Humanitarian Law Center Foundation

Policy Paper:

Wartime rape as a crime against humanity

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#ЕУ ЗА ТЕБЕ

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ABBREVIATIONS

ECtHR	European Court of Human Rights
HLC	Humanitarian Law Center
OWCP	Public Prosecutor's Office for War Crimes
FRY CC	Criminal Code of the Federal Republic of Yugoslavia
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICJ	International Court of Justice
UN Security Council	United Nations Security Council

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INTRODUCTION

The practice of international criminal tribunals has set the standard for prosecuting rape and sexual violence in war. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have recognised that such acts, when committed in the context of a systematic and widespread attack against the civilian population, may qualify as crimes against humanity.

A crime against humanity is a criminal offence that includes serious acts such as murder, persecution, torture, rape, etc, committed as part of a systematic and widespread attack on the civilian population. Unlike war crimes, crimes against humanity can also be committed in peacetime. To date, no person has been charged with this crime before Serbian courts.

The reason for this omission lies in the opinion of the Public Prosecutor's Office for War Crimes (OWCP) that a crime against humanity cannot be prosecuted, because this act was not part of the domestic criminal legislation until 2005. However, the position of the Humanitarian Law Center (HLC) is that the existing legal framework in Serbia allows for the prosecution of the criminal offence of crime against humanity without violating the principle of legality, i.e. through direct application of international law. The correctness of this position was confirmed by the judgment of the European Court of Human Rights (ECtHR) in the *Šimšić* Case.

By directly applying international law to proceedings relating to the 1990s, domestic prosecutors and courts would align their practice with the standards of modern international law in prosecuting rape and other forms of sexual violence committed during the armed conflicts in former Yugoslavia.

I. THE INTERNATIONAL LEGISLATIVE FRAMEWORK

The long-standing request of the Humanitarian Law Center (HLC), addressed to the Public Prosecutor's Office for War Crimes (OWCP) and the Higher Court in Belgrade (War Crimes Department), for the enablement of prosecution of crimes against humanity in Serbia, is based on proper and due application of international customary law. "International customary law is the most obvious manifestation of universal international law."[1] It is listed in the Statute of the International Court of Justice (ICJ) as one of the five primary sources of international law.[2] The adoption of the Statute of the ICJ in 1945 marked the essential recognition of customs as the means by which States have been – and still are – obliged to carry out certain actions, or to refrain from carrying out those actions, in accordance with international standards.

International customary law is created and developed by the consistent and broad practices of states and their belief that customary conduct is rooted in legally binding norms (*opinio juris*).[3] Despite its relatively informal nature, which implies, among other things, the absence of a specific agreement or convention establishing its principles, international customary law imposes firm legal obligations on states. Norms established by customary law mechanisms can be formalised in writing and adopted as agreements, conventions, or treaties. However, customary law is particularly important when it comes to mass violence, since it "fills the gaps left behind by contract law and thus enhances the protection available to victims."[4]

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1 International Law Commission (ILC), Report on the Work of the Seventy-First Session, 2019, UN Doc. A/74/10, Chapter 7, 160, available at: https://legal.un.org/ilc/reports/2019/english/chp5.pdf.

2 Statute of the International Court of Justice, Article 38, paragraph 1 (b).

3 "Customary International Law", European Center for Constitutional and Human Rights, available at: https://www.ecchr.eu/en/glossary/customary-international-law.

4 "Customary Law", International Committee of the Red Cross, available at: https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law.

Different aspects of international customary law impose different obligations on states. Imperative norms (*jus cogens*) have a unique status as customary norms "from which no derogation is permitted and which can only be modified by a subsequent norm of general international law with the same character."[5] The domestic courts of States recognise special obligations emanating from imperative customary law, such as the capacity to exercise universal jurisdiction.[6] With the exception of prohibitions on conduct from which states cannot derogate, national courts and legal experts have also emphasised that *jus cogens* establishes the duty [of states], by which it is considered imperative "to prosecute international crimes," including genocide, slavery, expulsion, torture, and crimes against humanity.[7]

i. Crime Against Humanity

As already noted, the prohibition of crimes against humanity is based on international customary law.[8] Legal experts believe that this customary norm existed even before the Second World War.[9] Crimes against humanity were first officially

5 International Law Commission (ILC), Vienna Convention on the Law of Treaties, p. 142; Article 53, 27 January 1980

6 *Ibid.*, p. 160.

7 *Ibid.* ("The High Court of Kenya has established the "duty to prosecute international criminal offences" both as a rule of customary international law and as a peremptory norm of general international law"); Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation: Chapter 5: Crimes against Humanity, 31 August 2001, available at: https://www.amnesty.org/en/documents/ior53/008/2001/en/.

8 International Law Commission (ILC), pp. 146–147. The representatives sought to include the obligations to prevent, avoid and prosecute acts against humanity in the proposed International Convention on the Prevention and Punishment of Crimes against Humanity. Washington University School of Law, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* , 2010.

9 David Matas, "Prosecuting Crimes Against Humanity: The Lessons of World War I," *Fordham International Law Journal* 13, 1989, p. 86.

mentioned in the 1945 London Agreement on the International Military Tribunal.[10] Crime against humanity is also an imperative norm, and thus, according to the Vienna Convention on the Law of International Treaties[11], it cannot be changed or abolished by an agreement. States have an accompanying duty to prosecute crimes against humanity.[12] Establishing this duty with regard to prosecution is a fundamental factor in the efforts to develop the Convention on the Prevention and Punishment of Crimes against Humanity.[13]

Since the first prosecution of crimes against humanity at Nuremberg, the doctrinal outlines of that crime have been developed by customary law and the jurisprudence of international criminal tribunals, including the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).[14] According to Article 7. of the Rome Statute, which established the International Criminal Court (ICC), crimes against humanity are specifically enumerated acts of execution (e.g., murder, rape, extermination, torture, persecution) committed "as part of an indiscriminate or systematic attack

10 Agreement on the Prosecution and Punishment of the Principal War Criminals of the Axis, 8 August 1945.

11 Vienna Convention on the Law on International Treaties, 27 January 1980.

12 M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems* 59, 1996, pp. 63–74; Jan Wouters, "The Obligation to Prosecute International Law Crimes," available at: https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf.

