

# WORKING WITH VICTIMS OF SEXUAL VIOLENCE DURING ARMED CONFLICT: A Manual for Ukrainian prosecutors



**Council of Europe Project  
"Combating Violence against Women  
in Ukraine – Phase II" (COVAW-II)**

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# WORKING WITH VICTIMS OF SEXUAL VIOLENCE DURING ARMED CONFLICT: A Manual for Ukrainian prosecutors

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*The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.*

This manual is an adaptation of the 2022 publication, "Working with Victims of Sexual Violence During Armed Conflict: A Manual for Ukrainian mental health and emergency response professionals", developed by Sareta Ashraph, Oksana Melnychenko and Oksana Stepaniuk under the Council of Europe Project "Combatting Violence against Women in Ukraine".

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Cover design and layout:  
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# Foreword

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**C**onflict-related sexual violence (CRSV) is a horrific weapon of war that has been widely used in human history. It is still being used today, in the twenty-first century, in the heart of Europe. It is a sensitive, silenced and extremely traumatic experience for the victims.

Since the beginning of the war of aggression in Ukraine as of May 2024, more than 270 cases of sexual violence related to the armed conflict have been investigated. Unfortunately, the number of such grave international crimes will only grow in the future.

Andriy Kostin, a Prosecutor General of Ukraine, stated: “There is no such category of Ukrainians that may feel protected from violence during this war. Conflict-related sexual violence affects men, women and children of all ages. Prosecutors organise comprehensive investigations, examining each fact of the crime in its context, including the gender component.”

Over the past decade, the close link between sexual violence and armed conflict has attracted increased attention of the international community. Its consequences have prompted numerous attempts to address the issue of accountability and impunity for perpetrators, including ensuring access to justice for victims and improving the effectiveness of its mechanisms.

During the pre-trial investigation of this type of crimes, prosecutors and investigators must demonstrate high level of professionalism as lawyers who do everything necessary to collect appropriate and admissible evidence and prove the offender's guilt in court. At the same time, it is extremely important to remain human and apply a victim-centred approach to avoid re-traumatising experience for both the victims and the witnesses.



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On behalf of the entire team of the Training Centre for Prosecutors of Ukraine, I am sincerely grateful to the authors of the manual for prosecutors "Working with victims of sexual violence during armed conflict" for their comprehensive work and for answering the most sensitive and challenging questions related to this rather complex and important topic in our difficult realities, which prosecutors face in the course of their duties. We will definitely use the materials of this manual when conducting trainings for prosecutors on procedural guidance in cases of conflict-related sexual violence.

## List of Abbreviations

Istanbul Convention	The Council of Europe Convention on preventing and combating violence against women and domestic violence
Istanbul Protocol	UN OHCHR Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide
Lanzarote Convention	The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

## List of Acronyms

ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CPC	Criminal Procedure Code
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights



ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
OHCHR	Office of the High Commissioner for Human Rights
OSINT	Open-source intelligence
OTF	Open-Source Intelligence Task Force
WHO	World Health Organization

# Introduction

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In April 2022, less than two months after the beginning of the full-scale stage of the armed aggression of the Russian Federation against Ukraine, which had commenced in 2014 with the attempted annexation of Crimea, concerns were raised of sexual violence – and particularly rape – being used as a weapon of war by the Russian Federation, as growing evidence of sexual violence emerged from areas retaken from retreating Russian forces.<sup>1</sup> In a joint statement released in June 2022, the EU High Representative for Foreign Affairs and Security Policy, Josep Borrell, and the UN Special Rapporteur for Sexual Violence in Armed Conflict, Pramila Patten, expressed grave concerns “about the harrowing personal testimonies and mounting allegations of sexual violence.”<sup>2</sup> It is believed that the scale of sexual violence being committed in Ukraine during the most recent and ongoing iteration of the conflict is significantly underreported.

Ukraine’s Prosecutor General Andriy Kostin stated that the main task of prosecutors is to ensure justice for victims, as this is what they expect from any investigation. Prosecutors work to ensure that all responsible for each crime are identified and punished. The Prosecutor General also noted the effective cooperation with UN Special Representative Pramila Patten and her team.<sup>3</sup>

As a result of this cooperation the Strategic plan implementation of powers of the Prosecutor’s Office in the field of criminal prosecution for conflict-related sexual violence was developed, which aims to improve access to justice for survivors of conflict-related sexual violence (hereinafter referred to as CRSV) by conducting prompt, comprehensive, full, and impartial investigations through strengthening the coordination role of the OPG, as well as providing effective support to public prosecution in criminal proceedings for crimes in this category.<sup>4</sup>

This Manual takes into account the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the [Istanbul Convention](#)) ratified by Ukraine in June 2022<sup>5</sup>, the experience of

different states in investigating crimes of sexual violence committed during armed conflict, as well as the case-law of the International Criminal Court and the European Court of Human Rights on these issues.

This publication primarily aimed at prosecutors who organise pre-trial and support public prosecution in cases of sexual violence and covers the following issues: qualification of crimes; challenges faced by prosecutors working with victims of conflict-related sexual violence; prosecutorial strategy according to the Strategic Plan on the Implementation of Powers of the Prosecutor's Office in the Field of Criminal Prosecution for Conflict-Related Sexual Violence; procedural means of avoiding re-traumatisation of conflict-related sexual violence victims etc.

Thus, the manual takes into account the provisions of treaties and other international instruments, foreign experience and practice of international institutions. It aims to be a reliable support for prosecutors who performing their responsibilities in this area.

# I. Understanding sexual violence

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## Defining sexual violence

**S**exual violence has been a devastating feature of human society, committed in war and peacetime alike. Rooted in structural inequalities, and notably gender inequality, sexual violence forms part of a continuum of violence and discrimination that impacts women and men, boys and girls, throughout their lives. On a global scale, those most at risk are women and girls.

The Preamble to the [Istanbul Convention](#) expressly underlines that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women's rights. The convention was preceded by [Recommendation 1873 \(2009\) of the Council of Europe's Parliamentary Assembly](#), which reads in part,

*The Assembly recalls that stopping sexual violence against women in armed conflict is intimately linked with empowering women and changing patriarchal societal models, as well as with ensuring justice is done each and every time a woman is raped in an armed conflict, be it close, on European soil, or far away on another continent. The key to eradicating sexual violence against women in armed conflict is gender equality.<sup>6</sup>*

A facet of patriarchal societies, sexual violence relies on the enforcement of rigidly defined gender roles for its efficacy. Discriminatory attitudes against women and girls bolster, and are bolstered by, the commission of sexual violence, whether the victims are female or male. In turn, the impact of sexual violence often further entrenches gender inequalities within a culture. Understanding these roots is integral to addressing and uprooting the stigma around sexual violence.

This Manual defines sexual violence, including rape, in accordance with the [Istanbul Convention](#), which entered into force on 1 November 2022.

Article 36 of the [Istanbul Convention](#), in setting out the obligations of parties to take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised, provides the following definition of sexual violence:

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
  - a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
  - b. engaging in other non-consensual acts of a sexual nature with a person;
  - c. causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

The definition offered by the [Istanbul Convention](#) is used in the following Council of Europe manuals and reports:

■ *Effectively investigating, prosecuting and adjudicating sexual violence cases: a manual for practitioners in Georgia*, (Council of Europe, UN Women and Equality Now), September 2021.<sup>7</sup>

■ *The Administration of Justice on Sexual Violence Crimes against Women, Research Study*, (Council of Europe and Public Defender (Ombudsperson) of Georgia), December 2020.<sup>8</sup>

■ *Preventing and combating violence against women and domestic violence in Ukraine: Good International Practices and Standards on Violence against women and domestic violence*, Report, (Council of Europe), May 2015.<sup>9</sup>

Although many states party to the [Istanbul Convention](#) may have incorporated the convention's definition of sexual violence into national law, this is not always the case. It is important, therefore, during the documentation and analytical process to consider how acts of sexual violence have or have not been criminalised in the country where the violence has taken place.

Similar standards to that established by the [Istanbul Convention](#) have been developed by the European Court of Human Rights (ECtHR),<sup>10</sup> the Committee on the Elimination of Discrimination against Women (CEDAW Committee),<sup>11</sup> and other international and regional criminal justice and human rights mechanisms.<sup>12</sup> The definition of sexual violence used by the UN Office of the High Commissioner for Human Rights in the work of its Commissions of Inquiry and Fact-Finding Missions also aligns with that of the [Istanbul Convention](#).<sup>13</sup>

Forms of sexual violence include but are not limited to, rape, attempted rape, forced prostitution, trafficking for the purpose of sexual exploitation, sexual slavery, forced marriage, forced pregnancy, forced abortion, and forced public nudity. In addition to being a crime in most national legal systems, sexual violence is a serious violation of human rights, and, depending on the context in which it takes place, may be a constituent act of genocide and/or a violation of international humanitarian law. Where acts have been criminalised under international criminal law and codified in the [Rome Statute of the International Criminal Court](#), those definitions are set out in Annex A.

Particularly (but not solely) in conflict settings, sexual violence is often committed as part of a broad pattern of violations against individuals and communities – a pattern that includes both sexual and non-sexual crimes. Regardless of the form it takes, where it takes place, or the identity of its victims or its perpetrators, sexual violence is not an expression of sexual desire. At its core, it is an expression of power, and a violent means of conveying dominance over the victims and the communities to which the victims belong.

### **Uprooting our assumptions about perpetrators and victims of sexual violence**

- a. *Sexual violence may be committed by a variety of perpetrators, depending on the context in which the violence has occurred. This includes state forces (including police, armed forces, and militia), members of organised non-state armed groups, peacekeepers, members of private military and security companies, criminal gangs and/or individuals.*

Although the vast majority of perpetrators of documented sexual violence are male, females have also been found to have committed and/or incited

sexual violence.<sup>14</sup> Minors associated with armed forces who commit acts of sexual violence may have been indoctrinated or otherwise manipulated or forced to commit such acts. In accordance with the UN Guidelines on Justice Matters Involving Child Victims and Child Witnesses of Crime<sup>15</sup> and the UN Convention on the Rights of the Child,<sup>16</sup> children should be treated as survivors or witnesses and not as perpetrators.

- b. *Sexual violence can be committed against and by individuals of any gender.* The definition provided by the Istanbul Convention, the Istanbul Protocol by the Office of the High Commissioner of Human Rights and in the ICC Elements of Crimes are all gender-neutral. They include same-sex penetration and encompass both male and/or female perpetrators and victims.
- c. *An individual can be liable for a crime of sexual violence even if they are not directly involved in the conduct.* For example, a perpetrator would include someone who forces another to commit the crime. It can also include someone who orders, plans, instigates, encourages, and aids the crime.

### ***Understanding the role of consent when it comes to rape or other acts of sexual violence***

It is generally accepted that a person may be incapable of giving genuine consent if affected by natural, induced, or age-related incapacity.

The European Court of Human Rights – echoing Article 36(2) of the [Istanbul Convention](#) – has found, relating to the prosecution of rape, that for sexual contact to be legal, “Consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances”.<sup>17</sup>

But what does this mean in practice? The jurisprudence of the European Court of Human Rights has been illuminating.

In the *M.C. v. Bulgaria* judgment of 4 December 2003, the Court stated that it was

” persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends

in that area, the member states' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.<sup>18</sup>

The Court also noted as follows:

” Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence.

International criminal law has a similar focus on the threat of force or coercion, including “taking advantage of a coercive environment”. In the ICC Trial Judgment in the case of the *Prosecutor v. Jean-Paul Bemba Gombo*, delivered in March 2016, the Trial Chamber considered the facts which may contribute towards a coercive environment, holding

” [t]he Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape.<sup>19</sup>

It also considered that several factors may contribute to create coercive environment. It may include, for instance,

- the number of people involved in the commission of the crime, or
- whether the rape is committed during or immediately after a combat situation, or
- is committed together with other crimes.

Both the jurisprudence of the European Court of Human Rights and of the International Criminal Court emphasise the significance of the surrounding circumstances, and the context, in which sexual violence occurs.



[The Explanatory Report to the Istanbul Convention](#) set this out most clearly:

*Prosecution of this offence will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.<sup>20</sup>*

### **Use of the term “victim”**

This Manual uses the term “victim” to refer both to those who survived sexual violence and to those who did not, recognising that some victims of sexual violence may have died as a result of their injuries or have been murdered as part of or after the attack. Further, the term ‘victim’ recognises that those who have been subjected to crimes (including but not limited to sexual violence) under international law, as well as under Ukrainian domestic law, have the legal status of victims. Nevertheless, it is acknowledged the term “survivor” more accurately captures the agency, autonomy and resilience of individuals who have been subjected to sexual violence.

Furthermore, and in line with Article 3 of the [Istanbul Convention](#), the term ‘women’ also encompasses women and girls while ‘men’ includes both men and boys. Where, however, crimes against children have been documented, the Manual applies an age-disaggregated approach, which explicitly highlights the experiences of girls and boys.

## **Analysis of incidents and patterns of sexual violence**

To analyse sexual violence is to contextualise sexual violence. It is through understanding how and why sexual violence is employed against particular individuals and communities that one can grasp the role it plays in achieving the perpetrators’ wider aims. Understanding the rationale behind the commission of sexual violence is essential for a nuanced and probing understanding not only of this violation but also of the larger pattern of violations in which sexual violence often forms part.

Sexual violence – regardless of the form it takes, where it takes place, or the identity of its victims or its perpetrator – is not an expression of sexual desire. At its core, it is an expression of power, and a violent means of conveying dominance over the victims and the communities to which the victims belong.

## **Structural inequalities underpinning sexual violence**

The Preamble to the [Istanbul Convention](#) sets out the strong link between violence against women and gender inequalities. It states, in part, recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.

*Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men*

*...[the parties have agreed to the Articles of the Istanbul Convention]*

The commission of sexual violence reveals the pre-existing historical and structural inequalities in the society to which the perpetrators of sexual violence belong. Communities (and the individuals who belong to them) most at risk are those where the political, social, economic, and cultural systems of perpetrator society support violence against them, whether by act or omission.

