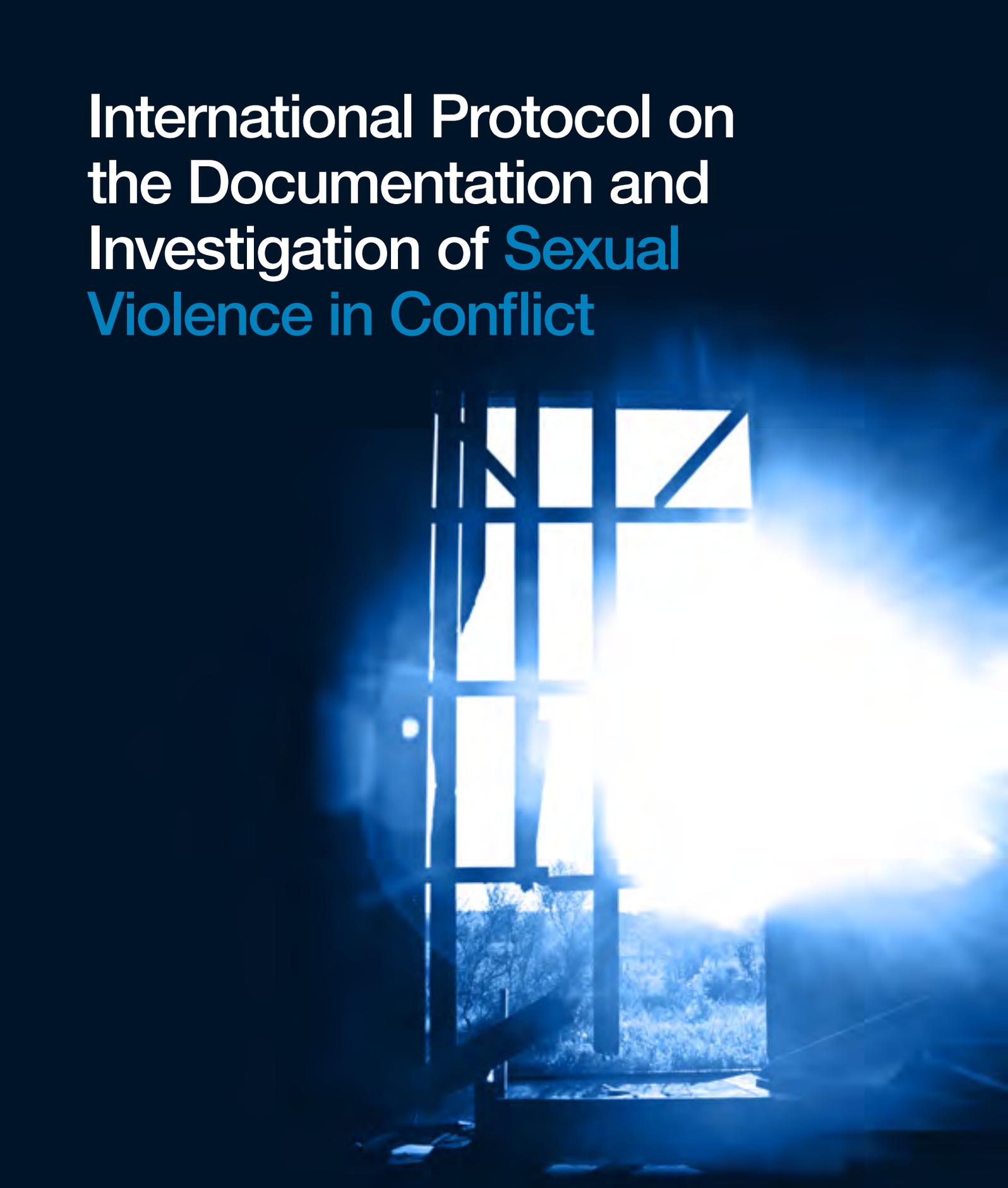


# International Protocol on the Documentation and Investigation of **Sexual Violence in Conflict**



Best Practice on the Documentation of Sexual Violence  
as a Crime or Violation of International Law

SECOND EDITION: MARCH 2017



# International Protocol on the Documentation and Investigation of Sexual Violence in Conflict

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as a Crime or Violation of International Law**

Second Edition: March 2017

Sara Ferro Ribeiro and Danaé van der Straten Ponthoz  
on behalf of the UK Foreign & Commonwealth Office

# Contents

<b>Foreword</b> .....	<b>6</b>
<b>Preface</b> .....	<b>7</b>
<b>Acknowledgements</b> .....	<b>8</b>
<b>Acronyms</b> .....	<b>9</b>
<b>PART I: Using the International Protocol</b> .....	<b>10</b>
<b>CHAPTER 1: Using the International Protocol</b> .....	<b>11</b>
A. What is the International Protocol? .....	11
B. Who can use the International Protocol? .....	12
C. How to use the International Protocol .....	15
<b>PART II: What is Sexual Violence?</b> .....	<b>16</b>
<b>CHAPTER 2: Understanding Sexual Violence</b> .....	<b>17</b>
A. Contextualising Sexual Violence .....	17
B. Forms of Sexual Violence .....	18
C. Conflict and Atrocity-Related Sexual Violence .....	19
D. Impact of Sexual Violence .....	25
<b>PART III: Sexual Violence under International Law</b> .....	<b>28</b>
<b>CHAPTER 3: Accountability Avenues and Remedies</b> .....	<b>29</b>
A. Introduction .....	29
B. Sexual Violence as Violation and Crime under International Law .....	29
C. Overview of Accountability Avenues and Remedies for Victims .....	30
<b>CHAPTER 4: Individual Criminal Responsibility</b> .....	<b>41</b>
A. Introduction .....	41
B. The Elements of Crimes under International Law .....	43
C. Factual Scenarios .....	56
D. Rules of Procedure and Evidence .....	59
<b>CHAPTER 5: State Responsibility</b> .....	<b>65</b>
A. Introduction .....	65
B. Actions and Omissions giving rise to State Responsibility .....	66
C. Categories of Elements of Human Rights Violations .....	70

<b>CHAPTER 6: Reparations .....</b>	<b>75</b>
A. Introduction.....	75
B. Avenues for Reparations .....	76
C. Principles and Forms of Reparations.....	77
D. Elements to Document Harm .....	82
<b>PART IV: Documentation in Practice: Preparation .....</b>	<b>84</b>
<b>CHAPTER 7: Do No Harm .....</b>	<b>85</b>
A. Key Concepts .....	85
B. Informed Consent .....	89
C. Mitigating Harm .....	92
<b>CHAPTER 8: Safety and Security.....</b>	<b>105</b>
A. Introduction.....	105
B. Holistic Security Strategy .....	106
C. Managing Risks to Practitioners .....	108
D. Managing Risks to Information .....	111
E. Managing Risks to Victims and Witnesses .....	115
<b>CHAPTER 9: Planning .....</b>	<b>119</b>
A. Introduction.....	119
B. The CARSV Documentation Plan .....	121
<b>CHAPTER 10: Types of Evidence of Sexual Violence .....</b>	<b>141</b>
A. Introduction.....	141
B. Testimonial Evidence.....	146
C. Documentary Evidence.....	148
D. Digital Evidence .....	150
E. Physical Evidence .....	154
<b>PART V: Documentation in Practice: Gathering Information.....</b>	<b>160</b>
<b>CHAPTER 11: Interviewing.....</b>	<b>161</b>
<b>CHAPTER 12: Collecting Additional Information.....</b>	<b>187</b>
A. Processing Documents.....	187
B. Processing Sites of Violations .....	189
C. Photographing, Video-Recording and Sketching Sites of Violations, Physical Evidence and Physical Injuries .....	193
D. Chain of Custody .....	199

<b>CHAPTER 13: Storing and Handling Information .....</b>	<b>203</b>
A. Introduction.....	203
B. Key Principles .....	203
C. Manual Storage System.....	205
D. Digital Storage System.....	206
<b>Part VI: Analysing Evidence and Information .....</b>	<b>210</b>
<b>CHAPTER 14: Analysing Evidence and Information.....</b>	<b>213</b>
A. Introduction.....	213
B. Evaluating Information .....	215
C. Establishing the Elements .....	220
D. Strengthening Evidence .....	224
E. Identifying Patterns.....	224
<b>CHAPTER 15: Trauma .....</b>	<b>231</b>
A. Understanding Trauma.....	231
B. Sexual Violence-Related Trauma.....	233
C. ‘War Rape’ Trauma .....	236
D. Interacting with Victims of Trauma .....	239
<b>CHAPTER 16: Sexual Violence against Children.....</b>	<b>245</b>
A. Introduction.....	245
B. Sexual Violence against Children.....	245
C. Legal and Procedural Framework .....	249
D. Ethical Considerations.....	251
E. Core Guidance on Involving Children in the Documentation Process.....	257
<b>CHAPTER 17: Sexual Violence against Men and Boys .....</b>	<b>265</b>
A. Introduction.....	265
B. Myths and Stereotypes .....	265
C. Scale and Forms.....	267
D. Experience and Impacts .....	271
E. Legal Frameworks.....	273
F. Specific Considerations throughout the Documentation Process .....	277
<b>Part VIII: Conclusion .....</b>	<b>282</b>
<b>CHAPTER 18: Conclusion.....</b>	<b>282</b>
A. Using the Information .....	282
B. Future use of the International Protocol .....	283

<b>List of Annexes .....</b>	<b>i</b>
<b>ANNEX 1: Evidence Workbook for Documentation of Crimes of Sexual Violence.....</b>	<b>i</b>
ANNEX 1a. List of elements of crimes .....	ii
ANNEX 1b: <b>Example Evidence Workbook.....</b>	<b>vii</b>
<b>ANNEX 2: Conducting Threat and Risk Assessments .....</b>	<b>xiii</b>
<b>ANNEX 3: Reasons not to Collect Physical Evidence.....</b>	<b>xvii</b>
<b>ANNEX 4: Sample Sexual Assault Medical Certificate .....</b>	<b>xix</b>
<b>ANNEX 5: Organisational Security Good Practices Checklist .....</b>	<b>xxiii</b>
<b>ANNEX 6: Grab Bag Content.....</b>	<b>xxvii</b>
<b>ANNEX 7 – Interview Checklist.....</b>	<b>xxix</b>
<b>ANNEX 8 – Template for Personal Data to be Collected from Victims/Witnesses.....</b>	<b>xxxiii</b>
<b>ANNEX 9 – Chain of Custody Form.....</b>	<b>xxxv</b>
<b>Bibliography .....</b>	<b>xxxvii</b>

# Foreword

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***Whether committed as a war crime, crime against humanity, act of genocide or any other violation of international law, sexual violence is often part of the tragic and brutal pattern of criminal acts perpetrated against women, men, and children in conflicts and other mass atrocities around the world.***



*All states have a responsibility to prosecute those responsible for these crimes. Yet only limited numbers of perpetrators have ever been brought to justice.*

*This International Protocol was introduced in June 2014 to help overcome the barriers to prosecution, by setting out clearly and comprehensively the basic principles of documenting sexual violence as a violation of international law. The International Protocol has so far been translated into 9 languages and used by lawyers, police, medical personnel and NGOs to gather evidence and investigate crimes to help strengthen prosecutions in at least a dozen countries in Europe, Africa, Asia, the Middle East and South America.*

*We launched the International Protocol at the Global Summit to End Sexual Violence in Conflict with the hope that it would be improved and strengthened over time. We want to thank all the experts and practitioners who have contributed to this first revision based on their experience of its use, and all those who work with survivors of sexual violence, often at risk to themselves.*

*Above all, we pay tribute to survivors themselves. We hope that the International Protocol, allied with political will and support from governments, can help them attain the justice and recognition they deserve.*

**The Rt Hon. the Lord Hague of Richmond**

Co-founder, Preventing Sexual Violence in Conflict Initiative

**Angelina Jolie DCMG**

Co-founder, Preventing Sexual Violence in Conflict Initiative and Special Envoy of the UN High Commissioner for Refugees

# Preface

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***As the Prime Minister's Special Representative on Preventing Sexual Violence in Conflict, I have seen first hand the terrible and long-lasting impact sexual violence in conflict can have on individuals, their families and the wider community. I have also heard from survivors about how important it is to pursue justice and hold the perpetrators of these crimes to account.***

*I am proud of the significant contribution the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict has made to the fight against impunity. Its impact can already be seen in the improvements to evidence gathering and litigation in countries such as Syria, Bosnia and Herzegovina, and the Democratic Republic of the Congo.*

*The International Protocol was always intended to be a living document, to be updated as best practice evolved and in light of the feedback we received on its use. I am pleased that we are now ready to meet this commitment.*

*The revised version contains a number of additions, including: guidance on the specific context, challenges and techniques required for interviewing and documenting conflict and atrocity-related sexual violence against children and against male victims; further guidance on trauma; and a focus on analysing evidence and establishing patterns of violations.*

*This second edition of the International Protocol would not have been possible without the considered input and advice of many practitioners around the world. I am grateful to all those who shared their knowledge and expertise so generously.*

*As a result, the International Protocol is now an even more important global tool in our collective effort to combat the terror of sexual violence in conflict and to bring justice to survivors.*

A handwritten signature in black ink that reads "Joyce Anelay". The signature is written in a cursive, flowing style.

**The Rt Hon Baroness Anelay of St Johns DBE**  
Minister of State at the Foreign & Commonwealth  
Office and Prime Minister's Special Representative  
on Preventing Sexual Violence in Conflict

# Acknowledgements

The lead authors of the Second Edition of the International Protocol were Sara Ferro Ribeiro and Danaé van der Straten Ponthoz, independent consultants and PSVI Senior Advisers for the UK Foreign & Commonwealth Office. Erica Hall, Senior Child Rights Policy Adviser at World Vision, drafted the Chapter on Sexual Violence Against Children.

Additionally, the UK Foreign & Commonwealth Office would like to thank the many individuals, organisations and institutions that contributed their valuable time, experience and expertise to the revised edition.

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The UK Foreign & Commonwealth Office further acknowledges the critical contributions of those practitioners in Iraq, Syria, Bosnia, Colombia and the Democratic Republic of Congo (DRC) that have been using the Protocol since the launch of the first edition in 2014, and provided the invaluable feedback that enabled this revision.

Editorial authority for the Protocol has rested with the UK Foreign & Commonwealth Office, as such, being a contributing expert is not necessarily indicative of full endorsement of all aspects of this Protocol.

# Acronyms

<b>ACHRP</b>	African Commission on Human and Peoples' Rights	<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>ACtHR</b>	African Court of Human Rights	<b>IDP</b>	Internally Displaced Person
<b>AU</b>	African Union	<b>IHL</b>	International Humanitarian Law
<b>CAH</b>	Crimes Against Humanity	<b>IHRL</b>	International Human Rights Law
<b>CARSV</b>	Conflict and Atrocity-Related Sexual Violence	<b>IICI</b>	Institute for International Criminal Investigations
<b>CAT</b>	Committee Against Torture	<b>IRC</b>	International Rescue Committee
<b>CcTJ</b> <b>ECOWAS</b>	Community Court of Justice of the Economic Community of West African States	<b>KSC</b>	Kosovo Special Court
<b>CEDAW</b>	Committee on the Elimination of Discrimination against Women	<b>MARA</b>	Monitoring, Analysis and Reporting Arrangements on Conflict Related Sexual Violence
<b>CIPEV</b>	Commission of Inquiry on Post Election Violence	<b>MICT</b>	Mechanism for International Criminal Tribunals
<b>CMN</b>	Case Matrix Network	<b>MRM</b>	Monitoring and Reporting Mechanism
<b>COI</b>	Commission of Inquiry	<b>NGO</b>	Non-Governmental Organisation
<b>CRC</b>	Committee on the Rights of the Child	<b>NHRI</b>	National Human Rights Institution
<b>EAC</b>	Extraordinary African Chambers in the Senegalese Courts	<b>NIAC</b>	Non-International Armed Conflict
<b>EACtJ</b>	East African Court of Justice	<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia	<b>OISL</b>	OHCHR Investigation in Sri Lanka
<b>ECtHR</b>	European Court of Human Rights	<b>PTSD</b>	Post Traumatic Stress Disorder
<b>FCO</b>	Foreign and Commonwealth Office of the United Kingdom	<b>RPE</b>	Rules of Procedure and Evidence
<b>GBV</b>	Gender-Based Violence	<b>SCSL</b>	Special Court for Sierra Leone
<b>GBVIMS</b>	Gender-Based Violence Information Management System	<b>SEA</b>	Sexual Exploitation and Abuse
<b>GIS</b>	Geographic Information System	<b>SGBV</b>	Sexual and Gender-Based Violence
<b>IAC</b>	International Armed Conflict	<b>SOP</b>	Standard Operating Procedure
<b>IACHR</b>	Inter-American Commission of Human Rights	<b>SPSC</b>	Special Panels for Serious Crimes
<b>IACtHR</b>	Inter-American Court of Human Rights	<b>STD/I</b>	Sexually Transmitted Disease/Infection
<b>ICC</b>	International Criminal Court	<b>UJ</b>	Universal Jurisdiction
<b>ICJ</b>	International Court of Justice	<b>UN</b>	United Nations
<b>ICL</b>	International Criminal Law	<b>UNHRC</b>	United Nations Human Rights Council
<b>ICRC</b>	International Committee of the Red Cross	<b>UNICEF</b>	UN International Children's Emergency Fund
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>UNODC</b>	United Nations Office on Drugs and Crime
		<b>UNSCR</b>	United Nations Security Council Resolution
		<b>UPR</b>	Universal Periodic Review

# PART I: Using the International Protocol

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## Chapter 1 Contents

<b>CHAPTER 1: Using the International Protocol</b> .....	<b>11</b>
<b>A. What is the International Protocol?</b> .....	<b>11</b>
<i>Box 1</i> Documentation Versus Investigation.....	11
<b>B. Who can use the International Protocol?</b> .....	<b>12</b>
<i>Box 2</i> Who Can Use The International Protocol? .....	13
<b>C. How to use the International Protocol</b> .....	<b>15</b>

# CHAPTER 1: Using the International Protocol

## A. What is the International Protocol?

The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (the Protocol) is a set of guidelines setting out best practice on how to document, or investigate, sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law. For the purpose of this Protocol, such crimes and violations under international law are referred to as Conflict and Atrocity-Related Sexual Violence, or CARSV.

The Protocol is a practical document, intended to promote accountability for CARSV. It achieves this by setting out the basic principles of documenting and investigating sexual violence in this context: from understanding the impact of CARSV and the different forms of accountability that can be pursued, to setting out techniques for interviewing witnesses and gathering and analysing information that could be critical to these accountability efforts.

The Protocol is not a legal document and it is not binding on states. Rather, it can serve as a tool to support efforts by national and international justice and human rights practitioners to effectively and protectively document CARSV.

### Box1

#### Documentation Versus Investigation

There has been much discussion in the community of practice regarding the terms ‘documentation’ and ‘investigation’. Some NGO activists may refer to themselves as ‘investigators’ in the course of gathering information on human rights violations, while others use the term ‘documenters’ as they view investigations to be solely the function of state or judicial authorities.

However, throughout the Protocol the term ‘documentation’ is used to refer to the process of systematically gathering information on CARSV that may establish that a violation of international law occurred, and who may be responsible for that violation and how—whatever the role or mandate of the relevant practitioner.

Where relevant, the term ‘official investigation’ is used in reference to activities that this Protocol considers to be the purview of state-led, official investigations conducted by mandated justice and law enforcement professionals.

Additionally, regardless of the objective of the documentation, the process itself must at a minimum be carried out with respect for the standards set out in this Protocol, and endeavour to collect credible, relevant, and reliable information on CARSV in a manner which empowers survivors and strengthens all manner of accountability processes.

## B. Who can use the International Protocol?

### ‘Practitioners’

The Protocol can be used by anyone who is documenting CARSV for the purpose of securing or supporting processes of accountability for its victims.

This includes non-governmental organizations (NGOs), civil society groups, national authorities, human rights monitors and international investigators, for example. The term ‘practitioners’ is used to describe these various actors.

Some practitioners will find all the sections of the Protocol directly relevant and useful for their work. Others may refer only to specific sections or tools, such as the chapter on interviewing, or the chapter on understanding the impact of trauma, depending on their specific mandate or function.

Nevertheless, all practitioners working with victims and other witnesses of CARSV—whether they are investigating it or not—can use the Protocol to improve their understanding of the various accountability options available for victims and their own potential role in the documentation process.

## Box 2

## Who Can Use The International Protocol?

## Examples

**NGOs and Civil Society Organizations**

- documenting sexual violence as crimes under international law for national or international criminal prosecution or to preserve evidence for future criminal prosecutions
- victim representatives and civil parties representing victims before domestic, international and hybrid courts
- gathering evidence of sexual violence for the purposes of civil compensation claims
- gathering evidence of sexual violence for human rights litigation and advocacy
- documenting sexual violence for commissions of inquiry, truth-telling and other fact-finding mechanisms
- documenting impact and harm for administrative reparations claims
- gathering information of sexual violence for advocacy;
- researching sexual violence to improve understanding of prevalence, patterns and impact
- recording first-hand information from victims and other witnesses for any of the above purposes.

**International Authorities**

- investigating, prosecuting and adjudicating sexual violence as crimes under international law for criminal prosecutions
- documenting sexual violence as crimes or violations of international law for commissions of inquiry and fact-finding missions.

**National Authorities**

- police investigators and prosecutors investigating cases of CARSV
- investigative magistrates
- prosecutors and lawyers shaping their legal strategy and arguments to prosecute sexual crimes as international crimes
- judges adjudicating on cases of CARSV
- documenting sexual violence as crimes or violations of international law for national truth commissions.

**Others**

- clinicians treating victims of sexual violence seeking better understanding of the holistic context and impact of acts of sexual violence, and how their work may be relevant to the accountability process
- emergency relief/protection and gender-based violence specialists seeking information on different forms of accountability avenues for victims.



*Practitioners must do their utmost to ensure their activities contribute to, and do not undermine, existing official efforts to bring justice to victims.*

### Limitations In Using The Protocol

**Multi-Sectoral Coordination.** Responding to sexual violence requires a strong multi-sectoral approach involving the coordinated provision of health services, protection, psychosocial support, and access to justice for survivors. Working in coordination with these services is key to increasing the likelihood that victims report crimes of sexual violence.

**Training and capacity.** No matter what their objective, all individuals and organizations using this Protocol should first ensure that they are adequately trained and equipped to do so. The Protocol is not intended as a stand-alone tool. For those practitioners with limited investigation skills, the Protocol should be used only as a reference alongside long-term training, mentoring or other support on the documentation of CARSV. The lack of or inadequate experience and capacity to investigate or document CARSV can have grave consequences, in particular for victims and witnesses.

**Competencies.** The full scope of activities associated with documenting CARSV requires practitioners to demonstrate a significant range of knowledge, skills and attitude-based competencies before engaging with victims and other witnesses, or evidence. Throughout the Protocol, the specific skills and practices required for particular activities are highlighted (such as interviewing adults and children, gathering physical evidence, authenticating digital information, etc.). However, at a minimum, all practitioners involved in this work should demonstrate the following basic knowledge and attitude-based competencies:

#### Knowledge

- » *Understanding of context-specific dynamics of sexual violence and its potential impact on survivors—(health, psychosocial, developmental and socio-economic).*
- » *Understanding of concepts such as the survivor-centred approach, autonomy, do no harm, informed consent, confidentiality, and non-discrimination.*
- » *Knowledge of context-specific multi-sectoral support model and how to access it.*

#### Attitudes

- » *Understanding and implementation of the principles of gender equality and non-discrimination in any form, but especially in terms of gender, gender identity, sexual orientation or regarding the forms of sexual violence.*
- » *Empathy and respect for individuals, families and communities and non-judgemental attitudes.*

**Mandate.** The mandate of organizations gathering information on CARSV will undoubtedly be varied, and include organizations working directly with state authorities as well as those operating in environments where rule of law and state infrastructure are practically non-existent. Nevertheless, all practitioners must at a minimum be aware of national and local laws regarding third party investigations in the area where they are operating, in particular those laws regulating evidence collection and any obligations to turn evidence in to national authorities. Practitioners must do their utmost to ensure their activities contribute to, and do not undermine, existing official efforts to bring justice to victims.

**Local context.** Similarly, practitioners using the Protocol must be mindful to adapt it to the local context in which they are working. This means understanding local dynamics concerning gender and sexual norms in terms of culture, religion and social norms that impact upon how sexual violence is treated, as well as the specific legal definitions and rules of procedure and evidence concerning sexual violence applicable in the jurisdiction where the documentation is taking place.

## C. How to use the International Protocol

**Part I** of the Protocol outlines what the Protocol is, who can use it, and how.

**Part II** provides an overview of CARSV, including its relationship to gender-based violence and gender inequality more broadly, its unique dynamics and prevalence, the grave consequences associated with sexual violence, and the obstacles faced by survivors in accessing justice. It also includes indicators, or ‘red flags’, that could signify sexual violence is occurring.

**Part III** deals with sexual violence under international law. This includes an overview of accountability avenues, individual versus state responsibility, and reparations.

**Part IV** outlines what preparation is required for practical documentation: what to do to research, prepare and set up a documentation process and understand the role of different types of evidence of sexual violence. Part IV also includes the key principle of ‘do no harm’ and suggests practical strategies that practitioners may employ in order to mitigate and address the possible risks associated with sexual violence, how to conduct threat and risk assessments, secure informed consent, work according to principles of confidentiality and refer victims and other witnesses. A chapter on safety and security is also included in this section.

**Part V** describes the procedures for gathering information: how to conduct safe and effective interviews, and the minimum requirements when gathering, handling and storing audio-visual, physical and documentary evidence of sexual violence.

**Part VI** suggests ways in which to organize, evaluate and strengthen the evidence gathered—including types of patterns to look out for and how to establish them.

**Part VII** is concerned with issues that require significant additional detail, but should be considered as intersecting throughout the Protocol. It includes stand-alone chapters on understanding trauma, in particular ‘war rape’ trauma and its various manifestations; documenting sexual violence against male victims; and children as victims and witnesses.

**Part VIII** outlines the key considerations to take into account when reporting on, submitting or using CARSV information, and concludes with recommendations for future use of the Protocol.

**The annexes** contain some tools and further information, which it is hoped will prove directly useful to documenters as they carry out their investigations. This includes an example Evidence Workbook, setting out how to organize the elements of crimes and the different types of evidence related to each element. The annexes also include practical forms and checklists on interviewing, documenting personal data, conducting threat assessments, dealing with physical and documentary evidence, and medical documentation for evidentiary purposes, among others.

# PART II: What is Sexual Violence?

## Chapter 2 Contents

<b>A. Contextualising Sexual Violence.....</b>	<b>17</b>
1. Gender and Conflict .....	17
<b>BOX 1</b>	
Gender-Based Violence .....	18
<b>B. Forms of Sexual Violence.....</b>	<b>18</b>
<b>BOX 2</b>	
Victims And Survivors .....	19
<b>C. Conflict and Atrocity-Related Sexual Violence.....</b>	<b>19</b>
1. Prevalence And Motivations.....	19
<b>BOX 3</b>	
Sexual Violence During Crises.....	20
2. Under-Reporting Of Sexual Violence .....	20
3. Victims .....	21
<b>BOX 4</b>	
Sexual Violence Against Lesbian, Gay, Bisexual, Trans And Intersex Persons.....	22
4. Perpetrators .....	22
5. Characteristics .....	23
i. Continued violence and general insecurity.....	23
ii. Public nature of acts .....	23
iii. Brutality of acts.....	23
6. Indicators .....	24
<b>BOX 5</b>	
Red Flags .....	24
<b>D. Impact of Sexual Violence.....</b>	<b>25</b>
<b>Box 6</b>	
Impact of Sexual Violence.....	25

# CHAPTER 2: Understanding Sexual Violence

Sexual violence is a particularly heinous form of violence. It includes rape and any other attack of a sexual nature, physical or mental, perpetrated against women, girls, men or boys. Its consequences can be brutal and may include acute physical and psychological repercussions for victims and other witnesses. Sexual violence can have a deep destabilizing effect on communities and populations as a whole (see section D: Impact of Sexual Violence).

## A. Contextualising Sexual Violence

### 1. Gender and Conflict

Sexual violence is unfortunately neither a new, nor isolated, type of violence committed against both males and females, irrespective of age, during armed conflict or other mass atrocities. In some form or another, it has been a distinct feature of a significant number of past and active conflicts.<sup>1</sup> CARSV can be committed by anyone, to anyone, and in many different ways, and there is no one ‘typical’ example. Understanding how gender norms are manifested in any given society is key to understanding these variations in how sexual violence is committed, against whom, by whom, and to what effect.

The gender stereotypes apparent in different societies, and the inevitable gendered roles arising from them, shape how men, boys, women and girls experience conflict differently. This is because men, women and children:

Are differently embodied; symbolize different things to their communities and those that attack them; are targeted differently and their injuries have different social and livelihood impacts; have different responsibilities in their families and communities and thus

end up in harm’s way differently; and have different livelihoods, access to the cash economy, and ability to claim, own and inherit property, all of which impact the resources they can access to aid their survival and recovery.<sup>2</sup>

Additionally, traditional patriarchal social models often depict women and girls as submissive, passive, and less valuable than men. Women and girls may also be cast as being symbolic of the family, honourable and pure, and as such, as ‘natural’ victims. These models encourage the commission of sexual violence against women, and shape its different manifestations, motivations and the likelihood that it is normalized and not recognized as an egregious violation.

Similarly, heteronormative assumptions and stereotypes regarding male masculinity, power, aggression and dominance can cause men to demonstrate and exercise control over women through violence, and can lead to a reluctance to admit to the existence of male victims of sexual violence at all. Both attitudes are rooted in problematic gender norms that serve only to further entrench power disparities between men and women and deny individual victims, whether female or male, justice for CARSV.

1 For overviews of manifestations and prevalence, see Askin, K. (2013) ‘Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward’ in A. de Brouwer et al. (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches*. Antwerp: Intersentia; Bastick, M., Grimm, K., and Kunz, R. (2007) *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector*. Geneva: Centre for the Democratic Control of Armed Forces; Cohen, D.K., and Nordas, R. (2014) ‘Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989-2009’, *Journal of Peace Research*, 51, 3: 418–428.

2 Mazurana, D., and Proctor, K. (2013) *Gender, Conflict and Peace*. Somerville, MA: World Peace Foundation, Tufts University.



*Physical invasion of the body is not necessary for some forms of sexual violence to take place.*

### BOX 1

#### Gender-Based Violence

Sexual violence has been referred to as ‘the most immediate and dangerous type of gender-based violence occurring in acute emergencies’. Gender-based violence (GBV) is described as ‘any harmful act that is perpetrated against a person’s will and that is based on socially ascribed (i.e. gender) differences between males and females. It includes acts that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion, and other deprivations of liberty.’<sup>3</sup>

While all forms of sexual violence can generally be considered to be acts of GBV, not all forms of GBV are sexual in nature.<sup>4</sup>

Physical invasion of the body is not necessary for some forms of sexual violence to take place.

Sexual violence includes, but is not limited to:

- » rape, including vaginal and anal penetration by a body part or an object, or oral penetration by a sexual organ, by both the perpetrator or the victim
- » threats and attempts of any form of rape or threats and attempts of other sexual assaults
- » female genital mutilation including mutilation of the vagina, labia, clitoris, mutilation of breast and nipples, male genital mutilation or amputation, or other types of violence directed at sexual organs
- » sexual slavery, including conjugal slavery or concubinage
- » sexual torture, including electrocuting genitals or pinching nipples, or being forced to watch a partner or child be sexually abused
- » forced prostitution
- » forced pregnancy
- » forced sterilization and forced abortion
- » forced nudity.

(For an example, refer to Annex 1 listing the elements of crimes of sexual violence enumerated in the Rome Statute of the International Criminal Court.)

## B. Forms of Sexual Violence

Sexual violence can take many different forms, and is not limited to rape. It includes any act of a sexual nature committed with use of force or under coercive circumstances, or any act that specifically targets a person’s sexual function or organs. Taking advantage of the victim’s incapacity to give genuine consent—for example if the victim is a child or someone who is physically or mentally unable to consent—is also a form of coercion.

Sexual violence is often generally described as ‘any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.’<sup>5</sup>

3 Inter-Agency Standing Committee (2015) *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Reducing Risk, Promoting Resilience and Aiding Recovery*. Geneva: IASC.

4 This Protocol does not directly deal with documenting gender-based crimes that are not sexual (e.g. targeted selection and killing of men of fighting age of a specific group), although some of the tools and methods will be useful for documenting incidences of non-sexual gender-based violence.

5 World Health Organisation (2016) *Violence Against Women—Intimate Partner And Sexual Violence Against Women: Factsheet*. Geneva: WHO.

## BOX 2

## Victims And Survivors

The term victim is predominantly used throughout the Protocol in reference not only to those who have been victims of crimes and violations of sexual violence, but is also understood to include their family and community members, including children born as a result of pregnancy from rape. Importantly, the term victim refers to individuals that have both survived sexual violence, and those that did not, and may have died as a result of their injuries or murdered after the attack.

The use of the term victim rather than survivor is in no way meant to diminish the agency, autonomy and resilience of individual victims, which using the term survivor arguably better captures. However, to be in line with the purpose of this Protocol – to seek accountability for sexual violence – the term used must accurately reflect and recognize the legal status of persons as victims of crimes and violations under international law, whose rights have been violated - individually and collectively.

## C. Conflict and Atrocity-Related Sexual Violence

For an explanation of the term conflict and atrocity-related sexual violence (CARSV) as used in this Protocol, please refer to the section in Chapter 1: Using the International Protocol.

### 1. Prevalence And Motivations

Whether committed as a war crime, a crime against humanity and/or as genocide or other violation of international law, sexual violence is often part of the tragic and brutal pattern of criminal acts perpetrated against males and females, including children, in conflict.

For example:

- » In conflict settings, sexual violence may be committed against multiple individuals, including civilians, as a strategy to advance military objectives. Such sexual violence can form part of a widespread or systematic attack directed against a civilian population, or acts of genocide.
- » Sexual violence can be used to weaken and gain control over communities. It can be used to punish or destroy a particular group, instil terror in them, retaliate against them or cause them to flee from a location, and spread the word of the attacks.
- » In detention centres, prisons and interrogation facilities, sexual violence can be used as a form of torture, to punish, humiliate, intimidate or coerce information from male and female detainees.
- » Individuals can be targeted with sexual violence because of their specific function, role or position in a community—as leaders, activists or supporters. Their family members may be targeted as a form of punishment, to coerce them to provide information about their activities or whereabouts, and tortured.
- » Sexual violence can be committed against civilians or members of enemy forces as a way to bind soldiers and fighters together, as a form of camaraderie, reward or initiation rite, or method through which younger members of the group become complicit in the crime and therefore tied to the larger group.

- » Sexual violence may be committed as part of ritualistic or harmful communal practices, for example in the belief that sexual intercourse—often with virgins and/or children—provides fighters with special powers, invincibility or a cure for diseases.

**BOX 3****Sexual Violence During Crises**

In situations of conflict, emergency and displacement, sexual violence is not limited to acts of CARSV—in fact, it is primarily committed as a consequence of the breakdown of community and family structures, lack of security, absence of rule of law and prevailing impunity. This typically develops against a backdrop of inequality that can lead to women, children and sexual minorities being particularly vulnerable and exposed to extreme forms of gender-based violence perpetrated by armed combatants or civilians, strangers or intimate partners. Although the focus of this Protocol is on the documentation of CARSV, practitioners must be aware that CARSV does not occur in isolation from other forms of sexual violence, for which domestic criminal and international human rights accountability must be sought.

**2. Under-Reporting Of Sexual Violence**

Unlike other forms of violence that occur during conflict, sexual violence is notoriously under-reported and under-documented. Victims of sexual violence face significant barriers to accessing services, justice mechanisms and other post-conflict remedies.

Some survivors do not come forward because of societally imposed stigma, shame and humiliation, and because of debilitating trauma experienced by survivors and their families. Others fear being ostracized by spouses, other family members and their community. Some are afraid of further violence, such as retaliation or honour killings. Victims also have a lack of trust in authorities, such as the national police, or international peacekeepers or investigators. In some countries, victims of sexual violence can face criminal prosecution for charges of sodomy or adultery.

Those practitioners responding to, and in particular documenting, sexual violence should not assume that victims do not come forward because they feel insurmountable shame—often their inability to access justice is due to the lack of a safe and supportive environment in which to do so, and/or because of the risks that victims and witnesses take in coming forward. All practitioners should endeavour to collectively enable a safe, private and supportive environment in which survivors and witnesses of sexual violence feel sufficiently secure and comfortable to come forward and report crimes.

### 3. Victims

Everyone can be affected by sexual violence:

#### Women

Although everyone can be affected by sexual violence, the historical and structural inequalities that exist between men and women, and the different forms of gender-based discrimination that women are subjected to all over the world, contribute to women and girls being disproportionately affected by sexual violence in conflict settings. Sexual violence in conflict must be situated within this broader context, and as part of a global normalization of violence against women and girls that ranges from suffering extremely high levels of intimate partner violence, sexual and physical violence by non-combatants, forced early marriage, female genital mutilation, honour killings and trafficking for sexual exploitation.

#### All Ages

Females and males of all ages are affected. A 2010 study in Eastern Democratic Republic of Congo found that women over 49 suffered from the same rates of sexual violence as the rest of the population.<sup>6</sup>

#### Disabled

Those with physical and/or mental disabilities are particularly vulnerable. A Human Rights Watch (HRW) report in Northern Uganda highlighted that one-third of women with disabilities interviewed had

been subjected to sexual violence,<sup>7</sup> targeted because of 'their isolation, lack of support structures, limitations in physical mobility, communication barriers and also because of myths that women with disabilities are weak, stupid, or asexual'.<sup>8</sup>

#### Men

Men form a significant percentage of victims of sexual violence. Although data is limited, recent findings indicate that there is less of a disparity between male victims and female victims than has historically been acknowledged.<sup>9</sup>

#### Children

In some conflicts, children, both girls and boys, including pre-puberty and adolescent, make up over 80 per cent of victims of sexual violence.<sup>10</sup> There are reports of babies as young as six-months-old being victims of sexual violence.

There are no 'typical' victims of sexual violence—it is not a crime limited to young, able-bodied women.

Some groups may be more frequently targeted for acts of sexual violence than others. This includes those who are internally displaced, refugees, children, female heads of household, male and female human rights defenders, male and female detainees (including those under the control of an armed group), those associated with armed forces or armed groups, those belonging to a specific racial, religious, political, national or ethnic group, and other discriminatory status.

6 Harvard Humanitarian Initiative and Oxfam International (2010) *'Now, The World Is Without Me': An Investigation of Sexual Violence in Eastern Democratic Republic Of Congo*. Cambridge, MA: Harvard Humanitarian Initiative; Oxford: Oxfam International. p 9.

7 Human Rights Watch (2010) *'As if We Weren't Human': Discrimination and Violence against Women with Disabilities in Northern Uganda*. New York: Human Rights Watch.

8 Human Rights Watch (2010) *'As if We Weren't Human': Discrimination and Violence against Women with Disabilities in Northern Uganda*. New York: Human Rights Watch. p 8.

9 See Chapter 17: Sexual Violence against Men and Boys

10 Save the Children (2014) *Unspeakable Crimes Against Children: Sexual Violence in Conflict*. London: Save the Children.

*...children who commit acts of sexual violence have often been manipulated or coerced into such acts and are victims themselves.*

## BOX 4

## Sexual Violence Against Lesbian, Gay, Bisexual, Trans And Intersex Persons

All over the world, Lesbian Gay Bisexual Trans and Intersex (LGBTI) individuals face violence and discrimination because of their sexual orientation and gender identity. In situations of armed conflict and political instability, CARSV perpetrated against members of the LGBTI community occurs and constitutes an egregious form of gender-based violence and human rights violation. Its occurrence, however, is extremely under-documented.

Various forms of rape, genital mutilation, and other acts of sexual assault are committed against LGBTI persons by state officials, militia fighters and religious or political militants or collaborating civilians to punish, terrorise, or 'correct' their sexual behaviour and gender identity.

Moreover, in many regions, the criminalization of homosexuality, widespread discrimination and persecution of sexual minorities, and lack of appropriate services and healthcare mean that victims of sexual violence face significant barriers in accessing psycho-social or medical care, legal or economic assistance and justice, including reparations for those crimes and human rights violations.

## 4. Perpetrators

Sexual violence can be committed by anyone, including members of armed forces, police and other state officials, paramilitary groups, non-state armed groups, peacekeepers, humanitarian actors and civilians.<sup>11</sup>

Although the vast majority of perpetrators of sexual violence are male, females have also been found to perpetrate, co-perpetrate, and incite sexual violence.<sup>12</sup>

In cases of sexual violence committed by children<sup>13</sup> associated with armed groups and forces, practitioners must remember that children who commit acts of sexual violence have often been manipulated or coerced into such acts and are victims themselves. Children should be treated as survivors/witnesses and not as perpetrators, in accordance with UN Guidelines on Justice Matters Involving Child Victims and Child Witnesses of Crime<sup>14</sup> and the UN Convention on the Rights of the Child.<sup>15</sup>

11 See for examples: United Nations Security Council, Conflict-Related Sexual Violence—Report of the Secretary-General (S/2016/361) [EN/AR]; UN General Assembly, Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces In The Central African Republic (A/71/99); UNHCR and Save the Children, Sexual Violence and Exploitation—The Experience of Refugee Children in Guinea, Liberia And Sierra Leone (New York, NY, and London, 2002).

12 de Brouwer, A., and Ruiz L. (2017) 'Male Sexual Violence and Female Perpetrators of Sexual Violence in Conflict' in S. Mouthaan and O. Jurasz (eds) *Sexual Violence in Transitional Justice*. Antwerp: Intersentia (forthcoming).

13 For definitions and discussions on children and sexual violence, see Chapter 16: Sexual Violence and Children.

14 UNICEF and UNODC (2005) *Guidelines on Justice Matters Involving Child Victims and Child Witnesses of Crime*. New York and Vienna: UNICEF and UNODC.

15 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

## 5. Characteristics

The way in which sexual violence in conflict differs from ‘peacetime’ sexual violence goes beyond settings and motivations. Sexual violence in conflict often has the following characteristics:

### i. Continued violence and general insecurity

Sexual violence is often not committed in isolation but rather takes place as part of a broad campaign of crimes (e.g. mass killing, pillaging). Survivors of CARSV will most likely also be survivors of other atrocities and be witnesses to other crimes. The continuum of violence and insecurity characteristic of conflict means that many survivors of sexual violence cannot return home or flee to safety after being attacked. Real threats of physical danger still exist, so survivors may be unable to scale down from a constant state of alarm, fear and agitation. Survivors may sometimes have to co-exist with perpetrators—either because they live within the same community, or operate in nearby areas. They may live with the well-founded fear that they could be raped or assaulted again—and many are.

### ii. Public nature of acts

CARSV is often, though not always, a public crime: witnessed by other victims, soldiers, or community members. Wives are raped in front of their husbands, men are sexually abused in front of other detainees, children are assaulted in front of their parents, and vice-versa. Communities, ethnic groups or sexual minorities can be sexually terrorized, collectively.

Public knowledge of acts can contribute to a survivor’s sense of being ‘tainted’ and ashamed. It can lead survivors to feel that they are symbolic of the defeat of the entire community, and make witnesses—whether parents, relatives or others—feel that they have failed to protect their loved ones.

CARSV can also be publically encouraged—via the media, the state and within armed groups—creating

opportunities to commit CARSV on a larger scale than would otherwise be the case.

### iii. Brutality of acts

Sexual violence in conflict can be particularly brutal, sadistic, xenophobic and misogynistic. Often, victims are gang raped, with each successive rape more violent than the next. The physical injuries accompanying sexual violence can be especially severe, and include mutilation and other injuries to the genital area as a result of gunshots or through the use of weapons such as guns and bayonets to penetrate victims. Victims may be penetrated with the mutilated body parts of their loved ones. Women’s breasts or nipples may be sliced off. In cases of sexual violence against men, ropes can be tied around penises and pulled to cause extreme injuries, and men can be forced to have sex with their sisters, daughters or mothers.

Victims and other witnesses may be forced to watch their loved ones, including infant children, being raped, injured or killed. There have been reports of men being forced to have sex with cadavers. The extreme brutality, dehumanization and objectification apparent in many forms of sexual violence in conflict means many victims suffer from severe physical and mental injuries for which they often have no adequate support (see Chapter 15: Trauma).

## 6. Indicators

Certain situations and incidents can act as indicators that sexual violence attacks may be imminent or ongoing. These ‘red flags’ include, but are not limited to<sup>16</sup>: forced recruitment into armed groups; abductions; looting by military or armed groups; school raids; checkpoints; detention; situations where men and women are forcibly separated; reports of torture; and flight and displacement. However, even when no indicators are present, CARSV can still be taking place.

### BOX 5

#### Red Flags

Incidents and situations that may indicate that sexual violence is imminent or ongoing

<b>Military/ security</b>	<ul style="list-style-type: none"> <li>» forced recruitment and abduction</li> <li>» forced separation of men and older boys from women and younger children</li> <li>» house raids</li> <li>» school raids</li> <li>» looting and rampage</li> <li>» retaliatory attacks</li> <li>» checkpoints and vehicle ambushes</li> <li>» detention, interrogation and torture</li> </ul>
<b>Political/ legal</b>	<ul style="list-style-type: none"> <li>» propaganda and hate speech, including demeaning and dehumanizing speech regarding females</li> <li>» ethnic divisions</li> <li>» declaration of emergency laws, allegiances or religious imperatives which curtail women’s and human rights</li> <li>» targeting of female politicians, candidates and women’s rights defenders</li> <li>» targeting sexual minorities such as members of the LGBTI community</li> <li>» targeting non-conforming gender standards</li> </ul>
<b>Social/ human- itarian</b>	<ul style="list-style-type: none"> <li>» refugee and internally displaced person (IDP) flight and displacement</li> <li>» poor security and infrastructure in displacement settings</li> <li>» noticeable absence of women from public spaces and activities</li> <li>» armed control of camps</li> <li>» reports of unauthorised exchanges of goods and services between peacekeepers and other armed groups and vulnerable members of local population</li> <li>» reported presence of unauthorized civilian women and children in military camps, police stations or barracks, or peacekeeping bases</li> </ul>

<sup>16</sup> UN Action Against Sexual Violence in Conflict (2001) *Matrix: Early Warning Indicators of Conflict-Related Sexual Violence*. New York: UN Action; Institute for International Criminal Investigations (2015) *The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Training Materials*; Brammertz, B.S., Jarvis, M., eds. (2016) *Prosecuting Conflict-Related Sexual Violence at the ICTY*. Oxford: Oxford University Press. 250–253.

## D. Impact of Sexual Violence

Understanding the impact of sexual violence is key to both referring victims and other witnesses to appropriate services and accurately documenting the harm caused to individuals, their families and communities.

Sexual violence typically has long-term and life-threatening physical and psychological consequences, as well as social, economic and legal repercussions, and results in increased risk and vulnerability for survivors. Communities and communal structures can be damaged or destroyed at their core by the commission of sexual violence against their members.

### Box 6

#### Impact of Sexual Violence

Sexual violence may cause immediate and grave physical and psychological harm to survivors. This can include injuries, disease and infection, shock, post-traumatic stress and depression.

However, additional, serious harm is caused to survivors by unresponsive, inadequate or harmful health, police or justice services and mechanisms; and by family and community members that do not support survivors, and may even ostracize, blame and punish them.

#### Physical impacts

<i>All victims</i>	<i>Female victims</i>	<i>Male victims</i>	<i>Children victims</i>
<ul style="list-style-type: none"> <li>» injury, including pelvic, genital, anal and oral injuries, sometimes leading to death</li> <li>» disease</li> <li>» sexually transmitted infections (STIs) including HIV, chlamydia, gonorrhoea, syphilis, herpes, and human papillomavirus (HPV)</li> <li>» disability</li> <li>» sexual dysfunction</li> <li>» infertility</li> </ul>	<ul style="list-style-type: none"> <li>» genital, pelvic and rectal injuries, including tears/traumatic fistula</li> <li>» miscarriage</li> <li>» unwanted pregnancy</li> <li>» complications from unsafe abortions</li> <li>» menstrual disorder</li> <li>» pregnancy complications</li> <li>» gynaecological disorders</li> <li>» infertility</li> <li>» pelvic pain and dysfunction</li> </ul>	<ul style="list-style-type: none"> <li>» rectal damage (e.g. tears, fissures, prolapse and associated incontinence)</li> <li>» penile or testicular damage (tendonitis of suspensory ligament of penis)</li> <li>» malnutrition when victims avoid eating to minimise further rectal damage</li> <li>» atrophy of the genitalia due to the tying of the genitalia which may obstruct blood flow</li> <li>» chronic back and rectum pain</li> </ul>	<ul style="list-style-type: none"> <li>» death from pregnancy at young age</li> <li>» severe physical injuries (may be more severe because bodies are not fully developed)</li> <li>» heightened risk of STIs (increased destruction of genital tissue because of smaller physical size)</li> </ul>

## Impact of Sexual Violence

## Psychological/ Psychiatric consequences

*All victims*

- » acute stress disorder
- » depression
- » anger, anxiety and fear
- » shame, self-blame and low self-esteem
- » suicidal thoughts and behaviour
- » high-risk health behaviour, including substance abuse
- » emotional numbing

See Chapter 15 on Trauma for further details

- » post-traumatic stress disorder (PTSD) and associated comorbidities
- » chronic fatigue
- » behavioural disorders
- » sleeping disorders
- » loss of interest in sexual activity
- » high risk sexual behaviour
- » sexual dysfunction/ impotence

*Children victims*

- » neurological changes in the brain as a result of trauma, leading to nervous system and neurological dysfunctions as they grow up
- » 'normalisation' of abuse/ not developing healthy understanding of sex

## Social

*All victims*

- » disrupted relationships with partners/spouses and children
- » abandonment by partners/spouses
- » social stigma, rejection from communities and isolation
- » isolation resulting from relocation

*Female victims*

- » cultural-specific feelings of thwarted femininity, such as feelings of being 'dishonoured' as women and girls being tainted, no longer pure
- » rejection of femininity and female sexuality as perceived causes of aggression
- » difficult relationships with own children born of rape

*Male victims*

- » thwarted masculinity due to physical inability to work, jeopardising capacity to generate income and support their families
- » increased likelihood of domestic violence

*Children victims*

- » difficulty trusting or developing close relationships as grow up

## Box 6

## Impact of Sexual Violence

## Socio-economic and legal

<i>All victims</i>	<i>Female victims</i>	<i>Male victims</i>	<i>Children victims</i>
<ul style="list-style-type: none"> <li>» loss of livelihood and economic dependency</li> <li>» loss of role or function in society</li> </ul>	<ul style="list-style-type: none"> <li>» arrest, detention and punishment for sexual relations outside of marriage or adultery, which may include death penalty/stoning in certain countries</li> <li>» increased gender inequalities</li> </ul>	<ul style="list-style-type: none"> <li>» arrest, detention and punishment for same-sex acts, including death penalty in certain contexts</li> </ul>	<ul style="list-style-type: none"> <li>» loss of access to education</li> <li>» loss of vocational and livelihood opportunities as mature</li> </ul>

# PART III: Sexual Violence under International Law

## Chapter 3 Contents

<b>CHAPTER 3: Accountability Avenues and Remedies .....</b>	<b>29</b>
<b>A. Introduction.....</b>	<b>29</b>
<b>B. Sexual Violence as Violation and Crime under International Law .....</b>	<b>29</b>
<i>Box 1</i>	
What is the difference between International Criminal Law, International Human Rights Law and International Humanitarian Law? .....	30
<b>C. Overview of Accountability Avenues and Remedies for Victims .....</b>	<b>30</b>
1. Domestic Avenues.....	32
<i>Box 2</i>	
Universal Jurisdiction As A Tool To Fight Impunity .....	33
2. Regional and International Human Rights Mechanisms.....	34
3. Investigative and Fact-Finding Bodies.....	35
4. International and Hybrid Courts and Tribunals .....	36
5. Avenues for Interstate Disputes .....	37

# CHAPTER 3: Accountability Avenues and Remedies

## A. Introduction

Conflict and Atrocity-Related Sexual Violence may consist of crimes such as rape, torture and other forms of sexual violence which—when committed in conflict or as attacks against a civilian population—can constitute not only human rights violations but also war crimes, crimes against humanity or acts of genocide.

As a matter of international customary law—that is general unwritten rules by which all states are bound whether or not they are parties to a specific international instrument—victims of sexual violence amounting to gross violations and crimes under international law are entitled to:<sup>1</sup>

- » equal and effective access to justice
- » adequate, effective and prompt reparation for the harm suffered.

There are many avenues through which information about sexual violence collected by practitioners can be used for accountability purposes. The information may be useful, amongst other reasons, for criminal prosecution, civil compensation claims, human rights complaints or individuals obtaining formal victim status for the purpose of reparation or state social support. An overview of key accountability avenues and remedies that may be available for victims of CARSV at the domestic, regional and international level is provided in section C.

## B. Sexual Violence as Violation and Crime under International Law

Rape and other forms of sexual violence have long been prohibited by international humanitarian law (IHL) and are now recognized as prohibited as a matter of customary international law at all times (both in times of peace and during armed conflicts).<sup>2</sup> Sexual violence is prohibited under various international human rights law (IHRL) instruments, including through the right to security, the prohibition of discrimination and the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and under international criminal law (ICL). It is through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (the ad hoc tribunals or ICTY and ICTR) that rape, in particular, was first prosecuted as a war crime, crime against humanity and act of genocide. For instance, in the Akayesu case, the ICTR not only held that rape was a constitutive act of the crime of genocide but it also recognised that rape could amount to torture.<sup>3</sup>

1 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (2005) (UN Basic Principles on the Right to a Remedy and Reparation), VII 'Victim's right to remedies', principle 11.

2 International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 93, 'Rape and other forms of sexual violence are prohibited', available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93)

3 The Prosecutor v. Akayesu (Trial Judgement), ICTR-96-4-T, 2 Sept. 1998, para. 687.



*...international law contains norms and standards on both the definition of the acts themselves and what sexual violence amounts to under international law.*

### Box 1

#### What is the difference between International Criminal Law, International Human Rights Law and International Humanitarian Law?

**International criminal law (ICL)** is the body of public international law governing the criminal responsibility of individuals for the most serious international crimes, such as war crimes, crimes against humanity and acts of genocide, and can result in penalties such as imprisonment.

**International human rights law (IHRL)** lays down obligations for states to respect, protect and fulfil a wide range of rights, be they civil, political, economic, social or cultural. Its main aim is to protect individuals on the territory or under the jurisdiction of a state from arbitrary acts and abuses of power by this state. It applies both in times of peace and in times of conflict. States can be held responsible for actions and omissions infringing these rights not only by their own organs or persons acting with their authorization, acquiescence or support but also for failure to act to protect those rights and prevent or respond to violations by state and non-state actors.

**International humanitarian law (IHL)** applies in times of armed conflict, and aims at protecting certain categories of persons who are not or are no longer taking part in hostilities, as well as regulating the means and methods of warfare. The rules of IHL impose duties on parties to a conflict (states and non-state organised armed groups) and many violations of IHL are considered war crimes under ICL, for which individuals may be held criminally liable.

ICL, IHRL and IHL complement each other and can apply simultaneously to a specific case provided the facts satisfy the different legal requirements.

When documenting sexual violence, a distinction must always be made between the definition of acts of sexual violence (e.g. rape) and how these acts will be classified under international law, in particular, how they would be charged based on the various

types of international crimes. This distinction is important because international law contains norms and standards on both the definition of the acts themselves and what sexual violence amounts to under international law. Any attempt to document CARSV will require gathering evidence on both dimensions, that is, evidence relating to the act itself, but also to the context in which the act was committed and which can make it a crime under international law. Domestic laws may be inadequate both in the definitions of acts of sexual violence and how these acts are being classified as crimes.

For example, rape can be defined in the relevant national criminal code in a restrictive manner, such as limiting rape to male perpetrators and female victims, which is incompatible with international standards which define it in gender neutral terms. In addition, rape and other forms of sexual violence amounting to violations or crimes under international law (e.g. torture, war crimes, crimes against humanity and genocide) must be criminalized and prosecuted domestically so as to reflect the violent nature and the gravity of the crime, which is not always the case within states.

### C. Overview of Accountability Avenues and Remedies for Victims

This section provides an overview of key accountability frameworks and remedies that may be available for victims of sexual violence amounting to a crime or violation under international law.

It is important to note that state's obligations to bring those responsible for rape and sexual violence to justice and victims' rights to a remedy and reparation are two complementary sets of norms under international law. States have the primary responsibility to investigate and prosecute those responsible for acts of sexual violence that constitute crimes under international or national law, as well as to provide effective remedies and reparations to victims of CARSV, for acts or omissions which can be

*...documentation should also serve to ensure that the full range of harm suffered is documented to support reparations that are just and adequate...*

attributed to the state and amount to violations of international law.<sup>4</sup> Reparations will generally entail compensation but might also involve, as appropriate, 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.<sup>5</sup>

While documentation of sexual violence may primarily be seen as aiming to successful prosecutions through gathering information on the crime itself, it is imperative that this activity be conducted also having in mind claims for reparation by victims in that documentation should also serve to ensure that the full range of harm suffered is documented to support reparations that are just and adequate to the harm caused. (For more details, see Chapter 6: Reparations, Box 2: 'What constitutes adequate remedy and reparation?').

However, where national institutions are unable or unwilling to investigate crimes of sexual violence, practitioners with the appropriate training, tools and mandate can play a key role in promoting accountability and victims' rights to an effective remedy and reparation by effectively documenting sexual violence crimes and preserving the evidence gathered, thus keeping options open for victims.

The range of accountability mechanisms available to victims may depend on some of the following factors:

- » applicable legal framework in the country where the crimes took place
- » regional and international instruments to which the relevant country is a party and how these have been implemented

- » possible exhaustion of domestic remedies (which is necessary to access most regional and human rights mechanisms)
- » ratification of the Rome Statute establishing the first permanent International Criminal Court (ICC)
- » response by the international community (for instance by setting up a commission of inquiry, an international or hybrid tribunal, or referring the situation to the ICC)
- » type of victim, date of commission of the crimes and circumstances of the act.

Victims of CARSV may be able to seek justice and reparation at the domestic, regional or international level.<sup>6</sup> Within this, accountability mechanisms can broadly be categorised as:

- (i) judicial, that is, leading to a legally binding decision by a competent court
- (ii) quasi-judicial (e.g. leading to recommendations made to a state by UN Treaty Bodies and other regional human rights monitoring mechanisms, or recognition of victim status)
- (iii) non-judicial (e.g. commissions of inquiry, truth and reconciliation commissions, Special Procedures of the UN Human Rights Council such as special rapporteurs and working groups).<sup>7</sup>

Seeking accountability through quasi and non-judicial mechanisms does not necessarily mean that judicial mechanisms become unavailable—in fact, as information is escalated to the international community's attention, quasi-judicial and non-judicial mechanisms may ultimately lead to criminal accountability and other judicial responses.

4 UN Basic Principles on the Right to a Remedy and Reparation, *supra* note 1, IX 'Reparation for harm suffered', principle 15.

5 Nainar, V. (2012) *Litigation Strategies for Sexual Violence in Africa*. London: Redress.

6 More detailed information on certain accountability avenues available to victims of sexual violence can be found in Nainar, Vahida, 'Litigation Strategies for Sexual Violence in Africa', (London: Redress, 2012).

7 The Working Group on Arbitrary Detention which is part of the UN Special Procedures can however be considered as a quasi-judicial body in view of its working methods.

## 1. Domestic Avenues

At the domestic level, victims may be able to, for example:

### a. Judicial

- » File a **criminal complaint** to prompt the prosecution of the individual perpetrator(s) for sexual violence as a crime under international law or as an 'ordinary'<sup>8</sup> crime under national (domestic) law, depending on the relevant legal framework. Criminal prosecution is brought by the state against the alleged perpetrator(s), and if upheld, the perpetrator(s) will be convicted and sentenced. In some countries, rape and other forms of sexual violence may only be criminalised as ordinary offenses in national criminal law. In others, in particular in countries where the Rome Statute of the ICC (see section 4, International and Hybrid Courts and Tribunals) or other parts of ICL have been domesticated or are otherwise applicable, two legal regimes may co-exist: one for ordinary crimes and one for crimes under international law. The scope, definitions and legal elements in one regime may be different from the other and, within the latter regime, there may also be important relevant differences, depending on the particular source of ICL. Some states provide for exclusive jurisdiction of military courts over international crimes, while more progressive states have set up special judicial, prosecution and investigation units within civil jurisdictions, staffed with specialized personnel, to deal with international crimes.<sup>9</sup>
- » File a **civil case** for compensation and/or other forms of reparation (for example, restitution of goods, forms of satisfaction such as apology and guarantees of non-repetition) against the perpetrator, a corporation

(for a company's complicity in the commission of crimes under international law) or in some cases the responsible state (for instance where sexual violence was committed by members of the police, army and other government officials, or the perpetrator is indigent). Some domestic legal systems allow for compensation to be adjudicated as part of criminal proceedings but still require a separate civil action to execute the judgment, while in others it may not be necessary.

- » File a **constitutional case** against the state to trigger a finding of a violation of their fundamental rights and/or to force the authorities to undertake a thorough investigation of the facts, as well as other measures aimed at the protection of their rights (see Chapter 5: State Responsibility).

### b. Quasi-judicial

- » Claim **compensation** or a declaration that a violation was committed before a quasi-legal body such as a national human rights institution (NHRI), a trust fund for victims or an administrative reparations programme. The nature of administrative reparation programmes depends on their structure but such programmes are increasingly of a quasi-judicial nature.

### c. Non-judicial<sup>10</sup>

- » Provide **information** to transitional justice mechanisms, such as truth and reconciliation commissions.<sup>11</sup>

8 The term 'ordinary' is used here to refer to crimes that are not defined as international crimes under national law (e.g. rape as such and not rape as a crime against humanity) and does by no means imply that such crimes are not extremely serious and grave.

9 Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict (2013) *Report of Workshop on Sexual Violence against Men and Boys in Conflict Situations*. p. 19.

10 In certain countries, victims may be pressured by families and communities to take their cases to an informal justice process whereby the family of the victim and the perpetrator enter into an 'amicable' arrangement. These out-of-court settlements do not typically promote a victim-centred approach and they do not result in meaningful justice for the victim.

11 For instance, the Timor-Leste Commission for Reception, Truth and Reconciliation tasked with investigating human rights violations between 1974 and 1999 included evidence of sexual violence.

## Box 2

### Universal Jurisdiction As A Tool To Fight Impunity

Under national laws, criminal jurisdiction is usually linked to territoriality (i.e. the offence took place within the state exercising jurisdiction) or the nationality of the alleged perpetrator or victim. However, in conflict and post-conflict countries, the courts in the 'territorial state' are often inaccessible to victims for a variety of reasons, including problems of insecurity, lack of resources and institutional capability, the availability of domestic immunities, amnesties or lack of political will, especially when the crimes are state-sponsored or involve state agents, or because the perpetrators have fled the country.

In its broadest form, the principle of universal jurisdiction allows the national authorities of any state to investigate and prosecute individuals suspected of certain crimes under international law such as war crimes, crimes against humanity, genocide and torture, regardless of where these crimes took place and regardless of the nationality or residency of the victims or suspects.

While many states have legal frameworks recognizing this principle to some degree, in practice most of the cases which have eventually gone to trial have taken place in Western Europe (mainly in Belgium, Germany, Spain, Switzerland and the Netherlands) and Africa (e.g. South Africa) and against perpetrators who had taken residence in these countries.

The principle of universal jurisdiction is an important tool in the fight against impunity for crimes under international law, and states are generally committed to not become safe havens for perpetrators seeking refuge on their territories.

Example 1 – Germany: Ending a four-year landmark universal jurisdiction trial, on 28 September 2015, the Higher Regional Court in Stuttgart, Germany, convicted two Rwandans and former senior leaders of the Forces Démocratiques pour la Libération du Rwanda to 13 and 8 years in prison respectively for leading a terrorist organization and war crimes committed in the Kivu provinces in eastern Democratic Republic of Congo.

Example 2 – Argentina: In 2010, the relatives of Spanish and Argentinian citizens filed a complaint in Argentina using the principle of universal jurisdiction for crimes against humanity and genocide committed during the Francisco Franco dictatorship in Spain (1939-1975). The case is currently being investigated by the Federal Criminal and Correctional Court No.1 in Buenos Aires. A supplemental complaint was filed in 2016 by NGO Women's Link Worldwide, requesting to include and investigate sexual and gender-based violence crimes committed against women and girls suspected of being Republican or leftist during this period of time, including sexual abuses and rapes; gendered acts of torture (e.g. electric shocks to genitals and attacks against women's reproductive organs); forced abortions; and abduction of children of women political prisoners, which were given to families sympathetic to the regime with falsified birth certificates showing adoptive parents as birth parents. Due to the time that has elapsed since the violations were committed, the complaint was based on strong circumstantial and pattern evidence as well as an analysis of all the evidence with a gender perspective using ICL and IHRL standards.

*...international law contains norms and standards on both the definition of the acts themselves and what sexual violence amounts to under international law.*

## 2. Regional and International Human Rights Mechanisms

At the sub-regional, regional and international level victims may also be able to file a complaint to seek remedies and reparation before human rights mechanisms to engage state responsibility for the violation of substantive or procedural rights under a specific treaty (as opposed to individual criminal responsibility of the perpetrator(s)) (see Chapter 5: State Responsibility).

Most human rights treaties do not contain specific or explicit prohibitions of sexual violence.<sup>12</sup> However, sexual violence may give rise to violations of other rights and freedoms such as the right to be free/prohibition from torture, inhuman and degrading treatment and/or the rights to life, liberty, personal security, physical integrity, health, equal protection under the law and effective remedy. Key regional and international human rights instruments generally contain provisions codifying these rights.

The implementation of human rights treaties and conventions usually is or can be monitored by courts or monitoring bodies, some of which allow for individuals and/or NGOs to file submissions. The availability of a specific mechanism is subject to a number of conditions, in particular:

- » The state has ratified or acceded to the relevant international instrument and/or explicitly recognised the competence of the relevant court, commission or committee.
- » The alleged violations were committed after the entry into force of the instrument for the relevant state.
- » All the admissibility criteria are fulfilled, in particular, the previous exhaustion of domestic remedies which is a key requirement for most international human rights mechanisms, unless special circumstances/exceptions apply.

Some of the human rights mechanisms that victims of sexual violence can consider are mentioned below:

### a. Judicial

Decisions of human rights courts are legally binding on states.

#### *Regional*

- » African Court on Human and Peoples' Rights (ACtHR)
- » European Court of Human Rights (ECtHR)
- » Inter-American Court of Human Rights (IACtHR).<sup>13</sup>

<sup>12</sup> See, for instance, the International Covenant on Civil and Political Rights, (adopted 16 December 1966, entry into force 23 March 1976) (ICCPR); European Convention on Human Rights, (adopted 4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR); American Convention on Human Rights, (adopted 22 November 1969, entry into force 18 July 1978) 'Pact of San Jose', Costa Rica (ACHR); African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entry into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter). Even the Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13 (CEDAW) only explicitly prohibits 'traffic in women and exploitation of prostitution of women' (Art 6), not sexual violence. That said, at the international level the Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3 (CRC) of 1989 expressly provides that states must protect children from all forms of sexual exploitation and sexual abuse, including through the adoption of appropriate legislative, administrative, social and educational measures (Art 19 (1) and 34). At the regional level, a few instruments contain provisions prohibiting 'violence against women' which includes, in particular, sexual violence but they generally do not have a monitoring mechanism allowing for complaints by individuals. See, for instance, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entry into force 5 March 1995) ('Convention of Belem do Para') (Art 1-3); the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (11 July 2003) (Maputo Protocol) (Art 3(4), 4(2), 11(3), 12(1)(c)(d), 13(c), 14(2)(c), 22(b), 23(b)).

<sup>13</sup> Individuals cannot file a complaint directly before the IACtHR. Cases must first be processed by the Inter-American Commission for Human Rights and then be referred to the IACtHR.

### Sub-Regional

- » Community Court of Justice of the Economic Community of West African States (CtJ ECOWAS)<sup>14</sup>
- » East African Court of Justice (EACtJ).

### b. Quasi-judicial

Decisions of quasi-judicial bodies are usually not legally binding but they do have authoritative value. They generally issue broad recommendations and refrain from making specific injunctions or allocate awards, instead leaving discretion to states as to how to implement their decisions. Some of the mechanisms to consider are mentioned below:

#### International

- » UN Treaty Bodies, including:
  - Human Rights Committee (HRC)
  - Committee against Torture (CAT)
  - Committee on the Elimination of Discrimination against Women (CEDAW)
- » Committee on the Rights of the Child (CRC).

#### Regional

- » African Commission on Human and Peoples' Rights (ACHPR)
- » Inter-American Commission of Human Rights (IACHR).

### c. Non-judicial

#### International

Information on specific human rights violations can also be submitted to UN Special Procedures mandate holders, such as special rapporteurs and working groups, who have either country or themat-

ic mandates. Special Procedures do not have any judicial powers but they can intervene directly with governments on allegations of violations of human rights that come within their mandates by means of letters which include urgent appeals and other communications.<sup>15</sup>

As part of their advocacy work, civil society actors, including NGOs and individuals, can also provide information about sexual violence for consideration during the Universal Periodic Review (UPR) process, which ensures the review of each UN Member State's human rights obligations over a four-year cycle.

#### Regional

Similar special mechanisms have been set up as part of the African and Inter-American human rights systems:

- » African Union Special Mechanisms of the ACHPR (e.g. special rapporteurs, committees and working groups)
- » Organization of American States Rapporteurships of the IACHR.

### 3. Investigative and Fact-Finding Bodies

Information about sexual violence can also be passed on to investigative and fact-finding bodies established to investigate human rights violations and/or international crimes committed in a particular country or region, usually with a view to providing recommendations for follow-up action. These can be set up by regional or national authorities with appropriate jurisdiction (e.g. Commission of Inquiry on Post Election Violence (CIPEV)/Waki Commission established by the government of Kenya to investigate the 2007/8 post-election violence; Afri-

<sup>14</sup> There is no need for exhaustion of domestic remedies in order to submit a case to the CtJ ECOWAS.

<sup>15</sup> Submission of information to Special Procedures can be done by everyone (not only victims) and does not depend on the ratification of any treaty, making this avenue much more accessible than litigation before judicial and quasi-judicial bodies. In addition, there is no need for exhaustion of domestic remedies in order to submit an individual case or situation to Special Procedures. Communications can deal with individual cases, general patterns and trends, cases affecting a particular group, the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards. The intervention can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. For more information, see <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>.

can Union Commission of Inquiry on South Sudan). International commissions of inquiry and fact-finding missions have also been established with mounting frequency by the UN Security Council, the General Assembly, the Human Rights Council, the Secretary-General and the High Commissioner for Human Rights in a growing variety of contexts. More than 50 international commissions of inquiry and fact-finding mission have been set up by various UN bodies to date, with recent examples including the Independent International Commission of Inquiry on the Syrian Arab Republic (COI Syria), the Office of the United Nations High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka (OISL) and the Commission of Inquiry on Human Rights in Eritrea (COI Eritrea).<sup>16</sup>

Reports from investigative and fact-finding bodies generally provide recommendations for best ways to ensure accountability and may provide the impetus to instigate criminal prosecutions at the domestic and/or international level.

#### 4. International and Hybrid Courts and Tribunals

Perpetrators of sexual violence qualifying as crimes under international law may also be prosecuted by international, ad hoc and hybrid courts and tribunals

with appropriate jurisdiction.

The ICC operates as a permanent court of last resort and can exercise its jurisdiction<sup>17</sup> to try individuals accused of genocide, war crimes and crimes against humanity, including sexual violence, when national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely do so. This principle of complementarity to national criminal jurisdictions governs the exercise of the ICC's jurisdiction<sup>18</sup> and the Rome Statute of the ICC expressly recognizes that states have the first responsibility and right to investigate and prosecute crimes under international law.<sup>19</sup>

International ad hoc tribunals (such as the ICTY and ICTR (MICT)<sup>20</sup>) or hybrid courts (such as the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes (SPSC) in East-Timor and the Extraordinary African Chambers in the Senegalese Courts (EAC), which tried Hissène Habré, the former President of Chad) were established to deal with specific situations.<sup>21</sup> Other specialist chambers and hybrid courts (both national and international in nature) include the Extraordinary Chambers in the Courts of Cambodia (ECCC), which can still accept victim participants. The Central African Republic government is also in the process of establishing a hybrid Special Criminal Court (SCC) within the

16 UN Office of the High Commissioner for Human Rights (2015) *Commissions of Inquiry and Fact-Finding Mission on International Human Rights and Humanitarian Law, Guidance and Practice*. Geneva: OHCHR. Annex III (listing 50 international commissions of inquiry and fact-finding missions supported or deployed by OHCHR between 1992 and 2014).

17 The ICC can only exercise jurisdiction if: (a) the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court, (b) the crime took place on the territory of a State Party or State otherwise accepting the jurisdiction of the Court, or (c) the UN Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime (see in particular articles 12 and 13 of the Rome Statute).

18 Article 1 of the Rome Statute of the ICC.

19 International Criminal Court, Office of the Prosecutor (2003) *Informal Expert Paper: The Principle of Complementarity in Practice*. The Hague: ICC-OTP. p 3.

20 The Mechanism for International Criminal Tribunals (MICT) established by the UN Security Council in 2010 (formally the International Residual Mechanism for International Tribunals) has assumed responsibility for a number of essential functions previously carried out by the ICTR and ICTY and still has open cases for investigation as regards the Rwandan genocide. During the initial years of the MICT, it operated in parallel to the ICTR and ICTY, and it will continue to operate after the tribunals' closure. The ICTR closed as of 31 December 2015 and the ICTY is expected to close at the end of 2017. For more information see [www.unmitc.org](http://www.unmitc.org).

21 Note that within this Protocol these institutions will be referred to as 'the ad hoc and hybrid tribunals'.

*This Protocol sets out a documentation methodology primarily intended to support fact gathering according to an international criminal framework*

national judicial system to investigate and prosecute war crimes and crimes against humanity committed in that country since 2003.<sup>22</sup> In addition, the EU-backed Kosovo Special Court (KSC) set up to try alleged crimes by former Kosovo Liberation Army fighters between 1998–2000 is expected to start its activities in 2017.<sup>23</sup>

### 5. Avenues for Interstate Disputes

Information about sexual violence crimes and other violations of international law can also be part of interstate disputes, where violations were committed against the nationals of a state by armed forces or groups of another state. Interstate disputes can be submitted by states on their own behalf and on behalf of their nationals before the International Court of Justice (ICJ), which is the principle judicial organ of the UN and whose role is to settle, in accordance with international law, legal disputes between states and to give advisory opinions on legal questions referred to it by authorised UN organs and specialised agencies. Interstate disputes can also be submitted by the states concerned to international arbitration panels, such as the panel established by the Permanent Court of Arbitration that settled in 2009 the dispute between Ethiopia and Eritrea and awarded damages for death, injury, rape, looting and destruction resulting from a two-year war between the counties.<sup>24</sup> These mechanisms can only be engaged through formal state channels and are not avenues generally available to individuals or groups.

### Key to note

- » Although all the above options serve the overall goal of promoting accountability, they each have different mandates, admissibility and evidentiary requirements. For instance, the rules of evidence or burden of proof may be stricter in a criminal case than a constitutional case, civil action or claim before a human rights institution.
- » Certain accountability avenues may be used in parallel while others are exclusive of each other. For example, in criminal law the general principle is that the same person or entity cannot be tried twice for the same crimes (*ne bis in idem*).
- » Documentation on sexual violence can also be undertaken even when no accountability mechanisms exist at the time, in order to secure evidence for future processes.
- » This Protocol sets out a documentation methodology primarily intended to support fact gathering according to an international criminal legal framework. Nevertheless, information collected to establish criminal responsibility for sexual violence as a crime under international law can be used across multiple mechanisms. It can also be used to help establish state responsibility, and where that is legally an option, corporate responsibility or the responsibility of other non-state actors. It may also be used for reparation programmes, reports and submissions to non-judicial mechanisms—which may ultimately lead to criminal prosecutions.

<sup>22</sup> The ICC is also conducting investigations in the Central African Republic, but it will most likely only prosecute a few suspects. The ICC is complementary to the national judicial system and the Special Criminal Court, once it has been set up.

<sup>23</sup> The Kosovo Special Court (formally the Kosovo Relocated Specialist Judicial Institution) will be a Kosovan national court operating under Kosovo law established in The Hague.

<sup>24</sup> For more information, see <https://pcacases.com/web/view/71>.

The below chart does not aim to be comprehensive and only provides an overview of some possible accountability avenues and remedies:

 International Level		
Individual Responsibility	State Responsibility	Both
<p><b>Judicial</b></p> <p>International Criminal Court (ICC)</p> <p>Mechanism for International Criminal Tribunals (MICT), taking over from:</p> <ul style="list-style-type: none"> <li>International Criminal Tribunal for the former Yugoslavia (ICTY, expected to close in 2017)</li> <li>International Criminal Tribunal for Rwanda (ICTR, closed 31.12.2015)</li> </ul>	<p><b>Judicial</b></p> <ul style="list-style-type: none"> <li>International Court of Justice (ICJ)<sup>1</sup></li> <li>International Arbitration Panels<sup>2</sup></li> </ul> <p><b>Quasi-judicial</b></p> <p>UN Treaty Bodies e.g.</p> <ul style="list-style-type: none"> <li>Human Rights Committee</li> <li>Committee against Torture</li> <li>CEDAW Committee</li> <li>Committee on the Rights of the Child</li> </ul> <p><b>Non-judicial</b></p> <ul style="list-style-type: none"> <li>UN Special Procedures (e.g. special rapporteurs and working groups)</li> <li>Universal Periodic Review (UPR)</li> </ul>	<p><b>Non-judicial</b></p> <p>International commissions of inquiry (COI) and fact-finding missions e.g.</p> <ul style="list-style-type: none"> <li>COI Syria</li> <li>OHCHR Investigation on Sri Lanka (OISL)</li> <li>COI Eritrea</li> <li>Etc.</li> </ul>

 Regional Level		
Individual Responsibility	State Responsibility	Both
<p><b>Judicial</b></p> <p>African Court of Justice and Human Rights (African Court, not yet established )</p>	<p><b>Judicial</b></p> <ul style="list-style-type: none"> <li>African Court on Human and Peoples' Rights (ACtHR, expected to be merged with and become the African Court of Justice and Human Rights)</li> <li>European Court of Human Rights (ECtHR)</li> <li>Inter-American Court of Human Rights (IACtHR)</li> <li>ECOWAS Community Court of Justice (CCtJ ECOWAS)</li> <li>East African Court of Justice (EACtJ)</li> </ul> <p><b>Quasi-judicial</b></p> <ul style="list-style-type: none"> <li>African Commission on Human and Peoples' Rights (ACHPR)</li> <li>Inter-American Commission of Human Rights (IACHR)</li> </ul> <p><b>Non-judicial</b></p> <ul style="list-style-type: none"> <li>African Union Special Mechanisms of the ACHPR (e.g. special rapporteurs, committees and working groups)</li> <li>Organisations of American States Rapporteurships of the IACHR</li> </ul>	<p><b>Non-judicial</b></p> <p>Regional commissions of inquiry and fact-finding missions e.g.</p> <ul style="list-style-type: none"> <li>African Union COI on South Sudan</li> </ul>

<sup>1</sup> The International Court of Justice mainly deals with interstate disputes and is not open to claims by individuals or NGOs.

<sup>2</sup> International arbitration panels may be set up by states to settle their disputes. They are not avenues generally available to individuals or NGOs for human rights litigation.

