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SEXUAL CRIMES IN ARMED CONFLICT: INTERNATIONAL LEGAL FRAMEWORK AND CONTEMPORARY CHALLENGES

Abstract

Sexual crimes committed during armed conflicts represent some of the most serious violations of international humanitarian law and international criminal law. Although such crimes have accompanied armed conflicts throughout history, their recognition as distinct international crimes and the development of mechanisms for individual criminal responsibility have evolved gradually. The adoption of the Rome Statute of the International Criminal Court and the accompanying Elements of Crimes established a comprehensive legal framework for the prosecution of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as crimes against humanity. Nevertheless, despite significant normative progress and the contribution of international criminal jurisprudence, the effective investigation and prosecution of sexual crimes committed during armed conflicts continue to face numerous practical and legal challenges. These include difficulties in evidence collection, the protection and participation of victims, establishing individual and command responsibility, and ensuring accountability in contemporary armed conflicts. This article examines the international legal framework governing sexual crimes

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in armed conflict and analyses the principal challenges that continue to hinder their effective prosecution. It argues that while international criminal law has significantly strengthened the legal protection of victims of sexual violence, further efforts are required to improve accountability mechanisms and ensure consistent implementation of international legal standards.

Key words: sexual crimes; armed conflict; international criminal law; crimes against humanity; Rome Statute; International Criminal Court; sexual violence.

1. INTRODUCTION

The classic and most typical sexual crime is rape, and modern national legislation recognizes a whole range of other sexual criminal offences (Škulić 2019, 133). This is also the approach in contemporary international criminal law when it comes to crimes against sexual freedom committed in armed conflicts (Škulić 2024, 265). And when it comes to international criminal law, the evolutionary development of crimes against sexual freedom, as a form of certain international crimes, such as some forms of crimes against humanity and war crimes, has been long-lasting and is linked to the general understanding of the essence of rape as a classic crime against sexual freedom (Aleksić & Škulić 2020, 334). The act of rape itself has been perceived in very different ways from the earliest times to the modern era, which can be briefly summarized in the following chronological overview (Škulić 2024, 395).

Among various primitive peoples, rape was punished only as an act that reduced the sale value of a girl. In the Middle Ages, rape was primarily an attack on a woman's honor, which did not primarily belong to her, but to her family, and the basic condition for punishing the rapist was the victim's innocence, so the rape of a woman without a permanent residence, as well as those with a bad reputation, was not punishable, and the raped woman was required to immediately after the event, with her hair disheveled and her clothes torn, complain to the first person she met. During the Enlightenment, there was serious doubt about the possibility of rape occurring at all if the woman resisted, and the act of rape was, accordingly, punished only if more than one person participated in it, or if the victim was threatened with a weapon, or if she was tied up. It was only in the 19th century that the factor of the victim's innocence was eliminated as an important factor, so that the victim no longer had

to be exclusively a girl, a married woman or a widow, or a respectable woman, and therefore the factor of discrimination against the victim was pushed into the background in relation to the violent penetration of sexual nature of the sphere of someone else's will. In modern societies and their criminal justice systems, any woman against whom violence of this kind was used is considered a victim of rape, regardless of her innocence, age, and lifestyle.

In addition, in relatively recent times, the incrimination of rape in modern criminal law systems also includes not only coercive sexual intercourse, but other sexual acts, committed under coercive or just against the will of the victim, which are equated with sexual intercourse and these sexual crimes can exist regardless of the gender of the victim, i.e. the passive subject of rape, as well as the gender of the perpetrator of this criminal offense (Škulić 2018, 40). This concept, when it comes to rape, but also other types of crimes against sexual freedom, is also accepted in modern international criminal law, which primarily means in the Rome Statute (Škulić 2022, 453).

This very broad approach to defining rape is largely a consequence of the significantly increased social engagement of women in the second half of the 20th century,¹ and in particular the organized efforts of various women's movements, primarily in Western countries, and especially in the USA, where it was concluded as early as the 1980s that „the crime of rape is becoming the most discussed crime in that country” (Gilbert 1980, 256).

¹ Today, it is indisputable that the key to the change in the dominant consciousness, first in the USA and then throughout the world, regarding crimes against sexual freedom in general, and especially regarding rape as a „capital” and basic crime of that type, was a now famous, even legendary book by Susan Brownmiller, a socially very engaged American journalist and one of the most prominent feminists of the 20th century, whose understandings, although she is not an „academic criminologist”, today represent mandatory „criminological reading” when it comes to criminological, especially victimological, and to some extent also criminal law views on sexual crimes. Susan Brownmiller's key thesis regarding rape is expressed in her very famous book *Against our Will, Men, Women and Rape*. This book was then often published in summary versions under the title „No against our Will”, and quickly became a kind of feminist manifesto, but finally, as is particularly evident in the changes in the definition of rape in many national criminal law systems under the influence of the Istanbul Convention, it strikingly gained its immediate criminal law outcome, which is also noticeable in the relevant norms of the Rome Statute.

It is undeniable that in this respect, too, the influence of some feminist movements in the USA, and then throughout the world, was extremely strong and significant. The key thesis of such a view of rape, but also of sexual crimes in general, boils down to the strict position that rape is not primarily about a „sexual act”, but rather the basic content of rape (*phenomenological component*), but also the dominant impulse for committing this criminal act (*etiological component*) – gaining and demonstrating power, primarily „of a man in relation to a woman”, and even „keeping women in centuries-old subordination in relation to men” (that is, of course, an extremely far-reaching and very radical feminist concept), which also reflects the very significant victimological component of rape, but also of sexual crimes in general (Škulić 2019, 32). The „homosexual variant of rape”, when both the perpetrator and the victim are male, is also treated in this way, not primarily as a sexual act, but as a manifestation of the power of some men over other men (Brownmiller 1994, 16-17).

The same basic criminological concept concerning the phenomenology and etiology of rape and other sexual crimes, which has experienced normative reflection in contemporary national criminal legislation, is also applied in contemporary international criminal law, and is primarily noticeable in the norms of the Rome Statute, but also in the Elements of Crimes, which are a supplementary source of substantive criminal law for the International Criminal Court (ICC).