13 Amnesty International, *General Recommendations to States for a Convention on the Prevention and Punishment of Crimes Against Humanity* , 2023, available at: https://www.amnesty.org/en/wp-content/uploads/2023/03/IOR4064972023ENGLISH.pdf (emphasis added).

14 United Nations Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820 Review of the elements of sexual violence in the judgments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Tribunal for Sierra Leone in the context of Security Council Resolution 1820*, 9 March 2009, 20, available at: https://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf.

directed against any civilian population, with cognisance of the attack."[15] Crimes against humanity are not conditioned by the existence of armed conflict.[16]

The claim that a crime against humanity refers to an indiscriminate attack "is what distinguishes a crime against humanity from 'ordinary' crimes. The focus on the collective in the form of civilian population, rather than on individual victims, categorises crimes against humanity among the most serious crimes."[17] This legal requirement refers to the extent of the damage directed against civilians, as well as the organised, structural nature of the violence.[18]

A basic crime that is prosecuted as a crime against humanity does not have to be widespread in itself.[19] However, the act that harms the victim must relate to a broader regime of violence against civilians, because there must be a link between the conduct in question and such an attack.[20] Crimes against humanity can also be committed for personal reasons. The motives of the accused are irrelevant as long as the incidents that amount to crimes against humanity take place as part of a systematic and widespread attack on civilians.[21]

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15 Rome Statute of the International Criminal Court, 17 July 1998 The ICC has significantly expanded the modalities of sexual violence which, as integral parts, could be considered crimes against humanity. Mark Ellis, "Breaking the Silence: Rape as an International Crime," *Case Western Reserve Journal of International Law* 38, 2007, 225, available at: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1335&context=jil.

16 *Ibid.*

17 United Nations Department of Peacekeeping Operations, p. 22 (quoting the judgment in the *Zelenovic* Case, paragraph 37).

18 Nicole Dorsky, "The Elements of Rape as a Crime Against Humanity, What Witnesses are Required to Say to Satisfy These Elements, and the Cultural Implications of Describing Rape in Detail" (2003). *War Crimes Memorandum*, 213, available at: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1212&context=war_crimes_memos.

19 United Nations Department of Peacekeeping Operations, p. 17.

20 Siobhan Kehoe Dubin, "A Comparative Study of Sexual Violence Trials in the ICTY and ICTR Comparing Six Particular Issues," 2003, *War Crimes Memorandum*, 2003.

21 United Nations Department of Peacekeeping Operations, p. 23.

ii. The legal definition of rape

During the armed conflicts in the former Yugoslavia, reports from the field indicated that "sexual violence was carried out in an 'organised or systematic manner' or in accordance with orders or with the approval of superior officers."[22] This "entrenched the perception that this violence was part of the politics."[23] Rape and other forms of sexual violence were "massive in nature", and "strategically" used as a weapon of conflict.[24] Documented attacks on civilians in Bosnia and Herzegovina (BiH) included sexual violence, which was pervasive throughout the war, in the form of "mass rape" and as a tool for the spatial ethnic cleansing and elimination of Bosnian Muslims.[25] By 1993, the reported number of rapes varied, with estimates ranging from 12,000 to 70,000 raped women in Yugoslavia. Sexual violence continued in Kosovo in 1998 and 1999.[26] These devastating testimonies of horrific sexual violence and of rape in particular, prompted international actors to establish the ICTY.[27] The ICTR also had sought to address the abundant evidence of

22 *Ibid.*

23 *Ibid.*, p. 22.

24 Grace Harbour, "International Concern Regarding Conflict-Related Sexual Violence in the Lead-Up to the ICTY's Establishment," in *Prosecuting Conflict-Related Sexual Violence at the ICTY* p. 21, Serge Brammertz & Michelle Jarvis (eds). 2016.

25 *Ibid.*, p. 23.

26 *Ibid.,* p. 25.

27 HLC, "Policy Paper: Awarding Reparation Claims to Victims of Sexual Violence in War Crimes Proceedings before Courts in Serbia", June 2021, p. 7, available at: https://hlc-rdc.org/wp-content/uploads/2021/06/Policy_Paper_-_SRP.pdf.

rape as an instrument of genocidal violence against the Tutsi people and, to some extent, against the Hutu people, in Rwanda.[28]

There was no definition of rape in the international legal lexicon at the time, when both courts were tasked with prosecuting those responsible for rapes committed during the armed conflicts. Nevertheless, the conventions and criminal courts that had preceded the ICTY and the ICTR outlawed rape and sexual violence. The 1863 Lieber Code was the first iteration of the modern rules of war and contains a provision in Article 44 that explicitly prohibits rape.[29] The Hague Conventions of 1899 and 1907 codified the customary rules of war at the time, but did not explicitly mention rape as an act prohibited during war.[30] However, rape was implicitly prohibited, insofar as these documents provided the protection that existed within the customary norms of war.[31] In humanitarian law, rape had not been explicitly outlawed until the Fourth Geneva Convention.[32] In Article 27, it states: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[33]

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28 When contextualising the ideological use of rape in an existing framework of violence such as genocide, there is the accompanying possibility of erasing certain victims and imposing restrictions on describing what is at the root of the harm inflicted. In particular, "the narrative of rape as a weapon of genocide makes it difficult to ask questions about the cause of rape and how rape could have been linked to different social relationships and structures that preceded genocide, as well as what women did to negotiate and resist sexual violence." Doris E. Buss, "Rethinking Rape as a Weapon of War," *Feminist Legal Studies* 17, 2009, pp. 145, 147–148, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373975. Therefore, the legal categorisation of rape as a tool in the implementation of more comprehensive forms of violence must be considered at the same time as considering its complex characteristics and invisible contours; *see also* Jonathan M. Short, "Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court," *Michigan Journal of Race and the Law* 8, 2003, p. 503, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1177&context=mjrltag.

29 Fraciah Muringi, 'Evolution of Rape as a War Crime and a Crime Against Humanity', 2 August 2016, pp. 1–2, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813970.

30 *Ibid.*, p. 3.

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*, p. 5.