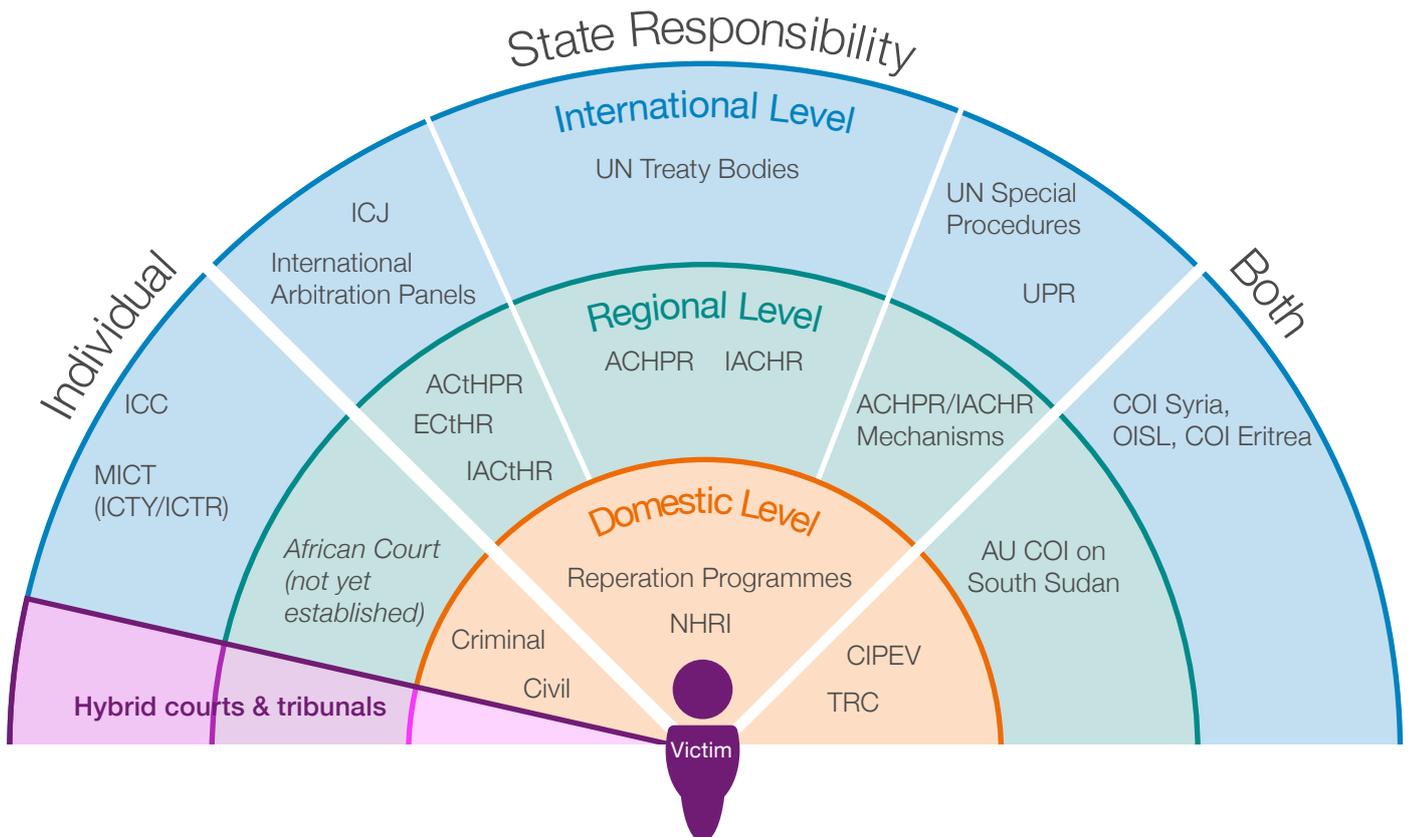
 Domestic Level				
Individual Responsibility			State Responsibility	Both
<b>Judicial</b> Criminal court  in country where crimes took place or in another country exercising jurisdiction e.g. universal jurisdiction (UJ) cases	<b>Judicial</b> Military court  if relevant according to national laws and procedures	<b>Judicial</b> Civil court  claims against individual perpetrator(s), corporations or other entities	<b>Judicial</b> According to national laws and procedures  <b>Quasi-judicial</b> <ul style="list-style-type: none"> <li>National human rights institutions (NHRI)</li> <li>National trust fund for victims/administrative reparations programmes</li> </ul>	<b>Non-judicial</b> National commissions of inquiry and fact-finding missions e.g. <ul style="list-style-type: none"> <li>CIPEV/Waki Commis-sio in Kenya</li> <li>Truth and reconciliation commissions (TRC)</li> </ul>




**Internationalised and hybrid courts and tribunals e.g.**

- Special Court for Sierra Leone (SCSL)
- Special Panels for Serious Crimes in East-Timor (SPSC)
- Extraordinary Chambers in the Courts of Cambodia (ECCC)
- Extraordinary African Chambers (EAC)
- Kosovo Special Court (KSC)
- Central African Republic Special Criminal Court (CARSCC)

Internationalised and hybrid courts have been placed together although some of them have been created through an agreement between a state and the UN, while others have been set up through an agreement between a state and a regional organisation such as the African Union (AU) or European Union (EU). In addition, the EU-backed Kosovo Special Court is technically a Kosovan national court established in The Hague.



# Chapter 4 Contents

<b>CHAPTER 4: Individual Criminal Responsibility.....</b>	<b>41</b>
<b>A. Introduction.....</b>	<b>41</b>
1. Legal Framework.....	41
<b>Box 1</b>	
Main Types Of Crimes Under International Law Relevant For Sexual Violence .....	41
2. Legal Definitions .....	42
<b>B. The Elements of Crimes under International Law.....</b>	<b>43</b>
1. Introducing the Elements of Crimes .....	43
<b>BOX 2</b>	
Contextualising Sexual Violence.....	44
2. Requirements of the Elements Of Crimes .....	45
(i) PART A: Specific elements of underlying crime.....	45
<b>BOX 3</b>	
Peer experience—other crimes committed by using sexual violence .....	46
<b>Box 4</b>	
Specific acts that can constitute war crimes, crimes against humanity and genocide .....	47
(ii) PART B: Common elements of category of crime .....	48
<b>BOX 5</b>	
Common Elements Of War Crimes, Crimes Against Humanity And Genocide.....	49
<b>BOX 6</b>	
Case law examples—sexual violence as genocide .....	53
(iii) PART C: Linkages elements/modes of liability .....	53
<b>BOX 7</b>	
Linkage Elements/Modes of Liability .....	54
<b>Box 8</b>	
Case law example - command responsibility - Bemba case.....	55
<b>C. Factual Scenarios.....</b>	<b>56</b>
<b>Box 9</b>	
Sexual exploitation and abuse by peacekeepers .....	58
<b>D. Rules of Procedure and Evidence .....</b>	<b>59</b>
1. Consent.....	59
<b>BOX 10</b>	
No consent under coercive circumstances .....	60
2. Corroboration .....	61
<b>BOX 11</b>	
Case law example—Habré judgement .....	61
3. Prior and Subsequent Sexual Conduct.....	62
<b>Box 12</b>	
Virginity of the victim and ‘virginity tests’ .....	62
4. Other Protective Measures .....	63
<b>Box 13</b>	
Examples of protective measures.....	63

# CHAPTER 4: Individual Criminal Responsibility

## A. Introduction

### 1. Legal Framework

Over the past 20 years, international law has developed in the direction of seeking greater accountability for the most egregious crimes, including crimes of sexual violence when committed as war crimes, crimes against humanity or acts of genocide. As international criminal jurisprudence has developed—first in the context of the ICTY<sup>1</sup> and the ICTR,<sup>2</sup> then subsequently further codified in the Rome Statute of the ICC (the Rome Statute), and advanced yet again by the SCSL, ECCC, EAC and other hybrid and domestic tribunals—rape and other forms of sexual violence are being investigated and prosecuted, both domestically and internationally, as the following three main types of crimes under international law:

#### Box 1

#### Main Types Of Crimes Under International Law Relevant For Sexual Violence

Please check how war crimes, crimes against humanity and genocide are defined in applicable domestic law, if any.

<i>Sexual violence can amount to</i>	War Crimes	Crimes against Humanity	Genocide
<i>When</i>	Committed in the context of and associated with an armed conflict <sup>3</sup>	Committed in the context of a widespread or systematic attack directed against a civilian population	Committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group
<i>A connection to an armed conflict is</i>	Required	Not required	Not required

The starting point for discussion of international crimes applicable to acts of sexual violence in the context of this Protocol is the Rome Statute. The Rome Statute is not, however, the most comprehensive elaboration of applicable international criminal law; customary international law and the law of some countries are in many ways far broader. The ad hoc tribunals, the ECCC and the SCSL have all applied principles of customary international law, and the jurisprudence emerging from those institutions is also instructive and reflective of these broader principles. While this Protocol has a focus on the provisions as set out in the Rome Statute, practitioners should bear in mind the importance of the jurisprudence of the ad hoc and hybrid tribunals as a source of applicable principles, in particular because many provisions of the Rome Statute have not yet been litigated or resolved. In this case, the jurisprudence of the ad hoc and hybrid tribunals may provide the only available guidance. Decisions and interpretations of national criminal courts, human rights

1 Brammertz, B.S., Jarvis, M., eds. (2016) *Prosecuting Conflict-Related Sexual Violence at the ICTY*. Oxford: Oxford University Press.

2 United Nations Mechanism for International Criminal Tribunals (2014) *Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, <http://www.unict.org/>.

3 Under the Statutes of the ICTY and ICTR, there must be a nexus between the act and the armed conflict.

courts and other mechanisms may also be useful, for example, by helping establish customary international law, or if relevant, general principles of law.

## 2. Legal Definitions

Although many States party to the Rome Statute have incorporated the Statute's definitions of sexual violence as international crimes into national law, many others have not. Some States parties of the ICC have incorporated or can apply only the Statute's definitions, but not the more detailed elements<sup>4</sup> of those crimes as set out in the ICC Elements of Crime instrument. Some have also adapted the ICC definitions. Some States have also incorporated or can apply other aspects of ICC law, including concerning modes of liability.<sup>5</sup> Regarding the incorporation and applicability—or not—of other relevant treaty and customary sources of international law, the picture similarly varies across countries.

Despite positive developments in international law, rape and other forms of sexual violence continue to be primarily outlawed as 'ordinary criminal offences' in the law of many States. The definitions of the criminal acts, and the elements that comprise them—as well as other relevant parts of criminal law (such as modes of liability law and the law on defences or grounds for excluding criminal liability)—may vary somewhat according to the jurisdiction in which the crime(s) are being investigated and prosecuted, even when national laws treat them as international crimes. This may be important for the documentation of sexual violence crimes. For instance, in international criminal practice, sexualized torture is prosecuted as a war crime or crime against humanity, but national criminal codes may criminalise torture as a separate standalone crime not under the umbrella of war crimes, crimes against

humanity or genocide. National definitions of sexual violence crimes—such as rape or torture—may also not always be in line with international classifications.<sup>6</sup>

In countries where two legal regimes co-exist, one for rape and other forms of sexual violence as ordinary crimes, and one as crimes under international law, the definitions between the two regimes may differ and often only specific domestic courts will be competent to try crimes under international law.

**This section only deals with rape and other forms of sexual violence amounting to crimes under international law, whether or not a specific regime exists at the domestic level.**

Since the legal definitions of crimes and their elements directly impact on the type of information to be collected and the questions to ask victims and other witnesses during interviews to elicit relevant evidence, practitioners documenting sexual violence as crimes under international law should be familiar with:

- » the elements of crimes as defined by the Rome Statute
- » the elements of crimes and relevant law on modes of liability, grounds for excluding criminal liability (such as duress) and bars to the exercise of criminal jurisdiction of the legal framework in relation to which they are operating

4 The elements of a crime are its component parts, that is, what must be proven or satisfied to prove that particular crime.

5 The modes of liability refer to how an individual can be held criminally responsible for a crime.

6 Depending on their mandate, practitioners may want to identify gaps in national definitions of sexual violence crimes and challenge retrograde and discriminatory definitions at odds with international standards (e.g. laws where only women can be victims and only men can be perpetrators, where oral sex or the use of objects is not recognised as rape, or where use of force or resistance of the victim needs to be proven), as part of their advocacy work.

- » the relevant jurisprudence of the ad hoc and hybrid tribunals and the ICC<sup>7</sup>
- » the relevant law on procedure and evidence of the legal framework in relation to which they are operating.

Practitioners are also encouraged to familiarize themselves with:

- » relevant decisions and interpretations by domestic courts and human rights mechanisms as appropriate.

For the purposes of the Protocol, the main focus is on the Rome Statute framework applicable to sexual violence crimes.

## B. The Elements of Crimes under International Law

### 1. Introducing the Elements of Crimes

As set out in detail in the Evidence Workbook, in order for any act of rape and sexual violence to qualify as an international crime, practitioners need to find information to prove three categories of elements (see Annex 1: Evidence Workbook for Documentation of Crimes of Sexual Violence: A Tool to Assist Investigators in Filling Evidentiary Gaps):<sup>8</sup>

- A. Specific elements of the underlying crime
- B. Common elements or chapeau elements
- C. Linkage elements or modes of liability.

These three categories of information can be considered to constitute Parts A, B and C of the complete information required to demonstrate that specific acts amount to war crimes, crimes against humanity or genocide and to suggest who may be individually criminally responsible for the commission of those crimes.

In order for someone to be found individually criminally responsible for a crime under international law, the elements of the underlying crime (such as rape), the common elements of the category of crime (such as crimes against humanity), and the modes of liability (such as ordering) must be proved beyond a reasonable doubt.

For example, for the crime against humanity of rape committed through ordering the crime pursuant to the Rome Statute (art. 7(1)(g)-1 and 25(3)(b)), the elements to prove are:

7 The Gender Jurisprudence and International Criminal Law Project, based at the American University Washington College of Law, maintains a large collection of relevant documents issued by international criminal courts, such as judgments and decisions on their database available at: <http://www.genderjurisprudence.org/index.php/gender-jurisprudence-collections>. Please also refer to the Sexual Crimes in Conflict Database developed by the International Nuremberg Principles Academy ([www.nurembergacademy.org](http://www.nurembergacademy.org)). This online database provides a collection of literature and case law on conflict-related sexual and gender-based violence from international, ad hoc and hybrid tribunals, regional and national courts, including military courts, together with relevant findings from transitional justice mechanisms such as commissions of inquiry and truth commissions.

8 Marcus, M. (2013) 'Investigation of crimes of sexual and gender-based violence under international criminal law', in A. de Brouwer, et al., (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches*. Antwerp: Intersentia. pp. 227–233.

*Practitioners should also systematically gather evidence about the impact of the crime on the victim...*

#### A. Specific elements of underlying crime: RAPE

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear or violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>9</sup>

#### B. Common elements: CRIME AGAINST HUMANITY

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part or intended the conduct to be part of a widespread or systematic attack directed against the civilian population.
5. The attack was carried out pursuant to or in furtherance of a state or organizational policy to commit such attack (ICC element which may or may not be required in the jurisdiction in which practitioners are documenting).

#### C. Linkage elements/modes of liability: ORDERING

6. The accused had the authority to issue orders and expected them to be carried out.
7. The issuance of the orders played a substantially contributing role in the perpetration of the crime or underlying offense.

#### BOX 2

#### Contextualising Sexual Violence

Practitioners should conduct their documentation with the knowledge that an attack may involve a number of different crimes. Contextualising sexual violence means that they must understand the connections between sexual violence and other crimes, and the role that sexual violence plays in the campaign of violence. For example, in the Ntaganda case,<sup>10</sup> acts of pillaging were often accompanied by acts of murder and rape, physical and verbal abuse or threats of violence. Gathering information on elements to establish all the crimes and how sexual violence is connected to the context is essential to accurately describe and label the full scope of the criminal conduct and, in doing so, can also contribute to linking sexual violence to higher-level officials.<sup>11</sup>

<sup>9</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See Rome Statute Elements of Crime, p. 8.

<sup>10</sup> The Prosecutor v. Bosco Ntaganda ICC-01/04.02/06 (ongoing).

<sup>11</sup> Baig, L., Jarvis, M., Salgado, E.M., Pinzauti, G., (2016) 'Contextualizing Sexual Violence: Selection of Crimes', in B.S. Brammertz and M. Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY*. Oxford: Oxford University Press. 172–216.

## *Sexual violence crimes cannot be documented in isolation from other atrocities...*

### A. Specific elements of underlying crime

*'What happened, to whom, when and where?'*

Specific elements are satisfied by information that shows what particular act was committed and that the specific elements of the underlying crime of rape, sexual slavery, enforced sterilisation, torture or any other relevant crime are realised.

### B. Common elements of category of crime (war crime, crime against humanity or genocide)

*'What was the context' in which the act/underlying crime was committed?*

Common elements, often referred to as 'chapeau' elements, are satisfied by information that describes the circumstances in which the particular act was committed and elevate the act to the level of a war crime, crime against humanity or genocide.

An underlying crime (see A above) can only amount to a crime under international law if committed in a specific factual context which makes it a war crime, crime against humanity or act of genocide (e.g. sexual slavery as a war crime, rape as a crime against humanity, causing serious bodily or mental harm to members of a group as genocide).

This means that if the common elements are not appropriately documented, a crime will only be susceptible to prosecution as an 'ordinary crime' under national law (e.g. rape as such) not as a crime under international law (e.g. rape as a war crime or rape as a crime against humanity). Convictions for rape and other forms of sexual violence may attract stronger sanctions if prosecuted as international rather than ordinary crimes.

### C. Linkage elements/modes of liability

*'Who is responsible and how?'*

Linkage elements, also known as 'modes of liability', are satisfied by information that describes the manner in which one or more alleged perpetrator(s) are criminally responsible for an act or omission amounting to a crime under international law.

## 2. Requirements of the Elements Of Crimes

The next sections will set out what is required for each of the three steps in a practitioner's investigation into crimes of sexual violence. In the Evidence Workbook (see Annex 1), practitioners can view examples of testimonial, documentary and photographic/visual evidence which can serve to prove the specific, contextual and linkage elements of these international crimes (see also Chapter 10: Types of Evidence of Sexual Violence).

### (i) PART A: Specific elements of underlying crime

*'What happened, to whom, when and where?'*

In order to prove that a particular act/underlying crime was committed (e.g. rape) practitioners need to gather information showing what happened, to whom, when and where. This information needs to satisfy each of the specific elements of the relevant underlying crime. The same facts can be relevant to more than one underlying crime.

Practitioners should also systematically gather evidence about the impact of the crime on the victim, as this may be an element for certain crimes. For instance, the underlying crime of torture requires the infliction of 'severe pain or suffering, whether physical or mental' and genocide may be committed by causing 'severe bodily or mental harm'. This evidence may also be useful where a gravity threshold applies (e.g. crime of 'comparable gravity'), for sentencing and reparation (see Chapter 6, D: Elements to Document Harm).

There are crimes under international law which always involve acts of sexual violence, such as rape or forced prostitution, but there are other crimes which can be committed by either sexual or non-sexual conduct, such as torture or murder. Evidence of sexual violence can be used to prove both types of crimes:

- specific sexual violence crimes
- other crimes under international law that can be committed by using sexual violence.<sup>12</sup>

Sexual violence crimes cannot be documented in isolation from other atrocities and should be ‘contextualized’. It is recommended that when practitioners begin the process of qualifying the crimes that they will be documenting, they do not restrict themselves solely to those crimes that can only be committed with acts of sexual violence.

**BOX 3****Peer experience—other crimes committed by using sexual violence**

Aarif, Investigator: *‘It is important to always start any investigation with an open mind and gather evidence that objectively fits the elements of all sorts of different crimes. I remember a case where male members of a minority ethnic group had been forced to strip naked, had chilli powder rubbed on their genitals, and were raped.’*

*‘We gathered evidence not only to prove the elements of the crimes of rape and other forms of sexual violence but also of the crime of torture. The torture charge was important as it better reflected the violent nature of the crime and enabled to describe accurately and fully the scope of the harm suffered by these men.’*

12 The Rome Statute lists crimes of sexual violence as well as other crimes that can be sexualised and which can amount to war crimes, crimes against humanity and genocide, some of which are listed in Box 4. Please refer to the Evidence Workbook (see Annex 1) for more details about the elements of each of these crimes. A broader compilation of crimes under international law and their elements as set out in the Rome Statute are contained in the ICC Elements of Crimes. In addition, the statutes and elements of crimes of the ad hoc and hybrid tribunals and the provisions of domestic criminal codes can serve as additional sources of applicable provisions and definitions.

## Box 4

## Specific acts that can constitute war crimes, crimes against humanity and genocide

**WAR CRIMES** (for example for internal armed conflict, article 8.2 (c)-(e) Rome Statute)

Specific acts/underlying crimes listed below amount to a war crime when committed in the context of and associated with an armed conflict

**War crimes of sexual violence**

War crime of

- » rape
- » sexual slavery
- » enforced prostitution
- » forced pregnancy
- » enforced sterilisation
- » other forms of sexual violence

**Other relevant war crimes**

War crime of

- » murder
- » torture
- » cruel treatment
- » mutilation or medical/scientific experiment
- » use of child soldiers
- » outrages on personal dignity e.g. humiliating/degrading treatment

**CRIMES AGAINST HUMANITY** (article 7, Rome Statute)

Specific acts/underlying crimes listed below amount to a crime against humanity when committed in the context of a wide-spread or systematic attack directed against a civilian population

**Crimes against humanity of sexual violence**

Crime against humanity of

- » rape
- » sexual slavery
- » enforced prostitution
- » forced pregnancy
- » enforced sterilisation
- » other forms of sexual violence of comparable gravity

**Other relevant crimes against humanity**

Crime against humanity of

- » murder<sup>13</sup>
- » extermination<sup>14</sup>
- » enslavement
- » imprisonment
- » torture
- » persecution
- » other inhumane acts

**GENOCIDE** (article 6, Rome Statute)

Specific acts/underlying crimes listed below amount to genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group

- » killing members of the group e.g. raping and then killing
- » causing serious bodily or mental harm to members of the group e.g. rape
- » inflicting conditions of life calculated to destroy the group
- » imposing measures intended to prevent births within the group e.g. sterilisation
- » forcibly transferring children of the group to another group

13 Oosterveld, V. (2012) 'Gender and the Charles Taylor Case at the Special Court for Sierra Leone', *William & Mary Journal of Women and the Law*, 19, 1: 6–33.

14 For example, gathering civilians together, detaining them, stripping them, beating them in their genitalia area (and other areas) to death, as part of a mass killing of civilian.

Key considerations when documenting and investigating underlying crimes:

- » The specific elements to prove for each underlying crime (e.g. rape, sexual slavery, torture, persecution) are set out in the Evidence Workbook in Annex 1.
- » Sexual violence cannot be documented in isolation from other atrocities and practitioners are encouraged to document sexual violence as well as other crimes committed in the context of the same attack or situation.
- » In addition, provided the facts support it, practitioners are encouraged to document and investigate sexual violence conduct under both enumerated sexual violence crimes and other crimes. This may help to increase accountability for sexual violence conduct by demonstrating that, as a crime under international law, such conduct is another form of criminal violence and not something apart from the other crimes being committed in the context of mass atrocities. This can also help ensure that the nature of the particular harm is accurately reflected and adjudicated. To achieve this, practitioners need to be familiar with the definitions of all underlying crimes, not only sexual violence crimes, and look out for facts that will help establish the elements of those crimes during the investigation. For instance, when a victim of rape (or other crime of sexual violence) is a member of a particular ethnic group, practitioners should consider whether there is evidence that sexual violence was directed at the victim due to her/his ethnicity and/or gender, as this can help prove persecution as an additional underlying crime.
- » The Rome Statute, the Statutes of the ICTY and ICTR (Mechanism for International Criminal Tribunals—MICT) and the Statute of the SCSL, amongst others, provide

for the crime against humanity of ‘other inhumane acts’. This crime serves as a residual, or catch-all, for other criminal acts which are not specifically enumerated. At the SCSL, this crime was used as the basis for the investigation, prosecution and ultimate conviction of the conduct of forced marriage, for which the SCSL subsequently proposed the term ‘conjugal slavery’<sup>15</sup>. Other criminal conducts which could be charged as the crime against humanity of ‘other inhumane acts’ could include forced abortion and forced nudity.

- » The Rome Statute is the first international legal instrument to list the crime against humanity of persecution on the basis of gender. Since genocide under international law only protects four specific groups (national, ethnical, racial or religious; see Part B, Box 5), gender-based persecution as a crime against humanity can be used as a legal basis for (i) crimes resulting from discrimination on the basis of gender<sup>16</sup> (e.g. persecution of LGBTI people targeted for their sexual orientation or not conforming to gender identity, such as transvestites) or (ii) acts that have a sexual and gender-based form of harm (e.g. sexual enslavement or rape of women targeted for being members of a certain political group).

*(ii) PART B: Common elements of category of crime*  
*‘What was the context in which the underlying crime was committed?’*

For each of the three categories of international crimes—war crimes, crimes against humanity and genocide—there are certain common elements that must be proven, in addition to those elements related to the acts/underlying crimes themselves mentioned under Part A.

15 The SCSL judgement in *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF accused) Case No. SCSL-04-15-A, known as the Revolutionary United Front (RUF) case—confirmed by the Appeals Chamber on 26 October 2009—brought the first-ever convictions in an international or hybrid tribunal of sexual slavery as a crime against humanity and of the crime against humanity of other inhumane acts under which acts of forced marriage were considered (as the Statute of the SCSL did not explicitly prohibit forced marriage). The SCSL solidified the international legal definition of sexual slavery in its landmark judgement in *Prosecutor v. Charles Taylor* Case No. SCSL-03-01-T of 18 May 2012 and proposed that the term ‘conjugal slavery’ (a combination of sexual slavery and gendered forms of forced labour through enslavement) be used to refer to what had previously been termed ‘forced marriage’ by the SCSL. See Oosterveld, Valerie, ‘Gender and the Charles Taylor Case at the Special Court for Sierra Leone’, *William & Mary Journal of Women and the Law*, 19/1 (2012), 6–33.

16 Note that the Rome Statute defines ‘gender’ as the two sexes, male and female, within the context of society. See Rome Statute, Article 7(3).



*The common elements satisfy the jurisdiction requirements that raise a specific crime to the level of a crime under international law...*

The common elements satisfy the jurisdictional requirements that raise a specific crime to the level of a crime under international law, and the background circumstances must reach a gravity threshold for this to happen.

In order to allege the commission of crimes of sexual violence as violations of international criminal law, the information obtained by the practitioner's team must therefore include facts about the circumstances under which the act took place. These facts must support the common elements applicable to war crimes, crimes against humanity or genocide. These crimes often overlap and the same act of sexual violence, for instance rape, can—depending on the legal system—be investigated and prosecuted simultaneously as a war crime, crime against humanity and genocide.

**BOX 5**

### Common Elements Of War Crimes, Crimes Against Humanity And Genocide

To prove acts of sexual violence as war crimes, crimes against humanity or genocide, practitioners need to ensure that they gather sufficient information to prove that the following common elements, as codified in the Rome Statute, are satisfied:

#### War Crimes

1. The prohibited underlying act (see Part A, Box 4) was committed 'in the context of and was associated with' an armed conflict (international or non-international).
2. The direct perpetrator was aware of the factual circumstances that established the existence of the armed conflict.

#### Crimes Against Humanity

1. The prohibited underlying act (see Part A, Box 4) was committed as part of an 'attack', which is:
  - 'widespread' or 'systematic'
  - directed against any civilian population.
2. The direct perpetrator 'knew' or 'intended' that the conduct would form part of the attack.

#### Genocide

The prohibited underlying act (see Part A, Box 4) was committed with

1. the intent to destroy, in whole or in part,
2. a national, ethnical, racial or religious group.

Key considerations when documenting and investigating possible **war crimes**:

- » Rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts<sup>17</sup> but different legal frameworks define what constitutes both types of armed conflict differently. International humanitarian law distinguishes two types of armed conflicts, which are defined as follows:
  - International armed conflicts (IACs) exist whenever there is resort to armed force between two or more states (regardless of the reasons or the intensity of the confrontation or whether a formal declaration of war has been made).
  - Non-international armed conflicts (NIACs) are protracted armed confrontations occurring between governmental armed forces and the forces of one or more non-state armed groups, or between such groups arising on the territory of a state. The armed conflict must reach a minimum level of intensity and the parties involved in the conflict must show a minimum organization.<sup>18</sup>
- » It is important to collect evidence of when an armed conflict began and ended, and for internal armed conflicts in particular, of the intensity and duration of the confrontation. Riots, social upheaval and policing operations do not generally amount to an internal armed conflict.
- » The protection against sexual violence under International Humanitarian Law (IHL) is not limited to members of the opposing armed forces, persons who are hors de combat, or civilians not directly participating in hostilities. Unlike other war crimes, there is therefore no need to prove that a victim of sexual violence was a civilian or other protected person. As long as the common elements for war crimes are satisfied (see Box 5), pursuant to the Rome Statute of the ICC, an act of sexual violence will always constitute a war crime regardless of the status of the victim. In particular, rape and sexual slavery committed against members of the same armed group, whether in situations of IACs or NIACs, can amount to war crimes under the Rome Statute.<sup>19</sup>

17 Gaggioli, G. (2014) 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law', *International Review of the Red Cross*, 96, 894: 511–313.

18 International Committee of the Red Cross (2008) *How is the Term 'Armed Conflict' Defined in International Humanitarian Law: Opinion Paper*. Geneva: ICRC. p. 5.

19 In *Prosecutor v. Bosco Ntaganda*, ICC Trial Chamber VI, 4 January 2017, the Chamber concluded that members of the same armed forces are not per se excluded as potential victims of the war crimes of rape and sexual slavery and that the court could therefore exercise jurisdiction over alleged acts of rape and/or sexual slavery committed by members of the Union of Congolese Patriots (UPC)/Patriotic Forces for the Liberation of Congo (FPLC) against UPC/FPLC child soldiers under the age of 15 years old. Similarly, the Justice and Peace Tribunal of Medellín held that the forced abortion of female combatants by their own armed group during the Colombian internal armed conflict amounted to a violation of their fundamental rights and a war crime; see case of Olimpo de Jesus Sanchez Caro of 16 December 2015, available in Spanish at: <http://www.saladepazmedellin.com/comunicadoprensa/c21/16.12.2015-sentencia-ejercito-revolucionario-guevarista-olimpodejesus-sanchez-caroyotros.pdf>.



*Riots, social upheaval and policing operations do not generally amount to an international armed conflict.*

Key considerations when documenting and investigating possible **crimes against humanity**:

- » Under the Rome Statute, crimes against humanity do not require a connection with armed conflict—they can take place in peacetime. However, it is common that war crimes and crimes against humanity are committed within the same or a similar context.
- » The act needs to be part of a widespread or systematic attack against a civilian population—it does not need to be part of both. The attack does not have to be armed or military, as long as it is widespread or systematic.<sup>20</sup> ‘Widespread’ is defined as large-scale, meaning that the attack is directed against a multiplicity of victims. The concept of ‘systematic’ means that the attack must follow a preconceived plan or policy.<sup>21</sup>
- » It is not the sexual violence itself that must be widespread or systematic in order for it to constitute a crime against humanity; it is the attack<sup>22</sup> on the civilian population. In fact, a single act of rape or other form of sexual violence can be a crime against humanity if it was committed as part of a widespread or systematic attack directed against a civilian population. That being said, evidence of large-scale sexual violence can also help prove the attack.
- » The Rome Statute also requires evidence that the attack must have been committed ‘pursuant to or in furtherance of a state or organisational policy’ to commit the attack.<sup>23</sup> This requirement may or may not be required by the jurisdiction in which the practitioner is gathering information; it is the responsibility of the practitioner to know what is legally required in the context in which s/he is gathering information, in order to be sure to gather sufficient information upon which to conclude that crimes against humanity may have been committed. Even when this is not a legal requirement in the relevant jurisdiction, evidence of a state or organizational policy may however be useful to gather, including to prove that the act was ‘directed’ against a civilian population.

20 ICC Elements of Crimes, Art 7, Introduction, para. 3.

21 Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes at <http://www.iccnw.org/documents/3rdSesProposalArticle7.pdf>.

22 Rome Statue Article 7 defines ‘attack’ in this context as a ‘course of conduct involving the multiple commission of acts’ which are crimes against humanity.

23 This requirement is not considered a common element of crimes against humanity under customary international law. The statutes of the ad hoc and hybrid tribunals do not contain this additional requirement. The inclusion of this requirement in the ICC elements of crimes against humanity limits those crimes against humanity which could be subject to ICC jurisdiction.



*...a single act of rape...can be a crime against humanity if it was committed as part of a widespread or systematic attack directed against a civilian population.*

Key considerations when documenting and investigating possible acts of **genocide**:

- » Genocide does not require a connection with armed conflict—it can take place in the absence of an armed conflict.
- » Genocide requires that particular underlying acts of genocide are committed with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. However serious the crime, many mass killings, sexual violence and other crimes cannot per se be considered genocide.
- » Genocide does not necessarily, or just, mean mass killings. Genocide can also be accomplished through rape and other forms of sexual violence as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such (e.g. rape and other forms of sexual violence make it less likely that members of a particular group reproduce and can therefore satisfy the specific intent element).
- » Sexual violence is generally found to be an underlying act of genocide through the element of ‘causing serious bodily or mental harm to members of the group’. Nevertheless, sexual violence can also amount to genocide through other elements. For instance, the element of ‘killing members of the group’ can be satisfied in respect of victims who are first raped and then killed or die as a result of sexual violence. In addition, sexual mutilation, sterilization, forced birth control, separation of sexes and prohibition of marriages can also be construed as ‘measures intended to prevent births’ within the target group or ‘conditions of life calculated to destroy the group’. Forced pregnancy through rape can also constitute genocide when the intent is for the victim to give birth to a child who will not belong to her/his mother’s group, and the kidnapping of children may fulfil the element of ‘forcibly transferring children from one group to another group’.
- » Direct and public incitement to commit genocide might also be a crime that urges sexual violence, and it is criminalized as such under customary international law and the Rome Statute (art. 25(3)(e)).<sup>24</sup>
- » Genocide is a crime against a group, even if it involves harming individuals.
- » Genocide requires that the perpetrator be in a very specific mental state while committing the crime: a specific intent to physically or biologically destroy a particular group. Genocide is not an easy crime to prove as it is often difficult to find evidence to prove the specific intent to destroy the particular group, in whole or in part.
- » Only national, ethnical, racial or religious groups are covered by the crime of genocide under international law (some national jurisdictions may have added other groups). The targeting of members of other groups on discriminatory grounds—such as gender, sexual orientation or political opinion, could still constitute the crime against humanity of persecution. The crime against humanity of extermination can also overlap with genocide which involves the killing of numerous people.

<sup>24</sup> Timmermann, W.K. (2005) ‘The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?’, *Leiden Journal of International Law*, 18, 2: 257–282.



*Genocide is a crime against a group, even if it involves harming individuals.*

## BOX 6



## Case law examples—sexual violence as genocide

The ICTR was the first international tribunal to recognize that rape and sexual violence can constitute genocide, in its landmark decision in *Prosecutor v. Akayesu* of 2 September 1998 (Case No ICT R 96-4-T). The ICTR found that ‘rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim... Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their and the destruction of the Tutsi group as a whole’ (para. 731).

At the domestic level, José Efraín Ríos Montt—the former President of the militia junta and of the Republic of Guatemala—was sentenced to 80 years in prison on 10 May 2013 on charges of genocide and crimes against humanity for his responsibility in the killing and torture of 1,771 Ixil indigenous people (a Mayan ethnic group) and the forced displacement of tens of thousands. The court confirmed in its judgement that the Ixil women suffered mass rape by soldiers, forced nudity, sexual slavery and violence against pregnant women who were not only raped but whose foetuses were frequently removed by cutting open their bellies, taking as evidence the testimony of women and of experts on international gender-based crimes. The court recognized sexual violence and gender-based violence as acts constituting the crime of genocide and found that ‘The physical appropriation of women through acts of violence, whether or not they are killed, constitutes an act that demoralizes both men and women, and constitutes one of the aspects that contributed to undermining the foundations of their identity and the physical reproduction of the members of the Ixil Maya ethnic group’<sup>25</sup>. This decision is the first in which a former head of state was sentenced for crimes of a sexual nature and gender-based violence as genocide and crimes against humanity, the first conviction for genocide in Guatemala and all of Latin America.

## (iii) PART C: Linkages elements/modes of liability

*‘Who is responsible and how?’*

The ‘modes of liability’ describes the legal theory applied to attribute criminal responsibility to the accused for the various crimes outlined above. The basic principle underlying this section is that as well as gathering information on the criminal act itself (Part A), and in addition to gathering information on the context in which that criminal act was committed (Part B), the documentation process must also aim to gather information regarding how the crime was allegedly committed and what the nature of the role of the alleged perpetrator(s) was in carrying out this criminal act of sexual violence.

25 See Women’s Link Worldwide, Gender and Justice Awards, Case: Ríos Montt, para. 72 available at: <http://womenslinkworldwide.org/premios/interna-caso.php?lis=1%24%24-42BLXMn2mtpPXMBVvgB&idi=en>. In April 2013, a Women’s Link Worldwide attorney took the stand, providing expert testimony on the ways in which women and girls were targeted by the Guatemalan military; see <https://vimeo.com/109211759>.

## Linkage Elements/Modes of Liability

To prove the below key modes of liability set out in the Rome Statute,<sup>26</sup> practitioners need to ensure that they gather sufficient information to demonstrate that:

Mode of Liability	Rome Statute Provision	Evidence Requirements
Co-perpetration	25 (3) (a)	The suspect formed a common plan with a group of people to commit crimes under international law. <sup>27</sup>
Common purpose liability	25 (3) (d)	The suspect contributes to a crime by a group of persons acting with a common purpose.
Indirect perpetration	25 (3) (a)	The suspect exercised control over the crime (e.g. by exercising control over the will of the direct perpetrator or an organised structure of power such as the police or military), intended the direct perpetrator to commit the crime and had awareness of the circumstances that enabled her/him to exercise control over the crime. <sup>28</sup>
Ordering	25 (3) (b)	The suspect had the authority to issue orders and expected them to be carried out, and their issuance played a substantially contributing role in the perpetration of the crimes or underlying offense.
Soliciting/ inducing	25 (3) (b)	The suspect encouraged, provoked, incentivised or convinced the direct perpetrator to commit the crimes.
Aiding and abetting	25 (3) (c)	The suspect provided to the direct perpetrator practical assistance (e.g. by providing means for the commission of the crime), encouragement or moral support.
Command responsibility <sup>29</sup>	28 (a)	The military commander had (i) effective control over subordinates, (ii) knew or should have known that the subordinates were committing crimes, (iii) failed to take reasonable measures to prevent or punish or submit to competent authorities to investigate and (iv) as a result the crime was committed.
Superior responsibility	28 (b)	(i) The superior and direct perpetrator were in a superior-subordinate relationship, (ii) the superior knew or consciously disregarded information which clearly indicated that subordinates were committing crimes, (iii) the crimes were activities within the effective responsibility and control of the superior, (iv) the superior failed to take all necessary and reasonable measures to prevent or submit to authorities for investigation and (v) as a result the crime was committed.

<sup>26</sup> Note that the modes of liability under customary international law are different and potentially wider than those codified in the Rome Statute. For instance, planning is an additional mode of liability under the Statutes of the ICTY, ICTR and SCSL, and instigation in these Statutes if the ICC does not interpret its Statute to include this mode of liability.

<sup>27</sup> The ad hoc tribunals have developed case law on co-perpetration under the theory of what has been called joint criminal enterprise or participation in a common plan or design. Some national courts and hybrid tribunals have applied this theory but others not.

<sup>28</sup> Note that some of the factual underpinnings of this mode of liability may also serve to prove other modes, such as command responsibility of military commanders pursuant to Art 28 (a).

<sup>29</sup> The Rome Statute and national laws inspired by it make a clear distinction between the responsibility of military commanders under the doctrine of 'command responsibility' and the responsibility of civilian superiors, which is somewhat more onerous than command responsibility.

Key considerations when documenting and investigating **modes of liability**:

- » The Rome Statute sets out modes of liability applicable to perpetrators being prosecuted at the ICC.<sup>30</sup> Practitioners should recall that the domestic legislation of a particular context in which they are working may set out very different modes of liability than those applied internationally. Some of the modes of liability under the Rome Statute set out in this Protocol may not exist at all domestically.
- » Under customary international law, it is possible to hold to account not just the direct perpetrator of sexual violence but also remote perpetrators who may not have been present at the crime scene or ever met the victim but committed through others, for example ordered, instigated, directly and publicly incited, aided or abetted by encouragement or through omission.
- » The Rome Statute provides for *direct responsibility* of the perpetrators who commit (directly, indirectly or as a co-perpetrator), order, solicit, induce, aid and abet or otherwise contribute to the commission (or attempted commission) of the crime by a group acting with a common purpose. Military commanders who knew or should have known that their subordinates were committing sexual violence and civilian superiors who knew or consciously disregarded information which clearly indicated that subordinates were committing crimes can also be held accountable on the basis of *command and superior responsibility* respectively, where they failed to take reasonable steps to prevent or punish the commission of such crimes.<sup>31</sup>
- » Most international courts and hybrid tribunals limit their jurisdiction or have a policy to prosecute only mid-level or high-ranking perpetrators or the most responsible individuals because of limited resources and time. This is in particular the case before the ICC.<sup>32</sup>
- » Whatever forms of criminal liability apply in the practitioners' relevant jurisdiction, it is crucial for them to document detailed information that could help prove a link to those responsible for the crime.

### Box 8



#### Case law example - command responsibility - Bemba case

On 21 March 2016, Jean-Pierre Bemba Gombo was found guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging), for crimes committed in the Central African Republic (CAR) between October 2002 and March 2003 by a contingent of *Mouvement de Libération du Congo* (MLC) troops.

In its judgement, the Trial Chamber convicted Mr. Bemba under Article 28(a) of the Rome Statute, as a person effectively acting as a military commander, who knew that the MLC forces under his effective authority and control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillaging. The Chamber found that these crimes were a result of Mr. Bemba's failure to exercise control properly. In terms of evidence it relied on, the Chamber noted, *inter alia*, that Mr. Bemba had consistent information of crimes committed by MLC soldiers in the CAR, over which he had ultimate, effective authority and control. Such authority extended to logistics, communications, military operations and strategy, and discipline. Although not physically present, Mr. Bemba maintained a constant, remote presence, requiring and receiving regular, if not daily, reports and affirmatively exercising his authority, including by taking the most important decisions, such as committing MLC troops to the CAR and withdrawing them. Mr. Bemba also visited the CAR on a number of occasions, including in November 2002 when he met with the MLC troops. He provided arms, ammunition, and reinforcements to his troops and the forces aligned with President Patassé<sup>33</sup>.

30 Note that the modes of liability under customary international law are potentially far wider than those codified in the Rome Statute.

31 In contexts where the direct perpetrator is dead, unknown or has fled to another country, command and superior responsibility may be the only way for victims to obtain justice for the crimes committed.

32 International Criminal Court (2014) *Policy Paper on Sexual and Gender-Based Crimes*. The Hague: ICC. Para. 13.

33 ICC TJ, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 21 March 2016.

## C. Factual Scenarios

As mentioned above, the same act of sexual violence can satisfy the substantive elements of various underlying crimes, and practitioners are encouraged to document both crimes which always involve sexual violence, such as rape, enforced pregnancy or sexual slavery, and other crimes which can be committed by sexual and non-sexual conduct, such as torture or murder.

The same act of sexual violence can also simultaneously satisfy the common elements of various categories of international crimes such as war crimes, crimes against humanity and/or genocide, depending on the background circumstances.

Below are examples of factual scenarios and the possible crimes they could amount to under the Rome Statute.

Fact scenarios/ Indicators <sup>34</sup> <i>Were the acts committed</i>	War crimes <i>in the context of and associated with an armed conflict</i>		Crimes against humanity <i>as part of a widespread or systematic attack against a civilian population</i>		Genocide <i>with the intent to destroy a specific group</i>
	War crimes of sexual violence	Other relevant war crimes	Crimes against humanity of sexual violence	Other relevant crimes against humanity	
Bodies of women are found in a village with their clothing removed, some with their legs apart	Rape? Other forms of sexual violence?	Murder? Torture? Outrages on personal dignity?	Rape? Other forms of sexual violence?	Murder? Torture? Other inhumane acts?	Killing members of the group? Preventing births within the group?
A boy child soldier assigned to a female commander who wants a baby is forced to have sex with her until she gets pregnant	Rape? Sexual slavery? Other forms of sexual violence?	Use of child soldiers? Outrages on personal dignity?	Rape? Sexual slavery? Other forms of sexual violence?	Imprisonment? Other inhumane acts?	
Male and female prisoners of war are photographed naked in humiliating positions	Other forms of sexual violence (forced nudity)?	Outrages on personal dignity?			
Two male prisoners of war are forced by their captors to perform oral sex on each other	Rape?	Torture? Outrages on personal dignity?	Rape?	Torture? Imprisonment? Other inhumane acts?	
A rebel soldier <sup>34</sup> under interrogation by police is tied to a chair while his penis and testicles are beaten with a knotted rope	Other forms of sexual violence?	Torture? Outrages on personal dignity?	Other forms of sexual violence?	Torture? Other inhumane acts?	

Fact scenarios/ Indicators <sup>34</sup>  <i>Were the acts committed</i>	War crimes <i>in the context of and associated with an armed conflict</i>		Crimes against humanity <i>as part of a widespread or systematic attack against a civilian population</i>		Genocide <i>with the intent to destroy a specific group</i>
	War crimes of sexual violence	Other relevant war crimes	Crimes against humanity of sex- ual violence	Other relevant crimes against humanity	
A militia group kidnap several groups of young girls from their schools in an occupied zone and takes them to a market to be sold as slaves	Sexual slavery?	Outrages on personal dignity?	Sexual slavery?  Forced marriage under other inhuman acts?	Enslavement?  Other inhumane act?	Causing serious bodily or mental harm to members of the group?
A female leader of an opposition party is being arrested with members of her party and told that if she does not confess to plotting a coup her young son will be raped in front of her		Torture?		Torture?  Persecution?	
A women in an occupied zone agrees to sleep with a senior commander to protect herself from lower-ranked troops	Rape?  Sexual slavery?  Other forms of sexual violence?	Outrages on personal dignity?	Rape?  Sexual slavery?  Other forms of sexual violence?	Other inhumane acts?	
All the inhabitants of villages occupied by an ethnic minority group are imprisoned. The men of military age are beaten and killed while the women and girls are given as 'wives' to members of the other ethnic group	Rape?  Sexual slavery?  Other forms of sexual violence?	Murder (men)?  Outrages on personal dignity (women)?	Rape?  Sexual slavery?  Other forms of sexual violence?	Murder (men)?  Persecution (women)?  Other inhumane acts?	Killing members of the group (men)?  Causing serious bodily or mental harm to members of the group/ Preventing births within the group (women)?

34 These factual scenarios are adapted from the IICI Training Materials on the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (2015).

35 UN Secretariat (2003) *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ST/SGB/2003/13, 9 October 2003.

## Sexual exploitation and abuse by peacekeepers

**Scenario example:** A teenage girl is given a mobile phone and clothes by peacekeeping troops in exchange for sexual favours.

Provided factual circumstances satisfy relevant legal requirements, sexual exploitation and abuse (SEA) by humanitarian actors, including peacekeepers, may amount to crimes against humanity or war crimes. The UN and Inter-Agency Standing Committee (IASC) standards of conduct on SEA prohibit in particular sexual relations with minors under 18 years of age and sexual relations in exchange for assistance, food, goods, services or money (often referred to as ‘transactional sex’).<sup>35</sup> Some of these acts may amount to crimes. In practice these offenses are often left unpunished or only occasionally prosecuted at the domestic level by troop-contributing countries (TCCs). According to the UN Model Memorandum of Understanding with TCCs, TCCs have the exclusive responsibility to discipline and criminally sanction their military contingents. TCC’s commitment is therefore extremely important for accountability purposes and the UN has called on them to hold courts martial in host countries as a measure of visible accountability. It is also important for Member States to finalise an international convention to ensure accountability of UN civilian personnel and personnel with the legal status of experts on mission such as UN Police Officers and UN Military Observers in connection with crimes committed in peacekeeping operations.<sup>36</sup>

The UN continuously strive to improve and strengthen its zero-tolerance policy on SEA, including the establishment in 2016 of a Special Coordinator on Improving the United Nations Response to SEA<sup>37</sup> and the creation of a high-level task force to develop a strategy to strengthen the UN response to SEA.<sup>38</sup>

Efforts to document SEA by peacekeepers, whether by UN actors or external actors, may be useful for promoting accountability efforts in the national jurisdiction of the individual involved, before the ICC or other international tribunal which may eventually be set up for that purpose.<sup>39</sup>

<sup>36</sup> The UN Secretariat, *Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ST/SGB/2003/13, 9 October 2003, defines ‘sexual exploitation’ as ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’; and the term ‘sexual abuse’ as ‘the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’.

<sup>37</sup> de Brouwer, Anne-Marie, ‘Combating Sexual Exploitation and Abuse in Peace Operations’ in Terry Gill, Dieter Fleck and Bill Boothby (ed.), *Manual of International Law Applicable to Peace Operations* (The Hague) (forthcoming 2017).

<sup>38</sup> UN News Centre, ‘Seasoned Official Appointed to Coordinate UN Efforts to Curb Sexual Abuse by Peacekeepers’, (8 Feb. 2016).

<sup>39</sup> UN News Centre, ‘New task force to develop strategy to strengthen UN response to sexual exploitation and abuse’, (6 Jan. 2017).

<sup>40</sup> See UN Women, ‘Preventing Conflict, Transforming Justice, Security the Peace : A Global Study on the Implementation of United Nations Security Council 1325’ (New York, NY, 2015), for thoughts on setting up an International Tribunal for SEA by UN peacekeepers and staff; O’Brien, Melanie, ‘Sexual Exploitation and Beyond : Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes’, *International Criminal Law Review*, 11 (2011), 803–827.

## D. Rules of Procedure and Evidence

Rules of procedure and evidence (RPE) can be used as tools for protecting victims and other witnesses. Each jurisdiction is different and each court will have different RPE. The evidence required to prove a crime beyond reasonable doubt in a criminal prosecution at a national court is often rigid, detailed and of high threshold. Despite also applying high evidentiary thresholds, international courts and tribunals have on the other hand generally adopted a more liberal approach to the issue of admissibility of evidence: in the absence or even destruction of documentary evidence, they tend to rely on the evidence of witness testimony and to admit practically any evidence that has probative value, including open source information, NGO or UN reports—although the weight attached to various types of evidence may be different.

In addition, the ICC<sup>41</sup> and other international tribunals<sup>42</sup> and courts have established rules and mechanisms to protect victims/witnesses during their testimony and to address the issues of:

1. consent
2. corroboration
3. prior and subsequent sexual conduct
4. other protective measures.

These rules are designed to protect victims/witnesses from added trauma and take into consideration the particular nature of sexual violence crimes, including the inherently coercive circumstances in which they are committed. They have been developed to protect victims from irrelevant, overtly aggressive and humiliating methods of questioning.

Practitioners can use this section as a resource to advocate for the adoption of similar rules to improve victims/witnesses participation in the justice process, their protection while testifying in court and

accountability for sexual violence crimes domestically. It is also hoped that these suggestions may inspire the application of creative solutions to existing applicable rules on the part of national prosecutors and judges for victims/witnesses testifying in court.

International criminal practice has in place the following RPE:<sup>43</sup>

### 1. Consent

In domestic contexts, victims of crimes of sexual violence are often obliged to demonstrate to the court that they did not consent to the sexual act. In international criminal practice, the jurisprudence has developed to protect victim from questions relating to consent: the emphasis has shifted away from having to prove an absence of consent towards instead proving the presence of **coercive circumstances**. Genuine consent under circumstances of mass violence, duress, detention, threats and coercion is viewed as being essentially impossible. In addition, coercion may be inherent in certain circumstances, such as detention, armed conflict or military presence, or in crimes committed against persons incapable of genuine consent, such as a child or persons with intellectual or other cognitive disability.

Under international criminal practice, once sufficient evidence of the coercive circumstances which made consent impossible has been provided, there is no need to elicit further specific evidence from the victim to prove an absence of consent, such as questions about whether the victim physically resisted the perpetrator.<sup>44</sup>

41 Gopalan, P., Kravetz, D., Menon, A. (2016) 'Proving Crimes of Sexual Violence', in B.S. Brammertz and M. Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* Oxford: Oxford University University. 111–167.

42 See ICTY/ICTR RPE 96; Gopalan, Priya, Kravetz, D., Menon, A., 'Proving Crimes of Sexual Violence', in Brammertz, Baron Serge and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford, 2016), 111–167.

43 These concepts are reflected in various ways in the RPE of the ICC, ad hoc and hybrid tribunals. This section of the Protocol sets out the concepts in general terms without specific reference to a particular jurisdiction.

44 See, for instance, ICC TJ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3343, 21 March 2016, para. 105-106 : 'The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice. Therefore, where "force", "threat of force or coercion", or "taking advantage of coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent.'

## BOX 10

## No consent under coercive circumstances

To be in line with international standards,<sup>44</sup> domestic RPE for sexual violence cases as a crime under international law should in particular provide that:

- » Prosecutors don't need to provide evidence of force or threat of force to prove an absence of consent.<sup>45</sup>
- » Sufficient evidence proving the presence of coercive circumstances negates genuine consent.
- » Silence or lack of physical resistance by the victim does not denote consent.
- » No questions regarding consent may be asked of the victim/witness unless the court holds a closed session in which it gives prior express permission after considering the arguments of the parties and such questioning is conducted in a closed session hearing.

Practitioners—particularly prosecutors and victim counsel—must be ready with evidence and arguments concerning the existence of coercive circumstances in response to possible defence requests for the introduction of consent evidence.



## Case law examples

The ICTR noted that '*coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence...*' (*Prosecutor v. Jean-Paul Akayesu* (1998) para. 688).

The ICTY further held that '*force is not an element per se of rape*', and a '*narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force*'. In relation to the rape of women in de facto military headquarters, detention centres and apartments maintained as soldiers' residence, the Appeal Chamber held that '*such detentions amount to circumstances that were so coercive as to negate any possibility of consent*' (*Prosecutor v. Dragoljub Kunarac, Radomir Kova and Zoran Vukovic* (2002) para. 129-133).

<sup>45</sup> See, for instance, ICC RPE 70-72; ICTY/ICTR RPE 96.

<sup>46</sup> Lack of consent is not an element of rape as a crime against humanity or as a war crime under the Rome Statute (Art 7 (1) (g) and Art 8 (2) (b)(xxii) respectively). Proof of non-consent formally remains an element of rape as interpreted by the ad hoc tribunals but this element can be satisfied by proof of coercive circumstances.

## *Genuine consent under circumstances of mass violence, duress, detention, threats and coercion is viewed as being essentially impossible*

### 2. Corroboration

Under principles of international criminal procedure, no corroboration is required in cases of sexual violence. What this means in practice is that—provided it is credible and reliable—a victim’s own testimony can be sufficient evidence of the commission of a crime of sexual violence, in the absence of any other corroboration from witnesses, documents, medical reports, photos, or any other potentially corroborative evidence.<sup>47</sup> In practice, corroboration can strengthen a case, of course, but the absence of corroboration does not mean that the evidence on which to base charges or indeed a conviction will be insufficient.

However, this may often mean that the victim’s credibility is challenged on cross-examination in an attempt to discredit her/his testimony. Practitioners should be aware of international and national case law that sets out that victim testimony is not inherently less credible and that corroboration is not required to establish credibility.

#### BOX 11



#### Case law example—Habré judgement

On 30 May 2016, the former president of Chad, Hissène Habré, was convicted and sentenced to life in prison by the Extraordinary African Chambers in the Senegalese Courts for war crimes and crimes against humanity committed in Chad between 1982 and 1990. In particular, he was found guilty of torture as a standalone crime and as a crime against humanity as well as rape and sexual slavery as crimes against humanity in relation to the rape of female detainees by prison guards and soldiers, which the Chambers considered as being a foreseeable consequence of the joint criminal enterprise of which Habré was a member. Habré was also found guilty of personally raping Khadija Hassan Zidane based solely on her testimony. The Chamber analysed the victim’s credibility in a gender sensitive manner, considering in particular that although the victim’s testimony had somewhat evolved over time, *‘the reasons justifying this evolution are satisfactory and do not affect her credibility’* (para 733). The Chambers further considered that the *‘inaccuracies or omissions in Khadija Hassan Zidane’s testimony are only due to difficulties to remember in court facts that she tried to forget in order to survive in a context particularly difficult and hostile toward women victim of sexual violence’* (para 734).

*Prosecutor v. Habré*, Extraordinary African Chambers in the Courts of Senegal, 30 May 2016 (in particular para 719-736 and para 1577-1582)

<sup>47</sup> Note that the ICC RPE explicitly state that no corroboration is required for any crime being prosecuted under the Rome Statute. In the Bemba case, supra note 44, para. 245, the Chamber held that: *‘Rule 63(4) prohibits the Chamber from “impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence”. The extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence. The Appeals Chamber found that “[d]epending on the circumstances, a single piece of evidence [...] may suffice to establish a specific fact. However, [...] this does not mean that any piece of evidence provides a sufficient evidentiary basis for a factual finding”. The Chamber agrees with this approach’.*

### 3. Prior and Subsequent Sexual Conduct

Most international criminal tribunals prohibit questions relating to the prior sexual conduct of the victim. The ICC RPE also prohibit questioning on subsequent sexual conduct. These questions can be particularly humiliating and, in the context of war crimes, crimes against humanity and acts of genocide, are viewed as being irrelevant and incongruous. The relevant questions concern the surrounding circumstances and whether or not they allowed for the victim to freely consent to sexual acts with the alleged perpetrator in the specific instance.

Questions about prior or subsequent sexual conduct are irrelevant as each sexual act must be agreed to independently, and such questions do not provide any information regarding consent at the time the alleged crime was committed. They are based on patriarchal gender stereotypes that women and girls who consent to sex in a variety of contexts are more likely to have agreed to sex with the alleged perpetrator in the instant case. These questions are used as a method of undermining the credibility of victims—both to say that they are liars (i.e. having agreed to sex in a number of cases, they are likely to have agreed to sex in the case at hand) but also that women and girls who tend to have sex with a number of partners are less dignified and worthy of respect than women and girls who only have sex with a spouse or partner.

#### Box 12

#### Virginity of the victim and ‘virginty tests’

Questions such as ‘are you/were you a virgin?’ should not be permitted as they can be distressing for victims and are irrelevant to proving or disproving the alleged crimes. Generally speaking, the introduction of any evidence on this issue should be prohibited, unless the victim agrees that this issue is relevant for her to reflect the physical, mental and social impact of the crime. Practitioners can look at international practice as a basis for advocating for procedures precluding such questions.

Gynaecological examinations to prove either the ‘virginity’ of a girl or woman or that she was accustomed to sexual intercourse are common in certain jurisdictions. The World Health Organisation<sup>48</sup> and Independent Forensic Expert Group<sup>49</sup> have condemned these tests as ‘*degrading, discriminatory and unscientific*’. In addition to being profoundly psychologically humiliating, and physically very painful, their administration constitutes a form of discrimination, which is unlawful under the Convention on the Elimination of All Forms of Discrimination against Women and other standards. Forcing a girl or woman to undergo such a procedure as a requirement of the criminal justice system is a serious human rights violation.<sup>50</sup> When committed forcibly and involving vaginal penetration (known as the ‘two finger test’), it may amount to rape and torture and engage state responsibility. Even a visual examination can be psychologically painful and humiliating, amounting to degrading treatment for which states may be held responsible (see in particular Art 1 and 16 of the UN Torture Convention).

48 World Health Organisation (2014) *Healthcare for Women Subjected to Intimate Partner Violence and Sexual Violence, A Clinical Handbook*. Geneva: WHO.

49 Independent Forensic Expert Group (2015) ‘Statement on Virginity Testing’, *Journal of Forensic Legal Medicine*, 33, 121-124.

50 Gormley, L. (2016) *Women’s Access to Justice for Gender-Based Violence, A Practitioner’s Guide*, International Commission of Jurists, Practitioner’s Guide N°12, 239–240.

## 4. Other Protective Measures

Victims (or their families and close associates) should never be exposed to risk of retaliation or re-traumatization<sup>51</sup> as a consequence of their cooperation as a witness.

### Box 13

#### Examples of protective measures

Each judicial system should have protective measures available for victims/witnesses. Such measures may include the following:

##### *Structural*

- » fair representation of men and women in the judiciary structure
- » staff with trauma expertise, including trauma related to sexual violence crimes
- » staff with legal expertise on investigations and prosecutions of gender crimes
- » staff with expertise in dealing with child victims and witnesses.

##### *Physical/out-of-court witness protection*

- » secure witness transport and/or accommodation during testimony, interviews or otherwise ensure safe contact environment
- » ensure safety of witness's home (e.g. outer walls, gates or guards)
- » witness relocation programmes (only as a last resort solution).

##### *Procedural/in-court witness protection*

- » closing hearings to the public
- » remote testifying, for example by video link
- » testifying under pseudonym<sup>52</sup>
- » testifying using voice and image distortion, or use of screens/curtains where technological measures are not available
- » separate entrance and waiting areas for witnesses of the defence and prosecution
- » delayed transmission (of television proceedings)
- » right to be represented by a lawyer.

##### *Witness support, for instance through specific victim/witness unit, prior, during and after trial*

- » free legal advice about the rights and duties of witnesses
  - » explanation about the testifying process by a neutral party and visit to the courtroom before testimony
  - » sufficient notice and time to prepare for testimony
  - » counselling
  - » administrative support with logistics, for example translation, travel and claiming of expenses
  - » providing for a 'companion' to accompany the witness throughout the trial process as an additional support
- It is for the practitioner to explore the scope of these measures and to advocate for their broadening for victims/witnesses of these types of crimes.

51 Recalling the details of the crimes may result in emotional and psychological stress after the testimony, including 'flashbacks', which cannot always be avoided and it is therefore essential to ensure that victims get appropriate support before, during and after testimony.

52 This means obtaining a judicial order to ensure that the pseudonym of the victim/witness will be used in all contexts before, during and after trial, and that the name of the victim/witness may not be used.

## CHAPTER 5: State Responsibility

## Chapter 5 Contents

CHAPTER 5: <b>State Responsibility</b> .....	<b>65</b>
<b>A. Introduction</b> .....	<b>65</b>
<b>BOX 1</b> .....	<b>66</b>
Categories of Conducts Giving Rise to State Responsibility .....	66
<b>B. Actions and Omissions giving rise to State Responsibility</b> .....	<b>66</b>
<b>BOX 2</b> .....	<b>68</b>
Case law example—COHRE v. Sudan: obligation to prevent, investigate and prosecute sexual violence under state's due diligence responsibility .....	68
<b>BOX 3</b> .....	<b>69</b>
Challenging Legal and Procedural Obstacles Denying Victims Access to Justice .....	69
<b>C. Categories of Elements of Human Rights Violations</b> .....	<b>70</b>
1. 'Which rights were violated?' .....	70
2. 'How is the state responsible?' .....	71
<b>BOX 4</b> .....	<b>72</b>
Rape as a Form of Torture or Other Ill-Treatment .....	72
<b>BOX 5</b> .....	<b>73</b>
Case law examples - rape as a form of torture or other ill-treatment.....	73

# CHAPTER 5: State Responsibility

## A. Introduction

IHRL lays down obligations which states are bound to respect and may engage their responsibility.<sup>1</sup> When they ratify or accede to international human rights treaties, states undertake to **respect, protect and fulfil** the rights provisions contained in such treaties. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of human rights.<sup>2</sup>

Human rights guaranteed under international law can be the basis of challenge and reparation at the domestic level when states do not comply with their obligations. Where domestic legal proceedings fail to address human rights violations, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are respected, implemented and enforced at the domestic level.

As such, states can be held responsible:

- (i) for their **own actions or omissions and for the actions or omissions of persons** or groups of persons acting with their authorisation, acquiescence or support
- (ii) under their **due diligence responsibility for failure to prevent, protect and respond** appropriately to violations committed by state and non-state actors where the state knew or should have known about their actions.

Both types of responsibility can arise in the context of conflict or during peacetime.

Depending on the context and factual circumstances, victims of sexual violence may consider filing a case against the state responsible claiming:

- » **At the domestic level:** the violation of their fundamental rights guaranteed under the constitution or other national laws, as well as international treaties when these are directly applicable in domestic law. When domestic legislation is at odds with international standards, provisions of international human rights treaties to which the relevant state is a party and their interpretation—in particular through case law—may also be helpful to fill the gaps and establish what rights victims are entitled to or to help interpret domestic provisions.
- » **At the regional/international level:** the violation of the fundamental rights guaranteed under the human rights treaty for which the relevant human rights court, commission or committee is responsible, provided—amongst others—that the relevant state has explicitly accepted the competence of such mechanism and that all admissibility criteria are met; in particular, the previous exhaustion of domestic remedies, which is a key requirement in most cases, unless special circumstances or exceptions apply (see Chapter 3: Accountability Avenues and Remedies).

<sup>1</sup> States' responsibility is not of a criminal nature.

<sup>2</sup> Gormley, L. (2016) *Women's Access to Justice for Gender-Based Violence, A Practitioner's Guide*, International Commission of Jurists, Practitioner's Guide N°12, p. 50.

### Categories of Conducts Giving Rise to State Responsibility

Sexual violence crimes may give rise to a violation of international human rights law where:

*State responsibility in relation to the act:*

- » state agents commit these crimes
- » these crimes are committed by persons or groups of persons acting with the state's authorisation, acquiescence or support
- » states fail to prevent the commission of these crimes by non-state actors.

*State responsibility in relation to the response (non-exhaustive list):*

- » states fail to conduct prompt, effective, independent, impartial, thorough and gender-sensitive investigations
- » states fail to prosecute and appropriately sanction those responsible so as to reflect the gravity of these crimes
- » states fail to provide an effective and adequate remedy including gender-sensitive reparations to victims, including when these crimes are committed by non-state actors
- » states fail to ensure access to health care for the victim, including emergency sexual and reproductive health goods and services, in relation to the needs arising from sexual violence
- » states contribute to further victimization of the victim during legal proceedings
- » states contribute to discrimination, including multiple and intersecting forms of discrimination, against the victim in different settings (e.g. in education, at work, in the family and community and in access to social services)
- » states fail to provide information about the timeframe and progress of the investigation to victims or otherwise deny them their right to effectively participate in the investigation
- » states fail to include victims in the design, implementation, monitoring and evaluation of reparations.

States can be held to account using the tools and mechanisms of human rights frameworks, including domestic constitutional courts, UN treaty monitoring bodies and the European, African and Inter-American human rights systems (see Chapter 3: Accountability Avenues and Remedies).

## B. Actions and Omissions giving rise to State Responsibility

Sexual violence is prohibited by a number of international human rights instruments, primarily as a violation of the right to physical and mental integrity and as a form of torture and cruel, inhuman or degrading treatment.<sup>3</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasises that sexual violence is a form of gender-based violence and a manifestation of structural discrimination against women and girls, which is deeply rooted in harmful gender stereotypes and impairs or nullifies the enjoyment by women and girls of human rights and fundamental freedoms.<sup>4</sup> The CRC—which has been ratified by all states except the United States—expressly provides that states must protect children from all forms of sexual exploitation and sexual abuse, including through the adoption of appropriate legislative, administrative, social and educational measures.<sup>5</sup> At the regional level, the Convention of Belem do Para<sup>6</sup> in the Inter-American human rights system, several instruments in the African system<sup>7</sup> and the Istanbul Con-

3 See, for instance, the ICCPR, 1966; ECHR, 1950; ACHR, Pact of San Jose, Costa Rica, 1969; Banjul Charter, 1981.

4 UN Committee on the Elimination of Discrimination Against Women (1992) *CEDAW General Recommendation No. 19: Violence against women*. New York: CEDAW. Paras 7, 9, 24(a).

5 The CRC, 1989, Art 19 (1) and 34.

6 The Convention of Belem do Para, 1994 (Art 1-3).

7 See, for instance, the Maputo Protocol, 2003, (Art 3(4), 4(2), 11(3), 12(1)(c)(d), 13(c), 14(2)(c), 22(b), 23(b)).

vention<sup>8</sup> in the European system explicitly prohibit ‘violence against women’ which includes, in particular, sexual violence.

In addition, sexual violence may give rise to violations of other *substantive rights* as well as *procedural rights* engaging state responsibility (see below for further details).

A non-exhaustive list of forms of sexual violence, conducts and situations which may engage state responsibility includes:<sup>9</sup>

*State responsibility in relation to the act:*

- » rape and sexual violence by government officials (military, police, etc.)<sup>10</sup>
- » intrusive physical examinations by prison staff, such as supervision of naked women by male guards and body cavity searches (e.g. digital vaginal ‘inspections’)<sup>11</sup>
- » forced sterilization
- » rape and sexual violence by persons or groups of persons acting on the instructions or under the control of the state, such as private military or security agents contracted by the state to run prisons or conduct security or military operations
- » rape and sexual violence by non-state actors, including private persons and militia groups, if the state failed to act with due diligence under its duty to protect persons under its jurisdiction.<sup>12</sup> States have indeed a positive obligation to prevent such acts. State responsibility may be engaged for instance where the police or army fails to take action to protect individuals known to be at risk of violence or because of a general environment which allowed such pattern of violence to happen.

*State responsibility in relation to the response:*

- » where a violation or abuse has occurred, failure by the state to exercise due diligence and comply with its duty to promptly, effectively, independently, impartially and thoroughly investigate, prosecute and punish sexual violence crimes (whether committed by government officials or non-state actors).<sup>13</sup> In case of gross human rights violations, including torture and rape, the investigation must be carried out ex officio, without the victim having to launch a complaint.<sup>14</sup> Moreover, it must be conducted in a gender and age-sensitive manner with due regard to confidentiality and be aimed at identifying those responsible, prosecuting and punishing the perpetrators appropriately, providing effective remedies and reparation to the victims and enabling them to participate effectively in the

8 The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, (adopted 11 May 2011, entry into force 1 August 2014) CETS No 210 (Istanbul Convention) (Art 2-4).

9 For a non-exhaustive list of relevant case law from the ECtHR, please refer to the rape and sexual abuse section of the ‘Violence Against Women’ factsheet, June 2016, [http://echr.coe.int/Documents/FS\\_Violence\\_Woman\\_ENG.pdf](http://echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf).

10 See for instance IACHR, *Raquel Martin de Mejia v. Peru*, Case 10.970, Report No 5/96, 1 March 1996 (rape of human rights defender’s wife by military); IACtHR, *Rosendo Cantu v. Mexico*, 31 August 2010 (rape of an indigenous girl by military in a militarised area); HRC, *Fatima Mehalli v. Algeria*, CCPR/C/110/D/1900/2009, 21 March 2014 (rape with a stick by police of a woman in detention during the Algerian civil war).

11 See, for instance, IACHR, *X v. Argentina*, Case 10.506, Report No 38/96, 15 October 1996 (vaginal inspection of female visitors to prison, X and her 13 years old daughter Y).

12 See, for instance, ACHPR, *Egyptian Initiative for Personal Rights & Interights v. Egypt*, Communication 323/06, 16 December 2011 (sexual harassment of female journalists by police and private individuals during protest).

13 See, for instance, IACtHR, *Gonzalez et al. (‘Cotton Field’) v. Mexico*, Judgement of 16 November 2009 (failure to effectively investigate, prosecute and prevent the rape and killing of three women).

14 See, for instance, IACtHR, *Espinosa Gonzales v. Peru*, Judgement of November 20, 2014, para. 241 (rape and other acts constituting torture in detention by police and failure to diligently investigate the crimes); ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, 15 May 2006, para. 70 (rape and other forms of widespread violence after elections).

- investigation.<sup>15</sup> Non-compliance with these obligations by a state may give rise to separate procedural violations
- » domestic definitions of rape at odds with international standards denying victims' access to justice such as a proof of use of force, physical resistance by the victim<sup>16</sup> or the exclusion of men as victims
  - » Re-victimisation of the victim during proceedings amounting to separate prohibited ill-treatment such as discriminatory rules of procedures or 'rape myths'.<sup>17</sup>

**BOX 2**
**Case law example—COHRE v. Sudan: obligation to prevent, investigate and prosecute sexual violence under state's due diligence responsibility**

Following the emergence of an armed conflict in the Darfur region of Sudan in 2003, militiamen known as *Janjaweed* have engaged in forcibly evicting, killing and raping thousands of black indigenous people in that region. Following a petition, the African Commission held the Republic of Sudan in violation of several articles of the African Charter on Human and Peoples' Rights, particularly Articles 4 and 5. It found that Sudan failed to prevent mass scale torture, rape and other gross violations of human rights in the Darfur region and further, failed to effectively investigate and prosecute them (ACHPR, Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan (2005)).

<sup>15</sup> See, for instance, IACtHR, *J. v. Peru*, Judgement of November 27, 2013, para. 393-408 (torture and sexual abuse of woman detainee, failure to diligently investigate the crimes and provide integral reparation, including rehabilitation, satisfaction and guarantees of non-repetition); ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgement of 13 December 2012, para. 185 (rape—sodomy with an object—and other ill-treatment of male detainee by state officials).

<sup>16</sup> See, for instance, ECtHR, *M.C. v. Bulgaria*, App. No 39272/98, 4 December 2003, para. 180-182 (acquittal for non-conflict-related rape because victim did not resist violates due diligence obligations; force is not an element of rape under international law and coercive circumstances negate consent).

<sup>17</sup> See, for instance, CEDAW, *Karen Tayag Vertido v. The Philippines*, Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008, 22 September 2010 (gender stereotyping in rape trial).

## BOX 3

## Challenging Legal and Procedural Obstacles Denying Victims Access to Justice

It is not uncommon for domestic legislation to contain provisions or procedures which de facto promote impunity and prevent victims of CARSV from accessing justice, such as:

- » laws criminalising adultery even where the act was non-consensual, meaning that the victim may end up facing charges
- » laws only recognising women and girls as victims and/or where the victim of a non-consensual same sex act could be criminalised, making justice for male victims practically impossible
- » evidentiary hurdles, such as the ‘four male witness rule’<sup>18</sup> to prove rape, which makes conviction almost impossible unless the perpetrator confesses to the crime
- » lack of programmes and/or procedural rules aimed at providing protection to victims of sexual violence and avoiding re-traumatisation
- » amnesties
- » statutes of limitation<sup>19</sup>
- » immunities for officials accused of sexual violence
- » procedural obstacles to reparations, including lack of sensitivity to the differential experiences of women, men, girls and boys, and expertise in engaging with traumatised victims.

Such legal obstacles can be challenged and may engage the responsibility of states, in particular in relation to their procedural obligations and/or victims’ right to a remedy, under various human rights instruments ratified or acceded to.

18 In certain countries applying Sharia law, unless the accused confesses, a female alleging rape is required to produce four male eye-witnesses to prove that she was raped.

19 Statutes of limitation are laws that set a timeframe within which legal proceedings must be initiated. See, for instance, UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 of 16 December 2005, IV, ‘Statutes of Limitations’, principles 6-7.

## C. Categories of Elements of Human Rights Violations

The legal framework applicable for each human rights mechanism will be different and determine the specific rights whose violation may be argued and the elements to establish in order to prove that the state violated those rights. Practitioners need to gather evidence to prove the following elements:<sup>20</sup>

### 1. 'Which rights were violated?'

Sexual violence may give rise to violations of a multitude of rights. Substantive and procedural violations can arise at the same time out of the substantive and procedural limbs of certain rights<sup>21</sup>.

#### Substantive violations

Substantive violations are violations of the substantive component of a right. For instance, the right to physical integrity; personal security; liberty; life; family life; the prohibition of torture and ill-treatment; the right to health; non-discrimination; equal protection under the law; the right to an effective remedy and reparation (see Box 4: 'Rape as a form of torture or other ill-treatment' and Chapter 6: Reparations).

#### Procedural violations

Certain rights encompass procedural components linked to their justiciability and procedural violations are violations of the procedural aspects needed to exercise a right. Violations of procedural rights can play a role in assessing alleged violations of substantial rights and may also give rise to independent procedural violations, regardless of whether any substantive rights have been violated.

For instance, the right to an effective remedy encompasses both a substantial right to reparations and procedural rights necessary to access reparations, such as the right to information about a reparation mechanism whose violation may prevent victims from accessing their substantive right to reparations. Separately, the failure by the state to exercise due diligence and comply with its duty to promptly, effectively, independently, impartially and thoroughly investigate sexual violence crimes (whether committed by government officials or non-state actors) may give rise to independent procedural violations.

Practitioners should gather information, as relevant, to demonstrate the following:

- (i) **That a particular act of sexual violence was committed** corresponding to information gathered to prove 'What happened' and 'What was the context' for criminal responsibility (Chapter 4: Individual Criminal Responsibility).
- (ii) **That such act resulted in the violation of a number of rights** (e.g. prohibition of torture and ill-treatment, right to non-discrimination, personal liberty, privacy, health, family life, education, work, effective remedy and reparation etc.). This requires gathering information satisfying the elements of each right whose violation can be argued based on the factual circumstances. For instance, to prove that an act of sexual violence violated the prohibition of torture under the UN Torture Convention the following elements need to be proven:<sup>22</sup>
  - » the act inflicted severe pain or suffering, whether physical or mental
  - » the act was intentional
  - » the suffering was inflicted for a specific purpose (e.g. confession, punishment, coercion, discrimination)
  - » the act was committed by or with the involvement or acquiescence of a public official or person acting in an

<sup>20</sup> Redress (2013) *Redress for Rape: Using International Jurisprudence on Rape as a Form of Torture or Other Ill-treatment*. London: Redress. 45–100.

<sup>21</sup> The distinction between substantive and procedural rights is of a pragmatic nature with a certain level of approximation and overlap in some cases. It is meant to help practitioners keep in mind the procedural aspects of rights and related violations.

<sup>22</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Art 1.

official capacity.

Another example of a violation resulting from sexual violence could be discrimination in education. This may occur, for instance, when sexual violence results in a pregnancy and victims are students that end up being excluded from educational establishments because they are pregnant. To prove this violation, practitioners need to prove:

- » That sexual violence resulted in a pregnancy;
  - » That the victim was attending some form of education, including vocational training;
  - » That she was excluded from such education;
  - » That the exclusion was de facto or de jure linked to her pregnancy.<sup>23</sup>
- (iii) The physical, mental and socio-economic harm caused to the victim to substantiate a claim. Thoroughly documenting the harm caused to the victim can support the claim that the failure by the state to comply with its procedural obligations caused harm to the victim and amounts in itself to a human rights violation.

## 2. 'How is the state responsible?'

Practitioners will also need to gather information to establish:

- (iv) **The potential actions or omissions of the state and/or non-state actors** (if relevant) responsible for the sexual violence or other violations. Such information is necessary to establish which category/ies of conducts (listed in Box 1) may implicate state responsibility in the case at hand.
- (v) **Whether the state complied with its positive obligations** to prevent sexual violence and violations related to it, including investigating, prosecuting and sanctioning sexual violence crimes, and providing reparation to the victim. Practitioners will need to find out, amongst others, whether

or not the state has:

- » taken appropriate measures aimed at protecting the victim (e.g. ensured that a detainee known to have been sexually tortured is not left in the hands of her/his torturers)
- » promptly initiated a criminal investigation
- » diligently conducted the investigation of the case
- » provided information to the victims about the progress of the investigation and allowed them to participate effectively in such investigation
- » issued a judgement reflecting the gravity of the crime
- » provided adequate reparation (see Chapter 6: Reparations)
- » ensured access to health care, including sexual and reproductive health goods and services
- » taken measures to prevent or remedy discrimination against victims, including in education and at work.

Where possible, practitioners need to gather evidence showing that the state had been informed that sexual violence occurred (e.g. media reports, UN reports) and nevertheless did not comply—or not timely or diligently enough—with its obligations of prevention and response, in particular by initiating an investigation ex officio. In order to strengthen a case, practitioners are also encouraged to gather evidence showing that the victim has been proactive in seeking justice, for instance by contacting or providing information to investigative authorities, which should have triggered an investigation.