The problem is that during times of armed conflict, there is an escalation of sexual violence that manifests on in various ways that are humiliating to a human being, and this goes to this day - even though there are many instruments that should provide protection from these crimes and punishment for those who had committed them (Stevanović 2025, 176). Sexual violence has long accompanied armed conflicts, affecting individuals and communities regardless of geographical region, historical period, or the nature of the conflict. Pervasive sexual violence, a manifestation of gender-based violence, occurs during wartime, in its aftermath or in any period of societal breakdown (Sellers 2007, 3). Gender-based violence undermines, impairs, nullifies and deprives females of the exercise of their human rights which are deemed inalienable, interdependent and indivisible from any and all other human rights (Sellers 2007, 3). Far from being an inevitable by-product of war, sexual crimes have increasingly been recognized as deliberate acts committed to intimidate civilian populations, destroy communities,

exert control over occupied territories, and inflict long-term physical and psychological harm upon victims. The devastating consequences of such crimes extend beyond individual victims, often affecting families and entire communities, thereby undermining post-conflict recovery and reconciliation, given the fact that victims themselves can be excluded from society due to the reason of stigmatization, or second-victimized during the judicial procedure, and harmed in many more ways, other than sexual violence itself, to begin with.

However, until relatively recently, International Law has rarely dealt with rape and other forms of sexual crimes committed in armed conflicts and similar contexts, it was considered to be “a natural part of war” (Škundrić 2025, 89). Despite the historical prevalence of conflict-related sexual violence, international law was slow to recognize these acts as autonomous international crimes. For decades, rape and other forms of sexual violence received limited attention in international criminal proceedings and were frequently treated as incidental consequences of armed conflict rather than serious violations of international humanitarian law.

Significant progress was achieved only during the last three decades through the development of international criminal jurisprudence with the creation and operation of the ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), there came a revolution in this field (Škundrić 2025, 90). Also, the adoption of the Rome Statute of the International Criminal Court, which explicitly recognizes various forms of sexual violence as crimes against humanity and war crimes under specific legal conditions, contributed greatly.

Today, the prohibition of sexual violence in armed conflict constitutes an important component of the international legal framework aimed at protecting civilians and ensuring individual criminal responsibility for the perpetrators of such crimes. Nevertheless, despite the existence of a comprehensive normative framework, the investigation and prosecution of sexual crimes committed during armed conflicts continue to face numerous legal, evidentiary, institutional, and practical challenges. Ongoing armed conflicts further demonstrate that sexual violence remains a persistent feature of warfare, highlighting the gap between legal norms and their effective implementation.

Against this background, this article examines the international legal framework governing sexual crimes committed during armed conflicts, with particular emphasis on their qualification as crimes against

humanity under the Rome Statute of the International Criminal Court and the Elements of Crimes. It further analyses the principal contemporary challenges associated with the investigation and prosecution of these crimes, emphasizing the continuing need to strengthen accountability mechanisms and improve the protection of victims within the framework of international criminal justice.

2. INTERNATIONAL LEGAL FRAMEWORK OF SEXUAL CRIMES IN ARMED CONFLICT

2.1. Sexual Violence as a Form of Crimes against Humanity

Sexual violence has a long history in warfare. The literature provides numerous examples illustrating its occurrence throughout different historical periods. Thus, even primitive tribes waged wars not only to secure food but also to capture women. The Hebrews kept captured women as slaves and concubines. Similarly, in ancient Greece, women were regarded as legitimate spoils of war and could, at the victor's discretion, be taken as wives, concubines, slaves, or war trophies. During the conquest of the „New World,” Spanish conquerors deliberately targeted captured women of high social status for rape. Following the English victory over the Scots at the Battle of Culloden, the mass rape of women formed part of the brutal campaign to pacify Scotland. Even before the outbreak of the Second World War, during the *Kristallnacht* („Night of Broken Glass”), numerous Jewish women were subjected to rape. During the Second World War, members of the *Wehrmacht* and the SS raped thousands of women in Poland, Russia, and France. Likewise, during the Soviet occupation of Berlin, mass rapes of German women occurred, with estimates indicating that at least 100,000 women were victims, while some less conservative estimates place the number as high as 980,000 girls and women (Möller 2023, 358).

It is generally considered that the majority of wars and armed conflicts have been accompanied, to a greater or lesser extent, by mass rape and other forms of sexual abuse. This has led some authors to characterize sexual violence as a „weapon of war,” emphasizing that, according to certain studies, sexual violence was systematically employed in approximately twenty armed conflicts as a tactical method of warfare, a reward for soldiers, a means of boosting troop morale, or a

method of terrorizing and destroying populations regarded as „inferior” (Bassiouni & McCormick 1996, 3).

On the other hand, the characterization of rape and sexual abuse as a form of „weapon” has also been widely used for large-scale propaganda campaigns that were often not based on factual evidence. The most notable example, according to the author, is the media portrayal of an enormous number of Muslim women allegedly raped during the civil war in the former Yugoslav republic of Bosnia and Herzegovina, which, in the author’s view, was soon shown to have been a gross exaggeration serving the purpose of the media demonization of the Serbian army. For example, a *Newsweek* report published in January 1993 claimed that between 30,000 and 50,000 rapes had allegedly been committed by Serbian forces. This figure was subsequently characterized as significantly exaggerated, illustrating the manner in which reports concerning sexual violence could be employed within the broader media representation of the conflict (Škulić & Škundrić, 2025, 12).

The first serious attempts to examine, in an official capacity, the relationship between war and sexual violence emerged after the First World War. In 1919, a special Allied Commission investigated reports of the mass rape of French and Belgian women committed by German troops. However, these investigations did not result in the criminal prosecution of the perpetrators, as such prosecutions were considered inconsistent with the political and diplomatic interests of Europe at the time. Consequently, sexual violence committed during armed conflict once again came to prominence during the Second World War. As noted in the literature, „The Second World War witnessed a wide range of acts of sexual violence committed by Russian and Japanese soldiers, and, to a lesser extent, by German troops. It is estimated that the Japanese detained more than 300,000 Korean women in what they euphemistically referred to as ‘comfort stations,’ which in reality functioned as facilities where Japanese troops systematically subjected these women to rape” (Bassiouni & McCormick 1996, 3–4).

