key focus. The cases before the Court particularly demonstrate the development and dynamics of the prosecution of crimes committed on the grounds of generalised intolerance at the ICC. The researcher recommends considering a gender perspective in the investigation and prosecution of sexual violence. The study conducted by O. Oyewole (2023) is in line with the research findings of the present study – highlighting the gender approach in prosecution, providing a proper assessment of GBV and sexual violence in armed conflict – and complement each other. It is worth agreeing with the findings of the above-mentioned researcher in full. At the same time, when investigating GBV and gender-based sexual violence, it is important to consider that violence against women and girls is a separate category of violence in the current context that can be part of GBV.

Furthermore, for a proper understanding of the specific features of holding perpetrators accountable for sexual violence or gender-based violence, A. Adamska-Gallant (2023) analysed the characteristics of the judge, personal experience, or gender. The researcher pointed out that in adopting the Rome Statute, which established the International Criminal Court, the need to involve women judges was recognised to better respond to the problems of women who have been victims or witnesses of violence. In this case, the international community tried to implement a gender-sensitive approach at the due level.

The Rome Statute provides for equitable representation of women and men judges¹. For centuries, women and children have been innocent victims of war crimes during armed conflicts. But they did not play a substantial role in the peace negotiations or in the punishment of war criminals. Even the nature of the crimes committed against them, mainly rape, has been disguised in international legal linguistics under general terms such as crimes against honour and dignity. Women have been largely invisible in the prosecution of war criminals (Wald, 2011). Female judges who have experience in dealing with crimes of sexual violence have a better understanding of their victims and the context in which the crime was committed. They also show greater empathy for victims during testimony, especially during cross-examination, making them more active in situations where witnesses testifying about sexual violence may be at risk of undue pressure and even aggression from the defence. By evaluating evidence, female judges avoid harmful stereotypes about the behaviour of victims (Adamska-Gallant, 2023). The findings of the above-mentioned researchers, when compared with the cases examined in the present study, clearly suggest that international justice has made a great step forward. Compared to the present study, A. Adamska-Gallant (2023) assessed the specific circumstances of the ICC proceedings, while this study examined the gender-sensitive approach from the standpoint of the evidence collected and the proper proof of a person's guilt in court. At the same time, one cannot but agree that the empathetic component of a court case may depend on the gender of the judge. At the same time, it cannot be agreed that the involvement of female judges in hearing this category of cases becomes decisive in the final court decision. Moreover, such a formulation may lead to gender inequality in the composition of the courts, both ICC and national courts, as minimising the role of male judges and devaluing their attitude towards victims may imply an expression of toxic masculinity on the part of A. Adamska-Gallant (2023), which the author of this study cannot agree with. However, the ICC, when making the above decisions, assessed the testimony of the victims, even in cases where such testimony differed from the initial testimony (taken at the pre-trial investigation stage).

Within the framework of the present study, the research by M. Sjöholm (2020) was examined for her analysis of sexual violence and gender-based international crimes in Swedish case law. Notably, the Swedish judicial system differs from the Ukrainian one, while the study of M. Sjöholm (2020) is of great practical importance in determining the role of the ICC in shaping the national legal system.

¹ Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

Unlike Ukraine, Sweden ratified the Rome Statute in 2001, which greatly facilitated the prosecution and accountability of perpetrators of GBV and sexual violence in armed conflict. M. Sjöholm (2020) concluded that the awareness of international courts that sexual and gender-based crimes are becoming an element of warfare has a positive impact on the further investigation of analogous crimes and the development of case law in national courts. The author of this study agrees with this conclusion, considering that in Ukrainian legislation, GBV in armed conflicts is currently prosecuted in the context of violations of the laws and customs of war, and very often courts do not distinguish sexual violence as a means of warfare.

For the purposes of this study, court cases in which victims of GBV and sexual violence were predominantly women and girls were assessed. The study by S.K. Chynoweth *et al.* (2020) was examined, wherein the authors provided a relevant assessment of the perpetration of gender-based violence and sexual violence in armed conflict against men and boys. According to S.K. Chynoweth *et al.* (2020), the perpetration of sexual violence against men and boys in many conflict-affected regions is becoming increasingly evident. The author of this study fully agrees with the above in the context of the present study. When examining the cases of international tribunals, namely the ICC case of Prosecutor v. Bosco Ntaganda¹, it was found that victims of GBV can be persons of any physiological gender. In the context of this study, the findings of S.K. Chynoweth *et al.* (2020) are of great significance in determining the form, place, and consequences of such violence. Furthermore, little research has been conducted to date on sexual violence against men and boys in the context of displacement.

The majority of this study is based on an analysis of ICC judgements in cases of sexual and gender-based violence. It was found that the ICC currently attaches great importance to the protection of victims and reparations. At the same time, having analysed the study of R. Fowler (2021), wherein the latter argues that although the ICC plays a unique and crucial role in the prosecution of international criminals, it is not the beginning of justice. The researcher criticises the ICC's ability to provide adequate support to victims of GBV and sexual violence and questions its institutional capacity. The author of this study cannot agree with this conclusion, because as of 2024, the ICC is perhaps the only international organisation within its competence to restore justice for victims of GBV. However, as noted by V. Pylypenko (2024), neither the provisions of the Rome Statute nor the provisions of the Rules of Procedure and Evidence and other acts

that guide the Court in its activities reflect or specify the content of the forms of compensation for damage: their choice depends solely on the opinions, conclusions, and decisions of the court in each particular case. This may have a certain impact on the fairness of court decisions in the context of victim protection.