If an investigation has been initiated but not effectively and adequately conducted, or the case was closed, or the victim or her/his family or the alleged suspects were never interviewed, or the crimes left unpunished, or punished so minimally as to be an evasion of the law, or the victim never received adequate reparation, or the state did not take appro-

<sup>23</sup> Please note that excluding pregnant girls or women from education is a human rights violation regardless of whether the pregnancy is a result or not of sexual violence. In this example, the link between sexual violence and pregnancy is relevant when practitioners need to prove other violations resulting from sexual violence.



*...rape and other forms of sexual violence can be considered as a particularly grave form of torture.*

appropriate measures to prevent the sexual violence crimes to occur, these actions and omissions may engage state responsibility.

Evidence collected to prove how the state is responsible corresponds to information gathered to establish 'Who is responsible and how' for criminal responsibility (Chapter 4: Individual Criminal Responsibility).

#### BOX 4

### Rape as a Form of Torture or Other Ill-Treatment<sup>24</sup>

#### Key to note

- » Whether in conflict or peacetime, there is a clear and absolute prohibition of both torture and cruel, inhuman or degrading treatment or punishment ('other ill-treatment') in international human rights law, international humanitarian and international criminal law, which is binding on all states as a matter of international customary law.
- » For an act to amount to prohibited ill-treatment it must generally reach a minimum level of severity. It is clear from case law that rape—whether committed by a state or non-state actor, amounts to prohibited ill-treatment per se and triggers obligations on states under international human rights law to use due diligence to prevent and respond to it.
- » Torture is one form of prohibited ill-treatment. Different bodies have different approaches to what distinguishes torture from other ill-treatments. It is however generally accepted that torture involves:
  - (i) the infliction of severe pain and suffering, whether physical or mental
  - (ii) that such act be intentional
  - (iii) that such suffering be inflicted for a specific purpose (e.g. interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender).<sup>25</sup>

For various bodies, torture also requires the involvement or acquiescence of a public official, as set out in the definition of the UN Torture Convention and Inter-American Convention to Prevent and Punish Torture. This is however not a requirement under customary international law and various domestic criminal codes.

When committed by state agents or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, rape and other forms of sexual violence can be considered as a particularly grave form of torture.

<sup>24</sup> Redress (2013) *Redress for Rape: Using International Jurisprudence on Rape as a Form of Torture or Other Ill-treatment*. London: Redress.

<sup>25</sup> Please note that under the Rome Statute, a specific purpose is required for torture as a war crime but not for torture as a crime against humanity (see ICC Elements of Crimes).

## BOX 5



## Case law examples - rape as a form of torture or other ill-treatment

*International human rights law jurisprudence*

Torture and ill-treatment often occur in situations of detention because of the inherent imbalance of power between the detained individual and the detaining authority. The European Court of Human Rights, Inter-American Commission of Human Rights and Inter-American Court of Human Rights have all expressly recognised that the rape of a detainee by an official of the state amounts to torture.<sup>26</sup> Rape may constitute torture even when it consists of a single act or takes place outside of state facilities.<sup>27</sup>

*International criminal law jurisprudence*

The ICTR first held that rape constitutes torture in the *Akayesu* case. The ICTY also recognised that forced oral sex by a detainee amounted to rape and torture as war crimes<sup>28</sup> and declared that there can be no question that acts of rape may constitute torture under customary international law.<sup>29</sup> It also determined in the *Kunarac* case that '*the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the UN Torture Convention*'.<sup>30</sup> This position was later followed by the ICTR in the *Semanza* judgement.<sup>31</sup>

26 See, for instance, ECtHR, *Aydin v. Turkey*, 25 September 1997; IACHR, *Raquel Mejia v. Peru* Case 10.970, Report No 5/96, 1 March 1996; IACtHR, *Miguel Castro-Castro Prison v. Peru*, Judgement of November 25, 2006.

27 See supra note 91 *Rosendo Cantu v. Mexico* para. 118; *V.L. v. Switzerland*, Decision of January 22, 2007, UN Doc/CAT/C/37/D/262/2005, para. 8.10; IACtHR, *Fernandez Ortega et al. v. Mexico*, Judgement of August 30, 2010.

28 ICTY TJ, *Prosecutor v. Anto Furundzija* Case No IT-95-17/1-T, 10 December 1998, para. 183.

29 ICTY TJ, *Prosecutor v. Mucic et al.* Case No IT-96-21-T, 16 November 1998, para. 495-496.

30 ICTY AJ, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 12 June 2002, para. 146-148.

31 ICTR TJ, *Prosecutor v. Laurent Semanza*, 15 May 2003, para. 342-343.

## Chapter 6 Contents

CHAPTER 6: <b>Reparations</b> .....	<b>75</b>
A. Introduction.....	75
B. Avenues for Reparations.....	76
<i>BOX 1</i> .....	77
What is the relationship between Criminal Prosecution and Civil Compensation Claims? .....	77
C. Principles and Forms of Reparations.....	77
<i>BOX 2</i> .....	79
What constitutes adequate Remedy and Reparation? .....	79
D. Elements to Document Harm.....	82

# CHAPTER 6: Reparations

## A. Introduction

The right to an effective remedy when an individual's rights have been violated is part of international customary law and enshrined in various international<sup>1</sup> and regional<sup>2</sup> human rights law and humanitarian law instruments. Reparation for victims of CARSV is part of a process consisting of obtaining truth, justice, reparation and guarantees of non-repetition. Remedies for gross violations of IHRL and serious violations of IHL for which states are responsible as provided by international law include:<sup>3</sup>

1. **equal and effective access to justice** by way of judicial and non-judicial remedies, including access to administrative and other bodies and mechanisms in accordance with domestic law
2. **adequate, effective and prompt reparation** for the harm suffered (see below for more details, including Box 2: 'What constitutes adequate remedy and reparation?')<sup>4</sup>
3. **access to relevant information concerning violations and reparation mechanisms.** This means that states should inform the general public and victims in particular of all available legal, medical, psychological, social, administration and all other services to which they may have a right to access.

The Rome Statute and the ICC RPE embody these principles and introduce a system of reparations that reflects a growing recognition in ICL that there is a need to go beyond the notion of punitive justice, towards a solution that is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.<sup>5</sup>

For reparation purposes, victims of CARSV need to be defined broadly and include persons who, individually or collectively, suffered such violence but also family members, such as children or partners, and children born as a result of pregnancy from rape. Persons who depend on the victim of sexual violence and others may also be victims as a con-

1 The provisions of numerous international instruments provide a right to a remedy for victims of violations of *international human rights law*, in particular: article 8 of the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR); article 2 of the ICCPR; article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS 1465; article 39 of CRC; and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entry into force 4 January 1969) UNTS 660. Also of *international humanitarian law*, such as article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV); article 91 of the Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; and articles 68 and 75 of the Rome Statute of the ICC.

2 The provisions of various regional conventions also provide a right to a remedy for victims of violations of *international human rights*, in particular: article 7 of the Banjul Charter; article 45 of the Protocol on the Statute of the African Court of Justice and Human Rights (amended by article 20 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights); article 25 of the ACHR; and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) ETS 5.

3 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution A/RES/60/147 (21 March 2006) (UN Basic Principles on Remedy and Reparation), VII 'Victim's right to remedies', principle 11.

4 As a matter of IHRL, states must provide reparations to victims of gross violations of IHRL and IHL that can be attributed to states. In addition, if the liable party—including another state—is unwilling or unable to provide reparations, then the state in which the victim is a national is responsible to uphold their rights and provide reparations; see, in particular, UN Basic Principles on Remedy and Reparation, principles 1 (c), 3(d), 11, 13, 15, 16.

5 ICC AJ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on Principles of Reparations, ICC-01/04-01/06-3129, 3 March 2015, Annex A (Lubanga Amended Reparations Order), para. 1.

## *Administrative reparation programmes are the preferred form of reparations for CARSV victims...*

sequence of the harm inflicted through the violation. Victims may also include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>6</sup>

### **B. Avenues for Reparations**

Victims of CARSV may seek different forms of reparation through different avenues at the domestic, regional or international level, in particular:

- » through **civil litigation**, by filing a civil compensation claim against the person, corporation or other entity responsible for the sexual violence crimes domestically
- » through **human rights litigation**, by filing a civil or constitutional claim domestically or as part of an individual complaint before a national, regional or international human rights mechanism (e.g. NHRI, ombudspersons, court, commission or committee) against the responsible state (see Chapter 5: State Responsibility)
- » through **criminal prosecution**, by requesting a ruling on compensation and/or restitution in the context of criminal proceedings in specific contexts where this avenue for reparation is provided by law (see Box 1: 'What is the relationship between criminal prosecution and civil compensation claims?')
- » through **administrative programmes for reparation and assistance to victims**, which states should provide when violations take place on a large scale or parties liable for the harm suffered—including other states—are unable or unwilling to meet their obligations. Administrative reparation programmes are the preferred form of reparations for CARSV victims for many reasons (e.g. stigma prevention, ease of access, timelines). Nevertheless, administrative reparations programmes should not preclude victims of CARSV from obtaining reparations through domestic or international courts, who should take into account and complement reparations awarded by administrative reparations programmes<sup>7</sup>
- » through the **ICC Trust Fund for Victims** (TFV) whose mission is to provide support to victims of genocide, crimes against humanity and war crimes under the jurisdiction of the ICC via its two separate reparations and assistance mandates. Earmarked funding constitutes an important component of the TFV's resources under the assistance mandate, especially for supporting victims of CARSV.<sup>8</sup>

6 United Nations (2014) *Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence*. New York: UN. p. 3.

7 See, in particular, UN Basic Principles on Remedy and Reparation, supra note 3, principle 16; UN Guidance Note on Reparations for CRSV, supra note 6, p. 6; General Comment No 3 of the Committee against Torture on implementation of article 14 of the UN Torture Convention, 19 November 2012 (CAT GC No 3), para. 29.

8 (i) Reparations Mandate: implementing awards for reparations ordered by the ICC against a convicted person; (ii) Assistance Mandate: using other resources (voluntary contributions and private donations) to provide victims under ICC jurisdiction with physical rehabilitation, psychological rehabilitation, and/or material support. The key difference between the assistance and reparations mandates is that reparations are linked to accountability, arising from individual criminal responsibility of a convicted person, whereas the assistance mandate is not; see article 79 of the Rome Statute and Rule 98 (1-5) ICC RPE ; ICC TFV website at <http://www.trustfundforvictims.org/>.

## BOX 1

### What is the relationship between Criminal Prosecution and Civil Compensation Claims?

Criminal prosecution and civil action can be pursued simultaneously or alternatively depending on the jurisdiction. In certain contexts, a civil action is not available unless there is a criminal conviction, which can make access to reparation difficult and contradict international standards,<sup>9</sup> while in others civil compensations claims are possible even without prior criminal conviction. In some cases, civil claims form part of the criminal procedure and compensation can be adjudicated directly by criminal courts.<sup>10</sup>

## C. Principles and Forms of Reparations

Key considerations and principles for reparations:<sup>11</sup>

- » Reparations must be victim-based, gender-sensitive, adequate, effective and comprehensive, tailored to the particular needs of the victim, and proportionate to the gravity of the harm suffered. Adequate reparation for victims of CARSV can include the complementary and reinforcing combination of different forms of reparations such as restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition (see Box 2: 'What constitutes adequate remedy and reparation?').
- » Judicial and/or administrative reparations should be made available to victims of CARSV as part of their right to obtain a prompt, adequate and effective remedy. When violations take place on a large scale, and when the party liable for the violation is unable or unwilling to provide reparations, states should establish administrative reparation and other assistance programmes to victim.<sup>12</sup>
- » Administrative reparations programmes have the potential of being more timely, inclusive, and accessible than courts, hence reaching a larger number of victims. The operation of these programmes must be simple and administrative authorities should be able to assess and award reparation with minimal formality, without leading to the public identification of the victims, and avoid the stress, costs, complexity and length of time that legal action requires.
- » Access to administrative reparations programmes should not be unduly time restricted. Potential applicants should be provided with information about the reparations programme, including access avenues,

9 See, in particular, CAT GC No 3 supra note 7, para. 26 '*Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. (...) Civil liability should be available independently of the criminal proceeding and necessary legislation and institutions for such purpose should be in place*'.

10 TRIAL International (2016) *Compensating Survivors in Criminal Proceedings: Perspectives from the Field*. Bosnia and Herzegovina: TRIAL.

11 These considerations are primarily based on the UN Basic Principles on Remedy and Reparation, supra note 3; Lubanga Amended Reparations Order, supra note 5; and UN Guidance Note on Reparation for CRSV, supra note 6.

12 UN Basic Principles on Remedy and Reparation, supra note 3, IX 'Reparations for harm suffered', principle 16.

*...reparations should strive to be transformative in their design, implementation and impact...*

and the programme should be open for an adequate amount of time.

- » Reparation programmes may include material and/or symbolic reparations and be granted on an individual and/or collective basis. Individual and collective reparations tend to serve different purposes and collective reparations should not substitute for individual reparations. However, collective reparations for victims of CARSV may for instance help to ensure confidentiality and prevent stigma as they do not require the naming of individual victims. In addition, they can target opportunities, reintegration, livelihoods and empowerment projects in the communities where victims live.
- » Reparations should strive to be transformative in their design, implementation and impact as well as to challenge the structural inequalities and gender stereotypes which are the root causes of sexual violence. Victims of CARSV should be able to assume a proactive and empowering role in obtaining reparations.
- » Meaningful participation and consultation of CARSV victims in the mapping, design, implementation, monitoring and evaluation of reparations is essential and should be encouraged through pro-active awareness-raising and outreach programmes. This aims at ensuring in particular that victims are fully informed, reparations are accessible to all, do not exclude or marginalise any group of victims, are gender-sensitive and culturally appropriate, have the intended impact and that there is ownership of the process.
- » Considerations of privacy and confidentiality are essential at all stages of the reparation process to encourage victims to come forward, give them faith in the process, assist to (re)build trust between victims and the state, and to protect them from further harm

(see Chapter 7: Do No Harm/Confidentiality). Measures should be put in place to ensure victims can actively participate in the planning, implementation and monitoring phases of reparations programmes without compromising their right to privacy and requests for anonymity.

- » States should endeavour to put in place urgent interim reparations to respond to the most urgent and immediate needs of victims of CARSV. Urgent administrative reparation programmes may in particular include fistula surgery, access to anti-retroviral drugs, access to safe abortion services, antenatal, childbirth and post-natal services, psycho-social support and other related measures.
- » Because of the very different nature of establishing criminal liability and awarding compensation, courts and other bodies hearing reparations claims for sexual violence should:
  - apply a lower standard of proof than the standard which is required for a criminal conviction (e.g. a 'balance of probabilities' as opposed to proof 'beyond reasonable doubt')<sup>13</sup>
  - adopt rules of procedure specifically aimed at protecting the interest of victims of CARSV (e.g. no corroboration)<sup>14</sup>
  - expand the scope of evidence for sexual violence to include, for instance, testimonies from other witnesses and scientific experts, such as psychologists and sociologists, which can help explain the victims' behaviours, choices and needs.
- » Development cooperation and assistance should support state's obligation to ensure access to reparations. It should however not be a substitute for the role that states must play in reparation.<sup>15</sup>

13 Lubanga Amended Reparations Order, supra note 5, para. 22: 'Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of "beyond a reasonable doubt", should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence'.

14 For instance, the requirement in certain countries to provide corroboration to establish victim status in order to access disability pension or other social measure may prove impossible for many victims, hence practically denying their access to these protection measures.

15 UN Guidance Note on Reparation for CRSV, supra note 6, pp. 9-10.

*Monetary compensation alone is not a sufficient form of redress for a victim of sexual violence.*

## BOX 2

### What constitutes adequate Remedy and Reparation?

Under international law and practice<sup>16</sup>, reparation must be victim-based, gender-sensitive, adequate, effective and comprehensive, tailored to the particular needs of the victim and proportionate to the gravity of the harm suffered. Reparations that victims of CARSV are entitled to include the five following elements<sup>17</sup>:

#### 1. Restitution

- » This means restoring the victim, whenever possible, to their original situation prior to the violation.
- » This may include restitution of housing, land and property or relocation, access to educational and other programmes, restoration of liberty and employment and the enjoyment of other human rights.
- » In light of the requirement for reparation to be transformative, a sole focus on restitution would be insufficient and may perpetuate pre-existing structural gender inequalities and unequal social relations supporting discrimination and violence (see ‘transformative reparations’ below).

#### 2. Compensation

- » This means providing for monetary compensation of economically assessable damage, where appropriate.
- » This includes taking into consideration (i) physical and mental harm, (ii) lost opportunities including employment, education, marriage, family life, and social benefits, (iii) material damages, loss of earning and earning potential, (iv) moral damage, (v) medical expenses and cost of future rehabilitative services and fees for legal and other expert assistance.
- » Monetary compensation alone is not a sufficient form of redress for a victim of sexual violence.
- » In trying to compensate these harms, attention must be paid to not reinforce existing stereotypes and cultural norms to the detriment of victims, as well as how the form in which compensation is provided—lump sum or pension—can enhance its transformative potential (e.g. issues around confidentiality and stigma, as well as security and financial independence).

<sup>16</sup> See UN Basic Principles on Remedy and Reparation, supra note 3; Lubanga Amended Reparations Order, supra note 5; UN Guidance Note on Reparation for CRSV, supra note 6.

<sup>17</sup> Although article 75 of the Rome Statute only specifically refers to restitution, compensation and rehabilitation as forms of reparation, this list is not exclusive. Other types of reparations, for instance those with a symbolic, preventative or transformative value may also be applied by the ICC; see Lubanga Amended Order for Reparations, supra note 5, para. 34.

## BOX 2

## What constitutes adequate Remedy and Reparation?

**3. Rehabilitation**

This means providing victims with all essential services they need to assist them to carry out their life in a dignified way. This means, amongst others, adequate, timely, consistent, gender and culturally sensitive medical and psychological care, legal and social services (e.g. housing) and economic rehabilitation. Rehabilitation can assist to empower victims when extended to initiatives such as education and employment opportunities.

**4. Satisfaction** can take many forms and should include, where possible or appropriate:

- » Effective measures to end the violations;
- » Bringing to justice and appropriate sanctions against perpetrators;
- » Public memorials, commemorations and tributes to the victims;
- » Public apologies including acknowledgment of the facts and responsibility.

The design of measures aimed to provide satisfaction requires a thorough understanding of societal shame and stigma, and should not put victims at further risk of harm. Satisfaction measures should be gender-sensitive and focus on upholding victims' rights as equal citizens, not reinforce notions of victimhood or vulnerability.

**5. Guarantees of non-repetition**, including giving effect to the requirement of '**transformative reparation**',<sup>18</sup> by addressing the structural causes of the violation, including any kind of discrimination related to, for instance, sex, gender, sexual orientation, gender identity, mental or other disability, race, colour, political or other opinion, ethnicity, age, religion, economic or indigenous status, and all other grounds of discrimination. This could include, where appropriate:

- » changes in relevant laws and practices
- » justice system reforms and strengthening the independence of the judiciary
- » effective civilian control of military and security forces
- » ensuring civilian and military proceedings abide by international standards
- » promoting the observance of codes of conduct and ethical norms
- » trainings of state officials on international standards
- » sensitization campaigns to change discriminatory perceptions and gender bias
- » establishment of Truth Commissions to identify the root causes of violence and make recommendations to address them.

18

18 Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, A/HRC/14/22, para. 31; IACtHR *Cotton Field v. Mexico*, supra note 97, para. 450; Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation, Principle 3.H; ICC TC *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 222.

*These five forms of reparation are not mutually exclusive but complement each other...*

## BOX 2

### What constitutes adequate Remedy and Reparation?

These five forms of reparation are not mutually exclusive but complement each other, as all those different forms of reparation address different types of needs that victims may have. In order to adequately provide reparation for sexual violence, these forms need to be considered in broad terms, so as not to reinforce structural and other inequalities.<sup>19</sup> Pre-existing structural gender inequalities can not only compound the consequences of sexual violence but also pose a challenge to the design and implementation of measures aiming to address the harm of sexual violence.

**Care must be taken to avoid reinforcing pre-existing stereotypes and causing further harm. This can be achieved through adequate consultations with victims, respecting confidentiality, ensuring consistency with gender equality, and having an adequate understanding of the cultural setting.**

For further details, see in particular:

- » Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (2005)
- » UN Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence (June 2014)
- » Nairobi Declaration on Women's and Girls' right to a remedy and reparation, issued by women's rights advocates and activists as well as survivors of sexual violence in situations of conflict from Africa, Asia, Europe, Central, North and South America (March 2007)
- » Human Rights Committee, General Comment No 31 (2004), para. 16
- » CEDAW, General Recommendation No 28 (2010), para. 32
- » Committee against Torture, General Comment No 3 'Implementation of article 14 by States parties' (2012), in particular para. 6, 29, 38 and 39
- » Website of the ICC Trust Fund for Victims at <http://www.trustfundforvictims.org>.

<sup>19</sup> UN Women (2016) *The Conflict Did Not Bring Us Flowers: The Need for Comprehensive Reparations for Survivors of Conflict-Related Sexual Violence in Kosovo*. New York: UN Women. pp 20–21.

## D. Elements to Document Harm

In order to allow victims to seek reparation—regardless of the avenue through which reparation is eventually sought—it is essential that practitioners thoroughly document the different forms of harm caused to victims, their families and communities (see Chapter 2: Understanding Sexual Violence, section D, Impact of Sexual Violence). Documenting harm can also strengthen criminal evidence: it can help to prove elements of crimes (see Chapter 4: Individual Criminal Responsibility, section B, part A. Specific Elements of Underlying Crime) and is necessary for sentencing, which should be commensurate to the gravity of the crime.<sup>20</sup>

Forms of harm to document should include:

- (i) physical harm, e.g. immediate and long-term injuries and diseases, including reproductive health problems
- (ii) mental harm, e.g. trauma, depression and mental illnesses
- (iii) social harm, e.g. stigma, ostracism, damaged reputation, divorce/loss of marriage opportunities and other sources of moral damage
- (iv) economic harm, e.g. loss of income and earning potential; lost opportunities including employment, education and social benefits; medical expenses incurred and cost of future rehabilitative care, including psychological services; cost of legal process (legal/expert assistance fees); cost of raising a child born of rape and of raising children by single parent victim after losing marriage or re-marriage opportunities, and ostracism from the family unit; displacement.

Calculating compensation for economically assessable damage requires an understanding of the harm of sexual violence as well as the gendered factors inherent in structural inequalities that may affect such calculations. For example, moral damage suffered by victims of sexual violence, in particular women and girls, is difficult to quantify and prove. Similarly, calculating loss of earning and earning potential may need to be creatively considered for those that may work in the home or on family land, where they do not receive any income.<sup>21</sup>

Documenting harm will be done, in particular, by (i) asking relevant questions during interviews; (ii) documenting and taking pictures of physical injuries; and (iii) obtaining copies of documentary evidence such as medical certificate and medical/legal bills (see Annex 4 Sample Sexual Assault Medical Certificate).

<sup>20</sup> Thorough documentation of the harm caused to the victims is essential, for instance, for crimes where 'comparable gravity' is an element, for torture which requires the infliction of '*severe pain or suffering, whether physical or mental*' and genocide which may be committed by causing '*severe bodily or mental harm*'.

<sup>21</sup> UN Guidance Note on Reparation for CRSV, *supra* note 6, p. 17.



# PART IV: Documentation in Practice: Preparation

## Chapter 7 Contents

<b>CHAPTER 7: Do No Harm .....</b>	<b>85</b>
<b>A. Key Concepts.....</b>	<b>85</b>
1. Harm.....	85
<b>BOX 1</b>	
Victim experience—sources of harm .....	88
2. Autonomy .....	88
<b>B. Informed Consent .....</b>	<b>89</b>
<b>BOX 2</b>	
Fundamentals of informed consent .....	89
<b>C. Mitigating Harm .....</b>	<b>92</b>
<b>BOX 3</b>	
Mitigating harm .....	92
1. Threat and Risk Assessments .....	92
<b>BOX 4</b>	
Threats, risks and vulnerabilities .....	92
2. Coordination .....	93
3. Confidentiality .....	95
<b>BOX 5</b>	
Official requests for information .....	96
<b>BOX 6</b>	
Peer experience—limits of confidentiality .....	97
4. Referrals .....	98
<b>BOX 7</b>	
Referral terms .....	98
<b>BOX 8</b>	
Types of referral .....	99
<b>BOX 9</b>	
Peer experience—setting up the right referrals .....	100
<b>BOX 10</b>	
Widespread lack of support services for men and boys .....	102

# CHAPTER 7: Do No Harm

## A. Key Concepts

### 1. Harm

#### What does it mean to Do No Harm?

The key ethical principle at the heart of documentation of CARSV is the obligation to, at a minimum, ‘Do No Harm’. This means practitioners must be fully aware of the possible negative impacts of documentation on victims and other witnesses, the wider community and the investigators themselves; be prepared for the harm those impacts may inflict; and put in place measures to prevent or minimize that harm.

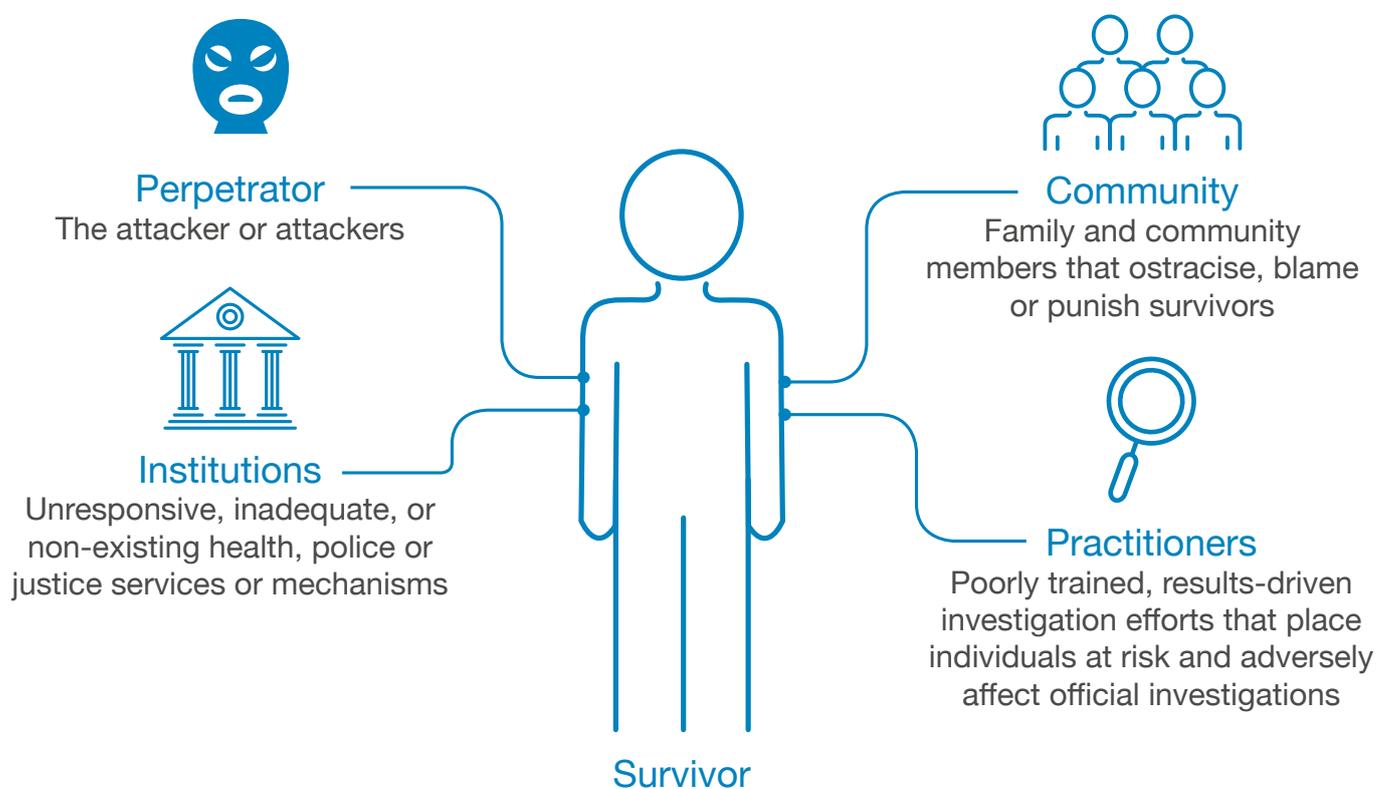
As discussed in Chapter 2: Understanding Sexual Violence, rape, serious sexual assault and other forms of sexual violence may cause grave physical, psychological and other harm to victims and others. However, victims and other witnesses can be harmed in ways that extend beyond the immediate violence they suffered at the hand of perpetrators. Additional, serious harm can be caused by unresponsive or inadequate health, police or justice services and responses; by family and community members that do not support survivors, and may even ostracize, blame and punish them; and critically, by poorly trained, unprepared or purely results-driven documentation efforts that do not place the survivor at the centre of their approach, do not adequately plan their interventions and do not put in place strategies to mitigate potential harm.

When documenting CARSV, some risks are unavoidable. Investigators cannot offer a complete guarantee of protection and well-being to victims, witnesses or entire communities.

However, investigators must remember that the safety and dignity of survivors is at the centre of the entire documentation process. This means ensuring the process prioritises their needs and requests, especially with respect to security concerns. Notwithstanding this, the risk of additional harm must also be balanced with respect for a survivor’s desire to tell his or her story and seek justice and reparation for the crimes that took place.

**Respecting the principle of Do No Harm should not automatically be interpreted as a reason not to pursue the documentation of CARSV—rather, it can pave the way towards safely and ethically giving survivors the opportunity to speak out, while identifying potential support mechanisms for them. It should, first and foremost, mean respecting and supporting survivor autonomy.**

## Who causes harm to victims/survivors of sexual violence?



Type of harm/ who causes it	Examples
<b>Immediate Physical Harm</b> <ul style="list-style-type: none"> <li>Perpetrators</li> </ul>	Acts of sexual violence that result in direct physical injury and/or death
<b>Secondary Physical Harm</b> <ul style="list-style-type: none"> <li>Perpetrators</li> <li>Institutions</li> <li>Community</li> <li>Practitioners</li> </ul>	<p>Ineffective medical response to sexual violence resulting in avoidable long-term complications, including infections</p> <p>Unsafe abortions performed by local communities in areas where access to legal abortions for rape victims is not available</p> <p>Complications arising from untreated physical injuries because of family or community shame is disclosing sexual violence suffered by one its members</p> <p>Honor killings</p>
<b>Psychological Harm</b> <ul style="list-style-type: none"> <li>Perpetrators</li> <li>Institutions</li> <li>Community</li> <li>Practitioners</li> </ul>	<p>Trauma from sexual violence</p> <p>Mental health complications as a result of non-existing support services or institutional recognition of violation</p> <p>Depression, isolation, anxiety and suicidal thoughts resulting from community blaming of victims, or disbelief.</p> <p>Poorly conducted interviews trigger re-traumatization</p>
<b>Socio-Economic Harm</b> <ul style="list-style-type: none"> <li>Institutions</li> <li>Communities</li> <li>Practitioners</li> </ul>	<p>Lack of reparations to victims unable to reintegrate and carry on with lives</p> <p>Loss of job, education as a result of stigma</p> <p>Poorly operationalized privacy measures resulting in unwanted exposure of victim to wider community, resulting in job loss or expulsion from school</p>
<b>Legal Harm</b> <ul style="list-style-type: none"> <li>Institutions</li> <li>Communities</li> <li>Practitioners</li> </ul>	<p>Disclosure of rape resulting in incarcerations in cases where sex outside marriages or homosexuality is criminalized.</p> <p>Community led, informal justice mechanisms that do not adequately represent rights of victims and favour family-level compensation over individual right to justice and reparation</p> <p>Documentation processes that do not respect relevant rules related to evidence-gathering and negatively impact victim ability to secure justice through official investigation and prosecution of crimes</p>

## BOX 1

## Victim experience—sources of harm

Safaa\*, 17: *'I was 12 the first time a (armed militia member) raped me, and the second time I had already turned 13. That was a few years ago. It is still very painful to think about. My brother found me the first time, and told me to get washed and not to tell anybody. He said our parents would be too ashamed and it was better for them if we kept it a secret. I was so afraid of disappointing them, I kept silent. I said the bruises were from a fall. I had many nightmares and I couldn't sleep, and couldn't eat. I heard them whisper that I wasn't the strong girl they thought I was.*

*The second time it happened it was impossible to hide. There were three men and my insides were bleeding too much, I was so broken. The doctor they took me to asked me if I was virgin. I said no but that's because of the first time I was raped. He didn't believe me because I had kept it a secret. He said that girls that do not keep their virginity, their bodies send out a signal to men. How can men be to blame, he said. He said I did not deserve to get treatment like other patients that are innocent victims. My parents are too ashamed to speak to me properly. It became too difficult and so I left.*

*Life is difficult in the camp, but at least nobody knew about my past. Then I told a camp worker what had happened. I told him it was ok to pass my details on to someone who could help me. I thought maybe someone would come to help me stop having nightmares or find the men responsible. Instead at least six different people have come to ask me the same questions over and over. And then they leave, I get nothing, and the whole thing starts again. I should never have spoken up.'*

(\*not her real name)

## 2. Autonomy

Adopting a survivor-centred approach to documentation and to mitigating harm involves first and foremost respect for a survivor's autonomy. Autonomy refers to a survivor's ability to make her or his own decisions, and respect for autonomy requires the recognition of a person's right to make independent choices, and take action based on their own personal values and beliefs.

The ethical obligation to 'do no harm' can sometimes conflict with the obligation to respect survivor autonomy, when and if survivors make decisions that seem to practitioners to be harmful and self-injurious. However, survivor autonomy must be respected above all. This is not always easy. Separating autonomous decision-making capacity from, for example, cultural or familial pressures that inform individual decision-making, is not always possible, and practitioners may feel that survivors are not acting in their own best interests but rather in the interests of the group. For these reasons, it is critical that practitioners do their utmost to share information with survivors, discuss all risks and benefits of participation with survivors and other witnesses, respect confidentiality where possible, and support them in accessing the services and assistance they may need in order to make the best decision they can.

## B. Informed Consent

Informed consent is grounded in the principle of autonomy and embodies the idea that an individual should be free to choose her or his own course of action regarding their involvement in the documentation of sexual violence.

**Survivors and other witnesses have the ultimate authority to consent to participate. This authority is founded on both the ethical respect for their autonomy, and their legal right to self-determination.**

Obtaining informed consent is a legal and ethical obligation of anyone gathering information about crimes under international law, including violations of human rights, from victims/witnesses.

### BOX 2

#### Fundamentals of informed consent

Giving informed consent means survivors, witnesses and any other cooperating person deemed competent consents to participation on the basis of:

##### 1. Comprehension

- » full disclosure of information regarding all aspects and stages of the documentation process, and its risks and benefits
- » comprehension of the information disclosed to them

##### 2. Voluntariness

- » giving their voluntary consent without coercion

##### 3. Stated Permission

- » indicating their consent.

#### WHO CAN'T GIVE INFORMED CONSENT?

The ability to give voluntary informed consent is based on a general requirement of competency. Adult men and women with severe intellectual disabilities, mental illness, or any other physical, mental or emotional condition that may impair their ability to fully comprehend all the relevant facts may not be competent to provide informed consent.

Children are generally presumed to lack competency to consent, but depending on their age and other factors, such as maturity, may be required to provide informed assent. (See Chapter 16: Sexual Violence against Children for more detail.)

In the case of an individual, adult or child, who is not capable of giving informed consent, the permission of a legally authorized representative in accordance with applicable law must be sought in lieu of informed consent.

**Key to note**

**Informed consent is a process and involves consenting throughout all STAGES of documentation:** All cooperating persons must give their informed consent to each applicable stage or process, which may include any of the following:

1. to be interviewed and/or examined
2. to be photographed
3. to have their information recorded
4. to be referred to any support services
5. to have their information and contact details shared with third parties.

**Informed consent also involves consenting to all ASPECTS of documentation:** Practitioners must fully and clearly understand:

1. the purpose of all aspects of documentation and intended future use
2. the meaning of confidentiality and how it applies, or not, to the information they provide
3. the procedures that will be followed—including the kind of information that will be requested and what information may need to be disclosed in the future
4. the risks and benefits to themselves of participating.

**Informed consent is a legal obligation.** The results of an interview conducted without securing proper and informed consent may also not be accepted in certain legal proceedings, on the grounds that the information was provided under some kind of duress or coercion, or based upon misleading assurances.

**Why obtain informed consent?****Obtaining informed consent before documenting testimonial information:**

Ensures that the victim/witness maintains full control and power over her/his own experiences, and that s/he is a knowledgeable and willing participant in the justice process.

**Not obtaining informed consent:**

Violates the rights of the victim/witness, disrespecting her/him, and causing her/him harm.

**Obstacles to informed consent**

**A. Lies, deceit, and partial disclosure.** This includes, for example, not fully disclosing risks in order to obtain consent. It can also include situations when the intention to withhold information is not malicious, but to prevent victims from becoming agitated or alarmed. Apart from avoiding intentional deceit, the culture of informed consent endorses extensive positive obligations to disclose all relevant information.

**B. Inability to fully comprehend.** Disclosure alone does not mean automatic comprehension by survivors and other witnesses, even when fully competent. In situations where efforts are made to explain all the relevant facts in the appropriate, and accessible, language, limited comprehension may persist. For example, studies have shown that a high percentage of participants in medical trials do not grasp the full meaning of statistical information about risks.<sup>1</sup> As such, effective communication is the key to achieving fuller consent.

**C. Coercion and inducement.** Voluntary consent is incompatible with coercion, whether that coercion originates from the investigators themselves, or from members of the victim/witness family, community or

<sup>1</sup> Beauchamp, T.L., Childress J.F. (2008) *Principles of Biomedical Ethics*, 6th edn. New York: Oxford University Press.

others. A threat to withdraw assistance, for example, if a victim/witness does not disclose sexual violence, invalidates consent. Similarly, an inducement to offer assistance in return for disclosure may render consent invalid: when attention is unduly fixated on the potential benefit, then a full consideration of the risks is jeopardized.

### Obtaining Informed Consent is a Process:

#### 1. Ensure the consent given by the victim/witness is based on her/his free will

- » Create situations of genuine trust that will enable the victim/witness to agree freely and voluntarily or feel comfortable enough to refuse. Some suggestions as to how to actually build this trust are set out in Chapter 11 on Interviewing.
- » Clearly explain to the victim/witness that they have a choice whether or not to speak to practitioners and that this choice can be exercised at any time throughout the process.
- » Offer the victim/witness the opportunity to ask questions or share concerns.
- » Handle the power of your position as practitioner with care and interact respectfully with the victim/witness.
- » Be vigilant of the power dynamics and potentially coercive setting resulting from any other individuals accompanying the victim/witness – such as male companions or parents.
- » Ensure that the victim/witness has sufficient time to make a decision, recognizing the challenge victims may face if assessing risk while in a vulnerable situation and within the rapidly changing circumstances of conflict. The time given should take into account the significant and complex consequences of participation for victims, their families and communities, now and in the future.
- » Each time you make contact with the victim/witness, confirm with the victim/witness that they have not changed their mind about the use of their statements or the transmission of information to certain third parties.
- » Choose a language that is readily understood by the victim/witness, and in particular provide any forms in

the victim's/witness's own language.

- » Use interpreters who are competent in word-for-word interpretation and ensure that they fully understand the meaning and requirements of informed consent.

#### 2. Take time to explain all the relevant factors to victims/witnesses

- » Identify members of the team present, their functions, who they work for and for whom the information is being gathered.
- » Fully explain the purpose and nature of the information-gathering process, and the composition, affiliation and mandate of the team.
- » Describe and obtain consent for all possible uses of the information provided (e.g. data collection, information sharing etc), including the possibility that the information may need to be disclosed, whether or not the person is asked to testify in any type of proceeding.
- » Explain the benefits and risks of participation in the documentation process and limitations of services provided, if any.
- » Disclose the types of questions that may be asked of the victim/witness.
- » Present the information in a way that is clear to the survivor/witness and ensure the information has been understood. It is good practice for practitioners to ask the survivor/witness to explain back to them what the survivor/witness has understood about the process.

#### 3: Obtain explicit consent for specific activities

- » Victims/witnesses need to expressly agree to the transfer of identity, contact and substantive information to third parties if this is intended, in particular to national or international investigators or organisations, courts and the police.
- » Consent must be given for note-taking and using devices such as a tape recorder or video camera during an interview. Ensure that the victim/witness knows that an audio or video recording is being made.
- » Additional specific consent must be given for taking photographs, physical examinations, imaging of documents or any other form of evidence a victim may provide.

## C. Mitigating Harm

CARSV investigators therefore have an ethical responsibility to put in place measures that can prevent, mitigate or respond to potential additional harm. Mitigating measures should reach further than addressing the potential harm caused by investigators themselves, and extend to assuming responsibility for mitigating and responding to harm caused by other contextual, social and institutional forces as well.

### BOX 3

#### Mitigating harm

##### How to mitigate harm?

1. **Assess the risks** and put in place measures to counter them
2. **Coordinate** your efforts as much as possible with other groups
3. **Respect confidentiality** and understand its limitations
4. **Refer** victims and other witnesses to the appropriate services

### 1. Threat and Risk Assessments

**Assessing Risks** involves first identifying potential threats, assessing what risk factors contribute to the likelihood that a threat will materialize, and finally putting in place measures to counter those potential risks.

When planning for documentation of sexual violence, practitioners must assess **threats**—real, imagined, or perceived—that could potentially cause harm to victims and other witnesses, the wider community and investigators themselves, as well as the **risk** that these threats will be carried out.

### BOX 4

#### Threats, risks and vulnerabilities

Threats refer to any factors (actions, contexts or events) that could cause harm to the survivor/witness, wider community, or to practitioners themselves, or damage or destroy evidence, any infrastructure or the operation as a whole.

Vulnerabilities are weaknesses or gaps that can be exploited by threats to cause actual harm.

Risk refers to the likelihood that a threat will actually be carried out in addition to the impact it would cause if it did.

Assessing Risks involves first identifying potential threats, assessing what risk factors contribute to the likelihood that threat will materialize, estimating the impact that that will have, and finally putting in place measures to counter those potential risks.

#### Key to know

**Carrying out a thorough Threat and Risk assessment** is the **first and most important step** towards putting in place measures that can mitigate harm, both in terms of **prevention**, and in offering an adequate **response** to harm.

Threat and Risk assessments should be carried out **repeatedly** throughout the documentation process to take into account changing realities and stages in the documentation of CARSV. A continuous risk assessment will inform the direction a documentation process should take.

The most **important** assessment to be carried out is one that takes **into account the potential threat to all the individuals potentially impacted by the investigation**. However, threat/risk assessments should be done holistically to take into account the security of the infrastructure and equipment as well (see Chapter 8: Safety and Security).



*When the risk is too significant and cannot be mitigated, then that witness or information should not be pursued.*

Documenting **sexual violence** can involve a **particular type of threat and risk** to victims and their family. Threats of retaliation by family members who feel ‘dishonoured’ by the violence, of coercive pressure on victims to marry assailants or lie about what happened, and even punishment or arrest of victims in situations where sexual conduct outside marriage, or homosexual relations, are stigmatized or criminalized, are often particular to victims of sexual violence. Practitioners must look beyond the usual risks associated with disclosure of other types of crimes and violations that are not as taboo or face such institutional, social and legal obstacles in getting victims to come forward.

#### How to carry out a threat and risk assessment

**Step One: list the threats:** What are the threats? Who or what is threatened? Who or what has made the threat?

**Step Two: Assess the risk:** How likely is it that the threat will become a reality? How severe would the impact be—on individuals, infrastructure, or the information?

**Step Three: Mitigate or manage the risk:** What measures can be put in place to reduce or counter those risks?

See Annex 2: Conducting Threat and Risk Assessments

## 2. Coordination

At any given time, there may be multiple efforts under way to collect, record and analyse information on sexual violence in conflict-affected areas. This is especially true in areas where sexual violence is believed to be highly prevalent, where humanitarian responses have been established, or where official international or national investigations have been launched.

The existence of multiple forms and lines of inquiry can be harmful to individuals and communities, impact the quality of information collected and its ability to be used in a criminal trial, and affect the work of organizations operating in the area.

#### Poor coordination can lead to:

- » Victims/witnesses may have to **repeatedly** tell **their story** on numerous occasions, for different purposes, to different people. In some cases this might lead to **re-traumatisation**. Being asked questions, however sensitively, can be experienced by the victim/witness like an interrogation.
- » **Assessment fatigue**—communities become saturated from multiple inquiries, intrusions and promises with no delivery of assistance.
- » Individuals and communities are placed **at risk** from the increased attention and perception they are betraying members of their own community or accusing others.
- » Multiple accounts could create possible **inconsistency and conflicting factual statements**, which may impact on the credibility or reliability of survivors in future criminal justice, reparation or other processes.

In order to respect victims/witnesses and ensure the best information is collected, these processes should be coordinated where possible. To this end, practitioners should:

**Find out whether documentation has already taken place.** Practitioners should assess, to the extent possible, whether the information they are seeking has already been documented by other practitioners and organizations, whether that information is accessible, and whether re-documentation, including interview, is necessary.

**Develop relationships** with other organizations prior to travelling to the area, and where possible assess the type, quality, frequency and purpose of the information they may or may not have collected.

**Find out about the existing gender-based violence coordination** mechanisms at national, regional and local levels. Being aware of existing systems may facilitate information-sharing and access to data, as well as securing protection solutions for victims/ witnesses.

**Be aware of security and additional concerns of other organizations** collecting information. Certain organizations may be collecting information discreetly and may be operating under strict security protocols that require others to adapt their manner of approach and coordination.

**Be aware of organizations and individuals who have been mistreating the affected community** by manipulating information, threatening them with consequences should they come forward, and putting out false information with the aim of undermining documentation efforts.

**Be familiar themselves with existing systems collecting data** on sexual violence: their purpose, how they are implemented, and what the limitations are on sharing information collected by them. This includes the Gender-Based Violence Information Management System (GBVIMS) and the Monitoring, Analysis and Reporting Arrangements (MARA) introduced by UN Security Council Resolution 1960.

**Respect the mandate of other organizations** working according to different agendas with communities. Often service providers are working to offer impartial assistance to all, and mediating conflict, remaining independent of prosecution efforts, and integrating with the whole community is key to that role.

**Take extra precautions when visiting organizations** and communities in refugee and displacement camps and sites, offices of aid workers, clinics and community safe spaces. Where appropriate, they should plan those visits beforehand and not show up unannounced requesting information.

**Be aware that often service provision to victims/witnesses is based on guarantees of confidentiality** that cannot be breached, in some cases even forbidding sharing of anonymous data that may be useful to establish patterns, location, responses and types of sexual violence that occurred.

**Keep in mind UN Security Council Resolution 1888** in which UN and government agencies and NGOs, at both the national and international level, are called on to support improved monitoring, documentation and reporting of crimes of sexual violence. Service providers and other institutions supporting survivors may choose to respond to this call by sharing information on survivors according to best ethical practices and the informed consent of survivors.

### 3. Confidentiality

#### What do we mean by confidentiality?

Confidentiality is an ethical principle when documenting sexual violence that requires practitioners to protect information they gather on sexual violence, and apply that principle throughout the documentation exercise. Information about victims and other witnesses should be collected, used, shared and stored in a confidential manner. Depending on the context, confidentiality measures can be put in place to cover not only the **identity** of victims and other witnesses but also any **information** collected, **referrals** made and **protective measures** taken, as well as the existence of the **documentation process itself**. Practitioners should have both facilities and procedures in place in that respect (see also Chapter 8: Safety and Security).

#### How to operate according to confidential principles:

##### CONFIDENTIALITY CHECKLIST

- ✓ Define **confidentiality procedures** and make sure that all members of the documentation team are aware of what information is and is not taken, where and how it may be stored, and who has access to it. Determine a policy on whether audio or visual recording is permitted.
- ✓ Ensure **information protection measures** are in place with regards to all identifying information on the victim/witness and their testimony, including the use of pseudonyms and coding systems for testimonial information as well as any referral options implemented or protective measures put in place (see also Chapters 8: Safety and Security, and Chapter 13: Storing and Handling Information).
- ✓ Ensure all members of the team **understand** and **apply** the parameters of confidentiality established in the documentation exercise, and do not discuss case details with family, friends or colleagues who are not part of the team. p
- ✓ Fully and clearly explain to survivors/witnesses the **conditions and limits of confidentiality** and ensure they give their informed consent to how their information is used.
- ✓ 5. Agree with the victims/witness how they would like you to approach and interact with them in public, if at all, and how to get in touch with them and other potential witnesses in a way that respects their privacy and need for safety.

*All members of the documentation team must be made aware of the limits of confidentiality, and the potential consequences of refusing to testify or hand over information.*

### What are the limits to confidentiality?

Working according to the principle of confidentiality should be understood as an **ethical** obligation and **operational** necessity. Confidentiality measures are often critical to building trust with survivor/witnesses, protecting them and respecting their privacy, and sometimes protecting practitioners themselves.

Documenters must be honest with survivors of sexual violence about the limits of confidentiality. Possible disclosure to criminal justice authorities, and what this means, must be explained before a survivor's information is recorded—in particular that this may eventually mean disclosure to the defence, if applicable. In addition, documenters should never promise total anonymity or respect for confidentiality as unintended breaches are always possible. Survivors must be fully informed that confidentiality can only be guaranteed to the best of the abilities of the documentation team and in accordance with the intended use of the information. Where appropriate, this information should be provided in writing.

NGO documenters should also keep in mind that the confidentiality measures they undertake may not qualify as a legal privilege to keep information in their possession confidential.

The work material of NGOs gathering information about crimes of sexual violence is not always protected from requests by national and international courts to hand that information over. This is especially true if NGOs have submitted some information—in the form of reports—but not all of it. Courts may request NGOs to hand over more complete information than initially submitted, such as detailed first-hand information, witness identity, and any evidence collected. Practitioners may also be asked to give testimony as to what they have personally witnessed.

If operating in contexts where there are ongoing investigations and it is highly likely that subpoenas or appearance orders are forthcoming, and practitioners have genuine concerns for the security and safety of victims and witnesses should information

about them become public, it is best not to take down their testimony, identifying details or details about their whereabouts.

All members of the documentation team must be made aware of the limits of confidentiality, and the potential consequences of refusing to testify or hand over information.

### BOX 5

#### Official requests for information

Courts in both international and national settings have the formal power to compel witnesses to attend proceedings, give evidence and submit information. In international contexts, NGOs cannot automatically assert evidentiary privilege (the right to refuse to give evidence) to reject such requests for information. In domestic settings, some NGOs may be able to assert this right, but it depends on the nature of the work done by the NGO, and the national laws of the state in which it operates.

#### Privilege

For example, many national laws even go as far as prohibiting lawyers, doctors and the clergy from testifying about confidential exchanges with individuals. In international criminal settings, this type of professional privilege is granted in the Rules of Procedure and Evidence of the ICC, which encourages the Court to recognize as privileged the communications between a person and her or his doctor, psychiatrist, psychologist, counsellor and member of the clergy (ICC Rules of Procedure and Evidence 73). However, the evidence gathered by many civil society organizations in the course of documenting CARSV will usually not fall into this category of protected communication.

The consequences of ignoring subpoenas or appearance orders can vary according to context, but can result in fines, suspension of operations, and even in some cases, imprisonment.

If investigative or judicial authorities make official requests for information, NGOs should get legal advice **before** responding to the request.

## BOX 6



## Peer experience—limits of confidentiality

Frederico, counselling team leader: *'We had been running a 'Safe Space' project in a camp in YYY for some months, for women to come together and speak about their concerns. Through it we were building trust with the community, and after each session one or two counsellors from my team would stay behind to speak with women alone if they wanted to. We had already received a few reports of attacks against young women by one of the gangs operating close to the camp, and had been documenting the cases and referring the victims for further assistance.*

*One girl, ME, was always too shy to participate in the sessions. But she and I found out we had some family links and she would always come by the shelter during the sessions and come see me afterwards, and we would have coffee and speak unofficially. One of those times, she told me about a man who came to her tent every week, sometimes twice a week. She would not tell me who he was, but that he would spend the whole night with her and force himself on her and leave before anyone noticed. He said that if she told anyone, he would tell them that she had arranged it and everyone would say she was a whore.*

*I told her to see a doctor, to report what was happening, but she refused, and made me promise not to tell anyone what she told me. One morning we arrived at the camp and the police was everywhere. A man had been found in Block D, where she lived. He had been stabbed many times. Soon the police found out he had been visiting her. She was refusing to speak. Then they found out she had coffee with me all the time.*

*They called me in and asked me if she had ever said anything to me about the man. I refused to answer. I said that information was confidential. They told me that it was not, because I was not officially a counsellor and we had not been speaking in an official session. They threatened my organisation with a fine, and when I still refused, they said they would arrest me. I wanted to protect her, as we always say we keep information confidential. But my wife was pregnant and we did not have much money—I could not afford to be arrested, even if I felt strongly about her case. In the end I had to testify about what she had told me. I didn't know that I did not have the right to refuse. I know some international organisations like the UN have that right, but we did not.'*

*Referring victims is not dependent on their participation in the documentation process.*

#### 4. Referrals

Before initiating any documentation process, practitioners should try to identify options for referring victims/witnesses (including children and male victims) for assistance and support, and put in place procedures for the referral process itself. The victims/witnesses they encounter may be in need of immediate medical, psychosocial or security assistance, or they may also find that the process of disclosing information itself is emotionally difficult, traumatic or puts them at additional risk. All victims and witnesses have a right to know what health, psychological, legal and social services are available to them prior to being interviewed.

#### BOX 7

##### Referral terms

Men, women and children who have experienced sexual violence may have multiple needs, including for medical and psychosocial care, protection, and legal advice, among others.

**REFERRING** victims to these different services is a critical component of any response to sexual violence, including documentation.

It is unlikely that a single organization or institution can provide victims with all the different types of assistance they may need. Different organizations, services and individuals should work collaboratively across the different sectors to deliver holistic assistance to victims. When working effectively, this model of service coordination and support is often referred to as the **MULTISECTORAL MODEL**.

The term **REFERRAL SYSTEMS**, sometimes known as **REFERRAL PATHWAYS**, describes the framework and process connecting different services, individuals and institutions to each other in a way that should place the victim, their needs and wishes, at the centre of any response.

#### Key to note

Practitioners should not promise victims referral to a service that may not be accessible.

Referring victims is **not dependent** on their **participation** in the documentation process. Every victim/witness interacted with should, with their consent and according to their needs, be referred to the appropriate service even if they decline to provide you with their testimony.

Be careful that referrals are **not interpreted as an exchange of goods or services** for testimony, and have clear policies in place regarding how far practitioners can go to support victims in accessing referrals.

The ability for a victim/witness to access referral and assistance services may be determined by **gender**—male and female victims are sometimes treated differently when seeking assistance (see Box 10: ‘Widespread lack of support for men and boys’).

If formal services are not available or accessible, practitioners should assess what **informal systems** are in place that can be of support to the victim/witness, including family and community support systems. These forms of family and social support must always be considered when identifying child victims and witnesses.

Practitioners that come into contact with **children** they believe have been harmed may be required to communicate this to the appropriate authorities, as some countries have mandatory reporting laws.

### i. Types of referral assistance

The types of assistance that may be available to victims/witnesses are set out below:

#### BOX 8

Types of referral	
Medical assistance	Psychosocial assistance
<p>Hospitals, health centres and clinics with appropriate facilities to treat and assist sexual violence victims/witnesses. Facilities should offer as a minimum:</p> <ul style="list-style-type: none"> <li>» treatment and referral for life-threatening complications</li> <li>» treatment or preventive treatment for sexually transmitted infections, including post exposure prophylaxis for HIV</li> <li>» emergency contraception</li> <li>» care of wounds</li> <li>» psychiatric services</li> <li>» supportive counselling</li> <li>» referral to social support and psychosocial counselling services.</li> </ul>	<p>Counselling services, victim support groups, organizations with case management capabilities, and community centres that may offer:</p> <ul style="list-style-type: none"> <li>» confidential emotional support and direct counselling</li> <li>» family mediation and counselling</li> <li>» reintegration and livelihood assistance</li> <li>» skills training and income-generation programmes.</li> </ul>
Legal assistance	Protection assistance
<p>Legal clinics, victim support groups, programmes that offer:</p> <ul style="list-style-type: none"> <li>» legal education on the rights of victims/witnesses under the law</li> <li>» confidential advice regarding legal rights and options</li> <li>» legal representation for victims/ witnesses.</li> </ul>	<p>Organizations, victim support groups, centres that offer:</p> <ul style="list-style-type: none"> <li>» safe shelters</li> <li>» relocation and transport assistance</li> <li>» witness protection programmes.</li> </ul>

## ii. How to refer: Assessing assistance and developing referral pathways

Documenters should **develop their own referral pathways**, one that **reflects or adapts existing referral systems** in their area and also takes into account the **potential needs of the victims/witnesses** they will be interacting with, **their own capacity** to monitor and escort victims/witnesses to services, and **any limitations to accessing services** they come across during their assistance assessment phase.

### BOX 9



#### Peer experience—setting up the right referrals

Florence, Investigator: *'(...) we set up a team to respond to a request by a small local NGO to take witness statements from a group of women who claimed to have been raped and tortured by government forces during the civil unrest. During our planning phase, we contacted local clinics and assessed their ability to provide medical care to rape victims, and got the contacts for two local psychiatrists as well. But when we start the interviewing process, we realized we had set up all the 'wrong' services. These women had been raped 10, 15 years before. The majority did not have any immediate medical needs related to the sexual violence, most of them had already received medical and psychosocial care from the NGO that referred them to us. They were more interested in legal aid options, now that they were ready to tell their story and pursue accountability. We were woefully unprepared for this—we simply had not thought it through.'*

## How to refer survivors and other witnesses.

### Step 1 Map existing services and find out if there are any established referral systems in place.

#### These may include:

- » specific services provided by single organizations, such as NGOs specializing in psychosocial care, independent health clinics, and legal assistance
- » national, regional or local gender-based violence referral mechanisms among international and national relief agencies
- » referral pathways for vulnerable children, including informal community leaders and focal people, child-led groups, and specialised trauma support
- » informal support groups, faith leaders and self-help networks set up by victims themselves
- » national standard operating procedures for dealing with cases of sexual violence
- » services provided by victim/witness call centres or hotlines
- » multi-sectoral response services in place in sexual assault referral centres/'one-stop-shops'.

### Step 2 Assess safety and feasibility of accessing support services.

Once you have identified services available, determine what the limitations are on your ability to refer individuals to them, of the ability of victims and witnesses to access them. Ask the following questions:

#### *Quality limitations:*

Do services available provide adequate and supportive care?

#### *Safety limitations:*

Will referral to a support service put victims/witnesses at further risk? For example, there may be problems where health and security services are supplied by the government or where information is not treated according to standards of confidentiality.

Will community groups or focal people support victims and witnesses or pressure them to act against their wishes?

#### *Logistical and financial limitations:*

Are the support services too far or otherwise difficult for victims/witnesses to access?

#### *Other limitations, such as exclusionary cultural beliefs and discriminatory attitudes:*

Are there any prevailing cultural beliefs, such as discriminatory stereotypes or policies, which prevent referral of a victim/witness to local services?

### Step 3 Develop, adapt or adopt region-specific referral pathways that you will use

Put in place agreements, standard operating procedures and memoranda of understanding with service providers in order to facilitate efficient, confidential and safe referrals.

Establish point or points of entry into referral pathways, which services you will refer to and how they will link up to each other.

**Step 4 Implement internal standard operating procedures for referring victims/witnesses**

Establish criteria that set out:

- » **who** practitioners will actively refer for further support—this may include victims/ witnesses, family members or members of the community at large
- » **why** practitioners will make the referral
- » **what** kind of services practitioners will refer individuals to
- » **how** victims will access services—what is the policy on transporting victims/witnesses
- » **when** the referral will be made—at what stage in the documentation and interviewing process.

**Step 5 Communicate clearly with victims/witnesses**

Explain clearly to victims/witnesses the limits of the assistance practitioners can provide.

Communicate fully the available options to the victim/witness.

Explain that assistance is not dependent on provision of testimony, nor must testimony be given in a certain way to guarantee assistance.

**BOX 10****Widespread lack of support services for men and boys**

In most conflict-affected environments there are no shelters for men, and services for male survivors of sexual violence are non-existent, untailored or inaccessible, particularly for medical interventions. Male survivors are often referred to gynaecological units and made to line-up alongside women making both men and women uncomfortable.

Medical, psycho-social and humanitarian professionals are generally ill-equipped to identify and address the legacies of male rape and other forms of sexual violence and may express disbelief or display attitudes that may further stigmatize and harm male survivors.

Considering this institutional gap, planning for suitable referral avenues for male victims of sexual violence is often challenging. Practitioners may have to consider informal systems and self-help networks and/or build the capacity of local services providers prior to starting to approach male survivors of sexual violence, to ensure they have the necessary understanding, skills and attitudes to appropriately respond to such types of violence.



## PART IV: Documentation In Practice—Preparation

## Chapter 8 Contents

<b>CHAPTER 8: Safety and Security</b> .....	<b>105</b>
<b>A. Introduction</b> .....	<b>105</b>
<b>B. Holistic Security Strategy</b> .....	<b>106</b>
<b>BOX 1</b>	
Security and safety key points.....	107
<b>C. Managing Risks to Practitioners</b> .....	<b>108</b>
1. Risks to Practitioners.....	108
2. Mitigating Measures .....	108
<b>BOX 2</b>	
Peer experience—security plan.....	108
<b>BOX 3</b>	
Mitigating risks to practitioners .....	109
<b>D. Managing Risks to Information</b> .....	<b>111</b>
1. Risks to Information.....	111
2. Mitigating Measures .....	111
<b>BOX 4</b>	
Mitigating risks to information.....	112
<b>E. Managing Risks to Victims and Witnesses</b> .....	<b>115</b>
1. Risks to Victims and Witnesses.....	115
2. Mitigating Measures .....	115
<b>BOX 5</b>	
Mitigating risks to victims and witnesses .....	116

# CHAPTER 8: Safety and Security

## A. Introduction

Safety and security considerations are of paramount importance and both concepts are linked. Safety has both an emotional and physical dimension, and refers to a state of emotional well-being as well as feeling protected from physical harm. Security refers to the process of ensuring safety by putting in place certain safeguards.

Practitioners should be aware of the safety and security aspects of their work and the risks which may arise for themselves as well as for victims and witnesses and their families and communities. Weak safety and security systems, confidentiality breaches or inadequate support and protection services are likely to exacerbate risks not only to individuals but also to the documentation process and the information. Ensuring appropriate safety and security measures are put in place is therefore both an ethical and operational obligation.

Documentation of war crimes, crimes against humanity, genocide and other egregious violations often takes place in volatile and insecure environments in which numerous potential hazards must be considered. Additional risks and potential harms are associated with the documentation process itself, particularly if it includes sexual violence crimes.

In many organizations, security planning management will be the purview of trained, specialised, security focal points and not within the remit of documenters themselves. However, regardless of whether documenters are guided in their actions by security measures developed by specialists or have to rely on establishing their own security protocols, this chapter outlines some of the minimum guidance to take into account.

Setting up safety and security measures depends on:

- » the relevant country/context in which the documentation is taking place, including whether or not armed conflict is taking place
- » the mandate, profile and gender of practitioners
- » the identity, affiliations and resources of potential perpetrators of the crimes or violations being documented
- » the profile of victims and witnesses
- » the vulnerabilities identified during the preliminary planning stage, including, for example: lack of fully confidential spaces in which to conduct interviews; inability to keep office location away from areas of ongoing conflict; limited staffing options affecting hours worked, individual resilience to vicarious trauma.

Safety and security considerations are linked to the Do No Harm principle (see Chapter 7: Do No Harm) and should underpin any decision or action taken by practitioners throughout the documentation process: from planning activities, choosing how to approach victims and witnesses and where to meet them, recording, transporting and storing information, to referrals.

## B. Holistic Security Strategy

Practitioners are encouraged to adopt an organised and holistic approach to security risk management, which includes the following components:<sup>1</sup>

- » **Physical and organizational security:** mitigating risks to individuals' physical integrity; to organizations/ individuals' homes, offices and vehicles; and to physical/material information and assets
- » **Psychosocial wellbeing:** mitigating risks to individuals' psychological well-being
- » **Digital security:** mitigating risks to digital information, communication and equipment.

The above components comprise a holistic security strategy to mitigate overall risks to the documentation process and organization as a whole.

These different components are interrelated, and should be considered together by practitioners when developing a comprehensive security strategy. Security plans are a combination of:

- » assessments
- » mitigation and prevention measures, aimed at reducing the likelihood of a threat becoming a reality
- » response measures, aimed at reducing the harm caused by a threat that has materialised.

Since threats are constantly changing, practitioners' security strategy and plans will only be effective if they dynamically adapt to live evolving circumstances.

Measures that can be taken by practitioners at the

organizational level should not be isolated as safety and security management alone. Instead, security planning should be mainstreamed across all the following areas:

- » personal security
- » human resources
- » facilities and office security
- » programming
- » travel and transportation
- » communication and data
- » health and wellness.

Please refer to Annex 5: Organisational Security Good Practices Checklist<sup>2</sup> for practical security steps to consider for each of these organizational areas.

While specific risks to (C) practitioners, (D) information and (E) victims and witnesses are discussed below in separate sections, in reality they are intrinsically linked. For example, risk to information due to poor digital communication security (e.g. mentioning victims' names and other identifying information over unprotected emails) may expose victims to retaliation by perpetrators and rejection by their families and communities as well as put the security of practitioners at risk.

<sup>1</sup> This checklist was developed for the International Human Rights Funders Group and kindly shared by Alexandre Carle, Katie Skartvedt and Catherine H. Townsend.

<sup>2</sup> Holistic Security: A strategy manual for Human Rights Defenders, Tactical Technology Collective, 2016, available online.

*Threats, risks and vulnerabilities need to be assessed at the planning stage and continually reassessed throughout the documentation process*

**BOX 1****Security and safety key points**

1. Organizations have a duty of care to their staff. In addition, each person is also responsible for their own personal security and the security of her or his colleagues.
2. Practitioners and their organizations have a duty to:
  - » adopt a structured approach to security risk management in the form of a global security policy, and develop internal security protocols to conduct threats and risks assessments
  - » take reasonable steps to ensure the safety and security of their staff, victims and witnesses, their families and communities, and information
  - » maintain sufficient funding and resources to respond in a timely and diligent way to security risks that arise
  - » identify internal human resources mechanisms and external partners able to deal or assist them with security situations at short notice.
3. Threats, risks and vulnerabilities need to be assessed at the planning stage and continually reassessed throughout the documentation process to reflect a continually changing internal or external environment, including, for example: changes in the political and security situation; changes in the team's operational structure or ability; changes in the direction of the documentation; or heightened risks resulting from exposure during the documentation process itself.
4. Practitioners should endeavour to mitigate identified risks to an acceptable level. If this is not possible, the planned activities should not take place or be postponed.
5. In many contexts affected by prolonged armed conflict, terrorism and instability, inherent residual risks might be unavoidable.
6. Risk management also requires a clear understanding of what constitutes acceptable versus unnecessary risk; that is, when benefits actually outweigh costs, and vice-versa. Accepting a certain degree of risk is a function of risk assessment and management, and this must be done continuously as new risks arise. Organizations/practitioners must decide on their level of risk tolerance and transparently implement risk mitigation measures accordingly, including refraining from activities that are above the risk tolerance.

*...investigations undertaken without a prior security strategy are usually doomed to failure.*

## C. Managing Risks to Practitioners

### 1. Risks to Practitioners

Practitioners are exposed to various types of threats and risks to their physical and emotional health and well-being, including lethal ones, due to the environment they are operating in and their role. Below is a list of common threats. This is not a definitive list and it must be adapted to the individual practitioner and its specific context:

- » road traffic accidents<sup>3</sup>
- » health hazards associated with the destruction or degradation of public services
- » stress, fatigue, vicarious trauma and PTSD
- » kidnapping
- » violent attacks by armed groups, terrorist or criminal networks
- » sporadic outbreaks of violence
- » specific targeting from individuals or groups under investigation and their supporters
- » improvised explosive devices (IEDs), unexploded ordnance and war debris,<sup>4</sup> which may be triggered by environmental influences (e.g. change in temperature, humidity)

- » shelling or air attack
- » environmental risks (e.g. floods, landslides or extreme weather conditions)
- » theft.

Human rights defenders and other practitioners documenting crimes allegedly committed by state officials (e.g. police, armed forces, government officials) face additional threats if their activities become known to the authorities, such as:

- » office raids
- » compromised documentation and disclosure of identities as a result of infiltration
- » judicial harassment, arbitrary arrest/detention, extrajudicial killing (especially for national practitioners)
- » deregistration (for national NGOs)
- » denied entry visas and other administrative obstacles (for foreigners).

See Chapter 9: Planning, Box 4: ‘Guiding questions on threats and risks’.

### 2. Mitigating Measures

#### BOX 2



#### Peer experience—security plan

Nancy, Human Rights Defender: *‘The first document for our organisation is the security plan, which is based on a thorough analysis of the relevant context. The reason for this is that investigations undertaken without a prior security strategy are usually doomed to failure.’*

<sup>3</sup> Road traffic accidents/collisions are one of the most common and most likely risks in fragile and hostile environments.

<sup>4</sup> A very useful tool to better understand such threats is the Landmine & Explosive Remnants of War smartphone app developed by the United Nations Mine Action Service (UNMAS), which can be downloaded from the App Store.

## BOX 3

## Mitigating risks to practitioners

Some steps that practitioners should consider taking to protect themselves include:

### Mitigating Risks Through Security Planning

- (i) Adopt a structured and holistic approach to security including dedicated resources (see below), dynamic threat and risks assessments and adequate planning to mitigate identified risks.
- (ii) Develop a global security plan/policy and put in place security protocols for the most likely incidents. Review and update protocols after incidents to include lessons learned.<sup>5</sup>
- (iii) Identify developments (political, legal, social, technological, legal or environmental) susceptible to affect security.
- (iv) Foster open and healthy communications around security in order to build solidarity, trust and resilience, and schedule regular team meetings with various aspects of security as standing agenda items,<sup>6</sup> including briefings based on source information regarding possible threats and risks, sharing and analysing of security indicators, and adapt sensitive activities accordingly (e.g. location, timing or visibility of meetings).
- (v) Put in place contingency plans.

### Training

- (i) Train staff on aspects of safety and security most relevant to their work (e.g. personal security, security management, first aid, digital security, defensive driving) and evaluate such trainings in order to continually improve them.
- (ii) At a minimum, all staff should be aware of possible hostile surveillance and receive training on personal and communication security.
- (iii) Increase staff's understanding of digital technologies; how they work and do—or often do not—protect information is an important part of overall security.

### Dedicated resources

- (i) Ensure that at the programmatic level projects' proposals and budgets systematically include safety and security components.
- (ii) Keep an emergency cash reserve in case staff members need funds to cover medical, legal or other unexpected expenses linked to their activities or to be evacuated at short notice.
- (iii) Consider applying for institutional or private emergency assistance or a protection grant provided the practitioner fulfils the criteria (e.g. human rights defenders, women, LGBTI persons, cyber activists, journalists, scholars) and types of support covered (e.g. physical security, digital security, relocation, legal, medical or other type of assistance), which vary from grant to grant.<sup>7</sup>

### Protection network

- (i) Develop a network of security contacts including, as appropriate, local law enforcement, military and civilian peacekeepers, private security companies, faith leaders, elders, embassies, partners and other relevant allies who can provide information or intervene in critical situations.
- (ii) Consider whether a contact list with the details of such a network needs to be kept confidential, and how.

## Mitigating risks to practitioners

Travel<sup>8</sup>

- (i) Put in place travel authorisation protocols that ensure travel only takes place if risks have been assessed and mitigated.
- (ii) Only authorise appropriately trained individuals to operate in high-risk environments.
- (iii) Establish several routes to get to destination and be ready to change itinerary at short notice.
- (iv) Closely follow staff travel plans, ensure regular communication as part of check-in protocols and agree who to contact if a check-in is missed.
- (v) Set up contingency communication protocols if check-ins are missed.
- (vi) Identify safe havens and ensure staff carry emergency contact information (e.g. next of kin, office number, emergency medical services, security company, lawyer) when travelling, and store emergency numbers in staff phones, if possible on speed-dial/in 'favourites'.
- (vii) Avoid demonstrations and large crowds such as market places.
- (viii) Equip vehicles with back-up communications (e.g. alternative mobile phone, radio or satellite phone if appropriate), basic safety gear (e.g. repair kits, fire extinguishers) and keep a grab bag with you at all times (e.g. first aid kit/trauma pack, flashlights, water, food, emergency cash, identification documents, ID photos). Please refer to Annex 6 : Grab Bag Content
- (ix) Carry spare photocopies of your passport/ID in case originals get lost or stolen and email a copy to yourself and trusted persons.
- (x) Avoid overt signage on vehicles and equipment to preserve confidentiality.
- (xi) Vary route for routine journeys, such as travelling to and from the office.
- (xii) Use trained drivers.
- (xiii) Consider carrying credentials/letters of support if safe to do so.

## Health and self-care

- (i) Identify and know how to reach the nearest medical facility and other support services, especially when travelling to remote areas.
- (ii) Ensure regular debriefings for staff to minimise risk of vicarious trauma.<sup>9</sup> This will also limit the risk of staff discussing sensitive matters outside of work, and the associated risk of confidentiality breaches. Refer them for psychological support if necessary.
- (iii) Encourage staff to develop a self-care plan and adopt healthy habits to preserve their physical and emotional well-being and maintain a good work/life balance as stress, fatigue and trauma can all impact upon individuals' ability to identify and respond to threats<sup>10</sup> (see Chapter 9: Planning/Self Care).

5 Please refer to Open Society Justice Initiative (OSJI), 'Practice Note: Security for Human Rights NGOs', Annex 2, for an example of Security Incident Report Form.

6 If regular team meetings already take place, security can simply be added to the agenda.

7 For a non-comprehensive list of emergency grants, please see: Directory of Emergency/Rapid Response Grants 2015, International Human Rights Funders Group, [https://ihrf.org/sites/default/files/Directory\\_EmergencyResponseGrants\\_2015\\_0.pdf](https://ihrf.org/sites/default/files/Directory_EmergencyResponseGrants_2015_0.pdf); <http://www.icanpeacework.org/emergency-assistance-for-activists-scholars/>; and ProtectDefenders.eu <https://www.protectdefenders.eu/en/supporting-defenders.html#emergency-support>.

8 Please refer to OSJI, 'Practice Note: Security for Human Rights NGOs', Annex 1, for an example of Pre-Travel Security Memo.

9 For a list of practical steps to avoid or limit secondary trauma for practitioners exposed to distressing digital content, such as photos or videos, please refer to The Engine Room, Benetech, Amnesty International 'DatNav: How to Navigate Digital Data for Human Rights Research' (2016), p. 71.

10 Holistic Security, supra note 1, 1.2. Individual Response to Threat.

## D. Managing Risks to Information

### 1. Risks to Information

Any type of information may be exposed to various types of threats and risks which may lead to confidentiality breaches, put the personal safety of practitioners, victims and other witnesses at risk or otherwise compromise the documentation process, including:

- » theft
- » loss or destruction
- » confiscation
- » modification
- » hacking/unauthorized access (by external or internal individuals)
- » surveillance
- » interception.

Threats are not only external (e.g. hacking): ‘insider threats’ (e.g. unauthorized access by internal individuals, accidental destruction), whether malicious or not, are also a significant risk.

### 2. Mitigating Measures

Information management and security is a critical component of any security plan. Its purpose is not only to protect data but also to protect practitioners and other individuals who contributed to the data collection as well as individuals featured in them, such as victims and other witnesses. Generally speaking, our ability to identify digital threats is far less developed than our ability to identify physical threats, and it is therefore essential that practitioners get a good understanding of the digital tools they use in their daily work (e.g. how and where information is stored and who may access it) as well as keep up-to-date with new tools and technological developments.<sup>11</sup>

Mitigating measures to preserve the security of information should cover:

- » information ‘in transit’, that is, data that is being communicated (e.g. face to face, phone or video-call conversations, emails, chats, SMS, information being uploaded to or accessed from a cloud storage and their metadata)
- » information ‘at rest’, that is, data that is being stored (e.g. a hard-copies stored in a filing cabinet, desk—including print-outs of information normally stored in digital format; digital files saved on a hard drive, cloud storage or digital devices and their meta-data)

11 Holistic Security, supra note 1, 1.2 Individual Response to Threat.

## BOX 4

## Mitigating risks to information

Some steps that practitioners should consider taking to protect information include:

### Information security policies

(Put in place information security policies covering, amongst others, access to sensitive information, data communication, data storing, use of social media, handling of sensitive information during documentation missions and transportation. Such policies need to be revisited and updated in the event of a breach of security. Such policies should in particular provide that practitioners:

- (i) use a coding system matching the personal data of victims and other witnesses (see Annex 8: Template for personal data to be collected from victims/witnesses ) to their actual statement
- (ii) set up information sharing practices on a strictly need-to-know basis, enabling to easily establish the source of any information leak
- (iii) limit the number of people with access to soft copies of sensitive information, others being given access to hard copies only which are shredded after use
- (iv) use a hard drive which can be stored in a fireproof safe or stand-alone computer not connected to any server to store sensitive information
- (v) use password protected folders and encrypted drives
- (vi) have clean desk policies (no sensitive paper to be left on desk when offices are not in use)
- (vii) consider using laptops that can be stored in fireproof safes
- (viii) never leave sensitive documents or electronic devices unattended in vehicles, restaurants, hotels or at home
- (ix) avoid carrying sensitive information identifying victims and witnesses by name, especially when crossing checkpoints.

### Digital data

- (i) Ensure there is the capacity, time and resources to collect, store, analyse as well as verify digital data before deciding to collect such types of information for documentation purposes. In assessing the advantages and disadvantages of using digital data or online media for documentation purposes in particular, the risks of mishandling data needs to be carefully considered (see Chapter 10, section D Digital Evidence and point above on training).
- (ii) In some settings, the risk of surveillance can also make digital data collection or communication inadvisable.<sup>12</sup>
- (iii) If using apps for communication or support documentation, be aware of the level of encryption and the user terms of service. Some apps are not truly private and using them can result in the creation of user rights for owners or third parties.

*...our ability to identify digital threats is far less developed than our ability to identify physical threats...*

**BOX 4****Mitigating risks to information**

Some steps that practitioners should consider taking to protect information include:

**Data communications**

- (i) Always act as if under surveillance.
- (ii) Avoid discussing cases and sensitive information over the phone or sharing such information by email or over social media without additional security measures in place.
- (iii) Consider the use of high standards encrypted electronic systems (e.g. for chats, emails) but note that encryption is often regulated by national law and may be illegal in some countries.<sup>13</sup> Practitioners are therefore advised to consult with local security experts or refer to online resources to find out about what is allowed in their specific context. Depending on the context, the use of encryption may be legal but nevertheless inadvisable (especially for those documenting violations which may incriminate the government) as it may attract the attention of the authorities. In some cases it is better not to use encryption but to practice other techniques to transfer information and protect it while in transit.
- (iv) When communication about cases through unprotected channels is unavoidable, find ways to do so without use of identifying information, such as victims/witnesses' names, locations.<sup>14</sup>

**Data storage**

- (i) Ensure data (digital or not) is safely stored according to the key principles mentioned in Chapter 13: Storing and Handling Information.
- (ii) For digital data, consider the use of encryption technologies (see (iii) above), use up-to-date anti-virus, protect all IT devices and sensitive folders with strong passwords, make regular back-ups to a remote server and remove hard drive if necessary.
- (iii) Store hard copies, USB sticks etc. in lockable, fireproof safes.

**Online posts**

- (i) Put in place a sign-off procedure for any material posted online, either on an organization's website or through social media (e.g. Facebook, Twitter) to ensure sensitive information has been scrupulously redacted and avoid posting a document or picture inadvertently revealing a victim/witness's identity, her/his whereabouts, location of interviews, images of workplace or with workplace in the background, etc.
- (ii) Keep raising staff awareness about the absence of separation between their professional and private lives and the risks of exposing themselves, victims and witnesses through reckless use of social networks (e.g. posting information about current whereabouts or other sensitive information).