The aforementioned case of mass rape in Belgium is frequently cited in the literature as an example of rape being used as an instrument of terror. Similarly, the mass rapes committed during the Nanjing Massacre are regarded as an example of rape being employed as a method of warfare. As noted in the literature, „Following the capture of the Chinese city of Nanjing by Japanese forces on 13 December 1937, a campaign of terror against the Chinese civilian population began, lasting

for approximately two months. It was characterized by widespread arson, looting, killings and, above all, mass rape. The death toll has been estimated at approximately 200,000, while it is estimated that around 20,000 women were raped during the first months of the occupation” (Möller 2023, 358–359).

Compelling another person, by the use of force or the threat of an imminent attack against that person’s life or physical integrity, or against the life or physical integrity of a person close to them, to engage in sexual intercourse or an equivalent sexual act (rape), as well as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of serious sexual violence, when committed as crimes against humanity, „essentially constitute acts directed against the victim’s sexual integrity, that is, acts of sexual violence committed against the victim” (Marković 2015, 158).

2.2. Common Elements of Crimes against Humanity

For a specific sexual offence to qualify as a crime against humanity, it is necessary, as a prerequisite, that the common contextual elements of crimes against humanity be satisfied. These contextual elements constitute an essential requirement applicable to every form of this international crime.

A common element applicable to all forms of crimes against humanity, as set out in the *Elements of Crimes*, is that „the conduct was committed as part of a widespread or systematic attack directed against a civilian population.” In addition, the perpetrator’s mental element must encompass awareness of this contextual circumstance, as reflected in the following requirement: „The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

It follows that this standard contextual element, applicable to every form of crime against humanity under the Rome Statute, incorporates the cognitive component of the mental element by requiring that the perpetrator knew that his or her conduct formed part of such an attack. In other words, the perpetrator must have been aware of this circumstance. At the same time, the *Elements of Crimes* do not expressly require that the perpetrator positively desired such a result; alternatively, they require that the perpetrator intended his or her conduct to be part of a widespread or systematic attack directed against a civilian population. Thus,

alongside the cognitive component of the mental element, the volitional component is also required, although it is defined exclusively in terms of intent, which, in principle, reflects a higher degree of determination than mere volition. During the negotiations on the adoption of the ICC *Elements of Crimes*, two opposing views emerged regarding the nature of the perpetrator's knowledge of the attack (von Hebel & Kelt 2002, 284). Some delegations considered it sufficient that the perpetrator was aware of the existence of the attack, without requiring knowledge of its nature and broader implications. Others maintained that the perpetrator must know that the attack was either widespread or systematic. Since the attack is defined as being widespread or systematic, it is logical that the mental element of the offence must encompass the perpetrator's awareness of these essential characteristics. Otherwise, the conduct might constitute an isolated act or excess, rather than a crime against humanity.

However, given the lack of consistency in Anglo-American legal terminology, as well as the fact that the English term *intent* is often equated with the concept of *dolus* (intentional culpability) in continental European criminal law—which also appears to be the approach adopted in Article 30 of the Rome Statute concerning the mental element—and considering that many concepts of Anglo-American criminal law cannot be readily aligned with, or adequately translated into, continental European legal terminology, caution is required in interpreting this provision. In our view, the relevant requirement is more appropriately understood as referring to the perpetrator's volition, that is, the existence of intent in the general sense established by Article 30 of the Rome Statute, rather than to *intent* as a distinct and narrower concept. In any event, it is undisputed that the provision requires a clearly expressed volitional element, namely direct intent. To a certain extent, it is problematic that the cognitive and volitional components of the mental element are not defined as complementary parts of a single concept but rather as alternative requirements. This approach stems from the general, and arguably incomplete, definition of the mental element under the Rome Statute. It also supports the conclusion that the concept of *intent* is, both terminologically and substantively, treated as equivalent to direct intent. The perpetrator's mental attitude towards the widespread or systematic attack against the civilian population of which the conduct forms part must not include the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, or to participate in such

destruction. Were such intent to exist, the conduct would constitute the crime of genocide rather than a crime against humanity. In that situation, there would be no concurrence of offences; it would instead be a case of apparent ideal concurrence based on the principle of specialty, with genocide prevailing as the more specific and more serious offence. Since genocide is a more serious international crime than crimes against humanity, the conduct would be legally characterized as genocide. Nevertheless, as previously noted, genocidal intent is notoriously difficult to establish in practice. Consequently, conduct that simultaneously satisfies the objective elements of both genocide and crimes against humanity is, in practice, more likely to be prosecuted and adjudicated as a crime against humanity, although significant evidentiary challenges concerning the subjective element remain even in relation to crimes against humanity.

It has been noted in the literature that when establishing the mental element of crimes against humanity, „the court should focus on three principal considerations. First, the perpetrator must have intended to contribute to a particular result, which is normally sufficient to establish criminal responsibility for crimes against humanity. Second, where the accused acted as an agent of a system and did not directly and personally commit the inhumane act, it is not necessary to prove that he or she foresaw every specific consequence of the omission. Rather, it is sufficient that the accused was aware of the risk that such conduct could result in serious harm to the victims, given the violent and arbitrary nature of the system within which the victims suffered. This aspect was particularly emphasized by the Supreme Court of Germany in the British Occupation Zone in cases involving the denunciation of Jews or political opponents to the police or the Gestapo, as well as in a case concerning the burning of a synagogue in 1938. Third, the accused must have been aware of the connection between his or her conduct and the policy or practice being pursued” (Cassese 2003, 81–82).

If these „three points,” or rather the three modalities of the perpetrator’s mental attitude, as identified by the aforementioned author, are carefully examined, it becomes apparent that only the first can be directly reconciled with the concept of crimes against humanity as defined in the Rome Statute and the *Elements of Crimes*. These instruments expressly require that the perpetrator knew that his or her conduct formed part of, or intended it to form part of, a widespread or systematic attack directed against a civilian population. However,

since the notion of intent in Cassese's formulation is directed towards the result, it may be supplemented by the third point, namely the perpetrator's awareness of the connection between his or her conduct and a particular policy or practice. Accordingly, the second point is reduced to conscious negligence, while the third merely requires an undefined form of awareness that the perpetrator's conduct forms part of a particular policy or practice. Such awareness may be equated with the knowledge required under the Rome Statute concerning a widespread or systematic attack; however, it does not encompass the additional requirement that the perpetrator intended his or her conduct to form part of such an attack. Considered in isolation, these elements—apart from intent, which itself is not fully defined—cannot constitute the subjective elements of crimes against humanity. In addition to the general rules governing the mental element under the Rome Statute, crimes against humanity require that the perpetrator possess further awareness of the widespread or systematic attack and a positive volitional commitment to participating in it.