During the trial in the case of *The Prosecutor v. Jean-Paul Akayesu*, the ICTR Chamber became the first international mechanism to officially define rape in international law.[34] The Chamber gave a progressive, abstract definition, which broadly laid out the concept of rape, without addressing the specific gender relations between perpetrator and victim or a specific type of physical contact.[35] The Chamber in the *Akayesu* Case also did not include the requirement for the victim to verbally express his or her non-consent, and introduced the existence of coercive circumstances that negate consent as the key element of the crime.[36] The International Criminal Tribunal for the former Yugoslavia (ICTY) defined rape in the case of *The Prosecutor v. Furundžija*, offering a narrower definition of the harm caused.[37] However, in the case of *The Prosecutor v. Kunarac et al.*, the Chamber adopted a different definition of rape, from which the necessary elements of coercion or the use of force were removed.[38] These definitions culminated with the introduction of the elementary definition used by the ICC.[39]

Since the inception of the ICTY and the ICTR, the United Nations Security Council (UNSC) has emphasised the importance of specially designed procedures in support of victims of wartime sexual violence, in particular of rape. The resolutions also mandated the proper contextualisation of these acts within the framework of politics, society, and ideology, and as a strategy of violent subjugation. In

34 *The Attorney General's Office against Akayesu*, Case no. ICTR-96-4, judgment (2 September 1998).

35 Muringi, p. 9.

36 *Ibid.*, p. 10.

37 *Prosecutor v. Ante Furundžija*, Case no. ICTY-95-17/1-T, judgment (10 December 1998).

38 *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-A and IT-96-23/1-A, judgment (12 June 2002); Muringi, p. 12.

39 *Ibid*, p. 14. The ICC requires that: (1) the perpetrator has committed an attack on the body of a person by conduct which has led to penetration, however slight, of any part of the victim's or offender's body with the genitals, or into the anal or genital opening of the victim with any object or any other part of the body, and (2) that the attack was carried out by force, threat of force or coercion; such as it is caused by fear of violence, coercion, detention, psychological oppression or abuse of power, against that person or another person, or by taking advantage of an environment of coercion, or committed against a person who is unable to give true consent.

Resolution 1820, the Security Council singled out war rape as a particularly troubling but common tactic in warfare, often part of a widespread systematic attack on civilians.[40] Accordingly, the Resolution explicitly states that rape can be considered a crime against humanity, as well as a war crime, i.e. an integral part of a genocide. The resolution underlined the importance of accountability for such crimes within the framework of sustainable peace and reconciliation.

The United Nations Security Council reiterated in Resolution 1888 that sexual violence, and rape in particular, may be "part of a widespread or systematic attack on the civilian population."[41] The resolution also calls on states to "undertake comprehensive legal and judicial reforms, as appropriate and in accordance with international law," to hold perpetrators of sexual violence in wartime conflicts accountable.[42] Finally, in the UN Security Council's Resolution 2467, the Security Council called on states to support the establishment of legal accountability for wartime sexual violence in national justice systems, noting that wartime sexual violence could be systematic and widespread, as well as involve significant forms of brutality.[43]

In prosecuting sexual violence before the Hague Tribunal, the Prosecution was confronted with several misconceptions and stereotypes present in case law, that made it difficult to determine the responsibility of those who committed or approved wartime rapes. Sexual violence is often systemically downplayed and considered less violent or serious than other war crimes. Finally, it is not uncommon for prosecutors and judges to treat wartime sexual violence as a "personally motivated" and/or "situation-conditioned" act, rather than as part of strategies such as ethnic cleansing or genocide. There was also a belief that conflict-related sexual violence could only be prosecuted if it were systematic or widespread, i.e. committed under orders.[44]

40 UN Security Council Resolution 1820 of 19 June 2008.

41 UN Security Council, Resolution No. 1888 of 30 September 2009, paragraph 1.

42 *Ibid.*, from paragraph 6.

43 UN Security Council, Resolution No. 2467 of 23 April 2019.

44 The ICTY's Prosecution of Sexual Violence in War Conflicts, Serge Brammertz & Michelle Jarvis (eds), 2016.

In order for such assumptions not to remain entrenched, it was necessary for the courts to make an additional effort and observe sexual violence in a broader context. This is achieved by specifying the nature of the violence committed and providing a more detailed description of the damage suffered by the victim, i.e. the survivor of the crime.[45] Classifying rape as a systematic attack on civilians, and including the perpetrators of such acts among the perpetrators of crimes against humanity, mitigates these tendencies and leads to a higher degree of accountability.[46]

iii. The Evolution of Rape as a Crime Against Humanity

Rape was first qualified as a crime against humanity in Supervisory Council Law No. 10[47], which was adopted by the occupation authorities in Germany to structure the prosecution of war criminals before German courts.[48] Decades later, the ICTY and the ICTR explicitly listed rape, among other related acts such as slavery and torture, as crimes against humanity.[49] It should be noted that rape was included in crimes against humanity before it was declared a possible war crime. Neither the ICTY nor the ICTR explicitly defined rape as a war crime, and it was only the ICC Statute that textually defined rape as a war crime and a crime against humanity.[50]

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45 Michelle Jarvis, "Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Serge Brammertz and Michelle Jarvis eds., 2016. The *Stakić* Case is an example of a successful contextualization of sexual violence. In it, sexual violence was presented as part of the persecution carried out in order to expel the non-Serb population from Prijedor. The crimes committed by Stakic were placed by the ICTY – among other acts, but at the very heart of the case – in the context of a deliberate policy of intimidation to get the non-Serb population out of Prijedor.

46 Michelle Jarvis & Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', in *Prosecuting Conflict-Related Sexual Violence at the* ICTY, pp. 34–39, Serge Brammertz & Michelle Jarvis eds., 2016.

47 Ellis, pp. 228–229.

48 *Ibid.*

49 Statute of the ICTY, UN doc. S/25704, Annex (1993), Article 5(g); The Statute of the Ministry of Culture and Social Sciences, S.C. doc. S/RES/955, Article 3 (g), United Nations (8 November 1994).