## Mitigating risks to information

Some steps that practitioners should consider taking to protect information include:

### Location security

For office security, consider protecting and equipping offices and other buildings as appropriate, and if possible, with:

- (i) physical barriers such as fences and access control systems
- (ii) secure doors and windows which can be locked
- (iii) intrusion detection systems
- (iv) security lighting and video surveillance
- (v) trained security personnel
- (vi) shredders to safely destroy documents
- (vii) security policies and procedures providing limited access to the server room, to the office director/manager, and members of the IT team<sup>15</sup>
- (viii) a safe room
- (ix) fire-fighting equipment
- (x) having an escape route.

For security in a private residence, hotel or other accommodation used during a documentation mission, practitioners should:

- (i) always lock their doors and use a door locker (such as a door wedge or any other device) even when inside, and not sleep with open windows unless there are additional security measures (e.g. bars)
- (ii) not leave sensitive documents or electronic devices at home/hotel when they are not there
- (iii) keep keys with them and be present when somebody comes with their permission (e.g. cleaner, builder)
- (iv) get to know their premises, emergency exit, but also their neighbours and neighbourhood
- (v) identify a safe haven close by in case of need to leave the premise in emergency.

### IT security

- (i) Keep up-to-date with the newest developments in terms of technology and security software.
- (ii) Use software that is open-source (freely available) and whose security features have been independently reviewed and audited. Since its source code is publicly available, open source software is continually evolving as developers add to it and modify it. It means that it can be more secure than proprietary systems and can be adapted to your own requirements.
- (iii) Use devices that have 'kill switch' functions that can be initiated remotely in case of loss or vulnerability.

12 The Engine Room, Benetech, Amnesty International (2016) *DatNav: How to Navigate Digital Data for Human Rights Research*, available at <https://www.theengineroom.org/datnav-digital-data-in-human-rights-research>. p 14.

13 OSJI, 'Practice Note: Security for Human Rights NGOs', March 2016, p. 7.

14 For additional guidance, practical tips and tools to protect information, including on anonymous browsing, encrypted emails, use of video and voice communications, please refer to OSJI, 'Practice Note: Security for Human Rights NGOs', March 2016, pp. 7-17.

15 For further guidance on location, equipment and practices to enhance office security, please refer to OSJI, 'Practice Note on Security for Human Rights NGOs', March 2016, pp. 3-4.

Breaches of security and confidentiality policies in relation to witness information and other forms of sensitive information should be immediately and fully reported up the chain so that the risk, if any, can be assessed and managed. To encourage disclosure of breaches, consider implementing a policy of no disciplinary repercussion for immediate and full disclosure.

## E. Managing Risks to Victims and Witnesses

### 1. Risks to Victims and Witnesses

Victims and witnesses are exposed to various types of threats and risks to their physical and emotional health and well-being. Their mere participation in the documentation process may put victims and witnesses, their families and communities at tremendous risk (see Chapter 7: Do No Harm).

Victims and witnesses must be consulted about individual, local or community-specific risks during the documentation planning stage and prior to any decision to physically meet being made. However, practitioners should keep in mind that victims and witnesses may sometimes not recognise threats, minimise their risks as a coping mechanism or have unfounded fears as a result of misinformation or past traumatic experience.

Below is a list of common threats and risks. This is not a definitive list and it must be adapted to the individual victim/witness and the specific context (see Chapter 7: Do No Harm):

- » intimidation or retaliation by perpetrators
- » arrest and detention
- » social stigma
- » divorce, family rejection, reduced chance of marriage
- » honour killing
- » re-traumatisation due to a lack of gender-sensitivity by service providers, practitioners and/or the justice system which may lead to self-harm or even suicide

- » imprisonment for 'adultery' or 'out of wedlock intercourse' for women and 'same-sex acts' due to homophobic laws for men, even when these acts were non-consensual in certain context.

### 2. Mitigating Measures

Guidance and strategies to mitigate risks to victims and witnesses are found throughout the Protocol, in particular in Chapters 7: Do No Harm, 9: Planning and 11: Interviewing. Please find below some practical measures that should be put in place from a security management perspective, alongside guidance further developed in other chapters of the Protocol.

*Victims and witnesses must be consulted about individual, local or community-specific risks during the documentation planning stage...*

**BOX 5****Mitigating risks to victims and witnesses**

Some steps to protect victims and witnesses that practitioners should take include:

**Do No Harm**

Comply with the principle of Do No Harm (Chapter 7) and the highest standards of confidentiality.

- (i) Only question victims of sexual violence if strictly necessary and the information is not otherwise available, and limit the number of interviews.
- (ii) Inform victims and witnesses about possible risks and security measures which must be adopted, ideally prior to meeting in person.
- (iii) Protect the identity of victims/witnesses and conduct interviews in a location that is safe, private, neutral, comfortable, easily accessible and culturally appropriate (see Chapter 11: Interviewing, Box 3: 'Interview settings do and don'ts').
- (iv) As a general rule, do not record the image or voice of a witness if there are security concerns.
- (v) Do not discuss work/sensitive issues in public, in taxis or in front of drivers, with friends/family members or with colleagues outside of the documentation team.
- (vi) Always discuss with the victim/witness the safest way to get in touch and interact as it may put them at risk to call at home, leave messages, send emails or be seen with them.
- (vii) Advise victims/witnesses on non-disclosure about the documentation exercise (who can they tell and how much).
- (viii) Do not tell victims/witnesses anything about the documentation exercise they do not need to know. Never show victims/witnesses investigative notes, statements or other documents that are unrelated to their evidence.
- (ix) Never give witnesses information about other witnesses.
- (x) Be supportive, sensitive and caring in all your interactions with victims and witnesses, whatever your role (see Chapter 15: Trauma).
- (xi) Refer male and female victims of sexual violence to support services which are incorporated into other services and provide a holistic support aimed at responding to the many different needs that they may have. Victims of sexual violence are likely to have suffered from other forms of harm as well (e.g. displacement, detention, ill-treatments, missing relatives) and a compartmentalisation of violence should be avoided. Referrals to services openly designed for victims of sexual violence or torture may expose victims to further stigmatisation.

*In situations where despite mitigating measure the risks cannot be brought to an acceptable level... contact with a victim or witness should not take place or be postponed...*

**BOX 5****Mitigating risks to victims and witnesses**

Some steps to protect victims and witnesses that practitioners should take include:

**Contingency plan**

- (i) Provide victims and witnesses with a 24/7 telephone number to contact in case of emergency.
- (ii) Have sufficient funds and a contingency plan in place for victims/witnesses as well as their family members in case something goes wrong—this may include placing them in a secure accommodation.

**Protective measures**

- (i) Contact victims/witnesses for an emotional check 24h after interviewing them and, if possible, at regular intervals after that.
- (ii) Keep victim/witness personal information separate from the interview notes and use a coding system.
- (iii) Provide assistance tailored to victims/witnesses individual safety and security risks to avoid giving the impression that the testimony is rewarded.
- (iv) Avoid engaging with courts and other accountability mechanisms that do not protect witnesses.
- (v) Refer to Chapter 4, section D, Box 13: 'Examples of other protective measures' for examples of measures that judicial systems can put in place to protect victims and witnesses.<sup>16</sup>

In situations where despite mitigating measures the risks cannot be brought to an acceptable level and remain too high, contact with a victim or witness should not take place or be postponed to a later stage.

<sup>16</sup> Commonwealth Secretariat (2011) *Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice System*. London: Commonwealth Secretariat.

# Chapter 9 Contents

<b>CHAPTER 9: Planning .....</b>	<b>119</b>
<b>A. Introduction.....</b>	<b>119</b>
<b>BOX 1</b>	
Peer experience—why plan? .....	120
<b>B. The CARSV Documentation Plan.....</b>	<b>121</b>
1. Preliminary Research and Analysis .....	122
<b>BOX 2</b>	
Guiding questions for research and analysis .....	123
2. Objective.....	125
3. Underlying Acts .....	125
<b>BOX 3</b>	
Peer experience—what violation?.....	126
4. Scope.....	126
5. Risks .....	126
<b>BOX 4</b>	
Guiding questions on risks and threats .....	127
6. Resources .....	129
7. Information Collection Strategy.....	129
<b>BOX 5</b>	
The information collection strategy.....	129
7a. What CARSV information is required? .....	130
7b. Where to obtain CARSV information? .....	130
<b>BOX 6</b>	
Peer experience—searching for evidence.....	130
7c. How to gather CARSV information .....	131
i. Identifying victims and witnesses .....	131
ii. Reaching out through intermediaries .....	132
<b>BOX 7</b>	
Case law example—risks in using intermediaries—the Lubanga case at the icc .....	132
<b>BOX 8</b>	
Checklist for engaging with intermediaries .....	133
iii. Using interpreters .....	134
7d. How to store and transport information.....	135
7e. How to organize the information.....	135
8. Reviewing and Reporting Arrangements .....	137
<b>BOX 9</b>	
Reviewing and reporting arrangements.....	137
9. Codes of Conduct .....	138
<b>BOX 10</b>	
Examples of principles included in codes of conduct .....	138
10. Standard Operating Procedures.....	139
11. Self-Care .....	139

# CHAPTER 9: Planning

## A. Introduction

The proper documentation of CARSV is based on a thorough documentation planning process: planning your CARSV documentation means thinking about and organising all the activities required to meet a specific accountability objective.

The documentation plan outlined below is comprised primarily of the steps to take when documenting CARSV, in accordance with the subject of Protocol. **Nevertheless, as an international crime, sexual violence should not be documented in isolation.** Rather, it is key to document how these crimes fit within a broad campaign of violations (e.g. mass murders, enforced disappearances, recruitment of children, destruction of villages) as this will be particularly important to establish contextual and linkage elements.

Whatever an organisation's primary objective—whether it is seeking criminal justice, or other forms of accountability—deliberating on, and organizing the activities required to achieve this objective is fundamental. This means thinking about why practitioners should gather information on CARSV, how that process complements, and does not hinder, existing investigations, and planning how to gather that information, to what end, and according to which framework.

All these fundamentals can be organized as part of a CARSV Documentation Plan. Answering these questions—**why** gather the information; **how** to gather that information; to **what** end; and according to **which** framework—and inputting the answers into a plan requires an extensive amount of research, assessment and preparation in itself.

Proper planning at the outset of a documentation process will enable practitioners to:

- » gather relevant and appropriate evidence needed to fulfil their objective
- » avoid unnecessary risks
- » be logistically and financially prepared
- » know what to do with the evidence gathered
- » put in place adequate referral options.

## BOX 1



## Peer experience—why plan?

Nayani, Women's Rights Group Organiser: *'Our organization runs a safe shelter programme for women. Originally, we sheltered women who were fleeing violent and abusive marriages, and took in their children as well. Now, there are many women who stay with us because they have been displaced by the conflict, their families killed, and have nowhere to go. When they first started telling their stories, we simply referred them to counselling. Then they began to give us more details, and asking us if we would help find the men that did this to them and stop them from doing it to others, or if we could tell the large international organisations their story. We began to compile their testimony in a more consistent way. But when we started to submit our reports to X (international human rights instrument) we were being told that we did not have the 'right' facts, we had not asked the right questions. We also did not realize how many other things we had to put in place in order to keep women safe and help them navigate the process. Now we are better prepared. We have a good methodology and we help other, smaller organisations plan their own activities as well.'*

**A thorough plan to document CARSV must answer the planning questions set out below to the fullest extent possible.**

However, plans often change throughout the documentation, and practitioners may not be able to address all the questions below prior to the information-gathering process itself.

The CARSV Documentation Plan is a dynamic document which needs to be revisited and, as necessary, adjusted as the situation evolves and after each interview, to take into account information gathered, remaining gaps and possible new lines of enquiries (see Chapter 11: Interviewing, section B, Interview Framework, 5. Evaluation).

Additionally, although the questions are numbered sequentially, many of the answers to these questions cannot be sought in isolation from each other. Deciding which underlying acts to document, for example, will depend as much on the overall accountability objective to be pursued, the capacity and skills an organization can deploy, the risks involved and ability to identify and safeguard relevant witnesses, among others.

## B. The CARSV Documentation Plan

The CARSV documentation plan is comprised of 3 main elements

### A. Preliminary issues to research and assess

1. What have you found through your Research and Analysis?
2. What is your Objective?
3. What Underlying Acts are you investigating?
4. What will be the Scope of your inquiry?
5. What are the Risks?
6. What Resources will you need and how much will they cost?

### B. An information collection strategy

7. What is your Information Collection Strategy?
  - a. What CARSV information is required?
  - b. What are your information gaps?
  - c. Where will you the obtain CARSV information?
  - d. How will you gather CARSV information?
  - e. How will you store and transport information?
  - f. How will you organize information?

### C. Procedures to put in place

8. What are the Reporting Arrangements?
9. How will you Review Procedure
10. What are your Codes of Conduct?
11. What are your Standard Operating Procedures?
12. How are you going to Self-Care?

## 1. Preliminary Research and Analysis

**What have you found through your preliminary research and analysis? As a first step, practitioners should assess, to the extent possible, whether the information they are seeking has already been documented by other practitioners and organisations, whether that information is accessible, and whether re-documentation, including interview, is necessary.**

If further documentation is necessary, there are many issues that should be thoroughly assessed and researched by practitioners prior to starting a documentation process. That information can form the foundation upon which the documentation plan should be grounded—it takes great care and knowledge of the communal context to ensure that victims of sexual violence are not disempowered, can have access to justice, and do not have their safety compromised.

Below are some of the key topics particularly related to documentation of sexual violence that practitioners should familiarise themselves with as a starting point for their inquiries.

Some of the information will be readily available from open source reports, documents and websites. Some will require more thorough research, and may be available from the UN and other international organisations, international and national NGOs, local and grassroots organisations, and think-tanks. Other information will be directly and locally available to practitioners working in their own national context.

## BOX 2

## Guiding questions for research and analysis

**Preliminary research into the specific crimes**

- » What are the gender dynamics in the area—including of gender expression and sexual orientation—both at country and local level, in which the violations are occurring? What are the traditional and cultural beliefs in the community in relation to gender roles? How may this impact the ability of victims to report sexual violence crimes and access justice?
- » What is the nature and scope of acts of sexual violence, including threats, intimidation and terrorization, that have allegedly occurred? What is the pattern of these criminal acts and how do they fit into the overall pattern of the attack?
- » What has been officially reported? To whom have the reports been made? Where have individuals been targeted?
- » What is the community understanding of, and attitudes towards, different forms of sexual violence, including against children, the disabled, racial minorities, indigenous communities or members of the LGBTI community? What are the repercussions, if any, for victims/ witnesses? How would the community or family react if they become informed of a crime of sexual violence perpetrated against a member of their community? Would the reaction differ based on the age or gender of the victim/witness?
- » What is the security situation and what are the obstacles in the path of victims in attempting to access accountability mechanisms?
- » How are different forms of sexual violence criminalised, if at all? What are the legal requirements to prove charges of sexual violence? Does the national legal system provide for equality before the law? If yes, is it applied in practice? Do the rules of procedure and evidence facilitate or obstruct access to justice for survivors? For example, are testimonies of men and women given equal weight? Are there specific legal provisions in place with regards to children?
- » How do cases get investigated and prosecuted at the national and local levels? Are there specialist police units trained to investigate and prosecute crimes of sexual violence, including units with particular expertise in dealing with children?
- » What are the different forms of justice, both formal and informal, available to victims/ witnesses? What are the strengths and weaknesses of these forms of justice? Do informal mechanisms reflect or entrench gender inequalities in the country? Are men and women treated equally in informal justice mechanisms? What are the consequences for a victim/witness who chooses not to proceed within the customary mechanisms but rather turns to the state-level mechanisms (if such exist)? Does s/he have access to both? Do children have access to both?

*A useful tool to conduct this research is the Women's Initiatives for Gender Justice's Gender Equality Traditions (GET) Indicators Checklist check list from its publication Gender in Practice: Guidelines and Methods to address Gender Based Crime in Armed Conflict, pp 9-14 (accessible at [http://www.iccwomen.org/whatwedo/training/docs/Gender\\_Training\\_Handbook.pdf](http://www.iccwomen.org/whatwedo/training/docs/Gender_Training_Handbook.pdf)).*

## Guiding questions for research and analysis

### Preliminary research into the context

- » What is the political and security situation? What is the history of the conflict or hostilities? Is there a history of ethnic, religious or racial persecution? Is there a history of gender-based persecution in particular (i.e. severe deprivation of fundamental rights on the ground of gender)?
- » Who has been targeted? Have specific groups been targeted? Are children being specifically targeted? How is it known that those groups have been targeted? Who has targeted them? Have they been targeted by men, boys, women or girls?
- » Have there been reports or records made of other criminal acts committed as part of the attack? Have there been reported incidents of house raids, arrests and detention of civilians, attacks on villages or at checkpoints, or reports of sexual and non-sexual torture? What is the pattern of crimes?

### Preliminary research into the alleged perpetrators

- » How is the political, military and security infrastructure organised? Which groups, armed or otherwise, are operating in the area? What is their relationship with the local population?
- » Where do armed groups come from? What is their affiliation? Are these groups comprised of men and women? Are these groups comprised of girls and boys? What are the different roles of the groups?
- » What is the affiliation (if any) between the alleged perpetrator group and the security forces present in the area where the documentation would be taking place? Do the perpetrators or any of their affiliates have any influence on the affected community at the time the documentation is being conducted?

### Preliminary research into available and accessed services

- » What medical, psychosocial or support do victims/survivors potentially require?
- » What medical care and psychosocial services have survivors received?
- » What health, psychosocial, legal, and economic assistance options are available for victims/witnesses of sexual violence? What referral systems or pathways are in place? Are they safe, secure and effective?
- » Which actors are providing these services at local, regional and national level?
- » Are there any obstacles to victims/witnesses accessing these services (e.g. security concerns, financial constraints, or discriminatory attitudes or policies)?

## 2. Objective

**What is your objective?** Thinking about the ‘accountability objective’ at the outset is critical. Practitioners must establish **(i) why they documenting CARSV**—whether their aim is to preserve evidence for future accountability mechanisms, to highlight human rights violations, or to support international criminal investigations, among others.

If the aim is accessing a justice mechanism then it may be that re-interviewing is unavoidable. However, if the mandate is advocacy, this may not be necessary (see Chapter 7: Do No Harm, section C, 2. Coordination).

Practitioners must also consider carefully **(ii) what specific outcome** they seek as a result of their documentation—whether that outcome is an eventual conviction, increases in funding for activities, or international pressure on specific states, for example. Determining these factors will lead to making the decision about **(iii) which accountability mechanism** to pursue, **(iv) what the requirements are to pursue that particular mechanism**, and whether you have the **(v) requisite capacity and skills to pursue that particular mechanism**.

Answering these questions will assist practitioners in **(vi) establishing the overall legal framework** for gathering information on CARSV—that is, whether aimed at establishing individual criminal responsibility, state responsibility or for other purposes at the domestic, regional or international level, the relevant rules of evidence; and the applicable standard of proof (see Chapter 3: Overview of Accountability Avenues). This is true even for those practitioners that are gathering information with the objective of preserving it for potential future accountability, including criminal prosecutions.

## 3. Underlying Acts

**What underlying acts are you documenting?**

Having determined which legal framework to rely on for documenting CARSV, practitioners may be in a position to examine what acts within that framework can be documented, and what their constituent elements are. To determine this, practitioners may ask the following questions:

- » What has been reported?
- » What specific crimes have allegedly been committed?
- » What are the elements of those crimes according to the relevant legal framework?
- » What do you need to prove?
- » What do you have the capacity, mandate and expertise to pursue? (*e.g. for an allegation of rape and sexual slavery made against a specific perpetrator, which elements of those crimes are you in a position to document?*)

## BOX 3



## Peer experience—what violation?

Naseem, Human Rights Investigator: *‘One young woman giving evidence for our program recounted a brutal pattern of violations against her, her family, and other victims. She witnessed the execution of her brothers and her father before she herself was taken to a number of locations where she was detained and raped repeatedly to be “tested” for how “able” she was. At the last location she recalls, she was put on sale, then eventually gifted to another fighter. She managed to escape after 6 months of captivity. During her time, between being captured and offered as a “wife”, she witnessed the deaths of other women in captivity—some as a result of the violent rapes, because they did not receive proper treatment for their injuries. Some others committed suicide.*

*Alongside other cases similar to hers, we assessed what we potentially had and realised we could potentially frame our investigation focusing on a system of organized rape and sexual assault and sexual slavery at least, but also gather evidence of murder, torture and forced marriage.’*

## 4. Scope

**What is the scope of your inquiry?** Determining the scope of CARSV documentation is crucial for the planning process, both geographically and temporally. Practitioners must establish early on in the process both where their efforts will be concentrated, and how much time they have. In documenting historical allegations of sexual violence, establishing a specific time window is also key.

- » When setting the scope of their enquiries, practitioners must consider the implications of that decision on their resources and mandate. It is simply not realistic, nor ethical, to engage in a complex documentation process involving multiple allegations, lines of enquiry and locations when organisations are aware they will not be able to work in a specific region in the long-term, nor have adequate funding to meet their operational needs.
- » In the cases of mass crimes, this is of particular significance, as practitioners may think that interviewing as many people as possible is key to establishing a large-scale violation. However, in many cases, it is preferable to adequately interview a small number of victims, and try to establish a pattern from those testimonies and evidence, than to try and interview more than practitioner capacity—financial, human and technical—allows.

## 5. Risks

**What are the risks?** Threat and Risk assessments must be undertaken at the planning stage of the documentation exercise, as well as throughout. The results of those assessments—including the risks that have been identified and the measures planned to mitigate or respond to them— should be included in the CARSV Documentation Plan.

- » When assessing threats and risks at the planning stage, practitioners should consider risks not only to victims and witnesses but also to the information, and to themselves (see also Chapter 8: Safety and Security).

*(Detailed guidance on carrying out Threat and Risk Assessments is included in Chapter 7: Do No Harm and Annex 2: Conducting Threat and Risk Assessments.)*

## BOX 4

## Guiding questions on risks and threats

**Overall Risks**

- » Who (individual, group or organisation) may represent a threat to the documentation as a whole, including victims, witnesses, practitioners and information, and what is their capability?

**Assessing Risks to Victims and other Witnesses**

- » Will your documentation impact on the safety and security of victims; witnesses; their communities?
- » Is there a nearby medical facility, and, if so, can you access it? Will it serve all the victims/witnesses you are interacting with or only some of them, and if not all then who can provide care for the others?
- » Will the documentation occur in an area where hostilities are ongoing, offenders are still in the area, or survivors/witnesses are at risk of intimidation, further attacks (including retaliation for speaking) or displacement? If so, what strategies will you put in place to overcome these obstacles?
- » Has the information about the location of a site originated from a victim/witness at risk of exposure if that information is linked back to her/him? If so, what mechanisms will you employ to protect the victim/witness or source from any risk?
- » Will visiting particular crime scenes risk placing individuals who told you about these locations in additional danger? If so, are there other ways (such as via an intermediary) to gather information about these locations?
- » What particular risks are faced by women/men/children if they come forward? Are they likely to be stigmatised or isolated if they report a crime? Are they likely to be prosecuted for adultery or same-sex acts? What protocols are in place to address identified risks or harm to specific categories of victims?
- » Have you taken into account both your own knowledge of risks and that of the victims/ witnesses? Practitioners must consult victims/witnesses, as only they may be aware of certain individual, local or community-specific risks.

## BOX 4

## Guiding questions on risks and threats

**Assessing Risks to Practitioners**

- » Will your documentation impact on your/the safety and security of your team or your organisation?
- » Is access to the area, and travel within it, potentially risky?
- » Is there a risk of armed groups, terrorist or criminal networks operating in the area or in the site itself?
- » Is your team at risk of being targeted specifically? Is there a risk that you or your team may be subjected to threats from perpetrators, their families and supporters (this is especially problematic for national practitioners)?
- » Have you considered any additional, non-physical risks (in particular to national NGOs)? For example, national NGOs may be threatened with de-registration if they carry on working.
- » Is there a risk of judicial harassment, arbitrary detention or other?
- » Are practitioners at risk of vicarious trauma?
- » Are particular sites physically safe to visit?
- » Is access to the area or site safe and not at risk of floods, landslides or extreme weather conditions?
- » Are particular sites too far to access without an overnight stay, and if so is an overnight stay possible?
- » Is there risk of unexploded ordnance at the site?
- » Is the site inside or near a structurally unsound building?
- » What will be the impact of being found in possession of any information and evidence you may gather?
- » Will you be adequately equipped to deal with any eventualities? For example, will you have sufficient extra fuel, supplies, first-aid kits and communication devices?
- » Can your team access a nearby medical facility?
- » If necessary, can you remove overt signage on your vehicles and equipment?

**Assessing Risks to Information**

- » Do you have the capacity to safely store and keep confidential any information that you gather?
- » Do you have a safe system for transporting information and evidence?
- » Are you working in area where checkpoints are present and searches habitual?
- » How many people are aware of the kind of information you are gathering and where you are keeping it, and do any of them represent a risk to the information?

## 6. Resources

An estimation of the resources required, and their attendant costs, must be made during the planning process.

- » Resources include staffing needs, and in particular determining whether any additional staff such as interpreters, investigators, and technical experts—for example, if practitioners need to engage the services of child protection specialists or IT specialists.
- » Resource planning also includes estimating your potential equipment, transport, infrastructural and material needs, including specifically resources such as storage facilities, additional software (such as case management systems or other electronic databases), and if necessary, training needs.
- » Additional to resource estimations, cost estimates must include travel, accommodation, substance allowances, and any costs associated with victims and witnesses, such as covering their transport costs or overnight accommodation, if applicable.

## 7. Information Collection Strategy

Within the broader CARSV Documentation Plan, practitioners must also develop a specific **information collection strategy**. The **Information Collection Strategy** should identify what information is needed to meet the evidentiary requirements of the crime(s) or violation(s) being documented, rules of evidence on corroboration and other evidentiary issues, where practitioners may get the information from, and outline a practical and systematic approach to gather that information, organize the information, and finally, store and transport information collected.

### BOX 5

#### The information collection strategy

##### The Information Collection Strategy includes

- |  |   |
|--|---|
| <b>a) What information on CARSV is required</b>                        | What information do you require to satisfy the elements of the crime(s) or violations you are documenting?  |
| <b>b) What are the gaps and where can you obtain CARSV information</b> | What are the potential sources and types of information available—testimonial, documentary, digital and physical? Where are they located?             |
| <b>c) How to gather the CARSV information</b>                          | How will you approach identifying, approaching, and interviewing victims and witnesses? How will you collect other types of information and evidence? |
| <b>d) How to store and transport the CARSV information</b>             | How will the information you gather be safely transported and stored?   |
| <b>e) How to organize information</b>                                  | What system will be in place for organizing the information in an effective manner?   |

### 7a. What CARSV information is required?

A detailed evidence workbook listing the individual elements that must be proved for each alleged crime or violation, and the type of information that could prove each element, should be developed by practitioners at this stage in the planning process. Such a workbook would ensure practitioners gather the most comprehensive information in the most effective way to meet all the evidentiary/information requirements of each allegation. See Annex 1 for an example of an Evidence Workbook developed to establish individual criminal responsibility according to the definitions of crimes and elements of crimes as defined by the Rome Statute as a starting point.

### 7b. Where to obtain CARSV information?

*For detailed guidance on the types of evidence for crimes and violations of sexual violence, see Chapter 10: Types of Evidence of Sexual Violence.*

Practitioners should list all potential sources of information and types of information available to them that could potentially satisfy one or more of the elements they need to prove for each allegation. This could include testimonial, documentary, digital or physical evidence— depending on each practitioner’s mandate and capacity. Practitioners must consider how they will choose priorities and select which leads to follow.

### BOX 6



#### Peer experience— searching for evidence

Carlos, Investigator and Analyst documenting allegations of sexual violence committed in detention centres in Country X during period of civil unrest: *‘...(the victims) reported being beaten, gang raped repeatedly, forced into humiliating sexual acts and positions, among other horrific forms of abuse. Our initial instinct was to produce a report based solely on the testimony of former detainees currently living in a transit shelter on the border. However, during the planning phase of our documentation mission we identified other potential sources of information—there were rumours that somewhere there were records of which prisoners were kept in the detention centres, and for how long. We had some contacts in the local government willing to help us access those documents. And some of the victims reported being visited by off-site doctors when their injuries were too severe for the prison medics to treat, NGO doctors who could potentially be witnesses themselves or even have produced individual medical records for each patient’.*

### 7c. How to gather CARSV information

Having determined what sources of information are available, practitioners must think about **how to gather the information from those sources**.

- » This includes how to identify and approach victims and other witnesses, what information is sought from those victims and witnesses, the kinds of questions to be asked to elicit that information, and more generally how to conduct interviews, and record information.
- » Practitioners must carefully consider the consequences of taking notes in the first person, of getting statements/record of interviews signed by the victim/witness and/or of using audio or video recording of interviews—actions which could potentially conflict with official statements taken by official investigators at a later stage and be used to challenge a victim/witness' credibility. (For additional detail on this issue, see Chapter 11: Interviewing.)
- » Where applicable, planning how to gather information may include setting out how to process, photograph and sketch evidence and crime scenes, collect evidence and maintain chain of custody during the information collection phase.

*For detailed guidance on interviewing victims and other witnesses, photographing and sketching crime scenes, collecting and handling information, see Chapter 11: Interviewing and Chapter 12: Collection Additional Information.*

#### i. Identifying victims and witnesses

Identifying victims and other witnesses of sexual violence can at times be more challenging than identifying victims and other witnesses of other crimes under international law. Even in areas where multiple anecdotal reports of sexual violence have been made, victims and other witnesses may be unwilling to come forward formally for many different reasons. Victims may be unwilling to risk experiencing traumatic memories of the sexual violence, think the sexual violence was their fault, or think no one will believe them if they do not have proof. Depending on the communal and traditional or cultural context, victims of sexual violence crimes might be at risk, or

be manipulated, within their communities. This might be from members of the perpetrator group in close proximity or even from their own community or family, who may behave in an accusatory fashion, make them feel ashamed, punish them, or use the sexual violence as an excuse to separate victims from their homes, families, livelihoods and educational opportunities. Victims may be willing, but unable, to speak out. Some may have particular difficulty, for example if they have an intellectual disability or another disability that makes it difficult for them to communicate.

It is important to create a supportive and safe environment in which victims and witnesses feel secure to come forward and report crimes. If outreach is advisable, determine the level of outreach that is necessary to undertake prior to receiving information about cases of sexual violence in any given community. Additionally, practitioners should keep in mind that useful information about sexual violence can be collected from many sources, not just from victims/witnesses. Crucially, practitioners must deal respectfully with all witnesses whether they present themselves as sexual violence victims or not. It is not rare that persons who seek to give other relevant information might also be victims who are assuring themselves that trusted relations can be established. (See Chapter 10: Types of Evidence of Sexual Violence.)

Victims and other witnesses will sometimes come forward and offer to give testimony of their own volition. Practitioners should be well prepared to respond speedily, effectively and securely when this occurs. Most research, risk assessments and plans should be in place before practitioners engage with victims/witnesses.

Victims are sometimes directly identified through assessments, screening tools and other surveys. When this is the case, it is important that any approaches made to victims/witnesses are in line with the explicit wishes and preferences expressed by them when they agreed to take part in the assessment, including any requests to remain anonymous

or any safety precautions that must be taken before approaches are made.

### ii. Reaching out through intermediaries

Intermediaries are individuals that practitioners may enlist to help them to identify and liaise with members of the community, overcome cultural and social barriers, and identify potential victims and other witnesses. Intermediaries can be used in cases where the practitioner is unfamiliar with the community and its members and dynamics, where victims and other witnesses may be endangered if they approach practitioners directly, or where victims and other witnesses are apprehensive about interacting with people from outside the community.

Intermediaries can be very effective community interlocutors, although care should be taken to ensure their impartiality. (See Box 8: 'Checklist for engaging with intermediaries'.) They will often be members of local grassroots organisations, national and international NGOs, service providers, and other community networks and support structures such as churches and women's groups, and may be already work closely with survivors through existing gender-based violence support mechanisms.

### BOX 7



#### Case law example—risks in using intermediaries—the Lubanga case at the ICC

The use of intermediaries in international criminal trials, in particular questions over their role and impartiality in investigations, gained significant attention over the course of the Thomas Lubanga Dyilo case at the ICC. In its judgement, the Lubanga Trial Chamber rejected the reliability of testimony of some of the prosecution witnesses, including of alleged child soldiers, based on the alleged conduct of some intermediaries, which included buying testimony and influencing witnesses. The judgement found that:

*'The prosecution should not have delegated its investigative responsibilities to the intermediaries(...) notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinize this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.'* ICC-01/04-01/06-2842, para 482.

## BOX 8

## Checklist for engaging with intermediaries

- |          |   |   |
|----------|---|---|
| <b>1</b> | Obtain information about all the actors present in the community surrounding the victim/witness to enable practitioners to effectively select the right intermediaries.<br><br><i>This includes mapping out the communal hierarchy, including the women's leadership within the community (e.g. the elders, midwives, teachers, female village chiefs or female religious leaders). Most communities have a leadership structure and every community of women will have a leader or leaders who may either facilitate or impede practitioner access to victims/witnesses. Most often the women leadership will serve as critical support to the work done by the team, but only if the team is operating in a manner which is principled, respectful and transparent.</i> | ✓ |
| <b>2</b> | When attempting to identify male victims specifically, seek out appropriate intermediaries—for example members of civil society organisations working just with male victims—and be aware of the particular cultural attitudes and sensitivities surrounding sexual violence against men.   | ✓ |
| <b>3</b> | Assess carefully whether or not engaging with victims and other witnesses via intermediaries will place victims and other witnesses, individual members of the community or organisations they approach at risk. Assess in particular whether or not intermediaries are coercing participation or exposing witnesses and not acting according basic ethical standards.  | ✓ |
| <b>4</b> | Ensure intermediaries know and can articulate the mandate of the organisation and general scope of the documentation, including any limitations (such as inability to cover certain areas, time periods, or categories of witnesses such as children) so as to avoid miscommunication or raising false expectations of potential witnesses.   | ✓ |
| <b>5</b> | Ensure intermediaries are aware of whether or not the scope of the documentation includes crimes against children, and in particular that they do not select underage witnesses for introduction to the team if the investigators are not in fact trained and authorized to interview children.   | ✓ |
| <b>6</b> | Be aware of any divisions in the community, and whether members from opposing 'groups' coexist within the same community.   | ✓ |

## BOX 8

## Checklist for engaging with intermediaries

- |    |   |   |
|----|---|---|
| 7  | If it is considered safe, work closely with community members, community leaders, medical service providers and support groups and institutions to help identify potential victims and other witnesses.   | ✓ |
| 8  | Connect with local organisations and set up initiatives to enable survivors and other witnesses to come forward, including development of women's empowerment forums, safe spaces, confidentiality and other protective measures.   | ✓ |
| 9  | Vet any potential intermediaries (for criminal records, impartiality, trustworthiness, capacity for the role, affiliations and ability to work with women/men/children).  | ✓ |
| 10 | Take care that neither practitioners themselves nor any intermediaries are perceived as offering anything of value in exchange for testimony, including financial and material assistance or improved access to aid. However, this should not preclude referral to services, which should be made where possible. | ✓ |
| 11 | Set clear expectations with intermediaries concerning their role and its limitations, and the level of support and guidance that they can expect from practitioners.  | ✓ |
| 12 | Ensure that any intermediaries have a reliable way of contacting the practitioners.   | ✓ |
| 13 | Document their own interactions with intermediaries such that they are in a position to justify any decisions made in relation to those intermediaries.   | ✓ |

## iii. Using interpreters

Interpreters are often a key part of the practitioner's team. Interpreters should be appropriately trained, not only in interpretation itself but also in working with survivors/ witnesses of sexual violence and, where relevant, with children.

Interpreters should be able to provide the practitioner's team with interpretation during any interaction practitioners may have with members of the community, including during interviews. They should also be able to provide practitioners with the right linguistic and cultural interpretations of key words, behaviours and expressions associated with sexual violence in a particular setting, without changing or influencing the information as provided by the survivor or other witness.

During interviews in particular, interpreters must be able to work sensitively and professionally, and according to the ethical principles of 'do no harm'. They must also fully understand the concept of informed consent, and abide by the team's codes of confidentiality.

### When selecting interpreters:

- » Allocate adequate financial and human resources to locating and retaining trained independent interpreters. Such persons are not always readily available.
- » Never use family members as interpreters for reasons of confidentiality. For the same reason, interpreters should only be drawn from the same community as the survivors/ witnesses as a last resort—in particular when it comes to indigenous communities.
- » Take time to assess potential interpreters. Vet any potential interpreters for criminal records, impartiality, trustworthiness, capacity for the role, affiliations and ability to work with children.
- » Recognise that the interpreter's sex, age, identity and ethnic, cultural and political affiliations might be a factor affecting the extent to which the survivor/ witness trusts them, but be sensitive in consideration of such factors so as not to perpetuate stereotypes or persecutory ideologies.
- » Always assess the candidate's personal views on sexual violence and gender equality prior to hiring them. Ensure they have a degree of comfort with the terminology of sexual violence so that their own discomfort (e.g. distress, shock) does not impact negatively upon the evidence-gathering process.
- » Include, where possible, female and male interpreters in the team.
- » When interviewing children, only use interpreters who have received special training and have prior experience of working with children.
- » Ensure interpreters:
  - » Are comfortable from a security point of view working in the region and context in which practitioners will be asking them to operate.
  - » Understand the local context but be objective in their viewpoint.
  - » Have experience with (and be sensitive to) the interplay between sexual violence and the local culture, and understand how these issues might affect communication with those being interviewed.
  - » Are comfortable with the detailed subject matter of sexual violence and its terminology, including the words and euphemisms likely to be used to describe sexual violence in the relevant area.

### 7d. How to store and transport information

Part of the planning process for investigating CARSV must include developing a sound system for storing and transporting information once it has been gathered. It is vital to store and maintain the information and evidence—for example, photographs of a crime scene or a document recording the interview with a victim/witness—in a manner that does not compromise its integrity or put victims and witnesses at risk of further harm.

Overall, planning how to store and transport information must include:

- » determining when, why and how practitioners might destroy information at risk of confiscation
- » whether practitioners are able to maintain 'Chain of Custody' (see Chapter 12: Collecting Additional Information, D. Chain of Custody)
- » whether they have the capacity to safely secure the information for long periods of time, including preventing its destruction or contamination through inappropriate handling or storage.

In planning how to **store information**, practitioners must plan where the information will be stored and who will have control over it. Practitioners must carefully consider how they will keep the information they gather safe and confidential. Ideally, they should use a central storage location in a safe zone, preferably not in the conflict area, that is overseen by an information custodian. (For detailed guidance on storage systems, see Chapter 13: Storing and Handling Information).

To **transport information** practitioners must consider the risks involved in travelling with information, in particular through checkpoints, airports, or other areas where vehicle and personal searches are likely. They must also think about what form of transport is available to them, and whether that form is suitable for transporting information and evidence.

### 7e. How to organize the information

The way in which the information is **organized** once it is stored is a critical aspect of the documentation

process and needs to be carefully thought through in advance of any documentation exercise. Ideally, an electronic database should be used, and populated with all the information gathered. The data should be linked internally, and include **at a minimum** the following information:

- » personal data of each victim/witness interviewed
- » security concerns of each victim/witness interviewed
- » evidence of informed consent to participate in the interview;
- » testimonial information given by that victim/witness
- » documentary information provided by that victim/witness
- » information regarding the existence of medical or police records
- » photographic or audio-visual information relating to that victim/witness
- » if applicable, translations of any of the above.

If at all possible, the database should be sufficiently developed such that the data will be searchable by many different criteria. There are many open source database applications that support documentation of international crimes and human rights violations.

## Example Tools

### 1. OpenEvsys

OpenEvsys, shorthand for Open Events System, is a free and open source database application developed by HURIDOCS. OpenEvsys enables human rights NGOs to:

- » record, browse and retrieve information on victims, perpetrators and instances of human rights violations
- » analyse data, browse reports and discern trends and patterns of abuse
- » manage and track interventions, such as medical and legal aid
- » securely store related documents like testimonies, affidavits and audio-visual files.

<http://www.openevsys.org>

### 2. I-Doc

I-DOC is another free and open sourced database application that supports documentation analysis for international crimes and serious human rights violations. With I-doc, practitioners can:

- » identify, collect, verify, corroborate, summarise and synthesise facts and evidence
- » catalogue essential information categories: evidence, incidents, context, persons (suspects, victims and witnesses), institutions, protected property and objects
- » analyse according to specific legal frameworks (state, federal, regional, international)
- » map geographic and time patterns, generate linkages and statistics
- » construct reports, legal complaints, ICC communications, outreach, criminal and human rights cases using information categories
- » link to the Case Matrix / CICD analysis of Core International Crime legal requirements and means of proof.

<http://blog.casematrixnetwork.org/toolkits/databases/i-doc/>

## 8. Reviewing and Reporting Arrangements

See also Chapter 14: Analysing Evidence and Information, for more details on ongoing documentation reviews.

### BOX 9

#### Reviewing and reporting arrangements

*From IICI Investigator's Manual, 9th Edition*

Practitioners must set out how they will continually reassess the documentation plan as new information is received, particularly to ensure that the original assumptions are still valid. Reassessment is also necessary to determine:

- » What additional work is required as a result of new information collected?
- » Should additional resources be applied to particular areas of your documentation, or redeployed?
- » Will the outcomes be achieved within the allocated timeframe?
- » Does the documentation plan need modification?
- » Are there newly identified obstacles to completing any aspect of the documentation?

## 9. Codes of Conduct

All team members should be committed to conducting themselves in an ethical and professional way, understand why they are expected to conduct themselves in this manner, and understand the consequences of misconduct. Codes of conduct serve to codify these commitments and guide the behaviour of professionals documenting CARSV.

Prior to documenting CARSV, practitioners should develop codes of conduct particular to a documentation, where a specific organisation's codes are not specific enough, or if there are members of the documentation team that do not belong to the same organisation conducting the documentation. These should reflect the obligations of professional behaviour of each team member, as well as the ethical principles team members are expected to abide by.

In particular:

- » **Confidentiality agreements** between the investigators and the organization are often required, and include the need to keep confidential all materials, knowledge, procedures, meetings, pronouncements, etc. that are not in the public domain.
- » Codes of conduct should reference the **potential mandatory reporting requirements for cases of sexual violence against children**. In settings where mandatory reporting requirements exist, practitioners must establish procedures for reporting suspected or actual sexual abuse.

If mandatory reporting laws or policies are in place, then practitioners must answer the following questions:

- » Who is required to report cases of child abuse?
- » Who are the officials designated to receive such reports?
- » When is the obligation to report triggered (i.e. with suspicion of abuse)?
- » What information needs to be shared?
- » What are the reporting regulations regarding timing and other procedures?
- » How is confidentiality protected?

- » What are the legal implications of not reporting?

(From IRC/UNICEF, *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*, (New York, NY, 2012))

### BOX 10

#### Examples of principles included in codes of conduct

**Ethical** imperatives contained in codes of conduct commonly include the following principles and values:

- » Do No Harm
- » Non-discrimination
- » Independence and impartiality
- » Respect for confidentiality
- » Respect for cultures and religions
- » Ensuring community participation in decision-making
- » Commitment to human rights.

**Performance-based**, or practical responsibilities enshrined in Codes of Conduct may include:

- » rules on how to manage funds, staff and resources
- » principles on information-sharing
- » good governance
- » internal complaints mechanisms.

**Code of conduct principles that are particularly important when working with victims and witnesses of CARSV:**

- » work according to a victim-centred approach
- » do not exhibit judgemental behaviour
- » never blame a victim
- » treat all victims with dignity and respect
- » prioritise the safety of the victim over the evidence.

It is common practice for team members to sign codes of conduct, if necessary.

## 10. Standard Operating Procedures

Practitioners should set up internal standard operating procedures to address the need for consistent practice and response to predictable operational eventualities.

This includes developing:

- » witness handling procedures
- » documentary, physical and digital evidence handling procedures
- » security and evacuation plans
- » digital security protocols
- » confidentiality protocols
- » policies on who can access sensitive information stored digitally and physical items stored in locked storage facility and why, limiting number of people with access (see Chapter 13: Storing and Handling Information)
- » communication plans
- » manner of documentation (notes, audio, video, photographing) and how to handle documentation equipment
- » procedures at scenes of violations
- » referrals (see Chapter 8: Do No Harm/Referrals)
- » plans, policy and referral options in place regarding emergency assistance or transportation of any victims/witnesses, unaccompanied children or other individuals
- » when, why and how practitioners may destroy information at risk of confiscation.

## 11. Self-Care

Developing appropriate self-care procedures for practitioners at the organizational and operational level is key to minimizing the impact of stress and mitigating the risk of team members suffering from severe forms of vicarious trauma as a result of being exposed to accounts of distressing events and experiences and working in high-risk, violent conflict environments.

The examples below are taken from the Sexual Violence Research Initiative, *Guidelines for the Prevention and Management of Vicarious Trauma Among Researchers of Sexual and Intimate Partner Violence* (Pretoria, 2015).

Procedures and safeguards to put in place may include:

- » Interviews for members of team should include assessments of individual resilience alongside broader experience and exposure to sexual violence documentations.
- » Individual team members should be trained to recognise the signs and symptoms of vicarious trauma, and how to respond to these, including how to access supportive supervision and trauma counselling when needed.
- » Access to trauma-trained counsellor who can offer pre-deployment/mission, ongoing and post-deployment/mission counselling to investigators.
- » Systems to limit exposure to traumatic material by varying and balancing the workload, including: rotating job responsibilities so interviewers have a break from listening to victim or perpetrator stories; researchers working in teams, so team members can temporarily shift from field interviews to quality control, driving, data entry, clerical and/or administrative tasks; and being able to engage in self-care activities, by taking time off and exercising, meditating, etc.
- » Capping the number of interviews researchers undertake per day.
- » Making sure investigators take adequate breaks between interviews.
- » Confidential team meetings to specifically address the emotional impact of undertaking research, separate from meetings for reviewing technical or operational aspects of the documentation.

# Chapter 10 Contents

<b>CHAPTER 10: Types of Evidence of Sexual Violence .....</b>	<b>141</b>
<b>A. Introduction.....</b>	<b>141</b>
<b>BOX 1</b>	
The impact of evidentiary and procedural requirements .....	142
<b>BOX 2</b>	
Open source information.....	143
Key to note .....	144
<b>BOX 3</b>	
Domestic prosecution of CARSV crimes—the question of evidence .....	145
<b>B. Testimonial Evidence.....</b>	<b>146</b>
1. What is Testimonial Evidence? .....	146
2. Where to Find Testimonial Evidence .....	147
3. What is the Role of Testimonial Evidence?.....	147
<b>BOX 4</b>	
Peer experience—the witness is the evidence.....	148
<b>C. Documentary Evidence .....</b>	<b>148</b>
1. What is Documentary Evidence?.....	148
2. Where can you find Documentary Evidence? .....	149
3. What is the role of documentary evidence?.....	149
<b>D. Digital Evidence .....</b>	<b>150</b>
1. What is Digital Evidence? .....	150
<b>BOX 5</b>	
Issues to consider when choosing digital evidence collection tools .....	151
2. Where to find Digital Evidence?.....	152
<b>BOX 6</b>	
Peer experience—example of social media use.....	152
3. What is the role of digital evidence? .....	153
<b>BOX 7</b>	
Special risks linked to collecting digital evidence .....	153
<b>E. Physical Evidence.....</b>	<b>154</b>
1. What is physical evidence? .....	154
<b>BOX 8</b>	
Can I collect physical evidence?.....	154
2. Where to find physical evidence? .....	155
3. What is the role of physical evidence?.....	155
<b>BOX 9</b>	
Understanding medico-legal evidence for CARSV.....	156

# CHAPTER 10: Types of Evidence of Sexual Violence

## A. Introduction

Obtaining the best and most reliable information or evidence is the objective of every documentation process.

The term ‘evidence’ is generally used in reference to relevant information that has some sort of probative value and form, when submitted to a court to establish a fact in dispute. In criminal prosecution, facts need to be proved ‘beyond a reasonable doubt’, whereas a lower standard of proof applies for practitioners documenting for advocacy or non-judicial purposes (e.g. a ‘balance of probabilities’ or other). In the context of this Protocol, the terms information and evidence will both be used as different practitioners will collect information about sexual violence crimes for different purposes—some which will require the information to comply with formal evidentiary and chain of custody requirements, others will not. It is the responsibility of practitioners to know what standard of proof and evidentiary requirements are applicable to their activities and tailor their information gathering to what is necessary for their purposes.

Relevant information for sexual violence documentation can be anything that provides information about the incident or circumstances being documented. It can be:

- » researched or found (e.g. a list of prisoners found in an abandoned detention centre, an NGO report downloaded from a website, a video found online)
- » handed over to practitioners, voluntarily or following a court order (e.g. copy of medical records; message history of a mobile phone)
- » generated by practitioners or third parties (e.g. witness statements, sketches of sites of violations, photographs of injuries, chain of custody log, practitioners’ own observations, scientific analysis).

Practitioners should gather information that not only establishes individual sexual assault crimes but also helps establish the scope of sexual violence crimes and other related violations or crimes that were perpetrated upon the victim, such as imprisonment or slavery. Practitioners should also gather information about the context and common elements that are necessary to elevate ‘ordinary’ crimes to the level of crimes under international law, as well as information about who is responsible for the violations or crimes and how (modes of liability) (see Chapter 4: Individual Criminal Responsibility and Chapter 5: State Responsibility).

## BOX 1

## The impact of evidentiary and procedural requirements

The type of evidence of sexual violence that is necessary, and how and by whom it must be collected and preserved (i.e. chain of custody requirements) to be admissible differs between jurisdictions and accountability mechanisms. There is no specific set of rules applicable for criminal, human rights or other types of accountability mechanisms, although the issue of admissibility of evidence is likely to be more rigid and detailed for criminal prosecution. Before embarking on any documentation process, practitioners should therefore ensure that they are familiar with the relevant substantive law and also with the applicable evidentiary and procedural requirements in relation to which they are operating; in particular, what type of evidence or proof of sexual violence needs to be provided for civil, criminal or other claims, and which organisations and individuals are permitted to collect or store it.

Depending on the context, certain categories of evidence may be inadmissible. For instance, in many common law jurisdictions a court will refuse to admit as evidence statements that a witness says he or she heard another person say ('hearsay evidence'), unless specific exceptions apply. Criminal courts may also refuse to admit prior witness statements rather than oral testimony, which can be challenged by the defence.

The ICC Rules of Procedure and Evidence (RPE) do not designate categories of inadmissible evidence and they instead provide a flexible framework for evidentiary analysis,<sup>1</sup> only requiring that evidence be admitted or rejected based on its:

- » relevance
- » probative value
- » prejudicial impact.

The ICC and other international criminal courts and tribunals are not rigid about the submission of evidence and most evidence is admitted. Questions about evidence focus more on its relevance and weight rather than its admissibility (e.g. prior or subsequent sexual conduct of the victim is not relevant). At the domestic level, however, RPE are likely to be more restrictive. Practitioners can use Chapter 4: Individual Criminal Responsibility, section D, Rules of Evidence and Procedure as a resource to advocate for the adoption of similarly flexible rules or progressive interpretation of existing RPE to improve victim/witness's participation in the justice process, their protection while testifying in court and accountability for sexual violence crimes.

1 ICC, Rules of Procedure and Evidence (63) and (64). <http://www.icc-cpi.int>.

All evidence can be classified into four groups. These groups are:

- » testimonial evidence
- » documentary evidence
- » digital evidence
- » physical evidence (including forensic evidence).

Although evidence falls into these four different categories, there are relationships and interactions between each type of evidence and they may complement and reinforce each other. For instance, an eyewitness may be able to explain how a torture device recovered from a site of violations was used or help practitioners interpret the meaning of documents collected as evidence. There may also sometimes be overlap between different categories due to the method of collection or storage of the evidence. For instance, a testimony may be collected and preserved on digital video, or a document may be digitized for preservation and redundancy. Moreover, a document may constitute evidence both for its content (documentary) and as such (physical), for instance because it contains a seal that can help authenticate it.

Some evidence will be useful to show that a particular event took place whereas other information, such as clinical records and other programmatic data, will only become valuable in the aggregate to help establish a pattern ('pattern evidence') (see Chapter 14: Analysing Evidence and Information, Box 11: 'The use of programmatic data to establish patterns'). Certain categories of evidence, such as testimonials from pattern witnesses like doctors, nurses or human rights monitors may be mainly relevant to establish the scope of violations, while others may be relevant both at the individual and aggregate level (e.g. testimonials from a large number of victims of sexual violence from the same village can constitute individual evidence as well as, taken together, pattern evidence that an attack was widespread or systematic).

**BOX 2****Open source information**

'Open source information' refers to information and sources that are generally available to the public, such as news media, public reports, academic work, social media, online videos and image sharing devices (see also sections C, Documentary Evidence, and D, Digital Evidence below).

While information obtained from open sources may in many circumstances be admissible as evidence, there can be issues about its reliability, therefore questioning its probative value. Authentication is crucial and always the first step when dealing with open source information. Practitioners should never assume that the information is what it seems to be without thorough verification (e.g. simple checks may for instance reveal that a video found online was not filmed in the location or at the date it mentions, meaning that it does not relate to the events it is supposed to document).

Open source information is a promising but still largely underexplored investigative resource when it comes to prosecutions for CARSV. Use of open source information might ultimately require that the person who created the information (e.g. journalist, photographer, filmmaker) be produced to verify the authenticity of what is presented, or other form of verification. However, certain open source information relating to contextual or jurisdictional evidence, such as a declaration of war, might be judicially noted as authentic.

Open source information alone is not sufficient. Other forms of direct or indirect evidence will always be necessary to satisfy a legal burden of proof and eyewitnesses derived information is preferable. That being said, open source information accessed from a computer away from physical dangers present in conflict-affected and fragile environments can arguably make documentation processes safer and cheaper than traditional eyewitness-based ones.<sup>2</sup>

2 Hiatt, K. (2016) 'Open Source Evidence on Trial', *Yale Law Journal Forum* 125, 2015-2016: 323-330.

*For many types of documentation...it is not legally or evidentiary necessary to collect physical evidence...*

### Key to note

- » Certain types of evidence, such as physical evidence, may require specific legal authorisation to collect and/or should only be processed, handled or stored by trained professionals. Practitioners who do not have the necessary authority or training should not collect such information as they may mishandle and contaminate it, making it inadmissible in courts. That said, they may record or document it in other ways, for example by photographing it.
- » For many types of documentation, particularly those for advocacy or non-judicial purposes, it is not legally or evidentiary necessary to collect physical evidence, and it may be possible to establish the same facts to the standard required (e.g. a 'balance of probabilities' or other) using documents, sketches, photos or victim/witness testimony.
- » In many situations, because the crimes or violations were committed a long time ago, because of deterioration or tampering with evidence, because of the lack of medical services during contexts of mass atrocities, or due to other factors, there may not be any documentary, physical or digital evidence to collect regarding the crimes. It is not uncommon for testimonials to be the only form of evidence available for the acts of sexual violence and this is the main reason why this Protocol puts an important emphasis on interviewing techniques. That said, other forms of evidence are still likely to be available to establish the common elements and modes of liability.
- » For international crimes such as CARSV, it is important to keep in mind that contextual evidence to prove the common elements is as important to document as evidence of the sexual violence crime itself. Too often, practitioners documenting sexual violence mass crimes focus only on the underlying sexual violence crime itself and forget to collect contextual evidence, or underestimate the importance of such type of evidence, which is however necessary to prove; for instance, the existence of an armed conflict or the existence of a widespread or systematic attack against a civilian population.

## BOX 3

## Domestic prosecution of CARSV crimes—the question of evidence

Evidentiary requirements are closely tied to available definitions of crimes, modes of liability (e.g. ‘command responsibility’; ‘joint criminal enterprise’), and procedural protections for victims in domestic and international courts. A key question for practitioners is whether or not national jurisdictions will follow the more flexible evidentiary standards and innovative RPE adopted by the international and hybrid criminal courts to prosecute sexual violence as a crime under international law in local courts. Incorporation of more flexible RPE can accompany domestication of international definitions of crimes under international law.

**I. The question of evidence in local prosecution of CARSV**

- » Which RPE will national courts follow in prosecuting CARSV?

**II. Adopting RPE that reflect differences in scale and context of CARSV<sup>3</sup>**

Key differences between international and domestic courts include:

- » elements of crimes
- » modes of liability
- » rules of procedure and evidence.

Rule 96 of both the ICTR RPE<sup>4</sup> and ICTY RPE<sup>5</sup> established the following key protections for victims of sexual violence:

- » corroboration of victim testimony is not required
- » information about the victim’s prior sexual conduct cannot be admitted as evidence
- » lack of consent can be inferred from the environment of coercion that characterizes war, mass violence, and detention.

The ICC RPE codified similar protections in Rules 70, 71, and 72.<sup>4</sup> Additionally, corroboration is not required to prove any crime within the jurisdiction of the ICC according to Rule 63.

Unlike in international and hybrid courts, corroborating evidence is often required in national jurisdictions. Medical or forensic evidence may be a formal or informal requirement in order for a case to go forward in court. Often such evidence is unlikely to be available, foreclosing victims’ access to justice. Further, forensic evidence and clinical findings may be undetectable even when rape is known to have occurred, depending in part on the nature of the violence, the likely delay between the assault and medical evaluation, and the availability of forensic evidence collection techniques. The absence of such evidence may, in effect, prevent prosecution and serve as a barrier for victims who seek access to justice.

**III. Questions for discussion and ways forward**

Practitioners may wish to use the following questions to prompt national-level dialogue about if and how local jurisdictions can adopt RPE and lessons learned from the international courts:

1. What questions of evidence have arisen in local investigation and prosecution of CARSV?
2. What innovative legal strategies have been developed to facilitate prosecution of CARSV in local courts?
3. Have local jurisdictions considered adopting innovative RPE similar to the international courts for prosecution of CARSV? What are the barriers? How might they be overcome?

3 United Nations Mechanism for International Criminal Tribunals (2014) *Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, <http://www.unicttr.org/>.

4 ICTR, Rules of Procedure and Evidence (Rule 96), Revision 22. Originally adopted on 29 June 1995; as amended 10 April 2013. Available at <http://www.unicttr.org/>.

5 ICTY, Rules of Procedure and Evidence (Rule 96), Revision 49. Originally adopted on 11 February 1994; as amended 22 May 2013. Available at <http://www.icty.org/sid/136>.

6 ICC Rules of Procedure and Evidence (Rules 70, 71, 72), supra note 1.

## B. Testimonial Evidence

### 1. What is Testimonial Evidence?

Testimonial evidence refers to the account of victims, eyewitnesses, insider witnesses, pattern witnesses, expert witnesses and suspects (although in view of its main target audience, this Protocol focuses on victims and other factual witnesses testimony only) about something that they have experienced with one of their five senses.

The quality of testimonial evidence depends from various factors, including the recollection of the witness and communication skills of both witness and interviewer. In addition, testimonial evidence needs to be assessed for credibility and reliability<sup>7</sup> (see Chapter 14: Analysing Evidence and Information/ Evaluating Testimonial Information on Sexual Violence).

Testimonial evidence can be given orally directly in court, recorded in writing in the form of interview notes or sworn witness statements, or by electronic means such as audio or video recordings (see Chapter 11: Interviewing, section C, Recording Interview Information and Box 11: 'Peer experience—Capturing and recording information').

Typical sexual violence testimonial evidence may include:<sup>8</sup>

- » a record as accurate as possible of the date, time and place of the sexual violence if known
- » a description of the type of crimes and violence the victim was subjected to and/or witnessed prior

to, during and in the related aftermath (i.e. term of detention) of the sexual violence

- » a description of how the victim came to be in the control of the perpetrator(s)
- » a description of the process of how the victim was taken to the place of violence, that is, what the place looked like, who else was present, how long the victim walked or was driven for, etc.
- » information about the context in which the crimes took place to help prove, for instance, the existence of an armed conflict or a widespread or systematic attack against a civilian population; the use of specific derogatory words or language to help prove the intent to destroy, in whole or in part, a specific group
- » a description of the appearance, demeanour and clothing worn by the perpetrator(s) (e.g. civilian clothing, uniform, insignias) and identity, if known
- » a description of the language spoken by the perpetrator(s) and how they referred to each other (e.g. nicknames, title such as 'Captain', 'Chief') which may help determine the command structure of the perpetrator's group, if any
- » description of any eyewitnesses to the sexual violence
- » description of the physical and mental harm the victim suffered as a result of the sexual violence and the subsequent economic, social, psychological loss it may have caused, keeping in mind that the level of detail required regarding the specific act(s) of sexual violence will vary according to practitioners' mandate and that they should avoid asking difficult questions that are not strictly necessary for their purposes.

7 In the Bemba case, supra note 73, para. 229-230, the court held that: *'In assessing a witness's credibility, the Chamber has considered the individual circumstances of each witness, including their relationship to the accused, age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination, possible bias towards or against the accused, and/or motives for telling the truth or providing false testimony. With regard to the reliability of the witnesses' testimony, the Chamber determined the weight to be accorded to the information provided. To this end, it considered the entirety of their testimony, having regard, in particular, to the capacity and quality of their recollection. In this respect, the Chamber took into account, inter alia, (i) the consistency and precision of the accounts; (ii) whether the information provided was plausible; and (iii) whether the evidence conflicted with a witness's prior statement. Finally, whenever relevant and necessary, the Chamber considered the witnesses' conduct during their testimony, including their readiness, willingness, and manner of responding to questions put to them by the parties, the Legal Representatives, and the Chamber'* (emphasis added).

8 SRedress (2012) *Litigation Strategies for Sexual Violence in Africa*. London: Redress. pp 71-72.

*...approaching insider witnesses is something which should be done with the utmost care and only by trained investigators*

## 2. Where to Find Testimonial Evidence

Testimonial evidence of sexual violence crimes is generally collected by interviewing individuals who may be the victims or have witnessed not only acts of sexual violence but other violations as part of a campaign of crimes (e.g. murders, mutilations, destruction of villages, pillaging).<sup>9</sup> These witnesses can be one or more of the following:

- » a direct victim/witness of sexual violence him/herself describing her/his experience and/or crimes committed against other victims, such as fellow detainees; direct victims/witnesses can also provide critical contextual information about the existence of an armed conflict, armed groups in the area, nearby checkpoints, attacks against civilians, patterns, prevalence, etc.
- » family members, members of the community, service providers, relief workers who witnessed or have knowledge of the attacks through, for examples, witnessing the incident as well as other crimes, hearing about it from the victim, or treating the victim after the incident
- » Pattern witnesses such as doctors, nurses, counsellors, local leaders, human rights/military officers and observers who may have information on the existence of many victims/witnesses of sexual violence as well as other crimes, timing and location of the acts. These are of particular importance in establishing the common elements of potential crimes and contextualizing sexual violence (see Chapter 4: Individual Criminal Responsibility, Box 2: 'Contextualising sexual violence')
- » insiders and former members of security forces or armed groups.<sup>10</sup> Remorseful co-perpetrators often provide the most critical evidence linking directly to the

perpetrators—but approaching insider witnesses is something which should be done with the utmost care and only by trained investigators

- » expert witnesses, who as professionals with specialist skills may provide their expert opinion on a variety of topics such as forensic evidence, military doctrine, political structures, customs and traditions, or the impact of trauma on testimony.

**Practitioners should also consider relying on testimonial evidence contained in adjudicated decisions by relevant courts to prove certain facts or elements for other cases—for instance the existence of an armed conflict—in order to avoid re-interviewing victims and other witnesses unnecessarily.**

## 3. What is the Role of Testimonial Evidence?

Testimony from victims/witnesses is often the type of information most readily available to practitioners, but it is also the type that must be treated with the most care. Sometimes, it is also the only form of evidence available about sexual violence crimes.

<sup>9</sup> Sexual violence does not happen in isolation and even if your mandate is narrow it is essential to discuss with victims and other witnesses all the crimes they may have experienced or witnessed. This is particularly important to be able to show how the sexual violence fits within a campaign of violations and this will help satisfy the common elements and linkage elements/modes of liability.

<sup>10</sup> Insiders can also be victims themselves who choose not to come forward for crimes committed against them, for example in a detention setting. In the *Furundžija* case, witness D was a sexual assault victim and an insider who did not seek to come forward on his own behalf but was subpoenaed as a witness. However, since the crimes committed against him were part of the indictment, the chamber held that he had been tortured by being forced to watch witness A being raped. ICTY TJ *The Prosecutor v. Anto Furundžija* IT-95-17/1, 10 December 1998, para. 267.

*...approaching insider witnesses is something which should be done with the utmost care and only by trained investigators..*

## BOX 4



## Peer experience—the witness is the evidence

Judge, Supreme Court of the Federation of Bosnia and Herzegovina: *'In Bosnia and Herzegovina cases are being processed after more than 20 years (...) the prosecution authorities mostly just have witness statements (...). There is often no forensic evidence or biological and DNA traces, and medical records of victims and so on may not be available'*.

This statement highlights the central role of testimonial evidence, especially when dealing with historical crimes as forensic evidence disappears over time. That said, the scene of a crime or violation should always be examined, at a very minimum to corroborate the witness' description. In addition, forensic evidence has in some instances been found at scenes of alleged crimes many years after the event.

The absence of documentary, forensic, physical, medical or audio-visual evidence of sexual violence does not mean that there can be no justice for those crimes. In international courts such as the ICC, physical and forensic evidence are not necessary to prove sexual violence as an international crime. International crimes can be established solely on the basis of victims and witnesses' testimony. International courts and tribunals rely heavily on testimonial evidence and cases built almost exclusively on victims and other witnesses' testimonies have led to successful prosecutions and convictions.<sup>11</sup>

Testimonial evidence is crucial to establish sexual violence, in particular:

- » that an act of sexual violence took place and its form
- » the circumstances surrounding the act, including form

and/or duration of detention and existence of coercive circumstances

- » the circumstances surrounding the attack, the ongoing, widespread or intentional commission of such crimes, pattern of movement of the alleged perpetrators or other contextual information
- » the nature and type of conflict, the political landscape and local power dynamics
- » the identity of the alleged perpetrators and other elements of modes of liability
- » the organisation and command structure of the perpetrator group
- » the location and type of additional evidence.

## C. Documentary Evidence

### 1. What is Documentary Evidence?

Documentary evidence refers to physical material recording information in a written or documentary format. The actual evidence is the information recorded in the physical document, as opposed to the document itself, which is only its support. A document can also constitute actual physical evidence, for instance if it has a stamp or someone's signature which can help authenticate it, or if there is blood on it (see Physical Evidence section E below).

Typical documentary evidence of sexual violence may include:

#### Official

- » military reports and other operational documents: for example, logistics records, duty logs, situation reports of activities, border reports, military plans and strategies, communication records, written directives and orders, combat reports, intercepts
- » medical certificates
- » prisoner lists and police records
- » identity and registration documents, including official documents about missing persons and grave

<sup>11</sup> For instance, RPE 96 of the ICTY and ICTY provides that in cases of sexual assault, no corroboration of the victim's testimony shall be required.

*In international courts such as the ICC, physical and forensic evidence are not necessary to prove sexual violence as an international crime.*

registrations

- » minutes of government sessions, command and control documents, internal government memoranda and correspondence to humanitarian organisations
- » intelligence reports
- » diplomatic documents including correspondence and documents related to negotiation terms
- » official archives and previous case law.

#### Non-official

- » other health records, including psychiatric/psychological reports,<sup>12</sup> notes, photographs and other forensic medical evidence produced by health professionals (see Box 9: 'Understanding medico-legal evidence for CARSV'); however, these types of documents cannot be obtained without the informed consent of victims, and many health providers will choose not to share these types of documents due to privacy concerns
- » reports and records by international and national organisations: for example, registration and profiling records of displaced populations and monitoring and tracking mechanisms, incident data, and human rights reports, in particular those containing analysis of violations committed, the impact of such violations, early-warning mechanisms in place, and statements from victims and other witnesses
- » reports of crimes received by local traditional and religious leaders, and contemporaneous notes made by victims or other witnesses
- » newspaper articles, including notes taken and not included in publications
- » evidence-based surveys, reports, studies, programmatic data and statistics on the type, frequency and breadth of sexual violence committed, the identity of the alleged perpetrators and superiors, and the impact on and needs identified by victims/

witnesses

- » diaries or simply words scratched onto a wall, for instance in a place of detention
- » sketches, for instance of sites of violations
- » documentation regarding chain of custody.

## 2. Where can you find Documentary Evidence?

Documentary evidence can be found in a number of different locations, such as:

- » official buildings
- » military bases and facilities used by paramilitary and other armed groups
- » hospitals and medical practitioners' archives
- » any place where an alleged crime or violation has been committed
- » historical archives
- » open sources.

## 3. What is the role of documentary evidence?

Documents, both official and non-official, can be the source of extremely relevant information when documenting sexual violence. The information found in documents can help establish the following:

- » the pattern, frequency and intensity of reported sexual violence: this can be found in records kept by medical and health personnel and facilities, case management statistics, evidence-based reports, survey and studies of sexual violence<sup>13</sup> as well as records kept by journalists and monitors, including national and international civil society organisations
- » the identity of perpetrators and superiors: information found in official military or government records establishing movement and presence of alleged perpetrators, organisation, command structure, and formal and informal authority; records of victim/witness

<sup>12</sup> Psychiatric/psychological evidence is a critical area of medical forensic documentation that is growing and is increasingly recognized as a vital complement to physical evidence in sexual violence cases, even in developing countries where mental health professionals with forensic training are scarce.

<sup>13</sup> Although these types of data on sexual violence can be useful as background research, or to support a particular allegation or allegations of sexual violence, data collected through surveys, case reports and other assessments do not represent the totality of incidents that have occurred. For further guidance on the dos and don'ts of using data on sexual violence, see UN Action, 'Reporting and Interpreting Data on Sexual Violence from Conflict-Affected Countries: 'Dos and Don'ts' (2008).

testimony describing appearance, clothing and significant marks of alleged perpetrators; and record of national and international organisations containing information, profiles and/or movements of alleged perpetrators

- » the existence of a plan or strategy and modes of liability: in copies of orders given, plans made to attack certain areas, and records of communications made between units/sections immediately prior to, during or after the attack
- » avenues for further investigation: information found in official or non-official documents may not conclusively determine any facts in themselves but may provide lead information for future investigative effort.

## D. Digital Evidence

### 1. What is Digital Evidence?

Digital evidence or electronic evidence refers to any probative information or data that is stored on, received or transmitted by an electronic device. This evidence can in particular be acquired when electronic devices such as computers and mobile/smart phones are seized and by browsing the internet for open source information. Digital evidence is sometimes considered as a specific form of documentary evidence and it is generally subject to the same rules and principles that apply to documentary evidence<sup>14</sup> (see Documentary Evidence section C). If digital evidence is retrieved from seized electronic devices, such devices will be preserved as physical evidence (see Physical Evidence section E) and the

digital expert who extracted the data may prepare a report or affidavit which can be used in court (see Documentary Evidence section B).

Typical digital evidence which may help prove sexual violence crimes may include:<sup>15</sup>

- » electronic health records, including psychiatric/psychological reports, photographs, digital medical imaging (X-rays, ultrasound, magnetic resonance imaging (MRI) scan, etc.) and other forensic medical evidence produced by health professionals, including data collected through specialized medical phone applications<sup>16</sup> (see Box 9: 'Understanding medico-legal evidence for CARSV')
- » pictures and videos, for instance of sites of violations and injuries, taken with mobile devices such as digital cameras or smart phones (ideally using tools enabling to record and securely transfer the evidence, see Box 5: 'Issues to consider when choosing digital evidence collection tools')
- » location information stored on cell phones or social media
- » pictures, videos and other information posted on social media such as Twitter, Facebook or YouTube
- » information stored on computers' hard drives and peripheral equipment, such as memory cards, USB thumb drives and CD-ROM
- » emails, text and instant messages
- » aerial photos and satellite imagery, for instance of troops or civilian population movements, or of the level of destruction of villages over time<sup>17</sup>
- » metadata, that is information that provides information

14 Association of Chief Police Officers (2012) *Good Practice Guide for Digital Evidence*. London: ACPO. para. 2.2.1.

15 Whether a certain type of digital evidence, such as a YouTube video, will be admissible for criminal prosecution or for other accountability purposes will vary from jurisdiction to jurisdiction and from mechanism to mechanism.

16 An example of mobile application is MediCapt, which is currently under development by the Program on Sexual Violence in Conflict Zones at Physicians for Human Rights, to help clinicians more effectively collect, document, and preserve forensic medical evidence of sexual violence to support the local prosecution of these crimes. This tool converts a standardized medical intake form for forensic documentation to a digital platform and combines it with a secure mobile camera to facilitate forensic photography. By combining these components, MediCapt will help preserve critical forensic medical evidence of mass atrocities, including sexual violence and torture, for use in courts. Health care providers will be able to use the app to compile medical evidence, photograph victims' injuries, and securely transmit the data to authorities engaged in prosecuting and seeking accountability for such crimes. For more information, see <http://physiciansforhumanrights.org/medicapt/>.

17 The Engine Room, Benetech, Amnesty International (2016) *DatNav: How to Navigate Digital Data for Human Rights Research*, available at <https://www.theengineroom.org/datnav-digital-data-in-human-rights-research>. p. 55–58.

*...essential that documenters carefully examine the terms of use of any app they consider using*

about a file (such as a picture, video, word document) that is stored within the file itself (e.g. metadata relating to a digital photograph can provide information on the time and location when the picture was taken while metadata embedded in a text message can provide clues on its origin, time it was sent).

**BOX 5****Issues to consider when choosing digital evidence collection tools**

Certain tools and mobile apps have been developed to enable human rights defenders, documenters, journalists, activists and citizens to securely take pictures and videos of human rights atrocities such as war crimes, crimes against humanity, genocide or torture and transmit the encrypted data to a secure repository. Some of these mobile apps were specifically developed to help bring perpetrators to justice by verifying footage and ensuring it is admissible in court. Such apps may have good features, such as encryption, recording of metadata, ability to hide in mobile devices and/or allowing to be swiftly deleted together with their content should the users find themselves in a situation where being in possession of such evidence would be compromising.

That said, it is essential that documenters carefully examine the terms of use of any app they consider using, particularly regarding ownership, licensing and future use as well as limitations to an app's encryption and/or meta-data storage features based on manner of use. Issues that practitioners may want to consider include:

- » What happens to the content once it has been uploaded?
- » Is the content encrypted automatically from the moment of collection or only once uploaded?
- » Who controls the content's future use once it has been uploaded to a secure server?
- » Where is the server based and does this raise issues of privacy or government surveillance?
- » What are other potential pitfalls and risks of using this app?

## 2. Where to find Digital Evidence?

Digital evidence can be found in a number of different locations:<sup>18</sup>

- » on an end-user device found during search of a site of violations—typically a user’s computers, mobile/smart phones, USB thumb drive or digital camera
- » online—for example, websites used for social networking, discussion forums and newsgroups
- » on a remote resource that is private, such as in internet service provider’s logs of user’s activity, a mobile phone company’s records of customers’ billing, a user’s webmail account and a user’s remote file storage
- » in transit—for example, mobile phone text messages, or voice calls, emails, or internet chat
- » any place where an alleged crime or violation has been committed.

Open source information on the internet can be accessed by anyone but it is necessary to record or preserve it in some form<sup>19</sup> as online posts, webpages and web content, especially sensitive ones, often get removed or later become unavailable. Other types of digital evidence, such as the message history of a particular mobile phone or social media account, are under the control of third parties and protected by privacy laws. It may therefore not be possible to access such information, authenticate it or extract its metadata or user information without a subpoena, data sharing agreement (whether formal or informal) or other form of consent.<sup>20</sup> Information seized or intercepted without authorization will generally not be admissible as evidence.

### BOX 6



#### Peer experience—example of social media use

Léonie, lawyer, Switzerland: *‘When the Balkans suffered a brutal ethnic civil war, my client Lejla, who was 14 years old at the time, was kidnapped with her cousin, aged 15, and they were both raped by soldiers who wanted to punish their family for supporting the other side of the conflict. Lejla knew the man who raped her as he was a local. This happened in 1993. When our organisation took over the case, Lejla told us that she had heard rumours that the perpetrator was living in exile in Switzerland but we didn’t know where. In 2013, twenty years after the war, we managed to track down the perpetrator through social media. On one picture that he had posted on his Facebook profile, you could see a car number plate which immediately enabled us to identify the canton of Switzerland where the car was registered. That gave us proof that the perpetrator was actually living in Switzerland and enabled us to file a criminal complaint with the Federal Prosecutor’s Office, which is competent to conduct criminal investigations for war crimes’.*

<sup>18</sup> Adapted from ACPO *Digital Evidence Good Practice Guide*, supra note 14, para. 3.3.

<sup>19</sup> The Engine Room, Benetech, Amnesty International (2016) *DatNav: How to Navigate Digital Data for Human Rights Research*, <https://www.theengineroom.org/datnav-digital-data-in-human-rights-research> and Frontline Defenders and Tactical Technology Collective, ‘Security in-a-Box: Digital Security Tools and Tactics’, <https://securityinabox.org/en>.

<sup>20</sup> Law enforcement agencies may have data sharing agreements with companies whereby companies will provide user data at the agency’s request without a court order. Sometimes, even in the absence of a data sharing agreement, law enforcement agencies may request user information and the companies may choose to provide or not provide the requested data. It is however unclear whether companies have turned over any user data to non-governmental investigative groups.

### 3. What is the role of digital evidence?

Due to the nature of digital forensic evidence, forensic digital experts are often required to ensure proper collection and storage of digital evidence, as well as interpretation. Interpretation by a forensic digital expert is generally required to ensure the evidential weight of recovered digital evidence is clear. For instance, open source information such as photos and videos posted online need careful authentication to ensure they are not fabricated and/or genuinely refer to the events they purport to document.

Some jurisdictions have required standards in place for the collection of digital evidence. Documenters should check legislative requirements in relevant jurisdictions before undertaking digital evidence exploitation. In particular, documenters should be aware of relevant ISO standards in this field, which some legal systems require adherence to for valid digital evidence collection.<sup>21</sup>

Analysis of digital evidence may help establish virtually all the elements of crimes, for example:

- » the underlying crimes with citizens' video evidence uploads or when offenders themselves have video recorded the incident
- » the perpetrator's intent, whereabouts at the time of a crime and relationship with other suspects through information on mobile phones, computer hard drives, USB sticks, statements in emails or social media posts
- » the existence of a common plan and other elements of modes of liability through phone or email intercepts
- » the pattern of movement of the alleged perpetrators/ that an attack on civilian took place or other contextual information, shown by aerial or satellite imagery, for example, troop movements, shelling impact sites, mass graves
- » corroboration of victim/witness testimony, for instance where videos or photos of an offender show him/her wearing the same clothing as that described by the victim (in legal systems that require this).

Note that any of the forms of digital material men-

tioned may yield evidence supporting *any* element of a crime.

#### BOX 7

#### Special risks linked to collecting digital evidence

Handling digital evidence requires specialist knowledge. The main risks of collecting or extracting digital evidence without the appropriate training are:

- » the risk of altering the data in the process of seizing it, thereby rendering it inadmissible as evidence
- » increased risks for people who gather the information first-hand and upload it online
- » lost or damaged files resulting from exposure to extreme temperatures, static electricity or moisture
- » compromised data resulting from simply opening, viewing and clicking on files as it may change the last access date of a file or piece of hardware
- » alerting a webpage owner of an investigation's interest if access is not conducted from a non-attributable computer
- » allowing destruction of data through remote commands without the documenter's knowledge
- » digital evidence not being admissible in court if proper authorization to search or seize was not granted, collection and extraction techniques have not been followed or full record of all actions taken/chain of custody cannot be demonstrated.

21 See, for instance., ISO/IEC 27037:2012 on identifying, gathering and preserving digital evidence and ISO/IEC 27042:2015 on analysis and interpretation of digital evidence.

## E. Physical Evidence

### 1. What is physical evidence?

Physical evidence refers to any physical objects or matter that can provide relevant information to help establish that sexual violence took place, or provide a link between a crime and its victim or between a crime and its perpetrator.