It may, however, be argued that the cited author intended these three subjective elements to operate cumulatively, rather than as alternative forms of the mental element of crimes against humanity. Such an interpretation would appear considerably more coherent. Even in that case, however, a logical connection could exist only between the first element (intent), which is an indispensable requirement for this crime, and the third element (the perpetrator's awareness that his or her conduct forms part of a particular policy or practice). By contrast, the first and the second elements are mutually exclusive. The second element is defined as conscious negligence, that is, awareness of the risk, whereas intent is an essential component of crimes against humanity, regardless of whether it is regarded as synonymous with direct intent (given that the Anglo-American concept of *intent* is frequently treated as equivalent to intent in continental criminal law) or as representing an even higher degree of volition. It would therefore be illogical to require cumulatively both intent and mere awareness of risk, since the existence of intent necessarily presupposes awareness of risk, intent being a substantially more intensive form of the perpetrator's mental attitude. Finally, the second element (the second „point” or „principal consideration”) is additionally problematic because it emphasizes that the accused did not personally and directly commit the inhumane act, but rather acted as an *agent of a system*. This formulation appears to

imply a form of command responsibility and even the possibility of liability for omission, thereby losing its connection with the explanation of the subjective elements of crimes against humanity. Furthermore, the concept of an „attack” within the framework of crimes against humanity is defined much more broadly than the notion of an „attack under the law of armed conflict” (Bontakos & Nash 2007, 128).

2.3. Forms of Sexual Violence under the Elements of Crimes

Sexual violence is regulated in considerable detail in the *Elements of Crimes*, which identify, by way of *exempli causa*, the following specific forms: (1) rape, (2) sexual slavery, (3) enforced prostitution, (4) forced pregnancy, (5) enforced sterilization, while also leaving open the possibility of (6) any other form of sexual violence.

2.3.1. Rape

Rape is defined in a gender-neutral manner, meaning that the victim may be either female or male. Likewise, given the broad definition of the *actus reus*, the perpetrator may also be either male or female. Nevertheless, as a matter of practical reality, it may reasonably be expected that men will constitute the predominant perpetrators of this form of crime against humanity.

The *actus reus* of rape consists of the perpetrator’s invasion of the victim’s body, resulting in penetration, however slight, of any part of the victim’s body, including the anal or genital opening, with a sexual organ or with any object or any other part of the body (Element 1, Article 7(1)(g) of the Rome Statute). Such invasion must be committed by force or by threat of force. By way of *exempli causa*, the *Elements of Crimes* enumerate circumstances including fear of violence, coercion, detention, psychological oppression, or abuse of power by the perpetrator or another person. The perpetrator may also exploit a coercive environment or commit the sexual act against a person incapable of giving genuine consent (Element 2, Article 7(1)(g) of the Rome Statute).

For rape to constitute a crime against humanity, the individual act must be committed as part of a widespread or systematic attack directed against a civilian population, and the specific offence itself must form an integral part of such an attack. In this regard, it has been argued that „it is sufficient for even a single act of rape to constitute part of such

an attack, provided that the perpetrator is aware of this fact” (Bürgi 2018, 59). In reality, however, the requirement extends beyond mere knowledge. The perpetrator must act with intent, and such intent must encompass not only all the essential elements of the particular sexual offence committed, but also, cumulatively, all the essential elements of the widespread or systematic attack of which that offence forms a part. The essential elements of rape as a crime against humanity include, on the one hand, the physical invasion of the victim’s body resulting in sexual penetration and, on the other, “the perpetrator’s use of force or threat of force to accomplish that act”.² Formally, the definition does not require proof of the victim’s lack of consent (*Nicht-Einverständnis des Opfers*), which distinguishes it from the definition of rape developed in the jurisprudence of the *ad hoc* tribunals (Biehler 2017, 219). Rather, this is a „classical” definition, based on the premise that where the perpetrator employs force or coercion within the context of a widespread or systematic attack directed against a civilian population—a circumstance likewise covered by the perpetrator’s intent—the victim’s consent to the sexual act cannot be regarded as genuine, and the act therefore cannot be considered voluntary.

2.3.2. Sexual Slavery

Sexual slavery constitutes a specific form of enslavement. On the one hand, as with other forms of slavery, it is characterized by the perpetrator’s exercise of one or more powers attaching to the right of ownership over the victim. On the other hand, the perpetrator exploits the services of the enslaved person or permits others to do so, which is likewise a defining feature of slavery in its general sense. What distinguishes sexual slavery, however, is that such exploitation is exclusively of a sexual nature, meaning that the person held in slavery is used for the purpose of sexual gratification.

The first constitutive element of sexual slavery is identical to that of enslavement in its general sense and refers to the perpetrator’s

² It should be noted, however, that the cited author explains the forms of coercion somewhat ambiguously. Since a threat itself constitutes one form of coercion, alongside the use of force as another possible form, it is conceptually inaccurate to refer to a „threat of coercion.” Rather, in this context, what may properly be threatened is the use of force, that is, the victim may be placed under the threat that force will be applied.

exercise of any or all of the powers attaching to the right of ownership over another person (Element 1, Article 7(1)(g) of the Rome Statute). However, in addition to this fundamental and traditional element of slavery, it is also necessary that the perpetrator compels the victim, that is, the person held in a condition of slavery, to engage in one or more acts of a sexual nature (Element 2, Article 7(1)(g) of the Rome Statute). Although this is not expressly stated, it may reasonably be inferred that the notion of a sexual act encompasses conduct falling within the elements of rape, which is defined broadly in the *Elements of Crimes*.

2.3.3. *Enforced Prostitution*

For enforced prostitution to constitute a crime against humanity, two cumulative elements must be satisfied. The first consists of a form of coercion exercised against the victim, while the second relates to the obtaining of financial or other material benefit by the perpetrator or another person, or the expectation that such benefit will be obtained through the „sale” of the victim’s sexual services.