■ Conclusions

The present study examined the cases of national courts and international tribunals related to gender-based violence in armed conflict. The purpose was to analyse how courts at different levels apply international law and national legislation to protect the rights of GBV victims in the context of armed conflict.

It was found that courts attempt to apply international law and national legislation to protect the rights of GBV victims, but there are considerable difficulties in doing so. One of the main problems is that GBV often goes uninvestigated and unpunished, especially in conflict zones. Victims may be reluctant to come forward out of fear of retaliation, while law enforcement agencies may lack the resources to investigate and prosecute these crimes. An important result of the study is that it demonstrated the need for clearer and more effective mechanisms to protect the rights of GBV victims in armed conflict, to consider a gender-sensitive approach, and to properly qualify the actions of perpetrators. This includes improving the conduct of pre-trial investigations, as well as providing adequate aid and support to victims of sexual violence or GBV committed in armed conflict.

Considering the complexity of investigating and prosecuting GBV cases, especially in the context of armed conflicts, the study explored a series of prominent issues, which constituted its scientific originality. Thus, the study examined the possibility of improving cooperation between national courts and international tribunals for more effective investigation and prosecution of GBV; identified the challenges faced by national courts and international tribunals in investigating GBV; and assessed the possibility of ensuring the protection of victims of GBV during the investigation and trial of their cases.

National courts and international tribunals play a vital role in investigating crimes of gender-based violence committed during armed conflict. Such crimes are grave human rights violations that have a devastating impact on the lives of individuals and society as a whole. It is paramount that the perpetrators of such crimes are held accountable to prevent their recurrence and ensure justice. National courts have the primary responsibility for investigating and prosecuting GBV crimes. They must have the necessary resources and suitably trained staff to conduct

¹ Judgment of the International Criminal Court in the Case No. ICC-01/04-02/06 "The Prosecutor v. Bosco Ntaganda". (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

effective litigation and ensure fair trials. International tribunals play a key role in cases where national courts are unable or unwilling to investigate GBV crimes. They also contribute to the development of international law and norms related to GBV. It must be emphasised that the international community should continue to support national courts and international tribunals in their efforts to investigate and prosecute crimes related to GBV.

At the same time, the study was based on a limited number of court decisions and reports of international organisations, no field research was conducted in investigating the topic in the areas of armed conflicts, and the study did not cover all aspects of GBV in armed conflicts. Nevertheless, the findings help to better understand the problem of GBV in armed conflict.

Promising areas for further research may include investigating the role of gender norms and stereotypes in the context of GBV in armed conflicts; analysing

the impact of armed conflicts on the availability and quality of rehabilitation measures for GBV victims; studying international practices in preventing GBV and protecting victims' rights in armed conflicts.

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■ Conflict of Interest

The author of this study declares no conflict of interest.

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Дослідження справ національних судів і міжнародних трибуналів, пов'язаних із гендерно зумовленим насильством, в умовах збройних конфліктів

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■ **Анотація.** Гендерно зумовлене насильство в умовах збройних конфліктів набуває стрімкого поширення, руйнуючи життя жертв, їхніх сімей і навіть спільнот. Розслідування таких злочинів і переслідування винних осіб є не лише кроком до справедливості, а й потужним інструментом запобігання подібним випадкам у майбутньому. Метою статті є ґрунтовне дослідження практики розслідування злочинів, пов'язаних із сексуальним або гендерно зумовленим насильством, національними судами та міжнародними трибуналами. Під час написання роботи було проаналізовано судову практику національних судів і міжнародних трибуналів, вивчено профільну наукову літературу, здійснено відповідний порівняльний аналіз особливостей національного та міжнародного судочинства. Дослідження дало змогу виявити низку спільних викликів, з якими стикаються національні суди та міжнародні трибунали під час розслідування гендерно зумовленого насильства в умовах збройних конфліктів: збирання доказів у небезпечних і складних умовах, їх недовговічне існування; забезпечення безпеки жертв та свідків, які часто є особливо вразливими, зберігання їх конфіденційності за необхідності; подолання стигматизації та дискримінації, що заважають жертвам звертатися за допомогою; доведення фактів учинення насильства саме в умовах збройних конфліктів до цивільного населення або військовополонених. Зауважено, що під час розслідування злочинів, пов'язаних із гендерно зумовленим насильством, суди мають застосовувати гендерно чутливий підхід, який ураховуватиме специфіку злочинів, пов'язаних з таким видом насильства, та його вплив на жертв. Доведено, що передумовою ефективного розслідування злочинів зазначеної категорії є співпраця на національному та міжнародному рівнях. Результати дослідження можуть сприяти підвищенню якості розслідування злочинів сексуального або гендерно зумовленого насильства в умовах збройних конфліктів, а також слугувати підґрунтям для розроблення програм, спрямованих на запобігання вчиненню цих злочинів

■ **Ключові слова:** сексуальне насильство; геноцид; військові злочини; міжнародні організації; гендерна рівність; права людини