As noted in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, “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.”<sup>21</sup> Indeed, regardless of the idiosyncratic political and/or military objectives of perpetrators, they are often united in their rigid adherence to gender stereotypes based on domination and inequality of women and girls.

This does not mean that men and boys are only perpetrators and women and girls are only victims. Discriminatory attitudes against women and girls bolster and are bolstered by the commission of sexual violence, whether the victims are female or male.<sup>22</sup> This includes attitudes reflective of societal discourses in which women and girls are viewed as the objects of men, where virginity is tightly bound to

notions of familial honour, and regarded as weaker and less worthy of respect. The objectification of women and girls underpins systems of sexual enslavement and forced prostitution. This motivates using the spectre of commission of sexual violence against women as an incentive to recruitment and to a reward to serving fighters. Sexual violence may be committed because it may tear asunder a community that prizes female virginity, leaving survivors at risk of being killed by their communities, or otherwise cast out as unmarriageable. Perpetrators may use rape as both a physical and psychological attack on male victims, causing them and their communities to regard them as “weak” – or rather, as “feminised”.

Unlike survivors of other violations, survivors of sexual violence risk being twice traumatised: first by the actions of the perpetrator, then again by the reaction of society and the state, which is often unresponsive or even punitive and discriminatory.

## **The importance of an intersectional approach**

An understanding of how gender functions in a particular society is integral to understanding the use of sexual violence. Gender, however, is not the sole prism through which to analyse the commission of sexual violence in a society. Multiple forces interact to reinforce conditions of inequality and social exclusion, the roots of violence and stigma. There are varying and often intersecting forms of discrimination that affect the commission of sexual violence during unrest and war. As stated in the Council of Europe [Gender Equality Strategy](#)<sup>23</sup>, these include sex, gender, “race”, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property ownership, birth, sexual orientation, gender identity and expression, sex characteristics, age, state of health, disability, marital status, migrant or refugee status. Also to be considered is socio-economic status, maternal status, statelessness, being involved in sex work, living with HIV/AIDS, or being a detainee. This list is not exhaustive.

Even a cursory glance at the documentation of sexual violence will illuminate the targeting of individuals and communities subjected to overlapping and interdependent systems of discrimination or disadvantage. For example, indigenous women and women of colour have been documented as being especially singled out for sexual violence during unrest and conflict. In an analysis of conflict-related sexual violence committed against women in Colombia, it was determined that

*In addition to factors impacting all women, indigenous and afro-Colombian women have to deal with a history of slavery and years of condoned violence against them. This is coupled with racist perceptions that include a series of stereotypes about women's bodies. This has resulted in even higher rates of violence against afro-Colombian and indigenous women.<sup>24</sup>*

A study of sexual violence against members of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community in the United States found that 47% of transgender people are sexually assaulted at some point in their lifetime, and of that group, people of colour (American Indian (65%), multiracial (59%), Middle Eastern (58%), and Black (53%)) were most likely to have been sexually assaulted in their lifetime.<sup>25</sup>

Documentation and investigation, both as a recognition of the crimes and as a path to accountability, is particularly important for crimes of sexual violence. Impunity for these crimes acts to reinforce, rather than challenge, these pre-existing norms and patterns of discrimination against women and other marginalised groups, both inside and outside of the context of unrest or war. Accountability for crimes of sexual violence, whether classified as domestic or international crimes, is of the utmost importance as it breaks the underlying acceptance of this arguably routine abuse. It also combats the stigma which so often attaches to survivors, and which is enforced by the society in which they live, including the community of which they are a part.

## **Tactical uses of sexual violence**

Since the end of the war in the former Yugoslavia, conflict-related sexual violence and until the beginning of the large-scale phase of the war of aggression by the Russian Federation against Ukraine, the phenomenon of conflict-related sexual violence was documented outside of Europe, as evidenced, for example, by a recent (2022) report by the UN Secretary-General.<sup>26</sup> The report deals with this kind of crimes perpetrated in Central African Republic, Democratic Republic of the Congo, Iraq, Mali, Myanmar, South Sudan, Syria, and Nigeria. Therefore the examples provided below are from distant countries. However, they may well be relevant for Ukraine, as are examples from the case law of the ICTY relating to events that took place some 30 years ago. Altogether, ICTY has convicted over 30 persons for crimes under international law involving conflict-related sexual violence.<sup>27</sup>

While sexual violence has a common foundation, the way in which it is used depends greatly on the perpetrators' strategic objectives. Often sexual violence serves more than one tactical use. Depending on the particular situation, sexual violence may be used tactically for many purposes, including as a mechanism of social control or as a means of dismantling social bonds. We will review some of the tactical uses of sexual violence potentially more relevant for the context in Ukraine.

### *As a coordinated strategy to destroy the group*

In the context of the Russian Federation's war of aggression against Ukraine and in light of Article 442 of the [Criminal Code of Ukraine](#), it is particularly important to review the examples of the use of conflict-related sexual violence as a part of a coordinated strategy to destroy the group protected by the definition of the crime of genocide.

Many genocidal campaigns have explicitly and implicitly sanctioned sexual violence, as is the case of the sexual enslavement of Yazidi women and girls by ISIS. Sexual violence, while not as efficient a strategy of group annihilation as killing, is a shockingly effective means of both destroying the individual victim and tearing apart the community from which s/he comes.

The ICTR case of *Akayesu* first found that rape and sexual violence constitute serious harm on both a physical and mental level – and consequently, if carried out with specific intent to destroy, in whole or in part, a protected group, constitute genocide:

*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 as s/he suffers both bodily and mental harm... The rapes resulted in the physical and psychological destruction of the Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and the destruction of the Tutsi group as a whole.*<sup>28</sup>

In 2016, the ICTY convicted Radovan Karadžić, former President of Republika Srpska, for genocide, crimes against humanity and violations of the laws or customs of war committed during the war in Bosnia and Herzegovina. Sexual violence was part of the elements in his conviction for the crime of genocide.<sup>29</sup>

In the same year, the Commission of Inquiry on Syria determined that sexual violence against Yazidi women and girls formed part of ISIS's continuum of genocidal violence against the Yazidi religious group, noting that

” [r]ape and sexual violence, when committed against women and girls as part of a genocide, is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.<sup>30</sup> Not specific to ISIS, the view of women and girls as objects finds a horrific, though logical, extreme in the terrorist group's conduct when backed by radical religious interpretation and territorial control affording dominance over women and girls.<sup>31</sup>

### *For humiliation and disempowerment*

Sexual violence, and in particular rape, carries with it masculinist connotations of dominance. Humiliation is not therefore only a consequence of sexual violence, but it can be a deliberate objective of its commission.<sup>32</sup> It is also seen in recordings, videos and photographs of sexual assaults and the later circulation. With easy access to smartphones and social media, such recordings have become increasingly common.

Sexual violence committed by men is used as a tool of emasculation and disempowerment (which again relies on gender stereotypes lining masculinity with strength). As examined by Sandesh Sivakumaran, sexual violence committed against men and boys serves not only to inflict pain but also to humiliate and disempower the men, challenge both their masculinity and heterosexuality, and assert the supremacy of those directing the sexual violence.<sup>33</sup> The first-ever international trial examining sexual violence against men was the trial of Duško Tadić at the ICTY.<sup>34</sup>

### *For deliberate impregnation*

If the bodies of women and girls are socially constructed as the carriers of purity, of honour and as the possessions of their fathers, brothers and husbands, violations of those bodies carry specific implications. The deliberate impregnation of women or girls, in such a context, is simultaneously an assault on that woman, an assault on her social identity and a message to the men in her community that she has been 'contaminated' and claimed by the opposing force. Women and

girls may be forced to marry perpetrators to 'legitimate' both their children and their so-called sexual contamination. Children born to abducted women and girls face ostracism and guilt by association.

The 1994 Final Report of the United Nations Commission of Experts, which reported on evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia, found that women and girls who became pregnant were denied abortions and forced to carry the pregnancies to term.<sup>35</sup>

### *As a method of terror*

Sexual violence has been used as a tactic of terror and has been recounted by Yazidi women held captive by Islamic State extremists in Iraq, girls who fled from Boko Haram, Somali women liberated from the al-Shabab extremist group, and women living under al-Qaeda linked militants in northern Mali.

Caution must be exercised here as the definition of "terrorism" has not been used consistently. It is more likely to be used in relation to armed groups, than to states even where both use sexual violence to terrorise communities. Within the category of armed groups, it is currently more likely to be applied to Salafi jihadist movements. While Charles Taylor's National Patriotic Front of Liberia both engaged in widespread and systematic rapes, including public gang rapes, of areas controlled by the Government and other armed groups, it did not tend to attract the moniker of "terrorism". As such the term tends to be used to describe who the perpetrators are, rather than how they behave – a political rather than a legal distinction.

Additionally, recognised terrorist groups that employ sexual violence – for a variety of tactical purposes, including terrorism – also exhibit very rigid social constructions of gender, within a framework of the domination and discrimination of women and girls. The same is also true of white supremacist and other nationalist groups.

## II. Working with victims of sexual violence in Ukraine

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**A**fter the armed aggression of the Russian Federation against Ukraine commenced, reports emerged in the media concerning rape and other acts of sexual violence committed by the Russian Forces. Women, men, the elderly, children and even infants have been subjected to sexual violence.

In Ukraine, sexual violence is being used as a weapon of war. It is a tactic of how the war is being waged and so should not be treated or understood as an inevitable “side effect” of the war. These crimes can be prevented, and the guilty can be punished. When sexual violence is committed as part of hostilities and armed conflict, it is not merely a criminal offence under Ukrainian domestic law; it also violates international humanitarian, human rights, and criminal law.

As discussed in Section III (Legal Frameworks), perpetrators may be individually criminally liable for crimes of sexual violence as other criminalised violations of international law.

Cases against perpetrators can take place before courts that have jurisdiction over crimes committed in Ukraine. Currently, these include the national courts of Ukraine and the International Criminal Court in The Hague. National courts of third states, where their domestic law permits, may try cases of sexual violence and other international crimes under universal jurisdiction, which provides the basis for a third state to investigate and prosecute certain crimes (including war crimes, crimes against humanity, and genocide), even if they were not committed on its territory, by one of its nationals, or against one of its nationals. It is important, therefore, to record the crimes where a person has been a victim or witness, and to collect as much evidence as possible in order to hold the perpetrators liable.



## Enforcement difficulties

Rape and other forms of sexual violence are violations of human rights law and international humanitarian law entailing state responsibility, and can also amount to crimes under international law and, consequently, entail individual criminal responsibility.

The prohibition against sexual violence is one of the areas where the [Istanbul Convention](#) and other norms and principles of international humanitarian law, human rights law and international criminal law move in the same direction, complementing and reinforcing each other. It is not uncommon to find international criminal tribunals and human rights courts and other bodies citing each other's decisions as they reach their findings as regards cases of sexual violence before them.

However, the legal recognition of sexual violence as a violation of international law has always led to a prioritisation in the documentation and prosecution of sexual violence. There continues to be a yawning chasm between the prohibition under international law of rape and other forms of sexual violence and the prevalence of crimes of sexual violence committed with impunity. There needs to be better implementation and enforcement of international law to ensure effective prosecutions of crimes of sexual violence, both internationally and domestically. Proper documentation, analysis and reporting strengthens those advocating that such prosecutions must be prioritised and supports the work of bringing cases before national, regional and international courts and tribunals.

A full examination of international humanitarian law, human rights law and international criminal law as regards sexual violence can be found in Section III (Legal Frameworks).

## Documentation and investigation of sexual violence

This section provides the particular guidance that should be considered when documenting and investigating sexual violence. It sits, therefore, within the broader framework for documenting and prosecuting violations of international law.

Documenting sexual violence comes with specific challenges. Information and evidence of sexual violence, due to the circumstances in which it often takes place, tends to be collected through the interviews with survivors and

witnesses. Obtaining information about sexual violence requires individuals to confront, admit to, and discuss an issue that is extremely sensitive, both culturally and socially. In particular, survivors are often asked to describe painful past or recent experiences, which may be profoundly distressing to them. Beyond this, constructing a clear record can be challenging due to the impact of trauma on memory. Additionally, the domestic legal framework of a particular country may contribute to an under-reporting of sexual violence. This would include instances where it is unlawful for women and girls over the age of consent to have pre-marital sex, or for men and boys over the age of consent to engage in same-sex sexual activity, where the law makes no distinction between consensual and non-consensual sexual intercourse.

Victims and witnesses may be asked to speak about their views on matters which are generally not openly discussed. In some settings, simply participating in an interview or inquiry about sexual violence can have serious, even life-threatening implications. While survivors may be particularly vulnerable, there may also be rippling dangers for the community of which they are part, as well as for those involved in collecting information. The risks to male and female survivors may differ, particularly as regards stigma. It is important to be alert to this so that signs that sexual violence has taken place are not overlooked during the documentation exercise.

Data collection, including through the collection of statistical or demographic data, is also invaluable to the analysis and prosecution of international crimes, including crimes of sexual violence. Under Article 11 of the [Istanbul Convention](#), Parties are obliged “to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention” and “to support research in the field of all forms of violence covered by the scope of this Convention”. The Explanatory Report underscores the importance of such data collection for the prevention and punishment of sexual violence, “[a]ccurate statistical information specifically designed to target victims and perpetrators of such violence is not only important in efforts to raise awareness among policy-makers and the public on the seriousness of the problem but can also encourage reporting by victims or witnesses”.<sup>36</sup>

Paragraph 2 of the same Article details Parties’ obligation to endeavour to conduct population-based surveys. Such surveys can also provide reliable data on victims’ experiences of violence, the reasons for not reporting, the services received, as well as victims’ opinions of and attitudes towards such violence.

As discussed in Section I ([Understanding sexual violence](#)), sexual violence often follows and reinforces pre-existing structural inequalities in a society.

Understanding the context in which you are about to work will assist both in the documentation and analytical exercise.