As in the case of rape, coercion in the context of enforced prostitution is defined broadly. Specifically, the perpetrator must have compelled one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force, or by coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against the victim or another person. Alternatively, the perpetrator may have taken advantage of a coercive environment or committed the act against a person who was incapable of giving genuine consent (Article 7(1)(g), para. 1 of the Rome Statute; *Elements of Crimes*).

Although this is not expressly stated, unlike the definition of rape, the relevant issue here is not the victim’s consent to a particular sexual act, but rather consent to engage in prostitution. Such consent would necessarily encompass both agreement to engage in sexual relations with a particular person and acceptance of remuneration in exchange for those sexual services. The second essential element of enforced prostitution concerns the commercial nature of the coerced sexual activity. Accordingly, it is required that the perpetrator or another person obtains, or expects to obtain, monetary or any other form of benefit in connection with, or in exchange for, the victim’s acts of a sexual nature,

Article 7(1)(g), para. 2 of the Rome Statute; Elements of Crimes (Škulić 2003, 262–263).

2.3.4. *Forced Pregnancy*

Forced pregnancy is, by its very nature, a form of sexual violence whose victim can only be a woman. This represents a logical departure from the otherwise consistently applied approach adopted by the Rome Statute and the Elements of Crimes, under which sexual offences are defined in gender-neutral terms. Moreover, forced pregnancy constitutes not only an act of sexual violence but also an attack on the victim's health and bodily integrity.

According to the Elements of Crimes, the constitutive elements of forced pregnancy as a crime against humanity (Article 7(1)(g) of the Rome Statute) are cumulative. First, the perpetrator must have unlawfully confined one or more women who had been forcibly made pregnant. Second, the perpetrator must have acted with the intent of affecting the ethnic composition of any population or of carrying out other grave violations of international law. Alternatively, the offence may also be established where the unlawful confinement constitutes a grave violation of international law, even in the absence of such specific intent.

2.3.5. *Enforced Sterilization*

Forced sterilization is, due to a certain conceptual inertia based on the fact that the passive subject is deprived of their reproductive capacity, and that such deprivation is achieved through appropriate interventions affecting the biological elements of their reproductive system, primarily through procedures performed on the reproductive organs themselves, classified as a form of sexual violence, although in essence it represents a form of serious bodily harm.

Under the *Elements of Crimes*, forced sterilization requires, in addition to the two general elements applicable to all forms of crimes against humanity (which relate to the characteristics of the attack directed against the civilian population and the perpetrator's awareness that their conduct forms part of such an attack), the cumulative fulfilment of the following requirements: 1) an objectively defined act of commission – the perpetrator deprived the passive subject of their

biological reproductive capacity; 2) the absence of a lawful basis for such deprivation of biological reproductive capacity, which is reflected in the alternatively prescribed absence of justification for such conduct: a) either on the grounds of medical treatment of the person concerned, or b) through the genuine consent of the passive subject (paras. 1–2 concerning Article 7(1)(g) of the Rome Statute).

2.3.6. *Any Other Form of Sexual Violence*

Any other form of sexual violence constitutes a manifestation of this form of crime against humanity, allowing for the possibility that another act of a sexual nature, namely an act whose commission would violate an interest of the passive subject relating to their sexual integrity and the right to free sexual choice, may also be considered an act of sexual violence. It follows that all previously mentioned forms of sexual violence, identified as typical and expected in the majority of cases, are essentially of an exemplary nature and do not represent forms of an exhaustive determination of possible acts constituting sexual violence.

The Elements of Crimes establish three basic distinguishing elements of this broadly defined form of sexual violence (paras. 1–3 concerning Article 7(1)(g) of the Rome Statute): 1) the relevant act of commission, 2) the appropriate gravity/seriousness of the act, and 3) the corresponding awareness of the perpetrator.

The act of *commission* of such an “other form of sexual violence” is defined in an exceptionally broad and potentially indeterminate manner – the perpetrator committed an act of a sexual nature against one or more persons, or caused those persons to engage in acts of sexual coercion, which was achieved through the use of force, the threat of force, or coercion, such as that caused by fear of violence, detention, psychological pressure, or abuse of power, or through taking advantage of a coercive environment, or the inability of the passive subject to provide genuine resistance.

Given the otherwise broad definition of the act of commission of rape, as well as all other existing forms of sexual violence, it appears that this additional and very broadly defined form of conduct, which essentially consists of forcing the passive subject to engage in a sexual act, or performing a sexual act upon them through the use of coercion in the same manner as in cases of rape, or by exploiting their inability to resist, is practically superfluous. It was likely included in the *Elements*

of *Crimes* due to the intention of its drafters to strengthen, to the greatest possible extent, the criminal law protection of sexual freedoms, an approach that can also be observed in many provisions of the Rome Statute and other sources of law applicable in proceedings before the International Criminal Court. However, in this particular case, such an intention represents a rather inadequate solution from a legal-technical perspective (Škulić 2003, 262).

The *gravity of the act* constituting such an “other form of sexual violence” is determined by analogy. This means that the perpetrator’s conduct must be of such a degree of seriousness that it can be compared with other crimes referred to in Article 7(1)(g) of the Rome Statute, namely other forms of sexual violence. Such a formulation represents an unclear and, from a legal-technical perspective, inadequate solution, because, on the one hand, it introduces a form of analogy, which is generally impermissible in criminal law provisions, while, on the other hand, such a broad definition, considering the previously provided detailed and casuistic enumeration of possible forms of sexual violence, is practically superfluous and unnecessary.

The perpetrator’s *awareness* must be directed in a specific manner and must possess a certain degree of relevance. The perpetrator must be aware of the factual circumstances from which the gravity of their conduct arises. The requirement concerning the characteristics of the perpetrator’s awareness in this particular case essentially amounts to requiring a specific form of intent on the part of the perpetrator, namely with regard to the factual circumstances indicating that such an “other form of sexual violence” is, in terms of its gravity, comparable or, more precisely, equivalent to the other explicitly enumerated forms of sexual violence.