50 Ellis, p. 239; Rome Statute of the International Criminal Court, 17 July 1998, Article 7 § 1 (g).

Rape constitutes a crime against humanity when it occurs in the context of a widespread, systematic attack on a civilian population, and the act is committed with the knowledge that it is part of such an attack. The description of rape as a crime against humanity "reflects the connection between sexual violence and the context because [a crime against humanity] requires proof that – at the very least – the sexual violence was not 'isolated' but was related to the 'large-scale' or 'organised' violence in which it was committed".[51] Linking rape to the context in which it occurs, by choosing an accusation such as an accusation of crimes against humanity, helps to show the extent of the violent act and the systematic context in which it was committed, and to link the crime more precisely to higher-ranking officials.[52]

The International Criminal Tribunal for the former Yugoslavia (ICTY) has successfully convicted several officials for rape as a crime against humanity.[53] *The Prosecutor v. Tadić* is the first international trial in which an accused was tried for rape as a crime against humanity. The tribunal convicted Duško Tadić in a verdict that constituted "an important judicial recognition of the role of sexual violence in the broader campaign of ethnic cleansing carried out by Serbs. The court found that the evidence for the existence of widespread and systematic rape in the camps of Serb forces was extremely credible, citing evidence that "prisoners of both sexes were subjected to extremely cruel treatment, [including] beatings, sexual assaults, torture and executions."[54] In several other ICTY judgments, individuals have been convicted of rapes committed as part of widespread and systematic attacks against

51 Laurel Baig, Michelle Jarvis, Elena Martin Salgado, & Giulia Pinzauti, "Contextualizing Sexual Violence: Selection of Crimes," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 181, Serge Brammertz & Michelle Jarvis eds., 2016.

52 *Ibid.*, p. 175.

53 Dubin, p. 32.

54 *Ibid.*, p. 9.

civilians.[55] Several Rwandan political leaders and military commanders have also been tried before the ICTR for rape as an integral part of a genocide.[56]

The ICTY and ICTR prosecutors have also qualified the act of rape as extermination, torture, slavery, or persecution, or as an alternative or supplementary basis for responsibility for crimes against humanity.[57]

Both the ICTR and the ICTY have issued verdicts for the crime of extermination with reference to the crime of sexual violence. The elements of extermination are similar to those shown in the *Akayesu* and *Stakić cases*: "(1) the accused or his subordinates participated in the killing of civilians, (2) the act or omission was unlawful and committed intentionally, (3) the unlawful act or omission was part of a widespread or systematic attack, and (4) the attack was based on discrimination".[58] In addition, crimes of sexual violence have been prosecuted as crimes against humanity through a slave relationship. For example, Dragoljub Kunarac and Radomir Kovač were convicted by the ICTY of enslavement as a crime against humanity, for the imprisonment and rape of women in an abandoned house in Foca.[59] In the proceedings against Kunarac, the Chamber defined enslavement as "the exercise of any or all of the powers pertaining to the right of ownership over a person".[60]

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55 Convictions for rape and sexual violence as crimes against humanity include *The Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, judgment (11 March 2004); *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-A and IT-96-23/1-A, judgment (12 June 2002); *The Prosecutor v. Dragan Nikolić*, Case no. IT-94-2-A, judgment (4 February 2005); *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, judgment (2 November 2001).

56 Ellis, p. 229.

57 United Nations Department of Peacekeeping Operations, p. 25.

58 Dubin, p. 27.

59 *Ibid.*, p. 28.

60 *Ibid.*

In the proceedings against Kunarac, the Chamber expressly held that rape could constitute a form of torture because of the harm inflicted on the victims, that is to say, as a result of the pain and suffering.[61] Amnesty International is among the organisations that stress that rape must be qualified as an act of torture, especially since "the idea that torture should be deliberate, premeditated and targeted is an important reason why torture is considered such a grave crime, and the victim is worthy of compassion and care. By contrast, rape is usually seen as an inevitable and normal part of life, especially in armed conflict".[62]

The International Criminal Court (ICC) and national courts tasked with dealing with cases of serious violations of human rights and humanitarian law have also prosecuted rape as a crime against humanity. In Kenya, the ICC's Pre-Trial Chamber found that rape was a widespread tactic in a widespread, systematic attack on civilians during the 2008 unrest.[63] Kenyan courts have also incorporated ICC standards into national legislation to allow for a similar approach to determining liability.[64] Courts in Bosnia and Herzegovina have also prosecuted rape as a crime against humanity, despite the fact that the institute of crimes against humanity had not been introduced into domestic legislation until 2003.[65]

61 *Ibid.* p. 30.

62 Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, 1 March 2011, 39, available at: https://www.amnesty.org/en/documents/IOR53/001/2011/en/.

63 K. Alexa Koenig, Ryan Lincoln, & Lauren Groth, "The Jurisprudence of Sexual Violence," *Sexual Violence & Accountability Project Human Rights Center*, May 2011, 31, available at: https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Jurisprudence-of-Sexual-Violence-SV-Working-Paper.pdf.

64 *Ibid.*, p. 34.

65 Amnesty International, *Criminalisation and Prosecution of Rape in Bosnia and Herzegovina: Submission to the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences*.

II. THE NATIONAL LEGISLATIVE FRAMEWORK

Since its establishment in 2003, the Belgrade War Crimes Public Prosecutor's Office (OWCP) has issued 106 indictments against individuals for crimes committed during the wars in the former Yugoslavia. Of those indictments, thirteen indictments include explicit incidents of sexual violence. The indictments include twenty-nine defendants for sexual violence committed against sixteen victims or survivors.[66]

This section discusses the existing legal framework, and discusses how the absence of allegations of crimes against humanity in the indictments brought by the OWCP has prevented the establishment of a more comprehensive and complete accountability before the courts in Serbia when it comes to rape and other forms of sexual violence.

i. The legal framework for the application of the generally accepted rules of international law in the criminal justice of Serbia

The status of international law in the domestic legal framework is specifically defined by the Constitution. The Constitution of the Federal Republic of Yugoslavia of 1992 repeatedly mentions the legal significance of international legislation. Article 10 mentions the legal obligation to recognise the rights of the citizen as recognised by international law, while Article 16 (1) of the Constitution stipulates the following: "International treaties ratified and promulgated in accordance with the Constitution and generally accepted rules of international law shall be an integral part of the domestic legal order."[67] The Constitutional Charter of the State Union of Serbia and Montenegro of 2003, which superseded the Constitution of

66 Subjects: *Bijeljina, Bijeljina II, Skočić, Brčko, Brčko II, Kalinovik, Bratunac – Borkovac, Gnjilanska grupa, Ćuška/Qyshk, Bratunac II, Đakovica, Goražde, Vukovar – Proleterska*.

