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SEXUAL VIOLENCE AGAINST WOMEN IN ECHR PRACTICE: MECHANISM OF INTERNATIONAL PROTECTION DURING THE RUSSIAN-UKRAINIAN WAR

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Astasheva O. S., Cheban V. M. Sexual violence against women in ECHR practice: mechanism of international protection during the Russian-Ukrainian war.

The Russian army commits sexual violence against Ukrainian people, especially women. Police have launched a series of criminal proceedings because of rape of women and girls in Donetsk, Kyiv, Kharkiv and Kherson regions. Rape is a kind of crime that is extremely traumatic for victims. Sexual violence during the war means not only rape in physiological dimension, but also humiliation supported and approved by Russian authorities. Currently no data exist to assess the scale of sexual crimes committed by the Russian military, said the Prosecutor General of Ukraine Irina Venediktova. The quantity of these crimes changes constantly, day by day, but the whole situation cannot be estimated to the fullest. Those who have suffered sexual violence are afraid and ashamed to talk about it. The press service of the Ministry of Internal Affairs and the International Human Rights Organization La Strada-Ukraine also reported about the lack of the exact numbers. UN Women has reported that the war increases the exposure of women and girls to war crimes, especially all forms of gender-based violence, arbitrary killings, rape and trafficking.

It is difficult to change the situation on the forefront, however, it is essential to bring up the question of sufferings of the most vulnerable groups of Ukrainian people.

At the same time, it is crucial not only to inform people about war crimes at this stage of the war, but also to understand, how exactly international mechanisms work to protect victims of sexual violence. Ukrainian authorities may fail to investigate allegation of rape properly and consequently the State duty to provide an effective legal protection against sexual abuse will be in breach. Subsequently, the European Court of Human Rights will be involved in such cases, thus, it is crucial to understand the relevance of its practice in this situation. This issue is also becoming more relevant given that sexual violence during martial law and occupation has not been considered by the European Court of Human Rights in the context of Article 3 of the European Convention on Human Rights.

Key words: rape, sexual violence, human rights, the European Court of Human Rights, gender-based violence, conflict-related sexual violence, torture, cruel, inhuman or degrading treatments, crimes against humanity, acts of genocide.

Асташева О. С., Чебан В. М. Сексуальне насильство щодо жінок у практиці ЄСПЛ: механізм міжнародного захисту під час російсько-української війни.

Російська армія вчиняє сексуальне насильство проти українців, а особливо жінок. Поліція відкриває серію кримінальних проваджень за фактом зґвалтування переважно жінок та дівчат у Донецькій, Київській, Харківській та Херсонській областях. Зґвалтування - це різновид злочину, надзвичайно травматичний для його жертв. Сексуальне насильство під час війни означає не лише зґвалтування у фізіологічному вимірі, а в першу чергу приниження людської гідності, що відбувається за повної підтримки російської влади. Наразі немає точних даних, які дозволять оцінити масштаби сексуальних злочинів, скоєних російськими військовими, заявляла генпрокурорка України Ірина Венедіктова. Ці цифри змінюються постійно і стрімко, день за днем, але навіть вони не віддзеркалюють всієї ситуації. Проблемою є ще і те, що, ті хто зазнав сексуального насильства, бояться і соромляться повідомляти про це. Про відсутність точних цифр також заявили у прес-службі МВС та Міжнародної правозахисної організації «Ла Страда-Україна». «ООН-Жінки» повідомили, що війна значно збільшує зазнавання жінками і дівчатами тортур від військових злочинів, особливо в формах гендерно-зумовленого насильства, включаючи вбивства пов'язані зі зґвалтуваннями та торгівлю людьми. Змінити ситуацію на передовій зараз, безумовно, дуже складно, але незважаючи на це, надзвичайно важливо зробити проблеми найбільш уразливих груп населення під час війни видимими. Відповідно, важливо не лише інформувати людей про військові злочини на цьому етапі війни, а й розуміти, як саме працюють міжнародні механізми для захисту жертв сексуального насильства, які застосовуватимуться в майбутньому. На жаль, українські правоохоронні органи наразі не можуть розслідувати зґвалтування належним чином і, отже, зобов'язання держави забезпечити ефективний правовий захист від сексуального насильства за Конвенцією можуть бути порушені. Таким чином, є висока вірогідність того, що згодом до таких справ буде залучений Європейський суд з прав людини, і тому дуже важливо розуміти його практику з цих питань та релевантність прецедентної практики до нашої ситуації. Це питання набирає більшої актуальності і з огляду на те, що сексуальне насильство під час воєнного стану та окупації не розглядалось Європейським судом з прав людини в розрізі статті 3 Європейської Конвенції з прав людини.

Ключові слова: зґвалтування, сексуальне насильство, права людини, Європейський суд з прав людини, гендерне насильство, сексуальне насильство, пов'язане з військовим конфліктом, катування, жорстоке, нелюдське чи таке, що принижує гідність, поведження, злочини проти людства, акти геноциду.

The question under study has not been thoroughly elaborated yet due to the absence of precedents in the European Court of Human Rights practice in regard to sexual violence against women during martial law and occupation. O. Dudorov [1] and O. Kharitonova [2], were the first Ukrainian scientists, who covered the general issue of criminal liability for rape after the amendments to the Criminal Code entered into force to implement the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). However, the issue of international responsibility for mass rapes in Ukraine because of the Russian occupation remains unexplored. **The purpose** of the article is to determine, how the mechanism for the protection of the human rights, namely under Article 3 of the European Convention on Human Rights, can potentially work in relation to sexual crimes committed by Russia. The issue of seeking Ukraine's obligation to effective legal protection from sexual violence under the Convention and the exclusion of Ukrainian State's guilt for crimes committed in the occupied territories, given the ambiguous practice in the European Court of Human Rights practice.