In this section, we examine the guidance provided by the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, more commonly known as the Istanbul Protocol, which was updated in June 2022. We then move on to look at the PEACE Model framework, the international best practice for conducting victim-centred, trauma-informed interviews of survivors of crimes, including conflict-related sexual violence.

## **The Istanbul Protocol**

### *What is the Istanbul Protocol?*

Torture, which may be committed through acts of sexual violence, inflicts profound harm on individuals and threatens the health, dignity, and wellbeing of families and communities. Health professionals have a duty both to document torture and to protect human rights as a foundation for human health and wellbeing. Effective clinical investigation and documentation are, therefore, essential to corroborate allegations of torture and other forms of ill-treatment and to achieve prevention, accountability, and redress for such crimes.

In 1996, health professionals with legal and human rights experts developed such standards, and these became the [Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), or the Istanbul Protocol. Updated in 2004 and 2022, the Istanbul Protocol has been used in medico-legal and other contexts as a practical tool to effectively guide the investigation and documentation of torture and ill-treatment and the protection of victims, and is routinely referenced by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>37</sup> It provides essential guidance for medical, law enforcement, prosecution, judicial and other relevant professionals.

The Istanbul Protocol standards have been endorsed by the UN and international, regional, and national human rights bodies and legal mechanisms. They have informed states' treaty obligations to investigate, prosecute, and punish torture under the UN Convention against Torture and international and national law. They have underpinned health professionals' global efforts to end torture, hold perpetrators accountable, and afford victims the redress and rehabilitation to which they are entitled.

## *The 2022 update*

Over the past six years, more than 180 clinical, legal, and human rights experts from 51 countries worked together to update the Istanbul Protocol standards and provide additional guidance. The initiative was coordinated by four civil society organisations (Physicians for Human Rights, the International Rehabilitation Council for Torture Victims, the Human Rights Foundation of Turkey, and REDRESS) and four UN anti-torture bodies (the Committee against Torture, the Subcommittee on Prevention of Torture, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Voluntary Fund for Victims of Torture).

This latest edition – published in June 2022 – reflects advances in the global understanding of the practices and effects of torture and ill-treatment. It clarifies the definition and scope of torture, jurisprudence on torture prevention, accountability, and redress, and outlines current legal investigation practices as well as new guidance for judges, prosecutors, and other actors.

It provides more consistent guidance on (a) the interpretation of physical and psychological evidence of torture and ill-treatment, as well as on (b) the obligation of clinicians to provide a conclusion on the possibility of torture in all medico-legal clinical evaluations. The updated Istanbul Protocol has been referred to as an essential tool to empower health professionals to leverage their clinical knowledge and skills to help end torture and safeguard our humanity.

## *Principles of effective investigation and documentation*

The purposes of effective investigation and documentation of torture and ill-treatment include:

■ clarification of the facts and establishment and acknowledgement of individual and state responsibility for victims and their families;

■ identification of measures needed to prevent recurrence;

■ facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the state, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

## **To run an effective investigation and documentation one needs:**

- a. a clear understanding of the elements of the crime;
- b. states must ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. The investigating body should be as diverse as the communities they serve;
- c. necessary budgetary and technical resources for effective investigation;
- d. alleged victims, witnesses and those conducting the investigation and their families must be protected from violence, threats of violence or any other form of intimidation or reprisals that may arise pursuant to the investigation;
- e. alleged victims of torture or ill-treatment have the right to complain about such treatment and to have such complaints promptly and impartially examined and the right to an effective remedy;
- f. medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and, in particular, must obtain informed consent before any examination is carried out.

### *Support to victims of sexual violence*

Ensuring parties provide support to victims of sexual violence is a pillar of the [Istanbul Convention](#).

Its Article 22 obliges parties to provide short and long-term specialist services to victims of any form of violence covered by the Istanbul Convention in adequate geographical distribution.<sup>38</sup> This includes shelter and safe accommodation, immediate medical support, the collection of forensic medical evidence in cases of rape and sexual assault, short and long-term psychological counselling, trauma care, legal counselling, advocacy, and outreach services. In September 2022, Oksana Zholnovych, Minister of Social Policy of Ukraine and Head of Delegation, in her response to questions from the Committee on the Elimination of Discrimination against Women during the ninth periodic report of Ukraine, stated that Ukraine – mindful of the Istanbul Convention – had expanded its network of specialised support services for victims of domestic violence and gender-based violence, comprising of 431 mobile teams of social and psychological assistance, 43 shelters, and 37 day centres of social and psychological assistance.<sup>39</sup> In 2022, almost 15,000 people had used these services.

Under Article 24 of the Convention, parties are required to set up state-wide telephone helplines available 24 hours, 7 days a week and free of charge to ensure easy and confidential access to information and counselling by trained professionals on all forms of violence against women in all relevant languages. It also encompasses telephone helplines to direct victims to the right type of service and specific services for children as victims or witnesses.<sup>40</sup> As per the Explanatory Report, the aim of such specialised support is “to ensure the complex task of empowering victims through optimal support and assistance catered to their specific needs.”<sup>41</sup> Ukraine has indicated that, as of September 2022, several hotlines – four national hotlines and 21 regional hotlines to combat domestic violence and support survivors – were in operation and being administered by the Government, with others coordinated by non-governmental organisations.<sup>42</sup>

Parties to the Convention, by virtue of Article 25, are required to take

” the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims.

The Mid-Term Horizontal Review of GREVIO baseline evaluation reports provides more specific guidance, indicating that parties

*are required to provide a set of holistic services to victims of sexual violence, including immediate medical care and trauma support combined with forensic examinations, as well as short and long-term psychological counselling and therapy to ensure the victim’s recovery. Such services should be provided by trained and specialised staff in an appropriate manner to respond to the victims’ needs, preferably within rape crisis or sexual violence referral centres established in sufficient number through the country to ensure their easy access.*<sup>43</sup>

Paragraph 142 of the [Explanatory Report](#) underscores that the parties are obliged to ensure not only that the centres are set up “in sufficient numbers, but also to ensure their easy access and that their services are carried out in an appropriate manner”.<sup>44</sup> The Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6) recommends that one such centre should be available per every 200.000 inhabitants and that their geographic spread should make them accessible to victims in rural areas as much as in cities.<sup>45</sup>

Significantly, Article 26 focuses on support to and protection of child victims and witnesses, and requires parties to ensure that, when providing services and assistance to victims with children who have witnessed violence, their rights and needs are considered. Paragraph 2 of Article 26 calls for age and developmentally-appropriate best evidence-based psychosocial interventions that are specifically tailored to children to cope with their traumatic experiences where necessary. The Mid-Term Horizontal Review of GREVIO baseline evaluation reports emphasises that

” the term “child witnesses” refers not only to children who are present during the violence and actively witness it but to those who are exposed to screams and other sounds of violence while hiding close by or who are exposed to the long-term consequences of such violence.<sup>46</sup>

### *Physical and psychological impacts of sexual violence*

The analysis of sexual violence necessarily includes an examination of the impact of sexual violence on survivors and their communities. Where perpetrators have used sexual violence strategically, examining impact is one measure of how successful they have been in achieving their objectives. Beyond that, an analysis of impact allows the documenting entity to make meaningful recommendations where survivors and their communities are being inadequately served by their state.

Impacts of sexual violence that have been repeatedly documented include:

- extreme physical and psychological pain in survivors, some of which may result in life-changing physical and mental injuries;
- an increased risk of a range of sexual and reproductive health problems, with both immediate and long-term consequences;
- disruption of relationships with spouses and children;
- destabilisation of gender and sexual identity (more often seen amongst male survivors);
- the breakdown of social bonds within targeted communities;

■ an aggravation of existing sectarian, ethnic and other divisions in the society;

■ when committed disproportionately against women and girls, the perpetuation of gender inequality is an obstacle to the achievement of equality, development, and peace.

Some of the personal impacts on survivors may be mitigated by the provision of psychosocial support and counselling.<sup>47</sup>

### *Impact of stigma*

Stigma aggravates the impacts of sexual violence on individuals and communities; reinforces structural inequalities including notably gender inequality; and prevents community and societal recovery by causing impacts to ripple through generations. At its worst, stigma can be life-threatening, isolating the survivor and equating their erasure with the erasure of shame.

As stated in the 2017 Annual Report of the Office of the Special Representative of the Secretary-General on Sexual Violence and Armed Conflict,

*Shame and stigma are integral to the logic of sexual violence being employed as a tactic of war or terrorism: aggressors understand that this type of crime can turn victims into outcasts, thus unravelling the family and kinship ties that hold communities together. The effect may be diminished reproductive capacity and prospects for group survival.*

As stigma and sexual violence are mutually reinforcing, interrupting stigma is crucial to breaking the cycle and alleviating stigma's negative social, political and economic impacts. Documentation, analysis and reporting of sexual violence, when done properly and sensitively, play a key role in that interruption.

### *Impact of impunity*

Where there is no path to accountability, there is an increased likelihood of instability and conflict surfacing (or re-surfacing). That there is no clear route to accountability may be a result of under-reporting, inadequate documentation, particularly as regards linkage, lack of jurisdiction, or failure to apprehend perpetrators.

It is also necessary to look at the legal codes of the particular country to determine whether its criminal codes impact the reporting of sexual violence to state authorities. For example, states, where pre-marital sexual relations and/or



same-sex sexual relationships are criminalised, can drive down reporting, with survivors seeing coming forward as a legal, as well as a social, risk.<sup>48</sup> Some criminal codes assume that the victim of a rape is always a woman or girl, so it is not legally possible for male survivors to make a criminal complaint. Not only do these frameworks make justice for male victims impossible in many countries, but they can also actively deter first-instance reporting to police and service providers.

Where the state or agents of the state are said to have perpetrated the crime, survivors are less likely to engage with state-run systems of justice. An absence of justice also decreases chances of reconciliation, particularly in societies where sexual violence is seen as besmirching the honour of the victim, their family and their community.

## **Challenges faced by prosecutors working with victims of conflict-related sexual violence**

Delays in investigations and trials of sexual violence contribute to additional trauma to the victims and can hinder their healing; they diminish the victim's faith in the justice system and effectively promote a climate of impunity for perpetrators. The longer a case goes on the more likely it is for a victim to withdraw and be less likely therefore to get justice.

Based on the gravity of the abuse and its impact on the victims, sexual violence cases should be prioritised, where possible, throughout the investigation and trial stages. The allegation of sexual violence itself should, where possible and because of its seriousness, suggest priority in trial planning and administration, irrespective of the condition of the defendant. The prioritisation of the examination of the case also depends on the level of preparedness of the parties (both the prosecutor and the defence) to engage in trial. Reports of historical incidents of sexual violence should be treated with the same investigative standards and priority as more recent complaints.

When forming the evidence base in proceedings concerning armed conflict-related sexual violence, the following considerations must be taken into account during:

■ inspection of the crime scene. Based on objective circumstances, it may not be possible to reach and inspect the scene due to its destruction, location in the temporarily occupied territory or the combat operations zone;

■ interviewing of witnesses and victims. The witnesses' location may be unknown, or they may be inaccessible (abroad or in another area). In addition, the

victim may be depressed, refuse to give evidence because of disbelief that the perpetrator will be punished, or fear its revenge;

■ taking readings of technical devices and technical means with photo, film, and video recording functions or photo, film, and video recording devices;

■ taking samples for examination. For example, a long time may pass from the moment an instance of sexual violence occurs to when samples can be collected, by which time biological traces can be destroyed. Moreover, obtaining biological samples from suspects in this category of criminal proceedings may be difficult due to the inability to establish their place of residence or if their location is inaccessible;

■ it should be taken into account that it might not be possible to carry out a forensic examination due to the lack of access to expert institutions.

## **Prosecutorial strategy according to the Strategic Plan on the implementation of powers of the Prosecutor's Office in the field of criminal prosecution for conflict-related sexual violence**

The Strategic Plan on the implementation of powers of the Prosecutor's Office in the field of criminal prosecution for conflict-related sexual violence was adopted by the Prosecutor General of Ukraine on 26 June 2023.<sup>49</sup> The Strategic Plan defines conflict-related sexual violence (CRSV) as acts of sexual violence which occur within the context of armed conflict (war crimes) or mass atrocities such as crimes against humanity or genocide. It specifies that those are acts of sexual nature carried out through sexual means or acts that target a person's sexuality. According to the Strategic Plan, CRSV is understood to include physical and non-physical acts or the threats of such and targets persons of all genders and sexual orientations.

The Strategic Plan aims to improve access to justice for survivors of conflict-related sexual violence by conducting prompt, comprehensive, full, and impartial investigations through strengthening the coordination role of the OPG, as well as effective support to public prosecution in criminal proceedings for crimes in this category. At the same time, the Strategic Plan focuses on ensuring the needs and rights of victims and witnesses by providing them with adequate protection and support, as well as information about their rights in accordance with national legislation and Ukraine's international human rights obligations.

The following factors were considered when developing the Strategic Plan:

- ▶ credible reports that the CRSV has been committed since 2014 in the temporarily occupied territories of Ukraine and that the scale and scope of the CRSV have increased significantly since the escalation of Russian aggression in 2022;
- ▶ children, persons with disabilities, and the elderly affected by CRSV are a particularly vulnerable group with special needs;
- ▶ ukrainian women and men who have experienced sexual violence are reluctant to report it to the authorities due to historical and societal factors;
- ▶ the persistent latency in the number of reports of CRSV due to trauma, stigma, displacement, and lack of information on how to ensure participation in the justice process;
- ▶ the Ukrainian context includes historically unequal power relations between women and men, discrimination against women, and discrimination against persons based on sexual orientation and gender identity;
- ▶ the public in Ukraine distrusts the national criminal justice system and/or has low expectations of the potential outcomes of the criminal justice process;
- ▶ survivors of CRSV have concerns about the disclosure of their personal data;
- ▶ legal and procedural obstacles in the Ukrainian criminal justice system limit the right of CRSV survivors to access justice;
- ▶ the level of cooperation between law enforcement agencies investigating conflict-related crimes, including CRSV, and between these agencies and the prosecutor's office, as well as between various state institutions involved in countering CRSV in a broader sense is insufficient;
- ▶ there is a lack of specialised training, guidelines, and working procedures for the investigation and trial of CRSV criminal proceedings that are victim-centred and trauma-informed.