3. CONTEMPORARY CHALLENGES IN THE INVESTIGATION AND PROSECUTION OF SEXUAL CRIMES IN ARMED CONFLICT

Although the Rome Statute and the Elements of Crimes provide a comprehensive legal framework for the prosecution of sexual crimes committed during armed conflicts, the existence of clear legal norms does not automatically ensure effective accountability. Despite the significant development of international criminal law and the extensive jurisprudence of international criminal tribunals, the investigation and

prosecution of sexual violence continue to face numerous practical, procedural, and evidentiary obstacles. These challenges not only affect the effectiveness of criminal proceedings but also have profound consequences for victims' access to justice and the prevention of future violations.

The development of accountability for sexual crimes demonstrates the significant strides that have been made with respect to gender-based violations in international law, but also exposes significant bias in the kinds of harms for which remedy is offered and received by women (Aolain et al. 2011, 426). Post-conflict accountability processes have a bias towards the violations of civil and political rights, of harms 'to the body', and often fail to capture the full panoply of violations which women experience and define as harmful to them (Aolain et al. 2011, 426). As well as the complexity of prosecuting sexual crimes in armed conflict themselves. Given the fact that these offenses are often committed in specific circumstances - they are often characterized as the collapse of state institutions, insecurity, population displacement, destruction of evidence, and the trauma experienced by victims, all of which significantly complicate criminal investigations. The crime against humanity of racially-, politically-, or religiously-based persecution has been explored by international tribunals and academic commentators, but the newly identified gender-based persecution has not been analyzed in the same depth (Oosterveld 2006, 49). On the other hand, establishing individual criminal responsibility, particularly in relation to senior political and military leaders, remains one of the most demanding aspects of international criminal proceedings.

Against this background, this section examines several of the most significant contemporary challenges in the prosecution of sexual crimes committed during armed conflicts, with particular attention to evidentiary difficulties, victim protection and participation, and, lastly, the problem of establishing accountability.

3.1. Challenges in Evidence Collection

In order for the prosecution of sexual crimes derived from armed conflict to be effective, it is always important to collect and preserve reliable evidence. However, there is a wide range of difficulties regarding evidence collection, when it comes to sexual-related crimes, which make them unique comparing to other international criminal

offenses. There are specific obstacles, that are not normally addressed, for example: victim trauma, stigma, delayed reporting, and the frequent absence of physical evidence. Investigators must address not only the general difficulties inherent in investigating crimes committed during armed conflict, but also the specific obstacles associated with the nature of sexual violence, from which the most important are social factors, that may include fear of facing stigma, ridicule, abandonment by an intimate partner, or social exclusion (Reis 2013, 213). In some settings, a survivor may not disclose due to fear that she will be blamed for the sexual violence or for not preventing it from happening, also she may be considered unfit for marriage due to what happened to her, and where marriage confers a degree of economic security and social status, concern about this may be a strong deterrent (Reis 2013, 213). Feelings of shame may also prevent a survivor from coming forward and may lead a survivor to isolate herself from her family and community (Reis 2013, 195).

All those things considered, it is evident that gathering the evidence of sexual crimes committed during armed conflict can be challenging and that it should be done with extreme caution - regarding victims/survivors. A witness should be approached with patience and respect; be given whatever time necessary in telling the story – or be given the choice to decide not to tell it in whole or in part, at any point; s/he should be confident that his or her physical and emotional security will be prioritized over the evidence-gathering process, and to anticipate that s/he will be provided with full information prior to consenting and electing to participate in the justice process; s/he should be empowered and not harmed in any way through the investigative and judicial process; s/he should not have any assumptions made on her or his behalf and should not be misled or promised something that s/he may not or will not receive or experience (Marcus 2013, 222). Rules of evidence, the treatment accorded to victims and witnesses, and other procedures, must be responsive to the needs of victims to ensure that the process is positive and does not cause further emotional damage, physical danger, nor inhibit victims from coming forward (Gardam & Jarvis 2001, 182).

These considerations demonstrate that the investigation of conflict-related sexual violence requires a victim-centered approach that balances the interests of criminal prosecution with the rights, dignity, and well-being of survivors. International criminal jurisprudence has increasingly recognized that insensitive investigative practices may not

only retraumatize victims but also discourage future reporting, thereby undermining the broader objective of accountability for international crimes. For example, International Criminal Tribunal for Former Yugoslavia (hereinafter: ICTY) introduced a significant development with its Rules of Procedure and Evidence, which expressly provide that no corroboration of the victim's testimony is required in cases of sexual assault (Rule 96(i)) and marked an important departure from traditional evidentiary approaches that frequently placed an additional burden on victims of sexual violence (Askin 2003, 335).

The importance of timely evidence collection is also reflected in the procedural framework of the International Criminal Court. It has been pointed out to the possibility of a so-called “unique investigative opportunity”, where the Prosecutor may identify during the investigation that a particular evidentiary measure, such as obtaining a witness statement, may not be possible at a later stage (Škundrić, 2022, 291–292). This is of particular relevance to conflict-related sexual violence, where the passage of time, displacement of victims and witnesses, and other circumstances associated with armed conflict may result in the permanent loss of evidence.

An additional challenge in the investigation of conflict-related sexual violence may arise from the principle of complementarity underlying the jurisdiction of the International Criminal Court. Under this principle, national criminal justice systems retain primary jurisdiction, while the ICC has a subsidiary role and may intervene when national authorities are unable or unwilling to genuinely conduct proceedings (Škulić 2025, 68–69). Consequently, the effective investigation and prosecution of international crimes remain largely dependent on the capacity and willingness of domestic authorities. As noted in the literature, the collapse of a national legal system as a result of civil war, internal conflict or similar circumstances may prevent the collection of evidence and the conduct of a fair trial (Bajović 2026, 41). Such difficulties may be particularly significant in cases of conflict-related sexual violence, where the passage of time, displacement of victims and witnesses, and the destruction or unavailability of material evidence can further complicate the investigation and prosecution of crimes.

Beyond the challenges associated with obtaining victim testimony, investigators frequently face a lack of corroborating physical and documentary evidence. Sexual violence is commonly perpetrated in private settings, without eyewitnesses, while forensic evidence may

disappear because of delayed reporting, ongoing hostilities, displacement of victims, or the destruction of medical records and crime scenes. As a result, international prosecutions often depend primarily on testimonial evidence, making the assessment of witness credibility particularly significant. These evidentiary difficulties illustrate that, despite significant developments in international criminal law, the prosecution of conflict-related sexual violence continues to face complex challenges. That is the main reason why sexual related offenses are unique compared to other international crimes, and why it is important to provide special protection for victims and witnesses of these serious crimes.