67 Constitution of the Federal Republic of Yugoslavia, Official Gazette of the Federal Republic of Yugoslavia, Year I, No. 1, Belgrade, 27 April 1992.

the Federal Republic of Yugoslavia, enabled the direct application of international agreements in domestic law. Article 16 of the Constitutional Charter also states that "ratified international treaties and generally accepted rules of international law shall take precedence over the law of Serbia and Montenegro and the law of the Member States."[68]

The Constitution of the Republic of Serbia of 2006 recognised the role of international law in the national legal system. Article 16 (2) of the Constitution provides that "the generally accepted rules of international law and ratified international treaties shall be an integral part of the legal order of the Republic of Serbia and [that] they are *directly [...] applicable* (author's italics)'.[69] This has made Serbia a monist state, in which international obligations do not require special regulation in order to have the same importance as domestic statutory law. This also confirms the previous formulation that even unwritten international law is essential to the legal system of a state.

The 2006 Constitution, which now governs legislation in Serbia, includes additional references to the role of international law in the judicial system. Article 18 of the Constitution guarantees the protection of rights guaranteed by international jurisprudence.[70] Further provisions, in particular Article 145, state that "judicial decisions shall be based on the Constitution, a ratified international treaty and a regulation enacted on the basis of a law."[71] In addition, Article 156 (2) notes that the Public Prosecutor's Office "exercises its function on the basis of the Constitution, law, ratified international treaty and regulations enacted on the basis of law."[72] These articles emphasise the role of international law, including customary international law, in the formulation and application of legislation in the courts of Serbia. This

68 Constitutional Charter of the State Union of Serbia and Montenegro, "Official Gazette of Serbia and Montenegro", year I, no. 1, Belgrade, February 4, 2003.

69 Constitution of the Republic of Serbia, "Official Gazette of RS", No. 98/2006, Article 16; *See also Ibid.* Article 194 (4) (emphasis added).

70 *Ibid.*, Article 18.

71 *Ibid.*, Article 145.

72 *Ibid.*, Article 155 (2).

is especially important in war crimes trials. As already mentioned, crimes against humanity are considered *jus cogens* norms in customary international law, and thus impose on Serbia the obligation to prevent and prosecute crimes against humanity.

ii. Applicable laws in the prosecution of war crimes

The Law on Organisation and Jurisdiction of State Authorities in War Crimes Proceedings, passed in 2003[73], stipulates that it is applied for the purpose of detecting, prosecuting, and trying criminal offences referred to in Arts. 370. to 384.[74] and Arts. 385[75] and 386.[76] of the Criminal Code, serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, as set forth in the Statute of the ICTY, and the criminal offence of aiding and abetting an offender after the commission of an offence under Article 333 of the Criminal Code, if it is committed in connection with the above-mentioned criminal offences.[77] The same law determines the exclusive jurisdiction of the Public Prosecutor's Office for War Crimes to act in cases of these criminal offences[78], and the High Court in Belgrade as the first instance and the Appellate Court in Belgrade as the second instance[79], with War Crimes Departments established in both courts.[80]

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73 Law on Organisation and Jurisdiction of State Authorities in War Crimes Proceedings, Official Gazette of RS, No. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 – other law, 6/2015 and 10/2023.

74 Crimes against humanity and other goods protected by international law.

75 Misuse of international signs.

76 Aggressive war.

77 Law on Organisation and Jurisdiction of State Authorities in War Crimes Proceedings, Official Gazette of RS, No. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 – other law, 6/2015 and 10/2023, Article 2.

78 *Ibid*., Article 4.

79 *Ibid*., Article 9.

80 *Ibid*., Articles 10 and 10a.

In war crimes proceedings conducted or conducting in the Republic of Serbia, the provisions of the Criminal Code of the FRY shall apply, as a law that is more lenient for the perpetrator. Namely, the perpetrator of a criminal offence, with respect to the principle *of nullum crimen nulla poena sine lege*[81], is subject to the criminal code that was in force at the time of the commission of the criminal offence. This was the Criminal Code of the SFRY, which stipulated that for the criminal offences of genocide (Article 141), war crime against civilians (Article 142), war crime against the wounded and sick (Article 143), war crime against prisoners of war (Article 144) and use of illicit means of warfare (Article 148, paragraph 2), imprisonment for a minimum of five years was the most lenient, and death penalty the most severe punishment. However, the same law stipulated that for the perpetrator of a criminal offence, in case of amendments to the law between the time of the commission of the offence and the trial, the criminal code that is more lenient for the perpetrator would be applied.[82] The Constitution of the FRY of 27 April 1992 stipulated that the death penalty could not be applied to crimes prescribed by the Federal Law, which at the time was the Criminal Code of the SFRY, which became the Criminal Code of the FRY by amendment in 1992.

The 1993 amendment to the Criminal Code of the FRY (Article 38, paragraph 2) stipulates that the most serious criminal offences are liable to 20 years' imprisonment. Although in the later period there were several amendments to the Criminal Code and an increase in the maximum prison sentence for the most serious crimes, for perpetrators of war crimes the Criminal Code of the FRY is still in force as the most favourable, and it provides a minimum sentence of imprisonment of five years, and a maximum prison sentence of 20 years. It should be noted that this law does not envisage the Crime against Humanity. With the adoption of the Criminal Code of the Republic of Serbia, entering into force on 1 January 2006, Article 371 introduced the criminal offence of Crime against Humanity into

81 Only those criminal offences can be committed, and only those criminal sanctions that are already prescribed by law can be determined.

82 Article 4 of the Criminal Code of the SFRY.

domestic legislation, which is defined in accordance with the definition provided by the Rome Statute.[83]

The indictments issued so far by the OWCP for crimes committed during the 1990s on the territory of the former Yugoslavia, have been in most cases related to the criminal offence of war crime against civilians under Article 142 of the Criminal Code of the FRY and the criminal offence of war crime against prisoners of war under Article 144 of the Criminal Code of the FRY, and only in one case for the criminal offence of Use of Illicit Means of Warfare under Article 148 of the Criminal Code of the FRY.