The implementation of the Strategic Plan will be ensured by a specialised unit of the Department for Combating Crimes Committed in the Context of Armed Conflict, the Unit of Procedural Management of Pre-trial Investigation and Public Prosecution in Criminal Proceedings on Crimes Related to Sexual Violence ("the Unit"). The Unit will apply a multi-stakeholder approach to the implementation of

the Strategic Plan, involving members of the working group on CRSV, which will include representatives of Ukrainian and international civil society, international organisations, and experts, as well as other stakeholders involved in protecting the rights of victims.

Importantly, the Strategic Plan envisages that the relevant programmes and procedures will focus, in particular, on:

- ensuring that investigators are aware of the elements of CRSV by identifying potential situations or vulnerabilities where such violence may have been committed, even if it was not reported or not fully reported;
- planning investigations from the outset so that investigators recognise gender-based crimes related to CRSV, at the earliest stages of an investigation;
- victim-centred approaches to investigations, including confidentiality, risk assessment, informed consent, interviewing techniques and referrals for assistance;
- a clear distinction between CRSV as an international crime and a general criminal offence;
- standards for proving crimes related to sexual violence in armed conflict in accordance with international standards and best practices.

## **Procedural means of avoiding re-traumatisation of conflict-related sexual violence victims**

According to Article 56(1) of the [Istanbul Convention](#) the Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by: enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered; ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible; enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

[The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse](#), also known as “the Lanzarote Convention” obliges the Parties take the necessary legislative or other measures to ensure that:

- a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;
- b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;
- c. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings (Article 35(1)).

Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, Investigation, prosecution and procedural law those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law (Article 35(2) of the Lanzarote Convention).

The tendency of prosecutors’ over-reliance on survivor information should also be addressed. As long as information from survivors is considered to be necessary for the investigation, there appears a risk of multiple demands and putting pressure on survivors, which may well amplify risks of their exposure and re-traumatisation. Whenever possible, one should look for SCRSV information from sources other than survivors (such as fact-pattern witnesses and expert reports) to reduce pressure on survivors (Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad-code) on 13 April 2022).

In the case of victims and survivors of sexual violence against children, the Council of Europe has published [Guidelines for policy makers on engaging with victims and survivors of child sexual exploitation and sexual abuse – “Nothing About Us Without Us”](#), that can also be used by prosecutors when engaging with them.

According to Article 225(1) of the [CPC of Ukraine](#), in exceptional cases related to the need to obtain testimony during the pre-trial investigation, if due to the existence of a danger to the life and health of a person, his/her serious illness, other circumstances that may make it impossible to question him/her in court or affect the completeness or reliability of testimony, parties to the criminal proceedings or their representatives, have the right to apply to the investigating judge with a request to examine such a person in court.

Criminal justice actors have an obligation to ensure the protection of victims at all stages of investigation and judicial proceedings. In particular, victims have a right to avoid contact with the defendant.

Questioning (examination) of persons and identification of persons or things during the pre-trial investigation may be conducted remotely via videoconference in the cases listed in Article 232(1) of the CPC of Ukraine. This helps to reduce the risk of re-traumatisation of the victim or witness of a violent crime, including sexual violence but does not exclude the possibility of new examinations if necessary.

Even if these provisions are fully made use of by the court and complied with by the parties, this does not exclude the possibility of a future questioning (examination) of these persons, for example, if such interrogation was conducted in the absence of the suspect and the latter would like to cross-examine the witness. In particular, pursuant to Article 225(4) of the CPC of Ukraine, the court has the right to hear a person who was questioned during the trial, in particular in cases where such questioning was conducted in the absence of the defending party or if there is a need to clarify witness statements or to obtain testimony regarding circumstances that were not clarified as a result of interrogation during the pre-trial investigation.

When preparing a request for interrogation during the pre-trial investigation in court, in addition to citing the provisions of the above-mentioned Council of Europe conventions, it is necessary to set out all the important facts that justify the expediency of such questioning (evidence of serious illness, post-traumatic stress disorder, psychological examination, etc.). Finally, when interrogating child victims or witnesses of conflict-related sexual violence, it is advisable to use the Green Room and Barnahus<sup>50</sup> techniques with the mandatory involvement of professional psychologists (Article 226 of the CPC of Ukraine).

## **Particular challenges in documenting and investigating sexual violence against men and boys**

Many of the same factors which contribute to women and girls' under-reporting of sexual violence contribute to the under-reporting of sexual violence against men and boys. These include internalised feelings of shame and the fear of stigmatisation. Legal frameworks and social services which do not recognise men and boys as victims of sexual violence also prevent survivors from reporting to the authorities. Men and boys may also face the stigma and 'shame' of assumed

homosexuality, and so are subjected to double stigmatisation – the stigma of being a survivor of sexual violence, and the additional stigma which exists in many societies around homosexuality.

Before the start of exercising the relevant prosecutor's tasks, it is important to discuss the particular challenges that may be faced in documenting and investigating sexual violence against men and boys, including any assumptions which may be present in the team.

It is also important to emphasise that certain investigative actions have their own gender specifics. In particular, according to Article 241(3) of the CPC of Ukraine, the examination of an individual which requires the person concerned to undress is carried out by persons of the same sex, except for the examination by a doctor. An inquirer, investigator, or prosecutor is not allowed to be present during the examination of a person of the opposite sex if it is necessary to expose the person to be examined.

During the examination, any actions that may humiliate the person, assault his/her dignity or be dangerous to his/her health are prohibited. Use of coercion is allowed only to the extent necessary to achieve the purpose of the examination.

Identical requirements apply to the collection of biological samples from a person (Article 245 of the CPC of Ukraine).

In addition, the services of a psychologist may be required in examining the materials of the criminal proceedings, establishing the identity of the victim (witness) and interviewing, as provided for by Articles 71, 105, 222, 214 of the CPC of Ukraine.

## **Investigation of sexual violence committed against children**

Chapter VII of the Lanzarote Convention is devoted to aspects relating to the investigation and prosecution of acts involving sexual violence against children, placing particular emphasis in the need to ensure that the procedures take due account of the particular vulnerability of children facing such procedures as victims or witness.

Moreover, as acknowledged in the [Explanatory Report to the Istanbul Convention](#), children do not need to be directly affected by the violence to be considered victims. However, witnessing violence is also traumatising, and therefore sufficient to victimise them.<sup>51</sup>

Article 35 of the Lanzarote Convention lays down a set of rules designed to limit the number of successive interviews with children, to prevent them from reliving the events they have suffered, and to enable them to be interviewed by the same people in suitable premises and a setting that is child friendly.

Interviews with children about any violations they may have suffered should be conducted by someone with specific expertise and experience in the interviewing of child victims and witnesses of violence. Where documentation or investigation are being led by governmental entities, Article 34 of the Lanzarote Convention requires state parties to

” adopt such measures as may be necessary to ensure that persons, units or services in charge of investigations are specialised in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose.<sup>52</sup>

That child victims of sexual violence must be interviewed by trained practitioners, including a specialist psychologist, is reiterated in the Methodological Guidance on Investigative Interviewing of Children (2021), published by the Council of Europe as part of the co-operation project “Combating Violence against Children in Ukraine”.<sup>53</sup> Persons lacking such training should not interview children at all, and if deemed appropriate anyway as well as indispensable, to do so only by keeping any interaction to a minimum. In particular, those without specific training should avoid interviewing children who have experienced serious trauma, including sexual violence. This owes to the fact that children are highly vulnerable to re-traumatisation and improper interviewing techniques can do lasting damage.

Interviews with child victims of sexual violence demand adherence to a child-centred investigative process, which acknowledges that children are not a monolithic group and that differences in gender, age, access to education and other intersecting identities impact the planning and conduct of the interviews as well as on post-interview care. Children-centred interviewing processes, including the use of age-appropriate vocabulary and taking place in a child-friendly interview space, are methodologically essential. This is because children, most particularly young children, are highly suggestible, more likely to agree with interviewers, and vulnerable to the creation of false memories.

Where the decision is made for an appropriately trained investigator or lawyer to proceed with an interview with a child (even a child close to the age of majority), the parents/guardian, or a person they trust, must at any time be present in any



documentation of information. Interviewers should speak to the parents/other caregivers and community members about possible consequences that the interview might have on the child. Additionally, they should consult experts on the local culture where the documentation exercise is occurring to gauge the risks to the child of going ahead with the interview. Similarly, the risks to and impact on a child of having her or his parents present in an interview about sexual violence should be considered.

Interviewers will need to be able to cogently advise the child, their parents, guardians, or caregivers, of any referral services and protection mechanisms that are available to them. They must also be prepared to see and respond to the specific needs that may arise during an interview.

The Council of Europe has developed [manuals](#) and training materials aimed at Ukrainian practitioners providing psychological counselling or mental health services to children to build capacities in regards to trauma-informed care, in multiple settings (conflict, sexual abuse etc).

## **Investigation of sexual violence committed against sexual and gender minorities**

Acts of sexual violence against sexual and gender minorities violently assert a particular political vision of certain norms of masculinity and femininity. Gathering information about sexual violence committed against lesbian, gay, bisexual, transgender, and intersex persons (LGBTI) poses specific challenges. LGBTI persons may be marginalised figures in that particular community, with violations against them generally under-reported or under-actioned. Efforts should be made to actively seek information on the situation of LGBTI persons, including through organisations that protect their rights, while ensuring confidentiality and the safety of the concerned persons. In the case of LGBTI children, the presence of parents may be problematic particularly if they are unaware of the sexual orientation or gender identity of their children and have strong negative views on LGBTI identities.

Whilst at the moment this Manual was written Ukraine did not have unified statistics on crimes of sexual violence against LGBTI people committed in the context of the armed conflict, some non-governmental organisations were actively collecting this information. For example, NGO "PROJECTOR" together with the charitable organisation "INSHA" with the support of the American human rights organisation "OutRight International" [documented war crimes and violations of LGBTQI+ rights in the liberated territories of Kherson region](#).<sup>54</sup> NGO

"PROJECTOR" noted that citizens who have been under Russian occupation report cases of cruelty by the Russian military, especially against people from key groups. It is reported that the occupying forces used the "rainbow" symbols as a signpost for humiliation, abuse and even extermination of people who had certain tattoos or whose smartphones had LGBT dating apps installed. The same NGO reported that within the government-controlled territory of Ukraine, there was allegedly a growing distrust of law enforcement agencies, which is why victims chose not to report war crimes against them and their families.

## **Investigation of sexual violence committed against persons with disabilities**

Persons with physical and/or mental disabilities living in conflict settings face an increased risk of injury, death, sexual violence, and other serious harm. They may not have the capacity or assistance needed to flee as hostilities intensify in the area in which they live. A 2010 Human Rights Watch report on the violations of international law during the conflict in northern Uganda highlighted that one-third of women with disabilities interviewed had been the victims of conflict-related sexual violence.<sup>55</sup> The same report, however, makes it clear that it was impossible to ascertain whether the women and girls with disabilities experience violence at greater or lower rates than other women and girls.

There should be dedicated efforts to reach out to persons with disabilities, who may not have the same visibility as victims without disabilities, and who may not be as easily accessible to investigators. It is essential that investigators document sexual violence committed against persons with disabilities as this community, which is by no means monolithic, is often overlooked in the investigation process which dramatically reduces the likelihood that their experiences will be recorded and form part of subsequent case-building efforts.

## **Bolstering of the institutional capacity of prosecution in investigating conflict-related sexual violence**

### *Gender-balanced composition of prosecution teams*

Relevant international experience demonstrates the importance of integrating gender perspectives into the overall investigation strategy. This concerns, in particular, striving to achieve a gender-balanced composition of prosecution and investigation teams. The sensitivities and obstacles to documenting and

investigating sexual violence can be overcome, in particular, by the possibility of conducting victim interviews by female or male investigators, depending on the assessment of the vulnerabilities of the victim. Gender-balanced composition of investigation teams can also contribute to addressing manifestations of gender bias, which might be present among prosecutors and investigators.

### *Inter-agency cooperation*

Ensuring good interagency cooperation in investigating and prosecuting conflict-related sexual violence is indispensable. Ukraine's law makes it clear that such cooperation shall be coordinated by the Prosecutor General as well as by the leadership of the relevant public prosecutor's offices (Article 25(2) of the [Law on Ukraine On the Public Prosecutor's Office](#)). The related institutional arrangements adopted for the investigation and prosecution of crimes against international law, including conflict-related sexual violence, are made according to the Prosecutor General's Order No. 309 on the role of prosecutors in criminal proceedings of 30 September 2021 (item 7.3, paragraph 6).<sup>56</sup>

Importantly, on 11 April 2023, by adopting Order No. 103 *On the Organisation of the Work of the Prosecutor's Office on Support of Victims and Witnesses of War and Other International Crimes and enacting the Concept of Implementation of the Mechanism for Supporting Victims and Witnesses of War and Other International Crimes*, the Prosecutor General entrusted the Coordination Centre for Support of Victims and Witnesses of War and Other International Crimes with ensuring that victims and witnesses can participate fully and effectively in criminal proceedings, are protected from secondary victimisation and revictimisation, intimidation and retaliation, and receive appropriate support to facilitate their recovery.<sup>57</sup> The Coordination Centre will ensure close cooperation between investigators, prosecutors, and judges with a view to providing victims and witnesses with timely and precise information about their procedural rights as well as about the progress of investigations and court proceedings. The Coordination Centre will also provide psychological assistance and counselling to victims and witnesses, and the respective coordinators will support them at every stage during the investigation and in the courts. The coordinators are also responsible for cooperating with the free legal aid centres, volunteer and charitable foundations, and other governmental and non-governmental organisations specialising in supporting victims of war crimes.