3.2. Protection of Victims and Witnesses

Apart from problems with evidence collection regarding conflict-related sexual violence, ensuring protection and meaningful participation of the victims and witnesses in criminal procedure also presents a major challenge in investigation and prosecution of these crimes, and, actually is connected to evidence collection itself. Many experiences of victims have come into the public and international domain an articulated need has been the provision of support to victims, thus, various victim support mechanisms are a starting to affirm on an international level that fair legal process is not simply achieved through formal legal proceedings, establishing the guilt or innocence of alleged perpetrators (Aolain et al. 2011, 429). Instead, acting responsibly with victims' needs to the fore requires advancing a restoration of balance and as much normality as is possible in their lives (Aolain et al. 2011, 429). The importance of victim protection is further illustrated by the observation made in the UN Women report *In Pursuit of Justice*, according to which: "Sexual violence is the only crime for which the victim is sometimes more stigmatized than the perpetrator, with the women who report such crimes being shunned by their families and communities" (Dolgopol 2016, 137). The fact that sexual violence occur often during armed conflicts raises the awareness and the need for a better victim protection, giving them the opportunity to have their own lives back, and to try to live normally, after the horrible crime that has been done to them.

Recognizing these risks, international criminal tribunals and the International Criminal Court have developed a range of protective measures designed to safeguard victims and witnesses throughout criminal proceedings. Learning from the experience of the ad hoc

tribunals, where women's voices have been muted but nonetheless influential, feminists have also been determined to see gender justice in terms of representation within the ICC. Securing a place for women on the ICC bench and signs of an increasing sensitivity to gender issues in the procedures of the court have been a significant advance on previous practice (Chappell 2003, 20).

Followed by, for example, Article 68 of the Rome Statute of International Criminal Court (1998) requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. These guarantees are further elaborated in the ICC Rules of Procedure and Evidence (2002), in which Rule 87 authorizes the Court to order protective measures where necessary, including measures to prevent the disclosure of victims' and witnesses' identities, while Rule 88 provides for special measures to facilitate the testimony of vulnerable victims and witnesses, particularly victims of sexual violence. In practice, these measures may include the use of pseudonyms, testimony in closed session, image and voice distortion, the presence of support persons during testimony, and other procedural safeguards intended to minimize retraumatization and encourage participation in judicial proceedings. The narrative behind these rules is demonstrating that sexual violence crimes, that happens during armed conflicts are nowadays fully recognized in international criminal law community, and with that the problems that victims and witnesses are encountering are finally being considered in a way they haven't been considered before - that is victim-sensitive approach.

These procedural safeguards have also been reflected in the prosecutorial policies developed by the Office of the Prosecutor of the ICC - The Policy Paper on Sexual and Gender-Based Crimes (2014), which emphasized that investigations and prosecutions of sexual and gender-based crimes require a victim-sensitive approach, taking into account the particular experiences of survivors, the risks of stigmatization, and the potential for retraumatization during criminal proceedings. The Policy recognized that effective prosecution of these crimes depends not only on the collection of sufficient evidence but also on ensuring that victims are treated with dignity, respect, and protection throughout the investigative and judicial process. Understandably, it is very hard for victims to re-live these experiences that happened to them,

given the fact that it was a traumatic event, probably the most traumatic one in their whole life, so that is why the courts and prosecution need to treat them with great caution and respect.

These principles were further developed in the Office of the Prosecutor's Policy on Gender-Based Crimes (2023), which expanded the survivor-centred approach by integrating trauma-informed and intersectional perspectives into all stages of investigations and prosecutions. While earlier guidance primarily focused on preventing secondary victimization during investigations, the 2023 Policy expands this approach by integrating survivor-centred, trauma-informed and intersectional principles into all stages of investigations and prosecutions. The 2023 policy marks a key shift from 2014 by separating reproductive violence from the general category of sexual crimes, defining it as a direct violation of reproductive autonomy. Additionally, the Prosecution moves away from linear frameworks to introduce an intersectional and trauma-informed approach, which analyzes how gender intersects with factors like race or age while protecting survivors from re-traumatization during the trials. Furthermore, the 2023 Policy requires prosecutors to systematically consider the gender dimensions of all crimes within the Court's jurisdiction, reflecting important developments in international criminal law and jurisprudence over the past decade.

These measures are of great necessity, as scholars have noted, victims of conflict-related sexual violence frequently encounter significant barriers to participation in criminal proceedings, including stigma, fear of retaliation, and social exclusion, which may discourage reporting and cooperation with judicial authorities (Oosterveld 2012, 200–202). Despite the development of comprehensive protective frameworks, the practical implementation of these measures remains challenging. Victims of conflict-related sexual violence often face multiple barriers that may prevent them from participating effectively in criminal proceedings, including fear of retaliation, social stigma, feelings of shame, and psychological consequences associated with the violence suffered. These difficulties are particularly pronounced in post-conflict societies, where victims may continue to live in the same communities as perpetrators or individuals associated with them. Moreover, the passage of time between the commission of crimes and the initiation of investigations may further complicate victims' ability to participate, as memories may be affected by trauma and as opportunities for providing timely support may have been lost. Consequently, ensuring meaningful

victim participation requires not only procedural safeguards before international courts but also broader institutional support, including access to psychological assistance, information about proceedings, and long-term protection measures.

3.3. From Legal Recognition Towards More Effective Accountability

The recognition of sexual violence committed during armed conflicts, as an international crime represents one of the most significant achievements of contemporary international criminal law. Over the past decades, the work of international criminal tribunals and the establishment of the International Criminal Court have transformed the perception of sexual violence in armed conflicts, moving it from a largely neglected “consequence of war” to a legally recognized form of criminal conduct subject to individual criminal responsibility. When individuals move from their domestic legal systems to international tribunal or ICC it cannot be assumed that they will leave behind the prejudices and negative assumptions about victims who have experienced sexual violence (Dolgopool 2016, 139). Nevertheless, the development of a comprehensive legal framework has not, by itself, eliminated the persistence of impunity or ensured effective accountability for perpetrators, as we mentioned before, the problems that can prosecution can come across with, such as evidence collection and victim protection.