It should be noted that rape is also listed as one of the alternatively determined acts of committing the criminal offence under Article 142 of the Criminal Code of the FRY – war crime against the civilian population. The same article also stipulates that some of the acts committed must take place during an armed conflict or occupation, which has made it impossible to prosecute a number of crimes committed shortly after the end of the wars of the 1990s, especially those that took place in Kosovo in 1999, despite their being committed in a context of persistent hostilities.[84]

83 Criminal Code, "Official Gazette of the Republic of Serbia", nos. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

84 Amnesty International, *Serbia: Ending Impunity for Crimes Under International Law*, p. 29 ("In a significant number of cases involving Kosovo, the OWCP has indicted and prosecuted the accused under Article 142 (war crimes against civilians), even when the alleged acts were committed after the end of the international armed conflict in June 1999, in accordance with the Kumanovo Military-Technical Agreement concluded between NATO and the FRY on 9 June, and UN Resolution 1244/99, adopted on 10 June).

III. CRIMES AGAINST HUMANITY IN THE DOMESTIC JUDICIARY

Ignoring international law and referring to the fact that prior to the adoption of the Criminal Code of 2005 the criminal offence of crimes against humanity had not been explicitly defined in domestic criminal legislation[85], the OWCP took the position that crimes against humanity could not be prosecuted within war crimes proceedings. According to the OWCP, prosecution for crimes against humanity would violate the principle of legality (*nullum crimen nulla poena sine lege*)[86], i.e. the principle that an individual could not be held responsible for crimes that were not determined as such by the law at the time of their commission.

The Humanitarian Law Center (HLC) and other human rights organisations, as well as the professional public, question such interpretations of the principle of legality by the OWCP, because, as stated earlier, the crime against humanity is clearly established in international law and exists as *a jus cogens* norm, which has been prosecuted since the Nuremberg trials.[87]

Domestic law allows for the direct application of customary international law. Article 15 of the International Covenant on Civil and Political Rights[88], ratified by the Socialist Federal Republic of Yugoslavia in 1971[89], provides: "*No one shall be*

85 HLC , *Analysis of the Prosecution of War Crimes in Serbia in the Period from 2004 to 2013*, September 2014, 56, available at: https://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf.

86 Bogdan Ivanišević, "Against the Current – War Crimes Prosecutions in Serbia", *International Center for Transitional Justice*, 2007, available at: https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Crimes-Prosecutions-2007-English_1.pdf.

87 ECtHR *Judgment Boban Šimšić v. Bosnia and Herzegovina* [hereinafter: *Šimšić v. BiH*].

88 International Covenant on Civil and Political Rights, Article 15, 1966, available at: https://unmik.unmissions.org/sites/default/files/regulations/05bosniak/BIntCovCivilPoliticalRights.pdf.

89 International Covenant on Civil and Political Rights, Official Gazette of the SFRY, No. 7/71 of 4 February 1971.

convicted of acts or omissions which did not constitute a criminal offence under domestic or international law at the time they were committed. A penalty greater than that which would have been applied at the time the crime was committed may not be imposed. If, after the commission of this criminal offence, the law provides for a lighter punishment, the culprit should use it." It also provides that "*the provisions of this article shall not preclude the trial or punishment of any person for acts or omissions which were considered a criminal offence at the time they were committed, in accordance with the general principles of law recognised by all nations*", which means that signatory states are allowed to apply direct and international customary law. The European Convention for the Protection of Human Rights and Fundamental Freedoms[90], which was also ratified in 2003[91], has an identical provision in Article 7 (2), which stipulates that the principle of legality "*shall not prejudice the trial and punishment of any person for acts or omissions which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations*". It should be noted that Article 7 of the Convention is not imperative, and does not oblige states to do so, but simply permits them to do so.

The issue of the application of international law was also resolved by a precedent before the European Court of Human Rights (ECtHR) in the case of *Šimšić v. Bosnia and Herzegovina*. In 2007, the ECtHR upheld a conviction for crimes against humanity based on acts committed in 1992, 11 years before the current Criminal Code of Bosnia included a ban on crimes against humanity.[92] The Court held that this was irrelevant given that "the acts, at the time they were committed, constituted a crime against humanity under international law."[93] Thus, in the opinion of the Court, the principle of legality did not prevent prosecutors in BiH from prosecuting certain crimes as crimes against humanity.

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90 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7 of 1950.

91 European Convention for the Protection of Human Rights and Fundamental Freedoms, "Official Gazette of SCG – International Treaties", No. 9/2003.

92 ECtHR judgment in the Case of *Šimšić v. BiH*.

93 *Ibid*.

There is no reason why the court's arguments in the *Šimšić* Case should not be applied in Serbia, except for a clear lack of will to put crimes against civilians in the appropriate context.[94] The Humanitarian Law Center has previously pointed to the lack of willingness to apply international law in war crimes proceedings before domestic courts, despite the axiomatic legal basis for doing so: "In the practice of domestic courts [in Serbia], there is conspicuous resistance to a broader application of international criminal law and to greater reliance on ICTY practice. Since, according to the Constitution of the Republic of Serbia, the rules of customary international law are an integral part of the internal legal order, there are no obstacles to their application. If it is accepted that there are obstacles to the application of certain institutes of international criminal law, it remains indisputable that they must always be taken into account, especially when imposing a criminal sanction."[95]

However, in one case, the OWCP showed a willingness to charge a person with an act for which there was no prohibition in domestic law at the time it was committed. In 2008, the OWCP filed an indictment against Nazi officer Peter Egner.[96] Egner was a member of the Einsatzgruppe in Yugoslavia, where he assisted in the operation of mobile gas chambers that were used to exterminate Jews, Serbs, Roma, and others. The unit killed about 17,000 civilians during the Holocaust. The Public Prosecutor's Office for War Crimes (OWCP) charged Egner with genocide, although such a crime did not exist in Yugoslav legislation at the time of the crime. Nevertheless, the District Court in Belgrade, in supporting the decision of the investigating judge to continue the proceedings, found that the principle of legality was not violated, because the carrying out of genocide constituted a criminal offence at the time

94 The ECtHR in one case against Estonia, the Special Court for Lebanon established by the UN Security Council and the Committee against Torture accept this interpretation of the principle of legality. Amnesty International, *Serbia: Ending Impunity for Crimes Under International Law* , pp. 20–21.