Another important procedural aspect related to interagency cooperation lies in the fact that the Prosecutor General and relevant prosecutors by virtue of Article 36(5) of Ukraine's CPC are empowered to transfer the investigation of war crimes

from one competent body to another if the investigation is found to be ineffective for objective or subjective reasons. It is useful to note that the bodies directly competent to investigate sexual violence are the Security Service of Ukraine, the National Police of Ukraine, and the State Bureau of Investigations. Further, the CPC has been amended to factor in the specificities of pre-trial investigation and court proceedings during martial law (Chapter IX-1 of the CPC).

### *International cooperation*

As conflict-related sexual violence in many or even most cases relates to crimes against international law, international cooperation is another crucial factor in strengthening the institutional capacity to investigate and prosecute such crimes. It should be recalled that Article 62 of the [Istanbul Convention](#) stipulates that the Parties shall cooperate to the widest extent possible, (a) preventing, combating and prosecuting all forms of violence covered by the scope of this Convention; (b) protecting and providing assistance to victims; (c) investigations or proceedings concerning the offences established in accordance with this Convention; (d) enforcing relevant civil and criminal judgments issued by the judicial authorities of Parties, including protection orders.

At the domestic level, Article 92(1) of [the Law of Ukraine On the Prosecutor's Office](#) provides for a general framework of international cooperation by the prosecution authorities of Ukraine based on mutual written guarantees. Order of the Prosecutor General No. 258 *On the Organisation of the Work of the Prosecutor's Office of Ukraine in the Field of International Cooperation* of 12 September 2023 stipulates that the International Legal Cooperation Unit of the Office of the Prosecutor General is directly responsible for ensuring cooperation with the ICC in accordance with the [Rome Statute of the ICC](#) and the CPC of Ukraine, including the execution of the ICC requests for cooperation (for assistance, for temporary arrest, for arrest and transfer of a person or any other requests that may be sent in accordance with the ICC Statute).

It should also be noted that Europol has established an OSINT Task Force (OTF) to support investigations into war crimes committed in Ukraine. The purpose of this task force is to help identify suspects and their involvement in war crimes, crimes against humanity or crimes of genocide committed in Ukraine through the collection and analysis of open-source intelligence (OSINT). Such intelligence can significantly assist investigators in verifying and documenting cases of war crimes. The OTF is led by the international crime units of the Dutch *Nationale Politie* and the German Federal Criminal Police Office (*Bundeskriminalamt*), with the support of Europol and its Major International Crimes (AP CIC) analytical project.

## III. Legal frameworks

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### Ukrainian domestic law

#### *Criminal Code of Ukraine*

**S**exual violence is a criminal offence under the [Criminal Code of Ukraine](#). Punishable criminal offences of a sexual nature include rape (including marital rape, Article 152), sexual violence (Article 153), coercion to engage in sexual intercourse/sexual act (Article 154), sexual relations with a minor (Article 155), and child sexual abuse (Article 156).<sup>58</sup>

In January 2019, after receiving remarks and recommendations from the UN Committee on the Elimination of Discrimination against Women, the Ukrainian government took steps to bring the definition of the crime of rape in its domestic law into line with international standards. International standards, including those set by the [Istanbul Convention](#), require a more inclusive and gender-neutral definition of rape, which is not limited to penetration of a vagina by a penis, and based on an absence of freely given consent while taking into account a wide range of coercive circumstances (which is to say, not based narrowly on the use of force or threat of force).

Consequently, in the [Ukrainian Criminal Code](#) rape is defined as “any acts of a sexual nature that include vaginal, oral, or anal penetration by genitals or any other object without the voluntary consent of the victim”.<sup>59</sup> In addition, consent is considered “voluntary if it is given as the result of the free will of a person, considering the accompanying circumstances”.<sup>60</sup> This definition appears to be in line both with international and European human rights law and international criminal law, as well as the definition contained in the [Istanbul Convention](#).

Acts of conflict-related sexual violence can constitute war crimes, crimes against humanity or the crime of genocide.

Article 438 of the [Criminal Code of Ukraine](#) establishes criminal liability for violation of the laws and customs of war. This article also establishes punishments for the cruel treatment of prisoners of war or the civilian population, the deportation of the civilian population for forced labour, the use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties, the binding consent of which has been granted by the Ukrainian Parliament. However, not all violations of laws of war – which is to say, of international humanitarian law – are criminalised in Ukraine; only serious violations are. Moreover, the Article does not specifically recognise acts of sexual violence as constituting various war crimes, including but not limited to rape.

Article 442 of the Criminal Code of Ukraine establishes liability for the crime of genocide, which it defines as

” an act intentionally committed with the aim of full or partial destruction of any national, ethnic, racial or religious group by taking the lives of group members or inflicting serious bodily harm on them, creating living conditions for the group designed for its full or partial destruction, physical destruction, reduction or prevention of childbearing in this group or by forcible transfer of children from one group to another.

While this definition is slightly narrower than that established by the Genocide Convention, and replicated without amendment in Article 6 of the ICC’s [Rome Statute](#) – particularly as regards the exclusion of ‘causing severe mental harm’ in addition to bodily harm, investigators and prosecutors knowledgeable about the gendered commission of genocide would be able to use Article 442 in investigations and prosecutions of sexual violence, committed as acts of genocide, in circumstances where there is evidence of genocidal intent.

### *Draft Law No. 2689 and the need to improve the legislative framework*

In May 2021, the Ukrainian Parliament adopted Draft Law No. 2689 “On Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of International Criminal and Humanitarian Law”.<sup>61</sup> The Draft Law, which has not yet been signed by the President, aims to harmonise the

provisions of Ukrainian national law with the provisions of international criminal and humanitarian law regarding criminal prosecution for the core international crimes of genocide, crimes against humanity, war crimes, and aggression.

In particular, the Draft Law proposes the amendment of Articles 438 and 442 of the Ukrainian Criminal Code, and to supplement it with Articles 438<sup>1</sup>-438<sup>2</sup> (on war crimes) and Article 442<sup>1</sup> (on crimes against humanity). Articles 438<sup>1</sup>-438<sup>2</sup> introduce national provisions on war crimes that are substantively similar to the provisions of Article 8 of the [Rome Statute](#). Draft Article 438 defines a war crime as

” deliberate commission in connection with an international armed conflict or a non-international armed conflict against a person who is under the protection of international humanitarian law: 8) rape, sexual exploitation, forced pregnancy, forced sterilisation or any other forms of sexual violence.<sup>62</sup>

Draft Article 442 brings Ukrainian domestic law more firmly in line with the definition of genocide set out in the Genocide Convention and in Article 6 of the [Rome Statute](#). It also specifically recognises that sexual violence may be a constitutive act of genocide if committed with the requisite intent. It explicitly recognises that that serious harm includes rape and other forms of sexual violence.

Draft Article 442<sup>1</sup> establishes criminal liability for crimes against humanity and replicates the definition provided by Article 7 of the [Rome Statute](#). The provisions of the article recognise rape, sexual exploitation, forced pregnancy, forced sterilisation or any other form of sexual violence as crimes against humanity. Moreover, it recognises torture – defined as the intentional infliction of severe physical pain or physical or moral suffering on a person – as a crime against humanity. As explored in Section III (Legal Frameworks), sexual violence as a form of torture is recognised in both international human rights law and international criminal law.

The implementation of the amendments described above, be it with the entry into force of Draft Law 2689 or through their inclusion into another act of parliament amending the Criminal Code of Ukraine, would bolster compliance of Ukraine's domestic criminal laws with international law norms and standards and create a stronger foundation for national efforts to investigate and prosecute allegations of sexual violence.

Strategic Plan on the Implementation of Powers of the Prosecutor's Office in the Field of Criminal Prosecution for International Crimes for 2023–2025, adopted by the Prosecutor General of Ukraine on 15 September 2023, also recognises the need to improve the relevant legislation of Ukraine with a view to ensuring effective prosecution for crimes under international law both at the domestic and international levels, including provisions aimed at providing compensation to victims of such crimes for both pecuniary and non-pecuniary damage.

### *Criminal Procedure Code of Ukraine*

The [Criminal Procedure Code \(CPC\) of Ukraine](#) contains provisions for the collection of evidence from victims and witnesses of sexual violence in armed conflict. According to Article 97(2), courts have the right, in exceptional cases, to accept hearsay evidence as admissible, regardless of the possibility of examining the witness who provided the initial explanation if such evidence is admissible under other applicable rules. In making this decision, the court must take into account:

1. the significance of explanations and testimony for clarifying particular circumstances and their importance for understanding other information;
2. other evidence on the issues that have been or may be submitted;
3. the circumstances of the initial explanations in favour of their reliability;
4. credibility of initial explanations;
5. the difficulty of refuting hearsay evidence for the party against whom it is directed;
6. the correlation of hearsay evidence with the interests of the person who provided this evidence;
7. the possibility of examining the person who provided the initial explanations or the reasons for the impossibility of such examination.

This legal provision is particularly relevant in cases where a long time has passed between the event of the crime and the start of the pre-trial investigation.

Article 225 of the CPC of Ukraine allows for the examination of a victim or witness during the pre-trial investigation in court, which is an effective legal tool to reduce the re-traumatisation of these persons.



CPC of Ukraine also takes into account the vulnerabilities of children, who were victims of sexual violence. In particular, Article 226 of the CPC of Ukraine outlines the peculiarities of interrogation of a minor or underage person, which must be conducted in the presence of a legal representative, teacher, or psychologist, and, if necessary, a doctor. When conducting investigative actions involving a minor or underage person, the participation of a legal representative, teacher, or psychologist, and, if necessary, a doctor, shall also be ensured (Article 227 of the CPC of Ukraine).

In order to ensure the safety of the witness or victim, identification may be carried out in conditions where the person being presented for identification does not see or hear the identifying person. The conditions of such an identification and its results are indicated in the protocol, as provided for in Article 228 (4) of the CPC of Ukraine. If necessary, identification may be made based on photographs and/or video recording materials, provided that they are compliant with the relevant requirements of Article 228 (1, 2) of the CPC. Article 232 of the CPC of Ukraine stipulates that in certain cases, examination of witnesses, and identification of persons or things during the pre-trial investigation may be conducted via videoconference.

Pursuant to Article 336(1) of the CPC of Ukraine, court proceedings may be conducted via videoconference, in the following cases: 1) impossibility of direct participation of a participant in criminal proceedings in court for health reasons or other valid reasons; 2) need to ensure the safety of persons; 3) examination of a minor or underage witness, victim; 4) need to take such measures to ensure the efficiency of court proceedings; 5) other grounds determined by the court. Where necessary, the court may order that a child witness be examined outside the courtroom via a video conference, as per Article 354 (4) of the CPC.

### *The impact of martial law*

On 24 February 2022, by Presidential decree, martial law was imposed on the entire territory of Ukraine. While the advent of martial law has not impacted the substance of the law regarding crimes of sexual violence, it has led to some changes in the running of criminal proceedings, which may impact the investigation and prosecutions of crimes of sexual violence, particularly where the commission of such crimes is conflict-related.

First, prosecutors now have enhanced powers. Under martial law, they may delegate the investigation of any criminal offence to another pre-trial investigation body, where the work of the appropriate investigative institution

is objectively no longer possible (for example, due to intense hostilities occurring in a particular area). Similarly, pre-trial investigation bodies are permitted to form inter-agency investigative teams to ensure the prompt investigation of all criminal offences.

Ukraine's martial law also simplifies several procedures with which prosecutors must abide. Some examples of such changes include:

- ▶ Article 29 of the [Constitution of Ukraine](#) prohibits detention beyond 72 hours without judicial approval. However, under martial law, this period has been extended to 260 hours;
- ▶ under martial law, a court may accept evidence obtained during the interrogation of a witness so long as that interrogation was recorded, and the suspect was represented at the interrogation. This is a significant change, as previously testimony provided at the pre-trial investigation stage could not be relied upon by a court in reaching its final verdict unless that testimony had been given before the court itself;
- ▶ prosecutors now have powers to decide on issues related to the implementation of the case, without recourse to a judge. This would include deciding to seize property; granting permission to enter a person's home or other property; granting a search permit; taking samples from items and documents; allowing for covert investigative/search actions; and deciding to extend pre-trial investigations.

Second, before the imposition of martial law, criminal trials could be held by video conference if the accused did not object. That right to object has now been removed and the court may decide on a remote trial without considering the opinion and wishes of the accused person.

Third, several specific offences have been created by martial law, arising directly from the ongoing armed conflict between the Russian Federation and Ukraine as a result of the former's invasion of Ukrainian territory. These include the offences of:

- ▶ collaborationism;
- ▶ "justification, recognition as lawful, or denial of the armed aggression by the Russian Federation against Ukraine as well as glorification of its participants";
- ▶ dissemination of information on the location of weapons, equipment, and soldiers, save for where information is published by the General Staff of the Armed Forces of Ukraine or the Ministry of Defense of Ukraine;

- ▶ incitement to regional hatred;
- ▶ defamation of soldiers' honour and dignity, and threats against soldiers;
- ▶ illegal use of humanitarian aid.

Finally, the Criminal Code was amended to exclude the liability of civilians who took up arms against Russian forces or any other persons “carrying out armed aggression against Ukraine.”

The Ukrainian government has, since 2019, taken concerted steps to ensure the criminalisation of the crime of rape and other crimes of sexual violence are in line with international and Council of Europe standards. In so doing, it offers both recognises a larger population of victims of sexual violence and provides them with a path towards justice, in the form of criminal accountability.

## International Human Rights Law

### *General provisions related to the investigation of conflict-related sexual violence*

The [Istanbul Convention](#) is founded upon respect for human rights and international human rights instruments and obligations, as set out in its Preamble. International human rights law applies both in peacetime and in times of conflict. While the primary obligation to uphold human rights falls on states, it is increasingly understood that armed groups, notably those in effective control of territory and over the populations therein, also have human rights obligations. Human rights are interdependent, indivisible, and interrelated. Consequently, violations of human rights are often cumulative and overlapping.