However, there are still some institutional limitations of international criminal justice mechanisms, and that is one of the main obstacles to more to effective accountability. The International Criminal Court, in particular, depends heavily on the cooperation of States Parties for the collection of evidence, arrest and surrender of suspects, and enforcement of judicial decisions (Cryer et al. 2010, 509–522)³. Unlike domestic courts, the Court does not possess its own enforcement authority, which may significantly delay proceedings and contribute to situations in which alleged perpetrators remain beyond the reach of justice (Cryer et al. 2010, 170). Consequently, the effectiveness

³ In the mentioned pages, the authors examine the framework of state cooperation with international criminal courts and tribunals, including obligations to cooperate, legal assistance, arrest and surrender of accused persons, and practical challenges arising from the dependence of international courts on state cooperation.

of international criminal law is closely connected to the willingness of states to cooperate with judicial institutions and fulfil their obligations under international law.

A further challenge concerns the attribution of responsibility to persons who are not the direct perpetrators of sexual violence. Conflict-related sexual violence may occur not only as isolated acts committed by individual offenders, but also as part of broader patterns of violence involving military or civilian structures. In such circumstances, establishing the responsibility of commanders and other superiors becomes particularly important. The doctrine of command responsibility provides a legal basis for holding superiors accountable for crimes committed by their subordinates where the relevant conditions are satisfied. As established in the Čelebići case, these conditions include the existence of a superior-subordinate relationship, the required mental element, and the failure to take reasonable measures to prevent or punish violations of international criminal law (Cryer et al. 2010, 389). The Rome Statute additionally requires a causal link between the superior's failure and the crimes committed by subordinates (Cryer et al. 2010, 389). In the context of conflict-related sexual violence, the effective application of command responsibility is particularly significant where such crimes form part of broader patterns of violence or are committed within hierarchical structures in which superiors have the authority and responsibility to prevent or punish them.

Moreover, achieving accountability for conflict-related sexual violence cannot be measured exclusively through the existence of legal proceedings or the number of convictions obtained. As Grey emphasizes, the success of prosecuting gender-based crimes before the International Criminal Court should also be assessed through broader considerations, including the recognition of victims' experiences, the quality of investigative efforts, the influence of international proceedings on national jurisdictions and the extent to which judicial processes provide meaningful acknowledgment of victims' suffering (Grey 2019, 35–36).

4. CONCLUSION

The development of international criminal law has fundamentally transformed the understanding and legal treatment of sexual crimes committed during armed conflicts, which were once largely overlooked or considered an inevitable consequence of warfare. Sexual violence

is today recognized as one of the gravest violations of international law, capable of constituting war crimes, crimes against humanity and, under specific circumstances, acts of genocide. The jurisprudence of international criminal tribunals and the establishment of the International Criminal Court have significantly contributed to this transformation by clarifying the elements of sexual crimes, expanding the scope of criminal responsibility and strengthening the legal recognition of victims' experiences.

Nevertheless, the existence of a comprehensive legal framework does not automatically ensure effective accountability. As this paper has demonstrated, significant challenges continue to affect the investigation and prosecution of conflict-related sexual violence. Difficulties in evidence collection, the frequent absence of physical and documentary evidence, the trauma and stigmatization experienced by victims, and the need to balance victim protection with the rights of the accused remain central concerns for international criminal justice mechanisms. These challenges illustrate that legal recognition, although essential, represents only the first step toward achieving meaningful justice, the real and effective prosecution of sexual crimes in armed conflict requires a broader approach that goes beyond the establishment of legal norms. Strengthening investigative capacities, ensuring survivor-centred and trauma-informed procedures, improving international cooperation and enhancing domestic judicial mechanisms are necessary to bridge the gap between legal standards and their practical implementation. Since the majority of cases will ultimately depend on national accountability processes, the effectiveness of international criminal law also relies on the willingness and capacity of domestic institutions to investigate and prosecute these crimes.

The evolution of international criminal law has therefore marked a significant shift in the perception of victims of sexual violence. As Chappell observes, women (who are usually the victims of sexual violence committed during armed conflicts) are no longer understood solely as mothers or as the dependents of men, but as individuals who have the right to sexual autonomy and who can be harmed both mentally and physically through acts of sexual violence, while crimes that were previously ignored in international law have received due recognition (Chappell 2003, 20). The remaining challenge is to ensure that this normative progress is consistently translated into effective accountability and meaningful justice for survivors of sexual violence in armed conflict.

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СЕКСУАЛНИ ЗЛОЧИНИ У ОРУЖАНИМ СУКОБИМА: МЕЋУНАРОДНОПРАВНИ ОКВИР И САВРЕМЕНИ ИЗАЗОВИ

Сажетак

Сексуални злочини извршени током оружаних сукоба представљају једна од најтежих кршења међународног хуманитарног права и међународног кривичног права. Иако су овакви злочини пратили оружане сукобе током читаве историје, њихово препознавање као посебних међународних злочина и развој механизма индивидуалне кривичне одговорности одвијали су се постепено. Усвајањем Римског статута Међународног кривичног суда и пратећих Елемената кривичних дела успостављен је свеобухватан правни оквир за кривично гоњење силовања, сексуалног ропства, принудне проституције, присилне трудноће, принудне стерилизације и других облика сексуалног насиља као злочина против човечности. Међутим, упркос значајном нормативном напретку и доприносу праксе међународних кривичних судова, ефикасно истраживање и кривично гоњење сексуалних злочина извршених током оружаних сукоба и даље се суочавају са бројним практичним и правним изазовима. Они обухватају тешкоће у прикупљању доказа, заштити и учешћу жртава у поступку, утврђивању индивидуалне и командне одговорности, као и обезбеђивању одговорности за извршене злочине у савременим оружаним сукобима. У овом раду анализира се међународноправни оквир којим су регулисани сексуални злочини у оружаним сукобима, као и кључни изазови који и даље отежавају њихово ефикасно процесуирање. Полази се од становишта да је међународно кривично право значајно унапредило правну заштиту жртава сексуалног насиља, али да су неопходни даљи напори ради јачања механизма одговорности и доследне примене међународноправних стандарда.

Кључне речи: сексуални злочини; оружани сукоб; међународно кривично право; злочини против човечности; Римски статут; Међународни кривични суд; сексуално насиље.

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