95 HLC, Report on War Crimes Trials in Serbia 2011, available at: https://www.hlc-rdc.org/wp-content/uploads/2012/04/Izvestaj-sudjenja-u-2011.-final.pdf.

96 "Serbia Prepares Case Against Egner", *Balkan Insight*, July 18, 2008, available at: https://balkaninsight.com/2008/07/18/serbia-prepares-case-against-egner/.

these crimes were committed, according to the general legal principles recognised by civilised nations.

By dismissing charges of crimes against humanity on false grounds, or by refusing to bring charges at all, victims have been denied justice before the courts in Serbia.[97] An illustrative example of this deficiency is the decision of the OWCP to dismiss a criminal complaint filed by the HLC in early February 2019 for crimes against humanity committed in October 1991 in the village of Morović in the municipality of Šid, when members of the Yugoslav People's Army (JNA) took the Abjanović brothers out of their house, after which all trace of them was lost. The criminal charges were dismissed because, according to the OWCP's interpretation, prosecuting crimes against humanity would violate the principle of legality.[98]

The Public Prosecutor's Office for War Crimes has refused to indict other cases which were part of a prolonged attack on Croat civilians in Vojvodina, including the murder of members of the Matijević family in the village of Kukujevci[99], as well as an indictment for the deportation of refugees from Srebrenica.[100] In addition, cases transferred to the domestic judiciary from BiH, in which indictments for crimes against humanity were issued and confirmed, were prosecuted only as war crimes

97 Amnesty International, *Serbia: Ending Impunity for Crimes Under International Law*, p. 21 ("The unwillingness of the OWCP to bring charges for Crimes Against Humanity – as defined in Article 371 of the Criminal Code of the Republic of Serbia. of the Criminal Code of Serbia - may have practical consequences in terms of impunity, as demonstrated in a number of cases described in Chapter 4, where – when it comes to Kosovo – indictments were issued under Article 142 (war crimes), despite the fact that the crimes covered by the indictment were committed after the end of the armed conflict").

98 HLC, "Criminal charges dismissed for the disappearance of the Abjanovic brothers", 13 March 2019, available at: http://www.hlc-rdc.org/?p=36434.

99 HLC, "Criminal Charges for the Murder of Matijevic Family Members in April 1992", 16 October 2018, available at: http://www.hlc-rdc.org/?p=35719.

100 HLC, "Dossier: Deportation of Refugees from Srebrenica", 13 July 2017, available at: http://www.hlc-rdc.org/?p=33971.

against the civilian population.[101] Rape and sexual violence, which often occur in the context of coordinated attacks against civilians, are also not validly qualified as crimes against humanity.

Since crimes against humanity require evidence of the widespread and systematic nature of the attacks, as well as the subjective element, such as knowledge of the attack, indictments presuming that the act committed was a crime against humanity would contribute to establishing a record of the existence of deliberate, extensive and calculated attacks on civilians during the 1990s. This would potentially lead to judicial confirmation of the key attacks on civilians, which are now ignored and denied.

IV. RAPE PROSECUTION IN WAR CRIMES TRIALS IN SERBIA

In the current practice of the domestic judiciary, sexual violence has on rare occasions been prosecuted, most often as one of the actions that appears alongside other acts of committing a war crime against a civilian population, such as murder and other types of physical violence.[102] As previously stated, 13 cases before the High Court in Belgrade involve the crimes of rape and sexual violence, often in conjunction with other incriminating acts (e.g. murder). Ten of the thirteen proceedings have been completed, and three proceedings are ongoing (*Goražde*, *Bratunac II* and *Vukovar – Proleterska*).[103]

101 HLC, *Report on War Crimes Trials in the Republic of Serbia in 2021*, available at: https://www.hlc-rdc.org/wp-content/uploads/2022/05/Godisnji_izvestaj_2022.pdf.

102 HLC, *Report on War Crimes Trials in the Republic of Serbia in 2019*, p. 96, available at: https://www.hlc-rdc.org/wp-content/uploads/2020/03/Izvestaj_o_sudjenjima_za_ratne_zlocine_u_2019._godini.pdf.

103 All cases are available at: http://www.hlc-rdc.org/?cat=234.

This indicates that there is a huge discrepancy between the number of indictments involving rape filed so far and the widely documented use of rape as a means of terror in Croatia, Bosnia, and Kosovo. Rape is often committed as an act that inflicts considerable damage as part of a prolonged, systematic, and widespread offensive against civilians of all ethnic groups. Nonetheless, the OWCP has pressed minimal charges and consistently qualified wartime rape as a war crime, disconnecting it from its context and downplaying in advance the responsibility that the court can establish. In addition, by refusing to prosecute suspects on the basis of command responsibility or qualifying rape as a crime against humanity, the OWCP has in fact shielded high-ranking perpetrators from the responsibility for these acts.[104]

i. The cases in which the perpetrated crimes could be qualified as crimes against humanity

In the current practice of prosecuting sexual violence in war crimes trials, there are several cases in which the OWCP could qualify the committed crimes as crimes against humanity.

The *Brčko II* Case involves a number of incriminating acts with which Miloš Čajević was charged, which he committed in Brčko, a town in western Bosnia and Herzegovina. One of the incriminating acts was the daily rape of the victim, who was held captive by the defendant in a house where members of the Intervention Unit of the Brčko Police Reserves, which was part of the Republic of Srpska's Army, were accommodated.[105] This occurred in the context of a widespread attack on the Bosniak population in the area, where many civilians were killed and others were treated inhumanely and/or sexually abused. In addition to the context of the guilt of a specific perpetrator, accusations of crimes against humanity place the

104 HLC, *Report on War Crimes Trials in the Republic of Serbia in 2014 and 2015*, 2016, p. 9, available at: https://www.hlc-rdc.org/wp-content/uploads/2016/03/Izvestaj_o_sudjenjima_za_ratne_zlocine_u_Srbiji_tokom_2014._i_2015._godine.pdf.

105 OWCP Indictment KTO no. 7/2019 of 22 October 2018.

committed acts in a more significant context, and thus more accurately describe the extent of the damage inflicted, and in addition, make it possible to determine a higher degree of guilt.