Typical physical evidence of sexual violence may include:

- » **physical material:** clothing, including uniforms or parts of uniforms and clothes that may have been worn by the victim/witness or perpetrator, blindfolds, bedding, towels, condoms, ligatures, rope/tape
- » **weapons:** firearms, knives, bullets, bullet/shell casings, explosives, shrapnel, torture devices, residue
- » **biological/forensic material:** bodies or body parts, skin, hair, fingernail scrapings, bone, teeth, stains, semen, saliva, blood, vomit, mucous, sweat, vaginal fluids and/or faecal matter
- » **physical injuries:** bruising, burns, cuts, scars, internal or external injuries
- » **electronic/digital items:** phones, computers and other communication equipment
- » **toxicology analysis:** showing the presence of drugs, poisons or alcohol
- » **trace:** fibres, hair, glass, soil, paint, metal, plaster
- » **impressions:** fingerprints, footprints, tool marks, tire marks
- » **sites of violations:** existence/location of site/detention centre itself, layout and physical descriptions of premises that may match a witness testimony, any evidence pointing to the site being occupied or lived in
- » **documents for analysis:** handwriting, typewriting, alterations, paper, ink analysis, etc. The information recorded in the document itself may also constitute documentary evidence (see section C, Documentary Evidence).

### BOX 8

#### Can I collect physical evidence?

The decision to collect physical evidence—which may include documents, as the case may be—should be taken with seriousness and care and be thought through very carefully. Practitioners considering collecting an item of physical evidence should ask themselves the following questions:

- ✓ 1. **Authority:** Do I have the necessary legal authority? YES/NO
- ✓ 2. **Capacity:** Do I have the professional training required (as an investigator, health professional or other) to collect and store the relevant physical evidence? YES/NO
- ✓ 3. **Resources:** Can I properly and safely store, transport and preserve the relevant physical evidence? YES/NO



**If the answer to any of those questions is no**, you should not collect physical evidence. You may not be able to use it and collecting it may even be illegal in your jurisdiction. You should instead document the evidence as best as you can (e.g. recording notes, sketching, photographing and/or video-recording) and consider contacting someone appropriately mandated, qualified and equipped to collect physical evidence.

In the very unusual circumstance where a practitioner decides to collect physical evidence, the 'Chain of Custody' principles set out in Chapter 12: Collecting Additional Information, in particular Box 5: 'Chain of custody—Specificities for physical evidence' should be followed.

*Documenters should check legislative requirements in relevant jurisdictions before undertaking digital evidence exploitation*

## 2. Where to find physical evidence?

Practitioners may come across physical evidence of sexual violence at/on:

- » bodies of victims/witnesses/perpetrators themselves, either living or deceased, depending on the time frame and nature of the injuries
- » any place where a crime or violation is alleged to have been committed
- » any place where perpetrators have been, including initial place of arrest or seizure
- » graves or places where bodies may have been left at any time.

The amount and type of physical evidence of sexual violence which can be recovered will therefore greatly vary depending, in particular, on how long ago the violence took place, whether the victim was seen by a doctor, and whether the site of violations can be accessed.

## 3. What is the role of physical evidence?

Physical evidence can help to establish:

- » the invasion of the body of the victim, for instance through semen leaking from the vagina or anus of the victim
- » the circumstances surrounding the act, including the existence of inherently coercive circumstances, for instance if the site of violations is a detention centre, or circumstances negating consent such as the presence of drugs or alcohol in the victim's system
- » the identity of the alleged perpetrators, for instance through analysis of samples found on bedding or pieces of clothing, and elements of modes of liability
- » the identity of the victim if unknown, for instance through DNA analysis of biological samples taken from the victim's body
- » the location and existence of a site of violations can in itself help establish the presence of alleged perpetrators in the area, and be analysed as part of the pattern of movement/that an attack on civilian took place or other contextual information when individual physical evidence is aggregated
- » corroboration of victim/witness testimony (in legal

systems that require this) or be used instead of victim/witness testimony as appropriate, for instance if the victim is dead or unavailable (in legal systems that permit this)

- » the physical impact of the sexual assault through documenting injuries such as tears or fistulas.

Although physical evidence can help establish or corroborate certain facts, practitioners must note that the collection of the physical evidence must at all times be accompanied by the collection of other corroborative and/or explanatory evidence in order for it to be of any use. Physical evidence is generally accompanied by testimony, including from expert witnesses. In addition, it requires impeccable preservation procedures to avoid contamination and chain of custody needs to be established.

*Physical evidence is generally accompanied by testimony, including from expert witnesses.*

**BOX 9****Understanding medico-legal evidence for CARSV****What is medico-legal evidence?**

When providing care for rape and sexual abuse victims, health professionals may collect a narrative history of the incident(s), examine the victim's body, document their findings and collect forensic specimens with the specific objective of corroborating accounts of sexual violence for legal purposes. The kind of evidence produced by this process is a type of **medico-legal evidence**.

Collecting medico-legal evidence involves **both (1) documenting various aspects of the history elicited from the victim, medical examination and its findings for the purposes of corroboration and, when there is capacity, (2) the collection of physical evidence—forensic specimens—from the victim's body.**

(1) **Documentation** includes:

- » documenting the patient's medical history
- » documenting the individual's account of sexual violence
- » recording the findings of the medical examination—which may include discovery of physical injuries anywhere on the body, and ano-genital trauma
- » recording findings of psychological evaluation
- » recording any treatments initiated
- » the results of any specimens collected and processed.

Medico-legal documentation can take the form of written or typewritten notes, medical charts, (including with pictograms/body-charts to show locations of injuries), official medical certificates computer files, digital mobile files, recordings, photographs, or a combination of the above.

(2) **The collection of forensic specimens** can form a key part of medico-legal evidence, but can only be done where there is capacity to store and process samples, and conduct forensic analysis. Types of forensic specimens collected in sexual violence cases include biological (from the mouth, anus, vagina, and including urine, blood, semen, secretions and skin) and non-biological (clothing) samples. Once collected, specimens should be processed and analysed, and official findings recorded. These findings will form part of the final medico-legal documentation.

*Only trained health and forensic professional can collect, process and analyse medico-legal evidence*

## BOX 9

## Understanding medico-legal evidence for CARSV

**Medical Certificates**

The medical certificate usually refers to the official document used by trained healthcare providers conducting forensic medical examinations and documenting physical and behavioural observations, and provides an official record of medical findings for use in courts.

The ability of a victim to obtain her/his own medical certificate varies according to national jurisdictions—for example, in some countries, victims must report a crime to the police in order to obtain a government certificate which can then only be completed by a government appointed doctor. In some other jurisdictions, a completed medical certificate is required in order for a victim to file a case in court. *It should be noted that these legal and procedural requirements often create significant barriers to a victim's ability to access justice, in particular where crimes are state-sponsored, or government appointed health officials are scarce or require payment for their services.*

Some medical, non-governmental organisations will issue their own medical certificates at the request of the victim—again the ability of such records to be presented as official certificates in courts will depend on the jurisdiction.

**What is medico-legal evidence for?**

The **objective of medico-legal evidence** is to help prove that an act of sexual violence took place. It can also help to establish a link between the perpetrator and victim, and to link facts and individuals to the site of violation.

However, the relationship between use of medico-legal evidence and positive legal outcomes is not yet clear<sup>22</sup>. What is known is that many victims of sexual violence do not sustain physical injuries, ano-genital trauma, or have no documented sperm or semen present in their bodies. The absence of this evidence does not mean the sexual violence did not occur.

22 Du Mont, Janice, and White, D., 'The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review', *Sexual Violence Research Initiative*, (Geneva, 2007).

## Understanding medico-legal evidence for CARSV

### Who can collect medico-legal evidence and where?

Only trained health and forensic professionals can collect, process and analyse medico-legal evidence. The collection of forensic specimens in particular should only be done in contexts where there is capacity to store and process samples, and conduct forensic analysis. Qualified health and forensic professionals can document other evidence even if there is no capacity to collect, store, analyse, or transfer biological specimens.

Similarly, only trained health and forensic professionals can testify to that evidence in court. However, it is not the job of health professionals to make legal determinations at any stage in the process. Health professionals can only testify to the findings of their examination, and not make determinations on whether or not sexual violence took place.

Medico-legal examinations can take place in various **different settings as long as they are private and secure**. Hospitals, health centres and clinics with the appropriate facilities to treat rape/sexual abuse victims may also have the capacity to conduct medico-legal examinations of the victim. Ideally, clinical treatment and medico-legal examinations should be provided at the same time to reduce the number of procedures a victim must undergo.

### Key to note

- » In international criminal practice, the use of medico-legal evidence to prove CARSV is not necessary. Such a requirement would impose an impossible barrier to justice for the majority of victims who do not have access to medical services close to the time the sexual violence had been perpetrated. This is true in particular in cases where the sexual violence has been perpetrated in the context of detention or forcible displacement, sexual slavery, and where ongoing violence makes mobility and access to health services impossible.
- » Even when no medico-legal examination has taken place, **individual patient medical records** generated in routine post-rape, or injury treatment care can still be useful to corroborate testimony—by providing evidence of injuries sustained for example, as documentation of the psychological impact of the attack and often as the first disclosure and description of the attack itself.
- » The disclosure of medical records by health professionals to investigators is to be done on a case by case basis, based on full and informed consent of the victim.
- » The fact that definitions of what constitutes sexual violence may vary between jurisdictions must not be used to justify medico-legal examinations of an unnecessarily invasive, humiliating or discriminatory nature, or conducting examinations with little or no medical validity. This includes but is not limited to unnecessary digital examinations of vagina and anus; examining the hymen for signs of penetrative sexual activity or virginity, and any form of virginity testing (see Chapter 4: Individual Criminal Responsibility, Box 12: ‘Virginity of the victim and virginity ‘tests’’).
- » Medico-legal evidence and medical records are not only useful to corroborate individual testimonial evidence of sexual violence. Aggregate, de-identified data generated from medical records can help establish patterns, frequency and general context of CARSV in particular areas and over time. (See Chapter 14: Analysing Evidence and Information/Identifying Patterns.)



# PART V: Documentation in Practice: Gathering Information

## Chapter 11 Contents

<b>CHAPTER 11: Interviewing .....</b>	<b>161</b>
<b>A. Introduction.....</b>	<b>161</b>
<b>BOX 1</b>	
Communications Dos and Don'ts.....	162
<b>B. Interview Framework .....</b>	<b>163</b>
<b>BOX 2</b>	
The PEACE Model .....	163
1. Planning and Preparation.....	164
<b>BOX 3</b>	
Interview Setting Dos and Don'ts .....	167
2. Engage and Explain.....	168
<b>BOX 4</b>	
Tips to Create a Positive Atmosphere.....	168
<b>BOX 5</b>	
Working with interpreters .....	171
3. Account and Clarification.....	172
i. Types of questions .....	172
<b>BOX 6</b>	
Productive Open-ended questions styles.....	172
<b>BOX 7</b>	
Types of Questions .....	173
ii. Subject areas for questions .....	176
<b>BOX 8</b>	
Subject areas for questions for sexual violence as a crime or violation of international law.....	176
iii. Examples of questions.....	177
iv. Interviewing techniques .....	178
<b>BOX 9</b>	
Dealing with inconsistencies .....	181
4. Closure.....	182
5. Evaluation.....	183
<b>BOX 10</b>	
Peer experience— importance of timely and proper evaluations .....	183
<b>C. Recording Interview Information .....</b>	<b>185</b>
<b>BOX 11</b>	
Peer experience— capturing and recording information .....	185

# CHAPTER 11: Interviewing

## A. Introduction<sup>1</sup>

An interview can be viewed as a conversation that is consciously managed in order to obtain accurate and reliable information from victims and other witnesses, be it conducted by criminal investigators, human rights investigators or those gathering information for general advocacy purposes. The underlying foundation of any interview is to ensure that any information obtained is not improperly influenced or modified by the manner in which the interview is conducted. To achieve this and avoid harming victims and witnesses, practitioners need:

- » thorough planning and preparation
  - » good communication skills
  - » a structure in which to apply those skills.
- » If carrying out an interview, practitioners must be appropriately trained to conduct it, with particular experience in interviewing victims/witnesses of sexual violence. When interviewing children and other vulnerable victims and witnesses (e.g. those with mental or physical disabilities), practitioners must be trained to respond appropriately to the individual needs and capabilities of the interviewee.
  - » Sometimes, interviewing victims/witnesses is not necessary nor is it recommended, and practitioners must be able to clearly justify the need to do so. Practitioners without the appropriate training and experience should refrain from interviewing victims and other witnesses.
  - » An interview is not an interrogation.

### Key to note

- » Interviewing is a very common and useful method of gathering information from victims and other witnesses. If done correctly, sensitively and professionally, interviewing has the potential to empower victims and other witnesses and give them a sense of agency and control.
- » If not conducted properly however, interviewing can re-traumatise victims and witnesses, place them at additional risk, affect the quality and reliability of information provided and distort victims' and witnesses' memory of the event(s).
- » If not documented properly, an interview can give rise to inconsistencies in the formal record of events, which can negatively impact on victims' and witnesses' credibility during future legal proceedings.

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<sup>1</sup> This chapter draws on the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Training Materials developed by the Institute for International Criminal Investigations (IICI), as well as other IICI training materials.

## BOX 1

## Communications Dos and Don'ts

## DO

- » Give your full attention to the interviewee and show this by using an active listening posture: keep respectful eye contact, nod or say 'Mmm hmm' to maintain rapport and encourage the victim/witness to keep talking
- » Allow the victim/witness to talk freely without interruption
- » Keep calm and do not allow your own emotions to intrude on the interview process; allow the victim to control the pace of the disclosure and the extent of what is disclosed
- » Be comforting and supportive and provide reassurance
- » Frame clear simple open-ended questions; ask one question at a time
- » Use clear simple language and make sure to clarify any unfamiliar terms
- » Acknowledge the most difficult aspects of the account and explain why these details are needed—if they are
- » Pay attention to non-verbal communication; know when to stop asking certain questions or change topic
- » Respect the victim/witness's opinions, beliefs, thoughts and emotions—don't tell her/him to stop crying or to calm down

## DO NOT

- » Interrupt the victim/witness
- » Press on and repeat questions over and over again
- » Make the victim/witness repeat her/his story of abuse to different people
- » Become angry or force the victims/witness to speak
- » Stare at the victim/witness
- » Express disbelief, disgust, disapprobation, exasperation or shock
- » Assume you know what the victim/witness wants to say
- » Rush the interview or the closing phase of the interview

## B. Interview Framework

A successful interview does not just happen. It must be well-planned, follow a consistent logical structure detailed in a written plan and be carefully managed in order to provide the best chances of eliciting detailed, accurate and reliable information.

The PEACE<sup>2</sup> model is a useful framework that can help practitioners maintain professional control over a complex and dynamic process and provide clarity and structure before, during and after the interview itself. See Chapter 16: Sexual Violence against Children/Core Guidance on Involving Children in the Documentation Process throughout the Documentation Process for guidance on using the PEACE model to interview children.

### BOX 2

#### The PEACE Model

The PEACE model provides a professional framework to conduct effective and ethical interviews which are conversational in tone. The PEACE mnemonic represents all five phases of an investigative interview:

- P** Planning and Preparation
- E** Engage and Explain
- A** Account and Clarification
- C** Closure
- E** Evaluation

The PEACE framework and interview checklist (see Annex 7) can be used as a skeleton around which practitioners can build the details of a specific interview.

<sup>2</sup> *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN General Assembly (A/71/298)*, (5 August 2016), para. 42. See also <http://www.ncl.ac.uk/press/news/2016/10/unitednationsanti-torturemeeting>.

*Practitioners without an official mandate should record information in the form of interview notes to avoid creating an authoritative record of events...*

## 1. Planning and Preparation

While all phases of the PEACE model are important, a key part of that framework is planning and preparation. Practitioners who fail to plan and prepare adequately will reduce the interview to an unstructured discussion and this will often result in the victim/witness confirming what the practitioner already knows, believes or wants to hear, whether or not it is true. In addition to inaccurate and/or incomplete information, lack of planning and preparation may also result in further harming victims and other witnesses.

### Summary of what to do and say in the planning and preparation phase:

#### a. Preliminary considerations

1. Consider which referrals and support systems are available for different types of victims (female, male and children), in particular medical/psychosocial support and witness protection if they exist, and determine the commitments that the documentation team can/cannot make to the victims/witnesses (see Chapter 7: Do No Harm/Referrals; Chapter 16: Sexual Violence against Children/Preliminary Research and Analysis; Chapter 17: Sexual Violence against Men and Boys/Preliminary Research and Analysis).
2. Assess the risks factors involved in the victim/witness meeting you, conduct a thorough risk assessment and prepare a security plan (see Chapter 7: Do No Harm/Threats and Risks Assessments; Chapter 9: Planning/Risks; Chapter 8: Safety and Security/Managing Risks To Practitioners; Chapter 16: Sexual Violence against Children/Preliminary Research and Investigative Planning; Chapter 17: Sexual Violence against Men and Boys/Preliminary Research and Analysis).

3. Gain an appropriate understanding of the context in which the sexual violence is occurring and of the different elements of the crimes under national and international law (see Chapter 9: Planning/Information Collection Strategy).
4. Be aware of the gender dynamics in the country or region where the crimes of sexual violence took place (e.g. gender identity, sexual minority, sexual stereotypes of racial, ethnic or indigenous groups or persons with disabilities) (see Chapter 9: Planning/Research and Analysis).
5. Be aware that different cultures have different communication styles (e.g. some are direct and come straight to the point, while others are indirect).
6. Ensure their staff is appropriately trained and vetted (see Chapter 9: Planning/Resources).

#### b. Preparing for the interview itself

1. Research any specific legal requirements to collect formal witness testimony in the legal framework you are operating in (i.e. taken under oath, formally recorded, collected by relevant authorities) if this is your objective and you have an official mandate. Some practitioners may be authorised to collect formal witness testimony while others may only be collecting statements (taken in the first person) or interview notes (taken in the third person). Practitioners without an official mandate should record information in the form of interview notes only to avoid creating an authoritative records of events which could be used against the victim/witness in case of future legal proceedings (see Box 11: 'Peer experience—capturing and recording information). Decide on methodology for data capture (e.g. hand-written notes only/typed notes).

*...ensure appropriate staggering of interview to avoid victims/witnesses coming across each other...*

2. Establish interview objectives, prepare a list of personal data to capture (see Annex 8: Template for personal data to be collected from victims/witnesses) and a written interview plan (e.g. a preliminary interview ‘template’ or outline). Identify priority questions/topics in case you have limited time or the interview is unexpectedly cut short (e.g. interviewee is delayed, needs to leave early).
3. Consider the most suitable interview location (see Box 3: ‘Interview settings dos and don’ts’) in view of the circumstances—although options may be limited—taking into consideration:
  - » security and comfort of location for the interviewee
  - » privacy of location (whether indoors or outdoors), ensuring not to be seen or overheard
  - » neutrality of location which should not be linked to a particular issue such as SGBV/torture
  - » access in, such as discrete entrance to avoid victim/witness being seen or stigmatized
  - » appropriateness, based on cultural, religious other reasons
  - » ease of access/distance to location for interviewee
  - » possible transport cost or provision of transport to location for interviewee.
4. Allow enough time to conduct a full interview (i.e. 3–6 hours at a minimum, with breaks for an adult interview), confirm how long the interviewee can stay and ensure appropriate staggering of interviews to avoid victims/witnesses coming across each other. When using interpreters, the interview duration will be substantially longer and additional time will be necessary. Suggest returning the next day to continue, in order to avoid exhaustion or too much disruption to the victim’s/witness’ daily routine. Do not forget to set aside enough time after each interview for reviewing your documentation plan in light of new information gathered (see 5. Evaluation below).
5. Evaluate the interviewee’s profile and make contingencies for potential reactions or needs. Prepare and discuss with the interviewee an adequate cover story if appropriate for her/him to explain why s/he is meeting you in case someone is asking or sees her/him.
6. Identify important topics and potential questions specific to the elements of the crimes applicable to the context in which you are documenting (see Box 8: ‘Subject areas for questions’). Plan to start the interview with a broad open question such as ‘Tell me what happened’, followed by TED questions (‘Tell me...’, ‘Explain to me...’, ‘Describe to me...’) and make sure to cover the ‘who’, ‘what’, ‘where’, ‘when’, ‘how’ of the crimes and ask ‘how do you know’ (see Box 6: Productive open-ended questions styles).
7. Consider appropriate language and terminology to use during the interview, and discuss this with the interpreter. In particular, consider a glossary of key terms and codes that are used culturally to refer to sexual acts and body parts (e.g. ‘they insulted me’ or ‘they did bad things to me’ may be codes for rape; ‘they tortured me’ may cover a very wide range of forms of physical and psychological violence) and any distinctions in language typically used by children or adolescents.
8. Where possible and appropriate, consider appointing another person than the interviewer to take notes during the interview as it may be difficult to listen and manage the interview as well as to accurately record what the victim/witness says. Practitioners will need to assess this in view of all the circumstances in the case at end (e.g. type of victim, gender of note taker and composition of the rest of the team) against the potential impact of having an additional person in the room.

*...ask the victim/witness in advance whether s/he would prefer a male or female interviewer and/or interpreter...*

9. Prepare all necessary documents (e.g. diagrams, photographs, maps, videos) that you might show the victim/witness and equipment (e.g. camera and ruler to take photographs of injuries, sketch paper and pens) and ensure you know how to use technical equipment. Be careful, however, not to show a victim/witness any diagram, photograph or video which would lead them to alter their evidence. If you are unsure whether showing any material to the victim/witness may lead her/him to alter her/his evidence, do not show it.
10. Have paper available for the victim/witness to write/draw on (e.g. maps, room layout) to help capture his/her perspective.
11. Wherever possible, ask the victim/witness in advance whether s/he would prefer a male or a female interviewer and/or interpreter. Remember not to assume that all female victims/witnesses will prefer female interviewers/interpreters or that all male victims/witnesses will prefer male interviewers/interpreters; each victim/witness can make her/his own choice.
12. Ensure that the victim/witness knows what to expect so they can plan logistically (e.g. child care, absence from work/home) and psychologically/emotionally (e.g. support from trusted person).
13. Consider practical arrangements, address them with the interviewee if needed and prepare the location for the interview, if possible in the circumstances:
  - » have drinking water available in the room
  - » access to a toilet
  - » turn off your telephone and ensure that there will be no interruptions
- » arrange the seating (e.g. chairs, desks, where each person will sit) so that it feels comfortable and secure for the victim/witness and the interviewer (if interviewing a child, see Chapter Chapter 16: Sexual Violence against Children/ Core Guidance on Involving Children in the Documentation Process for specifics on setting up the room in a child-friendly way)
- » consider how your victim/witness will get to and from the interview (e.g. consider safety, the distance, possible cost of travel for the victim/witness and the time of day when the interview concludes)
- » consider childcare arrangements, care of elderly or sick persons, or tending to other pressing family needs as well as job related responsibilities, if relevant, to help make the victim/witness at ease and more focused
- » consider accompaniment arrangements, if the interviewee is a child
- » ensure all costs (e.g. travel costs, accommodation, food, communication) are adequately resourced and document this in case it is alleged at a later stage that the interviewee has been financially rewarded/unduly influenced. While witnesses can never be paid for their testimony, it is perfectly acceptable to reimburse actual or reasonable costs associated with attending an interview.
14. Determine a safe and confidential system for recording the information obtained during the interview, in particular highly sensitive information (e.g. names, dates, locations) to protect the identity of the victim/witnesses (see Annex 8: Template for personal data to be collected from victims/witnesses ).

## BOX 3

## Interview Setting Dos and Don'ts

DO	DO NOT
<b>LOCATIONS<sup>3</sup></b>	
<p>Conduct interviews in a location that is:</p> <ul style="list-style-type: none"> <li>» safe, comfortable and culturally appropriate (e.g. a hotel room may not be suitable depending on the context)</li> <li>» private (auditory and visual privacy)</li> <li>» neutral</li> <li>» easily accessible/convenient</li> </ul>	<p>Do not conduct interviews in a location that is:</p> <ul style="list-style-type: none"> <li>» very public/crowded or at risk of surveillance</li> <li>» linked to SGBV/torture or otherwise creating a risk to privacy (e.g. tents in refugee camps where the interview could be overheard)</li> <li>» run by a third party (e.g. clinics, offices of relief workers, community spaces and women's centres) without prior arrangement with responsible staff</li> <li>» the victim/witness's home unless it is not feasible for the witness to go elsewhere and provided privacy and confidentiality can be maintained—the presence of a spouse, children or parents may indeed prevent the person to talk freely, or the visit of the documentation team may appear unusual and attract neighbours' attention</li> </ul>
<b>INDIVIDUALS PRESENT</b>	
<p>Limit the number of persons present in the interview room to those who are critical to the interview process (e.g. victim/witness, interviewer, interpreter (if any) and/or note taker (if different from interviewee))</p> <p>Any support person should be:</p> <ul style="list-style-type: none"> <li>» someone the interviewee trusts to be discreet and not reveal that contact has been made</li> <li>» present only during the Engage and Explain phase and during breaks, except in the case of children who can have a family member, guardian or other trusted adult present during the entire interview if this helps them</li> </ul> <p>Interview team should be:</p> <ul style="list-style-type: none"> <li>» familiar about cultural and social rules for interacting with married/unmarried women or children</li> <li>» carefully composed and sensitive to gender roles and dynamics which may influence disclosure for male/female victims/witnesses</li> </ul>	<p>Do not conduct interviews with/in:</p> <ul style="list-style-type: none"> <li>» groups or presence of other victims/witnesses due to risk of affecting each other's accounts (other witnesses should be interviewed separately)</li> <li>» presence of others who could influence or intimidate the interviewee, interfere with the interview process or otherwise make her/him feel nervous/unsure (e.g. spouses, intermediaries)</li> <li>» presence of support person during the Account and Clarification or Closure phases</li> <li>» presence of children, family members, co-workers or others who may become distressed or may increase the risk of a breach of confidentiality</li> </ul>

3

3 When choices are very limited, options should be carefully considered to select the most appropriate in the circumstances (e.g. under a tree, out of sight and hearing).

*The process of obtaining informed consent...  
...constitute a critical part of this phase of the interview.*

## 2. Engage and Explain

Engage and Explain is the first phase of an actual interview. Engage is the first step, meant to create a rapport and encourage conversation. The Explain phase is used to explain the purpose of the interview and what is expected of the interviewee. Its aim is to develop a good working relationship and create an atmosphere in which the interviewee will want to talk and share information. The atmosphere that practitioners create as interviewers will be vital to the success or failure of the interview and first impressions can affect positively or negatively the rest of the interview process. It is therefore key to spend as much time as necessary on this critical phase of the interview. If the victim/witness does not like or trust the interviewer, interpreter or other team members, s/he will not open up.

The process of obtaining informed consent—which involves consenting throughout all stages and in relation to all aspects of the documentation—constitutes a critical part of this phase of the interview. The meaning of informed consent is explained in Chapter 7/Informed Consent. A good way to ensure that the victim/witness has understood an issue is to ask her/him to repeat to you the information in her/his own words.

### BOX 4

#### Tips to Create a Positive Atmosphere

- ✓ Pay attention to your appearance, manners (e.g. ensuring to use culturally appropriate attire and greetings) and speech (e.g. how you will address the interviewee). Remember that eye contact preferences vary hugely in different cultures—some people like prolonged eye contact, some find it disrespectful.
- ✓ Provide a private, secure and comfortable environment (e.g. sufficient refreshments, access to a toilet).
- ✓ Keep tone conversational.
- ✓ Ask the victim/witness what they want or expect from the documentation process.
- ✓ Ask the interviewee if they have any domestic/safety issues and address her/his immediate needs/concerns.
- ✓ Be prepared to spend as much time as necessary. Take a patient and relaxed approach and repeat all relevant factors, several times if necessary, until you are satisfied that the victim/witness has fully understood.
- ✓ Behave professionally and respectfully at all times. Show empathy and be non-judgemental. Establish trust and respect.

### Summary of what to do and say in the Engage and Explain phase:

1. Introduce everyone in the interview room to the victim/witness and explain clearly their roles, addressing any concerns raised. Assure the victim/witness of your competence and explain confidentiality measures in place. If using an interpreter or note taker, introduce them specifically and reassure the interviewee that they will treat the interview and its contents according to the same confidentiality guidelines as the rest of the team. Allow the victim/witness to ask questions to the interpreter about herself/himself and their background (especially when they belong to a small linguistic group as they may be connected in some way) and gauge the interviewee's trust/comfort with the interpreter. Explain how to work with interpreters (see Box 5: 'Working with interpreters').
2. Ask the victim/witness if s/he is comfortable with speaking to the interviewer (e.g. gender, race) and empower her/him to ask to change the interviewer or interpreter if s/he is not comfortable with her/him.
3. Explain your organisation's mandate and objectives and the purpose of the interview. If the victim/witness is unsure about the reasons for the interview, they may, for example, limit their account to their own experience and not realise the importance of what they saw to the wider documentation process.
4. Describe the phases of the interview and the routines that will be adopted. This is useful to help relax the interviewee and reduce anxiety. This aspect is particularly important if it is the first time a victim/witness is exposed to such a process.
5. Explain the types of questions which may be asked, highlighting that:
  - » The victim/witness should report everything that comes to mind in relation to the event(s) in as much detail as s/he can remember.
  - » Bringing back to mind an event and remembering its details from memory is very demanding (mentally and often emotionally), especially after a period of time has elapsed or when events are embarrassing, traumatic, complicated or confusing, or when previous interviews have taken place.
  - » There may be questions about experiences that are distressing.
  - » The victim/witness should not guess when answering questions or reporting information. It is fine not to know or remember something. In that case, the victim/witness should simply say so and not be influenced by what s/he thinks other may want her/him to say. This is particularly important with children and vulnerable adults.
  - » Sometimes individuals find it easier to remember events and details if they close their eyes, and that the victim/witness is welcome to do so.
6. Discuss how long the interview might take and emphasize your willingness to remain flexible during the interview (e.g. to have the discussion over more than one session, if preferred). Also make clear that the victim/witness can take a break or end the interview at any time.
7. Describe all possible uses of the information provided, including the possibility that the information may need to be disclosed, whether or not the person is asked to testify in any type of proceeding. Address any concerns the victim/witness may raise.

8. Explain clearly that the victim/witness has a choice whether or not to speak to you, that the provision of services is not linked to their participation, and that s/he can exercise this choice before, during and after the interview. The victim/witness should feel respected, supported, in control and be empowered to cooperate.
9. As part of the informed consent process, document the victim/witness informed consent for the interview itself, ensuring that consent is based on her/his free will and that s/he fully understands the possible use of information and associated risks. For a child victim/witness, informed consent is typically also obtained from the parent or legal guardian, dependent on the child's age and maturity (see Chapter 16: Sexual Violence against Children/Core Guidance on Involving Children in the Documentation Process).
10. Be prepared to stop the interview and consider whether another person may be better suited to conduct the interview if you feel that you are not in a position to create the right environment for the interviewee to talk to you for any reason. In addition to having the appropriate professional and behavioural skills, certain additional factors, such as age, gender, culture, race, nationality and ethnicity, may play an important role in whether or not the interviewee will feel comfortable enough to open up.
11. Where necessary—for instance where the choice of interview location was limited and there might be a small risk that someone unexpectedly turns up during the interview (e.g. interview conducted in the victim/witness's home), agree with the victim/witness on a neutral topic (e.g. children, education, health) linked to your cover story to which you can both switch in order to preserve confidentiality.
12. Ask if the victim/witness has made any prior statements or been interviewed, and/or ask who else s/he has discussed these issues with.
13. Ask the victim/witness if s/he has heard other witnesses accounts of the events. Explain that it is important that the victim/witness makes clear during her/his account whether s/he is providing information about something that s/he actually saw and heard as opposed to information s/he heard second hand.

For specific guidance on the Engage and Explain phase when interviewing children, see Chapter 16: Sexual Violence against Children/Core Guidance on Involving Children in the Documentation Process.

## BOX 5

## Working with interpreters

When involving an interpreter in the interview, the interviewer should:

- » Vet the interpreter and allow the interviewee to ask her/him questions if needed to feel comfortable with his/her background.
- » Ensure the interpreter looks at and speaks directly to the victim/witness, and is aware of pitch, tone, pacing and voice inflections.
- » Speak to the victim/witness directly (*'what did you say after that?'*) and not to the interpreter (*'ask him what he said next'*).
- » Use short sentences, pausing frequently.
- » Avoid or minimise writing notes while the interpreter interprets the questions and answers (it is important to observe the victim's/witness' body language and tone of voice).
- » Be familiar with sexual violence related words in the interviewee's language so that you can react appropriately when sexual violence is discussed.
- » Actively listen (e.g. nodding, expressing sub-vocal understanding even when the victim/witness speaks a different language to the practitioners), as this will enhance trust and promote disclosure.
- » When interviewing children, only use interpreters who have received special training and have prior experience of working with children.

During interviews, interpreters should:

- » Use only the words of the victim/witness and the interviewer; none of her/his own words should be used during the interview.
- » Interprets what is said even if it does not answer the question.
- » Be sensitive to the individual needs and capabilities of children—including training on techniques to deal with children's particular communication difficulties.
- » Show empathy but not pity, shock or judgement.
- » Have a sensitive awareness of the impact their physical presence may have on a victim/witness, and be careful to enter, move around the room and sit in a way which does not intimidate or threaten the victim/witness.

An interpreter should not:

- » Exchange any words in relation to the information provided with the victim/witness other than those spoken directly by the practitioner. The interpreter is not a party to the conversation, but rather a valuable means of communication between the interviewer and interviewee. Words exchanges between the interpreter and the victim/witness should be limited to non-substantive matters such as where to sit and friendly common interactions, and should only be exchanged on breaks in the interview process.
- » Explain anything to the victim/witness or the interviewer, unless explicitly instructed to do so by the practitioner.
- » Change anyone's words. If a victim/witness uses a euphemism the interpreter should use that same term to the practitioner and suggest that this might have another meaning so that the practitioner can ask clarifying questions.
- » Omit parts of the interview that are in their view unimportant.
- » Make suggestions about how to carry out the interview.

### 3. Account and Clarification

The aim of the Account and Clarification phase is to obtain an accurate and reliable account of the events being documented. During the Engage and Explain phase the interviewer may do the majority of the talking, but that will give way to the interviewer talking less and listening more in the Account and Clarification phase, as s/he needs to understand and analyse what is being said.

#### i. Types of questions

There are some basic question types, which practitioners should be familiar with and can be useful when conducting interviews with victim and other witnesses of sexual violence.

The first questions being asked are of vital importance and may well set the tone for the rest of the interview. The approach should be to ‘funnel information’ from the interviewee, starting with broad open-ended questions (i.e. questions that require a narrative answer) to obtain her/his broad uninterrupted account and then moving to more specific ones to obtain particular details and clarifying the account, if necessary, still using open-ended questions.

Interruptions can negatively impact memory recall and make practitioners miss critical information. Allowing the victim/witness time and space to give an uninterrupted free recall account and encouraging her/him to keep talking will provide the most comprehensive and detailed account.

#### BOX 6

#### Productive Open-ended questions styles

Question for Breadth	TED Questions for Depth	WH Questions for more Specific Information
<p>Begin the account phase with ‘Tell me what happened’.</p> <p>Encourage the victim/witness to keep talking.</p> <p>Do not interrupt the victim/witness.</p> <p>In cases of long silences, repeat the victim/witness’s last few words to encourage them resume talking.</p>	<p>T ‘Tell me...’</p> <p>E ‘Explain to me...’</p> <p>D ‘Describe to me...’</p>	<p>W ‘Who...?’</p> <p>W ‘What...?’</p> <p>W ‘When...?’</p> <p>W ‘Where...?’</p> <p>H ‘How...?’</p> <p>We also recommend avoiding the W question ‘why’<sup>4</sup> and adding the following H question:</p> <p>H ‘How do you know...?’</p>

<sup>4</sup> Many other guidances also contain ‘why’ questions as part of the WH mnemonic. However, ‘why’ is usually not a productive question type as it can easily invite an opinion response rather than a fact-based response. It can also be stigmatizing (e.g. ‘Why did he do that to you?’) or blaming (e.g. ‘Why didn’t you fight back/escape?’). Practitioners should reformulate and find better ways to ask ‘why’ questions.

## Practitioners should aim to only use open-ended questions

Practitioners should aim to only use open-ended questions. Leading or opinion/statement questions, multiple questions, closed questions or forced-choice questions should be avoided as they suggest or presume the information to be provided by the interviewee.

Please find below a table describing the main types of questions, when best to use them and some examples:

### BOX 7

#### Types of Questions

Types of questions	What are they?	When to use them?	Examples
Open questions	Questions that may give parameters but invite a narrative response (more than one-word answers) and may provide further questioning	<p>At the beginning of the interview, you should use TED questions to encourage the interviewee to open up and to obtain an uninterrupted free recall/narrative account</p> <p>After the initial account, you can use more probing 'WH questions' which require more specific answers to obtain particular details (e.g. clothing worn, route travelled, what happened at a particular place or time).</p>	<p><b>TED questions</b>  <i>Tell me everything that happened from the time you left school that day until the soldiers released you the following day? I am interested in the step by step, moment by moment events that you can remember.</i></p> <p><b>WH questions</b>  <i>What were the attackers wearing? (answer). You mentioned the soldiers were wearing uniforms, please describe these uniforms in more detail for me ... (followed by) what colour were the uniforms?</i></p> <p><i>What happened on 2nd February?</i>  <i>What did they do to that part of your body?</i>  <i>What affiliation were the soldiers you mentioned?</i>  <i>What led you to that conclusion?</i>  <i>Who did this to you?</i>  <i>When did this happen?</i>  <i>Where were you when this happened?</i>  <i>How did you get there?</i>  <i>How do you know he was the leader?</i></p>

## BOX 7

## Types of Questions

Types of questions	What are they?	When to use them?	Examples
Clarifying questions	Questions that ask for an explanation of an inconsistency or unclear aspect of the account	At a later stage of the interview, if you encounter an inconsistency in the account or when you are unclear about what the interviewee is saying. Be aware when interviewing children that their ability to understand certain concepts (such as times, dates, size) develops gradually and plan your questions accordingly.	<p><i>You mentioned various men. Can you tell me how many men were in the room when you were asked to take your clothes off? If you are not sure, is there a reason for that and what is it? (e.g. they kept coming in and out of the room; blindfolded; too scared to look up from the ground).</i></p> <p>NB Make sure all the information in the question has been provided before by the witness.</p>
Closed questions	Questions that normally limit the responses to very specific answers and are likely to produce a simple yes/no response	<p>To be avoided as they are generally leading.</p> <p>Can only be used exceptionally as a last resort where (i) you really need a definitive yes or no answer to something specific, (ii) only after all other relevant information has been freely given by the witness and (iii) all other open ways of asking for this information have not given you the answer.</p>	<p><i>Did he use a condom?</i></p> <p><i>Did he ejaculate?</i></p>

## BOX 7

## Types of questions

Types of questions	What are they?	When to use them?	Examples
Leading/influencing questions	Questions that imply or assume facts or suggest a particular answer	Never/to be avoided	<i>Is that when he took off your clothes?</i> <i>Did he hit you?</i> <i>Did they take you to the camp?</i> <i>Was it the same commander that you saw earlier?</i>
Multiple questions	Questions that include various elements and may therefore be difficult to understand and answer	To be avoided, especially with children	<i>What did they look like and what did they say?</i>
Forced-choice questions	Questions which normally limit the response to a choice made by the interviewer	To be avoided	<i>Were the uniforms green or blue?</i>

## ii. Subject areas for questions

During the Planning and Preparation phase, practitioners will need to identify topics and subject areas for questions.

The type and degree of detail that practitioners need to establish about the specific act(s) of sexual violence will differ depending on their mandate and jurisdiction and they should prepare questions accordingly, keeping in mind the principle of do no harm and avoiding difficult or embarrassing questions that are not strictly necessary for their purpose (see Chapter 7: Do No Harm; for interviews with children, see Chapter 16: Children against Sexual Violence/Ethical Considerations).

Practitioners investigating sexual violence as a crime may need to establish specific details about penetration or body parts and ask detailed questions in that respect. It is essential for them to include questions not only about the act itself but also about all the elements of sexual violence as a crime under international law (specific, contextual and linkage elements) according to the context in which they are documenting.

Practitioners documenting sexual violence for advocacy or reporting purposes may on the other hand not need to establish that degree of detail regarding penetration or body parts, and should be careful not to use legal words when they do not know the details of what happened.

Practitioners should also systematically include questions relating to the physical, mental, social and economic impact of the sexual violence on the victim/witness as impact evidence can not only help establish elements of crimes or violations with a gravity threshold, but it is also necessary for sentencing and reparation purposes (see Chapter 6: Reparations/Elements to Document Harm).

### BOX 8

#### Subject areas for questions for sexual violence as a crime or violation of international law <sup>5</sup>

Specific Elements	Common Elements	Linkage Elements	Impact
Information to prove that the particular act (rape, sexual slavery, etc.) was committed	Information to prove that the act took place in a context which makes it a crime against humanity, a war crime, an act of genocide or a human rights violation	Information to prove that a particular individual was personally criminally responsible for that act and through what mode of liability or how the state is responsible	Information documenting the adverse consequences of the crime on the victim/witness, her/his family and community, including those leading to other human rights violations
Details of the assault and other crime(s) or violations(s)	Details of conflict/attack against civilian population	Details of intent/knowledge	Physical harm (immediate and long-term)
Location/date/coercive circumstances and description of site of violation	Political and security situation, scale, similar incidents or attacks	Command and power structure, communications, equipment	Mental harm (immediate and long-term)
Description of other people present and surroundings	Words and actions of perpetrator(s)/possible reasons for violence (e.g. gender, ethnicity, political affiliation)	Description of perpetrator(s) and their roles/responsibilities	Social/Economic harm

<sup>5</sup> Institute for International Criminal Investigations (2015) *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Training Materials*. The Hague: Institute for International Criminal Investigations. Module 6, Testimony.

### iii. Examples of questions

#### Examples of questions about the act; for example, to establish the specific elements of rape.

First element of rape:

- » *'If possible, if not too difficult for you, could you please try to describe for me what they did to you? I know this may not be easy, please take your time.'*
- » (If s/he says either that they 'raped' her/him one after another or uses some kind of slang or communal terminology which you know to mean rape, you must follow up again to get the factual description of penetration.)
- » *'When you say they raped you, can you please tell me precisely what they did when raping you?'*
- » *'It would be very helpful for me to understand what happened in more detail. If you can, please tell me what part of your body was affected.'*
- » *'What did they use to do that?'*

Second element of rape:

- » *'Please could you describe for us the circumstances in the surroundings when these events took place?'*
- » *'Could you tell us where you were?'*
- » *'Who was around?'*
- » *'What was happening?'*
- » *'Can you please describe the surroundings?'*

#### Examples of questions about the context; for example, to establish the elements of rape as a crime against humanity:

First and second elements:

- » *'Can you tell me what else was going on before the acts you have described?'*
- » *'Can you tell me what else was going on during the acts you have described?'*
- » *'Can you tell me what else was going on after the acts you have described?'*
- » *'Can you tell me about the people whom you told me about?'*
- » *'What were they wearing?'*
- » *'What were they carrying?'*
- » *'Where did they come from?'*
- » *'What military facilities or equipment or personnel, if any, were nearby?'*
- » *'Can you describe the way in which the attack you speak of took place?'*
- » *'What happened first, and what next, and what after that?'*
- » *'Do you know of anyone else who was treated in a similar way?'*
- » *'What led you to that conclusion?'*
- » *'Did you witness any other incidents involving attacks such as that which you have just described?'*

(S/he provides you with detail of these incidents s/he witnessed so that you are able to discern who, what, when, where, how, and how s/he knows.)

*ask separate questions to find out “who”, “what”, “when”, “where”, “how” and “how do you know”...*

**Examples of questions about the perpetrator to help establish through what modes of liability s/ he committed the crime; for example, directly (as opposed to command/superior responsibility)**

- » *‘Can you describe those you say were carrying out the acts you have told me about?’*
- » *‘Can you please tell me about their clothes?’*
- » *‘Can you describe any distinctive aspects to their appearance such as their head/footgear/other?’*
- » *‘What, if anything, was in their hands?’*
- » *‘What were they carrying?’*
- » *‘Can you describe their weapons/their equipment/their vehicles, etc.?’*
- » *‘Did you have occasion to observe someone in a position of authority?’*
- » *‘Did you have occasion to hear this individual (these individuals) say anything?’*
- » *‘What did they say?’*
- » *‘To whom did they say it?’*
- » *‘Under what circumstances did they say it?’*
- » *‘What was the result or reaction to what they said?’*
- » *‘Did you have occasion to observe the interaction among the individuals in this group?’*
- » *‘What were you able to observe about their interaction?’*
- » *‘Did you have occasion to hear them refer to each other, by name, by title/rank, by position, etc.?’*

Practitioners should also ask separate questions to find out ‘who’, ‘what’, ‘when’, ‘where’, ‘how’, and ‘how do you know’, or ‘what led you to conclude’ that this individual had a position of authority.

#### iv. Interviewing techniques

Employing the right techniques, behaviour and attitude while interviewing is critical to making a victim/witness feel respected, empowered and comfortable to share information.

#### Summary of what to do and say in the Account and Clarification phase:

1. Obtain a full uninterrupted first account of events from the victim/witness allowing her/him to tell her/his story in her/his own way before asking specific questions, especially regarding the act of sexual violence.
2. Use open-ended questions, as short and precise as possible, and start the interview with TED questions (Tell me ... Explain to me ... Describe to me ...) in order to encourage the interviewee to open up and to obtain a narrative response (as opposed to a one-word or yes/no answer).
3. Adopt a chronological structure following the story of the witness. Although there are other possibilities, chronological interviewing is the most common and easiest approach in the majority of cases. During the clarification phase, try to find a balance between following the chronology, ensuring that all the elements are covered and time management considerations.
4. After the initial account and where the interviewee mentions a number of topics, it is sometimes useful to label each one, choosing a non-emotive descriptor, in order to be able to refer back to them in conversation with the interviewee quickly and with minimum ambiguity.
5. For each topic, cover the ‘who’, ‘what’, ‘where’, ‘when’ and ‘how’ of the crimes, while remaining wary about asking the victim/witness any ‘why’ questions, so as not to apportion blame to the victim/witness. Remember you should not stick too rigidly to this list, and should ensure that you react to what you hear from the victim/witness. Do not forget to ask ‘How do you know?’

*..always prioritise the victim/witness over the information..*

or ‘What led you to that conclusion?’ to clarify assumptions and conclusions of the victim/witness. The answers to those questions will often give you the most critical evidence. Try not to move too rapidly between topics when interviewing children, and do not ask multiple questions in one session (e.g. ‘Where were you and who were you with?’).

6. When asking specific questions, accept ‘I don’t know’ or ‘I can’t remember’ as legitimate answers: persisting may just lead to a loss of rapport or guessing by the witness.
7. Avoid introducing directly information obtained from interviews with other persons or sources, and try to keep each interview discrete.
8. Keep asking victim/witness if anything else was done to them or they were forced to do even after one form of violence has been disclosed. Often, interviewers stop after a disclosure of one type of assault but it should not be assumed that this is all that happened. The more distressing the experience, the more difficult it will be for the victim/witness to find words to describe it.
9. Where the same event is reported to have occurred a number of times (e.g. detainee taken out of her/his cell for interrogation and abuse), ask what normally happened and then ask about the first and the last time (which tend to be the most clearly remembered) and whether there was anything distinctive or unusual about any of the other times.
10. Introduce regular short refreshment/comfort breaks which also provide an opportunity for the interviewer to reflect on whether the interview is still on track and check for ambiguities, omissions, etc.
11. During the clarification process, confirm what has been said about each aspect of the account to check that your understanding is accurate before moving on to the next topic, repeating back the victim/witness’s own words. Never change her/his words as that would be leading. If there is a lot of information in one topic area, confirm the interviewee’s response before the end of the topic and then summarize the whole topic using exactly the victim/witness’s own words before moving on. This approach helps maintain a professional working relationship by showing that you have listened and understood what has been said, and also gives the interviewee the opportunity to add to or alter what they have said. To maintain the conversational flow, link the summary to the next topic with an open question, for instance: ‘You mentioned that the first man came in and pushed you on the floor. What happened next?’
12. Ask the interviewee, if appropriate, to draw a map, plan or sketch of the area where the incident took place. Ensure to date, label/code with a key and preserve such material for future reference. Note however that some people may be unfamiliar with using maps or looking at areas from a bird’s-eye perspective, so different techniques may be more appropriate with some witnesses.
13. Ask the interviewee, if appropriate, whether they have any relevant pictures, videos or text messages on their mobile phone or other evidence.
14. Acknowledge the mental and often emotional effort required to recall events from memory and be aware of the frailties of human memory and non-verbal communication (e.g. change in tone of voice, eye and facial movements). Check in at appropriate intervals to ask the interviewee how s/he is doing, if s/he needs a break, but avoid disrupting disclosure or send a message that you do want to change subject or stop hearing about distressing experiences. Checking in also helps to introduce new lines of questioning and constitutes an opportunity for empowerment by giving the interviewee the agency to control the process (see point 17 below).
15. Carefully think how to phrase questions, especially when dealing with children since they

can be suggestible, interpret things literally or try to provide an answer which they think will please an adult (see Chapter 16: Sexual Violence against Children/Core Guidance on Involving Children in the Documentation Process).

16. Regardless of the format of questioning, you should avoid:

- » interrupting
  - » asking leading questions
  - » suggesting an answer when probing for additional details
  - » asking multiple questions (e.g. 'What did they look like and what did they say') or forced-choice questions (e.g. 'Were the uniforms green or blue') which are difficult for the interviewee to understand and answer and may be leading
  - » assuming any fact—even if the last 50 victims/witnesses identified the location of a particular incident, never assume that the 51st victim/witness will report the same location. Ask the question of every victim/witness
  - » finishing sentences
  - » forcing the interviewee to remember or share details
  - » using jargon
  - » giving your opinion or making value judgments (e.g. 'That's not what really happened, is it' or 'You should have tried to escape')
  - » asking questions suggesting that the victim is to blame and 'why' questions which can infer judgment, or require the witness to speculate (e.g. 'Why did the man do that to you?' 'Why did you follow him into the room?').
17. Throughout the interview, behave in a respectful and professional way that empowers the victim/witness:
- » always prioritise the victim/witness over the information
  - » sit at the same eye level or sit lower than the victim/witness
  - » give the victim/witness a sense of control over the process by consistently giving her/him the power to agree/disagree, answer/not answer, ask questions

and have information repeated as many times as necessary, take a break or stop the interview at any time if they feel uncomfortable or distressed

- » remember that informed consent is a process: consistently provide information to ensure that the choices s/he is making before, during and after the interview are based on full information. The first time you present an issue requiring informed consent or if you are not sure if s/he understood, ask her/him to explain to you some of this information in her/his own words
  - » show support, admiration and respect, not pity, disgust, anger or exasperation
  - » be polite, attentive and aware of social and cultural norms (e.g. expectations of demeanour relating to societal status, role)
  - » be aware of body language and facial expressions, taking care not to appear judgemental, surprised, shocked, disapproving or disbelieving at any point
  - » be flexible with time (remember to leave sufficient time for the interview) and be patient with how victim/witness answers your questions.
18. Reassure the victim/witness about their fears or concerns, but you must also manage their expectations and avoid making promises of any kind. Recognise that promises can be made affirmatively, or can be suggested by an absence of clarification. Do not promise (by words or silence), for example:
- » anonymity or confidentiality, noting that it is generally the responsibility of a court or other accountability mechanism to decide what protection measures will be granted once a case is pending (see Chapter 7: Do No Harm/Confidentiality; regarding child victims/witnesses see Chapter 16: Sexual Violence against Children/Ethical Considerations)
  - » money or the provision of any services
  - » protection for them or their family
  - » justice, truth or convictions
  - » visiting or meeting them again—you may agree to a follow-up meeting but be clear that this is not guaranteed.
19. Be prepared to encounter a wide range of possi-

ble emotional reactions in from victims and other witnesses, in yourself and any other members of the team that are present. There is no one way to behave. Do not assume the victim/witness will behave or react in a particular way. Victim/witness may:

- » become distressed, upset, withdrawn or struggle to express themselves
  - » become angry, defensive, dismissive, agitated, distracted, refuse to answer certain questions or speak at length about details that are seemingly irrelevant
  - » be calm, poised, clear and able to recollect and relay with accuracy all the events and circumstances surrounding the act
  - » have difficulty recalling minor details and the sequencing of events may change. This may be a consequence of trauma, which does not affect her/his credibility. Each individual is affected differently by trauma, make no assumptions (see Chapter 15: Trauma).
20. Be careful to recognise and avoid common stereotypes and assumptions about victims/witnesses of sexual violence; they are individuals and will not automatically have the same feelings or reactions. Do not presume or expect that:
- » they will feel ashamed or dirty
  - » they will be severely traumatised
  - » they will not want to talk about the sexual violence
  - » they will be fragile or weak
  - » they will have physical injuries
  - » their trauma will have negative impacts on their credibility
  - » the sexual violence was the worst or most difficult part of their experience
  - » female victims/witnesses will only want to talk to female investigators and male victims/witnesses will only want to talk to male investigators. However, it should always be asked, where the option is available, what the victim's/witness's preference is.
21. Give a last opportunity to the victim/witness to

confirm, alter, clarify, deny or add anything, before moving into the Closure phase of the interview.

**BOX 9****Dealing with inconsistencies**

Recommended techniques to address inconsistencies without confrontation:

- » Do not ignore inconsistencies.
- » Note down the inconsistency as the witness recounts the testimony.
- » Think about a break to consider what a witness has actually said and a process to deal with any issues.
- » Consider type of inconsistencies there are. Consider what you need to know about the inconsistencies – why are they occurring?
- » Do not directly confront a victim witness about inconsistencies.
- » Do not imply they are lying.
- » Deal with any inconsistencies in a subtle and professional manner.
- » Use open ended questions to get the information you need to assess why the inconsistencies are occurring.
- » A good rapport with witnesses allows you to better deal with inconsistencies.
- » Consider if there are any measures which might reduce trauma, fear or stressors which might be causing some of the inconsistencies.
- » Resist the urge to tell the witness what you think is the correct version of events.
- » Consider shortening or finishing the interview early if the problem is significant.
- » In the end, the record of interview should include a note of significant inconsistencies and your impression of them, if any.

For more detailed guidance on inconsistencies, see Chapter 14: Analysing Evidence and Information/Explaining inconsistencies.

#### 4. Closure

The Closure is the last phase of an actual interview. Interviews should not be ended abruptly and it is important to set aside enough time to close them properly and to explain the next stages of the process to the victim/witness.

Before Closure of the interview, practitioners should consider the following questions in light of their written interview plan and the information obtained during the interview:

- » Have I covered all the questions I wanted to ask?
- » Has the victim/witness provided all the information that they are able and willing to provide?
- » Have I covered all the aims of this interview?

#### Summary of what to do and say in the Closure phase:

1. Ask the victim/witness again if s/he has anything to add or if there is any aspect of the event(s) that were not discussed.
2. Ask the victim/witness if s/he has any questions or concerns. S/he may have worries and concerns about their personal safety or some other query. If they do ask questions, give honest answers and if you do not know the answer, say so.
3. Discuss with the victim/witness her/his needs and explain to her/him the referral options available. It is important to reiterate that referrals to service providers is not dependent on the victim/witness's participation in the interview and that her/his details will only be shared with service providers with her/his informed consent (see Chapter 7: Do No Harm/Informed Consent; for child victims/witnesses, see also Chapter 16: Sexual Violence against Children/Core Guidance on Involving Children in the Documentation Process). In case the victim/witness does not consent to be referred, give her/him service providers' contact details for her/him to get in touch if s/he later changes her/his mind.
4. Ask the victim/witness about her/his preferred method of being contacted. Consider how to contact and locate her/him many months, or a year, after interviewing them. For example, with the interviewee's consent, record the names of family members, close friends in the community, local church or group—anyone who may be in a position to help the practitioners locate the interviewee. Give the victim/witness enough information to enable them to contact you.
5. Repeat back to the victim/witness their concerns and the information they have provided, and address any practical issues that they have raised (e.g. safety concerns, referrals to service providers, future contact arrangements).
6. Read back the testimony, statement or notes to the victim/witness—with care as it can be highly distressing to hear their experiences expressed in plain language without emotion. For those practitioners with an official mandate to document sexual violence for judicial purposes, get her/his signature if appropriate. Practitioners documenting sexual violence without an official mandate should not get them signed by the victim/witness to avoid creating an authoritative record of events which could be used against the victim/witness in court at a later stage (see section C, Recording Interview Information).
7. Be prepared for new information and a return to the Account phase if necessary. It is important to remain flexible and it is possible for victims/witnesses to come up with relevant information that has not yet been discussed at this stage.
8. Explain to the victim/witness what to do if they remember more information in the future. They could for instance make a written note of any additional recall before contacting you.
9. Ask the victim/witness whether there is anyone else with whom the interviewer should speak in

relation to the event(s).

10. End the interview on neutral topics and assess the emotional state of the victim/witness. If s/he appears distressed as a result of the interview, try to bring them back to the present and to a positive frame of mind. Find out what s/he is doing next, where s/he is going and what kind of support (e.g. friend, family) s/he may have immediately after the interview. Explain that remembering and describing their experiences may make traumatic memories more present for a while and that they may have more difficulty sleeping for a time. If s/he appears outwardly distressed during the closure phase, seek professional psychological support.
11. Explain and ensure that the victim/witness understands what will happen next, making sure to manage her/his expectations in terms of timeframe, possible reparations, etc. Consider following up with the victim/witness shortly after the interview if possible and practicable to effectively do so and then at regular intervals. Capturing information as a one-off process without any further contact may result in the victim/witness feeling used (see Chapter 7: Do No Harm). As the case may be, tell her/him that you might contact them in a few days to check on them, inform them of any potential developments if appropriate, and to see if they have remembered anything else.
12. Ask them again whether they give their informed consent for the interview and use or disclosure of information. Allow them to change their mind and withdraw consent if they wish (see Chapter 7: Do No Harm/Informed Consent).
13. Acknowledge the victim/witness's participation in the interview and thank them for talking to you. Ensure to use culturally appropriate gestures (e.g. shaking hands) when departing.

## 5. Evaluation

Evaluation is the last phase of the PEACE procedure and constitutes an integral part of the interview process, as much as any other phase. An interview is only effective if you know why and how it is to be carried out (Planning and Preparation) and if you then assess its impact and significance (Evaluation).

### BOX 10



#### Peer experience— importance of timely and proper evaluations

Adrian, International Investigator:

*'I cannot stress enough the importance of conducting timely and thorough evaluations. Over the years I have heard so many examples of human rights documenters and criminal investigators getting this wrong: evaluations would not be conducted on the spot to meet time constraints of missions, the interview process would continue, sometimes for weeks, and all the evaluations would be done in one go at the end. Then people would realise that the information gathering process had gone off track, many interviews had been conducted unnecessarily as they actually already had enough information on certain elements of the crimes and they were also left with evidentiary gaps as they had not refocused the documentation process along the way. This is not only damaging the documentation process but also violates the principle of Do No Harm'.*

*Capturing information as a one-off process without any further contact may result in the victim/witness feeling used.*

### Summary of what to do in the Evaluation phase:

1. Conduct a full debrief immediately after each interview or on the same day, including an initial witness assessment, and consider possible vicarious trauma of the documentation team members, which is particularly important if the account contains highly distressing material. A debrief allows in particular those involved to compare notes and to discuss interpretations of what was said. In the absence of a debrief, members of the documentation team are also more likely to discuss the material outside the work environment, with increased security risks for all concerned.
2. Evaluate the information obtained and consider whether the aims and objectives for the interview have been achieved. To this end, you could ask yourself the following questions:
  - » What is the quality of the notes captured?
  - » Considering your interview plan and initial objectives, were these revised during the interview process? If so why?
  - » Have you achieved your initial (or revised) objectives?
  - » Have you elicited information about all the elements/points needed to prove the sexual violence crime in question?
  - » What additional information do you have now?
  - » Is it consistent with evidence already obtained?
  - » Are there any conflicts to be resolved?
  - » What further enquiries do you need to make as a result of this interview?
3. Review the Documentation Plan in light of the information obtained during the interview (see Chapter 9: Planning/Elements of the CARSV Documentation Plan). To this end, you could ask yourself the following questions:
  - » What is the impact of the new information on the Documentation Plan as a whole?
  - » Did you get leads of additional potential victims/witnesses?
  - » Are there new lines of enquiry that you should follow up on?
  - » What action do you need to take next?
4. Endeavour to improve your interviewing skills by evaluating your own performance as an interviewer and setting goals for the future if necessary. To this end, you could ask yourself, and if working with a colleague exchange feedback, on the following questions:
  - » What did you do well?
  - » What could you have done better?
  - » What skills could you further develop?
  - » How can you acquire these skills?

## C. Recording Interview Information

When interviewing victims and other witnesses and taking notes, make sure to do the following at a minimum:

1. Include as much personal data as possible (see Annex 8: Template for personal data to be collected from victims/witnesses), using a numbering system to link personal data to the statement or interview notes for security purposes. Be aware that the victim/witness may find it disarming to be asked about this personal information.
2. Keep comments (e.g. disturbances, emotional reactions) and thoughts and analysis by the interviewer separate from notes of the interview.
3. Take notes in the first person as the victim/witness says it for practitioners acting with an official mandate. Practitioners without an official mandate should not take notes in the first person, get statements/record of interviews signed by the victim/witness and/or using audio or video recording of interviews. These may indeed create authoritative records of events which could potentially conflict with official statements taken by duly mandated mechanisms at a later stage and be used to challenge a victim/witness's credibility (see Box 11: 'Capturing and recording information').
4. Do not summarise, cut down or cut out parts of the victim/witness information.
5. Read-back the statement/interview notes to the victim/witness prior to finalising the interview. Although this is time consuming, it is critical to ensuring the information you have gathered from the witness is as accurate as possible.
6. Note down any other evidence obtained through this victim/witness (e.g. photographs taken of physical evidence) within the statement/interview notes, and use a numbering system, to enable cross referencing.
7. Keep names and other personal data separate from statements/interview notes for security reasons (see Chapter 8: Safety and Security/Managing Risks to Information).
8. Use a standard system for naming statements/interview notes given in interviews.
9. Record and file each victim/witness's evidence separately (e.g. distinct documents/files).
10. Keep other information about the victim/witness separate—security concerns, living situation, health issues, or other issues relating to the victim/witness.
11. Keep leads given by the victim witness separate—your list of leads is a work product and should be kept in a secure separate place.

### BOX 11



#### Peer experience— capturing and recording information

##### Hannah, Investigator, Syria and Iraq:

*'Our teams of local investigators, working under the direction of international analysts and legal counsel, have been investigating instances of sexual violence amounting to crimes against humanity and war crimes in Syria since 2012 and Iraq since 2015. As we do not know when one or more international(ised) courts or tribunals will be established to address core international crimes perpetrated in Syria and Iraq, we are creating 'records of interviews' with victims and other witnesses. These are not to be confused with witness statements; in particular, the records of interviews are drafted in the third person and the signatures of witnesses are not appended to these records in order to avoid creating first-person accounts which could be construed at trial as constituting an official prior statement. For the same reason, we avoid audio and video recording of interviews.'*

# Chapter 12 Contents

<b>CHAPTER 12: Collecting Additional Information</b> .....	<b>187</b>
<b>A. Processing Documents</b> .....	<b>187</b>
1. Introduction .....	187
2. Dealing with Documents.....	187
<b>BOX 1</b>	
Best practice when dealing with documents .....	187
i. Respect confidentiality .....	187
ii. Accurately record and copy if possible .....	187
iii. Do not seize documents if you are not mandated to do so.....	187
<b>BOX 2</b>	
Practical examples of how to deal with documents .....	188
<b>B. Processing Sites of Violations</b> .....	<b>189</b>
1. Introduction .....	189
2. Dealing with sites of Violations.....	190
<b>BOX 3</b>	
Key steps when approaching sites of violations.....	190
i. Record the location of the site.....	190
ii. Appoint someone as site manager and establish a log of visitors .....	190
iii. Make detailed notes of all actions taken at the site .....	190
iv. Photograph the site and evidence.....	190
v. Sketch out the site and location of evidence.....	191
vi. Leave the site as you found it.....	191
<b>BOX 4</b>	
Collecting physical evidence .....	192
<b>C. Photographing, Video-Recording and Sketching Sites of Violations, Physical Evidence and Physical Injuries</b> .....	<b>193</b>
1. Introduction .....	193
2. Photographing and Video-Recording.....	193
<b>BOX 5</b>	
Example Tool: WITNESS Video As Evidence Field Guide .....	196
3. Sketching .....	198
<b>D. Chain of Custody</b> .....	<b>199</b>
1. Introduction .....	199
2. Principles.....	199
<b>BOX 6</b>	
Chain of custody key steps .....	199
i. How was the document or item collected?.....	199
<b>BOX 7</b>	
Chain of custody – specificities for physical evidence.....	200
ii. Was the possession of the document or item ever transferred between individuals or organisations? .....	201

# CHAPTER 12: Collecting Additional Information

## A. Processing Documents

### 1. Introduction

Documentary evidence can be useful to strengthen and corroborate testimonial evidence, and in some cases, open new avenues of inquiry in the documentation. Practitioners may find certain documents during the course of their documentation: for example, (a) they might come across a document in an abandoned army building that sets out the structure of command in an army patrol team at a given time, or (b) they might meet a doctor in a refugee camp who has in her/his possession a medical examination form for a rape survivor, or (c) they might meet with a government official who can provide them with a document that helps to identify a perpetrator. Any of these items might be ‘documentary evidence’ that could help establish that a crime or violation of CARSV has occurred.

In general, practitioners that are not conducting official investigations should not collect documents. Instead, non-official practitioners can accurately copy and record the information contained in documents to support the documentation of CARSV, as described below.

### 2. Dealing with Documents

#### BOX 1

#### Best practice when dealing with documents

When dealing with documentary evidence, you must at a minimum:

- i. respect confidentiality
- ii. accurately record and copy if possible
- iii. do not seize documents if you are not mandated to do so.

Please see below for more detailed guidance on these key points.

#### i. Respect confidentiality

- » Any sharing of records, reports, studies and statistics of cases of sexual violence should be done safely and ethically, and with respect for applicable victim/witness confidentiality (see Chapter 7: Do No Harm/Confidentiality).
- » Documents containing individual-level information must only be shared with the informed consent of the victim/witness (see Chapter 7: Do No Harm/Informed Consent).

#### ii. Accurately record and copy if possible

- » Non-official practitioners may make an accurate record describing the contents of the document found or received, the circumstances under which it was found or received, the location where it was found, from whom it was received, and who else was present when the document was found or received.
- » If the documentary evidence is provided by a third party, obtain a statement from the third party setting out the circumstances under which the third party obtained the document; when and from whom they received it; whether the document is an original or a copy; an explanation of the meaning or significance of seals, signatures and names in the document; and how the third party knows this information.
- » If the document is copied, ensure that the copy is clear and that both the front and the back are copied if necessary, and record how and when it was copied and by whom.

#### iii. Do not seize documents if you are not mandated to do so

Non-official investigators should, as a rule, avoid seizing documents from any organisation, government or military body, or individual. Practitioners should put in place procedures that set out what steps to take if they should find themselves in a situation where they come across or are being provided with documentation relevant to their work. Although such practitioners should never seize documentation without express authorisation to do so unless there is a risk of destruction, it may be possible to accept documentation voluntarily handed over, providing that procedures are in place and that the practi-

*...practitioners must be able to demonstrate when, where, from whom and how they collected documentary material.*

tioner collects sufficient information relating to the document itself (see ii. Accurately record and copy if possible).

- » Accurate information regarding the contents and location of certain records, without seizure, can be of use to future investigations with the mandate to seize evidence.
- » In circumstances where practitioners are authorized to collect documents (whether an original document or a copy of a document), the 'Chain of Custody' principles set out in section D, Chain of Custody, should be followed.

## BOX 2

### Practical examples of how to deal with documents

**Example (a):** If practitioners come across a document in an abandoned army building that sets out the structure of command in an army patrol team at a given time, they might have reason to believe that this document may be destroyed if left in the building. In this case, non-official practitioners should aim to take a copy of the document and obtain authenticating evidence (i.e. evidence detailing the document's information and circumstances of discovery, such as a witness statement).

**Example (b):** If practitioners meet a doctor in a refugee camp who has in her/his possession a medical examination form for a rape victim, they must not collect the original document. The patient may, for example, require the original document for her/his own purposes. Practitioner's focus should be on taking an authenticating copy of the document (if consent to do so is obtained) and conducting interviews with the doctor, victim and any other relevant witnesses (see Chapter 11: Interviewing).

**Example (c):** If practitioners meet with a government official who can provide them with a document that helps to identify a perpetrator, and they have reason to believe that they can safely collect, store and maintain that document until it is required in any future judicial proceeding, they can collect the original document.

**Many of the above considerations apply to receiving documents in digital format.**

### Special considerations for collecting documentary evidence:

- » To enhance probative value of collected documentary material in future international criminal proceedings (and ensure admissibility in some national criminal justice systems), practitioners must be able to demonstrate when, where, from whom and how they collected documentary material. This information should be the first entry in the chain of custody log. Record this information for each piece of documentary evidence (or each batch of documentary evidence if dealing with large quantities of material) in order to show the authenticity and assist future verification of the document. Preserve records of the chain of custody.
- » Endeavour to collect all material identified as of potential relevance to the documentation exercise, whether inculpatory or exculpatory in nature. Disregarding or discarding potentially exculpatory material (evidence tending to exonerate those believed responsible) can damage the integrity of the entire documentation. In order to achieve this, when collecting multiple documents/pages, practitioners should aim to collect the complete documentation in original sequence if possible. This is an important safeguard that also helps to rebut allegations of selectivity/tampering with material.
- » If safe to do so, take photographs/video of the process of documentary evidence collection to document the condition in which the documents were received and to augment the record of chain of custody.

## *Restrict access to documentary evidence in according the “need –to-know” principle...*

- » As soon as possible, transport documents to a designated secure place for storage away from heat, damp and other potentially adverse conditions.
- » Have in place an evidence management system that allows for the registration of each document in a log.
- » If preserving material for possible criminal proceedings, ensure that:
  - » each individual page or item is allocated a unique identification number
  - » if documents are obtained in large numbers (e.g. in files, collections or archives), where possible these are not broken up but held together and registered in the sequence they were received in
  - » file or binder covers are also registered
  - » multiple copies of the same document are stamped individually and referenced separately
  - » consider scanning documents into a digital system to ensure that original materials are not routinely worked upon, preserving the integrity of the originals.
- » Restrict access to documentary evidence in accordance with the ‘need-to-know’ principle and record when, where, who, and which documents are accessed in order to demonstrate the unlikelihood that documentary evidence was tampered with.
- » Exercise caution about collecting single documents that appear to offer a ‘golden bullet’, particularly from anonymous sources, as these may be forged or falsified. While there may be exceptions to this general rule, it is an important safeguard aimed at ensuring the origin and authenticity of all documentary material is verifiable.
- » In relation to medical documentation from victims, have in place a policy on whether to collect originals or copies of individuals’ proffered personal medical records. Determine which medical documents are considered not relevant (such as, for example, hymen testing reports) and do not collect them. Only collect health records, including copies, after obtaining specific informed consent for that aspect of documenting a survivor’s experiences.

## **B. Processing Sites of Violations**

### **1. Introduction**

Practitioners may have access to, or locate, the sites where crimes of sexual violence took place. Not only is the site of an incident useful as a potential source of valuable physical, documentary and digital evidence that can corroborate testimonial evidence (see Chapter 10: Types of Evidence of Sexual Violence), but the location and existence of the site in itself can help to establish the presence of alleged perpetrators in the area, and be analysed as part of the pattern of movement of alleged perpetrators, and other common elements or elements of modes of liability. It is important to note that sites of violations may include victims’ bodies or the bodies of perpetrators, whether living or deceased. Collaboration with medical or forensic science experts may be critical in retrieving such evidence.

Types of evidence found at sites of violations may include:

#### 1. Physical evidence such as:

- » clothing, uniforms, bedding, sheets, blindfolds
- » weapons, knives, bullets, shells, shrapnel, torture devices
- » bodies, body parts and skeletal remains
- » stains, blood, vomit, semen, vaginal fluids and/or faecal matter
- » proof of occupation such as food, power, drugs, alcohol
- » proof of layout and physical description of premises that may match a witness testimony
- » phones, computer and other electronic devices containing digital evidence.

#### 2. Documentary evidence such as:

- » official records, orders, duty logs
- » prisoners’ lists
- » IDs.

(See Chapter 10: Types of Evidence of Sexual Violence/Documentary Evidence/Digital Evidence/Physical Evidence).

Only official investigators should collect any relevant physical, documentary or forensic evidence from sites of violations. Practitioners without the appropriate training to collect such types of evidence should as a rule only record and document the site (see Dealing with Sites of Violations below).

## 2. Dealing with sites of Violations

### BOX 3

#### Key steps when approaching sites of violations

When dealing with sites of violations, and physical/documentary evidence found in those sites, you should not move the evidence and should instead follow these six steps:

- i. accurately record the location of the site of sexual violence
- ii. appoint someone as site manager and establish a log of everyone who visits the site
- iii. make detailed notes of all actions taken at the site
- iv. photograph the site, including the location of potential evidence
- v. sketch the site, including location and details of potential evidence
- vi. leave the site as you found it.

Please see below for more detailed guidance on these key steps.

#### i. Record the location of the site

You should accurately record the location of a site where suspected sexual violence took place. This will enable official investigators or those with the capacity to effectively document and collect physical evidence from the site to locate it in future.

You should:

- » record the location using GPS coordinates or map references
- » record any useful features of the area, including landmarks, physical features and the name(s) of the location and nearby communities, villages and towns, in case a GPS or map reference is unavailable or inaccurate
- » keep this information safe and do not disclose to the broader community the existence of the site.

#### ii. Appoint someone as site manager and establish a log of visitors

Once you have appointed a member of your team to act as site manager, s/he should:

- » establish and keep a log of all visitor(s) to the site
- » determine how to secure the site if necessary.

#### iii. Make detailed notes of all actions taken at the site

The site manager or someone the site manager appoints should take detailed notes of all actions taken at the site, who was present, what was found, when it was found and what action was taken in relation to items located.

#### iv. Photograph the site and evidence

Photographing the site, the surrounding area and key features or evidence within the site may prove extremely valuable to future investigators or experts analysing the evidence.

You should:

- » take photographs of the site and its contents without disturbing or removing them
- » take overall, contextual and close-up photographs of and at the site
- » overall photographs should include photographs of the surrounding area, geographical and physical features, buildings and streets
- » contextual photographs should show the relationship between the feature you are photographing and other objects or features
- » close-up photographs should show details of the evidence or feature you are recording
- » where possible, take the photograph with and without a scale
- » log photographs as they are taken. Include on the log the name and role of the person taking the photograph; the date, time and location; the type of film; and the camera settings.<sup>1</sup> Include also what focal length of lens used, if applicable, as this will assist persons reviewing evidence later in determining whether something could be seen with the naked eye
- » Give a brief description of each frame.

#### **v. Sketch out the site and location of evidence**

You should sketch out the site with as much detail as possible given any time, resource and safety constraints:

You should:

- » draw a sketch in the form of an overhead view
- » include a scale and measurements in the sketch
- » include key features
- » indicate the location and type of possible evidence found
- » sign and date the sketch.

#### **vi. Leave the site as you found it**

It is important to take care not to disturb the site, move objects or remove evidence from the site. Doing so can negatively affect the usefulness and relevance of the site and its contents and its evidentiary value. Most of the time, simply accurately recording the evidence you have come across is enough.

Please refer to the next section for more detailed guidance on photographing and sketching.

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<sup>1</sup> If using a digital camera, much of this information is captured in the photo files metadata.

*Collecting physical evidence from crime sites should only be done by trained professionals with the mandate, capacity, skills and equipment...*

**BOX 4****Collecting physical evidence****General Principle**

As a general rule, a practitioner should not collect any item of physical evidence unless s/he has been trained as an investigator or as a health practitioner in the proper collection of forensic evidence and has a mandate to do it. If practitioners do collect physical evidence without proper training, they may contaminate evidence, making it unusable.

In addition, the collection of physical evidence must at all times be accompanied by the collection of information verifying its authenticity and/or explanatory evidence, in order to be of any use.

**Do I Really Need Physical Evidence?**

Some jurisdictions may require physical evidence to corroborate other information about sexual violence. You should research and understand the local requirements and applicable rules of evidence on corroboration and other evidentiary issues before embarking on any documentation (see Chapter 9: Planning).

Generally speaking, physical evidence is not required to prove or corroborate sexual violence as a crime or violation under international law or as part of documentation for advocacy or non-judicial purposes, but you need to confirm this for your specific context and purpose.

**If it is not necessary for you to collect physical evidence for your documentation you should not do so and you should look at alternative ways to establish the same facts.** You should also consider sketching, photographing or video-recording the item rather than collecting it or removing it from the site. Interviewing victims and other witness and following leads to other witnesses can also provide critical information and remove the need for the physical evidence. Please refer to Annex 3: Reasons Not to Collect Physical Evidence.

**When Can I Collect Physical Evidence?**

Collecting physical evidence from crime sites should only be done by trained professionals with the mandate, capacity, skills and equipment to collect evidence without impacting its evidential value. Nevertheless, in some very limited circumstances, if it is safe to do so and the only viable option, it may be appropriate for other practitioners to collect physical evidence. The decision to collect physical evidence should be taken with seriousness and care, and thought through very carefully. Physical evidence should only be removed from sites in extremely exceptional circumstances if:

- » you have no means whatsoever of recording the evidence and are aware of its high risk of destruction or interference;
- » you have the skills and capacity to safely collect the evidence and remove it from the site;
- » you are able to ensure proper documentation of the handling, transportation and storage of the evidence removed, thereby ensuring its proper chain of custody (see section D, Chain of Custody).

**If you do not have appropriate facilities/resources to store the physical evidence, you should not collect it. Physical evidence which has not been handled and stored correctly may become contaminated or unable to be authenticated, and therefore of little use.**

*..in the case of physical evidence...it is much better to photograph, video-record and sketch the evidence rather than collect it.*

## C. Photographing, Video-Recording and Sketching Sites of Violations, Physical Evidence and Physical Injuries

### 1. Introduction

When you are in the field, you may come across sites which may appear to be the place where a sexual violence crime has occurred (e.g. a room with a bloodstained floor containing soiled mattresses), an item that suggests to you that an act of sexual violence has occurred (e.g. a weapon that you are told by a witness was used to commit a rape) or a victim whose sexual violence injuries are apparent (e.g. a woman with bruising and scratches on her back who has informed you that these injuries resulted from the act of sexual violence).

Along with the information that you gather from the victim/witness by way of interview, it is important to photograph, sketch and (where possible) video-record this information.<sup>2</sup> This information—if collected properly—can be very powerful evidence in any future justice and/or reparation proceedings.

As already mentioned, in the case of physical evidence in particular, it is much better to photograph, video-record and sketch the evidence rather than collect it.

In the case of physical injuries, it is generally advisable that trained medical examiners photograph these injuries. However, other actors may (if the guidelines set out below are followed) photograph basic injuries not located in intimate areas of the body, with the express permission of the injured party.

Remember that in situations of danger, the top priority is the safety of the victims/witnesses and

their community; if you cannot obtain a photograph/video that meets all these parameters, that does not mean that the photograph/video will never be admitted into evidence.

### 2. Photographing and Video-Recording

Photographs and videos can be very useful evidence in any future justice and/or reparation proceedings if the ‘authenticity’ of those photographs and videos can be demonstrated. ‘Authenticity’ means that the photograph or any other evidence can be shown to be genuine. Ensuring that you have sufficient information demonstrating authenticity is not always easy, and there are steps that can be taken to reduce the opportunities of others to challenge the authenticity of the evidence.

All points below apply to both photographing and video-recording, except points 6, 7 and 8 which provide guidance on photographing only and point 9 which focuses on practical tips for video-recording.