International human rights law prohibits sexual violence, in all its forms.<sup>63</sup> Depending on the context in which it occurs, sexual violence violates a number of human rights, including the rights to life; liberty and security of person; privacy; the highest attainable standard of physical and mental health; equality; be free from all forms of discrimination; equal protection under the law; and the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment. States are required to exercise due diligence to prevent, investigate and prosecute acts of sexual violence perpetrated by state or non-state actors.

As a starting point, the non-derogable – and *jus cogens*<sup>64</sup> – prohibition of torture or cruel, inhuman or degrading treatment or punishment, contained in all universal

and regional human rights treaties,<sup>65</sup> provides a strong basis to prohibit virtually all forms of sexual violence at all times. This includes not only the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), which was adopted by the General Assembly in 1984 but also the [European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#) (ECPT), adopted by the member states of the Council of Europe in November 1987. At the time of its publication, the European Convention was ground-breaking, as it was the first instrument capable of enforcing compliance with the obligations it created. It was ratified by Ukraine in 1997 and came into force the same year.

In 1986, the Special Rapporteur against Torture noted that sexual abuse was one of the various methods of physical torture.<sup>66</sup> Human rights jurisprudence provides guidance as to the circumstances in which sexual violence has been held to amount to torture or cruel, inhuman or degrading treatment or punishment. Rape, in particular, has often been considered as torture.

In the 1996 case of *Raquel Martín de Mejía v. Peru*, the Inter-American Commission on Human Rights (IACHR) determined that a rape, committed by a Peruvian soldier, of a woman suspected of belonging to a “subversive” group, and whose husband had been abducted by the Peruvian army, amounted to torture as it was committed intentionally by a state official with the objective of punishing and intimidating her.<sup>67</sup> In 1997, the European Court of Human Rights (ECtHR) in *Aydin v. Turkey*, determined the rape of a 17-year-old girl detained by Turkish security forces on suspicion of her and/or her family’s collaboration with the PKK, was committed in order to obtain information, and constituted torture.<sup>68</sup> The Court noted,

*Rape of a detainee by an official of the state must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim that do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. ... [T]he Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.*

Similarly, in June 2017, the UN Human Rights Committee determined that the gang rape, by Nepalese soldiers, of a woman suspected of supporting Maoist groups, which was committed to extract information, punish and humiliate her, and intimidate others in her community, “unequivocally amounted to torture”.<sup>69</sup>

Other forms of sexual violence can also amount to torture or cruel, inhuman or degrading treatment or punishment. While not exhaustive, these examples are instructive:

■ forcing someone to witness the rape of close relatives was found to constitute “a form of humiliation and degradation that is a violation of the right to humane treatment”<sup>70</sup>;

■ involuntary sterilisation has been found to amount to cruel treatment<sup>71</sup>;

■ the strip-searching of a male prisoner in the presence of a female prison officer constituted degrading treatment<sup>72</sup>; and

■ sexual assaults (including forcing male prisoners to rape each other, sometimes in front of other prisoners) amounted to torture.<sup>73</sup>

Where a state has not effectively investigated allegations of sexual torture and has not prosecuted or punished the perpetrators, the victim may suffer a separate violation of the prohibition against torture or other ill-treatment under its procedural limb and/or of the right to an effective remedy.<sup>74</sup>

Sexual violence also violates the right to life. The UN OHCHR Human Rights Committee identifies violence against women, including sexual violence, as a threat to the right to life.<sup>75</sup> The link between violation of the right to life was made clear in the sexual violence perpetrated by Hutu militia against Tutsi women and girls during the 1994 Rwandan genocide, where victims were raped to death, died from blood loss following sexual mutilation (including the cutting off of breasts), and who years later died from the transmission of HIV during the genocidal rapes. Rape, in particular, can have distinct health consequences harbouring right to life implications, including the transmission of potentially fatal sexually transmitted diseases. Any action by a non-state actor, condoned by the state and which violates the right to life, must result in the strictest sanctions, i.e., criminal sanctions.

The right to liberty and security of persons is a fundamental part of human dignity. It is a recognition of the equal worth of all human beings and a duty of others to respect that worth. Sexual violence is an assault upon this right. Sex

trafficking, which may include multiple acts of sexual and physical violence, is a violation of this right as, against their will, women are forced into dangerous conditions and unable to make any decision about their personal security. Sexual violence can be strategically used by state and non-state actors as a means of signalling that a refusal to submit to authority in a particular state or region will have consequences for an individual's or group's liberty and security.

In *X & Y v. Netherlands*, the ECtHR held that rape abridges the right to privacy under Article 8, which protects the "physical and moral integrity of the person, including his or her sexual life".<sup>76</sup>

Sexual violence also violates the right to the highest attainable standard of physical and mental health. In 2005, the World Health Organization (WHO) indicated that women who suffered physical or sexual violence have experienced a "range of physical symptoms (problems with walking, pain, memory, dizziness, and vaginal discharge)".<sup>77</sup> WHO noted that survivors face significant mental health challenges, may be more susceptible to suicide, and suffer the risk of HIV and other sexually transmitted infections. While the WHO report focused on violence against women, its findings are applicable to female and male victims of sexual violence. Survivors have the right to adequate reparation and rehabilitation that cover their physical and mental health.

The right to equality and to be free from all forms of discrimination<sup>78</sup> in the enjoyment of physical and mental integrity requires that there should be equality in the weight given to the free and full agreement of sexual contact by both or all parties to that contact, whether or not such sexual contact involves penetration. Sexual violence is one of the most significant aspects of discriminatory violence against women,<sup>79</sup> and other traditionally marginalised groups.

Sexual violence, a form of gender-based violence, disproportionately affects women and girls and as stated in [General Recommendation No. 35 of the Committee on the Elimination of Discrimination against Women](#), is

*rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.*<sup>80</sup>

Article 4 of the [Istanbul Convention](#) affirms the principle of substantive equality between women and men by requiring Parties to not only condemn all forms of discrimination against women but to enshrine the principle of equality in law, ensure its practical realisation as well as prohibit discrimination by law and abolish any discriminatory legislation and practices. The Explanatory Report expressly recognises that

” the enjoyment of the right to be free from violence is interconnected with the parties’ obligation to secure equality between women and men to exercise and enjoy all civil, political, economic, social and cultural rights as set out in the human rights instruments of the Council of Europe, particularly the ECHR and its Protocols and the European Social Charter, and other international instruments, particularly CEDAW, to which they are parties.<sup>81</sup>

Incidence of sexual violence often falls most heavily on already marginalised groups, both within and outside of the community of women. Some groups of women and girls, such as those from indigenous, black, religious, and ethnic minority communities, face layers of historic and current discrimination and may be particularly targeted for sexual and other forms of violence.<sup>82</sup> Other communities that have traditionally discriminated against in a particular society, may also be so targeted. This includes, for example, sexual minorities and the physically and mentally disabled.

Victims of sexual violence may also have their right to equal protection before the law violated, where it is found that perpetrators enjoy impunity from investigation, prosecution, and punishment in the overwhelming majority of cases.<sup>83</sup>

This is not exhaustive. Sexual violence can also be encompassed into other human rights violations depending on the circumstances. For instance, sexual slavery is included in the broader prohibition of slavery. When documenting, analysing, and reporting on sexual violence, it is essential to return to the human rights framework at different stages to reflect on whether and which violations of international human rights law may have occurred.

Where international humanitarian law applies, it is equally important to rely upon the human rights framework when examining conflict-related sexual violence. Human rights practice and case law can be useful tools for interpretation when

it comes to concepts such as slavery or discrimination, which can also be found under international humanitarian law and international criminal law. Human rights law also complements international humanitarian law by providing for additional rights/ prohibitions such as the prohibition of human trafficking or the right to privacy or to a private life that have no real equivalent under international humanitarian law.

### *Case law of the European Court of Human Rights on the effective investigation of war crimes and sexual violence*

The European Court of Human Rights has formed its approach to the obligation of parties to the [European Convention on Human Rights](#) to investigate war crimes and its requirements for such investigations to be considered effective based on Articles 2<sup>84</sup> and 3<sup>85</sup> of the Convention. As such, this obligation has an independent legal basis from any other international legal obligations of the States concerned by virtue of international humanitarian law and/or international criminal law. While the majority of cases examined by the Court up until now pertained to killings or enforced disappearances, the approaches developed in the relevant jurisprudence are applicable to any investigations of alleged war crimes.

The respective procedural obligation requires that, where there is an arguable claim that Article 2 and/or Article 3 of the Convention have been violated, those conducting any investigation must be independent and impartial and the investigations themselves should be promptly undertaken, thorough and competent, involving the alleged victim(s) in the relevant proceedings and being subject to public scrutiny.

The fulfilment of this obligation has been examined in a considerable number of cases brought before the European Court by victims of war crimes and/or their relatives in the context of several former conflicts, notably, that in former Yugoslavia in the 1990s (e.g., *Jelić v. Croatia*, no. 57856/11, 12 June 2014; *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011). It was also elaborated in cases relating to many other contexts, including cases about military operations of States parties to the Convention outside of Europe. Thus, the general principles concerning the obligation to carry out an effective investigation under Article 2 of the Convention in the context of an armed conflict were laid down in *Al-Skeini and Others v. the United Kingdom [GC]* (no. 55721/07, 7 July 2011) and repeated thereafter on numerous occasions.



To summarise those principles that are relevant to the investigation of conflict-related sexual violence, one needs to underline that what form of investigation will achieve the purposes of Articles 2 and 3 of the Convention may vary depending on the circumstances. However, whatever mode is employed, the authorities must act on their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. Furthermore, civil proceedings, which are undertaken on the initiative of the next of kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention. Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages.

On many occasions, the Court has emphasised that the investigation must be effective in the sense that it is capable of leading to a determination of the circumstances and the identification and punishment of those responsible. This is not an obligation of result but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the persons responsible will risk falling foul of this standard.

Considering the specific circumstances of armed conflicts, the Court also considers that in circumstances of war, mass violence and so forth, the procedural duty must be applied realistically, to take account of specific problems faced by investigators, in particular the feasibility of specific investigative actions (*Al-Skeini and Others v. the United Kingdom [GC]*, 7 July 2011, §168; *Georgiav. Russia (II) [GC] (merits)*, 21 January 2021, § 327). However, the understanding that the compliance with the procedural obligation of States under Articles 2 and 3 of the Convention should be reviewed realistically, the Court has never absolved a Contracting Party of such duties, which remains applicable in any circumstances. This means that the general requirements established by the Court's case law must in principle apply (*Hanan v. Germany [GC]*, 16 February 2021, §§198-210).

Nevertheless, when applying these requirements to various concrete situations, the Court's case law has followed a nuanced and differentiated approach, accepting different standards of investigation depending on the type of armed conflict at issue. Thus, all such conflicts covered by the existing case law on the

obligation to investigate war crimes effectively can be clearly divided into four categories: (1) internal conflicts, such as a civil war, an insurrection, or any kind of local armed conflict, within the internationally recognised boundaries of a State; (2) armed conflicts following the disintegration of previously existing States; (3) military operations carried out by Contracting States abroad, and (4) armed conflicts that occurred in a more distant past.

Regarding purely internal armed conflicts taking or having taken place within the internationally recognised boundaries of the respondent State, the Court has never recognised the specific military and political context of the events as a ground for nuancing or lowering the standard of investigation, even if it has acknowledged the existence of practical difficulties in this respect. In other words, the Court applies the same ordinary standards as in any case concerning the use of lethal force by police or other state agents.<sup>86</sup>

The Court's attitude is much more nuanced if the deaths have occurred in the context of an international armed conflict. It seems that the general criterion applied by the Court in such cases is that the procedural limb of Article 2 "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities", with reference to *Osman v. the United Kingdom* (28 October 1998, § 116, *Reports of Judgments and Decisions* 1998 VIII). For example, as regards armed conflicts following the disintegration of the former Yugoslavia, the Court has placed great emphasis on the specific situation in the region and the struggle of States to investigate human rights violations in post-conflict settings. Thus, in *Palić v. Bosnia and Herzegovina* (no. 4704/04, 15 February 2011), where the applicant criticised the investigation into her husband's disappearance during the 1992-95 war in Bosnia and Herzegovina, the Court found no violation of the procedural aspect of Article 2. It reiterated that the obligations under Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, although in a different context, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998 VIII). The Court took into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources.

The Court's case-law on the duty of States to effectively investigate sexual violence outside the context of armed conflict should also be mentioned. The principles related to the procedural obligation under Articles 3 and 8 to investigate sexual violence are set out, in particular, in the cases *M.C. v. Bulgaria* (no. 39272/98, §§ 149, 151 and 153, ECHR 2003 XII) and *Y. v. Slovenia* (no. 41107/10, §§ 95–115).

## International Humanitarian Law

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It applies only to armed conflicts, irrespective of whether they are classified as international or internal. International humanitarian law does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.

International humanitarian law treaties, notably the Hague Regulations of 1899 and 1907 and the 1949 Geneva Conventions, have been criticised because they characterised sexual violence as an intrusion on the victim's "honour",<sup>87</sup> rather than as an attack against the physical and psychological well-being of the victim.<sup>88</sup> There is a debate as to whether notions of "honour" have the same import today as they did then, but what is clear is that link between sexual violence and honour is less present in more recent international humanitarian law treaties.

Nevertheless, express prohibition against sexual violence appeared in some of the earliest codifications of international humanitarian law,<sup>89</sup> in contrast with international human rights law treaties. Rape was expressly prohibited in the 1863 Lieber Code.<sup>90</sup> A recognition of the commission of sexual violence during armed conflict, and the need to prevent it, is contained in the Hague Regulations of 1899 and 1907, and the 1929 Geneva Convention governing the treatment of prisoners of war.