In the *Ćuška/Qyshk* Case, the OWCP amended the indictment after the victim testified during the proceedings that she had been raped as a child. After that testimony, the prosecution also charged Milojko Nikolić with rape. However, this act of targeted violence took place as part of an attack in which at least 118 Kosovo Albanians were killed.[106] The same applies to many of the accusations resulting from the violence in Zvornik, including numerous rapes of Bosniak and Roma women, among other acts of violence committed against them and their families. For example, in the *Skočić* Case, where the defendants were charged with the murder of 27 civilians and the multiple rape of three victims, including two minors, the OWCP should have indicted them for crimes against humanity, in order to indicate more precisely the essence of the damage inflicted during the attacks on Roma civilians.

The importance of the possibility of indicting for crimes against humanity, especially in cases of sexual violence, is further illustrated by the temporal challenges that have arisen in relation to the facts in the *Gnjilane Group* Case. In the indictment, most of the charges, including those involving sexual violence, relate to events that took place after the end of the armed conflict in Kosovo, which means that they could not be legally qualified as a war crime against a civilian population.[107] By qualifying the crimes committed as crimes against humanity, the OWCP could have prevented the danger of an acquittal, given that crimes against humanity do not have to occur during an armed conflict.

106 Filip Rudić, "Serbian Soldier Dies Before Kosovo Massacre Trial Verdict", *Balkan Insight*, 5 July 2017, available at: https://balkaninsight.com/2017/07/05/serbian-soldier-charged-with-killing-albanians-passes-away-07-05-2017/.

107 HLC, *Report on War Crimes Trials in the Republic of Serbia in 2013*, available at: https://www.hlc-rdc.org/wp-content/uploads/2014/07/Izvestaj-o-sudjenjima-za-ratne-zlo%C4%8Dine-u-Srbiji-u-2013.-godini-ff.pdf.

All these cases testify to a campaign of systematic and widespread violence against civilians in which rape played a significant role. The act of rape itself constitutes a crime against humanity when it is committed in the context of a widespread attack on a civilian population and contains a subjective element of the awareness of such an attack. In addition to each of these acts of rape, there is additional evidence of killing, torture, enslavement, inhumane treatment and forced displacement, which can also qualify as crimes against humanity when they occur during a widespread and systematic attack.

In addition, the aforementioned cases, as already noted by the HLC[108], point to the malicious persecution of victims on the basis of their membership in a protected group, i.e. on the basis of their national or ethnic affiliation. This is also a crime against humanity. Taken as a whole, the evidence found in the indictments issued by the OWCP, which includes acts of rape, paints a picture of an intense, ruthless and brutal attack on civilians. The International Criminal Tribunal for the former Yugoslavia (ICTY) has made it clear that persecution is one of the most atrocious crimes, and that in these cases particularly extensive legal intervention is necessary.[109] The ICTY has also pointed out through its practice that rape itself can be considered persecution. Therefore, by not placing these crimes in the context of persecution, it is impossible to achieve broader justice for victims and their communities.

108 HLC, *Report on War Crimes Trials in the Republic of Serbia in 2011*, available at: https://www.hlc-rdc.org/wp-content/uploads/2012/04/Izvestaj-sudjenja-u-2011.-final.pdf.

109 *Ibid.*

RECOMMENDATIONS

I. Prosecution of crimes against humanity in general

a. Legal implications

i. **Harmonisation with international standards:** Customary international law, as interpreted by the European Court of Human Rights in the *Šimšić v. Bosnia and Herzegovina Case*, as well as by domestic courts of the national states (including the High Court of the Republic of Serbia in the *Egner* Case), requires the prosecution of crimes against humanity when the circumstances of the committed act allow it to be qualified as such. By directly applying international law to proceedings relating to the 1990s, domestic prosecutors and courts would align their practice with the standards of modern international law.

ii. **Accountability for acts committed after the war:** By allowing the prosecution of acts committed during the conflict of the 1990s as crimes against humanity, domestic judicial authorities could prevent the problems that arise in determining accountability for acts committed after the cessation of armed conflict, but which still constituted attacks on civilians and should be prosecuted in war crimes proceedings. In particular, given that crimes against humanity can occur outside of armed conflict, indictments based on them provide a better opportunity to establish accountability, where an indictment for war crimes is inadequate.

iii. **Accurate description of the crime:** By prosecuting crimes against humanity and placing them in the appropriate context, the OWCP could prosecute the perpetrators for the offence that most accurately describes the extent of the harm inflicted on the victim, as well as the brutality of the perpetrator. If the qualification of crimes against humanity is not available, there are restrictions on the presentation of crimes, which sometimes erases key information about the context and omits certain facts from the judicial acts.

II. Qualifying rape as a crime against humanity

a. Legal implications

i. **Alignment with international standards on acts of sexual violence**: The ICTR and the ICTY are the first international tribunals to hold that sexual violence should be prosecuted as a crime against humanity when it occurs in the context of a widespread and systematic attack against a civilian population. There is ample evidence that sexual violence against civilians in the 1990s was perpetrated as part of a broader campaign of terror against the civilian population, and it is possible that it was itself widespread and systematic. By prosecuting sexual violence as a crime against humanity, war crimes trials in Serbia would align with the important progress made by the ICTR and the ICTY in linking sexual violence to the wider context in which it occurs.

ii. **Accurate description of sexual violence**: Prior to the interventions of the ICTR and the ICTY to qualify sexual violence (and rape in particular) as a crime against humanity, sexual violence in war was considered a private act of opportunity and prosecuted out of the context in which it occurred. By deviating from international standards when prosecuting sexual violence in war, the courts in Serbia risk confirming this harmful presumption. By classifying sexual violence as a crime against humanity when it is committed as part of a widespread attack, prosecutors would place acts of sexual violence in the broader context of the attack on civilians in which it occurred, and more accurately and comprehensively address the victim's status as a victim of sexual violence - that is, a survivor of sexual violence -, as well as the nature of the attack on civilians in their community.

iii. **Prosecuting high-ranking perpetrators** who are less likely to have been direct perpetrators of rape and other forms of sexual violence, but who, in the case of the charges of crimes against humanity, can be prosecuted on the basis of command responsibility for these acts committed by their subordinates.

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