Before the documentation process:

1. Learn how to use your camera and other photographic/video equipment. In particular, learn how to operate the date and time function of your camera and how to balance colour and light. If you work across multiple time zones, you should set your camera at Greenwich Mean Time (GMT). If relevant, learn how to enable the geo tagging feature in your camera.
2. If taking photos/videos of individuals, obtain their informed consent to take the photographs/videos.
  - » This may include seeking authorisation to take the photographs/videos from: a community that has control over a crime site; a victim/witness who has possession of a piece of physical evidence; or a victim who has suffered physical injuries.

<sup>2</sup> Video recording is extremely useful as a recording methodology. Still photographs can be even more useful as evidence as they contain much more detail than video images.

- » Be considerate of the individual's comfort and privacy. The taking of photographs/videos can be considered inappropriate behaviour in some cultures. This is especially important when taking photographs of physical injuries.
  - » Inform the individuals involved of the intended use of the photographs/videos. In particular, discuss the issue of anonymity: to be admissible evidence in any future justice and/or reparation proceedings, any individuals photographed (e.g. a victim of sexual violence) will generally not be able to remain anonymous.
  - » If the photographs/videos involve human remains in any way, it is important to treat them, and any cultural practices associated with them, with respect.
  - » Once photographs/videos have been taken, link the individual's identity to the photographs/videos (e.g. ensure that every photograph/video contains a case identifier or, alternatively, print or write the case identifier on a sheet of paper and photograph/film this sheet at the beginning and end of the roll of film or memory card—note that this case identifier should not include details that divulge the individual's name and address).
4. Photographs and videos are rarely self-authenticating—in other words, without victim/witness and other testimony to explain what is in the photograph/video, when, where and why the photograph was taken and by whom, and to provide the context for what is being seen, the photograph/video risks being of low evidentiary value.
5. Take the photographs/videos immediately.
- » If you are photographing/filming a site of violation or a piece of physical evidence, take care not to disturb it before you photograph/film it.
  - » If you are photographing a physical injury and if the sexual violence happened recently, photographs should be taken as soon as possible. However, you should also consider whether to take follow-up photographs of the injuries, as certain bruises take hours to appear after trauma.
6. When taking **photographs**, take them from different angles and using scales.
- » For sites of violation and physical evidence:
    - i. First, take a photograph of the entire site of violation. Photographer should ensure s/he has a 'ruler marker'. If no 'ruler marker' is available, then use something that is standardised in size, such as a newspaper, to demonstrate scale.
    - ii. Take a medium-range or context photograph of each separate item to show its placement in the site of violation.
    - iii. Take close-up photographs of any significant items that aim to capture the context of the sexual violence crime (e.g. clothes, bloodstains, or instruments used to commit the sexual violence).
  - » For physical injuries:
    - i. Use a consistent method in the taking of photographs: e.g. take all photographs from left to right and from top to bottom of the victim for consistency.
    - ii. Preserve the privacy and modesty of the victim while taking the photograph.
    - iii. Take a first photograph of the victim's face for identification purposes. This is not necessary if the person photographed is clearly identified on each picture.
    - iv. Take at least two shots of each injury from different angles. A photograph of the lesion at a 90 degree angle should always be taken.
    - v. Take close-up photographs of each injury or lesion and use a scale to enable the proper measurement of the injuries sustained.
    - vi. Take medium-range photographs of each separate injury to show clearly which part of the body has been injured.
    - vii. When taking full-length photographs of the victim to show the scope of the injuries, consider dressing or draping the victim appropriately.

*Taking photographs with smartphones is not recommended unless there is no other alternative.*

7. Remember that clear and accurate photographs are more likely to be admissible in any future legal and/or reparation proceedings.
  - » If possible, photographs should be taken in daylight or with background lighting to avoid over-exposure.
  - » The background of the photograph should be as neutral as possible: colourful or crowded backgrounds should be avoided as they can alter the accuracy of the photographs.
  - » Digital cameras should have a minimum of 4 megapixel capacity or more of picture size. Taking photographs with smartphones is not recommended unless there is no other alternative.
8. Date the photographs.
  - » Use the camera's date and time function, or, if unavailable, take a picture at the beginning of the roll of film or memory card of that day's newspaper. If you work across multiple time zones, set the camera's time function to GMT (see point 1 above).
  - » By doing so, you will raise the evidentiary value of the photographs and will help authenticate the evidence.
9. When taking **video-recording**:
  - » Try to avoid narration if possible; rather, supplement the video evidence with evidence from victim/witness. In other words, when filming live, ongoing events, do so silently and as they occur without narration. Then conduct interviews with eyewitnesses who are aware of what happened as it appears in the video recording, and ensure that there is a method of connecting the victim/witness statement(s)/record(s) of interview with the video recording. Together, the video recording and the victim/witness statements/records of interview are the evidence.
  - » Ensure that you write down all information about who is filming, who else was present, the date, time and place of the recording, and note down all those who have custody of the film from the moment of filming onwards (see section D: Chain of Custody). Also note down any copies made of the video and who made or kept the copy.
  - » To the extent possible, try not to stop and start the filming too often when filming the same event or location. This will help avoid accusations of having cut out a part of the video.
  - » The more the content of the video shows the location, time of day, date, surroundings on the macro level and detail on the micro level,<sup>3</sup> the greater the likelihood that it will serve as valuable evidence. Corroborative victim/witness evidence can serve to bolster video evidence.
  - » Avoid dramatizations—film as if you are not there, as if you are a camera that is present but not someone who is trying to send a particular message.
  - » When filming a violent act in progress, prioritise your security rather than the evidence. If you have determined that it is safe enough to film, try as much as possible to film a large area and then focus on a detailed area without stopping and starting the filming.
  - » When filming a deceased victim or other site of violation, film 360 degrees around, from far and from close, and circle the body while continuously filming if possible, progressively getting close and close to the body while circling, and ultimately zooming in on any identifying evidence and wounds.
  - » It is always a good idea to film with the date and time showing on the screen; but ensure that the date and time are accurately set.

<sup>3</sup> Video footage has a much lower resolution than still photographs and is less useful for recording micro-level features.

*...note down all information relating to the photograph/video – who took it, when, where, why and how, who provided the information...and who else was present.*

**BOX 5****Example Tool: WITNESS Video As Evidence Field Guide**

*WITNESS' Video As Evidence Field Guide* sets forth guidelines, techniques, practices and ideas to help practitioners collect and document video to the highest possible standard—what is also called a 'trial-ready' standard. This ensures investigators, analysts, lawyers, and judges can rely on the video when making decisions about a person's innocence or guilt in a criminal investigation or about remedies in a civil case. The guide includes:

- » Basic legal principles and processes relevant to using video as evidence;
- » Tips for capturing video with enhanced evidentiary value;
- » Guidance on filming, organizing and managing videos for evidentiary purposes;
- » Techniques for verifying video content and guidelines for using ethically using eyewitness video.

<https://vae.witness.org/video-as-evidence-field-guide/>

WITNESS is an NGO training and supporting activists and citizens around the world to use video safely, ethically, and effectively to expose human rights abuse and fight for human rights change. Find them at <https://witness.org>

10. Maintain the chain of custody.

- » See section D Chain of Custody.
- » You must be able to authenticate photographs as being unaltered originals. If they are altered—e.g. cropped—document this and be in a position to explain why.
- » All photographs should be clearly labelled and the chain of custody must be maintained.
- » All photographs and video evidence should be catalogued within an established numbering system, and that numbering system should link to the other corroborative evidence in relation to this particular photograph/video (e.g. victim/witness evidence).
- » Make sure that you note down all information relating to the photograph/video—who took it, when, where, why and how, who provided the information that led the photographer/filmmaker to record this, and who else was present. Please find an example of photo log below:

**Site Photo Log**

Area Name		Site Code		
Photographer				
Other persons present				
Comments				
Date	Disk No	Photo No	Item No	Description

For photographs taken with film, note the production serial number of the roll of the film and original item number of each pose in the roll in relation to each photograph captured.

- » For digital cameras, use a technical solution which brands or ‘watermarks’ (an identifying code or logo) the photographs/videos at the time of capture and can be used to authenticate the photographs/videos subsequently, but be aware of whether this can distort or affect an important part of the photo. Each digital photograph/video file usually will include metadata that hold a large amount of information (e.g. date and time taken, date and time altered, type of camera, exposure and focal length). Find below an example of parts of a metadata table.<sup>4</sup>
  - » In order for a photograph to be used as evidence it must be an original. Nothing must be deleted from the genuine photograph image and nothing must be added to the original image. If you only have a copy of a photograph, you must be able to show that it is a genuine, unaltered copy of the original.
11. Store and maintain the photographs/videos in a safe manner (see Chapter 13: Storing and Handling Information, in particular Box 3: ‘Storing photographs and audio/video recordings’).

No	Filename	Size	Camera Make/ Model	Date Orig	Time Orig	Date Mod	Time Mod	ISO
1	8.jpg	287K	SONY CYBER-SHOT	14/02/2003	21:29	17/02/2003	23:16	100
2	Classroom - 30.JPG	2037K	SONY DSC-W115	13/05/2009	15:25	13/05/2009	15:25	320
3	DSC_0250.JPG	1721K	NIKON D90	15/05/2010	10:23	15/05/2010	10:23	640

<sup>4</sup> Please note that this is an extract and that some columns of the original metadata table have been deleted.

### 3. Sketching

A sketch can provide a useful alternative or back-up to a photograph as it is also a permanent record of the size and distance relationship of the site of violation and the physical evidence within it. Although this sketch might not ultimately be used as a primary form of evidence, it will assist you in refreshing your memory.

You may choose to produce a sketch to clarify the information present in any photographs you have taken (including the position of the camera and photographer, etc.).

1. Create your sketch after photographs have been taken and before anything is moved.
2. Sketch the entire site, the objects, and the information contained (e.g. the identity of individuals involved).
3. You can either create a 'rough sketch' (e.g. setting out the crude layout of a site of violation and recording measurements of items and structures, and distances between items) or a 'final/finished sketch' (e.g. a finished rendition of the rough sketch, usually produced during any future accountability proceedings).
4. If you are sketching a site of violation, you can either do a bird's-eye view sketch (which is the most common form of sketch, but which cannot represent heights of items) or incorporate other perspectives (e.g. side view).
5. Be sure to include:
  - » a title explaining what the sketch represents
  - » a legend explaining any symbols used in the sketch
  - » date, time and place of the sketch (and any other important identifying information)
  - » name of the person who drew the sketch
  - » indication of direction (e.g. north)

- » scale of the sketch (e.g. 1:1)
  - » measurement table (explain the distances and measurements associated with the sketch—although a note should be made that all measurements are approximate).
6. If you have the capacity, consider 'mapping' the site of violation, which can utilise:
    - » baseline mapping (using a baseline, e.g. a fence to measure the site accurately)
    - » rectangular coordinate mapping (using two baselines)
    - » triangulation mapping (using two fixed points)
    - » polar/grid coordinate mapping (using a fixed or known point to demonstrate the angle and distance) to record the scene.

Also consider using GPS and Total Stations, which are mapping systems that can take measurements in polar coordinates and then convert the measurements into grid coordinates. This is best done by professionals. If using GPS, check it for degree of accuracy (there will be a reading for this—few will show under a metre degree of accuracy). It is best to take a GPS coordinate of a fixed immovable object and then physically measure items from there.

*Practitioners should also be aware of the legal requirements in the relevant jurisdiction concerning chain of custody.*

## D. Chain of Custody

### 1. Introduction

‘Chain of Custody’ refers to the process of keeping a chronological paper trail documenting the collection, custody and transfer of evidence in order to demonstrate its integrity from the time it is collected to the time it is presented before a court or other accountability mechanism.

Chain of custody is a way of demonstrating where the document or item comes from. It is also a way of demonstrating that the document or item has not been tampered with in the intervening period between its collection by the practitioner and its use as evidence of a sexual violence crime. Chain of custody is very important, because without it a court or other accountability mechanism, might refuse to consider the document or item as evidence in the prosecution of a sexual violence crime or other proceeding, or might decide that the document or item is not very good evidence of a crime. It is a question of reliability—the finder of fact must be convinced that the authenticity of a piece of evidence can be relied upon, that it has not been planted or tampered with or inadvertently contaminated. The chain of custody procedures must allow practitioners to do this—in that way the evidence can be given its due weight.

The principles on chain of custody set out below generally apply to both documentary and physical evidence—including digital evidence in physical or documentary format. (For example, paper photographs, video recordings in memory sticks.) Certain specificities relating to physical evidence only are mentioned in Box 7: ‘Chain of custody—specificities for physical evidence’. Maintaining chain of custody for digital evidence in digital format is referenced in the section on digital evidence in Chapter 10: Types of Evidence of Sexual Violence.

### 2. Principles

To maintain the chain of custody of a document or item, practitioners need to record:

- » how the document or item was collected
- » whether (and how) possession of the document or item was transferred between different individuals and/or organisations.

Practitioners should also be aware of the legal requirements in the relevant jurisdiction concerning chain of custody

#### BOX 6

#### Chain of custody key steps

In order to maintain the chain of custody, practitioners who decide to collect documents or, in very unlikely circumstances, physical evidence, should follow the following key steps:

- » Label the document or item appropriately.
- » Make comprehensive notes, ideally on a single sheet of paper.
- » Place the document or item in an evidence bag, envelope, or if appropriate, box.
- » Seal the evidence bag or envelope and sign over the seal.
- » Attach the notes to the evidence bag or envelope in which the document/item has been placed.
- » Keep a transfer log of any transfer of the document or item between individuals or organisations.

Please see below for more detailed guidance on these steps.

#### i. How was the document or item collected?

The general principle is that each document or item (although collection and packaging methods will differ for physical items) should be **labelled** with a least the following information:

- » a case identifier—a number assigned to a particular case which can link all the information pertaining to that case
- » the date of collection

- » the name of the practitioner who collected the document or item and the names of any other people present during the collection
- » the precise location of the document or item when it was collected, and who or what it was collected from
- » the kind of document/evidence that was collected.

Practitioners should also include **notes** with the following information:

- » the measures that were put in place to ensure that the document or item was kept secure while it was in their possession (e.g. it was kept in a locked cupboard that only the practitioner's team had access to)
- » the preservation conditions if relevant, for example for a blood or other biological sample—noting that it was preserved, refrigerated, at certain temperature range to enable DNA extraction
- » if the practitioners did not collect the document or item themselves, details of any agreement, terms or discussion as to the use of the document or item between the person handing over the document or physical evidence and themselves.

Any document or item that practitioners collect should be placed with care in an **evidence bag** (an easily sealable plastic bag will suffice if there is no water/dampness on the document; an acid-free paper envelope is preferable if water/dampness is present). Practitioners should ensure that:

- » the evidence bag/envelope is sealed
- » the seal is signed by the person who collected the document or item
- » the evidence bag/envelope is not opened at any time.

Ideally all the notes should be set out on a single sheet of paper that is **attached to the evidence bag/envelope** in which the document or item has been placed.

This information need not be completed for each and every document or item where the source, date, location and name of the person collecting are one and the same. For large volumes collected from a single source and by a single individual for example, the information can be completed for the volume, and if necessary boxed. However, the process

should be repeated where any of these variables differ, in particular the source of the documents or items.

Additionally:

- » In the case of documents, ensure that the complete documentation is collected and as far as possible, maintained in its original sequence.
- » Do not remove any pages, covers or other parts of documentation, which could significantly damage its probity.

## BOX 7

### Chain of custody – specificities for physical evidence

In addition to the general principles on chain of custody mentioned in this section, practitioners dealing with items of physical evidence should:

1. Be aware of the collection and packaging methods applicable to the item in question (e.g. bodily fluids are collected and packaged differently from a piece of clothing or a document).
2. Include in the notes, in addition to information under '1. How was the document or item collected?' a note of:
  - » how soon after the incident of sexual violence the physical evidence was detected
  - » how close in proximity to the location of the incident the physical evidence was detected
  - » how they know these facts.
3. Conduct interviews with any witnesses near the site of violation and follow leads to other witnesses to the crime prior to collecting any item of physical evidence

**ii. Was the possession of the document or item ever transferred between individuals or organisations?**

If a document or item has ever been transferred between individuals or organisations, it is important to keep a record of the details of that transfer. This can easily be shown in a 'transfer log'.

This transfer log should set out for each transfer of each document or item:

- » the case identifier—a number attributed to a particular case which can link all the information pertaining to that case
- » the type of document or evidence collected
- » the date of transfer
- » the reason for the transfer
- » the signatures of both the transferor and transferee
- » if possible, the security conditions observed during handling or storage of the document or item.

In general, it is best to try to keep the number of transfers of custody as low as possible.

Please see Annex 9 for an example of a Chain of Custody Form.

# Chapter 13 Contents

<b>CHAPTER 13: Storing and Handling Information .....</b>	<b>203</b>
<b>A. Introduction.....</b>	<b>203</b>
<b>B. Key Principles .....</b>	<b>203</b>
<b>BOX 1</b>	
Storing key principles.....	203
<b>BOX 2</b>	
Storing medico-legal/forensic evidence.....	204
<b>C. Manual Storage System .....</b>	<b>205</b>
<b>BOX 3</b>	
Storing photographs and audio/video recordings.....	205
<b>D. Digital Storage System.....</b>	<b>206</b>
<b>BOX 4</b>	
Digital storage pros and cons.....	206
<b>BOX 5</b>	
Additional tools and guidance .....	208

# CHAPTER 13: Storing and Handling Information

## A. Introduction

Safe handling and storage of evidence and other information is crucial and must be considered from the very beginning of any documentation. Before practitioners decide to speak to a victim or other witness, take a picture of a crime scene or engage in any other information gathering activity, they must consider and plan where and how they are going to store such information (see Chapter 9: Planning).

The information on sexual violence that practitioners may collect (e.g. photos of crime scenes or injuries, statements from victims and other witnesses, medical or police records) is highly sensitive and confidential, extremely personal and could be very damaging if misused or made public. Practitioners who decide to collect such information have an obligation to maintain the security and confidentiality of the evidence or information they have collected and store it in a way that protects the safety of victims and other witnesses, their families/community and those collecting the information (see Chapter 7: Do No Harm/Confidentiality).

The more sensitive the information (i.e. personal or identifying details, photos or recordings, information about security threats or protective measures), the greater the responsibility to keep it safe and confidential.

Practitioners can use a manual storage system, a digital storage system, or a combination of both.

When considering the most appropriate system, practitioners should in particular consider whether they have the appropriate physical space, required capacity, necessary resources and adequate security measures in place to keep each type of information (documentary, digital or physical – including medico-legal and forensic information) safe and confidential. They should also consider the ultimate use of the evidence or information as this will have implications on how long they will have to store the information/evidence and under what conditions. If they cannot guarantee the confidentiality and integ-

ity of the information or evidence during transportation, communication or storage, they should refrain from collecting it.

## B. Key Principles

### BOX 1

#### Storing key principles

- ✓ Before collecting any type of information or evidence, you should plan where and how you are going to store it. It is too late to consider storage and maintenance after the information has been collected.
- ✓ If you collect information about sexual violence, you have an obligation to keep it safe and confidential in a way that ensures its integrity and does not put anyone at risk.
- ✓ Storing requirements may vary depending on the type of information (e.g. documentary, digital or physical), its sensitivity and ultimate use.
- ✓ If you cannot guarantee or maintain the necessary facilities and systems to store the information or evidence safely, you should not collect it.

To safely handle and store information, manually or digitally, practitioners must:

1. Plan where the information will be stored, who will have control over it and assess risks accordingly. Practitioners may want to consider using a central storage location that is overseen by an information custodian/data manager. However, while a central storage location can be an excellent and efficient option, an important risk is that it creates a single point of attack and compromise (if the custodian/data manager is bribed, threatened, or unknowingly installs malware on the host computer or server, information or peo-

*Practitioners should also be aware of the legal requirements in the relevant jurisdiction concerning chain of custody.*

ple may be put at serious risk).

2. Consider the use of technology to store, backup and encrypt sensitive/confidential information.
3. Where possible, avoid storing public and sensitive information together, in order to ensure better protection of the latter.
4. Store information that identifies a victim/witness separately and securely from the statements and evidence given by that victim/witness (e.g. an index for matching code numbers with identifying information/names of victims/witnesses to be stored in a different location than the statements and other evidence).

#### Key to note

**Special care should be taken to ensure that the statement and the identifying details can be matched when necessary. Improper storage and organisation can lead to problems in identifying the source of a testimony containing significant evidence if the master list of names of witnesses cannot be located.**

5. Organise information so that it can be easily and logically found when subsequently needed (whether stored digitally or not).
6. Train staff in the appropriate procedures for: (i) relocating stored information once the files have been closed; (ii) securing the information during an emergency evacuation; and (iii) what to do in the event their office or storage facility is raided by authorities, including which information is protected by professional privilege (if applicable) and cannot be seized.
7. Do not carry documents identifying victims and other witnesses by name and location, especially when crossing checkpoints. Only carry information that is absolutely necessary when undertaking a journey that might include checkpoints, as practitioners may be asked to disclose or hand over the information they are storing on their person or in their vehicle. Consider travelling only

with encrypted, discrete USB sticks if appropriate, which practitioners can destroy if and when necessary.

#### BOX 2

##### Storing medico-legal/forensic evidence

Only those mandated and specifically trained in the collection and storage of physical evidence (e.g. blood, semen or soiled clothing), including medico-legal evidence, should do so. If practitioners have not been professionally trained in the proper collection, handling and storage of such type of evidence, they may cause more harm than good (see Chapter 10: Types of Evidence of Sexual Violence, Box 9: 'Understanding medico-legal evidence for CARSV').

Forensic medical examinations/collections of medico-legal evidence should be done at the same time as the provision of medical care—and ideally by the same person (see Annex 4: Sample Sexual Assault Medical Certificate).

If the evidence is biological (e.g. blood, semen or soiled clothing for analysis) and practitioners are trained to collect, handle and store it, this information should be sealed in separate containers and taken to a laboratory immediately after collection, as it is likely that it will need to be refrigerated or frozen.

Countries in the midst of conflict or just coming out of conflict often do not have or have very few laboratories and other similar facilities appropriately equipped and staffed to handle, store and analyse biological and other types physical evidence. When this is the case, such types of evidence should not be collected.

## C. Manual Storage System

If practitioners are using a manual storage system to store information about sexual violence in the form of documents or other items (e.g. hard copy case files, printed photographs of injuries or a memory key/card containing a video recording of a crime scene), they should:

1. Keep the information in a locked storage facility (cabinet, safe or other storage unit) in a cool dry place.
2. Limit access to the storage facility to specific staff. There should be a clear policy on who can access the information—keeping the number of people with access to a minimum—and why (see Chapter 9: Planning/Standard Operating Procedures).
3. Have in place an emergency security plan to ensure the personal safety of those staff with access to the storage facility or responsibility to guard it (see Chapter 8: Safety and Security/Managing Risks to Practitioners).
4. Keep a logbook to record any access to the storage facility (e.g. name of the person, the date, the time and the purpose of access, and what items were accessed.).
5. If the information is part of a set (e.g. a collection of documents or printed photographs, whether film or digital), make sure that each item is marked and identified as part of a set and bind it with a note stating what makes up the full set. This will enable practitioners to identify if the set is incomplete or part of it becomes missing.
6. All items (including photographs and audio/video recordings) should be catalogued with an established numbering system, and that numbering system should indicate if they are connected to any witness statements, documentary evidence or other pieces of evidence or information.
7. If the information is perishable, make sure that the storage conditions are appropriate, in particular keep it away from heat, light and humidity as well as insects, mice or other animals which may threaten it.

### BOX 3

#### Storing photographs and audio/video recordings

In order to maintain and store photographs and audio/video recordings in a safe manner, you should:

- Keep the medium of storage, in particular film negatives and VHS videos, in appropriate storage conditions (see point 7 above) to avoid damage, decay and deterioration.
- For digital photography, transfer the content of the flash card on a computer, burn a WORM (Write Once, Read Many) CD or store the images on a password-protected memory key. Make two copies.
- Keep the rolls of film, printed photographs, CDs and flash cards in a locked cupboard with limited access and keep a record of access granted.
- Be able to justify continued storage and protect the confidentiality and security of the identities of those individuals featured in the photographs/recordings, especially if they are going to be stored for any length of time.
- Take care when going through checkpoints, as you may be asked to show any photographs (printed and digital) or negatives that you may be carrying. For example, you may be able to conceal memory sticks somewhere discrete, and place a 'clean' one in a camera with neutral pictures.

## D. Digital Storage System

Some evidence and other information about sexual violence may be in electronic or digital form only (e.g. images taken on a digital camera, recordings, document scans). Practitioners may also have an electronic database or digital archive to catalogue and manage or store copies of their documentary and physical evidence and other information, which must also be securely stored.

Storing and managing information digitally as opposed to manually has some advantages but also some inherent disadvantages.

In order to ensure the security and integrity of digital information, practitioners should:

1. Conduct risk assessments and put in place a digital security protocol *before* starting the collection of information that will be stored digitally. Ideally, information management and digital security specialists should be consulted for this purpose in addition to open source guidance available online.<sup>1</sup>
2. Assess which technologies are the most appropriate for your purpose and context in terms of data collection and storage. Examples of some of the technologies that could be considered, including their respective advantages and disadvantages, are provided in Box 5: 'Additional tools and guidance'.

### BOX 4

#### Digital storage pros and cons

##### Advantages

- » uses less physical space
- » easier to search and analyse
- » easier to update and generate reports from
- » easier to keep multiple copies in different places
- » can be protected to some extent, from theft, loss, destruction and unauthorized access

##### Disadvantages

- » dependent on power supply and sometimes internet access
- » susceptible to hacking and viruses
- » other software and hardware problems
- » more time-consuming to input data
- » risk of authorities compelling mobile/internet service providers to hand over sensitive information
- » may be rejected as evidence by a criminal court as it is harder to maintain clear chain of custody with digital storage

<sup>1</sup> See, in particular, Security in-a-Box Guide to Digital Security developed by Front Line Defenders and Tactical Technology Collective at <https://securityinabox.org/en>. It includes Tactics Guides (covering basic principles in particular on preventing worms, viruses and trojans, encrypting data and files, managing strong passwords, backing up devices and data and providing step-by-step instructions to help you install and use the most essential digital security software) as well as Community Guides focusing on specific groups of people—sometimes in specific regions—who face severe digital threats (e.g. LGBTI community).

*...encryption is illegal in some countries in which case the mere existence of encrypted files may be incriminating.*

3. Protect all digital information with strong passwords<sup>2</sup> (and the access to those passwords limited) and consider encrypting it with a trusted software (and access to the encryption and decryption keys limited).<sup>3</sup> Where possible, practitioners should take additional measures to protect sensitive information by using more advanced procedures and methods such as encrypting drives and ensuring safe transmission of digital information.<sup>4</sup>
4. Consider whether there is a need to keep a record of relevant passwords somewhere secure, off site, so that items can be accessed as necessary long after the documentation phase has terminated.
5. Limit access to protected files to specific staff. There should be a clear policy on who can access the information—keeping the number of people with access to a minimum—and why (see Chapter 9: Planning/Standard Operating Procedures).
6. Make and keep two copies of all digital files by transferring and storing them on a computer, memory key/USB and/or read-only CD which is kept separately/outside of the office. In addition, consider a remote backup/storage system, especially if digital files can be encrypted before being sent this type of service. This could reduce the likelihood of losing the backup copy which is a risk when backing up using a USB key or a CD only.
7. Have in place an emergency security plan to ensure the personal safety of those staff with access to relevant passwords and protected files. In addition, consider preparing a plan for the speedy destruction of locally stored digital evidence ahead of an impending raid or other immediate threat. This presupposes previously created accessible backup copies (see point 6 above) of all locally held digital evidence for recovery after deletion, and once the threat is no longer active.

2 Many websites contain guidance on how to create strong and memorable passwords. See, in particular, Security in-a-Box guide 'Create and maintain secure passwords' at <https://securityinabox.org/en/guide/passwords>. Key tips include: 1. Choose long and complex passwords containing at least 14 characters and a mix of letters and other characters. 2. Do not pick up words or proper nouns from the dictionary, even if you replace some letters with numbers. 3. Do not use the same password twice/use a unique password for each account/file. 3. Change your passwords once per year or more frequently. 4. Do not share passwords with others or only on a strictly need to know basis. 5. Store your passwords securely. Alternatively, you can use open source password generators and managers to help you create strong passwords and store them securely.

3 A 'trusted' software means software that has been long-established, has a proven track-record of success and security, is open source, has received publicly available audits, is commonly recommended by security professionals and guides, has been recently updated and is actively maintained. Please note that encryption is illegal in some countries in which case the mere existence of encrypted files may be incriminating. Practitioners may therefore want to hide encrypted files (e.g. by renaming them and making them look like music or image files) or consider alternatives. See Security in-a-box guide 'Protect the sensitive files on your computer' at <https://securityinabox.org/en/guide/secure-file-storage>.

4 International Committee of the Red Cross (2013) *Professional Standards for Protection Work*. Geneva: ICRC.

8. Take appropriate precautions such as using anti-virus software and backing up database files.<sup>5</sup>
9. Automatically record any access to the digital files and have an edit-trail facility on the database so that any additions/deletions or alterations to a note or record are logged to a particular user.
10. In instances where chain of custody must be rigorously maintained for evidence to be used in criminal cases, digital storage systems must be demonstrably inaccessible and un-tampered with, as well contain an evidence/affidavit package for each individual piece of evidence in the database to support its claims to authenticity.

**BOX 5****Additional tools and guidance**

For additional guidance on the following topics, please refer to:

**Digital security and data protection**

- » Front Line Defenders and Tactical Technology Collective, Security in-a-box, tools and tactics for digital security accessible online at <https://securityinabox.org/en>.
- » ICRC, Professional Standards for Protection Work, 2013, revised edition, in particular Chapter 6 on managing sensitive information.

**Collection of medical forensic evidence**

- » World Health Organisation Guidelines on Clinical Management of Survivors of Rape: A Guide to the Development of Protocols for Use in Refugee and Internally Displaced Person Situations, 2004.
- » PHR, OHCHR, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1999.

<sup>5</sup> See, for instance, Security in-a-box guide 'Protect your device from malware and hackers' <https://securityinabox.org/en/guide/malware> and 'Recover from information loss' at <https://securityinabox.org/en/guide/backup>.



# Part VI: Analysing Evidence and Information

## Chapter 14 Contents

<b>CHAPTER 14: Analysing Evidence and Information.....</b>	<b>213</b>
<b>A. Introduction.....</b>	<b>213</b>
<b>BOX 1</b>	
Checklist for Analysis of Sexual Violence Information .....	214
<b>B. Evaluating Information.....</b>	<b>215</b>
1. General Principles in Evaluating Information .....	215
2. Evaluating Testimonial Information on Sexual Violence.....	216
a. Credibility of sources. ....	216
<b>BOX 2</b>	
Categorizing sources of testimony .....	216
b. Reliability of information .....	217
c. Assessing for inconsistencies.....	217
<b>BOX 3</b>	
Peer experience— assessing inconsistencies .....	217
d. Explaining inconsistencies .....	217
<b>BOX 4</b>	
Victim experience – explaining inconsistencies.....	218
<b>BOX 5</b>	
Inconsistencies in children’s testimony .....	219
3. Evaluating Documentary, Physical and Digital Evidence.....	219
a. Authenticity. ....	219
b. Reliability. ....	219
<b>BOX 6</b>	
Digital Evidence and Authenticity .....	220
<b>C. Establishing the Elements.....</b>	<b>221</b>
<b>BOX 7</b>	
Peer experience— analysing information.....	221
<b>BOX 8</b>	
Example Evidence Grid.....	222

<b>D. Strengthening Evidence .....</b>	<b>224</b>
1. Corroboration .....	224
2. Contextual Information.....	224
<b>E. Identifying Patterns .....</b>	<b>224</b>
1. Typologies .....	224
<b>BOX 9</b>	
Peer experience— finding patterns .....	225
<b>BOX 10</b>	
Useful Questions in Establishing Patterns.....	226
2. Additional Methods for Identifying Patterns.....	228
a. Searchable databases .....	228
b. Statistical analysis.....	228
<b>BOX 11</b>	
Peer experience— the use of programmatic data to establish patterns .....	228
c. Crime mapping .....	228
<b>BOX 12</b>	
Example Tool – The Geospatial Technologies Project.....	229



# CHAPTER 14: Analysing Evidence and Information

## A. Introduction

Conducting advanced evidence analysis is a specialist skill beyond the scope of the guidelines included in this Protocol.<sup>1</sup> Nevertheless, practitioners collecting information on sexual violence according to this methodology should be able to understand and practice **basic evidence analysis skills**: knowing how to **organize, evaluate and strengthen** the information they have collected to inform documentation strategy, identify gaps in the evidence, and determine whether the body of evidence gathered can demonstrate the existence of a sexual violence crime or violation under international law.

*It must be noted that the process of collection and analysis is not often strictly sequential, but unfolds concurrently: ongoing analysis informs additional information gathering which requires further analysis again.*

### Key to note

As has been emphasized throughout the Protocol, to establish a crime or violation under international human rights law, international humanitarian law, or international criminal law, every element of the crime or violation must be satisfied. However, this should primarily involve examining overall situations and events and identifying the underlying sexual violence act(s) potentially within them, and which of those acts can be proved, if necessary. Deciding how to classify a crime or violation must be done objectively, once all the relevant evidence has been collected, in order to avoid engaging in a narrow results-focused documentation that focuses on establishing particular crimes or violations over others.

<sup>1</sup> United Nations Office on Drugs and Crime (2011) *Criminal Intelligence: Manual for Analysts*. New York: UNODC. Available at [https://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal\\_Intelligence\\_for\\_Analysts.pdf](https://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf)

## BOX 1

## Checklist for Analysis of Sexual Violence Information

1. Evaluate the information	<ul style="list-style-type: none"> <li>» Test the information and the investigation for the following:               <ul style="list-style-type: none"> <li>» Credibility: is the source reliable?</li> <li>» Reliability: is the information accurate?</li> </ul> </li> </ul>
2. Establish the elements	<ul style="list-style-type: none"> <li>» Use the Evidence Workbook (Annex 1) to map all the pieces of information gathered</li> <li>» Identify the information that is materially relevant</li> <li>» Ensure there are no gaps and no single elements have been overlooked</li> <li>» Look for connections between particular pieces of information and their potential to support other lines of inquiry</li> </ul>
3. Strengthen the information	<ul style="list-style-type: none"> <li>» Search for additional evidence that can corroborate what has been collected</li> <li>» Search for additional evidence that can strengthen the case you are making, add detail, context and additional information.</li> </ul>
4. Establish patterns	<ul style="list-style-type: none"> <li>» Find similarities between victims, violations, and perpetrators and classify violations</li> <li>» Additional methods to find patterns:</li> </ul>

## B. Evaluating Information

### 1. General Principles in Evaluating Information

All the information collected by practitioners must be evaluated for credibility and validity.

Credibility refers to the source of the information, and whether that source is essentially trustworthy. Validity in turn refers to whether the information itself is accurate and reflects the truth. Practitioners documenting sexual violence will primarily be involved in evaluating testimonial information—checking it for credibility and inconsistencies, and attempting to explain those inconsistencies if possible. Determining the credibility and reliability of other types of information, on the other hand, may involve more specialist forensic skills.

It is preferable to assess the credibility of the source and the reliability of the information separately to avoid automatically associating a credible source with reliable information, and vice-versa.

Once evaluated, all evidence—testimonial, physical, documentary and digital—can potentially be classified according to the criteria set out in an evidence analysis grid such as the one below:

Evidence Analysis Grid				
Undefined	Average	Important	Unreliable	Corroborating

Practitioners may also be able to determine whether the evidence collected is potentially:

- » inculpatory or exculpatory
- » supportive of, or contradicts, other information collected.

## 2. Evaluating Testimonial Information on Sexual Violence

### a. Credibility of sources.

In assessing the credibility of your source, consider the following:

- » Who has provided testimony—what are their political, social, familial or other group associations?
- » How are they testifying? In what capacity—are they the victims themselves, are they testifying about something they saw or heard directly?
- » Why was the evidence provided? Is the motivation clear?

#### BOX 2

### Categorizing sources of testimony

The following criteria can assist practitioners in categorizing and evaluating credibility: *From Case Matrix Network's (CMN) database application I-DOC*

Type of testimony:	<ul style="list-style-type: none"> <li>» eyewitness of victimization</li> <li>» witness of consequence of crimes</li> <li>» received information from primary witness</li> <li>» received information due to specific competence</li> <li>» received information in his official capacity</li> <li>» testifies about general information</li> <li>» witnessed preparation to the incident</li> <li>» direct evidence</li> <li>» hearsay evidence (including lawyers representing victim)</li> <li>» expert evidence</li> </ul>
Role and belonging:	<ul style="list-style-type: none"> <li>» general public</li> <li>» migrant/victim of trafficking</li> <li>» community leader (including teachers, lawyers, doctors, priests, etc.)</li> <li>» member of local police and/or security forces</li> <li>» staff of armed forces</li> <li>» member of paramilitary forces</li> <li>» member of criminal cartel</li> <li>» member of local government</li> <li>» member of state government</li> <li>» member of federal government</li> <li>» member of national police and/or security forces</li> <li>» member of defence group</li> </ul>

### b. Reliability of information

Practitioners must assess testimonial information and verify, as much as possible, as many facts contained within that testimony as they can. The more detailed and accurate the information contained in a statement as a whole, the more likely it is to be considered reliable and credible as evidence.

### c. Assessing for inconsistencies

In assessing individual testimonies, practitioners should evaluate the following:

- i. **Inconsistencies within testimonies.** Are there discrepancies within individual accounts of what happened? In particular in terms of location, methods, who was involved, how many people were present?

#### BOX 3



#### Peer experience— assessing inconsistencies

Josephine, Investigator:

*'You have to be very critical when you are re-reading the statements, for inconsistencies you may not have picked up during the interview. (For one case), in describing being taken to a particular building outside the city, (the victim) observed that it was strange that there was nobody on the street outside the house when he entered, that is was 'strangely quiet' (his words). However, in describing the way in which, with his head in a cotton sack, he was bundled out of the house to another location thirty minutes later, he described 'hearing the sounds of the market, chickens close by and children playing'. These two descriptions together were not impossible, but did not make much sense. How did a street go from deserted to as busy as a marketplace in only half an hour?'*

- ii. **Gaps in chronology.** Does the sequence and timing of events make sense? Are there large periods of time unaccounted for?
- iii. **Contradictions between testimonies and/or between testimony and other evidence.** Is the testimony consistent with other testimony gathered about the same facts and circumstances? Is the testimony consistent with other pieces of information containing potential evidence about the act, the circumstances or context in which it happened?
- iv. Types of inconsistencies can include:
  - » minor differences of detail or perspective, which may or may not be directly conflicting
  - » vague details which can vary with suggestion or over the narrative.
  - » obvious error of fact
  - » conflation of direct eyewitness testimony, hearsay and second-hand information
  - » omitting information or parts of the narrative
  - » odd, incompatible or conflicting testimony
  - » apparent exaggeration
  - » potential untruths, lies or half-truths.

### d. Explaining inconsistencies

**Inconsistencies and contradictions are not uncommon, and not necessarily indicative of a witness's lack of credibility, dishonesty or even reliability.**

- » Some inconsistencies are acceptable, but must be thoroughly identified, addressed and explained.
- » Practitioners may not always be able to immediately identify inconsistencies during the interview itself, when explanations can be immediately sought. However, practitioners should still involve witnesses in clarifying the most critical inconsistencies. They may be able to provide valid explanations, or identify additional sources of information that can objectively support their claims if necessary.

For sexual violence cases in particular, inconsistencies can be the result of many different factors:

- i. **Silence.** Victims that have not divulged what happened to them to members of their family or community may find that other witnesses contradict their testimony, especially if they have previously offered alternative narratives to explain disappearances, physical and psychological symptoms, or pregnancies.

#### BOX 4

#### Victim experience – explaining inconsistencies

Hana:

*'I didn't tell anyone about the rape. At first, I thought I would be ok. But I started feeling very anxious and disoriented, and I would start crying all the time. Once my sister-in law found me like this. I didn't know what to say to her so I told her I found out my husband was seeing another woman. She told my brother, and he was furious and went to my husband's work and started shouting at him. Then when everybody calmed down, they turned on me and started calling me a liar and troublemaker. I felt like it would be impossible to tell the truth now. Nobody would believe me, and everyone still calls me a liar.'*

- ii. **Culture.** Inconsistencies and omissions can often be the result of misunderstandings between interviewee and interviewer. The way an individual recalls events and expresses certain feelings, observations, acts and specific words are culturally specific. In many cases particular words to describe acts may not even exist. The central construction of narratives—whether they are described temporally, or based on external events or emotions—is also culturally specific.
- iii. **Politics.** The political agenda of interviewees may be a reason why testimonies may be exaggerated, falsified, or contradicted. Reporting sexual violence may

be used as a form of propaganda against particular groups, to depict them as barbaric, irreligious, or as criminals. Conversely, witnesses may come forward to deny sexual violence occurred and accuse victims of fabricating reports because of the affiliations to the accused.

- iv. **Access to assistance.** In settings where disclosure of sexual violence is widely known to result in enhanced access to assistance, protection, relocation and in some cases, financial support, false claims may be made.
- v. **Trauma.** Traumatized individuals cannot always accurately and fully recall what happened to them. They may experience gaps of memory, or block out parts of a memory, for time-limited periods, or simply be too affected by the experience to offer full disclosure about what happened (for more details, see Chapter 15: Trauma).
- vi. **Fear of retaliation.** Inconsistencies in testimony can also arise if witnesses are afraid of retaliation by attackers if their identity, and/or sexual identity, and the fact that they have disclosed having experienced or witnessed elements of the sexual violence, becomes known. They may offer only partial accounts; attempt to misdirect the investigation; and omit mentioning the presence of other victims, witnesses or of attackers.
- vii. **Error and poor recall.** Victims and other witnesses may simply be confused about facts—dates, times, locations, or have trouble remembering many of these details.
- viii. **Shame, embarrassment.** In particular of recounting personal matters in a public forum, disclosing important details that they find too shameful.
- ix. **Influence.** Including discussions between witnesses that may influence each other's accounts, or influence of a prior statement written by another person who hears or may interpret what is being said differently from what the witness means if the witness read over the statement.
- x. **Peer pressure and intimidation.** Witnesses may be pressured into providing corroborating details or supporting allegations for the benefit of the community, for example.
- xi. **Poor interpretation.**

## BOX 5

## Inconsistencies in children's testimony

Inconsistencies in a child's testimony may arise for any of the reasons mentioned above. There are also factors specifically linked to a child's age and development that can result in inconsistencies in testimony. It is important to remember that **children are more sensitive to suggestive questions and might give an answer even if they do not know**, in order to please the interviewer and find the 'right' answer. Younger children in particular may have difficulty understanding certain concepts (such as times, dates, ages, information about frequency, size, height, weight), which could result in them giving information that is inconsistent with what an adult has said. For guidance on how to minimize this risk, see Chapter 16: Children and Sexual Violence, section E, Core guidance on involving children in the documentation process.

### 3. Evaluating Documentary, Physical and Digital Evidence

For practitioners with access to additional forms of evidence beyond testimonial, evaluating the credibility and validity of documentary, physical and digital evidence involves determining both its authenticity and reliability.

#### a. Authenticity.

Authenticating a piece of evidence is the first step in evaluating its validity. Determining whether evidence has been falsified can be a complex, expert-led process; nevertheless, at minimum practitioners can:

- » Be confident of the **means through which the evidence was obtained**—from a reliable **source**, following appropriate chain of custody requirements.
- » **Locate comparable, or similar information**—for example, obtaining documents of a similar type and comparing them directly.
- » **Use expert analysis.** Forensic and other specialists with the required skills—such as ballistics, document authentication, anthropology, and cultural historians for example—may be able to analyse individual pieces of evidence to determine their authenticity and origins.

#### b. Reliability.

A piece of evidence may be authentic, but be unreliable—that is, the trustworthiness of the source of the evidence may be in question. For example, an authentic medico-legal report may be handed over by a state-run clinic, but contain false information regarding the presentation of injuries or a negative psychological assessment of victims specifically as a means to attack a victim's credibility, been conducted using incorrect methodology or unsound medical practice, or by an untrained/inexperienced clinician, and therefore be considered unreliable (see section 2, a. Credibility of source).

**Here again, practitioners must assess the credibility of the source of evidence:**

- » **Who** has provided testimony—what are their political, social, familial or other group associations?
- » **Why** was the evidence provided? Is the motivation clear?

**As well as considering:**

- » **Where** was the evidence located?
- » **How** does the evidence fit in with the rest of the information collected?

## Digital Evidence and Authenticity

The global proliferation of smart phones and social media has led to a significant increase in the availability of photographic and video footage depicting alleged crimes and human rights violations. Some of this footage can be extremely useful for practitioners conducting investigations into sexual violence, in particular to establish contextual elements of crimes.

Various human rights organisations have developed programmes and guidelines to assist practitioners in evaluating photographs and videos and verifying whether or not they are authentic.

See, for example:

- » Video as Evidence: Verifying Eyewitness Video' WITNESS
- » <https://library.witness.org/product/video-as-evidence-verifying-eyewitness-video/>
- » Amnesty International's Citizen Evidence Lab <https://citizenevidence.org> includes best practice, techniques and tools for authenticating user-generated content for human rights defence.
- » Verification Handbook: a Definitive Guide to Verifying Digital Content for Emergency Coverage & Verification Handbook for Investigative Reporting <http://verificationhandbook.com>
- » Dat Nav: A New Guide to Navigate the Digital Data in Human Rights Research, Amnesty International, Benetech, The Engine Room
- » [http://www.benetech.org/wp-content/uploads/2016/09/datnav\\_report\\_med\\_res.pdf](http://www.benetech.org/wp-content/uploads/2016/09/datnav_report_med_res.pdf)

### FIVE STEPS OF VERIFICATION FOR DIGITAL EVIDENCE

*From: Dat Nav: A New Guide to Navigate the Digital Data in Human Rights Research*

#### 1. How did you get the content?

Think about what information channels it travelled through before arriving on your desk. How many times did it change hands?

#### 2. Who created the content?

Is the person who shared or uploaded the content online also the creator, or was it someone else? Ask if you don't know.

#### 3. Where is the content from?

Descriptions and metadata can easily be forged. Are there visible landmarks or sounds (like police sirens or dialects) that can help you verify a location?

#### 4. When was the content created?

You can't trust the date stamp on a file. Are there visual clues like the weather? A reverse image search can show if a photo appears elsewhere.

#### 5. Why was the content created?

Can you determine the motivation for sharing the content? What interests does the uploader have?

## BOX 7

Peer experience—  
analysing information

Afua, NGO Director:

*'During the course of the 7 months our team was in the area, we collected over 300 individual testimonies—from survivors and other witnesses—and some 140 pieces of documentary and digital evidence, including medical histories corroborating the rapes and some video footage taken by a teacher in the local school during one of the more violent attacks. We thought we had everything we would need (...) Our field-based funding was running out and we had to leave at the end of the week, so we packed up our files and left, thinking we would organise and analyse what we had back in (capital city). That was a mistake. When we finally 'plotted' every piece of information we realised we did not have the right kind of evidence to satisfy all the required elements of the violations we thought we could prove. But it was too late to return and ask the kinds of questions or procure the evidence we would actually need. We should have continuously plotted that information, and not as an afterthought.'*

Once the information has been gathered and evaluated, practitioners may be in a position to assess which sexual violence crime or violation they have enough evidence to establish, and what, if any, additional evidence they may require.

Mapping the elements, their requirements, and the pieces of information gathered according to this format will also enable practitioners to identify which sources and pieces information they must **prioritise for evaluation**.

For example: practitioners may assess the evidence they have gathered and determine they are in a position to establish **rape** as, potentially, a **crime against humanity**. If so, they must ask themselves:

### Rape + Crime Against Humanity

#### 1. Specific crime of rape:

- » What evidence has been gathered that helps prove that 'the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'?
- » What evidence has been gathered to show use of force or coercive circumstances?

#### 2. Category of crime against humanity:

- » What information has been gathered that supports the conclusion that this conduct was part of a widespread or systematic attack?
- » What information supports the conclusion that the attack was directed against a civilian population?
- » What information supports the conclusion that the direct perpetrator knew that the conduct was part of or intended to be part of an attack against the civilian population?
- » What information supports the conclusion that the attack was carried out pursuant to, or in furtherance of, a state or organizational policy to commit such an attack? (if applicable in the jurisdiction)

## Example Evidence Grid

Potential Objective: Establish Sexual Violence violation of Rape as Crimes Against Humanity	Examples of EVIDENCE by TYPE			
	Testimonial	Documen- tary	Physical	Digital Evidence
<b>Elements of Rape</b>				
1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.	<p>Testimony from victim X:</p> <p><i>‘(The larger one) pinned down my head and tied my hands and then the smaller one (...) placed his penis inside me. (...) but he said “this bitch has had children, she is too loose” and so he pulled out and forced his penis into my anus.’</i></p>	Medico-legal report and medical history form completed by independent medical organisation and provided by witness Y.	Blue dress, which looks the same as the one worn by the woman in smartphone footage collected by witness Z.	None
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.	<p>Testimony from victim X:</p> <p><i>‘The armed men had entered our village two nights previously, I recognized them immediately. The last time they had been here I had heard screams and looked out of my window and seen them dragging a young man out of his house and shooting them on the spot. When they smashed into my house and pointed their weapons at my children and asked me to come with them, I knew I had no choice.’</i></p> <p>Testimony from witness Z, who testifies to the content of smartphone footage he took and context in which he took it.</p>	None	None	Smartphone footage of two soldiers forcing woman wearing blue dress into house, geo tagged as village Y, handed over to investigators by witness Z.
<b>Elements of Crimes Against Humanity</b>				
1. The crimes were committed as part of a widespread or systematic attack.	<p>Witness Z describes how over the course of his eight months of fleeing from place to place, he saw many villages attacked and was an eyewitness to many incidents of killing and beating, of detention and removal at gunpoint. The witness says that in several villages he observed first that there were air strikes; then the ground forces swept into the village and ordered everyone to leave immediately; and then finally armed men on foot came in the night and shot the young men that had remained. (The witness provides details of those incidents he witnessed, so that practitioners are able to establish the who, the what, the when, the where, the why and the how, as well as how he knows.</p>	A UN military observer’s daily mission report describes armed attacks taking place on numerous residential areas far from the combat areas, occurring at the same time and apparently coordinated.	Bullet casings found in locations described by witness Z	Satellite images over a period of time show villages prior to the attack and then villages post-attack. Each post-attack image reveals similar details, including columns of women and girls being marched away from the village.

Potential Objective: Establish Sexual Violence violation of Rape as Crimes Against Humanity	Examples of EVIDENCE by TYPE			
	Testimonial	Documen- tary	Physical	Digital Evidence
2. The attack was directed against a civilian population	<p>Witness Y describes the victims in her village as wearing civilian clothing. They were not in possession of any weapons whatsoever, and there was no military or armed group presence during the attack:</p> <p><i>'In the days and weeks before we were captured and held, our village and all the villages in our province were overrun with armed men. The local fighters had left our area a long time prior, but the armed men behaved as if we were all part of the village defence. They drove their tanks through our village, killing all livestock and destroying our fields. Then they started bulldozing houses, and this caused most of us to run out of our houses and right into the open area where the attack was taking place. They picked up the women and girls, and young boys as well, threw us roughly into the back of trucks.'</i></p>	None	None	None
3. The direct perpetrator knew that the conduct was part of or intended to be part of the attack against a civilian population.	<p>Testimony from victim X: 'The men were dressed in the same way, and used the same language, and they were among those taking over our village— some of the men who invaded the village gathered in a group, and started loading us onto trucks. They then were the ones who held us in the facility, where, as it turns out, they had their base.'</p>			
4. The attack was carried out pursuant to, or in furtherance of, a state or organisational policy to commit such attack (a jurisdictional element which may or may not be required in the jurisdiction in which you are documenting).		<p>A military order which makes reference to the overall military strategy of scorched earth.</p>		

*Corroboration... is not a legal requirement for proving crimes of sexual violence under international law.*

## D. Strengthening Evidence

Once practitioners have gathered sufficient information to establish the minimum elements required of any given crime or violation, they may choose to enhance the credibility of their investigation by gathering additional, supporting information.

Gathering additional information can strengthen investigations by both corroborating testimony and providing additional information to describe context or provide authoritative explanations.

### 1. Corroboration

As discussed in Chapter 4: Individual Criminal Responsibility/Rules of Evidence and Procedure, corroboration—the need for additional evidence to support witness testimony—is not a legal requirement for proving crimes of sexual violence under international law. In practice, however, corroboration can strengthen a case, and domestic rules of evidence and procedure may not have waived this requirement even in cases where sexual violence is being investigated as an international crime.

Corroboration can be both in the form of witness testimony and other forms of evidence, such as documentary, digital and physical (see Chapter 10: Types of Evidence of Sexual Violence).

Finding corroborating evidence, in whatever form, can be particularly challenging for allegations of sexual violence. Nevertheless, practitioners can find additional evidence—such as reports or witness statements by third party observers—to corroborate a victim's **timeline** of events, and their **movements and behaviour** before and after the attack. This can go some way in establishing the overall credibility of the witness. *For example, if a victim reports having left her house in the morning going towards her school, and having been kidnapped before arriving, additional witnesses can be sought to testify that*

*they saw the victim leaving her house at that time in that direction, as well as other witnesses that may report that they never saw her arriving at school/lost sight of her at point X.*

In legal systems that permit it, corroborating evidence can also be used in lieu of victim/witness testimony where appropriate—for example, when victims are deceased, or unavailable.

### 2. Contextual Information

Additional information can be gathered to provide:

**Explanations.** Testimony from experts can provide authoritative explanations on a variety of topics that may ultimately impact the final understanding of certain factors critical to the case—for example, certain customs and traditions influencing context and behaviour; use of language and particular words to describe sexual violence; culturally specific experiences of trauma that may affect testimonial coherence; the impact of stigma in a particular community as an explanation for victim silence or denial; and explanations related to military operations, conduct and make-up, for example.

**Background information.** Testimony from experts, reports and other forms of credible documentary and digital information can provide political, social, racial, ethnic and cultural histories and descriptions to aid understanding of a particular context, country and population.

## E. Identifying Patterns

### 1. Typologies

As well as gathering enough information to satisfy all the relevant elements of individual crimes, evidence of sexual violence as an egregious violation or international crime is strengthened if it can **demonstrate that individual incidents are part of a pattern of crime or violations—meaning that there are numerous, connected incidents sharing common features.**

Accordingly, when evaluating the evidence, practitioners must establish whether the crimes or violations were isolated incidents or whether they share similarities related to:

(a) the profile of the **victims**; (b) the profile of the **perpetrators**; (c) the **method** through which the crime was committed; and (4) the **geographical** area(s) and the **time period** in which they were committed.

Identifying similarities between incidents in this way can assist with the development of useful typologies of crimes as a basis for classifying violations and establishing patterns.<sup>2</sup> For example, the 2008 Report of the Commission of Inquiry into Post-Election Violence in Kenya identified three main types of sexual violence: (a) as ‘a means used to pressure people to leave their homes, to retaliate against them for having voted for the wrong candidate, tribe, or party and in tandem with that to dominate, humiliate and degrade them and their communities into a pit of powerlessness’; (b) ‘[i]n other areas, sexual violence was an opportunistic act played out against a background of lawlessness and a vacuum of power that created disorder bordering on anarchy’; and (c) an abusive sex trade imposed on displaced women.

## BOX 9



### Peer experience— finding patterns

Anja, Field Director:

*‘We had collected testimony and some other types of evidence for some 34 rape cases by the end of 2012. The evidence was collected by five different teams, some working quite separately from each other, from three mobile legal clinics and two GBV assistance units. At first, we couldn’t immediately see the similarities between the cases, aside from the fact that all victims were of a similar age and of a similar economic background—quite middle class. But when we began to assess the victim profiles in more detail, we started noticing things. The girls were all unmarried, but all had boyfriends—which was actually quite uncommon, as we were working in a conservative, religious area. Many of them did not wear the veil, and those who did, did so erratically. They all went to school, many to university. And in parallel to evaluating their profiles, we consulted with other human rights colleagues, who had been collecting reports of threats made against some members of the more secular, middle class establishment by one of the emerging radical religious groups on the island. Not many reports contained details about the perpetrators—the majority of girls were attacked in the dark, by groups of men wearing masks—but the common feature was the invocation of “God” in their threats to the girls: “You Godless whore”; “This is God’s punishment”; etc. We started to see a pattern—the girls attacked were the daughters, sisters, or cousins of moderate and secular public figures. They themselves were seen as ‘disrespecting’ the religious order by being educated, having boyfriends, and being unveiled. They were being punished, their families were being punished, and they were being sent a message.’*

<sup>2</sup> Aranburu, X.A. (2010) ‘Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases’, *Leiden Journal of International Law*, 23, 4: 609–627.

## Useful Questions in Establishing Patterns

PATTERN TYPE	Questions	Possible criteria for assessment (From CMN I-Doc):
<p><b>a. Victims</b> The same type of victim is targeted.</p>	<p>Are many victims:</p> <ul style="list-style-type: none"> <li>✓ Members, or affiliated or related to members, of the same political party or ethnic group?</li> <li>✓ Members, or affiliated or related to members, of a specific civil society group, such as women's and human rights defenders?</li> <li>✓ From specific residential areas, villages, displacement settings?</li> <li>✓ Persons of similar age, or of the same gender?</li> </ul> <p>Is there evidence of:</p> <ul style="list-style-type: none"> <li>✓ Public statements made by leaders, the media, political or religious groups targeting specific individuals or groups of individuals?</li> <li>✓ Legislation and state security measures targeting specific groups or individuals?</li> <li>✓ Previous attacks and/or killings of specific individuals?</li> </ul>	<ul style="list-style-type: none"> <li>» Role and belonging of victims</li> <li>» Particular vulnerability</li> <li>» Place of birth</li> <li>» Address at the time of violation</li> <li>» Age category</li> <li>» Gender</li> <li>» Identifying physical characteristics of victim</li> <li>» Nationality/citizenship</li> <li>» Ethnic belonging</li> <li>» Religion</li> <li>» Education</li> <li>» Occupation</li> <li>» Marital status</li> <li>» ICHL status</li> </ul>
<p><b>b. Violations</b> The same 'modus operandi' is evident across multiple incidents.</p>	<ul style="list-style-type: none"> <li>✓ Are there numerous instances of the same type of act (e.g. rape, gang rape, genital mutilation, forced nudity)?</li> <li>✓ Are victims taken, or attacked, at similar times of day?</li> <li>✓ Are there similarities between other details of the attack (kidnapping, use of drugs, shaving of hair, prolonged questioning)?</li> <li>✓ Have particular methods been used by known groups or forces before?</li> </ul> <p><i>For example:</i></p> <p><i>Paramilitary groups routinely 'punish' women who behave in perceived inappropriate ways by raping them and shaving off their hair.</i></p> <p><i>Dozens of young boys are kidnapped from their homes at night by rebel forces, and taken to remote locations where they are forced to take a combination of cocaine and Viagra and have sex with female members of the group.</i></p>	<ul style="list-style-type: none"> <li>» Rights and freedoms violated by alleged crime</li> <li>» Violation type</li> <li>» Time and location of incident</li> <li>» Factors triggering victimization</li> <li>» Circumstances of victimization</li> <li>» Aggravating circumstances</li> <li>» Mitigating circumstances</li> </ul>

## BOX 10

## Useful Questions in Establishing Patterns

PATTERN TYPE	Questions	Possible criteria for assessment (From CMN I-Doc):
<p><b>c. Perpetrator</b> The same type of perpetrator is responsible.</p>	<ul style="list-style-type: none"> <li>✓ Were specific troops seen in proximity to the location(s) of the attacks?</li> <li>✓ Did perpetrators across cases share the same characteristics (language, weapons, vehicle, clothes, ethnicity, nationality)?</li> </ul>	<ul style="list-style-type: none"> <li>• Role and belonging of perpetrator</li> <li>• Rank or position within organization or unit</li> <li>• Physical identifying characteristics of perpetrator</li> <li>• Gender</li> <li>• Nationality/citizenship</li> <li>• Ethnic belonging</li> <li>• Religion</li> </ul>
<p><b>d. Geography and time</b></p>	<ul style="list-style-type: none"> <li>✓ Are attacks happening in locations that correlate with areas under control of specific forces/groups?</li> <li>✓ Are attacks happening in areas where members of particular groups live?</li> <li>✓ Are specific violations happening within the time period of other crimes (e.g. as part of the attack against any civilian population, or within the period of established conflict)</li> </ul>	

## 2. Additional Methods for Identifying Patterns

As well as assessing the evidence gathered against the questions above, more specialist methodologies can be engaged to conduct crime pattern analysis and strengthen sexual violence evidence:

### a. Searchable databases

The database that is in place to organize and store the information gathered is an extremely useful analytical tool in itself. Even the simplest databases can be structured to provide opportunities for searching with different criteria, and more advanced databases can include a function to bring up the original electronic files from its link in the database. Both database applications highlighted in the Protocol, OpenEvsys and I-Doc, allow for this function (see Chapter 9: Planning).

### b. Statistical analysis

Statistical analysis of mass violations can be successfully employed as potential evidence for sexual violence investigations, if the methodology used is rigorous, subject to peer review, and adequately sourced.<sup>3</sup> The most straightforward role for statistical analysis is as a descriptive tool, capable of simply quantifying numbers of victims and violations, when and where victims were attacked, the harm caused by those attacks, and the profiles of victims. Statistical analysis can also provide circumstantial evidence of relative rates of victimization between groups, by gender, ethnicity, political affiliation, geography, for example, if sufficient data sets are used to enable robust comparison

Various data sources can be used for this purpose, including victimization surveys, medical records, records from detention facilities, displacement flows, refugee registration and census data. Analysis from these sources can be overlapped with testimonial evidence and crime mapping (see below) to present

useful estimates that can contribute to establishing the crime base of any given violation.

### BOX 11



#### Peer experience— the use of programmatic data to establish patterns

Roxana, Human Rights Defender:

*'Records kept by medical and health professional, such as statistical records of particular interventions made or the appearance of particular health problems (e.g. changes in the number of fistula surgeries carried out over a given period, spikes in STD testing or unwanted pregnancies), can provide important clues or substantiate evidence establishing specific patterns of abuse. For example, I remember that in one West African country, our organisation managed to establish a specific pattern of sexual violence against men who had been temporarily detained by a particular rebel group not through investigation into sexual violence but through spotting a spike in men presenting to a medical clinic complaining of difficulties in their sexual relationships. It shows how some seemingly banal information may become extremely valuable evidence when considered in the aggregate.'*

<sup>3</sup> Aranburu, X.A. (2010) 'Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases', *Leiden Journal of International Law*, 23, 4: 623, note 3..

### c. Crime mapping

Crime mapping is another form of analysis that can be used to identify patterns, and refers to the use of Geographic Information System (GIS) and other scientific tools to visualize and organize spatial data, primarily to establish correlation between different elements of a violation.

This includes, for example, plotting troop movements on a map against areas where rapes occurred, or highlighting the location of particular ethnic groups before and after reports of sexual violence that resulted in mass displacement.

Crime mapping can take many forms. Some advanced mapping software allows users to electronically track and visualize attacks, movements, and populations over time, and even link up to satellite imagery. However, basic hand-drawn mapping, using approximate locations, can also be used as a useful analytical tool in determining correlations, timeline and patterns.

### BOX 12

#### Example Tool – The Geospatial Technologies Project

The Geospatial Technologies Project, an initiative of the Scientific Responsibility, Human Rights and Law Program of the American Association for the Advancement of Science (AAAS), uses geographic technologies such as remote sensing, geographic information systems (GIS), global positioning systems (GPS) and volunteered geographic information (VGI) to advance research and documentation capabilities across the fields of human rights, humanitarian response, cultural heritage, environmental justice, and human security.

This research is conducted in collaboration with others, including human rights and other non-governmental organizations and international courts and commissions.

Geospatial technologies include a range of modern tools, such as remote sensing, GIS, and GPS that allow for mapping and analysis of multiple layers of georeferenced data.

Analysis of such data can provide critical information on:

- » the impact of remote, isolated conflicts on civilians
- » a host of human rights violations
- » damage to sites of cultural heritage
- » environmental and social justice issues
- » cross-border conflicts
- » indigenous rights.

The use of new technology can broaden the ability of non-governmental organizations to rapidly gather, analyse, and disseminate authoritative information, especially during times of crisis. They can also provide compelling, visual proof to corroborate on-the-ground reporting of conflicts and natural disasters affecting human rights.

<https://www.aaas.org/geotech/humanrights>

# PART VII: Cross-Cutting Issues

## Chapter 15 Contents

CHAPTER 15: <b>Trauma</b> .....	<b>231</b>
<b>A. Understanding Trauma</b> .....	<b>231</b>
<b>BOX 1</b>	
Victim experience of trauma.....	231
1. Trauma and Traumatic Experiences .....	231
<b>BOX 2</b>	
Factors contributing to individual resilience to trauma.....	232
<b>B. Sexual Violence-Related Trauma</b> .....	<b>233</b>
1. Reactions to the Trauma of Sexual Violence .....	233
<b>BOX 3</b>	
Post-traumatic stress disorder .....	235
<b>C. ‘War Rape’ Trauma</b> .....	<b>236</b>
<b>BOX 4</b>	
Mental health outcomes of rape, mass rape, and other forms of sexual violence.....	237
<b>D. Interacting with Victims of Trauma</b> .....	<b>239</b>
1. Re-traumatization during interview .....	239
2. Effects of Trauma on Witness Memory and Testimony .....	240
<b>BOX 5</b>	
Individualistic and Collectivistic Cultures.....	241
3. Engaging Witnesses with Memory Disorders.....	241
<b>BOX 6</b>	
Reliability vs Credibility .....	241
<b>BOX 7</b>	
Case law example – Anto Furundžija case.....	242

# CHAPTER 15: Trauma

## A. Understanding Trauma

'Though people react differently to stress and threats, events such as rape, torture, and the violence associated with war are experienced as traumatizing by nearly everyone, regardless of culture or other factors such as age or gender. It is therefore normal to have some or many symptoms of trauma after such experiences.'<sup>1</sup>

When discussing the impact sexual violence can have on its victims and witnesses, practitioners often list 'trauma', 'traumatization' or 'post-traumatic-stress disorder' as psychological impairments that are likely to be evident in survivors of sexual violence, as well as in their families and communities.

But what does being 'traumatized' actually mean? How does it impact individual survivors, families and communities, and how does it affect memory and individuals as witnesses?

### BOX 1

#### Victim experience of trauma

Celia, 36:

*'I can't describe the trauma when my eyes are open, it is when they are closed that I feel it. It is a pain that is always there. I have to learn to live with it. It's a feeling in me that has never gone a way, no matter what I do.'*

Documenting CARSV according to a trauma-informed approach means practitioners must:

- » Understand the nature and impact of trauma on survivors of sexual violence
- » Adequately address any trauma-related needs before, during, and after interviewing survivors and other witnesses
- » Put in place strategies to mitigate the possibility of re-traumatization
- » Understand how trauma can affect witness memory and testimony itself.

### 1. Trauma and Traumatic Experiences

The American Psychological Association (APA) defines trauma as 'an emotional response to a terrible event.' Health and Human Rights Info<sup>2</sup> explains it further as a 'major physical or mental injury, including (from) threats to life or physical integrity'. The World Health Organisation (WHO), in turn, describes a traumatic event as a stressful event of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone,<sup>3</sup> for example, natural or man-made disaster, combat, serious accident, witnessing the violent death of others, or being the victim of torture, terrorism, rape, or other crime. It also includes responses to chronic or repetitive experiences such as child abuse, neglect, combat, urban violence, concentration camps, battering relationships, and enduring deprivation. In short, someone who is 'psychologically traumatized' is suffering from a significant mental injury in response to a violent, distressing or destabilizing event—a traumatic experience.

1 Health and Human Rights Info (2014) *Mental Health and Gender-Based Violence: Helping Survivors of Sexual Violence in Conflict – A Training Manual*. Oslo: Health and Human Rights Info.

2 Health and Human Rights Info (2014) *Mental Health and Gender-Based Violence: Helping Survivors of Sexual Violence in Conflict – A Training Manual*. Oslo: Health and Human Rights Info.

3 World Health Organisation (1992) *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines*. Geneva: WHO.

*It is critical to understand that trauma is a subjective experience in response to an objective event*

It is critical to understand that trauma is a subjective experience in response to an objective event. That means that different individuals can experience the same violent, life-threatening event without exhibiting traumatic reactions, while others experiencing the same event may be severely affected. The psychological consequences, or sequelae, experienced by those who are traumatized may also differ from one person to the next.

The severity and type of trauma experienced by individuals varies depending on both risk and protective factors related to:

- » their situation and conditions before the trauma (pre-traumatic)
- » the severity of the stressor and perception of the experience during the trauma (peri-traumatic)
- » the immediate coping strategies and level of support available to them after the experience (post-traumatic).

The box below describes a number of factors that are associated with psychological resilience following trauma. Resilience is multifaceted, and includes the ability to withstand injury and maintain functioning, the speed and ease of recovery, and the ability to positively adapt in the face of trauma.<sup>4</sup> Documenters should be familiar with protective and risk factors impacting on resilience to be able to assess the potential risks of re-traumatization during interview.

**BOX 2**

### Factors contributing to individual resilience to trauma

#### 1a: Protective factors

- » Being part of functioning and loving relationships
- » Being accepted and supported by family and community
- » Having access to effective and respectful medical services—including psychiatric assistance
- » Having access to psychosocial assistance—including counselling and other forms of therapy
- » Having access to essential resources—income, housing, employment
- » Having an education
- » Having self-confidence and self-esteem
- » Being a religious or spiritual person
- » Being able to find positive meaning in the trauma (e.g. 'I am lucky to have survived this', 'At least God brought me a healthy, beautiful child to love out of this', 'It has made me realize how loved and valued I am by my family').

#### 1b: Risk factors

- » The survivor has already experienced some form of violence, such as intimate partner violence, or other types of violence associated with conflict
- » Attack was extremely brutal and violent and/or resulted in severe or chronic physical injury
- » There were multiple attacks, and/or they stretch over a long period of time (e.g. repeated rapes, prolonged period of captivity)
- » The survivor lives in permanent state of insecurity, danger and fear
- » Medical, psychosocial and protection support services are limited or inadequate
- » There is no social support, and communities stigmatize or expel survivors
- » The survivor has to cope with additional stressors such as loss of loved ones, livelihoods or displacement.

<sup>4</sup> Maltby, John, Day L., Flowe H., et al. 'An ecological systems model of trait resilience: Cross-cultural and clinical relevance', *Personality And Individual Differences* [serial online], 98 (August 2016), 96–101.

## B. Sexual Violence-Related Trauma

Rape and other serious acts of sexual violence are considered to be extreme stressors, and likely to cause severe trauma reactions.<sup>5</sup> Rape is described as a ‘distinct traumatic experience’<sup>6</sup> comprised of numerous dynamics:

- » Fear of being injured, killed, ‘fear of annihilation’
- » Dehumanization, extreme objectification
- » Loss of control over body and events, helplessness, powerlessness
- » Destruction of identity
- » Violent intrusion of perpetrator into a body, physical invasion
- » Transgression of intimate physical and psychological space
- » Humiliation
- » Pain, torture.<sup>7</sup>

### Key to note

Physical penetration is not a pre-requisite for severe traumatic consequences to be evident in victims of sexual violence—the traumatic experience of rape is the result of several factors that are not limited to the penetrative act itself.

## 1. Reactions to the Trauma of Sexual Violence

What happens to sexual violence victims who experience trauma?

The psychological consequences of trauma can manifest in different ways. Nevertheless, some reactions are more frequent and typical. They include:

- a. acute stress reaction
- b. anxiety
- c. depression
- d. dissociation
- e. post-traumatic stress disorder symptoms
- f. substance misuse.

5 Supra note 1.

6 Supra note 1.

7 Multiple sources. See, for example, Supra note 1; Medica Mondiale and Medica Zenica, *Research on the long-term consequences of war rape and coping strategies of survivors in Bosnia and Herzegovina: ‘We are still alive. We have been harmed but we are brave and strong’*, (Cologne, 2014); Hagen, KT., ‘The Nature and Psychological Consequences of War Rape for Individuals and Communities’, *International Journal of Psychological Studies*, 2/2 (2010).

### ‘Rape Trauma Syndrome’

Practitioners may often refer to the cluster of immediate and long-term reactions experienced after rape under the umbrella term ‘Rape Trauma Syndrome’ (RTS). RTS is manifested through a collection of somatic, cognitive, psychological and/or behavioural symptoms organized into a two-stage model of reactions: 1) Disorganization and 2) Reorganization.

As well as the conditions described in the box below, RTS includes experiencing varied heightened emotional responses during the acute/disorganisation phase—such as crying/sobbing, laughing, or seeming unaffected or ‘disconnected’ immediately after the experience. Victims may also feel anger, humiliation, a desire for revenge, and self-blame once those initial emotions have abated.

In the long-term/reorganization phase, victims can experience difficulties in functioning at work, home or school. They may begin to develop phobias, be afraid of being alone, have difficulty relaxing or sleeping. Sexual dysfunctions may also develop.

Unlike Post-Traumatic Stress Disorder (PTSD), RTS is a description of symptoms and stages of recovery rather than a diagnosis with specific criteria. However, expert witness testimony on both PTSD and RTS has been submitted as evidence in various national and international jurisdictions to educate jurors and judges on the impact of rape and the complex reactions experienced by its victims—albeit with varying degrees of success.<sup>8</sup>

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<sup>8</sup> See, for examples, Ellison, Louise, ‘Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’, *The International Journal of Evidence & Proof*, 9/4 (2005), 239-268; Bleil, Charles, ‘Evidence of Syndromes: No Need for a Better “Mousetrap”’, *South Texas Law Review*, 32 (1990) 37, 38; Gupta, Nina, ‘Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence’, *Law & Contemporary Problems*, 76/3-4 (2013), p234; Brammertz, Baron Serge, and Michelle Jarvis, (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford, 2016).

## BOX 3

### Post-traumatic stress disorder

Post-Traumatic Stress Disorder (PTSD) is a condition that may develop as a 'delayed or protracted response' to a traumatic event. Not everyone who experiences trauma develops PTSD; however, victims of interpersonal trauma such as sexual violence in conflict are much more likely to develop PTSD than victims of non-assault-based trauma (such as a car accident). Individual resilience (see Box 2: 'Factors contributing to individual resilience to trauma') also influences whether or not a victim of sexual violence exhibits signs of PTSD in the long-term. PTSD may start as an 'acute stress reaction', which is followed by a full PTSD syndrome; however, survivors may sometimes show few or no symptoms for several weeks or months. They may exhibit acute stress, then be stable with almost no distress, then develop PTSD.

The Diagnostic and Statistical Manual of Mental Disorders outlines very specific criteria that must be met for individuals to be diagnosed with PTSD: (a) They must have experienced or witnessed a traumatic event that involved actual or threatened death, serious injury, or threat to physical integrity and react to that event with intense fear, helplessness, or horror; (b) they must report a specified number of symptoms involving re-experiencing the event, avoidance, and heightened arousal; and (c) the symptoms must last for at least one month and cause clinically significant distress or impairment in functioning.

Typical manifestations include:

- » episodes of repeated reliving of the trauma in intrusive memories ('flashbacks')
- » dreams or nightmares
- » detachment from other people, unresponsiveness to surroundings
- » anhedonia (the inability to feel pleasure)
- » avoidance of activities and situations reminiscent of the trauma
- » involuntary hyperarousal with hypervigilance
- » an enhanced startle reaction
- » insomnia
- » anxiety and depression
- » suicidal ideation.

In most cases, those who suffer from PTSD will recover, but the condition may also become chronic. In the worst cases it may cause enduring changes of personality.

*...war and rape stand as the most destructive of all traumatic experiences.*

### C. 'War Rape' Trauma

Many of the characteristics of rape trauma described above are exacerbated when sexual violence is part of the continuum of trauma and violence experienced in conflict situations.

Conflict, whether experienced as a combatant or civilian, is considered one of the most potentially traumatic events to survive. The multiple devastating experiences of witnessing extreme violence and fatalities, loss of loved ones, loss of homes and livelihoods, flight and displacement, means that individuals impacted by conflict are more likely than others to suffer from mental health disorders as a direct result of their traumatic experience. The WHO has estimated that, in the situations of armed conflicts throughout the world, '10% of the people who experience traumatic events will have serious mental health problems and another 10% will develop behaviour that will hinder their ability to function effectively'.<sup>9</sup>

In conflict situations, survivors, in addition to having been victims of sexual violence, may also be victims of non-sexual physical violence, be displaced, live in insecure conditions, co-exist with their perpetrators, and experience domestic violence—common experiences in conflict-affected settings, leading to many experiencing layer upon layer of trauma, or cumulative, trauma. Additionally, the particular way that conflict and atrocity-related sexual violence is often perpetrated—in terms of its brutality, public nature, and context—will also contribute to the already psychologically destructive effects of the sexual violence itself.

'Prevalence rates for different traumatic events, as established by international trauma research, show that war and rape stand as the most destructive of all traumatic experiences. Their combination, war rape, is therefore expected to produce tremendous psychological suffering in survivors, affecting their mental and physical health and their relationship with others.'<sup>10</sup>

9 World Health Organisation (2001) *World Health Report 2001 - Mental Health: New Understanding, New Hope*. Geneva: WHO.

10 Medica Mondiale and Medica Zenica (2014) *Research on the Long-term Consequences of War Rape and Coping Strategies of Survivors in Bosnia and Herzegovina: 'We Are Still Alive. We Have Been Harmed But We Are Brave and Strong'*. Cologne and Zenica: Medica Mondiale and Medica Zenica

## BOX 4

## Mental health outcomes of rape, mass rape, and other forms of sexual violence

*Stanford University School of Medicine**Brief submitted at sentencing phase of ICC Prosecutor v. Jean Pierre Bemba Gombo*

The Human Rights in Trauma Mental Health Lab at Stanford University submitted an experts' brief in the sentencing phase of the Bemba case at the ICC (The Case of the ICC Prosecutor v. Jean Pierre Bemba Gombo Case No. ICC-01/05-01/08) based on its review of the evidence and of the trial record. The report submitted by the Lab, which includes a body of practitioners with considerable expertise in trauma mental health, described the individual, familial, communal and inter-generational impact of the massive and systematic sexual violence committed in the Central African Republic between 2002 and 2003.

The report, which draws connections between empirical research on the psychosocial effects of sexual violence, the expert testimony given during the trial, and events in CAR, describes the various psychological impacts of mass sexual violence on the population, at the individual and collective level. Among others, it describes the consequences of sexual violence as including PTSD, anxiety disorders, depressive and mood disorders, and dissociation—when the mind 'withdraws' from the body. It stated:

*'The psychiatric literature predicts very poor functional outcomes for such victims of sexual assault. The resulting myriad of individual consequences includes psychiatric disorders such as post-traumatic stress disorder, depression, and anxiety. Outside of these named mental health diagnoses, individuals suffer from abject feelings of hopelessness, spiritual degradation, heightened suspicion, persistent confusion, and fear. Victims of trauma see themselves as vulnerable, view the world as lacking meaning, and view themselves as lacking worth.'*

[https://www.icc-cpi.int/RelatedRecords/CR2016\\_06768.PDF](https://www.icc-cpi.int/RelatedRecords/CR2016_06768.PDF)

Alongside the traumatic nature of sexual violence and conflict as separate experiences, CARSV can impact survivors in particular ways:

1. The sexual violence occurs in a context of **recurring violence and insecurity**
2. There is a general **lack of formal and informal support mechanisms available**
3. The sexual violence is **public in nature**
4. The sexual violence is **particularly brutal**.

(For more complete descriptions of these factors, see Chapter 2: Understanding Sexual Violence.)