Today, the foundational documents governing international humanitarian law, the 1949 Geneva Conventions and their Additional Protocols of 1977, expressly prohibit rape and other forms of sexual violence in less explicit provisions such as the prohibitions against cruel treatment and torture, humiliating and degrading treatment, outrages upon personal dignity, indecent assault and enforced prostitution. [Additional Protocol I](#), which applies to international armed conflicts, provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", are "prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents".<sup>91</sup> Two additional provisions protect specifically

women “against rape, enforced prostitution and any other form of indecent assault”<sup>92</sup> and children “against any form of indecent assault”.<sup>93</sup>

Relevant to non-international armed conflicts, Article 3 common to the four Geneva Conventions implicitly also prohibits sexual violence by prohibiting “violence to life and person, in particular ... mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment”. [Additional Protocol II](#), which is applicable to a smaller range of internal conflicts than Article 3 common to the Conventions of 1949, prohibits, in the provision on fundamental guarantees, “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” for “all persons who do not take a direct part or who have ceased to take part in hostilities”.<sup>94</sup> This covers civilians and persons *hors de combat*.

In December 1992, following the ratification of the Additional Protocols, ICRC issued an *aide-memoire* to clarify the prohibition of rape under the 1949 Geneva Conventions. It stated, in part, that the grave breaches enumerated in Article 147 of the [Fourth Geneva Convention](#), especially the breach of wilfully causing great suffering or serious injury to body or health, “obviously covers not only rape but also any other attack on a woman’s dignity”.<sup>95</sup>

Customary international humanitarian law also prohibits rape and other forms of sexual violence. According to the [ICRC Customary Law Study’s](#) Rule 93, this prohibition has been found to apply both in international and non-international armed conflicts and protects women, girls, boys, and men.<sup>96</sup>

## International Criminal Law

International criminal law deals with the criminal responsibility of individuals for international crimes. The international core crimes, which is to say crimes over which international tribunals have jurisdiction under international law, are genocide, war crimes, crimes against humanity and aggression. Crimes against humanity and genocide can be committed irrespective of whether a state of armed conflict exists. War crimes can only be committed during an international or internal armed conflict.

The aftermath of the Second World War saw the rapid development of international criminal law. The precursors to the ad hoc and hybrid tribunals of the 1990s and 2000s, including Security Council resolutions, were unambiguous in their position that the jurisdiction of the international tribunals would include

crimes of sexual violence.<sup>97</sup> The statutes of the various tribunals, the International Criminal Court for the former Yugoslavia, the International Criminal Court for Rwanda, the Special Court for Sierra Leone, the Extraordinary Court Chambers for Cambodia, and the International Criminal Court<sup>98</sup> bear out this understanding. The subsequent jurisprudence handed down by these tribunals has furthered our understanding and interpretation of the law.

Under international criminal law, rape and other forms of sexual violence can be investigated and prosecuted as:

- i. war crimes when committed in the context of and associated with an armed conflict;
- ii. as crimes against humanity when committed in the context of a widespread or systematic attack on a civilian population; and/or
- iii. as an act of genocide when committed with the intent to destroy an ethnic, religious, national, or racial group in whole or in part.

Under international criminal law, therefore, one needs to gather information and evidence of both the underlying crime and the contextual circumstances in which the crime takes place.

### *War crimes*

The large-scale commission of war crimes during the war of aggression waged by the Russian Federation against Ukraine has been one of the incentives for the Council of Europe, most of its Member States, and several of other States to conclude a partial agreement establishing the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine.<sup>99</sup>

For a crime to be classified as a war crime, it must be committed in the context of and associated with an international or non-international armed conflict, by a perpetrator who is aware of the factual circumstances that make the situation one of armed conflict.

An international armed conflict exists “whenever there is a resort to armed force between states”.<sup>100</sup>

” A non-international armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached.<sup>101</sup>

For a crime to be a war crime, there must be a nexus between the crime and the armed conflict. The "nexus" requirement means that "the offence must be closely related to the hostilities or committed in conjunction with the armed conflict".<sup>102</sup> The ICTY Appeals Chamber in the *Kunarac* case elucidated further, holding

” The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.<sup>103</sup>

Crimes of sexual violence which, if the contextual elements are proven, may be war crimes are:

- i. rape,
- ii. sexual slavery,
- iii. enforced prostitution,
- iv. forced pregnancy,
- v. enforced sterilisation, or
- vi. any other form of sexual violence (in an international armed conflict)/ any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions (in a non-international armed conflict).

Other war crimes that could involve criminal conduct of a sexualised nature:

- vii. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- viii. committing outrages upon personal dignity, in particular humiliating and degrading treatment.

## *Crimes against humanity*

For a crime to be classified as a crime against humanity, it must be committed as part of a widespread or systematic attack directed against a civilian population where the perpetrator knew or intended the conduct to be part of such an attack. The International Criminal Court has included an additional requirement specific to its jurisdiction: that the attack which constitutes a crime against humanity must have been committed “pursuant to or in furtherance of a state or organisational policy to commit such an attack”.

“Widespread” may be defined as “massive, frequent, large-scale action, carried out collectively with consider seriousness” and directed against multiple victims.<sup>104</sup> “Systematic” may be defined as “thoroughly organised and following a regular pattern”.<sup>105</sup> An “attack” can be described as a course of conduct involving the commission of acts of violence,<sup>106</sup> or be non-violent in nature.<sup>107</sup> It need not be a military attack.<sup>108</sup> An attack is ‘directed against’ a civilian population if the civilian population is the primary object of the attack.<sup>109</sup> A population may be considered as ‘civilian’ even if certain non-civilians are present – it must simply be “predominantly civilian in nature”.<sup>110</sup> A “policy to commit such attack” requires that the state or organisation actively promote or encourage such an attack against a civilian population.<sup>111</sup>

It is essential to understand that the sexual violence does not need to be widespread or systematic. Rather it is the attack on the civilian population that must be widespread or systematic. “A single isolated act by a perpetrator, if linked to a widespread or systematic attack, could constitute a crime against humanity”.<sup>112</sup> For example, in its report “Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic”, the Commission of Inquiry of Syria determined that rapes committed in Syrian Government detention constituted crimes against humanity. The Commission determined this through the Government’s

” widespread conduct of mass arrests, arbitrary arrests and enforced disappearance, victimising the general civilian population living in restive areas and persons otherwise perceived to be in opposition to the Government, and the ensuing ill-treatment and killing of those detained, Government forces... engaged in the multiple commissions of crimes, amounting to a systematic and widespread attack against a civilian population. The documented rapes were part of this larger and more diverse widespread and systematic attack.

The perpetrator must know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Crimes of sexual violence which, if the contextual elements are proven, may be crimes against humanity are:

- i. rape;
- ii. sexual slavery;
- iii. enforced prostitution;
- iv. forced pregnancy;
- v. enforced sterilisation; or
- vi. any other form of sexual violence of comparable gravity.

Other crimes against humanity that could involve criminal conduct of a sexualised nature:

- vii. murder;
- viii. extermination;
- ix. torture;
- x. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender as defined in paragraph 3 of Article 7, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the ICC;
- xi. other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or mental or physical health.

## *Genocide*

Article II of the 1948 [Convention for the Prevention and Punishment of the Crime of Genocide](#) states that the crime of genocide is committed when a person commits a prohibited act with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Prohibited acts are (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. This definition is replicated, without amendment, in Article 6 of the [Rome Statute](#).



The crime of genocide requires that the perpetrator have a special intent to destroy, in whole or in part, a protected group. Genocidal acts must be committed against a person because of their membership in a particular group and as an incremental step in the overall objective of destroying the group. Sexual violence, when committed with the requisite special intent, can be a genocidal act. Sexual violence may fall under the following prohibited acts:

### ***Causing serious bodily or mental harm***

Conduct resulting in serious bodily or mental harm “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment”.<sup>113</sup> The International Criminal Tribunal for Rwanda (ICTR) case of *Akayesu* first found that rape and sexual violence constitute serious harm on both a physical and mental level – and consequently, if carried out with specific intent to destroy, in whole or in part, a protected group, constitute genocide. The findings of the Trial Chamber in the *Akayesu* case heralded as “the most important decision rendered thus far in the history of women’s jurisprudence”,<sup>114</sup> are instructive:

*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 as s/he suffers both bodily and mental harm... The rapes resulted in the physical and psychological destruction of the Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and the destruction of the Tutsi group as a whole.*<sup>115</sup>

### ***Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part***

In the *Kayishema* case before the ICTR, the Trial Chamber determined that rape was also a method of destruction which does not “lead immediately to the death of members of the group”.<sup>116</sup> In 2015, the International Court of Justice indicated that rape could fall within Article II(c) of the Genocide Convention but noted, in the particular case before the Court, “it has not been shown that these occurrences [of rape] were on such a scale to have amounted also to inflicting conditions of life on the group that was capable of bringing about its physical destruction in whole or in part”.<sup>117</sup>

### ***Imposing measures intended to prevent births within the group***

Measures intended to prevent births within the group include rape; sexual mutilation; the practice of sterilisation; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity; and mental trauma resulting in a reluctance to procreate.<sup>118</sup> Rape can be a measure to prevent births “when the person raped subsequently refuses to procreate, in the same way, that members of a group can be led, through threats or trauma, not to procreate”.<sup>119</sup> Annex A provides a detailed breakdown of the elements of each of these crimes.

# Conclusion

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In its September 2022 responses to the CEDAW Committee, Ukraine emphasised that, since February 2022, “cases of sexual violence against civilians by the Russian military had been recorded in Ukraine and sexual violence was being used as an instrument of war”, with 43 criminal proceedings on sexual violence committed during the armed conflict having already been initiated.<sup>120</sup> In September 2023, the Independent International Commission of Inquiry on Ukraine Commission Chair Erik Møse told the UN Human Rights Council in Geneva that in the Kherson region, “Russian soldiers raped and committed sexual violence against women of ages ranging from 19 to 83 years”, often together with threats or commission of other violations.<sup>121</sup>

As the war rages on, reports of sexual violence committed against Ukrainians – and particularly against women and girls – by Russian forces continue to rise. With access to some areas of the country curtailed and with some victims not yet willing to speak about the atrocities that they have suffered, the true scale of Russia’s tactical use of rape and other acts of sexual violence may take years to come to light.

The Council of Europe has long committed itself to preventing and combating violence against women, including through the adoption of the [Istanbul Convention](#) in 2011, and of a specific monitoring mechanism to underpin the effective implementation of its provisions by the Parties. Since the more recent Russian armed aggression against Ukraine, the Council of Europe has sought to support those working directly with victims of sexual violence in Ukraine, among them psychologists, hotline workers and other social care workers engaged by the local self-government bodies in Ukraine.

Gender-sensitive, victim-centred documentation efforts are integral to both building trust with victims and carving a path to accountability for the crimes that have been committed. The Istanbul Convention emphasises that documentation

of sexual violence has, at its starting point, a recognition that such violence is rooted in structural inequalities, notably gender inequality. Discriminatory attitudes against women and girls bolster, and are bolstered by, the commission of sexual violence, whether the victims are female or male.

It is through understanding how and why sexual violence is employed against particular individuals and communities in Ukraine that one can grasp the role it plays in achieving Russia's wider aims. Understanding the rationale behind the commission of sexual violence is essential for a nuanced and probing understanding not only of this violation but also of the larger pattern of violations in which sexual violence often forms part.

# ANNEX A:

## ICC elements of crimes of sexual violence

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### RAPE

<i>Physical element</i>	<i>Mental Element</i>
Invasion of 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 body part; <sup>122</sup> <i>and</i>	The perpetrator meant to invade the body of a person, <i>and</i>
The invasion was committed by threat of force or coercion, <sup>123</sup> 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>124</sup>	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent.

Rape as an international crime differs to how rape is understood under international human rights law in that, under ICL, the victim's lack of consent is not a legal element of the crime of rape.<sup>125</sup>

Under international human rights law, relating to prosecution of rape require that, for sexual contact to be legal, "Consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances".<sup>126</sup> This is also often how rape is criminalised under domestic laws.

## SEXUAL SLAVERY

is committed where a perpetrator:

<i>Physical element</i>	<i>Mental Element</i>
exercises any or all of the powers attached to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering the person) or imposing on them a similar deprivation of liberty, <sup>127</sup> and	The perpetrator meant to exercise powers attached to the right of ownership over one or more persons.
Causes such person or persons to engage in one or more acts of a sexual nature. <sup>128</sup>	The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature.

### (!) Forced Marriage

In the *Katanga* case before the ICC, the Court held that forced marriage may amount to sexual slavery.<sup>129</sup>

In the ICC case of *Ongwen* however, the Court concurred with the Special Court for Sierra Leone's Appeals Chamber in the *Brima* case in finding that forced marriage constituted "other inhumane acts". This reasoning was on the grounds that "victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery".<sup>130</sup>

## ENFORCED PROSTITUTION

is committed where the perpetrator:

<i>Physical element</i>	<i>Mental Element</i>
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,	The perpetrator meant to engage in conduct of causing one or more persons to engage in one or more acts of a sexual nature.

or by taking advantage of a coercive environment of such person or persons' incapacity to give genuine consent, *and*

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.

The perpetrator meant to obtain or expected to obtain pecuniary or other advantage.

International criminal tribunals have not yet adjudicated on this offence. It is currently difficult to see how most, if not all, forms of forced prostitution would not be encompassed by sexual slavery.

## FORCED PREGNANCY

is committed where the perpetrator:

<i>Physical element</i>	<i>Mental Element</i>
<ul style="list-style-type: none"><li>▶ confined one or more women; <i>and</i></li><li>▶ one or more women had been forcibly made pregnant; <i>and</i></li><li>▶ the perpetrator intended to affect the ethnic composition of any population, <i>or</i></li><li>▶ the perpetrator intended to carry out grave violations of international law.</li></ul>	<p>The perpetrator meant to confine one or more women forcibly made pregnant.</p> <p>The perpetrator meant to affect the ethnic composition of any population or carry out other grave violations of international law by confining one or more women forcibly made pregnant.</p> <p>The perpetrator was aware that one or more confined women had forcibly been made pregnant.</p>

**(!)** The trial of Ongwen before the ICC marks the first occasion where charges of forced pregnancy have been confirmed before an international criminal tribunal.

## ENFORCED STERILISATION

<i>Physical element</i>	<i>Mental Element</i>
The perpetrator deprived one or more persons of biological reproductive capacity.	The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity.
The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.	The perpetrator was aware that the conduct was not justified by the medical or hospital treatment <i>and</i> was aware of absence of genuine consent.