The methods identified in the article are as follows: *structural-logical, method of synthesis, linguistic method, psychological, sociological, comparative law methods* - for the analysis of the international European Court of Human Rights practice in relation to sexual violence.

There is a positive obligation of a State under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3 [3], that requires a State to take measures aimed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals [4]. The investigation of rape, in order to be considered effective, must be prompt, thorough, objective, with sufficient involvement of the victim in the process [5], which cannot be fully ensured under martial law. However, as follows from Article 1 of the European Convention, Member States are liable for violations of the rights and freedoms protected

by the Convention for acts which constitute a violation of the rights and freedoms set forth in the Convention [6]. In the European Court of Human Rights cases such as *Ilascu and Others v. Moldova and Russia*, *Catan and Others v. Moldova and Russia*, *Ivantoc and Others v. Moldova and Russia* - the European Court of Human Rights found that even though Russia had effective control over the part of Moldova, Moldova is not exempt from its positive obligations under the European Convention [7].

At the same time, the European Court of Human Rights notes that, in accordance with the principles of international law, a State should be liable if, as a result of hostilities (legal or illegal) in practice, it effectively controls a territory which is outside its state territory, it has an obligation to ensure the rights and freedoms in such a territory through its own armed forces or through a subordinate local administration [8].

The European Court of Human Rights applies the “presumption of jurisdiction”, and only then proceeds to consider the alleged violations of human rights. That means a State is still liable for crimes in its uncontrolled territory [9]. This approach of the European Court of Human Rights, which made the Moldovan Government liable for not taking diplomatic, economic, judicial or other measures within its capacity and in accordance with international law to secure to protect the rights guaranteed by the Convention [10], should be flexibly changed in future cases involving Russian crimes against humanity committed. Accordingly, partial or total failure to act of Ukrainian governmental bodies should be considered in the circumstances of martial law, and only the Russia Federation should be liable for acts of Russian soldiers raping and sexually assaulting women in the occupied cities, towns and villages. There is a major assault on Ukraine, as occupied cities, towns and villages are destroyed. The war between Russia and Ukraine continues and it is far more brutal than any other conflict, where the State-Party to the European Convention on Human Rights suffered from Russian invasion. Thus, there are no precedents in the European Court of Human Rights practice in regard to sexual violence against women during martial law and occupation. Subsequently, we will view the general approach to rape in the light of Article 3 of the Convention.

However, there is a clear understanding that the European Court of Human Rights should order the Russian Federation to pay to each applicant - victim damages, without finding Ukraine liable.

In the European Court of Human Rights case of *Aydin v. Turkey* [11], the European Court of Human Rights claimed that rape could constitute torture prescribed under Article 3 of the European Convention on Human Rights. Thus, an act of rape could constitute torture, and due to this progressive judgment it was hailed across the international community for its acknowledgement.

For that reason, there was the urgent need to develop legal mechanisms, particularly human rights norms, to bring perpetrators of sexual violence to justice. Further, following this approach, the International Criminal Tribunal for Rwanda issued its landmark judgment in *Prosecutor v Akayesu* [12], finding responsibility for genocide and war crimes, including rape [13]. Thus, rape was charged against the accused as a crime against humanity. The same situation was reported by the Commissioner for Human Rights of Verkhovna Rada of Ukraine Lyudmila Denisova stating mass cases of rape during the occupation of the city of Bucha near Kyiv by Russian troops [14].

Even though, rape does not meet the harm test for torture prescribed under Article 3, the severity of the damage is established [11]. The European Court of Human Rights stated that rape leaves deep psychological scars on the victim, which do not heal as quickly as other forms of physical and mental violence.

The Court found a violation of Article 3 (prohibition of degrading treatment) in case *M.C. v. Bulgaria* [15], as victims of sexual abuse, especially young girls, failed to resist for fear of further violence for psychological reasons.

Celebic'i case of the UN Trial Chamber ruled that rape constitutes torture because it constitutes a violation of personal dignity, and is used for the same purposes as torture, including: intimidation, degradation, humiliation, discrimination, punishment, and control or destruction of a person [16]. Lastly, in *Celebic'i case* it was referred to several United Nations commission reports that affirmed rape constitutes a form of torture [17].

Conclusions. In Russian – Ukrainian war, sexual assaults and rapes are a common practice, when Russian soldiers humiliate and torture Ukrainian females. International humanitarian law, human rights law, international criminal law expressly ban all types of sexual violence at all times and against anybody. Thus, new methods for improving the local and international execution of existing laws is definitely needed in this non-precedential situation.

Not only gender, but also nationality should be taken into consideration in future, as acts of genocide against Ukrainians are committed with the full support of the Russian authorities. Lastly, international juris-

prudence from the ad hoc tribunals on crimes of sexual violence and the European Court of Human Rights practice is silent on the matter of correlation of war crimes and sexual violence. Thus, in the near future decisions of the European Court of Human Rights should solve issues of the law never faced before. The European Court of Human Rights must address the problems discussed above to ensure the combating impunity for crimes of sexual violence in Ukraine, and bringing justice to survivors of atrocities in Ukraine.

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