### 1. Continued Violence and General Insecurity

The continued fighting and acts of violence that form the backdrop to victims' lives can lead to them suffering multiple, and cumulative, traumatic experiences, increasing their likelihood of exhibiting aggravated mental health problems.<sup>11</sup> Survivors may experience constant intrusions, in the form of flashbacks or nightmares, as a result of the many potential triggers in their daily lives. They may suffer from chronic stress because of their inability to scale down from a constant state of alarm. It may be genuinely unsafe for them to speak about what happened, thereby denying them the opportunity to access the support and assistance that is critical in protecting them from more severe mental health disorders in the long-term. Additionally, in situations of widespread violence, communities may be too involved in self-recovery and unable to provide adequate support to the individual. The collective trauma experienced by the community—as a result of mass violence, including sexual violence, that targets the physical health, cohesiveness, family ties, structures and habits of communities as a whole, means that the consequence of sexual violence in these contexts is 'far more extensive, pervasive, and devastating than can be measured in an assessment of an individual victim.'<sup>12</sup> The 'unique' experience of an individual victim can be lost, overlooked when everyone in the community has been brutalized in some way and is suffering from collective loss. The sense of injustice when perpetrators are not held accountable can be particularly disempowering.

'The individual and collective consequences of war rape often become entwined with broad con-

sequences of war that include cycles of poverty, violence and trauma.'<sup>13</sup>

### 2. Lack of adequate response

Conflicts characterized by limited infrastructure and support services pose an additional challenge to the mental health recovery of sexual violence survivors. The lack of adequate medical and psychosocial support means that trauma symptoms often go undiagnosed, and untreated.

The lack of educational and economic opportunities for the population in general can affect individual resilience to trauma and limit a traumatised individual's ability to access the social and financial resources that may help recovery.

Inadequate or unresponsive criminal justice institutions can exacerbate psychological consequences of trauma, in particular by not understanding how trauma can affect survivor testimony, or using poor interview techniques that could re-traumatise survivors.

### 3. The brutality of the act

The extreme objectification and dehumanization of victims of such brutal forms of sexual violence<sup>14</sup> often lead to more severe forms of traumatization.

11 Mollica R.F., McInnes K., Tor S. (1998) 'The Dose-Effect Relationships of Trauma to Symptoms of Depression and Post-traumatic Stress Disorder Among Cambodian Survivors of Mass Violence', *British Journal of Psychiatry*, 173, 6: 482–489.

12 Stanford University School of Medicine, 'Mental Health Outcomes of Rape, Mass Rape, and other Forms of Sexual Violence', Brief submitted at sentencing phase of ICC *Prosecutor v. Jean Pierre Bemba Gombo*.

13 See Hagen, *Supra* Note 6.

14 MacKinnon, C.A. (1994) 'Rape, Genocide, and Women's Human Rights' in *Are Women Human? And Other International Dialogues*, Cambridge, MA: The Belknap Press of Harvard University Press, 2006, pp. 180-191.

## D. Interacting with Victims of Trauma

### 1. Re-traumatization during interview

Re-traumatization refers to a situation, attitude, interaction or environment that **results in the re-experiencing of the events or dynamics of the original trauma** and triggers the overwhelming feelings and reactions associated with them.

When trauma reactions develop into severe stress disorders, victims may be re-traumatized, relapsing into a trauma-like state as a result of particular triggers—words, smells, sounds—that prompt their body to respond as if they were re-living the experience. Victims and other witnesses may suffer flashbacks or intrusive thoughts, whereupon they re-experience the act or cannot stop themselves thinking about it. Physically, they may exhibit rapid heart rates, sweating, dizziness or nausea.

Practitioners cannot always avoid potential re-traumatization of victims when they interact with them or interview them. Nevertheless, some general trauma-informed strategies can be put in place to minimize the risk of re-traumatization, alongside specific actions or behaviours to avoid based on prior understanding of the victim's experience—such as refraining from wearing strong perfumes or colognes if the information available about the victim, or gathered from other victims, included mention about nauseating odours associated with the alleged perpetrators, for example.

#### Mitigating re-traumatization: strategies for working according to a trauma-sensitive approach

##### a. Ensuring physical and emotional safety BEFORE, DURING AND AFTER interview

- ✓ Making sure physical space is safe, accessible, comfortable
- ✓ Making sure location is discreet
- ✓ Be familiar with basic grounding techniques in case individual begins to show signs of re-traumatization, including flashback, increased agitation, fear, etc.
- ✓ Making sure all members of team are experienced, trained and attentive
- ✓ Making sure you conduct a thorough 'safety check' after the interview:
  - Discussing with individual fact that distressing memories may be more present for them after the interview
  - Checking whether they have support at home, have they told anyone
  - Ask how they are feeling now that they have disclosed the experience
  - Refer them to appropriate services if necessary and appropriate
  - Conduct a basic risk assessment for self-harm.

##### b. Promoting trustworthiness

- ✓ Making sure roles, procedures and objectives are clearly explained and understood
- ✓ Making sure expectations are understood and managed

- ✓ Making sure relationships between survivor/witnesses and team members are courteous and professional
- ✓ Making sure interviewees and all members of team understand the parameters of confidentiality and its limitations.

##### c. Choice

- ✓ Making sure approach is survivor-centred
- ✓ Making sure they give their full and informed consent
- ✓ Making sure interviewees understand they have full control over interview.

##### d. Collaboration and participation

- ✓ Making sure survivors are consulted and feel they are part of investigation
- ✓ Making sure survivors have a system through which to communicate with practitioners and make complaints if necessary
- ✓ Making sure survivors receive regular information updates and can stop at any time.

##### e. Empowerment

- ✓ Making sure survivors know their rights and entitlements
- ✓ Making sure survivors fully understand the documentation and all possible avenues of redress.

## 2. Effects of Trauma on Witness Memory and Testimony

Recent research indicates that traumatized individuals face specific challenges in being able to accurately and fully recall the trauma they experienced. This kind of memory disorder is associated with PTSD sufferers in particular, and ranges from having distressing ‘intrusive memories’ (when memory of the trauma keeps intruding into their mind, as part of the ‘re-experiencing’ symptom) to dissociative amnesia (meaning experiencing gaps of memory, or blocking out parts of a memory, for time-limited periods).

Some studies indicate that the more PTSD symptoms in evidence, the more inconsistencies in memory recall will be present.

Overall, the memories of traumatized individuals can lack detail, consistency and coherence<sup>15</sup> which are often cited in judgments as factors in determining reliability of testimony.

### a. Avoidance

Traumatized survivor/witnesses may simply avoid discussing certain aspects of the event, or even the entire event itself, as a means of coping. As discussed above, interview settings may trigger a range of acute stress responses and intrusive memories for traumatized survivor/witnesses who initially thought they could cope with providing full testimony. Once interviews begin, however, they may find themselves unable to provide certain details, unwilling to think about or discuss what happened, deny it ever happened or give only partial details (e.g. telling the interviewer they were raped but that their child was unharmed when in fact their child was repeatedly raped in front of them).

### b. Inability to recall

**Trauma affects memory and memory recall for different reasons:**

- i. During situations of extreme stress, the ability to attend and perceive the environment can be diminished. Attentional focus tends to be restricted to the source of the stress. As a consequence, main rather than peripheral aspects of the event are more likely to be encoded in memory. Victims are more likely to mentally rehearse and recall the main, or central, aspects of a traumatic event (e.g. aspects relating to the perpetrator), and focus on themselves and how they felt, rather than on more peripheral aspects (e.g. aspect such as bystanders and the surrounding physical environment). Some studies indicate that people, including individuals suffering from PTSD, will more easily recall central issues and may even display a heightened accuracy in terms of details associated with the trauma. However, details such as location, type of room and appearance of others present during the trauma can be much less vivid and difficult to recall.
- ii. The traumatic experience can modify memory as a protective response to the trauma in order to re-establish a sense of identity and self.<sup>16</sup>
- iii. Traumatic memories have different qualities to normal memory. Normal memory reconstruction is voluntary and experienced as a narrative, with a beginning, middle and end. Traumatic memory is not voluntary, but can be experienced as an intrusion or flashback triggered by specific stimuli. It is more disjointed, and lacks narrative structure at the moment of recall.<sup>17</sup>
- iv. Inconsistencies in testimony provided by a traumatized survivor/witness could be the result of temporary memory loss followed by an increase in memory, rather than a voluntary omission.<sup>18</sup>

Notably, the qualities of traumatic memory outlined above can be experienced by those suffering from a number of psychiatric disorders (e.g. PTSD, depression).

15 Sparr, L.F., and Bremner, J.D. (2005) ‘Post-traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunal?’, *Journal of the American Academy of Psychiatry and the Law* 33, 1: 71-78.

16 Herlihy, J., and Turner, S. (2013) ‘What Do We Know So Far About Emotion and Refugee Law?’, *Northern Ireland Legal Quarterly*, 64, 1: 47-62, pp. 52.

17 Berthold, M., and Gray, G. (2011) ‘Post-Traumatic Stress Reactions and Secondary Trauma Effects at Tribunals: The ECCC Example’, in B. Van Schaack, D. Reicherter and Y. Chhang (eds) *Cambodia’s Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*. Phnom Penh: Documentation Center of Cambodia.

18 Supra 16.

## BOX 5

## Individualistic and Collectivistic Cultures

Although studies indicate that traumatized individuals tend to focus on central, rather than peripheral, events, how different cultures process and describe memories has also been the subject of several studies:

*'Language and culture have been found to influence autobiographical memory. Members of individualistic cultures tend to recall autonomous, lengthy, specific, emotionally elaborate and self-focused memories, which emphasize individual roles, experiences and emotions. Conversely, members of collectivistic cultures tend to provide more memories of social interactions and significant others, focusing more on the roles of other people, collective activities, general routines and emotionally neutral events.'*

Marschner, L "Implications of Trauma on Testimonial Evidence in International Criminal Trials" in Alston, P and Knuckey, S, (eds) *The Transformation of Human Rights Fact-Finding*

## 3. Engaging Witnesses with Memory Disorders

The reasons outlined in section 2 explain why certain victims survivors may provide inconsistent narratives and lack of detailed knowledge of an attack. In evaluating the credibility of survivor/witnesses, practitioners must be aware that **inconsistencies in testimony are natural for traumatized victims, and do not necessarily make them less credible as witnesses.**

## BOX 6

## Reliability vs Credibility

Practitioners must also be able to distinguish between reliability (accuracy of the testimony) and credibility (whether a person is being truthful in their testimony) when assessing witness statements and analysing the information gathered.

Reliability refers to accuracy of a witness's testimony whereas credibility is whether or not a witness appears to be speaking the truth or whether they come across as honest.

A witness may come across as credible but be completely unreliable or inversely, a witness may have a reliable memory but may not appear credible.<sup>19</sup>

Traumatized individuals can be both credible and reliable witnesses. A case-by-case approach is necessary to determine the extent to which the trauma may have affected memory, and how. Although the majority of practitioners interviewing victims will not have the necessary skills to clinically assess the impact of trauma, medical assessments should be sought and submitted as evidence in cases where traumatized individuals want to provide their testimony as evidence of sexual violence. (Cross-reference Chapter 10: Types of Evidence of Sexual Violence, Box 10: 'Understanding medico-legal evidence'.)

<sup>19</sup> Memon, A. (2012) 'Credibility of Asylum Claims: Consistency and Accuracy of Autobiographical Memory Reports Following Trauma', *Applied Cognitive Psychology*, 26, 5: 677–679.

## BOX 7



## Case law example – Anto Furundžija case

Anto Furundžija was the local commander of the HVO (Croatian Defence Council) special police unit (the ‘Jokers’) in the Lasva River Valley, Central Bosnia. During the Croat-Bosniak war, in May 1993, the ‘Jokers’ detained a woman, witness ‘A’ in a place referred to as ‘the bungalow’ near Vitez, where she was interrogated by Furundžija. During the interrogations, witness A was subjected to sexual assaults, rape and other physical and mental suffering.

During the trial, Furundžija’s lawyers argued that witness A’s memory was inaccurate as a result of the trauma she experienced. What was in question was witness A’s memory of her traumatic experience, not the experience itself, and her specific recollection of the defendant and whether he was present during her abuse. The defence pointed towards inconsistencies in witness A’s testimony and submitted evidence during the trial showing that traumatic memory recall—that is, the ability to remember traumatic events—was erratic in survivors of PTSD.

The prosecution, in turn, argued that inconsistency does not imply inaccuracy because inconsistencies could be the result of temporary memory loss followed by an increase in memory. They also argued that a PTSD diagnosis does not necessarily influence the facts reported by the witness and that traumatic experiences in individuals with PTSD can in fact be extremely accessible. Both sides presented expert testimony in support of their arguments.

*‘The Trial Chamber finds that, despite her inconsistencies on the finer details which the Defence has validly pointed out, Witness A is a reliable witness. (...) The Trial Chamber is of the view that survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses.’* Prosecutor v. Anto Furundžija, ICTY Case No. IT-96-17/1-T. para 113.

Trial Chamber II found Furundžija guilty of torture and outrages upon personal dignity including rape (as violations of the laws or customs of war). He was sentenced to 10 years of imprisonment. The court’s decision included the reasoning that a PTSD victim’s primary memory is enough to establish that the event occurred, and other inconsistencies did not diminish witness A’s credibility.



# Chapter 16 Contents

<b>CHAPTER 16: Sexual Violence against Children .....</b>	<b>245</b>
<b>A. Introduction.....</b>	<b>245</b>
<b>B. Sexual Violence against Children .....</b>	<b>245</b>
1. Forms of Sexual Violence .....	245
2. Scale and Scope.....	245
<b>BOX 1</b>	
Recognising the scale of sexual violence against children .....	246
3. Experiences and Impacts.....	247
<b>BOX 2</b>	
Sexual violence and child recruitment .....	248
<b>C. Legal and Procedural Framework .....</b>	<b>249</b>
1. Child-Specific Legal Framework .....	249
2. Rules of Procedure related to children .....	249
<b>BOX 3</b>	
Child victims and international court tribunals.....	250
<b>D. Ethical Considerations .....</b>	<b>251</b>
<b>BOX 4</b>	
Child-sensitive approach to accessing justice .....	251
1. Do No Harm.....	252
<b>BOX 5</b>	
Informed consent and assent of children.....	254
2. Right to Participation .....	256
<b>E. Core Guidance on Involving Children in the Documentation Process .....</b>	<b>257</b>
1. Preliminary Research and Investigative Planning.....	257
<b>BOX 6</b>	
Common signs and symptoms of sexual violence according to age.....	258
<b>BOX 7</b>	
Engaging child survivors and witnesses .....	260
2. Interviewing .....	260
<b>BOX 8</b>	
Creating a child-friendly atmosphere .....	261
<b>BOX 9</b>	
Determining a child's understanding of instructions for the interview .....	262
<b>BOX 10</b>	
The risk of contamination .....	262

# CHAPTER 16: Sexual Violence against Children

## A. Introduction<sup>1</sup>

Like adults, children can be victims of CARSV. Available statistics increasingly reflect the vulnerability of children to sexual violence. However, statistics continue to be underestimations (see Chapter 2: Understanding Sexual Violence/Forms of Sexual Violence). Under-reporting by children leads to few responses addressing their specific needs, which in turn leads to a vicious circle of further under-reporting. Additionally, data is not always disaggregated by age, and so fails to distinguish between victims under or above the age of 18. Public and media perceptions often do not distinguish between adult women and adolescent girls as victims.<sup>2</sup> Information on boys is virtually non-existent.

The reality is that, whilst girls and boys in all settings are vulnerable to all forms of sexual violence, children are at heightened risk in conflict zones. Their vulnerability increases as community protection structures break down, children and families are displaced and children become direct targets.

When documenting CARSV, practitioners should specifically consider whether and where there may be child victims—just as documenting conflict-related crimes against children must take into account potential crimes involving sexual violence.

Involving children in the documentation of sexual violence can be beneficial both to promote children's rights and to secure their access to justice. However, documentation must be done with appropriate care and consideration, to ensure no additional

harm is done. This chapter contains specific guidance on documenting violence against children; the general guidance provided in other chapters of the Protocol should equally be applied.

## B. Sexual Violence against Children

### 1. Forms of Sexual Violence

Gender-based violence often results from power inequalities based not only on gender but also on age (adult/child). Children may be directly targeted due to social perceptions, and status, of children in society.<sup>3</sup> For example, not being able to protect children may be seen as a failure of families or society as a whole, and tainting a child with rape is symbolic of destroying the future. Rape against children can be used as a form of reprisal against individuals, families or communities. Perpetrators may also seek to attack the fundamental values and social fabric of the community through maximising the humiliation and debasement of children and witnesses. As with adults, children experience various forms of sexual violence, including forced sodomy and other forms of rape, sexual exploitation, forced prostitution, sexual slavery, forced marriage and forced pregnancy. Children are also forced to watch parents and other family members being sexually assaulted. (See Chapter 2: Understanding Sexual Violence for descriptions of forms of sexual violence and Chapter 17: Sexual Violence against Men and Boys, Box 5: 'Examples of common forms of sexual violence against men and boys.')

### 2. Scale and Scope

It is difficult to find data on the number of children affected by sexual violence in conflict settings, for

1 The Convention on the Rights of the Child defines a child as 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. Ascertaining the exact age of an individual survivor/witness is key to establishing how to secure informed consent, as well as having implications for criminal proceedings. Where children do not possess birth registration documents, other measures should be taken to identify the age of the child, including through baptismal records, community records of births, and temporary or emergency systems set up by humanitarian organisations. For additional guidance see UNICEF, Innocenti Research Centre, Innocenti Insight: 'Birth Registration and Armed Conflict', 2007.

2 For example, media and advocacy around ICTR's case against Jean-Paul Akayesu, champions the 'three brave women' who came forward to make the charges of sexual violence possible. While this is true, one of the three was only 15 when she was raped, and 17 at the time of the trial.

3 HEAL Africa (2012) *North Kivu – Sexual Violence Targets Children*, pp 10-11, available at <http://www.heal africa.org/wp-content/uploads/2012/09/sexual-violence-targets-children-2012.pdf>

the same reasons that data is scarce for adults: under-reporting (due to insecurity linked to the conflict, uncertainty or breakdown of reporting mechanisms, lack of faith in the justice system, shame, risk of stigma or reprisals, lack of safe and confidential support services or access to existing services, etc.) and the lack of coordinated data collection. For more details, see Chapter 2: Understanding Sexual Violence. Reporting by child and adolescent victims (both girls and boys) is further hampered by a lack of age-appropriate reporting mechanisms and services. The frequent lack of age disaggregation of the data that does exist limits the ability to get a clear picture of the full scale of sexual violence against children.

## BOX 1

### Recognising the scale of sexual violence against children

There is no question that sexual violence against children is a significant problem; it is estimated that 120 million girls and 73 million boys have experienced some form of sexual violence.<sup>4</sup> Even during conflict, the majority of sexual violence against children is perpetrated by family members and acquaintances. The breakdown of legal and protection mechanisms also makes them more vulnerable to violence in the community.

Although statistics on child survivors are scarce, in some conflicts, children account for more than 50 per cent of reported cases:

- » Sexual violence against children is reportedly on the increase in Afghanistan, including the practice of *bacha bazi* ('dancing boys', involving sexual exploitation of boys by men).<sup>5</sup>
- » Of the 16,000 cases of sexual violence recorded by the United Nations Population Fund in the Democratic Republic of Congo in 2008, 65 per cent of the survivors were children.<sup>6</sup> At HEAL Africa's hospital in Goma, more than 70 per cent of individuals receiving medical support for sexual violence are under the age of 18.<sup>7</sup>
- » In Sierra Leone, girls under 18 account for 73 per cent of female sexual violence survivors supported by the International Rescue Committee (IRC), with 23 per cent being under the age of 11.<sup>8</sup>
- » In 2009 in Colombia, more than half of the victims of sexual violence helped by the International Committee of the Red Cross (ICRC) were children.<sup>9</sup>
- » In a 2010 UNICEF survey in the Central African Republic, more than 50 per cent of children reported sexual exploitation and abuse.<sup>10</sup>

Children's age, size and inherent dependency on

- 
- 4 UNICEF, 'Hidden in Plain Sight: A Statistical Analysis of Violence Against Children' (September 2014), p. 206; United Nations Secretary-General's Study on Violence against Children (2006), p.12.
  - 5 See, for example, 'Annual Report of the UN Secretary-General on Children and Armed Conflict', UN Doc A/70/836-S/2016/360, para 25.
  - 6 World Vision (2014) *Journey of a Survivor* London: World Vision.
  - 7 HEAL Africa (2012) *North Kivu – Sexual Violence Targets Children*, pp 10-11, available at <http://www.healafrika.org/wp-content/uploads/2012/09/sexual-violence-targets-children-2012.pdf>
  - 8 International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF. p 25.
  - 9 Save the Children (2014) *Unspeakable Crimes Against Children: Sexual Violence in Conflict*. London: Save the Children.
  - 10 UNICEF (2012) *Situation Analysis of Children and Women in the Central African Republic*. New York: UNICEF.

*...lack of age disaggregation of the data that does exist limits the ability to get a clear picture of the full scale of sexual violence against children.*

adults may make them particularly vulnerable to sexual violence.<sup>11</sup> Despite the lack of data, it is clear that some children, including refugees and IDPs (particularly those who are separated from their families), ‘child soldiers’,<sup>12</sup> children born of rape, members of child-headed households, working children and young mothers are especially vulnerable to sexual violence.<sup>13</sup>

### 3. Experiences and Impacts

While children who experience sexual violence face physical, psychological and socioeconomic consequences similar to adults (see Chapter 2, Understanding Sexual Violence/Impact of Sexual Violence), their age, physical size, developmental stage and social environment also lead to distinct impacts, including:<sup>14</sup>

- » **Physical harm:** Due to their physical size, child survivors can experience more severe harm, including internal lacerations and bleeding, which can lead to long-term damage to reproductive and other internal organs, fistula and infections. Because their bodies are not fully developed, adolescent girls who give birth, and their babies, are at greater risk of health complications and mortality. The risk is greatest for girls under the age of 16.<sup>15</sup>
- » **Psychological harm:** Children often feel guilt and confusion about what has happened to them. Children’s understanding of their bodies and sexuality develops as they grow older. Sexual abuse has a negative impact on a child’s ability to trust others (particularly adults if the perpetrator was an adult) and to develop healthy attitudes towards sexuality. Younger children may find it very difficult to understand and describe what has happened to them. As with

adult victims, children may experience post-traumatic stress, which can involve any of the following: intrusive memories of the violence, flashbacks, emotional numbness, increased arousal and nightmares. Self-harm, suicidal thoughts and suicide may also occur for child victims, or children born of rape.

- » **Socio-economic harm:** As a result of the physical and psychological harm linked to sexual violence, children may withdraw from social environments in the community (particularly school). The shame and guilt may be initiated by the child (and lessen their self-respect), but more often it comes from peers and the community (with child survivors seen as ‘tainted’, bringing dishonour to the family, a ‘bad influence’, etc.). In some cases girls and women who have been raped have been killed by their families in so-called ‘honour killings’. A girl who becomes pregnant may be forced to withdraw from school. The social impacts of withdrawal are immediate, with the child losing friends and ability to engage in normal activities. The lack of educational opportunities also has long-term economic effects. Sexual violence against children contributes to cycles of poverty, violence and disempowerment; children are left with physical and emotional difficulties preventing them from fulfilling their potential.

11 International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF. p 25.

12 The term ‘child soldiers’ refers to all children who are associated with armed forces and armed groups, including children used as porters, spies, cooks, sex slaves, etc. See Box 2 for more information on sexual violence and child recruitment.

13 World Vision (2015) *No Shame in Justice*. London: World Vision. p 19.

14 International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF.

15 World Health Organization, ‘Adolescent Pregnancy’, *MPS Notes*, 1/1 (October 2008).

*There is strong evidence that where child recruitment is being documented, sexual violence is also occurring against children and adults...*

**BOX 2****Sexual violence and child recruitment**

Child soldiers (more accurately termed 'children associated with armed forces and armed groups') encompass more than individuals under the age of 18 who take direct part in hostilities. According to the Paris Principles, a 'child associated with an armed force or armed group' refers to any person below 18 years of age who is or has been recruited or used by an armed force or armed group in any capacity, including but not limited to boys and girls being used for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>16</sup> There are an estimated 200,000–300,000 children associated with armed forces or armed groups today, many of whom (both girls and boys) experience sexual violence prior, during and/or following their association—although they are often classified as victims of only one of the crimes. In disarmament, demobilisation and reintegration processes, sexual violence is often overlooked.

According to the 2016 reports by the UN Secretary General, on Sexual Violence in Conflict and on Children and Armed Conflict, the unlawful recruitment and use of children in hostilities is happening in all of the conflict-affected countries where sexual violence is documented.<sup>17</sup> There is strong evidence that where child recruitment is being documented, sexual violence is also occurring against children and adults (and vice versa). The sexual violence may be linked to the recruitment, but is also perpetrated independently.

**Key to note**

- » When documenting or investigating sexual violence, be sure to look for cases linked to child recruitment and detention.
- » Where child recruitment is already documented, take this as a sign that sexual violence is probably also occurring.

<sup>16</sup> UN Children's Fund (2007) *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*. New York: UNICEF, para 2.1.

<sup>17</sup> 'Annual Report of the UN Secretary-General on Children and Armed Conflict', UN Doc A/70/836–S/2016/360, 20 April 2016; Report of the Secretary-General on Conflict-Related Sexual Violence, UN Doc S/2016/361/Rev.1, 22 June 2016.

## C. Legal and Procedural Framework

### 1. Child-Specific Legal Framework

The Convention on the Rights of the Child, specifically requires states to take all appropriate measures to protect children from all forms of violence, exploitation and abuse, including sexual violence and armed conflict.<sup>18</sup> Parties to an armed conflict must comply with international child protection standards and norms, including provisions in the 1949 Geneva Conventions and their 1977 Additional Protocols, specifically highlighting the protection and care of children during armed conflicts.<sup>19</sup>

Rape and other forms of sexual violence against children are considered a 'Grave Violation' against children in armed conflict<sup>20</sup> and armed forces and groups who commit these violations are listed in the UN Secretary-General's Annual Report on Children and Armed Conflict.<sup>21</sup> Listing in the report triggers the creation of a country-level Monitoring and Reporting Mechanism (MRM) to document and report on the violations. While the mandate for the MRM comes from the UN Security Council, its work is based on the international legal framework and so it can be a good source of information and collaboration when documenting or investigating sexual violence.

### 2. Rules of Procedure related to children<sup>22</sup>

Children's ability to access justice for sexual violence committed against them is partly dependent on the national legal framework and local procedures.<sup>23</sup> Child-sensitive or child-friendly justice requires an approach that balances a child's right to protection, with respect for all other rights (including the right to participation). This means it must be:

- » accessible and efficient (speedy)
- » age appropriate
- » fosters children's ability to understand the proceedings
- » respects their privacy and dignity.

However, national and local laws and practices often make access to justice difficult for children. Justice systems are by nature complex, and particularly difficult for children to understand and participate in.

18 Convention on the Rights of the Child, Arts 19, 34 and 38(4).

19 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art 77(1) ('*children shall be the object of special respect and shall be protected against any form of indecent assault*'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art 4(3) ('*children shall be provided with the care and aid they require...*').

20 UN Security Council Resolution 1261, S/RES/1261 (1999), 30 August 1999.

21 UN Security Council Resolution 1882 (S/RES/1882 (2009)), para. 3.

22 See Report of the UN High Commissioner for Human Rights, 'Access to Justice for Children', UN Doc A/HRC/25/35 (16 December 2013).

23 Although international tribunals may provide a forum for justice.

### Child victims and international court tribunals

Only a few cases in international courts and tribunals specifically refer to child victims of sexual violence,<sup>24</sup> and even fewer include the testimony of these children. These include:

- » In the *Charles Taylor* case, the SCSL specifically included sexual violence against girls in the charges.<sup>25</sup>
- » In the *Akeyesu* case at the ICTR,<sup>26</sup> witness OO was only 15 when she was raped, and 17 at the time of the trial.
- » The *Kunarac et al* case<sup>27</sup> (the Foča trials) at the ICTY, included the testimony of two victims who were under the age of 18 at the time of the mass rapes. In this trial, witnesses also testified to crimes against another child victim who was unavailable to testify.
- » Witnesses in the *Bemba* trial at the ICC included testimony about the rape of children. One of the witnesses who testified was a girl of 12 when she was raped. However, she was over 18 at the time of the trial.

The ICC's Policy on Children<sup>28</sup> recognises the gravity of crimes affecting children and the challenges faced to date in addressing them—and requires particular attention be paid to these crimes (see details in section D, Ethical Considerations). Crimes against children can be recognised in a number of ways, for example through direct testimony of the victim or eyewitnesses in court, or introduction of other evidence such as forensics or pregnancy. Applying for victim status<sup>29</sup> is another means by which child victims and the crimes against them can be recognised in the criminal process. See Chapter 3: Accountability Avenues and Remedies and Chapter 6: Reparations for the context of victim status.

Circumstantial evidence alone can be enough to establish crimes of sexual violence and charges may be proven through other means, not involving the testimony of children. However, it is important to balance the imperative to 'do no harm' with a child's right to participate (see Section D: Ethical Considerations below).

24 While it is generally believed that the vast majority of cases refer to adult victims, testimony and references do not always disaggregate by age, meaning the number may be higher than perceived.

25 Aptel, C. (2010) *Children and Accountability for International Crimes: The Contribution of the International Criminal Courts in Children and Transitional Justice: Truth Telling, Accountability and Reconciliation*. New York: UNICEF, INNOCENTI Research Centre. p 17.

26 The *Prosecutor vs. Jean-Paul Akayesu*, Case No ICTR-96-4-T.

27 *Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT-96-23-T and IT-96-23/1. This trial was also ground-breaking as it was the first case in which the accused were convicted of rape as an international crime.

28 Office of the Prosecutor, International Criminal Court (2016) *Policy on Children*. The Hague: ICC. Available at [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)

29 For detailed information on victim status and participation of victims at the ICC, see International Criminal Court, *A Guide for the Participation of Victims in the Proceedings of the Court*, <https://www.icc-cpi.int/NR/rdonlyres/8F-F91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> .

...children can be credible witnesses...

## D. Ethical Considerations

### BOX 4

Investigators and documenters are often hesitant to interview children or support them as witnesses to crimes,<sup>30</sup> both afraid to do harm to the child and questioning how much accurate information can be obtained from them. The concerns for the child's well-being are valid. However, children can be credible witnesses and, if done correctly, interviewing children can provide an important perspective on sexual violence in conflict, distinct from that of adults, and can promote their right to participation and access to justice.

### Child-sensitive approach to accessing justice

The child-sensitive approach outlined in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime<sup>31</sup> and in the ICC Policy on children provides a solid reference for those documenting or investigating sexual violence against children. The key principles of this approach are:

- » recognition of both the vulnerability and capability of a child, based on age and maturity
- » adherence to the principles of the UN Convention on the Rights of the Child, including non-discrimination, the best interests of the child and the right of the child to express her or his views on all matters affecting them (and have those views listened to and taken into consideration)<sup>32</sup>
- » ensure that all engagement with children is undertaken with due care and planning, including undertaking psycho-social assessments,<sup>33</sup> obtaining informed consent/assent and assessing the relevance of potential evidence and identifying referral pathways *prior to deciding whether to interview the child*, as well as ensuring interviewers are properly trained and limiting the number of individuals interacting with the children.

30 There may be a number of barriers to investigating and prosecuting cases with child victims, including not only the ethical considerations mentioned here but also considerations on how and whether a child can testify in court and if the courtroom set up and procedures are child-friendly.

31 UN Doc. E/RES/2005/20, 22 June 2005, [https://www.unodc.org/pdf/criminal\\_justice/Guidelines\\_on\\_Justice\\_in\\_Matters\\_involving\\_Child\\_Victims\\_and\\_Witnesses\\_of\\_Crime.pdf](https://www.unodc.org/pdf/criminal_justice/Guidelines_on_Justice_in_Matters_involving_Child_Victims_and_Witnesses_of_Crime.pdf)

32 See ICC Policy on Children, *supra* note 28, paras 6-8.

33 There are different schools of thought on what type of psychosocial assessment (and when) will ensure children's care and protection is maximised without risking their evidence being tainted. It is important to have some form of assessment of the child's capacity to decide to participate and be interviewed without undue negative impacts. See ICC Policy on Children, *supra* note 28.

*Only practitioners who possess strong experience in interviewing, or expertise in working with, children should be involved in interviewing children.*

When deciding whether to interview children on their experiences of sexual violence, it is important to balance the do no harm obligation (outlined in Chapter 7: Do No Harm) with the need for information and children's right to participation (if they choose). Where the risk of harm outweighs the need for information or benefits the child may themselves perceive in participation, alternative sources of information on the violations should be sought. However, it is wrong to assume automatically that it is not safe to or in their best interests to interview children; a case-by-case assessment should be made.

### 1. Do No Harm

The four principles for mitigating harm outlined in Chapter 7 apply equally when the victim or witness is a child. In addition, special precautions must be taken when working with child victims and other witnesses to ensure no further harm occurs.

Great care must be taken in approaching child survivors and witnesses—if practitioners have not received the necessary training and are not certain that they can approach children appropriately, cannot gain informed consent, cannot guarantee children are given appropriate access to referral services, or do not know how to access resources to support children in case he or she is re-traumatized by the interview, they should not attempt to approach them for documentation purposes.

Only practitioners who possess strong experience in interviewing, or expertise in working with, children should be involved in interviewing children.

### Assess risks

When assessing the threats to a child survivor/witness, it is important to look at:

- » individual characteristics of the child (age, developmental stage, maturity, education, disability, gender, membership in minority group, etc.)
- » social and cultural context (safety and situation of environment in which living, primary caregiver, child's relationships with family/caregivers, etc.)
- » particular vulnerabilities (such as displacement, sexual transmitted diseases, being parent or head of household).

### Coordinate

With a heightened risk of re-traumatization in children, the same principles of coordination apply. Care should be taken to ensure that a properly mapped out response protocol is in place and that coordination is carried out with child protection mechanisms, including the Monitoring and Reporting Mechanism on Children and Armed Conflict established by UN Security Council Resolution 1612 (where these exist)<sup>34</sup> and the Child Protection Area of Responsibility within the UN Protection Cluster (if present).

<sup>34</sup> S/RES/1612, 26 July 2005. The MRM is set up in countries where Parties to the conflict are listed in the Annex of the UN Secretary-General's 'Annual Report on Children and Armed Conflict'.

### Secure informed consent/assent

The section on obtaining informed consent in Annex 7: Interview Checklist equally applies to interviewing children, with the additional caveats:

- » Understand that securing informed consent must be done with the child's specific age, needs and level of understanding in mind. Dependent on national law regarding the age of consent, informed consent to participate in the documentation must be obtained from the parent or guardian of the child and/or informed consent or assent obtained from the child. (See Box 5 below for more information.)
- » Be aware that children may or may not have previously shared details about the sexual violence with their parents or guardians; some children may not even have realised that what happened constituted sexual violence. If the child has not told her or his parents or caregiver, caution should be observed before deciding to do so, with the best interests of the child and the child's age and maturity being primary considerations.
- » Children should be informed of the risks associated with participation in the documentation process in a careful, age-sensitive manner in order to avoid frightening them unnecessarily.
- » Children must be given all possible options and consequences of options by trained staff who can respond to the individual capabilities of the child. Children have the right to be told what rights are available to them under the UN Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
- » Practitioners should carefully explain to children what happens at each stage of the documentation process and what may be expected from them.
- » Children must be told that they have the right to stop the interview, pull out of the process at any time, or not to answer questions if they choose.
- » Children will often say 'yes' if they don't understand the question. In order to achieve informed assent/consent, it may be necessary to ask the child to tell the interviewer what they are consenting to, so that their genuine understanding can be checked.

## BOX 5

## Informed consent and assent of children

When dealing with a child, it is important to obtain informed consent from the parent or person with a duty of care (if required and appropriate) as well as consent/assent from the child herself or himself. Where a child has the legal capacity to consent to participate in the process, this consent is all that is required unless the child's level of maturity and development would make 'informed' consent difficult. If the child is below the age of consent to participate, consent is required from the parent or adult with a duty of care and informed assent must be given by the child.

Generally, parents or guardians are responsible for giving consent, although older adolescents may be legally able to provide consent in lieu of their parents. For younger children who are by definition too young to give informed consent, but old enough to understand and agree to participate, the child's 'informed assent' (expressed willingness to participate in the interview) is sought.<sup>35</sup>

In the absence of clear laws, the following general rules should apply (although maturity must also be taken into consideration):<sup>36</sup>

- » **aged 16-18:** informed consent given by the child and consent from the parent or adult with a duty of care sought only if deemed necessary in the circumstances
- » **aged 12-15:** informed consent should be given by the parent or adult with a duty of care, unless it is not deemed appropriate in the circumstances, and informed assent by the child
- » **below age 12:** informed consent should be given by the parent or adult with a duty of care and assent given by the child.

In all cases, the wishes of the child take priority and they should not be interviewed unless they agree to participate.

35 International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF.

36 Institute of Education, University of London, *The Research Ethics Guidebook, Research with Children*. Online only, available at <http://www.ethicsguidebook.ac.uk/research-with-children-105>.

*It is... ..vital that documenters... ..know if they have a reporting obligation and to whom disclosures must be reported.*

### Respect confidentiality

Although the principles of confidentiality outlined in Chapter 7: Do No Harm, apply, there may be additional limitations when a child divulges sexual violence against them. Depending on the national law, certain categories of professionals (including social workers, doctors, teachers, and other service providers) may have a duty to report offences involving a child victim or witness.<sup>37</sup> It is therefore vital that documenters do not promise total confidentiality, and know if they have a reporting obligation and to whom disclosures must be reported. It is equally important for a child to understand this limitation on confidentiality.

### Refer/coordinate with referral mechanism

The ability of a survivor/witness to access referral and assistance services may be impacted by her or his age (as well as gender). In settings of armed conflict and post-conflict, services may be weak or non-existent. When dealing with child survivors and witnesses, documenters must ensure that a protocol is set up before any interviews are conducted and they are referred to appropriate services or support, which will meet their immediate and long-term needs in some form, including:

- » **Physical:** After referrals for emergency medical treatment, children can have long-term health problems and will need effective treatment.
- » **Psychological:** Children may need support to cope with post-traumatic stress and with forming trusting relationships and understanding their feelings.
- » **Social:** Children may need support to reintegrate into school settings (where these exist in some form) and help to develop positive relationships.

- » **Care arrangements:** Children need a secure place to recover if abuse happened in the home or if they face continued harm or neglect by staying in their current home.

Availability and accessibility of services should be included as part of the Do No Harm assessment. It is important to note that practitioners may not be aware of violence or abuse happening in the home, but it may be divulged during an interview. Additionally, Do No Harm principles still apply to the continued safety of a child whose environment may put him or her at risk (for example, when reporting of the sexual violence becomes known).

As well as the detailed reaction and referral process mapped out in Chapter 7: Do No Harm, it is important to identify services for children that:

- » are specific to the age and gender of the child victim and appropriate to their ability, culture, etc.
- » provide access to child and adolescent-friendly spaces
- » provide access to community-based child-protection systems, including child-protection committees and child-led groups.

Practitioners dealing with child survivors/witnesses should be sure to:

- » make appropriate referrals where children are at risk from reduced or absent social support, including the risk of children becoming isolated from families and experiencing social stigma
- » establish clear practices on storing, accessing and sharing confidential information to ensure that children's best interests are always prioritised
- » support parents and carers, informing them of services available to help both child and family.

<sup>37</sup> See, as an example, the 'Model Law on Justice in Matters involving Child Victims and Witnesses of Crime', Art 3.

*Use interpreters who have received special training or have prior experience of working with children.*

## 2. Right to Participation

Dominique, 14 year old girl in Goma, Democratic Republic of Congo:

*'What he did to me was very bad. I still have nightmares. I wanted the police to do something. I wanted to tell my story, but no one was listening. It is like what happened to me does not matter. But then these people who helped me go back to school came and wanted to hear. They took my story and other peoples' and took them to the police and now this man has been arrested. I hope he will go to prison now and I can start my life.'*

The right to participate is however an individual right, and also implies a right not to participate. The role of practitioners is to understand whether the child in question is willing to participate and find the best and safest way for her or him to do this. Each child is different so the decision on whether to interview the child should involve the child and weigh the potential harm and the wishes of the child with any competing interests linked to the documentation.

Children have a right to express their views on all matters affecting them and have these taken into consideration. The UN Convention on the Rights of the Child specifically states that *'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body'*.<sup>38</sup> Documentation of sexual violence crimes that fails to consider the possibility of child victims or hear their voices is not compatible with these rights.

Like adult survivors/witnesses, some children will find involvement in the documentation of the crimes to be an empowering experience, and even part of their recovery. Information gathered may, for example, improve recognition that children are victims of sexual violence (if this is in doubt in the community), provide the foundation for an application for victim status at the ICC, or allow the child to access justice in other ways. The role of practitioners is to understand whether this is relevant to the child in question and find the best and safest way for them to do this.

<sup>38</sup> UNCRC, Art 12.

## E. Core Guidance on Involving Children in the Documentation Process<sup>39</sup>

Whereas both adults and children are affected by CARSV, expediency and Do No Harm often mean that obtaining information from adult victims and witnesses is given priority. However, as noted above, it is sometimes in a child's best interests to participate in the documentation and if done properly, can have great benefit to the outcomes.

The considerations mentioned below are specific to documenting crimes and violations against children and should be used with the general guidance provided in other chapters of this Protocol, from preliminary research and planning of the documentation process through interviewing of victims and witnesses. When documenting crimes and violations against boys, also take into account the guidance provided in Chapter 17 relating to male victims. In all cases involving children, interviews should be carried out by individuals with appropriate training.

### 1. Preliminary Research and Investigative Planning

When documenting CARSV, a decision will need to be made whether or not to interview children as part of the process. A preliminary decision on whether it is safe and feasible to interview children should be made during the planning process, based on the risk assessment and mapping of referral pathways. A primary consideration must be the availability of interviewers with the capacity (competency, experience and resources) to interview children. This decision should be continually considered throughout the documentation process.

During the initial research and analysis phase, practitioners should:

- » **Consider all possible victims:** Expressly take into account the possibility that girls and boys may have been victims of sexual violence, even in contexts where there are no allegations of sexual violence or the allegations relate only to adults. The lack of age- (and gender-) appropriate services and presumptions based on mandates or biases may result in more common allegations of sexual violence against women.
- » **Indicators:** Be aware of red flags that could indicate that sexual violence is being perpetrated against children, including evidence of child recruitment by armed forces and groups (see Box 2 above) and children exhibiting common signs and symptoms of sexual abuse (see Box 6 above).
- » **Risks:** Research context-specific attitudes towards children and sexual violence (for example, in many cases an adolescent girl who is no longer a virgin is automatically seen as 'promiscuous' and blamed for the rape) and the stigma a boy or girl may face at home or in school if he or she is identified.
- » **Referrals:** As noted above, it is important to map and vet potentially suitable formal and informal services to which children can be referred for protection and/or support. In the absence of child-centred referral pathways, consider what is available or could be set up to address the needs of children of different age groups.

<sup>39</sup> Information in this section is drawn substantially from the pilot training course 'Monitoring and Investigating Conflict-related Violations Involving Children', developed jointly by Justice Rapid Response, the Roméo Dallaire Child Soldiers Initiative, and the Institute for International Criminal Investigations and piloted in August 2016 in Amman, Jordan.

## BOX 6

Common signs and symptoms of sexual violence according to age <sup>40</sup>

Below are some common reactions of children to experiencing sexual violence. When interacting with children in the course of documentation planning or information gathering itself, practitioners should be aware of potential signs and proceed sensitively and with due care. This list is non-exhaustive and some of the symptoms described may be signs of trauma from causes other than sexual violence.

Common across all ages	<ul style="list-style-type: none"> <li>» having nightmares or sleep disturbances, or wanting to sleep all the time</li> <li>» exhibiting eating problems, such as eating all the time or not wanting to eat</li> <li>» displaying avoidance behaviour, including withdrawal from family and friends</li> <li>» displaying knowledge or interest in sexual acts inappropriate to their age</li> </ul>
Infants and toddlers (0-5)	<ul style="list-style-type: none"> <li>» clinging or unusually attaching themselves to caregivers</li> <li>» refusing to leave 'safe' places</li> <li>» developmental regression (such as loss of language, wetting or soiling accidents)</li> </ul>
Younger children (6-9)	<ul style="list-style-type: none"> <li>» similar reactions to children ages 0-5</li> <li>» having fear of particular peoples, places or activities, or of being attacked</li> <li>» refusing to go to school suddenly</li> <li>» touching their private parts a lot</li> </ul>
Adolescents (10-19)	<ul style="list-style-type: none"> <li>» showing signs of depression (chronic sadness), crying or emotional numbness</li> <li>» having suicidal thoughts or tendencies</li> <li>» having problems in school, changes in school performance or avoidance of school</li> <li>» displaying anger or expressing difficulties with peer relationships, fighting with people, disobeying or disrespecting authority</li> <li>» self-destructive behaviour (drugs, alcohol, self-inflicted injuries)</li> <li>» pregnancy</li> <li>» developing sexually transmitted infections; mouth ulcers, anal and vaginal bleeding and pain</li> </ul>

40 International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF. p 34.

During the documentation planning stage:

- » **Documentation team:** Carefully select and train members of the documentation team (investigators, interpreters, translators, intermediaries, analysts and other support staff) and ensure that:
  - » they have the necessary capacity (experience, skills and attitudes) to understand and sensitively deal with child sexual violence (e.g. create the appropriate atmosphere to elicit information about sexual violence against child victims, are aware of signs of distress and know how to avoid re-traumatising child victims) (see Box 6 above)
  - » the team is sufficiently diverse in terms of gender, age, nationality, ethnicity, religion, language skills, etc., to provide children with an opportunity to choose who they interact with. Whilst child victims of sexual violence will not necessarily prefer an interviewer/interpreter of the same gender, being able to accommodate a preference may help build the necessary trust for them to open up. The same applies to other factors such as age, ethnic or religious background.
- » **Documentation plan:** Explicitly include sexual violence against child victims, and related legislation, court practices and terminology in the Documentation Plan (see Chapter 9: Planning/ Elements of the CARSV Documentation Plan).
- » **Time:** Remember that, while it may take time to build rapport between the interviewer and child, it is important to limit the duration of an interview with a child based on the child's age, development and other factors so as not to unduly tire or stress the child. It may be necessary, and in some cases beneficial, to have a second interview with the same interviewer. This is especially true when an initial interview helps to build the trust and information-sharing necessary for the child to decide whether or not to engage in a more in-depth interview, as well as giving the interviewer a chance to properly assess the child's level of maturity.
- » **Number of people:** It is also important to limit the number of people interacting with the child, based on the child's age, development and other factors. Part of the planning should be to determine whether the child has been interviewed by others (investigators, documenters, journalists, etc. to minimize interviews with different individuals asking the same questions).
- » **Resources and costs:** Consider whether different and/or additional resources may be required compared to those needed to document sexual violence against adult victims, in particular to identify and access sources of information (thus potentially increasing overall costs). For example, creating a child friendly environment takes time and effort and this should be factored in.
- » **Confidentiality:** As noted above, confidentiality related to child survivors or witnesses is complicated both by the requirement of informed consent from a caregiver and a potential obligation to report allegations of crimes against a child. These should both be considered but confidentiality should be maintained as far as possible.

*Use interpreters who have received special training or have prior experience of working with children.*

### BOX 7

#### Engaging child survivors and witnesses <sup>41</sup>

When engaging child survivors and witnesses, practitioners should in particular:

- » have training specific to approaching, interviewing and referring children to enable practitioners to respond to the specific vulnerabilities and capabilities of the child
- » understand how to apply the principles of Do No Harm, confidentiality and informed consent/assent specifically to children, including the use of age-appropriate techniques when communicating with survivors and other witnesses
- » have training on child interviewing skills that are age-sensitive, and take into account that interacting with very young children requires different skills from those required when dealing with adolescents
- » have training on techniques to prevent re-traumatising children, such as allowing them to feel bodily sensations and emotions (trembling, shaking and crying)
- » have training on local culture and perceptions of children within society
- » understand the distinct challenges that different groups of vulnerable children may face, such as the risk of rejection by communities that young girls and boys associated with armed groups and forces can experience
- » develop a glossary of terms and phrases used by children in the child's environment.

## 2. Interviewing

The purpose of interviewing a child is the same as for interviewing an adult: to obtain accurate and reliable information. Interviewing children should not be seen as a last resort, only to be done when the necessary information cannot be gathered from adults; it may be in the best interests of the child to tell her or his story. What differs is the manner in which the interview is conducted, taking additional precautions to ensure no harm is done and to take account of how children's memories, understanding of concepts and cognitive reasoning develop.

It is important to remember that:

- » The age and development of the child as well as the rights of the child are of the utmost importance.
- » While adolescents may not have the developmental maturity to be interviewed as adults, they should not be treated the same as young children in the interviewing process.
- » Even professionals working with children can underestimate the ability of children to discuss stressful events and overemphasise their fears.
- » Young children may not fully comprehend the sexual nature of certain behaviours and approaches to the discussion may need to be adapted.
- » A child's response might be affected by the presence of a parent or support person, so it might be better if that person is nearby but not in the room.

When interviewing children, practitioners should:

- » Use interpreters who have received special training or have prior experience of working with children. All interpreters should be trained in child safeguarding.
- » Use age and developmentally appropriate language that the child understands, using the same words used by the interviewee as much as possible. Simple, non-complex questions will elicit more complete responses. As much as possible use the language that the child is using. Do not import words into their vocabulary. For example, rather than qualifying a particular act as rape or assault, stick to the purely

<sup>41</sup> International Rescue Committee and UNICEF (2012) *Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings*. New York: IRC, UNICEF.

*Consider using drawing, mapping or dolls to assist the child in explaining what has happened to her/him.*

descriptive words to describe body parts and acts that occurred (once raised by the child).

### BOX 8

#### Creating a child-friendly atmosphere

When interviewing children, it is important to create an atmosphere that makes the child feel as relaxed and as comfortable as possible. Specific suggestions for doing so include:

- » dress appropriately, but not overly formally (police interviewers should wear civilian clothes)
- » sit at eye-level with the child (for young children, this may mean sitting on the floor)
- » if a child has a physical, sensory, learning, social or communication impairment, consult a specialist to help tailor the interview to the child's particular needs
- » consider using drawing (body mapping, drawing the scene, etc.) and other techniques that will help children feel less threatened by the process.

- » Ask the child to share in as much detail what happened, using open ended questions—'What happened? When? How?'—and not questions which imply an answer, like 'Did he hurt you in your private parts?' This will prevent the risk of conveying with your body language a sense that a particular question is frightening to ask or answer.
- » Create a child-friendly atmosphere which provides a safe space for the child to talk. Consider using drawing, mapping or dolls to assist the child in explaining what has happened to her/him.<sup>42</sup> (If using these tools, be sure to collect these drawings or mapping and to document carefully the actions the child made with the doll, etc., especially if the interview is not being recorded.)
- » Pay attention to signs and clues of distress and protect the child from additional psychological harm (using the Principles of Psychological First Aid<sup>43</sup> and putting a stop to the interview if these arise).
- » Ensure that your body language does not convey a sense of horror or project any shock onto what the child is saying—what documenters may find shocking may not correspond to the emotional thoughts of the child survivor/witness.
- » Sit at the same height as the child; keep your eyes aligned with the child's and do not bend over or look down at the child in order to promote feelings of respect and to minimise intimidation. Avoid anything (e.g. posture, manner of speaking) that will convey authority or superiority and cause fear or intimidation.

Following the PEACE model (see Chapter 11 for an introduction to the model), an interview with a child survivor/witness should follow the following format:

- » **Introduction:** Introduce yourself, and the interpreter if one is used, and explain the purpose and process of the interview in child-appropriate language. The introduction should also include 'instructions' for the interview (explaining that the child should tell the truth, say if they do not understand or do not know the answer to a question, correct the interviewer if something is wrong). For younger children or those who may be developmentally delayed, it is important to use examples and feel confident that the child understands the instructions.

42 McDonald, B., Rogers, P. (2014) 'Interviewing', in *Methodological Briefs: Impact Evaluation 12*, UNICEF Office of Research, Florence. p 4.

43 [www.nctsn.org/content/psychological-first-aid](http://www.nctsn.org/content/psychological-first-aid)

*(as) part of ...rapport building – identify a positive event the child experienced in the past and ask questions about this event.*

- » **Rapport building and trust:** Take special care and spend as much time as necessary building a rapport with the interviewee during the initial phase of the interview in order to create the necessary trust for her or him to open up. Using a positive activity or experience in the child's life should help both to learn more about the child and develop the rhythm and model of interaction for the interview through a free narrative discussion. It provides an opportunity to practice the use of open prompts and gives the interviewer a sample of the child's language use and the abilities to produce information.
- » **Practice episodic memory recall:** Particularly for younger children, it is useful for retrieving from their memory details of a past event. This may form part of or be in addition to the rapport building—identify a positive event the child experienced in the past and ask questions about this event. The topic should not be linked to the sexual violence experiences. The purpose of the recall practice is to help the child understand the level of detail the interviewer requires about the experiences to be discussed later.
- » **Transition to substantive issues:** From this event, the interviewer can introduce the topic being documented, making the child understand what is to be discussed without suggesting specific content. Phrasing for how to introduce the topic should be thought about in advance. The child should have an idea of why she or he is being interviewed, but a general framing of what the interviewer is documenting ('bad' incidents/violations occurring in the community, etc.) —without referencing specific concerns regarding sexual violence, can help focus the interview.
- » **Free recall:** The ideal is for the child to provide a free narrative, in as much detail as s/he can remember, with the interviewer using open prompts without leading or suggestive questions.
- » **Clarification questioning and closure:** See guidance in Chapter 11: Interviewing/Interview Framework.

**BOX 9**

### Determining a child's understanding of instructions for the interview

It is vital to establish whether the child actually understands the difference between the truth and a lie, feels comfortable disagreeing with the interviewer, or saying if they do not understand or do not know the answer to a question. This can be done using practical examples, asking for example: If I told you it is raining, would that be a truth or a lie?

**BOX 10**

### The risk of contamination

It is important to minimise the risk that the child's narrative may be influenced by outside actors. Significant lessons have been learned, for example in the International Criminal Court's case against Thomas Lubanga, in which the testimony of presumed former child soldiers was discounted in the judgement, due to contamination by intermediaries used to identify child witnesses.<sup>44</sup> The International Criminal Court's Policy on Children and Guidelines Governing the Relations between the Court and Intermediaries help to address these concerns.

44 Buisman, C. (2013) 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', *Northwestern Journal of International Human Rights*, 11, 3: 3.



# Chapter 17 Contents

<b>CHAPTER 17: Sexual Violence against Men and Boys .....</b>	<b>265</b>
<b>A. Introduction.....</b>	<b>265</b>
<b>B. Myths and Stereotypes .....</b>	<b>265</b>
<b>BOX 1</b>	
Common myths and assumptions about sexual violence against men and boys <sup>7</sup> .....	266
<b>C. Scale and Forms.....</b>	<b>267</b>
<b>BOX 2</b>	
Statistical data of male-directed sexual violence.....	267
<b>BOX 3</b>	
Victim experience.....	268
<b>BOX 4</b>	
<b>BOX 5</b>	
Examples of common forms <sup>14</sup> of sexual violence against men and boys.....	270
<b>D. Experience and Impacts .....</b>	<b>271</b>
<b>BOX 6</b>	
Involuntary erections and ejaculations .....	272
<b>BOX 7</b>	
Responding to male sexual violence .....	272
<b>E. Legal Frameworks .....</b>	<b>273</b>
<b>BOX 8</b>	
Survey of rape laws.....	273
<b>BOX 9</b>	
This is not an exhaustive list .....	274
<b>BOX 10</b>	
Case law example – Bemba judgement .....	276
<b>F. Specific Considerations throughout the Documentation Process.....</b>	<b>277</b>
<b>BOX 11</b>	
Key features of documentation processes taking male victims of sexual violence into account.....	277
1. Preliminary research and analysis .....	278
2. Planning .....	279
<b>BOX 12</b>	
Overcoming resistance to address male-directed sexual violence .....	280
3. Interviewing.....	280
<b>BOX 13</b>	
Indicators of male-directed sexual violence .....	281

# CHAPTER 17: Sexual Violence against Men and Boys

## A. Introduction

Sexual and gender-based violence is committed against men and boys in a number of conflict situations around the globe.<sup>1</sup> Despite the prevalence of this type of violence, there is still little acknowledgement of males as victims of CARSV. There is a general lack of reporting and documentation of sexual and gender-based violence against male victims. It remains a taboo and often controversial topic in many contexts, and the problem is generally underestimated and marginalised.

While judgements of international tribunals dealt with sexual violence against males as far back as 1997,<sup>2</sup> the UN Security Council explicitly recognised men and boys as victims of sexual violence in conflict for the first time in UNSCR 2106 of June 2013.<sup>3</sup> Legal, institutional, policy, procedural and financial frameworks relevant for documenting crimes under international law generally focus, as far as victims are concerned, on women and girls, and fail to properly recognise men and boys as potential victims. Except for the Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence against Men and Boys published in 2016 by the Institute for International Criminal Investigations,<sup>4</sup> most of the existing frameworks, guidance and resources fail to apply a gendered analysis that explicitly addresses the targeting of men and boys as well as women and girls.

As a result, specific psychological, social, medical and judicial needs of male victims are not well understood and generally unfunded. Consequently, male victims rarely receive the assistance they need and often face significant legal and practical obstacles to accessing justice.

## B. Myths and Stereotypes

Cultural norms of masculinity and deeply rooted gendered assumptions still prevail in many societies, making it difficult for many—from members of the general population to lawyers, investigators, prosecutors and judges—to contemplate men as victims of sexual violence, whether by male or female perpetrators. The misconception that men are immune to this type of violence is in particular based on the following gender stereotypes:

1. *Men are naturally aggressive, sexually demanding and invulnerable, while women are naturally peaceful, sexually passive and weak.* With such a mindset, it is easy to assume that perpetrators are necessarily male and victims necessarily female and to discount the possibility of men being the victims and women being the perpetrators.<sup>5</sup>
2. *Men are strong, in control and invulnerable.* Attitudes about masculinity and the role of men in society are often incompatible with the concept of men as victims of sexual violence, which can lead to victims being disbelieved.
3. *Association between male sexual victimisation and homosexuality.* The consequence of such a

1 Sivakumaran, S. (2007) 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law*, 18, 2: 253–276.

2 *Prosecutor v. Tadic*, ICTY Trial Judgment, Case No IT-94-1-T, 7 May 1997, at paras 726, 730.

3 '...sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as groups that are particularly vulnerable or may be specifically targeted, while also affecting men and boys and those secondarily traumatized as forced witnesses of sexual violence against family members' (emphasis added), UNSCR 2106, 24 June 2013, <http://women-peacesecurity.org/media/pdf-scr2106.pdf>.

4 Institute for International Criminal Investigations (2016) *Guidelines for Investigating Conflict-related Sexual and Gender-based Violence Against Men and Boys*. § 1.4, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546569/PSVI\\_training\\_-\\_violence\\_against\\_men\\_and\\_boys.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546569/PSVI_training_-_violence_against_men_and_boys.pdf).

5 Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict (2013) *Report of Workshop on Sexual Violence against Men and Boys in Conflict Situations*. p. 8.

...sexual violence is a crime of power, not sex.

view leads to the assumption that a man who has been forcibly involved in same-sex acts is homosexual, and that 'he must have wanted it'<sup>6</sup> which is a way of blaming the victim.

4. *Sexual violence is primarily motivated by the satisfaction of sexual desire.* This assumption leads to the myth that sexual violence will generally be heterosexual and ignores the fact that sexual violence is a crime of power, not sex. For those who hold this belief, a heterosexual man sexually abusing another man is inconceivable, leading to the conclusion that the assault did not happen and the victim is lying.

These pre-conceived ideas and unease with issues of sexuality and homosexual behaviour generally lead to relevant evidence of sexual violence against male victims being ignored or overlooked and the phenomenon remaining under-documented.

### BOX 1

#### Common myths and assumptions about sexual violence against men and boys<sup>7</sup>

Men cannot be raped

Anal rape is the only form of sexual violence against men and boys

A man cannot be raped or be the victim of sexual violence by a woman

A man who has an erection or other physical reaction (e.g. ejaculation) while being sexually abused must be enjoying it

A straight man would never rape another man

A 'real' man can defend himself from becoming a victim of rape

Only gay men can be perpetrators/victims of male sexual violence

Men are not affected by sexual violence as much as women

A gay man cannot be raped by another man

Gay men are to blame for being sexually abused, because they are deviant and/or because they caused it

A male perpetrator of sexual violence against a woman cannot be a victim himself

A male refugee who claims that he has been sexually abused is only looking for resettlement

Male sexual violence only occurs in detention settings

6 Overseas Development Institute (2014) *Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict: A Briefing Paper*. Prepared for the workshop held at London, 14 May 2014. London: ODI. p. 2.

7 Turchik, J.A., Edwards, K.M. (2012) 'Myths About Male Rape: A Literature Review', *Psychology of Men and Masculinity*, 13, 2: 211–226

## C. Scale and Forms

Cases of sexual violence against men and boys have been documented in at least 25 conflict situations around the globe, from Latin and Central America, through Africa, the Middle East and Asia.<sup>8</sup> Precise statistical evidence of sexual violence against adult males in conflict-settings is, however, scarce and almost non-existent for boys.<sup>9</sup> This statistical silence is the result of several intersecting factors, including the following:

- » serious under-reporting of sexual violence by male victims who fear
  - » being re-victimised as a result of mockery or disbelief by service providers and authorities
  - » being labelled as homosexuals, with all the stigma and discrimination that this entails, as well as the risk of criminalisation
- » criminalisation of same-sex acts in certain countries, regardless of whether the conduct was consensual or not, making it difficult if not impossible for male victims to come forward (see section E, Legal Frameworks below)
- » endemic lack of support services and safe spaces for male victims which further acts as a deterrent to reporting
- » failure to document those cases that are reported by authorities, international actors and civil society organisations, due to a lack of training and funding of lawyers, doctors, counsellors and humanitarian workers to recognise and appropriately respond to such cases
- » sexual nature of the violence against male victims often overlooked and hidden under the umbrella term 'torture' and thus portrayed as non-sexual in nature by documenters, interviewers, tribunals and courts (including at the international level), as well as victims themselves.

Considering the lack of comprehensive statistical data regarding the actual prevalence of the phenomenon against men and boys, there is an argument that the claim that women and girls are 'disproportionally affected' by sexual violence is an unsubstantiated assumption.

### BOX 2

#### Statistical data of male-directed sexual violence

- » A study of male refugees from the eastern Democratic Republic of Congo (DRC) conducted by the Kampala-based Refugee Law Project in partnership with the Johns Hopkins School of Public Health suggests that in some refugee populations, more than one in three men have experienced sexual violence during their lifetime.<sup>10</sup>
- » A March 2010 population-based survey conducted in eastern DRC showed rates of *reported* sexual violence of 23.6 per cent among men compared to 39.7 per cent among women.<sup>11</sup>
- » Another study from 2008 in Liberia found that 42.3 per cent of women combatants and 9.2 per cent of civilian women had experienced sexual violence during the conflict compared to 32.6 per cent of male combatants and 7.4 per cent of civilian male.<sup>12</sup>

8 Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict (2013) *Report of Workshop on Sexual Violence against Men and Boys in Conflict Situations*. p. 5.

9 Overseas Development Institute (2014) *Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict: A Briefing Paper*. London: ODI.

10 Wirtz A.L., Dolan C., Ongwech O.D., Pham A.V.K., Glass N., Rubinstein L. (2013) 'Sexual Violence, HIV Risk and Prevention Among Male Refugees in Ugandan Settlements' *Sexual Violence Research Initiative*.

11 Kirsten Johnson, Asher, J., Rosborough, S., et al., 'Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo', *JAMA*, 304/5 (2010) 553-562, <http://jama.jamanetwork.com/article.aspx?articleid=186342>.

12 Kirsten Johnson, Asher, J., Rosborough, S., et al., 'Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo', *JAMA*, 300/6 (2008) 676-690, <http://jama.jamanetwork.com/article.aspx?articleid=182379>.

*...the disparity between male and female victims is actually not as dramatic as previously understood.*

### Key to note

- » **Prevalence:** Sexual violence against men and boys is pervasive and likely to take place in most, if not all, conflict situations where sexual violence is occurring.
- » **Scale:** The picture that emerges from the few situations where the actual levels of sexual violence against male victims have been seriously investigated and analysed is that its actual scale is much higher than is generally assumed or publicly admitted and that the disparity between male and female victims is actually not as dramatic as previously understood.
- » **Victims:** Victims are not only civilian and there are high levels of male victims within military settings (e.g. members of armed groups and armed forces). Male victims are mainly found in detainee, combatant and refugee populations.
- » **Perpetrators:** Most perpetrators belong to armed groups and forces, including prison staff, police and peacekeepers. While the majority of perpetrators of sexual violence against men and boys are believed to be men, cases of abuse by women are known to occur, especially where perpetrators act in groups (i.e. both mixed and same-sex groups).
- » **Forms:** Sexual violence against men and boys can take many varied forms. While anal rape of men is a common form, it is much broader than that (see Box 5: 'Examples of common forms of sexual violence against men and boys'). Male victims are often forced to actively participate in sexual acts against others (e.g. rape fellow detainees, family members) or witness family members being sexually assaulted and the violence often deliberately takes place in public. Forced nudity may also be used (e.g. during interrogation) to increase the humiliation and sense of vulnerability of the victim.
- » **Settings:** Such type of violence takes place in a wide range of settings: places of detention (e.g. while in police custody, prisons, interrogation/torture cells); refugee, detention centres and camps; military camps and training centres; people's own homes, neighbourhoods or villages. Red-flag indicators include places of detention and other situations in which power can be exercised with impunity.

### BOX 3

#### Victim experience

Tamil male, Sri Lanka:

*'I was stripped down to my underwear and tied to a chair. My interrogators started slapping and punching me. I continued to deny their charges that I was an LTTE member. They made me lie on a bench and started beating me with a baton. The torture grew worse and I was subsequently burnt with cigarettes. I was raped by those who were interrogating me for three consecutive days. The rapes occurred at night and they would come drunk to my detention cell. Finally, I could not bear the torture anymore and signed a confession statement on the fourth day. My interrogators groped and pulled my genitals during the interrogation but the rapes happened at night.'*

*'We Will Teach You a Lesson' Sexual Violence against Tamils by Sri Lankan Security Forces, Human Rights Watch, February 26, 2013.*

*Red-flag indicators include places of detention and other situations in which power can be exercised with impunity.*

## BOX 4

**Case law example – Martina Johnson case**

Lawyer for civil parties, Belgium, October 2014:

*'I am representing victims and their families in the case against Martina Johnson, a Liberian citizen and former artillery commander of Charles Taylor's<sup>13</sup> National Patriotic Front of Liberia rebel group.*

*Martina Johnson was arrested in Gent on 17 September 2014 and charged by a Belgian judge for her direct participation in alleged war crimes and crimes against humanity committed throughout Liberia's first civil war (1989-1996), including mass murders, enlistment of child soldiers and sexual violence. The case contains allegations of particularly violent sexual crimes, such as the mutilation by Johnson of the penises of several men.*

*This is a landmark case as this is the first time anyone has been indicted for international crimes committed during the Liberian civil war. Provided sufficient evidence is gathered, it could also be the first ever case where a high-ranking female perpetrator is found directly responsible for sexual violence committed against male victims in a conflict situation.'*

13 Charles Taylor, who was the leader of the rebellion movement, was finally elected and became President of Liberia in 1997. On 30 May 2012, he was convicted to 50 years in prison by the SCSL for the planning of attacks on various towns and for aiding and abetting the Revolutionary United Front (RUF) rebel group in the commission of war crimes, crimes against humanity and other serious violations of IHL in Sierra Leone between 1996 and 2002.

## BOX 5

Examples of common forms<sup>14</sup> of sexual violence against men and boys

Individual and gang **rape** (by men but also by women), including:

- » Anal rape with penis
- » Anal rape with other body parts (e.g. fingers)
- » Anal rape using objects (e.g. guns, sticks, bottles)
- » Oral rape / forced fellatio
- » Rape through forced intercourse/oral sex with
  - » family members (e.g. mother, father, sister, brother, cousin, aunt)
  - » non-family members (e.g. friends, fellow detainees)
  - » animals
- » In addition to anal and/or oral rape, perpetrators ejaculate into ears, eyes, etc.

**Sexual humiliation**, including:

- » Forced nudity (e.g. in front of family, friends, detainees, perpetrators, community)
- » Being used as a mattress while someone else (e.g. wife) is raped on top of male victim
- » Being raped in front of family
- » Forced to rub penis in a hole (e.g. in the ground, in a banana tree) to the point of ejaculation
- » Forced to masturbate in public

**Forced marriages**

Genital **torture** and **mutilation**, including:

- » Beating of the genitalia (e.g. with electric cables)
- » Genital burning (e.g. with cigarettes, molten plastic, heated water)
- » Forced circumcision
- » Tying of heavy objects to the genitalia
- » Tying two people together at the genitalia
- » Electrical shocks

**Forced sterilization** through:

- » Castration (e.g. cutting of penis, detainees forced to bite genitalia of fellow detainee, genitalia tied to vehicle)
- » Snipers targeting the male genitalia

**Torture** by being forced to watch sexual violence against others, notably, wife, children, siblings, parents, friends, neighbours, fellow detainees

**Sexual slavery** (e.g. child soldiers)

14 Sivakumaran, S. (2007) 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law*, 18, 2: 253–276.

## D. Experience and Impacts

Male victims' experiences and impacts of CARSV are in many ways similar to those faced by female victims. Please refer to Chapter 2: Understanding Sexual Violence, Box 6: 'Impact of sexual violence' for a list of possible physical, psychological, social and economic impacts of sexual violence on victims, which includes a specific column dealing with specific impacts on male victims. Some of the particular challenges relevant to male victims only are summarized below:

- » **Gender identity:** Sexual violence against male and female victims is based on similar gender norms and logic, both being 'feminized' by it and regarded as subordinate and inferior as a result of it. Both men and women's gender identity is challenged by such type of violence, with the additional consequence that for male victims, such type of attack is experienced not only as a feminisation but also an emasculation and homosexualisation. In addition, male victims are often unable to engage in any form of physical work as a result of their ordeal, which jeopardises their ability to earn an income and support their families, further challenging their masculinity and preventing them from fulfilling their traditional role as providers and protectors for women and children.
- » **Sexual identity:** Male victims may report confusion about their sexual identity as a result of the sexual acts they have been forced into since the majority of perpetrators of sexual violence (against both male and females) are men and involvement in same-sex acts (particularly where the man is penetrated) are considered in many cultures as proof of a man's homosexuality. Victims' confusion can be further increased by a lack of understanding of normal physiological responses such as reflexive erections and ejaculations (see Box 6: 'Involuntary erections and ejaculations'). The confusion can be further exacerbated by the reactions of friends, family, the community and service providers.
- » **Lack of support services:** In most contexts, male victims of sexual violence are ignored by humanitarian programming and inadequately cared for by service providers who lack training in how to respond to male victims and are already struggling to address sexual violence against women and girls with their limited resources. In addition, it is not uncommon for aid workers, doctors and counsellors to support homophobic views that male victims of sexual violence are gay, with all the risk of legal and social re-victimization that this entails. This problem combined with the absence, in most environments, of peer support groups tend to reinforce the sense of rejection and isolation of male victims. Legal, medical, psychological and psychosocial challenges associated with inappropriate response lead most male victims to stay silent and not report. When seeking help, male victims are also more likely to present other issues (e.g. back pain, sleep disorder, difficulties in sexual relationships) than report the sexual violence itself.

*...for male victims, such type of attack is experienced not only as a feminisation but also an emasculation and homosexualisation.*

**BOX 6****Involuntary erections and ejaculations**

Male victims of sexual violence can experience varied physiological and other responses, which—regardless of sexual orientation or gender identity—may include involuntary or reflexive erections or ejaculations. Since this phenomenon is not always well known and understood, these types of reaction can mistakenly be interpreted, by victims and responders alike, as meaning that the victim was enjoying or consenting to the act. This can cause confusion for victims themselves and lead them to question their sexual orientation and raise fears about their sexual identity. To avoid this, it is important to:

- » - ensure that all physiological and other responses are adequately researched and understood by practitioners and other team members concerned during the documentation preliminary research phase
- » - inform and reassure male victims and, where appropriate, their families, that these reactions are reflexive and perfectly normal to avoid internal feelings of guilt, or rejection by relatives. Delinking these physiological reactions from concepts of sexual arousal is particularly important where these may be causing confusion in relation to sexual orientation/identity. In this regard it may be useful to remind people that women can lubricate and also conceive in response to violent and unwanted rape, and that in neither the case of women or men should such responses be taken as indicators of desire or consent.

**BOX 7****Responding to male sexual violence**

Sexual violence against male victims is likely to affect not only the individual but also to create domestic and social dysfunctions. In particular, the stigmatisation of the victim by his community is often experienced by his family as well.

Victim-centred responses to male victims should therefore consider working not only with the individual victim but also, when appropriate, with their partners, families and communities. In addition, victims should be encouraged to join or establish self-help associations to get support from peers and break their isolation.<sup>15</sup>

<sup>15</sup> For examples of work with support groups, see Edström, J., Dolan C., and Shakrokh T., with David, O., 'Therapeutic Activism', March 2016, and 'Five journeys to activism' at [www.refugeelawproject.org](http://www.refugeelawproject.org).

## E. Legal Frameworks

### BOX 8

In many countries, domestic legal frameworks—penal codes and/or special sexual violence laws—prevent access to justice for male victims, making it either impossible or too risky for them to come forward. Male victims often face two main challenges:

1. Gender-exclusive definitions of rape or sexual violence which do not recognise men as potential victims of these crimes (and/or women as potential perpetrators); that is, language whereby only women and girls can qualify as victims, not men and boys (and/or perpetrators can only be men, making it impossible for a male victim to lay charges against a female perpetrator)
2. Frameworks criminalising homosexual activity,<sup>16</sup> regardless of whether the conduct was consensual or not. Where the provisions do not make this distinction, the male victim who reports such a crime may himself be criminalised for a same-sex act although it occurred against his will.

### Survey of rape laws

A recent survey<sup>17</sup> of rape provisions and the national laws in 189 countries found that:

- » 90 per cent of men in conflict-affected countries are in situations where the law provides no protection for them if they become victims of sexual violence
- » 62 countries, representing almost 2/3 of the world's population, only recognise females as potential victims of rape<sup>18</sup>
- » 67 countries criminalise same-sex acts and as a result men who report male sexual abuse may themselves be prosecuted
- » 28 countries only recognise males as potential perpetrators of sexual violence, not females.

16 National laws criminalising adultery similarly prevent access to justice to women and girls in many contexts.

17 Overseas Development Institute (2014) *Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict: A Briefing Paper*. London: ODI. p 6.

18 In some of these countries male victims can seek redress for 'sexual assault' or 'indecent assault' but these provisions generally provide for lesser punishments for perpetrators than for the rape of women.

*...male-directed sexual violence is still often prosecuted as torture or other inhuman treatment rather than rape...*

### Key to note

- » The Rome Statute of the ICC contains gender-neutral definitions of rape and other forms of sexual violence. This means that at the international level and at the national level, in countries where the Rome Statute has been domesticated or similar provisions adopted, men and boys are recognised as potential victims and women and girls as potential perpetrators, at least in the context of international crimes. Even when appropriate international crimes definitions have been adopted in national law, 'ordinary' crimes definitions can still be problematic and not be in line with international standards.
- » The Rome Statute definition of gender refers to the two sexes, male and female, as understood within the context of society. This means for instance that the systematic castration of men and boys within a specific group could—in addition to other crimes—be investigated as the crime against humanity of persecution on the basis of gender (Article 7 (1) (h) Rome Statute).
- » In countries where the definitions of rape or other forms of sexual violence *include* males as potential victims (and/or females as perpetrators), practitioners

- should endeavour to document acts falling within these categories as rape or other sexual offences (potentially in addition to other relevant offences) in order to reflect the sexual nature of the violence.
- » In countries where the definitions of rape or other forms of sexual violence *exclude* males as potential victims (and/or females as potential perpetrators), practitioners can nevertheless document relevant acts as serious offences of a non-sexual nature, such as torture, whose definitions include and protect men and boys as victims.
- » That said, even at the international level the sexual dimension of crimes against male victims has not always been taken into account despite legal frameworks allowing for it. In international criminal courts and tribunals, male-directed sexual violence is still often prosecuted as torture or other inhuman treatment rather than rape even when the facts could have led to such a legal qualification, or is not prosecuted at all. Legal qualifications of rape regarding male victims can only be found in a few decisions (see Box 9: 'Examples of international decisions dealing with sexual violence against men and boys').

### BOX 9

#### Examples of international decisions dealing with sexual violence against men and boys<sup>19</sup>

This is not an exhaustive list

Court/tribunal	Case	Relevant facts	Legal qualification
ICTY	Prosecutor v. Tadic (1997)	Two male detainees A and B forced to sexually assault another captive, C, in the presence of others (A ordered to lick C's naked bottom and B to suck C's penis, hit him in the genitalia and bite off one of his testicles) <sup>20</sup>	Persecution and inhuman acts as crimes against humanity. Torture or cruel treatment as a war crime
ICTY	Prosecutor v. Todorovic (2001)	After repeated beatings, at least four men were ordered by Todorovic to perform oral sex on each other in a police station <sup>21</sup>	Persecution on political, racial and religious grounds as a crime against humanity
ICTY	Prosecutor v. Cestic (2004)	Two detainee brothers forced at gunpoint to perform fellatio on each other in the presence of others <sup>22</sup>	Rape as a crime against humanity. Humiliating and degrading treatment as a war crime

## BOX 9

### Examples of international decisions dealing with sexual violence against men and boys<sup>19</sup>

This is not an exhaustive list

Court/tribunal	Case	Relevant facts	Legal qualification
SCSL	Prosecutor v. Sesay, Kallon and Gbao (2009)	Couple ordered by rebels to have sex in front of other captured civilians; man's daughter then forced to wash her father's penis <sup>23</sup>	Outrages upon personal dignity as war crimes
ICC	Prosecutor v. Bemba (2016)	Rape and gang rape of at least 28 victims, both men and women, sometimes in front of family and community members <sup>24</sup>	Rape as a crime against humanity and war crime
EAC	Prosecutor v. Habré (2016)	Sexual violence against men detainees during interrogation in the prisons of the Documentation and Security Directorate (secret police) including: beatings/electrocution of genitalia, sodomy and introduction of objects in their penises <sup>25</sup>	Torture as a crime against humanity

19 Sivakumaran, S. (2010) 'Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict', *International Review of the Red Cross*, 92, 259: 272–275.

20 *Prosecutor v. Dusko Tadic*, Opinion and Judgement, ICTY Trial Chamber, IT-94-1-T, 7 May 1997, § 206 at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>; Sentencing Judgement, 11 November 1999 at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts991111e.pdf>. This is the first case dealing with sexual violence against men from the ICTY. After that, incidents of sexual violence against men were examined in other cases before the ICTY, including, among others, Milosevic, Cestic, Mucic, Todorovic and Simic. In the Tadic case, despite the indictment mentioning that both men and women were raped in the camps, the facts relating to male victims who were forced to perform fellatio on each other were charged as torture, cruel or inhumane acts rather than rape or other forms of sexual violence, whereas the sexual violence acts relating to female victims were charged as rape.

21 *Prosecutor v. Stevan Todorovic*, Sentencing Judgement, Trial Chamber, IT-95-9/1-S, 31 July 2001 § 38-40 at <http://www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>.

22 *Prosecutor v. Ranko Cestic*, Sentencing Judgement, ICTY Trial Chamber I, IT-95-10/1-S, 11 March 2004, § 13-14 at <http://www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf>. This is the only occasion where sexual violence against male victims was charged and prosecuted as rape by the ICTY.

23 *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgement, Trial Chamber I, SCSL-14-15-T, 2 March 2009, § 1205 at <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>. These facts were prosecuted as outrages upon personal dignity despite the court recognising that the applicable definition of rape was gender neutral and that both men and women could be victims of rape (§146).