## OTHER FORMS OF SEXUAL VIOLENCE OF COMPARABLE GRAVITY

<i>Physical element</i>	<i>Mental Element</i>
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.	The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature.
	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent.
	The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

Such conduct was of a gravity comparable to:

- ▶ a crime against humanity as set out in Article 7 of the [Rome Statute](#);
- ▶ that of a grave breach of the Geneva Conventions;
- ▶ that of a serious violation of Article 3 common to the four Geneva Conventions.



**(!)** The UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict has defined sexual violence as:

” any violence, physical or psychological, carried out through sexual means or by targeting sexuality [... which] covers both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts. Sexual violence also characterises situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner.<sup>131</sup>

# ANNEX B:

## Template: interview notes

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### NOTES OF INTERVIEW

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**INTERNAL Code reference:****EXTERNAL Code reference:****INTERVIEWEE INFORMATION:**

Last Name:

First and middle names:

Other names used:

Gender:

Father's name:

Mother's Name:

Date of Birth/Age:

Place of birth:

Nationality:

Occupation:

Ethnicity:

Religion:

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Language(s) spoken by the interviewee:

Language(s) written by the interviewee:

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Language(s) used in the interview:

Place of interview:

Date(s) and time(s) of interview session(s):

Name of interviewer:

Name of interpreter:

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Names and titles of all other persons present:

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## OPENING PROCEDURE

1. I (*name of INTERVIEWER*) introduced myself to the interviewee and informed them that I was part of [*entity name*], working to [*entity mandate*] and explained the objective of [*entity name*] work in collecting information about [*focus of investigation*].

*(Name of INTERPRETER) was introduced to the interviewee as an interpreter working with [entity] and the interpreter's role in the interview was also explained to the interviewee. (Add anyone else's name and role if present in the interview, including the psychologist or a representative of the guardianship and custody authority).*

2. The interviewee agreed that the interview would be conducted in the [xxxxxx] language. They confirmed that they understand and speak the [xxxxxx] language. I informed the interviewee that, in the event of the interview lasting longer than two hours (children – one hour), there will be scheduled time breaks and that they were very welcome to let us know if they wanted a break at any time during the course of the interview. I also advised the interviewee that they had the right to end the interview at any time. The interviewee was advised that this is a voluntary process, and they were not obliged/under any pressure to participate in the interview process. I also advised the interviewee that they did not have to answer any questions that they did not wish to answer. If they did not like the way particular question was asked, they could also ask me to rephrase it.
3. I explained the interview process to the interviewee and asked them to be as accurate as possible in their account. I emphasised to the interviewee that they should state when they do not know the answer to a question or do not understand the question. The interviewee was asked to distinguish between what they experienced or saw themselves and what they heard or learnt about from someone else or through any other source.
4. I asked the interviewee for their consent to be interviewed. I approached the issue of consent to share at the start/at the end of the interview and explained to the interviewee that I would be asking them whether they would consent to sharing it with different named entities, and that I would provide an explanation of the work of the entity. I emphasised to the interviewee that they were welcome to ask additional questions especially if anything was unclear and that they also had the choice to consent to share the information with or without providing their personal details. I took the

interviewee through the consent options and took note of the interviewee's choice with regard to consent in these notes.

5. I advised the interviewee that other than the entities they had consented to share information with, that the interview was confidential.
6. I explained to the interviewee that in the interview they may be asked to recall events or conduct that might be upsetting.
7. I asked the interviewee if they had any further questions. If they did, the questions and my answers were recorded in the notes below. The interviewee was again asked to confirm their willingness to proceed with the interview.

## RECORDING OF INFORMED CONSENT

---

### Consent to be interviewed

- ▶ Interviewee has provided consent to be interviewed by [entity]
- 

### Consent to share information with

	<i>W/ personal details</i>	<i>Without</i>
▶ Ukrainian prosecutorial authorities	_____	_____
▶ International Criminal Court	_____	_____
▶ UN Commission of Inquiry	_____	_____
▶ [insert name of entity]	_____	_____
▶ Prosecutors of foreign countries	_____	_____

*If interviewee specifies countries please record below:*

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### Record of any concerns about informed nature of consent:

- ▶ Interviewee is unable to provide informed consent. *(Explain why)*
  - ▶ Interviewee was not asked to provide consent to share. *(Explain why)*
-

## DESCRIPTIVE PART

8. The victim (witness) describes the circumstances to the best of his/her knowledge. He/she freely describes what happened to him/her (the events he/she witnessed). Happened to him/her (the events he/she witnessed):
  - ▶ the place and time of the offence;
  - ▶ who committed the criminal acts, how many offenders there were;
  - ▶ what actions were taken;
  - ▶ who was present when the offence was committed;
  - ▶ XXXXX
9. Clarifying questions (if it is necessary to clarify certain facts or if the person cannot recall certain information):
  - ▶ season of the year or part of the day when the offence was committed;
  - ▶ special characteristics of the perpetrators and their number;
  - ▶ repeated commission of the offence;
  - ▶ contact details of witnesses and their location (if known);
  - ▶ whether witnesses or perpetrators took photos or videos of the offence;
  - ▶ XXXXX

## CLOSING

10. I indicated to the interviewee that the interview/ this day of interviewing was almost complete. The interviewee was asked whether they have anything they wished to add or anything to clarify at this time. I specifically asked if there was any aspect of the events that were not discussed and that they would like to be recorded in the notes of the interview.
11. I asked the interviewee if they had any questions or concerns that they wanted to raise before the end of the interview. If they did, those questions and the answers are set out in the notes above.

12. I again reviewed their consent options with them and made further efforts to ascertain the informed nature of that consent. I explained that the information collected from the interviewee will be securely stored and the aim is to use it to [entity mandate].
13. I explained clearly that it was not possible to guarantee justice because, for example, the person responsible may have died. I also emphasised that it takes time to gather enough evidence for a case, and to identify the person responsible. Where there is a case, the justice process often takes a long time. I explained this so that the interviewee had enough information to have realistic expectations about the possibilities of justice and the length of any justice process.
14. I expressed gratitude to the interviewee for speaking with [entity name] and thanked them once again before bringing the interview to a close.
15. ANNEXES

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87. For example, the Hague Regulations of 1899 and 1907 protect the “family honour and rights” of the population of an occupied territory, while the Third Geneva Convention of 1949 (repeating the language of the 1929 Geneva Convention on prisoners of war) provides that prisoners of war are “in all circumstances entitled to respect for their persons and honour” and that “women shall be treated with all regard due to their sex”. The Fourth Geneva Convention provides that civilian “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.

88. Judith Gardam, "Women, Human Rights and International Humanitarian Law", *International Review of the Red Cross*, No. 324, September 1998, pp. 421–432; Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, The Hague, 2001. See also, on the criticisms made by these authors, Helen Durham, "Women, Armed Conflict and International Law", *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 655–659.
89. See, for example, *Treaty of Amity and Commerce, US-Prussia*, 10 Sept. 1785, reprinted in *2 Treaties, Conventions, Acts, Protocols And Agreements Between The United States And Other Powers 1776-1909*, Malloy Collections, (1910).
90. Lieber Code: Instructions for the Government of Armies of the United States in the Field, General Order No. 100, 24 April 1863, Art. 44, available at: [www.icrc.org/ihl/INTRO/110](http://www.icrc.org/ihl/INTRO/110)
91. Additional Protocol I, Article 75(2)(b).
92. Additional Protocol I, Article 76(1).
93. Additional Protocol I, Article 77(1).
94. Additional Protocol II, Article 4(2)(e).
95. International Committee of the Red Cross, *Aide-memoire*, December 1992, para. 2.
96. ICRC Customary International Humanitarian Law database, Rule 93.
97. For example, Security Council Resolution 820 (17 April 1993), which concerned the creation of the ICTY, condemned "[A]ll violations of international humanitarian law, including in particular, the practice of "ethnic cleansing" and the massive, organised and systematic detention and rape of women, and reaffirms that those who committed or who have committed or order or ordered the commission of such acts will be held individually responsible in respect of such acts."
98. The Rome Statute of the International Criminal Court became the first international instrument to expressly define various forms of sexual violence as underlying acts of both crimes against humanity, and war crimes committed during international and non-international armed conflicts.
99. Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Adopted by the Committee of Ministers on 12 May 2023 at the 1466<sup>th</sup> meeting of the Ministers' Deputies).

100. ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.
101. ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70; ICTR, *Prosecutor v. Akayesu*, (Trial Chamber), 2 September 1998, paras. 619-21, 625.
102. ICTR, *Prosecutor v. Rutaganda*, Appeals Judgment, 26 May 2003, para. 557; ICTR, *Prosecutor v. Bagosora*, Trial Judgement, December 18, 2008, para. 223; ICTR, *Prosecutor v. Kamuhanda*, Trial Judgement, 22 January 2004, para. 735; ICTR, *Prosecutor v. Semanza*, Trial Judgement, May 15, 2003, paras. 368-69; ICTR, *Prosecutor v. Bagilishema*, Trial Judgement, June 7, 2001, para. 105.
103. ICTY, *Prosecutor v. Kunarac*, Appeals Judgment, 12 June 2002.
104. ICTR, *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, para. 580; ICTR, *Prosecutor v. Musema*, Trial Judgment, 27 January 2000, para. 204; ICTR, *Prosecutor v. Rutaganda*, Trial Judgment, 6 December 1999, para. 69.
105. ICTR, *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, para. 580; ICTY, *Prosecutor v. Tadic*, 7 May 1997, para. 648, citing from the ILC Draft Code of Crimes Against the Peace and Security of Mankind; ICTY, *Prosecutor v. Kunarac*, Appeals Judgment, 12 June 2002, para. 94.
106. ICTY, *Prosecutor v. Kunarac*, Trial Judgment, 22 February 2001, para. 415.
107. ICTR, *Prosecutor v. Musema*, Trial Judgment, 27 January 2000, para. 205.
108. ICC Elements of Crimes, Article 7.
109. ICTY, *Prosecutor v. Naletilic and Martinovic*, Trial Judgement, 31 March 2003, para. 235.
110. ICTY, *Prosecutor v. Kordic and Cerkez*, Trial Judgment, 26 February 2001, para. 180; ICTY, *Prosecutor v. Naletilic and Martinovic*, Trial Judgement, 31 March 2003, para. 235; ICTY, *Prosecutor v. Jelusic*, Trial Judgement, 14 December 1999, para. 54; ICTY, *Prosecutor v. Blaskic*, Trial Judgement, 3 March 2000, para. 214.
111. ICC Elements of Crimes, Article 7, footnote 6 which reads, "A policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such an attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action".
112. ICTY, *Prosecutor v. Kordic and Cerkez*, Trial Judgment, 26 February 2001, para. 178.

113. Footnote 3 of Article 6(b) of the Rome Statute.
114. Kelly Askin, Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC, in *International Crimes, Peace and Human Rights: the Role of the International Criminal Court* 47, 52 (Dinah Shelton ed., 2000).
115. *Akayesu* Trial Judgment, para. 731. Later similar findings that rape and sexual violence were acts of genocide were made in *Prosecutor v. Stakić*, Trial Judgment, 31 July 2003, para. 516; *Rutaganda* Trial Judgment, para. 51, *Musema* Trial Judgment, para. 156, *Gacumbitsi* Trial Judgment, paras. 291-292; and *Muhimana* Trial Judgment, para. 502.
116. *Prosecutor v. Kayishema et al.*, ICTR Trial Judgment, 21 May 1999, para. 116.
117. *Republic of Croatia v. Republic of Serbia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Judgment, 3 February 2015, paras. 362-364.
118. *Akayesu* Trial Judgment, paras. 507-8. See also *Rutaganda* Trial Judgment, para. 53.
119. *Akayesu* Trial Judgment, para. 508.
120. UNOG-INFORMATION Press\_Geneva, CEDAW/22/33 - Experts of the Committee on the Elimination of Discrimination against Women Commend Ukraine for Achievements in Gender Equality, Raise Questions on Conflict-Based Sexual Violence, 19 October 2022.
121. Ukraine: Rape and torture by Russian forces continuing, rights experts report, <https://news.un.org/en/story/2023/09/1141417>
122. Invasion, in the ICC's framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.
123. The ICC in the Bemba case considered the facts which may contribute towards a coercive environment, holding "The Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape. Further, the Chamber considers that several factors may contribute to create coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes". In addition, the Chamber emphasises that, in relation to the requirement of the existence of a "coercive environment", it must

- be proven that the perpetrator's conduct involved "taking advantage" of such a coercive environment", ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 104.
124. ICC Elements of Crimes, Article 7(1)(g), footnote 16: "A person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."
  125. ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 105.
  126. European Court of Human Rights, *M.C. v Bulgaria*, Application 39272/98, Judgment. 4 December 2003, paragraph 163.
  127. ICTY, *Prosecutor v. Kunarac et al.*, Trial Judgment, para. 542: "[I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."
  128. UNCHR, Update to the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, E/CN.4/Sub.2/2000/21, 6 June 2000, para. 50, which reads, "It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape. One respect in which slavery differs from imprisonment or arbitrary detention is that the limitations on autonomy can be solely psychological or situational, with no physical restraints."
  129. ICC, *Prosecutor v. Germaine Katanga*, Trial Chamber II, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008, para. 431, which reads "sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be "practices such as the detention

of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery."

130. ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422- Red, 23 March 2016, paras. 93-94.
131. UNCHR, SubCommission on Prevention of Discrimination and Protection of Minorities, Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, 22 June 1998, E/CN.4/ Sub.2/1998/13 ('UNCHR Final Report McDougall'), paras. 21-22.

**T**he Manual for Prosecutors on working with victims of sexual violence during armed conflict aims to support prosecutors to effectively investigate crimes of conflict-related sexual violence and provide essential support to victims. Based on Council of Europe human rights standards, including the Istanbul Convention, this manual outlines a victim-centred approach to securing justice for victims.

ENG

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