24 Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement pursuant to Article 74 of the Statute, Trial Chamber III, ICC-01/05-01/08, 21 March 2016 § 494, 498 and 637 at [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF).

25 *Prosecutor v. Hissène Habré*, Judgement 30 May 2016 §610-624, §1564-1570 at [http://www.chambresafricaines.org/pdf/Jugement\\_complet.pdf](http://www.chambresafricaines.org/pdf/Jugement_complet.pdf)

## BOX 10



## Case law example – Bemba judgement

The conviction of Jean-Pierre Bemba Gombo (Bemba) for his responsibility as commander-in chief for crimes of murder, pillage and rape<sup>26</sup> committed by soldiers under his effective authority and control in the Central African Republic in 2002-2003 is historic in many ways. Bemba is not only the first person to be convicted by the ICC for crimes committed by troops under his command but also the first person to be convicted of sexual violence by the ICC. In addition, the rape charges in this case were based on evidence from at least 28 victims of rape, both male and female victims. Please find below an extract of the experience of one of the male victims:

*The same day that his wife, daughter, and granddaughter were attacked, three armed soldiers forcefully penetrated P23's anus with their penises in his compound, while family members and his neighbour looked on. In light of the above, the Chamber finds that, in early November 2002, in P23's compound in PK 12, three perpetrators, by force, invaded P23's body by penetrating his anus with their penises. After the events, P23 could not walk, as his anus was swollen and he was treated only with traditional leaves. People in his community disrespected him. He considered himself a 'dead man' (para 494).*

<sup>26</sup> Murder and rape as crimes against humanity and murder, rape and pillaging as war crimes.

*Sexual violence against male victims should...be systematically integrated in all aspects and stages of any accountability-focused process...*

## F. Specific Considerations throughout the Documentation Process

Practitioners are unlikely to get evidence of the existence, nature and scale of sexual violence against male victims unless they actively look for it. Sexual violence against male victims should therefore be systematically integrated in all aspects and stages of any accountability-focused process in order to be identified, adequately documented and addressed.

The considerations mentioned below are specific to documenting violations against male victims and should be considered as part of the general guidance provided in this Protocol, from preliminary research and planning of the documentation process through interviewing of victims and witnesses. When documenting crimes and violations against boys, information provided in Chapter 16: Sexual Violence against Children provides general guidance and should be taken into account.

### BOX 11

#### Key features of documentation processes taking male victims of sexual violence into account

Integrating sexual violence against male victims into the documentation processes must be germane to the documentation planning, in the following manner:

1. Time spent in the field: it may take longer and multiple interviews to establish the necessary trust and rapport with such victims.
2. Teams should be adequately staffed, with male and female interviewers and interpreters, so as to accommodate victim preference in who conducts interviews.
3. Confidentiality and protection considerations must incorporate any specific risks associated with male sexual violence documentation (e.g. homophobic laws).
4. Suitable planning to identify referral avenues for male victims.
5. As needed, budget to competently execute the documentation plan. At times, there might be the need to participate in awareness-raising and capacity building programmes. It is also possible that there will be a need to secure expert advice and opinion for court proceedings.
6. Patience and resilience to contend with inadequate information or other obstacles from witnesses, communities and authorities.

## 1. Preliminary research and analysis

During the initial research and analysis phase, practitioners should:

- » **Postulate:** Expressly take into account the possibility that men and boys may have been victims of sexual violence, even in contexts where there are no such allegations, allegations only relate to female victims or there are no allegations of sexual violence at all. This will indeed impact on all subsequent documentation activities. Remember that the absence of reference to sexual violence against male victims in reports, discussions and other information gathered does not mean that such type of violence did not take place. Such silence may simply reflect personal biases of those consulted or of the authors. It may also reflect the policy or mandate of specific organisations or a misleading classification (for example, classifying acts of sexual violence as acts of torture without reference to the sexual dimension of the violence).
- » **Indicators:** Be aware of red flags that such type of violence may have occurred, such as situations of detention, other circumstances of particular vulnerability or power imbalance or other indicators appearing during the research phase (e.g. spikes in clinic records of men complaining of back pain or sexual dysfunction) (see Box 13: 'Indicators of male-directed sexual violence').
- » **Risks assessment:** Research context-specific risks associated with documenting sexual violence against men and boys, including community attitudes towards male victims and applicable domestic legal framework (see E, Legal Frameworks above), even if information is gathered according to another legal framework (e.g. regional or international) or to preserve the evidence for future accountability. In some homophobic contexts, suspicion of homosexuality may result in death, imprisonment or other grave consequences, which will hugely impact, amongst others, on the willingness of male victims to speak out and privacy concerns. Depending on the legal framework, forced perpetration of rape may be criminalized and duress/threats may not be invoked as a defences. Practitioners working with male victims may also be construed as 'promoting homosexuality' and face

additional hurdles from communities, authorities and others and mitigating strategies should be developed in that respect.

- » **Referrals:** Map and vet potentially suitable formal and informal services to refer male survivors for protection, psychological and psychosocial, medical and legal support, assessing in particular their willingness and ability to assist them confidentially. In the absence of male specific referral pathways, consider whether medical staff and other professionals providing support for female victims could be trained to provide adequate care and support for male victims or whether informal alternatives (e.g. safe spaces to share experiences or self-help support networks) exist or could be set up, keeping in mind the sensitivity of the issue and near universal need for confidentiality of male survivors (see Chapter 7: Do No Harm, Box 10: 'Widespread lack of support services for men and boys'). In the absence of adequate referral avenues for male victims of sexual violence, you may have to refrain from approaching such victims and witnesses until suitable referral points are in place.

In 2002, only 3 per cent of NGOs working on issues of wartime rape and other forms of sexual violence addressed working with male victims.<sup>27</sup> To this day, the situation has only marginally progressed.

<sup>27</sup> Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict (2013) *Report of Workshop on Sexual Violence against Men and Boys in Conflict Situations*. p. 15.

*In the absence of adequate referral avenues for male victims...you may have to refrain from approaching such victims...until suitable referral points are in place.*

## 2. Planning

During the documentation planning stage, practitioners should:

- » **Documentation Plan:** Explicitly include sexual violence against male victims in the Documentation Plan (see Chapter 9: Planning/Elements of the CARSV Documentation Plan).
- » **Documentation team:** Carefully select members of the documentation team (investigators, interpreters, translators, intermediaries, analysts and other support staff) and ensure that:
  - » they receive appropriate training on male sexual violence
  - » they have the necessary capacity (experience, skills and attitudes) to understand and sensitively deal with male sexual violence (e.g. create the appropriate atmosphere to elicit information about sexual violence against male victims, spot potential indicators and red flags during the interview process (see Box 13: 'Indicators of male-directed sexual violence'), deal with communities and institutions opposed to document and address male-directed sexual violence, etc. (see Box 12: 'Overcoming resistance to address male-directed sexual violence')
  - » the team is appropriately staffed in terms of gender, age, nationality, ethnicity, religion, language skills, etc. Whilst male victims of sexual violence will not necessarily prefer a male or female interviewer/interpreter, it is important that their views are sought in relation to this. Those who do have a preference<sup>28</sup> generally feel strongly about it and it is important that the team can accommodate such preference as this may help build the necessary trust for the victim to open up. The same applies to other factors such as age, ethnic or religious background.
- » **Time:** Allow for potential extra overall time to document male-directed sexual violence. In particular, allow for the possibility of longer than generally expected and multiple interviews as interviewers will only be able to elicit evidence of such violations against male victims provided a high level of trust has been developed with the interviewee, which can be

time consuming.

- » **Resources and costs:** Consider whether different and/or additional resources may be required compared to those needed to document sexual violence against female victims, in particular to identify and access sources of information (thus potentially increasing overall costs).
- » **Confidentiality:** Remember that, due to the specific risks associated with being suspected of homosexuality in certain contexts (see above), nearly all male victims generally have concerns about privacy and confidentiality. This should be kept in mind in particular when choosing/planning:
  - » where to conduct interviews
  - » how to approach male victims
  - » how and in which format to record victim's statements
  - » how to transport/store information.
- » **Victim-perpetrator:** Consider how to react if it turns out that a male victim has also intentionally perpetrated sexual violence, for instance by joining an armed group or the military deliberately so that he could in turn commit such violence as a form of revenge. Depending on practitioners' mandate and practice, cautions on incriminating disclosures may be required. This scenario needs to be distinguished from the case where an individual was involved in a sexual act involving sexual penetration of another person under extreme coercion (e.g. father ordered to rape his daughter or detainees forced to perform oral sex on each other). In the latter scenario, the individual is not a 'perpetrator' under international criminal practice but must be considered as a victim instead, which can be demonstrated by thoroughly documenting the coercive circumstances. Practitioners need to be ready to handle extreme emotions in such cases.

28 It is not uncommon for male victims to prefer having an interviewer and/or interpreter from a different sex than the perpetrator, although this is not always the case.

## BOX 12

## Overcoming resistance to address male-directed sexual violence

It is not uncommon to meet resistance to document and address male-directed sexual violence, be it at the individual or community levels up to the institutional level. Normative and practical arguments that can be presented when dealing with these situations include:

- » Everyone who has been harmed has a right to support, be they female, male or other, without discrimination.
- » Sexual violence constitutes of human rights violation, whether the victim is female, male or other.
- » Keeping silent about sexual violence against male victims helps perpetrators achieve their aims of stopping men from being productive, destroying families and dividing communities.
- » Sexual violence against male victims is often closely connected to sexual violence against female victims.
- » Where one or both members of a couple is a victim and there is no disclosure, the risks of untreated injuries and/or infections leading to long-term physical health problems (e.g. HIV, infertility) are significantly increased.
- » Adequate response to male victims benefits not only the individual but also his wife/partner, children, family and community.<sup>29</sup>

## 3. Interviewing

During the interview phase, practitioners should:

- » **Rapport and Trust:** Take special care and spend as much time as necessary building a rapport with the interviewee during the initial phase of the interview (see Chapter 11: Interviewing/Engage and Explain) in order to create the necessary trust for him to open up.
- » **Indicators:** Pay attention to any signs and clues (physical, verbal, non-verbal or otherwise) that the interviewee may have been victim of sexual violence (see Box 13: 'Indicators of male-directed sexual violence').
- » **Questions:** Specifically ask men and boys having spent time in detention centres and other circumstances of particular vulnerability about any sexual violence they may have experienced or witnessed, letting the victim know that it is safe to talk about it with the interviewer.
- » **Gender-specific remarks:** Ensure that questions posed and statements made are specific to sexual violence against male victims.
- » **Preconceptions:** Be careful not to form and/or convey preconceived ideas about what may have happened to the victim and/or how the acts should be categorised. Be especially wary of any statements or attitudes that may be perceived as judgemental.
- » **Physiological responses:** Pay particular attention to how you respond to evidence of reflexive erections and ejaculations (see Box 6: 'Involuntary erections and ejaculations'). Such evidence does not in any way suggest that the victim 'enjoyed it' and explicitly or implicitly consented to the act. As a matter of law, such evidence is irrelevant and should not be used, for instance, as a defence to exclude the perpetrator's criminal liability. Male victims whose sense of identity may have been shaken by such a reaction may need particular reassurance as to the normality of this type of physiological response.
- » **Reassurances:** Reassure the victim that he is not to blame, especially if he has been forced into sexual acts with others, and perceives himself or fears to be perceived by others or the law as a perpetrator, for

29 Dolan, C. (2015) 'Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence', *International Review of the Red Cross*, 96, 894: 1–17.

*...spend as much time as necessary building a rapport with the interviewee...*

example, if A forces B to rape his daughter C, A is the perpetrator and both B and C are victims.

**BOX 13****Indicators of male-directed sexual violence<sup>30</sup>**

<sup>30</sup> Institute for International Criminal Investigations (2016) *Guidelines for Investigating Conflict-related Sexual and Gender-based Violence Against Men and Boys*. § 2.11.5 and 2.11.6.

<sup>31</sup> These red flags may be picked up not only during interviews with male victims but also others such as family members, support services or during the research and analysis phase.

# Part VIII: Conclusion

## CHAPTER 18: Conclusion

### Chapter 18 Contents

<b>CHAPTER 18: Conclusion.....</b>	<b>282</b>
<b>A. Using the Information .....</b>	<b>282</b>
<b>B. Future use of the International Protocol.....</b>	<b>283</b>

#### A. Using the Information

Once practitioners have documented and analysed information on CARSV crimes and violations, how they choose to shape it and present it, who or what they submit it to, and what issues they must be alert to, depends largely on:

- » The objective of the documentation, and the form of accountability to be pursued;
- » The audience that will receive the information;
- » The mandate of the practitioner, and the mandate and role of their organization;
- » Political, legal and security context in which documentation took place, and the restrictions and parameters that context places on practitioners.

Practitioners must consolidate and present their findings according to the above considerations. For example, practitioners documenting sexual violence violations largely for advocacy purposes through submissions to non-judicial bodies will report on their findings differently than if they are documenting sexual violence in support of specific litigation strategies, or if they are planning on submitting the information gathered to a particular tribunal in reference to an ongoing case.

Practitioners may, for example:

- a. *Use the information gathered as a way to advocate and illustrate the wide-ranging pattern of violations in support of litigation;*
- b. *Use the information gathered specifically to litigate individual case(s) and secure individual redress through*

*judicial or quasi-judicial mechanisms;*

- c. *Hand over the information gathered to a particular court, investigative body, or law enforcement body;*
- d. *Keep the information safe for use in future accountability and other transitional justice mechanisms;*
- e. *Use the information to assist victims in making specific non-judicial-related claims such as applying for victim status.*

The various forms of utilizing and submitting documentation are as varied as the many forms of pursuing accountability available. Nevertheless, the following issues must be at the core of any strategy to pursue accountability through documentation:

#### Empowerment of victims and witnesses

Whether done through individual litigation or submitting anonymous information in relation to mass crimes allegations, the autonomy, empowerment and protection of victims and other witnesses must remain central to accountability strategies. This requires practitioners to unfailingly respect the right of victims and other witnesses to make his or her own choices, to be fully informed as to the risks and benefits of participation, and to consent – or not – to every aspect of documentation. It also involves being consistently aware of the assistance, services and protection needs of those involved in the documentation, both at the point of the documentation itself and following it.

### Confidentiality and anonymity of sources

Concerns with confidentiality and anonymity are not limited to ethical obligations in place during the documentation process itself. Measures to keep victim identity, and their participation, confidential, extend past documentation – and include keeping victims and other witnesses informed of the limits to confidentiality and possible disclosure obligations that arise when documentation results are submitted or presented to other parties. Practitioners are obligated to fully understand and communicate these limitations and parameters to victims and other witnesses, and to keep them updated of any consented to changes in the measures protecting their anonymity – such as the stage at which their identity may have to be divulged in reports or communications - in the case of submissions to complaints mechanisms, or their details provided to the defence in the case of criminal proceedings.

### B. Future use of the International Protocol

In the future, we hope that the Protocol will act as a practical tool to overcome some of the challenges faced by those who document sexual violence as a crime or violation under international law. It will be a living document that will need to be updated as best practice evolves.

In particular, we hope that: States will support, facilitate and empower documentation of sexual violence crimes in accordance with the basic principles and methods set out in the Protocol; donor States, when funding overseas initiatives related to accountability for international crimes of sexual violence, will encourage these initiatives to incorporate the basic principles and methods in this Protocol into their projects; conflict-affected States will develop national action plans using the Protocol to raise awareness and build capacity within government, civil society, medical and legal professions, and other relevant partners; donors will provide financial support for governments and non-governmental organisations (NGOs) using the Protocol, and/or develop training

packages to raise awareness and build capacity; and leading NGOs working in the field will use the Protocol as their primary and baseline methodology for training staff to document sexual violence as a crime or violation under international law in conflict zones.

# ANNEX 1: Evidence Workbook for Documentation of Crimes of Sexual Violence

## a tool to assist investigators in filling evidentiary gaps

### Introduction to the Evidence Workbook

Once the information has been gathered and evaluated, practitioners may be in a position to assess which sexual violence crime or violation they have enough evidence to establish, and what, if any, additional evidence they may require. Mapping the elements, their requirements, and the pieces of information gathered according to the format exemplified in the Evidence Workbook below (Annex 1b) will enable practitioners to maximise the efficiency of the evidence-gathering process, to protect witnesses from repeated interviews, facilitate assessment of leads, and to reduce the need to return to the field in order to gather additional evidence to fill in gaps.

Practitioners gathering information on CARSV can attempt to organise their evidence according to the following structure:

<p>I. ELEMENTS OF CRIMES: Elements of Underlying Crimes</p> <p>Common Elements of Category of Crime</p> <p>Modes of Liability/Linkage Elements</p> <p><i>(See full List of the Elements of Crimes in Annex 1a)</i></p>	<p>II. COMPONENTS OF ELEMENTS:</p> <p>Each Element is comprised of multiple Components</p>	<p>III. MEANS OF PROOF: The Concrete Factual Findings that can be used to establish the different components and elements</p>	<p>IV. Examples of Potential EVIDENCE by SOURCE</p>
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The example set out in this workbook – Rape as a Crime against Humanity committed through command/superior responsibility- is based on the definitions of crimes and the elements of the crimes, as set out in the Rome Statute and Elements of Crimes of the International Criminal Court (ICC). That said, the structure is relevant to all manner of evidence and can be adapted to the relevant context. The way it is structured, the Evidence Workbook can be revised to reflect the definitions and elements of any violations, in whichever jurisdiction the crimes are being investigated. Human rights documenters can utilise the Evidence Workbook as a tool to organise the information they collect – adapting it as necessary and gathering evidence of state responsibility, rather than individual responsibility. By working within the structure of the workbook and filling it with as much detailed evidence as possible, the evidence gathered by human rights documenters will be more broadly useful, should there ultimately be a justice or transitional justice mechanism, whether national or international.

The means of proof and case examples included in this iteration are drawn from the substantial work developed by the Case Matrix Network's (CMN) database application I-DOC available at <http://blog.casematrix-network.org/toolkits/databases/i-doc/>

## ANNEX 1a. List of elements of crimes Rape - Elements

### 1. Specific elements of underlying crime. What happened (what act was committed)?

#### Torture<sup>1</sup> - Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons<sup>2</sup>.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind (applied only to torture as a war crime).

1. The perpetrator invaded<sup>3</sup> the body of a person by conduct resulting in penetration<sup>4</sup>, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent<sup>5</sup>.

1 In some domestic jurisdictions, torture can be prosecuted as a standalone crime (i.e. not only under the rubric of war crimes, crimes against humanity or genocide). Practitioners in such jurisdictions will need to adapt the elements they are striving to satisfy according to the applicable domestic provisions.

2 Being forced to witness someone else being raped or sexually assaulted has been found to cause enough mental pain or suffering that it can constitute an act of torture by itself. In addition, being forced to carry out a sexual act in public (such as two prisoners who are forced to commit fellatio on each other in front of guards) or being raped or sexually assaulted in public or in front of family members can also constitute an act of torture.

3 The Elements of Crimes of the Rome Statute indicate that the 'concept of invasion is intended to be broad enough to be gender-neutral'.

4 The ICC has made it clear that the element of penetration does not have to be carried out by the perpetrator him/herself. It can also include situations where the perpetrator is the person who is being penetrated, or where another person is forced to carry out the penetration of the victim.

5 The ICC has held in the Katanga case that proving any one of these elements is sufficient to prove that an act of penetration constituted the crime of rape. It is not necessary to prove the absence of consent by the victim, except in circumstances where the perpetrator committed the act against someone 'incapable of giving genuine consent' due to age, incapacity or other circumstances.

**Sexual slavery<sup>6</sup> – Elements**

1. The perpetrator exercised any or all of the powers attaching to the right of ownership<sup>7</sup> over one or more persons, such as by purchasing, selling, lending or bartering such person or persons, or by imposing on them similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

**Forced conjugation or forced marriage – Elements**

1. The imposition of a forced conjugal association by the perpetrator over the victim
2. by threat or physical force arising from the perpetrator's words or other conduct<sup>8</sup>.

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6 The crime of sexual slavery is applicable to trafficking in human beings.

7 The ICC provided a more detailed definition of this element of the crime of sexual slavery in the Katanga trial judgement. The Court indicated that it is necessary to take a case-by-case approach when analysing the type of acts which would satisfy this element. For deprivation of liberty, the Court noted that facts relating to detention or captivity (including its duration) would be relevant, as would information that relates to efforts to limit freedom of movement or freedom of choice, and information on measures to prevent or discourage attempts to escape. Facts that show the use of threats, force or other forms of physical or mental coercion are relevant to proving this element, as are facts that show the exercise of psychological pressure, the vulnerability of the victim or an obligation to engage in forced labour. The Court also emphasised that the right of ownership over others does not automatically equate to a commercial transaction – the socio-economic conditions under which the powers of ownership are exercised is a relevant factor, but the fundamental nature of servitude comes down to the inability of the victim to amend or modify his/her situation.

8 The Rome Statute does not include the crime of forced marriage or forced conjugation. However, forced marriage was adjudicated to be an inhumane act as a crime against humanity in the context of the Special Court for Sierra Leone. The crime was defined in the Armed Forces Revolutionary Council (AFRC) Trial Judgement, Partly Dissenting Opinion of Justice Doherty, paragraph 53. Justice Doherty stated in paragraph 36 of her Partly Dissenting Opinion: *'the abduction of girls and their coercion into marital unions, as described by the Prosecution expert and by witnesses, is not the same nor comparable to arranged or traditional marriages'* In paragraphs 46–51 she states: *'The evidence shows 'forced marriage' in the context of the armed conflict of Sierra Leone involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they moved through the various Districts. The girls and women, without their consent, were taken as 'wives' by individual rebels. Girls and women forced into marriage benefited from their 'marriage' insofar as their ownership by a particular rebel may have offered them some protection from rape and other forms of abuse by the other rebels. However, given the overwhelming environment of coercion, I consider this to be a relative benefit or a means of survival, which cannot be understood as indicative of consent or the exercise of autonomous power within the relationship by the victims and which in no way diminishes the severity of the acts. Women and girls subjected to 'forced marriage' are often very young, and thus particularly vulnerable. Their vulnerability is heightened by their removal from their families and placement in a context of physical and sexual violence. Serious psychological and moral injury follows 'forced marriage'. Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise. Further, the label 'wife' may stigmatise the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma. On the evidence I find that the intention of the 'husband' was to oblige the victim to work and care for him and his property, to fulfil his sexual needs, remain faithful and loyal to him and to bear children if the 'wife' became pregnant. In return, he would protect the 'wife' from rape by other men, give her food when food was available and, depending on his status, confer a corresponding status upon the wife. In effect, these are rights and obligations of the type referred to by the Defence expert as being involved in traditional marriages but in there is no agreement of the family or kin of the 'wife' and the status is forced by violence or coercion upon the female partner. I would therefore distinguish the phenomenon from sexual slavery. The evidence of witnesses shows that victims had no protection from rape and were available to any rebel but were not stigmatised as 'rebel wives' or 'bush wives'. Additionally, I am satisfied on the basis of the testimony of the Prosecution expert witness that the use of the term 'wife' is indicative of forced marital status which had lasting and serious impacts on the victims. I find the label of 'wife' to a rebel caused mental trauma, stigmatised the victims and negatively impacted their ability to reintegrate into their communities. I would therefore have found that the actus reus and mens rea of an Other Inhumane Act, Forced Marriage, are satisfied with regards to the foregoing evidence.'*

**Enforced prostitution - Elements**

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for, or in connection with, the acts of a sexual nature.

**Forced pregnancy – Elements**

1. The perpetrator confined one or more women forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

**Enforced sterilisation – Elements**

1. The perpetrator deprived one or more persons of biological reproductive capacity.
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned, nor carried out with their genuine consent.

**Sexual violence – Elements**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other crimes against humanity.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

**Persecution<sup>9</sup> – Elements**

1. Contrary to international law, the perpetrator severely deprived one or more persons of their fundamental rights.
2. The perpetrator targeted the person or persons because of the identity of a group or collectivity, or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender (as defined in article 7, paragraph 3 of the Statute) or other grounds that are universally recognised as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the Court.

<sup>9</sup> Note: any of the above-mentioned crimes, when carried out in a persecutory manner, on political, racial, national, ethnic, cultural, religious or gender grounds, can also constitute persecution as a crime against humanity. It is critical to ask the witness questions about words that were spoken, in order to determine if there was any persecutory intent. Acts of persecution need not be sexual in nature, but if individuals are targeted on the basis of their political views, or on the grounds of race, nationality, ethnicity, culture, religious affiliation or gender, and if the acts are sexualised violence crimes, the crime of persecution may also be relevant.

## Annex 1

## Evidence Workbook for Documentation of Crimes of Sexual Violence

**2. Common elements of category of crime**

What was the context in which the underlying crime was committed i.e. was that crime committed as a war crime, a crime against humanity, an act of genocide, or more than one of those)?

**Crimes against humanity – Elements**

1. The crimes were committed as part of a widespread or systematic attack.
2. The attack was directed against a civilian population.
3. The direct perpetrator knew or intended that the conduct would form part of the attack against the civilian population.
4. The attack was carried out pursuant to, or in furtherance of, a state or organisational policy to commit such attack (a jurisdictional element which may or may not be required in the jurisdiction in which you are documenting).

**War crimes – Elements**

1. The crime was committed during (international or internal) armed conflict.
2. The crime had a nexus to the armed conflict.
3. The victim was a protected person (not an element for crimes of sexual and gender-based violence (SGBV))<sup>10</sup>.
4. The perpetrator knew that the victim was a protected person.  
AND
5. The perpetrator was aware of the factual circumstances that established the situation as one of armed conflict.

**Genocide<sup>11</sup> - Elements<sup>12</sup>**

1. The commission of any of the following underlying acts
  - Killing members of the group.
  - Causing serious bodily or mental harm to members of the group.
  - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
  - Imposing measures intended to prevent births within the group.
  - Forcibly transferring children of the group to another group.
2. Any of the acts mentioned under point 1 above, committed with the intent to destroy<sup>13</sup>, in whole or in part
3. a national, ethnical, racial or religious group as such.

<sup>10</sup> Protected persons are those who are either civilians or are not actively taking part in hostilities.

<sup>11</sup> This Evidence Workbook focuses on crimes of sexual violence; thus certain acts are not included here, such as killing and forcible transfer.

<sup>12</sup> Genocide may require two separate steps: 1. Evidence which shows that the act of sexual violence constitutes one of the five enumerated acts of genocide, and 2. Evidence which shows that the alleged perpetrator carried out these acts with the intent to destroy, in whole or in part, a group on the enumerated prohibited grounds.

<sup>13</sup> This element is the specific-intent element of genocide, which is required to be satisfied in order to anyone to be convicted of any of the underlying acts of genocide. The specific intent to destroy the group must be demonstrated with specific evidence. This is in addition to satisfying the mode of liability, as set out in '3. Linkage elements/modes of liability'. There is no requirement that the person allegedly responsible for acts constituting genocide be a high level official.

### 3. Linkage elements/modes of liability<sup>14</sup>

Who is (allegedly) responsible for the crime and through what mode of liability i.e. directly or through command/superior responsibility<sup>15</sup>?

#### Direct responsibility – Elements

The accused committed (directly, indirectly, or as a co-perpetrator), ordered, solicited, induced, aided and abetted, or otherwise contributed to the commission of the crime (by act or omission) – or an attempted commission (by act of omission) – by a group acting with a common purpose<sup>16</sup>.

#### Command/superior responsibility

##### *Military commanders*

1. The de jure or de facto military commander had effective command and control over subordinates.
2. S/he knew or should have known that the subordinates were committing crimes.
3. S/he failed to take reasonable measures to prevent the crimes, to punish the perpetrators, or to submit to the competent authorities for investigation.
4. As a result, the crime was committed.

##### *Civilian commanders*

1. The superior-subordinate relationship was characterised by effective authority and control over subordinates.

<sup>14</sup> This category of evidence has traditionally been the weakest element in sexual violence prosecutions and is the reason behind the vast majority of acquittals or dropped charges for sexual violence. It is worth spending time on the mode of liability and asking careful questions, because without it, the rest of the evidence cannot carry the day. There are been many situations where the judges have said: *'We are satisfied beyond reasonable doubt that the sexual violence absolutely happened, but there is not enough evidence to prove the individual criminal responsibility of the defendant for those acts.'* This part of the documentation process is absolutely critical.

<sup>15</sup> It is often thought that only a particular "kind" or "category" of witness (such as high-level insider witnesses) will possess information about alleged perpetrators, in particular if the perpetrator being investigated is remote from the crimes and the link between the act and the perpetrator is not direct. It is advised that documenters and investigators strive to avoid assumptions about any particular witness. Victim witnesses who have never seen the senior-level remote (alleged) perpetrator often give the most powerful linkage evidence in relation to senior-level officials who are accused of committing crimes on the ground. Each witness should be questioned on these matters; not asking risks loss of critical linkage evidence.

<sup>16</sup> Commission (ICC Statute Article 25(3)(a)) can be either individual/direct physical commission or committing a crime jointly with others; co-perpetration is based on joint control over the crime, or committing a crime through another person; ordering is directing another person to commit a crime; soliciting/inducing is prompting another person to commit a crime; aiding and abetting is providing practical assistance (e.g. by providing the means for the commission of the crime) or providing encouragement or moral support to the direct perpetrators.

## Annex 1

## Evidence Workbook for Documentation of Crimes of Sexual Violence

## ANNEX 1b: Example Evidence Workbook

Underlying Crime: <b>Rape</b>			
Elements of Crimes:	Components of Elements:	Means of Proof:	
Elements of Underlying Crimes, Common Elements of Category of Crime and Modes of Liability/Linkage Elements	Each Element is comprised of multiple Components	The Concrete Factual Findings that can be used to establish the different components and elements	
Elements	Components	Means Of Proof (With Examples Included)	
		Types Of Evidence	Examples From Case Law
Specific Element: <b>Conduct Of Invasion</b>			
The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body	Invasion of any part of the body or of the perpetrator with a sexual organ [OR]	Evidence of invasion of any part of victim or perpetrator with sexual organ:	<i>Evidence of penetration of victim's vagina with penis (Bemba TJ, Katanga TJ)</i>  <i>Evidence of penetration of victim's anus with penis (Bemba TJ) Penetration of victim's mouth with penis (Bemba TJ)</i>  <i>Evidence of semen leaking from victim's vagina or anus (Bemba TJ)</i>  <i>Evidence of injury to victim's vagina or anus (Muhimana TJ)</i>
	Invasion of the anal or genital opening of the victims with any object or any other part of the body	Evidence of invasion of the anal or genital opening of the victims with any object or any other part of the body:	<i>Evidence of introducing spears into female genitalia (Mbarushimana Dcc)</i>  <i>Evidence of invasion of the vagina with a piece of wood (Akayesu TJ)</i>
Examples Of Potential Evidence By Source			
Testimonial	Testimony From X: "(the larger one) pinned down my head and tied my hands and then the smaller one (...) placed his penis inside me. (...) but he said "this bitch has had children, she is too loose" and so he pulled out and forced his penis into my anus.  <b>See Part B of Workbook for ANALYSIS TOOL</b>		
Documentary	Medico-Legal Report and medical history form completed by Independent medical organisation and provided by Witness X		

## Evidence Workbook for Documentation of Crimes of Sexual Violence

Specific Element: Character of Invasion			
The invasion was committed by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or against a person incapable of giving genuine consent	Invasion by force [OR]	Evidence of an invasion of any part of the victim or of the perpetrator with a sexual organ	<i>Evidence of violence used during the invasion (Bemba TJ), Musema TJ</i>  <i>Evidence of victim's injuries resulting from the invasion (Musema TJ)</i>  <i>Evidence of psychological and medical consequences of the invasion (Bemba TJ)</i>
		Evidence of use of physical force	<i>Evidence of physical restraint of victim during the invasion (Bemba TJ)</i>  <i>Evidence of victim calling out in fear (Bemba TJ, Musema TJ)</i>
		Evidence of Detention/ Captivity	
	Invasion by threat of force or coercion	Evidence of fear of violence (or duress)	<i>Evidence of threat with weapons (Bemba TJ)</i>
		Evidence of psychological oppression	<i>Evidence of threat with weapons (Bemba TJ)</i>
		Evidence of abuse of power	<i>Evidence of threat with weapons (Bemba TJ)</i>
		Evidence of absence of consent or voluntary participation	
		Evidence of capacity to give genuine consent	
		Evidence of detention	

## Examples Of Potential Evidence By Source

Digital

Smartphone footage of two soldiers forcing woman wearing blue dress into house, geo tagged as Village Y

Common Element: **Crime Against Humanity**

<b>Elements of Crimes:</b> Elements of Underlying Crimes, Common Elements of Category of Crime and Modes of Liability/ Linkage Elements	<b>Components of Elements:</b> Each Element is comprised of multiple Components	<b>Means of Proof:</b> The Concrete Factual Findings that can be used to establish the different components and elements	
<b>Elements</b>	<b>Components</b>	<b>Means Of Proof</b> (With Examples Included)	
		Types Of Evidence	Examples From Case Law
<b>Context</b>			
The crimes were committed as part of a widespread or systematic attack	Attack	Evidence of conduct of hostilities	<i>Evidence of conduct of hostilities that includes multiple commission of acts referred to in Article 7(1) (Kunarac et al. TJ, Tolimir TJ; Bemba TJ)</i>
		Evidence of mistreatment of the civilian population	<i>Evidence of mistreatment of the civilian population that includes multiple commission of acts referred to in Article 7(1) (Lukić et al. TJ; Gbagbo DCC)</i>
	Widespread or systematic nature of attack	Evidence of scale of attack	<i>Evidence of multiplicity of acts (Brdanin TJ; Ntakirutimana TJ; Bemba TJ), Evidence of multiplicity of victims (Bisengimana TJ; Bemba TJ), Evidence of geographical scope of attacks (Bemba TJ), Evidence of substantial use of financial, military, logistical or other resources (Akayesu TJ; Jelišić TJ), Evidence of substantial results or consequences of the attack (Kunarac et al. TJ)</i>
		Evidence of pattern of attack	<i>Evidence of repeated and continuous commission of criminal acts (Jelišić TJ), Evidence of pattern related to means and methods of the attack (Blaškić TJ; Ntaganda DCC), Evidence of pattern related to the national/ethnic/racial/religious identity of victims (Blaškić TJ), Evidence of pattern related to the civilian status of victims (Kayishema and Ruzindana TJ)</i>
Evidence of organised nature of attack	<i>Evidence of the attacks carried out pursuant to a pre-arranged policy or plan (Kayishema and Ruzindana TJ), Evidence of attacks geographically or temporarily coinciding with each other (Lukić et al. TJ; Katanga TJ), Evidence of attacks being organised into a number of different phases (Blaškić TJ), Evidence of organised employment of means and methods of the attack (Blaškić TJ; Katanga TJ), Evidence of the establishment of parallel institutions intended to implement a policy (Jelišić TJ)</i>		
	Nexus between the acts of the perpetrator and the attack: "as part of"	Evidence of the commission of an act which, by its nature and consequences, is objectively part of the attack (AND)	<i>Not required: Evidence that the act was committed in the midst of attack (Kunarac et al. TJ), Evidence of the acts sharing common features, such as nature, consequences, characteristics, targets (Kajelijeli TJ; Kunarac et al. TJ; Gbagbo DCC) Evidence of acts being consistent with the general motives and a modus operandi (Bemba TJ),</i>
		Evidence of knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof	<i>Evidence inferred from an utterance, a document or a deed (Popović et al. TJ), Evidence of the geographical location of the attack (Nzabonimana TJ)</i>

## Evidence Workbook for Documentation of Crimes of Sexual Violence

Context, continued			
The attack was directed against a civilian population	Directed against any civilian population	Evidence of the civilian population as the primary object of the attack (not just an incidental victim of the attack)	<i>Evidence of the circumstances and nature of the attack (Mrkšić et al. TJ; Muhimana TJ; Katanga TJ); Evidence of the scale of crimes committed in the course of the attack (Stakić TJ; Kunarac AJ); Evidence of the means and method used in the course of the attack (Blaškić TJ; Kunarac et al. TJ); Evidence of the attack being directed against a UN protected enclave (Perišić TJ); Evidence of predominantly civilian status of victims (Perišić TJ; Bemba TJ); Evidence of the number of victims (Mrkšić et al. TJ)</i>
	[pursuant to or in furtherance of a state or organizational policy inferred from the totality of the circumstances: Elements of Crimes, Art. 7 para 3]	Evidence of existence of a state or organizational policy	<i>Evidence of an organisation within the meaning of Article 7(2)(a) (Bemba TJ)</i>  <i>Evidence of the level of knowledge and involvement of the authorities (Perišić TJ; Bemba TJ), Evidence of preparatory activities for the attack by the authorities (Katanga TJ), Evidence that the entity tolerated or condoned crimes in question (Blaškić AJ; Bemba TJ), Evidence of writings and speeches by the authorities (Ruto and Sang DCC; Katanga TJ), Evidence of the modus operandi of the attacks (Bemba TJ), Evidence of temporally and geographically recurrent pattern of violence (Bemba TJ), Evidence of the scale and degree of organisation (Blaškić AJ; Bemba TJ)</i>
Mens Rea			
The direct perpetrator knew of the attack	The perpetrator knew that the conduct was part of a widespread or systematic attack against a civilian population	Evidence that the perpetrator had knowledge of the attack	<i>Evidence of the scale, gravity and systematic nature of the attack (Lukić et al. TJ; Bemba TJ), Evidence of the role, rank or position of the accused (Krnojelac TJ; Nizeyimana TJ), Evidence of the accused's membership in forces that took part in the attack (Ruto and Sang DCC), Evidence of repeated contacts of the accused with forces carrying out the attack (Ble Goude DCC), Evidence of the accused's participation in the attack (Jelišić TJ), Evidence of the accused's participation in the preparation of the attack (Ble Goude DCC), Evidence of the accused's presence at the site of the attack (Krnojelac TJ; Musema TJ; Bemba TJ)</i>  <i>Evidence of the accused being told about the attack (Vasiljević TJ), Evidence regarding the degree to which the attack is common knowledge at the time in the relevant region (Krnojelac TJ), Evidence that the attacks were widely covered in media (Bemba TJ)</i>
		Evidence that the perpetrator knew his/her acts were part of the attack	<i>Evidence of orders issued by the accused (Gatete TJ), Evidence of the accused's attendance at the meetings held to plan and organise the attack (Niyitegeka TJ) Evidence of the accused's wilful pursuit of the goals of the attack (Ble Goude DCC), Evidence of the accused's expression of support for the attack (Niyitegeka TJ, Evidence of the accused's characterisation of a victim as a member of a distinctive group (Niyitegeka TJ), Evidence of nature and circumstances of the attack (Gotovina et al. TJ; Ndahimana TJ)</i>
	The perpetrator intended the conduct to be part of a widespread or systematic attack directed against a civilian population	N/A	<i>Evidence of active participation of the accused in the attack (Jelišić TJ)</i>

## Annex 1

## Evidence Workbook for Documentation of Crimes of Sexual Violence

## Linkage Element: Command Responsibility

<b>Elements of Crimes:</b> Elements of Underlying Crimes, Common Elements of Category of Crime and Modes of Liability/ Linkage Elements	<b>Components of Elements:</b> Each Element is comprised of multiple Components	<b>Means of Proof:</b> The Concrete Factual Findings that can be used to establish the different components and elements	
<b>Elements</b>	<b>Components</b>	<b>Means Of Proof</b> (With Examples Included)	
The de jure or de facto military commander had effective command and control over subordinates	The perpetrator had effective command and control (military commanders) [or]	Types Of Evidence	Examples From Case Law
		Evidence of superior authority	<i>Evidence of a formal military position (Đorđević TJ)</i> <i>Evidence of a chain of command (Orić TJ)</i> <i>Evidence of the suspect's ability to issue orders and orders being acted upon (Nyiramasuhuko et al. TJ; Hadžihasanović &amp; Kubura TJ; Bemba TJ)</i> <i>Evidence of high public profile (Ndindiliyimana et al. TJ)</i> <i>Evidence of recognition of exercise of authority by the de facto subordinates and peers (Ndindiliyimana et al. TJ)</i>
		Evidence of the suspect's material ability to prevent the commission of the crime	<i>Evidence of the suspect's authority to give direct combat orders (Ndindiliyimana et al. TJ)</i> <i>Evidence of the suspect's authority to represent the force in the negotiations (Bagosora TJ)</i> <i>Evidence of the suspect's ability to issue orders and orders being acted upon (Strugar TJ)</i>
	Evidence of the suspect's material ability to punish the perpetrators of the crime	<i>Evidence of the suspect's authority to initiate investigations or take administrative and disciplinary action (Hadžihasanović &amp; Kubura TJ)</i> <i>Evidence of the suspect's authority with regard to the promotion or removal of officers (Strugar TJ)</i>	
	The perpetrator had effective authority and control (civilian commanders)	Evidence of superior authority	<i>Evidence of domestic legislation providing the hierarchical authority of the suspect over the subordinates (Ndahimana TJ)</i> <i>Evidence of the suspect's ability to issue orders and orders being acted upon (Nizeyimana TJ; Ndahimana TJ)</i>
	Evidence of the suspect's material ability to prevent the commission of the crime	<i>Evidence of domestic legislation providing the suspect's power to remove the subordinates from their official position (Karemera &amp; Ngirumpatse TJ)</i> <i>Evidence of domestic legislation providing the suspect's power to take disciplinary sanctions against the subordinates (Kayishema &amp; Ruzindana)</i>	
	Evidence of the suspect's material ability to punish the perpetrators of the crime	<i>Evidence of domestic legislation providing the suspect's power to remove the subordinates from their official position (Karemera &amp; Ngirumpatse TJ)</i> <i>Evidence of domestic legislation providing the suspect's power to take disciplinary sanctions against the subordinates (Kayishema &amp; Ruzindana)</i>	

## Evidence Workbook for Documentation of Crimes of Sexual Violence

S/he knew or should have known that the subordinates were committing crimes.	The perpetrator knew that the forces were committing or about to commit the crime	Evidence that the person actually knew about the crimes	<p><i>Evidence that the suspect was notified about the crimes (Nizeyimana TJ)</i></p> <p><i>Evidence that the suspect knew the perpetrators (Brđanin TJ)</i></p> <p><i>Evidence that the suspect knew about the victims (Aleksovski TJ)</i></p>
	The perpetrator should, owing to the circumstances at the time, have known that the forces were committing or about to commit the crime	Evidence that the person should, have known that the forces were committing or about to commit the crime	<p><i>Evidence of the suspect's failure to punish past offences (Karadzic TJ)</i></p> <p><i>Evidence that a suspect received information that some of the soldiers under his command have a violent or unstable character (Krnjelac AJ)</i></p>
S/he failed to take reasonable measures to prevent the crimes, to punish the perpetrators, or to submit to the competent authorities for investigation.	The perpetrator failed to take the necessary and reasonable measures within his or her power the prevent the commission of such crime [or]		<p><i>Evidence of the suspect's failure to issue all necessary and reasonable orders to prevent the commission of the crimes (Bagosora et al. TJ)</i></p> <p><i>Evidence of the suspect's failure to remind subordinates of existing restraints (Strugar TJ)</i></p> <p><i>Evidence of the suspect's failure to speak to subordinates about the crimes (Krnjelac TJ)</i></p> <p><i>Evidence of the suspect being in denial of the commission of crimes (Strugar TJ)</i></p> <p><i>Evidence of the suspect's participation in the crimes (Aleksovski TJ)</i></p>
	The perpetrator failed to take the necessary and reasonable measures within his or her power to repress the commission of such crime [or]		<p><i>Evidence of the suspect's failure to issue all necessary and reasonable orders to repress the commission of the crimes (Ntawukuliyo TJ)</i></p> <p><i>Evidence of the suspect's failure to discipline subordinates (Delalić et al. TJ)</i></p> <p><i>Evidence of a subordinate being promoted rather than disciplined (Strugar TJ)</i></p> <p><i>Evidence of the suspect's failure to speak to subordinates about the crimes (Krnjelac TJ)</i></p> <p><i>Evidence of the person creating an atmosphere of lawlessness (Blaškić TJ)</i></p> <p><i>Evidence of the suspect's participation in the crimes (Bagosora et al. TJ)</i></p> <p><i>Evidence of suspect's failure to initiate an investigation (Hadžihasanović &amp; Kubura TJ)</i></p>
	The perpetrator failed to take the necessary and reasonable measures within his or her power to submit the matter to the competent authorities for investigation and prosecution		<p><i>Evidence of the suspect's failure to report the crimes (Bagosora et al. AJ)</i></p>
As a result, the crime was committed.	No means of proof determined by international criminal tribunals		

# ANNEX 2: Conducting Threat and Risk Assessments

1

Step One:  
**List the Threats**

2

Step Two:  
**Assess the Risk**

3

**Mitigate or  
Manage the Risk**

1

Step One: **List the Threats**

Identify the origin of threats or vulnerabilities, and think of those threats in relation to the harm they can cause not only to victims and witnesses, but also to staff, operations, and information. Use the example grid below to plot out the threats in relation to their origin and who or what the threat would target. .

## Example origins of threats

- » From sexual violence: delayed or ongoing physical, psychological and socio-economic effects of sexual violence
- » From conflict: violence, mines, collapsed infrastructure
- » From armed groups against you/witnesses: retaliation, attacks
- » From the physical environment: geography, climate, flooded location, incoming weather, isolated paths, poor shelter and security in refugee/IDP camps
- » From the family/community: violence, rejection, stigmatization
- » From institutions: political system; corrupt officials, non-functioning state services

## Conducting Threat and Risk Assessments

## Form 1

Potential Threats, By Origin & Risk to Survivors						
Risk/threat	From conflict environment	From armed groups	From community	From environment	From institutions	From Investigation
To survivors	Eg. Travelling to interviews through unsafe territory	Eg. Retaliatory attack on victim resulting in death/ physical injury/ further sexual violence	Eg. Victim living with husband's family who will abandon her if rape becomes public		Eg. Local medical examiner known for ultra conservative views and corrupt practices	Eg. Retraumatization
To family and broader community		Eg. Retaliatory attack on community	Eg. Family ostracized if wider community finds out			
To staff	Eg. Passage to camp Y surrounded by areas with unexploded mines			Eg. Victim referred to additional witness living in area at high risk of landslide		Eg vicarious trauma
To evidence/ information		Eg. Affiliated armed groups present at checkpoints specifically tasked with looking for documents taken from destroyed government building nearby				

## 2 Step Two: Assess the Risk

Plot the identified threats in terms of risk - the likelihood that they would happen, and the impact if they did. When thinking about risk, consider historical patterns, current levels of violence, and any other conditions that could exacerbate the vulnerability of an individual or target.

For example – when thinking about the risk of a retaliatory attack against a survivor or witness – consider the following influencing factors:

- » Have there been reports of some victims/witnesses being attacked after disclosing sexual violence?
- » Are suspected perpetrators/armed groups operating close by? What is the likelihood they will know about the disclosure?
- » Do victims/witnesses live isolated or closely with families/communities? Is the fact they suffered sexual violence public within the community? Would the community/family protect the individual?

Form 2

### Risk Level Assessment

Likelihood & impact	Negligible	Minor	Moderate	Severe	Critical
Very likely/ imminent					
Likely					
Moderately / likely					
Unlikely					
Very unlikely					

Key

- Very Low Risk
- Low Risk
- Medium Risk
- High Risk
- Very High Risk
- Unacceptable

## 3

## Mitigate or Manage the Risk

List the risks you identified in order of severity – starting with the highest. Identify measures you could put in place, or changes you could make, to reduce or counter those risks.

## Form 3

Level	Identified Risk	Notes on specific contextual factors/ vulnerabilities	Action	
Very High	Retaliation from armed groups against witness for disclosing information	<ul style="list-style-type: none"> <li>✓ Victim lives alone</li> <li>✓ Armed groups checking all papers carried by foreigners at check points</li> <li>✓ Rumours of break-away armed groups connected to suspected perpetrators still operating in area</li> </ul>	a. Consult with victim and potentially refer case to international organization running nearby camp with safer shelter and GBV assistance programme.	<input type="checkbox"/>
			b. Arrange for confidential location for interviewing somewhere other than village	<input type="checkbox"/>

## ANNEX 3: Reasons not to Collect Physical Evidence

1. Do the local rules of procedure and evidence for the type of claim envisaged (e.g. criminal, civil, constitutional or other) require forensic or other type of physical evidence to corroborate other information about sexual violence?
2. Does the purpose of the documentation process (e.g. judicial, non-judicial, advocacy etc.) require forensic or other type of physical evidence to corroborate other information about sexual violence?
3. Do you have the authority, capacity and resources to safely collect, transport and store the relevant physical evidence, in particular:
  - Do you have the professional training required, as an investigator, health professional or otherwise, to collect, transport and store the relevant physical evidence?
  - Do you have the necessary legal authority?
  - Can you properly store and preserve the relevant physical evidence?
4. If you have come across physical evidence at a site of violations or in the field, before considering collecting the item have you already tried to/recorded or documented the evidence by other means such as:
  - taking a note of the item(s) that you have found;
  - sketching the site of violations;
  - taking photographs of the item and the site of violations;
  - if possible, taking video recordings of the item and the site of violations; and
  - where possible and safe, conducting interviews with any victims/witnesses near to the site of violations and following leads to other witnesses of the crime.



**If the answer to any of those questions is no:**

### **YOU SHOULD NOT COLLECT PHYSICAL EVIDENCE**

You are likely to alter the physical evidence, not to be able to use it and collecting it may even be illegal in your jurisdiction. You should instead document/record the evidence as best as you can (see point 4 above) and consider contacting someone appropriately mandated, qualified and equipped to collect physical evidence.

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Reasons Not To Collect Physical Evidence

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# ANNEX 4: Sample Sexual Assault Medical Certificate

## SEXUAL ASSAULT MEDICAL CERTIFICATE

Confidential Document

Today's Date    /    /    Time ____ : ____		Location of medical exam
<b>A. PATIENT INFORMATION</b>		
1. Last name	2. Post-name	3. First name
4. Address		5. Gender <input type="checkbox"/> Female <input type="checkbox"/> Male
6. Age <input type="checkbox"/> Not known	7. Date of birth /    / <input type="checkbox"/> Not known	8. Place of birth <input type="checkbox"/> Not known
9. Marital status <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced <input type="checkbox"/> Separated <input type="checkbox"/> Not applicable		
<i>Note: If the patient is male, skip to question 14.</i>		
10. Date of last menstrual period /    / <input type="checkbox"/> Premenarchal <input type="checkbox"/> Post-menopausal <input type="checkbox"/> Not known		
11. Number of pregnancies	12. Number of live births	13. Currently pregnant <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not known
14. Patient had consensual intercourse within 7 days before the exam <input type="checkbox"/> Yes <input type="checkbox"/> No		
15. Patient had anal/vaginal wounds, injuries, diagnostic procedures or medical treatments within 60 days before the assault that could affect the interpretations of the current medical exam <input type="checkbox"/> Yes <input type="checkbox"/> No <i>If "Yes," explain :</i> _____		
16. Date and time of the assault /    /    ____ : ____ <input type="checkbox"/> Not known		17. Place of the assault <input type="checkbox"/> Not known
18. Use of force, threats or weapons <i>(check all that apply)</i> <input type="checkbox"/> Physical force <input type="checkbox"/> Use of weapons <input type="checkbox"/> Threats to the patient <input type="checkbox"/> Threats to others <input type="checkbox"/> No force <input type="checkbox"/> Not known		
19. Type of force/weapons <i>(check all that apply)</i> <input type="checkbox"/> Sticks/batons <input type="checkbox"/> Knives <input type="checkbox"/> Blindfold <input type="checkbox"/> Hands <input type="checkbox"/> Not known <input type="checkbox"/> Other <i>(such as forced nudity, suspension, electrical torture, witness or participation in torture of others, etc.) :</i> _____ <input type="checkbox"/> Guns <input type="checkbox"/> Restraints <input type="checkbox"/> Gag <input type="checkbox"/> Feet		
20. Forced chemical intoxication of patient <i>(check all that apply)</i> <input type="checkbox"/> No <input type="checkbox"/> Drugs <input type="checkbox"/> Alcohol <input type="checkbox"/> Not known <input type="checkbox"/> Other : _____		
<b>B. SUSPECT INFORMATION</b>		
1. Number of suspects <input type="checkbox"/> One (1) <input type="checkbox"/> Two (2) <input type="checkbox"/> Three (3) <input type="checkbox"/> More than three <i>If "More than three," specify the number : _____</i> <input type="checkbox"/> Not known		
<i>First suspect: answer questions 2 through 6.</i>		<i>Second suspect: answer questions 7 through 11.</i>
2. Relationship of suspect to patient <i>(check all that apply)</i> <input type="checkbox"/> Acquaintance <input type="checkbox"/> Family member <input type="checkbox"/> Stranger <input type="checkbox"/> Intimate partner / ex-partner <input type="checkbox"/> Not known <input type="checkbox"/> Other : _____		7. Relationship of suspect to patient <i>(check all that apply)</i> <input type="checkbox"/> Acquaintance <input type="checkbox"/> Family member <input type="checkbox"/> Stranger <input type="checkbox"/> Intimate partner / ex-partner <input type="checkbox"/> Not known <input type="checkbox"/> Other : _____
3. Suspect gender <input type="checkbox"/> Female <input type="checkbox"/> Male <input type="checkbox"/> Not known		8. Suspect gender <input type="checkbox"/> Female <input type="checkbox"/> Male <input type="checkbox"/> Not known
4. Approximate age of suspect <input type="checkbox"/> Not known		9. Approximate age of suspect <input type="checkbox"/> Not known
5. Suspect is <input type="checkbox"/> Civilian <input type="checkbox"/> Police <input type="checkbox"/> Military <input type="checkbox"/> Militia <input type="checkbox"/> Not known		10. Suspect is police/military/militia <input type="checkbox"/> Civilian <input type="checkbox"/> Police <input type="checkbox"/> Military <input type="checkbox"/> Militia <input type="checkbox"/> Not known
6. Language(s) spoken by suspect <input type="checkbox"/> Not known		11. Language(s) spoken by suspect <input type="checkbox"/> Not known
<i>If three or more suspects, answer question 12.</i>		
12. Describe the suspects in detail <i>(including relationships to patient, genders, approximate ages, whether suspects are police/military/rebels, languages spoken, etc.) :</i> _____ _____ _____		
Name of clinician _____	Signature of clinician _____	N°C.N.O.M. _____ Date    ____ / ____ / ____

## Sample Sexual Assault Medical Certificate

This forensic medical certificate is a sample of what can be used by trained doctors and nurses conducting forensic medical evaluations and documenting physical and behavioural observations in the health clinics, where possible.

## SEXUAL ASSAULT MEDICAL CERTIFICATE (continued)

C. SUMMARY OF EVENTS REPORTED BY THE PATIENT					
1. Penetration of female genitalia with:	Yes	No	Attempted	Not known	Comments:
a. penis	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. finger(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. foreign body	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
2. Penetration of anus with:	Yes	No	Attempted	Not known	Comments:
a. penis	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. finger(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. foreign body	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
3. Oral contact with genitalia:	Yes	No	Attempted	Not known	Comments:
a. suspect to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. third party to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. patient to suspect	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
d. patient to third party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
4. Oral contact with anus:	Yes	No	Attempted	Not known	Comments:
a. suspect to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. third party to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. patient to suspect	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
d. patient to third party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
5. Genital touch / contact:	Yes	No	Attempted	Not known	Comments:
a. suspect to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. third party to patient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. patient to suspect	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
d. patient to third party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
e. patient to self	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
6. Ejaculation:	Yes	No		Not known	Comments :
a. inside body orifice of patient	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	_____
b. outside body orifice of patient	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	_____
c. specify location of ejaculation:	_____				

## D. POST-ASSAULT PATIENT HYGIENE

1. After the assault, the patient (check all that apply)

Ate     Drank     Brushed teeth     Showered     Took a bath     Urinated     Not known

## E. PATIENT ACCOUNT OF EVENT

Provide a summary of the key elements of the assault as described by the patient. (If there are additional facts or observations that are not otherwise represented in this form, please attach a typed narrative.)

## F. GENERAL PHYSICAL EXAM OF THE PATIENT

1. Blood pressure	2. Pulse	3. Respiration	4. Temperature (Celsius)	5. Weight	6. Height
/					
5. Behavior and psychological state (check all that apply)					
<input type="checkbox"/> fear	<input type="checkbox"/> withdrawn	<input type="checkbox"/> sad	<input type="checkbox"/> ashamed	<input type="checkbox"/> impaired mental status	
<input type="checkbox"/> angry	<input type="checkbox"/> shocked	<input type="checkbox"/> crying	<input type="checkbox"/> mute	<input type="checkbox"/> anxious	

REMEMBER TO: COLLECT EVIDENCE (wet and dry secretions, stains, clothing and foreign materials from the patient's body);  
USE RAPE KIT (when available) AND CHAIN OF CUSTODY FORMS; and TAKE PHOTOGRAPHS

Name of clinician \_\_\_\_\_ N°C.N.O.M. \_\_\_\_\_  
Signature of clinician \_\_\_\_\_ page 2 of 4 Date \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_



Sample Sexual Assault Medical Certificate

**SEXUAL ASSAULT MEDICAL CERTIFICATE (continued)**

**I. LABORATORY AND OTHER TESTS**

PERFORMED:	Yes	No	RESULTS:	PERFORMED:	Yes	No	RESULTS:
1. HIV serology	<input type="checkbox"/>	<input type="checkbox"/>	_____	6. Urinary analysis	<input type="checkbox"/>	<input type="checkbox"/>	_____
2. Syphilis	<input type="checkbox"/>	<input type="checkbox"/>	_____	7. Wet mount for sperm / infection	<input type="checkbox"/>	<input type="checkbox"/>	_____
3. Hepatitis B	<input type="checkbox"/>	<input type="checkbox"/>	_____	8. Ultrasound	<input type="checkbox"/>	<input type="checkbox"/>	_____
4. PAP smear	<input type="checkbox"/>	<input type="checkbox"/>	_____	9. Other testing	<input type="checkbox"/>	<input type="checkbox"/>	_____
5. Pregnancy test	<input type="checkbox"/>	<input type="checkbox"/>	_____				

**J. TREATMENT / PLAN**

1. Post-exposure Prophylaxis (PEP)	Yes	Non	Comments:
a. PEP	<input type="checkbox"/>	<input type="checkbox"/>	_____
2. Medications	Yes	No	Comments:
a. Antibiotics	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. Pain medicine	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. Emergency contraception	<input type="checkbox"/>	<input type="checkbox"/>	_____
d. Other	<input type="checkbox"/>	<input type="checkbox"/>	_____
3. Referrals	Yes	No	Comments:
a. Patient will be referred to specialist today	<input type="checkbox"/>	<input type="checkbox"/>	_____
4. Police requisition	Yes	No	Comments:
a. Police requisition completed	<input type="checkbox"/>	<input type="checkbox"/>	_____
b. If 4a is "No," does the patient want to report to the police?	<input type="checkbox"/>	<input type="checkbox"/>	_____
c. If 4b is "No," was the patient counseled on the value of a police investigation?	<input type="checkbox"/>	<input type="checkbox"/>	_____

**K. EVALUATION FINDINGS**

1. History of event:	_____
2. Behavioral observations:	_____
3. Physical findings:	_____
4. Laboratory tests:	_____
5. Completed documents attached to this certificate:	
<input type="checkbox"/> Laboratory test results	<input type="checkbox"/> Written narrative (preferably typed)
<input type="checkbox"/> Photographs	<input type="checkbox"/> Not applicable

**L. EVALUATION CONCLUSIONS**

1.	<input type="checkbox"/> CONSISTENT with <input type="checkbox"/> HIGHLY CONSISTENT with <input type="checkbox"/> DIAGNOSTIC of <input type="checkbox"/> NOT CONSISTENT with	<u>SEXUAL assault.</u>
The medical evaluation findings are: <i>(choose only one option)</i>		
2.	<input type="checkbox"/> CONSISTENT with <input type="checkbox"/> HIGHLY CONSISTENT with <input type="checkbox"/> DIAGNOSTIC of <input type="checkbox"/> NOT CONSISTENT with	<u>PHYSICAL assault.</u>
The medical evaluation findings are: <i>(choose only one option)</i>		

**M. CLINICIAN OATH**

I have provided informed consent to the patient for the evaluation, photographs, and transfer of affidavit to the legal system or law enforcement.

Yes       No

I hereby solemnly swear that the information provided in this form is true and complete to the best of my knowledge and belief.

Name of clinician \_\_\_\_\_  
 Signature of clinician \_\_\_\_\_  
 Date \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Name of clinician \_\_\_\_\_      N°C.N.O.M. \_\_\_\_\_  
 Signature of clinician \_\_\_\_\_      Date \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

# ANNEX 5: Organisational Security Good Practices Checklist

## Safety and Security Management

- ✓ The organization develops safety and security policies and outlines security roles and responsibilities.
- ✓ Senior staff monitors and periodically discusses the operating environment and safety and security practices with all staff.
- ✓ The organization's leadership updates security policies and procedures on a periodic basis.
- ✓ Each office designates security focal points, and job descriptions include security responsibilities.
- ✓ The organization develops a network of security contacts with local law enforcement, stakeholders, embassies, and partners. This effort is spearheaded by the organization's leadership and senior staff.

## Meeting Security Standards

Many comprehensive resources provide guidance on organizational security (see appendix). The standards listed below provide a starting point for building strong safety and security management practices. These standards are not intended to cover all safety and security approaches or contexts, and there may be situations where it is not possible to meet the standards.

## Personal Security

- ✓ Staff is accountable for personal and professional conduct as actions impact personal security, the security of others, and the organization's reputation.
- ✓ Staff avoids conduct that would put them or others at risk, discredit the organization, or increase its vulnerability.
- ✓ Staff abides by all relevant national laws and seeks advice from management where national or local customary laws conflict with international norms.
- ✓ Staff respects the religious beliefs, customs, and habits of local communities and authorities.
- ✓ Staff completes a form that includes emergency contact information and health information relevant in the event of an emergency.
- ✓ Staff monitors the security situation and regularly updates their manager or designated staff.
- ✓ Staff reports safety and security incidents to management or human resources staff.

## Human Resources

- ✓ Human resource policies clearly outline security roles and responsibilities.
- ✓ Job descriptions clearly outline safety and security responsibilities.
- ✓ During recruitment and orientation, the organization ensures that individuals have security knowledge and training commensurate with the degree of threat to which they may be exposed.
- ✓ New staff orientation includes information about security policies.
- ✓ Performance reviews evaluate staff compliance with safety and security regulations.
- ✓ Staff breaches in safety and security policies are subject to disciplinary measures.

## Facilities and Office Security

- ✓ Office facilities deter and detect unwanted visitors or intruders. This should include a fence around the property and a robust access control system.
- ✓ All staff members know whom to contact in the event of an emergency. This information is posted in the office.
- ✓ Offices and equipment are comprehensively insured in case of theft or natural disaster.
- ✓ Office facilities are equipped with appropriate safety equipment and have emergency exits.
- ✓ One or more staff members are trained to handle fire hazards.

## Programming

- ✓ All projects incorporate a basic risk assessment that is periodically reviewed. A basic risk assessment should:
  1. List existing security threats, possible threats, and specific vulnerabilities
  2. Assess the likelihood of each threat listed and the impact it could have on the organization
  3. Develop strategies to mitigate and reduce likely threats and vulnerabilities
- ✓ Staff adapts project activities to dynamic security conditions
- ✓ Proposals and budgets include safety and security elements, such as:
  1. Staff trainings (personal security, first aid)
  2. Site enhancements (fences, safe, locks)
  3. Safety and security materials (first aid materials, phones)
  4. Human resources (focal points, guards, insurance)
  5. When required, contractual agreements with reputable private security companies

## Organisational Security Good Practices Checklist

## Travel and Transportation

- ✓ Staff records travel plans in a central system.
- ✓ Staff carries emergency contact information (next of kin, main office phone number, emergency medical services, lawyer, etc.) when traveling.
- ✓ Staff checks in with a designated contact when traveling. In the event of a natural disaster or security incident, traveling staff should contact manager or designated staff immediately.
- ✓ Staff registers international travel with respective embassies.
- ✓ If driving, staff members hold valid licenses, wear seatbelts and ensure vehicles meet safety regulations.
- ✓ Vehicles contain basic safety equipment including fire extinguishers, clean water, flashlights, back-up communications, first aid kits, and relevant repair kits.
- ✓ Drivers comply with local traffic laws at all times.

## Communication and Data

- ✓ When traveling to the field, staff has access to reliable telecommunications to keep in contact with colleagues, for example by carrying multiple SIM cards.
- ✓ If possible, when operating in remote areas without mobile network coverage, staff has access to a satellite phone and knows how to use it.
- ✓ Organization has updated antivirus software.
- ✓ Staff is trained in good practices in the area of IT security and staff compliance with policies is verified.
- ✓ All technological devices are password protected using strong passwords, which are periodically changed.
- ✓ Electronic files are regularly backed up to cloud-based storage or encrypted flash drives. Sensitive data should not be physically transported unless absolutely necessary.
- ✓ Hard copies of files are organized and secured, or destroyed.

## Health and Wellness

- ✓ Staff receives comprehensive health insurance, including international health coverage if traveling internationally.
- ✓ At least one person is trained in first aid in every office. At least one first-aid kit, fully stocked and maintained, is available in all office and vehicles.
- ✓ Emergency medical response procedures are posted in public areas.
- ✓ Locations near the offices are identified where staff can seek healthcare in the event of an injury or sudden illness.
- ✓ A local counselor is identified (in advance) to support staff and/or families in case of crisis or traumatic events.
- ✓ In case of sexual assault, access to psychological, legal, and medical support is available to all staff.
- ✓ This may include helping affected staff obtain access to a Post-Exposure Prophylaxis Kit.

## Appendix

### [Catalogue of Publications and DVDs for Human Rights Defenders](#)

Protection International, 2012

Defenders Protection Initiative Security Management Workbook

Defenders Protection Initiative, Kampala, Uganda, 2013

### [Front Line Handbook for Human Rights Defenders: What Protection can EU and Norwegian Diplomatic Missions Offer?](#)

### [Front Line, The International Foundation for the Protection of Human Rights Defenders, 2007 Insiste, Resiste, Persiste, Existe: Women Human Rights Defenders' Security Strategies](#)

### [Insiste, Persiste, Resiste, Existe – A Report on Women's Rights Activists](#)

Jane Barry with Vahida Nainar

Urgent Action Fund for Women's Human Rights, Front Line – The International Foundation for the Protection of Human Rights Defenders, and The Kvinna till Kvinna Foundation, 2008

### [New Protection Manual for Human Rights Defenders, Third Edition](#)

Protection International, 2009

Protection Manual for Human Rights Defenders

Front Line, The International Foundation for the Protection of Human Rights Defenders, 2005

### [Second Report on the Situation of Human Rights Defenders in the Americas](#)

Inter-American Commission on Human Rights, 2011

### [Security in a Box: Tools and Tactics for Your Digital Security](#)

A project of Tactical Technology Collective and Front Line - The International Foundation for the Protection of Human Rights Defenders, 2013

### [Workbook on Security: Practical Steps for Human Rights Defenders at Risk](#)

Front Line, The International Foundation for the Protection of Human Rights Defenders, 2011

## ANNEX 6: Grab Bag Content

Practitioners are advised to carry a Grab Bag with them at all times during field trips. To make your bag (ideally a shoulder bag, not necessarily waterproof) easier to find in the dark, attach a glow in the dark stick, reflective armband or tape to it. Suggested content includes:

Essential	
<i>Keep in a waterproof document pouch in the bag</i>	
Identification documents and other important documents or copies (e.g. mission order, driving licence, medical prescriptions etc). All these documents should be left on your email server by sending an email to yourself and sent to a trusted person You can also keep a copy on a Secure Digital (SD) card that you keep on you in a safe location	<input type="checkbox"/>
Emergency cash, in small notes of local currency or US\$	<input type="checkbox"/>
Emergency contact list (e.g. office, medical services, police/security company, lawyer etc)	<input type="checkbox"/>
<i>In the bag</i>	
Communication (e.g. radio, mobile/satellite phone if appropriate, incl. charged batteries, charger and extra credit for pre-paid phones)	<input type="checkbox"/>
First Aid kit/trauma pack	<input type="checkbox"/>
Medication	<input type="checkbox"/>
Water/food bars	<input type="checkbox"/>
Multi-tool (note that restrictions may apply in some circumstances such as when going through airport security)	<input type="checkbox"/>
Torches (incl. head torch) and spare batteries	<input type="checkbox"/>
Clothing/foil poncho	<input type="checkbox"/>

## Other

2 spare ID photos for emergency travel authorisation or other

Maps/compass/GPS (be sure to know how to use them and note that GPS may be illegal in some countries)

Sun protection/insect repellent/lip balm

Mosquito net

Heat/foil blanket (solid one, not thin aluminium one)

Waterproof jacket/poncho and trousers

Water purification tablets or purifier

Notebook, pencil, book

Soap, toothbrush/toothpaste, towel

Baby wipes/toilet roll

Lighter/cigarettes/condoms

Waterproof tape

Loud whistle

Respirator masks

Duct tape.

## ANNEX 7 – Interview Checklist

Once you have planned and prepared for your interview<sup>1</sup>, regardless of the subject matter of the interview, all interviews must include at a minimum the following actions:

### Engage and Explain phase

- ✓ Thank the interviewee for their time and ensure they feel safe and comfortable.
- ✓ Introduce yourself and your team and explain the role of each person present.
- ✓ If using an interpreter/note taker, introduce them specifically, explain their role and confidentiality obligations. Ask the interviewee if s/he is comfortable speaking to the interviewer/team.
- ✓ Fully explain the purpose and nature of the documentation, and the affiliation and mandate of the team.
- ✓ Explain the format and purpose of the interview as well as type of questions which may be asked.
- ✓ Discuss duration of the interview, making it clear that the victim/witness can take a break or end the interview at any time.
- ✓ Explain any potential future use of information, including potential disclosure to third parties (e.g. police, investigators, courts) if the victim/witness consents.
- ✓ Explain the limits of maintaining confidentiality, the possible risks to the interviewee of participating in the documentation process, and the limitations of the services referred to, if applicable.
- ✓ Reassure the interviewee, including children, that they have a choice about whether or not to speak to you.
- ✓ Assess and manage interviewee's expectations of interview process, use of information and type of assistance available.

- ✓ Address any security or other concerns that the interviewee may have.
- ✓ Ask if the victim/witness has made any prior statements or been interviewed, and/or ask who else s/he discussed these issues with.
- ✓ Make sure the interviewee understands what you have told him/her. It is good practice for practitioners to ask the victim/witness to explain back to them what s/he has understood about the process.

### Obtaining Informed Consent

- ✓ Obtain explicit consent for participation in the documentation, including specific consent for each of the following:
  - a. To be interviewed
  - b. For note-taking and using devices such as a tape recorder or video camera during an interview. Ensure that the victim/witness knows that an audio or video recording is being made, if applicable
  - c. For taking photographs, physical examinations, imaging of documents or any other form of evidence a victim may provide
  - d. For all possible uses of the information provided as described (e.g. data collection, information sharing)
  - e. To the transfer of identity, contact and substantive information to third parties if this is intended, in particular to national or international investigators or organisations, courts and the police.

<sup>1</sup> This checklist only covers the three middle phases of the PEACE framework relating to the interview itself: 1. Engage and Explain, 2. Account and Clarification, and 3. Closure. The Planning and Preparation and Evaluation phases which are essential parts of the PEACE framework are covered in detail in Chapter 11: Interviewing.

### Document consent obtained.

- ✓ For child interviewees, explain instructions (regarding telling the truth, what to do if they do not understand or do not know the answer to a question, etc.). See Chapter 16: Sexual Violence against Children for more guidance on engaging and explaining in relation to children.
- ✓ Record all relevant personal data for the interviewee (name, date of birth, gender, ethnicity/nationality/religion, if relevant, contact details etc., see Annex 8: Template for Personal Data to be collected from victims/witnesses). Where telecommunications are absent or unreliable, and conventional addresses are irregular, known by different names or non-existent, use alternative means to record the contact information of the victim/witness, including name of clan, tribe or community, or of an organisation or group that the victim/witness is in close contact with. Remember that this information is highly sensitive and you need to have robust security procedures in place regarding the safe handling and storing of such information to ensure its confidentiality (see Chapter 8: Safety and Security and Chapter 13: Storing and Handling Information).

### Account and Clarification phase

#### What you need to do

- ✓ Obtain a full and uninterrupted first account using open-ended questions (often called TED questions - Tell me, Explain to me, Describe to me) allowing the victim/witness to tell the story in his/her own words. Funnel information discussing broader and less sensitive issues before moving on to sensitive subjects.
- ✓ Chronologically clarify the account, dividing it into topics, repeating back the victim/witness' own words. Obtain additional details about all the elements of alleged crimes, covering the "who", "what", "where", "when" and "how" of the crimes, always asking "how do you know" and "what led you to that conclusion". Be wary of "why" questions. Pay particular attention to language used and difficult concepts when interviewing children. See Chapter 16: Sexual Violence against Children.
- ✓ Adapt your questions and the type and degree of detail to your mandate and jurisdiction. For sexual violence as a crime under international law, cover in particular:
  - Specific elements
    - Details of the assault/crime
    - Location/date/coercive circumstances
    - Description of other people present
  - Common elements
    - Details of conflict/attack against civilian population
    - Political and security situation, scale, similar incidents or attacks
    - Words and actions of perpetrator(s)/possible reasons for violence
  - Linkage elements
    - Details of intent/knowledge
    - Chain of command/power structure, communications, equipment
    - Description of perpetrator(s) and their role/responsibilities
  - Impact
    - Physical harm (immediate and long-term)
    - Mental harm (immediate and long-term)
    - Social/Economic harm
- ✓ Ask about any crimes against others the victim/witness may have eye witnessed.
- ✓ Ask about any other person who may have eye witnessed the crimes against the victim/witness being interviewed.

## Annex 7

## Interview Checklist

- ✓ Ask the victim/witness about any other information or evidence s/he may have, in particular if s/he took a picture, video or texted anyone about the incident.
- ✓ Allow the victim/witness to draw any maps/plans/sketches if appropriate (e.g. area where incident took place).
- ✓ Ask the victim/witness if there is any other information s/he would like to add or whether s/he has any questions to ask before moving on to the Closure phase.

**How you need to behave**

- ✓ Be aware of your demeanour (i.e. remain polite, respectful, patient and attentive; look straight at and speak directly to the victim/witness; be aware of your pitch/tono and that of your interpreter). Sit at the same eye level as the victim/witness (or below).
  - ✓ Consistently give the victim/witness the power to agree/disagree, answer/not answer, ask questions and have information repeated. Give the victim/witness enough information to make an informed decision.
  - ✓ Show empathy and respect, not pity. Avoid making promises of any kind (e.g. with regard to confidentiality). Remain flexible throughout the process.
  - ✓ Never assume anything about the victim's/witness' feelings or thoughts, about the facts, about his/her preferences, or about how trauma has impacted him/her.
  - ✓ Remind yourself that victims/witnesses will behave and react in distinct and varied ways when telling or retelling their story, i.e. s/he may become:
    - Distressed/upset/withdrawn
    - Angry/defensive/dismissive
    - Calm/poised/clear.
- There is no "one way" to behave.

- ✓ Remember not to assume that the victim/witness will be:

- Ashamed/afraid to talk
- Fragile/traumatised/discredited/wary of men (or someone of the same sex as the perpetrator)
- Most upset about the sexual violence (as opposed to other aspects of his/her experience)
- Physically harmed.

**Closure phase**

- ✓ Discuss and address any questions and concerns (e.g. safety, practical issues).
- ✓ Discuss interviewee's needs and explain referral options available.
- ✓ Establish current and long-term contact details, agreement to contact again and preferred method of being contacted. Include alternative means of contact (e.g. family, friends, local church or group who may be in a position to help you locate the victim/witness).
- ✓ Agree a mean for the interviewee to contact you in the future if necessary.
- ✓ Read back interview statement/interview notes to interviewee, ask them to sign/attest if you have an official mandate and if appropriate.
- ✓ End interview on neutral/positive topics and assess interviewee's emotional state. Find out where s/he is going and what kind of support (e.g. friend, family) s/he will have immediately after the interview.
- ✓ Explain the next steps and consider/discuss post-interview checks and follow-ups, ideally a few days after the interview and at regular intervals after that.
- ✓ Ask the victim/witness again whether they give their informed consent for the use or disclosure of information to allow them to change their mind or withdraw consent if they wish.
- ✓ Thank the victim/witness for talking to you and

use culturally appropriate gestures (e.g. shaking hands, etc.) when departing.

- ✔ Immediately after the end of each interview, conduct a thorough evaluation of the interview, assessing its impact and significance on the documentation (i.e. what elements are satisfied by the information you just gathered, what gaps are remaining and where do you now need to focus on). Even under tight time constraints, do not delay evaluations or leave them all until the end of your mission as this is likely to lead to both unnecessary interviews and gaps in the information gathering process (see Chapter 11: Interviewing/Evaluation).

## ANNEX 8 – Template for Personal Data to be Collected from Victims/Witnesses

This is a list of basic information that practitioners should collect from a victim/witness when conducting an interview:

1. Code (this will be the coding system used by the practitioner and his/her team for security purposes to match this personal data sheet with the victim's/witness's actual statement).
2. Name of victim/witness (first and last, and any previous or alternative names by which the victim/witness is known).
3. Sex of victim/witness.
4. Date of birth of victim/witness.
5. Place of birth of victim/witness.
6. Name of father of victim/witness.
7. Name of mother of victim/witness.
8. Languages spoken by victim/witness (including the victim's/witness's preferred language).
9. Language of interview.
10. Current residence/address of victim/witness.
11. Permanent residence/address of victim/witness.
12. Phone number(s)/email(s) of victim/witness.

## Template for Personal Data to be Collected from Survivors/Witnesses

13.	Occupation/work of victim/witness – current or former.
14.	Family status (names, age and location, if known, of any stated family members).
15.	Nationality of victim/witness.
16.	Religion of victim/witness (if relevant and contextually appropriate).
17.	Ethnicity/tribal origins of victim/witness (if relevant and contextually appropriate).
18.	Date, place and time of interview.
19.	Persons present during interview and positions/roles.
20.	Additional evidence provided by the victim/witness in the context of the interview (e.g. photographs, diagrams, maps, videos, medical reports, other documents, etc.) and coding of same.
21.	Information regarding whether the victim/witness agrees to be contacted again.
22.	Information regarding whether the victim/witness requires psychosocial support.
23.	Information regarding whether the victim/witness agrees to have her/his evidence shared with national judicial authorities (specify which).
24.	Information regarding whether the victim/witness agrees to have her/his evidence shared with international judicial authorities (specify which).
25.	Victim's/witness's signature after read-back (if the practitioner has decided to have the statements signed).

# ANNEX 9 – Chain of Custody Form



### EVIDENCE COLLECTION CHAIN OF CUSTODY FORM

Case #: \_\_\_\_\_  
 Exhibit Reference #: \_\_\_\_\_  
 Date Collected: \_\_\_\_\_  
 Time Collected: \_\_\_\_\_  
 Alleged Offense(s): \_\_\_\_\_  
 Description: \_\_\_\_\_

Location Where Found/Seized/Produced: \_\_\_\_\_

Collected By: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Transferred From: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Transferred To: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Date of Transfer: \_\_\_\_\_ Time: \_\_\_\_\_

Purpose of Transfer: (ex. Custody, Analysis, or Court)

Method of Storage: \_\_\_\_\_

### CONTINUITY

Transferred From: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Transferred To: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Date of Transfer: \_\_\_\_\_ Time: \_\_\_\_\_

Purpose of Transfer: (ex. Custody, Analysis, or Court)

Method of Storage: \_\_\_\_\_

Transferred From: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Transferred To: \_\_\_\_\_  
 [PRINT FULL NAME(S) IN BLOCK LETTERS]  
 [TITLE, SERVICE, & IDENTIFICATION #]  
 [SIGNATURE]

Date of Transfer: \_\_\_\_\_ Time: \_\_\_\_\_

Purpose of Transfer: (ex. Custody, Analysis, or Court)

Method of Storage: \_\_\_\_\_



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